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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Friday, 18th July 2008

B e f o r e:

MR JUSTICE UNDERHILL

Between:
THE QUEEN ON THE APPLICATION OF M

Claimant

v

THE HOSPITAL MANAGERS OF QUEEN MARY'S HOSPITAL

Defendant

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(Official Shorthand Writers to the Court)

Mr Stephen Simblett (instructed by Messrs Campbell Taylor solicitors) appeared on behalf of the **Claimant**
Mr Jeremy Hyam (instructed by Messrs Capsticks) appeared on behalf of the **Defendant**

J U D G M E N T
(As Approved by the Court)

1. MR JUSTICE UNDERHILL: This is an application for habeas corpus by a claimant detained purportedly under section 3 of the Mental Health Act 1983.

2. The outline facts can be summarised as follows. The claimant is a lady aged 44 with a long history of mental ill health. On 29th June this year, she was detained for assessment under section 2 of the Act. She was admitted to Queen Mary's Hospital, Roehampton, although she was a little while later transferred to St George's Hospital, Tooting because of an unrelated physical condition. The consultant psychiatrist responsible for her care at Roehampton, Dr Howlett, formed the view that she ought to be detained for treatment under section 3 of the Act, and on 10th July she was seen (I used that general term at this stage advisedly) by an approved social worker, Mr Kholi, and a section 12 doctor, Dr Keen, who completed the appropriate forms for an admission under section 3. In Dr Keen's case that consisted of a medical recommendation, which, with a recommendation from Dr Howlett, constituted the two medical opinions required by section 3(3). In Mr Kholi's case, it consisted of the actual application for admission. She has since been treated by the defendant Trust as detained under section 3.

3. It is the claimant's case that neither Mr Kholi nor Dr Keen had been through the steps required by statute to enable them, in the one case, to make a proper application and, in the other, to make a proper recommendation. So far as Mr Kholi is concerned, the provision relied on by the claimant is section 13(2) of the Act, which is in the following terms:

> "Before making an application for the admission of a patient to hospital an approved social worker shall interview the patient in a suitable manner and satisfy himself that detention in a hospital is in all the circumstances of the case the most appropriate way of providing the care and medical treatment of which the patient stands in need."

So far as Dr Keen is concerned, the relevant provision is section 12(1), which reads as follows:

> "(1) The recommendations required for the purposes of an application for the admission of a patient under this Part of this Act ... shall be signed on or before the date of the application, and shall be given by practitioners who have personally examined the patient either together or separately...".

4. The allegation that those requirements were not complied with depends essentially on the contents of the forms themselves, together with a contemporary report by Mr Kholi. I should set these out so far as relevant.

5. The form signed by Dr Keen contains the printed statement that he examined the patient. A date is left to be filled in, which he has duly completed as 10th July. The form goes on to state that in the doctor's opinion the subject was suffering from one or more specified conditions. Dr Keen "mental illness" and he gave his grounds as follows:

> "She has a well established diagnosis of bi-polar affective disorder and has recently been exhibiting characteristic signs of relapse. She has been hostile, abusive, intimidating neighbours who have had to call the police and threatening to kill her consultant psychiatrist. She is aroused, irritable and hostile, refusing to engage in a mental health act assessment interview."

He completed the reasons why he believed she required a treatment as follows:

> "She has a substantial risk history of chaotic behaviour and violence when unwell. She has recently been intimidating and [a word that is illegible] and says that Dr Howlett will 'lose her life' because of her harassment of [the patient]. She appears to lack normal social judgment and is likely to put herself or others at risk of harm if not formally detained for appropriate treatment."

6. Mr Kholi's formal application contained the statement as part of the printed form that he saw the patient on a date which he filled in as 10th July. It also contained the following printed statement:

> "I have interviewed the patient and I am satisfied that detention in a hospital is in all the circumstances of the case the most appropriate way of providing the care and medical treatment of which the patient stands in need."

At the same time as making that formal application, Mr Kholi completed an ASW assessment form. The most relevant part of that is section 4, headed "Details of Interview", which says this:

> "[The patient] was reluctant to talk to us. In fact, she was on the phone to her solicitor who was trying to persuade us from assessing her today given that she is feeling discomfort with her pancreatitis. She refused to speak to us and to be seen in the private room we had arranged for interview purposes. She then walked off the ward to have a cigarette, escorted by her RMN. During our brief interaction she was hostile and suspicious to both myself and the s12 doctor."

In the section of the form headed "Monitoring Data", Mr Kholi completed the question "How long did the assessment take?" by writing "1½ hours".

