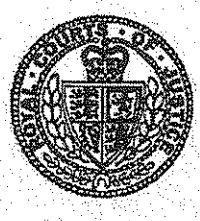

Neutral Citation Number: [2008] EWCA Civ 1457

Case No: C1/2008/2898

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION, ADMINISTRATIVE COURT
Mrs Justice Cox
[2008]EWHC 2912 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/12/2008

Before :

LORD JUSTICE WALLER
Vice-President of the Court of Appeal, Civil Division

LORD JUSTICE THOMAS
and
LORD JUSTICE AIKENS

Between :

The Queen on the Application of TF	**Appellant**
- and -	
The Ministry of Justice	**Respondent**

Stephen Knafler and **Roger Pezzani** (instructed by **Messrs Campbell Taylor**) for the **Appellant**
Katherine Olley (instructed by **Treasury Solicitor**) for the **Respondent**

Hearing date : 16th December 2008

Judgment Approved by the court for handing down (subject to editorial corrections)

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Lord Justice Waller :

1. The appellant is only 20 years old and already has a record of committing a series of criminal offences, including wounding with intent. He has a mental disorder which would come within the diagnosis of Dissociated Personality Disorder. His last sentence was one of 30 months for robbery, which was due to end on 12th September 2008. Consideration had been given from time to time during the period of that sentence to seeking from the Secretary of State a warrant directing his transfer to a hospital under section 47 of the Mental Health Act 1983 but, until the very last moment of his sentence, that did not happen. It is the circumstances under which a warrant was sought and obtained at the last moment of his sentence that is under scrutiny in the proceedings.

2. On the morning of the 12th September 2008, the day he was due to be released, the appellant was under the impression that he would be released into the community, albeit under supervision. A notice of supervision relating to the appellant's release plan was handed to the appellant on that day. It informed him that his sentence expired on 12th September and that after his release he would be under the supervision of a probation officer or local authority social worker for three months until 11th December.

3. Unbeknownst to the appellant, a direction had been sought from the Secretary of State for a transfer to a hospital and a warrant had been issued and signed on 11th September, transferring the appellant to a Medium Secure Hospital, Kneesworth House in Hertfordshire. Thus, when the appellant, who had prepared for and was expecting his release, reached the reception area having changed into his civilian clothes, he was served with the order for transfer and escorted by hospital staff to Kneesworth.

4. By section 47 of the Mental Health Act the Secretary of State must be satisfied of certain matters. The warrant stated that he was so satisfied, and it is convenient at this stage to quote the warrant issued in this case, which stated that the Secretary of State was satisfied "by the reports of two medical practitioners, of whom one at least is a practitioner approved for the purposes of section 12 of the said Act, that the [appellant] is suffering from psychopathic disorder within the meaning of the said Act and that the mental order is of a nature or degree which makes it appropriate for the patient to be detained in a hospital for medical treatment and that such treatment is likely to alleviate or prevent a deterioration of his condition."

5. By a judgment handed down on 18 November 2008 Mrs Justice Cox held that, on the evidence before her, the Secretary of State "could not have been satisfied by reports from at least two medical practitioners that hospital treatment was likely to alleviate or prevent a deterioration of the [appellant's] condition." On that basis she held that "if that had been the end of the matter" she would have felt constrained to make an order quashing the decision to transfer. But she also held that it was not the end of the matter. She went on to consider evidence from two practitioners brought into existence after the transfer had been made and, in reliance on that evidence, she found that if the Secretary of State had made further inquiries he would have been so satisfied and would have made the order for transfer, that in the exercise of her discretion she would not grant relief.

6. The appellant appealed that part of the judge's judgment whereby she had, in her discretion, refused relief. Buxton LJ granted permission to appeal on 10th December and directed that the appeal should be expedited. The appeal was listed to be heard on 16th December. The respondent put in a respondent's notice challenging that part of the judgment by which the judge indicated that but for the exercise of her discretion she would have quashed the transfer decision.

7. On the hearing of the appeal we indicated that we would like to hear argument on the respondent's notice first because if the judge's decision on that aspect were reversed that would make the appellant's argument academic. Having heard argument on the respondent's notice and having retired for a short while we indicated that we needed further time to consider that aspect and would like to hear argument on the judge's exercise of discretion on the basis that the judge's view on quashing the order to transfer might be right.

