Neutral Citation No: [2022] NIKB 3 *Judgment: approved by the court for handing down (subject to editorial corrections)**	*Ref:* *ICOS No:* *Delivered:*	**COL11923** **22/058007/01** **15/09/2022**

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
FOR JUDICIAL REVIEW

AND IN THE MATTER OF THE DECISION OF THE MINISTER OF HEALTH FOR THE DEPARTMENT OF HEALTH

and

THE MUCKAMORE ABBEY HOSPITAL INQUIRY
THE PPS
THE PSNI
NP3
AARON BROWN
BRYAN McCAREY
THE BELFAST HEALTH AND SOCIAL CARE TRUST

_____

Mr John Larkin KC with Ms Natasha Fitzsimons BL (instructed by McCann & McCann Solicitors) for the Applicant
Mr Peter Coll KC with Mr Philip McAteer BL (instructed by The Departmental Solicitor's Office) for the Respondent
Mr Sean Doran KC with Mr Mark McEvoy and Ms Denise Kiley BL (instructed by the Solicitor to the Muckamore Abbey Inquiry)
Mr Philip Henry BL for the Public Prosecution Service
Mr Mark Robinson KC with Mr Ben Thompson BL (instructed by the Crown Solicitor's Office) for the PSNI
Mr Connor Maguire KC with Ms Victoria Ross BL (instructed by O'Reilly Stewart Solicitors) for NP3
Ms Monye Anyadike-Danes KC with Mr Stephen J McQuitty BL (instructed by Phoenix Law Solicitors) for Aaron Brown
Ms Monye Anyadike-Danes KC with Ms Helena Wilson BL (instructed by Phoenix Law Solicitors) for Bryan McCarey
Mr Joseph Aiken KC for the Belfast Health and Social Care Trust

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COLTON J

Introduction

[1] The applicant is currently being prosecuted for alleged abuse of patients at Muckamore Abbey Hospital ("MAH"). The applicant is a former staff member of MAH and along with her co-accused faces 131 counts in respect of alleged acts of abuse allegedly committed at MAH between April and June 2017. The applicant is contesting all of the charges. The criminal prosecution is awaiting an imminent committal hearing in the Magistrates' Court at the time of the hearing of this application.

[2] In September 2020, the respondent ordered a Public Inquiry under the Inquiries Act 2005 ("the 2005 Act") into alleged abuse of patients at MAH.

Core Objectives

[3] The core objectives of the Terms of Reference of the Inquiry are as follows:

> "(a) Examine the issue of abuse of patients at Muckamore Abbey Hospital;
>
> (b) Determine why the abuse happened and the range of circumstances that allowed it to happen;
>
> (c) Ensure that such abuse does not occur again at MAH or at any other institution providing similar services in Northern Ireland."

[4] The Inquiry will report and make findings on events that occurred between 2 December 1999 and 14 June 2021. Following opening statements from the Chairman of the Inquiry and leading counsel for the Inquiry it commenced hearing evidence on 27 June 2022. The Inquiry is currently in summer recess and is scheduled to recommence on 20 September 2022.

[5] By this application the applicant seeks to challenge two decisions of the respondent whereby he refused to suspend the Inquiry until the determination of the criminal proceedings against her. These decisions were conveyed by way of letters from the respondent dated 29 June 2022 and 9 August 2022.

The Impugned Decisions

[6] The impugned decisions can be identified by reference to the following correspondence.

[7] On 16 June 2022 the applicant's solicitors, McCann & McCann, wrote to the respondent in the following terms:

> "Dear Sir/Madam
>
> **RE: Muckamore Abbey Hospital Inquiry and criminal proceedings**
>
> We refer to the above Inquiry and now attach a letter that we have furnished to the Inquiry as of today's date.
>
> As the sponsoring Minister for the Inquiry we are copying this to you for your response also.
>
> We look forward to hearing from you."

[8] On the same date as referenced in the above correspondence, the applicant's solicitors also wrote to the Chair of the Inquiry in the following terms:

> "Dear Sir/Madam
>
> **RE: Muckamore Abbey Hospital Inquiry and criminal proceedings**
>
> This correspondence is sent in accordance with the Inquiries Act 2005.
>
> Its status is a document given to the Inquiry on behalf of our clients.
>
> We act on behalf of several defendants who are currently before Antrim Magistrates Court. These are live criminal proceedings which are listed for committal on …
>
> There are eight co-accused facing 131 charges specified on the Statement of Complaint.
>
> We understand that the Inquiry will be considering alleged abuse over a period inclusive of dates in which are clients face criminal prosecution. Therefore, our clients' actions and roles regarding the alleged abuse of patients will be of direct examination and scrutiny by this Inquiry.
>
> We note that the Inquiry has already heard opening submissions and is due to commence the hearing of formal evidence. We had written to the solicitor to the Inquiry on

24 January 2022 advising that we consider that the Inquiry should not commence. We received a response on 31 January 2022 which stated:

> 'The Inquiry is a statutory Public Inquiry established under the Inquiries Act 2005. The scheduling of evidence at the Inquiry is a matter for the Chair.'

We have grave concerns that our clients unqualified Article 6 ECHR rights to a fair trial have been and continue to be infringed by this Inquiry commencing prior to the conclusion of the criminal prosecution.

All persons have the right to a fair and public trial or hearing in relation to both criminal and civil matters. Section 2 of Article 6 states:

> '2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.'

Our clients enjoy the presumption of innocence. However, there has been a huge amount of media coverage of this Inquiry already, including apologies and the presumption that abuse has taken place. As legal representatives of accused persons we have an increased and growing concern that their basic rights, such an empanelling and unbiased jury (sic), have already been irreparably damaged. Concerningly, there have already been significant and adverse and prejudicial commentary from various media sources. The following examples are illustrative of our clients' concerns:

- BBC News (6 June 2022): "Muckamore Abbey Inquiry told "bad practice was allowed to persist."

- Irish News (13 June 2022): "Muckamore staff threatened to cut off patient's genitals if he reported abuse."

- Belfast Telegraph (13 June 2022): "… the family was informed by PSNI that following the current review of CCTV, their loved one was captured being abused on 166 incidents."

The coverage and commentary has been widespread and worldwide across all information platforms. There have been sensational headlines and social media commentary which has jeopardised our clients' rights to a fair trial and tainted the criminal process in respect of all parties.

Some reporting on the commentary suggests that the Inquiry has reached a concluded view on some of the matters that will be investigated.

The Inquiry should not proceed to hear evidence in these matters until the conclusion of the criminal proceedings. The Minister has the power to suspend the Inquiry pending the determination of criminal proceedings pursuant to section 13(1)(b) of the Inquiries Act 2005 as detailed below:

> '(1) The Minister may at any time, by notice to the chairman, suspend an inquiry for such period as appears to him to be necessary to allow for—
>
> (a) …
>
> (b) the determination of any civil or criminal proceedings (including proceedings before a disciplinary tribunal) arising out of any of those matters.'

We require the immediate suspension of the Inquiry.

It is in the interests of all those concerned with the Inquiry that the integrity of the criminal proceedings is maintained.

The harmful and prejudicial publications to date give our office serious concerns that our clients' legitimate request to protect the integrity of their criminal trial and preserve their convention right to a fair trial would be even further undermined if this request was to be made public. In this vein, we seek confirmation that our clients are anonymised and that there is a restriction on this correspondence and request be made public.

Section 19 of the Inquiries Act 2005 provides for restrictions on public access to documents. Additionally, the Minster and the Inquiry are public authorities. Section 6(1) of the Human Rights Act 1998 states:

> '(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.'
>
> We are not aware of any other Public Inquiry commencing just before accused persons are returned for imminent Crown Court prosecution.
>
> We look forward to hearing from you. …"

[9] The key document is the Minister's reply of 29 June 2022 which resulted in the initiation of these proceedings. It provides as follows:

> "Dear Pearse,
>
> Thank you for your email dated 16 June 2022 regarding the Muckamore Abbey Hospital Inquiry.
>
> The Muckamore Abbey Hospital Inquiry (MAHI) is a statutory Public Inquiry established under the Inquiries Act 2005. The procedure and conduct of the Inquiry is a matter for the Chairman of the Inquiry pursuant to section 17(1) of the 2005 Act. Consequently, the Inquiry's investigations, to include the taking of witness statements and scheduling of oral hearings, are a matter for the Chair of the Inquiry. The Chair of the Inquiry has indicated in his statement of 10 November 2021 that he intends to adopt the Inquiry Rules 2006 and apply those rules unless, in his view, exceptional circumstances require a departure from the rules.
>
> As can be identified from the key documents and hearing transcripts from the MAHI website, a number of steps have been taken with the intention of respecting the integrity of the prosecutorial process whilst the Inquiry process continues. These include:
>
> (a) A Memorandum of Understanding (MOU) with the PSNI and the PPS. The MOU sets out how the Chair would make every effort, in accordance with section 17(1) of the Act, to ensure that the procedure and conduct of the Inquiry respects the integrity of the investigation and prosecutions while continuing to address its Terms of Reference. Part C of the MOU outlines a process for applications to restrict

disclosure of documents to Core Participants (CPs). At present the CCTV footage can only be viewed by the Inquiry Panel and its legal representatives. Part F (para 64) deals with oral evidence at the Inquiry and seeks to avoid the risk of 'impeding, impacting adversely on or jeopardising the investigation or prosecution.' This includes the deferring of oral evidence (para 65).

(b) The 22 June 2022 MAHI update. This identified that the first witnesses would be heard from during the last week of June and first week of July. This evidence will be focused on the patient experience. The patients' and relatives' names will be ciphered. The evidence of the patients and their relatives will not be live streamed outside of the hearing rooms except to Core Participants.

