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(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY HM SECRETARY OF STATE FOR NORTHERN IRELAND FOR JUDICIAL REVIEW (OSWALD BROWN)

DEENY J

[1] The first point with which I think it is necessary to deal is the reporting of this matter which comes before the court in a slightly unusual way. Initially the application was to be in chambers, but counsel for the Secretary of State said that was an inadvertent carry over from a precedent and Mr McMillan who appeared with Mr McCloskey for the Secretary of State on Friday when before me applied to delete those words and the reporting of the matter subject to one point was made open, but relying on the discretion of the experienced court reporter who was present. It seems to me that the Respondent having obtained not insignificant publicity and aroused legitimate public interest over the period of the hunger strike, that for me now to anonymise the proceedings would be futile. It would be obvious to anyone that references to In re O B referred to Oswald Brown. I think it would be unfair to the media to try and distinguish between what they were entitled to report on and what not. I bear in mind the dictum of Lord McDermott in the Ministry of Education v McPherson that the order of the court should not beat upon the air. Miss Gibson also helpfully reminds me that non-reporting is not mandatory in the circumstances where there is public interest and she cites the case of Simms in that regard and I think that is applicable, so in the circumstances I remove the reporting restrictions. I acknowledge that there is some interference with the Article 8 rights of the applicant but that has been brought upon himself while he did have mental capacity by commencing this fast and I think it is a necessary interference in the circumstances. In doing that, I bear in mind the particular matters that have been averted to in open court.

[2] Secondly, this matter came before the court by way of applications by the Secretary of State who is the Minister responsible for Prisons in Northern Ireland for declarations with regard to the non-treatment of Oswald Brown, ie, that they may at that time wish to observe and abide by his refusal to receive nutrition and further that they may lawfully abstain from providing him with hydration and nutrition whether by artificial means or otherwise for as long as he retains the capacity to refuse those. As I pointed out and his counsel now accepts the reference to hydration was always misplaced as he has always been taking water.

[3] Oswald Brown is a prisoner at Her Majesty's Prison, Magilligan. He has been there on foot of a sentence of the court for nine months imposed for his failure to abide by terms of a Custody Probation Order made by the Crown Court in 2001 following his conviction on a single count of rape. He received a sentence of six years imprisonment with two years custody probation, but in fact he did not abide by the terms of the probation order when he was released after serving three years of the six years in accordance with the statutory procedures in Northern Ireland. He was then sentenced as I have indicated to the nine months imprisonment. It is interesting and relevant to note that that sentence is due for completion apparently on 20th December 2006, merely a week away. Nevertheless Brown went on a fast initially on 17th and 18th October but he then took some sustenance on the 19th but from the 20th of October he has consumed nothing but water. He does this to draw attention to what he says is his innocence of the crime of which he was convicted. The court has been informed he has no other criminal record. The offence in question was not one of violence, but the jury were obviously satisfied in the way that they needed to be that the injured party, the young woman the victim of that offence, had not consented to Brown's acts on that occasion. While on hunger strike he was in the care initially of the prison and then more specifically of the prison hospital unit at Magilligan and in the care of some nursing staff there.

[4] The matter was lodged in court on the evening of Thursday 7th December and was before the court on Friday 8th. The court had the assistance of the Official Solicitor as amicus curiae, who had instructed Miss Heather Gibson QC on her behalf. The applicant's counsel put before me two affidavits. I observe that they were from the prison officers who were qualified nurses caring for Mr Brown. There was no affidavit from a doctor in the prison. The prison medical officers at Magilligan come from a general practice nearby. I have no doubt that they are caring practitioners and it is slightly unfortunate that one of them was away on leave. I was told that was the reason why he did not provide an affidavit, but I must observe that according to the records he was going on leave on 6th November. Those were the materials put before the court. Amongst the matters exhibited to the affidavit was a document dated 7th November and this was an Advanced Directive that had been given to the prisoner by the prison medical officer. Initially he was taken over it by

