IN THE COURT OF APPEAL

ROYAL COURTS OF JUSTICE

CO/2284/97.

5th February 1998

Before:

Lord Justice Nourse
Lord Justice Auld
Lord Justice Judge

B E T W E E N:

THE QUEEN

- and -

BROADMOOR SPECIAL HOSPITAL AUTHORITY

and

THE SECRETARY OF STATE FOR THE DEPARTMENT OF HEALTH

ex parte

S, H and D

DRAFT JUDGMENT

AULD LJ: The three appellants, patients compulsorily detained at Broadmoor Special Hospital under the Mental Health Act 1983, challenge a policy which the Hospital Authority sought to implement on 1st July 1997, and which it has since modified,

purporting to authorise random and routine searches of patients with or without their consent. They do so on appeal from an order of Potts J. on 15th October 1997 dismissing their application for judicial review of the policy.

Sections 3 and 37 of the 1983 Act provide for the admission of patients to, and detention in, hospital for "medical treatment". Medical treatment "includes nursing, ... care, habilitation and rehabilitation under medical supervision" (Section 145). Section 3 provides for admission and detention pursuant to an application for treatment for a "patient" who

> "... is suffering from mental illness, severe mental impairment, psychopathic disorder or mental impairment ...of a nature or degree which makes it appropriate for him to receive medical treatment in a hospital; ..."

Section 37 empowers a criminal court to make a hospital order in respect of a person convicted of an imprisonable offence who is

> " ... suffering from mental illness, psychopathic disorder, severe mental impairment or mental impairment ... of a nature or degree which makes it appropriate for him to be detained in a hospital for medical treatment ..."

In addition, a criminal court may, under Section 41, order that a patient in respect of whom it makes a hospital order should be subject to special restrictions where -

> "... it appears to the court, having regard to the nature of the offence, the antecedents of the offender and the risk of his committing further offences if set at large, that it is necessary for the protection of the public from serious harm so to do ..."

Broadmoor is one of three "special hospitals" provided by the Secretary of State pursuant to his duty under Section 4 of

the National Health Service Act 1977, as amended, for the detention of persons "who in his opinion require treatment under conditions of special security on account of their dangerous, violent or criminal propensities". Its population of about 500 consists of patients with a range of disorders of different types and seriousness, who are at different stages of treatment and who require different levels of supervision.

All Broadmoor patients must satisfy the criteria for admission to a hospital under the 1983 Act and to a special hospital under the 1977 Act. In addition, Broadmoor only admits patients who represent "a grave danger to the public" and who cannot safely be contained in a Regional Secure Unit.

The three appellants satisfy all those tests. Two of them are detained under Section 3 of the 1983 Act, pursuant to "an application for their admission for treatment", and the third is detained under hospital and restriction orders made respectively under Sections 37 and 41 of the Act. One of the Section 3 appellants, who suffers from a psychopathic disorder, has fantasies of killing and is assessed as a grave and immediate risk to others. The other Section 3 appellant, also suffering from a psychopathic disorder, has threatened nursing staff, has concealed objects and has also threatened to harm herself. The Sections 37 and 41 appellant, who has been convicted of attempted murder, is suffering from a mental illness and has been responsible for many incidents of violence in the ward. All of them, by reason of their history and condition are particularly

disturbed by the policy and have threatened violence or to harm themselves if subjected to random searches. One of them is said to have mutilated herself on learning of it. There is evidence that other patients have expressed similar sentiments.

Following guidance in a Code of Practice issued by the Secretary of State in 1983 Broadmoor's policy was to search patients only when there was a reason to do so. Before that guidance its staff had randomly searched patients leaving work areas. The proposed introduction of the policy of random and routine searches on 1st July 1997 was prompted by an incident in Broadmoor in August 1996 when a patient, who had secreted a heavy drinking mug, attacked and injured the Hospital's Roman Catholic priest with it. There had been, in addition, a number of incidents in the Hospital since early 1996 in which patients had secreted drugs and objects capable of causing physical injury.

The Head of Security at the Hospital, a consultant forensic psychiatrist and a ward services manager conducted an internal inquiry and reported in October 1996 on the shortcomings of the then practice of searching only "for cause". They recommended, inter alia, consideration of random and routine searches of patients. They did so because they considered that searching only for cause did not sufficiently protect patients, staff and visitors against the secretion by violent patients of dangerous objects which could be used to attack others. They also considered that it did not meet the risks of patients secreting such objects with a view to harming themselves or of carrying

illicit drugs or alcohol.