(c) Restriction Order No.4 (Staff identification). This prohibits the identification of past and present staff members who are implicated in abuse on the patients in evidence received by the Inquiry. Their names will be redacted in statements and replaced by ciphers.

(d) The Inquiry has required Core Participants, their relevant employees and their legal representatives to sign undertakings in respect of confidentiality.

(e) PSNI have appointed a senior counsel to engage with and attend the Inquiry.

The Department is not aware of the identity of your client as your correspondence did not identify them. You have not indicated whether your client has made a statement to the Inquiry or any application to the Inquiry in respect of any evidence which may be relevant to them. Notwithstanding this you suggest that there has been some prejudice to your clients' rights in respect of their criminal prosecution.

The Department does not accept that anything said in its opening statement directly suggested that any identified individual was guilty of a criminal offence in respect of Muckamore Abbey Hospital. The opening statement reiterated apologises I had made previously and did not refer to any specific individuals or incidents. However, as

a result of your correspondence the Department intends to copy it to the PPS and the Inquiry for their consideration.

The Department does not consider it necessary at this stage to publicise your correspondence, other than to copy it to the PPS and MAHI, however, it will alert you to any requests for publication of the correspondence and permit you to make representations on the request before it takes any decision.

The Department has seen and noted the Chair of the Inquiries response to your letter dated 24 June 2022. In light of the above safeguards that are in place with respect to this Inquiry and the Chair's response to this matter, who is best placed to advise on the Inquiry's conduct and proceedings, I am not minded to make a notice to suspend the Inquiry."

[10] The response from the Chair of the Inquiry referred to in the Minister's correspondence is dated 24 June 2022 and provides:

"Dear Mr MacDermott,

Re Muckamore Abbey Hospital Inquiry

The Chair acknowledges receipt of your correspondence of 16 June 2022. I note also the reference therein to your previous correspondence of 24 January 2022 and the reply from the Solicitor to the Inquiry dated 31 January 2022.

You express concerns that your clients' fair trial rights "… have been and continue to be infringed by this Inquiry commencing prior to the conclusion of the criminal prosecution." You refer specifically to media reporting of the Inquiry's opening sessions. You opine that some reporting and commentary suggests that the Inquiry has reached a concluded view on some of the matters which it will be investigating.

The evidence in the Inquiry has not commenced. The Chair categorically rejects any suggestion that a concluded view has been reached on any matter that the Inquiry is investigating. Further, for the avoidance of doubt, it is not accepted that the commencement of the Inquiry has infringed any of your clients' convention rights. In any event, the appropriate forum for the ventilation of any

concerns that you may have in this regard is the court in which your clients are to be tried.

You say that you require the immediate suspension of the Inquiry. You refer to section 13(1) of the Inquiries Act 2005, which empowers the Minister to issue a notice to suspend an Inquiry for such a period as appears to him to be necessary to allow for the determination of criminal proceedings arising from matters to which the Inquiry relates. No such notice has been issued.

You seek confirmation that your clients "… are anonymised …"

You may wish to note that the Chair has made a Restriction Order relating to the identification of present and former staff members named in evidence received by the Inquiry as being implicated in abuse of a patient. This is Restriction Order No. 4 (Staff Identification), which is available on the Inquiry's website. You should also be aware that Core Participants are required to sign a strict confidentiality undertaking in respect of all material received for Inquiry purposes.

Furthermore, as far as I am aware, none of your clients has to date made a statement to the Inquiry. Should any of your clients have information that they wish the Inquiry to consider, they are at liberty to complete the contact form on the Inquiry website. The Inquiry statement team will then arrange to have a statement taken from them. It is open to any witness making a statement to the Inquiry to apply to the Chair for measures such as anonymity and screening. The grant of such measures is at the discretion of the Chair, having regard to sections 18 and 19 of the Inquiries Act 2005.

You also seek confirmation that "… there is a restriction on this correspondence and request being made public." The Chair does not regard it as necessary at this time to publicise your request. If the Chair determines that your request ought to be made public, you will be notified accordingly.

As you are aware, information concerning scheduling and procedure is available on the Inquiry's website. I expect that you will wish to peruse the entirety of that

information. The following documents may perhaps be of particular interest:

(i) Restriction Order No. 1 (Redaction of Personal Details).

(ii) Restriction Order No. 2 (Patient Anonymity).

(iii) Restriction Order No. 3 (CCTV Viewing).

(iv) Restriction Order No. 4 (Staff Identification), as mentioned above.

(v) Protocol No. 4: Redaction, Anonymity and Restriction Orders.

(vi) MOU between MAHI and PPS and PSNI, dated 09 March 2022.

(vii) Chair's Update and Statement in relation to the dissemination of material to Core Participants, issued on 09 June 2022.

(viii) Chair's Update on Hearings, Restriction Orders and Witness Expenses, issued on 20 June 2022.

Should you have any difficulty in locating any of the above information please do not hesitate to contact me.

I trust that the above is of assistance however should you have any further queries about the progress of the Inquiry please do not hesitate to contact me."

[11] The applicant sought leave to apply for judicial review on 12 July 2022. Leave was granted on the papers and the matter was managed over the summer recess by way of a series of case management directions.

[12] The applicant was granted anonymity in these proceedings pursuant to a case management direction dated 15 July 2022.

[13] The court also directed that the various notice parties referred to in the title should be joined to these proceedings as persons with a sufficient interest pursuant to Order 53 rule 5 of the Rules of the Supreme Court. NP3, Aaron Brown and Bryan McCarey are Core Participants in the Inquiry representing former patients of the MAH. The interests of the other notice parties will be apparent.

[14] The court received detailed and comprehensive written submissions from each of the notice parties but only received oral submissions from counsel on behalf of the Inquiry at the subsequent hearing in addition to those on behalf of the applicant and respondent.

[15] To complete the picture the applicant's solicitor wrote to the Minister on 7 July 2022 in the following terms:

> "Dear Minister,
>
> **RE: Our Client – JR222**
>
> Thank you for your letter of 30 June in response to our letter of June 16 to the Chair of MAHI copied to you.
>
> In your letter you say that you "are not minded to make a notice to suspend the Inquiry." This position is based on the response of the MAHI Chair dated June 24 and "the above safeguards" (that is, certain measures referred to in your letter).
>
> The purpose of this letter is to invite you directly to use your power under section 13(1)(b) of the Inquiries Act 2005 to suspend MAHI pending the determination of the criminal proceedings against our client.
>
> As you know, by section 24 of the Northern Ireland Act 1998 you have no power to act incompatibly with our clients' rights under Article 6 ECHR (and the other articles of the ECHR). Section 24 is a much stronger provision than Section 6 of the Human Rights Act 1998 in that the former is a vires provision.
>
> It does not matter that our client has not made a statement to the Inquiry and it does not matter that the particular "safeguards" as referred to in your letter are in place. No party currently represented before MAHI is contesting the proposition that deeds of great cruelty and abuse took place at MAH during the time that their client was employed there. This is the position of your Department. The public mind is steadily being formed, during the course of the Inquiry, to accept this proposition.
>
> Unusually, as respects Inquiries in the NHS facilities, no undertaking by the PPS has been given with respect to

criminal proceedings. This has been done to facilitate criminal investigations and prosecutions.

Unusually too, the Public Inquiry proceedings are essentially in parallel with criminal proceedings. There is a very good reasons why this does not normally occur.

If, as is, candidly, obvious, the public mind is being formed to accept the view that horrifying cruelty and abuse occurred at MAH during the period during which our client was employed there, that any jury empanelled will have been sufficiently prejudiced to consider that cruelty and abuse were widespread, and a practical burden created whereby any individual defendant would be left to show that she or he has not been responsible for it. You will appreciate the unfairness of that position.

You will, naturally, not wish to suspend an Inquiry on which public money has been spent and in which the Department has a heavy policy and political investment. Nevertheless, the unfairness to our client is obvious and the power given to you by section 13(1)(b) of the 2005 Act was designed to prevent it. Please do so.

This is not a letter sent in accordance with judicial review pre-action protocol. It is, as stated above, a direct invitation to you to use your power to prevent unfairness. Article 6 ECHR and section 24 of the Northern Ireland Act 1998 have caused that power to become a duty."

[16] The Minister replied by letter of 9 August 2022 in the following terms:

"Dear Rosemary,

Thank you for your email dated 7 July 2022 relating to your clients (JR222) and ____ regarding the Muckamore Abbey Hospital Inquiry.

I have considered the safeguards in place as outlined in my previous letter and the views of the Chair of the Inquiry. I remain of the opinion that it is not appropriate to suspend the Inquiry at this point and I have decided against invoking the power under section 13 of the Inquiries Act 2005.

> I am also aware of judicial review proceedings in relation to this point and wish to defer to those."

[17] The judicial review challenge is to the two decisions communicated in the letters from the Minister dated 29 June 2022 and 3 August 2022.

Article 6 Considerations

[18] The thrust of the applicant's case will be apparent from the correspondence sent by McCann & McCann Solicitors to the Minister requesting him to direct the suspension of the Inquiry. In short, it is asserted that the continuation of press coverage relating to the MAHI, absent a suspension, will prevent the applicant having a fair trial.

[19] The foundation for this challenge is an alleged breach of JR222's article 6 ECHR right to a fair trial.

[20] Article 6 of the ECHR states:

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ...
>
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. …"

[21] The right to a fair trial is an unqualified one.

[22] Section 6(1) of the Human Rights Act 1998 provides:

> "(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right."

