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Delivered: 29/11/00

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (CROWN SIDE)

IN THE MATTER OF AN APPLICATION BY KATHY HINDES FOR JUDICIAL REVIEW

COGHLIN J

At the time of swearing her original affidavit, in March 2000, the applicant, Kathy Hindes, was booked into the Jubilee Maternity Hospital ("Jubilee") where she expected her fifth child to be born in June 2000. The applicant was then the mother of four children, aged from 4 to 13 years, all of whom had been born at the Jubilee. In the course of these proceedings the applicant seeks to challenge the decision taken by the Minister for Health, Social Services and Public Safety, Ms Bairbre de Brún, on 27 January 2000 that a new maternity hospital should be built on the Royal Group of Hospitals site.

Factual Background to the Proceedings

The impugned decision in this case has a long and somewhat controversial history much of which I recorded in detail in the course of giving judgment in *Re: Buick's Application for Judicial Review* [1999] NIJB 97. I

refer to the account therein set out which I do not propose to rehearse unnecessarily at this juncture. In *Re: Buick's Application for Judicial Review* I granted certiorari to the applicant for the purpose of quashing a decision taken by the then Minister for Health, Anthony Worthington MP, centralising maternity services at the Royal Maternity Hospital.

The judgment in *Re: Buick's Application* was delivered on 3 June 1999 and in July 1999 the Department of Health & Social Services ("the Department") published a consultation paper entitled "Maternity Services at the Jubilee and Royal Maternity Hospitals" with an introduction by the then Minister for Health and Social Services, Mr John McFall. This document was distributed to some 2,000 recipients and the consultation process was also widely advertised in the press in Northern Ireland. More than 5,000 representations were submitted to the Department in response to the consultation paper and these included submissions made on behalf of the Jubilee Action Group ("JAG") and the Joint Liaison Group of RMH ("JLG"). The Department also commissioned a Policy Appraisal and Fair Treatment ("PAFT") analysis. The Minister held meetings with both the JAG and JLG, presentations were received from the BCH Trust and RGH Trust, both hospitals were visited and the view of the Assembly Health Committee was considered in addition to administrative and professional medical, nursing, legal and economic advise from within the Department. The consultation paper identified both long-term and interim options for the location of maternity services and these were made the subject of High Level Economic

Appraisals carried out for the Department. An analysis of the responses to the consultation paper, based on advise from the Department's medical, nursing, economic and legal advisors, was prepared by Mr Brian Grzymek the Director of Performance Review and Secondary Care in the Health and Social Services Executive of the Department of Health & Social Services. The consultation period was formally extended from 22 October until 5 November 1999 and again, unofficially, until 25 January 2000. On 25 January 2000 Mr Grzymek submitted the materials to which I have referred, together with his own recommendations, to Ms de Brún who had indicated that she wished to announce her decision before the end of the month. The High Level Economic Appraisal of the long-term options identified in the consultation paper indicated a very close similarity between the weighted scores allocated to the option represented by locating the new hospital at the Royal site and the option represented by locating it at the City site. The distinction was a matter of a single point or mark in relation to "clinical effectiveness". The Appraisal noted that, in terms of clinical effectiveness, the key issue was links to other services and that the Royal site scored slightly higher because of the direct access to the Royal Belfast Hospital for Sick Children and the scheduled amalgation of Accident and Emergency on the Royal site whereas, by comparison, the City site offered easier access to adult Intensive Care and Gynaecological Oncology. The Minister, Ms de Brún, reflected the finely balanced nature of the comparison when she announced her final decision, observing:

> "The arguments from the consultation process and my Department's own analysis underlined the need to provide a new-build maternity unit. The choice between a new-build on the BCH or RGH sites was a close one. In the final analysis, the clinical arguments came down to the potential linkages of the new hospital to other on-site clinical services. My conclusion was that maternity services would be more clinically effective if located adjacent to regional paediatric services at the Royal Belfast Hospital for Sick Children and near to the RGH A&E Department."

The Statutory Framework

The head of the Department is the Minister of Health, Social Services & Public Safety by virtue of Article 3 of the Departments (Northern Ireland) Order 1999 and by Article 4(*a*) of the Health & Personal Social Services (Northern Ireland) Order 1972 it is the duty of the Department …

> "To provide or secure the provision of integrated health services in Northern Ireland designed to promote the physical and mental health of the people of Northern Ireland through the prevention, diagnosis and treatment of illness."

