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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

KING'S BENCH DIVISION
(JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY
CYRIL GLASS FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF A SINGLE JUDICIAL MEMBER OF THE HISTORICAL INSTITUTIONAL ABUSE REDRESS BOARD

Karen Quinlivan KC and Malachy McGowan (instructed by KRW Law, solicitors) for the applicant
Tony McGleenan KC and Philip McAteer (instructed by the Solicitor to the HIA Redress Board) for the respondent

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SCOFFIELD J

A previous version of this judgment was anonymised to protect the identity of the applicant. Upon his application, that anonymity has been removed. There remains an order restricting reporting of the detail of the sexual abuse alleged to have been suffered by the applicant and the detail of the impact which that is said to have had upon him *over and above* such of those details as appear within this judgment.

Introduction

[1] By this application for judicial review the applicant challenges a number of decisions of a single judicial member (SJM) of the Historical Institutional Abuse Redress Board ("the Redress Board"). The first decision was made on 17 December 2020 and was contained in a preliminary ruling of that date, which was then later confirmed in a final ruling dated 4 January 2021. The import of the preliminary decision was twofold, namely (i) to decline to direct an oral hearing on the applicant's appeal against the determination of the Redress Board; and (ii) to refuse to permit two witness statements upon which the applicant wished to rely to be

admitted in support of that appeal. In addition, the applicant challenges the ultimate determination on the substance of his appeal, insofar as he was refused damages in relation to sexual abuse endured in Rathgael Training School and psychological abuse which he endured in the Assessment Unit of Lisnevin Training School.

[2] The applicant was represented by Ms Quinlivan KC, who appeared with Mr McGowan; and the respondent was represented by Mr McGleenan KC, who appeared with Mr McAteer. I am grateful to all counsel for their helpful written and oral submissions.

The applicant's experience of historical institutional abuse and engagement with the HIA Inquiry

[3] The applicant is a survivor of historic institutional abuse. The precise nature and duration of that abuse was a matter considered by the Redress Board in this case. I do not propose to set it out in any more detail than is required for the understanding of this judgment. It is also clear that the applicant is now a person who has taken an active role in working with other survivors, for which he is to be commended.

[4] The applicant gave evidence to the public inquiry chaired by Sir Anthony Hart which investigated historical institutional abuse in this jurisdiction between 1922 and 1995, the Historical Institutional Abuse (HIA) Inquiry. He did so both by providing a witness statement, which he signed in April 2015, and by attending at the Inquiry's hearings to give oral evidence in late 2015. A copy of the transcript of his evidence has been made available to the court in the course of these proceedings.

[5] The applicant had an unsettled home life and, just after he started secondary school, began playing truant and engaging in criminal behaviour. He was sent to Rathgael Training School ("Rathgael") by way of a training school order in the summer of 1974. He was initially placed in the Assessment Unit of Lisnevin Training School ("Lisnevin") in Newtownards for a period of just under six weeks from late June to early August 1974. He then spent time in Rathgael from August 1974 to December 1975; thereafter as a day pupil; and then again on a full-time basis from December 1977 to January 1978.

[6] As noted above, the applicant gave oral evidence to the HIA Inquiry. His written statement was read back to him and he adopted it. Little additional explanation of his evidence was provided; nor was he probed in any great detail in relation to it. The applicant's representatives do not make any criticism of this, since the purpose of the inquiry was to consider *systemic* issues rather than to make determinations in relation to individual cases. However, it is a feature of the case made on his behalf that further detail of his experiences could have been drawn out of him by questioning at the inquiry or, perhaps, if he had had his own legal representation in that forum.

[7] In his written statement to the HIA Inquiry, the applicant drew a clear distinction between his treatment in Lisnevin and his treatment in Rathgael. He wrote that, "Lisnevin was fantastic and I have no complaints about my time there". In contrast, he said that his time in Rathgael was "very frightening because it was a tough disciplined environment". He described experiencing "a lot of physical, emotional and verbal abuse at Rathgael both from the other boys and from staff members". He gave details, in particular, of violence on the part of a number of members of staff; and described a lot of peer bullying there also.

[8] The applicant's inquiry statement referred to his being called "sexy" at Rathgael, as part of a nickname, by one of the teachers. He said that, albeit he was heterosexual, this teasing had a homophobic element to it and other boys made comments about his sexuality, implying that he was gay. He described constant teasing in this regard, which was very hurtful and made him feel humiliated.

[9] At the HIA Inquiry hearings, the applicant agreed with his written statement in respect of Lisnevin, confirming that he had described it as a fantastic place and that he had no complaints about his time there.

[10] In relation to the sexual teasing at Rathgael, he gave some further information about that in his oral evidence, noting that a staff member had encouraged other boys to mock him. He said that this teasing probably had one of the biggest impacts on his life. He described it escalating and then said:

> "Then the other – the other residents then, they would have mocked me, but it was nearly becoming – nearly becoming physical and it could have become – it could have become very, very dangerous nearly into the sexual abuse, but it wasn't, it was very, very near to it, and it had such effect on my life…"

[11] He was not asked to elaborate on precisely what he meant by this. He later added, on questioning from the Inquiry Panel, that everyone was aware of this teasing, which became exaggerated out of all proportion and "could have became [*sic*] very dangerous". He referred to one incident of a staff member engaging in this and said, "That was only one incident of many", without giving details of the many other such incidents.

The applicant's application for redress and the panel's determination

[12] The applicant submitted his application for compensation to the Redress Board on 16 July 2020. The application included a 'statement of experience' and was supported by an expert report from Dr Brian Mangan, Consultant Psychiatrist, dated 18 January 2019. The applicant asked for his statement of experience to be read

together with Dr Mangan's report and his earlier written statement to the HIA Inquiry.

[13] The statement of experience was relatively brief. In relation to his time in Lisnevin, he said this:

> "While I was in Lisnevin Training School there was persistent bullying by other residents. I remember that another [Witness J] was subjected to persistent bullying by other residents. The staff did not do anything to stop or prevent this bullying."

[14] In relation to the applicant's time in Rathgael, he included an explicit allegation of sexual assault, in the following terms:

> "While I was in Rathgael I was sexually assaulted by another resident, [name given]. He simulated sexual intercourse with me. It was sexual touching through clothes. This impacted upon my self confidence and my libido in later life. This happened on several occasions and another resident walked into the dorm when it happened to me. I did not consent to this sexual activity and I am embarrassed to discuss it. I am sure that the staff were aware that it was occurring, and they did not do anything to stop it.
>
> [Name] who was a member of staff was aware of the abuse. He made sexual innuendos towards me. "Here's [applicant's first name]" he would have said, and it was in a way that seemed sexual and the rest of the class would have laughed. I tried not to let it annoy me, but it did. I cried myself to sleep at night. I did not mention this at the inquiry as I was embarrassed.
>
> There are witnesses who seen this behaviour by [staff member], [four names given] can confirm this."

[15] The statement went on to recount instances of physical abuse from staff; as well as the effects the applicant considers his experiences in Rathgael to have had on him in later life.

[16] I have also carefully read through the report of Dr Mangan which arose from an interview he had with the applicant on 15 November 2018 and which was submitted with his application to the Board. This report focuses on physical and emotional abuse which the applicant suffered at Rathgael. It notes that he "had no

significant difficulties whilst in Lisnevin". In relation to Rathgael, the report describes physical abuse and bullying by both members of staff and other boys.

[17] As to allegations of sexual teasing, bullying or abuse, the applicant recounted to Dr Mangan that a member of staff called him "sexy" and this was a common theme of abuse from both students and teacher. Dr Mangan has expressly recorded, "Other students simulated sex with him". He also noted, in discussing the effects of his experiences, that the applicant described humiliation at the sexual teasing and that he had had difficulties with sexual functioning, lifelong problems with erectile dysfunction, and an adverse effect on his relationships. In Dr Mangan's opinion, the sum of the experiences in Rathgael had resulted in the applicant developing permanent disabling psychological injuries, with psychiatric damage which was severe.

[18] On 16 September 2020 a panel of the Board met and considered the applicant's application on the papers, determining that he should be awarded compensation in the sum of £15,000. In its written determination, the panel noted that it found many aspects of the applicant's account to be credible and the experiences he recounted to be consistent with the findings of the HIA Inquiry Report. It considered the applicant's 2015 account to the Inquiry to be "broadly consistent" with his account in his application to the Redress Board; but also noted "certain discrepancies and inconsistencies". Some of these are mentioned in the panel's written determination. The panel also said that, "In relation to the allegation of being sexually assaulted the Applicant does not appear to have made mention of it to either the Inquiry nor to Dr Mangan but first makes mention of it to the Redress Board". (That is not correct, at least as far as Dr Mangan is concerned: see para [17] above.) Broadly, however, the panel accepted the applicant's account; determined that he was entitled to compensation; considered that a sum in excess of the standard award of £10,000 was warranted having regard to the severity of the matters raised; and determined that the appropriate figure was £15,000. The panel also appears to have taken into account its assessment that some of the difficulties in the applicant's life were present before he came to reside in Lisnevin and Rathgael.

