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Judgment: approved by the Court for handing down (subject to editorial corrections)* | **Delivered: 21/12/2012**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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JR 55's Application [2012] NIQB 108

IN THE MATTER OF AN APPLICATION BY JR55 JUDICIAL REVIEW

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TREACY J

Introduction

[1] The applicant is a General Practitioner in sole practice. By this judicial review he challenges a decision by the Northern Ireland Commissioner for Complaints ("the Commissioner") to make a recommendation that the applicant make a consolatory payment of £10,000 in light of findings of maladministration relating to the death of a patient following a complaint made by the wife of the deceased.

[2] He also challenges the vires of a proposed decision by the Commissioner to lay a report before the N.I. Assembly pursuant to Art19 of the Commissioner for Complaints (NI) Order 1996 should the applicant refuse to comply with the recommendation to make the consolatory payment.

Factual Background

[3] The factual background in relation to the Commissioner's investigation and report are set out in detail in the Grounding Affidavit of the Applicant, as supplemented by the Replying Affidavit sworn by Ms Michaela McAleer, the Respondent's Director of Healthcare Investigations. There is no material factual dispute concerning the conduct of the investigation and production of the Commissioner's report. The applicant is not challenging specific findings.

[4] The Commissioner in his Executive Summary states:

> "I determined that [the deceased] should have received better follow-up care from his GP following his treadmill test in July 2008. I also concluded that

the action taken at his appointment on 6 January 2009, by a locum GP was insufficient in that no appropriate referral was made regarding [the deceased's] on-going chest pain. That said, I have noted that [the deceased] sadly died just hours after attending this appointment. I am unable, therefore, to conclude that the sad outcome would have been altered in any way even if the locum GP had taken alternative action. I have also been critical of [JR 55's] visits to [the deceased's wife's] house after her husband's death, the Practice's complaints handling procedures, and its contact with Dr B."

Grounds of Challenge

[5] The grounds of challenge as set out in the amended Order 53 Statement have been summarised by the applicant as follows:

> "(a) The Commissioner has no power to make a recommendation that a consolatory or compensatory payment be made to a complainant.
>
> (b) Even if such a power exists in an appropriate case, the present case was not such a case:
>
> (i) Since the making of such a payment was not necessary to effect a settlement of the complaint; and/or
>
> (ii) Insofar as the recommended payment represented compensation for an inadequate standard of care, this should be dealt with in normal civil litigation and is not a matter for the Commissioner.
>
> (c) In any event, the Commissioner has not provided any adequate reasons for the recommendation of a payment of £10,000 in this case; which is also *Wednesbury* unreasonable.
>
> (d) Even assuming the recommendation is lawful, the Commissioner has no power to use the 'Special Report' mechanism as a means of

enforcing or encouraging compliance with such a recommendation.

(e) The effective 'naming' of the Applicant by means of the making of a Special Report is also *ultra vires* the Commissioner's powers.

(f) In the circumstances of this case, the Commissioner's procedure and actions are in breach of the Applicant's Convention rights."

The Nature of the Office of Ombudsman

[6] The court's attention was very helpfully drawn by Mr McGleenan QC to material describing the history of the office of Ombudsman introduced into the UK by the Parliamentary Commissioner Act 1967. Wade and Forsyth at pp 75 *et seq* state:

> "*Ombudsman* is a Scandinavian word meaning officer or commissioner. In its special sense it means a commissioner who has the duty of investigating and reporting to Parliament on citizens' complaints against the government. An ombudsman requires no legal powers except powers of inquiry. In particular, he is in no sense a court of appeal and he cannot alter or reverse any government decision. His effectiveness derives entirely from his power to focus public and parliamentary attention upon citizens' grievances. But publicity based on impartial inquiry is a powerful lever. Where a complaint is found to be justified an ombudsman can often persuade a government department to modify a decision or pay compensation in cases where the complainant unaided would get no satisfaction. For the department knows that a public report will be made and that it will be unable to conceal the facts from the Parliament and the press. The department is not bound to accept the recommendations of the ombudsman. But the Secretary of State may only reject her findings of fact "on cogent reasons" and a decision to reject a finding may itself be subject to judicial review (and quashed if shown to be irrational.)"

