CO/558/2012

Neutral Citation Number: [2012] EWHC 556 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Wednesday, 22 February 2012

B e f o r e:

MR JUSTICE OUSELEY

Between:
THE QUEEN ON THE APPLICATION OF W

Claimant

v

(1) DR FINTAN LARKIN
(2) SECRETARY OF STATE FOR JUSTICE

Defendants

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(Official Shorthand Writers to the Court)

Mr T Baldwin (instructed by Scott-Moncrieff) appeared on behalf of the **Claimant**
Ms V Butler-Cole (instructed by Capsticks Solicitors) appeared on behalf of the **1st Defendant**
Mr J Hyam (instructed by the Treasury Solicitor) appeared on behalf of the **2nd Defendant**

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

1. MR JUSTICE OUSELEY: The claimant is currently detained in Broadmoor. He was convicted, and it was not his first conviction for a serious offence, on 28 February 1995 of two counts of manslaughter by reason of diminished responsibility and two counts of false imprisonment, rape and indecent assault, committed, it appears, on the same day in 1994. For the manslaughter offences, he is serving a life sentence with a minimum period of ten years, which has expired, and for the other offences he was sentenced to a combination of 14 years and seven years to run concurrently with the life sentence.

2. It is not necessary to set out the details of the offences. They are unpleasant and distressing.

3. The claimant was in prison until 2009, when he was transferred, under section 47 of the Mental Health Act 1983 as amended, to Broadmoor. He is currently in Broadmoor, but, pursuant to a notification given by Dr Larkin, the responsible clinician, under section 50 and the issue of a warrant by the Secretary of State for Justice, the claimant was to be returned to prison at HMP Wakefield. The claimant challenges the notification by Dr Larkin and the issue of the warrant by the Secretary of State for Justice on a variety of grounds.

4. Permission to apply for judicial review was adjourned to be dealt with at a rolled up hearing, with the substantive hearing to follow if permission were granted, pursuant to an order of Cranston J on 31 January 2012. Various other directions had been given on 18 January 2012 by Nicola Davies J, including provisions for disclosure and, importantly, an order preventing the defendants from enforcing the warrant of remission until the final resolution of this claim or further order, pending which the claimant was to be kept at Broadmoor.

5. I refused an application for an adjournment yesterday, made on behalf of the claimant with a view to a further exploration of documents produced as a result of disclosure made by the Secretary of State pursuant to Nicola Davies J's order of 18 January 2012. The timetable to which the case was proceeding was one the parties had agreed and had been embodied in a court order.

6. There is also a significant problem, and it is important to the case, that the Dangerous and Severe Personality Disorder Unit at Broadmoor, where the claimant was located, is closing on 29 March 2012.

7. I start by setting out the immediately relevant statutory provisions, the contrast between which is of relevance.

8. Section 47 of the Mental Health Act 1983 as amended 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 is 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 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'."

That provision deals with the removal to hospital of persons serving sentences of imprisonment.

9. Movement in the reverse direction is dealt with under section 50:

"(1) Where a transfer direction and a restriction direction have been given in respect of a person serving a sentence of imprisonment and before [his release date] the Secretary of State is notified by the [responsible clinician], and other [approved clinician] or [the appropriate tribunal] that that person no longer requires treatment in hospital for mental disorder or that no effective treatment for his disorder can be given in the hospital to which he has been removed, the Secretary of State may --

(a) by warrant direct that he be remitted to any prison or other institution in which he might have been detained if he had not been removed to hospital, there to be dealt with as if he had not been so removed; or

(b) exercise any power of releasing him on licence or discharging him under supervision which could have been exercisable if he had been remitted to such a prison or institution as aforesaid,

And on his arrival in the prison or other institution or, as the case may be, his release or discharge as aforesaid, the transfer direction and the restriction direction shall cease to have effect."

