Case No: C1/2010/0846

Neutral Citation Number: [2010] EWCA Civ 1590
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
(MR JUSTICE BURNETT)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Tuesday 23rd November 2010

LADY JUSTICE ARDEN
LORD JUSTICE SULLIVAN
and
LORD JUSTICE TOMLINSON

- -

Between:

The Queen on the Application of SP

Appellant

- and -

Secretary of State for Justice

Respondent

- -

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Mr Hugh Southey QC (instructed by RMNJ solicitors) appeared on behalf of the **Appellant**.

Ms Gemma White (instructed by Treasury Solicitors) appeared on behalf of the **Respondent**.

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Judgment

(As Approved by the Court)

Lady Justice Arden:

1. We are concerned on this appeal with a refusal by order dated 12 February 2010 of Burnett J to quash an order dated 11 December 2008 made by the Secretary of State for the transfer of the appellant (whom I will call "SP") to Rampton Hospital. I will call the Secretary of State's order a transfer direction. The quashing order was sought on the grounds that under section 47 of the Mental Health Act 2003, as amended with effect from November 2008, the Secretary of State had first to be satisfied by the reports of medical practitioners as to certain specified matters. The appellant, for whom Mr Hugh Southey QC appears, submits that the report of one of those practitioners was deficient, so that the transfer direction was unlawful.

2. I am going to take first the statutory background. It is necessary to set that out because a change in the statute is relevant to the factual background. Section 47 of the Mental Health Act 2003 is set out at paragraph 3 of the judge's judgment. So far as material it provides:

> "(1) If in the case of a person serving a sentence of imprisonment the Secretary of State is satisfied, by reports from at least two registered medical practitioners -
>
> (a) that the said person suffering from mental disorder; and
>
> (b) that the mental disorder from which that person is suffering is of a nature or degree which makes it appropriate for him to be detained in a hospital for medical treatment; and
>
> (c) that appropriate medical treatment is available for him, the Secretary of State may, if he is of the opinion having regard to the public interest and all the circumstances that it is expedient to do so, by warrant direct that that person be removed to and detained in such hospital as may be specified in the direction; and a direction under this section shall be known as 'a transfer direction'.
>
> (2) A transfer direction shall cease to have effect at the expiration of the period of 14 days beginning with the date on which it is given unless within that period the person with respect to whom it was given has been received into the hospital specified in the direction.
>
> (3) A transfer direction with respect to any person shall have the same effect as a hospital order made in his case."

As the judge observes in his judgment, the reference in subsection 3 of section 47 to a transfer direction having the same effect as a hospital order made under Section 37 carries

with it two consequences. The judge explained the consequences as follows:

> "The first is that, by virtue of section 40 and Schedule 1 Part 1 of the 1983 Act, following a transfer the patient is subject to the limitations and renewal provisions found in section 20 of the 1983 Act. There is no material before me of the detail of the claimant's detention since December 2008. However, he remains detained at Rampton. The inference is that the authority for detention has been renewed under section 20. The language of that section is of 'renewal' so, as was accepted by Miss White on behalf of the Secretary of State, such renewal under section 20 cannot cure any illegality, if there be illegality, in the original transfer direction.
>
> 5. The second consequence is that release from detention is governed by the same mechanisms as apply to those who are subject to hospital orders. Thus, such patients' cases are reviewed from time to time by the First Tier Tribunal in accordance with the statutory regime. I was told that there is a hearing before the tribunal next week. The task of the tribunal will be to consider whether the criteria for detention are currently met rather than to determine the underlying legality of the transfer direction."

3. In the present case, following the transfer direction the appellant was indeed detained at Rampton Hospital and his case was reviewed on 17 February 2010 when, as we understand it, the First Tier Tribunal held that SP was lawfully detained, but the appellant submits that the decision of the tribunal to that effect has no effect on the present application. It does not mean that the detention is or was lawful and that, as I understand it, is common ground. As I have said, section 47 was amended with effect from November 2008. The previous version, so far as material, is set out by the judge in paragraph 7 of his judgment:

> "If in the case of a person serving sentence of imprisonment the Secretary of State is satisfied, by reports from at least two registered medical practitioners –
>
> a) That the said person is suffering from mental illness, psychopathic disorder, severe mental impairment or mental impairment; and
> b) That the mental disorder from which that person is suffering is of a nature or degree which makes it appropriate for him to be detained in a hospital for medical treatment and, in the case of psychopathic disorder or mental impairment, that such treatment is likely to alleviate or prevent a deterioration of his condition;

> the Secretary of State may, if he is of the opinion having regard to the public interest and all the circumstances that it is expedient to do so, by warrant direct that that person be removed to and detained in such hospital as may be specified in the direction; and a direction under this section shall be known as 'a transfer direction'."