two nursing prisoner officers and he signed it and it has been opened extensively, but the essential points are, that he was saying at paragraph 2 that he did not wish to receive " food, nutritional or vitamin supplement during my fast", but on the other hand he did wish to receive water and/or fluid during his fast. I was told from the Bar that the only fluid he had received since 20th October was in fact water. At paragraph 6 he agreed to receive normal nursing care and at paragraph 8 he agreed to medical examinations as required but at paragraph 9 he did not agree to have a psychiatric or psychological assessment. At paragraph 11 he agreed to receive appropriate treatment for symptoms of prolonged fast, eg, pain relief or treatment for nausea and sickness and at paragraph 13 most importantly he agreed to the following: "in the event of my losing consciousness or becoming mentally incapacitated I wish this advanced directive to be overridden on the advice of my health professional, members of my family or any other third party". I adopt I think the helpful word of Doctor Scott when he came to give evidence before me that there is a certain degree of ambivalence about this advanced directive. A number of those matters were not seen as consistent, particularly the last, with a fixed determination to die. They would be consistent with somebody who was protesting their innocence but ultimately had ambivalence about how far that would be taken.

[5] On Friday 8th when this matter was before me I intervened in the submissions of counsel for the Secretary of State because I was concerned that from the notes and records it appeared that no psychiatric assessment had been carried out on this man, nor may I say had he ever been seen at any time during this prolonged fast by a consultant physician, at which I must express some surprise. I have no doubt that the part-time prison medical officers are conscientious but I would have thought that in a prolonged fast of this kind it would have been appropriate to have specialist care. On Friday I did receive a conscientious report by Doctor Mansilla who is one of these part-time medical officers which indicated that the prisoner while still able to dress and speak but was becoming more frail. However, because of my concern I intervened as I have indicated and I asked the Official Solicitor to arrange a psychiatric assessment. I did so partly because, although the Prison Service had attempted to do this I was not entirely happy about the mode of that. It appears that the request was made by a staff grade forensic psychiatrist standing at the door of the prisoner's cell and asking him whether he would undergo a psychiatric assessment which was perhaps no doubt one way of doing it but not the only way of doing it. In the event after a short adjournment on Friday the Official Solicitor indicated she was able to arrange for a consultant psychiatrist with expertise in the field of assessing mental capacity to examine the plaintiff but that this could not be done until Monday 11th and the matter was then adjourned on consent until today Tuesday 12th. Before rising on Friday afternoon I stated that my view was that if this man became either unconscious or mentally incapable medical personnel should act in accordance with paragraph 13. They could not be criticised if they

provided him with nutrition at that time in accordance with paragraph 13. I reminded the parties of Article 2 of the European Convention on Human Rights and the duty to protect life and the Secretary of State, in particular, of the duty to protect the welfare of a prisoner under the Prison Act of 1953 and I presume these remarks were conveyed to those who had the care of the prisoner.

[6] Among the papers furnished by counsel today on behalf of the Secretary of State was the medical record of the prisoner since that hearing on Friday and I note that on Sunday the 10th of December he was recorded as having difficulty in focusing which it might be thought was an ominous sign. The court, of course, only became aware of that this morning. On Monday 11th at approximately 10.00 am Doctor Scott very helpfully attended at Magilligan Prison. He had been out of the jurisdiction apparently until yesterday morning. He saw the prisoner and he has since prepared a report which I received this morning. He also had an opportunity of examining the clinical notes and records relating to the prisoner and like the prison forensic psychiatrist initially he was told unambiguously to go away, but he persisted in speaking to the prisoner and then did in fact have not one but several conversations with him in his cell. He elicited a history of depression on the part of the prisoner for which he had been treated by his GP in the past and which had been diagnosed by a psychiatrist in 2004. He formed the view that the prisoner had distinct paranoid ideation, ie, paranoid ideas with regard to the legal system and to some past prison cell mates but the doctor did not have enough information to make a diagnosis of true delusional paranoia at time. He did however conclude that it was likely that the prisoner "currently has a relapse of depressive disorder which is affecting his judgment as to his own best interest so making him mentally incapable of making such judgments. That is of truly understanding the nature of the information given to him as to the dire consequences of his food refusal actions and of weighing up all these things in a balanced and considered way and of thus coming to his own decision and communicating it". It then goes on to say that he would require a full assessment in an in-patient psychiatric unit. One exists within the Prison Service at Maghaberry and he says further that he discussed these matters with the senior nursing officer and with Governor Norman Woods and indeed that is borne out as Mr McCloskey helpfully provided me with some documents this morning to up-date the court and there is a note in the medical record without a time on it, but dated yesterday which, inter alia, says the following, quoting Doctor Scott : "In my view there is a likelihood that he currently has a relapse of depressive disorder which is affecting his judgment as to his own self-interest, so making him mentally incapable of making such judgments". It goes on to recommend further a full assessment. In those circumstances I have to express considerable surprise at the outcome of a case conference which was also held yesterday in the prison and the record of which is provided. It was attended by among others a Governor and one of the medical officers and the senior nursing officer. We have a

