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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 LAURENCE McGRADY FOR JUDICIAL REVIEW

KERR J

Introduction

[1] This is an application by a patient detained at Knockbracken Healthcare Park for judicial review of certain decisions taken by a Mental Health Tribunal relating to the hearing of an application by him to the tribunal under article 77 of the Mental Health (Northern Ireland) Order 1986 that he be discharged from the facility. The applicant also challenges the compatibility of Rules 11 and 12 of the Mental Health Review Tribunal Rules (Northern Ireland) 1986 with the requirements of the European Convention on Human Rights, in particular articles 5 and 6.

Background

[2] The applicant has been admitted to psychiatric institutions on a number of occasions in the past. His present detention is on foot of a decision made under article 12 of the 1986 Order in 1994. Detention under article 12 is for a period not exceeding 6 months but the period of detention may be renewed under article 13 and the applicant has been the subject of renewal periods between 1994 and the present.

[3] The applicant applied to the tribunal to be discharged on 17 August 2000. The hearing of that application was scheduled for 6 October 2000. Before the hearing date a number of medical reports and other documents were furnished to the applicant's solicitors. Sections of certain reports were provided on condition that they were not revealed to the applicant. Before the hearing began Dr W B McConnell, consultant psychiatrist, the medical member of the tribunal examined the applicant. This examination was conducted under Rule 11. Neither the applicant nor his solicitor was informed of the result of the examination.

[4] At the opening of the hearing before the tribunal the applicant's solicitor objected to what he claimed was the failure to make full disclosure of relevant material to the applicant. The hearing was then adjourned to allow the applicant and his solicitor to respond to reports and documentation that had been provided at the hearing and to allow further reports to be obtained.

[5] After the hearing had been adjourned the applicant applied for leave to apply for judicial review of the tribunal's decisions but this application was withdrawn on 27 November 2001, the applicant having signalled his intention to make a fresh application to the tribunal for discharge. A second application was duly made to the tribunal on 28 November 2001. The tribunal was invited to rule on a number of issues raised on the applicant's behalf.

[6] A second hearing of the application began on 18 January 2002. On the opening of the hearing the President informed the applicant's legal representatives (he was now represented by counsel) that Dr McConnell had examined the applicant. The tribunal then received submissions from counsel for the applicant and the solicitor for the South and East Belfast Health and Social Services Trust in relation to the application of Rules 11 and 12 of the 1986 Rules.

[7] By letter of 25 January 2002 the tribunal gave its decision in relation to the application of Rules 11 and 12 to the proceedings before it and made certain rulings as to the manner in which those proceedings would be conducted. It indicated that it intended to apply Rules 11 and 12 in the following manner: -

> "(a) Prior to the commencement of the hearing and in the absence of the parties and their representatives the non-medical members of the tribunal will be made privy by the medical member to the opinion he has formed solely of the patient's mental condition and his reasons therefor;
>
> (b) If it emerges that the medical member in the course of his pre-hearing examination of the patient or the medical records has ascertained facts not known to the parties or to either of them or their respective representatives from the documents already submitted by them which facts have had any bearing on the opinion formed by him the same will be brought to the attention of the other parties' representatives at an early stage

in the proceedings and in any event at such stage and in such detail as will afford them the opportunity effectively to deal with the same.

(c) The medical member will participate in the proceedings in his capacity as a member of the tribunal and will, at the conclusion of the evidence and the hearing of submissions, participate in the making by the tribunal of the decision as to whether or not to order the discharge of the patient.

(d) The tribunal may not exclude the admission into evidence of the facts set out in the addendum to the social work report solely on the basis that it is hearsay evidence but if it does admit the same it will have regard, when considering what weight to attach to such evidence, to the fact that it is hearsay evidence.

(e) The tribunal, on objection being taken to the admission in evidence of the facts set out in the addendum may, after hearing submissions from both parties, make any of the following rulings: -

(i) admit the addendum in evidence
(ii) decline to admit the addendum in evidence
(iii) authorise the patient's representatives to disclose the facts set out in the addendum to the patient
(iv) direct the attendance before the tribunal as a witness of the informant identified in the addendum

The addendum referred to in the final paragraph of the ruling referred to an annexure to a social work report which contained information given in confidence to the social worker by an informant who did not wish their identity to be revealed.

[8] On 25 April 2002 the applicant was granted leave to apply for judicial review of the tribunal's rulings and to challenge the compatibility of Rules 11 and 12 of the 1986 Rules with the European Convention on Human Rights. I heard the application on 10 February 2003.

