

Neutral Citation No: [2019] NIQB 11

Ref: McC10866

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Delivered: 06/02/19

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

BEFORE A DIVISIONAL COURT

IN THE MATTER OF AN APPLICATION BY DENNIS CRAIG
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

-v-

NORTHERN IRELAND PUBLIC SERVICES OMBUDSMAN

McCloskey J

Introduction And Procedure

[1] The court's adjudication of this leave application is made on the basis of all of the written representations *et al* provided by Mr Craig (who is self-representing), the oral representations of Mr Craig at two *inter-partes* hearings conducted on 21 January and 01 February 2019, a written submission and certain other materials furnished on the court's direction at the second hearing and the brief oral submissions of Mr Philip McAteer, of counsel.

[2] The court, of its own motion, adjourned the first of the two listings noted above in order to provide Mr Craig with an extended opportunity to consider the Ombudsman's aforementioned written contribution. Some three days in advance of the second listing Mr Craig informed the court in writing that he "*.. may need to seek an extension of time or further adjournment due to personal domestic issues*". The court was instinctively sympathetic to this and probed the matter at the outset of the second hearing, articulating its concerns about Mr Craig's welfare. Mr Craig, however, did not formulate any application to adjourn. He represented that he found his visits to the court and court building "*therapeutic*". He was clear that he wished to proceed. In answer to specific questioning he confirmed to the court that there was no medical reason why he should not do so. On the occasion of both listings the court found Mr Craig to be articulate and intelligible. The hearing therefore proceeded with the court making appropriate allowances for Mr Craig's

self-represented capacity and the sad personal history lying at the heart of his challenge, namely the demise of his elderly mother on 11 December 2013.

The Challenge

[3] It appears to the court that the main target of Mr Craig's challenge is the Ombudsman's report dated 24 March 2017 compiled in response to his complaint about the conduct of the Mount Surgery (which the Ombudsman describes as the "Practice") in connection with his mother's death. His mother was a registered patient of the Practice.

[4] In her report the Ombudsman summarises the complaint thus:

"Mr Craig's complaint concerns the failure of the Practice to arrange for the administration of Mrs Craig's flu vaccine in October 2013, which Mr Craig believes may have contributed to her subsequent death."

According to the death certificate "Bronchopneumonia" was the disease or condition directly relating to her death, while "chronic renal failure" was stated to be a significant other condition.

[5] The Ombudsman made the following specific findings of maladministration on the part of the Practice:

"The Practice failed to make the referral to the Trust's Call Management in order for the District Nursing Service to administer Mrs Craig with the flu vaccine ...

Dr McKee's assessment of Mrs Craig on 10 December 2013 was inadequate ...

The Practice failed to provide a satisfactory response to Mr Craig's complaint."

Consequent upon these three findings of maladministration, the Ombudsman made the following recommendations:

"A consolatory payment in the amount of £500 by way of a solatium together with an apology to Mr Craig is necessary to effect a fair settlement of the matters complained of. This amount reflects the injustice of upset, distress and inconvenience because of the maladministration identified ...

I would expect the Practice to provide the apology and payment within one month of the date of my final report ...

I consider that there are a number of lessons to be learned which will, in my view, provide the Practice with an opportunity to improve their service to patients ..."

To the latter end the Ombudsman then listed a series of further recommendations.

[6] I have considered the correspondence *et al* belonging to the period of some 14 months postdating promulgation of the Ombudsman's report. These disclose that Mr Craig was dissatisfied with the report. He formulated a series of complaints and assertions, in particular: an alleged failure to consider certain evidence; the attribution of excessive or insufficient weight to certain evidence; inadequate recommendations; a failure to supervise enforcement of the recommendations; bias; and a refusal to review the Ombudsman's report. During this period there was interaction between Mr Craig, aided and represented by certain public representatives and the Ombudsman's office.

