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(subject to editorial corrections)*

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

AN APPLICATION FOR JUDICIAL REVIEW BY
MW (Mental Health)

WEATHERUP J

[1] This is an application for judicial review of a decision of the Mental Health Review Tribunal of 3 March 2008 that the applicant, a patient at St Luke's Hospital, Armagh, should not be discharged. The issue that arises in this application concerns the role of the medical member of the Tribunal. Mr Potter appeared for the applicant and Mr Dunlop appeared for the respondent.

[2] The legislation governing the detention of those with mental illness is the Mental Health (Northern Ireland) Order 1986. Article 77 provides the power to discharge patients other than restricted patients as follows -

> "(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 –
>
> > (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 other persons; or

(c) *[not applicable]"*

[3] The relevant statutory rules are the Mental Health Review Tribunal (Northern Ireland) Rules (NI) 1986. Rule 11 provides -

> "At any time before the hearing of the application, the medical member or, where the tribunal includes more than one, at least one of them shall examine the patient and take such other steps as he considers necessary to form an opinion of the patient's mental condition; and for this purpose the patient may be seen in private and all his medical records may be examined by the medical member, who may take such notes and copies of them as he may require, for use in connection with the application."

It will be noted that the stated object of the medical examination under Rule 11 is that the medical member shall take steps necessary to form an opinion of the patient's mental condition. Rule 11 says nothing on the issue of the patient's detention.

[4] The decision of 3 March 2008 was issued by a Tribunal comprising Ms Fenton as President, Dr O'Gorman as the medical member and Ms Hillan, lay member. The Tribunal accepted the findings of the medical officer and found that the patient suffered from a mental illness as defined by the 1986 Order, namely psychosis of a schizo affective nature. Further, the Tribunal considered that the patient's illness was so serious in nature and of a degree which made it appropriate for the patient to be detained in hospital for medical treatment. In addition the Tribunal was not satisfied that the patient's discharge would not create a substantial likelihood of serious physical harm to herself or others.

[5] The background appears from the affidavit of Mr McParland, the applicant's solicitor. The applicant is thirty-six years old and currently detained under the 1986 Order and has been in continuous detention in hospital since 1 October 2007. An application was made on 23 October 2007 for a hearing before the Tribunal and a Tribunal hearing was fixed for 13 February 2008 at St Luke's Hospital. That morning Dr O'Gorman carried out an examination of the applicant under Rule 11 of the 1986 Rules. The hearing commenced in the afternoon with those present being the Director of Legal Services as the Trust's legal representative, a consultant psychiatrist and a social worker as the Trust's witnesses, the applicant and Mr McParland as her legal representative, a solicitor representing the Northern Ireland Office and a nurse escort accompanying the applicant.

[6] Mr McParland states that after the introductions were made he asked the President if she would let the parties know the medical member's views following

her examination of the applicant that morning. The President asked Dr O'Gorman to inform the parties of her views and Dr O'Gorman stated of the applicant:

> "She has a psychotic illness which requires her to be in hospital for treatment."

Mr McParland states that Dr O'Gorman did not qualify her view by saying that it was a provisional or preliminary view. Mr McParland addressed the President by stating that the medical member's statement was prejudicial to the applicant's case in that it displayed that the medical member had already made a decision on the matter before hearing the evidence. The President responded in terms that the statement reflected the medical member's view at that stage and that she would have to take full account of the evidence produced at hearing before coming to a final decision.

[7] An affidavit was filed by Dr O'Gorman in which she states that she was giving a preliminary opinion and she distinguishes between the clinical opinion of the applicant's mental condition and the different issue as to whether that condition warrants detention in hospital for medical treatment. Dr O'Gorman states that "The mechanism by which I defined or expressed the seriousness of the applicant's clinical position was to indicate that I believed it required treatment in hospital…. there is a significant percentage of persons who suffer from mental illness or a mental impairment which requires hospitalisation but who are equally not subject to compulsory detention…. her illness was sufficiently serious that appropriate treatment was required in hospital. In so concluding I was not forming any view or indeed expressing any conclusion on the question of detention which indisputably remained an issue to be determined after all the evidence had been called and in deliberation with the other Panel members."

[8] Ms Fenton, the President, also filed an affidavit in which she dealt with two particular matters to which I draw attention. First of all, the note of evidence that had been prepared by the Secretary to the Tribunal had omitted to record that in making the impugned statement Dr O'Gorman had stated that this was a clinical opinion and Ms Fenton refers to her own notes where she had recorded that Dr O'Gorman had stated that she was expressing a clinical opinion. Further, Ms Fenton states that she could confirm that the Panel did not base its decision on the statement made by Dr O'Gorman at the outset of the hearing and that the question of whether the medical condition of the applicant was one which warranted her detention in hospital was an issue decided by the Panel based on the evidence called.

