Neutral Citation Number: [2019] EWHC 739 (Admin)

Case No: CO/3226/2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT
SITTING AT CARDIFF CIVIL JUSTICE CENTRE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/03/2019

Before :

LORD JUSTICE HADDON-CAVE
MR JUSTICE SWIFT

- -

Between :

THE QUEEN (on the application of BERNADETTE SARGEANT)	**Claimant**
- and -	
(1) FIRST MINISTER OF WALES **(2) PERMANENT SECRETARY TO THE WELSH GOVERNMENT**	**Defendants**
- and -	
THE INDEPENDENT INVESTIGATOR	**Interested Party**

- -

Mr Leslie Thomas QC and **Ms Sheryn Omeri** (instructed by **Hudgell Solicitors**) for the **Claimant**
Ms Cathryn McGahey QC (instructed by **Welsh Government Legal Services Department**) for the **First and Second Defendants**
Mr George Peretz QC (instructed by **Government Legal Department**) for the **Interested Party (watching brief)**

Hearing date: 17th January 2019

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Approved Judgment

THE RT HON LORD JUSTICE HADDON-CAVE AND
THE HON MR JUSTICE SWIFT:

Introduction

1. The Claimant is the widow of the late Carl Sargeant AM, who was a member of the Welsh Assembly and member of the Labour Party. Her challenge by way of judicial review arises in relation to the establishment of the 'Independent Investigation into the First Minister's Actions and Decisions in relation to Carl Sargeant's Departure from his post as Cabinet Secretary for Communities and Children and thereafter' ("the Investigation"). Specifically, the Claimant challenges the terms of the Operational Protocol ("OP") which governs the procedures by which the Investigation is to be conducted.

2. Permission for judicial review was granted by the Judge in Charge of the Administrative Court, Supperstone J, following an oral permission hearing on 13th November 2018.

3. The Investigation was established by the then First Minister (Prif Weinidog), Mr Carwyn Jones AM. With effect from 11th December 2018 Mr Jones tendered his resignation; with effect from 13th December 2018 Mr Mark Drakeford AM became First Minister.

4. In respect of this judgment:

   (1) the First Minister is Mr Carwyn Jones;

   (2) the Permanent Secretary (Ysgrifennydd Parhaol) is Ms Shan Morgan;

   (3) the Director of Legal Services for the Welsh Government (Llywodraeth Cymru) is Mr Jeffrey Godfrey;

   (4) the Independent Investigator (Ymchwilydd Annibynnol CF) is Mr Paul Bowen QC;

   (5) Junior Counsel to the Investigation is Mr Adam Wagner; and

   (6) the Solicitor to the Investigation is Ms Charlotte Haworth Hird of Bindmans LLP.

5. The Claimant has been represented at this hearing by Mr Leslie Thomas QC and Ms Sheryn Omeri. The First and Second Defendants have been represented by Ms Cathryn McGahey QC. We are grateful to all Counsel for their helpful submissions. Counsel for the Interested Party, Mr George Peretz QC, appeared on a watching brief.

The Background Facts

6. On 3rd November 2017, Carl Sargeant was removed by the First Minister from his position as Cabinet Secretary for Communities and Children. Tragically, four days later, on 7th November 2017, Carl Sargeant was found dead at his home in Connah's Quay. It is common ground that he had taken his own life.

7. The precise circumstances surrounding Mr Sargeant's removal have yet to be fully investigated. It appears, however, that the First Minister received complaints from three women that Mr Sargeant had behaved in a sexually inappropriate way towards each of them. The First Minister referred those complaints to the Labour Party for investigation. The First Minister considered it inappropriate for Mr Sargeant to remain as a Cabinet Minister whilst the investigation was in progress, particularly since the Labour Party was likely to suspend Mr Sargeant's party membership pending that investigation. The First Minister removed Mr Sargeant from his Cabinet post in the course of a Cabinet reshuffle on 3rd November 2018. The Labour Party suspended Mr Sargeant's party membership on the same day.

8. Carl Sargeant's death caused widespread shock in Wales and beyond. The Defendants' skeleton argument states that, recognising the need for the public to understand what had occurred, and for independent scrutiny of his actions and decisions, the First Minister decided to appoint an independent Queen's Counsel to investigate and report upon the circumstances of Mr Sargeant's removal from office.

9. At 5 pm on Thursday 9th November 2017, the First Minister held a press conference at the Media Suite, Cathays Park 1, Cardiff, during which he stated as follows:

> "*This is an awful situation for everyone. I want to talk about Carl and his family today.*
>
> *We're all very shocked by what happened this week. There is great hurt, anger and bewilderment.*
>
> *Carl was my friend. In all the years that I knew him I never had a cross word with him. For 14 years we worked together. He was a great Chief Whip and a Minister who served his country with distinction.*
>
> *I cannot conceive of what Bernie and the family must be going through.*
>
> *There are a lot of inaccuracies in the press and many of you have questions to ask about what happened last week.*
>
> *Everybody is grieving and it is not appropriate for me to get into the precise detail.*
>
> *These are matters for the future - things that will need to be properly disclosed through what should be a Coroner's Inquest.*
>
> *As there will in all probability be an Inquest, I and my team will of course be cooperating fully with any questions that are raised there.*
>
> *The family deserve to have their questions answered and if that isn't possible through the Inquest then I will endeavour to make that happen through other means.*
>
> *There is a legal process to go through and I am obviously acting within that. I welcome any scrutiny of my actions in the future and it is appropriate for that to be done independently.*

> *I quite properly did all that I could to make sure that everything was being done by the book. I had no alternative but to take the action that I did and I hope that people will understand that.*
>
> *Carl was a true force of nature – he drove through more legislation than any other Minister. Not just through force of argument, but through force of personality.*
>
> *Wales has lost a person of great warmth, ability and charisma. These are the darkest days any of us can remember in this institution – but they are darkest of all for the family, and we must respect their right to grieve in peace at this time.*"
>
> (emphasis added)

10. On 10th November 2017, a discussion took place in the First Minister's office between the First Minister, Mr Desmond Clifford (the Director of the Office of the First Minister) and Mr Godfrey, to discuss the powers under which an independent investigation might be established, the form of the investigation envisaged and terms of a proposed Press Statement. Mr Godfrey explains the outcome of the discussion in his witness statement as follows:

> "*During the course of the discussion with the First Minister reference was made to a separate Investigation undertaken some years previously known as the Powell Investigation. That investigation had proceeded as an Investigation undertaken in private by an independent Barrister, established under section 71 of the Government of Wales Act 2006 ("GOWA"), following a process specified in an Operational Protocol. The First Minister confirmed the Independent Investigation should be established under sections 48 and 71 of GOWA. It would be undertaken by a senior Queen's Counsel. Evidence would be given in private and the process would be inquisitorial in nature. The First Minister was clear that an Inquiries Act 2005 Inquiry was not envisaged and was not being authorised. In relation to the form of the Independent Investigation, and the type of process it might follow, the First Minister confirmed his view that the investigation would need to be undertaken in private in order to protect the anonymity of the women who had made complaints against Carl Sargeant and the confidential basis on which those complaints had been received. The material information on which the First Minister had acted, and to which the scrutiny would be directed, was held within the Welsh Government and powers of compulsion were not, as such, considered to be needed. The Welsh Government and any Welsh Government employees would co-operate with the Investigation. The First Minister confirmed that the confidentiality of the complainant identities would be an absolute requirement. A commitment would be given to publish all of the findings of the Investigation in full to the Assembly.*"

Press statement on 10th November 2017

11. Later the same day, 10th November 2017, a Press Statement was published by the First Minister's office ("the Press Statement") in the following terms:

> "*Further to the First Minister's comments yesterday about the need for independent scrutiny of his actions and decisions in relation to Carl Sargeant, he agrees that there should be an independent inquiry and it would be proper to ask a senior QC to lead that work. To ensure this happens separately from his office, the First Minister has asked the Permanent Secretary to begin preparatory work for this inquiry, and to make contact with the family to discuss terms of reference and the identity of the QC. It is our understanding that such an inquiry should not take place before the outcome of a Coroner's Inquest – but we will take further advice on this matter.*" (emphasis added)

12. The precise terms of the above Press Statement issued on behalf of the First Minister are a key feature of this case as appears below.

