IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
(MR JUSTICE HARRISON)

QBCOF 96/1188/D

Royal Courts of Justice
Strand
London W2A 2LL

Friday 25th July 1997

B e f o r e

THE PRESIDENT
(Sir Stephen Brown)

LORD JUSTICE SAVILLE
LORD JUSTICE SCHIEMANN

R E G I N A

v.

(1) MANAGERS OF THE NORTH WEST LONDON MENTAL HEALTH NHS TRUST
(2) SECRETARY OF STATE FOR HEALTH — Respondents

ex parte CLEVELAND PERCIVAL STEWART — Appellant

(Handed down judgment of
Smith Bernal Reporting Limited, 180 Fleet Street
London EC4A 2HD Tel: 0171 831 3183
Official Shorthand Writers to the Court)

MR RICHARD GORDON QC (instructed by Messrs Alexander & Partners, London NW10 4NE) appeared on behalf of the Appellant.

MR STEVEN KOVATS (instructed by The Treasury Solicitor) appeared on behalf of the Respondents.

J U D G M E N T
(As approved by the court)

THE PRESIDENT: This is an appeal from the Judgment of Mr. Justice Harrison delivered on the 19th July 1996. He then dismissed an application for Judicial Review against the managers of the North West London Mental Health NHS Trust brought on behalf of a patient called Cleveland Stewart. By his Notice of Motion the Applicant sought an order of certiorari to quash the decision of the North West London Mental Health NHS Trust to detain him in hospital pursuant to the provisions of Section 3 of The Mental Health Act 1983. He also sought a Declaration that there is no power under Section 3 of The Mental Health Act 1983 to detain a restricted patient who had been conditionally discharged and, secondly a declaration that the Applicant's detention by the NHS Trust under Section 3 of The Mental Health Act 1983 was unlawful. At the outset of the hearing the learned Judge granted leave to the Applicant to amend his Notice of Motion to include a claim for two further declarations. The first of these sought a declaration that the "Notes for the guidance of Supervising Psychiatrists" relating to the supervision and aftercare of conditionally discharged restricted patients was erroneous in law insofar as the notes for guidance sought to advise that individuals who were restricted patients and who had been granted conditional discharge might lawfully be detained under Section 3 of The Mental Health Act 1983. He sought a further declaration that the Code of Practice insofar as it provided similar advice was also erroneous in law. A claim for damages for false imprisonment was adjourned by agreement pending the decision on the legality of the Applicant's detention in hospital.

In 1991 the Applicant had been convicted at The Central Criminal Court of an offence of assault occasioning actual bodily harm. The Court made a hospital Order pursuant to Section 37 of The Mental Health Act 1983. Section 37 sub section 1 provides:

> "Where a person is convicted before the Crown Court of an offence punishable with imprisonment other than an offence the sentence for which is fixed by law, or is convicted by a Magistrates Court of an offence punishable on summary conviction with imprisonment, and the conditions mentioned in sub-section 2 below are satisfied, the Court may by order authorise his admission to and detention in such hospital as may be specified in the order."

The Court also made a restriction order under the provisions of Section 41 of the Mental Health Act 1983. The restriction was imposed without limit of time. Section 41 sub-section 3 provides:

> "The special restrictions applicable to a patient in respect of whom a restriction order is in force are as follows -
>
> (a) None of the provisions of Part 2 of this Act relating to the duration, renewal and expiration of Authority for the detention of patients shall apply and the patient shall continue to be liable to be detained by virtue of the relevant hospital order until he is duly discharged under the said Part 2 or absolutely discharged under Section 42, 73, 74 or 75 below:"

On the 29th July 1993 a Mental Health Review Tribunal (MHRT) conditionally discharged the Applicant pursuant to Section 73 of the Mental Health Act. Section 73 sub-section 1 provides:

