

Casenotes

A Private Function

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R (Mersey Care NHS Trust) v Mental Health Review Tribunal; Ian Stuart Brady (First Interested Party) and Secretary of State for the Home Department (Second Interested Party)
Queen's Bench Division (Administrative Court), Beatson J, 22 July 2004
EWHC (Admin) 1749

A MHRT may sit in private even though a patient requests a public hearing and the ECHR presumes in favour of such a course

Introduction

Ian Stuart Brady is a restricted patient, who, having been transferred from prison, is detained at Ashworth Hospital.² The Mental Health Review Tribunal ('MHRT') decided that when it next considered his case, it would do so in public. The Trust challenged that decision and ultimately, its challenge was successful.

The Facts

In 2000, Mr Brady had made an unsuccessful attempt to stop Ashworth Hospital force-feeding him when he was on hunger strike.³ He hadn't previously taken part in MHRT proceedings concerning his case.⁴ Now, however, he wished to make public his complaints against the Hospital and his desire to be moved from there.

Mr Brady asked that his next hearing take place in public and the MHRT granted his request. (In the three years to January 2003, no more than one of approximately 600 MHRT hearings at Ashworth Hospital had been in public.⁵)

Mersey Care NHS Trust, which is "the managers" of Ashworth Hospital for the purposes of the Mental Health Act 1983 ('MHA 1983'), sought to challenge the Tribunal's decision by way of

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2 MHA 1983, s 47/49

3 *R v Collins and Ashworth Hospital Authority, ex parte Brady* [2000] *Lloyds Medical Reports* 355

4 Judgment, para 2

5 *Ibid.*, para 1. On 1 March 2005, *Broadmoor Hospital*

was the venue for a brief, public MHRT hearing in the case of Mahmoud Abu Rideh, who was being held as a suspected international terrorist. The hearing was adjourned pending the conclusion of proceedings concerning Mr Abu Rideh in the Special Immigration Appeals Commission. (See www.guardian.co.uk/guardianpolitics/story/0,,1428266,00.html)

proceedings for judicial review. Neither the MHRT nor the Home Secretary took any part in the judicial review proceedings.⁶

Ultimately, the matter came before Mr Justice Beatson in the Administrative Court. Mr Brady was refused permission to attend the hearing. Although legal argument took place in public, the factual and medical aspects of the case were heard in private.⁷

The Law

The law relevant to the case consisted of the MHRT rules on public hearings, the general law of contempt, and the right to a fair trial, which is to be found in Article 6 of the European Convention on Human Rights ('ECHR'). The Court also found it necessary to refer to decisions concerning the adequacy of reasons for MHRT decisions.

1. The Tribunal Rules

Under section 78 of MHA 1983, the Lord Chancellor may make rules governing MHRT procedure. In particular, those rules may make provision:

“(e) for enabling a tribunal to exclude members of the public, or any specified class of members of the public, from any proceedings of the tribunal, or to prohibit the publication of reports of any such proceedings or the names of any persons concerned in such proceedings.”⁸

Such provision is made in the Mental Health Review Tribunal Rules 1983,⁹ rule 21 of which states:

“(1) The tribunal shall sit in private unless the patient requests a hearing in public and the tribunal is satisfied that a hearing in public would not be contrary to the interests of the patient.

(2) Where the tribunal refuses a request for a public hearing or directs that a hearing which has begun in public shall continue in private the tribunal shall record its reasons in writing and shall inform the patient of those reasons.

(3) When the tribunal sits in private it may admit to the hearing such persons on such terms and conditions as it considers appropriate.

(4) The tribunal may exclude from any hearing or part of a hearing any person or class of persons, other than a representative of the applicant or of the patient to whom documents would be disclosed in accordance with rule 12(3), and in any case where the tribunal decides to exclude the applicant or the patient or their representatives or a representative of the responsible authority, it shall inform the person excluded of its reasons and record those reasons in writing.

(5) Except in so far as the tribunal may direct, information about proceedings before the tribunal and the names of any persons concerned in the proceedings shall not be made public.

