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

Delivered: 16/8/2018

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

IN THE MATTER OF AN APPLICATION BY LM FOR JUDICIAL REVIEW

MORGAN LCJ

[1] This is an application for leave to issue judicial review proceedings in respect of a decision of the Mental Health Review Tribunal ("the Tribunal") for Northern Ireland made on 27 July 2018 whereby the Tribunal directed that the applicant should remain detained in accordance with the provisions of the Mental Health (Northern Ireland) Order 1986 ("the Mental Health Order"). I am grateful for the assistance of counsel and in particular to Mr Corkey for his comprehensive and articulate exposition of the applicant's case.

[2] The background to this matter is that this is a lady who suffers from schizophrenia, in respect of whom I have made an anonymity order, and who has received treatment both in a voluntary and a detained basis on a number of occasions.

[3] She was the subject of a decision by the Tribunal on 4 July 2018 at which the Tribunal recognised that she had an established diagnosis of schizophrenia and at that time that was her sixth admission to a psychiatric hospital. Prior to that she had been under the care of community based mental health services, who reported a recent deterioration in her mental state, self-care and her engagement with those services. That was corroborated by reports from her father with whom she had been staying. Deterioration was attributed to non-compliance with medication and exacerbated by the use of cannabis in the opinion of the experienced mental health professionals dealing with her. Non-compliance of medication was also reported although the patient herself denied that.

[4] She was admitted to the Mater Hospital on 4 June initially as a voluntary patient and absconded on 5 June. She was discharged from hospital on 6 June while AWOL. On 8 June she was readmitted as a voluntary patient and detained under the Order on 9 June and her detention was allowed to lapse again on 15 June. She remained as a voluntary patient thereafter until 21 June, when she was again detained, but absconded on 28 June until 30 June. She was then transferred to

Holywell as a detained patient on 1 July and at the time of the hearing before the Tribunal on 4 July was in the Psychiatric Intensive Care Unit in Holywell. While in the Mater Hospital there were reported incidents of physical aggression and irritability. She was volatile and confrontational. She presented with active symptoms of her mental illness and reported feeling over-stressed. She presented with paranoid ideation relevant to staff members and absconded twice in the ward. She accused staff of neglect, bullying and abuse. Her presentation improved by the time she had moved to Holywell. She had better relationships with staff and there were no reported management issues. She was settled and complying with the assessment process and taking all prescribed medication and when she was asked said she was definitely keen to seek treatment.

[5] The Tribunal was satisfied that the patient required on-going in-patient assessment treatment. Assessment and the controlled stimulus setting of Holywell was required in particular and the Tribunal accepted the evidence that that environment was essential to her recovery. If she were to leave hospital the Tribunal accepted that she would suffer an early rapid deterioration in her mental health. The Tribunal therefore found that the patient was suffering from a mental illness of a nature and degree warranting medical assessment or treatment in hospital. The Tribunal then went on to consider whether a less restrictive option than detention was required and it concluded that it was not because:

- (i) The patient demonstrated insight into her need for medical assessment and treatment. She had replied to the doctors that she definitely accepted that.
- (ii) She was initially admitted to hospital as a voluntary patient and remained for periods during the admission voluntarily.
- (iii) When she absconded from the Mater Hospital on 6 June she reported that she needed help and wanted to return and did as a voluntary patient.
- (iv) She absconded from the Mater in the context of finding the ward very stressful and reporting paranoid beliefs relating to staff. She was more settled in Holywell and had no issue with staff and had made no attempt to abscond and was engaging.
- (v) It was accepted that the patient indicated that she would remain in hospital as a voluntary patient although the Trust disputed that conclusion, but the Tribunal found that there was no basis as to why that was the case.

So for those reasons the Tribunal at that stage was satisfied that detention in hospital for medical treatment or assessment was not warranted at the time.