The applicant's appeal to the single judicial member of the Board

[19] The applicant appealed against the panel's determination on 27 September 2020. The notice of appeal is in very brief terms and was effectively an appeal on the quantum of the assessed compensation in view of the fact that Dr Mangan had considered the psychiatric damage to the applicant to be permanent and severe.

[20] On 12 October 2020, the applicant's legal representatives provided additional submissions in support of the appeal, which included additional grounds of appeal. The applicant's solicitor has accepted that he also, wrongly, adopted the error which the panel had made, in accepting that the applicant had not informed Dr Mangan of any sexual abuse (when it is clear from Dr Mangan's report that the applicant had done so in the reference to other students simulating sex with him). This error

appears to have had no material effect on the final outcome however, because the SJM who considered the appeal correctly identified that the applicant *had* reported sexual abuse to Dr Mangan, so that the panel had been wrong to consider this an aspect of his application which had not been disclosed in his history to Dr Mangan. The additional grounds of appeal also referred to the applicant's oral evidence to the HIA Inquiry in which he referred to "borderline" sexual abuse (although that precise word was not used by the applicant: see para [10] above). It does not appear that the transcript of the applicant's oral evidence to the HIA Inquiry was provided at that stage. The additional grounds of appeal went on to say:

> "In hindsight and with the benefit of legal advice, the Appellant did suffer sexual abuse at the hands of this male and other residents in Rathgael. This occurred approximately a dozen times. The Appellant was subjected to persistent sexual assaults which occurred at the hands of other residents."

[21] The additional grounds of appeal document concluded by indicating that the appellant "would be obliged if an oral hearing could be convened so that the matters raised herein may be fully ventilated before the Panel and so that he may be afforded the opportunity to demonstrate to the Panel the persistent, systemic and severe abuse he suffered in Lisnevin and Rathgael."

[22] On 26 October 2020, there was a further letter from the applicant's solicitor asking that his request for an oral hearing be determined and indicating a wish to make further submissions if the SJM was not minded to grant an oral hearing.

[23] Then, on 10 November 2020, the applicant submitted a range of additional evidence. This consisted of an additional written statement from himself and also a written statement from each of two additional witnesses who had not provided any evidence in support of his original application. The statement from the applicant was designed to explain or deal with a number of the purported inconsistencies upon which the original panel had commented. It provided two reasons for sexual abuse not being mentioned at the HIA Inquiry: that the applicant was not sure if it was sexual abuse, although it had definitely had the most impact in his life; and that, at the time of the Inquiry, he had not been ready to talk about it or been capable of doing so. This statement went on to give further details of the sexual teasing and taunts, and of other boys holding him down and simulating sexual intercourse with him, including one particular incident with another named boy upon which the applicant relied.

[24] The two additional statements were from 'Witness J', who was a resident with the applicant in Lisnevin; and 'Witness H', who was a resident with the applicant in Rathgael. Witness J's statement is longer than that of Witness H. I return to the content of these below. The applicant's solicitor contended (in later correspondence) that they were of "high probative value".

[25] On the same date, 10 November 2020, the Redress Board requested submissions on the issue of time limits and the applicant's request for an oral hearing, drawing attention in particular to certain provisions of the 2019 Act (discussed below) and the relevant rules of procedure. The brief notice of appeal had been submitted within the required timescale as prescribed by rule 12(3); but the much fuller, additional grounds of appeal had not been contained within that document (as required by section 16(2) of the Act) and had been provided after expiry of the deadline for appeal.

[26] On 2 December 2020, the applicant's solicitor provided further submissions on the issues identified above. On 17 December 2020 the Single Judicial Member (the Rt Hon Sir John Gillen) provided his preliminary ruling in relation to these issues. He granted the applicant an extension of time for appeal and allowed the applicant to adduce his own additional statement. He declined to permit the applicant to rely on the additional evidence from the two other witnesses, although making clear that he would keep this under review; and refused the request for an oral hearing.

[27] In refusing the request for a hearing, the judge went through each of the points raised by the applicant's solicitor in support of the request. He said that the applicant's desire to fully explain and ventilate his case did not constitute exceptional circumstances "but is the locus classicus of an instance where an appellant has been dissatisfied with the original hearing and has now decided to adopt a different tack in the appeal". The thrust of the judge's reasoning was that a case should be fully and properly presented to the original panel and it was not a sufficient reason to grant an oral hearing on appeal that the applicant wished to 'shore up' his or her case, having been disappointed by the panel's determination below. This is perhaps most aptly expressed at para 27 of his preliminary ruling, in which the SJM said this:

> "Equally so appeals must not become a vehicle for those disposed to consider the initial hearing before the panel as a dry run, and upon dissatisfaction, generate more preparation and more evidence including oral evidence before the appeal. 'Exceptional circumstances' will rarely, if ever, embrace a situation where an individual has simply decided to adopt a new tack or approach in light of his previous effort which has failed to give the satisfaction he sought. Each original application must be thoroughly considered and thoroughly prepared in the expectation that no oral evidence will be permitted at a later stage if it was not originally sought albeit the appeal is a reconsideration."

[28] On that same date there was correspondence from the applicant's representatives requesting that the single judicial member therefore proceed to determine the appeal. No objection was raised at that point to the decision to refuse

an oral hearing or to the (provisional) decision not to admit the additional statements.

[29] On 1 January 2021 the appeal was determined and the applicant's award was increased to £25,000. This decision was set out in writing and provided to the applicant's solicitor under cover of a letter dated 4 January 2021. Relevant portions of the SJM's reasoning are set out below. However, the applicant takes issue with the conclusions on the part of the SJM that he was not satisfied that the applicant had sustained sexual abuse; and that he was not satisfied that the applicant had suffered abuse in Lisnevin which would materially affect the level of compensation in the case. Whilst the judge did increase the applicant's award from £15,000 to £25,000, it is argued that his reasoning "must mean that the applicant was denied additional compensation based on these conclusions".

[30] The applicant sent pre-action correspondence on 21 January 2021, which was responded to on behalf of the Redress Board on 4 February 2021. These proceedings were issued on 16 March 2021; and leave was granted on the papers by my order of 12 April 2021.

The decision on appeal

[31] As noted above, the SJM gave a written determination on the appeal, in which he determined that the applicant's compensation should be increased from £15,000 to £25,000. The judge set out the factual background to the appeal, dealing in turn which the applicant's time in Lisnevin and then in Rathgael; he summarised the panel's reasoning below; he set out the grounds of appeal; and then went on, in paras 24-39 of his decision, to summarise his own reasoning for the determination which he gave. The written decision bears the hallmarks of a careful and considered reassessment of the matter, as one might expect from a judicial figure of the experience of Sir John.

[32] The SJM accepted that there had been physical and emotional abuse at Rathgael. In respect of one particular incident on which the applicant had placed emphasis, the judge considered that there had been "some discrepancy in the description" of the incident, but found this to be of little significance and accepted that the incident happened.

[33] However, he said the question of sexual abuse having been suffered by the applicant was "rife with difficulty borne out of inaccuracy and inconsistency in the reporting of same". This had been addressed in "enormous detail" in the applicant's addendum statement, which the SJM had admitted as fresh evidence. However, that account "was not disclosed in this detail to the Hart Inquiry or indeed to Dr Mangan". The SJM then recounted the reasoning provided by the applicant, in various representations, as to why this issue had not been covered in detail from the outset. The SJM identified that this issue had been addressed in the applicant's

history to Dr Mangan by way of "brief references" (and, in para 19, comments that the panel had been incorrect to say the issue had not been mentioned to Dr Mangan).

[34] The SJM's conclusion on the sexual abuse issue is contained in para 29 of his determination:

> "As indicated above I must be persuaded on the balance of probabilities that the appellant is entitled to compensation. The current detailed allegations of sexual abuse before me are too rife with inconsistency to permit me to get over that evidential threshold in the appellant's favour. In particular:
>
> - I am unimpressed by the suggestion that he did not have enough time to inform Dr Mangan of the full details which he now puts forward. The report from Dr Mangan is enormously detailed and he clearly investigated every aspect of the appellant's case. I find it inexplicable that the appellant failed to mention the comprehensive detail which he now puts forward concerning the alleged sexual abuse and its effects on him.
>
> - I also found it inexplicable that abuse, which he now alleges occurred daily, was not recalled when giving his statement to the Inquiry or when he gave evidence before the Hart Inquiry. Insofar as the appellant asserts that he could not bring himself to talk about it at that stage that is difficult to reconcile with his failure to talk about it in detail to Dr Mangan. He must have been aware that the purpose of meeting Dr Mangan was to put evidence in full before the Panel and yet he has chosen not to give the detail which he now asserts."