8. Miss Olley at this stage indicated very properly that she would find it impossible to uphold the judge's exercise of discretion if the order to transfer and thus the warrant were quashed. With the greatest respect to the judge, who had clearly taken the greatest care in considering every aspect of a troublesome case, and, who quite understandably was concerned about the ramifications of quashing the order to transfer with its obvious consequences, the judge went wrong in seeking to keep an invalid order in place by the exercise of a discretion to refuse relief.

9. It seems probable that she was misled by the decision in *R v Secretary of State for the Home Department ex p Gilkes* [1999] 1 MHLR 6 where Dyson J (as he then was) held in relation to a decision to transfer under section 47 that it had not been reasonable for the Secretary of State to rely on one of the two medical reports she relied on and held that, in the light of the fact that if the Secretary of State had made further inquiries at the time of the decision to transfer, the decision would have been the same, that he would exercise his discretion against granting relief.

10. There does not seem to have been argument in that case as to whether, by virtue of unreasonably relying on a report, the warrant issued was unlawful. It may be that that case fell a different side of the line. Lord Donaldson MR in *R v Secretary of State ex p Cheblak* [1991] 1 WLR 890 explained the difference between an application for judicial review and habeas corpus in these words:-

> "Although, as I have said, the 2 forms of relief which the applicant seeks are interrelated on the facts of his case, they are essentially different. A writ of habeas corpus will issue where someone is detained without any authority or the purported authority is beyond the powers of the person authorising the detention and so is unlawful. The remedy of judicial review is available where the decision or action sought to be impugned is within the powers of the person taking it but, due to procedural error, a misappreciation of the law, a failure to take account of relevant matters, a taking account of irrelevant matters or the fundamental unreasonableness of the decision or action, it should never have been taken. In such a case the decision or action is lawful, unless and until it is set aside by a court of competent jurisdiction. In the case of detention, if the warrant,

> or the underlying decision to deport, were set aside but the detention continued, a writ of habeas corpus would issue."

11. If the judge's decision in this case was right the Secretary of State simply did not have the power under section 47 to direct a transfer. If that was right the detention was unlawful. The court simply cannot render a detention lawful that which was unlawful simply by refusing to grant relief.

12. I should perhaps add that, so far as the future is concerned, as Mr Knafler has explained in his skeleton there are provisions of the Mental Health Act sections 5 and 3 which would allow for the detention of the appellant in a hospital, if the criteria under those sections apply. That could be the only way in which the appellant's detention in a hospital could become lawful once the order for transfer and the warrant were quashed.

13. Accordingly the question is – was the judge right in her view that the Secretary of State did not have the power to direct a transfer under section 47? It is important in considering that question to have in mind the context. The decision under section 47 was being taken right at the end of the appellant's sentence and it was thus a decision that involved depriving him of his liberty. That may often not be the position when section 47 is used because the transfer is in the course of a sentence of imprisonment and the patient's detention in hospital is in exchange for lawful detention in prison. That, as it seems to me, heightens the scrutiny which should be applied both by the Secretary of State as to the evidence on which that decision should be taken, and heightens the scrutiny which the court must apply to the decision of the Secretary of State.

14. Mr Knafler reminded us of the words of Brooke LJ in *D v Home Office* [2006] 1 WLR citing the words of Lord Atkin and Lord Griffiths in paragraph 69:-

> "no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a court of justice. And it is the tradition of British justice that judges should not shrink from deciding such issues in the face of the executive" (*Eshugbayi Eleko v Office Administering the Government of Nigeria* [1931] AC 662, 670, per Lord Atkin.)
>
> "in English law every imprisonment is prima facie unlawful and . . . it is for a person directing imprisonment to justify his act. The only exception is in respect of imprisonment ordered by a judge, who from the nature of his office cannot be sued, and the validity of whose judicial decisions cannot in such proceedings as the present be questioned. (*Liversidge v Anderson* [1942] AC 206, 245-246, per Lord Atkin.)
>
> The law attaches supreme importance to the liberty of the individual and if he suffers a wrongful interference with that liberty it should remain actionable even without proof of special damage. (*Murray v Ministry of Defence* [1988] 1 WLR 692, 703, per Lord Griffiths.)"

In particular Mr Knafler emphasised that the onus lies on the Secretary of State to support the legality of his action where the liberty of the subject is concerned.

15. He further submitted that, in the mental health context, if someone is to be taken out of the community and detained in a hospital there must be clear evidence that the medical condition of a patient justifies such action; [see Sir Thomas Bingham MR in *S-C (Mental Patient : Habeas Corpus)* [1996] QB 599 at 603 F-H]. He further relied on a dictum in *Regina (Rogers) v Swindon NHS Primary Care Trust* [2006] 1 WLR 2649 para 56 to the effect that where fundamental convention rights are involved, such as Article 5 as in this case, the court must subject the decision to rigorous scrutiny. Indeed, for the same reasons, he would add that there was an obligation on the Secretary of State to scrutinise the evidence with rigorous scrutiny before making a direction.