13. Following the Press Statement, the Permanent Secretary established a group of senior officials which did not include any officials from the First Minister's office. Following discussions between the Permanent Secretary and Mr Godfrey, it was agreed that Mr Godfrey would take forward the process of establishing the inquiry by (i) identifying suitable senior Queen's Counsel to undertake the Investigation and (ii) developing the OP.

14. Mr Bowen QC was chosen as the Investigator to conduct the Investigation by the Sargeant family ("the Family") from a list of senior QCs. The Family confirmed they were content with their choice. Mr Bowen QC appointed his inquiry team which included junior Counsel to the Investigation, Mr Wagner, and the Solicitor to the Investigation, Ms Haworth Hird.

Terms of Reference

15. Following discussions regarding the draft Terms of Reference with the Family and the Investigator, the Permanent Secretary settled the final Terms of Reference for the Investigation as follows:

> "*To conduct an investigation into the First Minister's actions and decisions in relation to Carl Sargeant's departure from his post as Cabinet Secretary for Communities and Children and thereafter.*"

16. Before turning to the details of the Investigation, it is convenient to mention the Inquest and other relevant inquiries.

The Coroner's Inquest

17. On 13th November 2017, a Coroner's Inquest ("the Inquest") was opened into Mr Sargeant's death by Mr John Gittins, HM Senior Coroner for North Wales (East and Central) at County Hall Ruthin. In opening the Inquest, the Coroner found that the provisional cause of death was hanging, in an apparent act of self-harm, and indicated that in discharging his duty to consider what steps may be taken to prevent future deaths,

he would be examining actions and decisions taken by *"the Assembly"* in regard to Mr Sargeant prior to his death. The Coroner's inquest subsequently heard evidence from 26th to 30th November 2018, but was then adjourned.

Other related investigations

18. There were two other related investigations which should be mentioned by way of background. The first was commissioned by the Permanent Secretary on 4th November 2017 and concerned whether there had been a *"leak"* by the Welsh Government of information relating to the Ministerial reshuffle. The Chief Security Officer for the Welsh Government reported on 25th January 2018 that he had found *"no evidence of prior unauthorised sharing of information by the Welsh Government relating to the recent Ministerial reshuffle".*

19. The second was commissioned by the First Minister and was directed to whether he had breached the Ministerial Code by misleading the National Assembly for Wales (Cynulliad Cenedlaethol Cymru) in relation to answers which he had given on 14th November 2017 and earlier on 11th November 2014 regards allegations or reports of bullying by special advisers. The Independent Adviser on the Ministerial Code, Mr James Hamilton, reported on 17th April 2014 that the First Minister's answers on each occasion *"were truthful, and not misleading, and did not breach the Ministerial Code".*

The Correspondence

20. It is necessary to set out the correspondence in 2018 between the various parties in some detail. These exchanges took place principally between the Permanent Secretary, Mr Godfrey, Mr Bowen QC, Ms Haworth Hird, and Ms Cathryn McGahey QC, who was instructed on behalf of the First Minister. The exchanges took place in the context of various proposed amendments which Mr Bowen QC and the Family sought as to the wording of the draft OP.

21. On 25th January 2018, the appointment of Mr Bowen QC as the independent Investigator to conduct the Independent QC Investigation (Ymchwiliad Annibynnol CF) was formally announced. The Claimant and the First Minister were made 'Core Participants' in the Investigation.

22. On 25th January 2018, the Permanent Secretary wrote to the Welsh Assembly stating that *"the First Minister requested that I take the necessary steps to establish an independent investigation"* and published a shortened version of the OP which was sent to Welsh Assembly Members and the Family.

23. On 9th February 2018, Mr Bowen QC wrote to the Permanent Secretary regarding an issue which had arisen regarding the perceived independence of a nominated candidate to be Secretary to the Investigation as follows:

> "*This investigation has been set up to be entirely independent of the Welsh Government. My – and, I am sure, the First Minister's – overriding concern is that the investigation commands the confidence of the public and the family. … [Q]uestions around its independence is inevitable if there is even the slightest hint of an association with the Welsh Government generally and with the First Minister in particular.*"

It was subsequently decided to replace the Secretary to the Investigation with another person.

24. On 22nd February 2018, Mr Bowen QC wrote to the First Minister to introduce himself and update him as a 'Core Participant' on progress in setting up the Investigation. Mr Bowen QC explained that changes to the draft OP would be matters *"for agreement with the Permanent Secretary".*

25. On 26th February 2018, in response to a request from the Investigator, the Claimant's legal representatives submitted written representations as to amendments to the draft OP, on her behalf and in her capacity as a 'Core Participant'. The Claimant submitted in particular that her legal representatives (a) be permitted to attend all evidence-gathering interviews and (b) be permitted to question each and every witness.

26. On 28th February 2018, a meeting took place attended by officials, including the Permanent Secretary and Mr Godfrey, and Mr Bowen QC and the inquiry team, at which the terms of reference and the draft terms of the OP were discussed.

> "*2. The Permanent Secretary summarised the remit given to her by the First Minister and how this influenced the operational protocol.*
>
> *3. The Permanent Secretary noted that she would need to seek the First Minister's views before exceeding this remit.*
>
> *4. Paul Bowen QC acknowledged the First Minister's authority to establish the investigation and decision on the final operational protocol.*"

27. On 2nd March 2018, the inquiry team sent the Permanent Secretary a list of the Investigator's suggested amendments to the OP. These included the suggestion that, although the starting point was that oral evidence to the Investigation would be heard in private, the Investigator should have the power – on such terms as he considered appropriate – to permit other persons (such as the Claimant and her legal representatives) to be present when evidence was given if he thought it necessary in the interests of justice that they should attend. The Investigator did not, however, accept the suggestion that other participants in the Investigation should be permitted to question witnesses. He proposed that others might have the opportunity to suggest lines of questioning (or questions), but that any and all questioning would be either by him or his counsel.

28. On 2nd March 2018, Ms Haworth Hird wrote to the Permanent Secretary as follows:

> "*I understand that you will be discussing Mr Bowen QC's views with the First Minister on his return…*"

29. On 16th March 2018, the Permanent Secretary passed the Investigator's suggestions and comments on to the First Minister observing that *"there is now a widespread public expectation of openness and transparency in conducting the investigation".*

30. On 28th March 2018, Mr Bowen QC emailed Ms McGahey QC:

> "*We discussed the Operational Protocol on the telephone. While you represent the First Minister, not the Welsh Government, you*

> *explained that the FM has concerns about the Protocol that lie behind the Government's reluctance to accept my proposed amendments…"*
>
> *"… You are of the opinion that the duty of open justice/Article 10 does not apply to the investigation; I expressed the contrary view…"*
>
> *"My main concern is to avoid a situation that the Protocol itself is judicially reviewed because it gives me no discretion to share information beyond paras 21(i) and (ii) and second, because it undermines the independence of the Investigation if I do not have the final say on these issues…."*
>
> *"You will advise the FM [First Minister] accordingly and any amendments will be fed back via the PS [Permanent Secretary]*."

