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

ICOS No:

Delivered: 28/02/2024

IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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

IN THE MATTER OF AN APPLICATION BY THE NORTHERN HEALTH AND  
SOCIAL CARE TRUST FOR JUDICIAL REVIEW

Michael Potter (instructed by the DLS) for the Trust  
Aidan Sands (instructed by The Departmental Solicitor) for the Review Tribunal  
Steven McQuitty (instructed by the Departmental Solicitor) for the Department of Health:  
qua interested party  
The Patient's daughter: unrepresented  
Attorney General for Northern Ireland: by written submission

Before: McCloskey LJ, Horner LJ and McAlinden J

McCLOSKEY LJ (*delivering the judgment of the court*)

*Glossary*

|  |                        |
|--|------------------------|
| The Northern Health and Social Care Trust:                         | The "Trust"            |
| The Review Tribunal under the Mental Capacity Act (NI) 2016:       | The "Review Tribunal"  |
| Department of Health:  | The "Department"       |
| Deprivation of liberty:  | "DOL"                  |
| The subject of the Review Tribunal's DOL Revocation Authorisation: | The "patient"          |
| The Attorney General for Northern Ireland:                         | The "Attorney General" |

## *Introduction*

[1] By its decision made on 14 May 2021 an appropriately constituted panel of the Trust authorised the deprivation of the patient’s liberty (the “DOL authorisation”). This stimulated a referral by the Attorney General to the Review Tribunal. At a hearing on 20 October 2021 the Review Tribunal determined to revoke the DOL. Its written reasoned decision followed on 2 November 2021. On 1 December 2021 an emergency DOL authorisation was made by a panel. A further DOL authorisation was then made. This was followed by a further hearing before the Review Tribunal, on 17 October 2022. The outcome of this was the maintenance of the DOL authorisation.

[2] The application for judicial review giving rise to this appeal was initiated by the Trust subsequently. The target of the Trust’s challenge was the Review Tribunal’s October 2021 decision. The ensuing order of the High Court, whereby leave to apply for judicial review was granted and the application dismissed, is the subject of the Trust’s appeal to this court.

## *Statutory Framework*

[3] The Review Tribunal, as noted by the Deputy Judge, is a statutory agency constituted under Article 70 of the Mental Health (NI) Order 1986 (the “1986 Order”) as renamed by section 274 of the Mental Capacity Act (NI) 2016 (“MCA 2016”). Its predecessor was the Mental Health Review Tribunal.

[4] The Mental Capacity Act (NI) 2016 (MCA 2016) contains, *inter alia*, a cohort of inter-related provisions relating to “authorisations.” In the context of this appeal the most important are the following:

### **“Section 37**

“...First extension of period of authorisation

37 – (1) This section applies where –

- (a) an authorisation has been granted (and has not been revoked); and
- (b) the initial period of the authorisation has not ended.

(2) The period of the authorisation may be extended for a period of 6 months beginning immediately after the end of the initial period, by the making of an extension report (see section 39).

(3) In this Chapter –

“authorisation” means an authorisation under paragraph 15 of Schedule 1;

“the initial period” of an authorisation means the period of 6 months beginning with the date the authorisation is granted (see paragraph 15(6) of Schedule 1);

“the period” of an authorisation means the period at the end of which the authorisation (unless previously revoked) expires.”

By section 38 the period of the authorisation may be further extended for one year. Section 39 requires the generation of “extension reports.” The detention of a person pursuant to an authorisation in circumstances amounting to a deprivation of liberty constitutes a “measure” within the meaning of section 41 and associated provisions. The “responsible person” is per section 42, the social worker in charge of the patient’s case.

[5] DOL authorisations are, within the meaning of section 45(1) one of the “events” entitling a “qualifying person” (normally the patient) to apply to the Review Tribunal within a specified period. This is supplemented by the following provisions:

**“Section 47**

**“Power of certain persons to refer case to Tribunal**

47 – (1) At any time when an authorisation under Schedule 1 or 2 is in force, a person within subsection (2) may refer to the Tribunal the question whether the authorisation is appropriate.

(2) The persons are –

- (a) the Attorney General;
- (b) the Department;
- (c) the Master (Care and Protection), acting on the direction of the court.

(3) For the purpose of providing information for the purposes of a reference under this section, any medical practitioner authorised by or on behalf of the person to

whom the authorisation relates may do anything within section 275 (visiting etc powers) in relation to the person.”

