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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY THE APPLICANT X FOR JUDICIAL REVIEW

GILLEN J

Introduction

[1] The applicant has been detained since May 2002 under the Mental Health (Northern Ireland) Order 1986 as amended (hereinafter called "the Order"). The application challenges the decision of the Mental Health Review Tribunal for Northern Ireland ("the Tribunal" or "the Respondent ") of 21 August 2007 refusing the applicant's application for discharge pursuant to Article 77(1) of the Order.

[2] The grounds upon which leave have been granted are in essence that the Tribunal failed to apply the correct legislative tests pursuant to Article 77 of the Order, that there was insufficient evidence to enable the Tribunal lawfully to determine that the detention satisfied the legal criteria in Article 77 of the Order and that the Tribunal was wrongly influenced by the unavailability of community resources to facilitate the applicant's discharge. In addition the applicant submits that the Tribunal failed to meet the requirements of Regulation 23(2) of the Mental Health Review Tribunal Regulations (Northern Ireland) 1986 ("the Regulations") in that it failed to adequately explain its findings or set out its reasons pursuant to the criteria in Article 77 of the 1986 Order.

Statutory framework

[3] Where relevant, Article 77(1) of the Order as amended by the Mental Health (Amendment) (Northern Ireland) Order 2004 reads as follows:

> "(1) Where application is made to the Review Tribunal by or in respect of a patient who is liable to be detained under this Order, the Tribunal may in

any case direct that the patient be discharged, and shall so direct if –

(a) The tribunal is not satisfied that he is then suffering from mental illness or severe mental impairment or from either of those forms of mental disorder of a nature or degree which warrants his detention is hospital for medical treatment; or

(b) The Tribunal is not satisfied that his discharge would create a substantial likelihood of serious physical harm to himself or to other persons; or

(c) In the case of an application by virtue of Article 71(4)(a) in respect of a report furnished under Article 14(4)(b), the Tribunal is satisfied that he would, if discharged, receive proper care."

[4] When interpreting and applying Article 77 of the Order , the Tribunal must take account of Article 2(4) of the Order which provides as follows:

"(4) In determining for the purposes of this Order whether the failure to detain a patient or the discharge of a patient would create a substantial likelihood of serious physical harm –

(a) to himself, regards shall be had only to evidence –

(i) that the patient has inflicted, or threatened or attempted to inflict, serious physical harm on himself; or

(ii) that the patient's judgment is so affected that he is, or would soon be, unable to protect himself against serious physical harm and that reasonable provision for his protection is not available in the community;

(b) to other persons, regards shall be had only to evidence –

(i) that the patient has behaved violently towards other persons; or

> (ii) that the patient has so behaved himself that other persons were placed in reasonable fear of serious physical harm to themselves."

[5] Where relevant the provisions of Regulation 23(2) of the 1986 Regulations provides as follows.

> "The decision by which the Tribunal determines an application shall be recorded in writing by the Tribunal, the records shall be signed by the President and shall give the reasons for the decision and in particular where the Tribunal relies upon any of the matters set out in Article 77(1) … of the Order, shall state its reasons for being satisfied as to the those matters."

Principles Governing My Conclusions

[6] Amongst the salient principles governing my conclusions in this case are the following:

> The burden of proof in this matter to detain the applicant clearly falls on the party seeking to justify detention . The onus of proof is to establish in the first place the appropriate diagnosis of mental illness or impairment, secondly that the condition warranted medical treatment in hospital and thirdly that the applicant's discharge would create a substantial risk of serious physical harm to himself or other persons. In the wake of the Court of Appeal decision in England of R (on the application of H) v London North and East Region Mental Health Review Tribunal (2002) QB 1, which found a burden of proof on the patient was incompatible with Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"), the Mental Health (Amendment) NI Order 2004 changed the applicable tests under Article 77.

[7] Although the burden of proof is on the balance of probabilities, nonetheless the evidence must be cogent in order to satisfy the need for continuing detention (see R (on the application of N) v Mental Health Review Tribunal (Northern Region) (2006) 4 AER 194).

[8] The Tribunal must be satisfied that the applicant's condition warrants detention in hospital for treatment (see R v Hallstrom ex parte W (1986) 2 AER 306). It is important to appreciate that the test is not confined merely to the need for detention but must be for detention in hospital for medical treatment (see Reid v Secretary of State for Scotland (1999) 1 AER 481 at p. 500 per Lord Clyde.) St George's Health Care NHS Trust v S and Others (1998) 3 AER 673 ("St George's" case) is authority for the proposition that the relevant legislation can only be used to justify detention for mental health order if the case falls within the prescribed conditions.

