

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

IN THE MATTER OF AN APPLICATION BY PHILOMENA McKAY FOR
JUDICIAL REVIEW

TREACY J

Ruling on interim relief

[1] On 27 November of this year the applicant was granted leave to challenge a decision to close the MS Respite Unit and intermediate care beds at Dalriada Hospital. That application was supported by a very helpful skeleton argument from Mr Scoffield QC and Mr Donal Sayers who appear for the applicant. Unsurprisingly the respondent did not oppose the grant of leave.

[2] The applicant's central contention is that it was not lawful to close services at Dalriada Hospital without consultation. By way of interim relief the applicant seeks an order that no effect be given to the decision to close Dalriada Hospital pending determination of these proceedings. Counsel submitted that such an order is sought to ensure that the consultation which is now to take place does so in an appropriate context - with the hospital functioning and with consultees asked to consider a proposal at a *formative* stage that services be temporarily closed. As the case law and the text books make clear, and was not in dispute, "*the fundamental principle applied by the courts in deciding whether to grant interim remedies is that they should take whichever course carries the lower risk of injustice if it transpires that, in light of the eventual outcome of the claim, the interim remedy was wrongfully refused or granted.*" [Auburn, Moffett & Sharland *Judicial Review: Principles and Procedure* (2013), para 29.01] The applicant submitted that this principle resolved to the following question: is injustice more likely to result from (i) the grant of interim relief but the failure of the judicial review, or (ii) the refusal of interim relief but success of the application for judicial review?

[3] I have carefully considered the affidavit evidence of Briega Donaghy, the Acting Director of Strategic Planning and Performance Management at the Northern Trust relied upon by the respondent in opposing interim relief. I have also carefully considered the affidavit of Martin O'Kane who is a partner in the GP Practice at Dalriada Hospital which is relied upon by the applicant in support of the claim for interim relief.

[4] My attention was also drawn to extracts from the Official Report of the Northern Ireland Assembly of proceedings on 25 November 2014 when the closure was debated from which it can be seen that all of the political parties expressed their scepticism about the alleged temporary nature of the closure. For example, Mr Dickson of the Alliance Party, is recorded as having said the following:

“The words temporary closure were used in the press statement. “Temporary” is Civil Service - speak for final closure; let us get that on the record as well. These people will not just be making this a temporary break. They intend to close the facility.”

[5] To similar effect Dr McDonnell of the SDLP said:

“I am delighted to be able to take a few moments to discuss the temporary closure of the Dalriada Hospital. I must say that this is a habit that has happened repeatedly. We have temporary closures without consultation that become permanent. That trick has been used right across the health service.”

[6] Mr Allister of the TUV is recorded as having said:

“I think we all know that it is closure, not a temporary discontinuation.”

[7] Maeve McLaughlin of Sinn Fein was asked “Would she now agree that what the Minister said about no new admissions is in effect closure in another form?”

[8] At the conclusion of the debate, in a striking display of cross party support across every single party represented in the Assembly, it was resolved as follows:

“That this Assembly notes the decision to close the regional multiple-sclerosis respite centre at Dalriada Hospital in Ballycastle until March 2015 and transfer the service to the independent sector; further notes the importance of appropriate respite provision for patients and their families; believes the decision to be entirely wrong and one which makes no financial sense; fears the

decision will result in the permanent closure of the centre; and calls on the Minister of Health and Social Services and Public Safety to reverse the decision and immediately reinstate the services at Dalriada Hospital.”

[9] In addition to the expression of concern by all of the political parties Mr O’Kane deposed as follows:

“The starving of Dalriada Hospital of patients using its beds and the hasty redeployment of staff elsewhere as a result, seems designed to result in the MS Respite Centre and Intermediate Care Unit closing completely within a relatively short period of time and well within the period set aside for the purported consultation on the temporary closure. I, and others, remain concerned that this evidences a clear intention on the part of the Department, notwithstanding an announcement of a new consultation exercise, to proceed to close these facilities and make their re-opening as difficult as possible.”

[10] In support of the application for interim relief counsel drew my attention to para. 29.01 of Auburn *et al* which recognises that:

“ ...the adequacy of an award of damages at trial will rarely be determinative of an application for an interim injunction in the public law field. This is because of a combination of factors: the fact that a claim for damages against a public body exercising public law functions will only lie in limited circumstances, the fact that an award of damages to the public body (even if such an award were to be made and satisfied) may not be an adequate means of compensating any harm to the wider public interest that may result from the grant of an interim injunction, and the fact that an individual claimant will often not have the funds to give any meaningful cross-undertaking as to damages.”

[11] Further, at para 29.25 – 29.26 the authors noted that:

“In particular, the courts will bear in mind the fact that one of the purposes of claims for judicial review is to provide swift relief from the abuse of executive power. Accordingly, when deciding whether to grant an interim injunction, the courts will have regard to the purpose of any statutory framework within which the decision under challenge has been taken ...

Other factors that are likely to be relevant to the assessment of where the balance of convenience lies include the extent to which the claimant, the defendant, or a third party may suffer uncompensatable damage should an interim injunction be granted or refused; whether the grant of an interim injunction would, in practical terms, be determinative of the issues between the parties; and the relative strengths of the parties' cases, particularly where the dispute turns on issues of law rather than issues of fact. The relative strengths of the parties' cases are likely to be of particular relevance where the balance of convenience would otherwise be finely balanced or where the grant of an injunction would give rise to the risk of significant financial loss, but no cross-undertaking in damages has been offered."

[12] The statutory framework of the impugned decision includes the obligation, imposed by sections 19 and 20 of the Health and Social Care (Reform) Act (Northern Ireland) 2009, to establish a consultation scheme explaining how the relevant body will make arrangements with a view to securing that it involves and consults with persons to whom care is being provided, and their carers, on matters such as the development and consideration of proposals as to changes in the way that care is provided, and decisions affecting the provision of that care.

Conclusion

[13] In the circumstances of this case I see the force of the applicant's argument that if the interim relief is not granted interested parties may be seriously disadvantaged in any consultation exercise, for example, by being required to argue for the re-opening of a closed facility following the redeployment of staff and the commencement of alternative arrangements. Moreover, the risk that the factual landscape may have altered, perhaps significantly, by the time of the hearing might assist the respondent in resisting the more intrusive forms of remedy otherwise available in the event that the applicant were to succeed. In any event, based on my necessarily provisional assessment of the relative strength of the party's case as to the lawfulness of the decision to close services at the hospital without any consultation, I consider that in all of the circumstances the balance of justice comes down in favour of the grant of interim relief. Such a course is less likely in my view to cause injustice.

[14] Accordingly, for the period pending determination of the present proceedings I order that no effect is to be given to the decision to close services at Dalriada Hospital. I did make this Order yesterday and communicated it to the parties but indicated that I would, as previously indicated, give the reasons for that decision today.