Under section 48, a reference by the relevant Trust to the Review Tribunal of an extended DOL authorisation is obligatory.

[6] The involvement of the Attorney General in certain circumstances arises from section 50:

**“Duty of HSC trust to notify the Attorney General**

50 – (1) This section applies if –

- (a) the period of an authorisation under Schedule 1 has been extended (under section 38 or Schedule 3) for a period of one year;
- (b) the authorisation authorises a measure within section 41(2)(b) or (d) (deprivation of liberty or community residence requirement); and
- (c) at the relevant time, it appears to the relevant trust that the person to whom the authorisation relates lacks (or probably lacks) capacity in relation to whether an application under section 45 (applications to Tribunal) should be made.

(2) The relevant trust must as soon as practicable give the Attorney General –

- (a) notice of the matters mentioned in subsection (1)(a) to (c); and
- (b) any prescribed information.

(3) In this section –

“the relevant time” means the time 6 months after the beginning of the one year period mentioned in subsection (1)(a);

“the relevant trust” has the same meaning as in section 48.”

Schedule 1 to MCA 2016 regulates, *inter alia*, DOL authorisations made by Trust panels: see in particular paragraph 1 and paragraph 2(2)(b). The requisite application may be made by, *inter alios*, the patient’s social worker and must include, *inter alia*, a

medical report and a care plan. The criteria for a DOL detention are specified in paragraph 10:

“In relation to detention of P in a place in circumstances amounting to a deprivation of liberty, the criteria for authorisation are that –

- (a) appropriate care or treatment is available for P in the place in question;
- (b) failure to detain P in circumstances amounting to a deprivation of liberty in a place in which appropriate care or treatment is available for P would create a risk of serious harm to P or of serious physical harm to other persons;
- (c) detaining P in the place in question in circumstances amounting to a deprivation of liberty would be a proportionate response to –
  - (i) the likelihood of harm to P, or of physical harm to other persons; and
  - (ii) the seriousness of the harm concerned;
- (d) P lacks capacity in relation to whether he or she should be detained in the place in question; and
- (e) it would be in P’s best interests to be so detained. ”

[7] Upon receipt of an application of the foregoing kind the relevant Trust must observe the requirements of Part 4 of Schedule 1. The decision-making panel, which must be constituted by the Trust, has, per paragraph 15(1), the binary choice of (a) authorising the proposed DOL detention or (b) refusing it. In the case of (a) the DOL authorisation must specify the purposes for which the patient may be detained and the place of detention: per paragraph 16. Every DOL authorisation must be communicated to the Attorney General: paragraph 19. Variation and revocation powers are conferred by paragraph 24. By paragraph 26(1):

“The grant of an authorisation under paragraph 15(‘the later authorisation’), as well as revoking any interim authorisation relating to the same application, revokes any relevant earlier authorisation ...”

This is expressly subject to the relevant Trust panel’s power under sub-paragraph (3) to direct otherwise.

[8] By the route charted above one returns to the substantive statutory provisions, in particular section 51:

**“Powers of Tribunal in relation to authorisation under Schedule 1**

51 – (1) Where an application or reference to the Tribunal is made under this Chapter in relation to an authorisation under Schedule 1, the Tribunal must do one of the following –

- (a) revoke the authorisation;
- (b) if the authorisation authorises more than one measure (as defined by subsection (4)), vary the authorisation by cancelling any provision of it which authorises a measure;
- (c) decide to take no action in respect of the authorisation.

(2) In the case of an authorisation under paragraph 15 of Schedule 1, the Tribunal –

- (a) may vary the authorisation only if satisfied that the criteria for authorisation are met in respect of each measure that will remain authorised by the authorisation;
- (b) may decide as mentioned in subsection (1)(c) only if satisfied that the criteria for authorisation are met in respect of each measure that is authorised by the authorisation.

(3) In the case of an interim authorisation under paragraph 20 of Schedule 1, the Tribunal –

- (a) may vary the authorisation only if satisfied that there is a good prospect of it being established that the criteria for authorisation are met in respect of each measure that will remain authorised by the authorisation;
- (b) may decide as mentioned in subsection (1)(c) only if satisfied that there is a good prospect of it being

established that the criteria for authorisation are met in respect of each measure that is authorised by the authorisation.