[23] Section 7 of the 1998 Act provides that a person "who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may bring proceedings."

[24] Under section 24 of the Northern Ireland Act 1998:

> "(1) A Minister or Northern Ireland department has no power to make, confirm or approve any subordinate legislation, or to do any act, so far as the legislation or act—
>
> (a) is incompatible with any of the Convention rights."

[25] What then is the alleged breach of the applicant's article 6 rights? In this regard the applicant points to the public reportage of the Tribunal proceedings to date. Mr Larkin refers to the Terms of Reference of the Inquiry itself which presuppose the fact that abuse, which includes physical abuse, sexual abuse, psychological abuse and mental or emotional abuse has in fact occurred. He points to the fact that the Minister has issued apologies to the patients and families of patients of MAH. He says that this is reflected in the opening remarks of the Inquiry Chair made on 6 June 2022 when he says:

> "I regard the patients and their relatives and carers who have been abused, or received poor care, as being at the front and centre of this Inquiry …"

[26] Since the Inquiry has opened there has been significant press coverage of its proceedings. The applicant's supporting affidavit exhibits multiple examples of such coverage, some of which have been referred to in the correspondence set out above.

[27] Thus, the press articles contain headlines such as:

(i) "Muckamore staff 'threatened to cut off patient's genitals if he reported abuse.'"

(ii) "Muckamore abuse victim 'stayed in bedroom, looked down and never smiled.'"

(iii) "Muckamore Abbey Hospital Inquiry told 'bad practices were allowed to persist.'"

(iv) "Muckamore: Health Department apologises for 'appalling behaviour.'"

(v) "Muckamore Abbey Abuse Victims 'denied chance to lead the best lives.'"

[28] Reference is made in press reports to "industrial scale abuse" and a "toxic culture." It is reported that evidence would be given that a patient's parent was told by staff after she photographed significant bruising that "she would have to delete them if she wanted to see her son again." There was a further description provided in "graphic detail" of a patient being "kicked in the groin, punched on the shoulder, trailed across the ground with his genitals exposed."

[29] In his opening statement senior counsel to the Inquiry is reported as having said:

> "The Inquiry will inevitably hear some harrowing evidence of abuse in the course of its work."

[30] The Department of Health's legal representative at the Inquiry was reported on 13 July 2022 as having said:

> "Whilst it does not seek to gainsay any police investigation or the work of this Inquiry, the Department wish to take this opportunity to once again, publicly apologise for the appalling behaviours identified in the two reports to date."

[31] On 13 July 2022 there is reporting of action taken by the Trust in relation to the suspension of staff following the viewing of CCTV from the hospital relating to a period of months in 2017. That report indicates that the Trust does not seek to suggest 2017 was the only time during the history of Muckamore Abbey Hospital when staff abused vulnerable patients in their care. 2017 covers the period in respect of the criminal prosecution being faced by the applicant. On 5 June 2022 a newspaper published an article quoting the mother of a patient in respect of whom the court was told charges against JR222 are said to arise. She is quoted as saying that "drafting her statement to the Inquiry had been traumatic as she looked back at what had happened to her son." Referring to the CCTV evidence, whilst the panel watched this in private, in opening statements legal representatives for some of the families is reported to say on 16 June 2022 "the family was informed by the PSNI that following the current review of CCTV, their loved one was captured being abused in 166 separate incidents."

[32] The applicant further refers to social media comments in response to such coverage which demonstrates a clear and obvious prejudice against staff members previously employed at MAH.

[33] In summary, therefore, it is argued that the Inquiry is already clearly influencing public opinion. It is argued on behalf of the applicant if the Inquiry is to recommence in September 2022 as planned it will inevitably consider evidence which will be duly reported.

[34] As a consequence it is argued that when JR222's case comes to trial the effect of media coverage on influencing public opinion will be such that it will not be possible to empanel a jury to determine the charge against her and her co-accused impartially and on the basis of the presumption of innocence.

[35] In this regard, Mr Larkin also points out that, unlike the reporting of criminal trials, the reporting of proceedings at the Inquiry is not subject to the protections provided by section 4(2) of the Contempt of Court Act 1981. The Contempt of Court Act does apply to Tribunals of Inquiry – see section 20 which refers to "any Tribunal to which the Tribunals of Inquiry (Evidence) Act 1921 applies." By way of comment it seems an anomaly that this section has not been amended to include Inquiries under the 2005 Act. It will be noted, however, that under section 36 of the 2005 Act the Inquiry does have powers to enforce any failures to comply with notices made by it

under sections 19 or 21 of the 2005 Act or an order made by an Inquiry whereby the Chairman may certify a matter to the High Court for an Order of Enforcement.

[36] Taking all this material at its height (although I will refer to the context more fully later) I do not consider that it can be argued that the applicant has established any breach of her article 6 rights. The applicant has not yet been returned for trial in the Crown Court. No trial date has been set. No jury has been empanelled. The applicant's fears are speculative and not sufficient to establish a breach of article 6.

[37] I will leave aside the question as to whether or not the applicant is, in fact, a victim for the purposes of article 6 within the principles observed by the Grand Chamber in *Sakhnovskiy v Russia (Application No.21272/03)* 2 November 2010 at para [77]:

> "Indeed, a criminal defendant cannot claim to be a victim of a violation of Article 6(3) before he is convicted. … This is also true in respect of most of the guarantees of Article 6(1) of the Convention (with some exceptions concerning, for instance, the requirement of reasonable length of the proceedings, access to court, etc)."

[38] The impact of any future reporting of the Inquiry's proceedings on the applicant's article 6 rights are matters which can be properly dealt with by the trial judge and within the trial process.

[39] There are ample authorities, both domestic and from Strasbourg, dealing with the question of the impact of prejudicial publicity on the conduct of criminal trials. Perhaps the leading authority is the decision of the ECtHR in *Abdulla Ali v United Kingdom* [2015] App No.30971/12, where the court set out the general principles on this issue:

> "87. A virulent press campaign can adversely affect the fairness of a trial by influencing public opinion and, consequently, jurors called upon to decide the guilt of an accused. In this way it risks having an impact on the impartiality of the court under Article 6 section 1 as well as the presumption of innocence enshrined in Article 6(2) ... If there is a virulent press campaign surrounding a trial, what is decisive is not the subjective apprehensions of the suspect but whether, in the particular circumstances of the case, his fears can be held to be objectively justified.
>
> 88. The court has previously identified various matters that it considers relevant to the assessment of the impact of adverse publicity on the fairness of the trial or on respect for the presumption of innocence. Thus, it has made clear

that there is unlikely to be any arguable complaint under Article 6 where the criminal charges are determined by professional judges, since their professional training and experience allow them to disregard any external influence ...

89. Even in cases involving jury trials, an appropriate lapse of time between the appearance of any prejudicial commentary in the media and the subsequent criminal proceedings, together with any suitable directions to the jury, will generally suffice to remove any concerns regarding the appearance of bias … In particular, where the impugned newspaper reports appeared at a time when the future members of the jury did not know that they would be involved in the trial process, the likelihood of any appearance of bias is all the more remote, since it is highly unlikely that the jury members would have paid any particular attention to the detail of the reports at the time of their publication … In such cases, a direction to the jury to disregard extraneous material will usually be adequate to ensure the fairness of the trial, even if there has been a highly prejudicial press campaign (for an example where such a direction was sufficient, see *Beggs*, cited above, …). It is essential to underline in this respect that it is reasonable to assume that a jury will follow the directions given by the judge in the absence of any evidence suggesting the contrary …

90. In some cases concerning adverse press publicity, the court has looked at whether the impugned publications were attributable to, or informed by, the authorities … However, it is important to emphasise that the fact that the authorities were the source of the prejudicial information is relevant to the question of the impartiality of the tribunal only in so far as the material might be viewed by readers as more authoritative in light of its source. The question whether public officials have prejudged a defendant's guilt in a manner incompatible with the presumption of innocence is a separate issue to be considered under Article 6(2), with the focal point being the conduct of those public officials and not the impartiality of the tribunal itself … Thus, while the authoritative nature of the published material may require, for example, a greater lapse of time or most robust jury directions, it is unlikely in itself to lead to the conclusion that a fair trial by an impartial tribunal is no longer possible. In particular, allegations that any

> disclosure of prejudicial material by the authorities was deliberate and was intended to undermine the fairness of the trial are irrelevant to the assessment of the impact of the disclosure on the impartiality of the trial court.
>
> 91. It can be concluded from the foregoing that it will be rare that prejudicial pre-trial publicity will make a fair trial at some future date impossible. Indeed, the applicant has not pointed to a single case where this court has found a violation of Article 6 on account of adverse publicity affecting the fairness of the trial itself. As noted above, the trial judge, when invited to consider the effect that an adverse media campaign might have on a "tribunal", has at his disposal various possibilities to neutralise any possible risk of prejudice to the defence and ensure an impartial tribunal. In cases involving trial by jury, what is an appropriate lapse of time and what are suitable directions will vary depending on the specific facts of the case. It is for the national courts to address these matters – which, as the Law Commission observed in its 2012 consultation paper (see para 67 above), are essentially value judgments – having regard to the extent and content of the published material and the nature of the commentary, subject to review by this court of the relevance and sufficiency of the steps taken and the reasons given."

[40] The force of these principles is well illustrated by the ECtHR's decision in the case of *Mustafa (Abu Hamza) v United Kingdom* [2011] Application No.31411/07 when the court considered an application by Abu Hamza, the Imam at Finsbury Park Mosque, who was charged with offences including soliciting murder, using threatening abusive or insulting words with intent to stir up hatred and various terrorism offences.