> "Where an application to a Mental Health 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 such a tribunal, the tribunal shall direct the absolute discharge of the patient if satisfied -
>
> (a) As to the matters mentioned in paragraph (b)(i) or (ii) of Section 72 sub-section 1 above; and
>
> (b) That it is not appropriate for the patient to remain liable to the recalled to hospital for further treatment.
>
> (2) Where in the case of any such patient as is mentioned in sub-section 1 above the Tribunal are satisfied as to the matters referred to in paragraph (a) of that sub-section but not as to the matter referred to in paragraph (b) of that sub-section the Tribunal shall direct conditional discharge of the patient.
>
> (3) .....
>
> (4) Where a patient is conditionally discharged under this section -
>
> (a) He may be recalled by the Secretary of State under sub-section 3 of Section 42 above as if he had been conditionally discharged under sub-section 2 of that section"

Section 42 sub-section 3 provides:

> "The Secretary of State may at any time during the continuance in force of a Restriction Order in respect of a patient who has been conditionally discharged under sub-section 2 above by warrant recall the patient to such hospital as may be specified in the warrant."

Prior to his conditional discharge on the 29th July 1993 the Applicant had in fact been previously conditionally discharged in January of 1992 and recalled by the Secretary of State in March of 1993 before being conditionally discharged again on the 29th July 1993.

Sections 37 and 41 and 42 fall within Part 3 of The Mental Health Act 1983 which deals with the admission and detention of patients concerned in Criminal proceedings or under sentence.

On the 19th May 1995 the Applicant was admitted to hospital as in informal patient under the powers contained in Part 2 of The Mental Health Act. He discharged himself from hospital shortly afterwards on the 27th May 1995. On the 1st June 1995 the Hospital Trust admitted him and detained him in hospital under the powers contained in Section 3 of The Mental Health Act.

Section 3 sub-section 1 provides:

> "A patient may be admitted to a hospital and detained there for the period allowed by the following provisions of this Act in pursuance of an application (in this Act referred to as an Application for Treatment) made in accordance with this section.
>
> (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 illness, severe mental impairment, psychopathic disorder or mental impairment and his mental disorder is of a nature or degree which makes it appropriate for him to receive medical treatment in hospital; and
>
> (b) In the case of psychopathic disorder or mental impairment, such treatment is likely to alleviate or prevent a deterioration of his condition; and
>
> (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."

Sub-section 3 provides that:

> "An application for admission for treatment shall be founded on the written recommendations in the prescribed form of two registered medical practitioners....."

Section 17 gives power to the responsible medical officer to grant leave of absence from hospital to Part 2 patients subject to such conditions as he considers necessary in the interests of the patient or for the protection of other persons.

Section 20 provides that a patient admitted for treatment under Section 3 of The Mental Health Act can only be detained for six months unless it is renewed, in the first case, for a further six months and thereafter for twelve months renewable annually.

Section 23 gives power to discharge a patient detained under Part 2 of the Act. The discharge order in respect of a patient detained for treatment under Section 3 is made by the responsible medical officer, by the managers, or, subject to certain restrictions, by the nearest relative of the patient.

In the statutory framework of the Mental Health Act, Part 2 deals with what may be called for shorthand purposes "civil admissions" whilst Part 3 deals with the admission of patients concerned in criminal proceedings or under sentence.

The case for the Applicant which was rejected by the learned Judge is that a conditionally discharged restricted patient cannot be compulsorily detained in hospital in any manner other than by way of recall by the Secretary of State under Section 42 sub-section 3 of The Mental Health Act. He contends that the two parts of the Act, that is to say Part 2 and Part 3 are mutually exclusive. The single ground of appeal is in the following terms:

> "The learned Judge was wrong in law in holding that the Applicant could lawfully be detained pursuant to the said Section 3, notwithstanding that, at the time of his detention pursuant to the said Section 3, as a conditionally discharged restricted patient he remained liable to be detained pursuant to Sections 37 and 41 of The Mental Health Act 1983."