The statutory framework

[9] Article 12 of the 1986 Order permits the detention of a patient for a period not exceeding 6 months where in the opinion of a medical practitioner who has examined him the patient is suffering from mental illness or severe mental impairment of a nature or degree which warrants his detention in hospital for medical treatment and failure to detain the patient would create a substantial likelihood of serious physical harm to himself or to other persons. Renewal of the detention period may be authorised under article 13 of the Order on the certification by the responsible medical officer that the conditions provided for in article 12 continue to apply.

[10] Article 77 (1) of the Order provides: -

> **"77.** — (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 it is satisfied—
>
> (a) that he is not 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) that his discharge would not create a substantial likelihood of serious physical harm to himself or to other persons; …"

It is to be noted that these provisions require the tribunal to address three issues: - 1. is the patient suffering from a mental illness or severe mental impairment? 2. is he suffering from either form of mental disorder to the extent that it is necessary that he be detained in hospital for medical treatment? and 3. would his discharge create a significant risk of serious physical harm to himself or others?

[11] Mental health tribunals are established under article 70 of the Order, which provides: -

> "**70.** — (1) The Mental Health Review Tribunal for Northern Ireland shall be constituted in accordance with Schedule 3.

Schedule 3 paragraph (1) provides: -

> **"1.** The Review Tribunal shall consist of—

> (a) a number of persons (referred to in this Schedule as "the legal members") appointed by the Lord Chancellor and having such legal experience as the Lord Chancellor considers suitable;
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> (b) a number of persons (referred to in this Schedule as "the medical members") being medical practitioners appointed by the Lord Chancellor after consultation with the Head of the Department; and
>
> (c) a number of persons appointed by the Lord Chancellor after consultation with the Head of the Department and having such experience in administration, such knowledge of social services or such other qualifications or experience as the Lord Chancellor considers suitable."

By virtue of paragraph 4 of Schedule 3 the Review Tribunal when sitting for the purposes of any proceedings under the Order shall consist of a legal member, a medical member and a member who is neither a legal nor a medical member. Tribunals are to be chaired by the legal members – paragraph 6.

[12] The Rules under which the tribunal operates are those made under article 83 of the Order. When a patient makes an application for discharge to the tribunal the responsible Health & Social Services Board is required by Rule 6 to send certain documentary material including a statement from the responsible Board; in the case of a restricted patient, a statement from the Secretary of State; and reports on the patient's current condition as provided for in Parts A and B of the Schedule to the Rules. Rule 6 (4) states: -

> "Any part of the responsible Board's statement or the Secretary of State's statement, which in the opinion of –
>
> (a) (in the case of the responsible Board's statement) the responsible Board; or
> (b) (in the case of the Secretary of State's statement) the Secretary of State,
>
> should be withheld from the applicant or (where he is not the applicant) the patient on the ground that its disclosure would adversely affect the health or welfare of the patient or others, shall be made in a separate document in which shall be set

> out the reasons for believing that its disclosure would have that effect."

It was under this provision that the addendum to the social worker's report was made.

[13] Rule 11 deals with the issue of medical examinations by the medical member of the tribunal. It provides: -

> "**11** 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 medical 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."

In the present case, as is customary, the medical member, Dr McConnell had not informed the other members of the tribunal of the outcome of his examination but would have done so immediately before the hearing began. The opinion that he formed on the applicant's medical condition was provisional and it would have been disclosed to the applicant's legal advisers in the course of the hearing of the application for discharge.

[14] Rule 12 deals with the disclosure of documents. It provides: -

> "**12.** – (1) Subject to paragraph (2), the tribunal shall, as soon as practicable, send a copy of every document it receives which is relevant to the application to the applicant , and (where he is not the applicant) the patient, the responsible Board and, in the case of a restricted patient, or a conditionally discharged patient, the Secretary of State and any of those persons may submit comments thereon in writing to the tribunal.
>
> (2) As regards any documents which have been received by the tribunal but which have not been copied to the applicant or the patient, including documents withheld in accordance with rule 6, the tribunal shall consider whether disclosure of such documents would adversely affect the health or welfare of the patient or others and, if satisfied that

it would, shall record in writing its decision not to disclose such documents.

