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

Delivered: **23/01/2009**

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)**

Magowan's Application [2009] NIQB 6

**AN APPLICATION FOR JUDICIAL REVIEW BY VINCENT MAGOWAN
AS FATHER AND NEXT FRIEND OF
VINCENT MAGOWAN**

WEATHERUP J

[1] This is an application for judicial review by Vincent Magowan (the applicant), as father and next friend of Vincent Magowan (Vincent), a patient at Muckamore Abbey Hospital, Antrim. The first respondent is the Northern Health and Social Services Trust (formerly the Causeway Health and Social Services Trust), with responsibility for the area where the family lives, and the second respondent is the Belfast Health and Social Services Trust (formerly the North and West Belfast Health and Social Services Trust), with responsibility for the area where Muckamore Abbey Hospital is situated. Ms Keegan QC and Ms Williamson-Graham appeared for the applicant, Mr Good for the first respondent and Mr Finbar Lavery for the second respondent.

[2] Vincent was born on 2 February 1984 with Downs Syndrome. He is described by Dr Maria McGinnity, Consultant Psychiatrist at Muckamore Abbey Hospital, who has been the responsible medical officer for Vincent since 16 October 2006, as having a severe learning disability with very limited communication skills and longstanding behavioural difficulties. He attended Sandleford Special School, Coleraine from the age of 9 to 18 years when he transferred to Mountfern Adult Day Care Centre, which involved a 5 day placement per week. He was a patient at Muckamore Abbey Hospital between 29 October 2004 and 4 August 2005. Thereafter he returned to Mountfern Adult Day Care Centre until October 2005, when the applicant decided that he should remain at home.

[3] On 4 April 2006 he was readmitted as a patient at Muckamore Abbey Hospital under the Mental Health (Northern Ireland) Order 1986. The 1986 Order makes provision with respect to the detention, guardianship, care and treatment of patients suffering from mental disorder and for the management of the property and affairs of such patients. Part V of the Order provides for applications to the Mental Health Review Tribunal for Northern Ireland. The Mental Health (Amendment) (Northern Ireland) Order 2004 came into operation on 14 May 2004 and amended Article 77(1) as follows in relation to the power to discharge patients -

“(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 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), the tribunal is satisfied that he would, if discharged, receive proper care.”

[4] Thus the Tribunal may discharge in any case and shall discharge if not satisfied on the need for hospital treatment or the requisite degree of risk from the patient. The applicant applied for Vincent to be discharged and by a decision dated 1 August 2007 the Mental Health Review Tribunal directed that Vincent should not be discharged from detention under the 1986 Order. The Tribunal was satisfied that Vincent suffered from severe mental impairment of a nature and degree that warranted his detention in hospital for medical treatment. There was stated to be clear evidence of severe impairment of intelligence and of social functioning. In addition his severe mental impairment was stated to have been associated with abnormally aggressive and seriously irresponsible conduct which included a history of verbal and physical aggression to others and destructive behaviour towards property. Here the Tribunal was referring to both the requirement for hospital treatment and the risk of harm. The Tribunal’s written reasons concluded -

“It is clear from the patient’s history that he responds best to an environment which stimulates him with his preferred activities, provides him with supports and boundaries and draws a consistency of response to his challenging behaviour. This environment has proved difficult to replicate while the patient has been living in the community and this has invariably led to readmissions to hospital.

The tribunal has considered all of the evidence in relation to this application and is satisfied that the environment outlined above would not be available to the patient were he to be discharged back into the community. Similarly the treatment he receives in terms of the Behavioural Management Plan would not be available in the community. The tribunal has not doubt that the absence of the above environment and treatment would bring about the behaviours which the patient demonstrated which put others at risk of serious physical harm and which resulted in the patient’s admission to hospital.

In coming to its decision the Tribunal has considered the patient’s rights under the Human Rights legislation and is satisfied that the patient’s continued detention is proportionate to the risks involved in his discharge.”

[5] The applicant’s grounds for judicial review against the Northern Trust are as follows -

(a) The Northern Trust has acted unlawfully in that it has failed to assess the needs of Vincent and/or delayed unreasonably in meeting his assessed needs under section 2 of the Chronically Sick and Disabled Persons (Northern Ireland) Act 1978 and under Article 15 of the Health and Personal Social Services (Northern Ireland) Order 1972.

(b) The Northern Trust has acted in a Wednesbury unreasonable manner in failing to meet the assessed needs of the applicant.

