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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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

AND IN THE MATTER OF A DECISION OF THE REVIEW TRIBUNAL UNDER THE MENTAL CAPACITY ACT (NORTHERN IRELAND) 2016

Michael Potter (instructed by Rosaleen McGinn solicitor of the DLS) for the applicant
Aidan Sands (instructed by the Departmental Solicitor) for the proposed respondent, the Review Tribunal

LARKIN J

Introduction

[1] By this application for leave to apply for judicial review the Northern Health and Social Care Trust, ('the Trust') challenges a decision of the Review Tribunal, that is, the Review Tribunal constituted under Article 70 of the Mental Health (Northern Ireland) Order 1986 as renamed by section 274 of the Mental Capacity Act (Northern Ireland) 2016. The decision under challenge revoked the authorisation for the deprivation of Mrs Pearl Patterson's liberty which had been made by a panel of the Trust on 14 May 2021. The Tribunal hearing and decision are both of October 20 2021 and the written reasons for the decision were issued on 2 November 2021.

[2] Mrs Patterson has, despite this Tribunal decision remained at Massereene Manor Care Home Antrim (the location specified in the Trust Panel decision), in conditions that amount to a deprivation of her liberty; she is not, it seems, free to leave this care home and if she were to attempt to leave she would be prevented by staff employed there from so doing.

[3] On 1 December 2021, shortly after the Tribunal decision, the Trust in a letter to the manager of Massereene Manor Care Home advised that Mrs Patterson "is

being placed under **Emergency** [emphasised in the original] provisions of the Mental Capacity Act 2016." There then followed, it seems, a further deprivation of liberty authorisation and a further (and differently composed) Review Tribunal hearing on 17 October 2022. These events and their legal consequences are not before me for determination.

[4] Following the lodging of the Trust's application for leave to apply for judicial review, McFarland J in case management directions of 8 February 2022 directed that the case "be dealt with at a 'rolled up Hearing.'" Some observations on the nature of a 'rolled up hearing' may be found in *Re An Application by Larne Chemists Limited and others for leave to apply for Judicial Review* [2020] NIQB 65 at [2].

[5] Although at the commencement of the hearing the application is formally for leave to apply for judicial review, the papers before me are, save in one respect, indistinguishable from the papers to be expected in a substantive application for judicial review. The single point of distinction here is that there is not among the papers a notice of motion, the procedural measure that converts what are formally *ex parte* proceedings to *inter partes* proceedings. As all practitioners are aware, the Judicial Review Practice Direction requires that notice be given to an intended respondent, and it appears that practice may have moved some distance ahead of the position still formally contemplated by Order 53 rule 3 (2) RsCJ.

[6] I had the benefit of extensive written submissions from Mr Potter on behalf of the Trust and from Mr Sands on behalf of the Tribunal. Both counsel also assisted me with skilful oral submissions, and I had the benefit also of admirably focussed oral submissions from Ms Michelle Darlys, Mrs Patterson's daughter. At my invitation, the Attorney General for Northern Ireland made a short and helpful written submission.

Factual Background

[7] Mrs Patterson whose date of birth is 10 October 1935 is now 87. She has been diagnosed with vascular dementia and had been living in her own home with a package of support provided by the Trust until she fell in January 2021, fracturing her femur. After treatment in hospital, including surgery, Mrs Patterson was discharged to Rosedale Residential Unit but the Trust decided to transfer her to Massereene Manor Care Home and she was moved there in March 2021.

[8] In an affidavit from Jane McManus, a solicitor in the Directorate of Legal Services, she describes how (para 13) on 26 April 2021 "the Trust made a deprivation of liberty application to a Trust Panel seeking lawful authority to detain P in Massereene Manor for the purposes of receiving care and treatment." This description oversimplifies the procedure under Schedule 1 to the Mental Capacity Act (Northern Ireland) 2016. Paragraph 5 of Schedule 1 prescribes the categories of person who may make application; heading the list in paragraph 5(2)(a) is "an

approved social worker." It appears to have been a social worker who made the application in respect of Mrs Patterson.

[10] Rather than an application being made *by* the Trust, it is clear from a combination of paragraph 5 and paragraph 14 of Schedule 1 that the application is addressed to the Trust which must as soon as practicable, following receipt of a duly made application, by para 14(1)(b), constitute a panel to consider the application.

[11] Although made on April 26 2021, this application was not determined until 14 MayMay 2021 when a panel authorised Mrs Patterson's detention in Massereene Manor Care Home pursuant to paragraph 15(1)(a) of Schedule 1.