[7] In July 2011 the Law Commission published its report into the Office of the Parliamentary Ombudsman:

> "2.2 Though the first ombudsman, as a complaints handler, appeared in Sweden in 1809, it was only after the publication of an influential report by JUSTICE in 1961 that the need for such an institution took hold within the UK. The JUSTICE report led to the introduction into Parliament of the Parliamentary Commissioner Bill in 1966.
>
> 2.3 At the second reading of the Parliamentary Commissioner Bill in the House of Commons, Richard Crossman, the Minister in charge of its passage through the House, described the proposed Commissioner thus:
>
> > 'The office of Parliamentary Commissioner, which it is the object of this Bill to create, resembles the office of ombudsman in the one particular that it is designed to protect the individual citizen against bureaucratic maladministration'."

[8] As Mr McGleenan observed a number of the provisions which feature in this present challenge received their original incarnation in the 1967 Act, for example, section 5 which provides for a limitation on jurisdiction where the person aggrieved has a remedy in a Court or tribunal. Section 5(2) contains this proviso:

> "(2) Except as hereinafter provided, the Commissioner shall not conduct an investigation under this Act in respect of any of the following matters, that is to say—
>
> (a) any action in respect of which the person aggrieved has or had a right of appeal, reference or review to or before a tribunal constituted by or under any enactment or by virtue of Her Majesty's prerogative;
>
> (b) any action in respect of which the person aggrieved has or had a remedy by way of proceedings in any court of law:
>
> Provided that the Commissioner may conduct an investigation notwithstanding that the person aggrieved has or had such a right or remedy if satisfied that in the particular circumstances it is not

> reasonable to expect him to resort or have resorted to it."

[9] Of this provision Wade observed at p81:

> "This proviso means that the line of demarcation between the Commissioner and the legal system is not a rigid one and that much technicality and inconvenience can be eliminated by the Commissioner using his discretion. It may frequently happen that there is a possibility of a legal remedy but that the law is doubtful; in such cases the Commissioner may decide that it is not reasonable to insist on recourse to the law. Where there is clearly a case for a court or tribunal, on the other hand, he will refuse to act. It is not easy to tell from the Commissioner's reports how often he has made use of the proviso. But it seems probable that, with or without doing so, he has investigated many cases where there would have been legal remedies ….
> A certain overlap between the Commissioner and the legal system must be accepted as inevitable, and this, though untidy, is doubtless in the public interest."

The Statutory Context

[10] In Northern Ireland, replicating provisions in the rest of the UK, there has since 1969 been provision for an Ombudsman to conduct investigations into both central government matters and complaints about maladministration in local government, health, housing and other bodies listed in Schedule 2 of the Commissioner for Complaints (Northern Ireland) Order 1996.

[11] Section 10 of the Parliamentary Commissioner Act (Northern Ireland) 1969 provided:

> "(3) If, after conducting an investigation under this Act, it appears to the Commissioner that injustice has been caused to the person aggrieved in consequence of maladministration and that the injustice has not been, or will not be, remedied, he may, if he thinks fit, lay before each House of Parliament, a special report upon the case.
>
> (4) The Commissioner shall annually lay before each House of Parliament a general report on the performance of his functions under this Act and may

> from time to time lay before each House of Parliament such other reports with respect to those functions as he thinks fit."

[12] In respect of complaints about maladministration in local government etc section 11(3) of the Commissioner for Complaints (Northern Ireland) Act 1969 provided:

> "The Commissioner shall annually lay before each House of Parliament a general report on the performance of his functions under this Act and may from time to time lay *such other reports before Parliament as he may think fit*."

[13] Northern Ireland continues to have a single office-holder with a remit under the Ombudsman (Northern Ireland) Order 1996 and a general remit for investigating complaints pursuant to the Commissioner for Complaints (Northern Ireland) Order 1996 (the "1996 Order").

