Neutral Citation No: [2011] NIQB 41 | *Ref:* **TRE8172**

Judgment: approved by the Court for handing down | *Delivered:* **04/05/11**

*(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 JR49 (ACTING BY HIS MOTHER AND NEXT FRIEND) FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF THE DEPARTMENT OF HEALTH, SOCIAL SERVICE AND PUBLIC SAFETY DATED 10 MARCH 2011

TREACY J

Introduction

1. The applicant seeks an order of certiorari quashing the order dated 10 March 2011 made by the respondent authorising the applicant's removal from a hospital in Northern Ireland to a hospital in England pursuant to Section 82 of the Mental Health Act 1983 ("the 1983 Act").

2. Interim relief to stay the pending transfer was granted on the evening of 22 March 2011, leave was granted on 29th March 2011 and an expedited hearing was directed.

3. An application was made very late in the day by the Northern Ireland Commissioner for Children and Young People (NICCY) to intervene by way of written submissions in this case. This application was not opposed by the parties so the Court received the Commissioner's submissions although these do not in fact materially add to the case already made by the applicant.

Background

4. The applicant, who turned 17 on 3 April 2011, has been detained in Beechcroft Child and Adolescent Mental Health Unit pursuant to Article 12[1] of the Mental Health (NI) Order 1986 ("the 1986 Order") since 12 October 2010.

[1] "***Detention for treatment***
12.—(1) Where, during the period for which a patient is detained for assessment by virtue of Article 9(8), he is examined by a medical practitioner appointed for the purposes of this Part by the

5. Dr Francess Doherty is a consultant child and adolescent psychiatrist employed by the Belfast Health and Social Services Trust ("the Trust") and she works in Beechcroft. She is the Responsible Medical Officer for the applicant since his detained admission to the Adolescent Ward on 13 October 2010. She leads a multi-disciplinary team that is tasked with caring for and attempting to treat JR49 in Beechcroft.

6. Beechcroft is described as a Tier 4 regional mental health service for children and adolescents who present with mental ill-health and who require hospital admission. It is the only Tier 4 unit in Northern Ireland. Beechcroft is neither a secure nor a forensic unit. There are no secure or forensic hospitals for adolescents in Northern Ireland.

7. Dr Doherty has averred that the applicant presents with complex mental health difficulties and learning difficulties. He has been extremely difficult to manage in Beechcroft and he has spent most of his admission in the intensive care unit. Throughout his detained admission in Beechcroft he has displayed high levels of aggression, sexually disinhibited behaviour, impulsivity and self-harming behaviour. It is her view that he poses a high risk of harm to himself and others.

8. In light of the nature and extent of his difficulties Dr Doherty formed the view that the services being provided at Beechcroft were not sufficiently specialist

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Commission and that medical practitioner furnishes to the responsible authority in the prescribed form a report of the examination stating—
(a) that, in his opinion, the patient is suffering from mental illness or severe mental impairment of a nature or degree which warrants his detention in hospital for medical treatment; and
(b) that, in his opinion, failure to so detain the patient would create a substantial likelihood of serious physical harm to himself or to other persons; and
(c) such particulars as may be prescribed of the grounds for his opinion so far as it relates to the matters set out in sub-paragraph (a); and
(d) the evidence for his opinion so far as it relates to the matters set out in sub-paragraph (b), specifying whether other methods of dealing with the patient are available and, if so, why they are not appropriate,
that report shall be sufficient authority for the responsible authority to detain the patient in the hospital for medical treatment and the patient may, subject to the provisions of this Order, be so detained for a period not exceeding 6 months beginning with the date of admission, but shall not be so detained for any longer period unless the authority for his detention is renewed under Article 13.
(2) A report under paragraph (1) shall not be given by—
(a) the medical practitioner who gave the medical recommendation on which the application for assessment is founded; or
(b) any of the persons described in Schedule 1.
(3) Where a patient is detained in a hospital for treatment by virtue of a report under paragraph (1), any previous application under this Part by virtue of which he was subject to guardianship shall cease to have effect.
(4) The responsible authority shall immediately forward to the Commission a copy of any report furnished to the authority under paragraph (1)."

to meet his needs and that other more specialist care and treatment options outside Northern Ireland need to be explored. On 10 January 2011 Dr Doherty wrote to Dr Monks, Consultant Forensic Psychiatrist, at St Andrew's Healthcare in Northampton requesting an opinion on the suitability of the applicant for the secure adolescent unit at St Andrews. She expressed her opinion that the applicant required medium to long-term care and treatment in a secure setting. On 21 February 2011 Dr Monks provided a confidential forensic adolescent psychiatric assessment. This is an extensive 16-page report informed by detailed factual and clinical enquiry including interviews with the applicant's mother.

