Judicial Communications Office

15 September 2022

COURT DISMISSES CHALLENGE TO DECISION REFUSING TO SUSPEND MUCKAMORE ABBEY INQUIRY

Summary of Judgment

Mr Justice Colton, sitting today in the High Court in Belfast, dismissed an application for judicial review of two decisions of the Minister of Health refusing to suspend the Muckamore Abbey Hospital Inquiry ("the Inquiry")[1] until the criminal proceedings against the applicant, a former staff member of Muckamore Abbey Hospital, have concluded. The applicant is contesting all of the charges and has concerns that her article 6 ECHR right to a fair trial will be jeopardised by "adverse and prejudicial" commentary already in the media.

Article 6 ECHR

The decisions of the Minister ("the respondent") were communicated to the applicant by way of letters dated 29 June 2022 and 9 August 2022. In his first letter, the respondent outlined the steps that had been taken with the intention of respecting the integrity of the criminal proceedings including the preparation of a Memorandum of Understanding ("MOU") between the Inquiry, the Police Service of Northern Ireland (PSNI) and Public Prosecution Service (PPS). In addition, the Chair of the Inquiry wrote to the applicant to outline a number of measures put in place by the Inquiry relating to the redaction of personal details, anonymity, staff identification, and viewing of CCTV footage with the aim of addressing her concerns.

The applicant contended that the continuation of press coverage and social media comments relating to the Inquiry, should it continue, would prevent her having a fair trial. It was also argued that if the Inquiry recommences in September 2022 as planned it will inevitably consider evidence which will be reported by the media with the consequence that when the applicant's case comes to trial it will not be possible to empanel a jury to determine the charge against her and her co-accused impartially and on the basis of the presumption of innocence. The court, however, said that taking all the material at its height it did not consider it can be argued that the applicant has established any breach of her article 6 rights: "The applicant has not yet been returned for trial in the Crown Court. No trial date has been set. No jury has been empanelled; the applicant's fears are speculative and not sufficient to establish a breach of article 6."

In paragraphs [39] to [43] of its judgment, the court outlined the case law dealing with the question of the impact of prejudicial publicity on the conduct of criminal trials noting, however, that the reported cases concerned decisions in relation to actual trials which had commenced. In this case, the court was being asked to establish a breach of article 6 by speculating about what reporting may be given in the future and how it may impact on a trial in the future. The court said that neither the respondent nor the court was in a position to make such an assessment. It noted that there was nothing to suggest there has been a virulent media campaign about the applicant and while it is correct that some of the social media commentary is "typically toxic" it should be put in the context reflecting as it does the views of a very tiny minority of the general population:

[1] The public inquiry was established under the Inquiries Act 2005.

> "The essential point is that the applicant is entitled to and can expect a fair trial. The impartiality of a jury must be presumed unless there is proof to the contrary. The applicant's article 6 rights in respect of her criminal trial are fully protected within the criminal trial process. The fairness, or otherwise, of any trial can only be judged at the relevant time and by the trial judge. The court, therefore, concludes, that no breach of the applicant's article 6 rights has been established".

The remaining grounds of the applicant's challenge

In paragraphs [55] – [82], the court provided some background to the respondent's decisions which are under challenge including the power to suspend an inquiry under the 2005 Act, advice to the respondent on the potential implications of criminal investigations and trials running alongside inquiries, information about how the Grenfell Tower Inquiry is proceeding in parallel with a criminal investigation and an options appraisal identifying the risks of proceeding. The court commented that all this background information reinforced the fact that the respondent was alive to and fully sighted of the potential issues arising from the parallel conduct of the Inquiry and criminal proceedings arising from issues being considered by it. It said the evidence clearly demonstrated that these concerns had been specifically addressed by the Inquiry Chair in the conduct of the Inquiry to date and that this will continue. The court also noted that the correspondence setting out the respondent's reasons for refusal to suspend the Inquiry showed that he relied on various measures taken by the Inquiry Chair and which were set out in the briefing document upon which the respondent made the decision of 29 June.

The measures taken by the Inquiry Chair include the MOU which provides for continuing co-operation between the Inquiry, PSNI and PPS which means the Inquiry can keep the question of potential impact of a criminal prosecution under review. The MOU also deals with the issues of the production of documents, arrangements for viewing CCTV footage, and the provision of oral evidence by witnesses. The court said it will be seen that a recurrent theme of the MOU is the avoidance of risk that work will impede any prosecution. It also noted that the avoidance of any risk is underpinned by further steps already taken by the Inquiry including an undertaking by the Director of Public Prosecutions that no evidence drafted for the purpose of giving evidence to the Inquiry will be used in evidence against that person in any criminal proceedings or for the purpose of deciding whether to bring such proceedings. In addition, the Inquiry has developed a protocol in relation to restriction orders relating to the viewing of CCTV footage and staff identification. The court commented:

> "All of those matters are expressly relied upon by the [respondent] in his decision of 29 June 2022 and are, again, referenced in the decision of 9 August 2022. It is clear that the Inquiry is expressly addressing the fact that the criminal prosecution in relation to the applicant is running parallel to the Inquiry and has put in place detailed safeguards to ensure that its work does not "*impede, impact adversely on or jeopardise the criminal proceedings*."

