Neutral Citation No. [2012] NIQB 1 | *Ref:* **STE8400**

Judgment: approved by the Court for handing down (subject to editorial corrections) | *Delivered:* **16-1-12**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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BETWEEN:

X (acting by his next friend Y)

Applicant/Proposed Plaintiff

-and-

THE MENTAL HEALTH REVIEW TRIBUNAL FOR NORTHERN IRELAND
and
THE BELFAST HEALTH AND SOCIAL CARE TRUST

Respondents/Proposed Defendants

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STEPHENS J

Introduction

[1] The applicant, X, seeks leave to bring an action alleging negligence and false imprisonment against the Mental Health Review Tribunal for Northern Ireland ("the Tribunal") and the Belfast Health and Social Care Trust ("the Trust"). In so far as the Tribunal is concerned and by virtue of Article 133(2) of the Mental Health (Northern Ireland) Order 1996 the applicant needs leave of the High Court to bring proceedings because the Tribunal was acting or purporting to acting in pursuance of that Order when by its decision dated 15 April 2008, and in the event unlawfully, it deferred the discharge of X as a detained patient for a period of six weeks. In relation to the Trust the applicant does not need leave of the High Court to bring proceedings for which see Article 133(4) of the Mental Health (Northern Ireland) Order 1986. Accordingly the only part of the application which requires a decision relates to the proposed proceedings against the Tribunal.

[2] I have anonymised this judgment. Nothing should be published which would identify the applicant. In anonymising the judgment and restraining publication of any information which would identify the applicant I have sought to

apply the principles set out in *Revenue and Customs Commissioners v Banerjee No. 2* [2009] 3 All ER at 930, *JIH v News Group Newspaper Limited* [2011] 2 All ER 324, *Scott v Scott* [1913] AC 417 and *Attorney General v Leveller Magazine Limited* [1979] 1 All ER 745. I also refer to CPR 39, White Book 2001 Volume 1 commentary at 39.2.1 together with the decision of McCloskey J in *JR 45's application* [2011] NIQB 17. I have balanced the Article 8 rights of X and the Article 6 obligations on this court. The applicant has been a detained mental health patient and the balance comes down firmly in favour of anonymity and restraint of publication of any information which would identify the applicant.

[3] Mr Michael Potter appeared for the applicant, Mr Cooper appeared for the Tribunal and Mr Finbar Lavery appeared for the Trust.

The background facts

[4] The applicant suffers from a severe mental impairment. A psychometric assessment in October 1999 found an IQ in the range of 35-49. In 2005 Dr Pollock, psychologist, found that the applicant's abilities fell within an extremely low range of performance with a full scale IQ of 48.

[5] The applicant was first detained for treatment under the Mental Health (Northern Ireland) Order 1986 in May 2002. The statutory scheme is that to be detained for treatment two conditions have to be established. Those conditions are

(a) The individual is suffering from mental illness or severe mental impairment of a nature or degree which warrants his detention in hospital for treatment; and

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

See Article 12 of the Mental Health (Northern Ireland) Order 1986.

[6] In relation to the first condition it is clear that the applicant suffers from severe mental impairment and that remains the position. However to be detained for treatment the severe mental impairment has to be of a nature or degree which warrants his detention in hospital for treatment. Furthermore that a failure to so detain him would create a substantial likelihood of serious physical harm to himself or to other persons. The onus of proving these matters is on the party seeking to justify detention.

[7] By decision dated 15 April 2008 the Tribunal held:-

(a) That it was not satisfied that the applicant now suffers from a mental impairment of a nature or degree which warrants his detention in hospital for medical treatment; and

(b) That it was not satisfied from the evidence that the applicant's discharge would create a substantial likelihood of serious physical harm to himself or to other persons.

The statutory conditions for detention for treatment had not been established. Under Article 77(1) of the Mental Health (Northern Ireland) Order 1986 there was a mandatory duty on the Tribunal to order the discharge of the applicant. Article 77(1) also provides for a discretionary discharge by the Tribunal even if the two conditions have been established. Article 77(2) gives the Tribunal discretion when directing discharge under Article 77(1) to direct the discharge on a future date specified in the direction. The Tribunal considered that this gave it power to defer both a mandatory and a discretionary discharge.

[8] On 15 April 2008 the Tribunal directed the applicant's discharge but it also decided to defer his discharge for a period of six weeks "to enable the Trust to ensure that a satisfactory robust care package is in place for the (applicant) upon his discharge from hospital on that date".

