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.

Hilary Term
[2024] UKSC 7
On appeal from: [2022] NICA 35

JUDGMENT

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

before

Lord Reed, President
Lord Sales
Lord Stephens
Lady Rose
Lady Simler

JUDGMENT GIVEN ON
21 February 2024

Heard on 15 and 16 November 2023

Appellants and Interveners
Tony McGleenan KC
Aidan Sands BL
Matthew Corkey BL
Laura Curran BL
(Instructed by Departmental Solicitor's Office and Crown Solicitor's Office (Belfast))

Respondent
David McMillen KC
David Heraghty
(Instructed by Higgins Hollywood Deazley)

LADY SIMLER (with whom Lord Reed, Lord Sales, Lord Stephens and Lady Rose agree):

I Introduction

1. These appeals concern the proper meaning and operation of provisions governing the discharge from hospital of a mentally disordered patient who is compulsorily detained in a hospital for medical treatment, and their inter-relationship with provisions governing the use of leave of absence from hospital as a means of transitioning from secure conditions to discharge, contained in the Mental Health (Northern Ireland) Order 1986 (SI 1986/595 (NI 4)) ("the 1986 Order"). The statutory scheme in England and Wales (extended in some respects to Scotland: see section 146) is contained in the Mental Health Act 1983 ("the 1983 Act") and, as might be expected, there are strong similarities between the two legislative schemes.

2. A distinction is drawn in both legislative schemes, between "civil patients" whose compulsory admission to hospital for assessment or treatment of mental disorder is dealt with under Part II, and patients who are concerned in criminal proceedings or under sentence, including "restricted patients", who are dealt with under Part III. Restricted patients under Part III include those patients who commit an imprisonable offence and are either sentenced to custody and subsequently become mentally disordered and are transferred to hospital, or those who are made the subject of a hospital order with restrictions on their management and discharge from hospital. Whereas an offender made subject to a hospital order under Part III is put in almost the same position as a civil patient whose interests are paramount, in effect passing out of the penal system into the hospital regime, the position is different for restricted patients. A restricted patient's discharge from hospital requires the consent of the Department of Justice for Northern Ireland ("the Department of Justice") or the Secretary of State for Justice for England and Wales, in the interests of protecting public safety, and is dealt with by a relevant tribunal in both jurisdictions. The same distinction applies to the grant of leave of absence available to civil patients under Part II and restricted patients under Part III in both legislative schemes.

3. Authorised leave of absence from hospital for patients who are subject to a detention order can be an important part of the therapeutic management and rehabilitation of a detained patient. Such leave is governed by article 15 of the 1986 Order (and section 17 of the 1983 Act), which provides for the grant of leave to be absent from the hospital, subject to any necessary conditions, "to any patient who is for the time being liable to be detained in a hospital". Article 15 leave can be authorised for an indefinite period in an appropriate case but can (where necessary) be revoked and the patient recalled to hospital.

4. Articles 78(1) and 77(1) of the 1986 Order govern applications for the discharge of a restricted patient who is subject to a restriction order. The review tribunal considering such an application must order the patient's absolute discharge if "(a) the tribunal is not satisfied as mentioned in paragraphs 1(a) or (b) of Article 77; and (b) … is satisfied that it is not appropriate for the patient to remain liable to be recalled to hospital for further treatment" (see article 78(1)). The article 77(1) reference means that for this purpose the tribunal must be "(a) … not satisfied that [the patient] is then suffering from … mental disorder of a nature or degree which warrants his detention in hospital for medical treatment" or "(b) … not satisfied that [the patient's] discharge would create a substantial likelihood of serious physical harm to himself or to other persons ...". Where a patient is absolutely discharged under article 78(1), the relevant order authorising detention ceases to have effect and the patient ceases to be liable to be detained. Where the tribunal is not satisfied of one or other of the article 77(1)(a) or (b) conditions in article 78(1)(a), but sub-paragraph 78(1)(b) does not apply (in other words, it is satisfied that the patient should remain liable to be recalled to hospital for further treatment) then the tribunal must order a conditional discharge (see article 78(2)). A conditional discharge means that the relevant order authorising detention remains in effect; the patient leaves hospital and moves back into the community while remaining liable to be recalled to hospital at any time (on notice being given); and requires the patient to comply with such conditions (if any) as may be imposed at the time of discharge by the tribunal.

5. The inter-relationship between the discharge provisions in articles 78(1) and 77(1) and article 15 leave is at the heart of this appeal. The critical question is whether a review tribunal can remain satisfied that a patient's mental disorder warrants his or her detention in hospital even though the tribunal knows that she or he is due to be released into the community on article 15 leave without any further stay in, still less visits to, hospital.

6. In *Secretary of State for Justice v MM* [2018] UKSC 60; [2019] AC 712, (referred to below as "*MM*"), this court held that the 1983 Act does not permit the conditional discharge of a restricted patient to be made subject to any condition amounting to detention or deprivation of liberty. The court reached that conclusion notwithstanding its recognition that the purpose of conditional discharge from hospital is to enable the patient to make a safe transition from the institutional setting of a hospital to the community, and that there is nothing in the 1983 Act which expressly prohibits a condition which amounts to a detention or deprivation of liberty in another setting (see paragraph 38, per Lady Hale). Lord Hughes, dissenting, would have held that there is power, if considered right in all the circumstances, to impose conditions on the discharge of a restricted patient so long as the loss of liberty involved was not greater than that already authorised by the hospital and restriction orders. In his judgment, if the treatment of the patient had progressed to the point where the nature of the detention could be relaxed, it was plainly in the public interest that it should be, and he did not consider that the 1983 Act prohibited such arrangements. Neither side has sought to challenge the correctness of *MM* on this appeal. (I note that in response to the

judgment in *MM*, in June 2022, a draft Mental Health Bill was published. It includes the introduction of a new power of "Supervised Discharge", a subset of conditional discharge, through which a deprivation of liberty in the community would be permitted. The purpose of the power would be to enable restricted patients who are no longer therapeutically benefitting from treatment in hospital but continue to pose a risk that could not be safely managed in the community through a conditional discharge, to move into a community care setting with the necessary levels of supervision and restriction. The Bill has been subject to pre-legislative scrutiny and the Joint Committee on the Draft Mental Health Bill published its report on 19 January 2023. The Bill has, however, not yet been brought forward.)

7. Since *MM*, the use of authorised leave of absence as a tool for enabling detained patients to continue their rehabilitation in a community setting where appropriate has assumed greater clinical importance. In RM's case, the Northern Ireland Court of Appeal ("the NICA") acknowledged that the option of article 15 leave of absence for a detained patient is an important and valuable therapeutic tool, but held nonetheless, at para 40, that:

> "… Article 15 cannot and should not be used as a mechanism for providing legitimacy for what amounts to detention in the community when the grounds for detention in hospital for medical treatment no longer exist and it cannot and should not be seen as a means of avoiding the difficulties presented by the *MM* decision in respect of the conditions which can be imposed upon a patient who is subject to a conditional discharge."

8. The respondent to the appeal, RM, is a restricted patient detained for medical treatment under Part III of the 1986 Order (pursuant to orders made by the Crown Court under article 50A(2)(a) with a restriction order direction, without limit of time). His application (under article 78(1) of the 1986 Order) for discharge from detention in hospital was refused by a review tribunal, which concluded that his detention in hospital for medical treatment remained necessary. The tribunal accepted the recommendation of the responsible medical officer in the case that RM's long term leave of absence under article 15 (subject to conditions) would shortly be authorised, and he would move to a community-based setting as a means of transition from secure conditions to ultimate discharge. The tribunal considered that as a patient subject to leave of absence, he would nonetheless remain a patient detained in hospital for treatment for the purposes of article 77(1)(a) of the 1986 Order. The High Court upheld that decision.