[41] In and around the same time, the US Government requested Abu Hamza's extradition in respect of his alleged role in a kidnapping. The police raid at Finsbury Park Mosque, the subsequent criminal charges and the US Government's extradition request were widely reported in the UK media. Abu Hamza's trial began in July 2005 coinciding with the terrorist bombings of the London underground. The London bombings made international news headlines and some media coverage included references to Abu Hamza as someone who was likely to have contributed to the willingness of some to carry out the attacks. The defence applied for the prosecution to be stayed as an abuse of process. One of the grounds was that the publicity surrounding Abu Hamza had grown to such an extent that it would have been impossible for him to receive a fair trial by jury. The trial judge refused the application. He was subsequently convicted and he appealed his conviction to the

Court of Appeal. The court found the trial judge had been correct to refuse a defence application for a stay for abuse of process. It was concluded that the trial judge had been correct to rule that any adverse publicity could be cured by an appropriate direction to the jury.

[42] The ECtHR agreed that there had been no violation of article 6, even in those circumstances where the publicity was described by the court as "unremitting and sensational." Having considered UK domestic case law the court concluded:

> "[39] … The court shares their view that a fair trial can be held after intensive adverse publicity. In a democracy, high profile criminal cases will inevitably attract comment by the media. This cannot mean, however, that any media comment will inevitably prejudice a defendant's right to a fair trial, otherwise the greater the notoriety of a crime, the less likely that its perpetrators will be tried and convicted. As Lord Hope stated in *Montgomery*, cited above, it is not the purpose of Article 6 to make it impracticable to bring those who are accused of crime to justice. Instead, this court's approach has been to examine whether there are sufficient safeguards to ensure that the proceedings as a whole are fair. Indeed, as its case-law indicates, the court will require cogent evidence that concerns as to the impartiality of jurors are objectively justified before any breach of Article 6(1) can be found …
>
> The Court accepts that a virulent media campaign can in certain circumstances undermine the fairness of a trial by influencing public opinion and thus the jury which is called upon to decide on the culpability of the accused … However, in the majority of cases the nature of the trial process and, in particular, the role of the trial judge in directing the jury will ensure that the proceedings are fair … Moreover, in deciding whether such exceptional circumstances exist, domestic courts will be better placed to make this assessment than the court. This is all the more so when, as in England and Wales, the courts enjoy wide powers to prevent adverse media reporting during trial and can, if necessary, stay proceedings on grounds of an abuse of process. As was noted in Montgomery, this approach reflects not only the experience of the United Kingdom courts, but that of criminal justice systems throughout the common law world. In the Court's view, that experience should be respected."

[43] These principles have been routinely and regularly applied in this jurisdiction. By way of example in *R v Adams* [2015] NICA 24 at para 9 of the court's judgment Lord Justice Coghlin observed:

> "[9] There is no doubt that, as a consequence of the personalities involved, these proceedings attracted a very considerable degree of media publicity both before and, to a certain degree, subsequent to the initial trial. As is often the case the standard of that publicity varied. In such cases the trial judge has to exercise his or her discretion as to how, if at all, to deal with such pre-trial publicity when giving directions to the jury. Any specific reference to such publicity is likely to carry with it the risk of stimulating rather than suppressing interest on the part of a jury. In ex parte *The Telegraph Plc* [1994] 98 Cr. App. R. 91 Lord Taylor LCJ said, at page 98:
>
> > 'In determining whether publication of a matter would cause a substantial risk of prejudice to a future trial, a court should credit the jury with the will and ability to abide by the judge's direction to decide the case only on the evidence before them. The court should also bear in mind that the staying power and detail of publicity, even in cases of notoriety, are limited and that the nature of a trial is to focus the jury's mind on the evidence put before them rather than on matters outside the courtroom.'
>
> In a similar vein Lord Hope, delivering the judgment of the Privy Council in *Montgomery v HM Advocate* [2003] 1 AC 641, after referring to the risk that widespread, prolonged and prejudicial publicity might affect the minds of at least some members of the jury, went on to say:
>
> > 'The principal safeguards of the objective impartiality of the tribunal lie in the trial process itself and the conduct of the trial by the trial judge. On the one hand there is the discipline to which the jury will be subjected of listening to and thinking about the evidence. The actions of seeing and hearing the witnesses may be expected to have a far greater impact on their minds than such residual recollections as may exist about reports about the case in the media. This impact can be expected to be reinforced on

> the other hand by such warnings and directions as the trial judge may think it appropriate to give them as the trial proceeds, in particular when he delivers his charge before they retire to consider their verdicts.'"

[44] There are many more reported examples of similar sentiments.

[45] Significantly, all of these reported cases concerned decisions in relation to actual trials where the trial judge was in a position to assess the evidence to be adduced and the matters about which the defendant complained. Indeed, the reported decisions are analysing such decisions from a retrospective point of view.

[46] In this application in order to establish a breach of article 6 the court is being asked to speculate about what reporting may be given in the future and how it may impact on a trial in the future. Neither the Minister nor the court is in a position to make such an assessment. Importantly, the applicant's article 6 rights can, and will, be protected within the trial process. There are many obvious points that can be made already about the matters raised by the applicant. There is absolutely no reference to the applicant in any of the official reportage. Some of the comments to which the applicant refers have to be seen in context. Thus, in his opening remarks, after referring to relatives and carers who have been abused, the Chair goes on to say:

> "Now, let me speak a bit about what an Inquiry can do and what it cannot do. The central purpose of an Inquiry like this is set out in its Terms of Reference. In essence, it is to find out what happened and how it was allowed to occur. Our job is to make recommendations in due course to the government, which will be effective in preventing such things happening again.
>
> What an Inquiry is not allowed to do is to rule on or to determine anybody's civil or criminal liability. Now, that does not prevent the panel forming and publishing conclusions which may lay blame at an individual organisational door. But before we do that, before we publicly criticise anyone or any organisation, they are entitled to know of that criticism and have the opportunity of trying to address it."

[47] The apologies from the Department and the Trust which are reported in the media arose from previously published reports already in the public domain.

[48] On any showing the matters reported to date fall well short of the adverse reporting complained of in the cases of *Ali* and *Abu Hamza* discussed above. At this stage I should add, as I said, in the course of the hearing that there is nothing to suggest

that there has been in fact a virulent media campaign against the applicant. The reporting by the media that has been exhibited in the applicant's affidavit reflects an accurate and contemporaneous record of what has been said in the Tribunal. There is no reference at all to the applicant. It is correct that some of the social media commentary is typically toxic. Such commentary should be put in context reflecting as it does the views of a very tiny minority of the general population.

[49] In balancing the comments highlighted about findings of abuse it should also be noted that there is repeated reference to "alleged" abuse. Counsel for the police who are represented at the Inquiry stresses that there must be no risk to the criminal justice process. It is also reported in the media that in his opening remarks counsel for the Inquiry stated:

> "It is also important, however, to acknowledge that many involved in the care of the vulnerable carry out their work with diligence and compassion and in accordance with the highest professional standards. There are those who have dedicated many years of their lives, often in challenging circumstances, to care properly for the patients at Muckamore. It is important that their good work should not be obscured by the unacceptable conduct of others. The Inquiry will hear accounts of positive and negative experience …"

[50] However, this is all by the way. The essential point is that the applicant is entitled to and can expect a fair trial. The impartiality of a jury must be presumed unless there is proof to the contrary – see *Sander v UK* [2000] Application No.34129/96 at para [25]. The applicant's article 6 rights in respect of her criminal trial are fully protected within the criminal trial process. This is neither the forum nor the time for this court to conclude that there has been a breach of the applicant's article 6 rights because of a failure to suspend the Inquiry. The fairness, or otherwise, of any trial can only be judged at the relevant time and by the trial judge.

[51] The court, therefore, concludes that no breach of the applicant's article 6 rights has been established.

[52] Of course, the matter does not end there. A successful abuse of process application, any interference with the criminal prosecution or an unfair trial on the basis of future adverse publicity arising from coverage of the Inquiry's proceedings would not be in the public interest, the interest of the Inquiry or of any victims of abuse at MAH or the applicant who is entitled to a fair trial and who seeks vindication in respect of the charges against her.

The remaining grounds of the applicant's challenge

[53] Having dealt with the article 6 point, before analysing the other grounds relied upon by the applicant, it is useful to set out some further background to the decisions which have been challenged.

[54] The respondent has the power to suspend the Inquiry. Section 13 of the 2005 Act provides:

> "**Power to suspend Inquiry**
>
> 1. The Minister may at any time, by notice to the Chairman, suspend an inquiry for such period as appears to him to be necessary to allow for –
>
> …
>
> (b) The determination of any civil or criminal proceedings (including proceedings before a disciplinary Tribunal) arising out of any of those matters.
>
> …
>
> 3. Before exercising that power the Minister must consult the Chairman."

[55] It is clear from the 2005 Act that there is no prohibition on an inquiry and criminal or civil proceedings overlapping. There has, however, been an historical and understandable concern to ensure that a public inquiry does not hinder or prejudice criminal proceedings in particular. Hence the power to suspend.

[56] When analysing the background to the establishment of the Inquiry and its ongoing conduct it is clear that the Minister has been fully cognisant of the potential overlapping criminal proceedings. This emerges clearly from the affidavit of Ms La Verne Montgomery filed on behalf of the Department of Health in this matter. She is a senior civil servant in the Department of Health and since 28 February 2022 has been the Director of Public Inquiries and Public Safety in the Department. In her first affidavit in these proceedings she sets out the background to the establishment of the Inquiry. From this it emerges that on 16 January 2020 a submission went to the Minister from the Head of the Muckamore Abbey Review Team outlining the potential options available to him. The submission outlined the potential implications of criminal investigations and trials running alongside Inquiries.