[35] The SJM's key conclusion in relation to the applicant's experiences at Lisnevin is contained in the following paragraph of his determination:

> "Similarly in relation to his time in Lisnevin, I am again unable to conclude on the balance of probabilities that his experience there should play any material part in the compensation. I am of this view for the following reasons:
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> - His explanation, voiced through his solicitor, that the reference to his period in Lisnevin being "fantastic" was merely a reference to "the bright

and colourful environment compared to the bleak environment of Rathgael" seems unsustainable when coupled with his failure to make any complaint at all about Lisnevin.

- It is also difficult to understand why he would have told Dr Mangan that he had no complaints to make about Lisnevin.

- Insofar as there may have been bullying in Lisnevin, I find that it had no material effect on the appellant given the above omissions. The statement of [Witness J] does nothing to correct these vital omissions."

[36] The SJM nonetheless was satisfied that the applicant was subjected to physical and emotional abuse whilst in Rathgael, including abuse with a homophobic aspect. He increased the level of compensation which the panel had awarded because he accepted, as set out in the applicant's initial grounds of appeal, that the panel's award did not adequately reflect the severity of the psychological sequelae which had been described in Dr Mangan's report. In reaching this view, the SJM was less concerned than the panel below that some of the applicant's difficulties pre-dated his time in Rathgael.

[37] In summary, the SJM did not radically depart from the basic factual position as assessed by the panel (notwithstanding the considerable fleshing out by the applicant of his allegations of sexual abuse) but did consider that the panel had not adequately compensated the applicant for the physical and emotional abuse he had suffered at Rathgael.

Relevant provisions of the 2019 Act

[38] The HIA Inquiry was tasked, amongst other things, with making recommendations in relation to redress for victims of institutional abuse. It recommended that a publicly funded redress scheme be established to provide compensation to survivors. The applicant contends that it is clear from the Inquiry's recommendations that it took the view that the then existing mechanisms for redress (including the potential to make a civil claim for damages) were not effective in practice. I do not consider that that necessarily follows. A recommendation that a better, more bespoke or more accessible scheme be put in place does not involve an unavoidable conclusion that existing remedies are ineffective, either on the whole or in particular cases. In any event, the recommendations the Inquiry made in relation to the redress scheme were tailored to the needs of this particularly sensitive area. So, for instance, the Inquiry recommended that the Redress Board not require oral hearings but should determine applications based on written statements, with an essentially inquisitorial approach.

[39] The bespoke system which was devised by the legislature for determining redress applications in this area and providing compensation is set out in the Historical Institutional Abuse (Northern Ireland) Act 2019 ("the 2019 Act"). Section 1 of the Act establishes the Board. Sections 2-4 provide for entitlement to compensation and set out the eligibility requirements for such entitlement. The content of section 4 is of potential significance, since it makes clear that an application for compensation under the scheme established by the 2019 Act is an alternative to an application by way of civil proceedings through the courts. Broadly speaking, an application for compensation may not be made under the Act by or in respect of a person who suffered abuse if a court has dismissed a claim arising from a relevant matter brought by or in respect of that person (unless the claim in question was dismissed solely on limitation grounds); or if proceedings on a claim arising from a relevant matter brought by or in respect of that person are pending before a court (unless the claimant withdraws the claim in question).

[40] Applications are governed by section 5. An application for compensation must be made to the Board. The application must be made before the end of the period of five years beginning with the date on which the establishment of the Board was advertised in the Belfast Gazette. By virtue of section 5(4), "The application must be made in accordance with such provision as may be made in rules". Relevant rules were made by the Executive Office in March 2020 in the form of the Historical Institutional Abuse Redress Board (Applications and Appeals) Rules (Northern Ireland) 2020 ("the 2020 Rules"), made under sections 19 and 20 of the 2019 Act. Section 5(4) provides that the rules must include provision for the material which may be provided in support of an application for compensation to include material in the form of audio or video recordings. In turn, rule 3 provides for basic matters which are requirements of an application for compensation; and rule 4 makes provision for required supporting information. Pursuant to rule 3(1)(b) an application for compensation must be in such form as the Board may determine. The standard application form unsurprisingly invites an applicant to provide an account of their experiences of living in a relevant institution in support of their application and to attach any relevant medical or expert report or any other supporting documentation the applicant wishes the Redress Board to consider.

[41] The determination of applications is provided for in sections 7-11. Section 8 provides that an application for compensation is to be determined on behalf of the Board by a panel appointed by its President; and a panel appointed for this purpose must consist of one judicial member of the Board to chair the panel and two other non-judicial members of the Board. The panel must determine, in the first instance, whether compensation should be awarded on the application and, if so, the amount of compensation that should be awarded.

[42] The procedure to be adopted is governed by section 9 of the 2019 Act, which is a particularly important provision for the purpose of these proceedings. Section 9(1) states that:

> "An application for compensation under this Part is to be determined by the panel appointed under section 8 on the basis of—
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> (a) any material provided in support of the application,
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> (b) any material provided in response to a request by the panel (whether the request is made to the applicant, made for the purposes of subsection (2) or made for some other purpose),
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> (c) any evidence admitted under subsection (3) or given in a hearing directed under that subsection,
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> (d) any evidence provided or given pursuant to a notice under section 10,
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> (e) any advice from an advisor appointed under section 11, and
>
> (f) any other material which the panel considers relevant."

[43] Pursuant to section 9(2), the panel must, in so far as it is practicable to do so, "request the body, society or organisation which provided residential accommodation in an institution to which the application relates to provide whatever information would enable the panel to verify the accuracy of information provided in support of the application".

[44] Section 9(2) is important in a number of respects. First, it makes clear that the statutory intention was that the panel determining the application would have a role in verifying the accuracy of information provided in support of the application. Unsurprisingly, the panel is not bound to accept everything that is said in an application, or in the information provided in support of it, at face value. Any such obligation would leave the scheme open to potential abuse. Second, read with other provisions of section 9, section 9(2) provides a structure to the panel's evidence gathering. The primary information is likely to be the claimant's application and the information provided in support of it; but the panel must also take into account whatever relevant information the institution in question has to offer (unless the person by or in respect of whom the application is made provided evidence to the Inquiry (see section 9(8)), in which case the panel will still have to consider the Inquiry's conclusions about the relevant institution). Thereafter, it is essentially a matter for the panel what further information, if any, it feels it should seek or consider.

[45] Section 9(3) goes on to provide as follows:

> "The panel may, if it considers that there are exceptional circumstances which make it necessary to do so in the interests of justice—
>
> (a) allow fresh evidence to be admitted;
>
> (b) direct an oral hearing to be held with the evidence to be given on oath."

[46] As discussed in further detail below, the panel (and, later, the SJM) has a discretion as to whether the admission of fresh evidence should be allowed and/or whether an oral hearing (which will generally be held in private) should be directed. Significantly, a condition precedent to the taking of either of those steps is that the panel considers that there are "exceptional circumstances which make it necessary to do so in the interests of justice".

[47] In addition, the panel has a range of further evidence-gathering powers at its disposal:

(i) Where the panel decides that it needs access to the records of the HIA Inquiry in order to determine the application, the Public Record Office of Northern Ireland must allow the panel access to those records (in accordance with whatever restrictions are in force under section 8 of the Inquiry into Historical Institutional Abuse Act (Northern Ireland) 2013): see section 9(5).

(ii) The panel may also by notice in writing require a person to provide it with specified records, documents, objects or other items of evidence: see section 10(1)(a).

(iii) The panel may also by notice in writing require a person to attend a hearing convened by the panel and to give oral evidence on oath to the panel: see section 10(1)(b).

(iv) The Board may also appoint a person to act as an expert advisor (and the panel may take into account advice which they provide): see section 11 and section 9(1)(e).

[48] Section 9(6) of the Act, on which the applicant places reliance in these proceedings, provides as follows:

> "The entitlement to compensation on the application is not affected by—

(a) whether or not any matters to which the application relates were reported to the police;

(b) whether or not the person by or in respect of whom the application is made provided evidence to the Inquiry;

(c) whether or not the person by or in respect of whom the application is made has been convicted of an offence."

[49] Once the panel has determined the application, the secretary to the Board must notify the applicant in writing of the determination; and the notification must be accompanied by a summary of the panel's reasons for the determination.

