Neutral Citation No. [2014] NIQB 88

Ref: **TRE9337**

*Judgment: approved by the Court for handing down (subject to editorial corrections)**

Delivered: **27/06/2014**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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RS's Application [2014] NIQB 88

AN APPLICATION BY RS FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION BY THE SOUTH EASTERN HEALTH AND SOCIAL CARE TRUST DATED 10 MAY 2014

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TREACY J

Introduction

[1] This is a challenge to both the decision to detain the applicant under Art4 and later under Art12 of the Mental Health (Northern Ireland) Order 1986 ("the 1986 Order").

Relief Sought

[2] The applicant seeks the following relief:

(a) An order of certiorari quashing a decision of the South Eastern Health and Social Care Trust made on 10 day of May 2014 whereby the Applicant was detained against his will in Downshire Hospital, pursuant to Article 12 of the Mental Health (Northern Ireland) Order 1986.

(b) A declaration that the said decision is unlawful, *ultra vires* and of no force or effect.

(c) An order that the Applicant be released from his detention at Downshire Hospital and that he shall be allowed to return to the community at large.

(d) By reason of the continued existence of the decision to detain the Applicant, an order by way of interim relief suspending the effect of the decision against the applicant pending the determination of these proceedings.

(e) Damages for unlawful detention and breach of the Applicant's rights pursuant to Article 5 and 8 of the European Convention on Human Rights for the period commencing on 10 day of May 2014 when the Applicant was detained by the Respondent until the date of his discharge from detention.

Grounds upon which Relief is Sought

[3] The relief is sought on the following grounds:

(a) The Respondent's decision to detain the Applicant on 10 day of May 2014 was *Wednesbury* unreasonably and procedurally unfair in that the Respondent's Approved Social worker has failed to identify adequate information regarding the Applicant, that was not known to the Mental Health Review Tribunal for Northern Ireland when it made its determination on 4 March 2014, that puts a sufficiently different complexion on the circumstances of the Applicant and that is therefore sufficient to render the determination of the Mental Health Review Tribunal redundant.

(b) In detaining the Applicant under Article 4 of the Mental Health (Northern Ireland) Order 1986 the Respondent's aced in a manner that was *Ultra Vires, Wednesbury* unreasonable and procedurally unfair and dis so, in particular, by:

(i) Failing to found the Applicant's detention on an adequate statement of evidence in accordance with the requirement provided for in Article 4(3)(c) of the Mental Health (Northern Ireland) Order 1986;

(ii) Failing to apply the appropriate test as provided for by Article 4(2)(b) of the Mental Health (Northern Ireland) Order 1986;

(iii) Paying regard to evidence that does not fall within Article 2 (4) of the Mental Health (Northern Ireland) Order 1986 when determining whether the Applicant met Article 4(2) (b) of the Mental Health (Northern Ireland) Order 1986;

(iv) Failing to provide adequate reasons for detaining the Applicant pursuant to Article 4 of the Mental Health (Northern Ireland) Order 1986.

(c) In detaining the Applicant under Article 12 of the Mental Health (Northern Ireland) Order 1986 the Respondent's acted in a manner that was *ultra vires, Wednesbury* unreasonable and procedurally unfair and did so, in particular, by:

(i) Failing to provide an adequate statement of evidence in accordance with the requirement provided for in Article 12 (1) (d) of the Mental Health (Northern Ireland) Order 1986.

(ii) Failing to apply the appropriate test as provided for by Article 12 (1) (b) of the Mental Health (Northern Ireland) Order 1986.

(iii) Paying regard to evidence that does not fall within Article 2(4) of the Mental Health (Northern Ireland) Order 1986 when determining whether the Applicant met Article 12 (1) (b) of the Mental Health (Northern Ireland) Order 1986.

(iv) Failing to provide adequate reasons for detaining the Applicant pursuant to Article 12 of the Mental Health (Northern Ireland) Order 1986.

(d) In detaining the Applicant pursuant to Articles 4 and 12 of the Mental Health (Northern Ireland) Order 1986 the Trust has acted in a manner contrary to its obligations under section 6 of the Human Rights Act 1998 and has acted incompatible with the applicant's rights under Article 5 and 8 of the European Convention on Human Rights in a manner which is not proportionate.