[9] Mr Potter, who appeared on behalf of the applicant, reminded me of the terms of Article 5 of the Convention. Where relevant, Article 5(1) states as follows:

> "(1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure proscribed by law:
>
> …
>
> (e) The lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants.
>
> (4) Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

[10] In a very comprehensive skeleton argument augmented by oral submissions, Mr Potter drew my attention to a number of authorities on the Convention including Winterwerp v The Netherlands (1979) 2 EHRR 387 where the court stated inter alia:

> "(39) Except in emergency cases, the individual concerned should not be deprived of his liberty unless he has been reasonably shown to be of 'unsound mind'. The very nature of what has to be established before the competent national authority – that is a true mental disorder – calls for objective medical evidence. Further, the mental disorder must

> be of a kind or degree warranting compulsory confinement. What is more, the validity of continued confinement depends upon the persistence of such a disorder."

[11] I consider that the approach which requires to be adopted in this case, when the challenge to the legal validity of the Tribunal's decision is before the court, is that set out by Lord Clyde in Reid's case at page 506B et seq:

> "Judicial review involves a challenge to the legal validity of the decision. It does not allow the court a review to examine the evidence with a view to forming its own opinion about the substantial merits of the case. It may be that the Tribunal whose decision is being challenged has done something which it had not lawful authority to do. It may have abused or misused the authority which it had. It may have departed from the procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards a decision itself it may be found to be perverse or irrational or grossly disproportionate as to what is required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or sufficient evidence, to support it, or through account being taken of a relevant matter, or through a failure for any reason to take account of a relevant matter, or through some misconstruction of the terms of the statutory provision which the decision-maker is required to allow. But while the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies it is perfectly clear that in a case of a review, as distinct from an ordinary appeal, the court may not set about forming its own preferred view of the evidence."

That is the approach which I have sought to adopt in this case. I recognise that this is not an appeal from the Tribunal and I must be wary not to set about forming my own preferred view of the evidence.

[12] R v Ministry of Defence ex p. Smith is a well trodden authority for the proposition that "the more substantial the interference with human rights, the more the court will require by justification before it is satisfied that the decision is reasonable." I consider that the basic right to freedom of this applicant under Art 5 of the convention is such that the notion of "anxious" or "heightened" scrutiny should be employed to soften the full rigour of

Wednesbury unreasonableness. Whilst this does not derogate from the principle that the court is not a fact finder nonetheless the court will be less inclined to accept ex post facto justifications from the respondent (see R (on the application of Leung) v Imperial College of Science, Technology and Medicine (2002) EWHC 1358).

[13] In considering the adequacy of the reasons given by the Tribunal in this instance, I have found great assistance in the judgment of Burnton J in The Queen on the application of H (a patient) and Ashworth Hospital Authority and Others (2001)EWHC Admin(9th November 2001) ("the Ashworth case"). That case dealt with the reasoning of a Mental Health tribunal. At paragraph 77 et seq the judge said :

> " (a) Proper adequate reasons must be given that deal with substantial points that have been raised: Re Poyser and Mills' Arbitration (1964) 2 QB 467, 478, the classic statement of Megaw J, made, it should be noted, in the context of an arbitration award.
>
> (b) Reasons must be sufficient for the parties to know whether the Tribunal made any error of law: Alexander Machery Limited v Crabtree (1974) ICR 120
>
> (c) Where, as in the case of Mental Health Review Tribunals, Parliament has required that a decision be given with written reasons, those reasons have to be adequate. They may be elucidated by subsequent evidence, but in general, inadequate written reasons cannot be saved by such evidence: R v Westminster City Council ex p Ermakov (1996) 2 AER 302.
>
> (d) A Mental Health Tribunal's reasons must deal with the entirety of its decision …
>
> (e) It is unnecessary for a Tribunal to set out the evidence and arguments before it or the facts found by it in detail: Varndell v Kearney and Trecker Marwin Limited (1983) ICR 983.
>
> (f) It is often difficult to explain why one witness is preferred to another. Generally speaking a Tribunal's decision will not be inadequately reasoned if it does not give such an explanation.

(g) In assessing the adequacy of reasons, one must bear in mind that the decision will be considered by parties who know what the issues were (R v Mental Health Review Tribunal ex p Pickering (1986) 1 AER 99, 102)(*"Pickering's case"*).