[50] The award of compensation is dealt with in sections 12-15 of the 2019 Act, with section 12 providing particular guidance as to how the level of compensation is to be assessed. Leaving aside cases where the application is made by or in respect of a person who was sent to Australia under a particular programme, the amount of compensation which may be awarded is an amount of £10,000 and an additional amount not exceeding £70,000 if the panel is satisfied that an additional amount is justified by the severity of the matters raised by the application. Accordingly, the maximum amount of compensation which may be awarded on such an application is £80,000. Pursuant to section 12(6), in the case of an application which relates to more than one institution, only one determination of an amount of compensation may be made under each of paragraphs (a), (b) and (c) of section 12(2), regardless of the number of institutions concerned. That is to say, the panel will look at the claimant's global experience in calculating an award but will not make separate awards in respect of each institution. Under section 13, the panel may adjust the amount of the award of compensation where compensation for having suffered the abuse in question has previously been paid to or in respect of the person who suffered it and the proposed award exceeds the earlier compensation.

[51] Schedule 1 to the Act makes further provision in relation to the establishment of the Board. Paragraph 4(1) of that schedule is in the following terms:

> "In the exercise of the Board's functions, the Board or any member of the Board acting on its behalf, must have regard to the Report of the Historical Institutional Abuse Inquiry (ISBN 978-1-908820-91-4), being the report of the Inquiry held under the Inquiry into Historical Institutional Abuse Act (Northern Ireland) 2013; but this duty does not apply in so far as any of the Board's functions depart from the recommendations made in the Report."

[52] Section 16 of the 2019 Act provides for a right of appeal against the determination of a panel. It is of particular importance in the present case since it is an appeal decision which is the subject matter of this application for judicial review. Section 16(1) confers a right of appeal upon a person who applied for compensation against a determination under section 8 either that no compensation was to be awarded to them or as to the amount of compensation to be awarded. Pursuant to section 16(2), "The person bringing the appeal must, when doing so, set out in writing the grounds of the appeal". An appeal must also be made in accordance with such provision as may be made in rules.

[53] As to the determination of the appeal, by virtue of section 16(4) an appeal under section 16 "is to be determined on behalf of the Board by a single judicial member of the Board". It is for the President of the Board to select the judicial member who is to determine the appeal; but the President may not select the judicial member who was the chair of the panel which made the determination under section 8. Significantly, section 16(6) provides as follows:

> "An appeal under this section is to be by way of a reconsideration; and accordingly sections 9, 10 and 12 to 14 apply in relation to the appeal as they apply in relation to an application for compensation, but with references to the panel appointed under section 8 to be read as references to the single judicial member of the Board selected under this section."

[54] The SJM must therefore exercise his or her own discretion on the question of whether an oral hearing is required in the particular circumstances of the case. On an appeal, the SJM may confirm the panel's decision, reverse it, or increase or reduce the amount of the award of compensation. A decision on an appeal under section 16 is final (subject, of course, to the exercise of the High Court's supervisory jurisdiction on judicial review).

Summary of the parties' arguments

[55] There are really three key elements to the applicant's challenge:

(1) That the SJM wrongly refused to admit the two additional witness statements from others, upon which he wished to rely;

(2) That it was wrong and unfair for the SJM not to permit an oral hearing in the circumstances of the case; and

(3) That the SJM's conclusion on the substance of his entitlement was also in error and was a result which was not reasonably open to him (particularly by reason of its failure to provide any or adequate compensation in respect of

sexual abuse which the applicant endured in Rathgael and/or physical and psychological abuse which he endured in Lisnevin).

[56] Behind these three core contentions lie a series of elaborate and overlapping submissions to the effect that the SJM failed to take into account the Report of the HIA Inquiry, as required by paragraph 4 of Schedule 1 to the 2019 Act; that he failed to correctly interpret and apply various provisions of the 2019 Act; that he left a variety of material considerations out of account; and that the process was procedurally unfair in a variety of respects.

[57] The applicant seeks that the SJM's decision be quashed, with declaratory relief to the effect that he should be permitted to adduce the additional evidence, that he should be permitted an oral hearing, and that his appeal should be reconsidered and determined by a different SJM on behalf of the Redress Board.

[58] The respondent submits that the decision of the SJM is detailed and thorough. His rulings were favourable to the applicant of a number of important respects, including by way of extending time for his additional grounds of appeal; allowing the additional statement which had been prepared by the applicant himself to be introduced into evidence at the appeal stage; and, ultimately, increasing his award from the £15,000 determined as appropriate by the panel to the sum of £25,000. In the respondent's submission, the matters raised by way of this judicial review fall within the discretion of the decision-maker and are only to be disturbed on grounds of *Wednesbury* rationality, which are not made out in this case.

Relevant portions of the HIA Inquiry's Report

[59] The applicant has placed some emphasis on the findings and recommendations in Volume 1, Chapter 4, paras 39-40 of the Hart Report. In para 29 of that Chapter, the Inquiry recommended that the Northern Ireland Executive create a publicly funded compensation scheme. It then made recommendations in relation to the establishment of the Redress Board and how it should operate (see paras 30-38 of that Chapter). Paras 39-40, which the applicant emphasises, are in the following terms:

> "Many applicants to the HIA Inquiry who apply to the HIA Redress Board will have given their account of their experiences on more than one occasion. In addition, in order for a decision to be made whether they are entitled to compensation, and if so what the amount of compensation should be, it may be necessary to explore sensitive personal matters that many victims of abuse would find it upsetting to have to discuss in a public forum. We therefore recommend that the judicial member and the Appeal Panel should made decisions as to whether compensation should be paid, and if so, the

amount to be paid, solely on the basis of the written material submitted by the applicant, and any other written material the judicial member or the Appeal Panel consider relevant.

We recommend that the Redress Board should be structured in the following way.

(a) A single judicial member of the HIA Redress Board should decide whether compensation should be payable, and if it is payable, the amount to be paid. Brief reasons for the decision should be given in writing.

(b) A person or persons dissatisfied by the decision of the single judicial member of the HIA Redress Board should be entitled to appeal to an Appeal Panel whose decision would be final.

(c) The Appeal Panel would consist of three other judicial members of the HIA Redress Board selected by the President of the Redress Board.

(d) The Appeal Panel would make their decision on the same materials that were before the judicial member.

(e) The appeal would take the form of a complete reconsideration of the application.

(f) The Appeal Panel should have the power to affirm the decision of the judicial member, or to substitute its decision for that of the judicial member, including the power to vary the order made by the judicial member by awarding a higher or lower figure for compensation.

(g) In exceptional circumstances if it is necessary in the interests of justice the single judicial member or the Appeal Panel should have the power to (i) admit fresh evidence, and (ii) order an oral hearing.

(h) Any oral hearing, whether by a single judicial member or the Appeal Panel should be held in private.

(i) Decisions of the Appeal Panel should be by a majority, and the reason(s) for the decision should be given briefly in writing to the applicant and any other person the single member or the Appeal Panel consider should receive a copy of the decision."

[60] The applicant contends that these passages were not properly taken into account by the SJM when he found that the applicant was simply adopting a different approach on appeal; and when he took the view that the additional statements upon which the applicant wished to rely could easily have been provided for the purposes of the initial application. It is submitted on his behalf that the Hart Report recognises that the evidence-gathering process will be hard for a survivor of abuse who is making an application to the Board.

[61] The applicant's submissions did not draw attention to the contents of para 37 of the Inquiry's recommendations, which says, "We consider that the decisions to be made by the judicial members of the HIA Redress Board would be of the type made by judges in civil proceedings". For this reason, it was recommended that the judicial members should be appointed by the Lord Chief Justice and be persons who hold, or have held, judicial office as judges of the Court of Judicature in Northern Ireland or of the County Courts in Northern Ireland. Para 42 of the Inquiry's recommendations in that Chapter of its report also recommended that compensation should be awarded and only payable to or in respect of those "who can show… on the balance of probabilities that they… suffered abuse…".

[62] In paras 49-56 of their recommendations, the Inquiry considered the interplay between civil proceedings and the new mechanism for redress which it was recommending. The Redress Board process was to operate as an alternative to civil proceedings, with a claimant not being able to pursue both civil proceedings and an application for redress at the same time; although someone who wished to institute or continue civil proceedings instead of applying for compensation to the Redress Board should be entitled to do so (see para 51).

[63] As appears from the discussion above, Parliament adopted most, but by no means all, of the Inquiry's recommendations in relation to the shape and nature of the redress scheme which it established. Perhaps the most obvious difference is that the initial determination is made by a panel (with only one judicial member), with an appeal to a single judicial member; rather than the initial decision being made by one judicial member with an appeal to a panel. The statutory scheme does take up the Hart Inquiry's recommendation that the administration of the scheme should be paper based, with an oral hearing only directed in exceptional circumstances where considered necessary in the interests of justice.