10. W was transferred, as I have said, pursuant to section 47, to Broadmoor. He was transferred from HMP Whitemoor because of difficulties he was experiencing in receiving some of the treatment which he was undertaking at Whitemoor in 2008. The appropriate doctors recommended transfer to Broadmoor and also concluded that his personality disorder interfered with the treatment plan at Whitemoor to such a nature and degree as to require treatment in hospital, and conditions of detention under high security were required.

11. The claimant underwent the particular course of treatment, the Sex Offender Management Programme ["SOMP"], available at Broadmoor alone. This was undertaken during 2010, and Dr Larkin, who was W's responsible clinician, took the view that the claimant had performed well in engaging with the available treatment.

But, by the beginning of 2011, he was coming to the end of the work which Broadmoor could do with him. Dr Larkin says that he then started to consider options for transfer out of the DSPD Unit and rehabilitation. He said that there were two main pathways: one through the Health Service and the other through the Prison Service. He wrote to the Three Bridges Medium Secure Unit, which was also the regional secure unit, and in that capacity would act as what is called the gateway to other MSUs in the region. The purpose of Dr Larkin asking Three Bridges to assess the claimant's suitability for medium security, and whether he needed specialist medium secure services, was to see if he should follow the healthcare pathway.

12. There was some uncertainty in the responses of Three Bridges to this enquiry, but the provisional view, which later became the confirmed view, was that the medium secure service "would have nothing to offer in the way of treatment that cannot be provided by Broadmoor Hospital or the prison service". The position so far as Three Bridges was that, in June, it again expressed doubt that there was any scope for the claimant to be accepted for transfer there and it appears that, on a number of occasions between April and August, Three Bridges had indicated they would not support a healthcare route for the claimant.

13. Finally, Dr Larkin received a report dated 26 August 2011 from Three Bridges concluding that the claimant was definitely not suitable for transfer to Three Bridges as they did not have treatment suitable for patients with a primary diagnosis of personality disorder, so his detention there would be unlawful.

14. During the period up to then, the claimant was continuing to receive treatment at Broadmoor. Indeed, in April of 2011, Dr Larkin remained of the view that, because the claimant still had some months to go to complete a lengthy block of work within the SOMP, it was still appropriate for him to be detained in hospital and that appropriate treatment was available to him at Broadmoor.

15. In April 2011, those views of Dr Larkin were given to, and accepted by, the First-tier Tribunal in the Health, Education and Social Care Chamber, when it conducted its review of the detained patient. The reasons for the Tribunal's decision contain the evidence of Dr Larkin that the patient was suffering from dissocial, paranoid and emotionally unstable personality disorders, the nature at least of which made it appropriate for him to be detained, and necessary for him to be detained for the protection of others, in order to receive the appropriate treatment for his personality disorders available at Broadmoor.

16. Concern was expressed on behalf of the claimant that the Tribunal should endorse the fact that he continued to be in need of treatment and should remain in the healthcare system. Dr Larkin recognised that treatment in the form of "schema" and trauma therapies continued to be available at Broadmoor at that time, but he anticipated that the claimant would no longer need maximum security detention but could be transferred to a MSU. He referred to the state of contact between Broadmoor and the Three Bridges unit.

17. The Tribunal recorded that it was:

> "... Dr Larkin's professional opinion that the patient should remain in hospital for further treatment and that he should not be returned to prison. In his professional opinion, the treatments for personality disorders available to the patient in prison are inferior to those available to him in the health care system."

The Tribunal then concluded that the statutory criteria for continued detention in hospital for treatment were proved. It felt strongly that the claimant should continue to be treated for "a complex combination of personality disorders in detention in hospital rather than prison for the reasons expressed by Dr Larkin ..." It was only in May 2009 that the claimant had been transferred to Broadmoor.

18. But, by August 2011, the claimant had completed the SOMP. There was other work that could be done. He was undertaking trauma treatment, but, in his witness statement of 17 February 2012, Dr Larkin expresses the view that this trauma work could be completed in a number of other settings. He no longer required high secure hospital care and the DSPD service was closing at Broadmoor. The completion of the specific treatment, combined with his progress in other areas, made it appropriate for the claimant now to move on from Broadmoor Hospital.

