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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW BY RM
(A PERSON UNDER DISABILITY)
BY SM, HIS FATHER AND NEXT FRIEND

AND IN THE MATTER OF A DECISION OF A REVIEW TRIBUNAL
DATED 16 FEBRUARY 2021

Mr David Heraghty (instructed by Higgins Hollywood Deazley, Solicitors) for the Applicant/Appellant
Mr Matthew Corkey (instructed by the Departmental Solicitor's Office) for the Respondent/Respondent
Mr Adian Sands (instructed by the Departmental Solicitor's Office) for the Department of Justice

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Before: McCloskey LJ, Maguire LJ and McAlinden J

McALINDEN J (*delivering the judgment of the court*)

Introduction

[1] This is an appeal against the decision of Colton J delivered on 7 September 2021 in which he dismissed an application for judicial review brought by the applicant/appellant seeking an order quashing the decision of the Review Tribunal delivered on 16 February 2021 in which the Review Tribunal concluded that the grounds for detention in hospital for treatment set out in the Mental Health (Northern Ireland) Order 1986 were met and that the applicant/appellant should remain detained in hospital for treatment.

[2] The applicant/appellant is RM, acting by SM, his father and next friend. RM suffers from severe mental impairment. He has a history of engagement with mental health services. He does not have specific capacity to conduct legal proceedings on his own behalf. He was born in 1988. In March 2018 he was sentenced for a series of offences including indecent assaults of females and males, gross indecencies with or towards a child, sexual assault of a child under 13 and threats to kill. He had previously been determined to be unfit to plead to these charges. Having been found to have committed the acts alleged the Crown Court imposed a hospital order subject to special restrictions and without limitation of time pursuant to Articles 44 and 47 of the Mental Health (Northern Ireland) Order 1986 ("the 1986 Order"). Pursuant to Article 46 of that Order he was admitted to and detained at Muckamore Abbey Hospital on or about 13 March 2018.

[3] On 16 January 2019 he made an application to a Review Tribunal appointed under Article 78 of the 1986 Order seeking his discharge from detention. A hearing took place on 12 June 2020 and the Tribunal heard from, amongst others, Dr Milliken, Consultant Psychiatrist, the applicant/appellant's Responsible Medical Officer. Although the Review Tribunal was satisfied that RM was suffering from severe mental impairment, it concluded, on the basis of Dr Milliken's evidence, at paragraph [24] of its decision that RM had "completed all medical psychotherapeutic work which can be provided in hospital and that the development of specialised, effective community provision for RM's supervision, care and treatment in (a residential care setting) means that currently his severe mental impairment is not of a nature or degree requiring his detention in hospital for medical treatment. Such a detention would not be proportionate, necessary or warranted. The Tribunal is also satisfied that the continued detention of RM would be in breach of Article 5 of the European Convention (on) Human Rights. It is not the least restrictive option for his care and cannot be justified under Article 5. Accordingly, the Tribunal is satisfied that the grounds for detention are not satisfied."

[4] The Tribunal went on to conclude at paragraph [25] that although the conditions for detention in hospital for treatment were not met, it would be appropriate for RM to remain liable to be recalled to hospital for further treatment in accordance with Article 78(1)(b) of the 1986 Order and the Tribunal then addressed the issue of directing a conditional discharge under Article 78(2) of the 1986 Order. At paragraph [26] the Tribunal considered the conditions to which RM would be subject to in his community placement which were set out in a detailed proposed community care plan. The Tribunal concluded that "Under the conditions proposed RM would be in locked accommodation. He would not be able to leave (the residential care setting) without being escorted and would be continually supervised by staff when he does leave. Applying the test outlined in *P v Cheshire West and Chester Council* [2014] AC 896, the Tribunal found that he would be under continuous supervision and control and not free to leave."

[5] At paragraph [27] the Tribunal considered the Supreme Court decision of *Secretary of State for Justice v MM* [2018] UKSC 60 and concluded that "the *MM* case

clarifies that a deprivation of liberty cannot be imposed as a condition of conditional discharge. Baroness Hale noted at paragraph [38] of that decision:

> "the Mental Health Act does not permit the (tribunal) or the Secretary of State to impose conditions amounting to detention or a deprivation of liberty upon a conditionally discharged patient."

