

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

---

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

---

NR's Application [2015] NIQB 35

IN THE MATTER OF AN APPLICATION BY NR FOR LEAVE TO APPLY FOR  
JUDICIAL REVIEW

and

IN THE MATTER OF A DECISION BY THE BELFAST HEALTH AND SOCIAL  
CARE TRUST

---

**TREACY J**

**Introduction**

[1] By this application the Applicant challenges a decision of the Belfast Health and Social Care Trust ("the Respondent") concerning the disclosure of medical notes and records to the Applicant's solicitor in advance of a hearing before the Mental Health Review Tribunal for Northern Ireland to determine the lawfulness of the Applicant's detention in hospital.

[2] The relief sought includes:

- (a) An order of *certiorari* to bring up into this Honourable Court and quash a decision of the Belfast Health and Social Care Trust made on 21<sup>st</sup> day of March 2013 whereby the respondent revoked the permission granted to the Applicant's legal representative to view the Applicant's medical notes and records and refused the Applicant's representative permission to view the said notes and records.
- (b) A declaration that the said decision is unlawful, *ultra vires* and of no force or effect.

- (c) An order of *mandamus* requiring that the respondent shall make the medical notes and records of the Applicant available to the Applicant's solicitor as soon as reasonably practicable and in advance of the Applicant's Mental Health Review Tribunal.
- (d) By reason of the urgency of the medical matter and order by way of interim relief requiring the Trust to make the medical notes and records of the Applicant available to the Applicant's representative immediately.

[3] The grounds on which the said relief is sought are:

- (a) The Trust has in its power custody or control the medical notes and records of the Applicant. The Applicant's representative obtained written authority from the Applicant to view his medical notes and records in advance of the Applicant's Mental Health Review Tribunal Hearing. The Trust were provided with the written authority of the Applicant and a request was made by the Applicant's legal representative to view the Applicant's medical records and it failed to provide the notes and records to the Applicant's legal representative.
- (b) The Trust's decision to revoke the permission for the Applicant's legal representative to view the Applicant's medical notes and records and the ongoing refusal to allow the Applicant's representative to view the Applicant's medical notes and records constitute a decision that is unlawful and *ultra vires*, in particular, by:-
  - i. Applying the Data Protection Act 1998 in circumstances where the Act did not apply;
  - ii. Failing to take account of the exemption in respect of data necessary for the purpose, or in connection with, any legal proceedings (including prospective legal proceedings) provided for by S35 (2) (a) of the Data Protection Act 1998.
  - iii. Failing to take account of the exemption in respect of data necessary for the purpose of obtaining legal advice provided for by S35 (2) (b) of the Data Protection Act 1998.
- (c) In revoking the Applicant's representative's permission to view the Applicant's medical notes and records and by failing to allow the Applicant's medical notes and records to be viewed by the Applicant's representative the Trust failed to act in a procedurally fair manner and did so, in particular, by:

- i. Failing to allow the Applicant's representative to view the Applicant's medical notes and records at the appointment arranged for said viewing at 14:00 on 21<sup>st</sup> March 2013.
  - ii. Failing to implement a reasonable procedure for the viewing of medical notes and records by patient's representative in circumstances where they are relevant for the purpose of, or in connection with, any legal proceedings (including prospective legal proceedings) or necessary for the purpose of obtaining legal advice.
  - iii. Applying the Data Protection Act 1998 in circumstances where the Act did not apply;
  - iv. Failing to take account of the exemption in respect of data necessary for the purpose of, or in connection with, any legal proceedings (including prospective legal proceedings) provided for by S35 (2) (a) of the Data Protection Act 1998.
  - v. Failing to take account of the exemption in respect of data necessary for the purpose of obtaining legal advice provided for by S35 (2) (b) of the Data Protection Act 1998.
- (d) The Trust's decision was *Wednesbury* unreasonable in that the Trust, by refusing to allow the Applicant's representative to view the Applicant's medical notes and records at the appointment arranged for said viewing, followed a procedure which no reasonable Trust, properly directing itself in relation to the law, could have followed and did so, in particular, by:
- i. Failing to allow the Applicant's representative to view the Applicant's medical notes and records at the appointment arranged for said viewing at 14:00 on 21<sup>st</sup> March 2013.
  - ii. Failing to implement a reasonable procedure for the viewing of medical notes and records by patient's representatives in circumstances where they are necessary for the purpose of, or in connection with, any legal proceedings (including prospective legal proceedings) or necessary for the purpose of obtaining legal advice.
  - iii. Applying the Data Protection Act 1998 in circumstances where the Act did not apply.
  - iv. Failing to take account of the exemption in respect of data necessary for the purpose of, or in connection with, any legal

proceedings (including prospective legal proceedings) provided for by S35 (2) (a) of the Data Protection Act 1998.

