Neutral Citation No. [2010] NIQB 119 | *Ref:* **TRE7972**

Judgment: approved by the Court for handing down | *Delivered:* **15/10/2010**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

JR44's Application (Leave Stage) [2010] NIQB 119

IN THE MATTER OF AN APPLICATION BY JR44 FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

TREACY J

[1] The applicant is a patient detained in Muckamore Hospital since 1 April 2010. Mr Potter appeared for the applicant and Ms Murnaghan appeared for the proposed respondent. The relief sought includes a declaration that the rule promulgated by the Mental Health Review Tribunal (MHRT) placing restraints upon the ability of patients and their representatives to instruct psychiatrists on the MHRT Panel was ultra vires; a declaration that the MHRT erred in law in refusing to permit the applicant to instruct the psychiatrist of her choice and an order of certiorari to quash the decision of the MHRT and order that the Review be convened before a freshly constituted Tribunal.

[2] The grounds upon which relief is sought essentially resolved to a challenge to recently introduced directions to Medical Members of the MHRT, that they should not accept instructions to act as an expert medical witness on behalf of patients whose detention or guardianship is due to be considered by a tribunal. It is said that as a consequence of this rule, the ability of applicants and their representatives to call psychiatrists on the Member Panel has been unlawfully restricted in the manner elaborately set out in paragraph 3 of the Order 53 Statement.

[3] The background to the challenge are the directions issued by letter dated 21 July 2010 by Mr Fraser Elliott QC, the Chair of the proposed respondent which states:

> "… The case of *Lowal v Northern Spirit Limited & Another* [2004] ECWA Civ 208 has recently been brought to my attention. In that case the appellant had objected to the fact that the respondent before an

> Employment Appeal Tribunal charged with hearing the appeal of the appellant from the decision of an Employment Tribunal had engaged the services, as its legal representative before the Employment Appeal Tribunal, of a lawyer who was also a member of the Legal Panel of the Employment Appeal Tribunal. It was agreed between the parties that the appellant's objection was well founded and should be allowed so that there was not a finding as such on the point by the English Court of Appeal but it is clear from the report of its decision that it accepted the propriety of the decision that the objection should be allowed.
>
> It occurs to me that, mutatis mutandis, it follows that for a medical member of the MHRT to accept instructions on behalf of and to give evidence as an expert medical witness on behalf of a patient whose detention or guardianship is being considered by a Tribunal, would also, arguably save in exceptional circumstances, be open to objection. An exceptional circumstance might be where the patient has been quite unable to obtain the services of an independent psychiatrist and the Medical Member approached to act on his or her behalf in such capacity has been informed of the steps taken to obtain the same and is satisfied that there is no alternative open to the patient.
>
> Likewise, for a Legal Member of the MHRT to accept instructions on behalf of and to appear as a legal representative on behalf of any party to proceedings before a Tribunal would be open to objection.
>
> In the circumstances and for the reasons appearing no Legal Member of the MHRT should accept instructions to act as a legal representative on behalf of any party to proceedings before a Tribunal and **no Medical Member, save in exceptional circumstances**, which it is suggested should be checked with the Chairman of deputy Chairman before any decision is taken, **should accept instructions to act as an expert medical witness on behalf of a patient whose detention or guardianship is due to be considered by a Tribunal**. For the avoidance of doubt it remains the position that a Medical Member of the MHRT who is also an RMO may give evidence *in that capacity* before a Tribunal."[my bolding]

[4] Louise Arthurs, a solicitor employed by the Law Centre, Northern Ireland, has sworn an affidavit grounding this application. There is no affidavit from the applicant who has brought these proceedings in her own name and has not, thus far, sought anonymity, although I will grant her anonymity and the case will henceforth be referred to as JR44.

[5] Notwithstanding that the applicant suffers from a severe mental impairment, incomplete development of the mind and whose social functioning has been

assessed on a recognised scale as being the equivalent of someone 7 years and 10 months old the court, on enquiry, was informed by Mr Potter that she had capacity to bring these proceedings. When challenged about this in light of the above, he asserted that capacity could nevertheless be presumed.

[6] The background to the challenge is set out in a little more detail in the affidavit of Ms Arthurs and at paragraph 2 of that affidavit she records the fact that the applicant is 24, is detained in Muckamore Abbey Hospital following compulsory admission on 1 April 2010, has been diagnosed with severe mental impairment and has sought to have the lawfulness of her detention reviewed by the MHRT.