[14] The Ombudsman (Northern Ireland) Order 1996 makes provision for the office of Ombudsman to have oversight of matters relating to complaints of maladministration in respect of Northern Ireland Departments and their statutory agencies. Article 17 provides:

> "Reports to the Assembly
>
> 17.—(1) The Ombudsman shall annually lay before the Assembly a general report on the performance of his *functions* under this Order and may from time to time lay before the Assembly *such other reports with respect to those functions* as he thinks fit.
>
> (2) If, after conducting an investigation under this Order, it appears to the Ombudsman that—
>
> (a) injustice has been sustained by the person aggrieved in consequence of maladministration; and
>
> (b) the injustice has not been, or will not be, remedied,
>
> he may, if he thinks fit, lay before the Assembly a *special report* upon the case."

[15] The governing legislation for the Commissioner for Complaints is the Commissioner for Complaints (Northern Ireland) Order 1996. The remit of the

Commissioner for Complaints was extended to cover healthcare related matters by the Commissioner for Complaints (Northern Ireland) (Amendment) Order 1997. That Order extended the Commissioner's jurisdiction *inter alia* to enable him to investigate matters of clinical judgment and to investigate the actions of general health service providers and independent service providers.

[16] This amendment reflected the change that had been introduced into the parallel legislation in England in the Health Service Commissioners (Amendment) Act 1996. Both pieces of legislation had the effect of extending the jurisdiction of the Health Service Commissioner in England and the Commissioner in Northern Ireland, to investigate complaints about the actions taken by health professionals in the course of the care or treatment of a patient. In England the role of Parliamentary Ombudsman and Health Service Commissioner are now fused in the Parliamentary and Health Services Ombudsman (PHSO).

[17] The Commissioner is expressly empowered to investigate the actions of general health services providers pursuant to Article 8 which provides:

> "General health services providers subject to investigation
>
> 8.—(1) This Article applies to persons if they are—
>
> (a) individuals undertaking to provide general medical services or general dental services under Part VI of the Health and Personal Social Services (Northern Ireland) Order 1972;
>
> (b) persons (whether individuals or bodies) undertaking to provide general ophthalmic services or pharmaceutical services under Part VI of that Order; or
>
> (c) individuals performing personal medical services or personal dental services in accordance with arrangements made under Article 15B of that Order (except as employees of, or otherwise on behalf of, a health and social services body or an independent provider).
>
> (2) In this Order—
>
> (a) references to a general health services provider are to any person to whom this Article applies;

(b) references to general health services are to any of the services mentioned in paragraph (1).

(3) Where a general health services provider has undertaken to provide any general health services, the Commissioner may, subject to the provisions of this Order, investigate—

(a) any action taken by the general health services provider in connection with the services;

(b) any action taken in connection with the services by a person employed by the general health services provider in respect of the services;

(c) any action taken in connection with the services by a person acting on behalf of the general health services provider in respect of the services; or

(d) any action taken in connection with the services by a person to whom the general health services provider has delegated any functions in respect of the services.

..

(5) The Commissioner may investigate any action taken as mentioned in paragraph (3) only if a complaint is made to the Commissioner in accordance with this Order by a person who claims to have sustained injustice in consequence of the action so taken with a request to conduct an investigation into it.

(6) Nothing in this Order authorises or requires the Commissioner to question the merits of a decision taken without maladministration by—

(a) a general health services provider;

(b) a person employed by a general health services provider;

(c) a person acting on behalf of a general health services provider; or

(d) a person to whom a general health services provider has delegated any functions.

(7) Paragraph (6) does not apply to the merits of a decision to the extent that it was taken in consequence of the exercise of clinical judgment."

[18] Article 9(3) and (4), which imposes restrictions on the ability of the Commissioner to conduct an investigation in certain circumstances, provide:

"(3) Subject to paragraph (4) and to section 78 of the Northern Ireland Act 1998, the Commissioner shall not conduct an investigation under this Order in respect of—

(a) any action in respect of which the person aggrieved has or had a right of appeal, complaint, reference or review to or before a tribunal constituted under any statutory provision or otherwise;

(b) any action in respect of which the person aggrieved has or had a remedy by way of proceedings in a court of law.

(4) The Commissioner may conduct an investigation—

(a) notwithstanding that the person aggrieved has or had such a right or remedy as is mentioned in paragraph (3) if the Commissioner is satisfied that in the particular circumstances it is not reasonable to expect him to resort to or have resorted to it; or

(b) notwithstanding that the person aggrieved had exercised such a right as is mentioned in paragraph (3)(a), if he complains that the injustice sustained by him remains unremedied thereby and the Commissioner is satisfied that there are reasonable grounds for that complaint."