(6) Nothing in this rule shall prevent a member of the Council on Tribunals from attending the proceedings of a tribunal in his capacity as such provided that he takes no part in those proceedings or in the deliberations of the tribunal.”

It was rule 21(5) that was to excite most debate in this case.

6 *Ibid.*, para 3

8 MHA 1983, s 78(2)(e)

7 *Ibid.*, para 4

9 SI 1983 No 942

2. Contempt of court

A large part of this case turned on the MHRT's understanding of the law of contempt. It is established law that the MHRT is a 'court' within the meaning of the Contempt of Court Act 1981¹⁰ and therefore, that the law of contempt applies to its proceedings.¹¹ The Court considered contempt in both private and public proceedings.

(a) *Contempt in private proceedings*

The contempt provisions concerning court hearings in private are set out in section 12 of the Administration of Justice Act 1960, which states:

“(1) The publication of information relating to proceedings for any court sitting in private shall not of itself be contempt of court except in the following cases, that is to say –

[...]

(b) where the proceedings are brought under [Part VII of the Mental Health Act 1983] or under any provision of that Act authorising an application or reference to be made to a [MHRT] or to a county court ...

[...]

(e) where the court (having power to do so) expressly prohibits the publication of all information relating to the proceedings or of information of the description which is published.

(2) Without prejudice to the foregoing subsection, the publication of the text or a summary of the whole or part of an order made by a court sitting in private shall not of itself be a contempt of court except where the court (having power to do so) expressly prohibits the publication.

(3) In this section references to a court include references to a judge and to a tribunal and to any person exercising functions of a court, a judge or a tribunal; and all references to a court sitting in private include references to a court sitting in camera or in chambers.

(4) Nothing in this section shall be construed as implying any publication is punishable as contempt of court which would not be so punishable apart from this section.”

When interpreting section 12, the Court found that even where a case was held in private and the 1960 Act applied, the power to prohibit reporting of the proceedings would not be limitless.¹² Likewise, where a MHRT sat in private, some information about its proceedings might be published,¹³ including:

- (i) “the fact that a named patient has made an application to the tribunal for his discharge”;
- (ii) “information as to the date, time or place at which the tribunal hearing had occurred or was to occur”;

¹⁰ *Contempt of Court Act 1981, s 19*

¹¹ *Pickering v Liverpool Daily Post & Echo Newspapers plc* [1991] 2 AC 370

¹² *Judgment, para 13. See: Re S, a Child (identification:*

restriction on publication) [2003] EWCA Civ 936, per Lord Phillips MR

¹³ *Pickering v Liverpool Daily Post and Echo Newspapers plc, supra*

(iii) “the fact that a patient has been released from detention”.¹⁴

(b) Contempt in public proceedings

The law about contempt of *public* proceedings is contained in the Contempt of Court Act 1981. In summary:

- (i) One who publishes information about legal proceedings (including MHRT proceedings) conducted in public may be guilty of a criminal offence regardless of his/her intent.¹⁵
- (ii) However, if s/he is to be so guilty, the proceedings in question must be still ‘active’ at the time of publication¹⁶ and it must create a substantial risk that the course of justice will be seriously impeded or prejudiced.¹⁷
- (iii) A person will not be guilty of contempt of public proceedings if what s/he publishes is a fair and accurate report of legal proceedings held in public, which is published contemporaneously and in good faith.¹⁸

Furthermore, even though a court may prohibit or restrict publication of information about public proceedings,¹⁹ such a course would have to be justified under ECHR, Article 10.²⁰

3. Cases

Article 6 of the ECHR states, in part:

“1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”

The Court said it was agreed that cases under both domestic law and Article 6 recognise the importance of judicial proceedings being held in public.²¹ This is because:

- (i) they deter a court from behaving inappropriately;
- (ii) they enable the public to know that justice is being administered impartially; and
- (iii) they help to ensure that evidence becomes available that would not be so if the case were heard in private.²²

¹⁴ Judgment, para 13. (Hereafter, this information is said to have been rendered disclosable by ‘the Pickering conditions’.)

