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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY JR325 (A MINOR)
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

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Ronan Lavery KC & Chris Sherrard (instructed by Bernard Campbell & Co) for the Applicant
Gordon Anthony (instructed by the Departmental Solicitor's Office) for the Proposed Respondents
Philip Henry KC & Mark O'Hara (instructed by the Public Prosecution Service) for the Notice Party

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HUMPHREYS J

Introduction

[1] The applicant is a 17-year-old boy who has been diagnosed with autism and ADHD and has been the subject of a care order since the age of 12. He has complex needs and has a history of substance abuse and violent behaviour.

[2] The applicant currently faces the following criminal charges:

(i) Sexual assault by penetration contrary to Article 13 of the Sexual Offences (Northern Ireland) Order 2008;

(ii) Sexual assault contrary to Article 14 of the Sexual Offences (Northern Ireland) Order 2008; and

(iii) Common assault.

[3] These charges relate to alleged offending which occurred on 29 July 2022 and involved two young girls under the age of 13. They are being dealt with at Coleraine Youth Court.

[4] In addition, the applicant faces charges before Ballymena Youth Court relating to his conduct at a children's home as follows:

(i) Arson on 16 October 2022;

(ii) Criminal damage on 27 October 2022; and

(iii) Common assault of another resident on 17 April 2024.

[5] The applicant was released on High Court bail on 4 August 2023 subject to conditions including a prohibition on unsupervised contact with girls aged under 18. It later emerged that he had been having contact with girls aged 14 and 15 and, as a result, his bail was revoked in June 2024 and subsequent bail applications have been unsuccessful. He is currently remanded in Woodlands Juvenile Justice Centre.

[6] Following a consultation with the applicant, counsel directed that an expert report be obtained dealing with the issue of fitness to plead.

[7] The applicant's mother has sworn an affidavit addressing the extensive efforts undertaken by his solicitor to obtain such evidence. On 3 January 2023 a report was obtained from Dr Victoria Bratten, Senior Specialist Psychologist, who concluded that the applicant was not fit to plead.

[8] This report was served on the Public Prosecution Service ("PPS"), the notice party to these proceedings, who decided to obtain a report from Dr Philip Anderson, Consultant Psychiatrist. In his report, he determined that the applicant was fit to plead albeit that he should be recognised as a vulnerable defendant and certain special measures applied.

[9] In light of this, the applicant's solicitor endeavoured to instruct a suitably qualified psychiatrist who was appointed by the Regulation and Quality Improvement Authority ("RQIA"). Some 16 psychiatrists were contacted but none were available to accept instructions. A communication received from Dr Anderson, the expert instructed by the PPS, states:

> "Unfortunately, there is no-one else currently undertaking adolescent criminal cases. I am in a unique position as the Regional Child, Adolescent and Forensic Consultant."

[10] The applicant's solicitor did obtain a report from a Dr Uma Geethanah, Consultant Child and Adolescent Psychiatrist based in England. She is registered with the Care Quality Commission ("CQC") which carries out regulatory functions in England, but not with the RQIA which has responsibility for Northern Ireland.

The judicial review challenge

[11] The applicant seeks to challenge Articles 44, 49(1) and 49(4A) of the Mental Health (Northern Ireland) Order 1986 ("the 1986 Order") and the related failure by the proposed respondents, the Departments of Health and Justice, to rectify the claimed breaches of the ECHR which are caused by these provisions. The relief sought by the applicant is pleaded on four alternative bases:

(i) The quashing of the relevant statutory provisions;

(ii) Declarations of incompatibility pursuant to section 4 of the Human Rights Act 1998 ("HRA");

(iii) The 'reading down' of the legislation pursuant to section 3 of the HRA; and

(iv) Declaratory relief and/or mandamus to compel the proposed respondents to act to amend or repeal the impugned legislative provisions.