[19] Article 11 of the 1996 Order outlines the purposes of an investigation by the Commissioner. It provides:

"11. The purposes of the investigation by the Commissioner shall be —

(a) to ascertain if the matters alleged in the complaint—

(i) may properly warrant investigation by him under this Order; and

(ii) are, in substance, true; and

(b) where it appears to the Commissioner to be desirable—

(i) to effect a settlement of the matter complained of; or

(ii) *if that is not possible, to state what action should in his opinion be* taken by the body concerned, the general health services provider concerned or the independent provider concerned (as the case may be) to effect a fair settlement of that matter or by that body or provider or by the person aggrieved to remove, or have removed, the cause of the complaint.

Article 12 of the 1996 Order outlines the procedure to be adopted in respect of an investigation. It provides:

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 services 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 Department 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 to 8A shall not affect any action taken by the general health services 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."

[20] Article 16 of the 1996 Order makes provision for a person aggrieved to make application for compensation to a county court. This provision only applies to

Article 7 complaints and **not** to Article 8 complaints against a general health services provider such as that involved in this case.

[21] Art 17 of the 1996 Order sets out a procedure for application to the High Court for relief following a report by the Commissioner. Art17 applies where the Commissioner has found that a person aggrieved has sustained injustice in consequence of maladministration and it appears to him that the body concerned is likely to engage in similar conduct in the future unless relief is granted by the High Court. In such cases the Attorney General may, at the request of the Commissioner, apply to the High Court for the grant of relief and the court may grant mandatory injunctive or declaratory relief.

[22] Article 19 of the Order requires the Commissioner to lay an annual report before the Assembly. It also affords a broad discretion to lay such other reports as he thinks fit before the Assembly. It states:

> "19. The Commissioner shall annually lay before the Assembly a general report on the performance of his *functions* under this Order and may from time to time lay *such other reports before the Assembly as he thinks fit."*

Vires of ad hoc report

[23] The Applicant contends that, in proposing to lay an *ad hoc* special report before the Assembly in relation to this investigation and the applicant's refusal to implement the remedial recommendations therein, the Respondent is acting *ultra vires* Article 19. Mr Scoffield QC submitted that the statutory scheme is such that, in the absence of an application for compensation under art 16 or an application under Art 17, a Commissioner's report is designed to 'speak for itself'. These Articles are limited to investigations against bodies under Art 7 and do not apply in respect of investigations against health service providers, such as JR 55, under Art 8 or 8A. Mr Scoffield submits this was clearly a deliberate choice by the legislature. He further submitted that it was never intended that the laying of an ad hoc report under Art 19 would be used, as he put it, as a means of 'enforcement'; that the purpose of the provision was that the Commissioner would keep the Assembly informed about the performance of his *functions* and that the provision does not permit the provision of reports on individual cases for the purpose, as he characterised it, of 'naming and shaming' a particular individual.

[24] In support of this submission he contrasted Art 17 of the Ombudsman (NI) Order 1996, set out at para14 above, which was made at the same time as the 1996 Order.

[25] He submitted that because such a power (to make special reports) was not included in the 1996 Order that it supports no other interpretation but that the Commissioner has no power to act as he is proposing to in this case.

Consideration of vires of proposed ad hoc report

[26] I reject the above submissions for the following reasons. First, Art 19 of the 1996 Order by its terms imposes a requirement to lay a general report on the performance of his functions under the Order *and* a broad discretion "from time to time to lay such other reports …as he thinks fit". Second, it is significant that the "other reports" are not limited as the applicant claimed to reports about the performance of his *function*s. Had that been the intention one would have expected a phrase such as that which appears in Art 17(1) of the 1996 Ombudsman Order upon which the applicant relies, namely, "such other reports *with respect to those functions* as he thinks fit". This is a statutory distinction which appeared in the predecessor 1969 provisions set out above. Third, the applicant's construction, aside from being inconsistent with the clear statutory wording, would undermine the effectiveness of the Ombudsman's office as a means of protecting citizens from injustice resulting from maladministration. Historically as we have seen "his effectiveness derives entirely from his power to focus public and parliamentary attention upon citizens' grievances". Although his recommendations are not binding in any legal sense the expectation is that, unless quashed, they will be obeyed and if not obeyed that he has the power to lay a report before the Assembly. As Wade observed in the passage quoted earlier "publicity based on impartial inquiry is a powerful lever". If the applicant is correct in his submissions the Ombudsman would be completely deprived of this powerful lever in respect Art 8 complaints. These conclusions are fortified by the extracts set out below.

