Neutral Citation No. [2011] NIQB 17 | *Ref:* McCL8107

*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* 03/03/11

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

JR 45 application [2011] NIQB 17

IN THE MATTER OF AN APPLICATION BY JR 45 FOR JUDICIAL REVIEW

McCLOSKEY J

Anonymity

This judgment has been formulated in a manner designed to protect the anonymity of the Applicant and another person. Following representations from the parties at the outset of the proceedings, the protection of anonymity was granted, for three reasons. The first is that the Applicant is a detained mental health patient. The second is the court's assessment that, having regard to the description of the Applicant's condition and the symptoms thereof, the dissemination of this judgment without anonymisation could conceivably be detrimental to his treatment and recovery. The third is that there is an entirely innocent third party involved in the relevant factual matrix. There is no conceivable reason why this person's identity should be published or become known to the potentially wide audience which can be reached by judgments of the High Court. If the Applicant were not anonymised, this would create a real risk of identification of the innocent third party. No step should be taken by anyone which might have the consequence of identifying the Applicant or the third party concerned, who is described as "XY" throughout this judgment and in the edited papers.

I INTRODUCTION

[1] The Applicant is a detained patient. By this application for judicial review, he challenges a decision of the Mental Health Review Tribunal ("*the Tribunal*"), dated 29th October 2010, dismissing his application for discharge from detention. The effect of the court's ruling at the permission stage is to confine the Applicant's case to a single ground, namely that the impugned decision is vitiated by error of law. In the context of these proceedings, this requires the court to determine whether the Tribunal correctly construed and applied the statutory provisions in play.

II STATUTORY FRAMEWORK

[2] The relevant statutory provisions are contained in the Mental Health (Northern Ireland) Order 1986 ("*the 1986 Order*"), as amended. Two particular provisions of this Order in Council arise for consideration. The first is Article 77(1), which empowers the tribunal to discharge patients other than restricted patients. This provides :

> *"**Power to discharge patients other than restricted patients***
>
> ***77** **[**(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 in 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.**]***
>
> *A tribunal may under paragraph (1) direct the discharge of a patient on a future date specified in the direction; and where the tribunal does not direct the discharge of a patient under that paragraph the tribunal may—*
>
> *(a) with a view to facilitating his discharge on a future date, recommend that he be granted leave of absence or transferred to another hospital or into guardianship; and*
>
> *(b) further consider his case in the event of any such recommendation not being complied with.*
>
> *(3) Where application is made to the Review Tribunal by or in respect of a patient who is subject to guardianship under this Order, the tribunal may in any case direct that the patient be discharged, and shall so direct if it is satisfied—*

> *(a)* *that he is not then suffering from mental illness or severe mental handicap or from either of those forms of mental disorder of a nature or degree which warrants his remaining under guardianship; or*
>
> *(b)* *that it is not necessary in the interests of the welfare of the patient that he should remain under guardianship.*
>
> *(4)* *Paragraphs (1) to (3) apply in relation to references to the Review Tribunal as they apply in relation to applications made to the tribunal by or in respect of a patient.*
>
> *(5)* *Paragraph (1) shall not apply in the case of a restricted patient except as provided in Articles 78 and 79."*

The second material provision of the 1986 Order in the present context is Article 2(4), which provides:

> *"(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, regard 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, regard 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."*

Thus Article 77 merges with Article 2(4), to form a single statutory unit. In the context of these proceedings, the operative paragraphs are Article 2(4)(b)(ii). I shall consider the correct construction of all these provisions and the relevant governing legal principles presently.

III THE IMPUGNED DECISION

[3] The Applicant, a detained patient, applied to the Tribunal for discharge under Article 77 of the 1986 Order. The Tribunal's decision refusing his application was based on Article 77(1)(b), which operates in tandem with Article 2(4). The factual framework within which the impugned decision was made is uncontentious.

[4] In brief compass, the Applicant, then a university student, who is aged twenty-two years, engaged in inappropriate conduct vis-à-vis XY, a female student, consisting of the transmission of uninvited and unwanted messages electronically via Facebook; loitering outside her accommodation; and contacting her friends and boyfriend by internet and mobile phone. This conduct occurred in another part of the British Isles. The female student reported the Applicant's conduct to the police. Approximately one week later, the Applicant presented himself to the police voluntarily. These events occurred between June and August 2009. Since then, the Applicant has had the status of detained patient. He was prosecuted for the offence of breaching the peace, to which he pleaded guilty. On 6th January 2010, the court in question exercised its statutory power to impose a "Compulsion Order" (the equivalent of a Hospital Order in this jurisdiction) and the Applicant continued to be detained accordingly. Following a transfer at the end of June 2010, his place of detention changed to a psychiatric unit in Northern Ireland. It is agreed that the statutory authority for the Applicant's continued detention is Article 46 of the 1986 Order, pursuant to which he is the subject of a Hospital Order without restriction.

[5] In September 2010, the Applicant made an application to the Tribunal for his discharge. In determining his application, the Tribunal had available to it reports prepared by two qualified psychiatrists. The author of the first report is a consultant psychiatrist who had been supervising the Applicant's care since his return to Northern Ireland from the other part of the British Isles (the "responsible medical officer" or "RMO"). This report documents the Applicant's initial detention for psychiatric treatment in September 2009, when his symptoms included auditory hallucinations. The report continues:

> "*He has continued to exhibit signs of mental illness, although he is extremely guarded and hostile at times in respect of questions about the symptoms of schizophrenia…*
>
> *He has been non-compliant with medication at times …*
>
> [He] *suffers from schizophrenia … including blunted, hostile mood and acting as if in response to hallucinations. He has delusional ideas about his victim. He would default from treatment if he were at liberty to do so and he would discharge himself from hospital.* ***Discharge would lead to an immediately heightened risk in respect of***

> ***psychological harm to* [XY]. *She herself would feel at significant physical risk from him …*"**.

[My emphasis].