[6] The Tribunal went on to state at paragraph [28] that "it was not possible for a patient to give valid consent to very restrictive conditions amounting to a deprivation of liberty because if detention is the alternative, the consent cannot be genuine." This reflects the views of Baroness Hale set out in paragraph [23] of *MM*. The Tribunal noted that other legal avenues were open to the Trust including making an application for a declaration under the inherent jurisdiction of the High Court. The Tribunal noted that it was not appropriate for it to order a deferral of a conditional discharge since the conditions for a deferral set out in Article 78(8) were not satisfied. The Tribunal concluded that it did "not have the power to authorise a conditional discharge in the first place. The Tribunal is satisfied that it cannot in this case order a conditional discharge at this time and that the matter of RM's deprivation of liberty will have to be resolved in another venue." The case was, therefore, adjourned to await developments.

[7] Following this, an application for leave to apply for judicial review was launched on behalf of RM challenging the failure of the Trust to seek a declaration under the inherent jurisdiction of the High Court. A *habeas corpus* application was also brought on behalf of RM. The Trust then did seek declaratory relief in this case and another case involving similar issues and these applications for declaratory relief came before Keegan J. Judgment was delivered on 11 November 2020 in *A Health and Social Care Trust v Mr O and Mr R* [2020] NIFam 23. RM in the present case was referred to as Mr O in that case. The issues that had to be grappled with by the court are concisely set out in the introduction to Keegan J's comprehensive judgment.

> "[1] … In broad terms both Mr O and Mr R were made the subject of hospital orders with a special restriction pursuant to the Mental Health (Northern Ireland) Order 1986 ("the Mental Health Order"). In the case of both patients their detention has been examined before the Mental Health Tribunal. In both cases the Mental Health Tribunal (now called the Review Tribunal) has determined that a conditional discharge would be appropriate but has adjourned a finalisation of the cases due to a perceived difficulty in achieving this within the law. The difficulty flows from a decision of the Supreme Court in *MM v Secretary of State for Justice* [2018] UKSC 60 which determined that a tribunal could not impose terms

> as part of a conditional discharge which amounted to a deprivation of liberty pursuant to Article 5 of the European Convention on Human Rights ("ECHR"). This has led to an impasse which affects each patient in different ways. Mr O remains in Muckamore Hospital and urgently seeks transfer to a community placement. Mr O has brought a *habeas corpus* application during the course of this application which is pending before another court. Mr R has left Muckamore under temporary leave provisions and has been living in a community based setting for the past eighteen months.
>
> [2] This case has come to me after a judicial review brought by Mr O. That was directed at the Trust's failure to bring a declaratory application. Paradoxically, now Mr O does not support a declaration being granted. The representatives for Mr R query the court's jurisdiction under the inherent jurisdiction but in final submissions; "welcome any initiative that would preserve his position in his current placement." The Department of Justice appeared and was represented in these proceedings. Given the issues at play I also joined the Department of Health. I asked the Official Solicitor to act as amicus. The Human Rights Commission applied to intervene in Mr O's case and have done so on paper. Finally, the Attorney General of Northern Ireland has appeared as an intervenor and filed a written argument. I am very grateful to all for assisting the court. I was asked to determine this case on the basis of the papers put before me and the legal submissions.
>
> [3] From the outset I have encouraged a solution focussed approach but as will become apparent that has not yielded any fruit as yet and so the issue remains whether I should exercise my inherent jurisdiction in the case of Mr O and Mr R who on the evidence currently available have capacity to consent to care arrangements in the community which amount to a deprivation of liberty."

[8] The judge went on to give detailed consideration to the various issues raised in this case and then stated in paragraph [91] of her judgment that:

> "The use of the inherent jurisdiction has survived the mental capacity legislation and clearly it has been used to deprive capacious persons of their liberty in other situations. This is in accordance with the protective

> nature of the jurisdiction balancing paternalism with autonomy. I share the reservations of other judges about applying the jurisdiction to persons with capacity and so I am very cautious about this. However, I also have an obligation to act in a Convention compliant way."

The judge adjourned the matters in order to receive further medical evidence in relation to the issue of capacity and to receive further legal submissions.

[9] Keegan J then dealt with the application for habeas corpus on 23 November 2020 and gave judgment on 4 December 2020. In her judgment *In the matter of an application by SM as father and next friend of RO for a Writ of Habeas Corpus* [2020] NIQB 73, Keegan J refused the application and stated as follows:

> "[13] I therefore conclude as follows. The applicant is lawfully detained at present for the following reasons:
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> (i) He is lawfully detained under the Mental Health (Northern Ireland) Order 1986.
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> (ii) His application for discharge is currently before the review tribunal which has not finished adjudicating.
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> (iii) The applicant agreed to an adjournment of the review tribunal proceedings pending the patient proceedings.
>
> (iv) The tribunal has adjourned the matter but has yet to complete its proceedings by making a discharge order.
>
> (v) The trust applied for declaratory relief in the Family Division to facilitate the making of a discharge order to a suitable placement in the community where Mr RO will be detained.
>
> (vi) The plaintiff has the right to reconvene the Review Tribunal to apply for an absolute discharge.
>
> (vii) The ongoing detention is compliant with the mental health legislation in this jurisdiction pursuant to Article 5(1)(e) and 5(4) at present.
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> (viii) It remains to be seen whether or not Article 5(1)(e) and 5(4) remain complied with and that will