[9] The applicant commenced judicial review proceedings. I heard that application. The applicant's contentions in those proceedings are to be found at paragraph [2] of my judgment dated 9 January 2009 in *X's Application (No.2)* [2009] NIQB 2. A succinct summary is that the applicant contended that on the true construction of Article 77(2) of the Mental Health (Northern Ireland) Order 1986 the power to defer discharge is confined to a discretionary discharge and that accordingly the Tribunal had no power to defer the applicant's mandatory discharge.

[10] The respondents to the judicial review application relied on the decision of Harrison J in *R v Mental Health Review Tribunal for North Thames Region ex parte Pierce*, 36 BMLR 137. The issue in that case was whether the Tribunal had power under the English and Welsh statutory provision equivalent to Article 77(2) of the Mental Health (Northern Ireland) Order 1986 to direct a patient's discharge at a future date in circumstances where there is a mandatory duty to discharge the patient. Harrison J stated:

> "Whilst I can understand why this question of interpretation is one upon which differing views are held, it does not mean to say that the statutory provision is ambiguous. In my view, Section 72(3) is not ambiguous. It is clear on the face of it that, when directing a discharge under Section 72(1), a Tribunal can direct the discharge on a future date specified in that direction. A direction to discharge under Section 72(1) can be a discretionary discharge or a mandatory discharge. Section 72(3) does not in any way confine the power to defer discharge to cases of discretionary discharges as opposed to mandatory discharges under Section 72(1). If

> Parliament had intended the power in Section 72(3) to apply only to cases of discretionary discharges, it could and, in my view, would have said so. Miss Taylor's argument involves reading into Section 72(3) such words as "when exercising the discretionary power to direct the discharge of a patient", before the words "under subsection (1) above". It also, as she accepts, involves reading the word "forthwith" into Section 72(1)(b) and also, presumably, into Section 72(1)(a)."

Harrison J concluded that on the proper construction of the English and Welsh statutory provision equivalent to Article 77(2) of the Mental Health (Northern Ireland) Order 1986 the Tribunal did have power to direct the discharge of a patient at a future date in circumstances where there is a mandatory duty to discharge the patient.

[11] In determining the judicial review application I heard lengthy legal submissions over the course of three days. I reserved judgment. In the event I came to a different conclusion than that arrived at by Harrison J. I found that on its true construction the power to defer discharge in Article 77(2) is confined to a discretionary discharge and accordingly I granted a declaration that the decision by the Tribunal to direct the discharge of the applicant on a future date was unlawful. The applicant in the judicial review proceedings had also contended that if there was a power to defer mandatory discharges there were inadequate procedural safeguards and accordingly either the power was not compliant with Article 5 of the European Convention on Human Rights or alternatively Article 77(2) should be construed in a Convention compliant manner under Section 3 of the Human Rights Act 1998. In the event, in addition to the main reasons for my conclusion, I also determined that there were inadequate procedural safeguards and that I would also have construed Article 77(2) in a Convention compliant manner relying on Article 3 of the Human Rights Act 1998 to confine the power to defer discharge to a discretionary discharge.

[12] The plaintiff now wishes to issue proceedings against the Tribunal for his detention in hospital for the six week period during which his discharge was deferred. I have been provided with a draft writ of summons seeking damages for injury, loss and damage sustained by reason of the negligence, trespass to person, assault and battery, false imprisonment, unlawful detention, breach of confidentiality and breach of statutory duty of the Tribunal. Mr Potter accepted that there was no evidence of assault or battery or breach of confidentiality. He also accepted that trespass to person and unlawful detention added nothing to the allegation of false imprisonment. In relation to the allegation of breach of statutory duty he contended that this was based on sections 6 and 7 of the Human Rights Act 1998 that the Tribunal had acted in a way which was incompatible with X's convention rights. However he accepted that under section 9 of the Human Rights Act 1998 any claim would have to brought against the Tribunal in judicial review proceedings and that no claim for damages had been made in the judicial review proceedings that had in fact been brought. In conclusion the causes of action upon

which the plaintiff wishes to proceed are confined to negligence and false imprisonment.

The basis of the application for leave to bring proceedings against the Tribunal

[13] To succeed against the Tribunal for false imprisonment the plaintiff not only has to prove the constituent elements of that tort but also has to overcome the hurdle imposed by Article 133(1) of the Mental Health (Northern Ireland) Order 1986. That Article provides protection for acts done in pursuance of the Mental Health (Northern Ireland) Order 1986 and provides that -

> "a person shall not be liable, whether on the ground of want of jurisdiction or on any other ground, to any civil … proceedings to which he would have been liable apart from this Article in respect of any act purporting to be done in pursuance of this Order … unless the act was done in bad faith or without reasonable care".