[9] The applicant's grounds for judicial review are threefold.

The first ground is that the comments made by the medical member at the commencement of the Tribunal hearing gave rise to a reasonable apprehension that the Tribunal or a member of the Tribunal had a preconceived concluded opinion (in

breach of the requirements of the Human Rights Act 1998 and Article 6 of the European Convention on Human Rights).

Secondly, that the Tribunal, by relying on the comments made by the medical member at the outset of the hearing in its reasoning for its decision not to direct the applicant's discharge, erred in law.

Thirdly, that the Tribunal, by taking into account the comments made by the medical member in arriving at its decision not to direct the applicant's discharge, erred in law.

[10] Mr Potter accepted that in the light of the averments made in the replying affidavits he would be unable to make out the second and third grounds. He was correct to do so. The issue for decision concerns the first ground, namely the alleged procedural unfairness and apparent bias in relation to the terms in which the medical member expressed her opinion at the commencement of the hearing.

[11] The basis on which this ground falls to be considered concerns the application of the fair trial rights under Article 6 of the European Convention on Human Rights and the common law requirements of procedural fairness. In either case this requires an independent and impartial tribunal to determine the proceedings. The legal position was summarised by Silber J, at first instance in R (PD) v West Midlands and North West MHRT [2004] EWCA Civ 311. In the Court of Appeal Lord Phillips adopted the summary which reads as follows -

> "(a) in order to determine whether there was bias in a case where actual bias is not alleged "the question is whether the fair-minded and informed observer, having considered the facts would conclude that there was a real possibility that the Tribunal was biased" (per Lord hope of Craighead in *Porter v Magill* [2002] 2 AC 357 at 494 [103]). It follows that this exercise entails consideration of all the relevant facts as "the court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased" (ibid [104]).
>
> (b) "Public perception of a possibility of unconscious bias is the key. It is unnecessary to delve into the characteristics to be attributed to the fair-minded and informed observer. What can confidently be said is that one is entitled to conclude that such an observer will adopt a balanced approach. This idea was succinctly expressed in *Johnson v Johnson* [2000] 200 CLR 488, 509 at paragraph 53 by Kirby J when he stated that "a reasonable member of the public is neither complacent nor unduly sensitive or suspicious"" (per Lord Steyn in *Lawal v Northern Spirit Limited* [2003] ICR 856, 862 [14]).
>
> (c) in ascertaining whether there is a case of unconscious bias, the courts must look at the matter by examining other similar analogous situations. "One does not come to the issue with a clean slate; on the contrary, the issue of unconscious bias has cropped up in various contexts which may arguably

throw light on the problem" (Lord Steyn in *Lawal v Northern Spirit Limited* (supra), 862 [15]).

(Lord Phillips added the comment that Lord Steyn had stated that other similar analogous situations "may *arguably* throw light on the problem" and he cautioned "The natural reaction of the lawyer to any problem is to look for case precedent and this is true even where the issue is essentially one of fact. In such circumstances precedent can be helpful in focussing the mind on the relevant issues and producing consistency of approach. In a case such as the present, however, the search is for the reaction of the fair-minded and informed observer. The court has to apply an objective assessment as to how such a person would react to the material facts. There is a danger when applying such a test that citation of authorities may cloud rather than clarify perception. The court must be careful when looking at case precedent not to permit it to drive common sense out of the window.")

(d) the approach of the court is that "one starts by identifying the circumstances which are said to give rise to bias .. [a court] must concentrate on a systematic challenge and apply a principled approach to the facts on which it is called to rule" (per Lord Steyn in *Lawal v Northern Spirit Limited* (supra) 864-5 [20])

(e) the need for a Tribunal to be impartial and independent means that "it must also be impartial for an objective viewpoint, that is it must offer *sufficient guarantees* to exclude any legitimate doubt in this respect" (*Findlay v United Kingdom* (1997) 24 EHRR 221 at 224-245 and quoted with approval by Lord Bingham of Cornhill in *R v Spear* [2003] 1 AC 734 [8])."