[57] In particular, paras 15 and 16 of the submission provide as follows:

> "**Option 1 – Do Nothing**

15. Given the ongoing police investigation, the completed level 3 SAI Review and the Leadership in Governance Review which we expect to start shortly, you could conclude that these would provide sufficient understanding of what happened and why and enough insight to prevent further reoccurrence. While the police investigation will not address broader contextual issues (such as leadership and governance) or issues below the criminal threshold, these arguably, either have or will be addressed through the SAI or leadership in governance review. While it is not clear whether or how many prosecutions are to be brought to court, as outlined in para 2, the police are planning to bring a number of files to the PPS for a decision on prosecution. A significant number of successful prosecutions would no doubt have an impact on public confidence and provide significant insight into what happened and why (particularly alongside other reviews which, however, will be undertaken). However, the level of transparency and insight is unlikely to match that provided by a Public Inquiry and there will be a significant time lag before any successful prosecutions are completed.

16. Taking this option would potentially leave you open to criticism of an insufficiently serious response to significant issues involving allegations of physical abuse by professional HSC staff against a particularly vulnerable client group. It could also lead to allegations that the system is protecting itself – and you could be accused of holding staff to a lesser standard of accountability for people with a disability."

[58] The second option outlined for the Minister was to establish a Public Inquiry. The Minister was advised that establishing such an Inquiry would require a direction from him as Minister of Health. He was advised about the different forms of inquiries and the potential advantages and disadvantages of establishing such inquiries. Importantly, he was advised at para 20 of the submission that:

"20. Public Inquiries are commonly delayed when criminal investigations by the police take place at the same time. Inquiries cannot determine criminal or civil guilt as this is a function reserved for the courts. However, criminal investigations and trials running

> alongside Inquiries will often involve many of the same witnesses. Some may be unable to give testimony to an inquiry because in so doing they risk incriminating themselves. If an inquiry were to be set up, it is very likely that it would be adjourned pending the conclusion of the ongoing PSNI investigation though this drawback may apply to some other forms of Inquiry. This could mean that taking of a decision to instigate a Public Inquiry at this stage might have no material effect of addressing public concerns, as any inquiry is unlikely to be able to commence substantive work pending the completion of the PSNI investigation as was the case with the Hyponatremia Inquiry (which was set up in November 2004 …) but suspended in October 2005 to allow the PSNI to investigate the deaths of three children."

[59] The Minister's response is recorded in an email of 24 January 2020 as follows:

> "1. Follow recommendations and set aside time to consider options.
>
> 2. Advice on concurrent Public Inquiry and PSNI investigation.
>
> 3. Meeting with PSNI team; future clarity Pt8 i.e. blocking of safeguarding.
>
> 4. Costings and timelines of staff and non-staff inquiry."

[60] From all of this it is clear that the Minister was alerted to the issues that might arise in respect of the parallel running of an Inquiry and a criminal investigation in respect of which he sought further advice.

[61] On 28 January 2020 a follow-up submission was provided to the Minister. He was advised that:

> "3. There is some precedent for public inquiries proceeding in parallel with criminal investigations, most notably at present in the case of the Grenfell Tower Inquiry."

[62] The advice went on to explain how that Inquiry was being dealt with by the Chairman. Particular reference was made to a Memorandum of Understanding

(MOU) with the Metropolitan Police Service who were undertaking criminal investigations into the fire, independently of the Inquiry.

[63] The Minister was further advised:

> "8. The MOU also states that the Chairman of the Inquiry will use all reasonable efforts, so far as consistent with his statutory duty under the Inquiries Act 2005, to conduct the Inquiry in a way which does not impede or compromise the MPS investigation or its integrity.
>
> …
>
> 10. In summary, where there does not appear to be any legislative barrier to a public inquiry proceeding in parallel with ongoing criminal investigations and some precedent for this approach does exist, there is an obvious potential for a conflict of interest between the two processes. Witnesses called by a public inquiry may also be under investigation as part of the criminal investigation, and any evidence they might provide could potentially impact negatively on the criminal investigation. At the very least it would be important to have a clear delineation of the respective remits and roles of the parallel investigatory processes to avoid any potential prejudice to the outcome of the criminal investigation in cases against individuals."

[64] On 11 March 2020 a submission was provided to the Minister recommending that he issue a letter to Chief Constable, Simon Byrne:

> "seeking his view on whether or not a public inquiry would interfere with ongoing investigation and potentially prejudice future prosecution."

Such a letter was issued on 16 March 2020 and on 17 April 2020 the Chief Constable replied indicating that the PSNI:

> "will work with the Department of Health" should the Minister "make a decision to call a public or other inquiry and they would ask for due consideration in protecting the integrity of the criminal investigation."

[65] Thereafter, the Minister awaited and considered a report from the Leadership and Governance Review of Belfast Trust concerning events at MAH. He also engaged with other interested parties. On the issue of criminal investigations he received a

further submission on 3 September 2020 entitled "Muckamore Abbey Hospital – Options Appraisal." The submission stated at paras 7-9:

> "**The Criminal Investigation**
>
> 7. The police investigation into the abuse is ongoing and is likely to continue for some time (at least 2-4 years). To date seven individuals have been arrested and 63 members/former members of staff are on precautionary suspension (22 of these from January 2020 to date and four since the launch of the report of the review of leadership in Governance Review). To date, the police have not advised the Department of any findings other than this is the largest adult safeguarding investigation ever conducted in the UK.
>
> 8. Families we have spoken to consider that the criminal justice process is likely to take care of those members of staff (front line workers) who were involved in the actual abuse but they are concerned that senior members of staff, who, through ineffective management allowed the abuse to happen, will not be held to account."

[66] In the submission the Minister was provided with five options for his consideration.

[67] Option 1 was to commission a statutory Public Inquiry under the 2005 Act to run concurrently with the police investigation. The benefits of such an approach were described as follows:

- "This will satisfy the families and other interested parties who want answers about what happened at Muckamore and how it was allowed to happen sooner rather than later and do not think that the police investigation needs to conclude before a public inquiry starts.

- There is no statutory barrier to a public inquiry operating in parallel with an ongoing police investigation, and there are some recent precedents for this approach in both the Grenfell and Leveson Inquiries."

[68] Among the risks the following were identified:

- "Running the two processes in parallel has the potential of interfering with the criminal investigation – we understand this has led to some difficulties in the Grenfell Inquiry. … Individuals have the right to refuse to give evidence at an

Inquiry which may leave him or her open to prosecution (the right against self-incrimination).

- Potentially witnesses may, in giving evidence, incriminate someone else leaving that person/persons open to potential future prosecution.

- An undertaking that evidence presented by witnesses will not be used in a prosecution may have to be given (as was employed, for example, in the RHI Inquiry).

- … Individuals could argue that the evidence heard at a public inquiry, and the public reaction to this and the findings of an Inquiry may all make it difficult for them to obtain a fair criminal hearing."

[69] The other options included commission of a non-statutory public inquiry – Option 2.

[70] Option 3 was to commission a Public Inquiry and immediately suspend it to allow the police investigation to conclude. The benefits of this approach were described as follows:

- The Inquiry could begin its work by writing to relevant parties to ask that documents and other evidence e.g. CCTV be protected, gathered and then provided to the Inquiry.

- Would have the advantage of not interfering with the ongoing criminal investigation.

- The criminal investigation could produce evidence/information which would be helpful to the Inquiry.

[71] A risk of this option was identified as:

- It is difficult to predict how long a suspension would last.

- An undertaking that evidence presented by witnesses will not be used in a future prosecution may still have to be given (as happened with the Hyponatremia Inquiry).

[72] Option 4 was to wait for the criminal investigation to come to a conclusion and then establish a public inquiry. The risks associated with this were identified as follows:

- The criminal investigation could take several years to come to a conclusion.

- The delays associated with this approach is likely to be faced with criticism from families and other interested parties.

[73] Option 5 related to the establishment of an Independent Inquiry Panel to examine wider issues than MAH bringing a greater focus on accountability and the role of wider organisations pending conclusion of the police investigation.

[74] The Minister responded to the submission on 4 September 2020 by way of email indicating his intention to "give further consideration of a Chair/lead, but as previously highlighted with the Terms of Reference it does not affect the PSNI/PPS Service; that would give the Chair the discretion to adopt Option 3" i.e. immediately suspend the Inquiry.

[75] Mr Larkin pointed out that this reflected a fundamental misunderstanding by the Minister of his powers as the Chair would not have a discretion to suspend the Inquiry, this being a matter for him to determine. Clearly, the Minister was disabused of any such misconception when the issue of suspension arose.

[76] This is not a full account of the background to the establishment of the Inquiry but what is clear from all of this is that the Minister was fully sighted of the potential implications if any inquiry were to overlap with criminal investigations and proceedings.