(c) The Northern Trust has further acted unlawfully in failing to have regard for and in failing to observe its positive obligations arising under Article 8 of the European Convention on Human Rights to allow

the applicant and his family members to exercise their family rights in respect of one another, principally within the setting of the family home.

The applicant's additional grounds for judicial review against both the Northern Trust and the Causeway Trust are as follows -

(d) The failure to provide suitable and adequate day care and respite care has necessitated Vincent's continued detention in Muckamore Abbey Hospital notwithstanding that the conditions giving rise to his detention no longer are in existence and such continued detention in the hospital is a violation of the applicant's right to liberty under Article 5 of the European Convention.

(e) Vincent's continued detention in Muckamore Abbey Hospital is in violation of his right to liberty in that there has been unreasonable delay in securing and establishing suitable and adequate day care and respite care services that would allow him to be fully discharged from hospital.

[6] The applicant and his wife are undoubtedly devoted to Vincent and have acted at all times in what they have believed to be Vincent's best interests. The applicant believes that Vincent could and should be accommodated at home and cared for by his parents, with appropriate support, respite care, treatment and supervision being provided by the Trusts. The Trusts' position has been that in 2006 and 2007 the required treatment was only available in hospital and there was no appropriate support, respite care, treatment and supervision in the community to cater for Vincent's needs. The applicant contends that it was the duty of the Trusts to make available the appropriate support, respite care, treatment and supervision to meet Vincent's needs while living with his parents. In 2008 the Trusts completed the development of what they contend are appropriate residential and respite facilities with suitable treatment and supervision for Vincent's needs, which are in the community but outside his parents home. Vincent has now been granted temporary leave of absence from Muckamore Abbey Hospital to move to those facilities. The applicant makes the case concerning the failure to make appropriate arrangements for Vincent at his parents' home and in the community under the partly overlapping headings of the Article 5 right to liberty, the domestic health and social services legislation, the Article 8 right to respect for family life and the delay and unreasonableness of the authorities in the making of appropriate arrangements in the community.

[7] Article 5 of the European Convention provides for the right to liberty in the following terms:

“(1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with the procedure prescribed by law -

(e) the lawful detention of persons of unsound mind....

(4) Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if his detention is not lawful.”

[8] The European jurisprudence provides that a person cannot be considered to be of unsound mind and deprived of his liberty unless the following conditions are satisfied. First, that there is objective medical evidence that the patient suffers from mental disorder, second that the mental disorder is of a kind or degree warranting compulsory confinement and third that the mental disorder persists - Winterwerp v Netherlands [1979] 2 EHRR 387.

[9] The applicant relies on Johnston v United Kingdom (119/1996/738/937) a judgment of the European Court of Human Rights dated 24 October 1997. The patient had been detained under the Mental Health Act 1983 as a result of mental illness. He had been involved in the criminal justice system and the Crown Court had imposed a Hospital Order and a Restriction Order under the 1983 Act. A Mental Health Review Tribunal accepted that the patient was no longer suffering from mental illness and ordered his conditional discharge, the conditions being that he would be subject to psychiatric supervision and social worker supervision and reside in a supervised hostel. The patient’s discharge was deferred until arrangements could be made for suitable accommodation. Difficulties were encountered in securing suitable accommodation and the patient was not released for a further 3½ years. The ECtHR held that, while a decision to defer release until suitable hostel accommodation had been found was justified in principle, it was necessary that safeguards be in place to ensure that release was not unreasonably delayed. However the patient’s continued detention was found not to be justified under Article 5(1)(e) of the European Convention having regard to the situation which resulted from the decision of the Tribunal and to the lack of adequate safeguards, including provision for judicial review to ensure that the applicant’s release from detention would not be unreasonably delayed. The ECtHR noted that neither the Tribunal nor the authorities possessed the necessary powers to ensure that the condition relating to a suitable placement could be implemented within a reasonable time.