¹⁵ Contempt of Court Act 1981, s 1

¹⁶ *Ibid.*, s 2(3)

¹⁷ *Ibid.*, s 2(2)

¹⁸ *Ibid.*, s 4(1)

¹⁹ See, for example, *ibid.*, s 4(2) or s 11

²⁰ Judgment, para 12. Article 10 contains the right to freedom of expression.

²¹ *Ibid.*, para 13. See: *Schuler-Zraggen v Switzerland* (1994) 16 EHRR 405, para 66; *Campbell and Fell v United Kingdom* [1985] 7 EHRR 165; *Ex parte Guardian Newspapers* [1999] 1 WLR 2130, at pp 2144 & 2148; *Clibbery v Allan* [2002] EWCA Civ 45, Fam 261; *Scott v Scott* [1913] AC 417, 437

²² *R v Legal Aid Board, ex parte Kaim Todner* [1999] QB 966, per Lord Woolf MR at 976 & 977

The Court said that under Article 6, a person might be permitted to waive his/her right to a public hearing, but only if to do so would not run counter to the public interest.²³ The cases established that a private hearing might be justified in some circumstances – for example, proceedings relating to minors and MHA 1983 proceedings.²⁴

Ultimately, the Court said, the authorities showed that the requirement that justice be done must take precedence over the preference for a public hearing.²⁵ Furthermore, Article 6 recognised that a public hearing was not required where considerations of security or public order dictated otherwise, or where it would place a disproportionate burden on the state to hold one.²⁶ In fact, the Court found that Article 6 places a presumption in favour of private hearings where such was necessary in the interests of morals, public order or public security, or where it was required by the interests of juveniles or the protection of *private life*.²⁷ It would be for those who desired a public hearing to justify it.²⁸

4. Tribunal reasons

As for the reasons a MHRT must give for its decision, the Court found that the relevant provisions had been set out by the Court of Appeal in the case of H.²⁹ In particular, and as the Hospital’s counsel had suggested, the Court of Appeal held that:

- “1. Reasons must enable the parties to understand why a decision maker has reached his decision. Both the detained person and members of the public are entitled to adequate reasons.
2. If there is a conflict of expert evidence, there must be an explanation as to why the evidence of one expert is preferred to another, and the court must ‘enter into the issues’ canvassed before it.
3. Reasons should demonstrate the tribunal grappled with the major issues.
4. There should be no reliance on the argument that a mental health review tribunal decision is addressed to an ‘informed audience’, to justify, for example, the failure to set out material oral evidence or arguments made during the hearing.”³⁰

In addition, and as Mr Brady’s counsel had suggested, it would seem that in H, the Court of Appeal also held that:³¹

- “5. The adequacy of reasons must be judged by reference to what is demanded by the issues which caused the decision.”³²

And finally, as the Court itself noted:³³

- “6. The mere recitation of evidence or submissions is no substitute for giving reasons.”³⁴

23 *Schuler-Zraggen v Switzerland*, *supra*

24 *R v Legal Aid Board, ex parte Kaim Todner*, *supra*

25 *Scott v Scott*, *supra*

26 *Campbell and Fell v United Kingdom*, *supra*

27 *B and P v United Kingdom* (2002) 34 EHRR 529, para 39

28 *Clibbery v Allan*, *supra*, paras 81–82 & 123

29 *R (H) v Ashworth Hospital Authority* [2003] 1 WLR

127, at paras 76, 70, 74 & 79, respectively

30 *Judgment*, para 75

31 *R (H) v Ashworth Hospital Authority*, *supra*, per Dyson LJ at para 76

32 *Judgment*, para 76

33 *Ibid.*, para 77

34 *L v Devon County Council* [2001] EWHC Admin 958

Previous Hearings

The MHRT had two opportunities to consider whether Mr Brady's hearing should take place in public. It reached different conclusions on each occasion.

The MHRT first considered the matter at a preliminary hearing. It was argued on Mr Brady's behalf that the presumption in rule 21 in favour of a private MHRT hearing offended against the presumption of open justice and therefore breached section 78 of MHA 1983 and Article 6(1) of the ECHR. The MHRT did not agree, and it found against Mr Brady. Subsequently, he was denied permission to seek judicial review of that decision.