[7] The applicant applied in writing to the MHRT on 17 May 2010 and Ms Arthurs received instructions on 4 June 2010 to represent her before the Tribunal which was scheduled to commence on 2 July 2010. The applicant withdrew this initial application to the Tribunal by letter which was sent on 24 June and her instructions in this respect were confirmed to Ms Arthurs by a telephone conversation on 25 June. Fresh instructions were then received from the applicant by Ms Arthurs on 5 July to represent her at a further Tribunal which was convened for 19 August 2010.

[8] In preparation for that hearing, the applicant was advised and informed by Ms Arthurs that it was advisable for the applicant to instruct an independent doctor to prepare a report in relation to her diagnosis but at that stage the applicant instructed Ms Arthurs that she did not want to instruct an independent doctor.

[9] The hearing on 19 August 2010 was aborted due to the President becoming too unwell to continue and accordingly the hearing was adjourned to be reconvened on 31 August. At paragraph 8 of Ms Arthurs' affidavit she has deposed that when agreeing to the adjournment the applicant indicated that now that she had been made aware of the Medical Members' preliminary view at the aborted hearing on 19 August 2010 as to his view of her diagnosis, she had changed her mind and she now wanted to instruct an independent doctor as long as the doctor would be able to report quickly enough so as not to delay the hearing further.

[10] Although the deponent first received instructions from the applicant on 4 June 2010 to represent her before the MHRT then scheduled for 5th July 2010 and *prior* to the introduction of the impugned direction, there is no evidence of any attempt to then instruct and engage a medical expert. It was only in respect of the Tribunal convened for 19 August 2010 that the applicant was apparently first advised as I have already indicated. What I find a little surprising is that, notwithstanding the impugned direction, the applicant was specifically advised to engage an expert, that is Dr Scott, who was on the panel and therefore subject to the qualified prohibition. It is not clear from Ms Arthurs' affidavit whether she was aware of the direction at that time but she was certainly aware that Dr Scott sat as a Medical Member of the Tribunal - this is clear from her affidavit.

[11] In any event the applicant instructed Ms Arthurs to commission a report from Dr Scott who telephoned Dr Scott the same day and enquired if he would be able to prepare a report for use at the Tribunal. He confirmed that he was available to undertake the work but was aware of a new rule from the Tribunal prohibiting him from undertaking private work as an independent doctor on the basis that he also sat as a Medical Member of the Tribunal. Following an exchange of correspondence indicating the applicant's proposal to instruct Dr Scott and requesting to be informed of any objection to instructing what are referred to as dual experts/tribunal members, the applicant's solicitor received an e-mail from the proposed respondent on 25 August in terms not materially different from the letter of 21 July which I have already set out.

[12] A letter before application for judicial review was sent to the Tribunal on 27 August asking the MHRT to reconsider its decision. This did not bear fruit but a reply dated 27 August was sent but not received. It was eventually provided and according to paragraph 21 of the grounding affidavit is exhibited at LA6 although it does not appear in my bundle, however, nothing turns on its absence from my papers.

[13] On 31 August 2010 the Tribunal refused the applicant's application for discharge - the Law Centre having previously confirmed their instructions to proceed with the Tribunal in the event that Dr Scott could not be instructed and before the applicant would be in a position to seek judicial review. The applicant's representative, nonetheless maintained to Ms McKenna of the Crown Solicitor's Office, that there remained, as they put it in paragraph 19, "an important legal point to be resolved" that is to say, that patients have the unfettered right to choose what doctor they wish to instruct, irrespective of whether or not the doctor is on the Mental Health Review Panel.

[14] Whether or not the decision in *Lawal* necessitated a direction in the terms of the letter of 21 July it was clearly inspired by a desire to enhance confidence in the administration of justice in that forum. The impugned direction does not prevent the applicant from engaging such medical expert as is prepared to accept her instructions. The decision to accept (or not) her instructions was a matter for Dr Scott. He had a choice to make - to remain on the panel in which case he was subject to the directions or to step down from the panel and accept instructions. He could not, in the light of the direction introduced to enhance justice and dispel any suggestion of structural or apparent bias, wear both hats. Insofar as the direction directly or indirectly restricts the pool of experts available to be instructed, it arises from a desire to make the Tribunal more, not less, Article 6 compliant. The rule affects the ability of experts to perform dual roles. If they, or one of their number, believe the rule irrational or unlawful they would have standing to challenge the rule, a challenge which no doubt could be funded by the expert concerned or a medical association on his or her behalf. But this challenge is brought not by any medical expert but an applicant of dubious capacity supported by public funding via legal aid. In my view no right of this *applicant* has even arguably been

unlawfully interfered with nor have I been persuaded that she has standing to challenge the impugned direction. Accordingly leave is refused.