After extensive consultation with the staff, including the Hospital's Medical Advisory Committee, which includes all its responsible medical officers, the Hospital Authority formulated a written policy, for implementation on 1st July 1997, providing, inter alia, for "a rub down search which may be carried out at random and without reasonable suspicion". I should add that during the course of the 11 months between the start of the review and the proposed implementation of the new policy on 1st July 1997 searches of the wards had revealed a large number of potentially dangerous objects, including cigarette lighters, a razor blade, and lengths of cord removed from curtains. In addition, one patient was found with a knife and there were 445 incidents over the three months of May to July 1997 in which, in many instances, patients had used various objects to harm themselves.

The policy document contained the following material provisions:

> "1.2 We have a statutory duty to provide a therapeutic and safe living and working environment for patients and staff and to protect the public. To achieve and maintain a safe therapeutic environment it is essential that all staff employed by Broadmoor ... are responsible for security. Searching practices, including random and routine searching are an essential element of security and are necessary. (This includes not only protecting others from the consequences of a patient's activity but protecting themselves from their own action (eg self-harm, drugs, pornography and fraud).
>
> 1.3 Searching, including random and routine searching, shall include inspection of written material (including letters or other communications

stored on disc) to ensure its bona fides and that such does not contain inappropriate material (contrary to health and/or safety/security. If such material contains privileged communications under Section 134(3) of the Mental Health Act ... inspection shall be the minimum necessary to ensure the identity and address of sender or recipient is genuine (and not for any other purpose so that the confidentiality of privileged communication is maintained).

...

5 **Patients Consent/Refusal to Co-operate**

5.1 Before commencing a personal search of a patient and/or his/her personal possessions every effort must be made to obtain the consent and co-operation of the patient.

5.2 If a patient refuses to co-operate with a search they must be kept under observation, isolated from other patients and the nurse in charge of the patients ward informed. The nurse in charge must discuss the management of the situation with his Line Manager and the Consultant Psychiatrist. If refusal to co-operate continues, a further attempt to obtain consent must be made and if unsuccessful the patient must be told that in the absence of consent a search will be undertaken and, if necessary, by using the minimum amount of force necessary in order to conduct the search.

After the decision of Potts J. and before the hearing of this appeal Broadmoor revised paragraph 5 of the Policy. In doing so, it retained paragraph 5.1 and the first two sentences of 5.2 in their original form, it introduced a new paragraph 5.3 and repeated in substance the third sentence of the original paragraph 5.2 as paragraph 5.4. Paragraphs 5.3 and 5.4 now read:

"5.3 If the RMO [responsible medical officer] advises that subjecting the patient to search would have adverse consequences for the mental health of the patient, the nurse in charge must refer the matter to the Medical Director, who will decide, after taking into account the advice of the RMO and the interests of security and safety of the individual and the hospital, whether the search should proceed.

54.4 Before proceeding with a search to which a patient has refused cooperation a further attempt to

> obtain consent must be made, and the patient must be told that in the absence of consent a search will be undertaken, if necessary by using the minimum force necessary to conduct the search."

Broadmoor made those changes to provide for the possibility (believed by it to be very remote having regard to the experience of the other special hospitals) that there might be exceptional cases in which it would be undesirable to subject a patient to search without cause and consent. However, it maintains its stance that the policy as originally drawn is lawful.

The 1983 Act contains no express power for searching patients detained for treatment under its provisions. However, it provides in Section 118(1)(b) for the preparation and revision from time to time by the Secretary of State of a code of practice for, inter alia

> "... the guidance of registered medical practitioners and members of other professions in relation to the medical treatment of patients suffering from a mental disorder."

Pursuant to that power, the Secretary of State's 1983 Code of Practice, to which I have referred, gave the following guidance about "Personal Searches":

> "25.1 Authorities should ensure that there is an operational policy on the searching of patients and their belongings. Such a policy should be checked with the health authority's legal advisers.
>
> 25.2 It should not be part of such a policy routinely to carry out searches of patients and their personal belongings. If, however, there are lawful grounds for carrying out such a search, the patient's consent should be sought. In undertaking such a search staff should have due regard for the dignity of the person concerned and the need to carry out the search in such a way as to ensure the maximum privacy.
>
> ...
>
> 25.6 There is no lawful authority for the routine or

random searching of patients without their consent." Broadmoor argued unsuccessfully before Potts J. that these provisions were ultra vires Section 118(1)(b). He held that they were not binding on Broadmoor or the Court, being merely an expression of the Secretary of State's view as the best practice in hospitals in general.