In the matrix of reports and related materials before the court, this appears to be the first appearance of the term "*psychological* harm". This report also discloses that it is the plan of the Trust's psychiatrists to discharge the Applicant to the care of the Community Mental Health Team and that active preparations are being made accordingly. At this remove, some five months later, I shall assume that there has been a conscious and considered decision not to develop this solution at this stage.

[6] The second psychiatric report available to the Tribunal noted recent symptoms of agitation, hostility, preoccupation and lack of insight. The Applicant continued to present as "*guarded and suspicious*". He engaged in sexually inappropriate talk. He spoke in hostile terms about the psychiatrists treating him. He exhibited symptoms of perceptual disturbance. He engaged in verbally aggressive outbursts. He continued to have delusional beliefs and described delusional perception. He lacked insight into the severity of his mental illness, illustrated by his belief that he did not require psychotic medication and his disinclination to engage with mental health services. This report concludes:

> "*It is my opinion that he is suffering from schizophrenia …which is of a severity and nature that necessitates treatment in hospital. It is my opinion to continue his treatment with* [Q] *and if there is no significant improvement to change him to* [C] *…*
>
> ***At present I believe he meets their statutory test in terms of risk in that he has made threats of self harm, he lacks judgment and therefore places himself in situations where he could be open to reprisal due to his sexualised content of speech. He has placed staff in fear of their own safety and has placed a member of the public in fear of her safety …*".**

[My emphasis].

Also available to the Tribunal was a third psychiatrist's opinion, documented in the detailed social work report, which noted that the psychiatrist in question –

> "*… stated that JR 45 has made no threats of violence towards the victim and there has been no actual violence towards her. However there has* [sic] *been significant episodes of stalking behaviours*".

While a so-called "*stalker assessment*" was to be prepared by this psychiatrist, it apparently was not available for the Tribunal. The social work report also documented the Applicant's recent attempts to contact the female student concerned via Facebook and e-mail. All of these reports were up to date at the time of the Tribunal hearing and ensuing decision. Furthermore, in advance of the hearing, the Applicant was interviewed and assessed by the psychiatrist member of the Tribunal. Finally, at the hearing evidence was given by the first two mentioned consultant psychiatrists, two social workers and the Applicant.

[7] In its written decision, the Tribunal records some of the evidence of the Applicant in the following terms:

> "*He expressed his anger and frustration at the effects of his detention …*
>
> *He believes that his detention is a mistake, that he does not suffer from schizophrenia and that he does not require medication.*"

The decision then notes the psychiatric diagnosis and opinion. It also records the Applicant's continuing attempts to contact XY via Facebook. The Tribunal found that the Applicant was not suffering from perceptual disturbance or auditory hallucinations. The key passage in the Tribunal's decision is the following:

> "*Discharge would create a substantial likelihood of serious physical harm to other persons. The Tribunal had regard to the evidence that he had so behaved that other persons were placed in reasonable fear of serious physical harm to themselves* [Article 2(4)(b)(ii) of the Order]. *There is no history of physical assault or the infliction of physical harm on others. The pattern of behaviour which was consistent and focussed on a particular individual, leading to the conviction which precipitated admission, clearly constituted behaviour which placed her and her associates in reasonable fear of serious physical harm, even if none were inflicted. This pattern of behaviour persists, although the effects of detention restrain it. The patient's recent attempts to contact XY outweigh his account of lack of interest in her. If discharged, the influence of his ongoing delusions about her creates a substantial likelihood that he will contact her in every way possible. He is currently angry and frustrated about the fact of his detention.* ***This exacerbates the risk of physical harm, including psychological harm to XY who has expressed herself to be afraid****. It also heightens the risk of physical harm to those whom* [the Applicant] *sees as thwarting his wish to contact her ………….*

The methods by which the representative suggested XY could protect herself, such as concealing her address, were not convincing".

[Emphasis added].

[8] Following the grant of leave to apply for judicial review, the Tribunal Chairman swore an affidavit. I have considered this affidavit and the exhibits thereto in full. For present purposes, I shall simply highlight certain salient averments:

> "*[The Tribunal] was of the opinion that if the Applicant was discharged he would do his utmost to make contact with XY. It was considered that the Applicant was very likely to try to meet XY. He persisted in his delusion that he was in a relationship with her. It was considered that the Applicant was very likely to try to meet XY. He was certain to be rebuffed. The thwarting of his delusional plans would be highly likely to be met with physical harm. It was considered that any harm that the Applicant was likely to cause to this young woman would be serious having regard to the strength and persistence of his delusion, his (limited) violent outbursts and the removal of the controlling effect of medication. These factors, coupled with the Applicant's lack of insight along with the sexualised and delusional nature of his obsession with XY, in our opinion, met the test.*"

This affidavit also contains the following averment:

> "*I accept that the wording at paragraph 9 of the decision '**this exacerbates the risk of physical harm including psychological harm to XY who expressed herself to be afraid**' is unfortunate. This was meant to convey that XY had a reasonable fear of serious physical harm.*"

The affidavit exhibits materials which include the views expressed by the psychiatrist member of the Tribunal. The exhibited notes also attribute the following replies to the first of the two psychiatrists mentioned above (the "RMO"):

> "[Are you satisfied that Article 4(ii) is satisfied?]
>
> *Yes – haven't seen victim impact report, but stalking constitutes this, when accompanied by delusional beliefs that she is his wife. Her boyfriend and friends are also at risk …The behaviour is ongoing … Police checks show that he has contacted XY.*

> [Do you think that this is a substantial likelihood of serious physical harm to someone else?]
>
> *Yes …*
>
> [Were/are the contacts threatening/insulting in nature?]
>
> *Delusional about relationship.* ***He is very hostile to her associates, but not to her ...***
>
> *His initial intention is not violence towards XY but is fearful that he would become violent."*

[Emphasis added].