9. At p20 of his report Dr Monks states:

> **"[JR49's parents] told me that they had *concerns* about [JR49] being transferred to England. They were particularly concerned that there would be substantial disruption of his contact with his family. I agreed that this was a *major disadvantage* to such a plan and that this factor *raised the threshold* for making such a decision.**
>
> **I explained that there were no secure adolescent mental health inpatient units in Northern Ireland and that young people in need of such services had to be transferred to specialist centres in England. *I stated that a decision to move a young person to England for specialist secure care had to be made after balancing disadvantages (such as disruption of family contact and restriction of liberty) with advantages (preventing serious harm to self or others in hospital, working along a pathway towards discharge which may not be possible in a non-secure setting, ensuring the best chance of preventing mental state deterioration and/or serious antisocial behaviour after discharge to the community). I stated that if any plan to transfer [JR49] to an English secure unit were to be formulated, the responsible mental health team in Beechcroft Unit would need to be satisfied that the advantages outweigh the disadvantages and that it had been clearly demonstrated that all options to meet the needs of the young person in Beechcroft Unit had been exhausted (particularly behavioural and pharmacological interventions)."*** [Emphasis added]

10. The applicant has been clear that he does not want to be transferred (see, for example, the affidavit sworn by his solicitor Gerald Hyland on 28 March 2011 at paras2, 3 and 5). The applicant's mother, who is his nearest relative, has consistently expressed concerns about the transfer and its possible implications. Her concerns are accurately summarised thus in the applicants skeleton argument:

    (i) The applicant is very attached to his family. He currently receives daily visits from them;

    (ii) Such visits will not be available to him upon transfer. His visits will be limited by what the Department and/or Trust will fund and his mother's working hours;

    (iii) He finds it hard to adjust to new situations and people;

    (iv) There will be no-one and nothing familiar to him at St Andrews;

    (v) This could have an adverse effect on his behaviour and mental state;

    (vi) Upon transfer he could therefore deteriorate and be assessed accordingly, at a level which is not warranted;

    (vii) Upon transfer, jurisdiction for his detention transfers to the system in England and Wales;

    (viii) In order for him to return to Northern Ireland it appears that the same transfer process must take place, in reverse (see section 81 of the 1983 Act);

    (ix) If treatment at St Andrews does not improve his condition and no facilities exist for treating him in Northern Ireland it is not clear that the "reverse" transfer would or could take place.

11. By way of application for the applicant's transfer the respondent department received two documents:

    (i) The so-called "template" document entitled "Information required by the DHSSPS when transferring mentally disordered patients to special hospitals in Great Britain" dated 7 March 2011; and

    (ii) The referral letter from Dr Francess Doherty to Dr Monks dated 10 January 2011.

12. Beyond what appears in the template document (which incorrectly states that the applicant is "ambivalent" about the transfer) the Department was

provided with no information about the applicant's views about the transfer or his mother's concerns about same. Importantly the Department was not furnished with and did not receive a copy of Dr Monks' report. The Department did not subsequently seek updated medical evidence, input from the applicant or his mother or information about the manner in which the transfer could or would affect the applicant.

13. These documents were then furnished to Dr Ian McMaster who is a doctor of medicine employed as a full-time medical officer by the Department. At para 2 of his affidavit he states that his responsibility in relation to the removal of patients detained under the 1986 Order out of Northern Ireland to another jurisdiction in the United Kingdom is to consider the clinical information provided and advise whether the transfer proposed is necessary for the protection of the patient or others and is likely to address the patient's clinical needs. Dr McMaster has been a member of the Royal College of Psychiatrists since 1993 and has experience in working in mental health services.

