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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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X's application (No.2)

AN APPLICATION FOR JUDICIAL REVIEW BY X [No. 2]

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STEPHENS J

Introduction

[1] The applicant, X, has been detained since May 2002 under the Mental Health (Northern Ireland) Order 1986 as amended. This application challenges the decision of the Mental Health Review Tribunal for Northern Ireland ("the Tribunal") of 15 April 2008. The Tribunal was satisfied that the applicant suffered from a severe mental impairment, a central feature of which was an IQ in the range of 35/49. However the Tribunal was not satisfied that the applicant's discharge would create a substantial likelihood of serious physical harm to himself or to other persons. Accordingly the Tribunal directed the applicant's discharge but it also decided to defer his discharge for a period of 6 weeks "to enable the Trust to ensure that a satisfactory, robust care package is in place for the patient upon his discharge from hospital on that date". It is the lawfulness of the decision to defer discharge for 6 weeks in order to enable the Trust to ensure that a satisfactory robust care package is in place which is the subject of this judicial review application which was commenced against the Tribunal ("the first respondent") and the relevant Trust ("the second respondent").

[2] The grounds upon which the applicant challenged the lawfulness of the Tribunal's decision to defer discharge can be conveniently addressed under three distinct headings as follows:-

(a) Article 77(1) of the Mental Health (Northern Ireland) Order 1986 is mandatory requiring the Tribunal to direct

discharge if, as here, it is not satisfied that discharge would create a substantial likelihood of serious physical harm to himself or to other persons ("mandatory discharge"). Article 77(1) also enables the Tribunal in its discretion to direct discharge even if the patient is both suffering from mental illness or severe mental impairment of a nature or degree which warrants his detention in hospital for medical treatment and if his discharge would create a substantial likelihood of severe physical harm to himself or to other persons ("discretionary discharge"). Article 77(2) gives the Tribunal discretion, when directing discharge under Article 77(1), to direct the discharge of a patient on a future date specified in the direction. The applicant contends that on the true construction of Article 77(2) the discretion to defer discharge is confined to a discretionary discharge and that accordingly the Tribunal had no discretion to defer his mandatory discharge.

(b) That if on the true construction of Article 77(2) there was a discretion to defer a mandatory discharge then as a matter of domestic law the discretion was so uncompromisingly wide and unfettered as to be ultra vires in that it conflicts with fundamental principles of the law of humanity and/or that it is outside the enabling legislation or purpose of the rest of the order.

(c) That if on the true construction of Article 77(2) there was a discretion to defer the applicant's mandatory discharge then such a discretion is incompatible with Article 5 of the European Convention on Human Rights. It is contended that it is incompatible in a number of respects as follows:-

(i) Article 5(1)(e) of the Convention provides that no one shall be deprived of his liberty save . . . in the (case) of the lawful detention of a person of unsound mind and in accordance with a procedure prescribed by law. That the applicant is no longer a person of unsound mind within the jurisprudence of the European Court of Human Rights and accordingly he can no longer be deprived of his liberty. That to be a person of unsound mind within that

jurisprudence the applicant's mental disorder must be of a kind or degree warranting compulsory confinement. That requirement is only likely to be satisfied if the release of the applicant into the community would create a substantial likelihood of serious physical harm to himself or to other persons. The Tribunal having not been satisfied that the applicant's discharge would create a substantial likelihood of serious physical harm to himself or to other persons then it could no longer be said that the applicant was a person of unsound mind and accordingly under Article 5(1) of the Convention he should not be deprived of his liberty. Accordingly that either Article 77(2) should if possible be construed in a convention compliant manner under section 3 of the Human Rights Act 1998 by confining the discretion to defer discharge to discretionary discharges as opposed to mandatory discharges or alternatively as the Mental Health (Northern Ireland) Order 1986 is subordinate legislation Article 77(2) should be quashed by virtue of the violation of Article 5 (1) of the Convention.