Whether an oral hearing was required

[64] The respondent submits – correctly – that there is no absolute right to an oral hearing either at common law or under Article 6 ECHR. The 2019 Act envisages that decisions of the Board will generally proceed without an oral hearing or the facility of making oral submissions. There is good reason for this. In the first instance, a predominantly written procedure is considered to be in the interests of victims in this area, as recommended by the Hart Inquiry. Secondly, a written procedure is likely to be more speedy than a procedure requiring the convening of oral hearings. Expedition is a virtue in a scheme of this type where many of the victims and survivors of abuse will have waited a very long time for recognition and redress and, in particular, in circumstances where many may now be elderly, such that there is a premium on providing them with redress as quickly as possible. The convening of hearings would not only take additional time but would also be more costly. That much is common sense; but it is also abundantly clear from the costs provisions set out in the 2020 Rules, whereby applicants to the redress scheme are entitled to have their legal costs borne at public expense. Whatever the precise policy rationale for the redress scheme being set up as it has been, it is clear to me that the scheme is generally designed to operate without applicants being afforded an oral hearing.

[65] The applicant's submissions placed considerable weight upon the contention that the Redress Board is a mechanism relied upon by the State in discharging its obligations under Article 3 ECHR. I need not reach any firm conclusion on whether or not this is the case, since it does not materially assist in the resolution of the case before the court. Assuming Article 3 is engaged, there should be a mechanism for claiming compensation which is "effective, adequate and accessible" (see, for instance, *Gafgen v Germany* (2011) 53 EHRR 1, at para [127]). None of these objectives require an oral hearing as a necessary or indispensable feature of the scheme, provided that it allows (as the scheme under consideration does) that a hearing can be granted where the interests of justice require this. Accessibility does not equate to a survivor of abuse having an absolute right to elect for an oral hearing.

[66] I also bear in mind that the scheme established by the 2019 Act is an alternative to standard civil litigation in circumstances where it remains open to survivors (subject to limitation issues) to bring a claim for damages in the ordinary way. In cases where a claimant is insistent on securing a hearing at which they can give evidence and have legal representations made on their behalf, as well as enjoying a panoply of other procedural protections inherent in the litigation process, that will remain an option in at least some cases. In contrast, the scheme established by the 2019 Act is designed, in the interests of both claimants and the public, to be quicker, less formal and less complicated.

[67] The 2019 Act makes clear that an oral hearing is only to be directed if, in the view of the panel (or, on appeal, the SJM), there are "exceptional circumstances which make it necessary to do so in the interests of justice". That is a condition precedent to the exercise of the discretion to direct an oral hearing (although, it must be said, if the condition precedent is met the extent of the discretion to nonetheless decline to direct a hearing must be extremely limited, the panel or SJM having

determined that it is "necessary" to hold such a hearing in the interests of justice). Whether viewed as a condition precedent or merely as the statutory test for the holding of an oral hearing, the statutory wording used is important. First, because it requires "exceptional circumstances" – indicating clearly an expectation that the convening of an oral hearing will be an exception, rather than the norm. Second, because the test is whether it is "necessary" for a hearing to be held in the interests of justice. That is plainly not intended to operate as a very modest hurdle only. The mere fact that it may be better to have an oral hearing than not, or even that it may seem *more* fair to the applicant to do so than not, is not the test. There is an in-built weighting against the use of oral hearings unless necessary, as determined by the panel (or the SJM).

[68] Having considered previous authorities dealing with the concept of "exceptional circumstances" (*MF Nigeria* [2013] EWCA Civ 1192 and *Ali v Home Secretary* [2016] UKSC 60, considering the Secretary of State's guidance on that phrase in the context of deportation), the SJM took the view that the 'exceptionality' test did *not* require some unique or unusual feature to be demonstrated. Rather, the test was essentially one of proportionality: were the circumstances of the case such that refusal of an oral hearing would result in unjustifiably harsh consequences? I agree with that approach, which also seems to me to be consistent with the applicant's submission that the test of exceptionality cannot be set so high as to undermine the requirements of fairness. The test does not require some unique factual quirk before a case will merit an oral hearing; but it must be one where it would be unjustifiably harsh to refuse a hearing, bearing in mind that the scheme is set up in the expectation that hearings will not generally be required. The issue is therefore not whether the case is unusual but, rather, whether the degree of strength in the arguments for an oral hearing is sufficiently strong to warrant a departure from the usual approach that a hearing is not required in order to determine claims under the scheme.

[69] In my view, the formulation of the statutory test on the part of the legislature also impacts the standard of review which it is appropriate for this court to exercise. Ordinarily, the requirements of procedural fairness are a matter for this court and operate as a hard-edged yardstick of legality of the proceedings of an inferior tribunal: see, for instance, the cases cited in Fordham, *Judicial Review Handbook* (7th edition, 2020, Hart) at section 16.5. In the present case, it is appropriate to recognise that the statutory scheme places in the hands of the first instance and appellate decision-makers – who must be or include a judge of at least county court level – a judgment about what fairness requires in the particular circumstances of the case and bearing in mind the general aversion to the use of oral hearings in this context. This suggests that, exercising its supervisory role in the proper statutory context, this court should not lightly interfere with the decision of the SJM as to whether an oral hearing was or was not necessary. I do not consider that the SJM's view on this matter is vulnerable to challenge only on *Wednesbury* grounds. The High Court must be entitled to take its own view about whether the proceedings of the Board were fair; but, in doing so, it ought properly to pay due regard to the views of the

decision-maker below as to what fairness requires, in light of the matters to which I have adverted above.

[70] As the respondent's submissions emphasised, there is no complaint in these proceedings about the statutory test itself. The issue is instead the propriety of its application in the present case, to which I now turn.

[71] I propose to consider separately the SJM's preliminary decision that a hearing was not required; and then the position as it stood when he made his final determination (having indicated that he reconsidered the question of whether an oral hearing should be allowed at that stage). The applicant contends that – the SJM having correctly identified that the statutory test required consideration of the consequences for the applicant of not holding an oral hearing – he wrongly failed to focus on those consequences, in favour of asking whether a sufficiently good reason had been advanced for the request for an oral hearing. I reject that submission for two reasons. First, the preliminary decision not to direct an oral hearing in this case was counter-balanced by the SJM's decision to admit significant fresh evidence from the applicant, in the form of his additional written statement, which gave the applicant the opportunity to explain in detail (as he sought to do) his concerns about the panel's initial determination and why he did not disclose (or say more about) the alleged sexual abuse in his evidence to the HIA Inquiry or the history he gave to Dr Mangan. Second, the applicant's submissions proceed on the assumption that, had an oral hearing been granted, he would have been able to add to his written evidence in such a way that the SJM would have been persuaded to accept the full extent of his claim. The 'consequences' he considers were visited upon him were the disallowance of part of his claim for redress. But there was nothing before the SJM to suggest that the applicant would say anything more, or different to what was in his additional written statement, which might have had this result. At that point, all that the applicant lost was the opportunity to give oral evidence. There was (and is) no guarantee that his being permitted to do so would have given rise to any different substantive outcome.

[72] It must also be said that the initial submissions made on the applicant's behalf in support of the request for an oral hearing were not particularly compelling. The focus was on matters which had previously been raised being "fully ventilated". When the SJM directed further submissions on this issue, drawing particular attention to the test in section 9(3) of the 2019 Act, a more detailed response was provided on the applicant's behalf. Again however, the focus of the submissions was that an oral hearing was appropriate so that the applicant could "provide a more fulsome account of his abuse" and "may fully explain and ventilate" his experience as a survivor of historical abuse. In the event, the applicant was permitted to do this when the SJM admitted his additional written statement, which was much longer than his initial statement of experience and obviously designed (amongst other things) to provide further detail about the sexual abuse for which he sought redress *and* to explain why the detail he was providing at that stage had not previously been provided. Had the SJM declined to admit this statement, the applicant's attack on

the preliminary decision would be considerably stronger in my view; but it was within the range of appropriate discretion available to the SJM to consider that he should admit the additional statement but did not also need to convene an oral hearing as well, in light of how the argument for an oral hearing was presented to him. For the reasons given below, I consider that different considerations were at play when the SJM came to make his final determination.

[73] The applicant has relied upon the decision of the Supreme Court in *Re Reilly's Application* [2014] AC 1115 (also known as *R (Osborn) v Parole Board*), particularly the discussion at paras [67]-[71]. The principles set out there are not immediately applicable in the present context without modification, since there is an important difference between the statutory scheme at issue in the *Reilly* case and that at issue here. In the former, the relevant rules relating to the Parole Board's procedure were silent as to how requests for an oral hearing were to be decided (see para [9] of the judgment of Lord Reed). Common law requirements of fairness filled that lacuna. In contrast, as I have set out above, in the present case there is a fixed statutory test which applies to the directing of an oral hearing, which modifies the position which would apply at common law alone. Nonetheless, the type of considerations discussed in *Reilly* will also be relevant to the panel or SJM's consideration of what the interests of justice require in this context. They will also be relevant to this court's own assessment of whether fairness required an oral hearing under the scheme of the 2019 Act.