IV GOVERNING PRINCIPLES

[9] The liberty of the citizen has occupied an exalted position in our legal system for many centuries, dating from Magna Carta. Lord Bingham has recently observed that while the Great Chapter is written in Latin, even in translation its freedom provisions "*… have the power to make the blood race …*". [The Rule of Law, p. 10]. Magna Carta was unprecedented because, *inter alia,* it assumed a legal parity amongst all free citizens. In the eight centuries which have elapsed subsequently, this has been the impetus for robust judicial pronouncements at the highest level. These are exemplified by the formulation of Sir Thomas Bingham MR in ***In Re SC (Mental Patient: habeas corpus)***[1996] QB 599, p. 603C:

> "*As we are all well aware, no adult citizen of the United Kingdom is liable to be confined in any institution against his will, save by the authority of law. That is a fundamental constitutional principle, traceable back to Chapter 29 of Magna Carta 1297 …*".

In ***Eleko –v- Government of Nigeria*** [1931] AC 662, Lord Atkin stated, famously:

> "*In accordance with British jurisprudence no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a court of justice. And it is the tradition of British justice that judges should not shrink from deciding such issues in the face of the executive*".

In similar vein, in ***Khera and Khawaja –v- Secretary of State for the Home Department*** [1984] 1 AC 74, Lord Bridge of Harwich stated (p. 122F):

> *"**So far as I know, no case before the decisions under the Act which we are presently considering has held imprisonment without trial by executive order to be justified by anything less than the plainest statutory language ...**"*

Thus in ***The Queen –v- Pinder*** [1855] 24 LJQB 148, the detention of a lunatic in an asylum was rendered unlawful by the omission from the requisite medical certificate, contrary to the relevant statutory requirement, of the street and house number where the medical examination had been performed. Since this decision was made, the courts have continued to construe strictly statutory provisions purporting to interfere with the liberty of the citizen and to subject the detention of the citizen to rigorous scrutiny.

[10] Article 77(1) of the 1986 Order requires the Tribunal to be "*satisfied*" in the terms prescribed. This, in my view, imports the civil standard of proof. Accordingly, the Tribunal must be satisfied about the requisite matters on the balance of probabilities. In ***R (AM) –v- Mental Health Review Tribunal (Northern Region)*** [2006] QB 468, Richards LJ stated, at paragraph [62]:

> *"Although there is a single civil standard of proof on the balance of probabilities, it is flexible in its application. In particular, the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities."*

Lord Carswell expounded on this topic in ***Re Doherty*** [2008] UKHL 33:

> *"27. …… In my opinion this paragraph [i.e. Richards LJ's test as set out above] effectively states in concise terms the proper state of the law on this topic. I would add one small qualification, which may be no more than an explanation of what Richards LJ meant about the seriousness of the consequences. That factor is relevant to the likelihood or unlikelihood of the allegation being unfounded, as I explain below.*
>
> *28. It is recognised by these statements that a possible source of confusion is the failure to bear in mind with sufficient clarity the fact that in some contexts a court or*

> *tribunal has to look at the facts more critically or more anxiously than in others before it can be satisfied to the requisite standard. The standard itself is, however, finite and unvarying. Situations which make such heightened examination necessary may be the inherent unlikelihood of the occurrence taking place (Lord Hoffmann's example of the animal seen in Regent's Park), the seriousness of the allegation to be proved or, in some cases, the consequences which could follow from acceptance of proof of the relevant fact. The seriousness of the allegation requires no elaboration: a tribunal of fact will look closely into the facts grounding an allegation of fraud before accepting that it has been established. The seriousness of consequences is another facet of the same proposition: if it is alleged that a bank manager has committed a minor peculation, that could entail very serious consequences for his career, so making it the less likely that he would risk doing such a thing. These are all matters of ordinary experience, requiring the application of good sense on the part of those who have to decide such issues. They do not require a different standard of proof or a specially cogent standard of evidence, merely appropriately careful consideration by the tribunal before it is satisfied of the matter which has to be established."*

It is common case that the burden of proof rests on the detaining authority (in this case, the relevant Trust).

[11] Article 77(1) of the 1986 Order requires the Tribunal to direct the release of the patient unless it is satisfied about a "*substantial likelihood*", in the terms prescribed. In this statutory context, this entails, in my view, the formation of an evaluative, predictive and rational judgment, based on all relevant available evidence, applying the civil standard of the balance of probabilities and taking into account that the burden of proof is on the detaining authority. Article 77(1) requires the Tribunal to be "*satisfied*" about a "*likelihood*" that is "*substantial*". I construe "*substantial*" as something more than minimal or flimsy. What does "*likelihood*" denote, in this statutory context?

[12] "*Likelihood*" is a familiar word, belonging to the domain of everyday parlance. I observe, at the outset, that it was open to the legislature to opt for a different form of terminology – for example, "*possibility*" or "*risk*". These particular words have been frequently employed by successive legislatures in a wide range of statutory contexts. However, they are not the language of Article 77(1). In a quite different statutory context, that of care orders for the protection of children, the House of Lords considered the expression "*likely to suffer significant harm*" in Section 31(2) of the Children Act 1995, in ***Re H and Others (Minors)*** [1996] AC 563. Lord Nicholls, in

his opinion, considered, and rejected, the argument that "*likely*" meant "*probable*" in the statutory context under scrutiny. He stated (at p. 585):

> "***In everyday usage one meaning of the word likely, perhaps its primary meaning, is probable, in the sense of more likely than not***. *This is not its only meaning. If I am going walking on Kinder Scout and ask whether it is likely to rain, I am using likely in a different sense. I am inquiring whether there is a real risk of rain, a risk that ought not to be ignored. In which sense is likely being used in this subsection?"*

[Emphasis added].

While their Lordships concluded that in the statutory context under scrutiny "*likely*" denoted "*a real possibility*", I suggest that the proposition at the beginning of the passage quoted above is uncontroversial. Furthermore, the conclusion of the House entailed a rejection of what was acknowledged to be the primary meaning of "*likely*".