> depend upon the substantive proceedings which are pending before the Family Division.
>
> [14] The court stresses the need for urgency in this matter given the months that have passed and the imperative to deal with a person's liberty within a reasonable time. There is a danger that this case will keep going around in circles. The court is therefore indicating to the Trust that this matter must be dealt with within the next two weeks. I suggest that a date is sought from the Review Tribunal now to protect RO's interests. Some thought should also be given to fall back positions regarding the conditions of discharge and the length of a proposed deprivation of liberty and review of this. The length of a proposed deprivation during a period of testing in the community may actually be the key given the most recent submissions made on RO's behalf. I am not attracted to an option which means that RO remains in the hospital."

[10] At the request of RM, the matter was then relisted before the Review Tribunal on 12 January 2021 and a date for the hearing of the matter was set for 16 February 2021. On that occasion, the Tribunal heard from Dr Devine, Consultant Psychiatrist, who by that stage had replaced Dr Milliken, Consultant Psychiatrist, as the applicant's/appellant's Responsible Medical Officer under the 1986 Order. Having considered the evidence of Dr Devine, the Tribunal noted at paragraph [37] that his evidence differed in a "very significant way" from that of Dr Milliken, the applicant's/appellant's former RMO. Dr Devine was of the opinion that RM was at a stage in his treatment "where he should be allowed to leave the hospital with the approval of the Department on Article 15 leave." In Dr Devine's view Article 15 leave was an important part of the treatment plan and allowed for medical support and rehabilitation and this represented a "significant amount of medical supervision and treatment." Dr Divine was of the opinion that treatment under Article 15 "would allow testing of the care plan and allow RM to put into practice the skills he had learnt in a setting outside hospital and to build upon those skills." Dr Devine was of the opinion that "a lot of personnel would be involved in assessing RM's care needs and ongoing risk assessment and in providing regular psychological support. His role as RMO would be to have oversight of all that." In Dr Devine's opinion Article 15 leave would allow "rigorous testing out of a care plan and allow a support plan and risk management plan to be fully developed and adapted to meet RM's needs." Dr Devine "hoped that RM could quickly move to less supervised conditions under Art 15 and by the end of 6 months be in a position where his case could be referred to the RT with a recommendation for a conditional discharge."

[11] The Tribunal also received evidence from Ms Keating, a Consultant Psychologist, involved in the treatment of RM and this evidence is commented upon

in paragraph [38] of the Tribunal's decision. Ms Keating stated that it was time for RM to "progress out of hospital and that he had completed all psychological work which had to be undertaken in hospital. She agreed that the care plan had not yet been fully mapped out and that a short period of Art 15 leave followed by a conditional discharge would be an effective way forward." The Tribunal also heard from Dr East, another Consultant Psychiatrist who had assessed RM. In his report, Dr East stated that RM "with the right care plan can be safely managed in the community." This opinion was clarified in his oral evidence before the Tribunal, the contents of which are noted in paragraph [39] of the Tribunal decision. He "agreed 100% with Dr Devine. He said that Art 15 leave was medical treatment and was a necessary, safe and appropriate way to manage the case."

[12] Crucially, during the hearing, the Tribunal was referred by Mr Sands, counsel for the Department of Justice, to the decision of Pitchford J in the case of *R (On the application of CS) v Mental Health Review Tribunal and the managers of Homerton Hospital* [2004] EWHC (Admin) 2958. The Tribunal at paragraph [40] of its decision referred to paragraph [46] of that judgment where the judge had observed that:

> "in the closing stages of treatment in hospital her [the RMO's] grasp on the claimant was gossamer thin, but to view that grasp as insignificant is, in my view, to misunderstand the evidence."

[13] At paragraph [41] of its decision, the Tribunal went on to state that it recognised that Dr Milliken had been RM's RMO for a long time "and knew him very well. However, the Tribunal finds that the evidence of Dr Devine and Dr East is more persuasive in relation to the question of whether RM's severe mental impairment is of a nature or degree which warrants his detention in hospital for medical treatment." The Tribunal stated that it was satisfied that RM was "at a stage in his treatment when it was appropriate for him to be tested in the community. However, it is clear to the Tribunal, on the evidence, that treatment will have to continue in the form described by Dr Devine and that it should be continued whilst RM is still subject to detention until such time as he does not require detention in hospital for medical treatment. The Tribunal accepts the evidence of Dr Devine and Dr Best that the oversight, care and risk management described by Dr Devine does amount to treatment."