4. There are statutory definitions of "medical treatment" and "appropriate medical treatment". I take first the definition of medical treatment. That is to be found in Section 145(4) of the Mental Health Act 2003 as amended:

> "Any reference in this Act to medical treatment, in relation to mental disorder, shall be construed as a reference to medical treatment the purpose of which is to alleviate, or prevent a worsening of, the disorder or one or more of its symptoms or manifestations."

I would observe about the statutory definition that it does not deal with the willingness of any person to accept treatment. Appropriate medical treatment is defined for the purposes of the 2003 Act by section 3(4), which provides as follows

> "In this Act, references to appropriate medical treatment, in relation to a person suffering from mental disorder, are references to medical treatment which is appropriate in this case, taking into account the nature and degree of the mental disorder and all other circumstances of this case."

I note that this definition requires appropriateness to be judged from all of the circumstances of the particular case.

5. That then is the statutory background. I set out next the background to the transfer direction. I can do this briefly. Further details of the personal history and history of offending of SP are set out in the judgment of the judge but I need not refer to those matters. It is sufficient for me to state that on 10 December 2008 HMP Frankland submitted to the Mental Health Unit of the Ministry of Justice a request for a direction to transfer SP from that prison to Rampton Hospital for medical treatment. That was close to the date when SP would be released. The request was supported by reports from two registered medical practitioners, Dr J Poole and Dr P Egleston, who was also a consultant psychiatrist at Rampton Hospital. The relevant unit of the Ministry of Justice also received a copy of a letter from Dr Krishnan. I must refer to each of those matters, that is to the reports of Dr Poole and the letter from Dr Krishnan in a little more detail.

6. I take first the report of Dr Poole. This is conveniently set out by the judge in paragraphs 14 and 15 of his judgment :

> "The declaration in the old form completed by Dr Poole was (inevitably) in a different form. Having first set out details

of the patient and doctor, the declaration enabled the doctor to indicate which of the four types of mental difficulty set out in the old section 47 applied in the given case. In this case the declaration was in the following form:

‘3 DECLARATION

I am of the opinion that:

(a) This patient is suffering from
(ii) Psychopathic disorder within the meaning of the Mental Health Act 1983, and (b) that the mental disorder from which the patient is suffering is of a nature or degree which makes it appropriate for him to be detained in a hospital for treatment.’

Beneath that one finds this:

‘and where the patient is suffering from psychopathic disorder or mental impairment

(b) that such treatment is likely to alleviate or prevent a deterioration of his condition.

I recommend treatment in a special hospital.

My full medical report is given on the reverse.’

That was signed by Dr. Poole on 8th December. The medical report on the back of the form was in the following terms:

‘Information to establish mental disorder, including reference to type of disorder and description of symptoms.

Patient suffers from dyssocial personality disorder and emotionally unstable personality disorder. He has a childhood history of being sexually abused as well as a history of unsocialised conduct disorder with his behaviour being unmanageable in a range of settings, including home, school and later in children's homes. He has a history of illicit substance misuse dating back to childhood. He has been a persistent offender since the age of 10 years old. His offending has been versatile and includes rape of a 7 year old male when aged 12 years, theft, armed robberies and non-sexual violence particularly in the context of intimate relationship breakdown. Within prison establishments he has been involved in repeated fighting, bullying, fire setting

> and fixations on female staff as well as repeated acts of self harm. Index offence was of causing death by dangerous driving in the context of intoxication.
>
> Reasons for conclusion that the medical disorder is of a nature or degree which makes detention in hospital for medical treatment appropriate. Because of his high psychopathy checklist score he has been excluded from a number of treatment programmes within prison. He was also excluded from the DSPD unit of HPM Frankland as a result of a fixation on a female whose home address he had managed to obtain. He has therefore completed no work in relation to his personality disorders.'
>
> 6. Where applicable, reasons for recommending treatment to a special hospital.
>
> 'He requires placement in a DSDP setting. Only located in high security.'

I would add the following points. The acronym, DSDP, refers to dangerous and severe personality disorder. The next observation I would make is that the report of Dr Poole does not say what the treatment would actually comprise, but she does say that she requires a placement in a DSDP setting provided, that is, that setting is located in high security and in addition she says on the front side of the report as opposed to the reverse that the treatment is likely to alleviate or prevent a deterioration of the condition of SP.

