THE HIGH COURT

JUDICIAL REVIEW

Between:

Record No: 2021/303 JR

PHILOMENA LEE

Applicant

-and-

THE MINISTER FOR CHILDREN, EQUALITY, DISABILITY, INTEGRATION AND YOUTH, THE GOVERNMENT OF IRELAND, IRELAND AND THE ATTORNEY GENERAL

Respondents

IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

Amicus Curiae

And

Record No: 2021/180 JR

MARY HARNEY

Applicant

-and-

THE MINISTER FOR CHILDREN, EQUALITY, DISABILITY, INTEGRATION AND YOUTH, THE GOVERNMENT OF IRELAND, IRELAND AND THE ATTORNEY GENERAL

Respondents

IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

Amicus Curiae

OUTLINE SUBMISSIONS ON BEHALF OF THE *AMICUS CURIAE*

I. Introduction

1. These proceedings concern the correct interpretation of section 34 of the Commissions of Investigation Act 2004 and whether the applicants were identifiable from the final

report of the Commission of Investigation such that they should have been furnished with a draft copy of the said report.

2. If this Honourable Court resolves that question in favour of the applicants, the second question which arises is the appropriate remedy to which the applicants may be entitled.

II. Role of the Irish Human Rights and Equality Commission

3. The Irish Human Rights and Equality Commission is an independent statutory body established by the Irish Human Rights and Equality Commission Act 2014 whose functions include, *per* section 10(2)(e) of the 2014 Act, "*(e) to apply to the High Court or the Supreme Court for liberty to appear before the High Court or the Supreme Court, as the case may be, as amicus curiae in proceedings before that court that involve or are concerned with the human rights or equality rights of any person and to appear as such an amicus curiae on foot of such liberty being granted …"*

4. The Irish Human Rights and Equality Commission ('*amicus curiae')* is mindful of the parameters of its role in offering assistance to the Court as set out in *HI v Minister for Justice* [2003] 3 IR 197, *Doherty v South Dublin County Council* [2006] IESC 57, *Fitzpatrick v FK* [2006] IEHC 392, *Attorney General v Damache* [2015] IEHC 339, *LC v Director of Oberstown* [2016] IEHC 705 (reversed ex tempore by the Court of Appeal on 9 January 2017), and most recently as addressed by the Supreme Court in *Re JJ* [2021] IESC 1.

III. Factual background

5. The factual background to these proceedings is set out in the submissions of the parties.

6. The *amicus curiae* observes that the following core issues arise in these proceedings:
    i. The rights of victims of historic abuse;
    ii. The correct approach to the interpretation of "identifiability" for the purposes of section 34 of the Commission of Investigation Act 2004; and
    iii. Remedies.

IV(i). The rights of victims of historic abuse

International context

7. There is growing recognition in international law of the right to the truth in respect of serious violations of human rights. This right is often located in the right of victims of gross human rights violations to redress, and to an effective remedy; but it is also linked to the right of the community at large to know the truth about the circumstances and reasons that led to the perpetration of mass human rights abuses. These international law principles underline the purpose of so-called truth finding commissions as a means of recognising the past wrongs perpetrated on victims and provide a useful context for the interpretation of the provisions of the Commission of Investigation Act 2004. It is submitted by the *amicus curiae* that when examining the correct approach to the interpretation of the issue of "identifiability'', this Court should take account of the overriding principle that victims' rights are placed at the centre of the truth-finding process.

8. As Marloes van Noorloos notes in "A Critical Reflection on the Right to the Truth about Gross Human Rights Violations" (2021) 21(4) Human Rights Law Review 874 (footnotes omitted):

> "*In the 2000s, various soft-law instruments have further developed the concept of the right to the truth, in particular the Updated Set of principles for the protection and promotion of human rights through action to combat impunity (2005), as developed by independent expert Orentlicher on request of the UN Commission on Human Rights and updating Joinet's 1997 Principles against Impunity. The right of victims to full and public disclosure of the truth about gross human rights violations is also enunciated as part of the right to a remedy and to reparation in the Basic Principles on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (2006). Furthermore, the Office of the UN Commissioner on Human Rights (OHCHR) has published a study on the right to the truth in 2006*."

9. As the United Nations General Assembly observed in Resolution 60/147 of 16 December 2005 on Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law:

> "*22.* Satisfaction *should include, where applicable, any or all of the following:*
>
> *...*
>
> *(b) Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations;*
>
> *(c) ...*
>
> *(d) An official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim;*
>
> *(e) Public apology, including acknowledgement of the facts and acceptance of responsibility;*
>
> *...*
>
> *(h) Inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material at all levels*."

