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CO/5741/2007

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

Royal Courts of Justice
Strand
London WC2A 2LL

Friday, 19 December 2008

B e f o r e:

MR JUSTICE PLENDER

Between:
THE QUEEN ON THE APPLICATION OF MN

Claimant

v

MENTAL HEALTH REVIEW TRIBUNAL

Defendant

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Mr H Southey appeared on behalf of the Claimant
Miss M Demetriou appeared on behalf of the Defendant

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

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1. MR JUSTICE PLENDER: This is the judgment in R (On the Application of MN) v Mental Health Review Tribunal.

2. In this application Mr Southey moves on behalf of MN, a patient at a secure hospital, for review of the ruling of the Mental Health Review Tribunal dated 8 June 2007, by which the tribunal determined that the application made to it by MN when he was detained under Sections 47 and 49 of the [Mental Health] Act 1983 ceased to have effect when he ceased to be a restricted patient within the meaning of that Act.

3. The case raises a question on the interpretation of several sections of the 1983 Act, including Section 70. Section 70 provides:

> "70 A patient who is a restricted patient within the meaning of Section 79 below and is detained in a hospital may apply to a Mental Health Review Tribunal −
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> (a) in the period between the expiration of six months and the expiration of 12 months beginning with the date of the relevant hospital order; and
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> (b) in any subsequent period of 12 months."

4. Put more crudely, Section 70 ensures to a patient who is a restricted patient the right to make an annual application to the Mental Health Review Tribunal, save that in the first 12 months of his detention any application must be made in the second half of that year. That coincides with the common experience that those who are detained pursuant to the Mental Health Act, particularly under Section 37 thereof, are likely to have had a hearing before a judge or a recorder in the Crown Court at which evidence of psychiatrists will have been heard. So in the first six months of the detention of the patient there will be a recent hearing.

5. The position of MN is not an uncommon one. During the period of his detention the sentence − or the operative part thereof − had partly expired with the result that he ceased to be a restricted patient. The question then arises whether an appeal which he has made pursuant to Section 70 remains in force. Mr Southey submits that it must for, even if, as is the practice of the tribunal, the application made under Section 70 is treated as converted into one under Section 69 (2) applicable to non−restricted patients, the result, says Mr Southey, is that a patient loses one of his periodical rights to apply and may be faced with the embarrassment or disadvantage of having an application under Section 70 treated as live when he would prefer that it were not so treated.

6. In order to understand the basis of Section 70, we have to look at the scheme of the Act more generally. Assistance is derived from Section 41 (5) which provides:

> "(5) Where a restriction order in respect of a patient ceases to have effect while the relevant hospital order is in force, the provisions of Section 40 above and Part I of Schedule 1 to this Act shall apply to the patient as if he had been admitted to the hospital in pursuance of a hospital order

(without a restriction order) made on the date when the restriction order ceased to have effect."

7. Putting that language more crudely but colloquially, I would express it as follows. On the termination of the restriction order in relation to the patient, the patient will be treated as though he had been admitted to hospital in pursuance of an ordinary hospital order, that is to say one made without restriction, on the date on which the restriction order ceased to have effect. The last word requires some emphasis. It is from the date of the termination of the restriction order that the patient is treated as though he had been admitted to the hospital otherwise than on a restriction order.

8. It is submitted on behalf of the tribunal by Miss Demetriou that since the patient's restriction order is deemed to have ceased to have effect, the application that he had made under Section 70 must also necessarily lapse. That is so because an application under Section 70 is, by definition, one made by a patient who is a restricted patient within the meaning of Section 79 below. Further it is urged by the tribunal that the regime that applies to restricted patients differs from the regime applicable to non−restricted patients. The statutory scheme does not envisage that patients float between one category and another.

9. The claimant's application to the tribunal was made pursuant to Section 70 and that can only apply in the period between the expiration of six months and the expiration of 12 months beginning with the date of the relevant hospital order. By contrast, once a claimant is detained pursuant to a hospital order under Section 41 (5), that is to say a notional or deemed hospital order, he has the right to apply to the tribunal within the first six months of his detention, that is to say his detention as a non−restricted patient.

10. Thirdly, it is urged before me on behalf of the tribunal that the procedure applying to restricted patients and the procedure applying to non−restricted patients differs in significant respects. Perhaps the most important of these is that the Secretary of State must participate in tribunal hearings concerning restricted patients. The Mental Health Tribunal Rules 1983, Rule 6, provides:

> "The responsible authority shall send a statement to the tribunal and, in the case of a restricted patient, the Secretary of State, as soon as practicable and in any case within 3 weeks of its receipt of the notice of application; and such statement shall contain −
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> ..... "

It sets out what it contains. Sub−paragraph (2) states:

> "Where a patient is a restricted patient, the Secretary of State shall send to the tribunal, as soon as practicable, and in any case within 3 weeks of receipt by him of the authority's statement, a statement of such further information relevant to the application as may be available to him."

