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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY JR222 (NUMBER 2)
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF THE TERMS OF REFERENCE OF
THE MUCKAMORE ABBEY HOSPITAL INQUIRY
AND A DECISION OF THE DEPARTMENT OF HEALTH

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John Larkin KC and Natasha Fitzsimons (instructed by McCann & McCann, Solicitors) for the applicant
Peter Coll KC and Philip McAteer (instructed by the Departmental Solicitor's Office) for the respondent
Denise Kiley (instructed by the Solicitor to the Inquiry) for the Muckamore Abbey Hospital Inquiry as notice party
Karen Quinlivan KC and Helena Wilson (instructed by Phoenix Law) for the second notice party
Monye Anyadike-Danes KC and Aidan McGowan (instructed by Phoenix Law) for the third notice party

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SCOFFIELD J

Introduction

[1] This is an application for leave to apply for judicial review in respect of (what the applicant characterises as) two decisions which were contained in a letter of 18 January 2023 on behalf of the Permanent Secretary of the Department of Health ("the Department"). The impugned decisions relate to the terms of reference of the ongoing Muckamore Abbey Hospital Inquiry (MAHI) ("the Inquiry"). The applicant is a former member of staff at the hospital who, along with others, is being prosecuted for alleged abuse of patients there in the period between April and June 2017. By correspondence from her solicitors to the Department, she invited it to amend the terms of reference of the Inquiry on a number of bases, including that the present terms of reference were unlawful. The Permanent Secretary, Mr May, has

denied that there is any illegality in the present terms of reference; and he further determined that, in the absence of a Minister, he could not exercise the function under section 5(3) of the Inquiries Act 2005 ("the 2005 Act") of amending them.

[2] This is the applicant's second application for judicial review in relation to the Inquiry. In her previous application, she sought the suspension of the Inquiry by the then Minister of Health pending the conclusion of the criminal proceedings faced by her. That application was unsuccessful at first instance ([2022] NIKB 3) and on appeal ([2022] NICA 57), although she has been granted permission to appeal to the United Kingdom Supreme Court on one ground. I return to the potential significance of these earlier proceedings below.

[3] In the present proceedings the applicant, without objection from the other parties, has been anonymised, as she was in the previous application for judicial review, in order to ensure that the Inquiry's restriction order prohibiting staff identification is not undermined and to minimise any effect the reporting of these proceedings may have upon her criminal trial.

[4] Mr Larkin and Ms Fitzsimons appeared for the applicant; and Mr Coll and Mr McAteer appeared for the proposed respondent, the Department. Ms Kiley appeared for the Chair of the Inquiry as a notice party. There are two further third parties who were given permission to participate in the proceedings. They are each next friends of patients or former patients at Muckamore Abbey Hospital ("the hospital") and core participants in the Inquiry. To protect the anonymity of those patients I do not propose to name them in this judgment; but they were represented by Ms Quinlivan and Ms Wilson and by Ms Anyadike-Danes and Mr McGowan respectively. I am grateful to all counsel for their helpful written and oral submissions.

Factual background

[5] The issues raised in this application are essentially issues of law, in respect of which it is unnecessary to set out a very detailed factual background. Nonetheless, it will be useful to set out some key matters which set the context for the present litigation. On 8 September 2020, the then Minister of Health (Robin Swann MLA) announced his intention to establish a public inquiry in relation to the events at the hospital. The Inquiry was formally established under section 1 of the 2005 Act on 11 October 2021. The terms of reference of the Inquiry include the following:

> "The core objectives of the Inquiry are to:
>
> (i) examine the issue of abuse of patients at Muckamore Abbey Hospital (MAH);
>
> (ii) determine why the abuse happened and the range of circumstances that allowed it to happen;

(iii) ensure that such abuse does not occur again at MAH or any other institution providing similar services in Northern Ireland."

[6] The Inquiry is tasked with examining events which occurred between 2 December 1999 and 14 June 2021. Para 4 of the terms of reference provides that the Inquiry "will examine the nature and extent of abuse of patients at MAH." The terms of reference define the concept of "abuse" widely at para 5. This will include, but is not limited to, physical abuse, sexual abuse, psychological abuse, mental or emotional abuse, patient neglect, inappropriate or negligent care, appropriation of or improper interference with patients' finances or belongings and/or other misbehaviour towards patients. The applicant makes the basic point that some, perhaps many, of the types of abuse included within these definitions would also amount (if proven to the criminal standard) to criminal offences. Further provision about the examination of the nature and extent of abuse of patients at the hospital is made in paras 6-8.

[7] Para 13 of the Inquiry's terms of reference is in the following terms:

> "The Inquiry will also examine the response of other relevant agencies, including the Police Service for Northern Ireland (PSNI), the Patient and Client Council (PCC), the Health and Safety Executive (HSE) and the Regulation and Quality Improvement Authority (RQIA), when allegations of abuse of patients were reported to them."

[8] The Inquiry is also required by its terms of reference (at paras 18-19) to examine the regulatory framework in force and whether it was adequate to prevent abuse of patients with mental health conditions or learning disability.

[9] The Inquiry hearings opened on 6 June 2022. Oral evidence relating to patient experience was heard in summer and autumn 2022, with over 40 witnesses having given oral evidence. Further oral hearings have been held, and evidence taken, this year. In particular, a substantial amount of additional evidence has been heard in evidential modules from March to June 2023 (although the parties agreed that the subject matter of the present application did not affect those modules). From June 2023, there has been further patient experience evidence.