[12] Some initial observations are apposite at this stage. The 1986 Order is subordinate legislation within the definition provided by section 21(1) of the HRA and may therefore be subject to the full range of remedies available in judicial review. Section 6 of the HRA renders unlawful any act by a public authority which is incompatible with a Convention right. Section 6(6) provides:

> "'An act' includes a failure to act but does not include a failure to—
>
> (a) introduce in, or lay before, Parliament a proposal for legislation; or
>
> (b) make any primary legislation or remedial order."

[13] Thus, the courts cannot impugn a failure to act in relation to primary legislative processes. Given, however, that the issue at hand concerns subordinate legislation, the court does have jurisdiction to consider this type of challenge, but it will always be conscious of the need for restraint bearing in mind the proper constitutional role of the executive and legislature.

The legislative provisions

[14] Part III of the 1986 Order deals with criminal proceedings. Article 44 gives the courts powers to impose hospital orders or guardianship orders:

> "**44. Powers of courts to order hospital admission or guardianship**

(1) Where a person is convicted before the Crown Court of an offence punishable with imprisonment other than an offence the sentence for which is fixed by law, or is convicted by a court of summary jurisdiction of an offence punishable on summary conviction with imprisonment, then—

(a) if the conditions mentioned in paragraph (2) are satisfied, the court may by order (in this Order referred to as a "hospital order") commit him to the care of such authorised HSC trust as it may specify for admission to hospital; or

(b) if the conditions mentioned in paragraph (3) are satisfied, the court may by order (in this Order referred to as a "guardianship order") place him under the guardianship of an authorised HSC trust or of such other person approved by an authorised HSC trust as may be specified in the order.

(2) The conditions referred to in paragraph (1)(a) are that—

(a) the court is satisfied on the oral evidence of a medical practitioner appointed for the purposes of Part II by RQIA and on the written or oral evidence of one other medical practitioner that the offender is suffering from mental illness or severe mental impairment of a nature or degree which warrants his detention in hospital for medical treatment; and

(b) the court is of opinion, having regard to all the circumstances, including the nature of the offence and the character and antecedents of the offender, and to the other available methods of dealing with him, that the most suitable means of dealing with the case is by means of a hospital order.

(3) The conditions referred to in paragraph (1)(b) are that—

(a) the offender has attained the age of 16 years;

(b) the court is satisfied on the oral evidence of a medical practitioner appointed for the purposes of Part II by RQIA and on the written or oral evidence of one other medical practitioner that the offender is suffering from mental illness or severe mental handicap of a nature or degree which warrants his reception into guardianship;

(c) the court is satisfied on the written or oral evidence of an approved social worker that it is necessary in the interests of the welfare of the patient that he should be received into guardianship; and

(d) the court is of opinion, having regard to all the circumstances, including the nature of the offence and the character and antecedents of the offender, and to the other available methods of dealing with him, that the most suitable means of dealing with the case is by means of a guardianship order.

(4) Where a person is charged before a court of summary jurisdiction with any act or omission as an offence and the court would have power, on convicting him of that offence, to make an order under paragraph (1) then, if the court is satisfied that the accused did the act or made the omission charged, the court may, if it thinks fit, make such an order without convicting him."

[15] Article 49 addresses fitness to plead:

"**Procedure during trial on indictment**

49. Procedure in relation to unfitness to be tried

(1) The following provisions of this Article apply where, on the trial of a person charged on indictment with the commission of an offence, the question arises (at the instance of the defence or otherwise) whether the accused is unfit to be tried (in this Article referred to as "the question of fitness to be tried").

(2) Subject to paragraph (3), the question of fitness to be tried shall be determined as soon as it arises.

(3) If, having regard to the nature of the supposed mental condition of the accused, the court is of opinion that

it is expedient so to do and in the interests of the accused, the court may—

(a) postpone consideration of the question of fitness to be tried until any time up to the opening of the case for the defence; and

(b) if, before the said question falls to be determined, the jury returns a verdict of acquittal on the count or each of the counts on which the accused is being tried, that question shall not be determined.

