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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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IN THE MATTER OF AN APPLICATION BY SM AS FATHER AND NEXT FRIEND OF RO FOR A WRIT OF HABEAS CORPUS

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KEEGAN J

Introduction

[1] This application was lodged on 7 October 2020. It was first heard by Mr Justice McAlinden on 15 October 2020 and on that date the matter was adjourned pending my judgment with respect to declaratory proceedings. I gave my judgment on 9 November 2020 and it is reported at [2020] NIFam 23. This matter was then sent to me for hearing of the habeas corpus application and I heard the case on 23 November 2020. The case before me proceeded on the submissions of Mr Heraghty on behalf of the applicant and Mr Potter on behalf of the respondent. Mr Sands appeared as a notice party instructed by the Department of Justice. I inquired whether the Mental Health Review Tribunal was represented and was told that the Review Tribunal had been put on notice but did not wish to make any representations. This has been confirmed in subsequent correspondence.

[2] The application is therefore made within the context of my judgment of 9 November 2020 in which I effectively adjourned declaratory proceedings for this person and another person who are subject to Hospital Orders with restriction and who have proceedings before the Review Tribunal. These cases are affected by the Supreme Court decision in *Secretary of State for Justice v MM* [2018] UKSC 60 which I discuss in my decision.

[3] At the outset of these habeas corpus proceedings Mr Potter on behalf of the Trust accepted that the Trust was a proper respondent and also confirmed that the Trust was bringing further proceedings before the court by the end of November/start of December with a view to asking the court to give declaratory relief which would allow the matter to proceed back to the Review Tribunal before Christmas with a view to having this applicant discharged into accommodation in the community along with a care package. I note that these proceedings are not yet

lodged which is hugely disappointing and why I have given this judgment today. As I explained in my original judgment there was an evidential gap apparent to me in relation to the applicant's capacity and also in relation to whether or not the requirements of Article 5 were met in the case for continued detention/conditions flowing from the requirements of *Winterwerp v The Netherlands*[1979] 2 EHRR 387.

[4] The application for habeas corpus therefore came whilst judgment was pending which is somewhat usual. However habeas corpus is a relief as of right and can be brought at any time to consider the lawfulness of a person's detention. As Mr Heraghty in his submissions states:

> "A habeas corpus application constitutes a relatively straightforward and uncomplicated means by which a court can adjudicate on the lawfulness of a person's detention which should not – and in this case it does not – require extensive consideration of the applicable jurisprudence. The question of whether a person is lawfully detained is a very hard-edged and binary one."

That being said habeas corpus has more than once been found by the European Court of Human Rights to be an inadequate remedy because it fails to provide the court with sufficiently intensive powers to review the factual basis or judgments upon which detention has been ordered. This flows from *X v United Kingdom* [1982] 4 EHRR 188 and *HL v United Kingdom* [2005] 40 EHRR 32.

[5] The first port of call in looking at this issue is the decision of the Review Tribunal which must be considered in full. It is a decision which is contained within a written ruling of Ms Fenton. It is important to note that attached to that written ruling are further reasons not to be disclosed to the patient which appear to be due to statements that were made of a very prejudicial nature by persons in relation to the genuine and understandable fear for their safety *vis-a-vis* RO. In any event, the Review Tribunal adjudicated upon the case which was made by RO for an absolute discharge. That was rejected. The conditional discharge was the mechanism by which the Review Tribunal decided that this person should be discharged. That was not accepted by the Department of Justice. However, as Mr Sands frankly said, the Department has to live with that. In any event by agreement the proceedings were adjourned on consent to allow the Trust to bring an application for declaratory relief to the High Court in order to satisfy the lawfulness requirements of Article 5 following on from the Supreme Court case of *MM.*

[6] The Review Tribunal decision must be looked at in its entirety. Whilst Mr Heraghty has referred me to paragraph 24, paragraph 25 is also important along with subsequent paragraphs. I set these out as follows:

> "24. The tribunal is satisfied that RO has completed all medical and psychotherapeutic work which can be

provided in hospital and that the development of specialised, effective community provision for RO's supervision, care and treatment in the facility means that currently his severe mental impairment of not a nature or degree requiring his detention in hospital for medical treatment. Such detention would not be proportionate, necessary or warranted. The tribunal is also satisfied that the continued detention of RO would be in breach of Article 5 of the European Convention on Rights. It is not the least restrictive option for his care and cannot justified under Article 5. Accordingly the tribunal is satisfied that the grounds for detention are not satisfied.

25. Having reached this conclusion on Article 78(1)(a) of the Order, the tribunal considered Article 78(1)(b). It is satisfied that it is appropriate for RO to remain liable to be recalled to hospital for further treatment. The tribunal is further satisfied, on the evidence before it that conditions proposed and referred to in the draft care/support plan as noted in the restraint, restricted practices section of the draft care/support plan are appropriate and proportionate at this time.

