Neutral Citation no. [2004] NIQB 37 | *Ref:* **WEAC4170**

Judgment: approved by the Court for handing down | *Delivered:* **18/06/2004**

(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 SHARON McBURNEY

FOR JUDICIAL REVIEW

WEATHERUP J

The application

[1] The applicant is a patient detained at Knockbracken Health Care Park under the Mental Health (NI) Order 1986. She applies for Judicial Review of a decision of the Mental Health Review Tribunal made on 30 May 2003 by which the Tribunal dismissed her application under Article 77(1) of the 1986 Order that she be discharged.

The Mental Health (NI) Order 1986

[2] The 1986 Order makes provision for the detention, guardianship, care and treatment of patients suffering from mental disorder. Under Article 12 a patient may be detained for treatment further to the report of a medical practitioner appointed by the Mental Health Commission for Northern Ireland. Article 13 provides for the renewal of authority for detention of the patient for a further period of 6 months and then for further periods of 1 year. Article 14 provides for the discharge of the patient from detention by a written order made in specified circumstances by the responsible medical officer or the responsible board or the nearest relative.

[3] Part V of the 1986 Order provides for the Mental Health Review Tribunal for Northern Ireland. Article 71 provides for applications to the Tribunal by a patient detained for treatment. Article 77 provides for the discharge of 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 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; or
(c) in the case of an application by virtue of Article 71(4)(a) in respect of a report furnished under Article 14(4)(b) that he would, if discharged, receive proper care".

(2) A Tribunal may under paragraph (1) direct the discharge of a patient on a future date specified in the direction; and where the Tribunal does not direct a discharge of a patient under the paragraph the Tribunal may –

(a) with a view to facilitating his discharge on a future date, recommend that he be granted leave of absence or transferred to another hospital or into guardianship; and
(b) further consider his case in the event of any such recommendation not being compiled with".

The applicant's grounds

[4] The applicant's challenge resolved to three grounds –

(1) Procedural unfairness in the conduct of the proceedings,

(2) Tribunal error in declining to consider a request for a hospital transfer under Article 77(2)(a),

(3) Article 77(1) being incompatible with Article 5 of the European Convention on Human Rights, in that it places the burden of proof on the applicant to satisfy the Tribunal of the grounds for discharge.

The respondent's preliminary point

5] By way of preliminary point the respondent contended that the applicant's first two grounds had become academic and should not be considered by the Court. The applicant had made a further application for discharge to the Tribunal on 16 February 2004. The hearing of her application opened before the Tribunal on 2 April 2004 when the applicant was represented by Counsel, and the Tribunal acceded to an application for an adjournment to enable an independent medical report to be obtained on the applicant. So the issue of the applicant's discharge is before a new Tribunal.

[6] Lord Slynn in *R v Home Secretary Ex-parte Salem* (1999) 1AC 456 at 457 stated that –

> "The discretion to hear disputes, even in the area of public law, must, however, be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so, as for example (but only by way of example) when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future."

Carswell LCJ in the Court of Appeal's decision in *Re McConnell's Application* [2000] NIJB 116 at 120 quoted Lord Slynn and added –

> "It is not the function of the courts to give advisory opinions to public bodies, but if it is apparent that the same situation is likely to recur frequently and the body concerned had acted incorrectly they might be prepared to make a declaration to give guidance which would prevent the body from acting unlawfully and avoid the need for further litigation in the future. The (Parades) Commission is likely in the ordinary course of events to have to rule on other processions proposing to pass through areas whose residents will object to their presence. If it appeared from the evidence before us that there was a substantial possibility that it would then act in a way that was clearly outside its powers or contrary to its prescribed procedures we might be disposed to make a declaration to that effect."

[7] The applicant contends that procedural fairness requires that certain specified measures should apply to Tribunal hearings and the procedural approach advanced by the applicant is not contested by the respondent, save in one respect. There are however factual disputes between the parties concerning the application of the procedural measures. I do not consider it to be necessary to resolve the factual disputes that concern the uncontested procedural approach or to make any declaration in respect of such procedural matters. The one respect in which the parties differ concerns the approach of the Tribunal to the involvement of a lay representative. As this is a matter of general interest I propose to consider the issues of procedural fairness.