There is also the following general provision in Section 137:

> "(1) Any person required or authorised by or by virtue of this Act to be conveyed to any place or to be kept in custody or detained in a place of safety ... shall, while being conveyed, detained or kept, as the case may be, be deemed to be in legal custody.
>
> (2) A constable or any other person required or authorised by or by virtue of this Act to take any person into custody, or to convey or detain any person shall, for the purposes of taking him into custody or conveying or detaining him, have all the powers, authorities, protection and privileges which a constable has within the area for which he acts as constable."

Potts J held that Section 137, in particular (2), conferred no express power of search without cause. He ruled that Section 137(1) had no practical application to patients already detained in a special hospital pursuant to Sections 3 and 37 because those provisions made their detention lawful and that Section 137(2) was concerned with the limited function of detention for the purpose of conveyance to hospital, not with detention once there. However, he held that there was an implied general power of search, including search without cause and in the face of medical objection in an individual case. He summarised his reasons, at 27D-28A, as follows:

"(1) Since 'detain' means 'keep in confinement' a general power to search patients in order to prevent escape from detention must be implicit in the express power to detain conferred by the 1983 Act.

(2) The power to exercise control which is part of the power to 'detain for medical treatment' conferred by the 1983 Act ... necessarily implies a power to create and maintain a safe and therapeutic environment in which that medical treatment can take place.

(3) A general power to search patients must necessarily be implied as part of the duty to create and maintain that safe therapeutic environment. In the exercise of that power the decision of the Hospital Authority must necessarily prevail over an objection by an RMO on behalf of a patient on medical grounds."

Potts J. added that there was an implied power to make the policy in question and that it was not unlawful in a **Wednesbury** sense. He concluded, at 30E-F, by saying that Broadmoor had "demonstrated a self-evident and pressing need for such a power and its exercise".

The appellants now challenge Potts J's ruling on three main grounds, first, that he erred in law in finding that there was an implied power to search randomly and routinely and regardless of individual medical objections, secondly that the power, if it exists, is irrational and/or, thirdly, that it unlawfully fetters Broadmoor's discretion in its exercise because it allows of no exception on medical grounds. Broadmoor and the Secretary of State do not seek to challenge the Judge's ruling that there is no such express statutory power.

Mr Richard Gordon, QC, on behalf of the appellants, put at the forefront of all his submissions that the purpose of

detention of patients in special hospitals under Sections 3 and 37 is to give them medical treatment. He maintained that the implementation of the policy, in particular of its provision for searching by force where the patient refused consent to it, was capable of harming that treatment because it would destroy the relationship of respect and trust between staff and patients. He referred to the Executive Summary of a Report of an External Management Review of Broadmoor initiated by the Secretary of State and conducted in March 1997 under the aegis of the National Health Service Executive for Anglia and Oxford. It emphasised the importance of that relationship and recommended "random rub-down searches" only for staff and visitors and then only when an anti-alarm detection alarm is sounded.

Mr. Gordon relied on affidavit evidence to like effect of Dr. James MacKeith, a consultant forensic psychiatrist of great experience in the treatment of psychiatric patients in conditions of security, of Drs. Chandra Ghosh and Andrew Horne, two consultant forensic psychiatrists at Broadmoor, and of two psychiatric social workers employed there. Their view is that so important is the relationship between a patient and the clinical staff treating him or her that searching of any patient without his or her consent is likely to have an adverse effect on the treatment and to provoke incidents of violence and self harm. Dr. Ghosh said that it should not take place unless the clinical staff see "an overriding clinical necessity" for it. In short, her view is that the decision is a medical one to be made by the responsible medical officer in each case, not by

managers as a matter of policy. Mr. Gordon referred also to his instructing solicitor's evidence on affidavit of the likely adverse reactions of the three appellants and other patients to whom she had spoken at Broadmoor and exhibiting their written statements and, in the case of the first appellant, certain medical reports.