Factual Background / Sequence of Events

[4] On 23 August 2012 the applicant was detained for assessment pursuant to Art 4 of the 1986 Order and subsequently detained for treatment pursuant to Art 12 of the same Order.

[5] The applicant was discharged from the above period of detention on 4 March 2013 on foot of a decision of the Mental Health Review Tribunal ("the Tribunal") and currently remains in hospital as a voluntary patient. On 18 March 2013 he was discharged from the hospital into the community.

[6] On 10 May 2014 the respondent acceded to the application of the approved social worker under Art 4 of the 1986 Order to detain the applicant for assessment. Both Form

2 and Form 3 were completed and submitted on that date. Form 7 in relation to accepting the admission was completed by Dr Murty.

[7] On 12 May 2014 Dr Finnerty completed Form 8 pursuant to Art 9(6) of the 1986 Order to extend the period of assessment to 48 hours and on 15 May 2014 he completed Form 9 pursuant to Art 9(8) of the 1986 Order to extend the period of assessment to 7 days.

[8] The applicant applied to the Tribunal for a review of his detention on 16 May 2014 and his solicitor requested copies of the applicant's detention forms from the respondent.

[9] On 22 May 2014 Dr Finnerty completed Form 10 for the purpose of detaining the applicant for treatment under Art 12 of the 1986 Order.

[10] The respondent provided the applicant's detention forms to his representative on 23 May 2014 and on 30 May 2014 the applicant's representative sent a pre-action letter to the respondent.

[11] Proceedings were lodged with the Judicial Review on 3 June 2014 and the applicant received a response to the pre-action letter. The leave hearing began on 4 June 2014 and when it recommenced on 5 June 2014 the parties indicated that they were prepared to deal with the matter by way of a rolled up hearing. The rolled up hearing commenced and at the conclusion of the days' hearing the Court granted the applicant leave and directed further affidavits be provided by the respondent. The applicant was discharged from detention by the respondent. The expedited hearing of the case concluded on 11 June 2014.

Statutory Framework

[12] Art 2(4) of the 1986 Order provides:

> "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 judgement 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 only had 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."

[13] Art 4 of the 1986 Order provides:

"(1) A patient may be admitted to 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)."

[14] Art 12 of the 1986 Order provides:

"(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 RQIA 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;

(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;

(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) he 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."

[15] Art 5 of the European Convention on Human Rights states:

> "(1) Everyone has the right to liberty and security of the person. No one shall be deprived of this liberty save in the following cases and in accordance with a procedure prescribed by law:
> ….
>
> (e) The lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants."

[16] The 1986 Order Code of Practice (paras 2.55)

> "Medical recommendations should be examined at the same time as the application. They must be scrutinised to ensure that they show sufficient legal ground for detention…."

[17] The 1986 Order – A Guide (para 24)

> "It will be for the doctor to decide whether the evidence for one or more of the above is sufficient to warrant admission for assessment, but clearly a mentally disordered person who was simply making a nuisance of himself or indulging in anti-social behaviour would not meet the criteria. On the other hand, it is clear from paragraph 23(ii) that it is not necessary to wait until the patient has actually injured himself before admitting him to hospital."

[18] The 1986 Order – A Guide (paras 34-35)

> "[34] An error or defect in an application for assessment, the medical recommendation on which it is based, or a medical report given under Article 9, may mean that the authority for the detention of the patient is open to challenge and could be found to be invalid…
>
> [35] Those who sign applications, medical recommendations or reports should take care to see that they comply with the requirements of the Order and are in the proper form. Boards should make arrangements to have the admission documents carefully scrutinised as soon as the patient has been admitted…."

Arguments

Applicant's Arguments

[19] The applicant argued that the respondent failed to follow the statutory procedure under the 1986 Order in detaining and continuing to detain him under the 1986 Order, that the respondent did not apply the correct test as prescribed by the 1986 Order, and that the respondent breached the applicant's rights pursuant to the ECHR in a manner that was not lawful or proportionate.

[20] The applicant submitted that in order to satisfy Art 5 of the ECHR the burden of proof in this matter has to fall on the respondent as they are the party seeking to justify the detention of the applicant.