(3) Where the tribunal is minded not to disclose any document to which paragraph (1) applies to an applicant or a patient who has an authorised representative it shall nevertheless disclose it as soon as practicable to that representative if he is: -

(a) a barrister or solicitor;
(b) a registered medical practitioner;
(c) in the opinion of the tribunal, a suitable person by virtue of his experience or professional qualification;

provided that no information disclosed in accordance with this paragraph shall be disclosed either directly or indirectly to the applicant or (where he is not the applicant) to the patient or to any other person without the authority of the tribunal or used otherwise than in connection with the application."

It was under these provisions that the addendum to the social worker's report and the other material referred to in paragraph {3} above were provided to the applicant's legal advisers. It was made clear that the materials were provided on condition that they would not be revealed to the applicant.

The judicial review application

[15] On behalf of the applicant Mr Dunlop submitted that rules 11 and 12 should not be applied as proposed by the tribunal because this would entail a breach of natural justice and a violation of the applicant's rights under the Convention for the following reasons: -

1. The tribunal would rely on expert evidence not disclosed to the applicant or his advisers *viz* the examination of the applicant by the medical member. The outcome of that examination and the opinion formed by the medical member was central to the decision to be taken by the tribunal and neither the applicant nor his advisers would have the opportunity to challenge his findings.
2. The involvement of the medical member in the adjudicatory function of the tribunal was incompatible with his role as a witness who provided expert evidence that would influence the result of the application that the applicant be discharged.
3. The disclosure of material to the applicant's solicitor on condition that it was not revealed to the applicant made it impossible to obtain

detailed instructions on the matters alleged in the addendum to the social work report. The applicant was denied the chance to participate fully and effectively in the proceedings because he did not have the opportunity to address these allegations directly.

It had been submitted to the tribunal that the addendum should not be admitted in evidence because it contained hearsay material but this was not pursued on the hearing of the judicial review application.

[16] For the tribunal Mr Maguire pointed out that the medical member would disclose his opinion as to the applicant's medical condition in the course of the hearing. There was therefore no question of the applicant and his advisers being deprived of the opportunity to challenge the conclusions reached by Dr McConnell. In any event these conclusions were provisional and subject to the evidence to be adduced at the hearing. The findings of the medical member were in no sense binding on the tribunal and it could not be suggested that they dictated the outcome of the application. The examination conducted by the medical member under Rule 11 was designed to address the first of the three issues that the tribunal had to determine *viz* whether the applicant was suffering from a mental illness or severe mental impairment. It did not deal with the remaining issues that required to be considered by the tribunal before a decision on the application for discharge could be taken.

The disclosure issue

[17] It is clear from the tribunal's ruling that it has not yet been decided whether the applicant should see the addendum to the social work report and to that extent the application for judicial review may be said to be premature. The applicant contends, however, that the approach of the tribunal should be that in no circumstances should the addendum be withheld from the applicant. To do so would inevitably involve a breach of the applicant's rights under article 6 (1) of the Convention (a fair hearing to determine his civil rights) and article 5 (4) (the right to take proceedings by which the lawfulness of his detention shall be decided by a court).

[18] The European Commission of Human Rights has held in *AR v United Kingdom* Application No. 25527/94 that proceedings regarding a person's detention in a psychiatric hospital "do not as such concern the determination of that person's 'civil rights and obligations' within the meaning of article 6 (1) of the Convention unless it is found that the detention had indirect effects on the detained persons right to administer his property or to carry out legal transactions". It is unnecessary for me to consider the correctness of this decision since it is accepted by the respondent that such rights as the applicant might assert in respect of article 6 (1) are, in the circumstances of this particular case, replicated by his article 5 (4) rights.

[19] In general terms it is necessary that a person whose liberty is at stake in proceedings should be provided with all material that is adverse to him so that he may make answer to it in the course of those proceedings. That unexceptional principle was accepted in a number of decisions of ECtHR – see, for instance, *Mantovanelli v France* [1994] 24 EHRR 370, paras 30-31; *McMichael v United Kingdom* [1995] 20 EHRR 205, paras 80-84; and *Ruiz-Mateos v Spain* [1993] 16 EHRR 505, where the court said at para 63: -

> "The right to an adversarial trial means the opportunity for the parties to have knowledge of and comment on the observations filed or evidence adduced by the other party…"

[20] In the present case, however, different considerations arise. While it is for the tribunal ultimately to decide on its significance, it is clear to me, having read the addendum, that the material it contains is at least potentially relevant to the decision that the tribunal must take. If the tribunal concludes that the contents of the document are germane to the issue that it must resolve, it must take them into account. Although that material may be adverse to the applicant it does not follow that in every circumstance it must be revealed to him. Where, as here, disclosure may cause harm to the applicant or the informant, the tribunal must balance the right of the applicant under article 5 (4) with the interests that may be adversely affected if the material is disclosed. In this context the tribunal will want to consider carefully whether the Convention rights of the informant would be infringed if the material that that person has provided in confidence is revealed to the applicant.

