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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF APPLICATIONS BY RADKO BELKOVIC FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

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The Applicant appeared in person
Philip McAteer (instructed by Elliott Duffy Garrett) for the proposed Respondent

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HUMPHREYS J

Introduction

[1] By way of four separate applications for leave to apply for judicial review, the applicant seeks to challenge decisions made by the proposed respondent, the Northern Ireland Public Service Ombudsman ('NIPSO').

[2] Since each of these challenges has overlapping themes and factual connections, it is convenient to deal with each of them in a single judgment.

[3] The applicant has also launched interlocutory applications in each case:

(i) Seeking to strike out the proposed respondent's defence pursuant to Order 18 rule 19 of the Rules of the Court of Judicature (Northern Ireland) 1980 ('the Rules'); and

(ii) Seeking discovery of documents from the proposed respondent by virtue of the provisions of section 32 of the Administration of Justice Act 1970 and Order 24 of the Rules.

[4] I will also address these applications in this judgment.

[5] I propose to set out, in broad terms, the background to these applications for leave and then set out a number of general principles which are common to each application before considering the merits of each case.

Background

Application No. 1

[6] On 2 November 2016 the applicant applied to the Health and Social Care Board ('HSCB') for funding in relation to medical treatment which he sought to obtain in the Czech Republic, made pursuant to EU Directive 2011/24 on Cross Border Healthcare. This was approved in principle by the HSCB on 1 September 2017 but limited the amount claimable to the total equivalent cost of treatment in Northern Ireland. This scheme provides for reimbursement of amounts paid by the patient to healthcare providers, subject to that limit.

[7] Subsequently, on 4 July 2018 the applicant made a further application to the HSCB pursuant to both the EU Directive and the S2 route which permits similar funding via a different process.

[8] S2 funding is only applicable in circumstances where the same treatment is not available in Northern Ireland within a medically appropriate timescale. For that reason, the applicant was asked on 23 July 2018 to furnish a report from a consultant within this jurisdiction confirming that the potential wait for treatment was medically inappropriate. This was not supplied, and the application rejected on 10 September 2018.

[9] On 14 December 2018 the applicant issued complaints to the HSCB in relation to the manner in which his applications for funding had been treated. These resulted in a decision made by the HSCB on 19 March 2019 to the effect that the complaints were not upheld and that the applications had been correctly processed.

[10] A meeting was held on 23 May 2019 between the applicant and the HSCB at which the complaints were aired. Following this, the HSCB confirmed, in a letter dated 8 July 2019, that its position in respect of the complaints remained unchanged.

[11] On 22 July 2019 the applicant made a complaint to NIPSO in relation to the handling of his applications by HSCB. On 7 October 2019 NIPSO communicated to the applicant its decision that the complaint ought not to be accepted for investigation. The Investigating Officer had considered all the evidence submitted by the applicant and the written response and supporting documentation from the HSCB. It was concluded that there was no prima facie evidence of maladministration on the part of HSCB. The policies and the procedures of the HSCB had, on the available evidence, been followed. The Investigating Officer did identify a delay in the processing of the applicant's 2016 application but in light of the apology for this, and the reasons

proffered, it was determined that it would not be proportionate or in the public interest to further investigate this issue.

[12] The applicant sought a review of this decision on 2 November 2019. NIPSO's Director of Investigations considered this request and concluded, on 5 December 2019, that the grounds for review were not made out.

[13] The applicant then commenced judicial review proceedings on 17 February 2020, seeking leave to apply for judicial review of the 5 December 2019 decision on the basis that NIPSO erred in law, acted irrationally, laboured under a misapprehension of fact, breached the applicant's human rights and conducted a procedurally unfair process.

Application No. 2

[14] On 28 June 2019 the applicant made a complaint to his GP practice in relation to the services provided to him by the doctors. Various issues were raised, including the prescription of 'outdated' antibiotics, not being offered a home visit, not being prescribed antibiotics for a sufficiently long period, being lied to about test results and exposure to the risk of serious harm.

[15] On 3 July 2019 the GP practice responded to the complaint with a finding that all the treatment and advice given had been appropriate, and in the patient's best interests. It also informed the applicant that he had been removed from the practice's patient list on the basis that there had been a breakdown in the doctor/patient relationship.