[74] In addition to procedurally fair decision-making being efficacious by giving rise to better decisions, the Supreme Court identified a number of further important values which were engaged. The first, and most important in the present context, was avoiding a sense of injustice on the part of the individual concerned by reason of their feeling that their rights had been significantly affected by a decision in which they were unable to personally participate.

[75] In the context of the present case, the applicant complains that – had an oral hearing been provided – he would have been able to explain (or attempt to explain) differences between his accounts (to the HIA Inquiry, in his initial application, and in his later statement respectively) which the judge found to be "inexplicable" or difficult to reconcile. As I have observed above, one cannot assume that he would have been successful in doing so, since it is fair to say that his case in relation to the alleged sexual abuse appears to have developed incrementally to one which, in the applicant's additional statement, was much more significant in terms of nature, frequency and effect than what had been suggested before. At least, however, the applicant would himself have had the opportunity to explain why this was so.

[76] The applicant also relies upon the comment of Morgan LCJ in *Larkin v De La Salle Provincialate* [2011] NIQB 129, at para [18], to the following effect:

> "In a case of this kind, however, one also needs to bear in mind that there may be particular difficulties in making an

> allegation of this sort about such a deeply personal matter. To find that a person had fabricated or falsified such an allegation in court even on the balance of probabilities would in my view constitute a serious allegation."

[77] The applicant asserts that the effect of the SJM's conclusions are such as to amount to a serious finding against him. To reach this view without having afforded him the opportunity to provide oral evidence gives rise to a sense of injustice, pointing towards the requirement for such a hearing in his submission.

[78] I do not accept the applicant's characterisation of the SJM's conclusions as some kind of finding against him, much less a finding that he had fabricated or falsified his claims. Rather, the SJM simply concluded that he was not satisfied on the balance of probabilities, as he was required to be, that all that the applicant belatedly relied upon had occurred, having regard to the way in which his evidence to the HIA Inquiry had been given and then his application to the Redress Board had initially been presented and had developed. A conclusion that an applicant has not 'come up to proofs' is not the same as a positive finding of fabrication or deceit. Nonetheless it may, as in this case, be a conclusion which the applicant is likely to consider to be particularly significant.

[79] Insofar as the applicant's submission amounts to an argument that an application for compensation must be taken at its absolute height unless an oral hearing is afforded, that cannot be correct. It is the function of the Board to assess applications, including verifying the accuracy of what is relied upon. In some cases the applicant's own account will be sufficient for this purpose. In others, it will not. That might include cases where the institution's own evidence, or the findings of the HIA Inquiry, contradict or undermine the applicant's claim. It may also include cases where the applicant's own account has inconsistencies or discrepancies which are unexplained (or unsatisfactorily explained). These are matters of judgment for the members of the Board.

[80] Nonetheless, in the very particular circumstances of this case, and not without some hesitation, I have concluded that it was unfair for the SJM, when he reconsidered the matter at the time of his final determination, to dismiss the applicant's claim that he had been sexually abused in Rathgael without providing him with an opportunity to give evidence orally on that issue. The limited basis on which I have reached this conclusion is as follows. The applicant clearly made the case that it was this abuse which "most definitely had the most impact in [his] life" (see para 6 of his additional statement; and also paras 20 and 22, to similar effect). Albeit there were valid concerns raised by the SJM as to why the full detail contained in the applicant's additional written statement had not been disclosed earlier, when the issue of sexual abuse was later presented as the mainstay of the applicant's claim for compensation in terms of its lifelong effects upon him, I consider it was disproportionate to reject that aspect of his claim without hearing from the applicant personally.

[81] In reaching that view, I take into account the context that:

(i) The applicant had mentioned the sexual element of the emotional abuse and teasing in his inquiry statement;

(ii) He had then made the case in his oral evidence to the Inquiry that his treatment was very dangerous and very nearly amounted to sexual abuse (although in my view this could and should have been addressed in more detail in the representations to the SJM, rather than being encapsulated in the short reference to "borderline" abuse);

(iii) The applicant clearly mentioned the alleged sexual abuse in his history to Dr Mangan, which preceded his application to the Board, along with considerable detail relating to the significant effects which it had on him in terms of relationships and sexual functioning;

(v) He then referred to having been sexually assaulted on several occasions in his application to the Redress Board and also gave a reason (embarrassment) as to why he had not mentioned this at the Inquiry;

(vi) He had then supplemented the reasons as to why he had not set out the full detail of his claims previously in his addendum statement;

(vii) The applicant, no doubt unlike some other applicants, had indicated he wished to give oral evidence on these issues; and

(viii) Other than on the issue of sexual abuse, the applicant had generally been found to be credible by both the panel and the SJM (in relation to his experience of physical and emotional abuse at Rathgael).

[82] In those circumstances, this was a case where the applicant had advanced significant reasons for the earlier apparent discrepancies in his accounts on which he really needed to be heard orally before these could be rejected (cf. para [85] of *Reilly*). The SJM's conclusion that the applicant's failure to mention the comprehensive detail he later put forward when he gave his history to Dr Mangan and when he gave evidence to the HIA Inquiry was "inexplicable" is a clear rejection of the explanations the applicant had sought to put forward. Put another way, the question of whether the applicant's case on appeal had in fact represented a simple change of tack on the one hand (as the SJM felt) or a properly explicable gradual disclosure of his experiences on the other hand was one on which, exceptionally, he should have been heard before that element of his claim was not accepted. The decision to dismiss what he was presenting as the *main aspect* of his claim without hearing from him orally, in the particular context set out above, was apt, in my view, to give rise to a legitimate feeling of injustice on the applicant's part.

[83] I have some sympathy for the SJM's point (expressed in para 37 of his preliminary decision) that the applicant had not requested an oral hearing before the panel, which suggested that an oral hearing was unnecessary or, alternatively, that the later request for such a hearing was really just an attempt to get round the panel's earlier determination. I also have some sympathy for his further point (expressed in para 26 of his final determination) that, in his further written statement, the applicant had had a full opportunity to respond to the panel's determination and provide additional evidence. However, the SJM conducting an appeal must – by virtue of section 16(6) of the 2019 Act – reconsider the matter for himself or herself and exercise their discretion under section 9(3)(b) on the basis of the situation as it stands before them. They should also keep the matter under review, as the SJM in this case correctly identified, since what is required by the interests of justice may change upon receipt of further evidence or as the decision-maker's views on the case crystallise. When the respondent in the present case came to make his final determination he had before him additional evidence which he had admitted which the panel did not have. For the reasons given above, in light of that evidence, taken with the other factors I have mentioned, it seems to me to have been unfair to have rejected (what the applicant considered to be) the most important element of his claim without first hearing from him. That is not necessarily because he would have been able to provide additional information; but because of the sense of injustice of having what he presented as the most important element of his claim rejected without the opportunity of explaining himself.

[84] I reject the other bases on which the applicant challenged the SJM's final determination. The SJM plainly had regard to the Hart Report. He mentions para 42 of Chapter 4 of Volume 1 in para 25 of his determination. He also noted (at para 32 of his determination) that the physical and emotional abuse upon which the applicant relied was "well evidenced in the Hart findings as being part of the system operating in Rathgael at that time", which lent weight to the applicant's assertions. Moreover, the SJM also clearly recognised the legislation governing his functions as being "victim based and which aims to provide a right to compensation for those who have suffered abuse" (see para 15 of his preliminary ruling). He referred again to the context of the legislation when addressing the phrase 'interests of justice', noting that "the aim is to compensate children who have been abused" so that the relevant phrase was "intended to place a broad requirement on the Panel and the single judicial member to act with fairness in deciding whether to allow oral evidence". The nature of the redress scheme recommended by the Inquiry Panel and the potential vulnerability of applicants to it was undoubtedly understood and appreciated by the respondent.

[85] The SJM was not obliged, however, by virtue of the general references in the Hart Report to the difficulties which survivors may face in recounting their experiences, to accept that the applicant had a genuine or proper reason for not providing significant details of the claimed sexual abuse earlier. I have already held that, in my view, the SJM ought not to have dismissed this aspect of the applicant's case without providing him with an opportunity, in person, to deal with the SJM's

concerns. But the SJM is not to be criticised for failing to hold that the answers to those concerns were provided in the general references within the Hart Report on which the applicant has placed reliance.

