

Neutral Citation no. [2007] NIQB 104

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

Delivered:	23/11/2007
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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

AN APPLICATION BY JR18 (MENTAL HEALTH)

FOR JUDICIAL REVIEW

WEATHERUP J

[1] This is an urgent application for leave to apply for judicial review of a decision of the Southern Health and Social Services Trust, as communicated by letter of 22 November 2007, that the applicant's daughter has capacity to give instructions in relation to medical treatment while detained as a patient under the Mental Health (NI) Order 1986. The patient is currently in St. Luke's Hospital, Armagh and is on the 28th day of a hunger strike. The applicant is the mother of the patient. The patient's designated next of kin is her father, who has consented to the present proceedings being instituted by his wife on behalf of their daughter. Mr Larkin QC appears for the applicant and Mr McAlinden appears for the Trust.

[2] The patient is described by Dr Brazil, Consultant Psychiatrist, as having a severe emotionally unstable or borderline personality disorder. She was admitted to the psychiatric unit of Craigavon Area Hospital on 5 September 2007 on a voluntary basis. On 7 September she became agitated and aggressive and was threatening suicide. She was prevented from leaving the hospital in her own interests and she became violent and aggressive. She was detained under the mental health legislation on that day and was transferred to her present location at St. Luke's Hospital.

[3] The Mental Health (NI) Order 1986 provides that a person may be detained if, in the opinion of a responsible medical officer, that person is suffering from mental illness or severe mental impairment and certain conditions are satisfied. The patient appealed against her detention and then withdrew her appeal. I proceed on the basis that the patient satisfies the

conditions for detention under the mental health legislation and is suffering from the requisite mental illness or severe mental impairment.

[4] The applicant seeks a declaration and an order that the Trust should intervene and provide treatment for the patient by way of nutrition. The Trust opposes intervention on the basis that the patient is an adult with capacity to refuse treatment and that it would be unlawful for the Trust to provide nourishment without the consent of the patient.

[5] The general position is that an adult with capacity has the right to refuse medical treatment. The provision of nourishment may amount to treatment. A patient detained under the mental health legislation may retain capacity to consent to treatment. A patient detained under the mental health legislation may be provided with treatment for their mental disorder without their consent.

[6] The 1986 Order makes provision for consent to treatment by patients. Under Article 69 the consent of the patient shall not be required for any medical treatment given to him "for the mental disorder from which he is suffering" (not being treatment falling within Article 63 or 64) if the treatment is given by or under the direction of the responsible medical officer. Article 63, relates to treatment requiring consent and a second opinion, being surgery for destroying brain tissue or for destroying the functioning of brain tissue and other forms of treatment that are prescribed. Article 64 relates to treatment requiring consent or a second opinion, being forms of treatment that are prescribed and the administration of medicines in certain circumstances. Articles 63 and 64 do not apply in the present case.

[7] Accordingly the patient's consent is not required for medical treatment given to her for the mental disorder from which she is suffering, if given by or under the direction of the responsible medical officer. The medical treatment proposed by the applicant is that the patient should receive nutrition. The Trust contends that the proposed medical treatment does not relate to the mental disorder from which the patient is suffering. If the medical treatment does not relate to the mental disorder from which the patient is suffering her consent will be required, unless she lacks capacity to consent. The Trust contends that the patient has capacity to consent to treatment but that as she refuses nourishment the Trust cannot intervene.

[8] As to the issue of the patient's capacity to consent I have medical evidence in the form of reports from Dr Brazil and Dr McMahon, Consultant Psychiatrists, and have heard oral evidence from Dr Brazil. It is apparent that the medical view is that the patient retains capacity to consent to medical treatment. Mr Larkin, on behalf of the applicant, objects to that conclusion and his starting point is that those who are detained under the mental health legislation do not, by that fact, have capacity to consent to treatment. I do not accept that contention. It is apparent that the 1986 Order proceeds on the basis

that there may be circumstances where a patient retains capacity to consent and where that consent is required to certain treatment.

[9] There is also authority against the applicant's contention. In Re: C [1994] 1WLR 290 Thorpe J referred to three stages in assessing a patient's capacity to make a decision in relation to treatment. First, comprehending and retaining treatment information, second, believing it and third, weighing it in the balance to arrive at choice. Adopting that approach to the present patient in the light of the medical evidence I am satisfied that she has the capacity to consent to treatment. Further I am satisfied from the evidence of the applicant and the medical evidence that the patient does not consent to receive nutrition.

[10] Re: C illustrates the application of the mental health legislation where the proposed treatment does relate to the patient's mental disorder. The patient was a chronic paranoid schizophrenic serving a sentence of imprisonment who was transferred to a secure hospital. He developed an ulcerated foot and the surgeon advised amputation of the leg below the knee. The patient refused to consent and applied for an injunction that his leg would not be amputated without his written consent. He was found to have capacity to consent. The proposed treatment does not relate to his mental disorder. The injunction was granted.