(ii) That if either the applicant is still a person of unsound mind within the jurisprudence of the Convention or if a discretion to defer discharge is convention compliant then the requirement in Article 5(1) of the element of lawfulness, namely the aim of avoiding arbitrariness, has not been satisfied. The absence of necessary procedural safeguards in Article 77(2) in respect of deferral of a mandatory discharge failed to protect against arbitrary deprivations of liberty. Accordingly again either Article 77(2) should if possible be construed in a

> convention compliant manner under section 3 of the Human Rights Act 1998 by confining the discretion to defer discharge to discretionary discharges as opposed to mandatory discharges or alternatively as the Mental Health (Northern Ireland) Order 1986 is subordinate legislation Article 77(2) should be quashed by virtue of the violation of Article 5 (1) of the Convention.

[3] The grounds in (c) above raised issues as to the compatibility of Article 77(2) of the Mental Health (Northern Ireland) Order 1986 with the applicants Article 5 Convention rights. Accordingly under Order 121 rule 3A of the Rules of the Supreme Court (Northern Ireland) 1980 a notice of incompatibility was served on the Crown and the Department of Health and Social Services and Public Safety was joined as a notice party ("the notice party").

[4] Mr. Michael Potter appeared for the applicant, Mr David Dunlop appeared for the first respondent, Mr Finbar Lavery appeared for the second respondent and Mr McMillen appeared for the notice party. I am grateful to all counsel involved for the care and attention with which they delivered their oral and written submissions.

Acceptance or rejection of a care package was entirely at the discretion of the applicant and the Tribunal's conclusion reached despite the absence of the care package

[5] During the course of the hearing it was accepted by both respondents and the notice party that there was no power to compel the applicant to accept any care package that was put in place by the Trust. For instance the Tribunal had no power to impose conditions on the applicant's discharge compelling him to accept any care package that was put in place. Equally the Trust had no power to compel the applicant to accept any care package. The applicant was entirely free to accept or reject any such package either for good or genuine reasons or if he so wished for his own capricious reasons.

[6] In addition all the respondents and the notice party accepted that the Tribunal had arrived at the conclusion that it was not satisfied that his discharge would create a substantial likelihood of serious physical harm to himself or to other persons despite the fact that a care package was not in place and accordingly despite the fact that the Tribunal had no indication from the applicant that he would accept that package. The Trust had not been able to establish to the satisfaction of the Tribunal that the absence of a care

package or the absence of an indication from the applicant that he would accept that care package, would create a substantial likelihood of serious physical harm to the applicant or to other persons. If the Tribunal had been satisfied that the absence of a care package or the absence of an indication of a willingness to accept that care package created a substantial likelihood of serious physical harm to the applicant or to other persons then it could have exercised its discretion to adjourn the hearing until the care package was in place and/or an indication was given. The answer to the question whether an individuals discharge would create a substantial likelihood of serious physical harm to himself or to other persons and indeed the answer to the other question as to whether the individual is then suffering from mental illness or severe mental impairment of a nature or degree which warrants his detention in hospital for medical treatment, is very likely to be heavily influenced by the after-care arrangements that are to be provided following his discharge and the likelihood of him accepting those after care arrangements, see *R (H) v Ashworth Special Hospital Authority* [2002] EWCA 923 at paragraph [67]. However that is not this case. The conclusion was reached that the Tribunal was not satisfied that the applicants discharge would create a substantial likelihood of serious physical harm to himself or to other persons despite the absence of a care package and therefore despite the lack of an indication from the applicant that he would accept that particular package.

[7] There was no factual finding by the Tribunal or any suggestion by the first respondent or the second respondent that the applicant was a patient who remained liable to be recalled to hospital for further treatment.

The statutory scheme

[8] The applicant's first ground raises an issue of statutory construction. In order to address that issue it is necessary to set out the statutory scheme for the detention of patients. There is a distinction between civil and criminal patients. Under Article 4 of the Order a civil patient may be admitted to hospital and detained for a 14 day period for assessment. The grounds for detention for assessment are that –

> (a) he is suffering from "mental disorder" of a nature or degree which warrants his detention in a hospital for assessment (or for assessment followed by medical treatment) and
>
> (b) failure to detain him would create a substantial likelihood of serious physical harm to himself or to other persons.