7. In my judgment, since he says both those things the implication is that the treatment is appropriate to SP and is treatment of a kind that is available in a DSDP unit. In my judgment that is a necessary implication from what Dr Poole states, reading the report fairly as a whole.

8. The next important document for the purposes of this appeal is the letter from Dr Krishnan. This states in material part as follows. I should explain Dr Krishnan is the clinical director of "the DSPD Unit at Rampton Hospital" and he writes to Dr Poole on 9 December, that is, the day after Dr Poole had written the report to which I have just referred. He states:

> "Thank you for your letter of 12th October 2008 regarding the provision of a high secure hospital place for Mr P, who is currently a prisoner in HM Prison Frankland.
>
> We have now considered the application for his admission and are prepared to offer a place at Rampton Hospital for assessment and treatment, should the Secretary of State

> wish to make a transfer direction under section 47 of the Mental Health Act 1983.
>
> If the direction order is made, because we have confirmed that a bed is available, the personal custody officer of the patient should contact the Mental Health Act caseworker at the hospital…, so that a mutually convenient date can be arranged for the admission of the patient during the 14 days following the making of the order."

Mr Southey accepts that by virtue of the office held by Dr Krishnan the offer of a bed being available is for treatment, and for treatment in the DSPD unit. He is, as I read the letter, also accepting whatever was said in the letter of 12 October 2008 as to the basis for his writing the letter offering a place. I should say that we do not have the letter of 12 October 2008 and that we are told that it was not before the decision maker.

9. I next turn to the evidence of the decision maker. This was Geraldine Marsh. She is an official in the Ministry of Justice. Indeed she is the Casework Team Leader within the Public Protection and Mental Health Group of the mental health unit at the Ministry of Justice. Her evidence, and I think all I need to do is to set out one passage is as follows :

> "I then considered the criteria under section 47 of the Act and satisfied myself that:
>
> 1) The prisoner was suffering from a mental disorder of a nature or degree that justified detention in hospital for medical treatment.
> 2) The level security of the hospital proposed for the transfer was adequate.
> 3) Appropriate medical treatment was available to him in the light of his individual circumstances. Although Dr Poole's report was on an old style form, I was satisfied that the content covered the appropriate treatment test. Dr Poole stated the Claimant required placement in a DSPD setting in high security and the letter from Dr Krishnan to Dr Poole confirmed that appropriate treatment was available at Rampton."

10. I now turn to the judge's analysis. He set out all the material facts and background in a clear and helpful way and the essence of his conclusion is in paragraph 26 of his judgment and it is sufficient for me to quote the last part of this paragraph. He held:

> "It does not seem to me to be necessary to require the doctor to set out in greater detail the precise nature of the treatment which is available or likely to be given at Rampton. Geraldine Marsh was entitled to conclude from the material

> that Dr. Poole had provided, giving the close scrutiny appropriate in these circumstances, that appropriate medical treatment was available at Rampton for the claimant. The transfer direction was lawful"

Submissions on this appeal and my analysis.

11. SP was about to be released from prison when the transfer direction was made. The transfer direction therefore constituted a severe restriction on his personal liberty. In those circumstances the transfer direction must be considered carefully and cannot be acted on unless provisions of the section have been scrupulously satisfied. The common law has always placed a high value on liberty of the person, and this important principle of the common law is now reflected in Article 5 of the European Convention on Human Rights. I need not set that article out, but as one would expect it has an exception for the detention of persons who, in the perhaps rather antiquated language of the Convention, are "of unsound mind" provided they are detained in accordance with the procedure prescribed by law. The procedural requirements of section 47 are the safeguards which Parliament has provided for the liberty of persons in the position of SP. So, as Mr Southey puts it, the Secretary of State is the gatekeeper for the purposes of SP retaining or losing his liberty by virtue of the transfer direction.

12. In the present case there is no doubt but that paragraph (b) of section 47(1) was satisfied. It is also common ground that there is a link between paragraph (b) and paragraph (c) of section 47(1) and that the treatment whose availability is to be confirmed under paragraph (c) is that identified in the expert's report for the purposes of paragraph (b). It is also common ground that the type of availability being referred to in paragraph (c) is actual availability for the particular individual whose transfer is under contemplation. Nor is there any real dispute but that there can be more than two medical practitioners, who together can provide the necessary reports for the purposes of paragraphs (a), (b) and (c), though Mr Southey points out that because of the linkage between paragraphs (b) and (c) at least, a person who deals only with paragraph (c) must do so on the basis of reports as to paragraphs (a) and (b). We are not concerned with the completion of the report for the purposes of paragraph (c) by a person who is not a medical practitioner. That does not, in the circumstances of this case, arise.