So in addition to proving the constituent elements of the tort of false imprisonment the applicant has to prove on the balance of probabilities that the Tribunal was acting in bad faith or without reasonable care in construing Article 77(2) as conferring a power to defer a mandatory discharge. The applicant expressly makes it clear that there is no suggestion of bad faith on the part of the Tribunal but alleges that the Tribunal's construction of Article 77(2) the Mental Health (Northern Ireland) Order 1986 was negligent.

[14] In support of the application for leave to bring proceedings against the Tribunal two affidavits have been filed which set out the chronology of the decisions, exhibit letters of claim, the draft writ together with the decision of the Tribunal dated 15 April 2008 and my judgment in the judicial review proceedings of 9 January 2009. It is suggested on the part of the applicant that the proper construction of Article 77(2) of the Mental Health (Northern Ireland) Order 1986 was so clear that it is self-evident that there is a sufficient case of negligence simply by contrasting the decision of the Tribunal with my judgment.

[15] That contention is made against the background that the applicant has not filed any evidence as to what occurred before the Tribunal though such evidence would have been available to him. The applicant was represented by a different solicitor at the Tribunal hearing. However the previous solicitor could have been asked to provide information to the applicant's present solicitors and could also have been asked to provide all documents including notes in relation to what occurred at the Tribunal hearing. Accordingly there is no evidence as to whether the applicant's previous solicitors made any representations to the Tribunal as to the correct construction of Article 77(2) of the Mental Health (Northern Ireland) Order 1986 and if so what those representations were. There is no suggestion by the

applicant that the members of the Tribunal ignored submissions made to them. There is no suggestion that the Tribunal lacked concern. In short the applicant has chosen to produce no evidence whatsoever as to what took place at the Tribunal hearing.

[16] The applicant has also chosen not to produce any expert evidence from a professional witness to the effect that the Tribunal was negligent.

[17] The material before the court on which I am asked to hold that there is a sufficient case of negligence to grant leave to bring civil proceedings against the Tribunal is a copy of the Tribunal's decision of 15 April 2008 and my judgment of 9 January 2009. The applicant contends that even absent any legal submissions to the Tribunal and any reference to authorities by or on behalf of the applicant to the Tribunal, the Tribunal was negligent in construing Article 77(2) of the Mental Health (Northern Ireland) Order 1986 in such a way that it had power to defer a mandatory discharge.

The criteria to be applied in deciding whether to give leave.

[18] The misconstruction of article 77(2) of the Mental Health (Northern Ireland) Order 1986 by the Tribunal falls within the protection of Article 133(1) and in order to succeed at trial the applicant has to establish that the misconstruction was either in bad faith or negligent. It is obvious that the misconstruction of a statute does not necessarily of itself establish negligence for which by way of example contrast *Walkley v Precision Forgings Limited* [1979] 2 All ER 548 and *Horton v Sadler and Another* [2006] UKHL 27.

[19] In *Winch v Jones and another* [1985] 3 All ER 97 Sir John Donaldson MR giving the leading judgment in the Court of Appeal in England and Wales held that the test to be applied by the court when considering whether to grant leave was

> "whether, on the materials immediately available to the court, which, of course, can include material furnished by the proposed defendant, the applicant's complaint appears to be such that it deserves the fuller investigation which will be possible if the intended applicant is allowed to proceed" (see page 102 J).

Sir John Donaldson stated that the English and Welsh statutory provision equivalent to Article 133 required an individual approach and accordingly rejected the proposition that the court should apply a test used in other areas such as the "serious issue to be tried" test set out in *American Cyanamid Company v Ethicon* [1975] AC 396 (see also *Mothercare Limited v Robson Books Limited* [1979] FSR 466 at 471). He also rejected the proposition that the test should be that the applicant has to demonstrate a prima facie case or that the test should be the same as applicable to

the grant or withholding of leave to vexatious litigants (see *Becker v Teale* [1971] 1 WLR 1475). He considered that the closest analogous test to the test under Article 133(2) is that adopted at the leave stage in judicial review proceedings namely

> "if, on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting the applicant the relief claimed, it ought, in the exercise of judicial discretion, to give him leave to apply for that relief" (see *IRC v National Federation of Self-Employed and Small Businesses Limited* [1982] AC 617 at 643.