[16] On 31 July 2019 the applicant made a complaint to NIPSO in relation to the handling of his treatment by the GP practice. The applicant declined to pursue a complaint to the HSCB in this regard due to what he perceived to be a conflict of interest.

[17] NIPSO identified four issues raised in this complaint:

(i) Whether the care and treatment received by the applicant in January 2018 was in accordance with good medical practice;

(ii) Whether the care and treatment received by the applicant in March 2019 was in accordance with good medical practice;

(iii) Whether the decision to remove the complainant from the practice's patient list was reasonable and in accordance with the relevant guidelines; and

(iv) Whether the practice failed to retain records of treatment which the applicant had received in other European countries.

[18] On 9 January 2020 NIPSO responded stating that issues (i) to (iii) had been accepted for investigation but item (iv), in relation to record keeping, had not. It was stated that there was no prima facie evidence that the record keeping of the practice was inadequate, a decision which was upheld on review on 24 June 2020 by the Director of Investigations.

[19] In the request for a review, the applicant raised a further issue in relation to documents which he said were missing from his medical records, namely sleep study test results of March 2018 and urine sample testing records of March 2019. As these were not part of the complaint of 31 July 2019, NIPSO determined that it could not consider these issues.

[20] The applicant wrote a pre action protocol letter to NIPSO on 1 July 2020 setting out the basis for his challenge to the decision of 24 June. Following receipt of this, on 22 July 2020, NIPSO informed the applicant that it had reconsidered the position and would now accept issue (iv) for investigation. As a result, the alleged failure of the GP practice to retain records of treatment obtained elsewhere would form part of the investigatory process.

[21] However, the applicant was not satisfied with this outcome and sought to have the investigation extended to include the alleged failures in relation to record keeping for sleep apnoea and urine sample testing. NIPSO repeated, by letter dated 28 August 2020, that it could not investigate these matters as they formed no part of the original complaint. It was highlighted that the actual treatment of the applicant by the GP practice in March/April 2019 would form part of the investigation.

[22] The applicant then commenced his second set of judicial review proceedings, seeking leave to apply for a judicial review of NIPSO's decision of 24 June 2020 and alleging illegality, irrationality and procedural impropriety.

[23] The final investigation report of NIPSO into the four issues outlined was published on 26 February 2021. In summary, it found that the medical treatment provided to the applicant in January 2018 and March 2019 was appropriate and in accordance with relevant guidance. The failure to warn the applicant that he was at risk of removal from the practice and the lack of recorded reasons for decision making were found to be failings on the practice's part. The complaint in relation to record keeping was not upheld.

Application No. 3

[24] On 1 February 2021 the applicant issued a fresh complaint to his former GP practice in relation to the record keeping associated with his sleep apnoea test results and alleging that a urine sample result dated 5 April 2019 had been changed. The practice responded stating that if the sleep apnoea results were not present it was due to the failure of the relevant Trust to supply those to the practice. It also stated that

the matter of the urine sample had already been dealt with by NIPSO in the previous complaint.

[25] The applicant complained to NIPSO on 6 April 2021 in relation to the actions of the GP practice. On 9 December 2021 NIPSO determined that the complaint should not be accepted for investigation. No evidence had been identified to suggest that the GP practice had changed the result of the urine sample dated 5 April 2019. Equally, no evidence of maladministration in relation to the sleep apnoea records was detected. As a result, further investigation was deemed inappropriate.

[26] The applicant sought a review of this decision by letter dated 10 January 2022. The decision not to investigate the applicant's complaints was upheld on 10 January 2023.

[27] The applicant then commenced his third set of judicial review proceedings, seeking to impugn NIPSO's decision of 10 January 2023, again on the full range of judicial review grounds.

Application No. 4

[28] On 13 December 2019 the applicant made a complaint to Belfast Health & Social Care Trust ('the Trust') in relation to medical treatment, or rather the lack of treatment, which he had received. This was followed by several further communications with additional details in February and May 2020. The Trust's response was communicated on 7 October 2020 and set out its findings, which identified no failings in the level of treatment and service provided.