13. I would also add that there are limitations on the transfer direction. Suppose that, notwithstanding the diagnosis of the two medical practitioners on whose reports the Secretary of State acts, is different from that which is given to the person affected by the transfer direction on his arrival at the relevant hospital. There would then be a question, as we understand it from Mr Southey, that the hospital managers would have to consider whether they were under a duty to ensure that the person in question was given his liberty.

14. Mr Southey's helpful argument, when analysed, focussed on two particular points which in truth converge. His first submission focuses on the reasoning in the reports. What he submitted was that the Secretary of State is going to be reliant on the two

medical practitioners and the exercise of thediscretion has important implications so it is important to assess the statutory criteria to see that they are met and it is important that the Secretary of State sees the reasoning of the doctors and that they understand what is in issue in this case. It must be reasoning sufficient to enable the Secretary of State to be satisfied that the doctors have approached the correct issue.

15. So the Secretary of State is not simply to receive the reports and to read them but, as I read this submission in its full sense, the Secretary of State must have some obligation to monitor the medical sufficiency not just the sufficiency in terms of the statute and in terms of the facts which are available to the Secretary of State. I should say that Mr Southey accepts that a decision maker can only work on what he knows. He does not therefore submit that the Secretary of State must be taken to be aware of matters which are not within his knowledge.

16. In his submissions on this first submission, Mr Southey refers to the decision of Collins J in the case of R(DK) v Secretary of State [2010] EWHC 82 (Admin) at paragraph 25. In that case the Secretary of State had in fact only got one report on the relevant issue of treatability from the doctors, although the Secretary of State had a number of reports from medical practitioners. On the key issue, therefore, the Secretary of State only had one report rather than the two which even under the predecessor of the section 47 as it now stands were required. Collins J did not accept that it had to be implicit in the reports which did not deal specifically with treatability that the doctor had taken the view that the person the subject of the reports was in fact treatable.

17. Mr Southey also relies on the decision of the Upper Tribunal in DL-H the Devon Partnership NHS Trust v Secretary of State [2010] UKUT 108 (AAC). It held that a tribunal needs to consider:

> "What precisely is the treatment that can be provided? What discernible benefit may have on this patient? Is that benefit related to the patient's mental disorder or to some unrelated problem? Is the patient truly resistant to engagement?"

That is the end of the passage cited by Mr Southey, which comes from paragraph 33 of the decision of the Upper Tribunal.

18. In that case, as I understand it, the Upper Tribunal dealt with a decision made by a mental health tribunal on review of the detention of a person. It was, therefore, a tribunal decision which considered expert evidence. Mr Southey accepts that that is not the same context. What he submits is that this jurisdiction is as important as the situation in which the Secretary of State is determining whether to make a transfer direction.

19. So that is the first submission, which is about the sufficiency of reasoning and Mr Southey submits, applying all that to the facts of this case, there was not sufficient

reasoning in the report of Dr Poole to enable the Secretary of State to know that the type of treatment which Dr Poole was talking about would in fact be treatment, for example, with which SP would engage. Mr Southey informs us that in the past there had been difficulties in that regard with this appellant.

20. If he is correct on this point, then of course it affects not only this report but the other report in issue in this case as well but in the interests of economy of argument, Mr Southey has confined his submissions to Dr Poole's report.

21. Mr Southey's second submission is that paragraph (c) section 47(1) is dealing with appropriate treatment and because of the importance of each of the restrictions it is necessary that the writer of the report should address the sort of issues that were addressed by the Upper Tribunal in its decision in D-LH in the passage which I have already set out.

22. In my judgment neither of these two submissions succeeds for the reasons which I will now give. Section 47(1) is about the decision maker being properly dissatisfied as to the matters in paragraphs (a) (b) and (c) of section 47(1). As Ms Gemma White, who appears for the Secretary of State, submits, the level of reasoning required in any particular situation depends upon the particular context and she cites in support of that paragraph 27 of the decision of the Upper Tribunal in MD v Nottinghamshire NHS Trust [2010] UKUT 59 (AAC). That was a decision which was also referred to by Mr Southey in the course of his submissions. As I said and Mr Southey accepts, the Secretary of State can only work on what he knows.