10. Preambular paragraph 2 to this Resolution recommends:

> "*that States take the Basic Principles and Guidelines into account, promote respect thereof and bring them to the attention of members of the executive bodies of government, in particular law enforcement officials and military and security forces, legislative bodies, the judiciary, victims and their representatives, human rights defenders and lawyers, the media and the public in general*".

11. In addition to this Resolution, the UN Human Rights Council, Resolutions 9/11 and 12/12: Right to the Truth include recognition of:

"... the right of the victims of gross violations of human rights and the right of their relatives to the truth about the events that have taken place, including the identification of the perpetrators of the facts that gave rise to such violations ..."

12. In an Addendum titled "Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity" to the Report of the independent expert to the Commission on Human Rights (E/CN.4/2005/102/Add.1, 8 February 2005) principle 2 acknowledged the inalienable right to the truth as follows:

"2. Every people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes. Full and effective exercise of the right to the truth provides a vital safeguard against the recurrence of violations."

13. Principle 6 of that Addendum addressed the establishment and role of Truth Commissions in the following terms:

"6. To the greatest extent possible, decisions to establish a truth commission, define its terms of reference and determine its composition should be based upon broad public consultations in which the views of victims and survivors especially are sought. Special efforts should be made to ensure that men and women participate in these deliberations on a basis of equality. In recognition of the dignity of victims and their families, investigations undertaken by truth commissions should be conducted with the object in particular of securing recognition of such parts of the truth as were formerly denied."

14. In 2013, the Report of the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (A/68/362, 2013) concluded that:

"*the right to access information on human rights violations, as enshrined by the right to freedom of expression, should be considered to be part of the right to*

truth in all circumstances—whether it relates to past or present situations, is claimed by victims, their relatives or by anyone in the name of public interest, in situations of political transition or not, and irrespective of the existence of legal proceedings, including when judicial action has expired."

European context

15. In 2015 the European Union adopted a Policy Framework on Support to Transitional Justice as part of the implementation of the EU Action Plan on Human Rights and Democracy 2015-2019. The aim was to provide a framework for EU support to transitional justice mechanisms and processes and enhance the EU's ability to play a more active and consistent role, both in its engagement with partner countries and with international and regional organisations. This framework identifies four essential elements of transitional justice, namely (i) criminal justice, (ii) truth, (iii) reparations and (iv) guarantees of non-recurrence/institutional reform. Similar to the international law principles set out above in relation to measures adopted to address historic breaches of human rights, the Framework emphasises the importance of providing recognition and redress to victims, stating (at p.2):

> *"b) Providing recognition and redress to victims: Transitional justice includes an acknowledgment that victims have been harmed. To recognise the suffering alone is however not sufficient. Rather, it must be acknowledged that victims are holders of rights who are,* inter alia*, entitled to an effective remedy and adequate reparation. Post-conflict or post-transition processes need to ensure that victims are not re-victimised or re-traumatised."*

16. There are a number of relevant developments from the Council of Europe, including its "Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations" (30 March 2011) that address the issue of impunity in respect of acts or omissions that amount to serious human rights violations. They cover States' obligations under the European Convention on Human Rights to take positive action in respect not only of their agents, but also in respect of non-State actors. According to the Guidelines, "*impunity is caused or facilitated notably by the lack of diligent reaction of institutions or State agents to serious human*

rights violations. States are to combat impunity as a matter of justice for the victims, as a deterrent with respect to future human rights violations and in order to uphold the rule of law and public trust in the justice system". They provide *inter alia* for the general measures that States should undertake in order to prevent impunity, the duty to investigate, as well as the adequate guarantees for persons deprived of their liberty.

17. The European Court of Human Rights has also addressed the rights of victims of serious human rights violations, including the right to truth, in a number of decisions. In *Association "21 December 1989" v Romania* (App. No. 33810/07, judgment of 25 May 2011), the European Court of Human Rights held that the right to truth was a part of the procedural limb under Article 2 ECHR. The Court judged that the delays and inadequacies in the investigation of the deaths of anti-government protesters — including the lack of information given to the victims' relatives about the investigation—constituted a violation of the procedural limb of Article 2 ECHR, considering "*the right of victims and their families and heirs to know the truth about the circumstances surrounding events involving a massive violation of rights as fundamental as that of the right to life...*"

18. The scope of the right to truth in the context of serious human rights violations was further considered by the ECtHR in the context of a number of cases concerning extraordinary rendition. In *El-Masri v the Former Yugoslav Republic of Macedonia* (App. No.39630/09, judgment of 13 December 2012) the Court held:

> "*an adequate response by the authorities in investigating allegations of serious human rights violations, as in the present case, may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts*."

