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Judgment: approved by the Court for handing down | *Delivered:* **16/10/07**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY BRIAN McGEE FOR JUDICIAL REVIEW

GIRVAN LJ

[1] The appellant Brian McGee suffers from paranoid schizophrenia. He has been detained in a mental hospital on a number of occasions from 2001 onwards in connection with his condition. On 28 December 2005 he was admitted to Gransha Hospital, County Londonderry and detained there pursuant to an application for assessment under Article 9 of the Mental Health (Northern Ireland) Order 1986 ("the 1986 Order"). From 10 January 2006 he was detained for treatment under Article 12 of the 1986 Order. He made an application to the Mental Health Review Tribunal ("the Tribunal") in January 2006. The Tribunal heard his application on 3 March 2006. Following the hearing it decided that his mental illness was not of a degree that warranted his continued detention and it was not satisfied that his discharge would create a substantial likelihood of serious physical harm to himself or others. It accordingly ordered his release. The Tribunal's written decision was reached and signed on 3 March 2006 after the conclusion of the hearing and it sent a copy of the decision to the Foyle Health and Social Service Trust ("the Trust") which was in charge of the appellant's treatment. The Trust received the decision on 6 March 2006.

[2] In the view of Dr O'Hara, the consultant psychiatrist in charge of the appellant's case, formed prior to the Tribunal's decision, the appellant would benefit from a period of home leave during the weekend of 4-6 March. The appellant was thus permitted to go home to his mother's home during that

period. It was explained to the appellant that until the Trust heard the outcome of the Tribunal's decision that he remained a detained patient under the 1986 Order. It was agreed that the appellant would return to the hospital from leave on 6 March. After his release on 3 March, the hospital received telephone calls from the appellant's mother who was concerned that he was "roaring and shouting and making threats to kill her". He had apparently been drinking. He did not return to hospital on 6 March as arranged. His mother informed the hospital that he had left home at 1.00 pm to return. A later phone call from her revealed that he had gone to a pub in Strabane and had returned home at 6.00 pm. His leave was apparently extended for another day. At 11.00 am on 7 March a psychiatric nurse telephoned him and asked him if he intended to return to the hospital. He said that he did and in fact he returned around lunchtime. When he arrived at the hospital he was given the letter from the Tribunal advising him that he was no longer a detained patient. At 3.00 pm he indicated to nursing staff that he wished to leave the hospital. In accordance with normal procedure a member of the medical staff, in this instance Dr Qureshi, came to discuss the situation with the appellant. She found him pacing the corridor. He was expressing paranoid ideas regarding his mother and ideas of reference about paramilitaries in Strabane. Dr Qureshi spoke to his mother who was very unhappy that he was likely to be returning home. She stated that he had been drinking and had threatened to kill her and his brother Patrick. Dr O'Hara was consulted. He was of the view that the appellant had experienced psychotic thinking and that it was of a considerably increased severity compared to his thinking before he had left the hospital. He also considered that the threats were more specific and explicit than previously. He advised Dr Qureshi that she should use the powers under Article 7 of the 1986 Order to detain the appellant for a more detailed assessment to be carried out.

[3] Article 7 of the 1986 Order provides that an application for assessment may be made notwithstanding that a patient is already an in-patient at a hospital who is not liable to be detained there under the Order. Where an application is so made the patient shall be treated for the purposes of the 1986 Order as if he had been admitted to the hospital at the time when that application was received by the responsible Board. Under Article 7(2) it is provided:

> "If, where a patient is an in-patient in a hospital, but is not liable to be detained there under this Order, it appears to a medical practitioner on the staff of the hospital that an application for assessment ought to be made in respect of the patient, he may furnish to the responsible Board a report in the prescribed form to that effect; and where he does so, the patient may be detained in the hospital for a period not exceeding

> 48 hours from the time when the report is so furnished."