23. Section 47 does not contain any express provision as to any particular level of reasoning. Not unnaturally, that is left to be dealt with by the general law but it is necessary to have regard to the context. The reports of the medical practitioners are written by those who are expert in medical practice and they are addressed to the Secretary of State and his officials, who are lay persons. The Secretary of State and his officials are not concerned to pursue medical reasoning. In my judgment, in principle the decision maker is only concerned to see whether the medical practitioners have given some reasons which they consider adequate and which, on what they have said, do not fail to take account of material issues or matters and do not conflict with the facts known to the Secretary of State or the statutory requirements. The matter was set out by Dyson J, as he then was, in a passage in his judgment in R v SSHD ex p Gaynor Gilkes [1999] EWHC Admin 47, which was approved by this court in the case of TF v The Secretary of State for Justice [2008] EWCA Civ 1457. Waller LJ there held as follows:

> "Thus, whenever a decision under section 47 is taken the Secretary of State must be satisfied by reports from two medical practitioners of the matters set out in subsection (1) (a) and (b). Dyson J in *R v Secretary of State for the Home Department ex p Gaynor Gilkes* said this about such reports:-

> If the reports are manifestly unreliable, then the Secretary of State cannot reasonably be satisfied that the 2 conditions are met on the basis of the reports, and a decision to rely on them in such circumstances will be capable of successful challenge by judicial review. A medical report may be unreliable for a number of reasons. It may on its face not address the relevant statutory criteria. It may be based on an assessment which is so out of date that the mere fact of a lapse of time will be sufficient to render it unreliable. It may be unreasonable to rely on a report based on an assessment conducted an appreciable, but not inordinate, time before the decision to transfer where the mental disorder is a fluctuating and unstable condition and/or where there has been a change of circumstances since the assessment was made. In each case, it will be for the Secretary of State to consider whether in his judgment the medical report is one on which he can safely and properly rely so as to be satisfied that the conditions set out in paras (a) and (b) of s.47 are met. One of the considerations that will be uppermost in his mind is whether the assessment on which the report is based is sufficiently recent to provide reliable evidence of the patient's current mental condition."

24. That decision and that of Dyson J both concern the predecessor of section 47 with which we are concerned, as indeed did the decision of Collins J in DK, and because the old version of section 47 was concerned with the issue of treatability the issues that arose in that case arose around the problem of treatability and thus, it would not I think assist for me to go into the details of those facts. What is important is the principle, and the principle is clearly set out from the passage of the judgment of Dyson J (as he then was).

25. To take the present case, Mr Southey suggests that SP would or might reject any treatment, but the position is that the doctors do not refer to that possibility. His drug treatment history, however, is known, and is summarised, and clearly Dr Poole, who summarised it, does not see it as a bar to further treatment being offered or to that further treatment being appropriate. The Secretary of State is not, in my judgment, required to investigate whether SP was amenable to treatment if this was in question. This was not stated to be an issue by the doctors, and in any event there must be some doubt whether such a question could be considered helpfully at that stage.

26. As to the appropriateness of treatment, I would not decide this case on the basis that a person's known rejection of all treatment could never be relevant to the formation by a medical practitioner of his opinion as to the appropriateness of treatment, but in the present case what was known was that there had been difficulties in the treatment programme for SP in the past. Appropriate treatment must of course take account of all the circumstances (see the statutory definition in section 3(4) of the 1983 Act as amended), but I am concerned with the actions of the decision maker. The reports did

not on their face suggest that there was a blanket objection, and, as I see it, the Secretary of State was not obliged to consider and investigate that matter as there was nothing to suggest that it was a live issue.

27. I now turn to the implication to which I have referred in paragraph 7 in the report of Dr Poole. I fully accept that the Secretary of State cannot write in reasons which are not there. However, at the same time in my judgment the Secretary of State is entitled to give the reports a sensible meaning and is not required to go back to the medical practitioner to ask them to articulate in words matters which are there by necessary implication. I have referred above to matters which in my judgment are there by necessary implication in the report of Dr Poole, namely that the treatment is available in the DSDP type of unit and that it is appropriate to SP.

28. I say this because Mr Southey submitted that the Secretary of State was not entitled to draw inferences because that ignored the reason for the individual assessment. In that regard he referred us also to paragraph 25 of the decision of Collins J in DK, which is in turn referred to above and which deals with the sufficiency of reasoning. As I have said, in my judgment, certainly in the circumstances of this case, the Secretary of State was entitled to be satisfied by reference to matters which were there by necessary implication.

29. For all these reasons I would dismiss this appeal.

Lord Justice Sullivan:

30. I agree.

Lord Justice Tomlinson:

31. I also agree.

Order: Appeal dismissed