[10] A number of matters arise from the decision in Johnston v UK. First of all it should be noted that the Tribunal found that the patient was no longer suffering from mental illness and thus the Winterwerp criteria for detention were not satisfied. In R (H) v Secretary of State for the Home Department [2004] 1 All ER 412 the House of Lords considered Johnston v UK. The patient had been subject to a Hospital Order and a Restriction Order. The Tribunal deferred the patient's conditional discharge pending arrangements for psychiatric supervision. The patient was unsuccessful in his application for judicial review on the basis of unlawful detention in breach of Article 5 of the European Convention. Lord Bingham contrasted the facts of Johnston at paragraph 18:

“The key to a correct understanding of Johnston v UK is to appreciate the nature of the case with which the court was dealing. It was that of a patient who, from June 1989 onwards, *was found not to be suffering from mental illness and whose condition did not warrant detention in hospital*. The court's reasoning is not applicable to any other case.” (*Italics added*)

[11] Secondly there is a “categorical difference” between a case where the patient no longer suffers from mental illness, as in Johnston, and a case where the patient continues to suffer from mental illness, as in H where the House of Lords held that there was no breach of Article 5(1)(e) -

“There is a categorical difference, not a matter of degree, between this case and that of Johnston v United Kingdom [1997] 40 BMLR 1. Mr Johnston was a patient in whose case the Winterwerp criteria (Winterwerp v Netherlands [1979] 2 EHRR 387) were found not to be satisfied from June 1989 onwards. While, therefore, it was reasonable to try and ease the patient's reintegration into the community by the imposition of conditions, the alternative, if those conditions proved impossible to meet, was not continued detention but discharge, either absolutely or subject only to a condition of liability to recall.” His detention became unlawful shortly after June 1989 because there were, as all the doctors agreed, no grounds for continuing to detain him. The present case is quite different. There was never a medical consensus nor did the tribunal find, that the Winterwerp criteria were not satisfied. The tribunal considered that the appellant could be

satisfactorily treated and supervised in the community if its conditions were met, as it accepted, *but the alternative, if these conditions proved impossible to meet, was not discharge, either absolutely or subject only to a condition of recall, but continued detention.* The appellant was never detained when there were grounds for detaining him.” (*Italics added*)

[12] Thirdly, the detention in Johnston and in H arose in the context of a Hospital Order and a Restriction Order, unlike the present case. The same scheme applies under the 1986 Order in Northern Ireland. Article 44 provides that the Court may make a Hospital Order if satisfied that the offender is suffering from mental illness or severe mental impairment of a nature or degree which warrants his detention in hospital for medical treatment and the Court is of the opinion that the most suitable means of dealing with the case is by means of a Hospital Order. Further, Article 47 provides that where a Court makes a Hospital Order and it appears to the Court that it is necessary for the protection of the public from serious harm, the Court may also make a Restriction Order either without limit of time or for a specified period, by virtue of which the patient’s discharge from hospital is restricted. There are separate provisions for the discharge of restricted patients and those patients who are not restricted. In respect of the discharge of a restricted patient Article 78 provides that the Tribunal may direct absolute discharge or in certain circumstances may direct conditional discharge and may defer a direction for conditional discharge until the necessary arrangements have been made. On the other hand, in respect of patients other than restricted patients, Article 77 provides that if the Tribunal is not satisfied as to the requirements for detention (as set out at paragraph [3] above) it shall direct the discharge of the patient then or on a future date.

[13] Fourthly, one aspect of the decision of the ECtHR in Johnston concerned the supposed lack of powers of a Tribunal to review the inability to secure compliance with conditions imposed on the discharge of a patient. This arose because of the authority of the Secretary of State for the Home Dept v Oxford Regional Mental Health Review Tribunal [1987] 3 All ER 8. However this decision was then overruled by the House of Lords in H. A Tribunal can secure compliance with Article 5 by issuing provisional decisions or monitoring the implementation of conditions or varying conditions or modifying the decision.

[14] Fifthly, the duty of the health authority in response to the Order of the Tribunal imposing conditions for the discharge of the patient was “to use its best endeavours to procure compliance with the conditions laid down by the tribunal” per Lord Bingham in Johnston at paragraph 29. It was found in Johnston that the health authority had used its best endeavours, that it was

not subject to an absolute obligation to procure compliance, that it was not at fault in failing to do so and the appellant could base no claim on the fact that the Tribunal's conditions had not been met.