19. Accordingly, by August, those events and the absence of beds in the other DSPD ward led Dr Larkin to take a number of steps towards the discharge of the claimant from Broadmoor. His statement points out that the nature of the security at Broadmoor can only justifiably be applied to someone whose needs and the public's protection needs require them to be subjected to that level of security. It was not ethical and, he says, not lawful for someone who did not require that level of security to stay in such a stringently controlled environment.

20. The position in August was that, in the absence of a transfer or referral to or through Three Bridges, the criminal pathway for discharge was being examined with a temporary move to Ascot ward in Broadmoor, if a bed was available. A meeting, pursuant to section 117 of the Mental Health Act 1983, was held in August 2011. This is a meeting pursuant to the statutory duty on prison/probation services and the NHS and the local authority to co-operate in the aftercare of a person discharged from detained services. The meeting recommended that the claimant continue therapy, including healthy sexual function therapy, trauma focus, cognitive behavioural therapy and schema therapy, pending an anticipated transfer to prison in the relatively near future.

21. Dr Larkin, however, did not leave the question of referral to a MSU there. He was at least, by this time, pursuing the question of whether Three Bridges would permit Broadmoor to refer the claimant to Millfield MSU for assessment. Soundings began to be taken with Millfield around the end of August, as I understand the state of the evidence. Meanwhile, some work could be done because a bed was available on Ascot ward for six months and the opportunity, says Dr Larkin, was taken to complete a short package of work with the claimant whilst a possible referral to Millfield was taken further.

22. The position, so far as Millfield is concerned, remains unresolved even today, although it appears that, in a recent development, the MSU accepted in 26 January to the effect that the referral for assessment could be made and was made on 26 January 2012. By this time the claimant had also completed the treatment package available to him at Broadmoor.

23. The discharge planning, however, had to continue: the main SOMP work had been completed, the temporary work was either ending or had been completed and the DSPD Unit, the treatment at which was the justification for the claimant's detention in Broadmoor, was closing. The availability of the bed in Ascot ward was coming to an end.

24. Accordingly, a further section 117 meeting was held on 8 December 2011. Dr Larkin was, of course, present at that, with others who were involved, including a nurse from HMP Wakefield Mental Health Team (this is because that is the prison to which discharge was expected) and the claimant was present for at least part of the meeting and expressed his dissatisfaction and disappointment at the absence of a healthcare pathway and his expected return to prison.

25. At that meeting, Dr Larkin stated that there was no treatment currently for the claimant at Broadmoor and he would start a healthy sexual functioning programme at Wakefield. The schema work should be completed somewhere. Prison services were not as bleak as the claimant thought, they had improved significantly, and the treatment available at the ordinary personality disorder unit was not appropriate. The meeting also heard from the Wakefield nurse that the mental health team had been expanded and more support was available than hitherto, though not as much as at Broadmoor.

26. The relevant notice for the notification to the Ministry of Justice was prepared by Dr Larkin on 16 December 2011. Question 4 was:

> "Does the patient still require treatment in hospital for mental disorder?"

The form answered "no". Question 5 asked:

> "Can effective treatment for the patient's disorder be given in the hospital to which he or she has been removed?"

Again, the answer was "no".

27. Brief information to support those two answers was given in the box at the bottom of the form. It referred to the array of personality disorders diagnosed in the claimant. It continued:

> "[He] has completed a number of treatments available to him at Broadmoor. He has complied well with treatment here and successfully completed a number of programmes, including the sexual offending management programme, and has also had individual therapy during his stay at Broadmoor. He has benefited what he can from being in a hospital setting [sic].

> [He] has been assessed by his catchment area MSU. He does not have an onward healthcare pathway in place and can benefit from treatments available to him in the prison estate (eg HSF) and, in line with the national strategy on managing personality disorder offenders, should therefore now return to prison."

That notification is the decision made by Dr Larkin, the first defendant, and which is the subject of challenge.

