

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN:

OMAGH DISTRICT COUNCIL

Appellant

and

**THE MINISTER WITH RESPONSIBILITY FOR HEALTH,
SOCIAL SERVICES AND PUBLIC SAFETY**

Respondent

Before: Nicholson LJ, McCollum LJ & Higgins J

NICHOLSON LJ

Introduction

[1] This is an appeal by Omagh District Council (the Council) under Order 53 Rule 10(8) of the Rules of the Supreme Court from an order made by Kerr J (as he then was) made on 9 May 2003 whereby he dismissed the Council's application for leave to apply for judicial review of the decision of the Minister with responsibility for Health, Social Services and Public Safety (the Minister) made on 24 February 2003. The Council was represented by Mr Larkin, QC, and Mr Scofield and the Minister was represented by Mr Morgan, QC, and Mr Maguire. Counsel on behalf of the Minister, the proposed respondent to the application for leave, attended the hearing before Kerr J on the invitation of the court and attended as respondent to the appeal before this court. There is also an application before this court under Order 59 Rule 14(3) renewing leave to apply for judicial review of the Minister's decision.

[2] The decision of the Minister was that the site for the new acute hospital for the South West of Northern Ireland should be at a location to the North of Enniskillen. This was an extremely important decision for the Council as the only other serious contender for the new hospital was a site at or near Omagh.

[3] The challenge to the decision of the Minister was based on the contention that the Minister failed to investigate adequately the contribution which Health and Personal Social Services available in the Republic of Ireland might make to the issue as to whether the hospital should be sited north of Enniskillen or at or near Omagh.

[4] The judge took the view that the Minister had adequately investigated the situation in the Republic of Ireland for the reasons which he set out in his judgment, and to which we will return at a later stage, held that it was entirely reasonable that he should decide the matter when he did and considered that the applicant had not raised an arguable case.

GROUND FOR REFUSING LEAVE TO APPEAL

[5] Before we consider the arguments on behalf of the Council and the facts placed before us we point out that the court will refuse permission to claim judicial review unless satisfied that there is an arguable ground for judicial review on which there is a realistic prospect of success (see Fordham's Judicial Review Handbook, 3rd Edition, at paragraph 21.26).

THE ARGUMENTS ON BEHALF OF THE COUNCIL AND THE FACTS PLACED BEFORE US

[6] In their written skeleton argument and in oral argument before us counsel for the appellant indicated that the challenge related to the manner in which the Minister dealt with the possibility of hospital cover for Northern Ireland patients in hospitals in the Republic of Ireland. As patients' accessibility to hospitals was a cornerstone of the decision as to where to site the new acute hospital the manner in which the Minister dealt with this issue was necessarily very influential (if not determinative) in making his decision.

[7] They contended that the Minister failed to properly address this issue in that (i) he failed to take into account, adequately or at all, the possibility and/or capacity of hospital cover from the Republic of Ireland as a standard source from which Northern Ireland's healthcare needs could be met, particularly in light of Strand 2 of the Belfast Agreement, (ii) that the Minister improperly took into account "caveats" in a letter from the Republic of Ireland's Minister for Health and Children dated 23rd January 2003 which dealt with the possibility of hospitals in the Republic providing services for Northern Ireland patients; (iii) that the Minister made no attempt to investigate, adequately or at all, whether what he described as "caveats" preventing reliance on hospitals in the Republic of Ireland might be removed or diminished and failed to contact the Republic of Ireland's Minister for further information and/or clarification as invited by him; (iv) that in acting as he did the Minister breached the appellant's procedural and legitimate

expectations that he would investigate adequately in the context of his decision on the site of the new acute hospital for the South West the possibility and/or capacity of hospital cover from the Republic of Ireland as a standard source from which Northern Ireland's healthcare needs could be met.

[8] It was argued that the Minister failed to carry out his duty of enquiry adequately, not least in view of Strand 2 and the Annexe thereto of the Belfast Agreement.

[9] Reliance was placed on the affidavit of Mr McSorley, Chief Executive of the Council, who stated in paragraph 1 of his affidavit that he was familiar with the Council's involvement in the lengthy decision making process leading to the decision of the Minister and of the review of the current provision of acute hospital services on health service structure in Northern Ireland to which he referred in paragraph 2 of his affidavit. He stated that,

"A great deal of representations were made to the Minister and the Department in relation to the siting of the new acute hospital for the South West and the Council participated in the decision making process under the umbrella grouping of the Hospital Campaign for the Rural West (HCRW) Steering Group, a group formed in June 2001 to respond to the report of the Government's Acute Hospital Review Group (AHRG)."

This report is frequently referred to as the Hayes Report and we have referred to it as such or as the report of the AHRG in the course of this judgment.

At paragraph 3 he stated,

"A key consideration, if not the paramount consideration, in the Minister's decision to site the new hospital at Enniskillen was that of accessibility for the population of the South West."

A vital consideration, he said, had been the use that could be made by persons living in the South West of Northern Ireland of acute hospital facilities in the Republic of Ireland and he argued that if one took into account the capacity of acute hospitals in the Republic of Ireland to deal routinely with emergency healthcare needs of persons from the South West, this led to the clear conclusion that the most appropriate site for the new acute hospital was at or near Omagh. At paragraph 4 he referred to the Hayes Report which was published in June 2001 and recommended a site north of Enniskillen for the new hospital primarily on the grounds of accessibility and at paragraph 5

referred to a report commissioned by HCRW from the York Health Economics Consortium (YHEC). This report dealt in detail with the issue of accessibility and he claimed that the evidence produced by YHEC showed that the Enniskillen option was “the option with the lowest potential catchment population and the greatest adverse impact on population access” and they came down strongly in favour of the Omagh location.