[20] The appropriate test to be applied in relation to the English and Welsh statutory provision equivalent to Article 133(2) was given further consideration by the Court of Appeal in England and Wales in *James v Moore and Burgess of London Borough of Havering and Another* (1992) 15 BMLR 1. The applicant who sought leave in that case had been detained on an emergency basis under the mental health legislation. A social worker had been called to a house by the police and found a chaotic situation. A doctor was called and he formed the view that both the applicant and her mother were mentally ill. The applicant was detained but discharged within a very short time and had not been a mental patient since. The applicant contended that she had not been interviewed by the social worker as required by statute and accordingly that her detention was unlawful. The applicant also contended that any conflict of evidence as to whether she had been interviewed could only be determined at trial and accordingly applying *Winch v Jones* leave ought to be granted to bring proceedings. On the facts of that case the Court of Appeal held that it was virtually unarguable that the doctor and the social worker could have acted without reasonable care and that any action would be bound to fail. The Court of Appeal stated that the provision that no person should be liable unless the act was done in bad faith and without reasonable care is a protection from (the consequences of) errors.

[21] I seek in determining this application to apply the test set out in *Winch v Jones*. That test refers to the materials immediately available to the court. I have already set out those materials, which in essence consist solely of the decision of the Tribunal dated 15 April 2008 and my judgment dated 9 January 2009.

[22] In applying that test I have given consideration to the appropriate standard of care to be applied by the Tribunal. Mr Potter submitted that the standard was that of a reasonably competent Mental Health Review Tribunal. The Tribunal is made up of a legal representative, a psychiatrist and a lay member all appointed in accordance with Article 70 and Schedule 3 of the Mental Health (Northern Ireland) Order 1986. Mr Potter submitted that a reasonable standard in relation to matters of law was not to the highest judicial standards. For the purposes of this application I

am content to accept the formulation proposed by Mr Potter of a reasonably competent Mental Health Review Tribunal.

[23] The burden of proof in relation to the lack of care under Article 133(1) is on the applicant.

[24] The obligation to place sufficient material before me at the leave stage is on the applicant.

[25] During the course of submissions by counsel a question arose as to the relationship between the grant of leave to apply for judicial review under Order 53 Rule 3 of the Rules of the Court of Judicature (Northern Ireland) 1980 and the grant of leave under Article 133(2) of the Mental Health (Northern Ireland) Order 1986. It is contended on behalf of the applicant that his proposed action could have been for damages under Section 7 of the Human Rights Act 1998. The actions of the Tribunal were judicial acts within Section 9 of the Human Rights Act 1998 and therefore the plaintiff could only bring proceedings in respect of an allegation that the Tribunal had acted in a way which was incompatible with a Convention right by way of judicial review. Ordinarily judicial review involves an *enquiry* into a decision but it can also be combined with a claim for damages which is a claim *against* the decision maker. To bring an application for judicial review the applicant requires leave under Order 53, Rule 3 of the Rules of the Court of Judicature (Northern Ireland) 1980 but does not require leave under Article 133 of the Mental Health (Northern Ireland) Order 1980 see *R v Hallstrom and Another, ex parte W* (1985) 3 All ER 775. However in that case the judicial review application was not combined with a claim for damages. The applicant's case was confined to an enquiry into a decision rather than being combined with a claim for damages against the decision maker. If the applicant in this case had applied in the judicial review proceedings for damages I tend to the view that it would have been necessary also to seek leave under Article 133(2) of the Mental Health (Northern Ireland) Order 1980 insofar as the judicial review application related to the claim for damages because in relation to that part of the judicial review proceedings he would have been advancing a case against the Tribunal at the same time as enquiring into the decision of the Tribunal. In the event it is not necessary to form a final view in relation to those submissions.

Conclusion

[26] In my judgment dated 9 January 2009 I held that Article 77(2) of the Mental Health (Northern Ireland) Order 1986 had been misconstrued by the Tribunal in that it had assumed a power to defer the mandatory discharge of the applicant. Does the applicant's complaint that the misconstruction of Article 77(2) was negligent deserve further investigation?

[27] Harrison J in *R v Mental Health Review Tribunal for the North Thames Region ex parte Pierce* construed Article 77(2) in the manner relied upon by the Tribunal. In doing so he stated that he could understand why this question of interpretation is

one upon which differing views are held. I came to a different conclusion than that arrived at by Harrison J but expressly stated that I also understood why this question of construction is one upon which differing views are held. This was a difficult question of statutory construction upon which two High Court Judges in different jurisdictions have come to different conclusions albeit the decision of Harrison J was prior to the Human Rights Act 1998. In such circumstances I consider that on the material immediately available to me that the applicant's complaint does not deserve further investigation. I also make it clear that in my view if the action was to proceed it would be bound to fail.

[28] I refuse leave to bring proceedings against the Tribunal.

[29] I would add a general observation in relation to future applications seeking an order under Article 133(2) of the Mental Health (Northern Ireland) Order 1996 for leave to bring proceedings. In relation to such applications it would be preferable if the applicant not only exhibited a draft of the writ of summons but also a draft of the proposed statement of claim.