[86] Although, as the Hart Report eloquently identifies and explains, it will undoubtedly be difficult for many survivors of abuse to re-live or recount aspects of that abuse in the context of preparing and advancing an application for compensation to the Board, it cannot be the case that that phenomenon provides a complete answer in every case to a failure on the part of an applicant to fully and properly present their application to the Board in the first instance, as they are required to do. The SJM was quite right to identify that the scheme of the 2019 Act and Rules is that the application should be properly and fully prepared and presented before submission. The applicant's representatives also rightly accepted that the concerns expressed in para 27 of the SJM's preliminary determination (set out at para [27] above) were entirely appropriate as a matter of general principle. They urged me to find, as I have, that in the particular circumstances of this case, the applicant ought exceptionally to have been afforded a hearing. However, nothing in this decision should be read as any licence or encouragement for applicants or their representatives to not present their claim as fully and comprehensively as possible when it is submitted to the Board. The thrust of the SJM's concern about applicants changing tack between the initial determination and the determination on appeal is entirely valid. As I see it, however, the core issue in this case is not whether the applicant changed tack between the decision of the panel and the decision on appeal but, rather, the reason for the discrepancies (if they are such) between his account to the HIA Inquiry and to Dr Mangan on the one hand and the experience he relied upon in his application to the Redress Board for compensation.

The additional statements

[87] Turning to the SJM's decision not to permit the two further statements upon which the applicant wished to rely to be admitted, in para 42 of his preliminary ruling he said this:

> "My preliminary view is that the contents of the statements of neither [Witness H] nor [Witness J] constitute exceptional circumstances. There is absolutely no reason why the content of these statements could not have been furnished to the Panel in the first place. This was an appellant who had the benefit of a solicitor to advise him and must therefore have been well aware that the provisions of Section 9(3) of the 2019 Act would only permit fresh evidence thereafter to be admitted if there were exceptional circumstances. Other than to avail of an opportunity to strengthen his case by introducing statements to corroborate his own version of events, and which could easily have been made available at the initial

> hearing, these statements add nothing to the case which was presented to the Panel. Appeals cannot become a vehicle for dissatisfied appellants who now seek to find further evidence which could have been available in the first instance with a modicum of effort."

[88] In paras 27-28 of his final determination, the SJM returned to this issue and indicated that, albeit he had reconsidered the matter, he found no reason to change the approach he had adopted in his preliminary ruling. In particular, he said:

> "The statement of [Witness H] adds nothing to the appellant's case beyond what he has asserted. The statement of [Witness J] does nothing to add to the discrepancies in the appellant's early failure to mention a problem with Lisnevin."

[89] The applicant is particularly critical of the SJM's conclusions in relation to the (potential) effect of these additional statements. He submits that *both* statements provided corroboration for his own account, in circumstances where that account had not been believed by the Panel (and where it was then subsequently not accepted by the SJM).

[90] If the SJM is correct that the statements added nothing to the applicant's case, it could hardly be unfair to refuse to admit them as late additional evidence. On the other hand, if the SJM was wrong that they added nothing, the applicant's case is potentially stronger. Indeed, there may be a simple case of the SJM having misdirected himself. In approaching this issue, however, I must consider carefully what the SJM actually said about these statements, which is not as bald as the applicant's submissions at times suggested. I must also be cautious not to seek to substitute my view on factual and evidential issues for that of the relevant member(s) of the Redress Board. The Board (and, on appeal, the SJM) is the relevant fact-finding body under the 2019 Act. Even though the scheme is still relatively novel, I take into account that the Board, including its judicial members, will already have established some degree of experience and expertise in assessing such claims, which this court does not enjoy.

[91] Witness J's statement states that there was extensive bullying in Lisnevin, in the form of both physical and psychological abuse. That does not, of itself, assist the applicant: since the question for the Board and the SJM was whether *he* was abused during his relatively short time there. As to the applicant in particular, Witness J's statement says:

> "… there was one boy (possibly named [surname given]?) who shared our dorm and bullied both [the applicant] and myself on a very regular basis. We were both terrified of this older boy and we received both regular beatings and

> verbal abuse from him. After weeks of this I couldn't take any more and alerted the night staff as to what was happening and asked for [the applicant] and I to be put in a different dorm. My request was denied and [the applicant] and I were left to fend for ourselves. It took me eventually attacking this boy in self defence before the abuse finally stopped.
>
> As part of my own report to the HIA, I barely mentioned this abuse, because relative to the quite frankly horrific abuse that was to follow in other DPJ institutions, it seemed (at the time of reporting) to be of minor importance. Having conversed with [the applicant] on this subject I have come to understand that his situation was very similar to my own, i.e., that as awful as the fear and abuse in Lisnevin was, it was an experience that was much shorter in time than the subsequent abuses and so for him too, relatively speaking, it simply seemed not quite as significant."

[92] In my view, the SJM was entitled to treat Witness J's statement as he did. He did *not* say that it added nothing at all to the applicant's case. It seems to me that Witness J's statement *did* add something to the applicant's case about abuse at Lisnevin. It was further evidence of bullying there, from a resident seemingly able to give a first-hand account, and provides some further detail of the nature of the bullying and indeed named a perpetrator. However, the SJM recognised in his preliminary decision that this statement would "strengthen" the applicant's case and corroborate his version of events. The SJM did not consider the Witness J statement added nothing; but did take the view (as he was entitled to) that it was not "highly probative", as the applicant's solicitor had suggested. In his final decision, the SJM commented that the Witness J statement did not add anything "to the discrepancies in the appellant's early failure to mention a problem with Lisnevin": that is to say, it did not assist him with why the applicant had not made a consistent case about Lisnevin throughout his accounts. Although the further statement explains Witness J's failure to make more of his experiences in Lisnevin in his "report to the HIA", and suggests that the applicant may have also done so for the same reasons, Witness J's statement does not give any particular detail as to why, in the applicant's case, Mr Glass had not dealt with things differently in his application. (That is perhaps unsurprising, since that was dealt with in some detail in the applicant's own additional statement.) In summary, therefore, I consider the SJM properly recognised that Witness J's statement assisted the applicant to some degree on the facts of what happened in Lisnevin but to no material degree on the key issue which was causing the SJM concern in relation to the applicant's case (the apparent inconsistencies in his accounts). More importantly, it appears to me that the primary basis on which the SJM declined to admit this statement was that the interests of

justice did not require its admission in the circumstances in which it had been brought forward.

[93] A consideration of what the interests of justice require must include a consideration of whether the applicant had a prior opportunity, of which he or she failed to avail, to adduce fresh evidence (that is, as the SJM observed, not new evidence which has recently arisen but fresh evidence which was not provided in support of the original application but could have been). This distinction is one well known to the law: see, for instance, the first of the well-known *Ladd v Marshall* principles. My reading of the SJM's decisions is that he recognised that the additional statements would provide some assistance to the applicant's case but was not persuaded that the interests of justice required their admission because the statements could and should have been provided earlier. Ms Quinlivan candidly accepted that, as a matter of principle, the SJM was entitled to take the view that applications to the Redress Board should be fully and properly presented from the outset.

[94] The applicant, however, criticises the SJM's observation that the two witnesses whose evidence was provided late could "easily" have provided evidence to be submitted along with the initial application. It is argued that the SJM had no evidence to support this conclusion and that it is at odds with the findings of the HIA Inquiry to the effect that survivors of abuse have significant difficulty in discussing it.

[95] I do not accept the applicant's case that, in order to seek to secure the evidence of the additional witnesses, he would have been required to discuss the abuse he had suffered with both of those individuals. When an application is provided to the Board through a solicitor (as occurred in this case), the Board is entitled to proceed on the basis that the claimant has explained their experiences to the solicitor acting on their behalf and that the solicitor has taken reasonable steps to secure such supporting evidence as may be available in order to substantiate (or, to use the words of the statutory scheme, to verify) the matters upon which the applicant relies in their claim. No explanation was given as to why either or both of the additional statements was not, or could not have been, provided at an earlier stage. For instance, Witness H was mentioned in the applicant's initial application to the Board (along with others) as a potential witness who could confirm the behaviour of which he complained.

[96] Although the SJM's view that this was a clear (perhaps decisive) indicator against the interests of justice requiring the additional statements to be admitted may be regarded as extremely procedurally rigorous, he was entitled to take that view. Indeed, I can quite see the difficulties which might arise with the administration of the scheme if an appeal from the Redress Board could routinely be asked to consider new information which could have been provided in support of the initial application. Not only would this add to the time and cost to resolve applications, as well as to the administration of the scheme overall, but it could also undermine

confidence in the decisions of the Board at first instance. The SJM was quite entitled to insist on a degree of procedural rigour in the presentation of applications and all relevant supporting material on which an applicant wishes to rely. That is particularly so when applicants are entitled to be legally represented; and the scheme provides remuneration for legal assistance in the preparation and presentation of applications to the Board. I also do not have the same misgivings about the fairness of that approach to the applicant as I do about the SJM's failure to hear from him personally before finding the sexual abuse element of his claim not proven (see paras 80-83 above).