Failure to apply the statutory test in Article 4 for detention

[21] The applicant submitted that the contents of Dr Doyle's entries on Form 3 (i.e. that the applicant's thought process is disordered, that he is unable to explain how there is no electricity or food in his house or to discuss his daily routine, and examples of the applicant's paranoid statements regarding persons in the community) do not contain any evidence that the applicant's judgement was so affected that he was, or would soon be, unable to protect himself from serious physical harm and that reasonable provision for his protection is not available in the community. Therefore in accepting this recommendation the respondent failed to adhere to the provisions of Art 4 of the 1986 Order when detaining the applicant for assessment.

[22] The applicant submitted that evidence of self-neglect cannot equate to evidence that the applicant would be unable to protect himself from serious physical harm; that despite the absence of food there is no evidence that the applicant was severely malnourished, despite the absence of electricity there is no evidence that the applicant was physically suffering as a result and that in spite of the unusual statements made there is no evidence that the applicant had drawn the adverse attention of other individuals or been subject to physical assaults or threats.

[23] The applicant submitted that Dr Doyle's final comment that he was 'currently mentally unwell and unable to care for himself in the community' disclosed the doctor's failure to apply the appropriate test. Consequently the form contained evidence of the applicant struggling to care for himself rather than evidence of the applicant being unable to protect himself against serious physical harm. The applicant submitted that the respondent should have recognised that the application was defective and should have been declined.

Failure to adhere to the provisions of Art 12 of the 1986 Order in the detention of the applicant for Treatment

[24] The applicant noted that the Responsible Medical Officer (RMO), when filling in Form 10, which is sufficient authority to detain the patient for treatment, relies not on Art 2(4)(a)(ii) (which Dr Doyle had relied upon solely on Form 3) but on Art 2(4)(b) (ii) (i.e. that the patient has so behaved himself that other persons were placed in a reasonable fear of serious physical harm to themselves). The applicant submitted that the complete abandonment of the ground that was the basis of admission for assessment was highly unusual particularly given the short period of only 12 days between the submission of Form 3 and the completion of Form 10. The applicant further submitted that this lends weight to the applicant's argument that Form 3 did not disclose evidence that the applicant would not be able to protect himself from serious physical harm in the community.

[25] The applicant argued that the statement of evidence supporting the RMOs assertion that the applicant fell within the Art 2(4)(b)(ii) test did not adhere to the Art 2(4) requirement. The applicant submitted that there was no evidence that the applicant had behaved violently towards other persons or that the applicant had so behaved himself that other persons were placed in reasonable fear of serious physical harm to themselves.

Arts 5 & 8 ECHR

[26] The applicant submitted that due to the procedural failures of the respondent it failed to lawfully detain the applicant and as such his Art 5 and 8 rights have been breached.

The Failure of the Respondent to Identify Information not known by the Mental Health Review Tribunal that puts a Significantly Different Complexion on the case.

[27] The applicant relied on the decision of R (von Brandenburg) v East London and City MH NHS Trust [2003] UKHL 58 to argue that:

> "[10] … 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."

The applicant submitted that no such information exists in the instant case and as such the ASW was not in a position to lawfully apply for his admission.

Respondents Arguments

Art 4 Arguments

[28] The respondent argued that there was clear evidence before the court to show that a proper construction of the Form 3 as completed by Dr Doyle on 10 May following her joint assessment of the applicant that day, highlighted that there were more than ample grounds upon which Dr Doyle and laterally the admitting hospital could find that the Art (2)(b) and Art 4(3) tests were met.

[29] The respondent submitted that the information provided on the Form 3 could properly be said to meet the Art 2(4) criteria as to the type of evidence that can be properly taken into account in reaching a conclusion as to the 'serious harm to self' test under Art 4 (2)(b).

[30] The respondent submitted that it had discharged the burden of establishing that as at 10 May 2014, circumstances were such that the applicant's judgement was so affected that he would at the very least, soon be unable to protect himself against serious physical harm, that is harm not trivial or minor, if not already unable to so protect. The respondent did not accept that any analysis of the process of the Form 3 application fell foul of the analysis of the 'serious harm' test set out in JR45 (2011) NIQB 17.