After the 14 day assessment period has elapsed then under Article 12 a civil patient can be detained for treatment if –

> (a) he is suffering from "mental illness" or "severe mental impairment" of a nature or degree which warrants his detention in hospital for treatment and
>
> (b) failure to so detain him would create a substantial likelihood of serious physical harm to himself or to other persons.

Thus to detain for treatment, as opposed to for assessment there has to be a greater degree of mental disorder amounting to "mental illness" or "severe mental impairment". The second criteria of substantial likelihood of serious physical harm to himself or to other persons is the same.

[9] Both criteria have to be met before a patient is detained for assessment or treatment and similarly if one or other or both of the criteria are not met then a civil patient detained for assessment or for treatment shall be discharged either by a responsible medical officer (Article 14) or by the Tribunal (Article 77(1)).

[10] The statutory scheme in relation to criminal patients enables a Crown Court to make a hospital order where an offender has been convicted of an offence punishable with imprisonment and the offender is suffering from mental illness or severe mental impairment of a nature or degree which warrants his detention in hospital for treatment. "Once the offender is admitted to hospital pursuant to a hospital order . . . his position is almost exactly the same as if he were a civil patient. In effect he passes out of the penal system and within the hospital regime", see *R v. Birch* [1989] 11 Cr App R (S) 202 and 210. Accordingly the offender admitted on foot of a hospital order can be discharged from hospital in the same way as a civil patient. That is if either one or the other or both of the two essential criteria are then not met. The Tribunal's power to direct discharge is contained in Article 77.

[11] In addition to being subject to a hospital order a criminal patient may also be subject to a restriction order imposed by the Crown Court under Article 47 of the Order. A restriction order can only be imposed by the Crown Court if it appears to the court, having regard to the nature of the offence, the antecedents of the person and the risk of his committing further offences if set at large, that it is necessary for the protection of the public from serious harm to do so. It can be envisaged that some of the most dangerous criminals are or can be made the subject of a combined hospital order and restriction order see for instance *R v. Warwick* [2008] NICC 42.

[12] If there is both a hospital order and a restriction order in place in respect of a criminal patient then the Tribunal cannot direct discharge of the patient from hospital under Article 77 of the Order. In those circumstances the Tribunal's power to discharge is contained in Article 78. Under that article the Tribunal is enjoined to direct the absolute discharge of such a criminal patient if it is not satisfied as to one other or both of the two essential criteria that is:-

> (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 . . .

However even if it is not satisfied as to one or other or both of those criteria in addition, and before the Tribunal is under an obligation to direct the absolute discharge of such a criminal patient, it has to be satisfied that it is not appropriate for the patient to remain liable to be recalled to hospital for further treatment. If it is so satisfied then the criminal patient is absolutely discharged. If it is not so satisfied then the Tribunal is enjoined to direct the conditional discharge of the criminal patient. A criminal patient conditionally discharged has to comply with conditions set by the Tribunal. Such conditions could include compliance with a drug regime or acceptance of and compliance with a care package. Under Article 78 a Tribunal only has discretion to defer a conditional discharge. It has no discretion to defer an absolute discharge. Accordingly the power to defer can only be exercised if the Tribunal is satisfied that it is appropriate for the criminal patient to remain liable to be recalled to hospital for further treatment.

[13] Article 69 provides in effect that the consent of a detained patient whether civil or criminal shall not be required for any medical treatment given to him for the mental disorder from which he is suffering. There are qualifications in that certain treatments require consent *and* a second opinion, for instance surgical operations for destroying brain tissue and other treatments require consent *or* a second opinion.

Propositions to be deduced from and discussion in respect of, the statutory scheme

[14] To detain a civil patient for assessment or for treatment two essential criteria have to be established as follows:-

(a) the presence of "mental disorder" (detention for assessment) or "mental illness or severe mental impairment" (detention for treatment) of such a nature or degree which warrants his detention in a hospital for assessment/medical treatment; and

(b) that failure to so detain the patient would create a substantial likelihood of serious physical harm to himself or to other persons.

Those two essential criteria are then replicated when it comes to a decision as to whether to discharge a civil patient so that he is no longer detained.