9. The NICA allowed RM's appeal. It held that the words "warrants detention in hospital for medical treatment" in article 12 (which sets the test in the 1986 Order for compulsory detention for treatment to be lawful, is mirrored by the provisions of articles

77 and 78 and requires the person to be suffering from a mental disorder which warrants his or her detention in hospital for medical treatment) should be interpreted differently to the corresponding provision of the 1983 Act (section 3, which sets the test for compulsory detention for treatment under the 1983 Act and requires the person to be suffering from a mental disorder "which makes it appropriate for him to receive treatment in hospital"). The NICA held it was significant that the test of necessity in article 12 did not mirror the "appropriateness test" in section 3, and that courts in England and Wales had introduced a degree of flexibility into the meaning of medical treatment in hospital reflecting the latter (more relaxed) threshold. The NICA held accordingly, that when applying the test for discharge of a restricted patient under articles 78(1) and 77(1) of the 1986 Order, the words "warrants detention in hospital for medical treatment" should not be interpreted in the same (flexible) way. The review tribunal erred in this regard, applying the wrong legal test in RM's case. The need for a present and persisting liability to be detained in a hospital before a grant of leave of absence was held by the NICA to mean that the possibility of a grant of article 15 leave of absence should not have any bearing on the decision of the tribunal as to whether detention for medical treatment is warranted. The NICA held that it was inappropriate for the review tribunal to conclude that the statutory test for detention for treatment was met when the patient's authorised leave of absence from hospital under article 15 was intended. Since RM remained a detained restricted patient, the NICA's order remitted the application for discharge to the review tribunal to be reconsidered in light of its guidance.

10. Two main questions arise on the appeal. The first is whether the NICA was correct to conclude that the difference in wording just identified (and other differences between the 1986 Order and the 1983 Act) support a conclusion that a lower threshold test for compulsory detention applies under the 1983 Act and accordingly, authorities from courts in England and Wales could not be relied on to construe the requirement of detention in hospital for medical treatment. The second is whether the grant of leave of absence under article 15 of the 1986 Order 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. If so, such leave which may form an important and valuable part of a detained patient's treatment plan, that can and frequently does support a safe transition from the institutional setting of a hospital to a less secure, less institutionalised setting in the community, as part of the continuum from detention to discharge, is considerably restricted in its availability.

II The factual and procedural background

11. This is set out in detail in the judgments below. In outline, RM was born in 1988. He has a significant intellectual disability and severe impairment of social functioning associated with abnormally aggressive behaviour. He has been assessed as not having

the requisite capacity to conduct legal proceedings on his own behalf, but is otherwise assessed as having mental capacity.

12. He was charged with a series of offences including indecent assaults, gross indecencies with or towards a child, sexual assault of a child under 13 and threats to kill that were alleged to have been committed between 1998 and 2014. He was committed for trial in the Belfast Crown Court and found to be unfit to be tried. Consequently, a trial limited to a trial of the facts took place without investigating RM's *mens rea* in relation to the offences alleged, and accordingly, no criminal convictions could result. On 6 September 2017, however, RM was found by a jury to have committed the unlawful acts alleged.

13. On 2 March 2018 there was a sentencing hearing at Belfast Crown Court. Because RM was unfit to be tried and was found to have committed the unlawful acts alleged the provisions of article 50A of the 1986 Order applied in his case. The court made an order admitting him to hospital for medical treatment under article 50A(2)(a) and directed that RM should be treated as if a restriction order had been made without limit of time (see article 50A(3)(b)). The effect of the court's order and direction was that RM is treated for the purposes of the 1986 Order as if admitted to hospital in pursuance of a hospital order and an unlimited restriction order (see article 50A(3)).

14. RM was admitted to and detained at Muckamore Abbey Hospital on 13 March 2018. He has remained a restricted patient pursuant to the order and direction made by the Crown Court, and liable to detention ever since.

15. RM applied for discharge from detention on 16 January 2019. There was a hearing on 12 June 2020, by a review tribunal (formerly known as a mental health tribunal), comprising a legally qualified chair, a medical member (a Consultant Psychiatrist) and a lay member. Dr Milliken, a Consultant Psychiatrist, who was then the assigned "responsible medical officer" for RM, gave evidence that RM still had severe mental impairment. However, based on Dr Milliken's evidence, the tribunal was satisfied that RM had:

> "completed all medical and psychotherapeutic work which can be provided in hospital and that the development of specialised, effective community provision for [RM]'s supervision, care and treatment in [a residential care setting] means that currently his severe mental impairment is not of a nature or degree requiring his detention in hospital for medical treatment. Such detention would not be proportionate, necessary, or warranted. The Tribunal is also satisfied that the continued detention of RM would be in breach of Article 5 of

> the European Convention [on] Human Rights. It is not the least restrictive option for his care and cannot be justified under Article 5. Accordingly, the Tribunal is satisfied that the grounds for detention are not satisfied." (para 20)

16. Although not satisfied that the statutory conditions for detention in hospital for treatment were met, the tribunal held that RM should remain liable to be recalled to hospital for further treatment in accordance with article 78(1)(b) of the 1986 Order, so that a conditional (rather than an absolute) discharge appeared, in principle, appropriate pursuant to article 78(2). The conditions set out in a detailed proposed community care plan to which RM would be subject in his community placement included RM being in locked accommodation, unable to leave (the residential care setting) without being escorted, with continuous staff supervision when he did leave. However, applying *MM,* the tribunal concluded that the proposed conditions would amount to a deprivation of liberty and conditional discharge on this basis was not available. The Department of Justice had strongly opposed RM's discharge into a residential care setting on public protection grounds in any event and maintained that RM still required detention for treatment. The tribunal adjourned the case to await further developments without any final order being made.

17. Both the Belfast Health and Care Trust and RM commenced proceedings in the High Court to determine the powers of the review tribunal in this situation and RM challenged the lawfulness of his continued detention and sought his release. The Trust ultimately withdrew its application. Keegan J refused RM's applications (see *SM, Re Application for writ of habeas corpus* [2020] NIQB 73, where RM is referred to as "RO") and made clear that the matter should proceed before the review tribunal.

18. When the application was relisted for a final hearing on 16 February 2021, the review tribunal heard from Dr Paul Devine, Consultant Forensic Psychiatrist, who had replaced Dr Milliken as the responsible medical officer for RM, and Dr Adrian East, also a Consultant Forensic Psychiatrist, who endorsed Dr Devine's conclusions. The tribunal summarised their evidence as follows (at para 37):

> "Dr Devine is of the opinion that [RM] is at a stage in his treatment where he should be allowed to leave the hospital with the approval of the department on Art 15 leave. It is his view that Art 15 leave is an important part of the treatment plan and allows for medical support and rehabilitation of a patient. He told the Tribunal that this represented '*a significant amount of medical supervision and treatment*.' Dr Devine in his evidence outlined that treatment under Art 15 would allow testing of the care plan and allow [RM] to put into practice the skills that he had learnt in a setting outside

> hospital and to build upon those skills. He said that a lot of personnel would be involved in assessing [RM's] care needs and ongoing risk assessment and in providing regular refresher psychological support. His role as [responsible medical officer] would be to have oversight of all of that. Dr Devine submitted that the Art 15 leave would allow rigorous testing out of a care plan and allow a support plan and risk management plan to be fully developed and adapted to meet [RM's] needs. He said that he hoped that [RM] could quickly move to less supervised conditions under Art 15 and by the end of six months be in a position where his case could be referred to [the Review Tribunal] with the recommendation for a conditional discharge." (Emphasis as original)

19. The review tribunal concluded that RM had a severe mental impairment, that the impairment warranted his detention in hospital for treatment and that discharge would create a substantial likelihood of serious physical harm to others (see article 78(1)(a) and (b)). It acknowledged that RM's care plan would involve him moving to live in a community-based setting soon by way of leave of absence from hospital under article 15. It considered that as a patient subject to leave of absence, he would nonetheless remain a patient detained in hospital for the purposes of article 77(1)(a) of the 1986 Order.

20. Although the Department of Justice opposed RM's discharge, it recognised the utility of permitting RM to begin a period of supervision and testing in the community as being both in RM's interests and in the interests of the public at large in furthering the objective of more safely managing his risk. The Department of Justice therefore consented to the grant of leave of absence under article 15 of the 1986 Order. On about 29 March 2021, RM was granted article 15 leave to reside at an assisted, sheltered housing facility, where he remains.