[31] The respondent submitted that it was obvious and proper to infer from the evidence that the applicant would at the very least soon to be unable to protect himself against serious harm. The evidence recited is as follows:

> "RS is a man with a chronic history of paranoid schizophrenia, he has spent in excess of 8 out of the last 10 years as an inpatient, immediately prior to the application to admit he had self-reported as being non-compliant with his essential medication for 7 weeks, he had slept rough, he had no access to his own home, his accommodation had no provision for food, gas or heat, he was not living in any kind of supported living, he had disengaged entirely from his own Home Treatment Team, and finally that he was displaying delusional and paranoid thinking."

[32] The respondent submitted that the Form 3 conveyed the essential elements of the grounding evidence above upon which a determination that the applicant would at least soon to be unable to protect himself against serious harm in the manner envisaged in JR45.

[33] The respondent argued that the statutorily prescribed forms limit the level of detail that can be inserted thereon. The respondent contended that the Form 3 document created a sufficient basis upon which both the admitting Trust, and the

applicant himself, would be aware of the grounds for the decision to admit for assessment.

Failure to identify information not known to the MHRT

[34] The respondent submitted that this argument should only fall to be considered if the court were to determine that there were no appropriate statutory grounds under Art4 to admit the applicant for assessment. If the respondent's submissions were accepted in that regard, then this avenue did not fall to be determined.

[35] The respondent submitted that the applicant's argument in this regard was based on a direct lift from the wording of Von Brandenburg. That case would only apply where the ASW was aware of the MHRT judgment. In this instant case neither the ASW nor the recommending GP had any access to or knowledge of the MHRT decision on 10 May.

Art 12 Arguments

[36] The respondent did not accept that a decision 12 days post admission relying on a different limb of the statutory test could be said to be highly unusual or inconsistent. Under the equivalent English test dealing with similar admissions criteria to detain based on serious harm, two medical opinions are required which are permitted to rely on separate grounds even on the same date of assessment.

[37] The respondent submitted that Form 10 taken as a whole could properly be found to include the foundation of his opinion that the applicant had so behaved that other persons were placed in reasonable fear of serious physical harm to themselves. It is an artificial and illogical position to invite the court to disregard the information on p1 of Form 10 in the context of the patient and his condition. Dr Finnerty has particular knowledge of the applicant grounded on the many years he has spent as his clinician.

[38] The respondent submitted that the requirements of the Art 2(4) test as analysed in JR45 were met - that the harm not be trivial or minor, that the violence or apprehended violence should be physical in nature, and that any apprehension of harm should import an objective element such as to avoid unfounded, irrational or ill motivated assertions of fear by some third party. The respondent stated that in this case these pre conditions are established by the evidence provided by Dr Finnerty.

Arts 5 & 8 ECHR

[39] The respondent argued that any such breaches are contingent on the liability of the respondent under the other headings, which was not accepted. The respondent accepted that Arts 5 and 8 are engaged by virtue of Arts 12 and 4 of the 1986 Order.

Discussion

[40] In the first instance I accept the respondent's contentions [summarised at para [35] above that R v East London and the City Mental Health NHS Trust (ex parte von Brandenburg) [2003] UKHL 58 has no application in the instant case since neither the ASW nor the recommending GP had access to or knowledge of the MHRT decision on 10 May. In any event I am satisfied as a matter of objective fact that the position of the applicant had materially changed between the MHRT decision and the date of the application for assessment

Issues relating to detention under Art 4

[41] A lawful admission to hospital under Art 4 may only be effected where the following statutory measures have been properly carried out (to paraphrase the relevant sections of the 1986 order)

> "(a) An application is made (by an approved person which is grounded on the two permissible statutory criteria (both of which must be made out). These criteria are that:
>
> (i) 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
>
> (ii) Failure to so detain him would create a substantial likelihood of serious physical harm to himself or to other persons.
>
> (b) The application must be accompanied by a medical recommendation (in accordance with article 6, compliance with which is not contested in the instant case) which contains the following:
>
> (i) A statement from the medical practitioner that in her opinion both of the permissible criteria are made out.
>
> (ii) Particulars of the basis upon which her opinion that the patient 'is suffering from a mental disorder of a nature or degree which warrants his detention in a hospital for assessment'.
>
> (iii) A statement of evidence upon which the medical practitioners opinion that 'failure to detain [the patient] would create a substantial likelihood of

serious harm to himself or to other persons'. In making a determination about whether or not such failure would create such harm, it is only permissible to consider certain specific types of evidence. That evidence is, per Art 2(4) as follows:

"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.