26. Under the conditions proposed RO would be in a locked accommodation. He would not be able to leave the facility without being escorted and would be continually supervised by staff when he does leave. Applying the test outlined in *P v Cheshire West & Chester Council* [2014] AC 896, the tribunal found that he would be under continuous supervision and control and not free to leave.

30. The tribunal is satisfied that it is not appropriate to order a deferral of a conditional discharge since the conditions for same are not satisfied. The issue for the tribunal as outlined is that it does not have power to authorise a conditional discharge in the first place. The tribunal is satisfied that it cannot in this case order a conditional discharge at this time and the matter of RO's deprivation of liberty will have to be resolved in another venue. Accordingly the case is adjourned to 24 July when the tribunal will hear evidence in relation to the progress of the case."

[7] The first question is whether the detention is in conformity with the substantive and procedural rules governing the making of a conditional discharge. I

note that no application has been made in relation to the tribunal's ruling which is of course a ruling in two parts. So it appears to me that under domestic law this adjourned tribunal has not acted beyond its lawful powers. The case really comes down to Article 5 which is exactly what I am deciding in the declaratory proceedings. The benefit of the declaratory proceedings is that I have requested medical evidence which I can examine to determine if the *Winterwerp* criteria are met and therefore whether or not the proposed deprivation of liberty can be lawful within the meaning of Article 5(1)(e). This is an appropriate route it seems in my view to deal with this matter. This highlights the inadequacies of habeas corpus. In any event I agree with the submissions of Mr Potter that this current situation is currently compatible with Article 5 applying the principles from *Johnson v UK* [1997] 27 EHRR 296 and *Kolanis v UK* [2006] 42 EHRR 12. These cases are factually different but the principles apply as Mr Potter has summarised:

> "1. Article 5 permits a delay in the discharge of a patient such as Mr RO for a reasonable period of time which is more likely to be determined in terms of weeks and months rather than years.
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> 2. Article 5 does not permit a deferred conditional discharge which effectively amounts to indefinite deferral where there are no safeguards in place such as regular reviews by a tribunal or judicial review to ensure no unreasonable delay.
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> 3. Under Article 5(1) continued detention of a patient in hospital where a review tribunal has directed their release may be lawful where the discharge was only appropriate if pursuant to the conditional discharge order there was continued treatment or supervision necessary to protect their own health and the safety of the community.
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> 4. And for the purposes of Article 5(4) "where … the Mental Health Review Tribunal finds that a patient's detention in hospital is no longer necessary and that she is eligible for release on conditions, the court considers that new issues of lawfulness may arise where detention nonetheless continues, due, for example, to difficulties in fulfilling the conditions. It follows that such patients are entitled under Article 5(4) to have the lawfulness of that continued detention determined by a court with requisite promptness."

[8] In truth it seems to me that Mr Heraghty recognises the limitations with habeas corpus in this case and has asked for a nuanced approach which would

necessitate an adjournment and bail. This is of course in the context of the recall powers which are available within the legislation. Mr Heraghty went so far as to say that bail conditions could comprise a deprivation of liberty in the first instance. I do not criticise this pragmatic submission but it is inconsistent with the case made in the declaratory proceedings and the need to establish whether deprivation of liberty is justified in Mr RO's case in the context of the *Winterwerp* criteria. Also, I have not heard argument on the bail issues which arise and which were referenced in the declaratory case flowing from the Supreme Court decision in *Re Corry* [2013] UKSC 76. The core question is whether discharge is exclusively a matter for the Review Tribunal. So, I am not attracted to that course at present, pragmatic though it may be.

[9] I also bear in mind that there is a triangulation of interest in this case between the provider of care the Trust, the patient and the Department of Justice which is concerned with public protection. The issue of public protection is important given that it formed the basis of the Hospital Order with restriction. At paragraph 61 of *Johnson v UK* onwards there is discussion of this issue as follows.

