



OUTER HOUSE, COURT OF SESSION

[2021] CSOH 35

P981/19

OPINION OF LORD BOYD OF DUNCANSBY

In Petition of

THE BRITISH BROADCASTING CORPORATION

Petitioner

against

THE RIGHT HONOURABLE LADY SMITH

Chair of the Scottish Child Abuse Inquiry

Respondent

Petitioner: McBrearty QC, E Campbell; Burness Paul LLP

Respondent: Dean of Faculty, Pirie; Solicitor to the Scottish Child Abuse Inquiry

1 April 2021

Summary

[1] The petitioner is a public broadcaster. The respondent is a Senator of the College of Justice and Chair of the Scottish Child Abuse Inquiry (“the Inquiry”). She was appointed in August 2016 following the resignation of the previous Chair, Susan O’Brien QC.

[2] It is difficult to understate the importance of the Inquiry to the survivors of child abuse and to the wider community. The respondent has had the difficult task of rebuilding trust in the Inquiry following the departure of the previous chair, ensuring its independence and integrity.

[3] In July 2019 Mr John Halley, Advocate, a former counsel to the Inquiry, raised proceedings in the Employment Tribunal against the respondent arising out of his engagement with the Inquiry. The claim was based on the Equality Act 2010 and alleged disability discrimination, harassment and victimisation by the respondent. The respondent defended the claim. The claim was ultimately abandoned.

[4] The respondent issued two restriction orders under section 19 of the Inquiries Act 2005 (“the Act”) dated 25 July 2019 and 9 September 2019 (the “original restriction orders”). The effect of these orders was to prevent the publication or disclosure of the documents forming the claim (known as ET1 and a paper apart) and response (ET3 and a paper apart) as well as the existence of the proceedings before the Employment Tribunal. In the course of correspondence the petitioner sought to have these orders varied to enable them to publish the existence of the claim against the respondent and some details of the proceedings. There is no dispute between the parties that contained within the documents was material which was confidential and sensitive. The petitioner has not sought permission, or the right, to publish any of the confidential or sensitive material.

[5] The respondent sought an order from the Employment Judge under rule 50 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013/1237 (as amended) (“the Employment Tribunals Rules”) that a hearing to deal with substantive preliminary issues be held wholly in private. That motion was refused on the basis that the hearing would be dealing solely with matters of law and it would not be necessary to refer to the claim documents or hear evidence. Thereafter on 23 October 2019, and before the hearing due to be held on 28 and 29 October, the respondent issued a press release in which she revealed the existence of the claim against her. Separately advice was given to the petitioner by the Deputy Solicitor to the Inquiry as to the effect of the restriction orders on

the petitioner's ability to report the proceedings in the Employment Tribunal. The terms of that press release and advice given to the petitioner, together with the continued existence of the original restriction orders, remained a matter of dispute between the parties. Subject to those restrictions the media was able, for the first time, to publish the fact a claim had been raised against the respondent in the Employment Tribunal.

[6] A first order was granted in these proceedings on 29 October 2019. Mr Halley withdrew his claim against the respondent on or about 11 December 2019.

[7] On 2 March 2020 the respondent revoked the original restriction orders and granted a new restriction order ("the replacement restriction order"). The replacement restriction order is less restrictive than the original restriction orders. It continues to prohibit the publication of the papers apart to ET1 and ET3, with the exception of paragraphs 1 to 11 of the ET3 paper apart. These include sensitive and confidential details of the claim and response. Both parties agree that the information contained within these documents requires to be protected.

[8] The petitioner contends that the respondent had no power to make any of the restriction orders, and in any event no power to make the original restriction orders insofar as they prohibited the disclosure or publication of the ET1, the ET3 and paragraphs 1 – 11 of the ET3 paper apart. It also contends that the original restriction orders were in breach of article 10 of the European Convention on Human Rights ("ECHR") insofar as they prohibited disclosure or publication of those parts of the documents which were not confidential or sensitive. It further submits that the decisions taken on 23 October 2019 and 15 November 2019 to refuse to vary the original restriction orders were irrational. Finally the petitioner contends that all of the restriction orders are tainted by apparent bias. It seeks the reduction of the replacement restriction order.

[9] The respondent submits that the Court should refuse to consider the original restriction orders as they are now academic. In any event they were lawfully granted and in accordance with article 10 ECHR. There was no apparent bias. The respondent submits that the Court should refuse to consider the replacement restriction order as the petitioner does not have permission under section 27B of the Court of Session Act 1988 (“the 1988 Act”) to bring that order under review. In any event the petitioner has failed to exhaust its remedies as it could have asked either for the respondent’s consent to publish material or sought a variation of the order.

[10] For the reasons set out below I accept that granting the declarators sought in respect of the original restriction orders, or the failure to vary them, would serve no useful purpose. They are now academic. The petitioner submitted, however, that the manner in which the respondent dealt with the original restriction orders, in breach of the principle of open justice, raised important and troubling issues about the freedom of the press to report court proceedings. It also informed the assessment as to whether, in granting the replacement restriction order, the respondent had acted with apparent bias. For these reasons I deal in some detail with the principle of open justice as it ought to have applied to the proceedings before the Employment Tribunal. Because of my decision not to grant declarators in respect of the original restriction orders or their variation I have not further considered the arguments and nor have I repeated the parties’ submissions as they apply to the original restriction orders.

[11] I accept that the petitioner requires permission under section 27B of the 1988 Act to bring the replacement restriction order under review and I grant permission to do so. I reject the submission that I should not consider the judicial review of the replacement restriction order because of a failure by the petitioner to exhaust its remedies. I hold that the

respondent did have the power under section 19 of the Act to grant the replacement restriction order. I am satisfied that the replacement restriction order is not tainted by apparent bias.

Factual background

[12] The Scottish Child Abuse Inquiry was established by the Scottish Government under the Inquiries Act 2005 with the following terms of reference:

1. To investigate the nature and extent of abuse of children whilst in care in Scotland, during the relevant time frame.
2. To consider the extent to which institutions and bodies with legal responsibility for the care of children failed in their duty to protect children in care in Scotland (or children whose care was arranged in Scotland) from abuse, regardless of where that abuse occurred, and in particular to identify any systemic failures in fulfilling that duty.
3. To create a national public record and commentary on abuse of children in care in Scotland during the relevant time frame.
4. To examine how abuse affected and still affects these victims in the long term, and how in turn it affects their families.
5. The Inquiry is to cover that period which is within living memory of any person who suffered such abuse, up until such date as the Chair may determine, and in any event not beyond 17 December 2014.
6. To consider the extent to which failures by state or non-state institutions (including the courts) to protect children in care in Scotland from abuse have been

addressed by changes to practice, policy or legislation, up until such date as the Chair may determine.

7. To consider whether further changes in practice, policy or legislation are necessary in order to protect children in care in Scotland from such abuse in future.

8. To report to the Scottish Ministers on the above matters, and to make recommendations, as soon as reasonably practicable.

[13] The Inquiry has its own legal staff including counsel to the Inquiry comprising both senior and junior counsel. One of the junior counsel so engaged was Mr John Halley, Advocate.

[14] His appointment was terminated in about April 2019. In about July 2019 he raised proceedings in the Employment Tribunal by completing an Employment Tribunal claim form, known as an ET1, with a paper apart detailing the claim. He alleged disability discrimination, harassment and victimisation by the respondent, in contravention of the Equality Act 2010. He sought substantial damages in excess of £2m. The ET1 and paper apart were served on the respondent on or around 25 July 2019, along with notice of a preliminary hearing.

[15] On the same date, 25 July 2019, the respondent issued a restriction order under section 19(1)(b) of the Act in the following terms:

“The Rt. Hon. Lady Smith, Chair of the Scottish Child Abuse Inquiry (the ‘Inquiry’), has power under section 19(1)(b) of the Inquiries Act 2005 to make a restriction order to restrict disclosure or publication of any evidence or documents given, produced or provided to the Inquiry.

Employment Tribunals (Scotland) has given/provided to the Chair of the Inquiry a notice of a claim by John Halley against the Rt. Hon. Lady Smith as Chair of the Inquiry (comprising an ET1 claim form and paper apart) and, inter alia, a notice of a preliminary hearing dated 24 July 2019 (case number 4107805/2019) (hereinafter collectively referred to as the ‘Claim’). The Claim refers to many documents. The Chair has considered the terms of the Claim and has had regard to the sensitive and

confidential nature of its contents. In particular, the Claim makes detailed reference to the confidential work and workings of the Inquiry. In addition, it makes reference to an applicant to the Inquiry. Furthermore, having regard, in particular, to:

- the likelihood of impairing the effectiveness of the work of the Inquiry;
- the risk of harm or damage being occasioned to the ongoing work of the Inquiry; and
- the risk of harm or damage being occasioned to the applicant referred to (or to other witnesses engaging with/who have engaged with the Inquiry)

should the Claim be disclosed or published, the Chair has concluded that it is conducive to the Inquiry fulfilling its Terms of Reference and that it is necessary in the public interest to issue a restriction order and makes this order.

The Claim, or any part or parts of it, or any of the documents referred to therein (or any part or parts thereof) must not be disclosed or published without the prior consent of the Chair.

This order is effective from 25 July 2019.”

[16] On or around 9 September 2019 the respondent issued a response to the claim by way of an ET3 form and a paper apart. On the same date the respondent issued a further restriction order covering disclosure or publication of the response. The order was in much the same terms but the justification and reasons for making the order made reference to information given to the Inquiry by Police Scotland. The critical part is as follows:

“The Chair has considered the terms of the Response and has had regard to the sensitive and confidential nature of its contents. In particular, the Response makes detailed reference to the confidential work and workings of the Inquiry and information which has been given/provided to the Inquiry (including by virtue of the Claim). In addition, it makes reference to an applicant to the Inquiry as well as information which has been given/provided to the Inquiry by Police Scotland in confidence. Furthermore, having regard, in particular, to:

- the likelihood of impairing the effectiveness of the work of the Inquiry;
- the risk of harm or damage being occasioned to the ongoing work of the Inquiry; and

- the risk of harm or damage being occasioned to the applicant referred to (or to other witnesses engaging with/who have engaged with the Inquiry) or to the work of Police Scotland and the public interest therein

should the Response be disclosed or published, the Chair has concluded that it is conducive to the Inquiry fulfilling its Terms of Reference and that it is necessary in the public interest to issue a restriction order and makes this order.

The Response, or any part or parts of it, or any of the documents referred to therein (or any part or parts thereof) must not be disclosed or published without the prior consent of the Chair.”

[17] On 27 September 2019, the Employment Tribunal held a preliminary hearing and assigned a further hearing for 28 and 29 October 2019 to deal with substantive preliminary issues. The respondent applied to the Employment Judge for an order under rule 50 of the Employment Tribunals Rules that the hearing to deal with the substantive preliminary issues be conducted wholly in private. The basis for the application was that the respondent was of the view that, if her application was not granted, the restriction orders dated 25 July 2019 and 9 September 2019 would be breached. The Employment Judge invited submissions from the petitioner who responded with a written submission. On 11 October 2019 the Employment Judge refused the respondent’s application apparently stating that it would not be necessary to hear any evidence or refer to any documents in order to determine the preliminary issues (I have not seen any record of that comment). The Employment Judge observed that appropriate orders under rule 50, if any, in relation to the rest of the litigation would be considered once the outcome of that preliminary hearing was known.