[14] Having considered both decisions of the Tribunal it would seem that between 12 June 2020 and 16 February 2021 the Tribunal changed its opinion on whether RM was suffering from severe mental impairment of such a nature or degree as to warrant his detention in hospital for medical treatment in circumstances where there was no deterioration in his condition on the grounds that it was persuaded by Dr Devine's evidence that the degree of supervision, oversight and management which RM would need and receive in the community from hospital staff including a Consultant Psychiatrist was such as to constitute continued hospital treatment even though he would be immediately placed in a residential care facility under the

Article 15 leave provisions of the 1986 Order and it was not envisaged that he would receive any further inpatient treatment. It would appear that in coming to this conclusion, the Tribunal took into account and relied upon a line of English caselaw to the effect that in determining the issue of whether a patient was to be detained in hospital for the purposes of medical treatment, the Tribunal had to gauge whether the input from hospital clinicians and other professions was still significant and the Tribunal was entitled to take into account that in the closing stages of treatment in hospital the RMO's grasp on the patient could be gossamer thin "but to view that grasp as insignificant" would be a mistake.

[15] The judicial review challenge in this case is based on the contention that as a matter of law the Tribunal was not entitled to conclude that the test for detention set out in the 1986 Order was met in circumstances where it was not envisaged that any component of the RM's treatment would be administered in a hospital or an equivalent healthcare facility.

[16] In delivering his decision on 7 September 2021, Colton J at paragraph [18] of his judgment stated that:

> "The issue of what is meant by warrants for detention in hospital for medical treatment in this context has been considered by the courts in England and Wales under similar mental health provisions."

In this and subsequent paragraphs of his judgment, the judge went on to consider the cases of *R (On the application of CS) v Mental Health Review Tribunal and Managers of Homerton Hospital* [2004] EWHC 2958 (Admin), *R (On the application of DR) v Mersey Care NHS Trust* [2002] EWHC 1810, *AL v Somerset Partnership NHS Foundation Trust* [2011] UKUT 233 (ACC), *R v Barking Havering and Brentwood Community Health Care Trust ex parte B* [1999] 1 FLR 106 and *R (On the application of Epsom and St Helier NHS Trust) v Mental Health Review Tribunal* [2001] EWHC 101 (Admin).

[17] Having considered the Tribunal's decision in light of the English authorities, the judge concluded at paragraph [27] that it was "clear from the reasoning of the panel that it identified the appropriate legal test and referred to the relevant case law." At paragraph [28] the judge went on to state that:

> "It is clear from the authorities to which I have been referred and from a proper analysis of the legislation that the courts have taken a broad approach as to what is meant by medical treatment "in hospital." Whilst Mr Heraghty accepts that, in the words of Pitchford J, the hospital's grasp may be "gossamer thin" he submits that in this case there is simply no evidence that the patient warrants such treatment. He contrasts the circumstances of this case with the cases that have been considered by

> the court in that in all those cases the patient was required to attend hospital albeit on a limited basis. The only case in which no hospital attendance was required (the *Epsom and St Helier NHS Trust* case) discharge was held to be lawful."

[18] Colton J then went on to consider the nature and extent of the continued involvement of the hospital clinicians and other hospital professionals in the management and supervision of RM at paragraph [29] of his judgment and stated at paragraph [30] that "the RMO is based in a hospital environment. There is a warranted and necessary link with the hospital, the RMO and the patient's treatment." He went on to state that "Article 15 leave would form part of the treatment plan put in place by the RMO. That leave would allow for medical support of the applicant supervised by the RMO and would allow for the testing in the community of the care plan that was in place. There would be ongoing assessment of the patient. Whilst there would be an element of uncertainty as to how the patient would cope with the move to (the residential care facility) there would be continued involvement with a multi-disciplinary team of clinicians who would continue to supervise and support the applicant during the Article 15 leave." The judge referred to Dr Devine's characterisation of the care plan as involving "a significant amount of medical supervision and treatment" and how he as RMO would have "oversight" over all of that.

[19] Colton J held that in the circumstances of this case, the Tribunal was entitled to conclude that the patient's severe mental impairment warranted detention in hospital. The fact that the proposed future treatment would not take place physically in a hospital was not determinative of the issue. The hospital's "grasp" might be slight "but remains significant."