By virtue of Article 8 an application for assessment duly completed is sufficient authority for the applicant or a person authorised by the applicant or the responsible Board if the applicant so requests in a case of difficulty, to take the patient and convey him to the hospital specified in the application at any time within the period of two days beginning with the date on which the medical recommendation was signed. A patient admitted to hospital pursuant to an application for assessment should be examined immediately after he is admitted by the responsible medical officer, a medical practitioner appointed for the purposes of the 1986 Order by the Commission or by any other medical practitioner on the staff of the hospital provided that the examination is not to be carried out by the medical practitioner who gave the medical recommendation on which the application for assessment was founded. The medical practitioner carrying out the examination must furnish to the responsible Board in a prescribed form a report of that examination.

[4] The appellant in his judicial review challenged his continued detention and argued that it was neither substantively nor procedurally lawful. Mr McCann on behalf of the appellant contended that the hospital was required to loyally abide by the direction of the Tribunal which had considered that there were no continuing grounds for his detention. He accepted that if a patient's condition deteriorated and raised a different question from that raised before the Tribunal a medical practitioner might furnish a report to the responsible authority justifying an application for assessment under the 1986 Order. He argued that it was questionable whether there had been any real change of circumstances during the weekend leave. He contended that the hospital staff used the events after the weekend period of leave as a pretext on which to avoid the consequences of the Tribunal's decision with which, he said, the medical attendants simply did not agree. Before a medical practitioner could exercise the powers under Article 7 of the 1986 Order it had to be demonstrated that the appellant was at the relevant time an in-patient in the hospital. Counsel argued that the appellant was not in fact an in-patient at the time. He had returned to the hospital without knowing the outcome of the Tribunal's decision. He made it clear that he wished to leave the hospital and he could no longer be treated as a voluntary patient.

[5] Mr Toner QC who appeared with Mr Potter on behalf of the Trust argued that there had been a material change of circumstances arising over the weekend when the patient was on leave of absence. The deterioration in his condition merited and justified his involuntary detention on 7 March. He contended that the appellant was an in-patient at the relevant time. Although the Tribunal decision meant that he was no longer liable to be detained the Tribunal did not direct his discharge from hospital. Discharge involved discussions with the patient as to his future care and treatment. It would be

normal practice for a discussion to take place with the patient in relation to the decision to leave hospital and its implications for future care and treatment. The appellant having received the letter from the Tribunal remained in the ward for approximately an hour before indicating that he wished to leave. At that stage the nursing staff who were concerned about the appellant's condition paged Dr Qureshi who sought advice from Dr O'Hara. It was Mr Toner's contention that on the facts of the relevant time the appellant was still an in-patient.

[6] The appellant was assessed by Dr Singh on 9 March 2006 pursuant to Article 9(3) of the 1986 Order. He completed a form on that date which should have properly recorded his opinion which was that he should be detained for assessment in accordance with Part II of the Order. It is clear that Dr Singh did reach that conclusion but he had filled the form in incorrectly. He did record his conclusion that the appellant was suffering from schizophrenia and was currently in relapse, was suffering from delusions about a space ship coming to get him, was threatening to kill his mother and lacked insight. He was in fact detained for assessment. The error in the defective form was subsequently discovered and a corrected form was sent to the relevant Board within the requisite period provided for by Article 11, thereby rectifying the procedural error in the form as signed by Dr Singh. Mr McCann did not seek to rely on the error in the first form signed by Dr Singh as a legal basis to challenge the continuing detention and accordingly that procedural error, subsequently rectified, is not relevant to the issues raised in this appeal.

[7] Following assessment of the appellant by Dr O'Hara his detention was extended for a further seven days on 14 March 2006. Subsequently on 22 March 2006 he was re-graded as a voluntary in-patient and thereafter was longer detained for treatment under Article 12.

[8] At first instance Morgan J dismissed the appellant's judicial review application, being satisfied that the medical practitioner came to a bona fide belief that there had been a material change for the worse in the medical condition of the appellant during his home leave between 3 and 7 March 2006. On the facts he considered that it was reasonable for Dr Qureshi to conclude that a period of assessment under Article 7(2) was required. He concluded that at all material times the applicant retained his status as an in-patient in the hospital and that the Article 7(2) powers were properly exercisable in respect of him.