31. On 30th March 2018, Ms McGahey QC emailed Mr Bowen QC stating:

> "*I am sorry for the delay in replying to you. I am afraid that my clients have said that they would like the First Minister to be the first person to review my draft.*"

32. There was then an exchange of emails between Ms McGahey QC and Mr Bowen QC in the course of which Mr Bowen QC suggested the Family should be consulted on the OP. Ms McGahey QC responded on 4th April 2018 that she would "*raise it with the clients…."*. Ms McGahey QC explained during submissions that the reference to *"the clients"* was a reference to the solicitors from the Welsh Governments' Legal Department instructing her on behalf of the Welsh Government and on behalf of the First Minister.

33. On 13th April 2018 Ms McGahey QC emailed Mr Bowen QC stating that she had a meeting with the First Minister on Monday and the matter was being treated with urgency.

34. On 20th April 2018, Mr Bowen QC wrote to the Permanent Secretary expressing concern at the delay in responding to his proposed amendments and stating:

> "*It appears however that the decisions about the Investigation including the proposed amendments to the Operational Protocol have been referred to the First Minister. I have been contacted by counsel for the First Minister, Cathryn McGahey QC, who has in effect sought to negotiate the terms of the Operational Protocol with me. <u>As the First Minister is the subject of this Investigation, this involves a clear conflict of interest and does not accord with the First Minister's public statement on 10th November that the Investigation would take place separately from his office.</u>*" (emphasis added)

35. On 27th April 2018, Mr Bowen QC had email correspondence with the Permanent Secretary regarding the Permanent Secretary obtaining the First Minister's *"instructions"* on various issues to do with the OP.

36. On 9th May 2018, the Permanent Secretary sent Mr Bowen QC a revised version of the OP and the indemnity incorporating a number of the changes which he had previously proposed and various consequential changes.

37. On 14th May 2018, Mr Bowen QC wrote to the Permanent Secretary stating that he had sent the revised version of the OP and the indemnity to the Family for their comments and that, subject to it being finalised, *"I now consider the Operational Protocol will allow me to conduct a sufficiently fair and independent investigation to comply with the law and my terms of reference."*

38. On 30th May 2018, the Permanent Secretary 'adopted' the revised OP and sent a copy to Mr Bowen QC.

39. On 4th June 2018, what turned out to be the final version of the OP was published (see paragraph 50 below).

40. On 15th June 2018, the Permanent Secretary issued a notice to Welsh Government staff *via* the Welsh Government Intranet, referring to the launch of the Investigation, instructing staff to forward any relevant evidence in relation to the Investigation for the attention of the Director of Governance, the HR Director or her office. When concerns were raised about this instruction, it was amended.

41. On 25th June 2018, the Claimant's solicitors, Hudgell Solicitors, sent a pre-action protocol letter to the First Minister, Permanent Secretary and the Investigator, challenging the OP and the Permanent Secretary's decision to establish the Investigation under s.71 of GOWA 2006 rather than under the Inquiries Act 2005.

42. On 9th July 2018, the Permanent Secretary obtained confirmation from the First Minister of his approval of the 'final' terms of the OP.

43. On 9th July 2018, Ms Haworth Hird wrote to Mr Godfrey stating that, in the light of recent events, the Investigator was increasingly concerned that *"the existing Operational Protocol will not enable him to conduct an <u>effective</u> investigation"*. Ms Haworth Hird explained that one of the relevant factors was *"the growing public perception that the investigation lacks independence from the Welsh Government and the First Minister"*. The letter continued:

> "*Mr Bowen QC has been anxious from the outset that an impression is not given that the Investigation lacks independence. He is concerned that if (for example) the First Minister has been instrumental in setting the terms of the Operational Protocol and this fact is disclosed in the judicial review proceedings then that will further undermine the Investigation's perceived independence and prejudice its effectiveness and the authority of its conclusions.*"

Ms Haworth Hird concluded the letter by stating that Mr Bowen QC was of the view that "*circumstances now dictate that the preferred course would be to convert the Investigation into an Inquiries Act inquiry*".

44. On 13th July 2018 Mr Godfrey responded to Ms Haworth Hird rejecting Mr Bowen QC's suggestion and stating as follows:

> "*… [T]he Permanent Secretary has, at the direction of the First Minister, been responsible for taking forward practical elements of the establishment and administration of the Investigation."*
>
> *"… The Permanent Secretary has been clear with Mr Bowen QC throughout the earlier dialogue concerning the Operational Protocol that she has been working within a remit established by the First Minister. The Operational Protocol was drafted on her behalf to give effect to that remit. When changes were proposed by Mr Bowen QC and .. by the family which were not within that remit, the Permanent Secretary has been very clear that she would seek the agreement of the First Minister to any significant changes needed to that remit. The Operational Protocol was subsequently redrafted to the satisfaction of Mr Bowen QC to reflect a revised remit agreed by the First Minister. This has been a transparent process and the Operational Protocol was finalised and accepted by Mr Bowen QC with full knowledge of what had occurred. …*"

Mr Godfrey acknowledged that it was unsatisfactory that the Inquest and Investigation should be proceeding in parallel and stated that the First Minister would be willing to consent to the Investigation being suspended and re-started in January 2019.

45. On 2nd August 2018, Ms Haworth Hird wrote to Mr Godfrey at length, responding to his letter of 13th July 2018. She challenged Mr Godfrey's assertion that the process involving amendments to the OP had been *"transparent"* and with Mr Bowen QC's full knowledge. She reviewed the past 9 months' events and correspondence in detail and highlighted the Press Statement of 10th November 2017 in which she said *"the First Minister gave a public commitment to establishing an "independent inquiry"*. She continued:

> "*There is a significant difference between, on the one hand, the First Minister being consulted on the terms of the Operational Protocol (which would be unobjectionable, for the same reason – namely, that he is a Core Participant – that Mr Bowen QC requested that the Family be consulted) and, on the other, the First Minister making the final decision on his terms.*
>
> *Nor does the statement reflect the fact that Mr Bowen QC has repeatedly stated his concern that the First Minister should not be involved in determining the procedure for the investigation (as opposed to being consulted) as this risked undermining the appearance of independence of the Investigation.*
>
> *I would also question whether the process relating to the Operational Protocol can be described as "transparent", as is highlighted by the Family's surprise upon being told, via the pre-action process, of the First Minister's involvement in setting the procedure.*"

46. On 14th August 2018 Mr Godfrey responded to Ms Haworth Hird rejecting her characterisation of events. He said:

> "*[T]he First Minister had no involvement in the initial version of the Operational Protocol (based on his initial remit) and became involved in the revisions of the Operational Protocol only to the extent that this was necessary to reflect changes to the remit he had originally established."*
>
> *"The nature of the decision taken by the First Minister to establish the investigation and basis for the Protocol was made clear by lawyers from the outset.*"

47. On 14th August 2018 the Claimant issued these judicial review proceedings against the First Minister and the Permanent Secretary.

Mr Godfrey's evidence

48. The following matters are apparent from the helpful and candid statement of Mr Godfrey dated 7th December 2018:

    (1) Mr Godfrey provided advice to both the First Minister and the Permanent Secretary in relation to the OP;

    (2) The First Minister decided on crucial aspects of procedure of the Investigation from the outset (that evidence would be given in private, that the process would be inquisitorial in nature, that he would not authorise an Inquiries Act 2005 inquiry);

    (3) The OP was drafted by Mr Godfrey such that it 'reflected the First Minister's instructions';

    (4) That it had not been Mr Godfrey's or the First Minister's intention to consult with the Claimant or her Family on the terms of the OP until the Investigator raised this matter;

    (5) While the initial drafting of the OP was 'delegated' to the Permanent Secretary, the First Minister set narrow limits on the extent of the delegation which amounted to no more than the Permanent Secretary carrying out his will;

    (6) The First Minister discussed Mr Godfrey's advice with the Permanent Secretary in March 2018;

    (7) It was the First Minister's decision to reject the changes to the OP proposed by the Claimant and her family;

    (8) The First Minister, through Ms McGahey QC, sought to negotiate the terms of the OP with the Investigator privately and without the Claimant's knowledge;

    (9) The First Minister directed that the OP be amended in light of the Leak Investigation, again without informing the Claimant;

    (10) The First Minister continued to have ultimate say over the terms of the OP in late April 2018;

(11) The First Minister revised the remit of the Permanent Secretary in May 2018, the very month when the OP was finalised, demonstrating that the First Minister had final say over the terms of the OP (if not over the words used).