19. The joint concurring opinions of Judges Tulkens, Spielmann, Sicilianos, and Keller linked the right to truth to the right to an effective remedy under Article 13 ECHR as follows:

"*4. We consider, however, that the right to the truth would be more appropriately situated in the context of Article 13 of the Convention, especially where, as in the present case, it is linked to the procedural obligations under Articles 3, 5 and 8. The scale and seriousness of the human rights violations at issue, committed in the context of the secret detentions and renditions system, together with the widespread impunity observed in multiple jurisdictions in respect of such practices, give real substance to the right to an effective remedy enshrined in Article 13, which includes a right of access to relevant information about alleged violations, both for the persons concerned and for the general public.*

5. The right to the truth is not a novel concept in our case-law, and nor is it a new right. Indeed, it is broadly implicit in other provisions of the Convention, in particular the procedural aspect of Articles 2 and 3, which guarantee the right to an investigation involving the applicant and subject to public scrutiny.

6. In practice, the search for the truth is the objective purpose of the obligation to carry out an investigation and the raison d'être of the related quality requirements (transparency, diligence, independence, access, disclosure of results and scrutiny). For society in general, the desire to ascertain the truth plays a part in strengthening confidence in public institutions and hence the rule of law. For those concerned - the victims' families and close friends - establishing the true facts and securing an acknowledgment of serious breaches of human rights and humanitarian law constitute forms of redress that are just as important as compensation, and sometimes even more so. Ultimately, the wall of silence and the cloak of secrecy prevent these people from making any sense of what they have experienced and are the greatest obstacles to their recovery.

7. A more explicit acknowledgment of the right to the truth in the context of Article 13 of the Convention, far from being either innovative or superfluous, would in a sense cast renewed light on a well-established reality."

20. In *Al Nashiri v Poland* (App. No. 28761/11), judgment of 24 July 2014) the ECtHR further consolidated the collective aspect of the right to truth laid down in *El-Masri*, as follows:

"where allegations of serious human rights violations are involved in the investigation, the right to the truth regarding the relevant circumstances of the case does not belong solely to the victim of the crime and his or her family but also to other victims of similar violations and the general public, who have the right to know what has happened."

21. Most recently, the judgment of the Grand Chamber in *X & Ors v Bulgaria* (App. No.22457/16, judgment of 2 February 2021) concerned the investigation of alleged sexual abuse in an orphanage, ultimately holding that there had been a breach of the procedural limb of Art 3 ECHR:

"*176. The Court reiterates that Article 3 of the Convention enshrines one of the fundamental values of democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment. Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3…..*

177. The obligation of the High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to ill-treatment, including ill-treatment administered by private individuals (see, among other authorities, O'Keeffe v. Ireland [GC], no. 35810/09, § 144, ECHR 2014 (extracts), and M.C. v. Bulgaria, no. 39272/98, § 149, ECHR 2003-XII). Children and other vulnerable individuals, in particular, are entitled to effective protection (see A. v. the United Kingdom, 23 September 1998, § 22, Reports of Judgments and Decisions 1998-VI; M.C. v. Bulgaria, cited above, § 150; and A and B v. Croatia, no. 7144/15, § 106, 20 June 2019).

178. It emerges from the Court's case-law as set forth in the ensuing paragraphs that the authorities' positive obligations under Article 3 of the Convention comprise, firstly, an obligation to put in place a legislative and regulatory framework of protection; secondly, in certain well-defined circumstances, an obligation to take operational measures to protect specific

individuals against a risk of treatment contrary to that provision; and thirdly, an obligation to carry out an effective investigation into arguable claims of infliction of such treatment. Generally speaking, the first two aspects of these positive obligations are classified as "substantive", while the third aspect corresponds to the State's positive "procedural" obligation."