[12] Following this authorisation Mrs Patterson was not free to leave Massereene Manor; had she attempted to do so or had someone attempted to remove her from that location without permission, any attempts of that kind would have been resisted.

[13] In her first affidavit (para 15) Ms McManus says that because the Trust considered Mrs Patterson lacked capacity to ask for an independent review of her detention, it "referred the DOL [deprivation of liberty] authorisation in relation to Massereene Manor to the Attorney General on 27 May 2021 in accordance with section 50 of the Mental Capacity Act." In fact, the Trust referred Mrs Patterson's deprivation of liberty to the Attorney General on 25 May 2021, some ten days after the Trust Panel authorisation, and the Attorney General referred "the question of whether this authorisation is appropriate" to the Review Tribunal on 27 May 2021 pursuant to section 47 (1) of the Mental Capacity Act (Northern Ireland) 2016. The letter of referral from the Attorney General's office pointedly – and properly – observes "It is important for the article 5 ECHR rights of those detained that the Attorney is notified promptly of an authorisation."

[14] The content and sequencing of paras 15 to 17 of Ms McManus's first affidavit could cause the reader to consider, wrongly, that the Attorney General had not yet made her referral when she received a letter dated 21 June 2021 from Ms Darlys. I hope this is no more than unintentional clumsiness of expression. The Attorney General acted with the promptness required by article 5 ECHR in determining on 27 May 2021 a referral that was made to her only on 25 May 2021.

[15] Following the referral by the Attorney General the Tribunal listed it for hearing on 29 July 2021. The hearing was adjourned to 8 September 2021 to permit, it seems, an independent capacity assessment to be obtained. This was only obtained in October 2021 (and shared on 19 October 2021) with the result that the September date was vacated and the matter heard and determined on 30 October 2021.

Issues and Argument

[16] Although a number of grounds were pleaded in the Trust's Order 53 statement, including a claim founded on the Human Rights Act 1998, Mr Potter confirmed that his challenge was twofold: that the Tribunal had erred in its proportionality assessment by failing to appreciate that the package of care to which it made reference in its decision was not immediately available, and that the Tribunal had erred in law by bringing into being a "legal lacuna", that is, a set of circumstances in which a deprivation of liberty would not be authorised at Massereene Manor Care Home but an adequate package of care would not yet be available for Mrs Patterson at her home.

[17] During the course of exchanges with counsel, I suggested to Mr Potter that his ability to deploy the second of these lines of attack depended on the failure of the first of them. He agreed and, I think, rightly. 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.

[18] Although it is normally proper for a Tribunal to let its decision speak for itself, the Tribunal President, Ms Marshall, filed an affidavit in which she avers (para 8) that a trial period at Mrs Patterson's home "was more than a notional or possible placement. Rather, the evidence from the Trust confirmed that this was a concrete plan." Ms Marshall also avers (para 16) that she raised the issue "of a possible legal lacuna in that the [deprivation of liberty] authorisation would be revoked but it would take some time to finalise the necessary practical arrangements for the Patient's return home during which time the Patient would remain in the Care Home."

[19] Ms Marshall has recorded in her handwritten notes (para 9) that the date of 1 November had been agreed for the patient to return home. She observes that this "was less than two weeks away" from the date of hearing and decision.

[20] In the light of this evidence, which I accept, the Tribunal had found both that there would be a care package for Mrs Patterson at her home, at least on a trial basis and that this package would not be in place if the deprivation of liberty authorised by a Trust Panel on 14 May 2021 were to be discharged.

[21] Under the scheme of the Mental Capacity Act (Northern Ireland) 2016 a person may only be detained if, among other requirements, the criteria set out in paragraph 10 of Schedule 1 to that Act ('Criteria for detention amounting to a deprivation of liberty') are satisfied. At issue in this application is the Review Tribunal's assessment of these criteria in the context of its duties under section 51 of that Act.

[22] Paragraph 10 of Schedule 1 reads as follows:

> "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."

[23] In her written submissions the Attorney General says (para 3):

> "The point of focus for the Tribunal is whether (or not) the evidence before it satisfies it, at the time of hearing, that the criteria for authorisation are met. The present tense 'are' in section 51 (2) of the 2016 Act is important."

This is, I think, correct but incomplete and, potentially, misleading.

[24] Section 51 (1) and (2) read as follows:

> "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."

[25] It will be seen that of the three choices open to the Review Tribunal by section 51(1)(a) to (c) only two of them (section 51(1)(b) and (c)) are expressly subjected to the present tense in section 51(2). This is unsurprising; the Review Tribunal cannot maintain an authorisation in place, with or without modification, unless it is satisfied that the authorisation, as modified, continues to satisfy the criteria for authorisation.