[20] In its consideration of the issues in this case, this court felt it necessary to raise with the parties' representatives the question of whether any differences between the legislative frameworks applicable in England and Wales and Northern Ireland had a bearing on whether it was appropriate for courts in this jurisdiction to follow and place reliance upon English authorities dealing with the provisions of the Mental Health Act 1983 ("the 1983 Act"). Despite this issue being raised with the parties' representatives, the court received no written submissions dealing with this specific point and during the two hearings of this matter no oral submissions were made that specifically addressed this issue. It is clear from the Tribunal's decision and the judgment of Colton J that this issue was not addressed before either the Tribunal or the High Court. For the reasons set out below, this court considers that these were unfortunate oversights in that it is the judgment of this court that due to important differences in the two legislative frameworks, courts in this jurisdiction should exercise a high degree of caution when considering English authorities dealing with the provisions of the English legislation.

[21] As one would expect there are many strong similarities between the statutory schemes applicable in England and Wales and Northern Ireland which deal with the detention of those suffering from mental illness or disorders or abnormalities of the mind. Both legislative schemes prescribe in detail the circumstances which must exist for compulsory "admission for assessment" and compulsory "detention for treatment" to be lawful. In Northern Ireland the provisions which set out the conditions which must exist for an "admission for assessment" to be lawful are contained in Article 4 of the 1986 Order whereas the English provisions are set out in section 2 of the 1983 Act.

[22] In both jurisdictions, the test for "admission for assessment" is a twofold test and the first stage of the test in each jurisdiction is, at first sight, practically identical. In order for a patient to be compulsorily admitted for assessment and detained for a limited period of time set out in the legislation, Article 4(2)(a) of the 1986 Order and section 2(2)(a) of the 1983 Act stipulate that the patient must be suffering from a mental disorder of a nature or degree which warrants his detention in hospital for assessment or for assessment followed by medical treatment. The second stage of the test in the two legislative schemes is worded differently. Article 4(2)(b) of the 1986 Order states that for admission for assessment to be lawful it is also necessary to establish that failure to so detain the patient "would create a substantial likelihood of serious physical harm to himself or to other persons." Section 2(2)(b) of the 1983 Act states that an application for admission for assessment may be made in respect of a patient on the ground that "he ought to be so detained in the interests of his own health or safety or with a view to the protection of other persons."

[23] Any material differences in the second stage of the test in each jurisdiction are irrelevant for the purposes of this case but the "substantial likelihood of serious physical harm" threshold appears to be higher than the "in the interests of his own health or safety or with a view to the protections of other persons" threshold.

[24] As stated above, there appear to be no material differences in the first stage of the test which applies in each jurisdiction. But on closer examination, this is not the case. Both tests refer to "mental disorder." Section 1 of the 1983 Act defines mental disorder as any disorder or disability of the mind. This includes a personality disorder. One has to look at Article 3 of the 1986 in order to ascertain what is meant by "mental disorder" and other related expressions in the context of the Northern Ireland legislative scheme. Article 3 states as follows:

> "(1) In this Order –
>
> "mental disorder" means mental illness, mental handicap and any other disorder or disability of mind;
>
> "mental illness" means a state of mind which affects a person's thinking, perceiving, emotion or judgment to the

> extent that he requires care or medical treatment in his own interests or the interests of other persons;
> "mental handicap" means a state of arrested or incomplete development of mind which includes significant impairment of intelligence and social functioning;
>
> "severe mental handicap" means a state of arrested or incomplete development of mind which includes severe impairment of intelligence and social functioning;
>
> "severe mental impairment" means a state of arrested or incomplete development of mind which includes severe impairment of intelligence and social functioning and is associated with abnormally aggressive or seriously irresponsible conduct on the part of the person concerned.
>
> (2) No person shall be treated under this Order as suffering from mental disorder, or from any form of mental disorder, by reason only of personality disorder, promiscuity or other immoral conduct, sexual deviancy or dependence on alcohol or drugs."

[25] It is clear from the above that there are material differences in definition of "mental disorder" in both jurisdictions, the most obvious one being the exclusion of a personality disorder from the scope of the Northern Ireland legislation. Although this difference has little or no bearing on the issues that this court has to decide it is nevertheless instructive in that it demonstrates that even apparently identical terminology may have a different meaning in the context of each legislative scheme.