[13] How is the word "*likelihood*" to be construed in the specific context of Article 77(1) of the 1986 Order? It is trite to observe that, in determining this issue, the context is of supreme importance. This is repeatedly stressed by Lord Nicholls in his opinion in ***H (Minors)***. Article 77 belongs to a statutory context which is multilayered. This context is understood by identifying the main statutory purposes. These include the provision of mental health therapies and treatment to those in need, the rehabilitation of patients, the protection of the public and the prevention of crime and related mischiefs. These purposes are of more or less equally ranking importance and are readily identifiable in the discrete Article 77 regime. They are overlaid, in my view, by the hallowed importance of the liberty of the citizen. As Lord Nicholls observed in ***Re H (Minors)***, the primary meaning of the adjective "*likely*", in daily usage, is *probable*. Similarly, it seems incontestable that the primary meaning of the related noun, "*likelihood*", is *probability*. Focussing intensely on the statutory framework and giving effect to the principles rehearsed in paragraph [9] above, I conclude that the expression "*a substantial likelihood*" in Article 77(1) of the 1986 Order connotes *a real probability*. The statutory terminology, in my view, reflects an acknowledgement by the legislature of the human experience, which is that there are various shades of probability, some possessing more substance than others. Accordingly, in simple terms, Article 77(1)(b) is concerned with the formation by the Tribunal of an evaluative, predictive and rational judgment, applying the civil standard of the balance of probabilities, that the discharge of the patient would create *a real probability of serious physical harm to the patient or some other person,* with the burden resting on the detaining authority.

[14] By virtue of Article 2(4) of the 1986 Order, the question of whether this real probability exists is to be determined in a narrowly focussed and notably prescribed manner. I consider that Article 2(4) has two central features. The first is that the harm to which the Tribunal must direct its mind is of the *serious physical* variety. The second is that in making the determination required, the Tribunal must have regard *only* to a certain kind of evidence viz. *evidence that the patient has behaved violently towards other persons* or *evidence that the patient has so behaved himself that other persons were placed in reasonable fear of serious physical harm to themselves.* Thus the Tribunal must cast its gaze both backwards and forwards. In short, by virtue of Article 2(4), duly analysed:

(a) The violence or apprehended harm belonging to the past must be *physical* in nature.

(b) The apprehended harm, as regards the future, must also be *physical* in nature.

(c) The apprehended physical harm as regards both the past and, by prediction, the future must be *serious* in nature: I construe this as harm which is more than trivial or minor.

(d) Psychological harm or a state of mental anxiety or foreboding or a feeling of harassment on the part of a third party – as regards both the past and the future, as predicted - will not suffice.

(e) The evidence relating to the patient's past conduct must establish not only that this engendered a fear of serious physical harm to some third party but that such fear was *reasonable*. In my view, this imports an objective element, which is designed to protect the patient from unfounded, irrational or ill motivated assertions of fear by some third party.

This analysis of Article 2(4) serves to highlight the exacting and intellectually challenging nature of the Tribunal's decision making under Article 77.

V <u>CONSIDERATION</u>

[15] The Mental Health Review Tribunal is a judicialised body which makes decisions about the detention and discharge of patients. By Article 70(1) of the 1986 Order, the Tribunal is constituted in accordance with Schedule 3, which provides (in paragraph 1) that it is composed of three members who must have appropriate qualifications and experience in the legal, medical and social services professions. The posts of Chairman and Deputy Chairman are occupied by legally qualified members. Rule 23 of the Mental Health Review Tribunal (NI) Rules 1986 provides:

> *"(1) The decision of the majority of the members of the tribunal shall be the decision of the tribunal and, in the event of an equality of votes, the president of the tribunal shall have a second or casting vote.*
>
> *(2) The decision by which the tribunal determines an application shall be recorded in writing by the tribunal, the record 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) or (3) or Article 78(1) or (2) of the Order, shall state its reasons for being satisfied as to those matters.****"*

[My emphasis].

Notably, there is a specific emphasis on the need for very focussed reasoning in cases such as the present. There must be a reasoned exposition of the Tribunal's evaluation and determination of *each* of the matters enshrined in Article 77(1) – or (3), as the case may be – and, by extension, Article 2(4), which merges with Article 77.

[16] One of the leading statements on the judicial duty to provide reasoned decisions is that of Lord Phillips MR in ***English –v- Emery*** [2002] EWCA. Civ 605:

> *"**19.** It follows that, if the appellate process is to work satisfactorily, the judgment must enable the appellate court to understand why the Judge reached his decision. This does not mean that every factor which weighed with the Judge in his appraisal of the evidence has to be identified and explained. But the issues the resolution of which were vital to the Judge's conclusion should be identified and the manner in which he resolved them explained. It is not possible to provide a template for this process. It need not involve a lengthy argument. It does require the Judge to identify and record those matters which were critical to his decision. If the critical issue was one of fact, it may be enough to say that one witness was preferred to another because the one manifestly had a clearer recollection of the material facts or the other gave answers which demonstrated that his recollection could not be relied upon."*
>
> ***20.*** *The first two appeals with which we are concerned involved conflicts of expert evidence. In Flannery Henry LJ quoted from the judgment of Bingham LJ in Eckersley v*

> *Binnie (1988) 18 Con LR 1 at 77-8 in which he said that 'a coherent reasoned opinion expressed by a suitably qualified expert should be the subject of a coherent reasoned rebuttal'. This does not mean that the judgment should contain a passage which suggests that the Judge has applied the same, or even a superior, degree of expertise to that displayed by the witness. He should simply provide an explanation as to why he has accepted the evidence of one expert and rejected that of another. It may be that the evidence of one or the other accorded more satisfactorily with facts found by the Judge. It may be that the explanation of one was more inherently credible than that of the other. It may simply be that one was better qualified, or manifestly more objective, than the other. Whatever the explanation may be, it should be apparent from the judgment.*
>
> ***21.*** *When giving reasons a Judge will often need to refer to a piece of evidence or to a submission which he has accepted or rejected. Provided that the reference is clear, it may be unnecessary to detail, or even summarise, the evidence or submission in question. The essential requirement is that the terms of the judgment should enable the parties and any appellate tribunal readily to analyse the reasoning that was essential to the Judge's decision."*

While Lord Phillips MR was, of course, speaking about the duty of first instance judges to provide reasoned judgments, there is no reason in principle or logic why the essential philosophy identifiable in this passage, particularly in the final sentence, should not apply to all judicialised tribunals.