The Operational Protocol (OP)

49. The OP went through several drafts and iterations prior to its final approval by the First Minister on 9th July 2018. Each draft (including the final draft) contained the identical following opening three paragraphs, highlighting the terms of the Press Statement of 10th November 2017:

> "*1. The Permanent Secretary of the Welsh Government has established the Investigation with the following Terms of Reference: -*
>
> > *To conduct an investigation into the First Minister's actions and decisions in relation to Carl Sargeant's departure from his post as Cabinet Secretary for Communities and Children and thereafter.*
>
> *2. Paul Bowen QC has been appointed to act as an Investigator with a view to conducting the Investigation in accordance with this protocol and with the terms and conditions of appointment (see Annex).*
>
> *3. The Investigation is a process intended to give effect to the public commitment given by the First Minister on 10 November 2017 in the following terms: -*
>
> ***A spokesman for the First Minister said,***
>
> *'Further to the First Minister's comments yesterday about the need for independent scrutiny of his actions and decisions in relation to Carl Sargeant, he agrees that there should be an independent inquiry and it would be proper to ask a senior QC to lead that work. To ensure this happens separately from his office, the First Minister has asked the Permanent Secretary to begin preparatory work for this inquiry, and to make contact with the family to discuss terms of reference and the identity of the QC. It is our understanding that such an inquiry should not take place before the outcome of a Coroner's Inquest – but we will take further advice on this matter.*'"

50. The final version of the OP includes the following provisions as regards the manner and operation of the Investigation:

(1) The Investigator does not have powers to compel attendance of third parties or the production of documents (OP, paragraph 12).

(2) The Investigator is required to facilitate the opportunity for any person to give evidence to the Investigation. This can include allowing evidence to be given in private, anonymously or on such other terms or conditions as requested by that individual. The final decision about any such terms rests with the Investigator (OP, paragraph 19).

(3) Documents, witness statements, transcripts of evidence and any other material provided to the Investigator are not to be published unless the Investigator refers to such material in his Report, considers it necessary to provide the material to any person for comment, or considers publication to be necessary to comply with the principle of open justice or to comply with Article 10 of the European Convention on Human Rights (OP, paragraphs 21 and 22).

(4) Oral evidence is to be heard in private, in the presence of the Investigator, his counsel, the Investigation Secretariat, and any other person that the Investigator permits to attend on the basis of his assessment of (a) whether the person concerned has a sufficient interest in the subject matter of the evidence; and (b) whether it is in the interests of justice that the person should be permitted to be present (OP, paragraph 30). However, the effect of OP paragraph 30 is also determined by OP paragraph 12. Since the Investigator has no power to compel any witness, it will in practice be open to a witness to decline to give evidence if they object to the presence of a particular person when their evidence is taken.

(5) No person will be permitted to ask questions of any witness either directly or through their own or another legal representative. It will be open to any person to suggest questions or lines of questioning to the Investigator, but the Investigator will have the final decision on whether or not a question is put, and all questions will be put by the Investigator and Counsel to the Investigation (OP, paragraph 32).

51. So far as concerns the Claimant and her family, the combined effect of these provisions is to subordinate their role in the Investigation to the decision of the Investigator. They will not, as of right, be able to attend when witnesses give evidence to the Investigation; nor will they be able to question witnesses directly. Likewise, their access to documents will depend on decisions taken by the Investigator.

Grounds of challenge

The Application

52. The Claimant seeks an order quashing the following decisions of the First Minister and/or the Permanent Secretary made on or around 4th June 2018 and reflected in the version of the OP published on the website of the Independent Investigation (www.iqci.org.uk/documents):

(1) not to empower the Independent Investigator to compel witnesses to attend to give oral evidence and/or to produce evidence (OP, paragraph 12);

(2) that any oral evidence given to the Independent Investigator to be heard in private (OP, paragraph 30);

(3) to empower the Independent Investigator to refuse to permit the Claimant and the Family to attend hearings if attendance will cause a witness to withdraw his or her consent to give evidence (OP, paragraph 30);

(4) to refuse to permit the Claimant and the Family to ask questions of any witness through their legal representatives (OP, paragraph 32);

(5) to require that Welsh government civil servants notify David Richards, Director of Governance; Peter Kennedy, HR Director; or the Permanent Secretary's office if they believe they have evidence relevant to the Investigation ("Top civil servant asks staff to send Carl Sargeant evidence to her rather than independent inquiry", *Wales Online*, 15 June 2018, 16:59).

53. The Claimant seeks declarations that the above decisions are unlawful at common law in that they are irrational and/or amount to a fettering of discretion and/or demonstrate an absence of independence. The Claimant also contends that the above decisions were made in the absence of any consultation or any genuine or adequate consultation by the Defendants with her. The Claimant further relies on Article 6 and/or Article 8 of the European Convention on Human Rights ("ECHR"). The Claim Form also contained a challenge based on Article 2 of the ECHR, but that challenge is no longer pursued.

Claimant's Submissions

54. Fundamental to all of the Claimant's grounds of challenge is the central submission that it was unlawful for the First Minister – the subject of the investigation – to set the terms of the OP.

55. The Claimant's case on this point can be summarised as follows:

(1) First, the First Minister's public statement of 10th November 2017 was misleading. It stated in terms that the work necessary for the Investigation to take place would be done *"separately from this office"* (*i.e.* the First Minister's Office). However, it transpired that this was not the case because the First Minister had already given the Permanent Secretary a 'remit' in private as to how the Investigation should be established and the basic procedure to be followed.

(2) Second, the First Minister's public statement of 10th November 2017 was not followed because the First Minister did, in due course, have direct involvement both personally and/or through his Counsel (Ms McGahey QC) in controlling and approving the final terms of the OP.

(3) Third, the process by which the OP came to be drawn up and finalised was unfair. The Claimant and the Family were, at all material times, kept in the dark as to both the First Minister's initial and subsequent involvement in deciding the OP (*i.e.* both (a) the formulating of a 'remit' for the Permanent Secretary and (b) in finalising the OP as described above). Indeed, these matters did not come to light or to the Claimant and the Family's attention until the service of the pre-action protocol correspondence. In the meantime, they had been discussing the terms of the OP with the Investigator in good faith and in the belief that the OP was being determined independently from the First Minister, who was the subject of the Investigation.

(4) Fourth, the correspondence shows the subject of the Investigation, *i.e.* the First Minister, was both controlling the terms of the Investigation and in a position to 'consent' or otherwise as to how the Investigation proceeds.

(5) Fifth, in any event, the terms of the OP were themselves unfair, irrational and inappropriate for the conduct of an open, fair, independent inquiry such as was promised and required in this case.

56. Mr Thomas QC put his case in three ways:

(1) Legitimate expectation: He submitted that the First Minister's statement of 10th November 2017 gave rise to a legitimate expectation that the Investigation and its procedures would be set up and decided independently of the First Minister and this turned out not to have been the case. Although the target of this submission included the decisions taken in November 2017, the primary focus of the submission was on the First Minister's subsequent involvement in the period from March 2018, in decisions on whether changes should be made to the OP following representations made by the Claimant and her family, and by the Investigator.