[10] The applicant contends that the terms of reference of the Inquiry are unlawful, in short because they trespass upon matters of criminal justice during the period when functions relating to policing and justice were non-devolved. It was, accordingly, she submits, unlawful for a Minister in the devolved Northern Ireland administration to set up a public inquiry with terms of reference addressing these matters. The applicant's solicitor raised this in correspondence dated 12 September

2022 which was sent to the Minister whilst he was still in office. The applicant says that this was to seek amendment of the terms of reference to remove the illegality she had identified. In separate correspondence of the same date, the applicant's solicitor also invited the Minister to amend the terms of reference to exclude from them the period of time from 25 April 2017 to 18 June 2017, that being the time period in respect of which the applicant faced criminal charges. This was suggested in order to ensure that there was no overlap between the criminal proceedings against the applicant and the Inquiry process.

[11] There was some delay in replying to this correspondence and it was not until 18 January 2023, after the Minister had left office at the end of October 2022, that the substantive reply was received. This was sent on behalf of Mr May, the Permanent Secretary. As noted above, he did not accept that the Inquiry's terms of reference give rise to any illegality (a view shared by the Inquiry itself); and he also indicated that he had no power to amend the present terms of reference. It is that position which has given rise to these proceedings. I set out below the substance of the letter of 18 January 2023, which is said to contain the decisions challenged in these proceedings:

> "I disagree with your assertion that the Muckamore Abbey Hospital Inquiry Terms of Reference are unlawful in that the work of the Inquiry overlaps with matters which are criminal in nature, and which were not devolved matters between 1999 and 2010. While evidence to the Inquiry may also be relevant to criminal matters, criminal matters are not part of the Terms of Reference. Section 2 of the Inquiries Act 2005 (the Act) acknowledges such a potential overlap and provides that it may not inhibit an Inquiry.
>
> As Permanent Secretary in the Department of Health, I have taken legal advice in relation to my powers contained within the Act in the absence of a Minister. Section 5(3) of the Act gives power to a Minister, not a Department, to set and amend terms of reference. I therefore do not have the power to amend the Muckamore Abbey Hospital Inquiry Terms of Reference.
>
> Your correspondence will be retained for consideration by the Minister of Health when one is appointed."

Summary of the parties' positions

[12] The applicant has broken her challenge down into two aspects. Firstly, she contends that the terms of reference of the Inquiry, as they currently stand, are unlawful. She submits that it is obvious that the Inquiry is considering criminal

justice issues which were reserved matters between 1999 and 2010. The challenge is framed as an attack on the Permanent Secretary's refusal to acknowledge that the issue of "criminal conduct" could not be explored by the Inquiry in the period before 12 April 2010. Secondly, she contends that the Permanent Secretary was wrong to conclude that he had no power to alter the existing terms of reference, either to avoid illegality or otherwise.

[13] The Department's case is that the applicant's analysis on each of the principal issues is simply wrong in law. It submits that the terms of reference of the Inquiry do not stray beyond the properly permitted legal bounds; and that the Permanent Secretary has no power to amend them, even if he wished to, since that is solely a Ministerial function. In any event, the Department further contends that the applicant lacks standing to bring these proceedings; that her challenge, properly understood, is a challenge to the lawfulness of the terms of reference which is irredeemably out of time; and that her failure to raise the arguments she now advances in her earlier proceedings means that this challenge is an abuse of the court's process.

[14] The Inquiry addressed its submissions only to the first issue, relating to the legality of its terms of reference, taking no position on the second issue. On the first issue, it submitted that the applicant's case was devoid of merit, being based on a misreading of the relevant statutory requirements; and that the challenge was manifestly out of time. The second and third notice parties essentially support the case made by the Department and the Inquiry. They contend that the applicant's challenge to the terms of reference is out of time and rely in particular upon the prejudice which would accrue to them if an extension of time was granted for such a challenge. In the second notice party's case, if the applicant were to be successful on the first issue, he would be deprived of an investigation into his ill-treatment within the hospital over the period from 1998 until 2010. He further contends that the Inquiry is the means by which the State is giving effect to its obligation to conduct an effective investigation into his ill-treatment pursuant to article 3 ECHR, such that, if the applicant was successful, it would deprive him of an effective investigation in violation of his article 3 rights.

Relevant statutory provisions

[15] The principal statutory provisions relevant to the present application are to be found in the 2005 Act; with some important provisions also contained in the Northern Ireland Act 1998 (NIA) and, later, the Northern Ireland (Executive Formation etc) Act 2022 ("the 2022 Act").

[16] Section 1 of the 2005 Act confers power on a Minister to cause an inquiry to be held under the Act where it appears to him or her that particular events have caused, or are capable of causing, public concern; or there is public concern that particular events may have occurred. For the purposes of the Act, a Minister includes a United Kingdom Minister, the Scottish Ministers, the Welsh Ministers or a Northern Ireland

Minister. Under section 5(1), before the inquiry's setting-up date, the relevant Minister must set out the terms of reference of the inquiry. Section 5(3) goes on to provide that, "The Minister may at any time after setting out the terms of reference under this section amend them if he considers that the public interest so requires." Before setting out or amending the terms of reference the Minister must consult the person he proposes to appoint, or has appointed, as chairman. "Terms of reference" is defined in section 5(6) for inquiries under the 2005 Act. It means "(a) the matters to which the inquiry relates; (b) any particular matters as to which the inquiry panel is to determine the facts; (c) whether the inquiry panel is to make recommendations; [and] (d) any other matters relating to the scope of the inquiry that the Minister may specify."

[17] Section 30 of the 2005 Act imposes limitations on the matters which may be considered by a public inquiry which is established by Northern Ireland Minister. The limitation is essentially by reference to what are 'transferred matters' (that is, devolved matters, being matters which are neither 'excepted matters' nor 'reserved matters': see section 4(1) of the NIA). Section 30(1) provides that section 30 applies to an inquiry for which a Northern Ireland Minister is responsible. Section 30(2) is important in the present case and is in the following terms:

> "The terms of reference of the inquiry must not require it—
>
> (a) to determine any fact that is not wholly or primarily concerned with a matter which is, and was at the relevant time, a Northern Ireland matter, or
>
> (b) to make any recommendation that is not wholly or primarily concerned with a Northern Ireland matter."