21. By an application for leave to apply for judicial review, issued on 24 March 2021, RM challenged the tribunal's refusal to order his discharge. By a judgment dated 7 September 2021, Colton J upheld the tribunal's decision and dismissed the application ([2021] NIQB 75).

22. RM appealed by notice dated 15 October 2021. The NICA allowed the appeal ([2022] NICA 35). That is the judgment currently being considered by this court on this appeal.

III The statutory framework

23. Before coming to the provisions that are central to the appeal it is helpful to understand the statutory framework for the compulsory admission for assessment and/or medical treatment in hospital and subsequent discharge of detained patients with a mental disorder under the legislative schemes that operate in each jurisdiction. Since a key issue in this appeal concerns the comparability of the provisions of the 1986 Order and the 1983 Act, it is important also to understand where the corresponding provisions of the 1983 Act are the same and where and how they differ. The annex at the end of this judgment identifies the critical provisions under the two legislative schemes.

24. "Medical treatment" is defined widely in both schemes, to include all manner of treatment the purpose of which may extend from cure to containment and rehabilitation. By article 2 of the 1986 Order, it includes "nursing, and … care and training under medical supervision" (compare "nursing, psychological intervention and specialist mental health habilitation, rehabilitation and care … the purpose of which is to alleviate, or prevent a worsening of, the disorder or one or more of its symptoms or manifestations" in section 145 of the 1983 Act).

25. "Mental disorder" is defined by article 3(1) of the 1986 Order as "mental illness, mental handicap and any other disorder or disability of the mind" and "severe mental impairment" means "a state of arrested or incomplete development of mind which includes severe impairment of intelligence and social functioning and is associated with abnormally aggressive or seriously irresponsible conduct on the part of the person concerned". Article 3(2) expressly provides that a person shall not be treated as suffering from a mental disorder by reason only of personality disorder. (Compare, ""mental disorder" means any disorder or disability of the mind" in section 1 of the 1983 Act).

26. For civil patients under Part II, article 4(2) of the 1986 Order and section 2(2) of the 1983 Act govern the conditions for lawful "admission for assessment". The first statutory condition is the same: the patient must be "suffering from mental disorder of a nature or degree which warrants … detention … in a hospital for assessment" for at least a limited period: article 4(2)(a) and section 2(2)(a). The second statutory condition concerns risk to the health and safety of the patient or others if the patient is not detained. Article 4(2)(b) provides that failure to detain must create a "substantial likelihood of serious physical harm" to the patient or others, whereas section 2(2)(b) provides that the patient "ought to be so detained in the interests of his own health or safety or with a view to the protection of other persons". In both jurisdictions, the application to admit and detain must be founded on and accompanied by the written recommendation of one (in Northern Ireland) or two (in England and Wales) registered medical practitioners in prescribed form.

27. The power to detain a civil patient in hospital for medical treatment is given by article 12(1) of the 1986 Order and section 3(2) of the 1983 Act. In both cases, the report of one or more specially appointed doctors provides the authority for the patient to be detained where confirmation is given that the statutory conditions are met in the opinion of the doctor. The conditions in article 12(1) are:

> "(a) … the patient 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) … failure to so detain the patient would create a substantial likelihood of serious physical harm to himself or to other persons …"

There are other conditions as to the form and content of the report, but it is unnecessary to set them out.

28. The precise wording of the necessary statutory conditions in section 3(2) of the 1983 Act is different and I shall return below to the significance or otherwise of the differences when considering the judgment of the NICA. Section 3(2) as in force at the material time provides:

> "(2) An application for admission for treatment may be made in respect of a patient on the grounds that –
>
> > (a) he is suffering from mental disorder of a nature or degree which makes it appropriate for him to receive medical treatment in a hospital; and
> >
> > (b) [not used]
> >
> > (c) it is necessary for the health or safety of the patient or for the protection of other persons that he should receive such treatment and it cannot be provided unless he is detained under this section; and
> >
> > (d) appropriate medical treatment is available for him."

29. If met, the statutory "entry" conditions enable a civil patient to be detained in hospital for medical treatment. Once actual detention is authorised in this way, the patient is subject to the statutory scheme as a whole and remains liable to be detained until the prescribed period of detention lapses or the patient is discharged.

30. A civil patient's detention may be extended or renewed by the "responsible medical officer" subject to satisfying the conditions in article 13 of the 1986 Order, where the responsible medical officer confirms that the conditions in article 12(1)(a) and (b) are satisfied. This can only be done before the authorised period of detention expires by lapse of time. The responsible medical officer can also discharge a civil patient from detention by giving an order in writing under article 14. The responsible medical officer must make such an order if satisfied that the patient is "no longer suffering from mental illness or severe mental impairment of a nature or degree which warrants his detention in hospital for medical treatment". Thus, detention of a civil patient on the authority of a doctor continues and the patient remains liable to be detained unless and until the authority to detain expires by lapse of time under article 12 or the doctor makes an order discharging the patient from detention.

31. Civil patients who are compulsorily detained in hospital under these provisions cannot leave hospital unless given leave of absence by the patient's responsible medical officer under article 15. The responsible medical officer can grant such leave for a special occasion, or for a limited or defined period which may be extended. Leave of absence may be an important part of the care and treatment plan for a detained patient. Article 15 provides:

> "**15. Leave of absence from hospital**
>
> (1) The responsible medical officer may grant to any patient who is for the time being liable to be detained in a hospital under this Part leave to be absent from the hospital subject to such conditions, if any, as that officer considers necessary in the interests of the patient or for the protection of other persons.
>
> (2) Leave of absence may be granted to a patient under this Article either on specified occasions or for any specified period; and where leave is so granted for a specified period, that period may be extended by further leave granted in the absence of the patient.
>
> (3) Where it appears to the responsible medical officer that it is necessary to do so in the interests of the patient or for the

protection of other persons, he may, upon granting leave of absence under this Article, direct that the patient remain in custody during his absence; and where leave of absence is so granted the patient may be kept in the custody of any officer of the responsible authority, or of any other person authorised in writing by that authority.

(4) Where leave of absence is granted to a patient under this Article or where a period of leave is extended by further leave and the leave or the extension is for a period of more than 28 days, it shall be the duty of the responsible authority to inform RQIA within 14 days of the granting of leave or of the extension, as the case may be, of the address at which the patient is residing and, on the return of the patient, to notify RQIA thereof within 14 days.

(5) Where—

> (a) a patient is absent from a hospital in pursuance of leave of absence granted under this Article; and
>
> (b) it appears to the responsible medical officer that it is necessary to do so in the interests of the patient's health or safety or for the protection of other persons or because the patient is not receiving proper care;

that officer may, subject to paragraph (6), by notice in writing given to the patient or to the person for the time being in charge of the patient, revoke the leave of absence and recall the patient to the hospital.

(6) A patient to whom leave of absence is granted under this Article shall not be recalled under paragraph (5) after he has ceased to be liable to be detained under this Part."

[I note that references above to the "RQIA" are to the Health and Social Care Regulation and Quality Improvement Authority: see article 2(2) of the Order]

There is an equivalent leave of absence provision (in materially the same or identical terms) in section 17 of the 1983 Act.

32. The grant of leave of absence under article 15 does not bring the authority to detain the patient to an end or discharge the patient concerned. The patient remains liable to be detained and the leave of absence can be revoked at any time and the patient recalled to hospital if the responsible medical officer considers it necessary to do so (see subparagraph (5)). It is only once a patient ceases to be liable to be detained that the patient cannot thereafter be recalled to hospital if leave of absence is revoked (see subparagraph (6)). Consistently with a continuing liability to detention, conditions can be imposed on the patient during the leave of absence granted under article 15 as considered necessary by the responsible medical officer in the interests of the patient or to protect others. For example, such conditions can include remaining in custody while on leave (in the care of an authorised person), a requirement to live with a particular person, attend a clinic for testing or treatment, or return to hospital for tests or medication.