(2) Breach of natural justice: He submitted that this case involved the breach of the basic principles of natural justice at common law and the right to a fair hearing.

(3) ECHR: He submitted that what occurred in this case gave rise to breaches of Articles 2, 6, 8 and 13 the ECHR. Mr Thomas QC agreed that if he was right about the common law, he did not need to rely upon the ECHR. (In the event, only the Article 8 point was argued).

57. Mr Thomas QC made it clear that the Claimant was not in any way seeking to challenge the independence of the Investigator, Mr Bowen QC, himself or his ability to continue to conduct an independent investigation in accordance with his Terms of Reference.

Defendants' Submissions

58. Ms McGahey QC submitted on behalf of the Defendants in summary as follows:

(1) The Investigation is a non-statutory investigation, and the First Minister has a wide discretion in respect of the way in which it is to be conducted. None of the impugned decisions was *Wednesbury* unreasonable, or unlawful on any other basis;

(2) The fact that the former First Minister was the subject of the Investigation, the person responsible for its establishment and involved in determining its procedure did not render the terms of the OP unlawful;

(3) The Claimant's rights under the ECHR are not infringed;

(4) The essence of the Claimant's challenge is no more than a complaint that the Investigation is not being conducted in precisely the way that she would wish. The fact that the Investigation could have been conducted differently does not render the procedures that were in fact selected unlawful.

Issues

59. The parties drew up a joint List of Issues which numbered 17 in total. However, it was recognised at the hearing that Counsel should properly focus on the first three, namely:

(1) Issue 1. Was the First Minister's involvement in setting the OP a breach of natural justice, as he was acting as a judge in his own cause?

(2) Issue 2. Once the Investigation had been established by the First Minister under s.71 of the GOWA, was there any legal impediment to him having no further involvement in the setting of the OP, and instead leaving that to either the Permanent Secretary or another civil servant?

(3) Issue 3. Has the First Minister's involvement in setting the terms of the OP, or his receipt of advice from the Investigator, compromised (at least) the appearance of independence of the Investigation?

60. A fourth issue arises in respect of the notice to staff issued on 15th June 2018 which is the subject of the quashing order which the Claimant seeks (see above at paragraph 52).

Analysis

(1) First issue: The legitimate expectation argument

Principles

61. We were not referred by Counsel to any particular authorities regarding the doctrine of legitimate expectation but the relevant principles are well known and established. The promise or undertaking must be clear and unambiguous and understood as such on a fair reading by those to whom it was made or given (see *e.g.* Cranston J in *In United Kingdom Association of Fish Producer Organisations v Secretary of State for the Environment, Food, and Rural Affairs* [2013] EWHC 1959 (Admin) at [92]. If the Press Statement did contain a relevant clear and unambiguous representation, the further question arises as to whether it was nevertheless lawful for the First Minister subsequently to exercise his powers under GOWA to decide against the Claimant's requests for an Investigation in which (in particular) her legal representatives (a) should be permitted to attend all evidence-gathering interviews and (b) should be permitted to question each and every witness (see above).

Submissions

62. Mr Thomas QC submitted that the Press Statement issued by the First Minister's Office on 10th November 2017 gave rise to a legitimate expectation upon which the Claimant was entitled to rely.

63. Ms McGahey QC submitted that the Press Statement could not give rise to a legitimate expectation because (i) it was merely a statement of present intention, not future intention; (ii) it only referred to preparatory work for setting up the Investigation, but did not state in terms what remit had been laid down for the Investigation; (iii) it should have been obvious that the Permanent Secretary was working to a careful 'remit' given to her by the First Minister; (iv) only the First Minister had the statutory power under s.71 to sign off on the Investigation and, at all material times, the First Minister was acting entirely in accordance with his s.71 duties; and (v) the key question was not one of legitimate expectation but one of underlying fairness, and what occurred here she submitted was fair.

What did the Press Statement mean?

64. The first question is how was the Press Statement reasonably to be understood by members of the public and the Family when it was promulgated? In our view, the answer is clear both from the express and unambiguous terms of the Press Statement itself and from the context in which it was issued.

65. It is important to have regard to the context in which the Press Statement was issued. Mr Sargeant's tragic death, four days after being sacked from the Welsh Cabinet, had caused widespread shock and grief nationally. This led to a heightened and febrile political atmosphere. As the First Minister acknowledged in his press conference on 9th November 2017, there was intense focus by the press *"and many of you have questions to ask about what happened last week".* This led to the Press Statement the next day.

66. The Press Statement itself embodied three elements. First, a recognition by the First Minister of the need for *"independent scrutiny"* of his own actions and decisions in so far as they related to Mr Sargeant. Second, an agreement by the First Minister that there should be an *"independent inquiry"* conducted by a senior QC. Third, the announcement of a decision by the First Minister in the following terms:

> "*To ensure that this (i.e. independent scrutiny and an independent inquiry) happens separately from his office, the First Minister has asked the Permanent Secretary to begin preparatory work for this inquiry, and to make contact with the family to discuss terms of reference, and the identity of the QC*". (emphasis added)

67. In our view, a reasonable understanding of these words is as follows: (i) that the preparatory work for the setting up of the Investigation would be handed over and henceforth undertaken by the Permanent Secretary and nobody else; (ii) the Permanent Secretary would carry out this work independently, *i.e.* without input or interference from the First Minister or his Office; (iii) the preparatory work would include all matters relevant to setting up the Investigation, *i.e.* including such matters as the formulation of the procedure for the Investigation (the OP); (iv) the First Minister would have no involvement in the decision-making; and (v) the Permanent Secretary had a free hand, *i.e.* her only brief or instruction in carrying out the preparatory work for setting up the Investigation was to ensure that the Investigation was independent.

68. In relation to the last point, there was no hint or suggestion in the Press Statement that the Permanent Secretary had already had her hands tied as to how this preparatory work was to be carried out, *i.e.* that the First Minister had already given the Permanent Secretary a fixed 'remit' as to how the Investigation was to be conducted and what procedures were to be followed. On the contrary, the *gravamen* of the Press Statement was that the matter was being handed over to the Permanent Secretary who was being given an entirely free hand *"to begin preparatory work for the inquiry"*, with the only specific instructions being to make contact with the Family to discuss (a) the terms of reference, and (b) the identity of the QC to lead the Investigation.

69. The Press Statement was designed to reassure the Family and the public at large, in the light of the public concern following Mr Sargeant's death, and the need to provide answers. The thrust of the Press Statement was that there was to be no compromise on the independence of the Investigation or the transparency of the process. The Press Statement was not merely a statement to present intentions. It was an undertaking as to how things would be handled in the future.

70. The Defendants argued that a mere press release could not found a judicial review claim based on legitimate expectation. There is, however, no inherent reason why this should be so. A statement in a press release is just as much capable, both in principle and in practice, of giving rise to a clear and unambiguous representation as to a Minister or government official's intention as any other form of public statement. Indeed, *a fortiori*

where as in the present case the patent *raison d'etre* of the press statement was to indicate in clear terms what action or decision a minister or government official intended to take in order to deal with a particular issue.

71. The Defendants' alternative contention was to the effect that either the circumstances in which the statement was made, or something in the content of the statement itself, meant that it would not have been reasonable for the Claimant to rely on what was said as a statement of what the First Minister had decided to do. We see no substance in this contention.

72. First, there is nothing in the language of the Press Release to indicate that it was anything other than a statement of what the First Minister had decided to do. Indeed, the language is quite clear and unequivocal (see above).

