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Judgment: approved by the Court for handing down | *Delivered:* **10/11/06**

(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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

AND ON THE MATTER OF A DECISION OF THE FOYLE HEALTH AND SOCIAL SERVICES TRUST

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MORGAN J

[1] The applicant was born on 5 March 1976. He suffers from paranoid schizophrenia. He was first admitted to hospital on 20 September 2001 and has had multiple admissions to psychiatric hospital since then. His illness is severe and enduring.

[2] On 28 December 2005 he was admitted to Gransha Hospital, Londonderry for assessment under the relevant provisions of the Mental Health (Northern Ireland) Order 1986. On 10 January 2006 his detention was authorised under that Order for medical treatment. He then made an application through his solicitor to the Mental Health Review Tribunal. That hearing took place on 3 March 2006 and having considered the application the Tribunal directed that he should no longer be detained at Gransha hospital.

[3] The Tribunal hearing took place on a Friday and the responsible medical officer had already formed the view that it was appropriate for the applicant to enjoy a period of leave at his mother's home during that weekend. He was due to return on Monday 6 March 2006. On the evening of 3 March 2006 the hospital received 2 telephone call from the applicant's mother and the following note of the call was made:

> "Two telephone calls from Brian's mother last night stating that Brian was roaring and shouting and making threats to kill her. Brian heard shouting in the background, after further talking to Mrs McGee she said he'd had a few drinks on coming home.

> Advised by staff that if she felt unsafe to contact relevant parties and have him returned to hospital. No further phone calls at time of reporting."

[4] The applicant did not return on 6 March 2006 as arranged. At 3:30 p.m. his mother phoned the ward to say that he had left the house at 1 p.m. but he had not reached the ward at that stage. There was a further phone call from his mother at 6 p.m. to say that the applicant had not got the bus to Derry as planned and apparently went to a pub in Strabane and returned home around 6 p.m. His leave was extended for a further day.

[5] On 7 March 2006 the letter containing the tribunal's decision was received at Gransha hospital. At about 11 a.m. on that morning a psychiatric nurse working on the applicant's ward telephoned him and asked him if he intended to return to hospital. He indicated that it was his intention to do so. He expected to arrive back around 2 p.m. She says that she was unaware of the outcome of the Mental Health Review Tribunal hearing and was in particular unaware that the hospital had received a letter containing that decision. The applicant alleges that the nurse who spoke to him on the telephone advised him that police would be called if he did not return and also advised him that there was a letter addressed to him that he had to collect. There was no application to cross examine the nurse in relation to this conversation and in those circumstances I cannot be satisfied that the applicant's account of the conversation is correct.

[6] The applicant returned to the hospital around lunchtime on 7 March 2006. Nursing staff gave him the letter from the Mental Health Review Tribunal advising him that he was no longer a detained patient. At approximately 3 p.m. he indicated to nursing staff his decision to leave the hospital. In accordance with normal procedure Dr Qureshi came to discuss the situation with the applicant. She found him pacing around the corridor and found he was expressing paranoid ideas regarding his mother. A contemporaneous note is held in the nursing records:

> "Brian returned from leave today and was informed of tribunal decision that he be made a voluntary patient. Seen by Dr Qureshi who attempted to persuade Brian to remain in hospital to have his medication changed to depot which he was agreeable to. During conversation Brian voicing paranoid ideas regarding his mother and ideas of reference about paramilitaries in Strabane. Brian still insisting on leaving hospital today, Dr Qureshi spoke then to Brian's mum who was extremely unhappy that he was likely to be returning home. She states that whilst on leave Brian had been drinking and had

> threatened to kill both her and brother Patrick. Mrs McGee sees no improvement in Brian's mental state and feels afraid and threatened by him.

Dr Qureshi spoke to Dr O'Hara about situation and Form 5 completed. Brian informed of this decision and became irritable and agitated. Spent remainder of evening pacing corridor talking aloud and voicing various delusional ideas about being in "gardai special unit" and a commando. Threatening and hostile in manner."

[7] In a report prepared on 14 March 2006 Dr O'Hara indicated that on the basis of this information it seemed to him that the applicant had experienced considerably increased psychotic thinking than had been evident prior to him going on leave. There also seemed to be evidence that threats were more specific and explicit than had previously been expressed. It was on that basis that he advised Dr Qureshi that she should not allow the applicant to return home and that since he was now a voluntary patient she should use the power under article 7 of the 1986 Order so that a more detailed assessment could be made as to whether the criteria for detention for assessment under the Order were now met.