28. The Secretary of State then issued a warrant, dated 6 January 2012, pursuant to the notification that the claimant no longer required treatment for mental disorder or that no effective treatment for it could be given in the hospital to which he had been removed. He was directed to be remitted to HMP Wakefield. That is a decision of the Secretary of State which is also challenged.

29. Mr Baldwin for the claimant takes a number of points in respect of those decisions. There is a common theme underlying the allegations of unlawfulness. The first and fundamental contention is that section 50, on its true construction, does not permit a notification to be given in respect of each of what may be described as the two limbs, that is to say that the person no longer requires treatment in hospital and that no effective treatment can be given in the hospital where he is. The Act requires that one, and one only, of those limbs be selected because the two are in conflict. The Secretary of State would not understand what investigations he had to carry out when receiving such a dual notification. For example, if he received a notification on the basis that no effective treatment was available at the hospital where the individual was detained, the Secretary of State would be alerted to the fact that he should enquire whether other hospitals might be able to offer effective treatment. By contrast, if the Secretary of State received a notification that no hospital treatment was required, the Secretary of State should be clear that that was indeed the position in the clinical judgment of the responsible clinician, but the Secretary of State would not need to be further troubled, absent a change of circumstances, about a transfer to another hospital.

30. Mr Baldwin elaborated points which essentially follow from that first one. He said the Secretary of State had failed to carry out the investigations required by a notification under one or both heads as to the nature of the illness, the nature of the disorder, the nature of the treatment that was potentially still effective and other hospitals to which the claimant might go. The reasons given by the clinician were inadequate to support the views expressed and the Secretary of State in his turn should have realised as much. There was also a contention that the decision in the notification did not reflect the clinical judgment of Dr Larkin which had been subordinated to the strategy for sending detained persons who could no longer receive treatment where they were to prison. Effectively, the concern of the claimant was that Dr Larkin had, in both April and August and indeed later, expressed the view that treatment was still appropriate for the mental disorders suffered by the claimant, yet had by this decision precluded a healthcare pathway being pursued and being pursued before the claimant was discharged from Broadmoor.

31. I make a few observations before turning to the substance. Whatever else may be the position, it is perfectly clear from the first witness statement of Mr Larkin, even if it is not clear from the terms of the notification, that Dr Larkin does not hold the view that it would be inappropriate for the claimant to go to a MSU such as Millfield. It is not for him to express the view that it is definitely appropriate for the claimant to go to MSU Millfield, but it is equally clear, both from his conduct and from his statement, that the doctor did not take the view that it would be wrong if the MSU, on assessing the claimant, should decide that he should go there.

32. It is also clear from what Dr Larkin says that he is of the view that a transfer to HMP Wakefield does not prevent the appropriate procedures being undertaken under section 47 for a transfer from Wakefield to a MSU if the relevant practitioners are of the view that that is appropriate. He is not setting out to reach a decision for them or to close off options for them or to make decisions which it is for them to make. He is not suggesting that a referral or a decision to transfer would require some change in circumstances in the claimant's condition before he could be sent to a MSU under section 47.

33. It is equally clear that, with the closure of the DSPD at Broadmoor, Dr Larkin is of the view that it would be inappropriate for the claimant to be detained at Broadmoor awaiting the outcome of the referral for assessment to the MSU. He takes the view that there is no treatment which the claimant would receive or could continue to receive at Broadmoor. He could not be detained in conditions of such high security in order to receive treatment, because there is none suitable for him now, and, lawfulness apart, it would be an inappropriate use of the specialist resources at Broadmoor for them to be used by someone who did not need them, would not benefit from them, at the expense of somebody else who could. Putting it simply, if it was a matter of waiting for an outcome of the referral for assessment, that waiting could be done in Wakefield more beneficially overall than it could be done in Broadmoor.

34. He also expresses the view that, with the improvements in the support and treatment available within the prison estate, the sort of treatment which the claimant could benefit from was available within the prison estate, whether or not it might be better available in a MSU.