(4) The question of fitness to be tried shall be determined by the court without a jury.

(4A) The court shall not make a determination under paragraph (4) except on the oral evidence of a medical practitioner appointed for the purposes of Part II by RQIA and on the written or oral evidence of one other medical practitioner.

(9) In this Article and Articles 49A, 50A and 51(6) "unfit to be tried" includes unfit to plead."

[16] Both these Articles make reference to medical practitioners appointed for the purposes of Part II of the 1986 Order by RQIA. The RQIA has adopted a scheme whereby any consultant psychiatrist with specialist experience in the assessment and detention of patients, and who meets the criteria set out by RQIA, is eligible to apply for appointment as a Part II medical practitioner.

[17] Article 51(1) of the Magistrates' Courts (Northern Ireland) Order 1981 ("the 1981 Order") provides:

"Without prejudice to the powers of the court under Article 50, where a person is charged before a magistrates' court with an offence punishable on summary conviction with imprisonment or an indictable offence which is tried summarily, and the court is satisfied that the person charged did the act or made the omission charged but is of opinion that an inquiry ought to be made into his physical or mental condition, the court may remand him for such period as the court thinks necessary to enable a medical examination and report to be made so, however, that no single period shall, where the person remanded is on bail, exceed twenty-eight days commencing on the day after that on which the person is remanded or extend beyond

> the next sitting of the court whichever is the longer or, where the person remanded is in custody, exceed the period specified in paragraph (2) or, as the case may be, paragraph (3) of Article 47."

Fitness to plead in summary proceedings

[18] The provisions of Article 49 of the 1986 Order only apply "on the trial of a person charged on indictment." They have no application to summary proceedings. As is well recognised, an indictment is a formal legal document which presents the charges against an accused in the Crown Court. Section 46(2) of the Judicature (NI) Act 1978 provides that the Crown Court has exclusive jurisdiction in trials on indictment.

[19] Where fitness to plead is an issue in summary proceedings, guidance has been given by the courts in England & Wales. In *R (P, A Juvenile) v Barking Youth Court* [2002] EWHC 734 (Admin) the youth court adopted the procedure followed by the Crown Court in making a determination that the defendant in that case was fit to plead. The Divisional Court held that section 37(3) of the Mental Health Act 1983 (the equivalent of Article 44(4) of the 1986 Order) and section 11 of the Powers of Criminal Courts (Sentencing) Act 2000 (the equivalent of Article 51(1) of the 1981 Order):

> "… provide a complete statutory framework for the determination by the magistrates' court, itself a creature of statute, of all the issues that arise in cases of defendants who are or may be mentally ill." (para [10])

[20] On this basis, the proper approach of a magistrates' court where it is satisfied that a defendant ought not to face trial on the basis of mental condition is to:

(i) Determine whether the accused did the acts alleged; and

(ii) On the basis of the evidence, decide whether it is an appropriate case for an order to be made under Article 44(4) of the 1986 Order.

[21] The court concluded:

> "It will also be noted that the criteria for exercising the powers vested in the magistrates court under section 37(3) are considerably less strict and more flexible than the common law rules governing the issue of fitness to plead in the Crown Court." (para [10])

[22] It was also held that a youth court is a magistrates' court for the purposes of these statutory provisions.

[23] Some further guidance on the procedure to be followed was given by Smith LJ in *CPS v P* [2007] EWHC 946 (Admin):

> "(i) The fact that a court of 'higher authority' has previously held that a person is unfit to plead does not make it an abuse of process to try that person for subsequent criminal acts. The issue of the child's ability to participate effectively must be decided afresh
>
> (ii) Where the court decides to proceed to decide whether the person did the acts alleged, the proceedings are not a criminal trial
>
> (iii) The court may consider whether to proceed to decide the facts at any stage. It may decide to do so before hearing any evidence or it may stop the criminal procedure and switch to the fact-finding procedure at any stage
>
> (iv) The DJ should not have stayed the proceedings at the outset as he did without considering the alternative of allowing the trial to proceed while keeping P's situation under constant review.
>
> (v) If the court proceeds with fact-finding only, the fact that the defendant does not or cannot take any part in the proceedings does not render them unfair or in any way improper; the defendant's Article 6 rights are not engaged by that process." (see para [61])