On behalf of the Appellant Mr. Gordon Q.C. submitted that Section 37 is the *"font of authority"* for this applicant's detention and that at the time of his purported detention under Section 3 of The Mental Health Act he was a conditionally discharged restricted patient liable to be detained under Section 37 and accordingly could only be detained in hospital pursuant to recall by the Secretary of State. He submitted that the Applicant could not be detained under Section 3 having regard to the provisions of Section 40 sub-section 4 which provided that the provisions of Part 2 should have no application to patients detained or liable to be detained under Part 3 save where expressly provided for under Schedule 1 of the Act. He submitted that Section 3 is not one of the provisions of Part 2 which is specifically applied to Part 3 by Schedule 1. He further submitted that the mutual exclusivity of Parts 2 and 3 is demonstrated by the effect the *"special restriction"* in Section 41

sub-section 3 would have on a restricted patient who was subsequently detained under Part 2 namely;

> "(a) Any such Part 2 detention would be for an indefinite period
>
> (b) The patient would be deprived of his right to apply to a Mental Health Review Tribunal."

He argued in favour of a construction of the Act in the event of ambiguity in the statutory wording in favour of the liberty of the person and the presumption against infringement of the appellant's rights under the European Convention on Human Rights. Mr. Gordon developed these points in a skilful argument involving a detailed analysis of the provisions of the 1983 Act. He acknowledged that there was nothing in the Act which expressly excluded the operation of Part 2 of the Act in the case of a restricted patient but submitted that it was excluded by necessary implication having regard to the various statutory provisions.

Mr. Gordon placed particular reliance upon the provisions of Section 56 (i)(c). He termed it his "bull's eye". Section 56 sub-section (I) provides:

> "This part of this act (Part 4) applies to any patient liable to be detained under this act except
>
> (c) a patient who has been conditionally discharged under Section 42 sub-section 2 above or section 73 or 74 below and has not been recalled to hospital."

He argued that since Part 4 applies to a Section 3 patient who may be subjected to compulsory treatment, the provisions of Section 56 (i)(c) clearly excluded a conditionally discharged patient who had not been recalled and that meant that he could not be treated compulsorily. In order to be treated compulsorily he would have to be recalled to hospital by the Secretary of State. Furthermore he submitted that a conditionally discharged patient who had not been recalled but who was purportedly detained under Section 3 of the Mental Health Act would be denied access to Mental Health Tribunals pursuant to Section 66.

On the 24th April 1996 the Court of Appeal presided over by Sir Thomas Bingham, Master of the

Rolls gave judgment in an appeal in relation to an application for habeas corpus. The appellant was Mandla Dlodlo. The respondents were The Mental Health Review Tribunal for the South Thames Region (2)The Secretary of State for the Home Department and (3) The Eastbourne and County Healthcare NHS Trust. The applicant had been found not guilty of murder by reason of insanity. An order for his detention was made under Section 5 sub-section 1(a) of the Criminal Procedure (Insanity) Act 1964 and a hospital order was made under Section 37 of the Mental Health Act 1983 together with a restriction order under Section 41. In due course the applicant's case was considered by a Mental Health Review Tribunal which ordered his conditional discharge pursuant to Section 73 (2) of the 1983 Act. Whilst living in a hostel his mental health subsequently deteriorated and an order was made for his admission to the unit in which he had been previously detained under Section 3 of the 1983 Act. Section 3 of course appears in Part 2 of the Act which deals with civil or non-criminal admissions. Whilst at the hospital unit pursuant to his detention under Section 3 the Secretary of State issued a warrant for recall under Section 42 sub-section 3 of the Act. The point at issue in the appeal was whether having regard to the fact that the applicant was already in hospital a warrant for recall to the same hospital could properly be issued. The matter was dealt with in the context of "habeas corpus" and the Court of Appeal concluded that there was no reason why the warrant could not in fact be issued. The point at issue was different from that raised in this case but it is to be observed that the Court considered the particular provisions of the Act in both Part 2 and Part 3 with a degree of particularity and no question was raised as to the appropriateness of the admission under Section 3 in Part 2 of the Act notwithstanding that the applicant was already subject to an order for conditional discharge. Mr. Kovats for the respondent to this appeal cited that case as an example of how the Part 2 and Part 3 regimes can operate independently resulting in detention under two separate powers.