[7] This post-Ombudsman's report phase included the Ombudsman's letter dated 11 May 2017 to a public representative. This pointed out that accompanying the report of 24 March 2017 was a leaflet "Your Complaint, Our Decision" which details the process to be followed by a complainant seeking a review of an Ombudsman's decision. This entails, in very brief compass, a requirement that the complainant write to the Deputy Ombudsman requesting such a review and the subsequent transmission of the matter to a Director of Investigations not previously involved in the case. The correspondence confirms that Mr Craig requested a review of the Ombudsman's decision, giving rise to a further decision, communicated in a letter dated 20 July 2017 written by the Director of Local Government Ethical Standards, that the governing criteria were not satisfied. Events thereafter included a meeting attended by Mr Craig accompanied by a public representative and some further correspondence.

[8] In the more recent phase of the saga the Deputy Ombudsman reiterated to Mr Craig's public representative in a letter dated 22 March 2018 that the criteria for undertaking a review of the Ombudsman's report were considered not to be satisfied. The next development of substance entailed the initiation of these proceedings in June 2018. Following an initial - admittedly avoidable - delay of some weeks occasioned by administrative oversight, the court, beginning with its first case management order of 12 September 2018, has sought to advance these proceedings with reasonable expedition and considers that, with the active co-operation and assistance of the Ombudsman's representatives, this has been achieved.

Legal Framework

[9] Notwithstanding the advent of the Public Services Ombudsman Act (NI) 2016 Mr Craig's complaint was at all material times processed under the Commissioner

for Complaints (NI) Order 1996 as amended (the "1996 Order"). By Article 12 of the 1996 Order:

"Procedure in respect of investigations

12. - (1) *In determining whether to initiate, continue or discontinue an investigation under this Order, the Commissioner shall, subject to the foregoing provisions, act in accordance with his own discretion.*

(2) *Where the Commissioner proposes to conduct an investigation pursuant to a complaint under this Order-*

(a) *he shall furnish to-*

(i) *the body concerned, the general [health care] provider concerned or the independent provider concerned (as the case may be); and*

(ii) *any person who is alleged in the complaint to have taken or authorised the action complained of or who is otherwise involved in allegations made in the complaint,*

information as to the allegations made in the complaint so far as they relate to that body or provider or (as the case may be) to that person and the substance of any evidence which the Commissioner has reason to believe may be tendered in support of those allegations; and

(b) *he shall afford to every such body, provider or person an opportunity to comment on any allegations made in the complaint and to furnish oral or other evidence respecting them.*

(3) *Every investigation under this Order shall be conducted in private.*

(4) *Except as otherwise provided by this Order, the procedure for conducting an investigation shall be such as the Commissioner considers appropriate in the circumstances of the case.*

(5) *The Commissioner may obtain information from such persons and in such manner, and make such enquiries, as he thinks fit.*

(6) Subject to paragraphs (7) and (8), the Commissioner shall not be obliged to hold any hearing, and no person shall be entitled as of right to be heard by the Commissioner.

(7) If at any time during the course of an investigation it appears to the Commissioner that there may be grounds for making any report or recommendation that may adversely affect any body or person, the Commissioner shall give to that body or person, if it or he so desires-

- (a) the opportunity of being examined by its or his own solicitor or counsel; and
- (b) the opportunity of testing by cross-examination, by its or his own solicitor or counsel or otherwise, any evidence which may affect it or him.

(8) Where the opportunities mentioned in paragraph (7) are given to a person other than the person aggrieved, the like opportunities shall be given to the person aggrieved.

(9) The Commissioner may, if he thinks fit, pay to the person by whom the complaint was made and to any other person who attends or furnishes information for the purposes of an investigation under this Order-

- (a) sums in respect of expenses properly incurred by them;
- (b) allowances by way of compensation for the loss of their time,

in accordance with such scales and subject to such conditions as the [Office] may determine.

(10) An investigation pursuant to a complaint under Article 7 shall not affect-

- (a) any action taken by the body concerned or by any department or head of a department with respect to that body; or
- (b) any power or duty of that body, department or head of a department to take further action with respect to any matters subject to the investigation.