[26] If the Review Tribunal is not satisfied that the authorisation criteria are satisfied, then it must revoke the authorisation.

[27] As appears from the five authorisation criteria themselves, these are not all expressed in the present tense. Indeed, of the criteria for detention, only two, those at para 10 (a) and (d) are expressed in the present tense and do not involve some form of predictive evaluation. All of the other authorisation criteria, that is, those at para 10(b), (c), and (e) require the Review Tribunal to engage in a predictive exercise. whether as respects future risk of serious harm (10(b)), the proportionality of detention as a response to the likelihood of harm and the seriousness of that harm (10(c)), and the assessment of best interests (10(e)).

[28] At the core of the applicant's case, as noted above at [16], are two complaints, one of which is largely factual and the other doctrinal. The largely factual complaint is that the Review Tribunal did not appreciate at the time of its decision that no package of care was then available for Mrs Patterson to be looked after in her own home. The doctrinal complaint is that the revocation of an authorisation cannot occur when it would result in a period during which a person such as Mrs Patterson

would be cared for in a residential setting without the carers benefitting from the protection from liability for deprivation of liberty by virtue of section 9(2) and section 24 of the 2016 Act.

[29] Although I found (see [20] above) that the Review Tribunal members were aware that there would not be an immediate package of measures in place to care for Mrs Patterson in her own home it is less clear to me that the Review Tribunal obtained precision from either party before it as to the likely lapse of time before such a package of measures would become available. In Ms McManus's affidavit (at para 10) she does "not recall" the date of 1 November 2021 as having been agreed as the start date of the period during which Mrs Patterson would be cared for at home on a trial basis. Ms McManus points to the absence of any reference to this agreed date in the decision of the Review Tribunal.

[30] In this case any concern about instinctively human recourse to retrospective justification by the Tribunal is assuaged by the contemporaneous note referred to by Ms Marshall in which the date of 1 November 2021 is recorded as having been agreed.

[31] Mrs Patterson was not moved to her home on 1 November but the Review Tribunal cannot on the evidence be faulted, I find, for considering this a likely date for care to commence, albeit on a trial basis.

[32] This leaves, however, the second of the applicant's complaints, namely, that it is unlawful to permit the creation of any period during which care is maintained at a location but the carers do not benefit from the protection against liability in section 9(2) and section 24 of the 2016 Act.

[33] In the course of exchanges with Mr Potter it seemed that he took, on behalf of the Trust, a position that could be characterised as absolute. It was not lawful, he argued, for the Review Tribunal to permit any such period of 'legal lacuna' to come into being. His fall-back position was that the period of some two weeks (up to the date of 1 November 2021) was, in any event, unlawful.

[34] However understandable may be the position taken by the Trust in argument given that it will, naturally, be anxious to protect those persons conscientiously discharging difficult duties from being exposed unnecessarily to liability, it seems to me that the Trust argument fundamentally misconceives the task of the Review Tribunal under section 51 of the 2016 Act.

[35] On an application or reference made to it, the task of the Review Tribunal is to determine whether the authorisation criteria in paragraph 10 of Schedule 1 to the 2016 Act are still satisfied. Those criteria are not addressed to the administrative desiderata or even the perceived necessities of the Trust. Those criteria do not imply, far less express, a general test of the public interest. Those criteria which,

having quoted above at [22] I do not now repeat, are concerned, by way of summary, with the best interests of the detained person.

[36] Reference was made during argument to the well-known passage in *Aintree University Hospitals NHS Trust v James* [2013] UKSC 67 at [39] in which light is shed on the breadth of the concept of 'best interests' of a person. A structured approach to the ascertainment of the best interests of a person under the 2016 Act is provided by section 7. It can be seen from section 7(6)(a) to (c) of the 2016 Act that, in ascertaining the best interests of P "special regard" is to be had to in ascertaining the best interests of P is to be had to past and present wishes and feelings, beliefs and values of P as well as "the other factors that P would be likely to consider if able to do so."

[37] For very many persons, and Mrs Patterson must be included in that number, the wish to be cared for at home, in familiar surroundings redolent with memories – even if to do so incurs risk – will contribute greatly towards the determination of what the best interests of those persons requires.

[38] If, for example, a Review Tribunal finds that the criterion in paragraph 10(c) of Schedule 1 is not satisfied in respect of P, the Tribunal has no lawful option under section 51(1) but to revoke the authorisation to deprive P of his liberty. If the Trust considers that P still needs to be cared for, then the Trust can continue to care for P but cannot rely on the authorisation that has been revoked in order to protect P's carers from any liability that can arise if P is still deprived of his liberty.