[15] This approach to the obligation of the health authority is reflected in the ECtHR decision in Kolanis v United Kingdom [2006] 42 EHRR 12, where there was found to be no breach of Article 5(1)(e). A Tribunal ordered the conditional release of the patient, requiring psychiatric supervision which could not be made available, resulting in continued detention. Unlike Johnston, the patient continued to suffer from mental illness and required treatment and medical supervision. The ECtHR found that this was not tantamount to a finding that the second Winterwerp criterion (the mental disorder is of a kind or degree warranting compulsory confinement) was no longer fulfilled. In the absence of the required treatment and medical supervision the detention of the patient continued to be necessary in line with the purpose of Article 5(1)(e) of the European Convention. Where the required treatment and supervision were not available there could be no question of interpreting Article 5 (1)(e) as requiring discharge without the conditions, or as imposing an absolute obligation on the authorities to ensure that the conditions were fulfilled. A failure by the health authority to use "best efforts" would be amenable to judicial review. Appropriate safeguards must be in place to ensure that continued detention is consonant with Article 5(1)(e) and a period of delay raises issues under Article 5(4).

[16] In the present case the Tribunal found that the statutory conditions for detention were satisfied. The Tribunal made a finding that it was satisfied that Vincent suffered from severe mental impairment of a nature and degree which warranted his detention in hospital for medical treatment. Further the Tribunal referred to his abnormally aggressive and seriously irresponsible conduct. This represents a "categorical difference" between this case and that of Johnston v UK. In the present case the Winterwerp criteria were found to be satisfied.

[17] Further, the present case did not involve a Hospital Order or a Restriction Order and did not involve conditional discharge. Had Vincent been a restricted patient and had the requirements for continued detention no longer existed and had the circumstances that existed in hospital for the treatment and supervision of Vincent been specified by the Tribunal as conditions of his discharge, the obligation on the Trusts would have been to use their 'best endeavours', or in European terms 'best efforts', to secure compliance. The general duties under the health and personal social services legislation would not have converted the 'best endeavours' approach into an absolute obligation. There is no absolute duty imposed on the Trusts to secure the provision in the community of those facilities required for the treatment and supervision of every patient. As Lord Bingham stated in relation to H, if the conditions for discharge proved impossible to meet the alternative was

not discharge, either absolutely or subject only to a condition of recall, but continued detention.

[18] However the Tribunal considered that the requisite circumstances did not exist where Vincent could be satisfactorily treated and supervised in the community, namely the creation of an environment that stimulated the patient with his preferred activities, provided him with support and boundaries and drew a consistency of response to his challenging behaviours and further that the treatment he received in terms of the behavioural management plan was not available in the community. This was not tantamount to a finding that the Winterwerp criteria were not satisfied or that the statutory requirements for detention were not satisfied.

[19] The applicant contends for a breach of duty by the Trusts by virtue of the provisions of the Health and Personal Social Services (Northern Ireland) Order 1972 and the Chronically Sick and Disabled Persons (Northern Ireland) Act 1976. Article 4 of the 1972 Order states the general duty to provide or secure the provision of integrated health services and personal social services and to so discharge that duty as to secure the effective co-ordination of health and personal social services. Further, Article 15 of the 1972 Order provides that in the provision of personal social services the authority shall make such arrangements and provide or secure the provision of such facilities (including the provision or arranging for the provision of residential or other accommodation, home help and laundry facilities) as it considers suitable and adequate. In addition, section 2 of the 1976 Act provides where it is considered necessary to make arrangements under Articles 4 and 15 of the 1972 Order for the provision of practical assistance for a person in his home or the provision of assistance for that person in arranging for the carrying out of any works of adaptation in his home or the provision of any additional facilities designed to secure his greater safety, comfort or convenience, such arrangements shall be made.

[20] The 1972 Order and the 1976 Act involve the authorities in assessing needs and providing such facilities as are considered suitable and adequate to meet the needs of the patient. As Coghlin J stated in Hanna's Application [2003] NIQB the authorities also have an overall duty to promote the physical and mental health and social welfare of all the people of Northern Ireland, including those whose needs may, depending on the circumstances, be more urgent and pressing than those of the applicant. In achieving that goal it was stated to be necessary to take into account available resources (paragraph [9]).