[27] The Law Commission (having examined the rulings in Eastleigh [1988] QB 855 and Bradley [2008] EWCA Civ 36) state at para5.115 *et seq*:

> "Our approach to the public services ombudsmen recognises that they are not courts and we do not think that they should be made into court substitutes. Given this, and the way that ombudsmen seek to influence public bodies through repeated interactions, we did not think that there would be benefit in changing the current approach to recommendations – that they are not binding on public bodies. We, therefore, provisionally concluded that *the enforcement of recommendations should remain as part of the political process."*

[28] I accept the Respondents argument that the Commissioner in the present case seeks to use the political process as a means of enforcement and that this is in keeping with the underpinning rationale for the jurisdiction of an Ombudsman. I was referred to the consultation paper which preceded the 2011Law Commission report. At para6.91 of the consultation paper the Law Commission noted:

> "6.91 The statutory regimes which underpin the actions of the ombudsmen are similar in one particular way. They rely on *publicity*, whether in Parliament, the National Assembly for Wales or local press, as the primary mechanism with which to encourage the implementation of reports. *Within the bare statutory schemes, the final weapon available to any of the ombudsmen is not a binding order or a declaration that a public authority had acted in an illegal manner. Rather it is the placement of their findings and recommendations in the public sphere.* In some cases, the statute requires the authority to publish this. In others, there is a power to place a report before an elected body – either the Houses of Parliament or the National Assembly of Wales."

[29] Similarly at paras5.128 *et seq* of the Law Commission report:

> "5.128 We think that the position in ex parte Eastleigh is to be preferred to the alternative in Bradley and should be the position for all of the public services ombudsmen, except the Housing Ombudsman.
>
> 5.129 The collaborative relationship that the public services ombudsmen enjoy with public bodies in their jurisdiction is dependent on the nature of the ombudsman's findings and recommendations.
>
> 5.130 Recommendations allow the ombudsmen to make suggestions as to the manner in which a particular instance of injustice could be remedied and also to suggest improvements that could be undertaken to improve the administration of the public body subject to investigation. Such recommendations may have wide ranging implications, which could be outside the knowledge of the ombudsmen – given their primary focus on the complaints made to them. *It is correct, therefore, for recommendations to remain non-binding and questions as to their implementation to remain in the political domain*."

[30] Since the inception of the Ombudsman's jurisdiction in the United Kingdom presenting the legislature with his recommendations in circumstances where an injustice goes unremedied has been a central feature. Article 19 of the 1996 Order

provides the Commissioner for Complaints with the appropriate power to take the course of action that he has proposed – namely to lay a report before the Assembly in light of the applicants refusal to comply.

The availability of legal remedy

[31] As is noted above in Wade, it is a general feature of legislation relating to the office of Ombudsman that there is a residual discretion to investigate a complaint in circumstances where there may be a legal remedy [see also paras 8-9 above]. In R v Local Commissioner for Administration in North and North East England ex parte Liverpool City Council [2001] 1 All ER 462 the Court of Appeal considered the application of the proviso in section 26 of the Local Government Act 1974. It had been argued that the complainant ought to have utilised the judicial review jurisdiction to challenge a decision by Liverpool City Council to grant planning approval for an extension to a football stadium. At para28 the Henry LJ held:

> "In my judgment this was a clear case for the application of the proviso. Serious allegations of maladministration had been made. Such allegations could best be investigated by the resources and powers of the commissioner, with her power to compel both disclosure of documents, and the giving of assistance to the investigation. The commissioner was in position to get to the bottom of a prima facie case of maladministration, and the ratepayers would be unlikely to have reached that goal, having regard to the weakness of the coercive fact finding potential of judicial review."