Mr Brady made a further application for a public hearing when the substantive MHRT hearing began on 4 September 2003. This time, the Tribunal found for him.

Mersey Care NHS Trust told the MHRT that Mr Brady did not have the capacity to make a request for a public MHRT hearing, and that such a hearing would be inappropriate in view of its impact, both in its own right and in terms of the publicity it would generate, upon clinical matters and wider security issues. For Mr Brady, it was argued that security considerations were irrelevant as far as the MHRT Rules were concerned, and that in any event, appropriate arrangements could be made in that regard. The MHRT was assured that Mr Brady recognised that by seeking a public hearing he might be waiving his right to medical confidentiality.³⁵

The MHRT held that:

1. A hearing must be in private unless the patient requests a public hearing and it is not contrary to his/her interests to hold one.
2. According to the test laid down in *Re C*,³⁶ it was not satisfied that Mr Brady lacked the capacity to request a public hearing.³⁷
3. A public hearing would not be contrary to Mr Brady's interests.

The Court said that this last finding was for two chief reasons. First, that it was possible under rule 21(2) and (4) for a MHRT to open its proceedings in public, then exclude from the hearing everyone save the parties,³⁸ and finally announce its decision in public once again.

The second reason the MHRT decided to conduct proceedings in public was its belief that it had sufficient powers to control the publication of information about such proceedings. It said that in *Pickering*, the House of Lords had held that the combined effect of rule 21(5) of the MHRT Rules 1983 and section 12 of the Administration of Justice Act 1960 was:

1. That some information about a MHRT hearing may be published: "the fact that the tribunal application has been made by a named patient; the fact that an application or reference to a tribunal will sit, is sitting, or has sat at a certain date time or place; a direction made by a tribunal that the patient be discharged either absolutely or conditionally."³⁹

³⁵ *Judgment*, para 17

³⁶ *Re C (adult: refusal of medical treatment) [1994] 1 All ER 819*

³⁷ *Judgment*, para 18

³⁸ *In fact, under r 21(4), a MHRT may exclude anyone from the proceedings, save a representative of the applicant or (if different) of the patient.*

³⁹ *Quoted in Judgment*, para 22

2. That some information should not be published: “the recorded reasons for the tribunal’s decision to the extent that they disclosed the evidential and other material on which it is based; any conditions imposed by the tribunal.”⁴⁰
3. That this applies whether the MHRT hearing is in private or public.
4. That rule 21(5) of the MHRT Rules 1983 enables a tribunal to control the extent to which information is made public, and the rule is “underpinned by the contempt laws”.

Mersey Care NHS Trust sought judicial review of the decision to hold a public hearing. In the course of the judicial review proceedings, the Court would be particularly critical of the findings at 3 and 4.

The Decision

The Court found against Mr Brady. It did so under three discrete heads.

1. The power of the MHRT to control publicity

The MHRT believed that if it held a public hearing, it could address the Trust’s concerns and also protect Mr Brady’s interests. It would do this by: (a) invoking rule 21(4) of the MHRT Rules 1983, and by excluding the public and press from all or part of the hearing; or (b) by using its power under rule 21(5) to direct that information about the proceedings should not be made public. It was the second of these that was contested. The Trust thought the MHRT was irrational or unreasonable to imagine that such a thing was possible.

The Court identified two questions as being relevant under this head:

- (a) Did the MHRT think that the *Pickering* conditions applied to a public hearing?
- (b) Does rule 21(5) apply to a public hearing, and if so, does it enable the MHRT “to prohibit the publication of evidence and other information revealed at the public hearing and the reasons for the tribunal’s decision to the extent that they disclose the evidential and other material on which it is based?”⁴¹

(a) Contempt of a public hearing

The Court found that the MHRT *did* believe that the *Pickering* conditions applied to a public hearing.⁴² This belief was wrong. As the Court noted, in *Pickering*,⁴³ one of the judges had stated that the protected privacy “attaches to the substance of the matters *which the court has closed its door to consider*.”⁴⁴ The Court found that the Tribunal’s mistaken understanding of *Pickering* had influenced its decision that a public hearing would not be contrary to Mr Brady’s interests.