16. Section 47 provides as follows:-

> **"Removal to hospital of persons serving sentences of imprisonment, etc.**
>
> 47. (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 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 so to do, 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 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.

> (4) A transfer direction shall specify the form or forms of mental disorder referred to in paragraph (a) subsection (1) above from which, upon the reports taken into account under that subsection, the patient is found by the Secretary of State to be suffering; and no such direction shall be given unless the patient is described in each of those reports as suffering from the same form of disorder, whether or not he is also described in either of them as suffering from another form."

17. 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."

18. If the decision is being taken as in this case right at the end of the sentence what must also be in the Secretary of State's mind I suggest is that a decision to direct a transfer cannot simply be taken on the grounds that a convicted person will be a danger to the public if released (as understandable as that concern must be) but can only be taken on the grounds that his medical condition and <u>its treatability</u> (to use a shorthand) justify the decision.

19. On what material was the decision taken and who took the decision? The ultimate decision appears to have been taken by Kalpna Verma, a Casework Team Leader/Higher Executive Officer in the Ministry of Justice. Her statement so far as relevant is in the following terms:-

> "2. Shortly before 14 August, John Hughes of the Hertfordshire Probation Service and Chairman of the Multi Agency Public Protection Agency, Hertfordshire spoke by telephone to Mary

Robinson, Caseworker/Executive Officer in the Unit indicating that a transfer of the Claimant to hospital under section 47 was requested. Ms Robinson advised him that for this purpose two medical reports would be required. On 14 August a file of documents relating to the Claimant was received from Hertfordshire Probation Service and between 8 and 10 September medical documents were received consisting of the reports of Dr Isweran of 2 May 2007 and Dr Ijomah of 29 August 2008 and the report forms F1305 completed by Dr Isweran on 8 September 2008 and Dr Morris on 10 September 2008. On 12 September Ms Robinson referred the file to me under cover of a risk assessment form ("VK1 page 1) with a view to consideration of a transfer under s47 of the Act to Kneesworth House Hospital.

3. I analysed t he file and took into consideration numerous factors when considering a section 47 transfer and these were:

1) The nature of the index offence: robbery involving a threat of violence. (See Offender Assessment System Analysis of Offences "VK1" pages 2-5).

2) The very large number of previous convictions. (See PNC printout "VK1" pages 6-14).

3) The medical reports of Drs Isweran, Ijomah and Morris. As Dr Isweran's report on interview was dated May 2007 and that of Dr Ijomah was not by a doctor who had completed a form F1305, the advice of the Casework Manager, Chris Kemp, was sought as to their validity and he advised that as attempts had been made by the doctors to see the Claimant and he had refused to see them, coupled with the fact the reports indicated that he was suffering from a psychopathic disorder, being an enduring condition, that the medical evidence was sufficient.

4) The level of security of the proposed hospital (Kneesworth House, medium security).

5) The Risk Assessment form. ("VK1" page 1)

6) Sentence expiry date 12 September 2008.

7) The prison transfer form information ("VK1" pages 15-16).

4. I then considered the criteria under s47 of the Act and satisfied myself that:

1) The detainee was suffering from a mental disorder.

2) The level (of) security of the hospital proposed for the transfer was adequate.

3) The medical reports were valid."

20. The report forms F1305 completed by Dr Morris and Dr Isweran were as to the front pages pro forma, allowing for the crossing out of certain points and leaving in others. That process meant that on the front pages each doctor "Declared 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 and a degree which makes it appropriate for him to be detained in a hospital for treatment" Then follows an instruction in italics *"where the patient is suffering from a psychopathic disorder or mental impairment"* and the form continues "(c) that such treatment is likely to alleviate or prevent a deterioration of his condition. My full medical report is given on the reverse." (my underlining)

21. "The full medical reports on the reverse" were completed under two pro forma headings. The first is "Information to establish mental disorder, including reference to type of disorder and description of symptoms". Both doctors gave the required description.

22. The next heading is "Reasons for conclusion that the medical disorder is of a nature or degree which makes detention in a hospital for medical treatment appropriate". There is nothing in the heading that directs the attention of the doctor to giving reasons as to why he or she considers that treatment is likely to alleviate or prevent deterioration of the prisoner's condition.