33. A civil patient who is detained and remains liable to be detained can, within six months of admission to hospital (or where the responsible medical officer has refused to discharge the patient or has renewed the authority for detention), apply to a review tribunal under article 71 of the 1986 Order. This is a specialist tribunal constituted under schedule 3 of the 1986 Order, comprising medically qualified and other members.

34. Where such an application is made, article 77 applies. Article 77 presupposes that authority for the civil patient's detention remains in place, because it concerns a patient who remains liable to be detained. Article 77 provides:

> "**77. Power to discharge patients other than restricted patients**
>
> (1) Where application is made to the Review Tribunal by or in respect of a patient who is liable to be detained under this Order, the tribunal may in any case direct that the patient be discharged, and shall so direct if—
>
> > (a) (except in relation to detention for assessment), the tribunal is not satisfied that he is then suffering from mental illness or severe mental impairment or from either of those forms of mental disorder of a nature or degree which warrants his detention in hospital for medical treatment; or

(aa) in relation to detention for assessment, the tribunal is not satisfied that the patient is then suffering from mental disorder of a nature or degree which warrants the patient's detention in a hospital for assessment (or for assessment followed by medical treatment); or

(b) the tribunal is not satisfied that his discharge would create a substantial likelihood of serious physical harm to himself or to other persons; or

(c) in the case of an application by virtue of Article 71(4)(a) in respect of a report furnished under Article 14(4)(b), the tribunal is satisfied that he would, if discharged, receive proper care.

(1A) In paragraph (1) "detention for assessment" means detention by virtue of any report under Article 9.

(2) A tribunal may under paragraph (1) direct the discharge of a patient on a future date specified in the direction; and where the tribunal does not direct the discharge of a patient under that paragraph the tribunal may—

(a) with a view to facilitating his discharge on a future date, recommend that he be granted leave of absence or transferred to another hospital or into guardianship; and

(b) further consider his case in the event of any such recommendation not being complied with.

(3) Where application is made to the Review Tribunal by or in respect of a patient who is subject to guardianship under this Order, the tribunal may in any case direct that the patient be discharged, and shall so direct if it is satisfied—

(a) that he is not then suffering from mental illness or severe mental handicap or from either of those forms of mental disorder of a nature or degree which warrants his remaining under guardianship; or

(b) that it is not necessary in the interests of the welfare of the patient that he should remain under guardianship.

(4) Paragraphs (1) to (3) apply in relation to references to the Review Tribunal as they apply in relation to applications made to the tribunal by or in respect of a patient.

(5) Paragraph (1) shall not apply in the case of a restricted patient except as provided in Articles 78 and 79."

35. Accordingly, article 77(1) requires the tribunal to direct the patient's discharge if not satisfied at the time of its consideration, that one or other of the two statutory entry conditions continues to be met in the patient's case. If so, discharge must be ordered (though the tribunal can specify a future date for discharge to take effect). Alternatively, if the tribunal remains satisfied that the statutory entry conditions remain fulfilled (because positively satisfied both that the mental disorder warrants detention in hospital and that discharge would give rise to the substantial likelihood of serious harm) then, under article 77(2)(a) it can recommend the grant of leave of absence for the patient "with a view to facilitating his discharge on a future date".

36. Section 72 of the 1983 Act is in materially similar terms. So far as relevant it provides:

"**72. Powers of tribunals**

(1) Where application is made to the appropriate tribunal by or in respect of a patient who is liable to be detained under this Act or is a community patient, the tribunal may in any case direct that the patient be discharged, and—

(a) the tribunal shall direct the discharge of a patient liable to be detained under section 2 above if it is not satisfied—

(i) that he is then suffering from mental disorder or from mental disorder of a nature or degree which warrants his detention in a hospital for assessment (or for assessment followed by

> medical treatment) for at least a limited period; or
>
> (ii) that his detention as aforesaid is justified in the interests of his own health or safety or with a view to the protection of other persons;
>
> (b) the tribunal shall direct the discharge of a patient liable to be detained otherwise than under section 2 above if it is not satisfied—
>
> (i) that he is then suffering from mental disorder or from mental disorder of a nature or degree which makes it appropriate for him to be liable to be detained in a hospital for medical treatment; or
>
> (ii) that it is necessary for the health of safety of the patient or for the protection of other persons that he should receive such treatment; or
>
> (iia) that appropriate medical treatment is available for him; or
>
> (iii) in the case of an application by virtue of paragraph (g) of section 66(1) above, that the patient, if released, would be likely to act in a manner dangerous to other persons or to himself. […] "

37. Turning to Part III and criminal justice patients with which this appeal is concerned, a court order (supported by the opinion of two medical practitioners following examination) provides the authority to detain the offender in question. In general, the power to make a hospital order following conviction of an imprisonable offence in the Crown Court is in article 44(1) of the 1986 Order. As with civil patients, the court must be satisfied that the offender is suffering from "a mental illness or severe mental impairment of a nature or degree which warrants his detention in hospital for medical treatment": article 44(2). This test does not have to be satisfied where an order for admission to hospital is made under article 50A.

38. Where under article 49 the court finds that a person charged on indictment is unfit to be tried, article 49A allows for a jury finding that the person accused did the act or made the omission charged against him as the offence. In such a case the court must make one of the orders identified in article 50A(2), including an order admitting the offender to hospital: article 50A(2)(a). The offender is then treated as if admitted pursuant to a hospital order; and where so directed by the court, as if a restriction order had been made: article 50A(3)(a) and (b).

39. Article 47(1) governs restriction orders. These are hospital orders coupled with special restrictions on discharge from hospital. The special restrictions can be applied for a specified or an unlimited period and are set out in article 47(2). They include a provision that none of the provisions in Part II relating to the duration, renewal, and expiry of authority for the detention of patients shall apply, and that the patient shall continue to be liable to be detained by virtue of the hospital order until absolutely discharged under articles 48, 78, 79 or 80: article 47(2)(a). Another restriction that may be contained in a restriction order is that certain powers may only be exercised with the consent of the Department of Justice, including the power to grant leave of absence pursuant to article 15. In the case of an offender ordered to be admitted to hospital under article 50A(2), article 50A(3)(b) permits the court to make a direction that the person is treated as if a restriction order had been made. That is what happened in RM's case.

40. Under article 47(2)(c) a restricted patient may not be granted leave of absence under article 15 by the responsible medical officer without the consent of the Department of Justice; and if leave of absence is granted, the power to recall the patient on article 15 leave is vested in the Department of Justice and may be exercised at any time (see article 47(2)(d)). The Department of Justice exercises a control function in relation to these provisions in the public interest.

41. Accordingly, for Part III restricted patients, once detention has been authorised by a court order under the 1986 Order, the patient is detained and remains liable to be detained by virtue of the order until absolutely discharged under articles 48, 78, 79 or 80. Article 48 empowers the Department of Justice to direct that the patient shall cease to be subject to the special restrictions but has no application in this case since no such direction was made. Articles 79 and 80 do not apply either. Article 78 is, however, relevant, and central to RM's case.

42. Restricted patients have the right to apply to a review tribunal seeking their discharge in the same way as civil patients and the review tribunal has the power to discharge them either absolutely or subject to conditions. Article 78 provides that a tribunal must direct discharge if the statutory grounds for detention are no longer satisfied. It provides:

“**78. Power to discharge restricted patients subject to restriction orders**

(1) Where an application to the Review Tribunal is made by a restricted patient who is subject to a restriction order, or where the case of such a patient is referred to the tribunal, the tribunal shall direct the absolute discharge of the patient if—

(a) the tribunal is not satisfied as mentioned in paragraph (1)(a) or (b) of Article 77; and

(b) the tribunal is satisfied that it is not appropriate for the patient to remain liable to be recalled to hospital for further treatment.

(2) Where in the case of any such patient as is mentioned in paragraph (1)—

(a) sub-paragraph (a) of that paragraph applies; but

(b) sub-paragraph (b) of that paragraph does not apply,

the tribunal shall direct the conditional discharge of the patient.