Mr. Edward Fitzgerald, QC, for Broadmoor, submitted that a special hospital's power to detain for treatment necessarily implies a power of search for dangerous objects and illicit substances, that the manner of exercise of that power is for the hospital, and that, on the evidence, the exercise by Broadmoor of the power by the policy under challenge is rational and not the fettering of a discretion.

Mr. Fitzgerald relied on affidavit evidence from Dr. John Basson, a consultant forensic psychiatrist and the Medical Director of Broadmoor, Miss Lezli Boswell, the Hospital's Director of Patient Care Services and Nurse Executive, and Mr. Alistair McNicol, its Head of Security. The broad thrust of their evidence was of a piece with the Hospital's reasons for introduction of the policy, namely that it was essential for the provision of a safe environment for the treatment of all patients, and also for the safety of staff and visitors, that there should be random searching of patients, without their consent if necessary, for dangerous objects and illicit substances. They maintained that the policy would be more effective for that purpose than the previous one of search only

"for cause" and that it represented a proper balance between the needs of effective medical treatment to individual patients and, in the greater general safety and security it would provide, the effective treatment of all. There was also evidence on affidavit from senior staff at two other special hospitals and a secure hospital in Scotland of their well established use of a similar policy of random and/or routine rub-down searches without problem, in particular, of the necessity for it and the absence of any serious adverse reaction from patients.

Mr. Kenneth Parker, QC, on behalf of the Secretary of State, supported the Judge's ruling and Mr. Fitzgerald's submission on the first ground of appeal, namely that Broadmoor has an implied power randomly and routinely to search its patients, but took no position on the rationality of Broadmoor's policy as an exercise of that power.

The Judge's conclusion was that there is an implied general power of search, in which he clearly included a power to make random and routine searches without consent and contrary to any medical objection in an individual case. Mr. Gordon's main arguments against that conclusion were that:

- no power of search can be implied that can over-ride, and certainly not one that always over-rides, individual treatment objectives;
- the Judge's approach was flawed because he wrongly failed to consider whether such a power of search could be implied from the power to detain and treat as

distinct from a power solely to detain;

and

- the Judge should have focused on the question whether the power of search without cause could be implied rather than consider it as part of the broader question whether there is a general power of search.

Mr. Fitzgerald and Mr. Parker submitted in reply that a special hospital's power to detain for treatment carries with it, by necessary implication, a duty to provide a safe environment for treatment. That duty, they further submitted, necessarily carries with it a power of control and discipline, including, where it is considered necessary, a power of random and routine searches. Such an implied power, they argued, is capable of over-riding an objection to its exercise made on medical grounds on behalf of an individual patient.

Sections 3 and 37 of the 1983 Act provide for detention, not just for its own sake, but for treatment. Detention for treatment necessarily implies control for that purpose. If any authority were needed for that proposition in this context, it is to be found in the reasoning of Lord Widgery CJ and of Lord Edmund-Davies in **R v. Bracknell Justice, ex p. Griffiths** [1976] AC at 318E-G, DC, and 335E-H, HL, respectively, when construing the statutory predecessor of the 1983 Act, the Mental Health Act 1959. Both statutes leave unspoken many of the necessary incidents of control flowing from a power of detention for treatment, including: the power to restrain patients, to keep

them in seclusion (cf. **R v. Deputy Governor of Parkhurst Prison, ex p. Hague** [1992] 1 AC 58, HL), to deprive them of their personal possessions for their own safety and to regulate the frequency and manner of visits to them (though not the power of compulsory treatment, for which the 1983 Act now expressly provides in Part IV). Lords Widgery and Edmund-Davies were of the clear view that the power of detention and treatment necessarily carried with it a power of control and discipline. In my view, it is immaterial that there may be, as contended by Mr. Gordon, other candidates for exercising in particular circumstances certain forms of control and discipline other than the power of search without cause and the core ones mentioned above.

In my judgment, the Judge correctly approached the question of vires by considering first whether there is a general power of search and, as part of that exercise, a power of random and/or routine search. The question for him and for this Court is whether the express power to detain for treatment necessarily implies a power to search with or without cause. From the passage in his judgment that I have cited, it is clear that he kept well in mind the linkage between detention and treatment and rightly concluded that the interests of both necessitated the implication of such a power. As to the power to search without cause, he rightly rejected the value of any comparison between the powers and duties of a special hospital charged with the detention, control and treatment of mentally disordered and dangerous patients under the 1983 Act and the common law powers

of citizens to prevent crime outside such a setting.