22. The Court went on to address the procedural obligation to carry out an effective investigation as follows:

"*184. Furthermore, where an individual claims on arguable grounds to have suffered acts contrary to Article 3, that Article requires the national authorities to conduct an effective official investigation to establish the facts of the case and identify and, if appropriate, punish those responsible. Such an obligation cannot be considered to be limited solely to cases of ill-treatment by State agents (see S.Z. v. Bulgaria, cited above, § 44, and B.V. v. Belgium, no. 61030/08, § 56, 2 May 2017).*

185. In order to be effective, the investigation must be sufficiently thorough. The authorities must take reasonable measures available to them to obtain evidence relating to the offence in question (see S.Z. v. Bulgaria, cited above, § 45). They must always make a serious attempt to find out what happened and should not rely on hasty or ill-founded conclusions to close their investigation (see Bouyid v. Belgium [GC], no. 23380/09, § 123, ECHR 2015, and B.V. v. Belgium, cited above, § 60). Any deficiency in the investigation which undermines its ability to establish the facts or the identity of the persons responsible will risk falling foul of this standard (see Bouyid, cited above, § 120, and Batı and Others v. Turkey, nos. 33097/96 and 57834/00, § 134, ECHR 2004-IV (extracts)).

186. However, the obligation to conduct an effective investigation is an obligation not of result but of means. There is no absolute right to obtain the prosecution or conviction of any particular person where there were no culpable failures in seeking to hold perpetrators of criminal offences accountable (see A, B and C v. Latvia, no. 30808/11, § 149, 31 March 2016, and M.G.C. v. Romania, no. 61495/11, § 58, 15 March 2016)….

…

189. Moreover, the victim should be able to participate effectively in the investigation (see Bouyid, cited above, § 122, and B.V. v. Belgium, cited above, § 59). In addition, the investigation must be accessible to the victim to the extent necessary to safeguard his or her legitimate interests (see, in an Article 2 context, Giuliani and Gaggio v. Italy [GC], no. 23458/02, § 303, ECHR 2011 (extracts)).

23. In concluding that there had been a breach of the duty to conduct an effective investigation under the procedural limb of Article 3, the Court went on to observe:

"*208. ... [E]ven though the applicants' parents did not seek to be involved in the investigation, the Court finds it regrettable that the Bulgarian authorities did not attempt to contact them in order to provide them with the necessary information and support. Although the parents were indeed informed through the Italian authorities of the outcome of the criminal investigation the fact that they were not provided with information and support in good time prevented them from taking an active part in the various proceedings, with the result that they were unable to lodge an appeal until long after the investigations had been concluded…*"

24. As observed by Gallen in "The European Court of Human Rights, Transitional Justice and Historical Abuse in Consolidated Democracies" (2020) 19 Human Rights Law Review 675:

"*while investigations and the pursuit of truth of longer term historical abuse may not always generate an obligation to investigate with a view towards potential individual accountability or punishment, the Convention continues to insist upon the desirability of enabling investigation and truth seeking of historical wrongdoing as part of the protection of freedom of expression and as being in the public interest of Member States*."

Domestic context

25. It is submitted that a number of rights that are recognised and protected in the Constitution may also be of relevance, including the personal right to fair procedures and constitutional justice, which encompasses the right to be heard, pursuant to Article 40.3. It is well established that this right applies not just in criminal proceedings, but also in civil proceedings. As Hogan, Whyte, Kenny and Walsh note in *JM Kelly: The Irish Constitution* (5th ed, Bloomsbury Professional 2018) at para.6.1.63:

> "*The basic principle underlying* audi alteram partem *remains that a person affected by, or with an interest in the outcome of, an administrative decision has the right to have adequate notice of this decision and to be given an adequate opportunity to make his case before that administrative body. What the courts will regard as an 'adequate opportunity' will very much depend on the circumstances, since the requirements of natural justice are not fixed and unchanging*…."

26. The right to be heard was addressed by Cregan J in *Flynn v National Asset Loan Management Ltd* [2014] IEHC 408 as follows:

> "*The right to be heard is expressed in the Latin maxim* 'audi alteram partem*'. The verb 'audi' is expressed in the imperative mood. It is a command, a direction, to the court or tribunal: hear the other side, listen to the other side. This duty to hear gives rise to a corresponding right: the right to be heard. The right to be heard is a powerful and important right. Although it is expressed in the passive voice, it is in fact, an active right: a right to speak or a right to make representations to the court, tribunal or statutory body which seeks to make a decision which affects the person concerned. It is a right which is at the heart of our legal system. For if a person is denied a right to be heard, they are shut out of participation in the vital process which affects their interests. This right to be heard has been recognised for hundreds of years. It has been recognised and protected in our constitution since 1937 and it has been articulated and*

applied in numerous cases of the High Court and Supreme Court over the last few decades."