[32] At para47 Chadwick LJ stated:

> "Although there is a substantial element of overlap between maladministration and unlawful conduct in local government, the concepts are not synonymous. There will be cases of maladministration which do not involve unlawful conduct….So there is no reason in principle why the considerations which determine whether there has been maladministration should, necessarily, be the same as those which determine whether there has been unlawful conduct. The commissioner's power is to investigate and report on maladministration; not to determine whether conduct has been unlawful. So there is no reason why, when exercising the power to investigate and report, (which has been conferred on him by the 1974 Act) he should, necessarily be constrained by the legal principles that

> would be applicable if he were carrying out the different task (for which he has no mandate) of determining whether the conduct is unlawful".

[33] The Applicant's complaint was examined at the validation stage to determine whether it ought to be screened out on the basis of the availability of a legal remedy. The nature of the complaint was properly considered and it was not unreasonably determined that, given the complainant's quest for an explanation for the events surrounding her husband's death, it would be appropriate to investigate the complaint. The Commissioner is expressly empowered to investigate matters relating to clinical judgment. He was in my view fully entitled to investigate notwithstanding any theoretical possibility of a clinical negligence claim by the complainant.

[34] The Applicant complains that the Ombudsman's examination of the treatment provided by a doctor is an illegitimate usurpation of the function more properly discharged by the Court in clinical negligence actions. This point was considered in R (Attwood) v Health Service Commissioner [2008] EWHC 2315 where it had been contended that the Ombudsman, exercising jurisdiction over a health services complaint was required to apply the ***Bolam*** test. Burnett J at paras15-16 stated:

> ".. the amendments made in 1996 introduced a very significant change in the function of the ombudsman with far reaching potential consequences for clinicians. Prior to 1996 the ombudsman was limited to investigating matters such as the level of information given to patients, failings in internal complaints procedures, the quality of care on the ward, cleanliness, waiting lists, cancellations, record keeping, coordinated arrangements for discharge and the like. That continues to occupy much of the case load of the ombudsman *but the consideration of criticisms that go directly to the clinical judgment of doctors and other health professionals now forms an important part of the ombudsman's work*.
>
> … Most complaints about clinical judgment would give rise to a theoretical claim for damages in negligence since almost all would have resulted in some loss, otherwise a complaint would be unlikely. Nonetheless, *the ombudsman recognises that for many people compensation is not an issue at all. The reality is that it can be very difficult indeed to bring a claim for clinical negligence because of the costs involved and the difficulty in obtaining funding*. Unless the likely damages are large, or the claim apparently clear cut,

such claims are relatively uncommon."

[35] The court's attention was also drawn to para48 where Burnett J noted that an Ombudsman's report must be read fairly, as a whole, and that very fine analysis of small parts of it would be likely to defeat that aim. He held that the Ombudsman was entitled to approach questions of clinical judgment without applying the ***Bolam*** test.

The Recommendation of a consolatory payment and the Role of the Court

[36] The Courts have traditionally been reluctant to interfere with the exercise of a statutory discretion by an Ombudsman or Commissioner. This is a matter which was recently reviewed by this court in Re James Martins application [2012] NIQB 89 where after consideration of the relevant authorities the court concluded as follows:

> "Conclusion
>
> [39] As previously pointed out it is common case that the Police Ombudsman is subject to the supervisory jurisdiction of the High Court. However, he has a very wide discretion in respect of the exercise of his powers under Part VII of the 1998 Act. He is also the master of his own procedure. Accordingly, the circumstances in which it would be permissible for the Court to intervene will inevitably be extremely limited. The Court must be astute neither to abdicate its constitutional responsibility of supervisory review nor its constitutional duty not to trespass into forbidden territory. It is thus, for example, not the role of the Court to dictate to the Police Ombudsman how to carry out his functions."