In accordance with Article 5 (1) of the 1972 Order, the Department is required to provide throughout Northern Ireland hospital accommodation and medical, nursing and other services "to such extent as it considers necessary". Article 7(1) of the same Order provides that the Department shall make arrangements for the prevention of illness, the care of persons suffering from illness or the after-care of such persons "to such extent as it considers necessary." Article 8(1) which refers to the "care of mothers and young children" provides that:

> "The Department shall make arrangements, to such extent as it considers necessary, for the care, including in particular the medical and dental care, of expectant and nursing mothers and of young children."

The effect of these statutory provisions was to afford the Minister a wide general discretion in determining the location of the new-build maternity hospital. In my view it is important to emphasise that it is the Minister, with the benefit of her experienced expert advisors, to whom Parliament has entrusted this difficult and sensitive decision and the court's role is limited to ensuring that any decision is lawfully reached in accordance with the well known principles set out in *Association Provincial Picture Houses Limited v Wednesbury Corporation* [1948] KB 223, *Tesco Stores Limited v Secretary of State for the Environment* [1995] 2 All ER 636, *R v Radio Authority, Ex parte Bull* [1998] QB 294 and many other similar authorities.

For the purposes of these proceedings the applicant was represented by Mr Weir QC and Mr Lockhart, while Mr Weatherup QC and Mr McCloskey QC appeared on behalf of the respondent. I wish to acknowledge the considerable assistance that I derived from the clear and well-constructed oral and written submission of counsel.

In the course of opening the application before me Mr Weir QC helpfully confirmed that the applicant's complaint was limited to the long-term option, namely, the decision to build a proposed new maternity hospital on the Royal site and he also drew my attention to a number of other

amendments that required to be made to the Order 53 statement as a result of changes in circumstances since the institution of the proceedings.

In view of some of the publicity attendant upon the publication of the original decision by the Minister I consider that I should record that at the commencement of the hearing the applicant, through her counsel, formally confirmed that she did not intend to pursue any claim that the Minister's decision had been the product of, or influenced by, any element of bias, political or otherwise.

Without, I hope, doing too much injustice to the breadth and detail of the submissions advanced by Mr Weir QC, it seems to me that the applicant's attack upon the impugned decision may be considered under three separate headings:

1. The Minister's Alleged Failure to Properly Consider the Implications of Separating Obstetrics from Gynaecology

Since no specific factors are identified as relevant within the statutory framework, it is necessary to determine whether this is a factor that any reasonable Minister ought to have taken into account and, if so, whether the Minister failed to do so.

Two separate groups of highly qualified and distinguished experts in the field have now considered this problem. The Acute Hospitals Reorganisation Project (the "McKenna Committee") emphasised that Maternity, Gynaecology and Neonatology should ideally be together and the Medical Review Panel (the "Donaldson Committee") concluded that the most

pressing requirement was to "bring together the Maternity, Neonatal and Gynaecology services that were split between the BCH and RGH sites". The latter Committee felt that, until this was done, the provision of these services for Belfast and the provision of such specialist services for the whole of Northern Ireland would fail to reach their full potential. The Donaldson Committee agreed with the McKenna Committee that unification of these three services was a central issue and concluded that gynaecology services should be located on the same site as obstetric services, given that the same medical staff in general provided both obstetric and gynaecological services. This Committee also noted that the Royal College of Obstetricians and Gynaecologists recommended strongly that obstetrics and gynaecology services should be on the same site. Ultimately, the Donaldson Committee recommended that a new unified maternity block should be developed with direct access to the Royal Belfast Hospital for Sick Children and that a gynaecology unit should be created with the potential to develop further reproductive medicine and gynaecological oncology services (except for radiotherapy) on the same site as the Regional Perinatal Centre. In such circumstances the location of gynaecological services would clearly appear to be an important relevant factor in determining the ultimate location of the new maternity hospital.

There seems to be no doubt that the Department did accept that it was important to consider links between maternity and gynaecological services but it is clear from the terms of the July 1999 consultation paper that, at that

stage, a decision had already been taken to defer any consideration of the ultimate location of gynaecology services. Thus, the "background" section of that paper contained the following interesting statement:

> "This consultation is not about the future of either gynaecology services or paediatric services. However, in deciding the way forward for maternity services, it is important to consider their links to these services."