[21] It appears to me that the tribunal will also require to take into account that the applicant's legal representatives have seen the material in question. While they may not disclose that material to the applicant, they may nevertheless take his instructions on the themes with which that material is concerned. There is no reason that the applicant should not be at liberty to present material to the tribunal on the matters raised in the addendum even if he remains unaware of its contents.

[22] If the tribunal concludes that the addendum's contents should not be disclosed to the applicant it should approach the assessment of the material with care. It must keep in mind that details of the information have not been revealed to the applicant. Its duty is to ensure that the proceedings are conducted fairly. This duty arises under pre-incorporation law as well as under the Convention. But the applicant is not denied fairness simply because the material is withheld from him. As I have said, a balance must be struck between, on the one hand, the requirement that an applicant applying for discharge should generally have the opportunity to see and comment on all material adverse to him and, on the other, that the safety of the informant should not be imperilled. Unfairness would arise if the tribunal failed to

acknowledge that the applicant has not been able to see and answer specifically the details of the allegations made against him. Provided they are conscious of this and cater for it in their approach to the assessment of the addendum, the proceedings will not be unfair to the applicant.

[23] The applicant's challenge to the tribunal's decision on the matter of disclosure must fail for the rather more prosaic reason that the tribunal has not yet decided that it will withhold the material from him. The observations made in the preceding paragraphs are to some extent, therefore, academic but they are offered in the hope that they may provide some guidance to the tribunal in its decision on this issue.

The role of the medical member

[24] 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 ahs reached in the course of the hearing.

[25] Nevertheless, the dual role of the medical member is not a usual one. This was recognised by Stanley Burnton J in the case of *R (on the application of S) v The Mental Health Review Tribunal & the Department of Health* [2002] EWHC 2522 (Admin) where he considered a similar challenge to that raised by the applicant in the present case to Rule 11 of the Mental Health Review Tribunal Rules 1983 (which is in virtually identical terms to the Northern Ireland rule). At paragraph 14 of his judgment the judge referred to the Council on Tribunal's expression of concern in 1983 about the role of the medical member as follows: -

> "[The medical member is] … effectively a witness and a member of the tribunal deciding the validity of his own evidence, and that the applicant should have an opportunity of knowing what evidence he has given and commenting on it. Under the present system a medical member examines an applicant before the hearing and then (generally in the course of the hearing) raises any material factors which in his view should be open for comment; he then advises the tribunal in private. While this is not ideal, it is probably the best that can be devised."

[26] The same judge had this to say about the proper operation of the English Rule 11 in *R (on the application of H) v Ashworth Hospital Authority* [2001] EWHC Admin 901 para 86: -

> "The parties should be given the opportunity to address and to comment on any significant findings of the medical member, both because fairness so requires and because they may have comments or evidence to put before the Tribunal that may lead it to depart from the provisional opinion formed by the medical member. That this should be the practice is supported by the guidance from Regional Chairmen of Mental Health Review Tribunals referred to at page 159 of the Leggatt Report on Tribunals and in paragraph 57 of the judgment of Crane J in *The Queen on the application of H v Mental Health Review Tribunal* (Case number CO/2120/2000, unreported, 15 September 2000)."

The Court of Appeal approved this statement, , Dyson LJ observing,

> "I cannot see anything objectionable in paragraph 86. It seems to me both fair and sensible that, if the medical member of the tribunal has formed any views on the basis of his or her interview with the patient, the substance of those views should be communicated to the patient and/or those who are representing him. I cannot think of any good reason why this should not be a requirement, although I would not wish to rule out the possibility of exceptional cases where such a course may not be practicable." - [2002] EWCA Civ 923, para 84

The statements accord with what I have been told is the practice in Northern Ireland. The compatibility of Rule 11 with article 5 (4) of the Convention falls to be determined against that background, therefore.