shortened version of Doctor Scott's opinion, namely, Doctor Scott subsequently advised that there was enough evidence to indicate the prisoner requires psychiatric assessment, he proposed this should be at Maghaberry or another hospital. Doctor Scott's opinion may not have been available, but the note was there on the record that he had formed the view that this man was mentally incapable, albeit, that he did recommend full assessment. The conclusion of the case conference was : "On-going discussions with headquarters resulted in deciding that as the prisoner's blood sample results returned as normal he should remain in Magilligan Healthcare Centre for the remainder of his sentence (20th December 2006) unless directed otherwise by a court". Now it seems to me that if the doctor who was present at that case conference was aware of both Doctor Scott's opinion, which I would have thought he ought to have been and my remarks which certainly should have been conveyed to him on Friday, he ought to have intervened at that time. At the very least he should have acquired the attendance of a consultant physician or a consultant psychiatrist if he felt unable to make a decision himself. In the alternative he might have transferred him either to hospital or to the psychiatric unit at Maghaberry. Apparently the prisoner was asked and did not consent to that but it is not clear to me that his consent was required for an internal prison move of that kind. So in my view the inaction in this regard is difficult to understand.

[7] I make those remarks because I am now told by senior counsel this morning on Tuesday 12th December that the man's condition has deteriorated overnight, but at the time that counsel was telling me this he still had not been seen by a consultant physician. Counsel informed me and I accept ,of course, his entire integrity in this matter that his instructions were that the doctor had been contacted but felt that there was no point in attending if the prisoner was refusing to be assisted. I can only infer from that that the consultant physician was not told of Doctor Scott's opinion and was not told of my remarks on Friday. I note further that this man yesterday, and it is recorded in the notes, consented to an intravenous cannula being inserted to enable IVC fluids to be administered prior to an ambulance arriving. One would have thought this was a sensible precautionary step; he consented to this, but "it was not felt to be necessary at this time, although the prisoner had agreed to its fitting", nor had this been done this morning and it was only done after the court directed that it should be done. This morning I had the benefit of Doctor Scott's oral evidence and he confirmed his written opinion in the absence of any further psychiatric opinion from any of his colleagues save in one respect which I will turn to briefly. I asked him to consider Article 3 of the Mental Health (Northern Ireland) Order 1986, ie, whether this man was suffering from a mental illness, ie, a state of mind which affects a person's thinking, perceiving, emotion or judgment to the extent that he requires care or medical treatment in his own interest or in the interests of other persons, and Doctor Scott firmly expressed the opinion that he was suffering from such mental illness. In this case depression, as he said, can be a very severe

and dangerous illness and he was happy to give that opinion and indeed if he was seeing him clinically in another context the patient was in his opinion liable to be detained under the Mental Health Order. In those circumstances I think a number of things follow. I find that in the absence of any opinion to the contrary of any kind whatsoever clearly that opinion should prevail. Although I place little weight on it, in fact Doctor Scott had subsequently discussed the matter with Doctor Bownes a prison psychiatrist who he informed me completely agreed with Doctor Scott but that seemed to be with regard to the transfer; however, Doctor Scott accepted that the issue of transfer should defer to the frail physical condition of the prisoner at this time.