23. In this instance neither doctor gave any reasons or provided any grounds in support of the view that they were of the opinion that the treatment would alleviate or prevent deterioration. Indeed the point each seems to make is that the appellant's condition makes him likely to commit further offences if he is released into the community.

24. Kalpna Verma also had a lengthy report from Dr Ijomah, dated 19th August 2008. That undoubtedly did deal with treatability in these terms which seem to be somewhat guarded:-

> **"Treatability** – Mr [redacted] I would consider is treatable.
>
> Mr [redacted] is motivated for treatment and has engaged in previous treatment though these treatments have been brief in nature. There will be a number of treatment barriers to overcome, especially the features of his personality disorder which may trigger reactions of rejection from his carers. As would be expected Mr [redacted]'s motivation will fluctuate with external circumstances and adverse events.

Treatments

> Mr [redacted] seems most likely to benefit from treatment targeting his emotional regulation and impulsivity. This would be best through cognitive behavioural modality.
>
> Mr [redacted] tells me has had undergone these in the past but the more effective treatments are of longer duration, up to one year. This would involve primarily either anger management or dialectical behaviour therapy (DBT). The general aspects of these treatments would be involving group work and individual treatment work. There would be an educational element to aid his understanding of emotions, behaviour and cognitions. This would be coupled with a means of obtaining self control over his emotions and cognition either through relaxation techniques, meditation etc. After practice, testing out the effect of treatment either through provocation or role playing problematic situations would give an indication of the treatment effectiveness.
>
> It was unclear if this type of treatment could be provided in the community as an alternative to receiving such treatment within a secure setting.
>
> Mr [redacted] could be considered to meet the legal criteria of psychopathic disorder and his condition I would consider would be amenable to treatment. Mr [redacted] states that he is willing to undergo treatment though his motivation will fluctuate over time."

25. The risk assessment form prepared by Miss Robinson set out details of the appellant's offence and refers to his extensive previous convictions. It confirms that the two medical reports had been obtained and then says this under the heading "Symptoms & Reasons for treatment":-

> "It is believed that Mr F is treatable and this can only be carried out within a secure setting." [This conforms with Dr Ijomah's view].

26. Her comments at the end were as follows:-

> "Rampton hospital have assessed him and have recommended a MSU. As can be seen the medical reports are out of date. I have however, discussed this with both RMOs who have informed me that Mr F has refused to see them making threats to kill them"

27. It is not in dispute that there was before the Secretary of State one report, that of Dr Ijomah, which dealt with treatability. Miss Olley submitted that, because of the declarations on the first pages of the F1305s, the right conclusion is that these reports

also demonstrated to the Secretary of State that it was these doctors' opinions that the appellant was treatable.

28. It seems to me that it would have been very difficult for Kalpna Verma, applying a rigorous scrutiny as she was obliged to do, to be satisfied that these doctors had applied their minds to treatability. More important perhaps is that it does not seem to me from Kalpna Verma's statement that she applied her mind to the question whether she had opinions from two doctors on treatability.

29. As appears from her statement and Miss Robinson's risk report the concern was that the F1305 medical reports were out of date in that neither doctor had interviewed the appellant recently. That concern would seem to relate to diagnosis and the possibility that the appellant's condition might be fluctuating. The advice to Miss Verma from Miss Robinson and Mr Kemp was that, since the appellant would not see either doctor in recent times but the appellant's condition was "enduring", she could rely on those reports. That, as it seems to me, is appropriate advice but does not engage with the question whether treatment would alleviate or prevent deterioration in the condition.

30. In her statement Kalpna Verma never addressed "treatability" at all. Her comment in paragraph 4 that the "medical reports were valid" goes simply to the fact that although any interview on which diagnosis had been made by the doctors who signed the F1305s was many months before, the views of the doctors on diagnosis were still valid.

31. Where section 47 is proposed to be used at the very end of the sentence, and hopefully that will only be in very exceptional cases, the onus must be on the Secretary of State to show that the mind of the decision maker has focused on each of the criteria which it is necessary to satisfy if there is to be power to issue a warrant directing transfer to a hospital.

32. In my view the Secretary of State has failed to establish that she had a report from a second doctor on treatability or indeed that Khamas Verma was herself satisfied on the evidence of the doctors before her that treatment would alleviate or prevent a deterioration in the appellant's condition.

33. In my view the judge's conclusion on this aspect was correct and in the result the appeal must be allowed.

Lord Justice Thomas :

34. I agree.

Lord Justice Aikens :

35. I also agree.