Procedural fairness

[8] The issues of procedural fairness raised by the applicant are first, the delay in furnishing the papers in the case to the applicant's representative; secondly, the failure to afford the applicant's representatives an opportunity to apply for an adjournment and to grant such an adjournment; thirdly, the failure to take a pro-active approach in relation to the requirements for procedural fairness where an applicant has engaged a lay representative.

[9] The Mental Health Review Tribunal Rules (NI) 1986 provide for procedure at Tribunals. The Rules provide for the furnishing of papers, the adjournment of proceedings and the use of lay representatives. Procedural fairness is a flexible principle depending upon "the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates." In any scheme of statutory decision-making the courts will imply "so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness." Lord Bridge in Lloyd v McMahon [1987] AC 625.702.

[10] The applicant's lay representative did not receive the case papers until the afternoon of the hearing. The Tribunal's practice is to furnish case papers to an applicant or his representative in advance of the hearing date. In the present case the Tribunal staff were uncertain about the identity of the applicant's representative because of the prior engagement of a legal representative. By reason of that uncertainty the lay representative did not receive the case papers until the day of the hearing. In the circumstances there was no basis for complaint that the applicant's lay representative did not receive the case papers before the hearing date.

[11] As to the events on the day of the hearing there is a dispute between the parties as to the time at which the lay representative received the case papers and as to the period available to consider those papers. It is not necessary to resolve the factual disputes. The respondent agrees that an applicant's representative should have sufficient opportunity to consider the case papers.

[12] When the hearing started it is by no means clear that the applicant's lay representative was denied an opportunity to indicate that there had been insufficient preparation time or that he applied for an adjournment. The respondent agrees that if, by reason of any delay in the furnishing of case papers, a Tribunal considers that a representative has had insufficient time to prepare for the hearing, sufficient time should be granted, and if necessary adjournment of the hearing should be considered.

[13] The third procedural issue, and the one on which the parties differ, is whether a Tribunal should take a pro-active approach to the involvement of a lay representative. By this the applicant means that the Tribunal has a responsibility to intervene to the extent necessary to establish that the lay representative has a full understanding of the course of the proceedings and that the Tribunal has a full understanding of the position being taken by the lay representative at all stages of the hearing.

[14] Procedural fairness requires that a party has the right to know the case against him and the right to respond to that case. The right to know and to respond requires the disclosure of material facts to the party affected, such disclosure being within a reasonable time to allow the opportunity to respond. The Tribunal's practice recognises the right to know and the right to respond by making disclosure of the case papers to the applicant in advance of the hearing to provide the opportunity to respond. There will be circumstances, such as occurred in the present case, where disclosure cannot take place until the day of the hearing and the right to respond may be impaired by lack of reasonable time to prepare the response. Where the applicant has a professional representative a Tribunal could reasonably assume that, in the absence of any indication to the contrary from the professional representative, there has been accorded sufficient time to allow a proper response. In the case of a lay representative who has received the case papers on the day of the hearing there may not have been sufficient opportunity to prepare a response and some lay representatives may be inhibited in attempting to seek the adjournment of a hearing in such circumstances.

[15] The obligation falls on the Tribunal to provide the lay representative with the opportunity to know the case and to prepare the response. That aspect of a fair hearing is the same in all cases but the measures required to achieve that aspect of fairness may vary from case to case. If the Tribunal knows of a delay in furnishing papers to a lay representative, and if it is to be satisfied that the lay representative has had sufficient opportunity to prepare a response, it may be necessary for the Tribunal to make reasonable enquiries to satisfy itself that the lay representative has had sufficient opportunity to prepare that response. That is not to impose an obligation to undertake enquiries on all issues in all cases involving lay representatives. Rather it is recognition that the knowledge of the Tribunal of the delay in furnishing the

papers might be sufficient in all the circumstances to prompt enquiry being made of the lay representative.