[29] The applicant then issued a complaint to NIPSO on 5 February 2021 in relation to his treatment by the Trust. On 16 June 2021 NIPSO concluded that the complaint could not be accepted as the applicant had a remedy by way of proceedings in a court of law, specifically an action for damages for clinical negligence. Following further correspondence, NIPSO ultimately accepted the complaint for investigation on 9 December 2021. The scope of the investigation was determined on 12 April 2022 to be the appropriate level of care and treatment provided to the applicant between January 2019 and February 2020 and the communication with the applicant between these same dates. The scope of the investigation was challenged by the applicant and reviewed by NIPSO with the outcome communicated to the applicant on 31 May 2023.

[30] On 23 November 2022 NIPSO produced a draft investigation report which was sent to both the applicant and the Trust for their comments. The applicant provided his lengthy and detailed comments on 29 December 2022.

[31] The applicant wrote a pre action protocol letter on 22 June 2023 challenging the scope of the investigation, its conduct and the outcome. In its response to the PAP letter dated 11 July 2023, NIPSO stated that the applicant's representations, as well as

the content of his PAP letter, were being considered by investigators, working through these documents in preparation for the final investigation report.

[32] The fourth application for leave to apply for judicial review related to what is described as the 'NIPSO final decision of 11 July 2023', i.e. the PAP response letter. In an 80-page Order 53 statement filed on 19 July 2023 the applicant in fact challenges the entire draft investigation report of 23 November 2022 on the full panoply of judicial review and human rights grounds. These grounds closely mirror to the representations made by the applicant to NIPSO on 29 December 2022.

General Principles

[33] There are certain general principles which apply to each of these applications. Firstly, the role of the judicial review court. This is concerned primarily with the lawfulness of decision making procedures. It does not act as a court of appeal nor does it substitute its view of the merits of a particular dispute for that of the decision maker. It is concerned to ensure that public bodies adopt and follow fair procedures, act rationally and in accordance with the law. It will only intervene with the substance of a decision where it is so unreasonable that no reasonable authority could have arrived at it or, in certain cases, where there has been a disproportionate interference with an individual's human rights.

[34] Secondly, the test for leave. In order to obtain leave to apply for judicial review of a decision made by a public body, an applicant must show an arguable case with realistic prospects of success – see *Re Ni Chuinneagain's Application* [2022] NICA 56.

[35] Thirdly, it is important to recognise that NIPSO is a creature of statute. The office was established by the Public Service Ombudsman Act (Northern Ireland) 2016 ('the 2016 Act') for the purpose of investigating maladministration by certain authorities and is independent of government. Health and social care trusts and healthcare providers are included within the list of authorities which may be the subject of NIPSO investigation.

[36] By section 5 of the 2016 Act the Ombudsman may investigate a complaint made by an aggrieved person if certain requirements are met. Notably, there is no obligation to investigate any particular complaint. Rather, NIPSO is invested with a broad discretion to determine which complaints it ought to investigate.

[37] Section 24 of the 2016 Act requires the aggrieved person to exhaust the authority's internal complaints procedure before pursuing a complaint to NIPSO, save in exceptional circumstances.

[38] Section 30 of the 2016 Act makes it clear that it is a matter for the Ombudsman to determine if an investigation should be conducted and whether the statutory requirements have been fulfilled.

[39] Fourthly, NIPSO has adopted policies and procedures which guide it in the exercise of its statutory functions. It outlines that there are three stages to the process of handling a complaint:

(i) Initial assessment;

(ii) Assessment; and

(iii) Investigation.

[40] Stage (i) involves a series to checks to ensure that the complaint falls within the jurisdiction of NIPSO, is not time barred, the authority's internal complaints process has been exhausted and other preliminary matters are considered.

[41] Stage (ii) is the process by which NIPSO determines whether or not to investigate a complaint. It will involve the consideration of the detail of the complaint and supporting material as well as information sought and received from the public authority. The relevant officer then will then carry out the assessment based on the '3P's policy':

(1) An investigation is appropriate and necessary in the circumstances (proportionality)

(2) Whether an investigation by the Ombudsman would directly bring about a solution or adequate remedy (practical outcome)

(3) Whether investigating the issues of complaint could be of potential benefit to the general public (public interest)

[42] If the case is accepted, then the stage (iii) investigation will commence with the identification of the specific issues to be investigated. The relevant officer has a broad range of options, including evidence gathering, interviewing and obtaining independent professional advice ('IPA'). Once the investigation is complete, an analysis is carried out as to whether maladministration has occurred. If there is such a finding, then the appropriate remedy is identified.