[10] In paragraph 6 he referred to the fact that the Department of Health, Social Services and Public Safety commissioned further research and published a consultation paper “Developing Better Services” in June 2002. This consultation document recommended the new hospital be sited to the north of Enniskillen although it stated that any new information would be taken into consideration before a final decision was made. At paragraph 7 he referred to a further submission by the HCRW in October 2002 including a report from a panel which conducted a public examination on behalf of the HCRW and a supplementary report from YHEC. He referred in paragraph 14 to the Department’s engagement with the authorities in the Republic and to the statements made by the Minister’s predecessor, Bairbre de Brun. At paragraph 16 he referred to the Minister’s announcement that he would make his decision on the issue of the site for the new hospital on 24 February 2003. He referred to a copy of a press release from the Department on 27 January 2003 in which the Minister disclosed that he had received a letter from the Minister in the Republic of Ireland dated 23 January 2003. At paragraph 20 he referred to the fact that after the release of the press statement the HCRW submitted another response to the Minister which contended that hospitals in Cavan or Sligo were capable of accommodating the patients living to the South and West of County Fermanagh and therefore that this strengthened the case for the siting of the new hospital at Omagh. At Paragraph 23 he argued on behalf of the Council that the Minister had appeared to close his eyes to the possibility of hospital cover from the Republic of Ireland as a standard or structured source from which Northern Ireland Healthcare needs could be met and expressed astonishment at this approach. He contended that this was all the more so when viewed in the content of the Department and the Minister’s prior statements on North/South co-operation and the provision for such co-operation in Strand 2 and the Annexe thereto of the Belfast Agreement. He argued at paragraph 24 that what was most surprising about the Minister’s approach was his heavy reliance on purported caveats in the letter of 27 January 2003 from the Republic of Ireland’s Minister for Health and Children. At paragraph 25 he submitted on behalf of the Council that the Minister’s reliance on the “caveats” in the Republic of Ireland Minister’s letter and the failure to take any steps to investigate whether these might be removed or diminished was unlawful and procedurally improper and in breach of a legitimate expectation that proper consultation on this aspect of the decision making process would take place and the responses to that and any further information properly taken into account. Rather the Minister had effectively discounted the issue of access to

hospitals in the Republic of Ireland. He had done so as a result of his own failure to seek proper information and had accordingly made his decision on the basis of a flawed understanding of the accessibility issue.

THE HAYES REPORT

[11] This report was commissioned in August 2000 and was published in June 2001. As is apparent from the contents of the report no one could complain about the lack of consultation, the details of which are set out at Chapter 1.4 to 1.18. At 1.20 it was indicated that morale was universally low, that they were told repeatedly that hospital services had been “cut to the bone” and that successive cuts had resulted in a lack of elasticity. Most importantly there was a need for a clear sense of direction, certainly about what was happening in and to the service, and confidence that things would get better. At 1.22 they stated that in keeping with a brief to consider the potential for co-operation with health care systems in the South they received briefings on arrangements there and held discussions with departmental officials and with the Minister. They also held discussions with health professionals in Dublin and informed themselves of the work of Comhairle na n-Ospidéal. They visited hospitals in Monaghan, Cavan, Sligo and Letterkenny and met health board officials and members and public representatives who asked to see them. They met with representatives from the Royal College of Physicians and Surgeons in Ireland.

[12] In Chapter 3 they pointed out that there had been a huge increase in waiting times for patients with a number of patients waiting 18 months or more for treatment increasing from 632 in March 1996 to 5,200 in March 2000. In Chapter 3.11 they stated that they believed that the current waiting times for treatment and outpatient consultations were totally unacceptable. At 3.33 they stated that to do nothing was not an option, that the status quo was unlikely to remain viable in the foreseeable future, the pressures that they had identified would not go away and, as they had seen, services in smaller hospitals could not be sustained unless changes were made, which were planned, systematic and radical. They concluded in Chapter 6 that the entire population of Northern Ireland should normally expect to be within one hour’s travel time of high quality emergency care and inpatient maternity services and in Chapter 7 sought to apply this principle to determine the future configuration of inpatient acute services at hospitals in Northern Ireland.

[13] They recommended the provision of these services at nine hospitals, of which one would be the new hospital for the South West of Northern Ireland. They discussed the location of a hospital for the South West at Chapter 7.20 and following, and emphasised that an issue that required to be addressed was where the hospital should be located to maximise access to acute services for the South West’s dispersed population of some 115,000 persons and

ensure that it attracted sufficient patients to sustain the safe delivery of a necessary range of high quality services. At 7.21 they stated that it was clear that it was not viable to have two hospitals in the South West to support key specialities on two sites. This was borne out by the professional views they received and by the Western Board's own deliberations on this issue. They rejected a suggestion that a new hospital for the South West should be on a green field site and the suggestion that the current one hospital on two sites model was not an appropriate long term solution for the population of the South West. They concluded that this model would inevitably result in some duplication of services and expressed a strong belief that a new hospital on a single site linked with others as part of a larger southern health and social care system represented the best way forward. At 7.24 they stated that they considered the options of a single hospital in Enniskillen, Omagh or on a green field site somewhere between the two, and, as we have stated, rejected the green field location.

[14] At Chapter 7.24 they concentrated their attention on a single site option at either Enniskillen or Omagh and stated at 7.25 that there was strong arguments for each. Sites would be available at both locations and each town would offer the necessary economic and physical infra-structure. Although an Omagh location would provide a slightly larger catchment, Enniskillen would provide better access for the relatively small dispersed population to the west of lower and upper Lough Erne. They also considered the potential for Sligo General Hospital to complement a hospital located in Omagh and meeting the needs of this small population but concluded that the condition of the road between Blacklion and Sligo involved travelling time in excess of an hour. While there were plans to improve some small stretches of this road it was unlikely that they would make a significant difference to travelling times. They did not express any view about Cavan/Monaghan Hospitals to which we will return. At 7.26 they stated that the issue was very finely balanced, there was no difference in the quality of service provided on either site; Omagh would provide a slightly larger caseload but would leave a larger number of people outside acceptable access times. Following the principles they had set out in Chapter 5, they concluded that Enniskillen offered the better location for a hospital providing emergency care and inpatient, maternity services. This conclusion was, they stated, not reached lightly but they believed that a location in and around Enniskillen provided cover for a wider geographical, albeit thinly populated, area and ensured that the people to the west of Lough Erne were not disadvantaged through impaired access to services.