[17] In ***R(H) –v- Ashworth Hospital Authority and Others*** [2002] EWCA. Civ 923, the Court of Appeal considered the equivalent English provisions, Rules 23(2) and 24(1) of the Mental Health Review Tribunal Rules 1983. Dyson LJ, giving the judgment of the court, cited the words of Lord Phillips MR (*supra*). His Lordship then noted the observation of Laws J in ***R –v- Mental Health Review Tribunal, ex parte Booth*** [1997] EWHC. Admin 816 that the decisions of Mental Health Review Tribunals are addressed to an informed audience, whose members are familiar with the basic documentary materials and the issues canvassed before the Tribunal. Dyson LJ expressed reservations about the force of this proposition, suggesting that it "*… has less force in relation to a mental health review tribunal decision than to a decision by a lower court in the civil justice system*": paragraph [79]. On this issue, he concluded:

> *"I do not accept that the "informed audience" point can properly be relied on to justify as adequate a standard of reasoning in tribunals which would not be regarded as*

> *adequate in a judgment by a judge. It does not follow that tribunals are obliged to produce decisions which are as long as judgments by a judge often tend to be. Far from it. A brief judgment is no less likely to be adequately reasoned than a lengthy one."*

Dyson LJ also quoted the relevant passage in the Handbook issued to tribunal members:

> *"Tribunals must give detailed reasons, based on the evidence and the logical application of sound judicial principles, for their decisions (this has been given substance by decisions in the High Court). The reasons need not be elaborate but they must deal with the substantive points, which have been raised and must show the parties the basis on which the Tribunal has acted. It is not sufficient merely to repeat the statutory grounds. It is not usually necessary to review the evidence at length. It is important to say which evidence has been accepted and often which has been rejected. It is not usually necessary to give lengthy reasons for acceptance or rejection of evidence. The reasons for the decision will be agreed by the Tribunal members at the conclusion of the hearing, put in writing and signed by the President."*

Having done so, his Lordship continued:

> *"This correctly states that reasons should be given dealing with the "substantive" points. It does not expressly state, but it does imply, that reasons must be given for the acceptance or rejection of disputed evidence, although it is not usually necessary for these to be lengthy. In my opinion, this advice is both useful and consistent with the law."*

Stated succinctly, the written decision of any Mental Health Review Tribunal must grapple with the core issues, link these to the relevant statutory tests and requirements and articulate the Tribunal's evaluation and determination of these matters.

[18] In my view, there is an inextricable nexus between the provision of adequate reasons for a Tribunal's decision and the legality thereof. A useful barometer of the adequacy of any judicialised body's reasons is the test of whether they are sufficiently cogent and detailed to enable any material error of fact, jurisdictional error or error of law to be identified. In other words, such decisions must be couched in terms which enable the parties to make an informed decision about whether to pursue a challenge in a superior court or, where the regulatory

framework permits, to request a rehearing or a review. In the same vein, the decision of every judicialised body must be formulated in terms which enable the High Court to exercise efficaciously its supervisory jurisdiction.

[19] Every decision of Mental Health Review Tribunals undeniably possesses its particular case sensitive context. One of the dominant and immutable contextual features of decisions made under Article 77 of the 1986 Order is that the liberty of the citizen is at stake. Having regard to this important contextual factor, I consider it appropriate that in a challenge of this kind the High Court, while exercising a supervisory jurisdiction, will subject such decisions to careful scrutiny. In ***D –v- Secretary of State for the Home Department*** [2006] 1 WLR 1003, Brooke LJ spoke of "*the common law's emphatic reassertion in recent years of the importance of constitutional rights*": see paragraph [130]. It is undeniable that the liberty of the citizen occupies an elevated ranking in the unwritten table of constitutional rights. In ***R –v- Tameside Magistrates, ex parte Brindle*** [1975] 1 WLR 1400, Roskill LJ stated, in a passage which resonates strongly almost four decades later (at p. 1410):

> "*When this court, like any other court in this country, has to consider a matter involving the liberty of the individual, it must look at the matter carefully and strictly, and it must ensure that the curtailment of liberty sought is entirely justified by the Act relied on by those who seek that curtailment*".

In one of the most celebrated judicial pronouncements in this field, Lord Atkin stated:

> "*It has always been one of the pillars of freedom, one of the principles of liberty … that the judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law …*".

(***Liversidge –v- Anderson*** [1942] AC 206, at p. 244).

Thus, in a challenge of the present variety, any failure by this court to apply a standard of review falling short of careful scrutiny would entail an abdication of its duty.

[20] Furthermore, I consider that any purported elucidation or elaboration of the decisions of any judicialised body by affidavit, following the grant of leave to apply for judicial review, must be evaluated with care and circumspection by the court. This, in my view, is one aspect of the duty of the court, as formulated above. Where a judicial review challenge to such decisions raises issues of a procedural nature – relating to, for example, the pre-hearing phase, the conduct of a hearing or whether certain evidence was considered by the tribunal – a replying affidavit will not be

unexpected, if there are issues or areas of contention between the parties. A replying affidavit might also be appropriate if the challenge were based on an assertion that the tribunal took into account some extraneous factor or disregarded material evidence or considerations *and* the text of its written decision does not readily lend itself to resolution of the issue raised. However, where the challenge is not of this *genre*, I incline to the view that, as a general rule, the submission of affidavit evidence by any judicialised body – this Tribunal, district judges, criminal injuries compensation panels, the Planning Appeals Commission and tribunals generally [a non-exhaustive list] – which has promulgated a reasoned, written decision should be the exception rather than the rule. I consider that, as a general rule, the reserved, reasoned, written decision of such tribunals should speak for itself. The audit of legality which this court conducts in a challenge of the preset variety should normally be confined to the text of the impugned decision and, where available, the materials on which it was based. If the text is incapable of withstanding scrutiny in a challenge of the present kind, it is unlikely to be fortified or redeemed by a supplementing affidavit.