At paragraphs 8 to 14 of his paper analysing the consultation responses Mr Grzymek outlined the argument in favour of not separating general gynaecology services from gynaecological oncology and, in the course of doing so, he acknowledged that both the McKenna and Donaldson reports had viewed the combining of obstetrics and gynaecology upon one site as being a high priority. He then went on to express the Department's views in the following terms at paragraph 15:

> "In summary, the Department's professional advisors take the view that this is not a strong argument. The future provision of gynaecology services is an important, but separate issue that should not be given undue weight in determining the location of obstetric services. Whilst the BCH site would have a marginal advantage in keeping gynaecological oncology and other gynaecology services together, choosing the RGH site would not adversely affect the provision of gynaecological oncology, or necessarily split gynaecology from obstetrics."

In the circumstances, while he accepted that the Minister had been presented with a "fait accompli" in the separate consideration of obstetrics and gynaecology, Mr Weatherup QC submitted that, in any event, the linkage had been adequately evaluated.

Further consideration of the separation of obstetric and gynaecology services revealed that it appeared to have its origin in the deliberations of the body set up by the Royal Group of Hospitals Chief Executive to produce a business case for the construction of a new central Belfast maternity hospital at the Royal site subsequent to the ministerial decision of Mr Worthington MP, the then Health Minister, who adopted the recommendation of the Donaldson Committee in November 1997. Two Project Boards were appointed under the joint title of "Maternity Services Project Board" to oversee, respectively, the preparation of the business case to support the building of the new maternity hospital at the RGH site and the transfer of appropriate staff and services from BCH Trust to RGH Trust upon an interim basis. The Boards comprised representatives from both the RGH and the BCH Trust, together with professional staff from Health Estates. Mr John Cole, a professional architect, chaired the Project Board and the inaugural meeting took place on 14 January 1998. On 4 June 1998 Mr Cole made a presentation to the Maternity Services Project Task Group Workshop as a result of which it was decided to recommend to the Project Board that all but emergency gynaecology services should be excluded from the new maternity hospital thus facilitating ongoing discussions on the long-term configuration of gynaecology services without delaying the business case process for the new hospital. Mr Cole advised that the ultimate future configuration of gynaecology services was an unresolved issue and the Board subsequently accepted recommendations from the Group that,

(*a*) Gynaecological oncology should be provided in the BCH Tower.

(*b*) All other gynaecology services should be included in the RVH Redevelopment.

(*c*) The construction of a new maternity hospital should proceed on a site adjacent to the Royal Belfast Hospital for Sick Children.

All meetings of both Project Boards were suspended in June 1999 consequent upon the decision in *Re: Buick's Application*. Mr Weatherup QC accepted that the decision by the Maternity Services Project Board to accommodate only pre-natal gynaecology within the new maternity hospital and to revisit the long-term location of other gynaecology services at a future time had never been formally adopted by the Department.

It seems clear that, when considering her decision in January 2000, the Minister was not informed that the process of separately considering the location of maternity and gynaecology services had its origin in a decision taken by the body charged with responsibility for overseeing preparation of the business case to support the construction of a new maternity hospital on the Royal site in furtherance of the decision promulgated by Mr Worthington in November 1997, a decision which was subsequently quashed by this court in June of 1999. Nor does it appear to have been made clear to the Minister that she was free to choose whether both issues should be determined together or whether one or the other or both should be further deferred. The effect of this approach is particularly well illustrated at paragraph 15 of Mr Grzymek's paper analysing the consultation responses and it seems to me

that it is likely to have influenced both the way in which the Minister regarded the factor of linkage between gynaecology and maternity services and the weight which she attributed to that factor. I bear in mind the well known principle, re-emphasised in *Tesco Stores Limited v Secretary of State for the Environment* [1995] 2 All ER 636, that weight is a matter of judgment for the decision maker but, in this case, as a result of the advice that she received, the Minister was effectively prevented from exercising an independent judgment as to weight. Furthermore I consider that the Minister did not have the relevant information to ask and correctly answer the question – *Secretary of State for Education and Devine v Thameside Metropolitan* 13 C [1977] AC 1014.

2. The Proximity of an Accident and Emergency Department on the Royal site

In "Seeking Balance", published in April 1996, the McKenna Committee recommended that Accident and Emergency services should be provided only on the Royal site with Belfast City Hospital having a new arrangement for the direct admission for emergencies to its beds. Neither Dr McKenna nor Professor Donaldson expressed the view that proximity of an Accident and Emergency Department was a significant factor in locating maternity services. It seems that the argument that this linkage was an important factor first emerged in the submissions made on behalf of the Royal in response to the consultation paper and this is clearly illustrated by paragraph 4 of Mr Grzymek's affidavit of 5 July 2000. There seems to be