Hospital transfer

[16] The applicant's second ground is that the Tribunal refused to determine a matter within its jurisdiction, namely to consider making a recommendation that the applicant be transferred to another hospital. Article 77(2)(b) provides that where a Tribunal does not direct the discharge of a patient under Article 77(1) the Tribunal may "with a view to facilitating his discharge on a future date recommend that he be …. transferred to another hospital …"

[17] The respondent accepts that the Tribunal has jurisdiction to make a recommendation that the applicant be transferred to another hospital in the circumstances outlined in Article 77(2)(a) but denies that any such issue was raised by the applicant. Again there was a factual dispute as to the nature of the issue raised by the applicant's representative. The applicant had been transferred to a new ward at Knockbracken Health Care Park and was unhappy and distressed in the new ward and she and her representative believed that this was contributing to deterioration in her condition. It was their intention to apply to the Tribunal for a recommendation that the applicant be transferred to Windsor Ward in Belfast City Hospital. However it was by no means clear to the Tribunal that that was the character of the request being made on behalf of the applicant and the Tribunal believed that a request was being made for a ward transfer within Knockbracken Health Care Park, a matter outside the jurisdiction of the Tribunal. It is not necessary to examine the detail of the exchanges between the applicant's lay representative and the Tribunal or the circumstances in which the hearing was concluded. Counsel for the Tribunal accepted that the Tribunal had jurisdiction to address the issue of transfer to another hospital.

[18] However the present dispute illustrates circumstances that may arise where it may be appropriate to pay additional attention to the position of a lay representative, so that the Tribunal may have a full understanding of the position being taken on behalf of the patient. If the Tribunal has notice of some factor that might reasonably prompt further enquiry from the lay representative then it should make reasonable enquiry, in this instance to elicit the full scope of the character of the representations being made on behalf of the applicant.

The burden of proof

[19] The applicant's third ground is that Article 77(1) of the 1986 Order is incompatible with Article 5 of the European Convention in that it places on an applicant the burden of satisfying a Tribunal of the grounds for release

from detention. The equivalent provision in England and Wales is to be found in Section 72(1) of the Mental Health Act 1983. In *R (On the application of H) v Mental Health Review Tribunal North and East London Region* (2002) QB 1 the Court of Appeal made a declaration under Section 4 of the Human Rights Act 1998 that Section 72(1) of the 1983 Act (and section 73(1) in relation to the power to discharge restricted patients) was incompatible with Articles 5(1) and 5(4) of the European Convention in that, for the Tribunal to be obliged to order a patient's discharge the burden was placed upon the patient to prove that the criteria justifying detention in hospital no longer existed; and that Articles 5(1) and 5(4) required the Tribunal to be positively satisfied that all the criteria justifying the patient's detention in hospital for treatment continued to exist before refusing a patient's discharge. As a result of the decision of the Court of Appeal the Mental Health Act (1983) (Remedial) Order 2001 came into force in England and Wales on 26 November 2001 to remove the incompatibility by amending Section 72(1) of the 1983 Act (and section 73(1)) to provide that a Tribunal shall direct the discharge of a patient if the Tribunal is not satisfied that the criteria justifying detention in hospital for treatment continue to exist.

[20] At the date of the Tribunal hearing on 30 May 2002 there was no equivalent amendment to Article 77(1) of the 1986 Order. However Tribunals in Northern Ireland had responded to developments in England and Wales. The Chairman of the Tribunal stated that the Tribunal approached the issue of the burden of proof in respect of the applicant's discharge by placing the onus on the Trust to establish the matters referred to in Article 77. The applicant contended that the approach of Tribunals in Northern Ireland represented an informal practice and that there was a lack of clarity as to the formal legal position, and that in any event the approach of the Tribunal was not made clear to the applicant or her representative at the hearing before the Tribunal. Accordingly the applicant contended that the Court should exercise its powers in relation to the interpretation of legislation under Section 3 of the Human Rights Act 1998 to read and to give effect to legislation in a way which is compatible with the Convention rights. In the alternative the applicant contended that the Court should make a declaration that in the operation of Article 77(1) of the 1986 Order the burden of proof should not be on the patient but should be on the authority seeking the detention of the patient.