27. Hogan, Whyte, Kenny and Walsh also note at para.7.3.191 that Article 40.3 has been interpreted by a number of judges as including a right to an effective remedy, citing *Efe v Minister for Justice* [2011] 2 IR 798, *McKeogh v Doe (No.1)* [2012] IEHC 95, *Okunade v Minister for Justice* [2012] 3 IR 152 and *Brownfield Restoration Ireland v Wicklow County Council* [2017] IEHC 456. However, as noted by the applicants in their written submissions, in *YY v Minister for Justice* [2017] IESC 61, the Supreme Court, per O'Donnell J, reserved the question as to whether there is a right to an effective remedy within the constitutional order. Irrespective of whether there is a right to an effective remedy within the personal rights protected by Article 40.3, it is undoubtable that there is such a right pursuant to Article 13 of the ECHR. Furthermore, section 4 of the European Convention on Human Rights Act 2003 provides that judicial notice must be taken of the provisions of the Convention and of the judgments of the European Court of Human Rights on any question over which that court has jurisdiction.

28. Also of potential relevance is the right to dignity, which is also recognised as an aspect of the personal rights derived from Article 40.3. Thus, in *In Re a Ward of Court (No.2)* [1996] 2 IR 79, Denham J commented (at p.163) that "*An unspecified right under the Constitution to all persons as human persons is dignity — to be treated with dignity.*" Similarly, in *Foy v An tArd Chlairitheoir* [2002] IEHC 116 McKechnie J held (at para.362):

> *"As with the right to privacy this right of human dignity is not specified as a fundamental right but is expressly referred to in the Preamble of the Constitution. Whether the basis of this right is to be found in that part of the Charter or is sourced in a manner similar to the right of privacy is not relevant here. Its existence undoubtedly is acknowledged. In Re Article 26 Offences Against the State (Amendment) Bill [19401 I.R. 470, and In Re Philip Clarke [1950] I.R. 235 the courts have stated that the dignity of an individual is a value to be pursued. Hederman J., in McKinley -v- the Minister for Defence [1992] 2 I.R. 333 said (at p. 349):-*

'It seems clear to me that Articles 40 and 41 should be construed in accordance with the statement contained in the Preamble to the Constitution that the People gave to themselves the Constitution in order that amongst other objectives "the dignity and freedom of the individual might be assured.'"

29. It is submitted that the right to dignity is linked to the right to be heard, discussed above, and should be interpreted and applied in the context of the work of Commissions of Investigation in a manner which ensures that the process of verification of the facts and full and public disclosure of the truth does not cause further harm to the victims.

IV(ii). The correct approach to the interpretation of "identifiability" for the purposes of section 34 of the Commission of Investigation Act 2004

30. The long title to the Commissions of Investigation Act 2004 states that it is:

"*An Act to provide for the establishment of Commissions from time to time to investigate into and report on matters considered to be of significant public concern, to provide for the powers of such commissions and to make provision for related matters.*"

31. The Commission of Investigation (Mother and Baby Homes and certain related Matters) was established by S.I. No. 57/2015 - Commission of Investigation (Mother and Baby Homes and certain related Matters) Order 2015. Regulation 3 of the 2015 Regulations provides:

"*3. A commission is hereby established to—*

(a) ***investigate the matters, which are considered by the Government to be of significant public concern****, referred to in the terms of reference (the text of which is, for convenience of reference, set out in the Schedule) of the commission, and*

(b) *make any reports required under the Act in relation to its investigation*." (Emphasis added)

32. Part 5 of the Commissions of Investigation Act 2004 deals expressly with the preparation, content, and publication of interim and final reports by Commissions of Investigation. On completion of its investigation, a Commission of Investigation must prepare a final written report, based on the evidence received by it setting out the facts it established: section 32(1) of the 2004 Act. If a Commission of Investigation considers that the facts relating to a particular issue have not been established, the Commission of Investigation must identify the issue and may indicate its opinion as to the quality and weight of any evidence relating to the issue: section 32(2) of the 2004 Act. A Commission of Investigation is given a discretion to exclude from the report any information which identifies, or is likely to identify any person, pursuant to section 32(3) which provides:

"*32(3) A commission may omit from its report any information that identifies or that could reasonably be expected to lead to the identification of a person who gave evidence to the commission or any other person, if in its opinion—*

(a) the context in which the person was identified has not been clearly established,

(b) disclosure of the information might prejudice any criminal proceedings that are pending or in progress,

(c) disclosure of the information would not be in the interests of the investigation or any subsequent inquiry, or

(d) it would not be in the person's interests to have his or her identity made public and the omission of the information would not be contrary to the interests of the investigation or any subsequent inquiry."