[15] Their conclusion reflected the human geography of the area, took into account the fact that travel tended to be easier on an east-west access with Enniskillen midway on a strategic communication corridor between Belfast and Sligo. They recommended therefore that the necessary preparatory work should begin as soon as possible to identify a suitable location either at the

existing Erne Hospital site or at an alternative site to the north of Enniskillen. They also recommended that a modern local hospital facility should be developed in Omagh to provide the population in and around the town with access to a wide range of local hospital services. For the majority of services they would expect a new local hospital at Omagh to link into the new hospital for the South West at Enniskillen. This would be important as a means of ensuring the viability of a new South West hospital as part of the Southern Health and Social Care system, but they saw no reason why the new local hospital at Omagh should not also develop linkages with Altnagelvin where it was appropriate to do so.

[16] At 7.61 they stated that during the period 1994 to 2000 a number of acute services were removed from Tyrone County Hospital and the hospital now provided a range of local hospital services. Inpatient and maternity services were transferred to Craigavon Area Hospital in 1998, but more significant was the transfer to Craigavon of A&E and then general surgery in 1999. This left Tyrone County Hospital with minimal Anaesthetics and Radiology services and concerns were raised by Clinicians at Tyrone County Hospital. Their concern centred on the ability to continue to deliver emergency medical services in the absence of a surgical service. Subsequent visits by the Northern Ireland Council for Post-Graduate Medical and Dental Education and the Royal College of Physicians concluded with the withdrawal of training recognition, effective from August 2000.

[17] Clinicians from Tyrone County Hospital together with colleagues from Craigavon Hospital examined various models on which combined or single rotas might provide the required Anaesthetic cover and surgical opinion (viewed as vital to the maintenance of medical inpatients) to Tyrone County Hospital. However, they were unable to come up with a workable arrangement and in August 2000 the hospital ceased to provide emergency medical services.

[18] They pointed out at Chapter 7.65 that the experiences at Tyrone County Hospital highlighted the difficulties that arise when services are withdrawn from one hospital before there is evident capacity in another nearby to absorb the resultant demand. At the end of Chapter 7 they set out their vision of the local hospital of the future which would include Tyrone County Hospital.

[19] Chapter 12 was devoted to cross border co-operation in hospital services. They drew on material in two recently completed reports; one was on the evaluation of the co-operation and working together for health, gain and well-being in border areas, and the other was on cross border co-operation in health services generally. They pointed out inter alia, that ear, nose and throat services for Donegal, Cavan and Monaghan were provided from Omagh and referred to a proposal by Orthopaedic Surgeons in Northern

Ireland to link Enniskillen Hospital with Sligo. They pointed out that the overall level of cross border traffic in hospital services remained quite low and that there was clearly scope for development. Cross border co-operation in respect of development of policy had been slow although there had been some notable recent advances in the areas identified in the Good Friday Agreement. They recognised that there were a number of obstacles to cross border co-operation which included policy differences, funding issues, different methods of remunerating doctors, reciprocity, public acceptance, professional accreditation and insurance. They urged that these should not be viewed as insurmountable barriers but as challenges and opportunities to overcome in the interests of the population served. In Chapter 14 they envisaged four distinct phases for implementing their proposals. Phase 1 from 2001 to 2002 would give everybody (public, politicians, professionals, staff) the opportunity to digest and comment upon the ideas that lay behind the proposed changes and contribute to the thinking about implementation. Phase 2 (2002-2003) would involve a proposed strategic authority; this phase might last for 12 months or so. Phase 3 (2003-2008) would require the new structures to come into place.

[20] At Chapter 14.10 it was stated that it would help to build public confidence in the South West if the new hospital could be built in less than five years with services being provided from the new facility by 2006.

OMAGH HOSPITAL REVIEW STEERING GROUP

[21] In October 2001 a review of the Hayes Report was published by the Group. This was a carefully reasoned document setting out that Omagh District Council had established a Hospital Review Steering Group and that group had asked York Health Economic Consortium Limited (YHEC) to undertake a review of the methodology and findings of the AHRG Report in pursuit of its objective of securing a new sustainable area hospital in Omagh. The YHEC study made findings that a new acute hospital to serve the South West of Northern Ireland should be sited at or near Omagh with a community hospital at Enniskillen, rather than site the main acute services at or near Enniskillen as recommended in the AHRG Report. They argued that siting a new hospital in a more central location would ensure a larger and more viable hospital, there would be more A&E attendees which could support a level 2 department, maternity services and general acute services which would serve a larger population, and the sub-regional services of ENT and renal services would be retained in the locality. They analysed the decision making process of the AHRG and argued that there were a number of flaws, inconsistencies and omissions in it and in particular highlighted accessibility, sustainability, socio-economic factors and clinical criteria.

[22] The summary of the findings of the YHEC to support the case for a new acute hospital at Omagh was set out at Chapter 1.2. We have read both

the document submitted by the steering group and the YHEC report and noted their conclusions. But we do not consider that it serves any useful purpose to set them out in this judgment. The YHEC Report highlights the relevance of Cavan General Hospital as a potential source for patients from the south and west of Lough Erne. The contribution to the debate by the steering group and the YHEC was not and should not be confined solely to that statement. But it argued that the Hayes Report did not fully consider the implications of Cavan as a potential source of acute hospital services for that area of County Fermanagh, notwithstanding that the AHRG visited Cavan hospital in the course of their study. The contribution of the Group and of the YHEC study to the general debate cannot be underestimated.

DEVELOPING BETTER SERVICES

[23] In June 2002 the Department of Health, Social Services and Public Safety provided a paper entitled “Developing Better Services: Modernising Hospitals and Reforming Structures”. The Minister stated that the acute hospital’s review now in its final stages should not be seen in isolation. It was directly linked to work that the Minister had commissioned covering investing in health, building the way forward for primary care, best practice, best care and a review of community care. It stated that the 2002-2005 programme for Government committed the Executive to developing proposals for a modern acute hospital service with the declared expectation of taking decisions as to the way forward in the course of 2002. Chapter 4 addressed a model for future hospital services. The principles set out included access times to emergency care and maternity services in an appropriate facility. The minimum period achievable with the vast majority of people should be within 45 minutes and everyone normally should be within one hour of these services. Acute services must be refocused to achieve the concentration of expertise and experience required to deliver the highest possible levels of clinical care. Account had been taken of the Hayes Report and the outcome of the public consultation on its findings. It concluded that there should be nine acute hospitals and two enhanced local hospitals of which one would be the Tyrone County hospital.