(3) Where a patient is absolutely discharged under this Article he shall thereupon cease to be liable to be detained by virtue of the relevant hospital order, and the restriction order shall cease to have effect accordingly.

(4) Where a patient is conditionally discharged under this Article—

(a) he may be recalled by the Secretary of State under paragraph (3) of Article 48 as if he had been conditionally discharged under paragraph (2) of that Article; and

(b) the patient shall comply with such conditions (if any) as may be imposed at the time of discharge by the tribunal or at any subsequent time by the Secretary of State.

(5) The Secretary of State may from time to time vary any condition imposed (whether by the tribunal or by him) under paragraph (4).

(6) Where a restriction order in respect of a patient ceases to have effect after he has been conditionally discharged under this Article the patient shall, unless previously recalled, be deemed to be absolutely discharged on the date when the order ceases to have effect and shall cease to be liable to be detained by virtue of the relevant hospital order.

(7) The tribunal may defer a direction for the conditional discharge of a patient until such arrangements as appear to the tribunal to be necessary for that purpose have been made to its satisfaction; and where by virtue of any such deferment no direction has been given on an application or reference before the time when the patient's case comes before the tribunal on a subsequent application or reference, the previous application or reference shall be treated as one on which no direction under this Article can be given.

(8) This Article is without prejudice to Article 48."

43. Accordingly, article 78(1)(a) applies the statutory conditions in article 77(1) applicable to civil patients to criminal justice patients; and applies an additional condition, article 78(1)(b). If the tribunal is (i) not satisfied in relation to one or other of the article 77(1) conditions (ie that (a) the patient is then suffering from a mental illness of a nature and degree which warrants his detention in hospital for medical treatment; or that (b) the patient's discharge would create a substantial likelihood of serious physical harm to himself or to other persons) and is (ii) satisfied that it is not appropriate for the patient to remain liable to be recalled to hospital for medical treatment, it must direct an absolute discharge: article 78(1). Where (i) applies but (ii) does not, the tribunal must direct the patient's conditional discharge: article 78(2). It is only where the tribunal is satisfied that both article 77(1) conditions are met that it is not required to order a discharge.

44. The equivalent provision in the 1983 Act is section 73. It provides:

> "**73. Power to discharge restricted patients**
>
> (1) Where an application to the appropriate tribunal is made by a restricted patient who is subject to a restriction order, or where the case of such a patient is referred to the appropriate tribunal, the tribunal shall direct the absolute discharge of the patient if—
>
> (a) the tribunal is not satisfied as to the matters mentioned in paragraph (b)(i), (ii) or (iia) of section 72(1) above; and
>
> (b) the tribunal is satisfied that it is not appropriate for the patient to remain liable to be recalled to hospital for further treatment.
>
> (2) Where in the case of any such patient as is mentioned in subsection (1) above—
>
> (a) paragraph (a) of that subsection applies; but
>
> (b) paragraph (b) of that subsection does not apply, the tribunal shall direct the conditional discharge of the patient."

IV The judgments below in more detail

45. Both the review tribunal and Colton J referred to and relied on (as persuasive) several decisions made by the courts of England and Wales about the discharge provisions in the 1983 Act. It is convenient, at this stage, to describe two of those decisions, where the courts reconciled full-time leave of absence under section 17 of the 1983 Act (the equivalent of article 15 of the 1986 Order) with the need for continued detention for treatment in a hospital by adopting a test that permitted leave of absence where a "significant component" of the treatment plan for the patient was treatment in a hospital. As I have explained above, the NICA was critical of this approach and disapproved of its application to the parallel provisions in the 1986 Order. The decisions are *R (on the application of DR) v Mersey Care NHS Trust* [2002] EWHC 1810 (Admin) (Wilson J) ("*DR*") and *R(CS) v Mental Health Review Tribunal* [2004] EWHC (Admin) 2958 (Pitchford J) ("*CS*").

46. In *DR*, there was a challenge to the decision to renew authority for DR's detention under the 1983 Act. Her treatment plan proposed extensive leave of absence from hospital under section 17 of the 1983 Act, but with attendance required at hospital twice a week for occupational therapy and at a ward round to monitor and review her progress. Otherwise, she would be monitored and supervised in the community. At paragraph 30 of *DR*, Wilson J held:

> "The question therefore in my judgment is whether a significant component of the plan for the claimant was for treatment in hospital. It is worth noting that, by section 145(1) of the Act the words 'medical treatment' include rehabilitation under medical supervision. There is no doubt, therefore, that the proposed leave of absence for the claimant is properly regarded as part of her treatment plan. As para 20.1 of the Code of Practice states 'leave of absence can be an important part of a patient's treatment plan.' Its purpose was to preserve the claimant's links with the community; to reduce the stress caused by hospital surroundings which she found particularly uncongenial; and to build a platform of trust between her and the clinicians upon which dialogue might be constructed and insight on her part into her illness engendered. Equally, however, the requirement to attend hospital on Fridays between 9am and 5pm and on Monday mornings was also in my judgment a significant component of the plan. The role of occupational therapy as part of the treatment of mental illness needs no explanation. But the attendance at hospital on Monday mornings seems to me to be likely to have been even more important. Such was to be the occasion of the attempted dialogue; for monitoring; for assessment and for review. …"

47. CS was a civil patient with schizophrenia who sought to be discharged from detention in a hospital under the 1983 Act. There were concerns that, if discharged, she would stop taking her anti-psychotic medication. Instead, a treatment plan proposed full-time leave of absence in her own home under section 17 to enable testing in the community. Her application for judicial review of the decision not to discharge her was dismissed by Pitchford J who held that her continued detention was lawful (including under article 5 of the Convention) and necessary; and her full-time absence from hospital was not inconsistent with continued detention for treatment.

48. Pitchford J referred to *DR*. Adopting Wilson J's analysis above, Pitchford J held the proposed leave of absence was properly regarded as part of her treatment plan and held that a "significant component" of the plan was for treatment in hospital. As he explained:

> "44. Viewed as a whole the course of treatment should be seen, it is submitted, as a continuing responsive programme, during which the need for treatment in hospital and on leave was being constantly reassessed depending upon the circumstances, including CS's responses to AOS and the ward round. Until such time as the transition was complete, the element of treatment at hospital remained a significant part of the whole. I am not convinced that the mere existence of the hospital and its capacity to be treated by the patient as a refuge and stability is part of the treatment of the patient at that hospital. Otherwise, I accept the submissions made by Miss Stern in this context.
>
> 46. … It is clear to me that the RMO was engaged in a delicate balancing exercise by which she was, with as light a touch as she could, encouraging progress to discharge. Her purpose was to break the persistent historical cycle of admission, serious relapse and readmission. It may be that in the closing stages of the treatment in hospital her grasp on the claimant was gossamer thin, but to view that grasp as insignificant is, in my view, to misunderstand the evidence. …"

As stated, the review tribunal and Colton J adopted the approach established by these authorities.

49. In this case, having accepted the evidence of Dr Devine and Dr East as persuasive on the question whether RM's severe mental impairment was of a nature or degree warranting his detention in hospital for medical treatment, the review tribunal rejected RM's application for an absolute discharge from hospital. The tribunal remained satisfied that his severe mental health impairment was of a nature or degree which "warrants his detention in hospital for medical treatment". However, it was satisfied that RM was at a stage in his treatment where it was appropriate for him to be given leave of absence pursuant to article 15 so that he could be tested in the community and further, that treatment as described by Dr Devine and reflected in his care and treatment plan, including oversight, care and risk management should continue whilst RM remained subject to detention, until such time as he no longer required detention in hospital for medical treatment. The tribunal accepted the evidence of Dr Devine and Dr East that the oversight, care and risk management described by Dr Devine amounted to treatment as defined by article 2 of the 1986 Order. Although not strictly necessary to do so, the tribunal considered whether RM's discharge would create a substantial likelihood of physical harm to himself or others and concluded that it would.