The Judge correctly adopted the rigorous test voiced by Steyn LJ in **R v. Home Secretary, ex p. Leech** [1994] QB 198, CA, at 212E-F, namely that Broadmoor had to show "a self-evident and pressing need" for the power for which it contended. His observations preceding his conclusions, especially at pages 26D-E and 26G-27B, and on the issue of rationality, show that he was firmly of the view that the power of random and/or routine search, notwithstanding medical objection in an individual case, fulfils those criteria. In my view, his general reasoning was sound, though I have some doubt whether he was right to go so far as to hold lawful his characterisation of the original policy that, in the exercise of the power, Broadmoor's decision "must necessarily prevail over an objection by an RMO on behalf of a patient on medical grounds". After all, as Mr. Gordon observed, assessment of risk is a function of treatment. However, I do not consider that paragraph 5.2 of the policy in its original form is to be construed as going that far. It provided, where a patient objected to a search, for reference to his or her responsible medical officer before taking the matter further. No doubt the purpose and likely effect of that would have been to take the doctor's view whether the search was necessary or should, in any event, proceed.

However, the new paragraph 5.3 puts beyond doubt that the responsible medical officer is required to consider whether the proposed search would harm the patient's mental health and, if

that is his view, to refer it to the Medical Director for decision, who should take into account that view and "the interests of security and safety of the individual and the hospital". The policy thus provides for a balancing of the two main and important factors. The fact that it permits those of safety and security to prevail over the treatment requirements of an individual patient where considered appropriate cannot, in my view, take it outside the implied power of search.

As Mr. Parker submitted, once the Judge had concluded, applying Lord Justice Steyn's rigorous test, that there was an implied general power of search with or without cause, the means - that is, the specific regime of random and/or routine searches proposed - to achieve the lawful object of detecting dangerous objects and harmful substances fall to be judged by no more than **Wednesbury** principles; see **R v. Secretary of State, ex p. O'Brien and O'Dhuibir** [1996] Admin LR 121, DC, per Rose LJ at 134C-135E; and **R v. Secretary of State, ex p. O'Dhuibir** (unreported, 27th February 1997.

Such a power, necessary as it is for the maintenance of a safe therapeutic environment for all patients and for the safety of staff and visitors, must include the ability, where circumstances require it, of overriding the individual therapeutic requirements of an individual patient. As Mr. Parker observed, that is not because security objectives "trump" treatment objectives, but because security is a necessary part of the background to treatment.

In my judgment, one has only to consider the statutory context in which this issue has arisen, the detention for treatment of mentally disordered patients "under conditions of special security on account of their dangerous, violent or criminal propensities", to be driven to the conclusion that the power contended for by Broadmoor is essential to enable it to fulfil its prime function of treatment of its patients. Given their mental conditions and propensities requiring such treatment, it is obvious that, in the interests of all - in particular the need to ensure a safe therapeutic environment for patients and staff - that the express power of detention must carry with it a power of control and discipline, including, where necessary, of search with or without cause and despite individual medical objection.

The Judge's conclusion was amply justified on the material before him. This is not a case where a fundamental right of a person is unaffected by his detention and the reason for it, such as that considered in **Raymond v. Honey** [1983] 1 AC 1, HL or in **ex p. Leech** where it was held that there was no implied power to remove a prisoner' right of access to the court or to a solicitor for the purpose of legal proceedings. It is a case where, by reason of the mentally disordered and dangerous condition of the detained person and the purpose of his detention - treatment, circumstances may make it necessary to deny him the citizen's normal freedom from interference with his person without his consent. In my judgment, it meets the test recently formulated by Lord Browne Wilkinson in **R v. Home Secretary, ex p. Pierson**

[1997] 3 WLR 492, HL, at 507A-B, expressly drawing on **ex p. Leech** and other authorities:

> "A power conferred by Parliament in general terms is not to be taken to authorise the doing of acts by the donee of the power which adversely affect the legal rights of the citizen or the basic principles on which the law of the United Kingdom is based unless the statute conferring the power makes it clear that such was the intention of Parliament."