[24] At Chapter 4.26 it was stated that analysis of the journey times to an acute hospital to the north of Enniskillen showed that some people served by the Tyrone County Hospital would have journey times approaching 60 minutes. Recognising that traffic volumes and other factors might push journey times over the hour at certain times of the day, it was proposed to site an enhanced local hospital in Omagh. At 4.51 and following, the site of the new acute hospital was considered and at 4.53 it was stated that the choice of locating the hospital in or to the north of Enniskillen, in Omagh or in a location elsewhere was finely balanced and further analytical work had been undertaken to guide this decision. The overriding concern was to ensure that the new facility met the acute service needs of the population. The

consultation on the AHRG Report had generated a number of detailed proposals as to the location of the new hospital and information was provided in support of each location. To further inform the decision-making process some additional analysis had been undertaken in assessing journey times within Fermanagh/Tyrone and between the counties and adjacent hospitals in the south (see appendix 5). An independent review and analysis of the reports supporting a number of locations/sites was commissioned; and activity and staffing data covering Sligo, Cavan, Monaghan and Letterkenny Hospitals were analysed in order to help to establish the current potential of these hospitals to contribute to the provision of acute services in Northern Ireland.

[25] Results of these analysis could be summarised as follows:

- (i) If the use of hospitals in the south was not taken into account and a new Fermanagh/Tyrone hospital was situated in or to the north of Enniskillen around 8,744 people in Fermanagh/Tyrone area would have travel times of over 45 minutes of whom 2,131 would be between 50 and 55 minutes travelling time from the hospital. None would be more than 55 minutes away from the hospital. This compared with an Omagh location where 24,250 people in the Fermanagh/Tyrone area would be more than 45 minutes away, of whom 21,234 would be more than 50 minutes away, with 9,749 more than 60 minutes travelling time from the hospital.
- (ii) If hospitals in the south were able to provide A&E and a full range of acute services to the population and this was factored into travelling times no one in Fermanagh or Tyrone would have to travel more than 55 minutes to an acute hospital regardless of the chosen location. In this scenario the differences between access times were much closer. If the hospital was located in or to the north of Enniskillen, around 6,525 people in the Fermanagh/Tyrone area would have travel times of over 45 minutes, none of whom would be more than 50 minutes away from the hospital. This compared with an Omagh location where 4,626 would be more than 45 minutes away, of whom 2,365 would be between 50 and 55 minutes away from the hospital.

[26] At Chapter 4.57 it was stated that there had been communication at a senior level between the Department of Health and Social Services and Public Safety and the Department of Health and Children concerning the potential of hospitals in the south to provide services to patients from the north. From this it was apparent from the current stage of planning for hospital services that there was uncertainty as to whether the relevant hospitals in the South would, over the longer term, deliver the capacity and services equivalent to those provided by the nine acute hospitals in the North. This degree of uncertainty had to be taken into account in deciding the best location of the

new hospital with a potential life span of 60 or more years. At 4.59 it was stated that, given the difficulties that the Erne and Tyrone County Hospitals were currently experiencing in maintaining acute services it was essential that a decision on the location for the new hospital be reached as quickly as possible. In these circumstances and on the information available, the balance of advantage lay in locating the new hospital in or to the north of Enniskillen. The proposal was firmly based on the available information and any new information emerging during the course of the consultation would be taken into consideration before reaching a final decision.

[27] At Chapter 4.71 to 4.75 there was a discussion about working in partnership with the south and illustrations were given at 4.72 of the North/South Ministerial Council (NSMC) establishing a group to consider the opportunities for developing partnerships covering the wider regional and super regional services. It had been tasked with identifying service areas/specialities for cross-border or all-island co-operation which could be of mutual benefit and there was further discussion at 4.73 and 4.74 about co-operation in which it was stated that the health departments in Northern Ireland and in the south were working collaboratively on A&E planning for major emergencies, co-operation on high technology equipment, cancer research and health promotion. At 4.75 it was stated that such collaboration was in the best interests of patients, North and South. It was important that the full potential of such co-operation was realised.

[28] At Chapter 6.7 it was stated that the proposed 9 acute hospitals should ensure that the vast majority of the population would normally access high quality acute hospital services including emergency care and maternity services within 45 minutes and that all of the population normally would do so within one hour. Appendices 2 and 5 also dealt with the siting of the new hospital in the South West.

[29] In October 2002 a response by the HCRW was published and again maintained that a new hospital for the South West of Northern Ireland should be located in or adjacent to Omagh and its conclusions were set out at Chapter 9. They argued that the location of a new acute hospital in the South-West of Northern Ireland should be based on the strategic imperatives already set by Government and/or legislation; the best accessibility that could be achieved for the greatest number of people, i.e. something much more meaningful than the flawed "Golden Hour" concept; equality for all isolated communities; recognising and reflecting recent successes and failures in terms of acute hospital service configurations in the West; aiming to achieve and maintain safe, high and quality clinical standards. This was a valuable contribution as was the report by the University of Ulster which supported the siting of the new hospital at Omagh. At chapter 11 of the University of Ulster's report there was a discussion about the cross-border dimension. A further review by the YHEC also deal with this dimension.

MINISTERIAL STATEMENTS IN THE ASSEMBLY

[30] Mr McSorley exhibited to his affidavit a copy of extracts from the Assembly Hansard Reports for Monday 17 June 2002 which, of course, preceded the response in October. The then Minister of Health, Social Services and Public Safety was asked for her response to the earlier findings of YHEC on the siting of a new hospital to serve the rural west. She indicated that the findings along with all other information available to her were considered in relation to the location of a new acute hospital in Fermanagh/Tyrone area. Her Department commissioned Dr Tony Hindle to review the reports "A Review of the Acute Hospitals Review Group Report: Final Report by the York Health Economics Consortium" and "A New Acute Hospital for the South West of Northern Ireland": Report to Fermanagh District Council by Colin Stutt Consulting. Copies of Dr Hindle's review had been placed in the Assembly Library. It had also been placed on her Department Internet website and her Department would make copies available to interested parties on request. She indicated that her proposals also included further work which she asked her officials to take forward specifically in relation to the siting of an acute hospital in the Fermanagh/Tyrone area. She stated that the view that the balance lay in locating the new hospital in or to the north of Enniskillen was based on all the information available, including Dr Hindle's report. The views of all those who brought forward information during the consultation period were taken into account, including reports from groupings from various areas and work was carried out by her officials on hospitals in the south. Consultation would continue and she was prepared to consider new proposals and additional information that arose from that.