(c) Such application must be made on a prescribed form and addressed to the responsible authority."

[42] In the instant case the application was made on the basis that both grounds were made out and was accompanied by a medical recommendation. The applicant's complaint in relation to the Art 4 detention relates to the content of the medical recommendation in relation to the second required criteria i.e. the substantial likelihood of serious harm to himself or to another.

[43] Dr Doyle indicated on the relevant form that she was of the opinion that failure to detain the applicant would create a substantial likelihood of serious harm to himself on the basis of evidence of the type that tended to show that his judgement was 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. The specific items of evidence in the doctor's statement of evidence are as follows:

> "(a) His thought processes appear disordered.
>
> (b) He is unable to explain why there is no electricity or food in his house.
>
> (c) He is unable to discuss his daily routine.
>
> (d) His thoughts in relation to why he has no electricity are paranoid.
>
> (e) He expressed paranoid ideas about republicans and immigrants.
>
> (f) Finally, in the doctor's opinion he is currently unwell and unable to care for himself in the community."

[44] It seems uncontentious to me that a man suffering paranoid ideation, with disordered thought processes, who has no electricity or food in his home and cannot explain why this is so can reasonably and rationally be considered to be suffering from judgement so affected that at a minimum he is, or would soon be, unable to protect himself from serious physical harm. If he is unable currently to protect himself in the most basic way (i.e. by providing electricity and food) then this will, in the first instance, soon cause serious (i.e. 'more than trivial or minor' per JR45) physical harm. Even if it may take some time for the effects of lack of food, heating and washing facilities to become apparent, it remains the case that at the moment in time when the doctor was assessing him it appeared to her that at that time he was actually unable to protect himself from those things. He is creating for himself a situation where serious physical harm is inevitable and he doesn't seem to do anything about it, thus, he clearly meets the test.

[45] For these reasons I do not believe that the detention under Article 4 was unlawful.

Issues relating to detention under Art 12

[46] A person may be detained for treatment under Art 12 where, during the assessment period he is examined by a medical practitioner who prepares a report which includes:

> "(a) A statement that in his opinion both of the permissible criteria are made out; and

(b) Gives the grounds/evidence for his opinions in the same manner as for detention under article 4 as laid out above."

[47] On the statutory form the RMO, in the relevant part, indicated his opinion that failure to detain the applicant would create a substantial likelihood of serious physical harm to himself or others on the basis of evidence indicating that he had so behaved himself that other persons were placed in reasonable fear of serious physical harm to themselves. The specific items of this evidence are listed on the form as:

"(a) He is highly likely to disengage from treatment and misuse alcohol if not in hospital.

(b) Disengaging in treatment/misusing alcohol has been associated with increased psychosis in the past.

(c) He requires further period of in-patient treatment."

[48] Elsewhere on the form, to evidence his opinion that the patient is suffering from a mental illness which warrants his detention in hospital for medical treatment, Dr Finnerty states:

"(a) Presents as paranoid and suspicious.

(b) Verbally abusive towards others on ward.

(c) Presents as intimidating.

(d) Encroaches on others' personal space and staring excessively.

(e) Lacks insight."

[49] In his affidavit Dr Finnerty expands on the evidence on Form 10 as follows:

"I am very familiar with RS as he has been a patient at Downe Hospital for many years since I started work there in August 2005. For the majority of my time at Downe Hospital, RS has been an in-patient in [sic] due to his paranoid schizophrenia……

…As at the 22nd May 2014, the main focus of my concern regarding RS was not so much his self-care risks, as these to some extent were addressed through his care package on the ward and the more settled environment in which he adjusted to, but that of potential physical harm to others. On the 22nd May I have recorded on the Form 10 the following 'presents as paranoid and suspicious. Verbally abusive towards others

on the ward – presents as intimidating – encroaching on others' personal space and staring excessively – lack insight.' The purpose in highlighting this information in the form was intended to describe some of the presenting features of his mental condition at that point in time, although the underlying diagnosis of paranoid schizophrenia has remained consistent since he was 19 years old. However, I also included this information in support of my clear view at that time that RS, based on those clinical presentations of his illness, required to be detained in order to avoid a risk of serious physical harm to others. I did not consider it possible or logical to disentangle his clinical presentation at that time, with the risks that I was concerned about should he not be detained for treatment.