73. Second, the circumstances in which the Press Statement was made strongly support the conclusion that reliance on the statement by an objective observer was reasonable. The role of the First Minister in relation to the circumstances which may have led to Mr Sargeant's death was in the spotlight and a matter of acute public controversy. The Press Statement appears to have been the only public announcement of the decision to establish the Investigation. The establishment of an *"independent inquiry"* was the Welsh Government's primary response to the public controversy surrounding Mr Sargeant's death. There was no other pronouncement (in a document or otherwise) which could be pointed to as the definitive statement of the steps to be taken by the Welsh Government. Accordingly, we see nothing unreasonable in reliance on what was said in the Press Statement.

74. Third, it was wrong to say that the ability to rely on the Press Statement was affected by the prior 'remit' given by the First Minister to the Permanent Secretary that (a) the evidence should be heard in private and (b) witnesses could only be questioned by the Investigator and not by lawyers instructed by the 'Core Participants'. That 'remit' was given to the Permanent Secretary in a private meeting with the First Minister on 9th November 2017 (see the evidence of Mr Godfrey). Whatever was said in the official meeting on 9th November 2017 was not publicised and, therefore, could not have affected what the Press Statement would reasonably be taken to mean. In this regard, as stated above, there was no hint or suggestion in the Press Statement that the Permanent Secretary's authority in setting up the Investigation had been limited in any relevant way (see above).

Did the Defendants act in breach of the expectation raised by the Press Statement?

75. What should have happened if the Defendants were faithful to the representations made in the Press Statement is that the entire task of preparing the Investigation and deciding the final form of the OP should have been handed straight over to the Permanent Secretary (shorn of any 'remit'), who should then have carried out the work entirely independently of, and without further reference to, the First Minister and his office.

76. It is clear, however, that the First Minister and his officials acted in breach of the representations made in the Press Statement in three principal respects. First, the Permanent Secretary did not have a free hand: she was already subject to an unpublished 'remit' from the First Minister. Second, the Permanent Secretary did not carry out the preparations for the inquiry *"separately from the First Minister's office"*: during March to May 2018 she discussed the Investigator and Family's proposed amendments with the First Minister and sought his approval and authorisation for any changes. Third,

the First Minister continued to have control of the process: indeed, he effectively had the last say and controlled the final form of the OP.

77. These were matters of which, at all material times, the Family were entirely unaware.

Did the First Minister thereby act unlawfully?

78. The remaining question is whether, in acting contrary to the legitimate expectation raised by the Press Statement, the First Minister thereby acted unlawfully insofar as, during the period March to May 2018, he retained control of whether any and if so what alterations should be made to the OP.

79. The appropriate standard by which to assess action taken in breach of a legitimate expectation has been formulated in different ways by different courts, either in terms of 'rationality' or 'proportionality' (see *e.g. per* Lord Steyn in *R (on the application of Mullen) v Secretary of State for the Home Department* [2004] 1 AC 1 (HL) at [60] and *per* Laws LJ in *R (on the application of Bhatt Murphy) v The Independent Assessor* [2008] EWCA Civ 755 at [51], respectively).

80. Whichever way the test is formulated (rationality or proportionality), in our view, the Defendants fail in the present case.

81. There was a simple step which the First Minister could have taken before he signed off on the final form of the OP on 9th July 2018: he could have informed the Claimant that he had already given the Permanent Secretary a 'remit' as to the terms of the OP and he would, in fact, be the final decision-maker on the final form of the OP. The Claimant could then have made informed objections and representations appropriately.

82. The fact that the First Minister was the decision-maker on the final terms of the OP was plainly a matter of significance to the Family and to the public, in the light of the promise made in the Press Statement. To have proceeded in the manner in which the First Minister and Permanent Secretary did was neither rational, nor proportionate to the legitimate expectation arising from the Press Statement – not least because the thrust of the Press Statement was the First Minister would definitely not be the decision-maker as to the OP.

The Defendants' misunderstanding

83. The Defendants were, unfortunately, led into error by a collective misunderstanding of the legal position. The First Minister and Permanent Secretary and their respective offices appear to have believed that since the First Minister had the statutory power under s.71 to sign off the terms of an inquiry, it was necessary for the First Minister to lay down the 'remit' of the inquiry and how it was to be conducted and then for the Permanent Secretary faithfully to implement that remit; and then when objections to the draft OP were raised by the Independent Investigator and Family which threatened to exceed the 'remit', the Permanent Secretary believed she had no option but to revert to the First Minister to seek the necessary further express instructions and final approval of the final terms of the OP.

84. The same 'necessity' argument was made before us by Ms McGahey QC, namely that it was necessary for the Permanent Secretary to get the express approval of the final form of the OP because only the First Minister could exercise the necessary powers under ss. 48 and 71 of GOWA.

85. We reject this 'necessity' argument. This line of thinking is (and was) erroneous and betrays a fundamental misunderstanding of the legal position. It is true that only the First Minister had the ultimate power to establish an inquiry. However, this did not mean that he could not delegate the task to his officials or he, personally, had to be involved in deciding the precise terms upon which the Investigation was to be conducted, including the interstices of any OP.

86. The legal basis for the decision to establish the Investigation was s.71 of GOWA read together with section 48 of that Act (the First Minister's power to appoint and remove Welsh Ministers). The s.71 residuary power is framed in the usual broad terms, providing the First Minister with the power to "*… do anything… which is calculated to facilitate, or is conducive or incidental to, the exercise of [his] other functions*". As we see it, it was open to the First Minister under s.71 not only to delegate the preparatory work for the Investigation to an official such as the Permanent Secretary, including the setting of the terms of the Operational Protocol, but also to direct that the Permanent Secretary was to carry out such preparatory work "*separately from the First Minister's Office*" (as promised in the Press Statement). This is what the First Minister purported to do in his 10th November 2017 Press Statement. Since it was within the First Minister's power to act in this way, it must logically follow that the 'necessity' argument falls away.

87. Further, even if (contrary to the above) the Defendants' belief that, in respect of the proposed alterations to the OP, only the First Minister could exercise the relevant powers was correct, the argument does not assist them. First, in any event, we see no reason in principle why it would not have been possible, by reason of the power under s.46(5)(b) of GOWA, for the Presiding Officer to nominate a person to take the decisions on the final form of the OP which the First Minister made between March and May 2018. Section 46(5)(b) operates where the First Minister is *"for any reason unable to act"*. We see no reason why those words do not cover a situation in which the First Minister is unable to act by reason of (as in this case) a legal obligation arising from representations made by him. In the course of argument it was suggested that to read the provision in this way would somehow create some form of democratic deficit. We do not agree – the First Minister is as much subject to legal obligations arising from his own actions as any other public office holder. That being so this reading of section 45(6)(b) GOWA is certainly consistent with the language of the provision as enacted and entirely pragmatic.

88. Second, in any event, even if this route were not available, the First Minister could have simply come clean and told the Family openly and/or stated publicly, that he was not in fact relinquishing the power to decide on the procedure for the Investigation and he (the First Minister) would be the final arbiter as to the final form of the OP. This would have been a step that would have been both pragmatic and transparent.

89. Thus, whichever way it is looked at, the Defendants' 'necessity' argument is defeasible by the Claimant's case based on legitimate expectation. The need for Ministers occasionally to step away from the handling of inquiries or decisions touching on their own actions or departments or constituencies is not uncommon: see *e.g.* in the planning context, where planning decisions are being made in respect of the Minister's own constituency.

90. The Permanent Secretary had sufficiently clear instructions from the First Minister to enable her to proceed. She was instructed to carry out the preparatory work for setting up an 'independent inquiry' into the First Minister's actions and decisions in so far as they related to Mr Sargeant and to do so *"separately from the First Minister's Office"*.