[31] She was asked about meetings that took place with Micheál Martin TD Minister of Health and Children in respect of the future of acute care, any actions considered in terms of north/south co-operation and what impact any such discussions had had on the detail of their proposals. She stated that she had spoken with the Minister for Health and Children and had sent him a copy of the recently published consultation paper on the way forward for acute services "Developing Better Services: Modernising Hospitals and Reforming Structures". They had agreed soon to address the issues involved. The matter had also been the subject of a meeting and of correspondence between senior officials in her Department and the Department of Health and Children in Dublin on the potential use of hospitals in Cavan and Sligo to provide services to patients from the north. She had also carefully considered the findings of the YHEC. From the current planning stage for hospital services in the south, it was apparent that insufficient certainty existed as to whether the relevant hospitals in the south would, over the longer term, deliver the capacity and services equivalent to those provided by the nine proposed acute hospitals in the north. Any information that emerged during the consultation process would be considered before final

decisions were reached. On almost every occasion that she had spoken with Micheál Martin, the issues raised had touched on acute hospital provision. She indicated that she hoped to discuss the matter further with Executive colleagues and to take final decisions in 2002.

CORRESPONDENCE BETWEEN THE MINISTER'S PREDECESSOR AND THE MINISTER FOR HEALTH AND CHILDREN IN THE REPUBLIC OF IRELAND

[32] Ms de Brun's letter of 9 October 2002 to the Minister for Health and Children contained the following extracts,

"I thought it would be useful to set out our thinking since we met on 25 July, particularly in relation to the further work we agreed at that meeting. The meeting covered four areas; (i) the capacity of hospitals in the south to deal with additional numbers of service users from the north who chose to access services in the south, (ii) the long term plans for development of hospital services in the south, (iii) the potential for the development of complementary services north and south of the border corridor approx to Fermanagh, Cavan and Sligo and (iv) the future plans of road upgrades in the south in areas adjacent to the border. We agreed that it would be useful for a small team from my department to visit Cavan, Monaghan, Sligo and Letterkenny Hospitals in the south and to assess their potential to deal with estimated increased capacity from the north and also to consider the opportunity for complementary services north and south. We also discussed the nature of proposed road upgrades in the south and areas adjacent to the border particularly in relation to routes to Cavan, Monaghan and Sligo Hospitals and you agreed that your department would establish what plans there might be to upgrade these roads."

She went on,

"I am very grateful to.... Chief Executive Officers of the North Eastern and North Western Boards respectively and to the staff at Cavan, Monaghan, Sligo and Letterkenny Hospitals for the courtesy they showed to my officials and medical and nursing staff during their visits to Cavan and Monaghan Hospital Group on 18 September and to Sligo and Letterkenny

on 24 September. These visits were most informative and provided much useful additional information well beyond the statistical data already available. No decisions will be made about the site for the new acute hospital in Fermanagh/Tyrone until after the consultation on *Developing Better Services* is complete and I have had time to consider very carefully all the information available to me including any new information arising during the consultation period. However, whatever that final decision might be it is already clear that a new hospital build will take at least seven years to complete. During the hospital visits our officials had an opportunity to discuss the number of people we might realistically expect to travel south for acute admissions in an emergency. Our analysis suggests that of the population south and west of Fermanagh Lakes around 826 people might be expected to be admitted to Cavan/Monaghan Hospital Group and approximately 118 to Sligo General Hospital. These figures are based on the population at present in Fermanagh and the known ratio 1-10 (of that population who we would expect on current trends to be admitted to the Erne Hospital). This assumes that all 826 would travel south and we therefore estimate for planning purposes this would be the maximum number. I should therefore be interested to know whether within your plans for development of acute services in the North Eastern Board area is it likely that within our estimated planning timeframe of seven years additional capacity would be available in both Cavan/Monaghan Hospital Group and Sligo General Hospital to absorb our estimate of additional service users from the north. We also discussed at the ministerial meeting on 25 July the opportunities for developing complementary hospital services between hospitals in the north and south and asked that our officials consider these opportunities ahead of our meeting. Following the visits to the hospitals in the south where the issue of complementary services was discussed the broad consensus was that complementary services were to be welcomed and encouraged particularly for a triangle of hospitals including Cavan/Monaghan Hospital Group, Sligo and the new hospital in Fermanagh/Tyrone. However it was recognised the opportunity lay

around specialities and sub-specialities delivered by a network of hospitals. Consequently until I make my decision on the location of the new hospital in Fermanagh/Tyrone it would be difficult to make any real progress on the issue. Once my decision is taken then work should begin in earnest to develop complementary services which might impact upon the final profile of services for the new hospital in Fermanagh/Tyrone. There is also a view that complementarities should be developed under the auspices of the North South Regional Hospital Services Group drawing on the work already done by CAWT. I would endorse this approach. The consultation period for developing better services ends on 31 October and one of the issues which I must address in coming to a decision on the siting of a new acute hospital for Fermanagh/Tyrone is long term plans in relation to hospital capacity of hospitals in the south, particularly at Cavan, which appears to be operating at full capacity. It would therefore be of particular benefit to me if you could indicate as soon as possible whether, in light of the estimated figures provided in this letter, and over an estimated planning timeframe of seven years to construct a new hospital in Fermanagh/Tyrone there would be sufficient capacity planned for Cavan/Monaghan Hospital Group and Sligo General Hospital to absorb the additional numbers of people travelling from the north that I had indicated. An early response on this issue alone would be most helpful as I would need to put such a response into the public domain here and in sufficient time to allow the information to be considered during the remainder of the consultation period. My officials stand ready to discuss any finer detail which might be required in helping resolve this particular point if you would find this useful."