14. He avers that in this case he fulfilled that responsibility by considering the clinical information included in the "template" document and the referral letter from Dr Francess Doherty.

15. Based on the information contained in those documents he expressed himself satisfied that the applicant:

> **"6. ... had a significant mental disorder with risk to self and others and which was not responding to available interventions within the Beechcroft Unit. Furthermore following assessment by clinicians from both Beechcroft and St Andrews it was agreed by them that JR49 was likely to benefit from transfer to a more secure setting. As there is currently no secure adolescent mental health facility within Northern Ireland it is necessary to transfer patients to facilities in GB to access such care. I was aware of JR49's ambivalence to the transfer and his mother's objections, nevertheless remaining in Beechcroft's Intensive Care Unit (ICU) and not progressing clinically would not appear to be in the long term best interests of JR49."**

16. He also confirms in para 7 that he had not read Dr Monks' report when he considered this case for transfer originally although by the time he swore his affidavit he had, by then, read the material provided by the applicant in these judicial review proceedings and, in particular, the assessment report prepared by Dr Monks dated 21 February 2011.

17. At para 10 of his affidavit he avers that having now examined Dr Monks' detailed report he is fortified in his conclusion that a transfer for specialist treatment to an age appropriate psychiatric unit in England was the correct recommendation to make in this case.

18. By email dated 9 March 2011 Dr McMaster replied that "based on the information provided" he was content that the transfer went ahead. As already pointed out, at that stage he did not have Dr Monks' report which, of course, included the paragraph as set out at para [9] above. Whilst the "template" document informed him that the applicant's mother was not in favour of the transfer and had instructed a solicitor the reasons for her concern are not recorded in either of the two documents which he relied upon.

19. Following Dr McMaster's opinion the transfer was recommended for approval by Mr Ronald Long of the Mental Health Unit in the Department who wrote to Dr Briscoe on 10 March 2011 stating, *inter alia:*

> **"The Department's Medical Officer, Dr Ian McMaster, has received copies of the medical reports and supports the transfer. Also, the Department of Health is in agreement that the transfer can proceed.**
>
> **The Department's role is to authorise the transfer of detained patients within UK jurisdictions and I recommend that you approve and sign the attached draft authorisation."**

20. Dr Maura Briscoe has sworn an affidavit in these proceedings averring that she is a senior officer in the Department and that her responsibility in relation to the removal of patients detained under the 1986 Order is to give authorisation to that removal and to issue the transfer direction which will accompany the patient to his destination where it will constitute the continuing authority for his detention. This responsibility is undertaken in accordance with Section 82 of the 1983 Act and Art 134 of the 1986 Order.

21. At para 4 of her affidavit she states:

> **"In reaching a determination about an application to transfer a patient in a case of this type I do have available, and rely upon, the Department's psychiatric medical officer to confirm that the medical information provided in support of the transfer request justifies the detention and transfer of the patient which confirms departmental medical opinion on necessity for transfer. In the**

> **present case I was given an assurance that this was the case by Dr Ian McMaster. This was communicated to me by memo from Ronald Long, dated 10 March 2011. ..."**

22. At para 7 she confirms that the "template" pro forma, associated medical report from Dr Doherty dated 10 January 2011 and the opinion of Dr McMaster regarding the necessity for transfer were available to her at the time of the authorisation.

Legislative Framework

23. The transfer of a patient from Northern Ireland to England and Wales is permitted by Section 82 of the 1983 Act which states (so far as relevant):

> **"(1) If it appears to the responsible authority, in the case of a patient who is for the time being liable to be detained ... under the Mental Health (Northern Ireland) Order 1986 ... that it is in the interests of the patient to remove him to England and Wales, and that arrangements have been made for admitting him to a hospital ... there, the responsible authority may authorise his removal to England and Wales and may give any necessary directions for his conveyance to his destination.**
> **...**
> **(4) Where a person removed under this section was immediately before his removal liable to be detained for treatment by virtue of a report under Article 12(1) or 13 of the Mental Health (Northern Ireland) Order 1986, he shall be treated, on his admission to a hospital in England and Wales, as if he had been admitted to the hospital in pursuance of an application for admission for treatment made on the date of his admission.**
> **...**
> **(7) In this section "the responsible authority" means the Department of Health and Social Services for Northern Ireland ..."**

24. Article 134 of the 1986 Order provides (so far as relevant):

> **"(4) Subject to paragraph (5), where a patient liable to be detained or subject to guardianship by virtue of an application, report, order or direction under Part II or III ... is removed from Northern Ireland in**

pursuance of arrangements under Part VI of the 1983 Act ... the application, report, order or direction shall cease to have effect when he is duly received into a hospital or other institution ...
...