[43] Once prepared, the draft investigation report with proposed findings and recommendations is shared with both the complainant and the authority, seeking comments in relation to factual accuracy. Once these representations have been considered, the final investigation report is published. During the course of the process, it is recognised that there may be opportunities for settlement or alternative resolution.

[44] At stages (i) and (ii) of the process, it is open to the complainant to seek a review of NIPSO's decisions. At assessment stage, such a review is to be conducted by

NIPSO's Director of Investigations although it may be delegated to the Senior Investigating Officer. There is no right to seek a review of a final investigation report.

[45] Fifthly, the courts have recognised that they should be slow to interfere with the exercise of discretion undertaken by an Ombudsman or Commissioner for Complaints. In *R v Parliamentary Commissioner for Administration ex parte Dyer* [1994] 1 WLR 621, Simon Brown LJ observed:

> "the intended width of these discretions is made strikingly clear by the legislature"

[46] In *Jeremiah v Parliamentary and Health Service Ombudsman* [2013] EWHC 1085 (Admin), Collins J commented:

> "The law, as set out by both the Act and its interpretation in previous decisions, is that the hurdle which has to be surmounted by any Claimant seeking to persuade a court that an exercise of discretion by the Ombudsman is unlawful is a very high one indeed" (para [30])

[47] This line of authority was followed in this jurisdiction by Treacy J in *Re Martin's Application* [2012] NIQB 89. Whilst therefore decisions of Ombudsmen are susceptible to judicial review, the court must respect the wide discretion afforded to them by statute and, accordingly, the circumstances in which the court will intervene will be rare.

The applications to strike out

[48] In each case, the applicant has launched an application under Order 18 rule 19 of the Rules seeking to strike out the proposed respondent's defence. This is on the basis that the skeleton arguments disclose no reasonable defence, the defence is scandalous, frivolous or vexatious and its actions constitute an abuse of the process of the court.

[49] Order 18 of the Rules is concerned with pleadings. It prescribes a procedure for the service of a statement of claim, defence and reply and sets out the formal requirements for each of these documents. Order 18 rule 19 states:

> "The court may at any stage of the proceedings order to be struck out or amended any pleading of the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that –
>
> (a) It discloses no reasonable cause of action or defence, as the case may be; or

(b) It is scandalous, frivolous or vexatious; or

(c) It may prejudice, embarrass or delay the fair trial of the action; or

(d) It is otherwise an abuse of the process of the court."

[50] By Order 18 rule 19(3), this rule is extended to actions commenced by originating summons or petition, but not to applications for judicial review which are governed by Order 53 of the Rules. It simply has no application to this type of legal proceeding.

[51] In any event, the proposed respondent has filed no pleading and therefore there is nothing to be struck out or amended. If the court reached the conclusion that the case advanced by the proposed respondent was lacking in merit, then the appropriate course of action would be to grant leave under Order 53 rule 3 of the Rules.

[52] Each of the applications under Order 18 rule 19 is therefore dismissed.

The applications for discovery

[53] In each case, the applicant has also brought applications seeking discovery of documents, pursuant to section 32 of the Administration of Justice Act 1970 and/or Order 24 of the Rules. Section 32 can only be invoked in cases in respect of personal injuries or death against a non party to proceedings. It therefore has no role to play in judicial review applications.

[54] However, Order 53 rule 8 refers to applications for discovery under Order 24, and, as the caselaw demonstrates, such orders can be made in judicial review proceedings.

[55] The House of Lords decision in *Tweed v Parades Commission for Northern Ireland* [2006] UKHL 53 remains the leading authority in this jurisdiction on the question of disclosure in judicial review. It heralded a more flexible approach to discovery in such cases than had previously been the case, but nonetheless stressed it would not routinely be granted in judicial review. Once leave is granted in any given case, the respondent is required to file evidence and to comply with its duty of candour. This will normally involve exhibiting all relevant documentation to the affidavit evidence. It is only at this stage that an applicant may seek further disclosure by identifying documents which have not been furnished and establishing that these are necessary for the fair disposal of the case pursuant to the test in Order 24 rule 9 of the Rules.