[33] The Minister for Health and Children did not respond to this letter, until 23 January 2003. In his letter to the new Minister, Desmond Browne, he referred to previous correspondence and discussions concerning the scope that existed for improved cross border co-operation on acute hospital services in the context of the Northern Ireland Department consultation paper, "Developing Better Services; Modernising Hospitals and Reforming Structures." He stated:

"I am aware that you are anxious to reach an early decision on the location of a new acute hospital to service the Fermanagh/Tyrone area and that in that context questions have been raised about whether the hospitals at Sligo and Cavan/Monaghan would be in a position to provide services to people in south and west Fermanagh who are willing to avail of services there. As I understand it your department's analysis suggests that around 820 people might be expected to seek services at Cavan/Monaghan and a further 120 at Sligo, not all of whom would require admission as in-patients. Following consultation with the Chief Executive Officers of the North Western and North Eastern Health Boards our assessment is that in aggregate terms patient flows of this order could be accommodated. However, it would be necessary to look at the case load likely to be involved in terms of specialty and complexity in more detail in order to make a definitive commitment in this regard. In regard to future developments here, the Government is committed in the Health Strategy to a further expansion of capacity in the acute hospitals. The further analysis required to determine the specialty and geographic distribution of the additional beds is currently under-way in the Department. I trust that this will be of assistance to you in your decision-making process. Please feel free to contact me if you require any further information or clarification."

PRESS RELEASE

[34] On 27 January 2003 there was a press release from the Department of Health, Social Services and Public Safety. It stated as follows:

"The Minister...confirmed today that he would announce his decisions on the future of acute hospital services in Northern Ireland on 24 February. Decisions had been expected at the end of January. Speaking today the Minister said "a number of factors have led me to make this announcement. On 23 January I received a letter from Micheál Martin, Minister for the Department of Health and Children in Dublin, in relation to the use of hospitals in the Republic of Ireland which I will want to consider as part of my analysis of responses to the consultation on developing better services. This letter and further

work by the Department recently undertaken in relation to journey times and hospital catchment should I believe be put into the public domain to allow time for people to consider this information and to respond if necessary in good time before I make decisions. This means I will not be able to make my decision at the end of January as planned.” The Minister added; “However from my many meetings on Developing Better Services and on visits to hospitals everyone has impressed on me the need to make decisions as quickly as possible to avoid the damaging effect to services in our hospitals that a prolonged delay would cause. Therefore to avoid further speculation I intend to announce my decisions on the proposals in Developing Better Services on Monday 24 February so that we can press ahead to make the changes necessary to develop a robust, modern hospital service in Northern Ireland.”

The press release went on to state that a substantial number of responses had been received to the consultation on developing services which ended on 31 October 2003. These included over 4,000 letters and e-mails, in addition there were some 3,000 postcards and petitions with approximately 40,000 signatures. A summary of the responses would be prepared and made available to the public. In keeping with the Department’s policy on openness, individual responses would also be made available to the public unless the respondent had indicated otherwise. No decisions had been made on the proposals in Developing Better Services. The Minister hoped to make decisions around the end of January but the release of additional information into the public domain meant this would not now be possible. The Minister had indicated he would take decisions on the proposals in Developing Better Services on Monday 24 February. Those who wished to respond to the additional information released today (27 January) should do so in good time for the Minister to consider responses before taking decisions on the proposals in Developing Better Services.

EXECUTIVE INFORMATION SERVICE

[35] On 24 February 2003 a statement was issued on behalf of the Department of Health, Social Services and Public Safety.

It stated that “the most significant programme of acute hospital re-organisation ever made in Northern Ireland was announced today by Des Browne, Minister with responsibility for Health, Social Services and Public Safety. The Minister who was announcing his decisions on the consultation document “Developing Better Services” also unveiled the

500 million pound start of a capital investment programme in acute hospitals amounting to 1.2 billion pounds over the next 10 years, the largest such investment ever announced here."

Explaining the reasons for his decision the Minister said, "we have witnessed enormous change in the way hospital services are delivered in the past 30 years. The drive for modern hospital services is increasing, placing all of our hospitals under pressure, but particularly our smaller hospitals. The current profile in hospital services is no longer appropriate and we are trying to sustain too many acute hospitals for the size of our population. "Developing Better Services" propose around 9 acute hospitals for Northern Ireland and the response has broadly endorsed that level of provision."

The Minister added, "modernising our hospitals system is not about centralisation or the belief that somehow, 'bigger is best'; it is about getting the best fit of services around the patient. At the heart of this modernisation programme is a recognition that the range of safe, effective, high quality care can be offered in smaller hospitals than had previously been thought possible. Patients want more not fewer local services and the measures I have announced today will start to make that a reality... No one should be in any doubt of our determination to deliver the modernisation vision I have set out today; a vision which places patients at the heart of the health care safe system. We have already made a significant start to a major development programme for our acute hospitals amounting to around £217,0000. Additionally the strategic investment programme announced on 19 February by Ian Pearson includes investment projects of over £300,0000 for health and personal social services, of which over £70,000 will be available over the next three years to take forward the projects I have announced today and the new Strategic Investment Board will give these projects high priority."

THE NEW HOSPITAL IN THE SOUTH WEST

[36] In relation to the new hospital in the South West Mr Browne said,

"This was by far the most difficult decision facing me. I considered all the evidence before me, it was a finely balanced decision but I have concluded that the interests both of Fermanagh and Tyrone are best serviced by siting the new hospital to the north of Enniskillen. Throughout this process I have been very aware of the destabilising effect on hospital services in both Omagh and Enniskillen. This lack of a decision has caused [damage] and without a decision this damage to both hospitals could very quickly become irreversible...While we have made a good start in trying to reduce waiting times for

patients much more needs to be done. Development of protected elective centres will provide the opportunity to reduce waiting times, protected from the demands of emergency surgery. I want to see this opportunity developed to its full potential.”

MINISTERIAL ANNOUNCEMENT

[37] A Ministerial Announcement was then made, in the course of which the Minister stated:

“Secondly, by far the most difficult decision facing me has been the site of a new acute hospital for the South West. The arguments are finely balanced and all of those who have campaigned for the hospital to be built near Omagh or Enniskillen or at a mid-way point near Ederney, have argued their case strongly.