[18] The concept of a "Northern Ireland matter" is defined in section 30(8), as follows:

> "In this section "Northern Ireland matter" means—
>
> (a) a matter that relates to Northern Ireland and is a transferred matter within the meaning of the Northern Ireland Act 1998 (or, in relation to any time when Part 1 of the Northern Ireland Constitution Act 1973 (c. 36) was in force, within the meaning of that Act), or
>
> (b) a matter falling within section 44(2)(b) of the Northern Ireland Act 1998 (matters in relation to

> which statutory functions are exercisable by Northern Ireland Ministers etc)."

[19] Sub-section (9) provides that, for the purposes of section 30, "the relevant time" means the time when the fact or event in question occurred or is alleged to have occurred. There is a more general temporal limitation upon the subject matter of a public inquiry for which a Northern Ireland Minister is responsible, which is set by section 30(3). The Minister may not, without the consent of the Secretary of State, include in the terms of reference anything that would require the inquiry to inquire into events occurring before 2 December 1999 (the 'appointed day' for the purposes of the NIA) or during a period when section 1 of the Northern Ireland Act 2000 is in force (*viz* when devolution has been suspended in Northern Ireland under that provision). The section 30(3) limitation is not, however, relevant for present purposes.

[20] The Inquiry's evidence-gathering powers are also limited by reference to evidence and documents which are wholly or primarily concerned with Northern Ireland matters: see section 30(4). Section 30(7) imposes a broad prohibition in relation to excepted matters, in the following terms:

> "The inquiry must not consider evidence or make recommendations about any matter falling within paragraph 17 of Schedule 2 to the Northern Ireland Act 1998 (excepted matters: national security etc)."

[21] As mentioned above, section 4 of the NIA provides for the building blocks of the devolution settlement by defining transferred, excepted and reserved matters. The basic position is that a matter will be transferred if it is neither excepted nor reserved. Excepted matters are listed in Schedule 2 to the NIA; and reserved matters are listed in Schedule 3. It is Schedule 3 which is relevant in this case.

[22] In its original form, para 9 of Schedule 3 listed the following matters as reserved matters, namely: "(a) the criminal law; (b) the creation of offences and penalties; (c) the prevention and detection of crime and powers of arrest and detention in connection with crime or criminal proceedings; (d) prosecutions; (e) the treatment of offenders (including children and young persons, and mental health patients, involved in crime); (f) the surrender of fugitive offenders between Northern Ireland and the Republic of Ireland; and (g) compensation out of public funds for victims of crime."

[23] This position changed in April 2010 with the devolution of policing and justice. On 12 April 2010 the Northern Ireland Act 1998 (Amendment of Schedule 3) Order 2010 (SI 2010/977) ("the 2010 Order") came into force. Articles 2 and 3 of the 2010 Order substantially amended para 9 of Schedule 3 to NIA through the replacement of the originally enacted provision, with the result that a range of criminal justice matters became transferred matters from that date, since they were

no longer designated as reserved matters. Only a select few policing and justice functions, none of which are relevant for present purposes, remained reserved. The Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010 (SI 2010/976) made further provision in relation to the practical consequences of the amendments, including the transfer of functions to the new Department of Justice.

[24] The other provisions which are relevant in this case are to be found in the 2022 Act, which came into force on 6 December 2022. Section 3(1) of that Act is the key provision and it provides as follows:

> "The absence of Northern Ireland Ministers does not prevent a senior officer of a Northern Ireland department from exercising a function of the department during the period mentioned if the officer is satisfied that it is in the public interest to exercise the function during that period."

The illegality argument

[25] As I have mentioned, the applicant contends that it is obvious that the Inquiry is considering matters between 1999 and 2010 which were reserved matters at that time. There are two aspects to this contention: first, that the Inquiry is considering factual matters which, in substance, do or could amount to "criminal conduct"; and, second, that the Inquiry is considering the criminal justice response to what was occurring in the hospital during that time. In relation to the latter aspect, she has referred to the comments made by Senior Counsel to the Inquiry on 7 June 2022 in which he said that "the Inquiry will be examining how complaints arising from the Hospital have been managed historically by the police and prosecuting authorities, investigation and prosecutions." The Inquiry also has a memorandum of understanding between it and the Police Service of Northern Ireland (PSNI) and the Public Prosecution Service (PPS) which makes clear that the subject matter of certain PSNI investigations and prosecutions is of direct interest to the Inquiry. Where either criminal conduct or the criminal justice response prior to 12 April 2010 is at issue, the applicant contends that this is in breach of section 30(2) of the 2005 Act.

[26] The applicant also referred, by way of comparison, to the fact that, when a former First Minister and deputy First Minister wished to establish a public inquiry into institutional abuse which included the period before the devolution of policing and justice, this was achieved through the enactment of specific legislation (the Inquiry into Historical Institutional Abuse Act (Northern Ireland) 2013) which was not subject to the limitations of section 30 of the 2005 Act. I do not consider this really assists in the determination of the issues in this case. Since the HIA Inquiry was considering matters which occurred well before 1999 (going back to 1922) and, indeed, even before the Northern Ireland Constitution Act 1973, it could never realistically have been set up under the 2005 Act, even with the Secretary of State's consent under section 30(3), since the majority of its subject matter could not concern

a Northern Ireland matter within the meaning of that term in the 2005 Act. The mere fact that a different approach was used in the case of the HIA Inquiry tells me little about whether the MAHI terms of reference are lawful. That is to be determined on the basis of the statutory provisions, and the text of the terms of reference, mentioned above.