11. If the Section 70 application continued there would apply to it mandatory language of Rule 6 which requires that the Secretary of State shall send such further information relevant to the application as may be available to him. When I pressed Mr Southey on this point he stated it was his submission that the Secretary of State drops out of the picture. The Secretary of State drops out, as I understand it, because the patient is no longer a restricted patient and the Secretary of State no longer has a relevant interest. But I cannot reconcile the proposition that the Secretary of State drops out with the mandatory word "shall" which governs the Secretary of State's obligations. Moreover the concession that by some means or other the rules applicable to the participation of the Secretary of State do not apply to the person in the category of the present claimant who has ceased to be a restricted patient seems to me to disclose the unreality of the present submissions.

12. I have been referred to two domestic authorities of some relevance but neither is directly in point. The first is the judgment of Mr Justice Collins in R v South Thames Mental Health Review Tribunal ex p M CO/2700/1997. In that case Mr Justice Collins held that a change in status of a patient from a Section 2 to a Section 3 patient would not deprive him of a tribunal hearing in circumstances in which the change took place after the application was made but before being heard. This is an unsurprising if important decision.

13. The difference in the status of a patient governed by Section 2 and one in Section 3 relates to the provision of or other nature of the detention. Detention pursuant to Section 2 is provisional for investigation into the patient's condition and under Section 3 it is more enduring. It is not surprising that where a patient applies to a tribunal during the initial six months of his detention under Section 2 (see paragraph 26) that should continue to give the tribunal jurisdiction, notwithstanding that his six−month period has elapsed. The right of application to the tribunal under Section 2 and under Section 3 is much the same. In each case the application is to be made as soon as the patient has been admitted to hospital. In each case the rules of participation are the same. There is in particular no provision for participation by the Secretary of State, as there is under the 1983 Rules.

14. I therefore find the judgment of Mr Justice Collins neither questionable nor inconsistent with the position adopted by the tribunal in the present case.

15. The second authority quoted to me is R (On application of SR) v Mental Health Review Tribunal CO/1738/2005, a judgment of Mr Justice Stanley Burnton (as he then was). That matter arose in circumstances unlike the present. But in that case, as in the present, Mr Justice Stanley Burnton had to consider how − as he put it − patients with different status are treated. At paragraph 22 of his judgment he said:

> " ..... Section 72 qualifies the powers of the tribunal by reference to the status of the patient. Given the meaning of 'application to the tribunal' in Section 66 and other provisions of Part II of the Act, the more natural interpretation of the words 'where application is made to a ..... tribunal by or in respect of a patient who is subject to after−care and supervision' in Section 72 (4A) is that he is so subject when the application is made."

As I read them, those words fortify and support my observations as to the separate treatment of those who are admitted to the tribunal under various categories and fails to support the proposition which, it seems to me, Mr Southey must advance that there is some fluidity or movement between the patients in the various categories.

16. At paragraph 32 of the same judgment there is a further statement by Mr Justice Stanley Burnton which I find of assistance. He said:

> " ..... If the claimant's contentions were correct, a patient who makes an application to the tribunal while subject to Section 3 and before an application for supervised discharge is accepted who, before his application is heard, is the subject of an accepted application under Section 25A, has the right to challenge his supervised discharge before the tribunal on the hearing of that application, and if he fails is entitled immediately to make a further application under Section 66 (1) (ga) without any change in circumstances having occurred. In my judgment, that is a result that Parliament is unlikely to have intended, given its decision to restrict the applications that may be made by a patient within specified periods of time: see Section 66 (2) (c) ..... "

This, it seems to me, is very close to Mr Southey's present argument that a claimant can pursue his Section 70 appeal and immediately thereafter make a new appeal under Section 69. That is a result which, it seems to me, Parliament is very unlikely to have intended given its decision to restrict the application[s] that may be made by a patient within a specified period of time.

17. Two further points of some importance have been raised during the course of oral argument. Part of Mr Southey's argument was that a patient in the position of his client may be placed at a disadvantage by the treatment of the application that he has made under Section 70 as though it were one made under Section 69 (2) (a). He says that patients may have to make strategic decisions as to the right time at which to make applications. They are limited in the number of applications they may make, and must make a prediction of their likely improvement in condition and judge nicely the time when they are to apply accordingly.

18. Miss Demetriou has made it clear in response to my questions on the point that it is not the tribunal's policy to impose a hearing under Section 69 (2) (a) in any case in which an application has been made under Section 70 by a patient whose restricted status has been discharged. Rather the policy of the tribunal is to assist the patient to avoid any delay in the treatment of his case by treating applications under Section 70 as though made under Section 69 (2). Indeed Miss Demetriou says that the whole purpose of Section 69 (2) (a) is precisely to assist the patient in the position of N. Section 69 (2) reads:

> "Where a person detained in hospital −
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> (a) is treated as subject to a hospital order or transfer direction by virtue of Section 41 (5) above, 82 (2) or 85 (2) below of the Mental Health (Care and Treatment) (Scotland) Act 2003 ..... ; or

(b) is subject to a direction having the same effect as a hospital order by virtue of Section 45B (2), 46 (3), 47 (3) or 48 (3) above,

then, without prejudice to any provision of Part II of the Act applied by Section 40 above, that person may make an application to a Mental Health Review Tribunal in the period of six months beginning with the date of the order or direction mentioned in paragraph (a) above or, as the case may be, the date of the direction mentioned in paragraph (b) above."