[77] Furthermore, having been apprised of the potential risks of such an approach, it is clear that in the subsequent preparation for the establishment and commencement of the Inquiry proceedings specific attention was given to this issue. Thus, as per Ms Montgomery's affidavit at para [38]:

> "38. On 15 February 2021 the MAHI Sponsorship Team met with the PSNI to discuss the preparation for the Inquiry. During the engagement events in December 2020, many families were complimentary of the PSNI engagement and the MAHI Sponsorship Team wanted to learn from them and establish the PSNI view on the public inquiry going ahead in light of their ongoing criminal investigation. At the meeting the PSNI asked whether the Department had given any thought as to the sequencing of the public inquiry, particularly in relation to the CCTV time period they are considering. Officials advised that this has not yet been considered other than being cognisant of the importance of not jeopardising the police investigation and that it will be for the eventual Chair to decide on the order in which the evidence is heard. However, officials were cognisant this was a concern for the PSNI, although nothing was said explicitly by the PSNI regarding the Inquiry running concurrently with the police

investigation. No note of this meeting was recorded by the Department Officials but I refer to a copy of an email I received from Fiona Marshall on 16 February 2021 referring to the meeting …

39. As advised in the email to me from Fiona Marshall, the MAHI Sponsorship Team noted that the Inquiry's Guidance issued by the Cabinet Office states that:

> 'Any criminal proceedings would normally precede an inquiry.'

The Institute for Government also indicates:

> 'Public Inquiries are commonly delayed when criminal investigations will each take place at the same time … however, criminal investigations and trials running alongside Inquiries will often involve many of the same witnesses. Some may be unable to give testimony to an Inquiry because in doing so they risk incriminating themselves. Such legal complexities are common and invariably slow Inquiries down.'

40. A major consideration remained the potential for the Inquiry to in any way prejudice the criminal investigation and recognised that this needed to be addressed in the appointment of the eventual Chair and the drafting of the Terms of Reference."

[78] All of this reinforces the fact that the Minister was alive to and fully sighted of the potential issues arising from the parallel conduct of the Inquiry and criminal proceedings arising from issues being considered by the Inquiry.

[79] The evidence clearly demonstrates that these concerns have been specifically addressed by the Inquiry Chair in the conduct of the Inquiry to date and that this will continue.

[80] As is clear from the correspondence setting out the Minister's reasons for refusal to suspend the Inquiry he relies on various measures taken by the Inquiry Chair in the conduct of the Inquiry as per the Inquiry's letter to the applicant's solicitor dated 24 June 2022.

[81] These steps were set out in the briefing document upon which the Minister made the decision of 29 June 2022 dated 27 June 2022.

[82] Mr Doran took the court through these various measures in the course of his able submissions. They merit careful consideration.

MAHI Safeguards

[83] The starting point is the Memorandum of Understanding between the Inquiry and the PSNI and the PPS. Para 4 of the Understanding records that:

> "The PSNI is conducting an investigation in respect of alleged abuse at the hospital. The investigation followed the seizure of CCTV footage relating to an approximate six-month period commencing in April 2017. The investigation resulted in arrests and decisions being taken by PPS of prosecuting individuals for offences alleged to have been committed at the hospital."

[84] Thus, the understanding specifically addresses the investigation which relates to the prosecution of the applicant. Para 6 goes on to say:

> "The PPS and PSNI will provide the Inquiry with a narrative statement of the scope and progress of the investigation and prosecutions and will provide the Inquiry with monthly updates on these matters, with the objective of ensuring that the Inquiry is fully informed of relevant developments."

[85] This means the Inquiry can keep the question of potential impact of a criminal prosecution under review and exercise its powers under sections 17 and 19 of the 2005 Act (discussed further below) if appropriate. Para 7 states that:

> "The objective of the MOU is to state the shared understanding of how the Inquiry, the PSNI and the PPS will discharge their respective statutory responsibilities as the Inquiry, the investigation and the prosecutions proceed."

[86] Para 10 provides:

> "The three parties will engage in ongoing consultations to ensure that the arrangements set out in the MOU are working effectively. The three parties will also ensure that all persons involved in responsibilities that may fall within the ambit of the MOU are aware of its contents."

[87] The MOU provides for ongoing co-operation between the three parties.

[88] The basic principles are important and provide as follows:

"**Basic Principles**

16. The Chair of the Inquiry acknowledges the need to make every effort to ensure that the work of the Inquiry does not impede, impact adversely on or jeopardise in any way the PSNI investigation into abuse at the hospital and the prosecutions that result from that investigation.

17. The subject matter of the investigation and the prosecutions is of direct interest to the Inquiry, but the Inquiry is not examining the response of the PSNI and the PPS that has followed from the seizure of the CCTV footage.

18. The Chair, in accordance with section 17(1) of the Act, shall make every effort to ensure that the procedure and conduct of the inquiry respects the integrity of the investigation and prosecutions while continuing to address its Terms of Reference.

19. In particular, the Inquiry will be conducted with due regard to the live nature of the investigation and any ongoing or prospective prosecutions (and the investigative and disclosure duties that arise in that context under the provisions specified in para 13 above), in accordance with the arrangements prescribed by this MOU.

20. The Chair shall, where necessary, adopt specific measures as the Inquiry proceeds to ensure protection of the integrity of the investigation and prosecutions.

21. The parties to the MOU take cognisance of the fact that public access to Inquiry proceedings and information is governed by section 18 of the Act. Restrictions on such access are governed by section 19 of the Act. Restrictions imposed by the Chair must be justified with reference to section 19(3) to (5).

22. The PSNI and the PPS acknowledge that the work of the Inquiry extends beyond the subject matter and

timeframe of the police investigation and that the Inquiry must proceed with reasonable expedition to conduct work that is necessary to fulfil its Terms of Reference.

23. The PSNI and the PPS also acknowledge that the subject matter of the investigation and prosecutions is within the Inquiry's Terms of Reference and is therefore required to be addressed by the Inquiry.

24. In discharging the respective responsibilities in accordance with this MOU, the Chair, the PSNI and the PPS will adopt such measures as are required to protect the convention rights of persons affected."

[89] On the issue of the production of documents to the Inquiry on disclosure para 30 and onwards provide:

"30. Documents relating to the investigation and prosecutions that are provided by PSNI in accordance with this part of the MOU will not be disclosed to Core Participants without reasonable notice being given to the PPS and the PSNI.

31. The PSNI and/or the PPS may request a specified document should not be disclosed to Core Participants when there is a real risk of such disclosure impeding, impacting adversely on or jeopardising the criminal proceedings resulting from the investigation. Such a request will be made by way of an application under Rule 12 of the Rules specifying the nature of the risk and the suggested justification for restriction on disclosure being imposed in accordance with section 19.

32. In considering such an application, the Chair will have due regard to the live nature of the investigation with any ongoing or prospective prosecutions. The question of whether the real risk of disclosure impeding, impacting adversely on or jeopardising the criminal proceedings will be kept under review and any restriction on disclosure will remain in place only so long as is reasonably necessary."

[90] Under viewing arrangements for CCTV at first instance this will be restricted to the Inquiry Panel, the solicitor to the Inquiry and senior and junior counsel to the Inquiry.

[91] The question of wider viewing of the CCTV footage will be kept under review in consultation with the PSNI and the PPS. This is with the express purpose "to ensure that the integrity of the investigation and the prosecutions is protected." Para 44 provides:

> "In considering any issue relating to viewing of CCTV footage, the Chair will have particular regard to the live nature of the investigation and any ongoing or prospective prosecutions."

[92] On the issue of oral evidence at the Inquiry the MOU provides, inter alia, as follows:

> "64. The Inquiry's legal team, when scheduling oral evidence, will seek to avoid the risk of impeding, impacting adversely on or jeopardising the investigation or prosecutions.
>
> 65. The Inquiry panel may defer issuing a request to a witness to give oral evidence under Rule 9 of the Rules, where it adopts the view that such deferral is necessary to avoid the risk of impeding, impacting adversely on or jeopardising the investigation or prosecutions. Where it appears to the panel to be necessary to call such a witness to give oral evidence, the Inquiry will notify the other parties to the MOU and will afford a reasonable opportunity for an application for a restriction order in appropriate terms to be made.
>
> 66. The Chair shall also take appropriate steps in the course of oral evidence to avoid the risk of impeding, impacting adversely on or jeopardising the investigation of prosecutions.
>
> 67. Where oral evidence is given to the Inquiry and the Chair forms the view that reporting or publication of that evidence may impede, impact adversely on, or jeopardise the investigation or prosecutions, the Chair shall issue a restriction order in appropriate terms under section 19 of the Act to restrict

reporting or publication of such evidence until the views of the parties to this MOU can be canvassed."

[93] It will be seen that a recurrent theme of the MOU is the avoidance of risk that the Inquiry's work will impede any prosecution.

[94] The avoidance of any such risk is underpinned by further steps already taken by the Inquiry.

[95] Specifically, the Director of Public Prosecutions has given an undertaking, dated 6 June 2022, that no oral evidence or written statement drafted for the purpose of giving evidence to the Inquiry will be used in evidence against that person in any criminal proceedings or for the purpose of deciding whether to bring such proceedings. This is subject to a prosecution in which a person is charged with having given false evidence in the course of the Inquiry or having conspired with or procured others to do so or for a prosecution with any offence under section 35 of the 2005 Act.

[96] In addition, the Inquiry has developed a protocol in relation to restriction orders and for the purposes of this application of relevance is restriction order No.3 which provides that viewing of CCTV footage will be restricted to the Inquiry Panel, solicitors to the Inquiry Panel, senior and junior counsel to the Inquiry and any officer of the PSNI tasked to assist with the playing of CCTV footage.

[97] The restriction order expressly provides that PSNI materials relating to the investigation in para 4 of the MOU (see above) that are provided to the Inquiry panel in connection with the CCTV viewing sessions, including CCTV exhibits, shall not be disclosed or published.

[98] Restriction order No.4 deals with staff identification and orders that:

> "1. No person may identify or cause or permit to be identified any present or former staff member who is named in evidence received by the Inquiry as being implicated in abuse (as referred to in para 5 of the Terms of Reference) of a patient by either disclosure or publication by any means whatsoever, except as specified in para 6 and 7 below."