[27] The Department and the Inquiry have relied strongly upon section 2(1) of the 2005 Act. It provides that: "An inquiry panel is not to rule on, and has no power to determine, any person's civil or criminal liability." In light of that prohibition, they submit that the Inquiry's function is properly delineated, and quite separate, from matters concerning the commission of offences. In response, the applicant points to the rider in section 2(2) that an "inquiry panel is not to be inhibited in the discharge of its functions by any likelihood of liability being inferred from facts that it determines or recommendations that it makes." In light of this, she submits that the Inquiry will be fact-finding about matters which were not transferred matters between 1999 and 2010. However, section 2(2) merely indicates that an inquiry is not to be inhibited from fact-finding simply because the facts it is addressing might, in another context and if proven to the criminal standard, constitute criminal conduct. It does not undermine the general principle that it is no part of an inquiry's function to determine criminal liability. In short, a public inquiry is not the way in which the criminal law is applied or enforced.

[28] I reject the applicant's case insofar as she contends that consideration of facts which might amount to abuse is beyond the Inquiry's powers. Her submissions appeared to me to go as far as to suggest that the Inquiry could not fact find in relation to matters which were *or could be* "allegedly criminal behaviour", notwithstanding that it is no part of the Inquiry's function to seek to rule on or determine questions of criminal liability. I accept the submission on the part of the Department and the Inquiry that the effect of section 2(1) of the Act is to put clear blue water between the exercise of its functions and an impermissible trespass into criminal justice matters. In this inquiry, consideration of the treatment of patients is being undertaken with a view to examining the adequacy and propriety of the provision of healthcare to vulnerable patients; and to inquire into whether conduct which fell well below the required standards occurred. The mere fact that the conduct concerned could be said to amount to a criminal act is no bar to the Inquiry being required to address it in its terms of reference when those terms of reference do not (nor could they) require the Inquiry to consider or determine whether the relevant conduct amounted to a criminal offence.

[29] Insofar as the applicant asserts that the Inquiry's terms of reference are unlawful simply because they permit or require the Inquiry to consider facts which *could* amount to criminal conduct, I do not consider this case to be arguable in the sense of having a realistic prospect of success. Simply by asking whether patients were abused by healthcare staff who were charged with their protection or care is not, in my judgement, to deal with the criminal law in any of the senses described in para 9 of Schedule 3 to the NIA as originally enacted. Put another way, the issue of

abuse is being considered through a healthcare lens, which is "wholly or primarily concerned" with a Northern Ireland matter for the purpose of section 30(2) of the 2005 Act.

[30] I would draw a distinction, however, between that aspect of the applicant's case (seeking to prohibit the Inquiry from looking at the underlying facts) and the Inquiry's proposed consideration of the criminal justice response to abuse which may or may not have occurred within the hospital. It is clear that it is at least part of the Inquiry's intention to address this. Where the Inquiry expressly proposes to look at the operation of the criminal justice system, as opposed to merely looking at patient treatment through the lens of healthcare, it is in my view clearly arguable that that is to stray into forbidden territory for the period up to April 2010. In those circumstances, the Inquiry would be moving from the healthcare sphere into matters such as the prevention and detection of crime and prosecutions. I accept that the applicant has raised an arguable case of illegality in relation to that proposed aspect of the Inquiry's work, subject to the issue discussed immediately below.

[31] The Department and Inquiry relied on a further point, namely that section 30(2) only prohibited terms of reference *requiring* a public inquiry to determine or make recommendations in relation to certain issues. Since the terms of reference in this case imposed no such requirement, it was argued, they were not in breach of the prohibition contained within section 30(2). In particular, Ms Kiley's submissions examined the terms of reference closely with a view to demonstrating that there was no requirement imposed upon the Inquiry to determine any fact or make recommendations. Para 23 of the terms of reference provides only that the Inquiry "*may* make findings of fact on matters within the terms of reference"; and, although para 24 does envisage that the Inquiry will make recommendations, this is expressly "having regard to (and dependent on)" its factual findings.

[32] Mr Larkin laid particular emphasis on para 4 of the terms of reference, which states that, "The Inquiry *will* examine the nature and extent of abuse of patients at MAH." Even without that provision, it is arguable that, read as a whole and in context, the terms of reference impose an implied obligation upon the Inquiry to make findings about abuse which occurred at the hospital: otherwise, how would the Inquiry fulfil any of its core aims? There also seems to me to be a relatively clear requirement that the Inquiry will examine the criminal justice response of the police, imposed in para 13 of the terms of reference.

[33] I do not need to conclusively determine this issue, since I have concluded that leave to apply for judicial review should be refused on other grounds. I would be reluctant to conclude that it is a clean knock-out blow in favour of the Department and the Inquiry. However, the applicant did face a significant hurdle in pointing out precisely where there was a requirement, within the meaning of section 30(2), that the Inquiry determine any fact in relation to these matters. This is obviously a phrase chosen by Parliament with care, since it is to be contrasted with the stricter prohibitions (a) in section 30(3) that, as regards certain matters, the Minister may not

without the consent of the Secretary of State include in the terms of reference anything that would require the inquiry "to inquire into" certain events; and (b) in section 30(7) that, in respect of the excepted matter of national security, the inquiry must not "consider evidence" or make recommendations about this.

[34] Read together, these provisions suggest that the Inquiry may have significant leeway to inquire into, or consider evidence relating to, matters which are not wholly or primarily concerned with Northern Ireland matters, provided that its terms of reference do not actually *require* it to determine facts in relation to those matters or make recommendations in relation to them (although, where doing so, the Inquiry would also not be able to exercise its section 21 powers to obtain evidence in relation to those matters: see section 30(4)). The definition of terms of reference in section 5(6) of the 2005 Act make clear that they may specify "particular matters as to which the inquiry panel is to determine the facts" but that, in addition, they can set out more generally the matters to which the inquiry relates and any other matters relating to the scope of the inquiry that the Minister may specify. In light of the nature and purpose of public inquiries (as to which, see generally the short discussion in *Re JR276's Application* [2023] NIKB 107, at paras [40]-[43]) I would also be inclined to construe the prohibition in section 30(2) narrowly.