(b) Rule 21 and the public hearing

The Court held that the Tribunal *did* believe that rule 21(5) applied to a public hearing, and that it was right to do so.⁴⁵ Therefore, the next question was whether the MHRT had properly understood its powers under the Rules.

40 *Ibid.*

41 *Judgment*, para 44

42 *Ibid.*, para 45

43 [1991] 2 AC 371, 413 at 423

44 *Judgment*, para 46 (*original emphasis*)

45 *Ibid.*, para 50

For Mr Brady, it was argued that any error as to the ambit of the contempt provisions was irrelevant because, in rule 21(5), the MHRT had sufficient power to control publicity. However, the Court suggested that the Tribunal's error about *Pickering* might be material in this regard too, and it pointed out that that MHRT had declared that its confident pronouncement on the sufficiency of the rule 21(5) power was made "in the knowledge that it is underpinned by the contempt laws."⁴⁶ This declaration was to prove significant.

There had been considerable press interest in Mr Brady's next MHRT application, and the Court said it was clear that in opting for a public hearing the Tribunal had been influenced by the belief that it had sufficient power to control the publicity such a hearing might attract. However, the MHRT had misunderstood *Pickering*, and it had also assumed "that Rule 21(5) applies in the same way whether the hearing is public or private". Therefore, the Court concluded:

"In view of [the Tribunal's] erroneous approach to the decision in [*Pickering*], and the assumption in [its] decision that Rule 21(5) applies in the same way whether the hearing is public or private, [...] it is not possible to infer that the general reference to the protection of the contempt laws encompassed an assessment by the tribunal of the real difficulties [...] in enforcing any restrictions, or that the tribunal had these difficulties in mind in reaching its decision."⁴⁷

The "real difficulties" referred to had been identified by the Trust's counsel:⁴⁸

- (i) In a public hearing, the Contempt of Court Act 1981 would only apply where publicity would create a substantial risk that the administration of justice would be seriously impeded or prejudiced.⁴⁹
- (ii) Likewise, for there to be contempt of court, it would be necessary to show that the proceedings were still 'active' at the time of publication.⁵⁰
- (iii) Finally, any prohibition on publication would only be lawful if it could be justified under ECHR, Article 10(2).⁵¹

Because of the MHRT's "general reference to the protection of the contempt laws", the Court felt unable to decide whether it had erred in law or merely failed to take into account relevant considerations as to the exercise of its Rule 21 power. There were two possibilities:

"If the tribunal assumed that the strict liability contempt rule would give the same protection as the *per se* rule in section 12, it fell into error. If the tribunal did not take into account the difficulties in enforcing any prohibition or restriction as to the publication of information given at a public hearing in concluding that to hold a public hearing was not contrary to Mr Brady's interests, it failed to take account of relevant considerations on a matter which its decision shows was central to its conclusion."⁵²

46 *Ibid.*, para 52

47 *Ibid.*, para 55. (Of course, the Court also held that the MHRT had been correct in its belief that rule 21(5) applied equally to private and public proceedings; see Note 45, *supra*.)

48 *Ibid.*, para 53

49 *Contempt of Court Act 1981*, s 2(2)

50 *Ibid.*, s 2(3)

51 Article 10(2) contains exceptions to the right to freedom of expression, and it provides that the right may be interfered with where the interference is 'proportionate' and, for example, necessary "for the protection of health or morals" or for "the protection of the rights and freedoms of others".

52 *Judgment*, para 56

There were “analytical differences” between the two courses, but they made no difference to the overall result: the MHRT had acted unlawfully.

2. Failure to consider relevant considerations

The Court found that when considering whether a public hearing would be contrary to the interests of a patient, a MHRT must take into account its powers to prevent or limit publication of information about the proceedings. However, in this case the MHRT had misunderstood those powers and, the Court concluded, “This error affected its assessment of whether holding such a hearing would be contrary to Mr Brady’s interests.”⁵³

Because the MHRT had over-estimated its powers, there were two particular factors to which it had not given proper consideration.