[37] The non-binding recommendation of a consolatory payment is an exercise of discretion on the part of the Commissioner. The Applicant can elect as, he has done, not to comply with the recommendation. It was open to the Commissioner to conclude that effecting of a "settlement" was not possible and to then exercise his powers under Art 11(b)((ii)[set out at para19 above] to state "what action" should in his opinion be taken to effect a "fair settlement." The applicant contended that the Commissioner has not shown that it was not possible to effect a settlement and as a consequence that the terms of Art 11(b) have not been complied with. The respondent averred that where the complainant contends a relative has died in circumstances involving maladministration that it is impossible to "remove …. the cause of the complaint". Consequently it is asserted that where a complaint centres on bereavement Art11(b) empowers the Commissioner to recommend a consolatory payment. I accept that art 11(b)(ii) was properly engaged and that it was open to him to exercise his powers thereunder. This is a deliberately wide power. It is common case that it includes the power to make recommendations but not, the applicant

contends, a power to make a consolatory payment. (I note that art 12(7) of the 1996 Order refers to "any report or recommendation..."). That submission is inconsistent with the width of the discretion conferred by Art 11. It is also in my view inconsistent with the underlying purpose of effecting a "fair settlement". (I note that 11(b)(i) refers to effecting a settlement and 11(b)(ii) refers to stating action to effect a "fair settlement"). If correct the applicants argument would mean that if, as here, the Commissioner rationally considered that the action which in his opinion should be taken to effect a fair settlement was a recommendation of a (non-binding) consolatory payment, that he would be precluded from doing so.

[38] The action to be recommended and the quantum of the consolatory payment being recommended fall within the wide discretionary powers of the Commissioner. Whilst in principle such decisions may be subject to review the nature of the exercise is such that it will always be difficult to mount an effective challenge on irrationality grounds. These are the type of discretionary judgments which, whilst not immune from challenge, will by reason of their nature be difficult to successfully impugn.

[39] At Ground 3(c) the applicant also complained that the Commissioner had not provided adequate reasons for the recommendation of a payment of £10,000. I accept that the standard of reasoning required in a Commissioner's report is analogous to that required in the planning context. This was examined by Lord Brown in Bolton Metropolitan District Council v Secretary of State for the Environment (1993) 71 P & CR 309 at para36:

> "The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issue falling for decision. The reasoning must not give rise to substantial doubt as to whether the decision-maker erred in law, for example, by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in dispute, not to every material consideration."

This approach was accepted by Burnett J in Attwood (para52).

[40] The Commissioner has published a detailed investigative report which outlines the basis for his finding of maladministration. He has recommended a

consolatory payment for the maladministration proximate to his death. This is plain from the face of the report. The Commissioner has also afforded the Applicant an informal meeting where the issues were discussed with the applicant and his representative. He could elect to seek a formal hearing where he can present evidence and make submissions on the issue of reasons pursuant to Article 12(7) but declined to take that course. I am satisfied in the circumstances that the reasons were adequate and this ground of complaint is rejected.

[41] As to ground 3(d) and the alleged breach of Article 9(3)(b) I refer to my comments at para 23 *et seq.* The complainant had not instigated any litigation in respect of her husband's death at the commencement of the investigation. The Applicant has not averred that he is the subject of any writ action. The circumstances in which the proviso can be exercised has been the subject of judicial and academic consideration and the broad scope of the discretion has been recognised. There has been no breach of Article 9(3)(b).

[42] As to ground 3(g) *Breach of Confidentiality*. The Applicant relies on Articles 12(3) and 15(3) of the 1996 Order in support of the argument that any report before the Assembly must be anonymised. However Articles 12(3) and 15(3) relate to an investigation which has not been concluded. Once an investigation has concluded the statutory restriction on publicity no longer applies. The Commissioner can only decide to lay a special report before the Assembly in relation to a complaint investigation that has concluded. If he decides to take such a course in this case then the investigation will have concluded and Articles 12(3) and 15(3) will not apply. I therefore reject this ground.

[43] As to ground 3(i) alleging a breach of the applicant's convention rights there has been no final determination of the Applicant's civil rights and obligations and, therefore, Article 6 is not engaged. (See discussion in G v Governors of X School [2011] UKSC 33 of the jurisprudence in respect of final determinations). Moreover the applicant had the right to request a formal hearing on this matter before the Ombudsman but did not do so. This ground of challenge is also rejected.

[44] All the grounds of challenge are rejected and the application for judicial review is accordingly dismissed.