(4) For the purposes of this section each of the following is a “measure” –

- (a) the provision to P of treatment specified by the authorisation;
- (b) the detention of P in a place in circumstances amounting to a deprivation of liberty;
- (c) a requirement to attend at a particular place at particular times or intervals for the purpose of being given treatment specified by the authorisation;
- (d) a community residence requirement.

(5) In this section “the criteria for authorisation”, in relation to a measure, means the criteria for authorisation for that measure as set out in Part 3 of Schedule 1.

(6) In paragraphs 11(a) and 12(a) and (b) of that Schedule as they apply for the purposes of this section, the references to imposing a requirement include continuing the requirement.”

[9] By section 53 the Review Tribunal has the following additional powers:

“53(1) This section applies where, under section 51 or 52, the Tribunal decides to do anything other than revoke the authorisation.

(2) The Tribunal may, with a view to facilitating the ending at a future date of a measure still authorised by the authorisation –

- (a) recommend the taking of specified actions in relation to P; and
- (b) further consider P's case in the event of any recommendation not being complied with.

(3) Where the Tribunal further considers P's case under subsection (2)(b), section 51 or (as the case may be) section 52 applies."

### *Factual Matrix*

[10] The brief narrative in para [1] above belongs to a wider factual context. Until January 2021 the patient, then aged 85 years, had been living in her own home with the assistance of a support package provided by the Trust. She then had the misfortune to fall, fracturing her femur. Treatment in hospital followed by a period in a residential unit followed. In March 2021 the Trust transferred her to "M" Care Home. The material events belonging to the period April 2021 to November 2021 are summarised in paras [1]-[2] above.

[11] During the aforementioned period it was the aspiration of the patient and her daughter that the patient return to live in her home. There was liaison between the Trust and the patient's family to this end. An arrangement whereby the necessary domiciliary care package would be provided by the Trust and the family jointly was considered. One of the possibilities contemplated was the return of the patient to her home for a trial period of two weeks. This did not materialise and the new DOL authorisation noted in para [1] above followed.

[12] The patient has not returned to live in her home. She remained in M Care Home until 5 June 2023, when she was transferred to another comparable facility where she continued to reside until her recent demise.

### *The Review Tribunal's Decision*

[13] As noted above, the Review Tribunal's orally promulgated decision at the hearing on 20 October 2021 to revoke the DOL authorisation was followed by its written decision dated 2 November 2021.

[14] It is apparent to this court from the judgment under appeal and the parties' skeleton arguments that the main issue debated at first instance involved the interpretation of the Review Tribunal's written decision. The specific aspect of the decision under discernible from para [17] of the judgment:

"Although there is language in the Tribunal decision which might, taken in isolation, tend to suggest that the Tribunal thought that the relevant package of care was concretely to hand, this suggestion is negated when the Tribunal decision is read properly as a whole. The Tribunal was fully aware that the relevant package of care was not yet in place."

And at para [20]:

“... the Tribunal had found both that there would be a care package for [the patient] at her home, at least on a trial basis and that this package would not be in place if the [DOL authorisation] were to be discharged.”

The phraseology “in place” evidently denotes “in place immediately”: para [29] of the judgment confirms this interpretation. The deputy judge’s construction of the Review Tribunal’s decision was reinforced by the contemporaneous note of the Tribunal President recording 1 November 2021 as the agreed date of commencement of the envisaged domiciliary package.

[15] In order to lawfully maintain the DOL authorisation in respect of the patient, the Tribunal would have had to be satisfied that all of the five governing criteria specified in para 10 of Schedule 1 to MCA 2016 were fulfilled. The Tribunal, in substance, found that the first four criteria were satisfied, whereas the fifth was not. In other words, in the Tribunal’s judgement, it was no longer in the best interests of the patient to remain detained, for the reason that the return to her home with the support of a domiciliary care package was considered to be imminent. In passing, this was precisely the arrangement which the patient and her daughter were seeking. More broadly, this arrangement is considered best for people in the majority of cases, subject of course to feasibility.

### *Irrationality and Predictive Evaluative Judgement*

[16] Fundamentally, the exercise undertaken by the Review Tribunal in making the impugned decision was one of evaluative judgement. It was not a hard-edged factfinding exercise. It was, rather, one which required the Tribunal to evaluate all available material evidence and, applying its expertise and experience, make an evaluative judgement. There is nothing in the statutory language to support the view that a tribunal’s assessment of a patient’s best interests must be confined to the date upon which the assessment is made. It would in our view be absurd to suggest that an assessment of this kind must exclude future predictions. The same analysis clearly applies to all of the paragraph 10 criteria. In short, the *Wednesbury* standard of review is plainly engaged.