7. Mr Simblett for the claimant submits before me that it can be inferred from those materials that Dr Keen did not in fact carry out an examination as required by the Act and that Mr Kholi did not conduct an interview. He says that the overall message to be obtained from the materials is that, because of the claimant's refusal to talk to either Dr Keen or Mr Kholi or otherwise to engage with them, they felt unable to interview her or carry out an examination and did not do so. The phrases to which particular importance are attached are the statement by Dr Keen that the claimant was "refusing to engage in a

mental health act assessment interview" and Mr Kholi's statement that the claimant "refused to speak to us" and his reference to a "brief interaction".

8. Mr Simblett seeks to support that inference by reference to a witness statement from the claimant's solicitor, who was, as mentioned in Mr Kholi's report, in touch with her by telephone on the afternoon in question and was able to give some evidence about the timings and about what she had been told by the claimant. Although this was of a vague and imprecise nature, it to a limited extent supports the inference which Mr Simblett says should be drawn from the materials prepared by Dr Keen and Mr Kholi.

9. The defendant has lodged a witness statement from Mr Kholi in which he states explicitly that he and Dr Keen saw the claimant:

> "... for about 30 minutes with the results recorded in my application and in Dr Keen's medical recommendation. During that time she was indicating a wish to leave the hospital. It was evident that she was at a very high risk of absconding, and so we considered we should physically stay with her, as she had made a number of serious threats to her neighbour, her family and her RMO Dr Howlett."

He says that:

> "We also took her presentation and behaviour into account, in accordance with our respective professional expertise...".

He says that both he and Dr Keen complied with their statutory obligations.

10. That statement was only produced yesterday morning, just before the start of the hearing, because of the urgency with which the matter had been listed. Mr Simblett could not and did not object to it on that basis but he submitted that I ought not to proceed to determine the case until there had been an opportunity for Mr Kholi and Dr Keen to be cross-examined. He suggested that the claimant's application be adjourned to a date next week for that purpose. Mr Hyam for the Trust resisted the application for an adjournment. He submitted that, even on the basis of the material relied on by the claimant -- that is, without reference to Mr Kholi's witness statement -- her detention had not been shown to be unlawful and, if that was so, it was plainly desirable that the case be disposed of at this stage so as to avoid the cost, and the disruption to Dr Keen and Mr Kholi (both of whom plainly have important other duties), that would be caused by a further hearing. I agreed to entertain Mr Hyam's submission on that basis.

11. Having heard argument, I am persuaded that Mr Hyam's submission is correct. I do not think that it is possible to infer from the records relied on by Mr Simblett that Dr Keen and Mr Kholi were in breach of their duties in the manner suggested.

12. It is fair to start with a presumption -- of course a rebuttable presumption -- that Dr Keen, as a doctor approved under section 12 of the Act, and Mr Kholi, as an approved social worker, would be aware of their statutory obligations and would not deliberately act in breach of them. I do not believe that it is necessary to read Dr Keen's statement that the claimant was "refusing to engage in a mental health act assessment interview"

or Mr Kholi's statement that she refused to go to an interview room or to "speak to us" as meaning that no examination or interview within the meaning of the Act was possible or was performed or carried out. No doubt the claimant was indeed hostile and unco-operative, and refused to "engage with" Dr Keen and Mr Kholi; but that does not in my view preclude an examination within the meaning of section 12. A doctor can "examine" a patient for the purpose of reaching an opinion as to her mental health by observing her conduct over a sufficient period of time, even if she refuses, for example, to answer questions or to submit to a physical examination. If that were not the case, section 3 would in practice be inapplicable in many cases of patients exhibiting florid symptoms of mental illness. Dr Keen, on the form which he completed, was required to and did state in terms that he had examined the claimant, and I see no reason whatever to doubt this.

13. As to the length of the examination, if I were to regard myself as strictly bound by the contents of the contemporary records, Mr Kholi in fact states that the "assessment" lasted 1½ hrs. In fact in his witness statement he very properly explains that that figure includes preparation and time for writing reports. As I said, he estimates the time actually spent with the claimant as about thirty minutes. But even if I were to ignore that, and to have regard only to his reference to a "brief interaction", that does not in my view in any way mean that Dr Keen did not have a sufficient opportunity to observe the claimant's behaviour and form a professional judgment about it.

14. Likewise the contents of Mr Kholi's report do not in my judgment mean that no "interview" was carried out. I agree with the view expressed in the commentary to the Act in *Jones' Mental Health Act Manual*, 10th edition, at page 98 that:

> "It is submitted that, in the context of this Act, an attempt by an approved social worker to communicate with a patient would be sufficient to constitute an interview and that this would be the case even if the patient was either unable or unwilling to respond."