[56] The editors of De Smith's Judicial Review summarise the legal position as follows:

> "In practice, unless the claimant can show a prima facie breach of public duty, disclosure will not usually be granted…Applications for disclosure "in the hope something might turn up" are regarded as an illegitimate exercise, at least in the absence of a prima facie reason to suppose that the deponent's evidence is untruthful." [para 16-073]

[57] The applicant was unable to refer the court to any authority for the proposition that disclosure of documents should be ordered prior to the grant of leave. To do so would risk distorting the judicial review process which requires an applicant, on an ex parte basis, to show an arguable case with realistic prospects of success before a respondent is obliged to file evidence.

[58] The only case which has been identified where pre-leave or pre-permission disclosure has been sought is *R (AA,CK) v Secretary of State for Foreign and Commonwealth Affairs* [2008] EWHC 2292 (Admin) where the argument was given short shrift by Mitting J.

[59] I have therefore concluded that the applicant's applications for discovery are premature and ill-founded and accordingly they are dismissed.

The merits of the applications for leave

Application No. 1

[60] NIPSO's statutory remit is confined to questions of maladministration. It does not act as an appellate authority from decisions of public authorities. If a citizen dislikes or disagrees with the merits of a decision, this will not give rise to an entitlement to a remedy from NIPSO.

[61] This context is important as it is apparent from his submissions that the applicant profoundly disagrees with the rejection of his applications for funding.

[62] The decision which is the subject of the judicial review application is the determination of the review process of the original NIPSO decision not to investigate the applicant's complaint. This is several stages removed from the merits of the HSCB funding refusal.

[63] In its letter dated 7 October 2019 NIPSO sets out the reasons for deciding not to investigate the complaint. It explains the issues which were the subject matter of the complaint and the key principles underpinning both the S2 and EU Directive routes for treatment funding. It rehearses the procedural steps taken by the HSCB when funding applications are made and notes, in particular, the requirement in an S2 application for confirmation to be given by a Northern Irish consultant that the wait for treatment in this jurisdiction was clinically inappropriate.

[64] Mr Reid, the investigating officer, could not identify any failings on the part of the HSCB in respect of its procedures. The necessary steps required of the applicant were fully explained to him and the issues explored by the investigating officer. On the basis of the available material, prima facie evidence of maladministration was not identified. For these reasons, it was determined that an investigation was neither proportionate nor in the public interest.

[65] The applicant's complaint in respect of delay was upheld, although in light of the apology offered and the measures put in place to address future delay, Mr Reid decided that it was not proportionate nor in the public interest to investigate the matter further.

[66] On 5 December 2019 NIPSO declined the applicant's request for a review, stating:

> "…A case cannot be re-opened purely on the grounds that the complainant would have preferred the decision to be different. In this context it is necessary for the complainant to set out how they meet specific grounds for review which are:
>
> (a) You feel the decision was based on important evidence which contains facts that were not accurate, and you can show this using readily available information.
>
> (b) You feel you have new and relevant information that was not previously available, and which affects the decision."

[67] Ms McElhatton, the Director of Investigations, made this decision having considered the applicant's detailed submissions and the material which had been available to Mr Reid. She was satisfied that Mr Reid had not based his decision on inaccurate facts, nor was there any new information forthcoming that would have justified a review.

[68] No error of law has been identified by the applicant in relation to this process. NIPSO exercised its statutory discretion under section 5 of the 2016 Act to decline to investigate the complaint in line with its published procedures.

[69] The allegations of procedural unfairness are not made out on the facts. The applicant was given every opportunity to make his case, and all the relevant material was before the decision maker.

[70] The decisions made, whether by Mr Reid or Ms McElhatton, were entirely rational. All relevant matters were taken into account and the officers concerned carried out an evaluation in line with their statutory functions. Simply because one disagrees with the outcome cannot form the basis for a claim of *Wednesbury* unreasonableness.