[18] On 9 October 2019 agents acting for the petitioner wrote to the respondent referring to the restriction orders. The letter stated that the agents understanding of the orders was that they were not wide enough to prohibit disclosure or publication of the existence of the

proceedings against the respondent. The letter sought a variation under section 20(4) of the Act to clarify the point. The letter continued:

“If, on the contrary, the Inquiry intends that the Restriction Orders do prohibit disclosure or publication of the fact that the claimant has raised proceedings against the respondent, then BBC Scotland in any event request that Restriction Orders are varied to permit disclosure or publication of the existence of the proceedings.”

[19] On 10 October Jill Lavelle, the Deputy Solicitor to the Inquiry replied:

“I can confirm that it is the Chair’s position that they (the restriction orders) prevent publication or disclosure of the existence of the proceedings.”

She further noted that Lady Smith would “give careful consideration to the application by the BBC for the variation of her orders” and indicated that “she may convene a hearing to hear submissions on the application”.

[20] On 17 October, apparently in response to an opportunity to provide further submissions, the petitioner’s agents emailed the Inquiry as follows:

“As you are aware the BBC seeks variation of the orders granted by Lady Smith on 25 July and 9 September, not only because of the decision of Judge Whitcombe (the Employment Judge) to refuse a private hearing, but because it is the BBC’s position that the original orders of 25 July and 9 September were granted in error.

In this respect we would refer to section 5(5) of the Inquiries Act 2005 which provides that functions conferred by the Act on an inquiry panel, or member of an inquiry panel, are exercisable only within the terms of reference. While the BBC accepts that the Chair of the Inquiry had the power to grant restriction orders to immediately prohibit the disclosure or publication of genuinely sensitive and confidential information which related to the Terms of Reference and which was contained within the ET1 and ET3 (and the associated papers), we consider that Lady Smith did not have the power to grant orders, the effect of which was to prohibit disclosure or publication of the very existence of the tribunal proceedings or, indeed, any information other than that which relates to the Terms of Reference. The existence of the proceedings does not, in itself, relate to the matters falling within the Terms of Reference.

In addition, even if the Chair of the Inquiry had power to grant the original orders to cover the existence of the tribunal proceedings, the orders to that extent were not warranted in terms of section 19(3) and (4) of the 2005 Act.

Furthermore the orders are not now warranted in so far as Judge Whitcombe has ruled that the hearing will not be in private. All relevant information will be in the public domain as a result of a decision made by an Employment Judge in relation to proceedings before him. That being so, there is no warrant for retaining the orders in place in so far as it relates to matters that will in any event be in in the public domain.”

[21] On 23 October 2019, apparently in response to the email, the respondent issued a press release. It confirmed that John Halley had raised discrimination proceedings against the respondent in the Employment Tribunal. It continued:

“[The respondent] denies that he (Mr Halley) was discriminated against; the actings about which he complains were carried out by her in the performance of her duties as Chair of the Inquiry in relation to that counsel having a conflict of interest arising from his previous employment as a residential care worker.”

[22] The press release stated that it had been issued in circumstances where the Employment Judge had ruled that a hearing on 28 and 29 October, which was solely for the purposes of hearing submissions on issues of law, was to be open to the public. A note to the editors advised that the Chair had issued restriction orders under section 19 of the Act. Apart from the information provided in the press release,

“given these restriction orders, neither the claim or response nor part or parts of them nor any information contained in them may be disclosed or published without the prior consent of the Chair of the Inquiry.”

The same applied to any document referred to in the claim or response. The press were informed that the Employment Judge had made clear that the hearing was solely concerned with issues of law that did not require the hearing of evidence or any reference in the course of the hearing to what was said by way of particulars in either the claim or response.

[23] Along with the press release the respondent issued her decision on the application for variation by the petitioner. She narrated the background to the claim and the response. She noted that both the claim and the response made detailed reference to the confidential

work and workings of the Inquiry. She said that she had concluded that it was conducive to the Inquiry fulfilling its terms of reference to issue the restriction orders. She continued:

“In reaching that conclusion, I had regard, in particular, to (i) the likelihood, should the Claim or the Response be disclosed or published, of impairment to the effectiveness of the work of the Inquiry (ii) the risk, should the Claim or the Response be disclosed or published, of harm or damage being occasioned to the ongoing work of the Inquiry and (iii) the risk, should the Claim be disclosed or published, of harm or damage being occasioned to the applicant (a person who tells the Inquiry that he/she was abused in circumstances which fall within its Terms of Reference) referred to and to other witnesses engaging with or who have engaged with the Inquiry and (iv) the risk, should the Response be disclosed or published, of harm or damage being occasioned to the applicant referred to or to other witnesses engaging with or who have engaged with the Inquiry or to the work of Police Scotland and the public interest therein.’

The orders, when made, were intended to prohibit disclosure or publication of the fact that the claimant had brought proceedings against the Chair of the Inquiry and of anything contained in the Claim and the Response or any of the documents referred to therein.”

[24] The respondent made reference to the application for variation and confirmed, “I did intend to prohibit disclosure or publication of that fact (that proceedings had been brought against her) without my prior consent.” She referred to the press release issued by her in which she had confirmed the existence of the proceedings and repeated the salient parts of that release. Her decision on the petitioner’s application for variation of the restriction orders was as follows:

“In view of that statement, given that the BBC’s application was to seek a variation of the Restriction Orders to allow it to report the fact that the claimant has raised proceedings against me, I am refusing the application as unnecessary. I do not consider it necessary to make any variation to my Restriction Orders which remain in place.”

[25] On 24 October 2019 the petitioner’s agents wrote again to the respondent, noting her decision of the previous day. They did not agree with the decision and requested reconsideration of the request for a variation. They complained that the respondent’s decision had not addressed the question of vires. They repeated their view that the

respondent did not have the power to grant orders, the effect of which was to prohibit disclosure or publication of the existence of the tribunal proceedings or any information other than that which related to the terms of reference. The letter stated that the respondent's decision appeared to have wrongly proceeded on a narrow interpretation of the petitioner's position. At no time had the petitioner restricted the request for a variation to allowing the petitioner to report the fact that proceedings had been raised against her:

“Given the press release, the existence of the Employment Tribunal can no longer fall into the category of matters you seek to restrain. However your reliance on the press release as a justification for refusing variation of the Restriction Orders leaves our client unable to properly report aspects of the Employment Tribunal claim that ought legitimately to be disclosed such as the nature of the allegations. Such reporting would fall foul of the Restriction Orders despite not falling within the Terms of Reference.”

[26] The agents then referred to the preliminary hearing on 28/29 October 2019. The petitioner would ordinarily assume that anything said in the course of the hearing could be reported. It remained unclear however whether such reporting would fall foul of the restriction orders. They asked for clarification on the point. They closed by asking for a variation of the restriction orders to allow proper reporting of the Employment Tribunal proceedings.

[27] Two points should be made on this letter. First the reference to vires leaves it unclear whether the agents considered the restriction orders were entirely outwith the respondent's powers as Chair of Inquiry. If they were then it would follow that the respondent would have no power to vary the orders, as they were requesting. The better view, though unclear from the letter, is that what was sought was removal of those parts of the orders which took the orders ultra vires. It appears that what was being sought were orders which would, in their view, restrict its effect more closely to the terms of reference, though what was meant by that is again unclear from the letter. Secondly it was untrue for the respondent to suggest

that the petitioner had never restricted the application for a variation to the existence of the proceedings against the respondent. The letter of 9 October 2019 was such an application, though it is true to say that the request for variation was widened in the email of 17 October to include information which did not fall within the Inquiry's terms of reference.

[28] Jill Lavelle, Deputy Solicitor to the Inquiry, responded on 25 October 2019 advising that the request for a variation was under consideration. In relation to the reporting of proceedings before the Employment Tribunal was concerned she said that the Employment Judge had stated that he could see no reason for counsel for the claimant and the respondent at the hearing to refer to any of the sensitive and confidential material or, the confidential work and workings of the Inquiry, or information given by Police Scotland in confidence. If matters proceeded in that way, it seemed likely that no question of breaching the restriction orders by reporting on the proceedings would arise. She continued:

"However, the Chair cannot proceed on the assumption that there is no possibility of anything being said, whether inadvertently or not, that would fall within the scope of the Restriction Orders. In such circumstances, giving confirmation that reporting "anything said" in public in the course of next week's hearing will not give rise to a breach of the Restriction Orders is not something she can reasonably be asked to give at this stage. The Inquiry will be represented at next week's hearing and, if there is any dubiety as to whether reporting may breach the Restriction Orders, this can be discussed with the Inquiry's representatives and media consultants at the hearing venue."

[29] It is clear from this that the respondent considered that the restriction orders could prevent reporting of proceedings in public before the Employment Tribunal. It was not explained to me on what authority the chair of an inquiry established under the Act could purport to restrict the reporting of proceedings conducted in public before a Tribunal.

[30] In the course of the correspondence the petitioner's agents had made it clear to the respondent that if matters were not resolved to their satisfaction the petitioner would bring

a petition for judicial review. This petition was subsequently lodged and first orders were granted on 29 October 2019.

[31] On 15 November 2019 Jill Lavelle again wrote to the petitioner's agents. She noted that the petitioner had been given a copy of form ET1 by Mr Halley, or on his behalf and with his authority. This was in breach of a personal confidentiality undertaking. She said that the Inquiry's position was that the ET1 having been disclosed in breach of an obligation owed by Mr Halley to the respondent that the information in it should not be further disseminated by the BBC. The letter noted that the petitioner had not sought to report on matters which were the subject matter of the restriction orders but instead sought clarification of whether the effect of the orders was to prevent reporting of the very existence of the proceedings. The orders however had within them a mechanism whereby, whilst leaving the orders unvaried, the respondent might consent to disclosure or publication of matters protected by them.

The letter noted the position then taken by the petitioner in the petition for judicial review (which has since been amended by adjustment) that the petitioner would accept that "it would be appropriate for an order to be issued under section 19 of the Act covering (i) the confidential work and workings of the Inquiry; (ii) reference to any applicant to the Inquiry; and (iii) information which has been given/produced to the Inquiry by Police Scotland in confidence".

The letter noted however that

"given that the entirety of the claim concerned the confidential work and workings of the Inquiry (including actings/events in relation to the claimant having a conflict of interest), the respondent is having some difficulty in understanding how a restriction order in that form would, in substance, be any different from the terms of her existing restriction orders, or indeed how such an order could satisfactorily be framed".

The letter stated that the respondent's primary concern will "always be to protect all those who participate in the inquiry and in particular vulnerable survivors of abuse". The letter emphasised that if there was a particular matter or matters disclosed in the ET1 which it was

thought appropriate and in the public interest to report the petitioner should indicate what these were. The respondent would then be in a position to consider whether she was able to consent to publication.

[32] The petitioner's agents replied on 20 November 2019. They repeated that they considered that the restriction orders were ultra vires and accordingly it would be improper for the petitioner to seek consent from the respondent when they were of the view that the granting of the restriction orders was unlawful. "In any event," the letter continued,

"to suggest that our client ought to seek consent from Lady Smith would be to suggest that the BBC cede editorial control over the reporting of a civil claim held in open court. We do not accept that Lady Smith has any basis to request such control."

The letter concluded noting that it appeared implicit from the terms of the Deputy Solicitor's letter that the BBC's request for a variation as detailed in their letter of 24 October had been refused though it remained open to the respondent to reconsider that decision.

[33] Meanwhile, the preliminary hearing in the Employment Tribunal was adjourned on the claimant's application. Submissions had been made from counsel on the respondent's behalf. After counsel for the claimant had commenced his submissions the Employment Judge had intervened to ask whether counsel was advancing a claim not advanced in his pleadings. Counsel had then asked for an adjournment. On about 11 December 2019 the claimant withdrew proceedings against the respondent.