50. RM's judicial review challenge argued that, as a matter of law and in accordance with the clear provisions of articles 78 and 77 of the 1986 Order, he should have been discharged unless "a significant component" of his medical treatment was being administered or was to take place within a hospital or equivalent health care facility. Since no treatment in hospital was envisaged in RM's case, he should have been discharged from hospital under article 78 and the only remaining issue was whether the discharge should be absolute or conditional. While it was accepted on RM's behalf that the significant component test for the connection with a hospital could be gossamer thin, on the evidence in this case, where no medical treatment of any kind was taking place at a hospital, nor was any envisaged at any time in future, that connection was not made out.

51. By his judgment of 7 September 2021, Colton J dismissed the application for judicial review: [2021] NIQB 75.

52. As indicated, in addressing the meaning of "warrants his detention in hospital for medical treatment" in article 77(1)(a) of the 1986 Order as imported into article 78(1)(a), Colton J relied on *CS, DR* and a number of other decisions of the High Court of England and Wales on this issue that took the same approach (including *KL v Somerset Partnership NHS Foundation Trust* [2011] UKUT 233 (ACC), *R v Barking Havering and Brentwood Community Health Care Trust ex parte B* [1999] 1 FLR 106 (CA) (referred to below as *"Barking Havering*") and *R (on the application of Epsom and St Helier NHS Trust) v Mental Health Review Tribunal* [2001] EWHC 101 (Admin)). Although not binding on him, he regarded these judgments as supportive of a broad approach being taken to what is meant by "medical treatment in hospital" and as highly persuasive.

53. He held that the case must turn on the facts as lawfully found by the specialist tribunal. The tribunal was satisfied that RM was at a stage in his treatment when it was appropriate for him to be tested in the community; that during such testing he would continue to require medical treatment as described by Dr Devine (sometimes referred to as "the RMO" by Colton J), with which Dr East agreed; that Dr Devine would continue to have oversight of his care; and that RM would remain liable to be returned to hospital. Colton J continued:

> "30. The RMO is based in the hospital environment. There is a warranted and necessary link with the hospital, the RMO and the patient's treatment. From the contents of paragraph 37 of the reasoning it will be seen that Article 15 leave would form part of the treatment plan put in place by the RMO. That leave would allow for medical support of the applicant supervised by the RMO and would allow for the testing in the community of the care plan that was in place. There would be

> ongoing assessment of the patient. Whilst there would be an element of uncertainty as to how the patient would cope with a move to [the sheltered housing accommodation] there would be continued involvement with a multi-disciplinary team of clinicians who would continue to supervise and support the applicant during the Article 15 leave. Dr Devine described the care plan as involving 'a significant amount of medical supervision and treatment' and that he would have 'oversight' over all of that."

54. Colton J therefore held that the review tribunal had been entitled to conclude that RM's severe mental impairment continued to warrant detention in hospital. The fact that his proposed future treatment would not take place physically in hospital because he would be on leave of absence under article 15 was not determinative of the issue. The hospital's "grasp" might be slight "but remains significant." The review tribunal had correctly applied the law and there was ample medical evidence to support its conclusions.

55. RM's appeal to the NICA was heard by McCloskey LJ, Maguire LJ and McAlinden J (who delivered the judgment of the court): [2022] NICA 35. The NICA's reasoning for allowing RM's appeal is set out at paragraphs 27 to 40, and in essentials can be summarised as follows:

> (1) the NICA identified textual differences between certain articles of the 1986 Order and the corresponding provisions of the 1983 Act. Of most significance, article 12(1)(a) (which requires a mental disorder that warrants detention in a hospital for treatment) and section 3(2)(a) (which requires a mental disorder which makes it appropriate for the patient to receive treatment in hospital) setting the statutory entry conditions for compulsory detention in a hospital for medical treatment.
>
> (2) The difference in wording of these statutory entry conditions was material and had clear significance. "Warrants" in this context imported a necessity test in Northern Ireland and did not mirror the appropriateness test in the England and Wales legislation. The difference in wording was not accidental. It is implicit that the NICA concluded that there is a less onerous threshold test for compulsory detention under the 1983 Act.
>
> (3) The courts in England and Wales had when interpreting section 3 of the 1983 Act "introduced a degree of flexibility in what is meant by medical treatment in a hospital which reflects the threshold test of what is appropriate". *CS* was a case in point, and Pitchford J was of the view that "the degree of grasp

of a hospital consultant or other hospital-based healthcare professionals on a patient may be gossamer thin but such grasp may be significant and that is the key criteria. However, that does not mean that the differently worded provision in the Northern Ireland legislative scheme should be interpreted in the same manner. It is the view of this court that it should not be."

(4) The statutory entry conditions for compulsory detention for treatment in article 12 of the 1986 Order are precisely reflected in articles 77 and 78 of the 1986 Order. Therefore, any views expressed about the test to be applied under article 12 apply with equal force to the test to be applied under articles 77 and 78.

(5) At paragraph 34 the NICA identified three questions to be asked in ordered sequence by a review tribunal considering an application to discharge. First, is the patient suffering from mental illness or severe mental impairment as defined in article 3? Secondly, is relevant treatment available? Thirdly, if so, is the mental illness or mental impairment "of a nature or degree which warrants (necessitates) the person's detention in hospital for medical treatment." In relation to that third question, to justify the draconian step of depriving a person of his liberty in order to provide medical treatment, "it must be demonstrated that the detention in hospital is necessary in order to effectively provide the envisaged medical treatment … detention cannot be justified if the envisaged medical treatment regime can be effectively provided in a community setting."

(6) The power vested in the responsible medical officer to grant article 15 leave of absence only applies where the grounds for detention under Part II of the 1986 Order exist at that time.

(7) The need for a present and persisting liability to be detained in a hospital under Part II of the 1986 Order before a grant of leave of absence can be made means that the possibility of a grant of leave of absence under article 15 should not have any bearing on a review tribunal's decision as to whether detention for medical treatment is warranted.

(8) It was inappropriate for the review tribunal in this case to conclude that the statutory test for detention for treatment was met when the stated intention of the newly appointed responsible medical officer was that RM should reside on a long-term basis in a community setting, initially on article 15 leave. This important therapeutic tool cannot be used to legitimise detention in the community when the grounds for detention in hospital for medical treatment no longer exist. It cannot be used as a means of avoiding the difficulties presented by the Supreme Court's decision in *MM*.

(9) It followed that both the review tribunal and Colton J failed to apply the correct legal test in that they sought to justify their decisions by relying on a line of authority from England and Wales dealing with the test applicable in England and Wales rather than applying the different statutory test applicable in Northern Ireland.

56. The appellants contend that the NICA's judgment at most stages of that reasoning was wrong. In short, the NICA attached manifestly undue weight to the textual differences between the 1983 Act and the 1986 Order. The differences were neither material nor significant and did not support the NICA's conclusion that a lower threshold test for detention for treatment in hospital applies under the 1983 Act. The test is the same necessity test in both legislative schemes. The NICA wrongly focussed on Part II patients and the statutory conditions for detention for civil patients when RM is a restricted patient under Part III. Leave of absence under article 15 is available to restricted patients under Part III as well as Part II civil patients. The NICA was wrong to conclude that article 15 leave of absence should have no bearing when considering discharge on whether the statutory conditions for continued detention in a hospital are satisfied. Leave of absence is not necessarily inconsistent with detention for treatment in hospital and article 15 expressly provides that a patient who is granted leave of absence remains "liable to be detained". The NICA misunderstood the value of article 15 leave. It is a critical tool for managing detained patients in this context.

57. For his part RM does not seek to support the NICA's conclusion that different threshold tests apply under the 1983 Act and the 1986 Order. He contends, however, that the NICA was correct to allow the appeal. There was nothing to suggest that there was to be any future treatment in hospital (still less that a significant component of his future treatment would be in hospital) or any connection at all between him and the hospital at which he was detained for treatment, even on the broadest understanding of the test to be applied. The treatment plan for RM envisaged treatment in the community only. A patient on article 15 leave away from the hospital does not satisfy the "detention for treatment in a hospital" test merely by virtue of supervision by a doctor based at a hospital. The test for continued compulsory detention in a hospital requires some element of treatment in a hospital. To regard supervision by a doctor who happens to be based in a hospital as sufficient, renders the test arbitrary and a matter of happenstance. The element of treatment in a hospital was insufficient to justify RM's continued detention. He should have been discharged.