35. In my judgment, the fundamental issue of lawfulness in this case is whether the notification was unlawful, either by reference to the two limbs being notified or by reference to the underlying clinical opinions. In my judgment, there is nothing unlawful about a dual notification. It would be unlawful if Mr Baldwin's submission that the two limbs are inevitably in conflict were right. They could be in conflict, either by reference to statutory construction or by reference to the facts, but that is not the position, in my judgment, as a matter of statutory construction, nor in its application to the facts here.

36. It is clear that section 50 limb 1 envisages notification that a person "no longer requires treatment in hospital for mental disorder". The important words are "requires" and "in hospital". It is perfectly clear that a person may no longer require treatment in hospital in circumstances where it may nonetheless be appropriate for an order to be made under

section 47 transferring somebody to a hospital where appropriate treatment is available. The fact that a person may be transferred where such treatment is required does not limit the broader ambit of the words in section 47. The words in section 50 are clearly narrower.

37. The second limb envisages that no effective treatment for the disorder can be given in the particular hospital to which someone has been removed. Accordingly, the satisfaction of the second limb arises where, as is the case here, no effective treatment was available for the personality disorders at Broadmoor. The effective treatment had been undertaken and it had done some good.

38. The two limbs can go together to cover precisely the sort of circumstance which arises here. The claimant does not require to be treated in hospital for mental disorder because the sort of treatment for his mental disorder, from which he would benefit, is available in prison. It may be appropriate for him to receive such treatment in a hospital, and that treatment may be effective, but that treatment cannot be given in Broadmoor. So, in circumstances where it may be appropriate, but not required, for someone to receive treatment for a disorder in a hospital, notwithstanding its availability to a considerable degree in the prison state, but, where it is not available to the hospital where he is currently detained, both boxes can sensibly be ticked "no", as was done here.

39. So there is no inherent conflict, in my judgment, in ticking both boxes, either as a matter of statutory application or in its application to the facts here.

40. I was troubled by the sentence in the brief reasons for notification in which, on the face of it, Dr Larkin has gone beyond saying what he is required and has expressed a view about the potential for any benefit at all from a hospital setting. This is the sentence:

> "He has benefited what he can from being in a hospital setting."

41. Those brief reasons need to be understood with the box that has been ticked and the statutory questions that have to be asked, but, if there were any question of Dr Larkin having gone beyond what the statute required, it is perfectly clear from the witness statement he has put in and the submissions on his behalf what are the true limits of his view. He does not exclude the potential appropriateness of treatment in a MSU because that is not his function and clearly is not something he has excluded, given the actions he has taken in relation to a referral. Nor do I see the Secretary of State's response as being in a state of confusion as to what he should do. The Secretary of State's response and the issuing of the warrant was a lawful act, in its understanding of what the notification intended. There is nothing in the brief information provided by Dr Larkin to require further investigation by the Secretary of State. The Secretary of State was not obliged to carry out an investigation as to what other hospitals might be able to offer. He is entitled to rely on the proper operation of the statutory system and the judgment of those who under section 47 are tasked with reaching the relevant opinions. The reasons are adequate.

42. The second fundamental point is that, in reality, the views expressed by Dr Larkin are not in fact his own clinical judgment. This is a significant challenge to the integrity of the psychiatrist with the suggestion that the national strategy has led him to subordinate his clinical judgment to expediency or national strategies. But I see nothing to support that. The evolution of Dr Larkin's views is explained in his witness statement. It is all of a piece with the evolution of events and the views he has expressed at the Tribunal and at the 8 December section 117 meeting.

43. In April, treatment in which Broadmoor specialised was being undertaken and justified the continued detention for the receipt of such treatment of this claimant in high security. With the ending of that treatment, those conditions fell away and how the claimant was then to be dealt with on discharge came yet further to the fore. The doctor clearly did not take the view that no further treatment anywhere would be of any assistance. He took the view that treatment was available in prison, but he is clearly not ruling out someone taking the view that it would be appropriate for treatment to be received in a MSU, if he is accepted there, and the appropriate opinions under section 47 are given. So I see nothing in the evolution of events to suggest that the Secretary of State has not had a clinical decision on which he can wholly rely.