As the learned Judge pointed out in his comprehensive judgment, the case presented to him involved a detailed analysis of the framework and provisions of the 1983 Act. It is further to be

observed that guidance provided in the Mental Health Act 1983 Code of Practice (Second Edition) made under Section 118 of the Mental Health Act 1983 and laid before Parliament states at page 67:

> "28.2 If a conditionally discharged restricted patient requires hospital admission, it will not always be necessary for the Home Secretary to recall the patient to hospital. For example:
>
> (a) The patient may be willing to accept treatment informally. In these circumstances, however, care should be taken to ensure that the possibility of the patient being recalled does not render the patient's consent to informal admission invalid by reason of duress.
>
> (b) In some cases it may be appropriate to consider admitting the patient under Part 2 of the Act as an alternative."

Further the "*Notes for the Guidance of Supervising Psychiatrists - Mental Health Act 1983 - Supervision and Aftercare of Conditionally Discharged Restricted Patients,"* published by the Home Office and the Department of Health and Social Security in 1987 provides guidance for supervising psychiatrists if the supervising psychiatrist has reason to fear for the safety of the patient or others he may decide to take immediate local action to admit the patient to hospital for a short period either with the patient's consent or using civil powers such as those under Section 2, 3 or 4 of the Mental Health Act 1983. Whether or not such action is taken, and even if the social supervisor does not share the supervising psychiatrist's concern, the supervising psychiatrist should report to the Home Office at once so that consideration should be given to the patient's formal recall to hospital. Mr. Gordon of course challenges the vires of the guidance provided in both those publications. It is to be observed however that there has been no effective challenge in the intervening years either to the guidance or the advice given in those publications. Whilst it was accepted that the applicant remained at all times a restricted patient nevertheless it was submitted by the respondent that the particular provisions in Part 3 applied to the patient only as a restricted patient, whilst if he were to be admitted under Section 3 in Part 2 he could then be considered in the context of a liability to be detained under the civil provisions. The learned judge accepted that the two parts of the Act provided for independent regimes. He held that there was nothing in any of the Sections of the Act which was inconsistent with the independent operation of those regimes. As to

Mr. Gordon's submission that if the applicant were to be detained under Section 3 he would be denied access to the Mental Health Tribunal under Section 66 the learned judge held that if he were to be detained under Section 3 he would be able to exercise a right of access under Section 66 if it were necessary. It was the fact that as a restricted patient the applicant was liable to more stringent restrictions than he would be if he were to be detained under Section 3. As the guidance indicated it might be convenient and in the interests of the patient that the full stringency of recall would not be implemented in particular circumstances. The flexibility given to the supervising psychiatrist was something which could operate both in the interests of the patient and also in the interests of the public. The learned judge said that it was appropriate and desirable that the Section 3 procedure under Part 2 should be available as well as the recall power under Part 3. He said:

> "I do not consider that Parliament could have intended to deprive a patient of treatment by admission under Section 3 which is needed solely for his own health or safety simply because he had been convicted of an imprisonable criminal offence which resulted in him being made subject to a hospital order and a restriction attached. Admission of a person under Section 3 in those circumstances would not in any way prejudice the exercise of the Secretary of State's power of recall for protecting the public from serious harm, that power being exercised in relation to the patient in his capacity as a restricted patient liable to be detained pursuant to the hospital order."

The ability of the Secretary of State to exercise his power of recall even when the patient was already in hospital pursuant to detention under Section 3 was recognised by the decision of the Court of Appeal in the case of Dlodlo v Mental Health Review Tribunal for the South Thames Region and others, to which I have already referred. Mr.Gordon's skilful argument must fail if the two Parts of the Act are to be considered as capable of operating independently.