[21] The 1986 Order is "subordinate legislation" as defined in Section 21(1) of the 1998 Act. A declaration of incompatibility under Article 4 of the 1998 Act would not be available, as section 4 applies to a provision of "primary legislation" or a provision of secondary legislation rendered irremovable by primary legislation. Nevertheless the Court has jurisdiction to make a general declaration in the terms contended for by the applicant, should it be considered appropriate to do so.

[22] Since the hearing of this application for Judicial Review the Mental Health (Amendment) (Northern Ireland) Order 2004 came into force on 14 May 2004. It amends Article 77(1) of the 1986 Order (and also Article 78 of the 1986 Order in relation to the power to discharge a restricted patient subject to restriction orders). The effect of the 2004 Order is to place the burden on the authority seeking to detain the patient to establish the specified conditions for detention.

[23] In view of the 2004 Order it is not considered necessary that an analysis be carried out of the applicant's contentions. In short form I have considered the expansive approach taken in *R v A* (2002) 1 AC 45 and *Re King's Application* (2003) NI 43 where the House of Lords and the Court of Appeal in Northern Ireland respectively considered the application of Section 3 of the 1998 Act on the interpretation of legislation. *Re King's Application* concerned the role of the Secretary of State in the fixing of the minimum term of imprisonment under the Life Sentence (NI) Order 2001. The Court of Appeal held that the Secretary of State's role was incompatible with the European Convention. Section 3 of the 1998 Act was applied so as to read Article 11 of the 2001 Order to require the Secretary of State to certify the minimum term in accordance with judicial recommendations. In *R (on the application of Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837 a seven member appellate committee of the House of Lords considered the same issue of the Home Secretary's role in setting the minimum term for mandatory life sentence prisoners under section 29 of the Criminal (Sentences) Act 1997. The House of Lords refused to apply section 3 of the 1998 Act so as to read section 29 of the 1997 Act as requiring the Home Secretary not to fix a minimum term in excess of the judicial recommendation. A declaration of incompatibility was made under section 4 of the 1998 Act. In rejecting the proposed interpretative approach under section 3 of the 1998 Act Lord Steyn stated at paragraph 59 –

> "It is impossible to follow this course. It would not be interpretation but interpolation inconsistent with the plain legislative intent to entrust the decision to the Home Secretary, who was intended to be free to follow or reject judicial advice. Section 3(1) is not available where the suggested interpretation is contrary to express statutory words or is by implication necessarily contradicted by the statute."

[24] I would not have been prepared to interpret Article 77(1) of the 1986 Order so as to place the burden of proof on the Trust. Article 77(1) could not be read and given effect to in such a manner, as that would have involved a complete reversal of the plain meaning of the legislation. The remedy was

not a matter of interpretation of legislation for the Court but was a matter of amending legislation for Parliament, as has now occurred.

[25] In the alternative to the application of section 3 of the 1998 Act the applicant contended that the Court should make a declaration that the burden of proof should be on the authority seeking detention. This alternative has also been overtaken by the 2004 Order. At the hearing the respondent opposed the making of such a declaration on the ground that it might cause confusion in the Tribunals if the Court, having decided under section 3 of the 1998 Act that Article 77(1) could not be read and given effect in a way which was compatible with the Convention rights, then proceeded to declare that the Tribunals should apply Article 77(1) in that manner. The respondent further opposed striking down any part of Article 77 as it would have impacted on the powers of Tribunals to provide for the release of detained patients.

[26] Had it been necessary to decide the issue I would have accepted the respondent's contention in relation to the striking down of any part of Article 77. However, had the 1986 Order not been amended, I would have accepted the applicant's contention and made a declaration that the burden of proof should be on the authority seeking detention. Section 6 of the 1998 Act provides that it is unlawful for a public authority to act in a manner that is incompatible with a Convention right. The declaration would have confirmed the incompatibility of Article 77(1) of the 1986 Order as applied to place the burden on the patient to establish the grounds for release from detention. The declaration would have confirmed the lawfulness of Tribunal practice in placing the burden on the Trust to establish the grounds for detention of the patient. Such a declaration becomes unnecessary as a result of the 2004 Order.

[27] By reason of the events that have occurred since the Tribunal hearing as outlined above it is not necessary to make any order in these proceedings. Accordingly the application for Judicial Review is dismissed.