If that were not the case, section 3 would be inoperable in many cases where it was most obviously needed. Such a construction may be somewhat strained on a literalist approach, but I do not think it is impossible. I note the requirement that the interview be conducted in a "suitable" manner, which introduces a degree of flexibility. It is also material that subsection 2 makes it clear that the purpose of the interview is to enable the approved social worker to "satisfy himself that detention in a hospital is in all the circumstances of the case the most appropriate way of providing the care and medical treatment of which the patient stands in need". That purpose is, of course, achieved in a case where the approved social worker attempts to communicate with the patient but she fails to respond, or responds inappropriately, in a manner suggesting that she does indeed require treatment.

15. Another route to the same result would be to hold that a breach by the approved social worker of his duty under section 13(2) does not of itself automatically invalidate an application made by him under section 3. That argument has some appeal to me but it was not argued by Mr Hyam and I do not need to rest my conclusion on it.

16. Mr Simblett submitted that, while that general approach to the obligations to examine or to interview might be acceptable, in the present case there was nothing in the claimant's behaviour to justify the conclusions reached by Dr Keen and Mr Kholi: she was simply a non-co-operative patient, and that by itself did not justify the conclusion that she required admission under section 3. But whether that was so was a matter for the professional judgment of Dr Keen and Mr Kholi. I can see nothing in the descriptions of her behaviour that suggest they were not entitled to reach the conclusion that they did. She was, it is true, well enough to hold a conversation with her solicitor on the telephone, and indeed, on her encouragement, to protest that she felt too unwell to be interviewed. But she was also, on the same evidence, displaying abnormally hostile and suspicious behaviour and Dr Keen and Mr Kholi were entitled to take into account the other information about her recent conduct to which they refer in their respective recommendation and report.

17. Mr Simblett also referred me to the provisions of the Code of Practice issued under section 118 of the Act, but I can see nothing in the Code which is inconsistent with the view that I have formed on the effect of the statutory provisions.

18. For those reasons I dismiss this application. I would add that, even if I had formed the view (or if another judge had formed it at an adjourned hearing of the kind suggested by Mr Simblett) that no proper application had been made under section 3, it would not necessarily follow that the claimant's detention was unlawful or therefore that she was entitled to habeas corpus. She had, as I have said, been initially detained under section 2 and it was *prima facie* lawful for that detention to continue for 28 days -- that is, to 26th July. My provisional view is that the making of an ineffective order under section 3 would not undermine that earlier order, which would remain in place until it expired. In this connection Mr Simblett referred me to section 6(4) of the Act, which is in the following terms:

> "Where a patient is admitted to a hospital in pursuance of an application for admission for treatment, any previous application under this Part of this Act by virtue of which he was liable to be detained in a hospital or subject of guardianship shall cease to have effect."

He submitted that that meant that the admission of the patient pursuant to the section 3 application meant that the earlier section 2 application ceased definitively to have any effect. I am inclined to think that that is wrong, and that if the section 3 application is subsequently held to be unlawful the section 2 application remains -- or, it may be, is revived -- in full force. But the point was not fully argued before me and I need express no concluded view on it.

19. MR MARSH: My Lord, I am grateful. I think the claimant is legally aided but formally I apply for costs, which is effectively a football pools type order, essentially that the defendant's costs be postponed until --

20. MR JUSTICE UNDERHILL: Sorry, I have not been given your name.

21. MR MARSH: Mr Marsh, my Lord.

22. MR JUSTICE UNDERHILL: Oh, I have been given your name. I do the associate an injustice.

23. MR MARSH: My Lord, it is indeed the case that the claimant is legally aided, so if I could apply for the necessary assessment of costs.

24. MR JUSTICE UNDERHILL: Yes, but, although it almost bound to be academic, I think the defendant is entitled to the costs in the ordinary way.

25. MR MARSH: My Lord, I have no objection to that form of --

26. MR JUSTICE UNDERHILL: No, that must be right. Well, very well. I forget the exact formula these days but effectively the order not to be enforced -- whatever the formula is -- and you to have your legal aid assessment.

27. MR MARSH: My Lord, we do not have in our hand yet the legal aid certificate, so if we could have a certain amount of time -- 14 days for that to be served with the court.

28. MR JUSTICE UNDERHILL: Yes, an extension of 14 days to lodge the certificate with the court.

29. MR MARSH: I am grateful.