[21] The correctness of this approach is underscored by the philosophy which underpins the requirement to give reasons, where this exists, as expounded by Lord Clyde in ***Stefan –v- General Medical Council*** [1999] 1 WLR 1293, p. 1300:

> "*The advantages of the provision of reasons have often been rehearsed. They relate to the decision making process, in strengthening this process itself, in increasing the public confidence in it and in the desirability of the disclosure of error where error exists. They relate also to the parties immediately affected by the decision, in enabling them to know the strengths and weaknesses of their respective cases and to facilitate appeal where that course is appropriate.*"

Thus an obligation on a judicialised body to provide reasons for what it is deciding imposes a discipline which should enhance the calibre and quality of the decision made, to the benefit of the parties immediately affected. In this respect, there are also readily identifiable public interests in play. These include high quality judicial decision making and the achievement of finality in litigation. I make clear that in advocating the approach outlined in the preceding paragraph I am not propounding any inflexible rule. In applications for judicial review, the presentation of affidavit evidence on behalf of the judicialised tribunal concerned, addressing discrete issues, will be appropriate in some cases. The legal and factual context of every application for judicial review is unavoidably both individual and sensitive, with the result that the approach of the reviewing court will invariably be tailored to the particular matrix of which it is seized. However, the *general* rule propounded in paragraph [20] seems to me not only correct in principle but also harmonious with a clearly detectable trend in the reported cases, to which I now turn.

[22] There are several reported decisions exhorting caution on the part of the reviewing High Court where a judicialised tribunal whose decision is under challenge seeks to amplify or elucidate its reasoning by affidavit evidence. One of the best known is ***R –v- Westminster City Council, ex parte Ermakov*** [1996] 2 All ER 302, where the Council made a decision that the Applicant was intentionally homeless. In so deciding, it was subjected to a statutory duty to provide its reasons for so deciding. The decision was challenged by an application for judicial review. One of the issues considered by the Court of Appeal was the propriety of the decision maker amplifying and elucidating by affidavit his reasons. Hutchison LJ observed initially, at p. 309:

> "*It is well established that an obligation, whether statutory or otherwise, to give reasons for a decision is imposed so that the persons affected by the decision may know why they have won or lost and, in particular, may be able to judge whether the decision is valid and therefore unchallengeable, or valid and therefore open to challenge*".

It is long established that reasons provided pursuant to a statutory obligation must be proper, adequate and intelligible. Hutchison LJ cited a passage from the judgment of Steyn, LJ in ***R –v- Croydon LBC, ex parte Graham*** [1993] 26 HLR 286, at p. 292:

> "*In my judgment the idea that material gaps in the reasons can always be supported ex post facto by affidavit or otherwise ought not to be encouraged.*"

This prompted the following conclusion (at p. 315):

> "*The court can and, in appropriate cases, should admit evidence to elucidate or, exceptionally, correct or add to the reasons; but should, consistently with Steyn LJ's observations in* ***Ex parte Graham****, be very cautious about doing so. I have in mind cases where, for example, an error has been made in transcription or expression, or a word or words inadvertently omitted, or where the language used may be in some way lacking in clarity. These examples are not intended to be exhaustive, but rather to reflect my view that the function of such evidence should generally be elucidation not fundamental alteration, confirmation not contradiction. Certainly there seems to me to be no warrant for receiving and relying on as validating the decision evidence – as in this case – which indicates that the real reasons were wholly different from the stated reasons.*"

Finally, Hutchison LJ distinguished between the differing situations prevailing before and after the initiation of proceedings:

> *"Nothing I have said is intended to call in question the propriety of the kind of exchanges, sometimes leading to further exposition of the authority's reasons or even to an agreement on their part to reconsider the application, which frequently follow the initial notification of rejection. These are in no way to be discouraged, occurring, as they do, before, not after, the commencement of proceedings. They will often make proceedings unnecessary. They are in my judgment very different from what happened in this case."*

In ***R(S) –v- London Borough of Brent*** [2002] ELR 556, the English Court of Appeal recalled its earlier decision in ***Ermakov*** and stated:

> "[26] *… it is not ordinarily open to a decision maker who is required to give reasons to respond to a challenge by giving different or better reasons*".

In my view, the general rule suggested in paragraph [20] above emerges with tolerable clarity from this series of Court of Appeal formulations.

[23] The same philosophy is expressed in the judgment of Morris KJ in ***R(V) –v- Secretary of State for the Home Department*** [2003]1 FLR 979, at paragraph [18]. To like effect is the statement of Hooper J in ***R(Sporting Options plc)*** *–v- Horse Race Levy Betting Board* [2003] EWHC 1943(Admin), paragraph [197]:

> *"Courts treat with caution witness statements explaining a decision for the obvious reason that* ***there is a risk that, albeit unconsciously, a decision maker may seek to remedy any apparent weakness****."*

[My emphasis].

Other examples of comparable judicial pronouncements abound and excessive multiplication is unnecessary. They include a decision belonging to the present context, ***R –v- South West Thames Mental Health Review Tribunal, ex parte Demetri*** [1997] COD 445 [at p. 447 especially] and ***Bone –v- Mental Health Review Tribunal*** [1985] 3 All ER 330, where Nolan J reiterated the well established principle that, in the specific case of Mental Health Review Tribunals, reasons for decisions must be proper, adequate and intelligible, dealing with the substantial points raised (at p. 333). The importance attaching to reasons in the context of Mental Health Review Tribunal decisions and the rigorous nature of the duty in play are illustrated in ***DH's Application*** [2004] NIQB 74, where the court rejected a series of challenges to the adequacy of the Tribunal's reasoning, but made an order of certiorari quashing the decision on the ground of a single deficiency.