[12] In considering the present case it is necessary to distinguish two matters. On the one hand the medical member may offer an opinion on the mental condition of the patient and on the other hand all the members of the Tribunal will ultimately make a decision on the discharge of the patient. In relation to the first matter, the mental condition, Rule 11 provides that the medical member will conduct an examination and take other steps to form an opinion on the patient's mental condition. That opinion should be a provisional view and to the extent that it is other than the view of the medical officer or is otherwise adverse to the interests of the patient, that provisional view will be disclosed at the hearing and representations may be made. By contrast, on the second matter, the discharge of the patient, the present application has given rise to argument as to whether the medical member and other members of the Tribunal may form a preliminary view on discharge and further whether the medical member and other members of the Tribunal should disclose to the parties at the hearing any provisional view that has been formed in relation to detention.

[13] The role of a medical member of a tribunal determining whether a patient should be discharged has been considered by the European Court of Human Rights in DN v Switzerland (Application No 27154/95) with the judgment delivered on 29

March 2001. Under the Swiss system a medical expert acting as judge-rapporteur conducted an interview with the patient as a result of which he concluded that the relevant Tribunal should dismiss the patient's action for discharge. He then submitted his expert opinion to the Tribunal in which he recommended dismissal of the action. The Tribunal then convened for a hearing and the judge-rapporteur was one of the members of the Tribunal. The ECHR considered the subjective test and the objective test in assessing the issue of impartiality of the Tribunal. At paragraph 46 it was stated that under the objective test it must be determined whether, irrespective of the Judge's personal conduct, there were ascertainable facts which may raise doubts as to impartiality; appearances are important; confidence in the system is at stake; any fears that exist about lack of objectivity and impartiality have to be objectively justified in the particular case. The ECHR concluded that as the judge-rapporteur had twice formulated a conclusion prior to the hearing the situation raised legitimate fears that the medical member had a preconceived opinion as to the applicant's request for release from detention and that he was not approaching the case with due impartiality.

[14] The role of the medical member has been considered in England and Wales in R (S) v The Mental Health Review Tribunal [2003] 1 MHLR at 118. The patient asked the Tribunal to disapply the English equivalent of Rule 11 in relation to the medical member's role, the Tribunal declined and the patient applied for judicial review. It was submitted that as the rule required the medical member to form an opinion of the patient's mental condition before the hearing the medical member became both a witness who could not be cross-examined and a judge and it was said that that situation was inconsistent with the requirements of a fair and impartial judicial hearing. Stanley Burnton J dismissed the challenge and in considering the role of the medical member he stated at paragraph 21 -

> "Rule 11 does not expressly require the medical member to form an opinion of the patient's mental condition: it requires him to take the steps necessary to form his opinion. Quite apart from the requirements of the Convention I would not interpret it as requiring a medical member to form an opinion before the conclusion of the hearing. To the contrary, it is obvious that the medical member must not form a concluded opinion until the conclusion of the hearing, since otherwise the outcome of the hearing would be prejudged. It is implicit in the above citations from the judgments in *[R(H) v Ashworth Hospital Authority [2002] MHLR 314*] that both I and the Court of Appeal read r 11 as requiring only a provisional opinion to be formed by the medical member: hence the requirement that the parties be given an opportunity to address it. It is obvious that neither I nor the Court of Appeal thought

> that the forming and expression of a provisional opinion by the medical member gave rise to unfairness."

[15] Stanley Burnton J considered the position of a court or tribunal forming or discussing provisional views of a case before a hearing and stated that the forming of an opinion before the hearing is normally objectionable only if it is not provisional, liable to be changed by the evidence adduced and the submission of the parties, but is firm and concluded: in which case the hearing is an effective charade.

[16] The role of the medical member has also been considered in Northern Ireland by Kerr J in McGrady's Application [2003] NIQB 15, where the patient challenged the compatibility of Rule 11 with the requirements of the European Convention. At paragraph 24 Kerr J stated in relation to the role of the medical member:

> "It is important to recognise clearly the nature of the role to be performed by the medical member in examining the applicant under Rule 11. He does not reach a final view on the question whether the applicant is suffering from a mental illness or severe mental impairment. His role is confined to a determination on a provisional basis of the patient's mental condition. He does not consider whether the mental disorder (if he finds it) is sufficiently serious to warrant detention in hospital and he discloses the conclusion that he has reached in the course of the hearing."

[17] Kerr J referred to guidance which had been given by Mental Health Review Regional Tribunal Chairmen in England and which had been made available to members of the tribunals in Northern Ireland, where paragraph 4.06 stated -

> "Medical Members must therefore be very careful not to disclose in the preview their own opinion as to discharge of the patient and must retain an open and judicial mind on the question of discharge until all the evidence has been heard."