(a) Security, public order and the interests of other patients

The Court found that although the only interests the Rules require the MHRT to consider are those of the patient, it may also take account of wider considerations when considering whether to hold a public hearing.⁵⁴

Even though Rule 21(1) may not *require* a public hearing, the MHRT will still have *discretion* to hold one, and in deciding how to exercise that discretion, the MHRT must take into account “the law and the well-known public law principles of propriety of purpose and relevance”, and it must consider such relevant matters as are brought to its attention.⁵⁵

The Judge found support for this approach in the Strasbourg jurisprudence:

- (i) In deciding whether to depart from the principle of a public hearing, a MHRT might take account of considerations of public order and security, and whether requiring a public hearing would impose a disproportionate burden on the state.⁵⁶
- (ii) The decision whether to depart from a public hearing must be made with regard to the wider public interest.⁵⁷

The Court found that two security concerns were also relevant to the question of whether a public MHRT hearing would be contrary to Mr Brady’s interests. They are considered below.⁵⁸

(b) The best interests of the patient

The Court found that in considering whether a public hearing would be contrary to the interests of a patient, a MHRT must consider, not only the patient’s immediate and short-term interests but also those in the medium and longer term after the conclusion of the tribunal proceedings.⁵⁹

In addition, the Court said that a MHRT should consider the extent to which a patient understands what it means to request and participate in a public hearing. Whilst the patient’s capacity would be relevant to the question of whether his/her request for a public hearing was *validly* made, a finding that s/he was capable in that regard did not necessarily mean that s/he understood the likely *consequences* of the hearing being in public:

53 *Ibid.*, para 60

54 *Ibid.*, para 63

55 *Ibid.*

56 *Campbell and Fell v United Kingdom*, *supra*

57 *Schuler-Zraggen v Switzerland*, *supra*

58 *See section 2(b)*

59 *Judgment*, para 55

“The threshold for capacity is [...] low and where concerns as to the nature and extent of a patient’s understanding about the likely impact of his request are raised (as they were in this case [...]) they are clearly relevant to the determination of whether a hearing would be contrary to the interests of that patient, a determination which the tribunal is required to make.”⁶⁰

In this regard, too, the MHRT had fallen short:

“In the part of its decision dealing with whether a public hearing would be contrary to Mr Brady’s interests, the tribunal makes no reference to the nature and extent of Mr Brady’s understanding about the likely impact and ramifications of the hearing being in public or the [Trust’s] concerns [about the risk to Mr Brady of such a hearing]. It appears only to have considered Mr Brady’s understanding in the context of its determination as to his capacity to make the request for a public hearing.”⁶¹

This aspect of the MHRT’s decision is dealt with further, below.⁶²

The Court found that the following two security concerns were also relevant to the question of whether a public MHRT hearing would be contrary to Mr Brady’s interests:

- (i) Mr Brady’s own safety at a public hearing (which might in itself justify a departure from the Article 6 presumption in favour of a public hearing⁶³).
- (ii) The impact on Mr Brady’s mental state of the considerable security that would be required if a public hearing were to be held.

Whilst it was possible that the MHRT *had* considered these concerns, and concluded that it was possible for suitable arrangements to be put in place, such was not apparent from its decision.⁶⁴ Again, the inadequacy of the reasons given by the MHRT for its decision is considered further, below.⁶⁵

3. Inadequate reasons for MHRT decision

The Court found that although they occupied five pages, the reasons given by the MHRT for ordering a public hearing did not meet the standard set by the Court of Appeal in *H*.