[34] On 2 March 2020 the respondent revoked the restriction orders dated 25 July 2019 and 9 September 2019 and replaced it with a new restriction order. She noted that the claim by Mr Halley had been withdrawn and dismissed by the Employment Tribunal and stated, "The Chair has accordingly reviewed the terms of her orders of 25 July and 9 September."

The pertinent parts of the order were as follows:

“This order relates to (1) the paper apart appended to the notice of a claim (ET1) by John Halley against the Rt. Hon. Lady Smith as Chair of the Inquiry (case number 4107805/2019) (hereinafter referred to as the “ET1 paper apart”), and (2) the response by the Chair, comprising the paper apart appended to the response (ET3), with the exception of paragraphs 1 to 11 of the paper apart, to which this order does not apply (hereinafter referred to as “the ET3 paper apart”).

The ET1 paper apart and ET3 paper apart refer to the confidential work and workings of the Inquiry, and in particular to:

- evidence relating to particular establishments, to an applicant to the Inquiry and to the Inquiry’s ongoing, confidential engagement with a core participant, all provided to the Chair in the context of her inquiries into matters within the Inquiry’s Terms of Reference; and
- documents provided to the Chair (or to those acting on her behalf) in the context of her exercise of her powers relating to the appointment, and the continuing appointment, of counsel to the Inquiry under the Inquiries (Scotland) Rules 2007.

These matters are referred to directly and by implication throughout the ET1 paper apart and the ET3 paper apart.

The Chair has had regard to the sensitive and confidential nature of the ET1 paper apart and the ET3 paper apart, which contain evidence and documents given, produced or provided to the Inquiry. She considers that disclosure and/or publication of the ET1 paper apart and/or ET3 paper apart would be likely to:

- impair the efficiency and effectiveness of the work of the Inquiry;
- risk harm or damage being occasioned to the ongoing work of the Inquiry; and
- risk harm or damage being occasioned to the applicant referred to, to the core participant referred to and/or to others (including witnesses) who are engaging with/have engaged with the Inquiry.

The Chair has accordingly concluded that it is conducive to the Inquiry fulfilling its Terms of Reference and that it is necessary in the public interest to issue a restriction order and makes the following order.

The ET1 paper apart and/or the ET3 paper apart, or any part or parts of it, or any of the documents referred to therein (or any part or parts thereof) must not be disclosed or published without the prior consent of the Chair.”

[35] The replacement restriction order was imposed 12 weeks after the claim in the Employment Tribunal had been abandoned and a short time before the substantive hearing in these proceedings. (The substantive hearing was fixed 29 April 2020 with a procedural hearing on 27 March 2020. Both were adjourned as a result of the Covid-19 pandemic).

Orders sought

[36] The petitioner seeks the following orders:

- i. declarator that the Restriction Orders were *ultra vires* and of no effect.
- ii. failing declarator first sought, declarator that the Original Restriction Orders were *ultra vires* and of no effect insofar as they prohibited the disclosure or publication of the ET1, the ET3 and paragraphs 1 – 11 of the ET3 paper apart.
- iii. declarator that the Original Restriction Orders, were in breach of Article 10 of the European Convention of Human Rights insofar as they prohibit the disclosure or publication of the ET1, the ET3 and paragraphs 1 – 11 of the ET3 paper apart.
- iv. declarator that the decision dated 23 October 2019 to refuse to vary the Original Restriction Orders, in order to remove the prohibition of disclosure or publication of the ET1, ET3 and paragraphs 1 – 11 of the ET3 paper apart was irrational.
- v. declarator that the decision dated 15 November 2019 to refuse to vary the Original Restriction Orders, in order to remove the prohibition of disclosure or publication of the ET1, ET3 and paragraphs 1 – 11 of the ET3 paper apart was irrational.
- vi. declarator that the Restriction Orders are tainted by apparent bias and for reduction of the Replacement Restriction Order.

Legal provisions

Inquiries Act 2005

[37] The salient sections of the Inquiries Act are as follows:

“Section 5(5):

Functions conferred by this Act on an inquiry panel, or a member of an inquiry panel, are exercisable only within the inquiry's terms of reference.

Section 18: Public access to inquiry proceedings and information

1. Subject to any restrictions imposed by a notice or order under section 19, the chairman must take such steps as he considers reasonable to secure that members of the public (including reporters) are able–

- (a) to attend the inquiry or to see and hear a simultaneous transmission of proceedings at the inquiry;
- (b) to obtain or to view a record of evidence and documents given, produced or provided to the inquiry or inquiry panel.

Section 19: Restrictions on public access etc.

- (1) Restrictions may, in accordance with this section, be imposed on–
 - (a) attendance at an inquiry, or at any particular part of an inquiry;
 - (b) disclosure or publication of any evidence or documents given, produced or provided to an inquiry.
- (2) Restrictions may be imposed in either or both of the following ways–
 - (a) by being specified in a notice (a ‘restriction notice’) given by the Minister to the chairman at any time before the end of the inquiry;
 - (b) by being specified in an order (a ‘restriction order’) made by the chairman during the course of the inquiry.
- (3) A restriction notice or restriction order must specify only such restrictions–
 - (a) as are required by any statutory provision, [retained enforceable EU obligation]¹ or rule of law, or
 - (b) as the Minister or chairman considers to be conducive to the inquiry fulfilling its terms of reference or to be necessary in the public interest, having regard in particular to the matters mentioned in subsection (4).
- (4) Those matters are–
 - (a) the extent to which any restriction on attendance, disclosure or publication might inhibit the allaying of public concern;

- (b) any risk of harm or damage that could be avoided or reduced by any such restriction;
 - (c) any conditions as to confidentiality subject to which a person acquired information that he is to give, or has given, to the inquiry;
 - (d) the extent to which not imposing any particular restriction would be likely–
 - (i) to cause delay or to impair the efficiency or effectiveness of the inquiry, or
 - (ii) otherwise to result in additional cost (whether to public funds or to witnesses or others).
- (5) In subsection (4)(b) “harm or damage” includes in particular–
- (a) death or injury;
 - (b) damage to national security or international relations;
 - (c) damage to the economic interests of the United Kingdom or of any part of the United Kingdom;
 - (d) damage caused by disclosure of commercially sensitive information.”

Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013/1237

[38] The petitioner referred to rule 50 of the Employment Tribunals Rules. It is in the following terms:

“50. Privacy and restrictions on disclosure

- (1) A Tribunal may at any stage of the proceedings, on its own initiative or on application, make an order with a view to preventing or restricting the public disclosure of any aspect of those proceedings so far as it considers necessary in the interests of justice or in order to protect the Convention rights of any person or in the circumstances identified in section 10A of the Employment Tribunals Act.
- (2) In considering whether to make an order under this rule, the Tribunal shall give full weight to the principle of open justice and to the Convention right to freedom of expression.
- (3) Such orders may include—

- (a) an order that a hearing that would otherwise be in public be conducted, in whole or in part, in private;
- (b) an order that the identities of specified parties, witnesses or other persons referred to in the proceedings should not be disclosed to the public, by the use of anonymisation or otherwise, whether in the course of any hearing or in its listing or in any documents entered on the Register or otherwise forming part of the public record;
- (c) an order for measures preventing witnesses at a public hearing being identifiable by members of the public;
- (d) a restricted reporting order within the terms of section 11 or 12 of the Employment Tribunals Act.”

Submissions for petitioner

Introduction

[39] Mr McBrearty opened his submissions by emphasising that there was no question of actual bias. The petitioner was not seeking to question the respondent’s subjective motive in imposing the restriction orders. The petitioner also recognised the importance of the Scottish Child Abuse Inquiry. It recognised that the respondent required to build and maintain trust in the work of the Tribunal, particularly following the resignation of the former Chair, Susan O’Brien QC. The petitioner was not seeking to attack her personal integrity or honour.

[40] Nevertheless the respondent had erred. The effect of her orders was to interfere with the principle of open justice. If it was necessary to impose restrictions on the publication of material contained in the claim and response, appropriate orders should have been sought from the Employment Judge who was seized of the proceedings. The respondent was a litigant before the Tribunal. One could not reconcile with principle the proposition that a party to proceedings could control the dissemination of information before the court in

which she was a party. She had a personal interest. That conflict of interest meant that the orders should not have been granted. They were tainted by apparent bias and were ultra vires.

Open justice

[41] It was a general principle of constitutional law that justice is administered by the courts in public. Proceedings in open court may be reported in the press and by other methods of broadcasting in the media. The principle of open justice was inextricably linked to the freedom of the media to report on court proceedings. The courts had an inherent jurisdiction to determine how the principle should be applied. Whether a departure from the principle of open justice was justified would depend on the facts of the case. The Court had to carry out a balancing exercise. The principle of open justice is balanced by the risk of harm to the maintenance of an effective judicial process and the legitimate interests of others. The approach under article 10 ECHR is consistent with the common law: *A v Secretary of State for the Home Department* 2014 SC (UKSC) 151, per Lord Reed JSC at paragraphs 23 – 27, 41, 54; *MH v The Mental Health Tribunal for Scotland* 2019 SC 432, per Lord Carloway LP at paragraphs 16, 18 and 19.

[42] In *Dring v Cape Intermediate Holdings Ltd* [2019] 3 WLR 429, the Supreme Court had held that the constitutional principle of open justice applied to all courts and tribunals exercising the judicial power of the state. The public should be allowed access to documents which were before the court. In deciding whether to grant access to documents the court has to balance the principle of open justice with the risk of harm to the maintenance of an effective judicial process or to the legitimate interests of others; per Lady Hale PSC paragraphs 41 – 47.

[43] Applying these principles to this case what the respondent ought to have done was to seek an order under rule 50 of the Employment Tribunals Rules covering the sensitive material. Rule 50(3) was a non-exhaustive list of matters that might be covered by such an order and the ambit of the rule was wide enough to cover the claim and response and other documents and information before the Tribunal. Alternatively the Employment Tribunal has power to grant orders under section 4(2) of the Contempt of Court Act 1981; section 19 of that Act. The respondent could have applied for an order similar to the one which I had granted in this case at her behest. The fact that the respondent had moved for such an order from this Court demonstrated an acceptance that it is for the Court before whom the proceedings are live to regulate the dissemination of documents and information before it.

[44] So far as the particular documents are concerned there was nothing in ET1 which was harmful to the workings of the Inquiry. The paper apart was an extended version of the claim and did include sensitive details. Although the petitioner had a copy of the document it had no intention of publishing it or any information from it. Form ET3 did not contain any sensitive information and nor did paragraphs 1 to 11 of the paper apart. It was accepted that paragraphs 12 onwards did contain sensitive information which should not be published.

[45] The original restriction orders were of the most restrictive type that could ever be envisaged. They sought to prohibit the disclosure of the existence of the proceedings. The respondent had sought to persuade the Employment Judge to hold a private hearing on the basis that to hold it in public would undermine the restriction orders. This was an attempt to derogate from his discretion as to whether the proceedings should be held in public. The Employment Judge had refused the application. Yet the respondent had refused to vary the restriction orders preferring to rely on a press release which only gave a partial narrative of

the facts of the claim. In particular although the press release said that John Halley had raised discrimination proceedings against the respondent in the Employment Tribunal there was no mention of victimisation or harassment. The release also gave her side of the story denying that she discriminated against Mr Halley and noting his conflict of interest arising from his previous employment as a residential care worker. In other words all that could be reported at that point was what the respondent, a party to the proceedings, chose to put in the public domain. This was impossible to reconcile with principle.