As I have said, Mr. Gordon's second main and alternative submission in support of the application to this Court was that the policy as originally formulated was irrational in that it did not allow for considerations of treatment in individual cases. He maintained that it is still irrational in its modified form because it still permits medical views as to treatment to be overridden in individual cases. He coupled with this complaint a third one that the policy in its original form unlawfully fettered Broadmoor's exercise of discretion in that the power was to be exercised always so as to override any medical objection. In my view, in the circumstances the two grounds stand or fall together.

Mr Gordon directed his arguments before the Judge mainly to the question of the power to conduct random and/or routine searches capable of overriding medical objection in individual cases, not to the rationality of the power if it existed. That is because he considered that there was an overlap between his challenge to the existence of the power with his potential argument on irrationality of the exercise of a power of search

capable of overriding medical objection in individual cases. Considered as a question of the existence of a power, it was for Broadmoor to establish "self evident and pressing need"; considered as an issue of rationality, it was for the applicants to establish it to **Wednesbury** standards. As Mr. Gordon has acknowledged, if the Judge found that there was such a need he could not succeed on the ground of irrationality. It seems to me that he is in no better position on the application to this Court, for, as I have said, and despite his submissions to the contrary, I am satisfied that the Judge correctly concluded that there is a general power of search and, as part of it, of search without cause capable of overriding medical opinion against its exercise.

As to Broadmoor's need for and the particular terms of the policy in its original form, I agree with the Judge that the applicants have not established irrationality, subject to the reservation as to his characterisation of it to which I have referred. The modification to the policy, providing expressly for a balancing of the interests of safety and security and the treatment of the patient, is a fortiori unchallengeable under this head. In so holding I have had regard to the evidence advanced by Broadmoor that searches for cause are considered by those well qualified to judge to be insufficient to prevent or reduce the very serious risks of danger to patients, staff and visitors from patients' secretion and use of dangerous objects and illicit substances. There is also the evidence of the practice and experience of other special hospitals of the value

and successful use of similar policies. On the other side there is the evidence advanced on behalf of the appellants of the potential for adverse effect on the treatment on individual patients from implementation of the policy.

In my view, it is plain common sense that, on occasion, an individual patient's treatment may have to give way to the wider interest. Any outcome which permitted individual doctors, acting only in what they perceived to be the therapeutic needs of their respective patients, to exclude them from application of the policy would be a recipe for chaos and could endanger the safe environment necessary for the treatment of all patients and the safety of staff and visitors.

For those reasons I would dismiss this appeal.

Judge LJ:

I agree with Auld LJ that this appeal should be dismissed for the reasons set out in his judgment. However because of the acknowledged vulnerability of individuals detained under the Mental Health Act 1983 I add some observations of my own.

Although Broadmoor is a hospital, its patients are not ordinary hospital patients. They are there because they are lawfully detained under the 1983 Act, and their condition requires treatment in a secure environment because, in the language used in section 4 of the National Health Service Act 1977, "of their dangerous violent or criminal propensities". Therefore these patients are not free to come and go as if they were normal adults receiving treatment in hospital. Some have been convicted of serious offences of violence. Some are unfortunate individuals who simply because of mental impairment for which they may bear no responsibility nevertheless represent a danger to themselves or to others.

The essential submission by Mr Richard Gordon QC is that the treatment of the individual patient, and therefore his or her interests as perceived by the medical officer responsible for his treatment, is the paramount, virtually the only consideration, which should operate on the mind of the hospital authorities. Although the justification for detention is treatment involving, where deemed appropriate, compulsory treatment against the patient's wishes, responsibility for the treatment is placed not on management but on the patient's medical officer. The implementation of the policy now under review may, in the case of individual patients, prove inimical to their treatment and cannot be justified by any express power granted under the 1983 Act, nor be implied from the duties imposed on management by it.

Mr Gordon accepts that where there are reasonable grounds for suspicion and in order to prevent crime, or where necessary to avoid self harm, searches of the patient without consent are permissible: similarly if the responsible medical officer considers it appropriate as part of the health plan. However without such suspicion, or medical reason, searches without consent are prohibited.