33. However, where a Commission of Investigation does not exercise its discretion to exclude from the report any information which identifies, or is likely to identify any person, pursuant to section 32(3), then sections 34 and 35 of the 2004 Act set out certain mandatory procedural safeguards.

34. Section 34 of the Commissions of Investigation Act 2004 provides that draft reports must be sent to certain persons, as follows:

> "*34(1) Before submitting the final or an interim report to the specified Minister,* ***a commission shall send a draft of the report, or the relevant part of the draft report, to any person who is identified in or identifiable from the draft report****.*
>
> *(2) The draft report must be accompanied by a notice from the commission specifying the time allowed for making—*
>
> *(a) submissions or requests to the commission under section 35(1)(a) or 36(1), and*
>
> *(b) applications to the Court under section 35(1)(b) .*
>
> *(3) For the purposes of this section and section 35,* ***a person is identifiable from a draft report if the report contains information that could reasonably be expected to lead to the person's identification***." (Emphasis added)

35. Section 35 of the 2004 Act provides for amendment of draft reports for reasons relating to failure to observe fair procedures in the following terms:

> "*35(1) A person who receives a draft report or part of a draft report from a commission under section 34 and who believes that the commission has not observed fair procedures in relation to the person may, within the period specified by the commission—*
>
> *(a) submit to the commission a written statement setting out the reasons for the belief and requesting the commission to review the draft in light of the statement, or*
>
> *(b) apply to the Court for an order directing that the draft be amended before the submission of the report to the specified Minister.*
>
> *(2) After considering a statement submitted under subsection (1)(a) and reviewing the draft report, the commission may—*

(a) amend the report, including by omitting any part of the report based on evidence received without observing fair procedures,

(b) apply to the Court for directions, or

(c) submit the report to the specified Minister without making any amendments.

(3) After hearing an application under subsection (1)(b) or (2)(b), the Court may make any order or give any directions it thinks fit, including a direction to the commission to do one or more of the following:

(a) submit the draft report to the specified Minister without making any amendments;

(b) give a person specified by the Court an opportunity to give any evidence or make any submission that it considers should, in the interests of fair procedures, be received by the commission before the draft report is finalised;

(c) submit the draft report to the specified Minister after making such amendments as the Court may direct.

(4) Before submitting the report to the specified Minister, the commission shall give written notice of any amendments made under this section to any person who is identified in or identifiable from the report and who is affected by the amendments."

36. There does not appear to be any authority of the Superior Courts addressing the correct interpretation of the term "identifiable" for the purposes of sections 34 and 35 of the 2004 Act. It is submitted on behalf of the *amicus curiae* that the issue of identifiability for the purposes of sections 34 and 35 should be approached on the basis of an objective test, from the perspective of a reasonable and informed person (see, by analogy, the judgment of Simons J in *Friends of the Irish Environment v Roscommon County Council* [2021] IEHC 666). Such an approach is consistent with the literal meaning of the section, having regard to the use of the word "*reasonably*" in section 34(3) ("*a person is identifiable from a draft report if the report contains information that could reasonably be expected to lead to the person's identification*.")

37. It is also submitted on behalf of the *amicus curiae* that the interpretation of sections 34 and 35 of the 2004 Act must take account of the rights of victims of historic abuse, in particular, the right to an effective remedy and the right to truth, as set out above. It is further submitted that this interpretation is consistent with the recommendations of the UN General Assembly in Resolution 60/147 of 16 December 2005 and the Commission on Human Rights "Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity" (see above at paras. IV (i) 9, 10 and 12). Of particular relevance is the importance of encouraging victims to participate in the work of truth commissions, and ensuring that verification of the facts and full and public disclosure of the truth should be achieved in a manner that does not cause further harm to the victims or their families. The *amicus curiae* notes that many victims have waited a long time for an opportunity to give their account of what happened in asserting their right to truth, dignity and redress; it is submitted that ensuring such persons have a right of reply in accordance with sections 34 and 35 of the 2004 Act in respect of any parts of the report from which they are identifiable is an essential safeguard.