At paragraph 29 Kerr J stated that if the advice given was followed there would not be a violation of the Convention, thereby appearing to endorse the position that a preliminary view of a medical member on discharge may be formed in the course of proceedings.

[18] Finally, we come to the case of R (RD) v MHRT [2007] EWHC 781 (Admin). The medical member's view was reported as a preliminary view to the effect that the patient appeared to be ready for transfer to medium security but because of the length of time in detention, the lack of testing in the community and concern about how he would manage in the community he would appear to need the regime of a

secure unit rather than community living. Thus the medical member's view was expressed not only in relation to the mental condition of the patient but also in relation to discharge. The applicant objected that this preliminary view went beyond a medical opinion and dealt with the ultimate issue of discharge. At paragraph 19 Munby J stated -

> "The communication by the medical member of her 'very preliminary' view was manifestly lawful, notwithstanding that it went to the ultimate issue and not merely to the question of RD's mental condition. There is nothing in rule 11 to disable the medical member from doing what she (like the other members of the Tribunal) would otherwise plainly be entitled to do, namely to discuss all aspects of the case with the other members of the Tribunal before the hearing and to express to them her preliminary views either on the case as a whole or on any particular aspect of the case, just as there is nothing in rule 11 to disable the medical member (like the other members of the Tribunal) from expressing to the parties at the outset of the hearing her preliminary views either on the case as a whole or on any particular aspect of the case. The contrary, in my judgment, is simply unarguable."

[19] Mr Potter was undaunted by the view that the position he espoused was unarguable. He argued to the contrary that not only the expression to the parties of a preliminary view on discharge was inappropriate but that the forming of a preliminary view on discharge was inappropriate. The applicant objects to a medical member of a Tribunal forming a preliminary view on discharge because it is said that it might impact on the opinion on the patient's mental condition for the purposes of Rule 11 and if it is disclosed to the other Panel members it may exert undue influence on their views in relation to discharge.

[20] In Mr Potter's submission there are three different approaches that emerge from the authorities. The first approach and the only one that the applicant contends is lawful is that of Kerr J in McGrady's Application at paragraph 24 (set out at para [16] above) dealing with the examination of the patient for the purposes of Rule 11. It is appropriate for the medical member to express an opinion on the patients' mental condition. This must be a preliminary view and not a final view and should be disclosed so that the parties may make representations.

[21] The second approach is said to emerge from Stanley Burnton J in S's case (referred to at para [15] above) and Kerr J at paragraph 29 of McGrady's Application where he endorsed the pre-June 2006 guidance in England (referred to at para [17] above). This second approach is said to permit the medical member to form a preliminary view in relation to discharge, as any court or tribunal may do in relation

to the ultimate issue to be determined, but that in the case of Mental Health Review Tribunals there should be no disclosure of that preliminary view on discharge to the other members of the Panel. In this respect the applicant contends that Kerr J's position is inconsistent with his earlier discussion at paragraph 24.

[22] I do not find a conflict between Kerr J's views in paragraphs 24 and 29 of McGrady's Application. In paragraph 24 Kerr J was addressing the issue of examination for the purposes of Rule 11 and the presentation of a preliminary view of the patient's mental condition. In paragraph 29 Kerr J was dealing with the different issue of a preliminary view on the issue of detention.

[23] The third approach is said to be that of Munby J at paragraph 19 of RD's case (set out at para [18] above). This approach permits not only the formation of a preliminary view on discharge but the disclosure of the preliminary view to the parties so that representations might be made. On this approach there is disclosure of the preliminary view of the medical member in relation to the patient's mental condition and of the preliminary view of the members in relation to the discharge of the patient.

[24] It is inevitable in a decision-making process by a single decision-maker or a panel of decision-makers that some views may be formed on a preliminary basis as to the issues in the particular case. What is important is that such views as are formed must be preliminary and a concluded view must not be reached. The view is preliminary to whatever emerges in the course of the hearing and the decision maker must retain an open mind until the conclusion of the hearing. In that event a decision maker cannot be faulted if it is disclosed that a preliminary view has been formed and the nature of that preliminary view is revealed. Indeed, it is not uncommon for a Judge to disclose that he or she is minded to take a specified course and await the response of the representatives of the parties: of course the Judge may be persuaded otherwise and while remaining open to persuasion cannot be faulted for having formed what must be a preliminary view. It would be artificial to require any Tribunal member, including a medical member of a Tribunal, not to consider a preliminary view on the issues before the Tribunal, including the ultimate issue for decision. There may be cases where the decision maker is unable to form a preliminary view, but if the decision maker feels able to do so they cannot be criticised, provided they do not reach a concluded view in advance of the conclusion of the hearing.