I have met with all the main interest groups and I visited both the Tyrone County and the Erne Hospitals, to meet staff and hear first hand of their concerns. I have also met a range of elected representatives who have spoken passionately about the need for a new hospital in their respective areas.

One message above all has remained with me – the lack of any decision on this issue has already had a destabilising effect on services at both the Erne and at Tyrone Country and without an early decision on the matter the damage to both hospitals may very quickly become irreversible.

While uncertainty continues we have great difficulty in attracting qualified medical and other hospital staff to fill posts and the fear is that inevitably services will have to be withdrawn. I have been assured that once a decision is made, irrespective of the locality, clinicians within the respective communities will support my decision, knowing that to do otherwise, and to protract this debate further will almost certainly mean the demise of acute services in both Omagh and Enniskillen within a very short time.

I have considered carefully the evidence and information put before me, including the responses to the information put into the public domain on

27 January and, amongst other things, I have looked carefully at the issues of sustainability, equity of access, deprivation, opportunities for networking, the use of hospitals in Ireland and technical infrastructure issues such as regional planning and infrastructure costs, for all three options at Enniskillen, Ederney and Omagh.

I believe that an acute hospital, if developed on any of the three sites, could be sustained and would attract the numbers of patients required to enable clinicians to develop and maintain the specialist skills required to deliver a range of acute services. I have also noted that the preliminary assessment of the equality implications of the proposal for 9 acute hospitals concluded that there would not appear to be a significant differential impact on different equality groups wherever the new hospital in the South West were to be located.

I have considered the information on deprivation supplied to me and I have considered that information against the proposed new pattern of acute and local hospitals and the question of access to them, to assess what effect this might have on populations living in the most deprived areas in the South West. I believe that I have given proper and due regard to this issue in reaching my conclusions.

There was considerable debate around the application of average speeds for different types of roads and journey times used by the Department to calculate access times. As a result I put into the public domain further information on average speeds for different types of roads supplied by the Department of Regional Development and used by them. I am satisfied that whatever model or information is used, if applied correctly, the journey times do not alter to such a degree that one model or method of calculation can be held above another.

I have also considered very carefully the use of hospitals in Ireland, for the population living along the border in Fermanagh, should they choose to use them. *Developing Better Services* concluded that on the basis of the information available in June 2002,

uncertainty remained as to whether relevant hospitals in the South, close to the border with Fermanagh, could deliver over the longer term, the capacity and services equivalent to those provided by the 9 acute hospitals proposed in Northern Ireland.

During the course of the consultation my predecessor Bairbre de Brun and Micheál Martin in the Department of Health and Children in Dublin, met to discuss the future plans for acute hospital provision in the South and the opportunities to develop North-South co-operation on hospital services in the future. Bairbre de Brun also wrote to Micheál Martin in October 2002 seeking further clarification on these issues.

I have placed Mr Martin's response of 23 January 2003 in the public domain. It indicates that in aggregate terms, the future acute capacity at the Cavan/Monaghan Hospital Group and at Sligo Hospital is considered likely to be able to meet the possible scale of cross-border demand "for people who are willing to avail of services there." It also indicates that, "it would be necessary to look at the caseload likely to be involved in terms of specialty and complexity in more detail in order to make a definitive commitment in this regard."

In the longer term there can only be benefit for continued development of networking between hospitals in Northern Ireland and in Ireland. I fully endorse and welcome this development.

However, my first duty as a Minister is to provide hospital services for all of the people of Northern Ireland, irrespective of where they might choose to live. This is a fundamental point. I am very grateful to Micheál Martin for his response, but whatever we might have been prepared to consider, the caveats in his letter mean that the use of hospitals in Ireland can only be considered as an additional element of choice for the provision of acute hospital services for people living in Northern Ireland.

Taking all of these things into account I consider that the mid-way point option submitted by the Ederney

Community Development Trust is the least sustainable. While some of the infrastructure is in place to develop an acute hospital, the remaining infrastructure needed to develop a green field site in the area is not. The development of the roads system alone to ensure access to a hospital at Ederney would add a substantial extra cost and the location of a major acute hospital there would be inconsistent with the current Regional Development Strategy for Northern Ireland. I have therefore not chosen Ederney as a location for this hospital.

When I considered the remaining choices of Omagh and Enniskillen, I had to weigh in the balance the opportunities for access to acute hospitals in Northern Ireland, for those people living in both Omagh and Enniskillen, and exclude from that analysis, for the reasons given, the use of hospitals in Ireland, in relation to this decision.

In doing so I have looked carefully at the travel assumptions and journey times presented in the responses and the further information on average travel speeds provided by the Department of Regional Development. I have concluded that the assumptions of road speeds used to calculate average journey times provided in *Developing Better Services* are still valid, even after a degree of sensitivity analysis has been applied.

The responses suggest that, in the absence of a local acute hospital, the natural pathway for acute hospital services for the population living around Omagh would be towards Altnagelvin or to Craigavon Hospitals, with some of the population south of Omagh likely to travel to Enniskillen for treatment. All these travel times are all within one hour of an acute hospital. The converse is not true for a small but significant population living south of the Fermanagh Lakes – almost 10,000 people whose journey time to their nearest acute hospital, if it were to be located in Omagh, would be in excess of one hour. If they chose to go to Craigavon the journey would be considerably longer.

I have therefore concluded that the interests of both Fermanagh and Tyrone are best served by siting the new acute hospital to the North of Enniskillen. This solution I believe gives the best overall configuration of acute hospitals and allows the greatest spread of choice and equity of access to acute services for the population of both Fermanagh and Tyrone.

Let me stress again this was a finely balanced decision taken after careful consideration of all the options. I know this will be a significant disappointment for the population living around Omagh and Ederney, but I firmly believe it is the right decision and I would ask all those involved not to look at it in terms of winners and losers, but as a very significant opportunity for developing sustainable, modern acute services for all of the population of the South West."