[6] The case made on behalf of the Trust at that stage was not that discharge of the patient would create a substantial likelihood of serious physical harm to herself. The Trust did not make that case and therefore it was not before the Tribunal, but it did make the case that there was a danger to others and that also was dismissed by the Tribunal. So she was again a voluntary patient as of 4 July on the basis that she had indicated her commitment to continuing to receive treatment which she recognised that she required. In fact as soon as she was regraded to voluntary status following the Tribunal hearing on 4 July she left the hospital the same evening, contrary to medical advice. She did consent to engage with the Home Treatment Team and was assessed by staff that evening and it was noted that there were some signs of irritability and disinhibition, but nothing of any other significance. She was again reviewed at home some 3 days later on 7 July 2018, when she was calm and engaged while in conversation, but home conditions remained poor and she appeared dishevelled. She was seen again the following day when she was dishevelled in appearance and her home remained unclean. She was blunt in approach, repetitive in speech, irritable and guarded and said she did not need Home Treatment Team support. On 9 July she was repetitive in conversation but denied any hallucinations or delusions. She became irritable when pressed by a member of the staff. On 10 July she was seen by staff at her father's home. She was chatty and pleasant, but again said she wanted to reduce contact with the team. During a home visit on 11 July she said she did not wish to engage with the team, it caused her stress. She was assessed as being more brittle, her personal care had begun to deteriorate, but she did agree to a further visit from the team on 12 July.

[7] It appears that on 11 July evening she consumed substantial quantities of alcohol as a result of which she was found on the pavement outside a public house, collapsed apparently, unconscious. Her blood alcohol level was very high. She was brought into hospital. She said that she had been drinking too much the previous evening and it is not entirely clear what complaints she made at that stage, but certainly by 13 July when she was seen at her father's home by the Home Treatment Team she had been crying and was distressed, she said that she had been raped at a football club on 11 July, she gave a description of a violent attack upon her in respect of which there was no corroborating physical evidence at any stage other than some bruising to her forearms resembling hand marks, which as Mr Corkey quite rightly pointed out may well have been caused as a result of the medical treatment that she received at the time that she was brought into hospital. She had contact with the PSNI, but was unwilling to proceed further with the matter. She was reviewed again by the Home Treatment Team at her home on 14 July, was exceptionally distressed and tearful and spoke of the allegations of sexual assault, which again she described in effusive detail. Her father contacted the Team to say that she was highly distressed and that she had agreed to be admitted to Rathmore in the Mater Hospital. She was examined at Knockbracken Health Care Park and on 16 July 2018 it was recorded that she had a known background of schizophrenia, that there had been a deterioration in her mental state, there was non-compliance with medication, self-neglect and severe neglect of her living quarters, increasing cannabis use and she had been found unconscious following an alleged sexual assault on 11 July. She

was extremely guarded, malodorous and dishevelled. She was insistent on being discharged. She denied that she was mentally unwell, she lacked any insight into her condition. Her affect was flattened and her mood was objectively euthymic, in other words that there was not any agitation. She was subjectively stressed and was assessed as constituting an on-going risk to herself due to being unable to avoid situations of vulnerability or to protect herself and the theme of the reports that were made on the same day in relation to her detention are the same. So that was the background to her subsequent detention.

[8] The power to detain is contained within the Mental Health Order but the power to discharge is contained in Part V of the Mental Health Order and in particular in Article 77 which provides that where an application is made to the Tribunal by or on behalf of the patient that it may direct that the patient be discharged and shall so direct if the Tribunal is not satisfied that he is then suffering from a mental illness or severe mental impairment which warrants his detention in hospital for medical treatment. Now that test is not in issue in this case, it is agreed that this lady did satisfy that test. Secondly the Tribunal must be satisfied that the discharge would create a substantial likelihood of serious physical harm to herself or to other persons. In relation to that Article 2 (4)(a) of the Mental Health Order says that:

“In determining for the purposes of this Order whether the failure to detain a patient or the discharge of a patient would create a substantial likelihood of serious harm to himself, regard shall be had only to evidence ... that the patient’s judgment is so affected that he is or would soon be unable to protect himself against serious physical harm and that reasonable provision for his protection is not available in the community.”