[24] In a judicial review challenge of the present *genre*, the task of this court is to ascertain whether the Tribunal erred in law in the respects under scrutiny. It is no part of the function of the High Court to form its own view of the facts or to disagree with the Tribunal's evaluation thereof. This court must at all times be astute to recognise the line which separates the permissible area of enquiry from prohibited territory. The dividing line may not always be a bright luminous one. Mr. McMillen correctly reminded the court of the statement of Baroness Hale in ***AH(Sudan) –v- Secretary of State for the Home Department*** [2007] 3 WLR 832 , made in the context of specialised immigration tribunals.:

> "[30] … *This is an expert tribunal charged with administering a complex area of law in challenging circumstances …*
>
> *The ordinary courts should approach appeals from them with an appropriate degree of caution; it is probable that in understanding and applying the law in their specialised field the Tribunal will have got it right …*
>
> *They and they alone are judges of the facts …*
>
> *Their decisions should be respected unless it is quite clear that they have misdirected themselves in law.*"

To like effect is the recent cautionary statement of Sir John Dyson in ***MA (Somalia) –v- Secretary of State for the Home Department*** [2010] UKSC 49, relating to the same Tribunal:

> "[45*] But the court should not be astute to characterise as an error of law what, in truth, is no more than a disagreement with the AIT's assessment of the facts. Moreover, where a relevant point is not expressly mentioned by the Tribunal, the court should be slow to infer that it has not been taken into account*".

I accept that the High Court, in exercising its supervisory jurisdiction, should accord a reasonable degree of deference, or latitude, to the constitution of the Mental Health Review Tribunal. This is appropriate because, in common with most judicial review contexts, the High Court cannot lay claim to the expertise and experience possessed by the members of this specialised tribunal [as noted by Lord Bingham in The Rule of Law, p. 61]. This is achieved, *inter alia*, by recalling that this court does not exercise an appellate jurisdiction and, in a case of the present kind, is concerned solely to determine whether an error of law has occurred: a detached, clinical and objective exercise, guided by the relevant principles and applying the standard of careful scrutiny.

VI CONCLUSION

[25] In the present case, by virtue of Article 2(4) of the 1986 Order the Tribunal was permitted to have regard to two types of evidence only. The first is evidence that the Applicant had previously behaved violently towards others: it is common case that there was no such evidence here. The second is evidence that the Applicant "*… has so behaved himself that other persons were placed in reasonable fear of serious physical harm to themselves*". This is the provision which particularly occupied the Tribunal's attentions and deliberations in the instant case. I begin by focussing on one discrete issue. Repeated reading of the ninth paragraph of its decision has left me in genuine doubt about whether, in the Tribunal's reasoning, there was only one "*other person*" in the relevant matrix, namely XY. In this respect, the frequent use of the plural throughout these key passages is striking. Given the doubts thus engendered, the averments in the Tribunal's affidavit suggestive that the focus of their attention and reasoning was XY alone must, of course, be duly considered by this court. However, they illustrate the rationale underpinning the repeated exhortations of caution and circumspection in the decided cases considered above, coupled with the impact of the principles which govern the performance of the duty to give reasons, where this exists. Within the confines of the narrowly cast framework of Article 2(4) of the 1986 Order, I accept that, in its examination of the past, the Tribunal was entitled to scrutinise the conduct of the Applicant vis-à-vis persons other than XY. However, in doing so, it was in my view incumbent on the Tribunal to make clear what its analysis and conclusions were. I conclude, with due respect, that it has not done so.

[26] The issue of whether the Applicant had previously behaved himself in a manner which placed XY, or any other person, in reasonable fear of the infliction of serious physical harm by him was a pure question of fact for the Tribunal. Such evidence had to exist before the Tribunal could proceed to apply the test enshrined in Article 77(1)(b) viz. whether it was satisfied that to discharge the Applicant would create a substantial likelihood of serious physical harm to XY, or any other person, inflicted by him. As explained above, this was an exercise in evaluative judgment, not a fact finding task. Thus the exercise in which the Tribunal was engaged had two readily identifiable, though distinct, components.

[27] The first of these components concerned the question of whether there was *evidence* that the Applicant had previously behaved himself in a manner placing XY, or any other person, in reasonable fear of serious physical harm inflicted by him. I accept that the Tribunal had regard to the evidence of the Applicant's conduct giving rise to his arrest and prosecution, which I have summarised in paragraph [4] above. Further, in the sixth paragraph of its decision, the Tribunal noted:

> "*… on 23/9/10 XY reported that the patient had contacted her by Facebook nine times on one day and that she was afraid …*".

In the ninth paragraph, the Tribunal purported to apply the statutory test. It noted that there was no evidence of any previous infliction of physical harm by the Applicant on others. Then it expressed the view that the conduct culminating in the Applicant's conviction and giving rise to his admission –

> "*… clearly constituted behaviour which placed her and her associates in reasonable fear of serious physical harm, even if none were inflicted. This pattern of behaviour persists …*".