[46] When enquiries had been made about reporting of the hearing in public on 28/29 October 2019 the petitioner had been advised that there was no difficulty if the proceedings were limited to the issues of law. However, the respondent could not assume that there was no possibility of anything being said which might fall within the scope of the restriction orders. If there was dubiety about it then the petitioner could discuss the matter with the Inquiry's legal representatives and media consultants. In other words what could be reported as being said at a public judicial hearing was to be policed by one of the parties to the proceedings. Again this was contrary to principle. If, contrary to expectation, something had been said at the hearing then again the proper course for the respondent would have been to make an application under rule 50.

Whether the petition in respect of the original restriction orders was academic

[47] The petition, so far as the original orders was concerned, was not academic. The question of vires applied to all three restriction orders. The original restriction orders were the operative ones which prevented the petitioner from reporting the fact of the claim against the respondent when it should have been reported. News is a perishable commodity and the reason why the news perished in this case was as a result of the restriction orders.

There were wider implications and important repercussions. It was important that there was a ruling on the vires of the orders. This was a point of general public importance particularly given the fact that the respondent had herself prevented disclosure under the original orders and then, three months after the claim was abandoned and shortly before the substantive hearing, made a new order. There was a significant derogation from the principle of open justice and there was a strong public interest in adjudicating on that issue.

Vires

[48] The respondent had no power to make any of the restriction orders as it was not within the powers conferred on her by the Act. Section 5(5) provided that the functions conferred on an inquiry panel were only exercisable within the terms of reference; *Beer, Public Inquiries*, paragraphs 2.106-2.108; *Re Royal Commission on Licensing* [1945] NZLR 665. It follows that just as an inquiry can only investigate and report on matters falling within its terms of reference, any ancillary functions can only be exercised in relation to the terms of reference, in accordance with section 5(5). Sections 18 and 19 require to be read together. Section 18 imposes a duty on the chairman of an inquiry, subject to section 19, to take such steps as he or she considers necessary to allow public access to the inquiry, and to allow public access to evidence and documents given, produced or provided to the inquiry. Any documents to which public access is to be allowed must be those “given, produced or provided to the inquiry” as a result of the inquiry exercising functions within its terms of reference. Thus, section 18 applies to documents which are ingathered by the inquiry in the course of investigating the subject matter covered by the terms of reference and to documents referred at the oral hearings of the inquiry. Documents sent to the inquiry, such

as to the chairman in a private capacity, would not fall within the terms of reference and accordingly would not be documents to which section 18 applied.

[49] The words “given, produced or provided to an inquiry” in section 19 mirror the words used at section 18 and should be given the same meaning. The result is that, reading section 19 together with section 5(5), the power to grant a restriction order applies only to documents which are “given, produced or provided to the inquiry” as a result of the inquiry exercising a function within its terms of reference. The power to grant a restriction order can therefore only be exercised in relation to documents which otherwise fall within section 18 and to which the chairman is obliged to provide public access.

[50] Section 19(3) and (4) limit the power to grant a restriction order but it is a prerequisite to the grant of any restriction order that it should be imposed only in accordance with subsection (1). A chair would not be entitled to bypass the requirement of subsection (1) and to rely only on subsection (3) in order to grant a restriction order.

[51] Alternatively the terms of section 5(5) should be applied to the word “documents” within section 19(1) rather than to the words “given, produced or provided”. On that view a restriction order could be imposed in respect of the disclosure or publication of any document, however the inquiry comes to hold it, but only in so far as the document contains information falling within the terms of reference of the inquiry. Thus, if a document, or part of it, does not relate to the terms of reference of the inquiry, then there would be no obligation to make it public under section 18, and no power to restrict its disclosure or publication under section 19.

[52] In dealing with the claim document and in making the response the respondent was not exercising a function within the terms of reference. Likewise in completing the response the respondent was not exercising a function within the terms of reference. There is nothing

in ET1 which could be considered as falling within the terms of reference of the inquiry, nor anything that could be considered confidential. It is a form which in normal course could be made available to the press by the Employment Tribunal in accordance with the principle of open justice: *Dring v Cape Intermediate Holdings Ltd*. The paper apart contains more detailed information including sections which relate details of, for example, how certain complaints came to have been made to the Inquiry. Such information relates to the Inquiry but was not provided to the respondent in relation to her terms of reference. A similar analysis applies to the response. There is nothing in ET3 or paragraphs 1 to 11 of the paper apart which would justify the use of a restriction order. The remainder of the paper apart contains information which relates to the Inquiry but, again, it was not narrated on behalf of the respondent in relation to her terms of reference. The replacement restriction order does not prevent disclosure or publication of these details. There is no rational explanation why the withdrawal of the claims, in the absence of any order from the Court, justifies a change in position by the respondent. Either the existence and nature of the proceedings required to be restricted or they did not. The necessity to restrict access cannot rationally be determined by the outcome of the proceedings.

Apparent bias

[53] The restriction orders are tainted by apparent bias. The respondent decided that the ordinary principles of open justice should not apply to the proceedings before the Employment Tribunal. In doing so she acted as judge in her own cause. It was not necessary for her to make an order. She could have requested that the Minister make an order under section 19(1)(a) of the Act. Alternatively she could have sought an order from the Employment Tribunal. The correct approach to apparent bias is that the Court must first

ascertain all the circumstances which have a bearing on the suggestion that the judge was apparently biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility that the judge was biased: *Porter v Magill* 2002 2 AC (HL) 357 at 102-103. In the circumstances of the current action, it is submitted that the fair-minded and informed observer would conclude that there was a real possibility that the respondent was influenced by bias. In particular, due to the fact that the respondent: (i) had an interest in the matter; (ii) was judge in her own cause; and (iii) could have sought reporting restrictions from others but chose not to. Courts have consistently held there to exist at least apparent bias in circumstances which are less clear cut than the current circumstances. One of the fundamental principles of the common law of apparent bias is that one should not be a judge in one's own cause: *Dimes v The Proprietors of the Grand Junction Canal* (1852) 3 HL Cas 759; *R v Bow Street Metropolitan Stipendiary Magistrate & Ors ex parte Pinochet (No. 2)* [2000] 1 AC (HL) 119 ("*Pinochet*"). In some cases that can lead to automatic disqualification. On others the existence of apparent bias is presumed: see *R (on application of Darsho Kaur) v Institute of Legal Executives Appeal Tribunal* [2011] EWCA Civ 1168 at paragraph 45; *Locabail (UK) Ltd v Bayfield Properties Ltd & Ors* [2000] QB 451; *Davidson v Scottish Ministers* [2004] UKHL 34. In the circumstances there is a presumption of apparent bias.

Response to respondent's submissions

[54] Permission to bring the replacement restriction order under review was not required. The grounds of *vires* and apparent bias were the same as for the original restriction orders. There was no failure to exhaust remedies. If the orders were *ultra vires* then it followed that the respondent had no power to vary them.

Submissions for respondent

Introduction

[55] The Dean of Faculty submitted that the correct target for the petition was the replacement restriction order made on 2 March 2020. The Court should not grant the orders sought in respect of that order because no permission had been granted under section 28B(1) of the Court of Session Act 1988; there was a clear alternative remedy to which the petitioner has not resorted, the declarators would serve no practical purpose and the restriction order was not unlawful.

Judicial review of original restriction orders academic

[56] Judicial review of the original restriction orders would serve no practical purpose.

Judicial review remedies are discretionary: *Eba v Advocate General for Scotland* 2012 SC

(UKSC) 1 at [27]. In exercising its discretion, the court does not act in vain: *King v East*

Ayrshire Council 1998 SC 182 at p194 C - H. The Court should not entertain hypothetical or academic questions. The declarator must be designed to achieve a practical result:

Wightman v Secretary of State for Exiting the European Union 2019 SC 111 at [21] to [25] and in

particular quoting the dictum of Thomson LJ in *Macnaughton v Macnaughton Trs* 1953

SC 387 at 382. In *R (on the application of Dolan and others) v Secretary of State for Health and*

Social Care and anr [2020] EWCA Civ 1605 the Court of Appeal in England and Wales held

that a petition for judicial review brought against regulations made by the respondent to

deal with the Covid-19 pandemic was clearly academic as the regulations in question had

been repealed. In that case the Court went on to determine the issue of vires because the

same issue may have to be addressed in the Magistrates' Court as a defence in criminal

proceedings and because the same enabling power was being used to make new regulations.

There was however a tangible and public benefit. No such benefit was apparent here.

Failure to resort to alternative remedy

[57] The petition should be refused because the petitioner has failed to resort to an alternative remedy. The petitioner is entitled to apply for the respondent's consent to publish such parts of the ET1 as it contends ought to be publishable. It has failed to do so. Failure to resort to a statutory mechanism for recall or revocation may be fatal to an application to the supervisory jurisdiction: *British Broadcasting Corporation, Petr* [2020] CSOH 35 at [37]. A common law remedy such as that is also fatal to an application to the supervisory jurisdiction: *Gray v Braid Logistics (UK) Ltd* [2017] CSOH 44 at [28]-[29], [37]-[42]. Section 20 of the Act provides a mechanism for recall or variation.

No practical purpose to any of the orders sought

[58] The petitioner said in correspondence that it ought to have been able to publish all the information set out in the ET1, ET3 and paragraphs 1 - 11 of the ET3 paper apart. The replacement restriction order does not forbid the petitioner from publishing any of that information.

Vires

[59] Section 19(1) provides, "Restrictions may, in accordance with this section, be imposed on ...(b) disclosure or publication of any evidence or documents given, produced or provided to an inquiry". Read with subsection (2) it gives the respondent the power to make the restriction orders for two reasons. First, the documents themselves were "given,

produced or provided to an inquiry". Second, the contents of the documents were "given, produced or provided to an inquiry".

[60] The petitioner submitted that section 19(1)(b) did not give the respondent the power to make the restriction order because the documents were given for the purpose of the proceedings in the Employment Tribunal rather than the purpose of fulfilling the Inquiry's terms of reference. That interpretation of section 19(1)(b) was said to derive from reading it with section 5(5), which provides that functions conferred by the Act "are exercisable only within the inquiry's term of reference".

[61] That interpretation was wrong. First, it is contrary to the ordinary meaning of the words in section 19(1)(b). On a sensible, and in any event on a purposive reading of those words, the documents themselves and their contents were "given, produced or provided to an inquiry". Second, section 19(3) sets express limits on the section 19(1)(b) power to impose restrictions. Had Parliament intended the power to be limited to documents provided for the purpose of fulfilment of the terms of reference, it would have expressed that limit there. No such limit is found. Rather, the limitation that is expressed (by section 19(3)(b)) is that restrictions should only be such "as the ... Chairman considers to be conducive to the inquiry fulfilling its terms of reference or to be necessary in the public interest, having regard in particular to the matters mentioned in subsection (4)". Third, other provisions of the Act point away from an intention that the power to restrict disclosure or publication of a document depends on why an inquiry was given it; (a) Sections 1, 15(2) and 19(4)(a) show that the aim of the Act is to allay public concerns. The purpose for which a document is given (or produced or provided) to the inquiry has no bearing on the necessity of a restriction on its disclosure or publication for the pursuit of that aim; (b) Section 17(1) shows an intention to give the chair broad discretion in the conduct of an inquiry;

(c) section 19(3)(a) envisages a restriction order when required by any statutory provision or rule of law. It is hard to see why the power to make an order in accordance with the requirement should depend on the purpose for which the document was provided to the inquiry; (d) section 37(3) shows that Parliament will express a "for the purposes of proceedings before an inquiry" condition if it intends one; (e) the definition of "document" in section 43(1) shows that, for the purposes of restraints on disclosure, Parliament considered that the information is more important than the form in which the information is recorded.