[9] As I indicated in the course of submissions it seems to me that there are really four matters that arise from that:

- (i) Whether there is a risk of serious physical harm.
- (ii) Whether there is a malfunctioning of judgment on the part of the patient.
- (iii) Whether the malfunctioning of judgment is one that gives rise to a failure to protect against the risk.
- (iv) Whether there is within the community a mechanism for ensuring that protection would be available.

[10] In this case there was no issue taken before me that there would not be protection within the community. There was no issue taken before me, although I will come to the reasons for it, about the fact that there had been a failure of judgment in the sense that all the medical reports indicate that this lady lacked insight into her condition and professed herself not to be mentally unwell. The two issues that maybe were an issue were whether there was a risk of serious physical harm and whether or not the lack of judgment on the part of the patient were such as to mean that she was not in a position to be able to protect herself against that risk.

[11] So turning then to the approach of the Tribunal. At paragraph 12 the Tribunal noted that the illness was characterised by predominantly negative symptoms which underlined her self-neglect and chaotic living conditions. The Tribunal probed whether those were due to her illness or a lifestyle choice and was satisfied on the balance of probabilities that her complete lack of attention to her own care and to managing her living conditions was due to the passive symptoms of schizophrenia. It gave weight to the level of dishevelment and extent of the neglect of her living conditions and found that her failure to protect and keep herself clean during mensuration indicated a degree of pacificity and neglect consistent with her illness and accepted the consistent account in the reports rather than her own assertions. The Tribunal concluded that the patient's insight was currently limited and impaired and her view is that she has recovered in the last two years. There was a significant lack of insight indicated by her father, by her doctor and by others who were responsible for her medical care as was accepted by the Tribunal. Her own evidence indicated a lack of insight into the degree of her passive symptoms and impairment of judgment. There was no evidence of psychotic symptoms, but the negative symptoms remain strong and she was unable to recognise this and as a result could be irritable, demanding and impatient about her needs. So the view of the Tribunal was that detention in hospital for treatment was warranted and as Mr Corkey indicated no issue was taken with that in the hearing before the Tribunal.

[12] The Tribunal was entirely satisfied that if not detained the patient would immediately leave hospital. That indeed was her own account and the Tribunal considered whether she would avail of treatment outside of hospital when she was currently compliant, because her medication could be taken in the community with the support of the Home Treatment Team and she indicated that she would do so. But the Tribunal concluded on the balance of probabilities that the patient if discharged would not be compliant with her medication and it evaluated her account of her intentions as unreliable and really there is no basis upon which that could be challenged. She had indicated to the previous Tribunal that she would remain as a voluntary patient, but had not done so. She had an inflated idea of her own recovery and did not have insight into the extent of her illness. She had a history of non-compliance as set out in the report. She did not engage with Home Treatment Team immediately prior to admission. Her chaotic lifestyle and lack of real insight indicated that she would not take her medication as prescribed and that the Tribunal was satisfied that detention in hospital was warranted so that her

medication could be administered regularly with the aim of achieving stability and improving her insight.

[13] The real issue for decision was whether discharge created a substantial likelihood of serious physical harm to the patient herself and that was the test which the Tribunal considered satisfied and in using the term that it was so satisfied the Tribunal in my view was following the legislation which required the Tribunal to satisfy itself in relation to that. But I accept as Mr Corkey has suggested that the remarks of Mr Justice McCloskey in relation to *JR45* about the importance of recognising that this is an interference with liberty and that therefore there has to be a background against which the Tribunal must be persuaded that such an interference is appropriate means that the standard is not one of balance of probabilities *per se*, but it is certainly against the background of balance of probability. As the case law has suggested tribunals who are experts in relation to this area will generally be able to come to a conclusion as to whether or not they are so satisfied on the basis of the materials and where they are so satisfied because they are expert tribunals the courts will rarely seek to second guess their conclusions in relation to those issues.