The making of an order for detention under the 1983 Act does not turn the patient into an

outlaw, outside or beyond the protection of the law. Subject to section 139 of the Act, they are not less well placed than convicted prisoners who retain "all civil rights which are not taken away expressly or by necessary implication" (Raymond v Honey [1983] 1 AC 1). In the case of convicted prisoners I have recently expressed the view that "the starting point is to assume that a civil right is preserved unless it has been expressly removed or its loss is an inevitable consequence of lawful detention in custody". (R v Secretary of State for the Home Department, Ex Parte Simms & O'Brien & Ex Parte Main, unreported, 4th December 1997). Subject to the differences which arise between prisoners in custody and patients detained in special hospitals under the 1983 Act this principle applies to patients as it does to prisoners.

The first question is whether the policy under review is ultra vires (see R v Secretary of State for the Home Department, Ex Parte Leech [1994] QB 198, R v Secretary of State for the Home Department, Ex Parte Bamber [unreported, 15th February 1996]. R v Secretary of State for the Home Department, Ex Parte O'Dhuibir & Another [unreported, 27th February 1997] and R v Secretary of State for the Home Department, Ex Parte Simms & O'Brien & Ex Parte Main.)

The briefest analysis of the 1983 Act demonstrates that the individual patient at Broadmoor is to be provided with treatment appropriate to his illness prescribed by the responsible medical officer. (See sections 34, 55(1) and 64(1)) Therefore if medical treatment for each patient were the sole consideration the attractions of Mr Gordon's argument would be obvious. The problem however is that the patient is to be cared for and protected from self inflicted harm at all times, including occasions when the responsible medical officer is not available to supervise him, and simultaneously, while he is detained securely for the protection of the public outside Broadmoor, the risk which he represents to other patients, staff and visitors within Broadmoor must be minimised. These dangers can arise directly as a consequence of the risk posed by the individual patient, but also where an inadequate patient is manipulated by a stronger character, and in an environment where virtually every patient represents a serious potential threat, arrangements are required by which each individual patient is

protected from every other patient.

These considerations are obvious, but derive directly from the 1983 Act. For example, where an admission to Broadmoor is made under section 3 of the Act, an essential ground for the application and admission is that it is "necessary for the health or safety of the patient or for the protection of other persons that he should receive such treatment....." It would be absurd, if having been admitted on the basis that either of these two requirements had been established prior to his admission, the criteria of the health and safety of the patient himself or the protection of other persons were minimised during detention. Similarly, admission based on a court order under section 37 with a restriction on discharge under section 41 involves the decision of a Court that the offender represents a serious danger from which it is necessary to protect the public. The risk does not evaporate on admission. After admission the management of the hospital is authorised to detain and responsible for the detention of the patient (section 6(2)). The importance of securing the detention of the patient is underlined by the fact that if he goes absent without leave he himself is unlawfully at large and, whether or not he has committed any criminal offence, he is liable to be taken into custody before being returned to hospital. Equally it is an offence for anyone else to induce or assist him to remain at large or to harbour him if he is absent without leave. (Section 128)

The responsibility for the safe detention of each individual patient and the collective security of the hospital itself is a problem for the management rather than any individual medical officer. These considerations fall within the concept of "control and discipline" identified by Lord Edmund Davies in Pountney v Griffiths [1976] AC 314, which in my judgment remains undiminished by the amendments to the Mental Health Act 1959 enacted by the 1983 Act, and lead me to the conclusion that random searches without the consent of the patient are permissible as part and parcel of necessary internal control and discipline. To restrict such searches to the occasions postulated by Mr Gordon is, without disrespect, simply inadequate. Disaster will strike when no-one has any reasonable grounds to anticipate or suspect it, save in the general sense that most of the patients, including these five appellants personally, represent an ongoing danger. If Mr Gordon were right this would not of itself provide any

proper foundation for random searches. Therefore their introduction in circumstances where the common law would not provide the necessary justification falls within the statutory duties imposed on the management at Broadmoor and is lawful.

The implementation of the policy in its original form, and as amended, is not susceptible to judicial review on the basis that it is irrational in the Wednesbury sense. Difficulties will no doubt arise from time to time in reconciling the problem of enforcing the policy in the interests of the overall management of the hospital and the sometimes conflicting requirements of a particular individual patient. The question whether any specific exceptions should be made, and whether they should be general or particular, falls within the wide ambit of management responsibility, and would no doubt involve careful consideration of any concerns expressed by the responsible medical officer.

Nourse L.J. I agree with both judgments.