[8] For the applicant Mr McCann submitted that there was considerable evidence that he had previously made threats to his mother and others. He pointed to a psychiatric note on 3 February 2006 in which his mother claimed that he shouted that he was going to kill her and hang her. He also pointed to a psychiatric note made on 24 February 2006 when she claimed that the applicant said he was going to kill her and other people. It is agreed that on 28 February 2006 he was heard on the ward saying "I'll get you bitch". Dr O'Hara give evidence that he believed the statement was directed towards his mother although there was no express reference to her at the time. Although at one stage there appeared to be some difference of recollection between Dr O'Hara and the applicant's solicitor as to what occurred at the Tribunal it is now clear from the affidavits that there is no such dispute.

[9] The legislative provisions governing the admission of patients to hospital for assessment are contained in article 4 of the Mental Health (Northern Ireland) Order 1986:

> "4.-
>
> (1) A patient may be admitted to a hospital for assessment and there detained for the period allowed by Article 9, in pursuance of an application for admission for assessment (in this Order referred to as "an application for assessment ") made in accordance with this Article.

(2) An application for assessment may be made in respect of a patient on the grounds that—

(a) he is suffering from mental disorder of a nature or degree which warrants his detention in a hospital for assessment (or for assessment followed by medical treatment); and

(b) failure to so detain him would create a substantial likelihood of serious physical harm to himself or to other persons.

(3) An application for assessment shall be founded on and accompanied by a medical recommendation given in accordance with Article 6 by a medical practitioner which shall include—

(a) a statement that, in the opinion of the practitioner, the grounds set out in paragraph (2)(a) and (b) apply to the patient;

(b) such particulars as may be prescribed of the grounds for that opinion so far as it relates to the ground set out in paragraph (2)(a);

(c) a statement of the evidence for that opinion so far as it relates to the ground set out in paragraph (2)(b)."

Article 5 sets out those who may apply:

"5. -

(1) Subject to the following provisions of this Article, an application for assessment may be made by—

(a) the nearest relative of the patient; or

(b) an approved social worker,

and such a person is, in relation to an application for assessment made by him, referred to in this Order as "the applicant ".

(2) An application for assessment shall not be made by a person unless he has personally seen the patient not more than two days before the date on which the application is made.

> (3) An application for assessment shall not be made by an approved social worker except after consultation with the person, if any, appearing to be the nearest relative of the patient unless it appears to the approved social worker that in the circumstances such consultation is not reasonably practicable or would involve unreasonable delay. ”

Article 9 of the 1986 Order deals with the assessment and in particular provides the time limits within which an assessment can be carried out. The power to detain after assessment is contained in article 12 of the 1986 Order.

[10] The powers of the Mental Health Review Tribunal to direct the discharge of a patient are found in article 77 of the 1986 Order.

> "77. -
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> (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—
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> (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.".

The only other relevant provision is contained in article 7 (2) of the 1986 Order which provides a mechanism for detaining existing patients for assessment of their mental health.

> "7. -
>
> (1) An application for assessment may be made under this Part notwithstanding that a patient is already an in-patient in a hospital who is not liable to

> be detained there under this Order; and where an application is so made the patient shall be treated for the purposes of this Part as if he had been admitted to the hospital at the time when that application was received by the responsible authority.
>
> (2) If, where a patient is an in-patient in a hospital, but is not liable to be detained there under this Order, it appears to a medical practitioner on the staff of the hospital that an application for assessment ought to be made in respect of the patient, he may furnish to the responsible authority a report in the prescribed form to that effect; and where he does so, the patient may be detained in the hospital for a period not exceeding 48 hours from the time when the report is so furnished."

[11] For the applicant Mr McCann submitted that the hospital was obliged to comply with the decision issued by the Mental Health Review Tribunal and that its failure to do so was unlawful. It had concluded that it was not satisfied that the applicant's discharge would create a substantial likelihood of serious physical harm to himself or others. It was not open to the hospital to review that decision. In any event once the tribunal had communicated that decision the applicant was no longer a patient and accordingly the hospital were not entitled to use the procedure under article 7 of the 1986 Order.