[39] Again, by way of example, it would, I think, be a proper argument against the decision of a Review Tribunal if the Tribunal were, in its evaluation of the proportionality of deprivation of liberty as a response to (1) the seriousness and (2) the likelihood of any harm to P (as required by paragraph 10(c) of Schedule 1) to have regard to utterly fanciful or otherwise unreal alternatives to P's present care arrangements. It would not, however, be a proper argument that plausible alternatives had been taken into account by the Review Tribunal but that revocation caused difficulties for the Trust in the delivery of what it considered to be the best interests of P.

[40] The entire scheme in Part 2 of the 2016 Act is a response to the approach of a majority of the Supreme Court in *R v Cheshire and Cheshire West Council* [2014] AC 896 to article 5 of the European Convention on Human Rights. That scheme (which may, indeed, in some of its detail go beyond what Article 5 ECHR requires) puts in place regular judicial assessment of the lawfulness of treatment amounting to detention. The importance of compliance with judicial orders was recently given forthright emphasis by the Supreme Court in *R (Majera) v Secretary of State for the Home Department* [2021] UKSC 46 at [44].

[41] It follows, I think, from the foregoing analysis that a Review Tribunal must confine itself to its statutory task under section 51 and paragraph 10 of Schedule 1 to

the 2016 Act. The decision of the Review Tribunal at issue in these proceedings may be taken to have caused difficulty for the Trust but that future difficulty, real or merely feared, was not a relevant consideration in the authorisation criteria set out in paragraph 10.

[42] Notwithstanding the criticisms made of the Review Tribunal's decision made by the Trust it does not seem to be realistic to suggest that the Tribunal did not have the correct test before it nor that it did not apply the correct test.

[43] It is important to keep in mind that the Review Tribunal decision did not itself have the effect of altering the day to day care of Mrs Patterson; the decision simply revoked an authorisation that afforded specified protection against civil and criminal liability. It opened up the possibility of certain other forms of relief to Mrs Patterson but it was not itself equivalent, for example, to an order pursuant to a writ of *habeas corpus* requiring the release of an asylum seeker from a detention centre.

[44] Although the decision under challenge here was taken under section 51 of the 2016 Act and no argument, therefore, was addressed to me on the effect of section 53., section 53 can, however, be considered as helping generally with the interpretation of Part 2 of the 2016 Act. Section 53 only applies when the Tribunal has done anything other than revoke the authorisation and section 53(2) provides that:

> "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."

The conferral of such a discretion on the Review Tribunal to facilitate P's liberty is highly instructive about the doctrinal structure of Part 2 of the 2016 Act, and the proper favour it shows to liberty.

[45] Argument was addressed to me on behalf of the Applicant complaining that the Review Tribunal had not considered section 27 of the 2016 Act. This reads as follows:

> "27(1) For the avoidance of doubt, if—
>
> (a) by virtue of this Part a person ("P") is detained in a relevant place,
>
> (b) P is given permission to be absent from the relevant place for a particular period or a particular occasion, and

(c) a person does an act within subsection (2),

section 9(2) (protection from liability) applies to that act provided that the conditions of section 9(1)(c) and (d), and any other conditions that apply under this Part, are met in relation to that act.

(2) The acts within this subsection are—

(a) imposing any condition on P in relation to the permission;

(b) any act for the purpose of ensuring that P complies with such a condition;

(c) recalling P to the relevant place.

(3) For the purposes of this section a place is a "relevant place" if—

(a) P is detained in the place in circumstances amounting to a deprivation of liberty; and

(b) care or treatment is available to P in the place."

[46] In my view, section 27 was not relevant to the issues before the Review Tribunal. The function of section 27, an "avoidance of doubt" provision, is not to confer power on anyone to grant permission to a person subject to a deprivation of liberty authorisation to be absent from "the relevant place" (an expression defined in section 27 (3)). Rather, its function is to ensure that the protection from civil and criminal liability applicable when the conditions in section 9 (2) and section 24 are satisfied can apply also to any period of absence from "the relevant place" when permission to be absent is granted. The existence of a power to grant such permission is assumed by section 27.

[47] Section 27 need not have been considered by the Review Tribunal and it was both proper and understandable that no party drew that provision to the Tribunal's attention.

[48] Given the nature of the argument presented to me on behalf of the Trust, this application comfortably passes the threshold for leave (which I grant; I dispense with the requirement to serve a notice of motion) but, for the reasons set out above, I dismiss the application for judicial review.