no doubt that it was a key factor in the decision making process. The Department's "High Level Economic Appraisal" of 24 January 2000 balanced direct access to the Royal Belfast Hospital for Sick Children and the proximity of Accident and Emergency on the Royal site against easier access to adult Intensive Care and Gynaecological Oncology on the City site. In the analysis of consultation responses the Department advised that greater weight should be given to Accident and Emergency and Paediatric linkages on the Royal site and Mr Grzymek's briefing paper to the Minister recorded that the Department's professional advisors considered that this constituted a clinical advantage. The Minister herself, in announcing her decision on 27 January 2000, emphasised that the choice between the City and the Royals sites was "a close one" and that "in the final analysis" she had concluded that maternity services would be more clinically effective if located adjacent to regional paediatric services and the Accident and Emergency Department on the Royal site.

It seems to me that, in such circumstances, the Minister committed essentially the same breach of the requirements of procedural fairness which grounded the decision of this court in *Re: Buick's Application*. Despite the prolonged history of consultation and debate, the Minister again permitted those advancing submissions on behalf of one site, namely the Royal, to introduce a new factor, which ultimately assumed significant importance in the course of the decision making process, about which those seeking to advance the case on behalf of the other site, the City, were not given any

opportunity to make such representations as they may have thought fit. Taking into account the particular circumstances of this case, I consider that to do so was clearly in breach of the authorities to which I referred in *Re: Buick's Application* including *R v Brent London ex parte Gunning* (1986) 84 LGR 168; *R v Devon County Council ex parte Baker & Another* [1995] 1 All ER 73 and see also *Southern Health & Social Services Board v Lemon* (unreported Northern Ireland Court of Appeal 1995). It is not really clear why this occurred although, as I have noted above, the consultation period was unofficially extended until 20 January, the date upon which the Minister received the letter from Dr Joe Henderon, Chairman of the Health, Social Services and Public Safety Committee and, thereafter, Mr Grzymek's memorandum of 25 January 2000 suggests that the Minister injected a significant element of urgency into the process by indicating that she wished to announce her decision before the end of the month. An additional factor may have been the somewhat unusual decision not to create notes, minutes or other records of the Department's meetings with the Minister's medical, nursing, economic and legal advisors other than Mr Grzymek's submission of 25 January 2000 and the appendices thereto.

3. The Proximity of the Intensive Care Unit at Belfast City Hospital

In the responses to the 1999 consultation document this was a factor raised in favour of locating the maternity hospital at the BCH site. It was dealt with by Mr Grzymek in paragraphs 16 to 20 of his paper analysing the consultation responses. Mr Grzymek noted that the number of women

requiring transfer to the ICU during or after labour was relatively low, some 10 to 15 per year but that the risk to the health of mothers was high and emergency transfer was necessary. At paragraph 19 Mr Grzymek recorded that:

> "Consultation responses did not cite any empirical evidence of better clinical outcomes as a result of direct transfer. However the Department's professional advisors are satisfied that there would be a clinical advantage if such transfers were direct rather than by ambulance. However, a combined unit could provide dedicated high dependency care, first diminishing the need for transfer and ensuring expert stabilisation for those mothers requiring transfer."

Mr Grzymek summarised the argument at paragraph 20 by noting that it was valid but that it failed "… to consider the potential for critically ill mothers to be expertly managed within the combined maternity unit".

Mr Grzymek again referred to the clinical advantage offered by the closer links to adult ICU on the BCH site at paragraph 23 of his briefing document of 25 January 2000. During the course of this reference he noted that the professional advisors considered:

> "… that a better solution to meeting the needs of the very small number of mothers requiring urgent monitoring and support would be to provide immediate access to high dependency beds within the combined maternity unit. This would be equally true for either site."

The "high dependency unit" is designed to provide enhanced care for those who are not seriously ill enough to warrant admission to the ICU and since such a unit could be incorporated into a new maternity hospital at either site,

the factor is really neutral. In such circumstances, Mr Weir criticised the use of the phrase "better solution" as being inappropriate and I consider that there is substance in this submission. Again, perhaps a little more time for reflection might have produced a more accurate analysis of this factor.