[15] At the stage of detaining a civil patient for either assessment or treatment there is no ability to detain on the grounds that there is "no satisfactory robust care package in place". The absence of such a care package could lead to the conclusion that one or other or both of the essential criteria have been established. However if the absence of such a care package does not have that effect so that one of the essential criteria has not been established, then it cannot lead on its own to the initial decision to detain a patient.

[16] The power to detain is a power to detain for assessment or for assessment followed by medical treatment or for medical treatment. The consequences of a deferral of a direction to discharge is not only the continued deprivation of liberty but also where, as here, the applicant was detained for medical treatment, he can continue to be compelled to accept certain treatments under Article 69 of the Order.

[17] If the true construction of Article 77(2) of the Order enables the Tribunal to defer a mandatory discharge under Article 77(1) then a civil patient can be deprived of his liberty and be compelled to accept medical treatment in circumstances where a criminal patient subject to a restriction order could not be so deprived and compelled. If the applicant had been a criminal patient subject to a restriction order the Tribunal could not have deferred the direction to discharge him given that there was no finding that it was appropriate for him to remain liable to be recalled to hospital for further treatment.

[18] If Tribunal has discretion in Article 77(2) to direct the mandatory discharge of a patient on a future date then there is no statutory limitation on the purpose for which the discretion can be exercised nor is there any limitation on the time over which deferral can take place.

[19] If the true construction of Article 77(2) of the Order enables the Tribunal to defer a mandatory discharge under Article 77(1) then neither of the respondents and the notice party was able to discern any reason for the difference between civil and criminal patients as contained in Articles 77 and

78. Thus no explanation was advanced as to why there should be discretion to defer a mandatory discharge of a civil patient where, if the same individual was a criminal patient subject to a restriction order, there would be no such discretion. The reason advanced for the discretion to defer the mandatory discharge of a civil patient was to enable the Tribunal to arrange the orderly transition of the patient back into society. Such a reason should at least equally apply to a criminal patient subject to a restriction order.

[20] There is no power at the end of the 14 day assessment period to defer the discharge of a civil patient.

[21] There is no power under Article 14 where a civil patient is discharged by a responsible medical officer to defer discharge.

[22] Both civil and criminal patients may after being detained agree to be voluntary patients. One reason why patients may enter or agree to remain in hospital on a voluntary basis is to await a care package.

[23] The lack of any statutory limitations on the discretion in Article 77(2) to direct the discharge of a patient on a future date is not only called in aid by the applicant in the true construction of Article 77(2) but also in support of his proposition that there are insufficient procedural safeguards to protect against arbitrary deprivations of liberty so as to comply with Article 5 of the Convention. Detention for assessment is limited to 14 days. There is by contrast no limitation on the period of deferral under Article 77(2). The duration of time over which liberty can be taken away from an individual under Article 77(2) is completely unregulated by statute.

The contentions of the respondents and the notice party as to the construction of Article 77(2)

[24] The respondents rely on the decision of Harrison J in *R v. Mental Health Review Tribunal for North Thames Region ex parte Pierce,* 36 BMLR 137. The issue in that case was whether the Tribunal had power under the equivalent of Article 77(2) of the Order to direct a patient's discharge at a future date in circumstances where there is a mandatory duty to discharge the patient under the equivalent of Article 77(1) of the Order. Harrison J stated:-

> "Whilst I can understand why this question of interpretation is one upon which differing views are held, it does not mean to say that the statutory provision is ambiguous. In my view, Section 72(3) is not ambiguous. It is clear on the face of it that, when directing a discharge under Section 72(1), a Tribunal can direct the discharge on a future date specified in that direction. A direction to discharge under Section

> 72(1) can be a discretionary discharge or a mandatory discharge. Section 72(3) does not in any way confine the power to defer discharge to cases of discretionary discharges as opposed to mandatory discharges under Section 72(1). If Parliament had intended the power in Section 72(3) to apply only to cases of discretionary discharges, it could and, in my view, would have said so. Miss Taylor's argument involves reading into Section 72(3) such words as "when exercising the discretionary power to direct the discharge of a patient", before the words "under subsection (1) above". It also, as she accepts, involves reading the word "forthwith" into Section 72(1)(b) and also, presumably, into Section 72(1)(a)."