(6) Where the ... Department authorises the removal from Northern Ireland of a patient under Part VI of the 1983 Act ... the ... Department shall send notification of that authorisation to the Commission and to the nearest relative of the patient not less than 7 days before the date of the removal of the patient."

The Parties Arguments

25. On behalf of the applicant Ms Doherty contended that the Department considered only the template document and Dr Doherty's referral letter and that these documents failed to record the applicant's objection to the transfer; recorded the mother's objection but did not elaborate on her reasons; failed to acknowledge that there are possible significant disadvantages to the transfer which could outweigh its potential advantages as outlined by Dr Monks; and failed to acknowledge the possibility that the proposed transfer could be a long term arrangement. It was contended that the Department's failure to consider (i) the objections to the transfer and (ii) the possible significant disadvantages of transfer indicated that not all relevant considerations had been taken into account in reaching its decision. Furthermore, it was contended that the failure to seek additional information from the applicant and/or his mother, where it was clear that objections existed, amounted to vitiating unfairness in the procedure in circumstances where it was clear that both would be affected by the transfer and the transfer could have an adverse impact on the applicant's health and well being. It was also contended that the Department's decision amounted to little more than a "rubber stamp" of the application for transfer and that the manner in which the application was dealt with indicated a failure on the part of the Department to reach an independent decision on the transfer application amounting to an effective abdication and/or delegation of its power to transfer under Section 82 of the 1983 Act. In support of this conclusion Ms Doherty relied on what was said on the Department's behalf at the interim relief hearing to the effect that the Department considered that such decisions should be taken by clinicians and was "swayed" by the view of the Trust which was involved in the care.

26. It was also maintained that Art 8 was engaged and that there had been interference with his Art 8 right to respect for his family life. It was submitted that his transfer to England would mean that he was geographically removed from his family who would not be able to visit him often, and certainly much

less than they currently do. This interference required justification and, *inter alia,* the procedures adopted were not sufficient to protect the interests of the applicant and the family and accordingly the decision could not be justified.

27. The respondent maintained that the applicant's contentions about the sufficiency of the enquiry made by the Department had to be measured against the statutory framework and submitted that the evidential material before the Court demonstrated that the Department exceeded the requirements imposed by Section 82 in the present case. The Court was invited to note the statutory context in play. The legislative framework had been enacted to address these specific challenges which arise from providing appropriate treatment for persons who suffer from mental, not physical, illness. That context is reflected in the statutory structure that permits decisions to be made in the "interests" of a patient by a third party. The underpinning rationale for that departure from conventional principles of consent and authorisation is that the patient in question may have fluctuating or compromised capacity to make decisions for themselves. It was said that the statutory framework formed by the interlocking provisions of the 1983 Act and 1986 Order imposed the following key statutory requirements which must be met before a transfer such as that proposed in the present case could be authorised:

    (i) That the authorisation decision must be taken by the Secretary of State or the Department;

    (ii) That the authorisation must relate to a person lawfully detained pursuant to Article 12 of the 1986 Order;

    (iii) That the Department must be satisfied that it *appears* to be in the *interests* of the patient to remove him;

    (iv) That the Department must be satisfied that it *appears* that arrangements have been made for admitting the patient to a hospital in England and Wales.

28. The Court was invited to note what was referred to as the modest nature of the threshold requirements and it was asserted that the Department is asked by these statutory provisions to conduct an empirical audit of whether it appears to be in the interests of the patient to transfer to England and Wales and that it was notably, the respondent submitted, not a requirement to make a judgment about the patient's "best interests" or to adjudicate in circumstances where there is a clinical dispute about the appropriate course of treatment for a patient. The obligation upon the Department, the respondent submitted, is the significantly less onerous requirement to be satisfied that it "appears" to be in the interests of the patient to transfer.