[14] So what was the material against which the Tribunal found that the test satisfied? Well first of all it was that they considered whether the patient's judgment was so affected that she was or soon would be unable to protect herself against serious physical harm and that reasonable provision for her protection was not available in the community. For the reasons given earlier it was clear that the community was not an option. So looking at the reasons they looked first at the degree of her negative symptoms which were severe and that the patient did not have insight into them and these symptoms impaired her judgment so that she did not appreciate what posed a risk to herself. Her living conditions do not in themselves create a risk of serious physical harm but they do evidence the extent of the impairment of her understanding and judgment shown by her chronic neglect of her own care and needs. The reference to this passage as part of the Tribunal's consideration is challenged by Mr Corkey on the basis that this is a matter that is immaterial to the issues that are before the Tribunal, but I do not accept that submission. It seems to me that the issue of the extent to which this lady is impaired in relation to her judgment, lacks insight and lacks the ability to be able to look after herself is a material consideration in the question of whether or not if there is a serious risk of physical harm that the lady has the judgment to be able to protect herself from it. I accept that there are some aspects of a lack of judgment that might not be material to that issue, but particularly in a case of this nature issues going to lack of insight in my view are a material consideration. What weight they should take in relation to a particular case is a matter of judgment for the Tribunal.

[15] Her account to the Tribunal indicated a lack of insight into her illness and an inflated sense of recovery and ability to cope and of course paragraph 21 of the Tribunal's decision is exhibiting aspects of that precisely. The Tribunal then went on to consider the incident on 11 July which ultimately led to the present admission and

the importance of that incident is that it was that incident, in connection with other matters around her self-neglect, but particularly that incident which raised the question of whether or not there was a risk of serious physical harm in relation to this lady. Now Mr Corkey correctly challenged any suggestion that there was evidence that this lady had been raped, that she had been abused in the way in which she herself had described and I accept that it would have been entirely inappropriate on the basis of the material then available to have come to any conclusion on such a basis. But it is clear that the Tribunal expressly indicated that it was not possible on the available evidence to be sure exactly what had happened to the patient that night. What is clear is that this unfortunate lady was lying unconscious on a public street having consumed too much alcohol in circumstances where she had no insight of any significance in relation to her condition and the manner in which conduct in that way would put her at risk. It seems to me that that very fact is an indication against a background of lack of insight of a risk of serious physical injury to a lady lying in such condition in the public street. She did not have a pattern of heavy drinking and this was, as the Tribunal noted, a volatile time of the year. But the circumstances were such that the Tribunal recognised that the patient had put herself in a position of risk where she was unable to protect herself and needed help from a member of the public and that she was distressed by the incident. Although it was possible for anyone to become drunk and the victim of an assault the lack of insight into how to keep herself safe was attributable to her mental illness and heightened the risk of harm to her. Those it seems to me are conclusions which were open to the Tribunal. One does not have to wait until some catastrophe occurs in relation to the patient by way of an assault, such as she described for the Tribunal to be able to be satisfied in relation to a significant or substantial likelihood of serious physical harm. I accept that against this background it was open to the Tribunal on the basis of the bare fact finding that this lady was lying unconscious on the street, unable to protect herself as a result of excessive consumption of alcohol was sufficient for the Tribunal to reach the conclusion that there was a substantial likelihood of serious physical harm and it is but a short step thereafter to conclude that this lady did not have the wherewithal at this stage to protect herself from that or other similar incidents of neglect such as would cause harm.

[16] So in my view the Tribunal has explained its reasoning sufficiently in paragraphs 21 and 22 as to why the statutory test was satisfied. The matters in relation to the community are not an issue. There is no issue about the fact that she requires medical treatment at this stage. I conclude therefore that there are sufficient reasons, that the reasons are within the bounds of the legislation and that in those circumstances the application for leave should be refused.