[26] Looking at the circumstances which would have to exist in either jurisdiction for the first stage of the compulsory "admission for assessment" test to be satisfied; these would normally exist when a person is either in the community or in hospital as a voluntary patient and the person is exhibiting signs or symptoms of a mental disorder (widely though differently defined in each jurisdiction) that need to be investigated to provide a diagnosis and to formulate a treatment plan, and it is considered necessary to detain the person in hospital in order to assess his condition, because the person will not voluntarily enter hospital or will not voluntarily remain in hospital to allow the assessment to take place. In this context, it must be demonstrated that the ability to perform a meaningful assessment is dependent upon the person's detention in hospital for that assessment to take place. Nothing less will do. This is very much a binary issue. One can only compulsorily admit for assessment if the person's presence in hospital for a limited period of time is necessary for that assessment to take place. If these circumstances exist then the second stage of the test must be addressed and it would appear that a higher threshold exists in Northern Ireland in that it is necessary to establish that failure to

so detain the patient "would create a substantial likelihood of serious physical harm to himself or to other persons."

[27] Turning then to consider the test for compulsory "detention for treatment" in the two jurisdictions; in Northern Ireland, the circumstances which must exist for detention for treatment to be lawful are set out in Article 12 of the 1986 Order. In England and Wales, the relevant provisions are set out in section 3 of the 1983 Act. Looking at the two provisions, it is immediately apparent that they are very different. In Northern Ireland a person must be suffering from "mental illness or severe mental impairment of a nature or degree which warrants his detention in hospital for medical treatment." The conditions which must exist are much more restrictive than "mental disorder" which appears in the admission for assessment test. However, the phrase "of a nature or degree which warrants his detention in hospital" appears in both the admission for assessment test and the detention for treatment test. The court is of the view that the use of this phrase in both Northern Ireland provisions is very significant in the context of this case.

[28] In the context of the 1986 Order, it important to clearly define what the word "warrants" means. There can and should be no doubt that "warrants" in this context imports the concept of strict necessity. A relatively recent confirmation of this interpretation is contained in the case of *AM v South London and Maudsley NHS Foundation Trust and the Secretary of State for Health* [2013] UKUT 0365 (AAC) at paragraph [15] where Charles J stated that:

> "There was no dispute before me about this and all parties accepted, as submitted on behalf of AM, that to be compatible with Art 5(1)(e) ECHR, ss 2, 3 and 72 of the MHA have to be applied on the basis that for detention in hospital to be "warranted" it has to be "necessary" in the sense that the objective set out in the relevant statutory test cannot be achieved by less restrictive measures. As to that, I was referred to Varbanov v Bulgaria [2000] ECHR 31365/96 at paragraph 46, Enhorn v Sweden (2005) 19 BHR 222 at paragraph 44 and R(Countryside Alliance) v A-G [2008] 1 AC 719 at paragraph 156 (for the approval of the citation that to support the proposition that any restriction imposed on a Convention right must be proportionate to the legitimate aim pursued). "

[29] If one then goes on to consider the statutory language of section 3 of the 1983 Act which sets out the conditions which must exist for compulsory "detention for treatment" in England and Wales to be lawful, it is stipulated that a person must be suffering from a mental disorder (encompassing a wider range of states or conditions) of a nature or degree "which makes it appropriate for him to receive treatment in a hospital."

[30] The test of necessity that is set out in the Northern Ireland legislation does not mirror the appropriateness test set out in the England and Wales legislation. The difference in the wording of the test for "admission for assessment" and the test for "detention for treatment" in England and Wales is clearly significant and it must mean that there are material differences between the two tests. The use of the same wording in the test for "admission for assessment" and the test for "detention for treatment" in Northern Ireland is also clearly significant and this can only mean that the necessity principle is firmly embedded in both tests. The difference in the wording of the test for "detention for treatment" in Northern Ireland and the test of "detention for treatment" in England and Wales is neither accidental nor unimportant. This difference does have clear significance and this difference means that courts and tribunals in Northern Ireland must exercise great care when considering English authorities which deal with relevant aspects of the English test.

[31] There are other material differences in the definitions set out in the two legislative schemes that separately apply in Northern Ireland and England and Wales. In Northern Ireland a "hospital" is defined as meaning (subject to a limited exception) "any hospital, institution or special accommodation vested in the Department or an authorised HSC Trust." For some purposes the HSC Trust doesn't need to be an authorised Trust. For the purposes of clarification, an authorised Trust is defined in Article 2B of the Order. In England and Wales, a hospital is defined differently which is entirely understandable having regard to the fact that one is dealing with a separate and different health care system and the definition is set out in Sections 145 and 34 of the 1983 Act. There are also differences in the definitions of the "medical treatment" in both jurisdictions. In Northern Ireland "medical treatment" is defined as "including nursing and also includes care and training under medical supervision." In England and Wales "medical treatment" includes nursing, psychological intervention and specialist mental health habilitation, rehabilitation and care but the treatment must have the purpose of alleviating or preventing the worsening of the disorder or one or more of its symptoms or manifestations. These differences again highlight the need for courts and tribunals in Northern Ireland to exercise caution when considering relevant English authorities.