Harrison J concluded that on the proper construction of the equivalent of Article 77(2) the Tribunal did have power to direct the discharge of a patient at a future date in circumstances where there is a mandatory duty to discharge the patient under the equivalent of Article 77(1).

Conclusion in relation to the construction of Article 77(2)

[25] I also understand why this question of construction is one upon which differing views are held. If the inquiry as to the true construction concentrates purely upon the wording of Article 77(2) or its equivalent then I would have arrived at the same conclusion. However the construction of that Article is to be informed by the legislative scheme and against the cannon of construction that:-

> "Parliament is presumed not to enact legislation which interferes with the liberty of the subject without making it clear that this was its intention" see *R v. Hallstrom, ex parte W (No 2)* [1986] QB 1090 at 1104.

This principle in favour of physical liberty carries great weight and an enactment is not likely to be held to contravene it.

[26] The scheme of the Order is that the power to detain depends on the existence of what I have termed the two essential criteria. Article 77(2) if it extends to cases of mandatory discharge would be an exception to that scheme. The existence of a power under Article 77(2) to defer a discretionary direction to discharge is not an exception to that scheme because such a patient is not entitled to his liberty, the two essential criteria being present. An exception to the statutory scheme is to be found in Article 78 in respect of criminal patients subject to a restriction order but only in the circumstances where it is

appropriate for the patient to remain liable to be recalled to hospital for further treatment.

[27] Another aspect of the scheme of the legislation is to provide additional safeguards for the public in relation to criminal patients who are subject to a restriction order and therefore additional restrictions on liberty in respect of those criminal patients. I do not consider that the legislation should be construed in a way that is less rigorous in the protection of liberty in respect of civil patients than it is in respect of criminal patients subject to a restriction order. I consider that parliament intended that greater restrictions on liberty would be imposed on criminal patients subject to a restriction order given that they can comprise some of the most dangerous criminals in society.

[28] A patient who has had his mandatory discharge deferred would still remain a detained patient for the purposes of Article 69 of the Order and accordingly the consent to the patient would not be required for certain types of medical treatment for the mental disorder from which he is suffering if the treatment is given by or under the direction of a responsible medical officer. The reference in Article 69 is to "mental disorder" rather than to "mental illness "or severe mental impairment". Accordingly one could have an individual who suffers from "mental disorder" warranting medical treatment but not "mental illness" or "severe mental impairment". The Tribunal would be obligated to direct his mandatory discharge absent that component of one of the two essential criteria. However if the direction to discharge is deferred the individual would still be a detained patient and he could be compelled to undergo certain medical treatment irrespective as to his consent. Such a conclusion is understandable in respect of a patient subject to a discretionary direction to discharge in relation to whom the two essential criteria are still present. It is not in the scheme of the legislation that it is an intended consequence in respect of an individual in relation to whom there is a mandatory direction to discharge.

[29] Given that at the earlier stage of the initial decision to detain for assessment or treatment the absence of a care package cannot lead on its own to a decision to detain a patient it is appropriate to enquire as to why it should have that effect at the later stage of discharging a patient. Furthermore why that should be, given that there is no power to defer the direction to discharge if the applicant had been a criminal patient subject to a restriction order as opposed to a civil patient. Those questions are resolved if the purpose of the legislation is that the discretion to defer the direction to discharge applies only to the circumstances of a discretionary direction.

[30] An absolute discharge under Article 78 of a criminal patient subject to a restriction order operates as its name suggests. The hospital order and the restriction order cease to have effect. A conditional discharge again as its name suggests, is subject to conditions with which such a criminal patient has to

comply. The power to defer a direction for the conditional discharge of such a criminal patient is until the arrangements for his conditional discharge have been made. The sense of this is apparent in view of the fact that such a criminal patient has to comply with the conditions. However a civil patient, subject to a mandatory discharge, does not have to comply with any conditions. I consider that a power to defer discharge in such circumstances to enable arrangements to be made with which the patient does not have to comply demonstrates that the power to defer in Article 77(2) should be confined to cases of a discretionary direction to discharge. In those cases there is no obligation to discharge as both essential criteria are present. Accordingly in those cases there is a power to detain and to compel compliance in hospital with certain medical treatments.