[27] ECtHR considered the role performed by the equivalent of a medical member of the tribunal in *DN v Switzerland* [2001] ECHR 27154/95. In that case the applicant complained of the lack of impartiality of one of the members of the Administrative Appeals Commission, a doctor (R.W.) who specialised in psychiatry and psychotherapy, and who also acted as judge rapporteur for the Commission. The applicant had applied to the Commission for release from the psychiatric clinic where she was compulsorily detained. The doctor interviewed her at the clinic in the

presence of a court registrar. At the end of the interview he informed the applicant that he would propose to the court that her application be dismissed. He duly made that recommendation and the Commission dismissed the applicant's action, and in their decision referred to the doctor's expert opinion in which the recommendation was contained. ECtHR upheld the applicant's complaint that her article 5 (4) rights had been violated. At paragraphs 54-56 of its judgment the court said: -

> "54. When the applicant attended the hearing before the Administrative Appeals Commission on 28 December 1994, R.W. had already twice formulated his conclusion – orally during the interview on 15 December, and in writing in his report of 23 December – that, as a result of the psychiatric examination, he would propose to the Administrative Appeals Commission to dismiss her request for release from detention. In the Court's opinion, this situation raised legitimate fears in the applicant that, as a result of R.W.'s position in these proceedings, he had a preconceived opinion as to her request for release from detention and that he was not, therefore, approaching her case with due impartiality (see, *mutatis mutandis,* the *de Haan v. the Netherlands* judgment of 26 August 1997, *Reports* 1997-IV, pp. 1392-93, § 51).
>
> 55. The applicant's fears would have been reinforced by R.W.'s position on the bench of the Administrative Appeals Commission where he was the sole psychiatric expert among the judges as well as the only person who had interviewed her. The applicant could legitimately fear that R.W.'s opinion carried particular weight in taking the decision.
>
> 56. In the Court's view, these circumstances taken as a whole serve objectively to justify the applicant's apprehension that R.W., sitting as a judge in the Administrative Appeals Commission, lacked the necessary impartiality."

[28] It was because the applicant in the *DN* case had reason to apprehend lack of impartiality on the part of the doctor who acted as judge rapporteur and who had proposed the rejection of her application *before* it was considered by the Commission that a violation of article 5 (4) was held to have occurred. By contrast the medical member here does not form a final opinion

even on the single issue that is the subject of his examination (the mental condition of the applicant) much less make a recommendation as to the disposal of the application.

[29] The *DN* case has been the subject of guidance given by Mental Health Review Regional Tribunal Chairmen. I have been informed that this guidance has been provided to members of the Mental Health Tribunal in Northern Ireland. The relevant section is as follows: -

> "4.05 The European Court of Human Rights decision largely turns upon the fact that the Medical Member had, to all intents and purposes not only formed his opinion prior to the hearing, he had also disclosed it to the parties and other Tribunal members before the hearing. The Court accordingly concluded that the '*circumstances taken as a whole serve objectively to justify the applicant's apprehension that* [the Medical Member] *lacked the necessary impartiality*'.
>
> 4.06 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.
>
> 4.07 Tribunals must make absolutely sure that any significant findings by the medical member and any factual differences between what the RMO says and what the medical member has found, are laid open for the patient's representative to explore. This must be done at the start of the Tribunal hearing. It should normally be done by the President, but could be done by the Medical Member. The President should not allow 'cross examination' of the Medical Member but should ensure that any differences or additional information are fairly and fully laid open in the hearing at the outset."

As Stanley Burnton J observed in *S* the fact that this guidance is complied with in practice does not establish the compatibility of Rule 11 with the Convention but it appears to me that if this advice is followed no violation of article 5 (4) will arise. What is required is that there should be "due impartiality" on the part of the medical member – see para 54 of the *DN* judgment. If the medical member approaches his task as recommended in the

guidance he will achieve that standard. There is no reason to anticipate that the medical member in the present case will fail to comply with the guidance.

[30] Stanley Burnton J offered the following advice to medical members in paragraph 34 of his judgment as follows: -

> "Rule 11 clearly raises issues which must be handled sensitively. It is imperative that the medical member of the tribunal keeps an open mind until the conclusion of the hearing, and is seen to do so. The guidance cited above at paragraph 7 of the Members' Handbook must be observed. Furthermore, if during the course of the hearing, it appears that there is a factual conflict between the medical member and the patient, for example, as to what was said by the patient to the medical member, and that conflict may be material to the decision of the tribunal, the tribunal must consider whether it can properly continue to hear the patient's application. I do not think that I should express a view in the present case as to any general rule of practice in such circumstances: it would be better for the issue to be considered on the facts of a particular case, if and when one arises."

I agree with this analysis and commend it for the guidance of medical members in this jurisdiction.

Conclusions

[31] None of the grounds on which the application for judicial review was advanced has been made out and it must be dismissed.