THE REASONS GIVEN BY KERR J FOR HIS DECISION

[38] Kerr J (as he then was) gave an ex tempore judgement. The reasons which he gave for refusing leave to the Council were as follows:

1. The appellant and the respondent were ad idem that it was necessary for the Minister to investigate adequately the contribution which Health and Personal Social Services available in the Republic of Ireland might make, so that a confident and properly informed decision might be taken.
2. Given the controversy that surrounded the provision of health and social services in the Republic, particularly in this area, it was probably impossible for the Minister in the Republic to reply by 31 October 2002 to the letter from Ms de Brun of 9 October 2002, but one could perfectly understand why she had sought a response within that time and equally understand how it was impossible to provide it. In any event a meaningful response had been made and culminated in a letter from the Minister which the judge was satisfied contained qualifications, if not, a caveat. The issue was whether the Minister at that stage was obliged to take the matter further or whether he could properly decide to proceed to the ultimate conclusion as to the location of the hospital.
3. The Minister was not only entitled but was obliged to proceed without delay to this decision. As the judge had observed in the course of submissions, everyone in Northern Ireland knew that this was a decision which was a very long time in discussion. The decision was

one which must be made in order to provide satisfactorily for hospital services in this area and the Minister on the available evidence was plainly entitled, indeed bound to come, to the conclusion that to delay the matter further in order to investigate what he had described as caveats, would inevitably lead to the deferral of this vital decision by many months at least. In those circumstances it was entirely reasonable that he should decide that the matter should not be deferred further and that he should proceed to make his decision.

4. In those circumstances the Council had not raised an arguable case and therefore the application for leave must be dismissed.

OUR CONCLUSIONS

[39] The focus of the argument before this Court was whether the Minister was obliged to take up the offer by the Minister for Health and Children in the Republic, to contact him if he required any further information or clarification. We consider that the Minister was not obliged to do so. It is apparent from an examination of the documents that the Department of Health in the Republic had not been able to give a definitive commitment that the Cavan and Sligo Hospitals would provide the services available in an acute hospital in Northern Ireland. This was crucial to the decision made by the Minister, as almost 10,000 people in County Fermanagh would have been more than 60 minutes travelling time away from a hospital sited at Omagh. It was only if a definitive commitment had been given by the Department for Health and Children that Cavan Hospital and Sligo Hospital would provide acute emergency services in the same way as an acute hospital in Northern Ireland for patients from South and West of Lough Erne that the decision made to site the hospital north of Enniskillen could have been changed. Mr Martin was careful to avoid giving such a commitment, whether one describes his letter as containing “caveats” or “qualifications”.

[40] It is apparent from the Hayes Report, the report entitled “Developing Better Services” and the visit of Ms de Brun and her officials to the South that it was only when the site for the new acute hospital for the South-West was chosen that co-ordination of services could effectively be achieved, as she pointed out in her letter of 9 October 2002. The possibility of hospital cover from the Republic of Ireland and Strand 2 of the Belfast Agreement were considered in the various reports to which we have referred and the extensive consultation between the Minister’s predecessor and her officials with their counterparts in the South.

[41] Judgment was delivered by Kerr J on 9 May 2003. More than eight months passed before we heard the appeal. We would have considered an application for the admission of fresh evidence on behalf of the appellant. No such application was made although the Hanly Report on Hospitals in the Republic was published in October 2003. We have refrained from reading it because we have not had it placed before us nor have we taken into account any of the newspaper articles handed into Court on the part of the respondent. In the absence of bad faith or oversight on the part of an applicant who seeks leave to apply for judicial review, we take the view that a proposed respondent may not put forward materials which are not exhibited to an affidavit and as he is not yet a party to the proceedings, although he is a party to the appeal, he cannot produce materials to the judge or to us on appeal. But the appellant may do so if there is fresh evidence to support its application for leave.

[42] Numerous authorities were referred to us on behalf of the appellant (by reference to Fordham's Judicial Handbook) on the duty of inquiry in a case of this sort. We do not accept the contention that Kerr J did not consider that this duty was required of the Minister. On the contrary he expressly referred to the contacts between the Minister's predecessor, Ms de Brun, and her counterpart in the Republic of Ireland and to the letter from her counterpart, Mr Micheál Martin, Minister for Health and Children of 23 January 2003 which was put into the public domain on 27 January 2003 and led to a postponement of the decision of the Minister, previously planned for the end of January, to 24 February 2003. The Minister invited comments on that letter until his announcement on 24 February. Public consultation following publication of "Developing Better Services" had officially ended on 31 October 2002. We consider that the understandable inability of Minister Martin to give a definitive commitment that Cavan/Monaghan Hospitals and Sligo General Hospital would provide the acute emergency services of an acute hospital envisaged in the Hayes Report and in the further document "Delivering Better Services" was a crucial factor in the decision not to pursue further the investigation already undertaken into the services which hospitals in the Republic could provide.

[43] The grounds upon which relief was sought were:-

(a) The Minister failed to take into account adequately or at all

(i) The possibility and/or capacity of hospital cover from the Republic of Ireland as a standard source from which Northern Ireland health care need could be met and

(ii) Strand 2 and the annexe thereto of the Belfast Agreement.

We have deal with these grounds at paragraphs 11, 14, 15, 19, 24, 25, 26, 27, 30, 31, 32, 33, 34, 36, 37, 39 and 40 of this judgment.

(b) The Minister took into account purported 'caveats' in the letter from the Republic's Minister for Health and Children dated 23 January 2003.

We have dealt with this ground at paragraphs 32, 33, 34, 36, 37, 39 and 40 of this judgment.

(c) (i) The Minister failed to investigate adequately the 'caveats' in the letter of 23 January 2003 and

(ii) Failed to contact the Minister in the Republic for further information and/or clarification of his letter of 23 January.

We have dealt with these grounds at paragraphs 33, 34, 37, 39, 41 and 42 of this judgment.

(d) The Minister acted in breach of the appellant's procedural legitimate expectations that he would investigate adequately the possibility of hospital cover from the Republic of Ireland engendered by statements in 'Developing Better Services' and the statements made by his predecessor in the Assembly on Monday 17 June 2002. We have dealt with this ground at paragraphs 30, 31, 32, 34, 37, 39, 40, 41 and 42 of this judgment.

We consider that none of the grounds (a) to (d) give rise to an arguable ground for judicial review on which there is a realistic prospect of success.

[44] We respectfully agree with the reasons given by Kerr J (as he then was) in refusing leave.

[45] Accordingly we dismiss the appeal and refuse leave to renew the application for leave.