[62] Fourth, the petitioner's interpretation of section 19(1)(b) would make the Act ineffective. On the petitioner's interpretation, whether the chair of an inquiry has the power to restrict disclosure of a document because that is conducive to the inquiry fulfilling its terms of reference depends on the purpose for which the document was given rather than on what the document says. That power would be particularly unsuitable for the Inquiry because of the sensitivity of its investigations and the range of people involved including victims of sexual crime, alleged sexual criminals, the police or care organisations. The chair's power under section 18(1)(b) to disclose applies to the same documents - those "given, produced or provided to the inquiry" - as her power under section 19(1)(b) to restrict disclosure. If the purpose of giving a document prevents the chair from making a restriction order, it also prevents her from disclosing the document, irrespective of the extent to which disclosure would help to allay public concerns. The petitioner's argument denies the respondent the power to disclose the information that it says that the public interest requires it to be able to publish.

[63] Fifth, section 5(5) does not bear the weight that the petitioner puts on it. It should be interpreted in accordance with the principle that the legislator is presumed to legislate in the

knowledge of and having regard to relevant judicial decisions: eg *R Robinson v Secretary of State for the Home Department* [2019] 2 WLR 897 at [62]. Those decisions include ones that establish that an express statutory power implies reasonably incidental ancillary powers: eg *Re: Northern Ireland Human Rights Commission (Northern Ireland)* [2002] HRLR 35 at [51]-[53]. Therefore section 5(5) permits the respondent to exercise her powers under the Act when to do so is reasonably incidental to the Inquiry's terms of reference. In any event, the documents are within the Inquiry's terms of reference for the purposes of section 5(5) because they are full of information about the Inquiry's work and workings towards fulfilling those terms of reference.

[64] The respondent's interpretation of section 19 does not imply that every restriction on disclosure or publication of a document given to an inquiry is necessarily lawful. Rather, it means that the controls on restriction are found in the usual public law restraints on the exercise of statutory powers.

[65] The petitioner suggests another interpretation of section 19(1)(b); that it creates a power to impose a restriction order "only in relation to matters falling within the Inquiry's term of reference". It is unnecessary for the Court to consider this interpretation because the petitioner advances it only in order to obtain remedies for the original restriction orders. The interpretation would, however, have absurd results. A wide range of events could fall within the scope of section 1. Section 17 gives an inquiry procedural autonomy. It is inevitable that inquiries established under the Act will from time to time receive documents containing matters that are outside the terms of reference. It would be very odd if an inquiry were powerless to prevent disclosure of the matters irrespective of the interests involved. The Inquiry provides a good example. Suppose that a person came forward and informed it that he was the victim of serious sexual crime when he was 19, or when he was

under 18 but the crime took place in the home, outside Scotland or after 17 December 2014. That information falls outside the Inquiry's terms of reference. Parliament cannot have intended that the Inquiry would be unable to restrict, say, publication of the person's name in those circumstances.

Bias

[66] The Court should reject this ground of review for three reasons. First, the ground is baseless on the petitioner's own averments. The replacement restriction order does not forbid the petitioner from publishing anything in the ET1 or paragraphs 1 - 11 of the paper apart to the ET3. The ET1 shows the bases of claim and the remedies sought: pp6 - 8 and 12. The restriction order had no effect on the Employment Tribunal proceedings because the respondent made it after the proceedings had come to an end.

[67] Second, there is no apparent bias. The test is whether the fair-minded and informed observer, having considered the facts, would conclude that there is a real possibility of bias: *Porter v Magill* [2002] 2 AC 357 at [103]. That observer is neither unduly sensitive or suspicious nor complacent but is assumed to have access to all the facts that are capable of being known by members of the public generally: *Gillies v Secretary of State for Work and Pensions* 2006 SC (HL) 71 at [17]. Being aware of these circumstances, the observer would not conclude that there was a real possibility of bias when the respondent made the restriction order and would take the following into account: (a) the risk to the integrity of the Inquiry that publication of the material described in the restriction order would create; (b) the respondent's long service in judicial office in accordance with the judicial oath; (c) by its appointment under section 7(1)(a), 9(1) and 10(1), the Minister has shown himself to be satisfied of the respondent's general impartiality; (d) the respondent is subject to the

reporting provision in section 9(3); (d) the Minister has not exercised its power under section 12(3)(c); (f) the respondent's long service in the Inquiry; (g) there were no proceedings extant in the Employment Tribunal when the respondent made the restriction order; (h) under the respondent's leadership, the Inquiry published information about the Employment Tribunal proceedings in its press release; (i) in granting the replacement restriction order, the respondent permitted the media to publish more information about the proceedings; (j) the petitioner is the only member of the media to have taken issue with section 19 restrictions in relation to the proceedings and the replacement restriction order allows it to publish what it says it should be able to publish; (k) the respondent published her reasons for the restriction order and thereby submitted it to public scrutiny; (l) the respondent gave the petitioner the ET3 for the purpose of this litigation. She would have given it the rest of the documents for that purpose if the petitioner had not already obtained them from Mr Halley.

[68] Third, it was necessary for the respondent to make the restriction order. The Inquiry requires the confidence of its participants and of the public in order to fulfil its statutory purpose of allaying public concerns. Perceptions that the Inquiry is not sufficiently independent from the Scottish Government have called that confidence into question in the past. Although section 19(2)(a) gives the Minister the power to restrict disclosure or publication under section 19(1)(b) by issuing a restriction notice, Ministerial intervention in the workings of the Inquiry would compromise public confidence in the Inquiry's independence. That is especially so because the application for the notice, and the information necessary for the Minister to be able to take a rational view on it, would have to come from the Inquiry and only the respondent could enforce the notice under section 36(1) while the Inquiry is in progress. The natural justice rule against bias gives way to necessity:

see eg Wade & Forsyth, *Administrative Law*, 11th edition, at pp395 - 396. The doctrine of necessity has been applied in cases in which no-one other than the person tainted by apparent bias was empowered to act. There is no reason in principle why it should not also apply when someone else is empowered to act but his exercise of the power would compromise pursuit of the purpose of the statute that conferred it.

Discussion and reasoning

The Scottish Child Abuse Inquiry

[69] The respondent was appointed as chair of the Inquiry in August 2016 following the resignation of the previous chair, Susan O'Brien QC. She stepped down after Scottish Ministers commenced a formal procedure under section 12 of the Act to have her removed. Ms O'Brien brought proceedings against the Scottish Ministers in the Court of Session. That action was dismissed by Lord Pentland: *O'Brien v Scottish Ministers* 2017 SLT 1113. Part of Ms O'Brien's allegations at the time was of Government interference, a claim also made by Professor Michael Lamb, a member of the Inquiry, who also resigned. Inevitably the row generated adverse publicity. The respondent's productions include copies of newspaper articles with headlines that include "Child Sex Abuse Survivors Insist Inquiry is 'Not Fit For Purpose'" (Scottish Daily Mail 6 July 2016) and "Infighting Leaves Abuse Probe In Mire As Survivors Lose Confidence" (The National 6 July 2016).

[70] Similar problems arose in the Independent Inquiry into Child Sexual Abuse in England. That Inquiry is now on its third chair and some abuse victims have pulled out of the Inquiry saying they had lost confidence in it.

[71] I accept the submission made on the respondent's behalf that since taking office she has had to rebuild the survivors' trust. The importance of the inquiry in establishing the

historical record of the physical, emotional and sexual abuse in institutions having the care of children cannot be underestimated. But its importance goes beyond the immediate confines of those affected to the wider community and society in which these events occurred. Fundamental to the success of the Inquiry is the continued trust and confidence of its participants, most especially the survivors of such abuse. It is important that the Inquiry is seen to be impartial and independent of Government.

[72] The Inquiry is advised by Anne McKechnie, an independent consultant forensic clinical psychologist. She has produced a note that sets out the emotional and psychological impact on those who were abused as children in the care system. She points out that individuals who have experienced in care abuse are frequently mistrustful of authority; they often believe that statutory agencies including central and local government are conspiring to keep their abuse secret. This presents challenges to the Inquiry which has to work hard to be “open, consistent and boundaried” in its communications.

“If our applicants perceive any, even relatively small, indications that we are being secretive or are linked to agencies which have either directly or indirectly abused them, they will lose faith in our ability to fulfil our terms of reference. ... they will have lost a valuable opportunity to move forward resolving the consequences of early trauma.”

[73] The courts recognise the impact of historic sex abuse on children. In *MM v Criminal Injuries Compensation Authority* 2018 SLT 843 Lord Glennie quoted with approval an observation of mine in *M v Advocate General for Scotland* 2014 SLT 481 at [20]:

“... those who have presided over trials of historic sex abuse of children are only too aware of the deep psychological and emotional trauma that surrounds such criminal activity.”

[74] The courts also recognise the extreme sensitivity of public opinion to allegations of the sexual abuse of children and the concerns about the safety of children generally: eg the remarks of Lord Sumption JSC in *Khuja v Times News Newspapers Ltd* [2019] AC 161 at [8].

[75] The Dean of Faculty submitted that I should exercise restraint in dealing with decisions of the Inquiry. He drew a parallel with specialist tribunals and the self-imposed restraints which the courts have adopted when considering the reasoning and decision making of a tribunal. He drew my attention to the remarks of Gross LJ in *Hutton v Criminal Injuries Compensation Authority* [2016] EWCA Civ 1305; [2017] ACD 20 at [57], (again quoted by Lord Glennie in *MM*) in summarising the relevant principles:

“... {The} Court should exercise restraint and proceed with caution before interfering with decisions of specialist tribunals. Not only do such tribunals have the expertise which the ‘ordinary’ courts may not have but when a specialised statutory scheme has been entrusted by Parliament to tribunals, the Court should not venture too readily into their field.”

[76] I have no difficulty in accepting that the Inquiry should be treated as if it were a specialist tribunal and due restraint shown when the Inquiry is acting within its terms of reference, assessing evidence and making recommendations. This case however raises issues of statutory interpretation, open justice, freedom of the press and impartiality. These are fundamental to the working of our democratic institutions and the rule of law. These are issues for this Court; they are not the particular preserve of the Inquiry. No restraint need be observed in respect of these matters on the ground that the Inquiry is exercising a specialist function.

Open Justice

[77] I am satisfied that in relation to the replacement restriction order there is no breach of the principle of open justice. Indeed the petitioner accepts that the material protected by the replacement restriction order ought not to be in the public domain given its sensitive nature and the effect that its publication would have on the Inquiry. Nevertheless Mr McBrearty submits that the fact that there was, as the petitioner contends, a breach of the principle of

open justice in respect of the original restriction orders, is pertinent to a consideration of bias in relation to the replacement restriction order. For that reason, and because of its importance to the ability of the media to report court proceedings, it is necessary to deal with the submissions by the parties.

[78] The principle of open justice and the purpose it serves were set out by Lord Reed JSC in *A v Secretary of State for the Home Department* 2014 SC (UKSC) 1 at [23], [25] – [27] and [41]:

“[23] It is a general principle of our constitutional law that justice is administered by the courts in public, and is therefore open to public scrutiny. The principle is an aspect of the rule of law in a democracy. As Toulson LJ explained in *R (Guardian News and Media Ltd) v City of Westminster Magistrates’ Court* (para 1), society depends on the courts to act as guardians of the rule of law. *Sed quis custodiet ipsos custodes?* Who is to guard the guardians? In a democracy, where the exercise of public authority depends on the consent of the people governed, the answer must lie in the openness of the courts to public scrutiny.”