[71] The applicant seeks to rely upon his rights under articles 2, 3 and 6 of the ECHR and alleges that each of these has been interfered with by NIPSO. There is nothing in the conduct of the Ombudsman which could be said to fail to protect the life of the applicant, nor that could constitute the subjection of the applicant to torture or inhuman or degrading treatment.

[72] The civil limb of article 6 ECHR states:

> "In the determination of his civil rights and obligations…everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

[73] The investigation or otherwise of a complaint of maladministration does not itself determine any civil right or obligation of the applicant. It was always open to him to bring proceedings in the County Court seeking to recoup the cost of any medical treatment obtained abroad from the HSCB. In any event there is no evidence that NIPSO failed to follow a fair procedure.

[74] In summary, none of the grounds advanced by the applicant are arguable. They do not begin to meet the very high hurdle referred to by Collins J in *Jeremiah*. As a result, this application for leave to apply for judicial review is dismissed.

Application No. 2

[75] It is apparent from the factual background recited above that the applicant's four issues contained within his original complaint to NIPSO alleging maladministration on the part of the GP practice were ultimately accepted for consideration. The final investigation report into these matters was published on 26 February 2021 and is not the subject of any judicial review challenge.

[76] The applicant's remaining issue relates to the record keeping of the sleep apnoea and urine sample test results. These had not been referenced by the applicant until January and February 2020 and accordingly did not form part of the original complaint. Since they had not formed the subject matter of a complaint to the GP practice, NIPSO could not accept these as the basis of a complaint to it.

[77] The applicant then did make a record keeping complaint to the GP practice and subsequently a maladministration complaint in this regard to NIPSO, which forms the subject matter of application no. 3.

[78] It will be self-evident therefore that application no. 2 gives rise to no arguable case with realistic prospects of success. Its subject matter is entirely subsumed within application no. 3. By virtue of section 24 of the 2016 Act, NIPSO did not have jurisdiction to consider a complaint prior to the internal procedures of the GP practice being invoked and exhausted.

[79] This application for leave to apply for judicial review is therefore unarguable and is dismissed.

Application No. 3

[80] The specific allegations made by the applicant in respect of the GP practice's handling of the records were that:

(i) The practice had deliberately removed all documents relating to sleep apnoea tests from the applicant's medical notes and records; and

(ii) The practice had altered the positive findings of the urine culture test;

(iii) These actions were taken to prevent the applicant from accessing healthcare for these conditions.

[81] Mr Reid, the investigating officer communicated the decision not to accept the complaint for investigation on 9 December 2021. He outlined that he had communicated with the GP practice and confirmed with them that these complaints concerned a different subject matter than those considered by NIPSO in the final investigation report of 26 February 2021. This report addressed the treatment provided whilst the subject complaint related to record keeping and the changing of a positive result.

[82] Mr Reid had obtained an account from the GP practice as to how such samples are handled. It was explained that laboratory results are provided electronically to the practice from the Trust. The microbiologist carrying out the test records the level of white cells and bacteria grown and determines whether the result is positive or negative. If positive, the laboratory may suggest appropriate antibiotics to treat the infection. Once received, the practice cannot alter the results but can add a comment such as 'normal, no action'. The level of organisms shown by the test will determine whether and what treatment is appropriate.

[83] In light of the evidence received, Mr Reid concluded:

> "I accept that the practice does not have access to the laboratory system which deals with urine sample test results. Further, the practice does not have access to the electronic care record which would enable the practice to

> change a urine sample test result. I have not identified any evidence to suggest that the practice changed the result of your urine sample dated 5 April 2019. Accordingly, I have not identified any prima facie of maladministration with respect to this issue and I do not consider an investigation would be appropriate."

[84] In relation to the sleep apnoea records, it was not in dispute that the applicant underwent sleep studies at Belfast City Hospital on 5 July 2018 and that the records generated by this ENT department were not within the applicant's GP notes and records. There was correspondence in March 2018 from the hospital to the GP practice indicating that the applicant was to be referred for sleep apnoea investigations.

[85] The evidence obtained by Mr Reid revealed that the applicant had failed to attend multiple review appointments following the initial investigations and, as a result, he was removed from the review waiting list. The GP practice was unaware as to why the results were not received by it but was adamant that no such notes were removed from the patient's records.