V Analysis of the questions raised by the appeal

58. Against that background I turn to consider the questions raised by the appeal, starting with the threshold test for compulsory detention for treatment under the two legislative schemes.

(i) Is there a necessity test for detention under the 1983 Act?

59. The NICA relied on three main textual differences between the 1983 Act and the 1986 Order. The NICA regarded these as material and significant, and held, particularly in relation to the third identified difference, that it meant "that courts and tribunals in Northern Ireland must exercise great care when considering English authorities which deal with relevant aspects of the English test". This was not a point that had been raised or relied on by any of the parties below. Indeed, although it is recorded as having been raised with the parties (at paragraph 20 of the NICA judgment) neither side had any record of this having occurred, and neither side took the opportunity to adopt it or even make submissions on the point. In the appeal before this court, neither party supported this aspect of the NICA's judgment.

60. I can deal shortly with the first two main differences relied on since, on the face of it, neither is material or relevant to RM's case as a Part III restricted patient detained under an order made by the Crown Court pursuant to article 50A(2) and (3). The first relates to the second condition in the statutory test for admission for assessment of a civil patient under Part II. Article 4(2)(b) provides that to be admitted for assessment, it is necessary that failure to detain the patient "would create a substantial likelihood of serious physical harm to himself or to other persons" whereas section 2(2)(b) of the 1983 Act requires that the patient "ought to be so detained in the interests of his own health or safety or with a view to the protection of other persons." Not only is there no justification for thinking, as the NICA did, that the article 4(2)(b) threshold is higher than the section 2(2)(b) threshold, but the textual differences are irrelevant in this case. The NICA also regarded it as significant that the 1983 Act defines "mental disorder" as including a personality disorder whereas the 1986 Order does not. But as the NICA recognised, this difference in scope has no bearing whatever on the issues raised by the appeal as RM was not suffering from a personality disorder.

61. The NICA placed greater reliance on the differently worded test for compulsory detention for treatment of a civil patient in the two jurisdictions. In Northern Ireland article 12(1)(a) requires a "mental illness or severe mental impairment of a nature or degree which *warrants* his detention in hospital for medical treatment". In England and Wales section 3(2)(a) requires a mental disorder (encompassing a wider range of states or conditions) of a nature or degree "which makes it *appropriate* for him to receive treatment in a hospital." The NICA held that "warrants" in article 12(1)(a) imports a test of "strict necessity" in the Northern Ireland legislation that does not mirror the "appropriateness" test set out in the 1983 Act. The NICA regarded this as neither accidental nor unimportant. The decisions of courts of England and Wales had introduced a degree of flexibility into the different (less onerous) threshold test in section 3(2)(a) of the 1983 Act and should not be relied on.

62. The history of the legislation in England and Wales demonstrates that the words "warrants", "necessary" and the phrase "makes it appropriate" were used interchangeably and as synonymous in context. For example, the test for admission for assessment in section 2 of the 1983 Act (like its predecessor provision, section 25 of the Mental Health Act 1959) has always required a mental illness or disorder that "warrants" the patient's detention in a hospital and continues to do so. Under the 1959 Act, the power to detain a patient in a hospital for treatment was contained in section 26, the predecessor to section 3 of the 1983 Act, and by section 26(2)(a) it too required a disorder that "warrants" the detention of the patient in a hospital. With the repeal of the 1959 Act and the enactment of the 1983 Act, the relevant provision changed from "warrants the detention" to "makes it appropriate". The same change was also made in the power to grant a hospital order under section 60 of the 1959 Act which was replaced by section 37 of the 1983 Act. Although the wording of section 3(2) of the 1983 Act has subsequently been amended by the Mental Health Act 2007 (in ways that have no bearing on the appeal), the words "mental disorder ... of a nature or degree which makes it appropriate for him to receive medical treatment in a hospital" in section 3(2)(a) have not been amended, no doubt because the statutory test for admission has always been understood, for the reasons set out below, to be one of necessity.

63. It is significant that in reaching the conclusion it did, the NICA overlooked section 3(2)(c) of the 1983 Act. This is a critical statutory condition for admission to compulsory detention in hospital.

64. The single compressed statutory condition for admission to detention in article 12(1)(a) of the 1986 Order is disaggregated in section 3(2) in subsections 3(2)(a) and 3(2)(c) of the 1983 Act. In other words, while "warrants" sets the threshold for the compressed condition in article 12(1)(a), there are separate conditions that together constitute the statutory test in section 3(2) and must be read together. By subsection 3(2)(a) the nature and severity of the mental disorder must make it *appropriate* for the patient to receive medical treatment in a hospital; *and* by subsection 3(2)(c) it must be *necessary* for the health or safety of the patient (or for the protection of other persons) that the patient should receive that treatment *and* the treatment *cannot be provided unless* he is detained. In effect subsection (c) conditions the appropriateness test in (a) which cannot apply without it being satisfied. Accordingly, while different language is used in the parallel provisions of the two legislative schemes, the word "appropriate", in context, plainly 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.

65. That is unsurprising. The right to liberty is jealously protected. It is a fundamental principle of the common law that in enacting legislation Parliament is presumed not to intend to interfere with the liberty of the subject without making such an intention clear. Where a power of compulsory detention is conferred by legislation, the statutory provisions conferring it will be strictly and narrowly construed and its

operation and effect will be supervised by the court according to high standards (*Tan Te Lam v Superintendent of Tai A Chau Detention Centre* [1997] AC 97, 111E; *R v Secretary of State for the Home Department, Ex p Khawaja* [1984] AC 74, 122E-F per Lord Bridge).

66. A consideration of article 5(1)(e) of the Convention also supports this conclusion. It provides:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (e) the lawful detention … of persons of unsound mind …"

This requires the deprivation of liberty to be lawful as a matter of domestic law and free from arbitrariness.

67. The minimum conditions that must be satisfied for detention of a person of unsound mind to be lawful under article 5(1)(e) were first set out in *Winterwerp v Netherlands* (Application No 6301/73) (1979) 2 EHRR 387, as follows: first, it must be reliably established through objective medical evidence that the person has a true mental disorder; secondly, the mental disorder must be of a kind or degree warranting compulsory confinement; and thirdly, the validity of the continued confinement depends upon the persistence of the mental disorder. Accordingly, the need to ensure compliance with article 5 of the Convention means that the 1983 Act must be interpreted as requiring the mental disorder to be of a kind or degree that makes compulsory detention for treatment necessary. The provisions are structured around an analysis that favours liberty unless compulsory detention is necessary.

68. For these reasons the NICA was wrong to hold that a different (less onerous) test applies under the 1983 Act requiring courts and tribunals in Northern Ireland to exercise caution when considering relevant authorities from England and Wales. The test for detention is the same necessity test in both legislative schemes. Hence authorities from England and Wales can be read across to the 1986 Order where it is appropriate to do so.

(ii) The proper approach to a grant of "leave of absence" under article 15 and whether it can have any bearing on the decision of a review tribunal as to whether detention in hospital for medical treatment remains warranted

69. In my view any construction of the discharge provisions in articles 77 and 78 of the 1986 Order should be compatible with the operation of the provision for authorised leave in article 15 given its potential importance (increased since *MM*) as a tool in the therapeutic management and rehabilitation of detained patients. This power is available to be exercised in the case of all patients (civil and criminal justice alike), where the appropriate treatment for the patient is rehabilitation in the community under supervision. The narrow approach adopted by the NICA creates a catch 22 that emasculates this power. In my judgment, and for the reasons that follow, the NICA was wrong to suggest that the very fact that a patient is to be released on article 15 leave inevitably means that the patient's mental illness no longer "warrants his detention in hospital for medical treatment".