The Exercise of the Court's Discretion

Mr Weatherup QC submitted that, even if the applicant established one or more of her grounds for judicial review, nevertheless, the court should exercise its discretion not to grant relief in the particular circumstances of this case. He argued that, in all likelihood, the Minister would have come to the same decision even if she had been properly and accurately advised as to the circumstances in which the earlier decision to separate gynaecology and maternity services had been reached and he sought to persuade the court that, having been given an opportunity during the course of these proceedings, the applicant had not put forward any representations relating to the linkage to the Accident and Emergency Department which would have been likely to have changed the Minister's mind. Furthermore, Mr Weatherup argued that, whatever criticism might be made of the terms in which it had been represented in the briefing papers, it was clear that, ultimately, the Department's representatives had advised the Minister that the linkage with adult Intensive Care was an advantage in favour of the BCH site – see the Department's "High Level Economic Appraisal of the Long-term Options" of 24 January 2000, Mr Grzymek's analysis of the consultation responses, his

briefing paper to the Minister of 25 January 2000 and paragraphs 11 to 13 of Mr Grzymek's affidavit of 5 July 2000. Mr Weatherup QC also drew my attention to paragraphs 10 and 11 of his third affidavit of 25 September 2000 in which Mr Grzymek set out the deleterious affect on staff morale and working relationships which has resulted from the years of delay which have elapsed in the process of attempting to finally determine the future provision of maternity services. Mr Grzymek also referred to the "virtual blight" on finalising decisions about the location of other important services which has resulted from this delay and the consequent detrimental effect upon the welfare of patients. Mr Weatherup QC referred the court to the remarks of Sir John Donaldson MR in *R v Monopolies and Mergers Commissions ex parte Argyle Group Plc* [1986] 1 WLR 763 at 774-775 when he said:

> "Lastly, good public administration requires decisiveness and finality, unless there are compelling reasons to the contrary. The financial public has been entitled to rely upon the finality of the announced decision to set aside the reference … this is a very long time in terms of a volatile market and account must be taken of the probability that deals have been done in reliance on the validity of the decisions now impugned."

There is no doubt that the decision making process relating to the siting of the new maternity hospital has taken up an inordinate period of time and it is not difficult to sympathise with the concerns expressed by Mr Grzymek. While I bear in mind the quotation from the Master of the Rolls in *Monopolies and Merger Commission ex parte Argyle Group* cited above, I note that in that particular case Sir John Donaldson came to the conclusion that

there was little doubt that the Commission, or a group of members charged with the conduct of the reference would have reached the same conclusion as the chairman. In *R v AG ex parte Imperial Chemical Industries* [1987] 1 CMLR 72 Lord Ackner said, at page 109:

> "It must be wrong in principle, where a litigant has succeeded in making good his case and has done nothing to disentitle himself to relief to deny him any remedy, unless, at any rate, there are extremely strong reasons in public policy for doing so."

I remind myself also of the observations of Bingham LJ, as he then was, in *R v Chief Constable of the Thames Valley Police ex parte Cotton* [1990] IRLR 344 at 353:

> "While cases may no doubt arise in which it can properly be held that denying the subject of a decision an adequate opportunity to put his case is not in all the circumstances unfair, I would expect these cases to be of great rarity. There are a number of reasons for this:
>
> 1. Unless the subject of the decision has had an opportunity to put his case it may not be easy to know what case he could or would have put if he had had the chance.
>
> 2. As memorably pointed out by McGarry J in *John v Rees* [1970] Chancery 345 at page 402 experience shows that that which is confidently expected is by no means always that which happens.
>
> 3. It is generally desirable that decision makers should be reasonably receptive to argument, and it would therefore be unfortunate if the complainant's position became weaker as the decision maker's mind became more closed.
>
> 4. In considering whether the complainant's representations would have made any

> difference to the outcome the court may unconsciously stray from its proper province of reviewing the propriety of the decision making process into the forbidden territory of evaluating the substantial merits of a decision.
>
> 5. This is a field in which appearances are generally thought to matter.
>
> 6. Where a decision maker is under a duty to act fairly the subject of a decision may properly be said to have a right to be heard, and rights are not to be lightly denied."

In the circumstances of this case the fourth, fifth and sixth reasons referred to by Bingham LJ, as he then was, seem particularly apposite. In this case the Minister required urgent advice and seems to have taken the decision within two days of receiving the briefing papers. In my opinion she did not properly appreciate the nature of her discretion in relation to the linkage between gynaecology and maternity services. She herself expressed the choice of sites to be "close" and "in the final analysis" one of the two factors which persuaded her of the clinical argument in favour of the Royal site was its proximity to the A&E Department, a linkage which had not previously featured during the long history of the decision making process and about which those seeking to argue in favour of the BCH site were given no opportunity to make representations.

In the circumstances, I am not persuaded that I should exercise my discretion to refuse relief and, accordingly, I propose to grant certiorari to quash the Minister's decision.

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JUDGMENT

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