The Tribunal then employed the phrase "*substantial likelihood*" – not with reference to whether there was a substantial likelihood of serious physical harm to XY, rather "*… a substantial likelihood that he will contact her in every way possible*". The decision continues:

> "*He is currently angry and frustrated about the fact of his detention. This exacerbates the risk of physical harm, including psychological harm to XY who has expressed herself to be afraid. It also heightens the risk of physical harm to those whom JR45 sees as thwarting his wish to contact her.*"

[28] I accept that this court, in the exercise of its supervisory jurisdiction, must read the Tribunal's decision as a whole and in conjunction with the underlying evidence considered by it. However, bearing in mind the standard of review and the series of individual ingredients in the governing statutory provisions, I consider that some dissection of the Tribunal's decision is both appropriate and unavoidable. In my view, the key passages in the Tribunal's decision, all contained in the ninth paragraph, fall to be analysed in the following way:

(a) It seems uncontroversial to label the Applicant's previous conduct vis-à-vis XY as *harassment and stalking,* in the ordinary sense of these words. The Tribunal opined that this conduct had put XY and her friends in reasonable fear of the infliction of serious physical harm by the Applicant. The sixth paragraph of the decision records evidence that XY was *afraid*. This is insufficient to satisfy the statutory requirement. While one of the psychiatrists concerned (the RMO) addressed the statutory test in his evidence (per the notes exhibited to the Chairman's affidavit), he acknowledged that *he had not seen the victim impact report*. Furthermore, he confirmed that the Applicant is not hostile to the person concerned - *and* it appears that the contemplated "*stalker's assessment*", designed undoubtedly to assist the Tribunal, either was not prepared or was not available.

(b) Article 2(4) of the 1986 Order required the Tribunal to have regard only to *evidence* to the requisite effect. I accept that it was open to the

Tribunal to *infer* from identified evidence that XY or some other person had previously been placed in reasonable fear of serious physical harm to her by reason of the Applicant's conduct. Bearing in mind the observations in (a) above, this would require the Tribunal to engage in the relatively simple exercise of identifying the relevant primary evidence and then formulating the inference, with such elaboration or elucidation as might be appropriate. However, on the face of its decision, it is not clear that the Tribunal engaged in this exercise.

(c) Furthermore, in considering and determining the issue of past *fear*, in the statutory terms, it was incumbent on the Tribunal to address the question of whether any such ascertainable fear was *reasonable*. It is not apparent that the Tribunal did so.

(d) I accept that the Tribunal was entitled to pose the question of whether there was "*a substantial likelihood*" that, if discharged, the Applicant would attempt to contact XY. However, the concern which this raises is that, in this part of its decision, the Tribunal did not expressly address the statutory question, namely whether discharge would create a substantial likelihood of serious physical harm to XY at the hands of the Applicant, consequential upon contact attempts. While the Tribunal began by reciting the statutory test in the ninth paragraph, it then diverted, or digressed, to consider a very different type of *substantial* likelihood viz. one of making contact with XY. This raises the spectre of a real risk that the Tribunal, inadvertently, posed the wrong question for its consideration.

(e) Moreover, I consider that it was incumbent on the Tribunal to address the question of how, based on all the evidence, the Applicant's previous conduct consisting essentially of "long distance" contact with the person concerned might transform into a very different type of direct, face to face contact, this being the only type of scenario in which she could conceivably suffer physical harm at his hands. It is not clear from the text of its decision that the Tribunal consciously addressed, or resolved, this discrete issue.

(f) The nexus which the Tribunal forged between the Applicant's *current* anger and frustration generated by his detention and the resulting exacerbation of the risk of physical harm, including psychological harm, to XY is not explained in the decision and, on a fair and objective reading thereof, is not readily ascertainable. Objectively, it would seem that this anger and frustration would be more likely to lessen and dissipate than to endure, if the underlying cause (his detention) were no longer to exist.

(g) In the same passage, the Tribunal spoke of "*physical harm*", whereas the statutory behoved it to be satisfied about a substantial risk of "*serious physical harm*", indicating an erroneous approach

(h) Similarly, in the same passage the Tribunal spoke of "*psychological harm*" to XY: having regard to the statutory matrix, it formed no part of the Tribunal's function to consider the risk of psychological harm to anyone.

(i) Furthermore, the words "*those whom JR45 sees as thwarting his wish to contact her*" suffer from a lack of clarity. One possible construction is that they refer to those responsible for the Applicant's detention. A second possibility is that they refer to XY's associates. The very existence of two rational possibilities casts a cloud over the text. Whichever is the correct construction, the Tribunal expressly found that those belonging to this group are at heightened risk of "*physical* harm": this does not equate with the statutory standard of "*serious physical* harm".

(j) Finally, I consider that it was incumbent on the Tribunal to identify the members of this group with a greater degree of clarity and particularity. This is a function of its obligation to provide focussed reasons in the exacting terms dictated by the statutory requirement and the associated common law principles.

[29] As noted at the outset of this judgment, the question for this court, in the exercise of its supervisory jurisdiction is whether, in making the impugned decision, the Tribunal has erred in law in its application of the relevant statutory provisions. Based on the analysis set out above, I conclude that an error of this kind has occurred. In my view, the Tribunal has failed to correctly apply the statutory tests, in the respects adumbrated in paragraphs [27] and [28] above. Some of these defects are freestanding, while others are inter-related and/or cumulative. The passages in which the Tribunal speaks of "*psychological* harm" and (merely) "*physical*" harm would, individually, suffice to merit a conclusion that it has erred in law. Ditto the absence of any examination and determination of the reasonableness of XY's fear. Furthermore, while the Tribunal expressed a series of views, some of these are not linked to the statutory provisions in a clear and structured manner, while others appear impressionistic, rather than evidence based. While I accord due deference to the expertise and experience of the Tribunal members, who plainly set about their task conscientiously, this cannot displace the outcome of the dispassionate and objective audit of legality which the court has carried out.

<u>Remedy</u>

[30] I make an Order of Certiorari quashing the Tribunal's decision. The legal effect of this is to require a reconsideration and rehearing before a differently constituted Tribunal, which will doubtless consider fully updated evidence. As the Applicant's detention will continue in the meantime, it is desirable that, consistent with all necessary preparations and procedural requirements and safeguards, such rehearing be undertaken with reasonable expedition.

[31] I should add, finally, that the Applicant clearly benefits from two conspicuous advantages, which I trust he will prove capable of recognising and cherishing. The first is that he is in the hands of highly skilled and dedicated professionals. The second is that he is supported by wonderfully devoted parents. The court sincerely trusts that, armed with these blessings, he will successfully and speedily overcome his difficulties.