(h) However the reasons must sufficiently inform both the patient and the hospital as to the findings of the Tribunal.(see Pickering's case at p104). This consideration has been given added significance by the decision of the Court of Appeal in Brandenburg. A Tribunal must also bear in mind that its decision may have to be considered by those who are not present at or parties to the hearing, …… Furthermore, in my judgment there is no real difference in the requirements of reasons where the decisions of the Tribunal is to discharge a patient and where its decision is to refuse to do so …..

(i) In considering the adequacy of reasons the court is entitled to take into account the fact that the Tribunal has a legally qualified chairman and that in the case of Mental Health Review Tribunals the reasons do not have to be given immediately."

[14] I am indebted to counsel for drawing my attention to a number of other authorities on the standard of reasoning required of tribunals such as this. In particular I have perused R v Westminster City Council, ex p Ermakov (1996) 2 AER 302("Ermakov"), R (Nash) v Chelsea College of Art and Design (2001) EWHC 538("Nash"), Lothian and Borders Police and Ors v Gemmell (2005) CSOH 32("Gemel"), De Smith's Judicial Review 6th Edition and Supperstone Goudie and Walker "Judicial Review" 3rd Edition. I have derived from these authorities and texts the following principles relevant to this case.

[15] The standard of reasoning required in such cases will depend on the particular circumstances and the statutory context in which the duty to give reasons arises. In this case Regulation 23(2) of the 1986 Regulations requires written reasons which state the reasons for being satisfied Art.77(1) of the Order has been satisfied.

[16] Where, as in this instance, there is a statutory duty to give reasons as part of the notification of the decision, the "adequacy of the reasons is itself made a condition of legality of the decision". Only in exceptional

circumstances if at all will the court accept subsequent evidence of the reasons (see Nash's case at para 34).

[17] In determining the consequences of a failure to give reasons, a court should also take into account whether the decision-maker would have been expected to state the reason subsequently raised at the time the decision was made and also whether it would be just in all the circumstances to refuse to admit those subsequent reasons (see Nash's case at para 35 and 36).

[18] The stringency with which the court requires a statutory duty to give reasons to be complied with will depend on the court's view of the intention of the particular statute. In that regard, one relevant question will be whether the purpose of the duty is solely to provide information about the reasons for the decision, or whether it has other purposes, such as to affect the decision-making process, or to maintain public confidence in that process. Where there is a statutory duty to provide reasons as part of the notification of the decision to the parties, the court will normally interpret the legislation as having made the provision of adequate reasons with the decision a condition of a decision of validity. (See Gemmell's case at para. 70).

[19] The reasons given must be intelligible and must adequately meet the substance of the argument advanced. The Tribunal must grapple with the issues which are raised (see Pickering's case at page 102).

[20] There is no need to subject reasons to the analytical treatment more appropriate to the interpretation of a statute or a deed. A decision addressed to parties who are well aware of what issues are raised can be read in light of those issues as discussed at the hearing. (See Pickering's case at page 202 per Forbes J).

[21] It is preferable if the reasons demonstrated that a systematic analysis has been undertaken by the decision-maker. The reasons must generally state the decision-maker's material findings of fact where there is a duty to give reasons as part of the notification of the decision to the parties and the courts will normally regard the provision of adequate reasons at the time of the decision as a condition of the decision of validity. (See Gemmell's case at para. 70). In those circumstances fuller explanation of the reasons may not be possible. That is particularly so where the subject matter concerned important human rights (see Nash's case at para 35 and 36).

Conclusion

[22] I have concluded that the decision of the Tribunal made in this matter on 21 August 2007 must be quashed and the matter remitted to a fresh hearing before a differently constituted mental health review tribunal as soon

as can be conveniently arranged. I have come to this conclusion for the following reasons:

[23] First the onus of proof is on the party seeking to detain the patient. This court must afford this case heightened scrutiny since it involves human rights and in particular a consideration of article 5 of the Convention . I am not persuaded that the Tribunal has justified the detention of this applicant for criteria falling within the tests set out in Article 77 of the Order. The first criterion to be applied under Article 77 is to be satisfied that the applicant's condition warranted his detention in hospital for medical treatment. (See St George's case). Whilst the Tribunal did conclude in the penultimate paragraph "that (X) continues to suffer from severe mental impairment which requires his continued attention in hospital for medical treatment and so he will continue to be detained", I consider the Tribunal has fallen in to the trap adumbrated in Ashworth's case of merely reciting a general formula or restating a statutory prescribed conclusion without sufficiently informing the patient of the proper reasons for so concluding and discharging the burden of proof. A wholly disproportionate amount of the reasoning invoked for arriving at that conclusion is based on an analysis of the lack of availability of suitable alternative accommodation in the community to meet his needs. That is forbidden reasoning before determining that his condition warranted his detention in hospital for medical treatment. A lack of community accommodation cannot be used to justify continued detention under the terms of the Order. That is not sufficient to satisfy the initial criteria in Article 77(1) .