First, those reasons did not properly record the Tribunal’s findings as to the concerns of Mersey Care NHS Trust about security and the adverse effect of a public hearing upon Mr Brady’s mental state:

“The [Trust’s] concerns about security are mentioned in the summary of [its] submissions but are simply not addressed in the tribunal’s decision. The tribunal’s decision does not enable the [Trust], [...] to understand why its concerns have been set aside or what security arrangements the tribunal envisages. It does not display that it has ‘grappled’ with the issue, which, in view of Mr Brady’s profile, is a serious and substantial one.”⁶⁶

⁶⁰ *Ibid.*, para 66

⁶¹ *Ibid.*, para 67

⁶² See section 3

⁶³ *Campbell and Fell v United Kingdom*, *supra*, at paras 86–88

⁶⁴ *Judgment*, para 72

⁶⁵ See section 3

⁶⁶ *Judgment*, para 77

Second, the reasons did not properly record its conclusion as to whether the level of Mr Brady's capacity was such that a public hearing would be contrary to his interests. The Tribunal should have considered, "the nature and extent of his understanding about the likely impact and ramifications of the hearing being in public."⁶⁷

There were two further possibilities:

- (a) That the MHRT had rejected the evidence, given on behalf of Mersey Care NHS Trust, that because of Mr Brady's previous "aversion to publicity", a public hearing would have such an adverse impact on his clinical condition that it must be judged contrary to his interests. However, the Court said, such a finding "is not discernible from the decision."⁶⁸
- (b) That the MHRT had preferred the written evidence provided by a psychiatrist instructed on behalf of Mr Brady. However, the MHRT had pronounced this evidence to be "of limited assistance". Although Mr Brady's RMO was hampered by the fact that his patient would not discuss matters with him, he had had "long involvement" with Mr Brady's treatment, "particular weight should be given to his views",⁶⁹ and when those views were rejected, "there is a particular need for reasons to be given."⁷⁰

However, the Court found that the MHRT *had* given adequate reasons for its conclusions as to Mr Brady's capacity and, in particular, the conclusion that he possessed sufficient of it to request a public hearing. In fact, the only evidence as to Mr Brady's capacity to *request* a public hearing – as distinct from his capacity to understand its possible *implications* – was in a report from his RMO that had been prepared for the MHRT. In this report the RMO stated,

"that, as Mr Brady had refused to discuss his reasons for wanting a public hearing with him, he was unable to comment on his motivation and its possible relationship to his disorders with any certainty."⁷¹

Then, citing the opinion of a colleague that was referred to in the judgment of Maurice Kay J in Mr Brady's force-feeding case,⁷² the RMO said, "Mr Brady did not have capacity in relation to his decision to refuse food and I am concerned that this may still be the case."⁷³

The High Court said this statement was "the high point of the evidence as to lack of capacity".⁷⁴ There had been no oral evidence on the question of Mr Brady's capacity to request a public hearing, and the Trust had placed "significant reliance" on the decision in the force-feeding case, which had been "on a different issue four years ago".⁷⁵ Notwithstanding that evidence, the MHRT had concluded that it was not satisfied that Mr Brady's thinking was "so dominated that the decision to make the request [for a public hearing] was not a true one". This conclusion, the High Court said,

"addresses the issue raised by the RMO as to whether Mr Brady gives proper regard to the risks which he runs and enables the [Trust] to understand why the decision was reached."⁷⁶

67 *Ibid.*, para 78

68 *Ibid.*

69 *Here, the Court cited R (N) v Dr M [2003] 1 WLR 562, para 39.*

70 *Judgment*, para 78

71 *Ibid.*, para 80

72 *R v Collins & Ashworth Hospital Authority, ex parte Brady, supra*, at para 35

73 *Judgment*, para 80

74 *Ibid.*, para 81

75 *Ibid.*

76 *Ibid.*

The (limited) evidence before the MHRT enabled it to demonstrate that it had “grappled” with this issue, even if it had done so succinctly.⁷⁷

Conclusion

Accordingly, the Court found that the MHRT decision of 4 September 2003 was flawed. It ordered that the decision be set aside and the matter remitted to the MHRT for re-hearing.

Comment

The judgment of Beatson J is not always easy to follow. Some of its key conclusions are founded on inferences that are more apparent (at least to the learned Judge) than real, and the shifting sands of its logic always threaten to engulf the unwitting reader.

To some eyes, the judgment might seem to accord rather too much weight to the Tribunal's apparent misunderstanding of the *Pickering* case, and rather too little to the ambit of rule 21(5) and its impact upon the MHRT.