[17] If any reinforcement of the foregoing analysis is required, it is found in section 7 of MCA 2016, which it is appropriate to reproduce in full:

#### **“Best interests**

7.(1) This section applies where for any purpose of this Act it falls to a person to determine what would be in the best interests of another person who is 16 or over (“P”).

- (2) The person making the determination must not make it merely on the basis of –
  - (a) P's age or appearance; or
  - (b) any other characteristic of P's, including any condition that P has, which might lead others to make unjustified assumptions about what might be in P's best interests.
- (3) That person –
  - (a) must consider all the relevant circumstances (that is, all the circumstances of which that person is aware which it is reasonable to regard as relevant); and
  - (b) must in particular take the following steps.
- (4) That person must consider –
  - (a) whether it is likely that P will at some time have capacity in relation to the matter in question; and
  - (b) if it appears likely that P will, when that is likely to be.
- (5) That person must, so far as practicable, encourage and help P to participate as fully as possible in the determination of what would be in P's best interests.
- (6) That person must have special regard to (so far as they are reasonably ascertainable) –
  - (a) P's past and present wishes and feelings (and, in particular, any relevant written statement made by P when P had capacity);
  - (b) the beliefs and values that would be likely to influence P's decision if P had capacity; and
  - (c) the other factors that P would be likely to consider if able to do so.
- (7) That person must –

- (a) so far as it is practicable and appropriate to do so, consult the relevant people about what would be in P's best interests and in particular about the matters mentioned in subsection (6); and
- (b) take into account the views of those people (so far as ascertained from that consultation or otherwise) about what would be in P's best interests and in particular about those matters.

For the definition of "the relevant people" see subsection (11).

(8) That person must, in relation to any act or decision that is being considered, have regard to whether the same purpose can be as effectively achieved in a way that is less restrictive of P's rights and freedom of action.

(9) That person must, in relation to any act that is being considered, have regard to whether failure to do the act is likely to result in harm to other persons with resulting harm to P.

(10) If the determination relates to life-sustaining treatment for P, the person making the determination must not, in considering whether the treatment is in the best interests of P, be motivated by a desire to bring about P's death.

(11) In subsection (7) "the relevant people" means –

- (a) any person who at the time of the determination is P's nominated person (see section 69);
- (b) if at the time of the determination there is an independent mental capacity advocate who is instructed under section 91 to represent and provide support to P, the independent mental capacity advocate;
- (c) any other person named by P as someone to be consulted on the matter in question or on matters of that kind;
- (d) anyone engaged in caring for P or interested in P's welfare;

- (e) any attorney under a lasting power of attorney, or an enduring power of attorney, granted by P; and
- (f) any deputy appointed for P by the court.”

[18] In our view it’s plain that the exhortation in section 7(3) that the decision maker consider “all the relevant circumstances” must include predicted and foreseeable future circumstances which are deemed relevant. Indeed it is virtually impossible to conceive of any case in which the decision maker will not be focusing on the future. The contrary argument advanced on behalf of the Trust is manifestly untenable.

[19] It is clear to this court that the Tribunal's decision was predicated upon a firm expectation that a domiciliary care package for the patient was imminent. In the event this expectation was not fulfilled. However, having regard to all the material evidence it cannot be plausibly contended that this was other than a perfectly reasonable forecast. We consider that the Tribunal’s evaluative assessment was remote from the irrational.

#### *The statutory indemnity issue*

[20] The second challenge to the impugned decision of the Tribunal entails the contention that the revocation of the DOL authorisation unlawfully exposed Trust employees to the risk of working without the protection of the statutory indemnity in section 9 of MCA 2016 until the further DOL authorization was made. The first riposte to this contention is that this is not a consideration which the Tribunal was expressly required by the statute to take into account. Secondly, if and insofar as it is suggested that the Tribunal was impliedly obliged by the statute to reckon this factor, this in our view is confounded by a combination of section 7 and paragraph 10 of Schedule 1. In short, this ground is resoundingly defeated by the application of orthodox public law dogma.

[21] The question of whether the aforementioned contention is based upon a correct construction of the statutory indemnity provisions does not arise. It is unsuited to consideration in an *obiter* vacuum as it clearly requires fuller argument.

#### *Conclusion*

[22] For the reasons given the appeal must be dismissed.