“[25] The principle that courts should sit in public has important implications for the publishing of reports of court proceedings. In *Sloan v B* (p442) Lord President Hope, delivering the opinion of the court, explained that it is by an application of the same principle that it has long been recognised that proceedings in open court may be reported in the press and by other methods of broadcasting in the media. ‘The principle on which this rule is founded seems to be that, as courts of justice are open to the public, anything that takes place before a judge or judges is thereby necessarily and legitimately made public, and, being once made legitimately public property, may be republished’.”

“[26] The connection between the principle of open justice and the reporting of court proceedings is not however merely functional. Since the rationale of the principle is that justice should be open to public scrutiny, and the media are the conduit through which most members of the public receive information about court proceedings, it follows that the principle of open justice is inextricably linked to the freedom of the media to report on court proceedings.”

“[27] Since the principle of open justice is a constitutional principle to be found in the common law, it follows that it is for the courts to determine its ambit and its requirements, subject to any statutory provision. The courts therefore have an inherent jurisdiction to determine how the principle should be applied.”

“[41] ... Whether a departure from the principle of open justice was justified in any particular case would depend on the facts of that case. As Lord Toulson observed in *Kennedy v Charity Commissioners* (para 113), the court has to carry out a balancing exercise which will be fact specific. Central to the court’s evaluation will

be the purpose of the open justice principle, the potential value of the information in question in advancing that purpose and, conversely, any risk of harm which its disclosure may cause to the maintenance of an effective judicial process or to the legitimate interests of others.”

[79] In *MH v The Mental Health Tribunal for Scotland* 2019 SC 432, Lord Carloway LP, noted at paras [16] and [18]:

“[16] The starting point in relation to the withholding of any information concerning civil cases pending before the courts is to recognise that it is an interference with the principle of open justice and the requirement that the courts should operate in a way which is transparent to the public ... The reason for the principle is a fundamental one; public scrutiny of the courts facilitates public confidence in the system. It helps to ensure that the courts are carrying out their function properly.”

“[18] Open justice has two key elements. The first is that proceedings are heard and determined in public. The second is that the public has access to judicial determinations, including any reasons for them and the identity of the parties.”

[80] In *Dring v Cape Intermediate Holdings Ltd* [2019] 3 WLR 429 Lady Hale PSC observed at paras [41], [42] and [44]:

“[41] The constitutional principle of open justice applies to all courts and tribunals exercising the judicial power of the state. It follows that, unless inconsistent with statute or the rules of court, all courts and tribunals have an inherent jurisdiction to determine what the principle requires in terms of access to documents or other information placed before the court or tribunal in question.”

“[42] The principal purposes of the open justice principle are two-fold and there may well be others. The first is to enable public scrutiny of the way in which courts decide cases - to hold the judges to account for the decisions they make and to enable the public to have confidence that they are doing their job properly.”

“[44] It was held in *Guardian News and Media* [2013] QB 618 that the default position is that the public should be allowed access, not only to the parties written submissions and arguments, but also to the documents which have been placed before the court and referred to during the hearing.”

[81] Lady Hale went on to explain that although the court has power to allow access, the applicant has no right to be granted it. It is for the person seeking access to explain why he seeks it and how granting him access will advance the open justice principle. The media will be better placed than others to demonstrate a good reason for seeking access. In

exercising that power the court has to carry out a balancing exercise. On the one hand will be the principle of open justice and the potential value of the information in question in advancing that purpose. On the other hand will be any risk of harm which its disclosure may cause to the maintenance of an effective judicial process or the legitimate interests of others. There may good reasons for denying access (paragraphs 45 and 46).

[82] Drawing these strands together the following points seem relevant for this discussion;

1. It is an aspect of the rule of law in a democracy that the courts are open to the public.
2. The rationale for the principle of open justice is to ensure public scrutiny and to hold judges to account.
3. The principle applies to all courts and tribunals and *mutatis mutandis* to judges sitting as a chair of a public inquiry.
4. Each court or tribunal has an inherent jurisdiction to determine how the principle of open justice should be applied to proceedings before it.
5. The media have the right to report on all proceedings held in public.
6. The right to report on proceedings extends to a right to have access to documents which are before the court. This right is not automatic.
7. It is for the court or tribunal before whom the proceedings are taking place to regulate access to its proceedings and to documents which are before it. In doing so it conducts a balancing exercise between, on the one hand, the principle of open justice and, on the other hand, the risk of harm that disclosure may cause to the administration of justice and other legitimate interests.

8. The withholding of any information concerning civil cases before the court is an interference in the principle of open justice. Accordingly there is a presumption in favour of disclosure.

9. The principle of open justice extends to judicial determinations, including any reasons for them and to the identity of the parties.

[83] Applying these principles in this case it was for the Employment Tribunal to determine the application of the principle of open justice to the proceedings before it, including access to documents and to the names of the parties. In carrying out that function the Employment Judge would have required to have balanced the principle of open justice with the harm that could flow to the administration of justice and other legitimate interests. In this case that would have involved a consideration of the effect that publication or disclosure of the confidential and sensitive parts of the documents would have had on the interests of the Inquiry.

Are the declarators and orders sought in respect of the original restriction orders academic?

[84] One of the recognised limits on the right to a legal ruling is when the issue that is being litigated is deemed hypothetical or academic. These limitations were considered by the First Division in *Wightman v Secretary of State for Exiting the European Union* 2019 SC 111

[85] Lord Carloway LP at [22] said that “in a case where there are no petitory conclusions, the declarator must have a purpose. It “must be designed to achieve some practical result”. In *Wightman* the issue was whether or not the Court should consider issuing a declarator as to whether or not the United Kingdom could unilaterally revoke its notification under article 50 of the Treaty on European Union to leave the European Union. At that time there was no proposal before Parliament to invoke article 50, and we now know that option was

never actively considered by Parliament. Nevertheless the Court held that Members of Parliament had an interest in seeing the uncertainty about the legal competence of revoking the notification in advance of a vote on the ratification of an agreement between the UK Government and the EU Council in terms of the European Union (Withdrawal) Act 2018. The Court said that it was not advising Parliament nor seeking to influence Parliament but declaring the law as part of its essential function of the Courts in ensuring the preservation of the rule of law. Accordingly the Court made a reference to the Court of Justice of the European Union for a preliminary ruling under article 267 of the Treaty on the Functioning of the European Union seeking an answer as to whether the article 50 notification could be unilaterally revoked by the United Kingdom.

[86] In *R (on the application of Dolan and others) v Secretary of State for Health and Social Care and anr* [2020] EWCA Civ 1605 the Court of Appeal in England and Wales considered an application for judicial review against regulations made by the Secretary of State in response to the Covid-19 pandemic. By the time of the hearing for permission the regulations which were the subject of the judicial review had been repealed and replaced by new regulations. The Court held that the claim was “clearly academic” (para 39). The crucial question was whether the Court should nevertheless permit the claim for judicial review to proceed in the public interest. Lord Burnett of Malden LCJ giving the opinion of the Court referred to the principle which governed the exercise of the Court’s jurisdiction to hear judicial review cases which have become academic as set out by Lord Slynn of Hadley in *R v Secretary of State for the Home Department, ex parte Salem* [1999] 1 AC 450. Lord Burnett noted at paragraph 40:

“There is a discretion to hear disputes which have become academic but the discretion, even in the area of public law, must be exercised with caution; appeals which are academic between the parties should not be heard ‘unless there is a good

reason in the public interest for doing so'. By way of example (but stressing that this was only by way of example) Lord Slynn said:

'When a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future.'

[87] One of the grounds of judicial review in *Dolan* was an attack on the vires of the regulations. The Court concluded that it would serve the public interest if the Court was to consider the issue rather than leave it to be potentially raised as a defence to criminal proceedings in the Magistrates Court. Moreover the question whether or not the Secretary of State had the vires to make such regulations continued to be a live issue as new regulations continued to be made under the same enabling power. The Court thus granted permission but only in relation to the vires ground. The Court proceeded to hold that the Secretary of State had the power to make the impugned regulations.

[88] In both these cases there was a practical result in the sense that they answered a question which was necessary for future decision makers. In both cases there was a considerable public interest in the Court deciding the issue before them. In *Wightman* the practical result was advice given to Members of Parliament in the event that they were called upon to consider the unilateral revocation of the article 50 notification as an option when considering the withdrawal agreement. In *Dolan* the Court of Appeal's decision effectively removed a potential defence to prosecutions in the Magistrates Courts for breaches of the regulations. It also enabled the Secretary of State to make further regulations under the same enabling power. That was particularly important to enable the Government to deal with the global Covid-19 pandemic.

[89] The attack on the original orders is now academic. They were both repealed by the restriction order made by the respondent on 2 March 2020. The question then is whether or

not in the exercise of the Court's discretion I should now consider the declarators sought in relation to the original restriction orders. The petitioner argues that there are a number of reasons why the Court should consider the orders sought in respect of the original restriction orders.

[90] First it says that these were the orders in place at the time these proceedings were raised. "It is not in the gift of the respondent to vary the restriction orders with the effect of avoiding an adverse finding against her." That is plainly wrong. The respondent has power under section 19 of the Act to make, vary and revoke restriction orders. Whether such steps are done to avoid an adverse finding against her is neither here nor there. It might be thought to be a prudent and wise exercise of her discretion in the light of the arguments made by the petitioner in the course of the proceedings.

[91] It was also submitted that it was necessary to determine the issue as it was relevant to expenses. I do not accept that argument. Expenses are a matter of discretion for the court and can be dealt with on submissions taking into account such factors as change of position by one of the parties in response to the litigation.

[92] Mr McBrearty also submitted that the respondent is performing a statutory function and it is in the public interest that the issues raised relating to the original restriction orders, including vires, bias and potential breaches of article 10 ECHR are determined. News, he submitted, is a perishable commodity and the restriction orders interfered with the petitioner's right to report matters in the public interest. Again I do not accept that submission. In the first place the issues of statutory interpretation and apparent bias are raised with the replacement order. Secondly the factual background is almost certainly unique. It will not be often that the chair of a public inquiry is the respondent in a claim in the Employment Tribunal. Thirdly while it is true that the orders restricted the reporting of

proceedings in the Employment Tribunal the orders are no longer in force. By the time of the hearing before the Employment Tribunal the petitioner could report the fact of the claim and the submissions before the hearing. For these reasons I do not consider that there are wider issues of public interest to be addressed by an examination of restriction orders which are no longer in force or to the alleged failure to revoke or vary these orders.

Does the petitioner require permission to bring the replacement restriction order under review?

[93] In *MIAB v Secretary of State for the Home Department* 2016 SC 871 the First Division considered the issue of amendment of a petition to bring in new grounds of review after permission had been granted generally. Lord Carloway LP at [64] noted that the terms of section 27B of the Court of Session Act 1988, as amended, provided for the granting of permission in respect of particular grounds only. It followed that since permission could only have been given for the grounds stated in the original application such permission must also be necessary for any new grounds introduced later.

[94] Here the averments in respect of the replacement restriction order were introduced in the course of adjustment rather than by minute of amendment. Accordingly the Court was not asked to allow the amendment. The petitioner submits that all of the restriction orders have to be regarded as one exercise of a statutory power raising exactly the same grounds. The Court granted permission to proceed on the basis of vires, bias and breach of article 10. Vires and bias are live issues in respect of the replacement restriction order. The argument appears to be that this raises no new grounds, merely a different target.