44. Mr Hyam for the Secretary of State drew my attention in this context to the what was said by Arden LJ at paragraph 23 in R (on the application of SP v Secretary of State for Justice [2010] EWCA Civ 1457. I do not need to set it out.

45. I have considered a number of passages from the decision of Munby J in R (IR) v Dr Shetty v Secretary of State for the Home Department [2003] EWHC 3022 (Admin). The interplay which I have described between section 47 and section 50 is in my judgment supported by a number of observations which he makes between paragraphs 28 and 40. More importantly, the case deals with the Article 5 argument raised first of all against Dr Larkin. I am entirely satisfied that an Article 5 claim can not lie against Dr Larkin. On the facts here, an Article 5 claim does not lie against the Secretary of State. In particular, it does not lie against him because he is acting upon a proper clinical judgment.

46. If there had been any difficulty in law over the notification or over the nature of the reasons given for the answers which Dr Larkin gave to questions 4 and 5 of the notification form, I would not have quashed the decision because it is perfectly clear from Dr Larkin's witness statement what the intention of Dr Larkin is and, whichever box he had ticked, it would still have led to the same result, namely the notification followed by a warrant for transfer to prison.

47. The position so far as the claimant's desire to have a healthcare pathway is concerned is not closed off by that decision anyway. The question remains open for consideration by those who are empowered to consider it. The two simple facts which lie against the claimant's having any relief, even as a matter of discretion, are that the DSPD in Broadmoor is closing and there is no effective treatment for him there. He therefore has to be discharged. There is nowhere else for him to go to. No MSU has yet said they will take him, so he has to be discharged from Broadmoor to prison and, however

one looks at the various pieces of the law, a decision which reflects those realities is inevitable.

48. It is apparent that I do not regard there as being an arguable case that the defendants have acted unlawfully, but, even if there had been, for those latter reasons, I would have declined to grant relief. The outcome of this case, in pragmatic terms, which is that the claimant is to leave Broadmoor and go to HMP Wakefield, or somewhere else in the prison estate, seems to me inevitable given the very simple stark facts.

49. Accordingly, I refuse permission to apply for judicial review.

50. MR HYAM: My Lord, I know in fact that the first defendant is not making an application for costs. I think the claimant is legally aided. I am instructed to make a section 11 Access to Justice Act order, essentially a court order that there should be -- it would only be limited to --

51. MR JUSTICE OUSELEY: You asking for an order of costs in favour -- whatever appropriate limitations there are.

52. MR HYAM: Yes.

53. MR JUSTICE OUSELEY: Whatever they may be. I can't remember what they are. There's a different formula from the one that we used to know.

54. MR HYAM: Well, there is. I think it's in the form --

55. MR BALDWIN: My Lord, I think it's based on that the actual section 11 order would be subject to a means assessment, not to be enforced without permission --

56. MR JUSTICE OUSELEY: Subject to a needs assessment.

57. MR BALDWIN: Yes.

58. MR JUSTICE OUSELEY: Do what you want to say anything about that application? **(Pause)** Do you want to say anything about the principle.

59. MR BALDWIN: No. I mean, I gather both defendants are seeking their costs according to that principle.

60. MR JUSTICE OUSELEY: I don't know what Ms Butler-Cole says.

61. MS BUTLER-COLE: There's no application on behalf of the first defendant.

62. MR JUSTICE OUSELEY: Very well. There will be an order in favour of the second defendant, so far as his costs are concerned, not to be enforced without leave of the court.

63. MR BALDWIN: My Lord, with the claimant, it would be a detailed assessment of the claimant's publicly funded costs.

64. MR JUSTICE OUSELEY: Yes, community legal aid, legal services --

65. MR BALDWIN: -- commission 2000 Regulations --

66. MR JUSTICE OUSELEY: -- funding assessment of your costs. Yes.

67. Thank you very much, everyone.