[11] Although the patient has capacity, Article 69 provides that consent is not required for medical treatment which relates to the mental disorder from which she is suffering. Medical treatment is defined in the 1986 Order as including nursing and care and training under medical supervision. I am satisfied that the provision of nourishment does qualify as treatment for this purpose - see the House of Lords decision in Airedale NHS Trust v Bland [1993] AC 789.

[12] The issue then arises as to whether the mental treatment permitted under Article 69 without consent is limited to treatment directly offered for the mental disorder or whether it may extend to ancillary treatment for the symptoms or consequences of the disorder. In the present case is the hunger strike a symptom or consequence of the mental disorder such that treatment by the provision of nourishment would address that symptom or consequence of the disorder?

[13] The patient has a history of taking overdoses with the intention of killing herself and has a tendency to self harm in other ways. Over the past three years she has had over twenty acute psychiatric admissions and is frequently suicidal. She retreats into a world of fantasies and this fantasy world provides a very irresistible pull away from anything difficult and disturbing. The present hunger strike has been explained by the patient as relating to the influence that her death will have on certain people with

whom the patient is wholly unconnected. As to the effect of her hunger strike on her overall condition Dr Brazil reported that the patient had remained in bed, although this had been put in play by her carers because of her weakness brought about by malnourishment. The incidents of self harm had fallen and her main focus had become her refusal to eat as the form of her ultimate self harm. Dr McMahon reported concerns that the patient's malnourished state was resulting in mood changes and unusual thinking that were influencing her decision making and that such induced mood changes would not be resolved by antidepressant medication. Dr Brazil agreed in evidence that malnourishment would not aid her mental wellbeing and as her physical health deteriorated, so her mental health would deteriorate.

[14] The hunger strike is the latest in a long line of self harming events and acute psychiatric admissions. The consequences of her self harm are inevitably going to occasion deterioration not only in her physical condition but also of her mental condition. The treatment that is required is nourishment.

[15] Assistance is provided by a decision of the Court of Appeal in England and Wales in B v Croyden Health Authority [1995] Fam 133. The patient was a 24 year old women suffering from a psychopathic disorder and one of her symptoms was a compulsion to harm herself. She was compulsorily detained in hospital under the mental health legislation and she stopped eating and her weight fell to a dangerous level. There was a threat of feeding by naso-gastric tube and that resulted in some improvement but her weight fell again to a critical level and she was again threatened with tube feeding. The patient applied to the Court for an Order to stop the Health Authority from tube feeding without her consent. The Court of Appeal upheld the decision that tube feeding constituted medical treatment for the mental disorder from which she was suffering and that her consent was not required. The term 'medical treatment' in the mental health legislation referred to treatment, which taken as a whole, was calculated to alleviate or prevent deterioration of the mental disorder from which the patient was suffering. A range of acts ancillary to the core treatment included those which prevented the patient from harming herself or those which alleviated the symptoms of the disorder fell within the legislation. Accordingly tube feeding constituted medical treatment and could be carried out lawfully without the patient's consent. Hoffman LJ made the following comment with which I am in entire agreement -

"It would seem to me strange if a hospital could, without the patient's consent, give him treatment directed to alleviating a psychopathic disorder showing itself in suicidal tendencies, but not without such consent be able to treat the consequence of a suicide attempt".

Neill LJ stated that the medical treatment that was permitted included treatment given to relieve the symptoms of the disorder, as well as treatment to remedy its underlying cause.

[16] In my judgment medical treatment for mental disorder may include the provision of nourishment, when the need for the provision of such nourishment is brought about as a consequence of the mental disorder. It would be somewhat incongruent if this patient could be detained in hospital without her consent for a mental disorder that involved the patient in self harming and having suicidal ideation and that once detained she could continue to manifest self harm by resorting to hunger strike, thereby putting her life at risk, but could not be treated for that consequence of her mental disorder without her consent.

[17] Accordingly I am satisfied that in the present case it is lawful under Article 69 of the 1986 Order for the medical authorities to provide treatment for the patient by way of nourishment, without the patient's consent. Leave is granted to apply for judicial review. The Trust called evidence from Dr Brazil and produced the medical reports of Dr Brazil and Dr McMahon. Because of the urgency of the matter the hearing has been treated as a leave hearing and a substantive hearing. A final order may now be made.

[18] It is proposed to make a declaration that under Article 69 of the Mental Health (NI) Order 1986 it is lawful, without the consent of the patient, to provide treatment to the patient, in the form of nutrition, for the mental disorder from which she is suffering, when given by or under the direction of the responsible medical officer, as the nutrition will alleviate the symptoms and consequences of and prevent the deterioration of her mental disorder.

[19] The circumstances, the timing and the conditions under which the responsible medical officer decides that treatment should be administered in the form of nutrition are matters in respect of which the responsible medical officer is the primary decision maker.