[95] In my opinion that approach is wrong as a matter of law. Section 27B requires the identification of a decision or the exercise of the power which gives rise to the application to

the supervisory jurisdiction of the Court. The respondent exercised the power under section 19 of the Act on three occasions. The petitioner has been given permission to bring two of them under review. It does not have permission in respect of the third occasion. In my opinion the petitioner requires permission to bring each separate exercise of the power under review. One way of testing this is to ask whether a separate petition could be brought in respect of the third exercise of power. If it would be competent to bring separate proceedings then permission is required under section 27B. Clearly the petitioner could have brought separate proceedings and accordingly permission to do so was required.

[96] The petitioner submits in the alternative that if permission is required I should now give permission. It may be thought somewhat artificial given that parties were engaged on these issues at the substantive hearing. Nevertheless the point was taken by the respondent and requires to be addressed.

[97] The test is whether or not the application has real prospects of success. That test is clearly met in respect of the replacement restriction order. Had I been asked to grant permission I would have done so. The Court granted permission to bring the original restriction orders under review on the same grounds raised in respect of the replacement restriction order, namely vires and apparent bias. Both issues have real prospects of success. Insofar as it may be necessary to extend the time to bring the judicial review I consider it equitable to do so standing the existence of these proceedings at the time the replacement restriction order was made. Accordingly, I shall grant permission to bring proceedings for judicial review against the making of the replacement restriction order.

Is there an alternative remedy?

[98] The respondent submits that the petitioner has not exhausted alternative remedies. In particular, because the respondent has the power to vary a restriction order under section 20 of the Act the petitioner ought to have asked the respondent to exercise that power to allow them to report any particular matter covered by the order. Only if she refused to do so would the petitioner have cause to invoke the supervisory jurisdiction of this Court.

[99] There is no merit in this point. If the petitioner is correct that the respondent did not have the power to make the restriction order then she did not have the power to vary it. Moreover the respondent had twice refused to vary the original orders and the petitioner can be excused for having little confidence that she would exercise the power to vary the order if requested a third time.

The grounds of challenge to the replacement restriction order

[100] There are two grounds of challenge to the replacement restriction order. The petitioner submits that on a proper interpretation of section 19 of the Act the respondent did not have the power to make the order; the vires issue. Secondly it submits that the respondent had an interest in the making of the order and accordingly acted with apparent bias.

Vires

[101] The respondent, as chair of the Inquiry, has the power under section 19(2) of the Act to make restriction orders. The section is headed "Restrictions on public access etc."

Subsection (1), so far as relevant, reads:

“(1) Restrictions may, in accordance with this section, be imposed on–

(a) ...

(b) disclosure or publication of any evidence or documents given, produced or provided to an inquiry.”

[102] The restriction order must specify only those matters which the chair considers

“to be conducive to the inquiry fulfilling its terms of reference *or to be necessary in the public interest*, (my emphasis) having regard in particular to the matters mentioned in subsection (4).”

[103] Whether or not the respondent had the power to make the replacement restriction order depends on the interpretation of that section. A statutory body can only act within the powers conferred on it by Parliament. The exercise of a power may be expressly authorised, or it may depend on whether what is done can fairly be regarded as incidental to or consequential upon what has been authorised. The approach to be taken to the exercise of a power not expressly authorised was discussed by Lord Hutton in *Re: Northern Ireland Human Rights Commission* [2002] HRLR 35 at [53] and 54:

“53. In my opinion the authorities show that a liberal approach should be adopted. In *Att-Gen v Great Eastern Railway Company* Lord Selborne LC stated at 478: ‘It appears to me to be important that the doctrine of *ultra vires*, as it was explained in that case [*Ashbury Railway Carriage and Iron Co v Riche* (1875) LR 7 HL 653], should be maintained. But I agree with James LJ that this doctrine ought to be reasonably, and not unreasonably, understood and applied, and that whatever may fairly be regarded as incidental to, or consequential upon, those things which the Legislature has authorised, ought not (unless expressly prohibited) to be held, by judicial construction, to be *ultra vires*.’

54. It is also relevant to note that Lord Selborne then recognised that acts may be *intra vires* ‘on the ground that they are such acts, on the borderline between authority and no authority, as may reasonably be thought incidental to the exercise of powers expressly given’. Lord Blackburn stated at 481: ‘My Lords, I quite agree with what Lord Justice James has said on this first point as to prohibition, that those things which are incident to, and may reasonably and properly be done under the main purpose, though they may not be literally within it, would not be prohibited.’ But to the extent that there may be a difference, I consider that later authorities have followed the approach of Lord Selborne. In *Trustees of Dundee Harbour v D & J*

Nicol [1915] AC 550 at 570 Lord Parmoor stated: 'It is settled law that a body such as the appellants, constituted by statute, have no authority except such as Parliament has conferred upon them, and that they must find a sanction for any powers which they claim to possess in their incorporating statute or statutes. These powers may be expressly authorised or implied as fairly incidental to what is expressly authorised.'

55. In *Att-Gen v Smethwick Corporation* [1932] Ch 562 Lord Hanworth MR, after referring to the authorities, stated at 577:

'We have, therefore, the direction of the House of Lords that if the enterprise we are considering is incidental to or consequential upon those things which the Legislature has authorised, it ought not to be held to be *ultra vires*.'

[104] The issue is whether the making of the replacement restriction order was expressly authorised by section 19 or whether its exercise might be regarded as incidental to or consequential upon that which is authorised.

[105] Section 5(5) of the Act provides that functions conferred by the Act on an Inquiry panel are exercisable only within the terms of reference. The petitioner submits that the Inquiry only has the power to investigate matters within its terms of reference and cannot go beyond them. That is true. However the petitioner goes further and links "function" to investigation. That in my opinion is where the petitioner falls into error. "Function" is not confined to the taking of evidence, writing a report or making recommendations.

"Function" must also include matters which are fairly regarded as incidental to or consequential upon the establishment of the Inquiry. So for example section 11(2) provides for the chairman, during the course of the inquiry, to appoint assessors. In exercising that power a chairman would be exercising a function conferred on her for the purpose of the inquiry. The Act provides for the payment of counsel (section 39) and in engaging counsel the Chair is exercising a function conferred on her by the Act. What section 5(5) constrains is the widening of the scope of an inquiry; *Re Royal Commission on Licensing* [1945]

NZLR 665. It does not prevent the chair carrying out those things which are necessary to

conduct an inquiry, such as the establishment of an office, the appointment of assessors and the engagement of staff.

[106] Mr Halley's appointment was by virtue a letter of appointment/instruction from the then Chair of the Inquiry, Susan O'Brien QC to Mr Halley dated 4 September 2015. The claim made by Mr Halley in the Employment Tribunal arises out of his engagement as counsel and was made against the respondent in her capacity as Chair of the Inquiry, not as a private citizen or as Senator of the College of Justice or any other capacity. It must therefore follow that in responding to the claim the respondent was carrying out a function which was incidental to and consequential upon the respondent's appointment as Chair of the Inquiry.

[107] Accordingly in exercising the function under section 19 the respondent's powers are not limited to the investigation of the matters contained in the terms of reference but extend to those matters which are necessarily consequential to the investigation.

[108] The petitioner submits that section 19 has to be read with section 18 and the phrase "documents given, produced or provided to an inquiry" which appears in both sections has to be construed in the same way. Section 18 provides for public access to inquiry proceedings and information and provides a duty on the chairman. The petitioner further submits that the function conferred on the chairman under section 18 must be read in accordance with section 5(5), with the result that section 18 only applies to documents which are ingathered by the inquiry in the course of investigating the subject matter covered by the terms of reference and to documents referred at the oral hearings of the inquiry. Thus, the argument goes, the power under section 19 to impose a restriction order is constrained to those documents ingathered by the inquiry in the course of their investigation. If the power relates to any document given to the inquiry for any purpose then it is submitted the Chair

must take steps under section 18 to allow public access to it. That would produce the absurd result, it is submitted, that, for example, private letters of congratulations addressed to the Chair on her appointment and received in the Inquiry office would have to be made public.

[109] I reject these submissions. In the first place for the reasons given above I am satisfied that “function” has a broader meaning than that given by the petitioner and includes matters which are incidental and consequential to the Inquiry fulfilling its terms of reference.

[110] Secondly, the duty in section 18 is “subject to any restrictions imposed by a notice or order under section 19.” Accordingly no duty arises under section 18 if the documents in question are the subject of a restriction order under section 19.

[111] Thirdly, the submission for the petitioner is that the duty is

“to take such steps as he or she considers necessary (my emphasis) to ... allow public access to evidence and documents given, produced or provided to the inquiry.”

In fact the duty on the Chairman is to take such steps as she considers reasonable. It is an important distinction as the word “reasonable” implies a greater degree of discretion vested in the chairman exercising the duty than might be implied in the petitioner’s submission. There could be no obligation on the Chair to allow public access to material which might, for example, infringe the article 8 rights of any person involved in the Inquiry, or documents received in confidence from, for example, the police, as happened in this case. Nor would there be any obligation to give access to documents which did not truly relate to the subject matter of the Inquiry or were frivolous or vexatious.

[112] Fourthly, one has to have regard to the purpose of the section; it is to provide a mechanism by which restrictions on public access may be imposed to enable the inquiry to fulfil its terms of reference or as required in the public interest. Thus it is to protect what

might be termed legitimate interests. A restriction order may be imposed on “disclosure or publication of ... documents given, produced or provided to an inquiry”. A literal reading of that phrase might suggest that the Inquiry has to be the recipient of the document. That would mean that an internal document could not be the subject of a restriction order. So if a member of the team produced a precis of evidence heard in private, or a memorandum about information received in confidence, such an interpretation would prevent the Chair from making a restriction order in respect of it. That cannot have been Parliament’s intention. It points to purposeful interpretation.

[113] Fifth, I reject the analogy which Mr McBrearty sought to draw between letters of congratulations written to the Chair of the Inquiry and a claim form served on her by the Employment Tribunal. There frankly is no comparison between a private letter written to the Chair in a personal capacity, even if addressed to her at the Inquiry’s office, and a claim form served on her in her role as Chair of the Inquiry. Form ET1 and the paper apart were documents which were given to the respondent in her capacity as Chair of the Inquiry. As such they fall within the definition of documents given to the Inquiry

[114] The petitioner had an alternative interpretation; section 19 might be interpreted by focussing on the word “documents” in section 19(1) rather than the phrase “given, produced or provided”. On that view the restriction order, it is submitted, could be imposed in respect of the disclosure or publication of any document, however the inquiry comes to hold it, but only insofar as the as the document contains information falling within the terms of reference. The problem with this interpretation is that it proceeds on the petitioner’s restrictive and erroneous interpretation of function under section 5(5).

[115] The restriction order prohibits the disclosure or publication of ET1 paper apart and the ET3 paper apart with the exception of paragraphs 1 to 11. These include sensitive

references to the internal workings of the Inquiry, information given to the Inquiry in confidence by Police Scotland, information about a residential establishment which is under scrutiny by the Inquiry and the subject of police investigation, and sensitive personal information about Mr Halley. These are all matters which arise incidentally from the exercise by the Inquiry of its functions within its terms of reference.

[116] The power to make a restriction order is constrained by section 19(3) and (4). That is recognised in the reasons given by the respondent for making the order. Having set out the particulars of the harm or damage that would flow from the disclosure or publication the respondent concluded that “it is conducive to the Inquiry fulfilling its Terms of Reference and that it is necessary in the public interest to issue a restriction order”. This reflects the language of section 19(3). It was not suggested to me that the respondent had not properly considered the matters set out in section 19(3) and (4).