[9] In R (Von Brandenburg) v East London and City Mental Health NHS Trust (2004) 2 AC 280 the House of Lords gave guidance as to how a relevant mental health authority should deal with the consequences of a Mental Health Tribunal's decision that a patient is no longer liable to be detained where there is a change in the condition of the patient following the

Tribunal's decision. Lord Bingham stressed that proper effect must be given to a Tribunal decision and it is not open to the nearest relative of a patient or an approved social worker to apply for admission of the patient simply because they disagree with the Tribunal's decision to discharge. This is however subject to the proviso that if the approved social worker has formed the reasonable and bona fide opinion that he has information not known to the Tribunal which puts a significantly different complexion on the case as compared with that which was before the Tribunal it may be permissible to detain the patient. Lord Bingham pointed out that it is an approved social worker who makes the application not the doctors. A recommending doctor is not required to do more than express his or her best professional opinion.

[10] As properly found by Morgan J the evidence before the court in the judicial review application clearly established that the medical practitioner at Gransha Hospital formed a reasonable and bona fide professional opinion that there had been a change for the worse in the medical condition of the applicant during his period of home leave between 3-7 March 2006 and it was reasonable to conclude that a period of assessment under Article 7(2) was required. The relevant authorities had in the words of Lord Bingham formed the reasonable and bona fide opinion that there was information not known to the Tribunal which put a significantly different complexion on the case as compared with that which was before the Tribunal.

[11] In order for the powers under Article 7(2) of the Order to be lawfully exercisable the appellant had to be an in-patient in the hospital. That is a question of fact to be determined on the evidence though the question arises as to what constitutes an in-patient for the purposes of the provisions. The word "in-patient" is not without its legal difficulties. The Code of Practice published by the Department of Health and Social Services under the 1986 Order in paragraph 2.65 states:

> "Where a doctor is of the opinion that an application for assessment ought to be made in respect of a patient already in hospital including a general hospital (but not an out-patient or someone attending an Accident and Emergency Department) the doctor should, when appropriate, complete Form 5 recording his reasons. Use should only be made of this provision, and Form 5 should only be completed, where there is a possibility that the patient could seek to leave hospital before an application can be made."

In R (DR) v Mersey NHS Trust [2002] MHLR at paragraph 27 stated:

> "The word in-patient suggests the allocation and use of a hospital bed."

Richard Jones in his Mental Health Act Manual 10th Edition at paragraph 10.067 proffers a suggested definition as "a compliant patient who has arrived at the ward and who has not provided any evidence of resistance (either verbal or physical) to the admission procedures. In both cases, the availability of a bed for the patient is a pre-condition to attaining in-patient status." That text goes on:

> "As the power contained in this sub-section only applies if the patient is an informal in-patient, it is necessary to identify how a patient can divest himself of his in-patient status. Can, for example, an in-patient avoid being held under this provision by the simple expedient of saying to the doctor who is about to invoke the power 'I discharge myself'. It is highly unlikely that the courts would find that a patient could end his in-patient status in this manner as such a finding would have the effect of totally subverting Parliament's intention in enacting this provision. It is submitted that a patient does not lose his in-patient status until he has physically removed himself from the hospital."

[12] In this instance it is apparent that the appellant was prior to 7 March an in-patient at the hospital. He returned to the hospital as such a patient on 7 March. The essential question is whether he ceased to be an in-patient as a result of Tribunal's decision, on being told of the Tribunal's decision and saying that he wanted to leave the hospital. He did not physically remove himself from the hospital which until he was discharged continued to have responsibilities for his medication, care and treatment and for making the appropriate post-release arrangements. His bed was still available for him. We conclude accordingly that Morgan J correctly considered that he retained his in-patient status in the hospital and that the powers under Article 7(2) were lawfully exercisable.

[13] In the result we dismiss the appeal.