[86] Mr Reid concluded, after considering the materials, that there was no prima facie evidence of maladministration and therefore no investigation should follow.

[87] The request for a review was considered by Ms McGlashan, Acting Senior Investigating Officer, and its outcome communicated in a letter dated 10 January 2023.

[88] As far as the urine sample test was concerned, it was noted that the practice had added the comment 'normal – no action' to the test result which reflected the level of organisms as showing 'no significant growth'.

[89] Ms McGlashan concluded that there was no evidence the practice had amended its records to show a negative result and as its records matched those from the laboratory, there was no prima facie evidence of maladministration.

[90] Equally, in respect of the sleep apnoea test results, Ms McGlashan agreed there was no evidence to support the assertion that these documents had been received by the GP practice and subsequently removed from the applicant's medical records. There was no basis to conclude that an investigation would be appropriate in such circumstances and therefore the request for a review was refused.

[91] The applicant has made the case that the decision process was infected by bias and a conflict of interest. The evidential basis for this is that Ms McGlashan was involved in the decision in January 2020 to exclude issue (iv) from the complaint which formed the subject matter of application no. 2.

[92] The test for apparent bias is well-known. The question is whether a fair-minded and informed observer would conclude that there was a real possibility

of bias – see *Porter v Magill* [2001] UKHL 67. The fact that a decision-maker has reached a conclusion adverse to the complaining party is not, of itself, a factor which points to apparent bias.

[93] The fair-minded observer would note that Ms McGlashan accepted three of the issues which formed the subject matter of the complaint for investigation. The one issue which she did not accept was subsequently admitted by NIPSO into the investigatory process. He or she would also be cognisant of the fact that NIPSO has finite resources, and the combination of multiple complaints and reviews makes it very likely that some decisions would have to be taken by the same officers within the organisation.

[94] I am not satisfied that it is arguable that this process was in any way infected by apparent bias.

[95] The available materials demonstrate an entirely lawful exercise of the discretion vested in NIPSO by section 5 of the 2016 Act not to accept a complaint for investigation. Both the applicant and the GP practice were afforded the opportunity to make representations and the evidence generated was the subject of due consideration. Mr Reid made a decision supported by rational reasons. Both he and the reviewing officer were entitled to make an evaluative judgement which should only be the subject of judicial review where the high hurdle of irrationality has been surmounted. No arguable case of illegality or irrationality has been made out.

[96] Equally, I am not satisfied that it is arguable that the process was in any way vitiated by procedural unfairness. NIPSO followed its own procedures, as laid down in the manual, and no breach of the principles of natural justice can be discerned.

[97] For the reasons set out in relation to the similar issues raised in application no. 1, no arguable case in relation to breach of any of the applicant's Convention rights has been established.

[98] No arguable grounds having been made out, the application for leave to apply for judicial review is dismissed.

Application No. 4

[99] The factual background set out above in relation to this application reveals that the applicant has made detailed submissions in relation to the draft investigation report, in line with NIPSO's published procedures, and the final investigation report is now awaited.

[100] In *Re Burns and McCready's Application* [2022] NICA 20, the Court of Appeal stated:

> "This is a court of supervisory jurisdiction. It performs an important function to scrutinise the actions of public authorities including government. As a general rule, the courts are concerned in judicial review with adjudicating on issues of law that have already arisen for decision and where the facts are established. The courts will not generally consider cases which are brought prematurely because, at the time the claim is made, the relevant legal or factual events to which the claim relates have not yet occurred." (para [12])

[101] The applicant's challenge to the investigation process is demonstrably premature. The complaints levelled against the procedure adopted and the outcomes found fail to recognise that no final decision has been taken by NIPSO.

[102] On this basis, there is no arguable case to be advanced and the application for judicial review is dismissed.

Conclusion

[103] All of the applicant's applications are dismissed. I will follow the court's normal practice in relation to leave applications and make no order as to costs between the parties. However, the applicant has failed in his interlocutory applications and costs should follow the event in respect of those. I therefore make an order that the applicant pay the costs of the proposed respondent in each of the strike out and discovery applications, such costs to be taxed in default of agreement.