91. Finally, it does not assist the Defendants to contend that the conclusions of the First Minister on the final form of the OP (*e.g.* as to the right of the Family's legal representatives to attend witness interviews and to question witnesses *etc*.) were ones properly open to a First Minister. The expectation raised here by the Press Statement was essentially a procedural expectation, *i.e.* that the *process* of deciding and drawing up the procedures to be followed for the inquiry would be in the hands of the Permanent Secretary and these preparations would be carried out independently of the First Minister's Office. It was not an expectation of necessarily obtaining a substantive benefit, *i.e.* that the terms of the OP would be in a particular form. For this reason, whether or not the First Minister as decision-maker ultimately reached a substantive conclusion that was reasonably open to him is beside the point: what has been lost - and what the judicial review is designed to restore - is the benefit of the promised independent procedure, *i.e.* a procedure whereby the preparations for the inquiry are truly made *"separately from the First Minister's Office"* and the First Minister is not the decision-maker or arbiter of the OP.

Summary on Issue (1)

92. For the reasons set out above, the Claimant succeeds on the first issue. It would – in layman's terms – be unfair for the First Minister both to retain the political capital of the announcement that the work necessary to establish the Investigation would be undertaken independently from his office, and to retain the power to decide what the arrangements for the Investigation should be. In our view, because of the 10th November 2017 Press Statement, it was also unlawful for him to do this. On this ground alone, we allow the Claimant's application for judicial review.

93. It is not necessary, therefore, to determine the remaining issues but we do so briefly out of deference to Counsels' arguments.

(2) Second issue: the Rule against Bias (*nemo iudex in causa sua*)

94. The Claimant contends that the principles *audi alteram partem (*the right to be heard, or to have a fair hearing) and *nemo iudex in causa sua* (no-one one should be judge in their own case, or the rule against bias) apply in this case. Put succinctly, the Claimant's essential case is that what occurred here was unlawful and unfair because (a) the terms of the OP were set by the very subject of the investigation, *i.e.* the First Minister himself, and (b) at all material times the Claimant was kept in the dark about this (see above).

95. The rule against bias is the more relevant of the two. The classic formulation of the principle is *"whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased"* (*per* Lord Hope in *Porter v Magill* [2001] UKHL 67; [2002] 2 AC 357 at [103])

96. There are two issues to be considered. First, whether and, if so, how the First Minister's decisions engage the principle. Second, if so, whether this is a situation where the principle gives way to necessity.

97. As to the first issue, the principle classically applies to decisions on substantive outcomes. Its application is problematic in the present case for two connected reasons. First, the present case concerns a procedural issue, *i.e.* the First Minister controlled the process of deciding and drawing up the procedures in the Investigation of which he was the subject. While we accept that decisions on procedural issues are capable of affecting substantive outcomes, such decisions are at least at one stage removed from whatever the substantive outcome may be. The person who takes the procedural decision may

not be able to know how the decision will affect his own interests. The extent to which the principle is engaged will depend on circumstances of the case in hand. Second, on the facts of the present case, it not clear whether it could be said that, when the First Minister took the decisions in question on the OP, he knew or could reasonably anticipate whether he would be (or be likely to be) advantaged or disadvantaged by the decisions. As we have explained above, the general effect of the decisions taken were to vest power in the Investigator in respect of the conditions under which evidence would be given, and the extent to which the Claimant and the Family would have access to such information, and have the ability directly to question witnesses. We cannot help noticing that for the most part, if not entirely, the alterations made were the ones requested by the Investigator. Overall, it is difficult to divine whether questioning by the Investigator rather than the Family and/or permitting the Family to attend evidence sessions would be likely to advance his interests or hinder them or what effect these decisions might have on the willingness of witnesses to attend.

98. In summary, had it been necessary to decide this issue, we are not at all sure that we would have been persuaded by this aspect of the Claimant's second ground.

99. Second, if our conclusion on the application of the principle on the facts of this case had been in favour of the Claimant, it would still be necessary to consider whether necessity required the First Minister to be the person to decide the terms of the OP.

100. We have already addressed the issue of necessity in the context of the legitimate expectation argument. Here, the issue is more acute than in relation to the legitimate expectation context, since the logic of the Claimant's case on this ground affects not just the March to May 2018 decisions, but also extends back to the 9th and 10th November 2017 decisions to establish the inquiry in the first place. In our reasoning above, as one answer to the necessity argument, we have pointed to the power at s.46(5)(b) of GOWA which is available where the First Minister is *"for any reason unable to act"*. In the context of the present submission, whilst s.46(5)(b) might operate to rebut a necessity argument in relation to the decisions taken between March and May 2018, we are doubtful whether it would operate in relation to the decisions taken prior to the 10th November 2017 press release. As we have analysed the legal consequences of the facts of this case, the contents of the 10th November 2017 Press Statement are critical; and it is the representations made on that occasion which provide the legal basis for criticism of the First Minister's actions between March and May 2018.

101. Overall, had the Claimant relied on the *nemo iudex in causa sua* principle alone, we think she would have faced considerable difficulties.

(3) Third issue: Was there a breach of Article 8?

102. Article 8 of the ECHR states:

> "*1. Everyone has the right to respect for his private and family life, his home and his correspondence.*
>
> *2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*"

103. On behalf of the Claimant, Ms Omeri relied on the fact that Article 8 can give rise to procedural rights. She contended that the Claimant's Article 8 rights were the relevant Article 8 rights because her right to private life could be adversely affected if the Investigation heard evidence on allegations of impropriety on the part of her late husband, which might reflect poorly on her. That interference, went the submission, would not be justified if the Investigation were not conducted in accordance with a fair process, and that the Investigation would be unfair if her lawyers were not able to attend the evidential sessions as of right, and not able directly to question any witnesses whose evidence was heard.

Legal principles

104. Article 8 protects rights of central importance to the individual's identity, self-determination, physical and moral integrity, maintenance of relationships with others and a settled and secure place in the community (see *Connors v UK* (2005) 40 EHRR 9 at [82]).

105. Article 8 encompasses a right to respect for reputation. The notion of 'respect' under Article 8 includes both a positive and a negative aspect. Accordingly, if an inquiry affects an individual's private life by injuring their honour or reputation, a claim for judicial review may lie (*c.f. Chauvy v France* (2005) 41 EHRR 29 and *Pfeifer v Austria* (2008) 48 EHRR 8). Dealing appropriately with the dead out of respect for the feelings of the deceased's relatives falls within the scope of Article 8 (*Genner v. Austria*, ECtHR no. 55495 /08, 12th January 2016).

106. The courts have recognised that the threshold for engaging Article 8 is low (*London Borough of Harrow v Qazi* [2004] 1 AC 983 at [8] – [10]).

Discussion

107. We are not persuaded by the Claimant's third ground. In the first place, the breach alleged is speculative. We note that the inquiry relates to the actions of the First Minister. It is not about the truth or otherwise of the allegations of impropriety against Mr Sargeant. That being so, there can be no certainty that evidence of the sort the Claimant is concerned about will ever figure in the Investigation. Even if it does, whether the prejudice feared by the Claimant arises at all will depend on how the Investigator exercises his powers in the course of the Investigation. It may never arise.

108. In the second place, even if in future the process operates in the manner the Claimant fears, we do not consider, in an investigation of the sort and scope in issue in this case, that fairness (whether under Article 8 ECHR, or at common law) does require that the Claimant (or her lawyers) be permitted to attend all evidential sessions or have the opportunity to question all witnesses. We consider that the inquisitorial procedures provided for in the OP, which place the Investigator at the centre of the procedure, are permissible (and for that matter, appropriate and common) procedural provisions in inquiries of this kind. Our reasons for this conclusion are the same as set out below at paragraphs 114 – 118.

(4) Remaining Issue: Was the notice to staff unlawful?

109. The remaining matter under challenge relates to the notice to staff issued on 15th June 2018. This was one of the five particular decisions in respect of which the Claimant seeks relief and a quashing order (see above at paragraph 52).