19. Miss Demetriou submits that this provision would have no purpose but would be otiose if the submissions made by Mr Southey were correct.

20. Mr Southey made a further point at the end of his opening address based upon Article 5 (4) of the European Convention on Human Rights. He advanced a proposition which, as a bare proposition of law, I would most readily accept; that is that a Member State does not conform to its obligations under the Convention by putting in place a practice, particularly an administrative practice, which is consistent with the Convention so long as its statutes are to the contrary.

21. It is indeed the case for the tribunal as advanced by Miss Demetriou that an application made under Section 70 is not, as a matter of law, deemed to be one made under Section 69 (2) (a) from the moment at which the patient's restricted status ceases to exist as such. Rather it is the practice of the tribunal to treat applications made under Section 70 as though they had been made under Section 69 (2) (a) so as to avoid the patient being placed under the disadvantage to which he would otherwise have been placed of having to wait six months or to fill in an application form and wait any period of time for the hearing of the Section 69 (2) (a) application. Here, I interject that what appears to have led to the institution of the present proceedings is precisely the error of the tribunal's administration on this point. Mr N was told that his application under Section 70 had expired. He was told that he had to re−apply under Section 69 (2) (a).

22. Miss Demetriou's submission was that the first of those statements was correct; the second was incorrect because there was in place an administrative practice of treating under Section 69 (2)(a) those which had previously been made by a restricted patient under Section 70.

23. If this were the case of a mere administrative practice designed to correct an error of law I would have been persuaded by the submissions made by Mr Southey. But on closer examination, and with the assistance of Miss Demetriou, I have come to the conclusion that that is not the case. Section 69 (2) (a) applies specifically to a patient who had the right to apply to the tribunal previously. If a patient could rely on the old Section 70 application, as I have said, Section 69 (2) (a) would have no purpose.

24. It follows, in my judgment, there is no inconsistency between the statute as drafted and the rule of the European Convention which requires that a person detained shall have access to an independent, impartial tribunal capable of giving determinations within a reasonable time and regular reviews of the patient's status.

25. For these reasons I have concluded that the present application must fail.

26. MR SOUTHEY: I think your Lordship made reference to Section 2 lasting for six months. Section 2 only lasts for 28 days. I may have misheard.

27. MR JUSTICE PLENDER: I daresay there are a number of details like that which may need correction. It not infrequently happens when a judgment is given extempore.

28. MR SOUTHEY: I did notice that and thought it may assist. More substantively, there are two applications I would seek to make. The first one, which I suspect is non−controversial, is an application for Legal Services Commission assessment.

29. The second application − so I suspect more controversially − is for permission to appeal. I recognise that your Lordship has heard lengthy argument on this matter and has come to a conclusion you feel is clear. The point I would make at this stage − and this is not to concede in any way should the matter proceed further that it is brought on these grounds, far from it, but it is appropriate to put it this way − is that this determination does have implications for a number of patients. It is of some practical importance to patients to know whether − to use the phrase that perhaps I have over−used this afternoon − they lose one bite of the cherry by reason of the operation of the statute or whether they have further opportunity, not least because it will guide them when they decide to make the tactical decision that they will need to make under Section 69 (2). The importance of the issue, in my submission, is that that is sufficient to justify permission to appeal.

30. MR JUSTICE PLENDER: Miss Demetriou?

31. MISS DEMETRIOU: We seek an order for costs, the usual order that applies in respect of legal aid assisted parties.

32. MR JUSTICE PLENDER: You have no submissions on the point of appeal.

33. MISS DEMETRIOU: I resist the application for permission to appeal. In my submission, your Lordship's judgment is clear. This is an academic case. It is no longer of importance to the claimant himself. In those circumstances it should be for the Court of Appeal to determine whether it wishes to hear an appeal. We say in any event that an appeal is not likely to succeed.

34. MR JUSTICE PLENDER: Mr Southey, the good news is that I grant your application for assessment by the Legal Services Commission. The bad news is that I do not grant permission to appeal. Any application for leave to appeal to the Court of Appeal should be made to the Court of Appeal. The reasons are that the case is no longer practically important for your client. I do not consider the point of law is of such difficulty that a lower judge should give permission to appeal to the Court of Appeal.

35. MR SOUTHEY: The reason I stood up was not because I had any of those orders necessarily sprung at me; my friend wants to make an application for costs. In reality, I suspect they would be extremely difficult in practice to enforce. The claim was brought as a test case, we would submit, for good reason. You may think about departing from the normal rule. But however if you wish to follow the normal rule, I would also point out that any costs order should be made subject to Section 11 of the

Access to Justice Act because of the fact that the claimant has been in receipt of public funding.

36. MR JUSTICE PLENDER: I shall make an order for costs subject to Section 11 of the Access to Justice Act.

37. MR SOUTHEY: It is the current statutory provision.

38. MR JUSTICE PLENDER: The football pools order.

39. MR SOUTHEY: It is the football pools order, but that is the correct language.