…I considered this information to be part and parcel and complementary to the previous information provided. In my view, RS at that time was in an acutely psychotic and paranoid delusional state, even within the parameters of his ongoing illness, and his presenting behaviours at that time and based on my previous knowledge of him, gave rise to a real risk of physical harm. Any attempt to address this outside of a detained setting at that time was almost certain not to succeed due to his very recent proved non-compliance that was a major contributor to the very psychotic state that we were attempting to treat.

In assessing the evidence that was available to me at that time to establish that RS had "so behaved himself that other persons were placed in reasonable fear of serious physical harm to themselves", I drew on general information provided to me by both the nursing staff and my Senior House officer Dr Thornton. I was aware from these sources and my observations that RS had been exhibiting quite a lot of staring behaviours, where he would come right up into the personal space of the staff in an intimidating manner. Dr Thornton had informed me that RS had come up to he [sic] window of the doctor's office and had proceeded to stare at her for a considerable period of time without

> speaking. RS was also noted to have spent significant period of time staring excessively at the other patients and encroaching on their personal space on a number of occasions. Nursing staff had also informed me that he has presented as verbally hostile and abusive to them at times.
>
> In of themselves these behaviours need not always be of significant concern on a ward where often many different presentations are common and are dealt with by staff. However, in the case of RS, I was concerned that this has in the past been a clear indicator of a deepening state of psychosis and paranoia on his part that has progressed relatively shortly thereafter to physical outbursts. Against a background of what appeared to have been a lengthy period of non-compliance with any of his medication prior to his admission … his agitated state on the ward was of concern in itself. Taken in conjunction with his previous clinical history of which myself and the staff on the ward were very aware, this led me to the view that I expressed on the Form 10 on the risk of serious harm."

[50] While I appreciate that the RMO has worked with the applicant for many years, and while I do accept his affidavit evidence that he genuinely believed that the relevant test was made out, no actual acceptable evidence making out the ground was contained on the form and therefore no lawful detention under Art 12 was effected.

[51] The Art 12 report is *only* sufficient authority for the responsible authority to detain the patient in the hospital for medical treatment but only if the cumulative statutory requirements for the report spelt out in Art 12 have been satisfied. The completion of this report is therefore no mere formality as it is this report which if, and only if, it meets the requirements of Art 12 constitutes sufficient authority to detain. Persons involved in administering this scheme on the ground must understand that these statutory forms, perfunctory as they are, are *not* a mere formality, they are an important safeguard and must be capable of demonstrating that the statutory test is made out on acceptable, permissible evidence and that as such the patient is not being deprived of his liberty unlawfully. I do not doubt the doctor's judgement in any way, and as I said, it was his job to ensure the applicant got the care that he needed. On top of their clinical duties the persons administering the scheme must clearly demonstrate in the prescribed manner (which is far from onerous) that the two tests are made out and that the detention is lawful.

[52] All that is required is for the doctor to fill in *some* rational reason to justify the view they have arrived at. If the doctor had simply stated on the form 'I have observed

these presentations [staring, verbal abuse, evidence of increased psychosis] and in my clinical experience with RS these presentations usually preface a violent outburst' I believe that would have been sufficient to meet the test. In this regard I note that the 'behaviour placing persons in reasonable fear of serious physical harm' test is expressed in the past tense, however I would caution that this does not allow the form filler to rely on purely historical evidence, unless as in this case, there is some reason to believe that that historical evidence is *currently relevant*. Any use of evidence in this manner must of course disclose a rational connection between historical behaviour and current behaviour.

[53] Further, I note that the doctor is obliged to 'specify whether other methods of dealing with the patient are available and, if so, why they are not appropriate' [see Art 12(1)(d)]. This requirement was not addressed at all on Form 10. This a further reason why no lawful detention under Art 12 was effected.

Conclusion

[56] For the above reasons the judicial review must be allowed. I will hear the parties as to what further relief, if any, is required.