The judge reviewed the statutory provisions in great detail in the context of the submissions made and came to the clear conclusion that the powers provided by Part 2 of the Act could be invoked in the case of a conditionally discharged restricted patient. He said:

> "I accept the argument of Mr. Kovats and Mr. Kent (amicus curie instructed by The Treasury Solicitor) that the Part II and Part III powers can co-exist and operate independently of each other. The provisions relating to restricted patients relied upon by the applicant are, in my view, dealing solely with patients in their capacity as restricted patients liable to be detained pursuant to a hospital order, a capacity which is not applicable to the power of admission and

> detention under Section 3. That power is not excluded by the Provisions of Part III and the rights of a patient detained under that power exist, including those of access to the Tribunal under Section 66 whether or not he happens also to be a conditionally discharged restricted patient. If he were discharged by the tribunal it would be a discharge in relation to his liability to detention under Section 3 which would in no way affect the Secretary of State's powers to recall him as a restricted patient. Such a conclusion ensures that patients and those treating them can take advantage of the benefits of treatment for the purposes mentioned in Section 3(2)(c)."

I agree with the judge's conclusion which he reached after detailed consideration of the statutory framework. I would accordingly dismiss the appeal.

LORD JUSTICE SCHIEMANN: Sections 2-4 of the Act, which deals with civil admissions (to adopt the president's useful shorthand) are to be found in Part II of the Act. They set out circumstances in which a person can be compulsorily admitted to and detained in a hospital on mental health grounds for the purposes of assessment of treatment. The essence of Mr Gordon's submission is that once a hospital order under section 37 has been made in respect of an offender, the only powers in Part II of the Act which can be used are those in sections referred to in Schedule 1 (which do not include sections 2-4). That submission is founded on the provisions in section 40(4) and 41(3). Those subsections do not expressly prevent use being made of sections 2-4 in the case of restricted patients. I see no advantage to anyone - whether a restricted patient or anyone else - in holding that an inhibition on the use of sections 2-4 powers is implicit in sections 40(4) and 41(3) or in the scheme of the Act.

I am conscious of the need to safeguard the liberty of the individual and of the possible conflict between the use of Mental Health Act powers and such liberty. However, Parliament has seen fit to make the use of the powers in sections 2-4 available in respect of an individual who has not been convicted of any crime. I can see no need to place an inhibition on their use in respect of an individual who has been so convicted, has been subjected to a hospital order and has been conditionally discharged.

Construing the Act in the way for which Mr Gordon contends would be productive of considerable harm in certain circumstances. Consider the following situation. A patient who has been conditionally discharged shows signs of being severely mentally ill in such a way that he constitutes a danger to himself and others. His condition is spotted by a doctor or social worker who thinks it appropriate to take action under sections 2, 3 or 4 of the Act. If the law were as Mr Gordon argues, the doctor, in order to determine whether he is acting within the law, must establish whether the patient is an offender who has been conditionally discharged. That is not easily and quickly done without asking the patient. Such a question, based on an assumption that the patient had been convicted of crime, would be offensive to most persons. Moreover the patient, perhaps because of his mental illness or general truculence, may well not inform the doctor of the fact that he has been conditionally discharged. If the doctor proceeds to be a party to his detention he will, if Mr Gordon's submissions are well founded, be acting illegally. The decision in Re S-C (mental patient: habeas corpus) [1996] 1 All E.R. 532 may mitigate the consequences of the illegality but that hardly answers the point.

I do not regard Mr Gordon's submission that section 56(1)(c) makes it impossible lawfully to treat a conditionally discharged patient without his consent until such time as he has been recalled to hospital as one which militates strongly in favour of his proposed construction of the Act. Assuming, without deciding, the submission to be well founded, its only consequence would be that recall procedures would need to be activated prior to treatment. This would not prevent detention in the meanwhile.

I agree that this appeal should be dismissed.

Order: Appeal dismissed; costs be paid from legal aid fund with nil contribution; order nisi against Legal Aid Board; application for leave to appeal to

the House of Lords refused.