[35] In summary, I consider the applicant's case unarguable insofar as she contends that the Inquiry's terms of reference wrongly require it to fact find in relation to abuse (merely because that *could* constitute criminal conduct). With some hesitation, I consider the applicant's case arguable in relation to the Inquiry's terms of reference insofar as they relate to the criminal justice response to circumstances in the hospital up to April 2010; but I nonetheless refuse to grant her leave in respect of this for the further reasons set out below. Before addressing those reasons, I turn to the second substantive issue of law raised by the application.

The Permanent Secretary's role

[36] The Permanent Secretary is a senior officer of the Department of Health and so, pursuant to section 3(1) of the 2022 Act, is entitled to exercise a function of the department during the absence of a Minister (provided he is satisfied that it is in the public interest for him to exercise that departmental function). The applicant contends that it was therefore open to him to amend the terms of reference of the Inquiry which the previous Minister of Health had set out. She accepts that section 5 of the 2005 Act textually confers power on a *Minister* to amend the terms of reference. However, she contends that this is nonetheless a departmental function which falls within the enabling scope of section 3 of the 2022 Act.

[37] I cannot accept that submission. Notwithstanding how persuasively it was developed by Mr Larkin, the power to amend the terms of reference is one conferred solely upon the Minister who initially set out the terms of reference. That follows from the plain wording of section 5(3) of the 2005 Act: "The *Minister* may at any time after setting out the terms of reference under this section amend them…" [italicised

emphasis added]. I construe that as referring to the holder of the relevant Ministerial office, so that it is not the case that, unless and until Mr Swann is reappointed as Minister of Health, the Inquiry's terms of office are unamendable under section 5(3). He was acting in his capacity as the Minister of Health. A future holder of that office could lawfully amend the MAHI terms of reference in my view. The point is that this is a function reserved to Ministers and not conferred upon a department.

[38] It is well known that, in Northern Ireland, powers and functions are frequently conferred directly upon departments and are therefore clearly departmental functions. Pursuant to section 23(2) of the NIA, as respects transferred matters the executive powers of His Majesty in relation to Northern Ireland are exercisable on His Majesty's behalf both by Ministers and Northern Ireland departments. However, a statutory power or function is sometimes expressly conferred only upon a Minister, in which case they are generally to be exercised by the Minister personally. This distinction – between departmental functions and Ministerial functions – is both intentional and recognised in section 22 of the NIA (under the heading, 'Statutory functions') which provides as follows:

> "(1) An Act of the Assembly or other enactment may confer functions on a Minister (but not a junior Minister) or a Northern Ireland department by name.
>
> (2) Functions conferred on a Northern Ireland department by an enactment passed or made before the appointed day shall, except as provided by an Act of the Assembly or other subsequent enactment, continue to be exercisable by that department."

[39] Although this provision applies to the NIA itself and other 'enactments' (meaning provisions of, or made under, Northern Ireland legislation), such that it does not apply directly to the terms of the 2005 Act, it is demonstrative of a dichotomy which is evident more generally in the conferral of statutory functions in Northern Ireland. Sometimes they are conferred on departments; and sometimes on Ministers.

[40] The 2022 Act did not change that position and it refers, in section 3(1), only to a senior officer of a department exercising "a function of the department" during a period of Ministerial absence. There are similar references to "departmental functions" in section 5(1) and (2).

[41] At a high level of generality, in England and Wales the office of Secretary of State is a corporation sole, with their department (lacking formal legal personality) gathered around them; whereas in Northern Ireland, the department is the relevant body corporate, with a Minister "in charge" of the department and provided with

power to direct and control the exercise of its functions: see, generally, the Departments (Northern Ireland) Order 1999 (SI 1999/283) ("the Departments Order"). Article 4(3) of the Departments Order provides that, subject to the other provisions of that Order, "any functions of a department may be exercised by… the Minister; or… a senior officer of the department." Pursuant to article 4(1), the functions of a department shall at all times be exercised subject to the direction and control of the Minister. The result is that a Minister can always control the exercise of a function of their department or exercise that function personally. It does not follow, however, that a departmental official can exercise a function which has been conferred upon their Minister, even taking account of the 2022 Act.

[42] There may well be force in Mr Larkin's criticism of the 2005 Act to the effect that it has not been drafted with the different constitutional arrangements in Northern Ireland to the fore, if they were in mind at all. That said, Parliament is to be taken to be aware of the content of legislation it has previously passed (see *Bennion, Bailey and Norbury on Statutory Interpretation* (8th edition, LexisNexis) at section 11.3). In addition, in section 23 of, and Schedule 1 to, the 2005 Act – which make amendments to the Interpretation Act (Northern Ireland) 1954, under which some inquiries may also be held – it is clear that Parliament had in mind the distinction between a Northern Ireland Minister and a Northern Ireland department. In the new Schedule A1 to be inserted into the 1954 Act, for the purposes of that Act (but not the 2005 Act) it was provided that the "Department" meant *either* the Minister *or* the Northern Ireland department causing the inquiry to be held. Notwithstanding that, for the purposes of section 5, Parliament chose only to confer the relevant power on Ministers, including Northern Ireland Ministers.

[43] In summary, I accept the Department's submission that the setting and amendment of inquiry terms of reference are Ministerial functions and not a departmental function. This is a result of the plain wording of the 2005 Act, possibly in recognition of the fact (as Mr Coll submitted) that the establishment of a public inquiry is frequently, if not always, an intensely political step which Parliament has intentionally limited to Ministers. As a Ministerial function, rather than a departmental function, amendment of the terms of reference was not a function which the Permanent Secretary was entitled to exercise in the absence of a Minister under the 2022 Act.