[32] When the learned trial judge stated in paragraph [18] of his judgment that "The issue of what is meant by warrants detention in hospital for medical treatment in this context has been considered by the courts in England and Wales under similar mental health provisions" it is clear that he had not been made aware by any of the parties' representatives that the issue which was the subject of consideration in those various decisions was what is meant by the phrase "which makes it appropriate for him to receive medical treatment in a hospital." It would appear that the courts in England and Wales, in the interpretation of section 3 of the 1983 Act, have introduced a degree of flexibility in what is meant by medical treatment in a hospital which reflects the threshold test of what is appropriate. In the case of *R (On the application of CS) v Mental Health Review Tribunal and Managers of Homerton*

Hospital [2004] EWHC 2958 (Admin), Pitchford J formulated the question for decision in that case in the following manner at paragraph [39]:

> "[W]as CS's mental illness of a nature and degree which made it appropriate for her to receive treatment, a significant and justified component of which was treatment in hospital?"

Pitchford J was of the view that the degree of grasp of a hospital consultant or other hospital-based healthcare professionals on a patient may be gossamer thin but such grasp may be significant and that is the key criteria. However, that does not mean that the differently worded provision in the Northern Ireland legislative scheme should be interpreted in the same manner. It is the view of this court that it should not be.

[33] This court has directed its primary focus upon the meaning of Articles 4 and 12 of the 1986 Order. For the avoidance of any doubt, the test for the lawfulness of compulsory "detention for treatment" set out in Article 12 of the 1986 Order is precisely reflected in the test set out in Articles 77 and 78 of the 1986 Order which the Review Tribunal must apply when determining whether a Trust has made out the case for detention and, therefore, any views that this court expresses in respect of the test to be applied under Article 12 applies with equal force to the test to be applied under Articles 77 and 78.

[34] Bearing in mind that the necessity test appears in both of the Northern Ireland legislative provisions relating to "admission for assessment" and "detention for treatment" and taking into account the guidance on article 5 of the European Convention on Human Rights helpfully set out by Keegan J in paragraphs [46] and [47] of the *Mr O and Mr R* case [2020] NIFam 23, this court considers that the interpretation of the Northern Ireland provision relating to compulsory "detention for treatment" must involve the Review Tribunal in Northern Ireland asking itself a series of questions in an ordered sequence in order to assess the lawfulness of the detention for treatment. Firstly, the Review Tribunal must ask itself whether it is established that the patient is suffering from mental illness or severe mental impairment as defined in Article 3 of the 1986 Order. Secondly, the Tribunal must ask itself whether it is established that the said mental illness or severe mental impairment is amenable to medical treatment in the sense that medical treatment (which includes nursing and includes care and training under medical supervision) is available for the patient and that the purpose and likely result of such treatment is the bringing about of a cure or improvement in his condition, or the amelioration or alleviation of the symptoms arising from his condition, or the prevention of any deterioration in his condition or the prevention of any worsening in his symptoms. Thirdly, if these matters are established, the Review Tribunal must consider whether the mental illness or severe mental impairment is of a nature or degree which warrants (necessitates) the person's detention in hospital for medical treatment.

[35] In relation to this third question, it is obvious that trivial or functionally insignificant conditions will never warrant detention for medical treatment. The mental illness or the severe mental impairment must be of a nature or degree that would justify the draconian step of depriving a person of his liberty in order to provide medical treatment. But the test is more stringent than that in that it must be demonstrated that the detention in hospital is necessary in order to effectively provide the envisaged medical treatment. In other words, detention cannot be justified if the envisaged medical treatment regime can be effectively provided in a community setting. Finally, even if the Tribunal is satisfied of all these matters, detention of an individual in hospital for the purposes of medical treatment is only lawful if the Tribunal is satisfied that a failure to so detain would create a substantial likelihood of serious physical harm to that individual or to other persons.

[36] It may well be that on careful analysis, the medical treatment (which includes nursing and includes care and training under medical supervision) which is prescribed in an entirely appropriate and comprehensive care and treatment plan does *per se* constitute or involve a deprivation of liberty. The 1986 Order does envisage that this can occur. However, if this is the case then such medical treatment, in order to be lawful under the 1986 Order, can only take place in a hospital and cannot take place in a community setting, unless the provisions of Article 15 "leave of absence" apply and it is to these provisions and their meaning that the court now turns its attention.