[24] In excess of half of the decision was taken up with consideration of the inadequacy of facilities and accommodation in the community. Ms Arthurs, who had acted on behalf of the applicant at the hearing, had specifically indicated to the Tribunal that it was not open to it to detain any patient on the grounds that there were inadequate facilities in the community for looking after severely handicapped patients. The time spent dealing with this factual issue has driven me to conclude that it has been allowed to play far too big a part in this decision and the Tribunal has failed to recognise that before addressing this issue the Tribunal had to be satisfied as to the propriety for detention in hospital for medical treatment (see Reid's case).

[25] This concentration on alternative facilities in the community in the course of the decision deflected the tribunal from grappling with the statutory criteria . Two main pieces of evidence were before the court namely that of the psychiatrist Dr Mulholland and the social worker Sharon Woods. Ms Woods, along with Mr Hynes, had prepared a report for the Tribunal. In my view her conclusion had impermissibly directed the Tribunal's attention to the need to detain the applicant until the appropriate accommodation was available. Her conclusion of 30 May 2007 reads:

> "During the past year (X) has benefited from the structured behavioural environment provided by Muckamore Abbey Hospital staff. I consider (X) needs to remain in hospital as a detained patient until the appropriate accommodation and intensive care package becomes available. I do not consider it in (X's) best interests for (X) to return to live with his parents due to the level of supervision he will require on a 24 hours basis."

That directed this Tribunal entirely to the wrong test. Whilst the Tribunal did not expressly adopt this approach, I consider that by implication the decision resonates with the spirit of Ms Woods report and has flawed the overall outcome. It is important to appreciate that treatment must not become mere containment until appropriate accommodation is available however close in the near future that may be.

[26] I am confirmed in my view that this aspect has dominated the conclusion of the Tribunal by virtue of the paucity of other reasoning to justify the conclusion of the applicant's continued detention in hospital for medical treatment. In the opening paragraph of the decision the Tribunal refers to the fact that "it was generally agreed by the parties" that there had been no marked change in his condition since "the hearing in June 2006". The decision went on to relate "the RMO, Dr Mulholland, confirmed her diagnosis of severe mental impairment and said that the hospital is continuing their efforts to try and modify (X's) behaviour. (X) continues to have aggressive outbursts and in the last year there were a considerable number of incidents, listed in her report, *which seemed to happen every few day (my italics)*. These incidents mainly consist of agitating and being agitated by his peers. He ends up shouting and threatening self-harm and requiring medicating with Lorazepam. In that connection there is no change from the behaviour that the Tribunal heard in June 2006." The decision then goes on to deal in great detail and at length with the alternative accommodation in the community.

[27] These findings, brief as they are, seem entirely at odds with the evidence which was before the Tribunal. It was clear to me that the applicant's solicitor Ms Arthurs had certainly not accepted the absence of "marked change". The report of Dr Mulholland which was before me dated 22 May 2007 detailed only 2/3 incidents between February 2007 and May 2007 albeit there was some general reference to "numerous verbal confrontations with peers and verbal abuse to staff". The record of the evidence records:

> "Dr Mulholland referred to pages 6-10 of a report which detailed approximately 30 incidents between

> June 2006 and May 2007 (*I pause to observe that possibly only 2 or 3 had occurred between February and May 2007*). He has been verbally abusive to staff. Since May 2007 there have been further incidents along similar lines and a number of confrontations with his peers. Lorazepam has been required on these recent occasions six times."

Given that the hearing was in August 2007, I fail to see how such evidence justified a conclusion that these incidents were happening "every few days" as recorded in the decision. The records do seem to herald a change in behaviour post June 2006.