38. A further issue which arises in relation to the interpretation of the concept of identifiability for the purposes of sections 34 and 35 of the 2004 Act is the question of curial deference. The State respondents plead at para.18 of the statement of opposition in the *Harney* proceedings and para.17 of the statement of opposition in the *Lee* proceedings that "*the Commission was entitled to a margin of discretion in determining whether a person is identified in, or identifiable from the draft Report*" and further plead that the Commission of Investigation's decision on this issue "*within its margin of discretion, is lawful in the circumstances*." At para.43 of the State respondents' written submissions herein, it is stated:

> "*in applying section 34, a commission is concerned with a mixed question of law and fact i.e. whether, applying an objective standard, a person or persons are identified or identifiable from the draft report or relevant parts thereof. This is not a mechanistic exercise. It requires a commission, at a particular point in time, to assess and determine whether a person is identified or identifiable from its draft report. That is a difficult exercise. In making this assessment, a*

commission is entitled to have regard to the evidence before it (which in the ordinary course is to be kept confidential), the steps taken to protect the identity of witnesses and other persons with whom it engages, as well as the purpose of this process to provide a right of reply where fair procedures so require, especially where findings may be made against a person. This is self-evidently an exercise in respect of which it is appropriate to afford a margin of discretion."

39. The *amicus curiae* respectfully disagrees with this submission in a number of respects. In the first instance, it is notable that absent entirely from this formulation is the perspective from which the question of identifiability is to be adjudicated, i.e. that of the reasonable and informed person. The *amicus curiae* also respectfully disagrees with any construction of section 34 of the 2004 Act that seeks to limit its application to cases where findings may be made against a person. The respondents submit at para.35 of their submissions that "*the 2004 Act cannot be understood as effecting a significant extension of the fair procedures required in the context of public inquiries. For this reason, section 34 is concerned with persons in respect of whom the commission has made findings and/or who would otherwise be entitled to a right of reply*."

40. This construction would represent a significant limitation on the scope of application of section 34 of the 2004 Act, and would violate the basic canon of statutory interpretation, which is that the words of a statute should be given their ordinary, literal meaning unless to do so would give rise to an absurdity. Insofar as the respondents submit that it was not the intention of the Oireachtas to effect a significant extension to the scope of fair procedures in the context of public inquiries, it is noted that in *Howard v Commissioners of Public Works* [1994] 1 IR 101, it was held that a court was not to interpret a section by "*coming to a conclusion as to the intention of the legislature without that intention being expressed in the section itself*." It is submitted that there is nothing expressed in section 34 of the 2004 Act that would support the restrictive interpretation contended for by the respondents. While section 5 of the Interpretation Act 2005 permits departure from the literal interpretation where that interpretation would give rise to an absurdity, no such absurdity has been identified in the present case.

41. Any argument that section 34 is limited to protecting only those who may have adverse findings made against them presupposes that victims who advance an account before the Commission of Investigation have lesser rights than any putative perpetrator of abuse. This construction places the emphasis not on *identifiability* but on a *finding of wrongdoing* but there is no support for such a construction in the words of the section. Indeed, in placing the emphasis on *identifiability*, it appears that section 34 explicitly recognises a right in the person so identified to have an input in to any description of her evidence or account before the Commission of Investigation. Indeed, given the central role of victims in this Commission of Investigation, this interpretation would also appear to be supported by a purposive approach to the interpretation of the section. Such an approach would also be consistent with the right to truth of victims of serious human rights breaches, as recognised in international law.

42. It is further argued that if a Commission of Investigation were required to furnish a draft report, or relevant parts thereof, to any person who could conceivably be identified therefrom, this would add to the cost and burden of the investigative process in a manner which would run contrary to the overarching objectives of the 2004 Act. This is not an absurdity, but an administrative workability argument, which does not satisfy the criteria for departure from the literal rule. Furthermore, if a Commission of Investigation was concerned at such possible adverse administrative consequences, then such concerns could be met by ensuring that the persons are not identified or identifiable from the report, thus obviating the need to furnish a draft to such persons.

43. It is submitted on behalf of the *amicus curiae* that, in light of the objective test based on the reasonable and informed person which should be applied to the concept of identifiability for the purposes of section 34 and 35 of the 2004 Act, no curial deference or margin of discretion should be afforded to the Commission of Investigation's determination as to whether or not the applicants in the within proceedings were identifiable from the draft report.