- v. Failing to take account of the exemption in respect of data necessary for the purpose of obtaining legal advice provided for by S35 (2) (b) of the Data Protection Act 1998.
- (e) The respondent in breach of the Applicant's procedural legitimate expectation, failed to adhere to the decision taken to allow the Applicant's solicitor to view the medical notes and records of the Applicant and communicated to the Applicant by way of telephone conversation on 20 March 2013.
- (f) The failure by the Trust to disclose the medical notes and records of the Applicant prior to the hearing before the Mental Health Review Tribunal puts the Applicant's representative, and therefore the Applicant, at a disadvantage in the Mental Health Review Tribunal proceedings and thereby causes an inequality of arms between the trust and the Applicant.
- (g) By refusing to allow the Applicant's representative to view the Applicant's medical notes and records at the appointment arranged for the said viewing the Trust has acted in a manner contrary to its obligations under section 6 of the Human Rights Act 1998 and has acted incompatibly with the Applicant's rights under Articles 5, 6 and 8 of the European Convention on Human Rights in a manner which is not proportionate.

## **Background**

[4] The Applicant was an inpatient in Ward K of the Mater Hospital and he was being detained by under Article 12 of the Mental Health (NI) Order 1986 ("the 1986 Order").

[5] In or around 6 February 2013 the Applicant applied to the Mental Health Review Tribunal for Northern Ireland under Article 71 of the 1986 Order for a review of the lawfulness of his detention.

[6] On 21 February 2013 the Applicant's solicitor wrote to the Respondent's Responsible Medical Officer and the Medical Records Department enclosing an original form of authority signed by the Applicant.

[7] On 20 March 2013, the Applicant's solicitor telephoned Ward K to make arrangements to read the Applicant's medical notes and records and it was agreed that the notes and records would be made available on the ward the following day at 2.00pm. However, on arrival on Ward K on 21 March 2013, the Applicant's solicitor

was informed by a member of the ward staff that he would not be permitted access to the notes and records for “data protection” reasons.

[8] The Applicant’s solicitor issued emergency judicial review proceedings and the Respondent disclosed the Applicant’s medical notes and records to his solicitor on 22 March 2013.

[9] On 22 March 2013 the Mental Health Review Tribunal adjourned the Applicant’s case on its own motion due to inclement weather conditions.

[10] The Respondent discharged the Applicant from detention on 8 April 2013, which was in advance of the adjourned hearing before the Mental Health Review Tribunal. The delay of one day in the Respondent disclosing the medical notes and records to the Applicant’s solicitor did not result in the Applicant being detained for any longer than would otherwise have been the case.

[11] The Applicant initially raised an issue of redaction of medical notes and records. However, upon disclosure of his medical notes and records these did not contain third party information and there was no redaction. Accordingly, the issue of redacting medical notes and records and the application of the Data Protection Act 1998 did not fall to be considered in this matter.

### **Declaration**

[12] In light of the foregoing the court accedes to the invitation of the parties to make a Declaration in the following terms:

“The legal advisors of patients detained under the Mental Health (Northern Ireland) Order 1986 have a right, pursuant to Articles 5 and 6 of the European Convention on Human Rights to view their client’s medical notes and records, in a practice and manner which safeguards the confidential and sensitive information therein, in advance of a Mental Health Review Tribunal Hearing as soon as reasonably practicable after reasonable notice has been given to the detaining trust accompanied by a properly executed written form of authority signed and dated by the detained patient.”

### **Costs**

[13] The Respondent agrees to pay the reasonable costs of the Applicant and the parties agree that costs will be taxed in default of agreement.