[44] The applicant relied upon the fact that section 3(3) of the 2022 Act provides that the fact that a matter has not been discussed and agreed at the Executive Committee is not to be treated as preventing the exercise of a power under section 3(1). Since it is only Ministers who are under an obligation to bring matters to the Executive Committee, the applicant submits that section 3(1) cannot be intended to exclude from its purview functions which have been textually conferred upon Ministers only. I do not consider that this follows. In the decision of the Court of Appeal in *Re Buick's Application* [2018] NICA 26, it was made clear that a senior official could not exercise a departmental function where a Minister would have been expected to exercise that function (or to have given directions in relation to its

exercise) and, in those circumstances, would have been required to refer it to the Executive Committee for discussion and agreement under the Ministerial Code (see paras [52]-[56] of the majority judgment). Section 3(3) of the 2022 Act, and equivalent provisions of earlier legislation, is designed merely to make clear that this prohibition no longer applies. However, it again relates only to departmental functions and does not, in my view, suggest that senior officials are in a position to exercise functions which are conferred directly upon Ministers.

[45] The applicant further relies upon the fact that the statutory guidance (issued by the Secretary of State in December 2022, pursuant to section 3(4) of the 2022 Act, about the exercise of functions by a senior officer of a Northern Ireland department in reliance upon section 3) makes no suggestion that a power textually conferred by statute on a Minister cannot be exercised by an official. She says that the guidance assumes that functions to be exercised under the 2022 Act include those that would plainly be exercisable personally by ministers. I think it likely that the reason the guidance does not spell out that officers cannot exercise functions specifically conferred by statute on ministers is because it was considered unnecessary to make this basic point. The guidance is generally dealing with departmental functions which would have been exercised by, or subject to the direction of, the Minister. In those circumstances, for the reasons discussed above, a senior official *could* exercise the power under section 3 of the 2022 Act, provided that they were satisfied that it was in the public interest for them to do so. In my view, that does not apply to a power or function expressly conferred upon the Minister only.

[46] The above analysis disposes of the second issue raised in this application. However, it is appropriate to deal with two further points raised by the applicant. First, she submits that it is clear throughout the 2005 Act that powers and duties are conferred on "the Minister" in circumstances where, in Northern Ireland, they are in fact undertaken by the relevant department. The primary example given – indeed, the only real example relied upon – is the discretion under section 39(1) of the 2005 Act for the Minister to agree to pay inquiry expenses; and the related obligation on the part of the Minister under section 39(2) to pay certain amounts awarded by the chairman under section 40. I have received no detailed argument, much less evidence, about the arrangements for discharging the Inquiry's expenses, since that is not a matter which is in issue in these proceedings. It may be that, once the Minister has agreed to pay remuneration and expenses under section 39(1) the ongoing obligation to honour that agreement and make relevant payments becomes a departmental function (provided the spending is regular in public finance terms) or that the legal basis for that departmental spending is found elsewhere than in section 39 of the 2005 Act (for instance, in a Budget Act). In any event, I did not consider this argument to materially affect the correct analysis of the statutory provisions at the centre of this case.

[47] Second, the applicant submits that the 2005 Act had made provision for periods of suspension of devolved government in Northern Ireland to be addressed by the Secretary of State for Northern Ireland stepping in (see section 45). I also

found no real assistance in the terms of section 45, since it deals with a suspension of devolved government which is effected by section 1 of the 2000 Act being in force. That is not the position at present. Devolved government in Northern Ireland has not been suspended; it is merely inoperative due to the present impasse in electing a Speaker of the Northern Ireland Assembly and filling Ministerial posts. (Indeed, section 1 of the 2000 Act has since been repealed.) Although section 45(2) of the 2005 Act evinces a legislative intention that periods of suspension under the 2000 Act should not stymie the operation of public inquiries under the 2005 Act, it says little if anything about what should happen when devolved government is not suspended but is merely inoperative. In those circumstances, the relevant legal position must be resolved by reference to the terms of other provisions within the 2005 and 2022 Acts. It might also be said that section 45(2) lends some weight to the submission of the Department and Inquiry, given that it refers to "functions conferred by this Act *on a Northern Ireland Minister*" and, when in operation, requires those functions to be exercised by another Minister (namely a UK Minister, the Secretary of State).

The standing issue

[48] I have concluded above (see paras [30]-[35]) that there is one aspect of the applicant's case in relation to the Inquiry's terms of reference which is arguable. However, I accept the proposed respondent's submission that the applicant does not have standing to pursue this issue in the present proceedings. RCJ Order 53, rule 3(5) provides that "the Court shall not, having regard to section 18(4) of the [Judicature (Northern Ireland) Act 1978], grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates."

[49] The nub of the applicant's complaint is that the Inquiry should not be looking at criminal justice matters which pre-date the devolution of policing and justice in April 2010. However, it is clear from the correspondence that the period of time with which she is concerned is from 25 April 2017 to 18 June 2017, in respect of which she currently faces criminal charges. It was this period of time which she particularly asked to be excluded by amendment of the terms of reference in her solicitor's correspondence of 12 September 2022. She was employed at Muckamore Abbey Hospital for in or around three years, none of which overlaps with the period of time during which (by this case) she contends the Inquiry should not be considering abuse. If the terms of reference were amended to remove consideration of matters earlier than April 2010, this would be of no practical or material significance to her. The applicant's riposte is that she is trying "to minimise the prejudicial impact of the Inquiry" on the criminal proceedings in which she is a defendant, since the prejudicial impact will be lessened if less time is spent upon (and less publicity generated by) examining whether or not abuse occurred at Muckamore Abbey Hospital.