[31] I also consider that an unlimited statutory discretion to defer a direction to discharge a patient is only consistent with circumstances in which the patient can still continue to be compulsorily detained. That is that such unlimited discretion is only consistent with a situation where there is no mandatory obligation to direct the discharge of the patient and the alternative open to the Tribunal is that the patient perfectly justifiably remains deprived of his liberty detained in hospital for medical treatment as a consequence of the existence of the two essential criteria.

[32] On the basis of the general legislative purpose underlying Article 77(2) and the constitutional principle in favour of liberty I consider that Parliament did not intend that there should be a power to direct a patient's discharge at a future date in circumstances where there is a mandatory duty to direct the discharge of the patient. I conclude that under Article 77(2) the Tribunal did not have power to direct the discharge of the applicant at a future date in circumstances where, as here, there is a mandatory duty to discharge the applicant. I accordingly grant a declaration that the decision by the Tribunal to direct the discharge of the applicant on a future date was unlawful.

Further conclusions

[33] That construction of Article 77(2) of the Order concludes this case but if I am incorrect in that decision I also deal with the applicant's other grounds. In respect of the second ground the applicant recognised that the purpose of the rest of the Order related to the question of construction in the first ground of his challenge. The applicant did not rely in substance on any other part of the second ground of challenge.

[34] In respect of the third ground of challenge I would have decided that the applicant was no longer a person of unsound mind within the jurisprudence of the European Court of Human Rights (see *Winterwerp v Netherlands* [1979] 2 EHRR 387 at paragraph [39]) as his discharge would no longer create a substantial likelihood of serious physical harm to himself or to other persons

which, allowing for the difference in legislative language between section 3(2)(d) of the Mental Health Act 1983 and Article 77 (1)(b) of the Order, was the test applied in *R (on the application of IH) v Secretary of State for the Home Department* [2002] All ER (D) 219 at paragraph [86]. The applicant no longer being a person of unsound mind under the jurisprudence of the European Court of Human Rights the questions which have to be addressed are (a) whether there is a domestic discretion to defer discharge. If not then there is no authority to continue to deprive the applicant of his liberty. (b) If there is domestic law discretion to defer discharge then is the existence of such discretion inconsistent with Article 5 of the convention. (c) If not then are there sufficient procedural safeguards to that discretion for it to be compliant with Article 5 of the Convention. In respect of (a) I have concluded that there is no domestic discretion to defer discharge. If I am wrong in that conclusion then in respect of (b) I consider that in general a power to defer discharge is consistent with Article 5 of the Convention see *Johnson v UK* [1997] 27 EHRR 296. As far as (c) is concerned I consider that the very purpose of safeguards is to protect against misjudgements and professional lapses. The adequacy of the safeguards should be consistent with the issue that is deprivation of liberty particularly the liberty of vulnerable incapacitated individuals. The availability of judicial review as a procedural safeguard to correct any mistakes is not in this field an adequate protection. The safeguards should strictly regulate the circumstances in which an individual can be deprived of his liberty. Judicial review requires the review of its legality thereafter, see *HL v UK* [2005] 40 EHRR 32 at paragraph [123]. In consider that the power in Article 77(2) in respect of a mandatory discharge does not have sufficient procedural safeguards to comply with the element of lawfulness in Article 5(1), see *Engels v Netherlands* [1976] 1 EHRR 647 at paragraph [58]. That I would have construed Article 77(2) in a Convention compliant manner under Section 3 of the Human Rights Act 1998 by confining the power to defer discharge to discretionary directions to discharge. On that alternative basis I would also have concluded that under Article 77(2) the Tribunal did not have power to direct the discharge of the applicant at a future date in circumstances where, as here, there is a mandatory duty to discharge the applicant. Again on that alternative ground I would have granted a declaration that the decision by the Tribunal to direct the discharge of the applicant on a future date was unlawful.