[25] In relation to the formation of a preliminary view on discharge of a patient, there may be disclosure between the members and disclosure to the parties so that representations may be received in relation to the preliminary view. First of all, Rule 11 does not prevent a preliminary view of detention being formed or disclosed because Rule 11 deals with the role of the medical member on an examination in order to form an opinion on the mental condition and does not either expressly or impliedly prohibit other roles for the medical member. If there is to be a restraint on what the medical member might do, as the applicant contends, it is not in my

opinion to be found in Rule 11. Further, the European Convention jurisprudence and other domestic jurisprudence do not in general prevent the formation by a Court or Tribunal of preliminary views of the ultimate issue for decision. What they prohibit, on the ground of real and apparent bias, is predetermination of the issues. A preliminary view may be formed provided that the Tribunal remains open to persuasion. A predetermined view, that is a concluded view, is not permitted.

[26] In general is there anything about the position of the medical member of a Mental Health Review Tribunal that alters the general entitlement of a Tribunal to form and disclose a preliminary view on issues that it has to determine? It is necessary to recognise the special position of the medical member of such a Tribunal who, alone of the members, has a role in examining the patient and taking other necessary steps to form an opinion as to the mental condition of the patient, as well as reaching a decision, as with the other members, in relation to the other issues arising on the appeal. However, subject to certain caveats set out below, I am satisfied that the role of the medical member is not such as to alter the general entitlement of a Tribunal to form and disclose a preliminary view on the issues that it has to determine.

[27] First of all, it is necessary to separate out the specific role of the medical member of a Mental Health Review Tribunal under Rule 11. The medical member's role under Rule 11 is to examine the patient and take other necessary steps in advance of the hearing to form a preliminary opinion on the patient's mental condition and to disclose that opinion to other members and to the parties so that representations may be made.

[28] Secondly, and distinct from the operation of Rule 11, a preliminary view on the issue of detention of the patient may be formed by the medical member, the lay member and the President. That preliminary view may be disclosed to the other members and it may be that a Tribunal view will emerge. Whether the preliminary view of a member or the preliminary view of the Tribunal on the issue of detention will be disclosed to the parties will be a matter for the determination of the Tribunal.

[29] Thirdly, for the medical member's preliminary opinion on the patient's mental condition, as disclosed to the parties, to be expressed together with a preliminary view on detention, will be confusing and may appear to give undue weight to the view of the medical member and may give the impression that it was the view of the Tribunal. If the President were to attempt to address any such impression by limiting the preliminary view on detention to the medical member or giving different preliminary views of detention from other members of the Tribunal that may cause even more confusion. It would be undesirable to adopt any such approach.

[30] Fourthly, there is no objection in principle to a Tribunal electing to offer a preliminary view on detention provided it is dealt with in a manner that clearly

distinguishes that exercise from that of the medical member disclosing his preliminary opinion on the mental condition for the purposes of Rule 11.

[31] Against that background I return to the circumstances of the present application. Dr O'Gorman's affidavit at paragraph 8 discloses her position in relation to her role. It is apparent that there was no confusion in the decision-making as far as the medical member was concerned because she quite clearly drew the distinction between expressing a clinical view in relation to the mental condition of the patient and the quite separate issue of whether or not that condition should be the basis on which the patient should be detained. She makes clear in her affidavit that when she expressed her opinion at the beginning of the hearing she was not addressing the issue of detention, but was expressing a view on the seriousness of the applicant's condition. I have no reason not to accept the view expressed. It is quite clear on that approach that she has not confused the issues that had to be addressed.

[32] The issue in the present application is one of apparent bias. The form of apparent bias does not arise out of institutional bias where the role of the medical member creates an apparent conflict of interest. RD's case involved institutional bias because the medical member of the Tribunal was also employed by the Trust that was promoting the detention of the patient. The existence of a medical member on the Tribunal has been found not to create a conflict of interest such as to render it institutionally improper. The issue is whether on the particular facts of the case there is apparent bias by predetermination of the ultimate issue, namely whether the medical member expressed what appeared to be a concluded view on the issue of detention.

[33] Dr O'Gorman expressed a clinical opinion and the opinion was stated to be clinical and it was stated to be preliminary. As such I am satisfied that the fair minded and informed observer would not consider that there was a real possibility of bias. Dr O'Gorman had not reached and there was no real possibility that the fair minded and informed observer would consider that she had reached a concluded view on the applicant's detention at the commencement of the hearing.

[34] Accordingly, I dismiss the application for judicial review.