44. While the Commission of Investigation may be afforded a margin of discretion in the manner in which it carried out the general functions of the Commission of Investigation, the legislation does not afford it any specific powers or discretion in relation to determining who is identifiable in the report. Indeed, to afford it such a discretion would

be dilute the protection afforded by the section. The word "*shall*'' in section 34 imposes a mandatory requirement that the Commission of Investigation furnish a draft report to anyone who is objectively identifiable in the report. The obligation on the Commission of Investigation must be construed strictly and the clear thrust of the section is to provide a remedy for anyone who is objectively identifiable in circumstances where the Commission of Investigation makes an incorrect judgment call or fails for any other reason to comply with the obligation.

45. It is accordingly submitted that the question of whether the applicants were identifiable from the Commission of Investigation's report within the meaning of section 34 of the 2004 Act, such that the procedural safeguards in section 35 ought to have been followed, is a question to be determined by this Court by assessing whether, in the light of the informed contained in the Commission of Investigation's report, the report could be said to contain information that could have led a reasonable and informed person to identify the applicants or either of them.

IV (iii). Remedies

Certiorari and/or declaratory relief

46. In the event that the Court concludes that the applicants (or either of them) were identifiable for the purposes of section 34 and 35 of the 2004 Act, the question then arises as to the appropriate remedy. The applicants have sought orders of *certiorari* in respect of specified portions of the Commission of Investigation's report and also seek declaratory relief regarding the failure to comply with the statutory procedure set out in section 35 of the 2004 Act.

47. It is submitted by the *amicus curiae* that the question of the appropriate remedy is ultimately within the discretion of the Court, and that in reaching a determination as to the appropriate remedy, regard should be had to the rights of the applicants, in particular the rights to fair procedures and dignity pursuant to Article 40.3 of the Constitution. The *amicus curiae* concurs with the respondents' characterisation of section 35 of the 2004 Act as being derived from the right to fair procedures (albeit for the reasons set out above, the *amicus curiae* disagrees with any restrictive interpretation of that section

which would limit its application to cases where allegations have been made). It is submitted that the appropriate remedy must also be informed by the right to an effective remedy pursuant to Article 13, and the principles enunciated by the European Court of Human Rights in *El Masri v the Former Yugoslav Republic of Macedonia* (App. No.39630/09, judgment of 13 December 2012) discussed above.

48. In this regard, it is submitted that in the event that this Honourable Court finds that the applicant(s) were identifiable within the meaning of section 34 of the 2004 Act, one consequential corollary of such finding would be that the applicants were deprived of the benefit of the procedural rights pursuant to section 35 of the 2004 Act. As noted above, in the recent Grand Chamber judgment in *X & Ors v Bulgaria,* in finding a violation of the right to an effective investigation pursuant to the procedural limb in Article 3, the Court was critical of the failure to provide the applicants with "*information and support in good time [which] prevented them from taking an active part in the various proceedings*…."

49. In the event that the Court finds that the applicants (or either of them) were identifiable for the purposes of section 34 of the 2004 Act, it is submitted that the Court may (in the exercise of its discretion) grant both orders of *certiorari* and declaratory relief. This would be consistent with a maximal approach to the vindication of the rights of the applicant(s), including the rights to truth, to dignity, to fair procedures and the right to an effective remedy. This would also be in accordance with the United Nations General Assembly Resolution 60/147 of 16 December 2005 on Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, which recommends that satisfaction should include "*verification of the facts and full and public disclosure of the truth*" and "*inclusion of an accurate account of the violations that occurred in international human rights law*…" In addition to individual victims and their families, communities and society at large also have the right to know the truth about human rights violations, and it is submitted that this aim could be achieved by a declaration or by quashing those parts, if any, of the final report of the Commission of Investigation which are found to have identified the applicant(s) herein in circumstances where they were not afforded the benefit of the procedural protections set out in section 35 of the 2004 Act.

V. Conclusions

50. It is respectfully submitted that the correct interpretation of section 34 of the Commissions of Investigation Act 2004 requires the application of an objective test, based on the reasonable and informed person, to determine whether the applicants (or either of them) were reasonably identifiable from the Commission of Investigation's report. It is submitted that when determining this issue, the Court should take account of the international principles outlined above which focus on the purpose of truth finding commissions as a means of recognising the past wrongs perpetrated on victims. Further, the interpretation issue should be determined in accordance with the right to be heard, the right to dignity and the right to participate. In the event that this Honourable Court finds that either, or both, of the applicants was so identifiable, it is submitted that the Court may grant the applicants orders of *certiorari* in respect of the offending parts of the report and/or declaratory relief, provided the remedy sufficiently vindicates the right to fair procedures and to an effective remedy.

Patricia Brazil BL

Eilis Brennan SC

15 November, 2021

7,681 words