[97] The issue over the exclusion of Witness H's statement is more complex since it does speak to the sexual elements of the applicant's claim. It is in very brief terms. What he says which is of relevance to the applicant's claim is set out in three short paragraphs, as follows:

> "I remember boys, myself included called [the applicantt] names. These included the terms, "sexy Cyril" and they would have wolf whistled at him. Other boys in Rathgael would have asked him to do sexual things. They asked him to perform oral sex and things like that. This occurred on a daily basis, for the duration of my time there.
>
> It was out of order what happened to [the applicant]. I recall that staff were present when this occurred, and they did not do anything to stop it.
>
> In House 8 there was verbal abuse directed at [the applicant]. On a regular occurrence when post was being distributed by the staff, they referred to Cyril as, "sexy Cyril". This occurred in front of the other children."

[98] It is again important to look closely at what the SJM said about this. He observed that it "adds nothing to the appellant's case *beyond what he has asserted*". As with the Witness J statement, the SJM did *not* say the statement added nothing at all; but that it did not add anything material to the applicant's own summary. Indeed, on one view, this statement does not go anywhere near as far as the applicant's assertions. It notes that boys would have asked the applicant to "do sexual things". It does not state that the applicant did any such acts; nor does it mention the simulation of sex, which the applicant's additional statement said involved "at least 12 to 20 boys over a long period of time" who would have "held [him] down and simulated sex with [him]." The sexual taunting and sexual invitations were both dealt with in the applicant's own evidence to the SJM (and, indeed, appear to have been accepted by him in light of his acceptance that there was a homophobic aspect to his treatment there). On the key issue of sexual *assault*, the Witness H statement appears to add nothing material.

[99] For similar reasons to those addressed in relation to the Witness J statement above, therefore, I consider the SJM was legally entitled to decline to admit this additional statement.

The substantive determination

[100] The applicant also challenges the SJM's final determination on the appeal, and his purported refusal to award damages in relation to the abuse the applicant described enduring at Lisnevin, or in relation to the sexual abuse he described enduring at Rathgael, on the basis that the ultimate decision was flawed by reason of the matters discussed above; and on the basis that, contrary to section 9(6) of the Act, the applicant's entitlement was, in the event, affected by his not giving evidence to the HIA Inquiry.

[101] I am unable to find anything in the SJM's treatment of the applicant's claim as regards his experience in Lisnevin which would justify intervention by this court. As noted above, the SJM's key finding was that he was unable to conclude that the applicant's experience in Lisnevin "should play any material part in the compensation". That appears to me to be a finding which was plainly open to the judge on the basis of the materials before him. He does *not* say that the applicant did not experience any bullying in Lisnevin at all; simply that, whatever occurred there, it was not sufficient to materially alter the compensation payable in this case. That was an understandable conclusion on the basis of the evidence before him, particularly in light of what is set out in section 12(6) of the 2019 Act. Although two institutions were involved in the applicant's claim, the panel and SJM had to address his experience of institutional abuse globally when they assessed the level of compensation due to him. No complaint was made about Lisnevin in the applicant's evidence to the HIA Inquiry or in the history given by him to Dr Mangan. His statement of experience lodged with his application to the Redress Board referred to persistent bullying by other residents but does not make clear that this bullying was directed at him. He refers to Witness J having been bullied.

[102] Even assuming that the applicant himself was bullied during his short time in Lisnevin however, on his own evidence this was much less severe than his experiences in Rathgael. The SJM was entitled to find, as he did, that insofar as there may have been bullying in Lisnevin, it would have no material effect on the level of compensation payable. Indeed, in presenting the application for judicial review, Ms Quinlivan very fairly accepted that, of the two factual issues, the SJM's treatment of the applicant's experiences in Rathgael was the primary issue. Even if his case in relation to his treatment in Lisnevin had been accepted, it was likely that it would not have made any difference (given that he was there for only some 5-6 weeks). That was an entirely proper concession.

[103] In respect of the SJM's finding that the "detailed allegations of sexual abuse" had not been made out to his satisfaction on the balance of probabilities, in light of

my conclusion on the issue of fairness, that will have to be reconsidered in any event. Nonetheless, I would make the following observations in light of the arguments which were addressed to me on that issue.

[104] First, the applicant says that the SJM placed significant reliance on the fact that his description of the sexual abuse he endured was not contained in Dr Mangan's report; and this was in error because the applicant *did in fact* describe sexual abuse to Dr Mangan. As I have mentioned above, the SJM correctly identified (unlike the panel which had considered the case before him) that Dr Mangan had mentioned the alleged sexual abuse in terms of other students simulating sex with the applicant. He was nonetheless entitled to consider whether this issue had not been discussed by the applicant with Dr Mangan in any greater detail (and, if so, the significance of that) in light of the very heavy reliance placed on this aspect of his claim by the applicant in his appeal to the SJM.

[105] The applicant also submitted that the SJM placed significant reliance on what he considered to be inconsistencies between the applicant's evidence to the HIA Inquiry (for which the applicant did not have the benefit of legal advice) and his evidence to the Board (in respect of which he did have legal advice). In so doing, it is said that the SJM effectively penalised the applicant for having given evidence to the HIA Inquiry. Any discrepancies between his evidence to the Inquiry and his evidence to the Board should have been given little or no weight (he submitted) in light of section 9(6) of the 2019 Act. I reject the suggestion that the Board cannot take into account inconsistencies between a claimant's evidence to the HIA Inquiry and his or her account to the Board for the purpose of securing redress. Section 9(6) of the Act is clearly designed to indicate that entitlement to compensation is not dependent on an individual having given evidence to the HIA Inquiry. Cooperation with the Inquiry is not a condition of entitlement to redress under the 2019 scheme; just as having reported the matter to police or the conviction of the perpetrator are also not necessary conditions under section 9(6). However, when assessing entitlement (or the level of compensation payable), I do not consider that the Redress Board is precluded from considering the *content* of evidence provided to the HIA Inquiry in cases where the claimant gave evidence (or, for that matter, the content of a report to police or the fact of any subsequent convictions). That would be contrary to the general requirement to have regard to the Hart Report and also to common sense.

[106] Had section 9(6) been intended to be read in the way that the applicant suggested, so that something which is obviously material would have been required to have been left out of account, I believe that Parliament would have made that clear. Accordingly, I do not consider that the Board or the SJM fell into error in having regard to the evidence which the applicant provided to the Hart Inquiry. In cases where there are inconsistencies or discrepancies between such evidence and the claimant's later account for the purpose of seeking redress, the Board is entitled to consider this. For instance, if a claimant advances a case which he or she previously flatly denied, it would be illogical to leave that out of account. As a result of this

judgment, hopefully applicants to the Redress Board will be more aware (if they were not already) of the need to deal with any actual or apparent inconsistencies or discrepancies between their claim and any evidence they provided to the Hart Inquiry. Of course, in many cases, there is unlikely to be any such inconsistencies and the evidence to the Inquiry can be taken as an earlier consistent account. In cases where there are any inconsistencies, the Redress Board will no doubt be cognisant of both the difficulties some individuals are likely to have felt when giving evidence to the Inquiry and the limited legal assistance available to them when doing so.

Conclusion

[107] By reason of the foregoing, I propose to allow the applicant's application for judicial review on a limited basis. The single judicial member of the Redress Board was entitled, in his preliminary decision, to refuse to direct an oral hearing. He was also entitled to decline to admit the two additional statements which were provided late. In my view, he quite properly admitted the applicant's additional statement and undertook to keep under review whether a requirement had arisen, as a matter of fairness and in contrast to the usual expectation under the 2019 Act, to direct an oral hearing. On balance, I consider that when he came to re-examine that issue and had taken the view that he was not persuaded on the written materials that the applicant had made out his claim of sexual abuse – which the applicant then presented as the element of his claim which "definitely had the most impact in [his] life" – it was unfair to do so without first hearing from the applicant in person. I consider this arose in part, if not largely, because of the way in which the claim was initially presented and then only developed at a later stage. I consider the remainder of the SJM's treatment of the application as unimpeachable – although it will obviously be for any further SJM considering the remitted appeal to take their own view on all of the issues in the appeal before them.

[108] I therefore propose to quash the SJM's final determination and to remit the matter to the Redress Board for a re-determination of the appeal by another single judicial member. That SJM will be entitled to revisit, if they wish, any aspect of the earlier SJM's preliminary determination but is not obliged to do so; save that, in the event that (like Sir John) the SJM in determining the appeal is unpersuaded on the written materials that the sexual abuse the applicant relies upon occurred, in the particular circumstances of this case the decision should not be finalised without the applicant being afforded an opportunity to give oral evidence to seek to address the SJM's concerns in that regard. If any such evidence is given, it goes without saying that its assessment and reliability is a matter for the SJM. I invite the parties to seek to agree a final draft order to the above effect.

[109] I will also hear the parties on the issue of costs.