[28] I recognise that this court must be careful not to trespass against the principles set out by Lord Clyde in Reid's case and set about forming its own preferred view of the evidence. However in circumstances where the conclusions of the Tribunal do seem to be prima facie clearly at odds with the objective evidence before it, coupled with the introduction of and the seemingly inordinate emphasis on material such as availability of alternative services, I must conclude that the decision overall is flawed. Mr Dunlop, who appeared on behalf of the Trust, was correct to emphasise that the only medical evidence before the Tribunal was that of Dr Mulholland. However such circumstances render it all the more important that that evidence is carefully and accurately assessed and the tribunal expressly remains uninfluenced by irrelevant or misleading material.

[29] A second reason why I have concluded that this decision must be quashed is that I am not satisfied that the Tribunal has adequately explained its findings or set out its reasons pursuant to the criteria in Article 77(1) of the 1986 Order and Regulation 23(2) of the 1986 Regulations.

[30] I consider that Regulation 23(2) is an example of where the statutory duty to give reasons is part of the notification of the decision and is a condition of the legality of the decision. It is insufficient to provide further reasons subsequent to the decision or at the judicial review hearing which were not given in the course of the decision itself. This is an instance where the court will normally interpret the legislation as having made the provision of adequate reasons with the decision a condition of its validity. (See Gemmell's case at para 70). The burden of proof is one which dictates that there be cogent evidence before detention is authorised. The scrutiny of such decisions touching human rights will inevitably be serious. The patient can legitimately expect to find the reasons for his detention in the decision .Public confidence in the process would demand no less. In my view this serves to underline that the decision maker would be expected to state all the salient reasoning at the time the decision was given. In these circumstances the court should not accept subsequent evidence of the reasoning per Nash's case.

[31] In his affidavit prepared for the purpose of this hearing, Mr McFerran the President of the Tribunal dilated upon the reasons given in the decision and set out a number of details not contained in the decision. The following paragraphs are examples:

(a) At paragraph 13:

> "An important factor, which the Tribunal did take into account, was that the applicant was detained at a locked ward with experienced staff. Dr Mulholland said that the experienced staff were adept at early interventions to avoid violence. Part of the incentive plan being used by the staff was to permit the applicant to walk to the on site shop on his own without supervision. This had only been allowed on three occasions without incident. This short walk is the only unsupervised walk he is allowed outside the ward at any time."

There was no reference to this matter as a reason in the written decision.

(b) At paragraph 15:

> "Further issues which the Tribunal considered important, were that the applicant had previously been moved to unlocked wards, but this had not been successful. There had also clearly been difficulties in previous home visits but home leave had started officially from Easter 2007."

Again there was no reference in the decision to this fact although it now appears to be a reason for the detention.

(c) At paragraph 16:

> "The evidence of the applicant's social worker Mrs Woods that if the applicant was discharged there would be a substantial likelihood of serious physical harm to himself and others. She also stated that in her experience the applicant would not attend the hospital voluntarily or co-operate with the community psychiatric service."

There is a lack of reference to this in the decision as a reason for the detention other than to emphasise the lack of alternative community facilities.

[32] In the penultimate paragraph of the decision the Tribunal did state:

> "It is the view of the Tribunal that (the applicant) continues to suffer from severe mental impairment which requires his continued detention in hospital for medical treatment and so he will continue to be detained."

As I have already found in paragraph 23 of this judgment this falls into the trap of merely reciting a general formula or the statutory prescribed criteria. It does not address the reasons for coming to that conclusion and does not meet the substance of the case which the Tribunal needed to advance to meet the criteria of Article 77. Earlier references are sparse and unsatisfactory (see paragraph 27 of this judgment). I recognise that no prescriptive rules can ever be set down about the format of decisions or judgments .Circumstances and context vary too much. This was an ex tempore judgment given on the day of the hearing and in that context decision-makers must be granted a certain latitude in how they express themselves. However I consider there is much to be said for Tribunals setting out the statutory criteria that require to be satisfied and thereafter systematically analysing the facts and reasons that are said to meet that criteria especially where, as I find in this case ,fuller explanation of the reasons at some later stage may not be possible. I find no such systematic analysis has been undertaken in this instance with the decision-maker making the material findings of fact necessary to sustain the argument that the statutory criteria has been fulfilled. In the event the Tribunal has failed to grapple with the major issues and has not reached the appropriate standard of reasoning which is necessary under the terms of Regulation 23(2) of the 1986 Regulations.

[33] In all the circumstances therefore I have come to the conclusion the decision of the Tribunal must be quashed and the matter remitted to a differently constituted Tribunal for re-consideration.

[34] At the handing down of this judgment I shall invite counsel to address me on the questions of costs and the necessity, if any, to anonymise the contents.