The Inquiry is considering events over a period between 2 December 1999 and 14 June 2021. The court noted that the period of time relating to the charges against the applicant is therefore only a small part of the Inquiry's considerations. Further, the Inquiry is charged with the responsibility of examining a multiplicity of issues that extends significantly beyond the conduct of individuals, including: the role of staff at all levels and those responsible for management and oversight within

the Trust and beyond; the processes for identifying and responding to concerns; recruitment, retention, training and support; the use of CCTV; the adequacy of policy and processes in place for discharge and resettlement of patients; the legal and regulatory framework. In addition, the Inquiry's work has an important forward looking aspect; it is expected to make recommendations on a wide range of matters with a view to ensuring that abuse does not recur at Muckamore Abbey Hospital or any other comparable institution within Northern Ireland. The court commented that to suspend the Inquiry would have the effect of delaying this important work.

The respondent has fettered or surrendered his discretion

The applicant submitted that the respondent, when he referred in correspondence dated 4 September 2020 to the Chair's discretion to open the inquiry and then immediately suspend it, had placed undue reliance on and deference to the Chair's views. The court noted, however, that by the time of the decision under challenge the respondent could have been under no illusion as to the fact that the decision whether to suspend was his decision and that this was clear from the briefing note and the actual decisions themselves. Counsel for the applicant was critical of the lack of direct evidence from the respondent. The court did not consider there was any merit in this submission and concluded that on any reading of the papers it could not be said that the decision taken in this case was anything other than that of the respondent. It said it had been given adequate material to assess the basis upon which that decision was made and concluded that there had been no fettering of discretion in this case.

Irrationality/material and immaterial considerations

The applicant contended that the respondent failed to take into account the voluminous prejudicial material published by media outlets and on social media and the impact this would have on the criminal proceedings in which she is involved. The court outlined the two categories of irrationality; the first being a decision which is so outrageous that no sensible person who had applied his mind to the question could have arrived at it; and a decision which either takes account of irrelevant considerations or fails to take account of relevant considerations.

The court noted that the relevant provisions of the Inquiries Act 2005 ("the 2005 Act") give the respondent a discretion as to whether to suspend an inquiry where there are ongoing investigative, civil or criminal proceedings and explicitly recognises there will be times when an inquiry is ongoing in parallel with criminal proceedings. The court said it did not consider the respondent's decision met the unreasonable test and that the respondent had reached a rational and balanced decision:

> "I take the view that the [respondent] is entitled to base his decision to refuse to suspend the Inquiry on [the safeguards put in place by the Inquiry and after consultation with the Chair of the Inquiry]. To do so could not be considered to be irrational. These safeguards have been expressly designed to deal with material considerations in the assessment by the [respondent] as to whether he should exercise his discretion to suspend the Inquiry."

Alleged failure to provide adequate reasons

The court noted that the obligation to provide reasons is only required in the event that the respondent exercises his power to suspend under section 13(5) of the 2005 Act. It noted, however, in the circumstances of this case the requirements of transparency, public confidence in the decision making processes concerning the Inquiry and fairness to the applicant require the respondent to give

adequate reasons (which is generally held to mean that reasons should be both "intelligible and adequate" to meet the circumstances of a particular decision). The court took the view that any fair reading of the respondent's letters of 29 June and 9 August 2022 clearly identify the reasons for his decision and concluded that it cannot be said that there had been a failure to provide adequate reasons.

Failure to obtain the consent of the Secretary of State for Northern Ireland for the Inquiry to consider periods when devolution was suspended

Section 30 of the 2005 Act provides that a Minister may not include anything in the Terms of Reference of an inquiry which relates to a period when devolution was suspended without the consent of the Secretary of State for NI ("SoSNI"). The court noted that a senior official in the Department of Health wrote to the SoSNI on 15 September 2021 seeking confirmation of permission to extend the timeframe to finalise the Terms of Reference and enclosing a copy of the final draft Terms of Reference. The SoSNI replied on 28 September confirming he was content for the extension of time and confirmed that he had "sight of the proposed Terms of Reference regarding the statutory Public Inquiry investigating the allegations of abuse at Muckamore Abbey hospital". The court concluded that the appropriate authority had been obtained prior to the formal completion of the Terms of Reference and said nothing turned on this point.

Did the respondent apply the correct legal test?

On the morning of the hearing, counsel for the applicant raised a new point, seeking to argue that the respondent had misdirected himself as to the nature of his discretion to suspend the Inquiry under section 13 of the 2005 Act. It was contended that whilst the respondent has a discretion to suspend an inquiry the concept of necessity applies only to fixing the duration of any such period of suspension and not the decision to suspend. The court said that section 13 provides the respondent with a discretion in that he may suspend. It said it could not be suggested that there is a presumption for a suspension but rather the section points to both the suspension and the period for any such suspension to be "necessary". The court was satisfied that the respondent had applied the correct test.

Conclusion

The application for judicial review was dismissed.

NOTES TO EDITORS

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Judiciary NI website (https://judiciaryni.uk).

ENDS

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