[117] There is one matter related to the original restriction orders which needs to be addressed. The petitioner submits that the proper course of action for the respondent would have been to have asked the Employment Tribunal to make an order rule 50 covering these documents. Mr McBrearty pointed to what he said was an anomalous approach by the respondent in seeking an order in these proceedings under the Contempt of Court Act 1981 and failing to seek an order from the Employment Tribunal. The petitioner however did not submit that the fact that such an order could have been made by the Employment Judge under rule 50 excluded or fettered the power of the respondent to make a restriction order. I agree that it would have been competent for the Employment Judge to make such an order under Rule 50 or an order. And while that would have been the appropriate course to take I express no view on whether the fact that the Employment Judge could have made an appropriate order excluded the power of the respondent to make a restriction order.

[118] In this case however the proceedings before the Employment Tribunal are no longer live. Accordingly when the replacement restriction order was made in March 2020 it was no longer an option to request the Employment Judge to make an order. The material covered by the restriction order is sensitive and requires to be protected. In those circumstances not only was the respondent able to make such an order but, subject to considerations of bias, she was bound to make the order.

Apparent bias

[119] The test for apparent bias is set out in the *dictum* of Lord Hope in *Porter v Magill* at [103];

“The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.”

[120] Lord Hope gave a further description of a fair-minded and informed observer in

Helow v Advocate General for Scotland [2008] UKHL 62 at [2] and [3];

“[2] The observer who is fair-minded is the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious, as Kirby J observed in *Johnson v Johnson* (2000) 201 CLR 488, 509, para 53. Her approach must not be confused with that of the person who has brought the complaint. The real possibility test ensures that there is this measure of detachment. The assumptions that the complainer makes are not to be attributed to the observer unless they can be justified objectively. But she is not complacent either. She knows that fairness requires that a judge must be, and must be seen to be, unbiased. She knows that judges, like anybody else, have their weaknesses. She will not shrink from the conclusion, if it can be justified objectively, that things that they have said or done or associations that they have formed may make it difficult for them to judge the case before them impartially.

[3] Then there is the attribute that the observer is informed. It makes the point that, before she takes a balanced approach to any information she is given, she will take the trouble to inform herself on all matters that are relevant. She is the sort of person who takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read or seen into its overall social, political or geographical context. She is fair-minded, so she will appreciate that the context

forms an important part of the material which she must consider before passing judgment.”

[121] The Dean of Faculty for the respondent submitted that in the circumstances of this case a fair minded and informed observer would conclude that there was no apparent bias. Mr McBrearty however submitted that the very fact that the respondent had an interest in the subject matter of the restriction order was sufficient to disqualify her from making an order. He founded on a series of cases where automatic disqualification was presumed.

[122] In *Dimes v The Proprietors of the Grand Junction Canal* the Lord Chancellor had presided in a case in which he had an interest as a shareholder in one of the parties. The decree was set aside. Lord Campbell expressed the view that that “the maxim that no man is to be a judge in his own cause should be held sacred” (p793). In *Pinochet* the House of Lords followed *Dimes* in setting aside its earlier decision because one of the judges, Lord Hoffman, was an unpaid director and chairman of company which was wholly owned by Amnesty International. Amnesty International had campaigned against Pinochet and had intervened in the case. *Dimes* was again followed in *Locabail (UK) Ltd v Bayfield Properties Ltd & Ors* [2000] QB 451. The Court of Appeal in England and Wales held that there was one instance where the existence of bias is effectively presumed and that was where the judge is shown to have an interest in the outcome of the case. Lord Bingham LCJ giving the decision of the Court at [7] said

“The basic rule is not in doubt. Nor is the rationale of the rule: that if a judge has a personal interest in the outcome of an issue which he is to resolve, he is improperly acting as a judge in his own cause; and that such a proceeding would, without more, undermine public confidence in the integrity of the administration of justice.”

[123] Lord Bingham added at [8] that the question was not whether the judge has some link with a party involved in a cause but whether the outcome of that cause could realistically affect the judge’s interest.

[124] These cases predated *Porter v Magill*. Yet it is possible to see the influence of the doctrine of automatic disqualification remaining in subsequent case law. In *Davidson v Scottish Ministers* the House of Lords held that the involvement of Lord Hardie the former Lord Advocate in a case which raised a question about the interpretation of section 21 of the Crown Proceedings Act 1947 as it applied to Scottish Ministers was tainted by apparent bias. As Lord Advocate, Lord Hardie had promoted the Scotland Bill in the House of Lords and during a debate given his opinion on the effect of section 21 on Scottish Ministers. In his speech Lord Bingham at [6] said:

“[A] judge will be disqualified from hearing a case (whether sitting alone, or as a member of a multiple tribunal) if he or she has a personal interest which is not negligible in the outcome, or is a friend or relation of a party or a witness, or is disabled by personal experience from bringing an objective judgment to bear on the case in question. Where a feature of this kind is present, the case is usually categorised as one of actual bias. But the expression is not a happy one, since ‘bias’ suggests malignity or overt partiality, which is rarely present. What disqualifies the judge is the presence of some factor which could prevent the bringing of an objective judgment to bear, which could distort the judge’s judgment.”

[125] While at first glance this might have the appearance of automatic disqualification, the House of Lords nevertheless applied the *Porter v Magill* test, Lord Bingham finding at [17]:

“The fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that Lord Hardie, sitting judicially, would subconsciously strive to avoid reaching a conclusion which would undermine the very clear assurances he had given to Parliament.”

[126] In *R (on the application of Darho Kaur) v Institute of Legal Executives Appeal Tribunal* [2011] EWCA Civ 1168, the Court of Appeal in England and Wales attempted to reconcile what it saw as a jurisprudential issue between the *Dimes/Ex p Pinochet (No 2)* doctrine and the doctrine of apparent bias as set out in *Porter v Magill*. Rix LJ found

assistance in what he described as the illuminating observations of Lord Bingham in

Davidson v Scottish Ministers at [6] and [7]. He concluded [45],

“In these circumstances, it seems to me that by now it may be possible to see the two doctrines which remain in play in this appeal as two strands of a single over-arching requirement: that judges should not sit or should face recusal or disqualification where there is a real possibility on the objective appearances of things, assessed by the fair-minded and informed observer (a role which ultimately, when these matters are challenged, is performed by the court), that the tribunal could be biased. On that basis the two doctrines might be analytically reconciled by regarding the ‘automatic disqualification’ test as dealing with cases where the personal interest of the judge concerned, if judged sufficient on the basis of appearances to raise the real possibility of preventing the judge bringing an objective judgment to bear, is deemed to raise a case of apparent bias.”

[127] It is difficult to reconcile automatic disqualification with an objective test. If bias follows automatically from a certain set of circumstances then there is no need to apply a test. What I understand Lord Bingham in *Davidson* and Rix LJ in *Darsho Kaur* to be saying is that where the judge has an interest in the outcome of a case the fair-minded and informed observer is most likely to conclude that there is a real possibility that the tribunal is biased. The test in *Porter v Magill* is not supplanted by the doctrine of automatic disqualification in these cases but in certain circumstances, of which *Davidson* and *Darsho Kaur* are examples, it would be almost impossible for the fair-minded and informed observer to reach any other conclusion. Confirmation that the test in *Porter v Magill* is still to be applied in such cases can be seen from Lord Bingham’s speech in the House of Lords in *Davidson* at [17].

[128] Mr McBrearty’s primary position was that the very fact that the respondent had a direct interest in the subject matter of the restriction order was sufficient to demonstrate apparent bias notwithstanding the terms of the restriction order. I reject that submission. The circumstances here are far removed from any of the cases cited to me. In making the restriction order the respondent was not deciding a case brought before her in a judicial capacity. She was not sitting in judgement. She was not determining a litigant’s civil rights

or obligations. The restriction order had no impact on the case brought against her in the Employment Tribunal. Even if proceedings were still live the order could have no influence or impact on the Employment Tribunal case. The petitioner concedes that the order does not interfere with its article 10 rights and that it has no problem with its terms. A more intensive consideration of the test is required.

[129] Mr McBrearty submitted that the fair-minded and informed observer would have regard to the history leading up to the granting of the replacement restriction order. The original orders had prevented the reporting of even the fact of the claim against the respondent. This offended the principle of open justice. The respondent had refused to vary the orders on two occasions. She sought to persuade the Employment Tribunal to hold its hearing in private and when the Employment Judge had refused to place an article 50 order on the proceedings she had put out a press release which was, in some respects incomplete. She had then sought to control the reporting of Employment Tribunal hearing by suggesting that the petitioner's reporters should liaise with the Inquiry's lawyers and media consultants who would advise on whether any aspect would infringe the restriction orders. Finally it had taken her three months from the abandoning of the claim by Mr Halley to rescind the original orders and make the new replacement order. She had only done so, he suggested, in the face of the imminent substantive hearing. Given the lapse of time between the withdrawing of Mr Halley's claim the reason given for the making of the replacement order, that she was re-appraising the orders in the light of the claim's withdrawal, was questionable.

[130] The granting of the original restriction orders was in my opinion unwise. They offended the principle of open justice. They prevented the petitioner and others from reporting the names of parties to a case in the Employment Tribunal and reporting that a

claim had been made against the respondent which alleged discrimination, victimisation and harassment. In making the orders in these terms the respondent left herself open to a claim of bias which might have been difficult to counter. It was not necessary for her to make these orders. There was another option open to her.

[131] I am not satisfied however that the fair-minded and informed observer would start with the background as outlined by Mr McBrearty. While the petitioner's concern about the original restriction orders is understandable, as Lord Hope observed in *Helow* the approach of the fair minded and informed observer must not be confused with that of the person who has brought the complaint.

[132] In my opinion the fair minded and informed observer would look first at the terms of the order. She would note that it restricts the disclosure or publication of sensitive and confidential material which it is accepted should not be in the public domain. She would know through counsel's submissions that if the original restriction orders had the same effect as the replacement restriction order it is unlikely that the petitioner would have complained. Such an observer would appreciate the importance of the Inquiry to the participants, particularly the survivors of abuse and the need to ensure that it retains the confidence of the participants and the wider public. She would know that the respondent is a senior and well respected judge who has worked hard to restore confidence in the Inquiry following the resignation of the previous Chair.

[133] Moreover when the restriction order was made in March 2020 the respondent did not have the option of requesting an order from the Employment Tribunal under rule 50. Proceedings were no longer live. The sensitive and confidential parts of the documents required to be protected from disclosure or publication. The respondent knew that the petitioner had a copy of ET1 and the paper apart. It had been given to it by Mr Halley in

breach, according to the respondent, of a written undertaking of confidentiality. While the petitioner has taken an editorial decision not to publish any of the material, even if it were free to do so, the respondent could not know whether the documents had been given to any other media outlets.

[134] I accept that requesting the Minister to make a restriction notice under section 19(2)(a) was not a viable option. Given its history the respondent had a well-founded concern to ensure that the Inquiry was kept at arm's length and independent from Government. The risk to the integrity of the Inquiry and public confidence in it was too great.

[135] In March 2020 the respondent had no other option than to grant the order herself. I accept therefore that it was necessary for her to grant the restriction order. In circumstances such as these the courts have recognised that the responsibility for granting an order cannot be shirked and the objection of interest cannot prevail: *Wade & Forsyth, Administrative Law*, 11th edition p396. Given the sensitive and confidential nature of the material protected by the restriction order and the risk to the integrity of the Inquiry if it were made public the respondent was right not to shirk that responsibility.

[136] For these reasons I am not satisfied that the petitioner has demonstrated apparent bias.

Decision

[137] I will grant permission to review the restriction order dated 3 March 2020 on the grounds of vices and apparent bias. Thereafter I shall sustain the third plea in law for the respondent and dismiss the petition. I reserve the question of expenses.