[21] In the present case the Tribunal concluded that Vincent's condition warranted continued detention in hospital for treatment. They expressed the view that his continued detention was proportionate to the risks involved in his discharge. Social Services had been involved with Vincent prior to his admission to Muckmore Abbey Hospital. Janet Kennedy, Social Worker and

member of the Learning Disability Team of the Northern Trust, had responsibility for the care of Vincent from February 2002. After Vincent left Mountfern in October 2005 he was cared for by his parents at home until his admission to Muckamore Abbey Hospital in April 2006. Ms Kennedy advised Vincent's parents on the Direct Payment Scheme whereby the Northern Trust could provide direct funding for families to identify and recruit their own carers, although in the event the applicant felt unable to take advantage of the scheme. Ms Kennedy also provided information in relation to a service known as Vela Microboard, which is a charitable body that helps families construct a microboard of a group of family and friends committed to developing an individualised package of care for disabled family members or friends. The applicant felt unable to agree that Vincent return to Mountfern even on a part-time basis. Social services staff and psychiatric staff and Vincent's parents were all attentive to the needs of Vincent, although the parents were not always in agreement with the assessments made or the response adopted. Consideration was given to respite care at Meadowbank Care Home Londonderry, at Culmore Manor Private Nursing Home Londonderry, at Longfield Care Home Eglinton, at Greanan Lodge Londonderry, at Three Island Private Nursing Home Toomebridge and at Praxis Challenge Unit, Crumlin. None of the facilities proved satisfactory to all concerned.

[22] Matters moved along in 2008. The Northern Trust refurbished an existing building near the Mountfern Day Care Facility, which incorporated a specialist day care unit for persons whose behaviour had been deemed to be challenging. The facilities were developed with the individual needs of Vincent in mind. Further, with regard to residential accommodation, the Northern Trust developed a new facility at Woodford Park, Coleraine, to provide accommodation for six service users who were being discharged from Muckamore Abbey Hospital. Again the facilities were developed with Vincent in mind. A transition plan for Vincent was developed for his transfer from Muckamore Abbey Hospital to Mountfern and Woodford Park. This transfer involved the grant of leave of absence from hospital under Article 15 of the Mental Health (Northern Ireland) Order 1986. Vincent commenced his leave of absence on 14 October 2008 by transferring to Mountfern and Woodford Park. His detention remains subject to the power of the Tribunal to order his discharge in accordance with Article 77 of the 1986 Order.

[23] In the course of this application for judicial review the Office of the Official Solicitor was made a Notice Party to the application to consider the interests of Vincent. Ann Blake, a solicitor in the Office of the Official Solicitor, visited Woodford Park and Mountfern and met Vincent and all the professionals involved in his care. Ms Blake provided most comprehensive reports, in the form of affidavits, of her visits and meetings. It was her conclusion that overall the transition had been extremely successful. She rightly emphasised the unique and significant role played by Vincent's family

in his life and given his dependence on and attachment to them and recognised that the input of Vincent's parents into his care and management could not be underestimated and must be maintained and encouraged.

[24] I am satisfied that all the authorities carried out repeated assessments of Vincent's needs and devised treatment plans to address his needs and took all reasonable steps to secure the provision of the appropriate environment and treatment and supervision for the needs of Vincent. Such arrangements for treatment were not available in the community or in Vincent's home, despite the best intentions of his parents. Proposed arrangements for treatment did not become available in the community until the present arrangements were put in place in Woodford Park and Mountfern. Whether those arrangements will prevail in the longer term remains to be determined. I am satisfied that in all the present circumstances it is not a practical proposition to seek to secure the necessary treatment and supervision within the applicants home, whatever may have been possible in former years. Had it proved necessary to approach the matter in terms that the authorities used their best endeavours and their best efforts I would have been satisfied that that had been achieved, in that Vincent's present needs are best met by the present arrangements at Woodford Park and Mountfern and those arrangements are subject to ongoing monitoring.

[25] The applicant also advances the case on the basis of the right to respect for private and family life under Article 8 of the European Convention. Article 8 provides as follows -

“(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

[26] I do not accept that reliance on Article 8 adds to the consideration of the applicant's case under Article 5 and the domestic legislation. To the extent that there is any interference with the right to respect for family life the circumstances outlined above must amount to justification under Article 8(2). Any interference was in accordance with a specified legal framework. It was undertaken for the legitimate aim of the protection of the rights and freedoms of others. Any issue would concern the proportionality of the action, involving a balance of the private and public interests involved, a matter on

which I have settled above in favour of the public interest in detaining the applicant in the circumstances.

[27] Further the applicant complains about the delay and the unreasonableness of the authorities in securing appropriate arrangements for the applicant at his parents home and in the community. Again I am satisfied for the reasons outlined above that such delay as has occurred in securing appropriate arrangements for Vincent has been unavoidable and the actions of the authorities cannot be classed as unreasonable.

[28] I have not been satisfied on any of the applicant's grounds for judicial review and the application is dismissed.