[50] The fact that the purported illegality which the applicant challenges in these proceedings has no material impact upon her is not necessarily determinative of the objection to her standing. However, it is highly relevant to the court's assessment of

whether her interest is sufficient to permit her to pursue the point. Recent authority such as *R (Good Law Project and Others) v The Prime Minister and Others* [2022] EWHC 298 (Admin) has served as a reminder that a more exacting analysis of the standing requirement may be required in appropriate cases. This case was referred to, and a helpful distillation of relevant principles set out, in the recent judgment of the Court of Appeal in *Re Duff's Application* [2023] NICA 22, at paras [29]-[30] (and see also *Duff v Causeway Coast and Glens Borough Council and FP McCann Ltd* [2023] NICA 56, at para [17]). The question of whether an applicant has a sufficient interest in any case is fact-sensitive and context-specific. The nature and weight of the applicant's substantive interests, and the extent to which they are prejudiced, are factors which must be assessed objectively in considering the sufficiency of the interest.

[51] In concluding that the applicant does not have sufficient interest to advance this ground, I consider the following matters to be material:

(i) As noted above, the relief she seeks would be of no practical assistance to her in relation to her own case and concerns, relating, as they do, to a period in 2017 when criminal justice matters had been devolved for some time. It is entirely clear that, from start to finish, the applicant's primary concern has been her own position in those criminal proceedings. I make no criticism of her for that fact; but it sets the context for the consideration of her standing.

(ii) The applicant is not, nor does she represent, a specialist body or organisation with expertise in this issue or with a role in promoting the public interest in relation to it.

(iii) This is not a case where the claimed excess of power affects the public generally. Rather, it relates to a limited category of persons and a limited period of time.

(iv) There will also be others – none of whom is before the court – who would be much more directly affected by the issue raised by the applicant (namely, staff whose conduct was in issue in the pre-2010 period or, more directly still, criminal justice agencies whose actions may be the subject of examination). Such a person would represent a much better-placed challenger than the applicant, particularly since resolution of the issues may require, or be informed by, the concrete factual scenario in which they arose.

The delay issue

[52] The proposed respondent also contends that the true nature of the first limb of the applicant's challenge is that it is a challenge to the legality of the Inquiry's present terms of reference. I accept that submission. Although Mr Larkin presented the case as a challenge to the more recent decision of the Permanent Secretary, it is clear from the materials submitted by the applicant that she contends that the present terms of reference are unlawful and that, for that reason, the Department is required to

acknowledge this and give a remedy (see, for instance, para 9 of her grounding affidavit). That is also the basis upon which the Minister was invited to amend the terms of reference in the applicant's solicitor's letter of 12 September 2022. However, this complaint first arose a considerable time ago.

[53] On 29 September 2021, the then Minister made a written statement to the Northern Ireland Assembly announcing that the process of developing the MAHI terms of reference had been completed and a copy of the terms of reference was attached to the statement. Amongst other things, this confirmed that the Inquiry would report and make findings on events that occurred between 2 December 1999 and 14 June 2021. The Department contends that this was the date when any challenge to the lawfulness of the terms of reference "first arose" for the purpose of RCJ Order 53, rule 4.

[54] A shorter time limit of 14 days (from the date of the applicant's awareness of the challenged decision) is imposed by section 38 of the 2005 Act in respect of a judicial review challenge to a decision made by the Minister in relation to an inquiry. In the present case, that does not apply since the applicant is challenging a decision of the Permanent Secretary. However, insofar as the challenge is properly to be viewed as incorporating a challenge to the Minister's decision to set unlawful terms of reference, a direct challenge to that decision would have been required to have complied with the more strict time limit set out in the 2005 Act.

[55] The present issue was first raised by correspondence on the applicant's behalf of 12 September 2022, almost a year after the terms of reference were published. Nothing material has changed since that time. I also accept that the clock cannot simply be reset by the artificial mechanism of asking the Minister to reconsider the terms of reference on the basis that they are, and have always been, unlawful, and to then use that fresh 'decision' as the starting point for the judicial review time limit. Such an approach is generally regarded as insufficient to overcome a proper objection on the basis of delay, at least where there is no material change of circumstance and the nature of the underlying alleged illegality upon which the applicant wishes to rely remains the same (see, for instance, *Re Duff's Application* [2022] NIKB 8, at para [27]). In the present case, the applicant's proposed challenge to the Department's "refusal… to acknowledge" that the terms of reference are unlawful appears to me to fall within this category. In addition, the Inquiry has drawn attention to the prejudice which it has suffered in it having proceeded to date, including by the taking of many witness statements and the hearing of evidence, on the basis that its terms of reference were entirely legitimate. Those concerns were strongly echoed by the second and third notice parties. I would therefore hold that the first limb of the applicant's challenge is out of time. No application for an extension was made – on the basis that no such extension was needed – but I would, in any event, not have been inclined to grant any extension.

[56] I am reinforced in this conclusion by the fact that Colton J observed, in the applicant's earlier application for judicial review, that (at that time, in September

2022), "Self-evidently, any challenge to the lawfulness of the Terms of Reference is manifestly out of time": see *Re JR222's Application* [2022] NIKB 3, at para [132]. That conclusion was not appealed to the Court of Appeal in the subsequent appeal against Colton J's judgment. I need not determine whether the issue is strictly *res judicata* between the parties since, in any event, I consider the delay objection to be well-founded insofar as the applicant's case relies upon the proposition that the terms of reference are (and have always been) unlawful.

[57] The delay issue does not bite in the same way in relation to the second limb of the applicant's case. That could only have arisen after the Minister had ceased to hold office. However, I have concluded that that aspect of the applicant's case should not be granted leave on its merits. In any event, it arises only because of the applicant's concern that the terms of reference were and are unlawful. Considering that element of the case in the abstract, without reference to the (out of time) complaint about the legality of the terms of reference, I would hold that the claim is academic or hypothetical and so leave ought to be refused on that basis.