[24] In *G v DPP* [2012] EWHC 3174 (Admin), Pitchford LJ stressed that the youth court's discretion whether to conduct an inquiry as to whether the accused was guilty of the facts charged, without making a finding of guilt, depends on the particular circumstances of the case and the medical evidence will only be one part of the evidence to be considered. It will be for the court, not medical practitioners, to determine whether the accused's level of understanding meets the requisite standard.

[25] This issue does not appear to have been raised in any reported decision in this jurisdiction. I respectfully endorse and adopt the approach of the English courts, based as it is on materially identical statutory provisions.

The test for leave

[26] It is incumbent upon the applicant at this stage to establish an arguable case with realistic prospects of success.

Grounds of challenge

[27] The applicant contends:

(i) The requirement in Article 49(4A) in relation to RQIA appointed practitioners is unlawful as being incompatible with the applicant's article 5, 6 and 14 Convention rights;

(ii) The similar provision in Article 44(2) is unlawful on the same bases;

(iii) By failing to amend or repeal the legislation, the proposed respondents have acted unlawfully by breaching the applicant's article 5, 6 and 14 rights; and

(iv) The proposed respondents have acted irrationally by introducing a legislative requirement that the admissibility of expert evidence be constrained by mandatory RQIA approval.

(i) Illegality

[28] It will be apparent, in light of the express words of Article 49, that the challenge brought in respect of that provision by this applicant is unarguable. The statutory procedure contained therein only applies to trials on indictment and has no application in these criminal cases. The applicant faces charges exclusively before the youth court which is a court of summary jurisdiction. The district judge can weigh up any evidence presented to him, there is no requirement that it be from an RQIA appointed consultant.

[29] The requirement under Article 44(2) only arises in the event that a finding is made that the defendant is suffering from mental illness or severe mental impairment of a nature or degree which warrants his detention in hospital for medical treatment. No such evidence has been given in the cases under consideration.

[30] Even in a case where these statutory provisions did relate to the applicant, the evidence reveals that it is not the provisions per se which cause any adverse impact but the lack of any available RQIA medical practitioner save for Dr Anderson. The legislation does not, on its face, engage or interfere with the applicant's Convention rights.

[31] A Crown Court faced with this same factual situation could, of course, proceed to determine the issue of fitness to plead since the Article 49(4A) requirement would be met. If the inability to challenge the evidence of Dr Anderson with the opinion of another RQIA appointed practitioner caused any unfairness, and I make no comment

in this regard, the court always remains under a duty to preserve the fairness of the trial process both under article 6 and at common law.

(ii) Irrationality

[32] For the same reasons, the irrationality challenge must fail. There is no requirement in any of the applicant's criminal cases that a particular expert must be RQIA approved.

[33] Given that the legislation was introduced 28 years ago, and Article 49 has always contained a requirement that the court receive the oral evidence of an 'appointed' medical practitioner (initially by the Mental Health Commission and latterly the RQIA), this claim would inevitably have faced a formidable delay hurdle.

[34] Furthermore, the structure of the 1986 Order is such that many of the important steps to be taken by medical practitioners require the imprimatur of RQIA appointment. It is entirely rational for the legal system to require a process of accreditation through the application of published criteria to underpin the right to make decisions and express opinions on the abilities and functioning of those persons suffering from mental disorders. For the court to intervene and effectively amend the legislation to expand the field of medical practitioners who can carry out particular functions under the 1986 Order would go against "the grain of the legislation" (see, for example, *O'Donnell v Department for Communities* [2020] NICA 36).