[99] In explaining the basis for the restriction order para 8 provides:

> "8. This Order is considered by the Chair to be conducive to the Inquiry fulfilling its Terms of Reference and to be necessary in the public interest to ensure the integrity of the ongoing police investigation and prosecutions referred to in the memorandum of understanding to the Inquiry, the

> Police Service of Northern Ireland (PSNI) and the Public Prosecution Service (PPS). Both of these restriction orders can be certified, if necessary, under section 36 of the Inquiries Act should there be any threat to a break or actual break of the Order. Furthermore, the participants in the Inquiry have signed a confidentiality agreement to the effect that the disclosure of any materials made to them by the Inquiry is subject to the agreement requiring that the materials be used only for the purpose of the Inquiry, that it is not used, exploited, disclosed, published, reproduced or made available to any third party except as expressly permitted by the agreement."

[100] In a statement dated 20 June 2022 the Chair explained the rationale behind the restriction order in relation to staff identification as follows:

> "10. I regard this measure as necessary in the interests of fairness and to achieve the Inquiry's objectives. It is particularly important to bear in mind that there is a live criminal investigation and prosecutions. As acknowledged in the MOU, there is a need to take steps where necessary, to ensure that the Inquiry's work does not impede, impact adversely on or jeopardise the criminal proceedings.
>
> 11. Staff named in Inquiry statements may be facing charges or may face charges in the future, this order means that they will not be publicly named in the evidence given to the Inquiry. The Inquiry also wants to hear from staff, including staff who are the subject of allegations. They will have an opportunity to comment on allegations made against them. The naming in evidence of staff against whom allegations are made would, in my view, discourage staff from co-operating with the Inquiry. The order will, I believe, both ensure fairness and facilitate engagement by staff with the Inquiry."

[101] Consistent with all the above the PSNI have appointed a senior counsel to engage with and attend the Inquiry.

[102] All of these matters are expressly relied upon by the Minister in his decision of 29 June 2022 and are, again, referenced in the decision of 9 August 2022. It is clear that

the Inquiry is expressly addressing the fact that the criminal prosecution in relation to the applicant is running parallel to the Inquiry and has put in place detailed safeguards to ensure that its work does not "*impede, impact adversely on or jeopardise the criminal proceedings*."

[103] Mr Doran also emphasises that these measures are not static. They are subject to revision and can be adapted prior to or during the course of any trial faced by the applicant or others. Mr Doran points to the provisions of sections 17 and 19 of the 2005 Act. Section 17 provides that the procedure and conduct of an Inquiry are to be such as the Chairman of the Inquiry may direct. In making a decision as to the procedure, the Chairman must act with fairness.

[104] Importantly, section 19 provides for restrictions on public access, permits the imposition of restrictions on "disclosure or publication of any evidence or documents given, produced to provide it to an Inquiry." As has been set out above section 19 has already been invoked with a view to protecting the integrity of any criminal proceedings. This power, of course, remains open to the Chair of the Inquiry and any breach is subject to the enforcement provisions of section 36 of the 2005 Act.

[105] The court notes that in the written submissions to this hearing counsel for the PSNI and the PPS support the Minister's decision not to suspend and are content that there has been no prejudice to the integrity of the criminal prosecution related to this application.

[106] The Inquiry is considering events over a period between 2 December 1999 and 14 June 2021. The period of time relating to the charges against the applicant is therefore only a small part of the Inquiry's considerations. Further, the Inquiry is charged with the responsibility of examining a multiplicity of issues that extends significantly beyond the conduct of individuals, including: the role of staff at all levels and those responsible for management and oversight within the Trust and beyond; the processes for identifying and responding to concerns; recruitment, retention, training and support; the use of CCTV; the adequacy of policy and processes in place for discharge and resettlement of patients; the legal and regulatory framework. In addition, the Inquiry's work has an important forward looking aspect; it is expected to make recommendations on a wide range of matters with a view to ensuring that abuse does not recur at MAH or any other comparable institution within Northern Ireland. To suspend the Inquiry would have the effect of delaying this important work.

[107] I turn now to the remaining grounds relied upon by the applicant having set out the factual background above.

The applicant contends that the respondent has fettered or surrendered his discretion

[108] In this regard, the applicant submits that, in effect, the Minister has placed undue reliance on and deference to the Chair of the Inquiry's views.

[109] The seeds of this deference, Mr Larkin argues, are to be found in the Minister's email of 4 September 2020, to which I have already referred, when the Minister refers to the Chair's discretion to adopt Option 3 which was then being considered by the Minister i.e. open the inquiry and then immediately suspend it. Mr Larkin is correct to point out that this demonstrates a misunderstanding of the respective roles of the Minister and the Chair in regard to suspension. However, this was as of 4 September 2020. By the time of the decision under challenge the Minister could have been under no illusion as to the fact that it was his decision. This was clear both from the briefing note of 27 June 2022 and from the actual decisions themselves which are clearly made in the name of the Minister.

[110] Section 13(3) of the 2005 Act provides that a Minister "must consult" the Chair of the Inquiry before exercising the power to suspend. In his decision letter the Minister says:

> "The Department has seen and noted the Chair of the Inquiry's response to your letter dated 24 June 2022. In light of the above safeguards that are in place with respect to this Inquiry and the Chair's response in this matter, who is best placed to advise on the Inquiry's conduct and proceedings. I am not minded to make a notice to suspend the Inquiry." [Emphasis added]

[111] In similar vein, the second letter outlining the decision of 9 August 2022 records that:

> "I have considered the safeguards in place as outlined in my previous letter and the views of the Chair of the Inquiry. I remain of the opinion that it is not appropriate to suspend the Inquiry at this point and I have decided against invoking the power under section 13 of the Inquiries Act 2005." [Emphasis added]

[112] It seems to me from this correspondence that it is clear that the decisions challenged are those of the Minister and that he has properly consulted and taken into account the Chair's views in the overall balance in coming to his decision not to use the power under section 13 of the 2005 Act.

[113] What emerges from all the material before the court is that the Minister himself has taken the lead in the establishment of the Inquiry, fully cognisant of the fact that it will run in parallel with criminal proceedings and fully appraised of all steps taken by the Chair of the Inquiry to address concerns that might arise in those circumstances.

[114] To conclude on this issue Mr Larkin points to the final passage of the letter of August 2022 where the Minister refers to the then ongoing judicial review proceedings

in relation to the first decision challenged. Mr Larkin suggested in doing so he has "ducked" behind the role of the court in these proceedings. I do not consider there is any merit in this submission. It is perfectly reasonable for the Minister to point out that the issue of the lawfulness of the failure to suspend the Inquiry would be a matter to be determined by the court. That does not, in my view, amount to an abdication of his duties but a simple recognition of the reality that he would be subject to the outcome of those proceedings. The reasons for the refusal set out in the letter of 9 August 2022 were reiterated as those relied upon in his letter of 29 June 2022.

[115] By way of addition, Ms Montgomery points out in her second affidavit that similar correspondence was sent to other solicitors seeking suspensions on similar grounds to those raised by the applicant refusing those requests but which did not refer to the judicial review proceedings which were unique to the applicant.

[116] In general terms Mr Larkin is critical of the lack of direct evidence from the Minister. There is no affidavit from him. Instead, he relies on the affidavits from Ms Montgomery. It is clear that the decision is one which is to be made by the Minister, who as a matter of constitutional law, is separate from the Department. In those circumstances Mr Larkin submits that the court at the very least should expect an affidavit from the Minister setting out his thinking for the decisions he has made, rather than hide behind affidavits sworn by and on behalf of the Department.

[117] I do not consider there is any merit in this submission. It is regular and common practice for senior civil servants in a government Department to swear affidavits in relation to decisions made by a Minister of their Department. In this case the court has been referred to all the relevant documentation upon which the decision made by the Minister was based. Importantly, it has the actual decision letters in the name of the Minister which convey the decisions and the reasons for the decisions which are challenged in this application. In addition, the court notes that under Article 4(1) of the Departments (Northern Ireland) Order 1999:

> "4.—(1) The functions of a department shall at all times be exercised subject to the direction and control of the Minister."

[118] On any reading of the papers it could not be said that the decision in this case was anything other than that of the Minister. The court has been given adequate material to assess the basis upon which that decision was made.

[119] I do not consider that there has been any fettering of discretion in this case.

Irrationality/material and immaterial considerations

[120] The applicant further relies on irrationality as a ground of challenge. In support of his submission the applicant repeats many of the points raised in relation to the article 6 ground. In particular, she says that the respondent failed to take into account

the voluminous prejudicial material published on established media outlets and social media and the impact this would have on the criminal proceedings in which she is involved.

[121] The two categories of irrationality are succinctly stated in the valuable publication "Judicial Review in Northern Ireland: A Practitioners Guide" (2007) in the following way at chapter 2.09:

> "(1) A decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question could have arrived at it.
>
> (2) A decision which either takes account of irrelevant considerations or fails to take account of relevant considerations."

[122] The relevant statutory provision gives the Minister a discretion as to whether to suspend an Inquiry where there are ongoing investigative, civil or criminal proceedings. The statutory provision explicitly recognises there will be times when an Inquiry is ongoing in parallel with criminal proceedings. It does not require the suspension of an Inquiry but rather it gives the Minister a broad discretion as to whether to suspend an Inquiry in those circumstances.