110. This does not arise under the rubric of legitimate expectation or in connection with the OP. This concerns the notice issued on 15th June 2018 by the Permanent Secretary instructing staff to forward any relevant evidence in relation to the Investigation to the attention of the Director of Governance, the HR Director or her office (see paragraph 39 above). Whilst the original notice may have been clumsily worded, there is no evidence that it was designed to deter staff from coming forward or was perceived as such. The notice was, in any event, quickly withdrawn and replaced and so the matter became academic.

Relief

111. We turn, finally, to consider the particular aspects of the OP in respect of which the Claimant seeks relief and a quashing order (see paragraph 52 above).

112. For the reasons we have given in relation to the First Issue, it is right that we should formally quash the four aspects of the OP specifically challenged by the Claimant. These matters were part of a process of revision of the OP which took place in breach of their legitimate expectation. As we have held, these expectations were in the nature of a 'procedural' expectation (see paragraph 92 above). These four aspects are the following:

(1) that the OP should not empower the Independent Investigator to compel witnesses to attend to give oral evidence and/or to produce evidence (OP, paragraph 12);

(2) that any oral evidence given to the Independent Investigator should be heard in private (OP, paragraph 30);

(3) to empower the Independent Investigator to refuse to permit the Claimant and the family of Mr Sargeant to attend hearings if attendance will cause a witness to withdraw his or her consent to give evidence (OP, paragraph 30);

(4) to refuse to permit the Claimant and the family of Mr Sargeant to ask questions of any witness through their legal representatives (OP, paragraph 32).

113. However, in the event that the Permanent Secretary reconsiders these aspects of the OP in the light of our Order and Judgment, it is also right that we should express our views as to the justifiability of these four particular provisions under challenge.

114. As to (1), *compulsion of witnesses*, we see no substantive error of law in a decision that the Investigator should not have powers of compulsion. The First Minister has no power to compel witnesses in a non-statutory inquiry or to empower the Investigator to do so. On this basis, this aspect of the Claimant's complaint comes to the contention that the First Minister was, in the circumstances of the present case, compelled to establish an inquiry under the Inquiries Act 2005. Yet, the question of whether to hold a statutory or non-statutory inquiry is entirely a matter of discretion of the First Minister. The power under the 2005 Act is broadly framed. The decision to hold a non-statutory inquiry in the present case has not been challenged in these proceedings. We have seen no basis upon which such a challenge could be made.

115. Similarly, as to (2) and (3), *witness evidence to be heard in private*, in the circumstances of the present case, we see no legal principle that requires an approach different to that ultimately included in the OP. The specific provisions relating to these aspects are set out in paragraph 30 of the OP:

> "*30. It is intended that any oral evidence will be heard in private. Those present when oral evidence is taken shall be confined to the Investigator, Counsel and Solicitor to the Investigation, the Secretariat, the witness and their legal representative(s), and any other person(s) who the Investigator determines (a) has a sufficient interest in the subject matter of the evidence; and (b) it is necessary in the interests of justice should attend. Where the Investigator permits such a person to attend to hear a witness give evidence he may do so on such conditions as he considers appropriate. The Investigator may refuse, or revoke, such permission if attendance will cause a witness to withdraw their consent to give evidence. The Investigator shall refuse or revoke such permission for all or part of any evidence where this is necessary to ensure that the requirements of paragraph 17 are complied with. Any witness giving evidence to the Investigator may decline to answer any question in the presence of such persons in circumstances where the witness considers that the answer to the question may lead to the requirements of paragraph 17 not being complied with.*"

116. In all the circumstances, and given the nature of the Investigation (non-statutory), the subject matter of the Investigation (the focus being the actions and decisions of the First Minister, not the conduct of Mr Sargeant), and the need to encourage the attendance of witnesses and to ensure that they gave their best evidence, these flexible arrangements were a permissible option. They are not inherently unfair to the Claimant (or for that matter, to any of the Core Participants). Further, there was no evidence to suggest that the decision to have witness evidence heard in private was made other than for proper motives, in particular, concern for the privacy of complainants likely to come forward.

117. As to (4), *no questioning by claimant's lawyers,* the same conclusion applies. The specific provisions relating to these aspects are set out in paragraph 32 of the OP:

> "*32. Any person may provide the Investigator in advance, in writing, with questions that that person wishes the Investigator to put to any witness during the taking of oral evidence. It will be for the Investigator and Counsel to the Investigation to determine whether or not, and the conditions upon which, any such questions will be asked. Where any person has been permitted to attend during the taking of oral evidence in accordance with paragraph 31 the Investigator may permit such further questions to be asked, through the Investigator or Counsel to the Investigation, as he thinks fit. No person will be permitted to ask questions of any witness in any other manner, whether directly or through their own or another legal representative.*"

118. It is not uncommon for inquiries such as the present to be inquisitorial in nature, *i.e.* that questioning of witnesses is carried out by the tribunal of inquiry or counsel to the inquiry. In all the circumstances, and for similar reasons given above, it cannot be said that an inquisitorial process was unfair to the Claimant or to any of the Core Participants.

Decision

119. For the reasons given above, the Claimant succeeds in her judicial review on the first ground, legitimate expectation. The decisions taken in May 2018 in respect of the content of the OP were taken unlawfully. We consider that the alterations made to the OP at that time should be quashed. This will affect paragraphs 30 and 32 of the Operational Protocol. We will receive submissions from Counsel as to the precise nature of the relief that should be ordered.

JUDICIARY OF
ENGLAND AND WALES

PRESS SUMMARY

27th March 2019

The QUEEN (on the application of BERNADETTE SARGEANT) and

FIRST MINISTER OF WALES and others

[2019] EWHC 739 (Admin)

DIVISIONAL COURT

Lord Justice Haddon-Cave, Mr Justice Swift.

BACKGROUND TO THE CLAIM

Mrs Sargeant challenged decisions taken, in the early part of 2018 by Carwyn Jones, then the First Minister of Wales. Those decisions had concerned the procedures to be followed by an Independent Investigator, appointed by Mr Jones to look into his own actions in relation to Carl Sargeant.

Mr Sargeant, an Assembly Member, had held the office of Cabinet Secretary for Communities and Children. Mr Jones removed him from that post on 3rd November 2017. On 7th November 2017 Mr Sargeant was found dead at his home in Connor's Quay, having taken his own life.

In these proceedings Mrs Sargeant contended that Mr Jones ought not to have taken the decisions he did relating to the Investigator's procedures, because his own actions were the subject matter of the investigation. She contended that Mr Jones had acted unlawfully at common law, because he had acted in a way that was unfair, and she contended that Mr Jones' decisions were in breach of her rights under the Human Rights Act 1998.

JUDGMENT

The Divisional Court granted the application for judicial review. The procedural decisions that were taken will need to be reconsidered.

REASONS FOR THE JUDGMENT

The Court concluded that, in taking decisions on the procedures to be followed by the Investigator, Mr Jones had acted contrary to representations made in a Press Statement issued on 10th November 2017, that the arrangements for the investigation would be made separately from his office. In the circumstances of this case, those representations were legally enforceable **[64] – [77]**, and it was not reasonable for Mr Jones to depart from them **[78] – [93]**.

The Court accepted that the procedural arrangements adopted for the investigation were, in principle, arrangements that could, lawfully, be adopted for an investigation of this type **[113] – [118]**. However, in light of what had been said in the 10th November 2017 Press Statement, it had been unlawful for Mr Jones to have been involved in the decisions to adopt those arrangements.

The Court rejected Mrs Sargeant's remaining grounds of challenge, including the challenge under the Human Rights Act 1998 **[94] – [110]**.

References in square brackets are to paragraphs in the judgment.

NOTE:

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at: https://www.judiciary.uk/judgments/.