

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

SC's Application [2015] NIQB 34

IN THE MATTER OF AN APPLICATION BY SC 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 Detention Forms to a detained patient's solicitor.

[2] The relief sought is:

- (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 6th and 7th day of March 2013 whereby the Trust refused to provide the Applicant's legal representative with the relevant detention forms and the decision of the 13th March whereby the Respondent sought to deal with the Applicant's request for sight of his detention forms as a '*subject access request*' and the Trust thereby refused to provide the Applicant's legal representative with his detention forms at the earliest possible opportunity.
- (b) A declaration that the said decisions are unlawful, *ultra vires* and of no force or effect.

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

- (a) The Trust's decision, on the 6th and 7th March 2013, to refuse to provide the Applicant's legal representative with the Applicant's detention forms constitute decisions that are unlawful and *ultra vires*, in particular, by:-
 - i. Failing to follow a procedure prescribed by law;
 - ii. Taking into account irrelevant considerations, namely the disclosure procedure in the course of Mental Health Review Tribunal cases and the Data Protection Act 1998;
 - iii. Failing to give any or adequate reasons for the decision;
 - iv. Failing to act in a manner pursuant to s6 of the Human Rights Act 1998 specifically acting in a manner contrary to the Applicant's rights under Article 5 of the European Convention on Human Rights.

- (b) The Trust's decision, on the 6th and 7th March 2013, to refuse to provide the Applicant's legal representative the Applicant's detention forms constitute decisions that are *procedurally unfair*, in particular, by:-
 - i. Failing to follow a procedure prescribed by law;
 - ii. Taking into account irrelevant considerations, namely the disclosure procedure in the course of Mental Health Review Tribunal cases and the Data Protection Act 1998;
 - iii. Failing to give any or adequate reasons for the decision;
 - iv. Failing to implement a reasonable procedure for the viewing of detention forms 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.
 - v. Failing to act in a manner pursuant to s6 of the Human Rights Act 1998, specifically acting in a manner contrary to the Applicant's rights under Article 5 of the European Convention on Human Rights.

- (c) The Trust's decision, on the 6th and 7th March 2013, to refuse to provide the Applicant's legal representative the Applicant's detention forms constitute decisions that are *Wednesbury unreasonable*, in particular, by:-
- i. Taking into account irrelevant considerations, namely the disclosure procedure in the course of Mental Health Review Tribunal cases and the Data Protection Act 1998;
 - ii. Failing to give any or adequate reasons for the decision;
 - iii. Failing to implement a reasonable procedure for the viewing of detention forms 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.
 - iv. Failing to act in a manner pursuant to s6 of the Human Rights Act 1998, specifically acting in a manner contrary to the Applicant's rights under Article 5 of the European Convention on Human Rights.
- (d) The Trust's decision on 13th March to treat the Applicant's request for detention forms as a '*subject access request*' and to delay in providing the Applicant's legal representative the Applicant's detention forms 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 of, 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.
 - iv. Failing to construe s35 of the Data Protection Act 1998 in a convention complaint manner as per section 3 of the Human Rights Act 1998.
- (e) The Trust's decision on 13th March to treat the request for the detention forms as a '*subject access request*' was *Wednesbury* unreasonable in that

the Trust, by refusing to allow the Applicant's representative to view the Applicant's detention form, 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 detention forms as soon as they could reasonably be made available after the Applicant's legal representative made a request to view said forms;
 - ii. Failing to implement a reasonable procedure for the viewing of detention forms 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.
 - vi. Failing to construe s35 of the Data Protection Act 1998 in a convention complaint manner as per section 3 of the Human Rights Act 1998.
 - vii. Failing to act in a manner pursuant to s6 of the Human Rights Act 1998, specifically acting in a manner contrary to the Applicant's rights under Article 5 of the European Convention on Human Rights.
- (f) The Respondent, in breach of the Applicant's procedural legitimate expectation, failed to provide the detentions forms to the Applicant's legal representative as soon as reasonably practicable after the request was made to view said forms by the Applicant's legal representative. The procedure adopted by the Respondent was contrary to the procedure adopted by other health and social care trusts in this jurisdiction and contrary to the procedure formally adopted by the Respondent trust.

- (g) By refusing to allow the Applicant's legal representative to view the detention forms 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 a detained inpatient in the Avoca Ward of Knockbracken Healthcare Park who was being detained by the Respondent under Art12 of the Mental Health (NI) Order 1986 ("the 1986 Order").

[5] The 1986 Order prescribes Forms that are to be completed by the Responsible Medical Officer and Authorised Social Worker on the detention of a patient. A review of the detention Forms by a detained patient and his/her legal representative allows a legal representative to advise the patient, *inter alia*, of:

- a. The provisions of the 1986 Order under which the patient is detained;
- b. The reasons relied upon by the Trust for the detention;
- c. The lawfulness of the detention;
- d. The options open to the patient in terms of challenging the detention; and
- e. The merits of such a challenge to the detention.

[6] On 6 March 2013 the Applicant's solicitor telephoned the Respondent's Medical Records Office and requested copies of the Applicant's detention Forms. The verbal request was followed by a letter that was faxed from the Applicant's solicitor's office on the same day enclosing a form of authority.

[7] On 6 March 2013, the Applicant's Responsible Medical Officer sent the Applicant's solicitor an email stating, *inter alia*, that the data protection department must be approached to request the information. A further letter was then sent by the Applicant's solicitor on 7 March 2013 requesting the detention Forms.

[8] On 19 March 2013 a letter was received from the Respondent's Data Protection Office dated 13 March 2013 stating that they were treating the request for the detention Forms as a "*subject access request under the Data Protection Act (DPA) 1998*" and requested a cheque in the sum of £30.00.

[9] On 10 April 2013 the detention forms were received by the Applicant's solicitor under cover of a letter from the Respondent's Data Protection Office dated 4 April 2013. The cover letter referred to the request for the Forms as a request under the Data Protection Act 1998.

[10] The Respondent has subsequently discharged the Applicant from detention. The delay in the Respondent disclosing the detention Forms to the Applicant's solicitor did not result in the Applicant being detained for any longer than would otherwise have been the case.

Declaration

[11] Against this background the court accedes to the application of the parties to make a Declaration in the following terms:

“A declaration that patients and their legal advisors have a right, pursuant to Article 5 of the European Convention on Human Rights, to be provided with their detention forms, by means of secure transmission, as soon as reasonably practicable after a request has been made to the detaining authority by the detained patient or their legal advisor.

In the case of requests by a legal advisor the request should be accompanied by a written form of authority signed and dated by the detained patient.

The Data Protection Act 1998 does not interfere with the rights of a detained patient or their legal representative to obtain copies of his detention forms.”

Costs

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