> "It does not automatically follow from a finding by an expert authority that the mental disorder which justified a patient's compulsory confinement no longer persists, that the latter must be immediately and unconditionally released into the community. Such a rigid approach to the interpretation of that condition would place an unacceptable degree of constraint on the responsible authority's exercise of judgment to determine in particular cases and on the basis of all of the relevant circumstances whether the interests of the patient and the community into which he is to be released would in fact be best served by this course of action. It must also be observed that in the field of mental illness the assessment as to whether the disappearance of the symptoms of the illness is confirmation of complete recovery is not an exact science. Whether or not recovery from an episode of mental illness which justified a patient's confinement is complete and definitive or merely apparent cannot in all cases be measured with absolute certainty. It is the behaviour of the patient in the period spent outside the confines of the psychiatric institution which will be conclusive of this.
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> 62. It is to be recalled in this respect that the court in its *Luberti* judgment accepted that the termination of the confinement of an individual who has previously been found by a court to be of unsound mind and to present a danger to society is a matter that concerns, as well as that

> individual, the community in which he will live if released. Having regard to the pressing nature of the interests at stake, and in particular the very serious nature of the offence committed by Mr Luberti when mentally ill, it was accepted in that case that the responsible authority was entitled to proceed with caution and needed some time to consider whether to terminate his confinement, even if the medical evidence pointed to his recovery.
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> 63. In the view of the court it must also be acknowledged that a responsible authority is entitled to exercise a similar measure of discretion in deciding whether in the light of all the relevant circumstances and the interests at stake it would in fact be appropriate to order the immediate and absolute discharge of a person who is no longer suffering from the mental disorder which led to his confinement. That authority should be able to retain some measure of supervision over the progress of the person once he is released into the community and to that end make his discharge subject to conditions. It cannot be excluded either that the imposition of a particular condition may in certain circumstances justify a deferral of discharge from detention, having regard to the nature of the condition and to the reasons for imposing it. It is, however, of paramount importance that appropriate safeguards are in place so as to ensure that any deferral of discharge is consonant with the purpose of Article 5(1) with the aim of the restriction in sub-para (e) and in particular that discharge is not unreasonably delayed."

[10] *In DC v Nottinghamshire Healthcare NHS Trust* [2012] UKUT 92 the Upper Tribunal Judge Jacob said that a tribunal can adjourn at any time before it is under a duty to direct a discharge. That is what has happened in this case and as I have said this is lawful in domestic law. It seems to me that at present the tribunal has effectively raised an issue of legality which I am grappling with in the declaratory proceedings. As it stands at the moment whilst this is being assessed I do not consider that the detention is unlawful under Article 5(1)(e) at present.

[11] I also consider that this applicant has had the benefit of recourse to court to consider this matter quite considerably since the issue arose by virtue of the hearing before the judicial review court which appeared to end in no application being pursued, the declaratory proceedings and now these habeas corpus proceedings. I am reassured that the Trust is bringing a revised application forthwith and it seems to me that that is appropriate. I should say that notwithstanding the view that an

authority has a measure of discretion and can act with the matter in a cautious manner given the various interests at stake that I have mentioned, it seems to me that this case is coming very close to the margins of Article 5 compliance in terms of delay. I am very much of the mind to deal with this case before Christmas otherwise it seems to me there may well be a difficulty in terms of the time taken to rectify this situation.

[12] Hence, I intend to dismiss the application for habeas corpus at this time. A fresh application can of course be made if there is new evidence. There may be new evidence depending on the outcome of the declaratory proceedings or the outcome of the declaratory proceedings may provide a solution to this vexed problem. I have already indicated my issue with this case and my commitment to trying to find a solution and I understand the frustrations raised by Mr RO but as I have said there are a number of interests at stake in this case and the matter must be handled carefully.

[13] I therefore conclude as follows. The applicant is lawfully detained at present for the following reasons:

(i) He is lawfully detained under the Mental Health (Northern Ireland) Order 1986.

(ii) His application for discharge is currently before the review tribunal which has not finished adjudicating.

(iii) The applicant agreed to an adjournment of the review tribunal proceedings pending the patient proceedings.

(iv) The tribunal has adjourned the matter but has yet to complete its proceedings by making a discharge order.

(v) The trust applied for declaratory relief in the Family Division to facilitate the making of a discharge order to a suitable placement in the community where Mr RO will be detained.

(vi) The plaintiff has the right to reconvene the Review Tribunal to apply for an absolute discharge.

(vii) The ongoing detention is compliant with the mental health legislation in this jurisdiction pursuant to Article 5(1)(e) and 5(4) at present.

(viii) It remains to be seen whether or not Article 5(1)(e) and 5(4) remain complied with and that will depend upon the substantive proceedings which are pending before the Family Division.

[14] The court stresses the need for urgency in this matter given the months that have passed and the imperative to deal with a person's liberty within a reasonable time. There is a danger that this case will keep going around in circles. The court is therefore indicating to the Trust that this matter must be dealt with within the next two weeks. I suggest that a date is sought from the Review Tribunal now to protect RO's interests. Some thought should also be given to fall back positions regarding the conditions of discharge and the length of a proposed deprivation of liberty and review of this. The length of a proposed deprivation during a period of testing in the community may actually be the key given the most recent submissions made on RO's behalf. I am not attracted to an option which means that RO remains in the hospital.