The Court believed the MHRT had concluded that there was a direct link between rule 21(5) and the contempt provisions exemplified by *Pickering*. However, any such belief is surely a creature of inference, not of hard evidence. There is a three-fold possibility that the Court seems to have been unwilling to countenance: that rule 21(5) gives the MHRT all the power it requires in public proceedings; that in consequence, the MHRT need have no recourse to the general laws of contempt; and that the MHRT knew this. The Court was prepared to infer that the MHRT believed its rule 21(5) power to be derived from *Pickering* merely because there was no evidence to the contrary. That may not have been an appropriate course to take.

There was one inference, however, that the Court was not prepared to draw. It declared itself unsatisfied that the MHRT had taken full account of the difficulties it might face in enforcing restrictions on publication. The Court made this declaration because, it said, the Tribunal had assumed “that rule 21(5) applies in the same way whether the hearing is public or private”. However, closer inspection of the Tribunal's reasons reveals that this assumption was based upon an assessment of the *combined* effect of rule 21(5) and section 12 of the Administration of Justice Act 1960 (as the Tribunal believed it to have been summarised in *Pickering*). While it may be the case that the contempt provisions do not apply to a public hearing, that – as the Court's own judgment in this makes clear – is not so of rule 21(5). Of the MHRT Rules it assuredly *can* be said that they apply in the same way whether the Tribunal hearing is public or private. Therefore, it might be argued, the Court should not have allowed the passage upon which it alighted to cast doubt upon the Tribunal's assessment of its powers.⁷⁸

There are other key questions about the Court's approach to this case. Was it right to distinguish between the capacity to *request* a public hearing and that required to understand its *implications*? Further, having decided that Mr Brady had sufficient capacity for the first task, was the Court justified in refusing to find that he possessed it for the second? Was the Court correct to impose a capacity test of any kind? The ‘c’ word is not mentioned in rule 21. Surely the issue is dealt with

⁷⁷ *Ibid.*

⁷⁸ Compare paras 22 & 24 of the Judgment with para 72 of the Judgment

when the MHRT determines the patient's 'best interests': the lower his/her level of capacity the more likely it is that the Tribunal will contradict him/her in that regard.

And there is a further point that might cause concern. When finding that the MHRT had given sufficient reasons for its decision on the first capacity question, the Court said it had rightly considered, "whether Mr Brady gives proper regard to the risks which he runs." But aren't the 'risks' Mr Brady 'runs' properly part of the second capacity question? He could hardly be 'running' a 'risk' merely by *requesting* a public hearing (unless, perhaps, things have come to such a pass within the MHRT secretariat that its response is likely to be a physical one). Having insisted on two discrete capacity questions, did not the Court hopelessly confuse the two?

This decision provides a further illustration of the relative weakness of some parts of the European Convention on Human Rights. It would appear that the force of Article 6 is diminished by the jurisprudence it has spawned. Its preference for a 'public hearing' is clearly no more than that, and the Article itself is far from the statement of unwavering principle that some have supposed it.

Mr Brady has not enjoyed good fortune when challenging the organs of the state. He failed to stop Ashworth Hospital force-feeding him and now he has failed to compel the MHRT to hear his case in public. A common theme of both cases is, of course, Mr Brady's intellectual capacity. However much of it he is shown to have, it never seems to be enough. His force-feeding was lawful under the common law doctrine of 'necessity' because, although he was perfectly capable in most every other facet of his life, Maurice Kay J felt he was not so in relation to decisions about food refusal. Now, his acknowledged capacity to request a public hearing has been held not to imply that he is capable of understanding the implications of such a course. The Court has shown itself willing to make an inference against Mr Brady from the mere absence of information to support him.

In Mr Brady the State has indeed been fortunate in its choice of adversary, for, despite the merit his claims have sometimes seemed to have, and despite the skill and tenacity with which they have usually been pursued, its judges have always been able to find sufficient – and sufficiently *legal* – reasons to deny him what he wants, and to do so, moreover, for his own good.