29. The respondent submitted that the affidavit evidence presented by the Department identified that the core statutory requirements of Section 82 had been met. The Department had considered material which allowed them to form the view that (i) the transfer is in the interests of the applicant and (ii) there are arrangements in place to place him in an appropriate clinical setting in England. They rejected the applicant's contention of unlawful abdication or delegation of duty by the Department. They pointed out that the argument had to be measured against the precise nature of the statutory obligation imposed by Section 82 to determine whether hospital accommodation has been arranged and whether it is in the interests of the patient to be transferred. Both of these assessments have been made by the Department and inevitably, they say, must be informed by material provided by the Trust but that consideration of itself could not establish unlawful abdication or delegation - a mechanism they submitted which appeared to be anticipated by the statutory structure itself.

30. The respondent also rejected the allegations of insufficiency of enquiry, insufficiency of reasons or that there had been any disproportionate interference with the applicant's Article 8 rights.

Discussion

31. This case has raised several issues of concern to this Court. One concern has been the interpretation of Section 82(1) of the 1983 Act which states that the responsible authority may authorise the transfer of a patient to England if "it appears" to the responsible authority that such a transfer "is in the interests of the patient". At times during this hearing the respondent department, which is the "responsible authority", suggested that the term "interests" of the patient was materially different from the more common term "best interests" which might have been used and that the phrase "interests" meant something different to and rather less than the term "best interests".

32. The meaning of the phrase "in the interests of the patient" must be determined in the light of the entire context in which it appears. In this case the context is that the department is charged with a statutory responsibility to authorise a proposed change in the residency of a patient which will inevitably impact strongly on his level of contact with his family, which may prove to be a long term transfer and which is not subject to any right of appeal by the parties affected. In other words the department has the responsibility to authorise a change in the patient's circumstances which could and, in practice, would have the most profound and long-term impacts on his Art 8 rights and those of his family.

33. The rationale for transferring the responsibility of this decision from the patient to the department is that the patient's capacity to make such decisions

for himself may either fluctuate or may be significantly impaired. In view of that impairment the responsibility to decide, which would normally rest with the individual affected, is transferred to a third party – the responsible authority. It is hardly necessary to state that the responsibility must be discharged with all the care and diligence that an unimpaired responsible person would exercise on his or her own behalf.

34. On what basis then does an unimpaired person make important decisions of this kind? Naturally an unimpaired person will, ordinarily, only take a course of action which he or she judges, after careful balancing of all the available options, to be in his or her interests. What does it mean for a change to be in somebody's "interests"? It must mean at least that on the balance of probabilities the chosen course will confer more benefits and/or fewer burdens than any other available course of action. There must be more elements favouring that choice than favour any other choice. Only then will that course be in that person's "interests". Whether that term is qualified by the adjective "best" or not is immaterial in practice. It is inherent in the decision making process that the outcome selected will be better than any other possible outcome. In that sense it will be the "best" outcome possible in the situation under consideration. In this sense any choice of option which is considered to be in a person's "interests" is implicitly in his or her "best interests" because that choice is inherently better than any other choice that could be made at that moment in time. For these reasons I believe that in cases such as the present there is no significance to the fact that the statute refers to the patient's "interests" rather than his or her "best interests". The choice indicated by either or both of these terms is the choice which brings more benefits to the patient than any other choice that could be made ie the choice of the best option.

35. In the framework of the present legislation it is the responsibility of the department to identify the choice which serves the patient's interests in this way because the patient is not capable of making the selection on his own behalf.

36. Another matter which caused concern in this case was the interpretation of the word "appears" in Section 82(1) of the 1983 Act. This section states:

> **"If it appears to the responsible authority ... that it is in the interests of the patient to remove him to England ..."** then **"the responsible authority may authorise his removal to England."**

37. At one point the respondent department invited the Court to note what was referred to as the "modest nature" of this threshold requirement. It was asserted by the department that this statutory provision only required it to

conduct an "empirical audit" of the evidence it had available in order to decide what "appears" to be in the patient's interests.

