Press Summary

THE COURT ORDERED that no one shall publish or reveal the names or addresses of RM or SM or publish or reveal any information which would be likely to lead to the identification of RM or SM or of any member of their family in connection with these proceedings.

21 February 2024

In the matter of an application by RM (a person under disability) by SM, his father and next friend (Respondent) for Judicial Review (Northern Ireland)
In the matter of an application by RM (a person under disability) by SM, his father and next friend (Respondent) for Judicial Review (Northern Ireland) No 2

[2024] UKSC 7
On appeal from [2022] NICA 35

Justices: Lord Reed (President), Lord Sales, Lord Stephens, Lady Rose, Lady Simler.

Background to the Appeal

RM suffers from a severe mental impairment. In 2018, he was charged with a series of violent and sexual offences and was committed for trial in the Belfast Crown Court. He was found to be unfit to be tried. As a result, a trial of the facts took place without investigating RM's intent or knowledge of his actions, from which there could be no criminal conviction. The jury found that he had committed the unlawful acts alleged. Because RM was unfit to be tried, the Crown Court made an order admitting him to hospital for medical treatment under the Mental Health (Northern Ireland) Order 1986 ("**the 1986 Order**") and directed that he should be treated as if an unlimited restriction order had been made. The effect of this was that RM was treated as if admitted to hospital under a hospital order, and could not be discharged without the consent of the Department of Justice for Northern Ireland or the Mental Health Review Tribunal ("**the Tribunal**"). RM was detained in a psychiatric ward.

In 2019, RM made an application for discharge to the Tribunal. Although the Department of Justice opposed RM's discharge from hospital, the medical evidence before the Tribunal indicated that RM would shortly be given a leave of absence so that he could begin receiving treatment outside hospital in a community-based setting as part of a period of testing with a view to ultimate discharge, with the consent of the Department of Justice. Under the 1986

Order, a patient may only continue to be compulsorily detained if they are suffering from a mental disorder of a nature or degree which warrants their detention in hospital for medical treatment. The Tribunal acknowledged that RM's care plan would involve him moving to live in a community-based setting, but concluded that he would nonetheless remain a patient receiving treatment in hospital and denied him discharge.

RM brought an application for judicial review, arguing that his continued detention was unlawful in light of the treatment plan, which did not envisage further treatment in hospital. The High Court dismissed the appeal, upholding the decision of the Tribunal. However, the Northern Ireland Court of Appeal ("**the NICA**") overturned the decisions of the Tribunal and High Court, holding that they had applied the wrong legal test. The Tribunal and Department of Justice now jointly appeal to the Supreme Court.

Judgment

The Supreme Court unanimously allows the appeal. Lady Simler gives the only judgment, with which the other Justices agree.

Reasons for the Judgment

Two main questions arise in this appeal. The first is whether the NICA was correct to conclude that differences in the wording of the 1986 Order, as compared to the legislation in England and Wales, supports a conclusion that a lower threshold test for compulsory detention applies in England and Wales. The second is whether the grant of leave of absence is inconsistent with a conclusion that a patient still satisfies the test for detention in hospital for medical treatment and should have no bearing on the decision whether detention for medical treatment is warranted.

The Legislative Scheme

In Northern Ireland, the 1986 Order governs the compulsory detention in hospital of a mentally disordered patient for medical treatment, their discharge from hospital, and the use of leave of absence from hospital as a means of transitioning from secure conditions to discharge. The equivalent legislation in England and Wales is contained in the Mental Health Act 1983 ("**the 1983 Act**"). As might be expected, there are strong similarities between the two legislative schemes. However, there are some differences in wording.

For continued detention to be lawful under the 1986 Order, the patient must be suffering from a "mental disorder of a nature or degree which warrants his detention in hospital for medical treatment". Under the 1983 Act, the patient must be suffering from a mental disorder "which makes it appropriate for him to receive treatment in hospital". Patients who are detained in hospital cannot leave unless given leave of absence under article 15 of the 1986 Order (or section 17 of the 1983 Act) **[1], [23] – [44]**.

Authorised leave of absence can be granted to a patient "who is for the time being liable to be detained in a hospital". A grant of leave of absence does not discharge the patient, and the patient remains liable to be detained. Leave can be authorised for a limited or defined period which may be extended, but can be revoked and the patient recalled to hospital **[31], [32]**.

The NICA's decision

In allowing RM's appeal, the NICA highlighted the textual differences between the 1986 Order and the 1983 Act, finding that they were material and significant. It found that the 1986 Order contained a test of strict necessity, while the 1983 Act applied a test of "appropriateness". The courts in England and Wales had introduced a degree of flexibility

into the meaning of medical treatment in hospital, reflecting a more relaxed threshold under the 1983 Act. In the NICA's view, the tests should not be interpreted in the same way and cases from England and Wales should not be relied upon in Northern Ireland. The possibility of a grant of article 15 leave should not influence the decision of the Tribunal as to whether detention for medical treatment is warranted. In RM's case, it had been inappropriate for the Tribunal to conclude that the test for detention for treatment was met when his authorised leave of absence from hospital was intended **[55], [59], [61]**.

The Test for Compulsory Detention

The Supreme Court disagrees with the conclusion reached by the NICA. The history of the legislation in England and Wales shows that different words have been used interchangeably (for example, "warrants", "necessary" and the phrase "makes it appropriate") and as synonymous in context. Although the wording has changed, the test for admission to hospital has always been understood to be one of necessity. While different language is used in the 1983 Act, the word "appropriate", when read in context, means that it will only ever be appropriate to compulsorily detain in hospital if it is necessary to do so. The test for compulsory detention under the 1983 Act is the same necessity test that applies under the 1986 Order, and the NICA was wrong to hold otherwise. As a result, cases from England and Wales can be followed in Northern Ireland where it is appropriate to do so **[62] – [64], [68]**.

The Proper Approach to authorised Leave of Absence

Authorised leave of absence under article 15 can be an important tool in the therapeutic management and rehabilitation of detained patients. It can be used where the appropriate treatment for the patient is rehabilitation in the community under supervision. The NICA was wrong to suggest that the fact that a patient is to be released on article 15 leave inevitably means that the patient no longer meets the test for compulsory detention. A patient remains "liable to be detained" while subject to an order authorising their detention. Such detention need not be continuous, and a patient remains "liable to be detained" while on article 15 leave. The leave may be revoked, and the patient recalled to hospital, unless and until the authority for detention lapses or is discharged **[69], [72], [73]**.

The fact that article 15 leave is planned does not necessarily mean that the patient's mental disorder no longer warrants detention in hospital for treatment. Article 15 leave is an important means of managing risk and testing whether the treatment so far provided to the patient has been effective so that the medical disorder no longer necessitates detention. A period of leave under article 15 can properly be regarded as detention in hospital for medical treatment **[78] – [80]**.

In RM's case, the statutory conditions for detention under the 1986 Order were met notwithstanding the decision that he should reside on a long-term basis in a community setting, initially on leave granted under article 15 **[83]**. Accordingly, the Tribunal was right to refuse to discharge him and to hold that his continued detention in hospital was lawful.

References in square brackets are to paragraphs in the judgment.