[12] For the respondent Mr Potter submitted that this was a case where the circumstances had changed between the date on which the tribunal had made its assessment and the date on which the hospital made a revised assessment. He further contended that at all material times the applicant remained a patient within the hospital so that the article 7 procedure was appropriate. I am grateful to both counsel for their helpful submissions.

[13] The parties are agreed that the leading authority governing the circumstances in which a patient may be detained in face of a tribunal decision in his favour is R (Von Brandenburg) v East London and City Mental Health NHS Trust [2004] 2 AC 280. At paragraph 8 the House recognised the need to give effect to tribunal decisions:

> "8. Fourthly, the rule of law requires that effect should be loyally given to the decisions of legally-constituted tribunals in accordance with what is decided. It was clearly established by the House in P v Liverpool Daily Post and Echo Newspapers plc [1991] 2 AC 370 that a mental health review tribunal is a court to which the law of contempt applies. It

> follows that no one may knowingly act in a way which has the object of nullifying or setting at nought the decision of such a tribunal. The regime prescribed by Part V of the 1983 Act would plainly be stultified if proper effect were not given to tribunal decisions for what they decide, so long as they remain in force, by those making application for the admission of a patient under the Act. It is not therefore open to the nearest relative of a patient or an ASW to apply for the admission of the patient, even with the support of the required medical recommendations, simply because he or she or they disagree with a tribunal's decision to discharge. That would make a mockery of the decision."

14. That placed a constraint in particular on the actions of Approved Social Workers as set out at paragraph 10:

> "10. The problem at the heart of this case is to accommodate the statutory duty imposed on ASWs (by whom, in practice, most applications for admission are made) within the principles referred to in paras 6, 7 and 8 above. The correct solution is in my opinion that proposed by the Master of the Rolls, although I would express it in slightly different terms. In doing so, I do not find it necessary to make detailed reference to the European Convention. Consistently with the principle identified in para 8 above, an ASW may not lawfully apply for the admission of a patient whose discharge has been ordered by the decision of a mental health review tribunal of which the ASW is aware unless the ASW has formed the reasonable and bona fide opinion that he has information not known to the tribunal which puts a significantly different complexion on the case as compared with that which was before the tribunal."

[15] It is clear, however, that the House recognised the difficult position of doctors exercising clinical judgment in the best interests of their patient:

> "12. It was argued for the appellant that if "the mental health professionals ", having considered a previous tribunal decision, consider that there has been a relevant change of circumstances justifying them in taking a different view from the tribunal they must give reasons for their decision at the time. I

> would observe that the test of relevant change of circumstances was rejected by the Court of Appeal and is not the test which I have propounded. I would, secondly, resist the lumping together of the ASW and the recommending doctor or doctors as "the mental health professionals". It is the ASW who makes the application, not the doctors. While it will doubtless be helpful if a medical recommendation identifies any new information on which it is based, a recommending doctor is not in my opinion required to do more than express his or her best professional opinion."

[16] In this case I am satisfied that the medical practitioner at Gransha Hospital came to a bona fide belief that there had been a change for the worse in the medical condition of the applicant during his period of home leave between 3 and 7 March 2006 and having regard to the notes made during this period and her discussion with Dr O'Hara that it was reasonable for her to conclude that a period of assessment under article 7(2) of the 1986 Order was required. I do not have to consider to what extent if at all the position of a medical practitioner exercising an article 7(2) power is different from that of the recommending doctor. Accordingly I consider that the application fails on this point.

[17] The power under article 7(2) is only available if the applicant at the relevant time was an in patient in the hospital. The applicant contended that the tribunal's decision operated as a discharge from the hospital. In my view there is no support for that view in the authorities or the legislation. In R (on the application of DR) v Mersey Care NHS Trust [2002] EWHC Admin Wilson J said that the word in-patient "suggests the allocation and use of a hospital bed". That view is broadly supported in Richard Jones, Mental Health Act Manual, Ninth Edition. In my view it is the test which I should adopt in this case. I consider that at all material times the applicant retained his in-patient status in the hospital and that the medical practitioner was, therefore, entitled to exercise the article 7(2) powers in the 1986 Order in respect of him. Accordingly I dismiss the application.