Abuse of process and the court's discretion

[58] Finally, the Department also contends that the challenge relating to the legality of the terms of reference is an abuse of the court's process. The applicant's first judicial review challenge was heard on Thursday 8 and Friday 9 September 2022. This claim included a complaint about the legality of the Inquiry's terms of reference, albeit on different grounds. The Monday after the hearing, 12 September 2022, is the day when the applicant's solicitor sent the further letter to the Department raising concerns about the issue which has been pursued in this case. In these circumstances, the proposed respondent submits that the applicant "should not be permitted to drip feed grounds of challenge into multiple applications for judicial review, thereby wasting multiple sets of costs and court time for no good reason as well as risking unnecessary administrative uncertainty that could have been avoided by bringing all grounds of challenge simultaneously and timeously." This is raised as an aspect of the Department's opposition to leave on the grounds of delay but also, separately, as constituting an abuse of process.

[59] The nature of this objection is simply that the applicant could have, but did not, raise the issue of vires or jurisdiction which she now pursues in relation to the terms of reference in her earlier proceedings, notwithstanding that the earlier challenge took issue with the legality of the terms of reference on other grounds; and that there has been no proper explanation for her failure to do so. In support of this argument, the third notice party relied upon the comments in the Divisional Court judgment in *R v Secretary of State for the Environment, ex parte Hackney LBC* [1983] 1 WLR 524, at 539B-C, approving commentary in the fifth edition of Professor Wade's text, *Administrative Law*, where, albeit doubting then whether *res judicata* applied in the field of judicial review, it was noted that "the court may refuse to entertain questions which were or could have been litigated in earlier proceedings, when this would be an abuse of the legal process."

[60] The applicant's first judicial review sought to impugn the Inquiry's terms of reference on the basis that they were unlawful by reason of a failure to obtain the consent of the Secretary of State in respect of periods of time to be examined by the Inquiry when devolution had been suspended pursuant to section 1 of the 2000 Act. It was argued that this illegality ought to have been considered by the Minister when considering the question of whether the Inquiry should be suspended (see para [132] of the judgment). Although obviously different from the point now made, that objection raised similar themes to the present challenge. It was dealt with in Colton J's judgment at paras [132]-[139]. The issue pleaded in the present case was not raised in the earlier challenge, nor did the applicant seek to introduce it in the course of her appeal to the Court of Appeal. If it was a good point, it could equally have been prayed in aid of her contention that the Inquiry should be suspended considering, inter alia, that it had been set up in a manner which strayed beyond a lawful remit.

[61] The High Court's judicial review jurisdiction is discretionary. It seems to me that the proposed respondent's objection – if well made – does not necessarily have to be categorised as an abuse of the process of the court in order for it to provide a sufficient basis for the refusal of leave in the exercise of the court's discretion. It undoubtedly overlaps with the Department's objection on the ground of delay (discussed above). The objection also engages the principles of legal certainty and finality, which are aspects of both the public interest and fairness; as well as the courts' concern about permitting 'rolling' judicial review, particularly within but also between judicial review proceedings.

[62] I have not been persuaded that it would be appropriate to refuse leave on this basis alone. This makes no difference in the present case, given my conclusions on the issues of delay and standing set out above. There will undoubtedly be cases where the court would be entitled, in the exercise of its discretion, to refuse leave if it was plain that a judicial review complaint could and should have been brought in earlier proceedings. The High Court, including in judicial review proceedings, also has the power – indeed, duty – to protect its process from being abused. In appropriate cases, that too could be reflected in a refusal of leave to apply for judicial review. In the present case, however, I have not been persuaded that there was anything improper in the way in which this issue arose. It would have been helpful if had been raised in the earlier proceedings, but it emerged for the first time after the hearing and argument in that case had concluded. As most counsel know (often through bitter experience), a new or better point will occasionally occur to them after a case has been argued. Where such a point has knowingly and intentionally been held back, in order to promote delay for some tactical advantage or to maximise legal representatives' remuneration in a further publicly-funded claim, that may well amount to an abuse of process; but there is no suggestion of any such conduct in this case, much less any evidence to substantiate such a complaint. In those circumstances, I would not have refused leave on this basis alone.

Conclusion

[63] In summary, I hold as follows:

(1) The applicant's challenge to the legality of the Inquiry considering at all potential abuse in Muckamore Abbey Hospital which pre-dates the devolution of policing and justice is unarguable. Provided the Inquiry is not examining those matters from a criminal justice perspective, it is entitled to fact find in relation to them under its terms of reference.

(2) Different considerations may apply where the Inquiry expressly sets out to examine the criminal justice response to the treatment of patients in Muckamore before 12 April 2010. I accept that it is arguable that, insofar as the Inquiry is required to do so by its terms of reference (which I have not determined), that goes beyond what is permissible under section 30(2) of the 2005 Act.

(3) Nonetheless, I decline to grant leave in relation to that matter on the following bases:

(a) The applicant lacks sufficient interest to have standing to raise this point; and

(b) The applicant is also out of time to raise this point since it is, in essence, a complaint about the legality of the terms of reference which were set in September 2021.

(4) I also refuse the applicant leave to apply for judicial review on the second aspect of her case, namely whether the Permanent Secretary had power to amend the terms of reference of the Inquiry. I do not consider that element of the applicant's case to be arguable.

(5) Further, when detached from the first aspect of her case (which is either unarguable or on which she lacks standing), the question of the Permanent Secretary's powers is, for the moment, purely academic, given the basis upon which he was invited to exercise such power as it was contended he had.

[64] For those reasons, leave to apply for judicial review is refused. I will hear the parties on the issue of costs.