[8] It seems to me that he being incapable, the matter can be dealt with in one of two ways : he had given this advanced directive saying he would allow his refusal of nutrition to be overridden, in effect,(a) on the advice of the health professional or (b) a member of his family or any other third party. I learned just before commencing these remarks and I welcome that information, that during the brief adjournment I allowed counsel for the Secretary of State, he told me that a cannula had been fitted and that nutrition is being given to Oswald Brown. It seems to me paragraph 13 may be enough in these circumstances but I will say a word more out of caution and as the matter does not seem to have come before the courts in Northern Ireland before. Firstly, it seems to me there is authority at B v Croydon Health Authority [1995] 2 WLR 294, a decision of the Court of Appeal in England. In that case B was a twenty four year old woman suffering from a psychopathic disorder and Lord Justice Hoffman (as he then was) considered the matter with Lord Justices Neil and Henry and they concluded that nutrition could constitute a treatment within the meaning of the Mental Health Act. I think in the circumstances I needn't read that judgment in extenso. But as the Lord Justice said (pp138,139): "Nursing and care concurrent with the core treatment, or as a necessary pre-requisite to such treatment, or to prevent the patient from causing harm to himself or to alleviate the consequences of the disorder are in my view all capable of being ancillary to a treatment calculated to alleviate or prevent a deterioration of the psychopathic disorder". It seems to me in this context that it would be impracticable or impossible to treat this man's depressive condition unless his life can be preserved and his senses and vital organs restored to health. That decision has been followed by the High Court in England in The Queen v Collins, ex parte Brady [2000] Lloyds Reports Medical 355 and I think I needn't refer further to that. The decision that I would take here is consistent with the recent decision of the European Court of Human Rights in Pretty v The United Kingdom 29th April 2002. I quote from page 7:

> "The court is not persuaded that 'the right to life' guaranteed under Article 2 can be interpreted as involving an negative aspect. Article 2 is

> unconcerned with issues to do with the quality of living or what a person chooses to do with his or her life. To the extent that these aspects are recognised as so fundamental to the human condition that they require protection from State interference, they may be reflected in the rights guaranteed by other articles of the Convention or in other international human rights instruments. Article 2 cannot without a distortion of language be interpreted as conferring the diametrically opposite right, namely, a right to die, nor can it create a right to self-determination in the sense of conferring on an individual the entitlement to choose death rather than life".

That is of course not inconsistent with Article 8 and a respect for human dignity and human freedom, but I think it is a salutary reminder of what the position is.

[9] Finally, I have just been referred to the very recent decision, also of the European Court of Human Rights, Nevmerski v Ukraine [2006] 43 European Human Rights Reports 32 where the court had to consider the ill-treatment of a prisoner, for such they found it to be, in the Ukrainian prison system. But it is important to note that although they found on the facts that his ill-treatment included force feeding, that they held at page 12:

> "A matter which was of therapeutic necessity according to established principles of medicine could not in principle be regarded as inhuman and degrading, the same could be said of force feeding that was aimed at saving the life of a detainee who consciously refused to take food. However, the medical necessity had to be convincingly shown to exist and the court had to ascertain that the procedural guarantees for the decision to force feed had been complied with. Moreover, the manner in which an individual was subjected to force feeding could not trespass the threshold of minimum severity envisaged by the Article 3 case law".[para.94]

As it happens in this case Doctor Scott was able to tell me and Mr McCloskey's instructions seems to bear this out that in the present context the nutrition would be given intravenously and there would be therefore no need in all likelihood for force feeding in the sense that that might be envisaged by a lay person, by the mouth and by physical restraint with the conceivable

possibility of injury. In fact that would not appear to be necessary here. If that does become necessary the matter can be re-visited, but it can be seen that on the authorities more vigorous measures could well be justified if it were necessary. So taking all those matters into account, I would have refused the application for the declarations as sought, but Mr McCloskey just before these remarks indicated that he did not wish to pursue those further. I think it is important for the court to make a declaration in the circumstances. Miss Gibson for the Official Solicitor has provided a helpful draft which I am minded to accept, but I will allow counsel some time to consider the precise wording of it and the precise wording of the schedule, but I propose to make a declaration consistent with these remarks and indicating that it is in my view both lawful and proper that this man should be given nutrition at this time.