[123] Having regard to the matters set out above, I do not consider that on any showing the respondent's decision meets the "Wednesbury unreasonable", test that is the test set out at sub-para (1) above. The Minister expressly addressed this issue in establishing the Inquiry and has properly taken into account the measures which have been taken by the Inquiry to ensure that the integrity of the criminal proceedings involving the applicant has been protected. All of these considerations were clearly relevant to the decision taken by the Minister which was well within the range of decisions open to him and in no sense could be considered irrational or illogical. Indeed, the contrary is the case. As for the failure to take into account relevant considerations, namely the potential prejudice to the applicant, these were clearly within the contemplation of the respondent throughout and it was because of these considerations that the measures relied upon by the respondent to refuse the suspension of the Inquiry were put in place. It would be wrong for the court to criticise the Minister for failing to expressly refer to fairness to the applicant when the matters he relied upon to refuse the requests to suspend the Inquiry were expressly designed to ensure fairness to the applicant. In the court's view the Minister reached a rational and balanced decision and there are no grounds for setting it aside on irrationality grounds.

[124] The essence of this case, in the court's view, is that by relying on the safeguards put in place by the Inquiry and after consultation with the Chairman of the Inquiry the Minister was entitled in law to make the decision he did.

[125] I take the view that the Minister is lawfully entitled to base his decision to refuse to suspend the Inquiry on these safeguards. To do so could not be considered to be irrational. These safeguards have been expressly designed to deal with material considerations in the assessment by the Minister as to whether he should exercise his discretion to suspend the Inquiry.

The applicant relies on alleged failure to provide adequate reasons

[126] In terms of the statutory obligation to provide reasons these are only required in the event that the Minister does exercise his power to suspend, under section 13(5) of the 2005 Act.

[127] Nonetheless, the court considers that the applicant is clearly entitled to be provided with reasons for the decision not to suspend. Much of the applicant's complaint in this regard is grounded in the alleged failure of the respondent to grapple with the issues raised under article 6 ECHR. However, the court has already found that there is no basis for the assertion of a breach of the applicant's article 6 rights.

[128] That said, in the circumstances of this case the requirements of transparency, public confidence in decision making processes concerning this Public Inquiry and fairness to the applicant require the respondent to give adequate reasons. What is adequate, of course, depends on the circumstances. Generally, it has been held that reasons should be both "intelligible and adequate" to meet the circumstances of a particular decision.

[129] In this case in his letter of 29 June 2022 the Minister has set out in detail the steps taken by the Inquiry with the express intention of respecting the integrity of the prosecutorial process whilst the Inquiry process continues. The decision sets out what those steps are. The court has considered that these steps form a lawful and rational basis for the decision taken by the Minister.

[130] The Minister's letter also points out that a further factor taken into account was that there was nothing said in the opening statement of the Chair that identified any individual as being guilty of a criminal offence, which is another relevant factor to be taken into account. In his letter of 9 August 2022 he reiterates his reliance on the safeguards in place as outlined in his letter of 29 June 2022.

[131] Therefore, I take the view that any fair reading of the correspondence clearly identifies the reasons for the respondent's decision and it cannot be said that there has been a failure to provide adequate reasons in this matter.

The respondent has failed to obtain the consent of the Secretary of State for Northern Ireland for the Inquiry to consider periods when devolution was suspended

[132] The applicant contends that the respondent has failed to obtain the consent of the Secretary of State for Northern Ireland ("SoSNI") for the Inquiry to consider periods when devolution was suspended and that therefore the Terms of Reference of the Inquiry are unlawful. Mr Larkin submits that this illegality ought also to have been considered when the question of suspension was before the respondent. Self-evidently, any challenge to the lawfulness of the Terms of Reference is manifestly out of time.

[133] Section 30 of the 2005 Act provides:

> "(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—
> …
> (b) during a period when section 1 of the Northern Ireland Act 2000 (c. 1) is in force (suspension of devolved government in Northern Ireland)."

[134] As has been set out the Inquiry's Terms of Reference state that it will consider the period between 2 December 1999 and 14 June 2021. Therefore, it includes periods when devolution was suspended. Ms Montgomery in her first affidavit avers at para 47 that:

> "On 15 September 2021 Minister Swann approved the Muckamore Abbey Hospital Inquiry Terms of Reference."

[135] The affidavit did not exhibit any evidence of the SoSNI's consent to the inclusion of events occurring during the periods when devolution was suspended. This matter was dealt with by Ms Montgomery, with the leave of the court, in a further affidavit sworn on 25 August 2022. In that affidavit she explains that on 15 September 2021 she wrote to the SoSNI's Office to advise that Minister Swann was "finalising" the Terms of Reference for the Inquiry in conjunction with the Inquiry Chair. The correspondence set out the relevant period of time i.e. between 2 December 1999 and 14 June 2021. She enclosed a copy of the final draft of the Terms of Reference and sought confirmation as soon as practicable of the SoS's permission to extend the timeframe as stipulated so that Minister Swann could formally approve them and agree to their publication.

[136] On 28 September 2021 Brandon Lewis MP, SoSNI, wrote to Minister Swann confirming that he was content for him to extend the timeframe in line with the proposed Terms of Reference for the Inquiry. In that correspondence the SoSNI confirmed that he had "sight of the <u>proposed</u> Terms of Reference regarding the statutory Public Inquiry investigating the allegations of abuse at Muckamore Abbey hospital." [Emphasis added]

[137] Having received that approval the Minister made a written statement to the Northern Ireland Assembly on 29 September 2021 announcing that the process to develop the Muckamore Abbey Hospital Inquiry, Terms of Reference had been completed. In that written statement he confirms that the Terms of Reference "have now been completed."

[138] It would be entirely understandable that the Minister would enter into discussions with the proposed Chair and the various interested parties and agree a Terms of Reference for presentation to the SoS before obtaining his final consent to cover the relevant period set out therein.

[139] In my view, the appropriate authority has been obtained prior to the formal completion of the Terms of Reference and nothing turns on this point. The Terms of Reference of the Inquiry have been validly determined by the Minister in accordance with the 2005 Act.

Did the Minister apply the correct legal test?

[140] On the morning of the hearing Mr Larkin, on behalf of the applicant, raised a new point, not pleaded in the Order 53 Statement. He sought to argue that the Minister had misdirected himself as to the nature of his discretion under section 13 of the 2005 Act in two related respects, namely:

(a) He applied the concept of necessity to the entirety of his discretion under section 13; and

(b) He failed to appreciate that the concept of necessity applies only to fixing the duration of any period of suspension.

[141] Mr Coll on behalf of the respondent, was taken by surprise on this point. I granted him some time to take instructions on the matter, after which he indicated that whilst he did not consent to any amendment he was happy for the matter to proceed to hearing. Accordingly, the applicant was granted leave to amend the Order 53 Statement to plead the point set out above.

[142] Mr Larkin's submission was prompted by the advice note provided to the Minister on 27 June 2022 after which the Minister issued his decision on 29 June 2022. The key passage is as follows:

> "**Response to the complainant's letters**
>
> 9. The Minister has a discretionary power under section 13 of the 2005 Act to suspend an Inquiry,

> where it is "necessary" to allow for the completion of a criminal investigation or criminal proceedings arising out of matters to which the Inquiry relates. The Minister must consult with the Chairman of the Inquiry before the power is exercised."

[143] Put simply, as a matter of construction, Mr Larkin argues that whilst the Minister has a discretion to suspend an Inquiry the concept of necessity applies only to fixing the duration of any such period of suspension and not the decision to suspend. He says this is consistent with an approach which, in effect, presumes a suspension with the real decision for the Minister being the appropriate period of time which would be "necessary" to allow for "the determination of criminal proceedings." Mr Coll argues that, in fact, the Minister has applied the appropriate test. He argues against the disjunctive approach adopted by Mr Larkin and says that the text of section 13(1) should be read as a whole.

[144] I agree with the interpretation argued for on behalf of the Minister. By definition any request for a suspension or a decision to suspend will be for a period of time. In this particular application the request is for a suspension until the conclusion of the criminal proceedings faced by the applicant. In my view, a proper interpretation of the section is that any suspension imposed by the Minister must be necessary before it may be imposed. The question is whether it is necessary to suspend the Inquiry for the purposes set out in sub-paras (a) and (b). It will be noted that under section 13(2) the power may be exercised whether or not the investigation or proceedings have begun. In the event that there is a suspension the Minister must set out in a Notice his reasons for suspending the Inquiry. Under sub-section 4 the Minister has the power to suspend an Inquiry "until the giving by the Minister of a further notice to the Chairman." Again, this supports the interpretation that the suspension itself must be necessary given the open-ended nature of the potential period of suspension open to the Minister. Clearly, the section provides the Minister with a discretion – he may suspend. It could not be suggested that there is a presumption for a suspension but rather the section points to both the suspension and the period for any such suspension to be "necessary."

[145] I am satisfied that the Minister has applied the correct test.

[146] Even if I am wrong about this I am not persuaded that I should interfere with the Minister's decision. The grant of any remedy in judicial review applications is discretionary. If the test is not to be one of necessity then it would be clear that the Minister enjoys a very broad discretion. In exercising that discretion it seems to me that he will of necessity take into account the considerations that have been set out in this judgment. He would need to take into account fairness to the applicant, and the potential impediment to any criminal prosecution balanced against the public interest in the continuation of the Inquiry which covers matters over a 22-year period. As is evident from the Terms of Reference it will inquire into and make recommendations in relation to a wide range of issues which have been described in para [106] above.

In light of the factors to which he refers in his decision, that is the safeguards put in place by the Inquiry to ensure fairness to the applicant in respect of the criminal proceedings, it seems to me that his decision would have lawfully been the same.

[147] For all of these reasons the application for judicial review is dismissed.