(iii) Incompatibility

[35] There has been substantial delay in the criminal proceedings, largely caused by the applicant's pursuit of an RQIA appointed expert to prepare a report and by the launch of this judicial review application. Both courses of action have proven misguided insofar as they rely on the provisions in Article 49(4A) of the 1986 Order. Since, as I have already held, this does not apply to cases before the youth court, there was no need or requirement to instruct such an expert. The procedure adopted by the youth court in any such case is more flexible than that which is required to be followed in the Crown Court. There is no basis to contend that either the impugned legislative provisions or the conduct of the proposed respondents has given rise to an arguable breach of the right to a fair trial enshrined in article 6 ECHR.

[36] Article 5 ECHR guarantees the right to liberty and security of the person. It provides that no one shall be deprived of his or her liberty save in prescribed circumstances. These include the lawful arrest and detention of a person on reasonable suspicion of having committed an offence. There is an express entitlement to a trial within a reasonable time or release pending trial.

[37] In the applicant's case, he was released on bail by the High Court in August 2023 and he failed to comply with bail conditions. He was assessed as presenting a risk of serious harm to young girls which could not be properly managed by the use

of bail conditions. As a result, a court of competent jurisdiction has determined that it was necessary for the protection of the public that he be remanded in custody pursuant to Article 12 of the Criminal Justice (Children) (Northern Ireland) Order 1998.

[38] The delay in the conclusion of the criminal proceedings has been caused by the misguided pursuit referred to above, and the remand in custody has been occasioned by the applicant's own behaviour in breaching bail conditions. In these circumstances, there can be no arguable case that the proposed respondents have carried out any act which has caused a breach of the applicant's article 5 rights.

[39] In an amendment to the Order 53 statement, the applicant now seeks to argue that insofar as the Article 49 provisions do not apply to charges in the youth court, he is disadvantaged by comparison to an adult defendant in the Crown Court and this constitutes unlawful discrimination contrary to article 14 ECHR when read in conjunction with articles 5 and 6.

[40] Recently, in *Re Hilland's Application* [2024] UKSC 4, the Supreme Court confirmed that to establish a violation of article 14 it is necessary to establish:

(i) The circumstances must fall within the ambit of one of the substantive Convention rights;

(ii) The difference in treatment must have been on the ground of one of the article 14 characteristics or 'other status';

(iii) The persons treated differently must be in analogous situations; and

(iv) There must be a lack of objective justification for the different treatment.

[41] In his *Criminal Procedure in Northern Ireland, 2nd Edition,* Valentine states that a magistrates' court can determine whether an accused is fit to be tried and the footnote at para 16.13 reads:

> "The absence of special procedure to that effect in the Mental Health Order is solely because there is no jury"

[42] The district judge sitting in the magistrates' court, and the district judge sitting with two lay magistrates in the youth court, are arbiters of all matters of fact and law. The difference in treatment between an adult in the Crown Court and a juvenile in the youth court facing the same charges can be explained and justified on this basis. Indeed, it can be divined from the caselaw referred to above that a youth is subjected to a more flexible procedure and one which does not entail the very complaint which was the foundation of these proceedings – namely the requirement that one medical practitioner be RQIA appointed. Any difference in approach may therefore work to the applicant's advantage and, in any event, is objectively justified.

[43] It is, therefore, not arguable that there has been any breach of article 14 on the facts of this case.

[44] There is also an overarching reason not to grant leave in this case. The courts have repeatedly made clear that satellite litigation in criminal cases is to be deprecated (see, recently, *Re Parker and Caldwell's Application* [2023] NIKB 24). It is only in exceptional cases that the judicial review court should intervene since the specialist criminal courts are fully equipped to guard against any unfairness to an accused.

Conclusion

[45] For the reasons set out, the applicant has not established any arguable grounds for this challenge and the application for leave to apply for judicial review is therefore dismissed.

[46] As has already been noted, there has been substantial delay in the criminal proceedings. It is imperative that these matters are now brought to trial as soon as possible in the youth courts in light of the guidance offered by this judgment.