(11) *An investigation pursuant to a complaint under Article 8 or 8A shall not affect any action taken by the general [health care] provider or independent provider concerned, or any power or duty of that provider to take further action with respect to any matters subject to the investigation."*

[10] The starting point is that the Ombudsman is not beyond the purview of judicial review. However, as the decision in R v Parliamentary Commissioner for Administration [1994] 1 WLR 621 makes clear, there will normally be appropriate reticence on the part of the court to interfere with the broad statutory discretion in play, one which involves a high degree of subjective judgment. Per Simon Brown LJ at page 626:

"All that said, however, and despite my rejection of both Mr. Richards' submissions on the question of jurisdiction, it does not follow that this court will readily be persuaded to interfere with the exercise of the Commissioner's discretion. Quite the contrary. The intended width of these discretions is made strikingly clear by the legislature: under section p5(5), when determining whether to initiate, continue or discontinue an investigation, the Commissioner shall 'act in accordance with his own discretion;' under section 7(2), 'the procedure for conducting an investigation shall be such as the Commissioner considers appropriate in the circumstances of the case'. Bearing in mind too that the exercise of these particular discretions inevitably involves a high degree of subjective judgment, it follows that it will always be difficult to mount an effective challenge on what may be called the conventional ground of Wednesbury unreasonableness (Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223)."

The court there was concerned with the English statutory regime which, in substance, mirrors its Northern Ireland counterpart. This decision has not been questioned in any subsequent authority brought to the attention of the court.

Conclusion

[11] The court has considered with care the lengthy written formulation of the Applicant's case, endeavouring to construe this to the best of its ability and making due allowance for the Applicant's self-represented status. In this context I refer to the summary in [1] and [2] above.

[12] As I trust is made clear in [2] above, the court, while entertaining concerns about the Applicant's welfare, has engaged fully with his legal challenge on its

merits. The court has also approached this case as sympathetically as possible, taking into account that it involves the death of the Applicant's mother and that this has clearly had a major and lasting impact on him. The court readily accepts the Applicant's contention that there were certain serious questions to be considered arising out of his mother's death. The legal vehicle for this purpose which materialised was the Ombudsman's investigation and ensuing report.

[13] I consider that this is primarily, but not exclusively, an irrationality challenge. I have viewed the Applicant's written and oral representations through the prism of other public law misdemeanours, in particular the well-established duties to take into account all material evidence and considerations, while disregarding the immaterial. Having done so I am unable to identify, to the level of arguability, anything of a legally contaminating nature in public law terms in either the Ombudsman's report or any of the subsequent actions of the Ombudsman or other officials of the Ombudsman's office. Quite the contrary. The court considers that the impugned report and the subsequent decisions and actions disclose an investigation conducted impartially, independently, rigorously and with assiduous care and attention, ticking all of the applicable public law "boxes" and quite the antithesis of the vague and unparticularised allegation of bias, one of the grounds advanced. The application of the legal framework to Mr Craig's challenge impels inexorably to the conclusion that the threshold for the grant of leave to apply for judicial review has not been overcome.

[14] I trust that Mr Craig will be able to understand that his legal challenge has been determined by an independent and impartial court. It has been subjected to appropriate judicial scrutiny and has been found to be lacking in substance. I hope that this will serve to dispel Mr Craig's suspicions and reservations about the conduct of the Ombudsman. Mr Craig should further take cognisance of this court's statement that the Ombudsman and her legal representatives have co-operated candidly and admirably with the court in these proceedings, in a manner which has made it possible for the court to appreciate and absorb the nature of Mr Craig's challenge, something which would otherwise have been very difficult indeed. Furthermore, it is clear that Mr Craig has done all that is humanly possible to expose and vindicate his deeply held concerns about the sad death of his mother. The court trusts that Mr Craig will now be able to turn a corner and move forward.

[15] The decision of the court therefore is:

- (a) An order dismissing Mr Craig's application for leave to apply for judicial review.
- (b) No order as to costs *inter-partes*.