70. Two concepts used in article 77(1) are relevant to the issues raised by this part of the appeal. First, the power to order some form of discharge arises in the case of a patient who is "liable to be detained" and secondly, that power is to be exercised unless the tribunal is satisfied that the patient's mental illness then "warrants his detention in hospital for medical treatment". In article 78(1) the power to order discharge applies to a patient "who is subject to a restriction order" and is engaged in RM's case, and again, is to be exercised unless the tribunal is satisfied that the patient's mental illness then "warrants his detention in hospital for medical treatment".

71. For civil patients, there is broad symmetry in the statutory tests for admission for assessment and detention for treatment in articles 4(1) and 12(1) of the 1986 Order on the one hand, and the statutory test for discharge in article 77(1) on the other.

72. So far as the statutory test for admission for assessment is concerned, "detention for treatment" must mean actual detention in hospital for in-patient treatment. Once admitted and detained, the detained patient remains "liable to be detained" as long as the authority for detention remains extant. So, "liable to be detained" simply means that the patient remains subject to an order authorising their detention, whether the patient is then detained in hospital or is on article 15 leave in the community. It also follows from article 15 that detention in hospital need not be continuous and that a patient does not cease to be liable to be detained merely by virtue of being absent on article 15 leave. The leave may be revoked in appropriate circumstances and the patient recalled to hospital at any time, unless and until the authority for detention lapses or is discharged, and accordingly, even when on leave the patient still has a hospital at which he or she is detained when not on leave: see *R v Barking Havering,* referred to above (where Lord Woolf MR differed from McCullough J's construction of these provisions in *R v Hallstrom ex p W*; *R v Gardner ex p L* [1986] QB 1090 that was referred to and relied on by the NICA in this case).

73. A civil patient can apply for consideration under article 77(1) for discharge. The question then is whether the patient's mental disorder is of a nature or degree that meets

the need for detention. That question is not answered by whether the patient is then on article 15 leave. There is no equivalence between the two and they are not to be equated. Article 77(2) makes that clear because in a case where the tribunal is satisfied that the patient is still suffering from a mental disorder that warrants his detention in hospital for medical treatment and that discharge would create a substantial likelihood of serious harm, article 77(2) provides for article 15 leave as an alternative to discharge. The tribunal has discretion to recommend the grant to the patient of leave of absence "with a view to facilitating his discharge on a future date". In other words, article 77 expressly envisages that the tribunal can conclude that it remains necessary for the patient to be detained in a hospital for medical treatment, but still recommend him for leave with a view to facilitating his discharge on a future date. It also makes clear that the leave does not have to be sandwiched between two periods of detention.

74. The clear implication of these provisions is that the legislative scheme permits a review tribunal to decide that a civil patient's continued detention is necessary (because the statutory conditions are still met) and simultaneously consider that article 15 leave should be granted. The further implication is that there is no inconsistency between detention for treatment in hospital and authorised leave for treatment in the community.

75. Although article 77(2) is not imported into article 78(1) for restricted patients, in my judgment, it gives guidance as to how article 77(1) should be interpreted, including for the purposes of article 78(1). The power to recommend the grant of article 15 leave, though not expressly referred to in article 78, is undoubtedly available in the case of a restricted patient who, having been admitted and detained in a hospital for medical treatment, is deemed pursuant to article 47(2)(a) "liable to be detained … until … absolutely discharged".

76. A review tribunal considering discharge under article 78(1)(a) (and therefore tasked with considering article 77(1)(a) and (b)) is engaged in a prospective assessment that inevitably involves uncertainty and whose aim is to seek to identify the least restrictive means of best achieving any necessary ongoing medical treatment. Provided it is relevant, there is no restriction on the matters that can be considered as part of that assessment. It is an exercise of judgement that requires consideration of the patient's condition, the whole course of medical treatment past and present, and what might be required in future. The circumstances must be looked at holistically and in the round.

77. There is express power under article 78(4)(b) for the tribunal to attach conditions to any proposed discharge plan. This might simply involve a recall condition. There might, for example, be detailed conditions about not visiting or living near a school, or not contacting certain people. It may well be that it is only because the tribunal can impose, monitor, and enforce a range of conditions, that it can be satisfied that the patient no longer warrants detention in hospital or that he or she no longer poses a

threat. In other words, the prospects of what will happen to the patient on release, necessarily feed back into the question whether the test for discharge is satisfied.

78. The same is true in relation to article 15. Since the assessment of whether the statutory conditions for detention continue to be met involves consideration of the least restrictive way of delivering ongoing medical treatment, it is entirely consistent with this consideration for the tribunal to have regard to the availability of treatment in the community by way of article 15 leave of absence. Article 15 leave should be viewed as part of a continuing responsive programme, during which the need for treatment in hospital and on leave is being reassessed depending upon the circumstances and the patient's response to treatment and testing. Accordingly, a tribunal can and should consider any proposal to grant article 15 leave as a means of assessing the patient's ability to manage his or her condition in the community and to test the plans that are likely to be put in place, if or when, the patient leaves hospital.

79. Importantly, 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. Treatment received in detention may have suppressed symptoms or behaviours deriving from the mental disorder. Article 15 leave is simply a means of managing risk and testing whether the treatment so far provided to the patient (and/or any ongoing medication regime to be maintained outside hospital) has sufficiently alleviated the disorder and/or its symptoms so that the medical disorder no longer necessitates detention.

80. It follows that, for the purpose of applying article 77(1) as it is incorporated into article 78(1)(a), a period of leave under article 15 of the 1986 Order can be regarded as detention in hospital for medical treatment so that the expectation of the patient being granted such leave is entirely consistent with a decision of the tribunal that it is not satisfied as to the matter set out in article 77(1)(a).

81. The NICA's observation that article 15 leave is not to be used to legitimise detention in the community when the grounds for detention in hospital for medical treatment no longer exist or for avoiding the difficulties presented by *MM* is unfortunate. While I agree that article 15 leave should not be used illegitimately, that is not what the review tribunal did in this case, and I see no justification for this implied criticism. To the contrary, the proposed treatment plan included a regime of care, support, rehabilitation, and supervision that constituted "a significant amount of medical supervision and treatment" on the review tribunal's findings. Initially the medical supervision and treatment was planned to take place in the community in circumstances that were more restrictive than those then imposed on RM in hospital. There was uncertainty as to how RM would cope with leave of absence. It was evident from Dr Devine's evidence that the package of care, treatment, support and supervision that would be in place in the community would be tested by the leave of absence and that it

would have to be developed and adapted to meet RM's needs. This was "medical treatment" under the 1986 Order. The review tribunal also concluded that it was necessary for the treatment to continue while RM met the statutory conditions for detention and remained liable to recall from leave. In other words, the review tribunal's conclusions meant that even when on leave, RM has a hospital at which he is detained when not on leave.

82. However, in agreement with the NICA (though for different reasons) I do not regard the "significant component" test as necessary, or indeed helpful, when deciding whether a patient's ongoing treatment is treatment in a hospital. The test has no statutory basis and is a gloss on the statutory words. I agree with the submission on behalf of RM that it risks unnecessary treatment being devised in an effort to ensure that the test is met and is arbitrary and subject to happenstance. For these reasons, it should no longer be followed. As explained, even when on authorised article 15 leave, the patient has a hospital at which he or she is detained when not on leave, and article 15 (with the liability to recall in article 15(5)) itself provides a sufficient connection to a hospital for a patient who is liable to be detained.

83. For all these reasons, I would allow the appeal and restore the decision of the review tribunal that the statutory test for detention in hospital for medical treatment was met notwithstanding the responsible medical officer's decision that RM should reside on a long-term basis in a community setting, initially on article 15 leave.

ANNEX

Provision	**Mental Health (Northern Ireland) Order 1986**	**Mental Health Act 1983**
Definition of mental disorder	Article 3	Section 1
Admission for assessment	Article 4	Section 2
Detention for treatment	Article 12	Section 3
Leave of absence from hospital	Article 15	Section 17
Powers of courts to order hospital admission or guardianship.	Article 44	Section 37
Powers of courts to order hospital admission or guardianship	Article 47	Section 41
Power to discharge patients other than restricted patients	Article 77	Section 72
Power to discharge restricted patients.	Article 78	Section 73