[37] It may appear obvious but it does need to be restated that the power vested in the RMO to grant Article 15 "leave of absence" only applies in circumstances where the grounds for detention under Part II of the 1986 Order exist at that time. This is clear from the wording of Article 15(1) of the 1986 Order.

> "The responsible medical officer may grant to any patient who is for the time being liable to be detained in a hospital under this Part leave of absence from the hospital subject to such conditions, if any, as that officer considers necessary in the interests of the patient or for the protection of other persons."

[38] The need for a present and persisting liability to be detained in a hospital under Part II of the 1986 Order before a grant of leave of absence can be made means that the possibility of a grant of "leave of absence" under Article 15 should not have any bearing on the decision of the Tribunal as to whether detention for medical treatment is warranted. In this case, it is obvious from consideration of the Tribunal's decision that the clearly stated intention of the RMO to immediately grant Article 15 leave of absence if the Tribunal upheld the detention of the applicant/appellant for the purposes of medical treatment was a matter which had a significant bearing on the Tribunal's decision making. In essence, the anticipated degree of supervision and input from hospital professions whilst the appellant was placed in the community on Article 15 leave was deemed sufficient to constitute

hospital treatment thus somehow justifying detention of the applicant/appellant so that this treatment could be provided. This court is firmly of the view that rather than taking into account the likelihood of Article 15 leave being swiftly implemented when determining whether the applicant/appellant was suffering from severe mental impairment of a nature or degree which warranted his detention in hospital for medical treatment, the Tribunal should have directed their minds to the questions set out in paragraphs [34] and [35] above. The court is firmly of the view that it was inappropriate for the Tribunal to conclude that the statutory test for detention for treatment was met when the stated intention of the newly appointed RMO was that the applicant/appellant should reside on a long-term basis in a community setting, initially on Article 15 leave and thereafter as a conditionally discharged patient, provided that the conditions that were then deemed necessary did not themselves constitute detention in the community.

[39] In this context, this court approves of the following passage of the judgment of McCullough J in the case of *R v Hallstrom Ex p W* [1986] 2 All ER 306 at 315 where he stated:

> "In my judgment, the key to the construction of section 3 lies in the phrase 'admission for treatment.' It stretches the concept of 'admission for treatment' too far to say that it covers admission for only so long as it is necessary to enable leave of absence to be granted after which the necessary treatment will begin. 'Admission for treatment' under section 3 is intended for those whose condition is believed to require a period of treatment as an inpatient. It may be that such patients will also be thought to require a period of out-patient treatment thereafter, but the concept of 'admission for treatment' has no applicability to whose whom it is intended to admit and detain for a purely nominal period during which no necessary treatment will be given."

[40] There is no doubt that the option of Article 15 "leave of absence" for a detained patient is an important and valuable therapeutic tool. Nothing in this judgment should be interpreted as meaning that the court is seeking to place obstacles on the legitimate use of Article 15 in the therapeutic management and rehabilitation of a patient. However, Article 15 cannot and should not be used as a mechanism for providing legitimacy for what amounts to detention in the community when the grounds for detention in hospital for medical treatment no longer exist and it cannot and should not be seen as a means of avoiding the difficulties presented by the *MM* decision in respect of the conditions which can be imposed upon a patient who is subject to a conditional discharge.

[41] It follows from the above discussion of the issues raised in this appeal that the court is of the view that the Tribunal in this instance did not apply the correct legal

test in that it sought to justify its decision by relying on a line of authority from England and Wales which deals with the test that is applicable in England and Wales rather than applying the different statutory test that is applicable in Northern Ireland. In coming to this conclusion, this court is of the view that the learned trial judge similarly applied the wrong test and, therefore, the applicant's/appellant's appeal is allowed.

[42] As to the appropriate remedy in this case, this will primarily depend on the present status of the applicant/appellant. If the applicant/appellant is no longer detained for treatment under the provisions of the 1986 Order, then no further hearing before the Tribunal will be required and this judgment can be left to speak for itself, subject to the court determining the issue of costs, following receipt of the parties' submissions in respect of that issue. If, however, the applicant/appellant remains detained under the provisions of the 1986 Order, then it will be necessary for a Review Tribunal to be convened to adjudicate upon the lawfulness of the applicant's/appellant's detention in the light of the guidance contained in this judgment, particularly paragraphs [34] and [35] above and by bearing in mind that the test for detention for treatment set out in the 1986 Order cannot *per se* be satisfied by the casting of a gossamer thin net of supervision, care and control in a community setting.