38. Once again the meaning of the term "appears" must be determined with reference to its context in the statutory provision. As we have seen the matters under consideration in this case are not minor matters. The provision deals with authorisation of proposed transfers – potentially long term transfers – of a patient's place of residence. I have already noted the grave consequences of such transfers in terms of the patient's Art 8 rights. Within this context what does the word "appears" mean?

39. It is quite clear to me that "appears" does **not** mean some kind of superficial visual weighing up of whatever paperwork is sent to the department in support of a proposal to transfer a patient. Despite its unfortunate visual connotations the word "appears" in this statute has nothing to do with how the paperwork may look on its surface. In the context of the nature of the decision at issue, given its far-reaching and potentially long term impacts, and given the fact that no appeal mechanism exists, the term "appears" in Section 82 requires a much more rigorous and inquisitorial exercise to take place. In its context "appears" means "is deemed or judged to" after all appropriate investigations and assessments have been completed. The level of the investigation and assessment required will depend on the gravity of the decision involved. As we know a decision to transfer a patient to England against his family's wishes and his own ascertainable wishes is a very grave decision indeed which demands the best informed and most anxious scrutiny. It certainly requires more than an "empirical audit" of the paperwork *presented* to the responsible authority.

40. The issue of paperwork is another matter of concern. The concerns of the family were carefully and appropriately reflected in some of the paperwork which existed in this case. In particular, Dr Monks report noted that the applicant's mother and stepfather had concerns about the applicant being transferred and that they were particularly concerned that there would be substantial disruption of his contact with his family. Dr Monks agreed in his report that this was a "major disadvantage to the transfer plan" and that this factor "raised the threshold for making such a decision". Dr Monks stated that a decision to move a young person to England for specialist secure care had to be made after balancing disadvantages with advantages. Crucially he added:

> **"I stated that if any plan to transfer JR49 to an English secure unit were to be formulated, the responsible mental health team in Beechcroft Unit would need to be satisfied that the advantages outweigh the disadvantages and that it had been *clearly demonstrated* that *all options* to meet the needs of the young person in Beechcroft Unit had**

been exhausted (particularly behavioural and pharmacological interventions).” [Emphasis added]

41. It is a matter of huge concern that Dr Monks' careful report was not included in the paperwork forwarded by the Trust to the responsible authority. What was forwarded was a template document which was actually both inaccurate and misleading. This template document stated that the patient was "ambivalent" about the proposed transfer to England whereas the evidence available to this Court indicated that he was firmly opposed to it. The template document also informed the relevant authority that the patient's mother objected to the transfer and had instructed solicitors to advise her in relation to it. It did not however set out the basis of her objection or any other relevant information.

42. The second piece of paperwork supplied by the Trust was the referral letter from Dr Doherty to Dr Monks in which she seeks his opinion about the suitability of a transfer of this patient to a secure facility in England. Significantly however the paperwork forwarded did not include Dr Monks' detailed and ultimately inconclusive response to that enquiry in which he indicated that the proposed transfer would involve both advantages and disadvantages for the patient and that these would need to be carefully made.

43. The fact that Dr Monks' response was not made available to the responsible authority and, worse, that the responsible authority did not even request it before making a decision on this issue is a matter of concern. It appears that the current mechanisms in place for proposed transfers do not necessitate the transmission of all relevant evidence to the responsible authority. It further appears that the responsible authority does not have its own mechanism for reviewing and evaluating the quality of the evidence supplied to it by Trusts. These are serious flaws in the present system for proposed transfers of detained patients to England and I suggest that they be investigated and corrected at the earliest opportunity.

44. It is axiomatic that a decision founded on incomplete or on partial evidence is likely to be a defective decision which is open to challenge by concerned families. It is in everyone's interests that all sensible systemic provisions should be in place to minimise the need for these types of challenges with all their associated emotional and financial costs.

45. In fact in the present case there is no evidence that either the Trust or the department carried out the balancing exercise recommended in Dr Monks' report. The Respondent by failing to consider the objections to transfer and the possible significant disadvantages of transfer, did not take into account all relevant considerations before reaching its decision authorising the applicants removal to a hospital in England pursuant to Section 82. Accordingly for these reasons the decision must be quashed.