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IN THE HIGH COURT OF JUSTICE CO/5008/98

QUEEN'S BENCH DIVISION
(CROWN OFFICE LIST)

Royal Courts of Justice
Strand
London WC2

Tuesday, 5th January 1999

B e f o r e:

MR DAVID PANNICK QC
(Sitting as a Deputy Judge of the Queen's Bench Division)

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IN THE MATTER OF PETER ALAN WHITBREAD

-and-

IN THE MATTER OF AN APPLICATION FOR LEAVE TO ISSUE A WRIT OF HABEAS CORPUS AD SUBJICIENDUM

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180 Fleet Street, London EC4A 2HG
Telephone No: 0171-421 4040/0171-404 1400
Fax No: 0171-831 8838
Official Shorthand Writers to the Court)

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MR K GLEDHILL (instructed by Anthony Stokoe, Kingston upon Thames, Surrey KT2 6PW) appeared on behalf of the Applicant.

MR R McCARTHY QC (instructed by Bevan Ashford, Bristol BS1 4TT) appeared on behalf of the Respondent.

MR A FRASER-URQUHART (instructed by the Legal Department of the London Borough of Richmond, Twickenham TW1 3B2) appeared on behalf an interested party.

J U D G M E N T
(As approved by the Court)
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Tuesday, 5th January 1999.

MR DAVID PANNICK QC: This is an application for a writ of habeas corpus, and it raises a novel question of mental health law.

The Applicant is aged 54. He has a long history of severe mental illness. The details are set out in the affidavit of Dr Obuaya, who is employed by the Kingston and District Community NHS Trust as a consultant psychiatrist. The Applicant has been diagnosed as suffering from bipolar affective disorder (or manic depression as it used to be called). He is known to the Mental Health Services. He has been in hospital on several occasions and has had contact with the Community Mental Health Services.

By November 1998 there was increasing concern about the Applicant's threatening behaviour towards others. On 26th November he was taken to the Tolworth Hospital for assessment under section 2 of the Mental Health Act 1983.

Section 2 states as follows:

"(1) A patient may be admitted to a hospital and detained there for the period allowed by subsection (4) below in pursuance of an application (in this Act referred to as 'an application for admission for assessment') made in accordance with subsections (2) and (3) below.

(2) An application for admission for assessment may be made in respect of a patient on the grounds that-

"(a) he is suffering from mental disorder of a nature or degree which warrants the detention of the patient in a hospital for assessment (or for assessment followed by medical treatment) for at least a limited period; and

(b) he ought to be so detained in the interests of his own health or safety or with a view to the protection of other persons;

...

(3) An application for admission for assessment shall be founded on the written recommendations in the prescribed form of two registered medical practitioners, including in each case a statement that in the opinion of the practitioner the conditions set out in subsection (2) above are complied with.

(4) Subject to the provisions of section 29(4) below, a person admitted to hospital in pursuance of an application for admission for assessment may be detained for a period not exceeding 28 days beginning with the day on which he is admitted, but shall not be detained after the expiration of that period unless before it has expired he has become liable to

be detained by virtue of a subsequent application, order or direction under the following provisions of this Act."

The circumstances leading up to the admission of the Applicant under section 2 are set out in the affidavit of Dr Christopher Kenn, who is employed by the District and Community NHS Trust as a Consultant Adult General Psychiatrist and who was one of the two doctors who recommended the Applicant's admission. Dr Kenn explains the decision to admit the Applicant in paragraphs 4 to 6 of his affidavit. He says this:

"4. ... The clinical symptoms indicative of risk were that the Applicant had begun reportedly to show the pro-dromal signs of relapse in recommencing the letter writing to his former Consultant, Dr Roberts and in developing ideas of harming others. The reported behaviour indicative of risk was that the Applicant had shown evidence of self-neglect and threats and intimidation to others. The treatment related indicators were that the Applicant had discontinued medication, failed to attend appointments and had made an unplanned dis-engagement from the service. His forensic history included convictions for violence offences. He had been charged with arson though the case had been dropped because of insufficient evidence. He had been a patient at a special hospital and he had been engaged in behaviour suggestive of risk. He had stalked staff from Newlands House and specifically had targeted Dr Megan Roberts, his former Consultant Psychiatrist. In order to carry out a full risk assessment and to effectively assess the Applicant's mental state with a view to treatment if appropriate it was considered that he probably required admission into secure facilities under the Mental Health Act and a formal assessment by a Forensic Psychiatrist. A worrying feature of his behaviour was that the pattern of his stalking behaviour had escalated and there was a recent record of a physical assault in July 1998. The Applicant on a risk assessment was a person who presented a high risk of dangerousness and I identified that any assessment should be carried out clearly recognising this fact."

Dr Kenn then, in paragraphs 5 and 6, explains how these concerns were exacerbated by attending at the Applicant's flat and observing him. Dr Kenn concludes at paragraph 6:

"... I was satisfied that he required in-patient assessment of his risk of dangerousness in the context of his mental health. Of particular concern was the escalation of behaviour in seeking out Dr Roberts' home address and writing to her there which he denied. He clearly had no insight into his behaviour and its effect on Dr Roberts."

I emphasise, of course, that it is yet to be determined whether the concerns about the Applicant's behaviour are well founded. I should also mention that a patient may be admitted alternatively under section 3 of the 1993 Act for treatment for up to six months.

Section 3 of the Act provides as follows:

"(1) A patient may be admitted to a hospital and detained there for the period allowed by the following provisions of this Act in pursuance of an application (in this Act referred to as 'an application for admission for treatment') made in accordance with this section.

(2) An application for admission for treatment may be made in respect of a patient on the grounds that-

(a) he is suffering from mental illness, severe mental impairment, psychopathic disorder or mental impairment and his mental disorder is of a nature or degree which makes it appropriate for him to receive medical treatment in a hospital; and

(b) in the case of psychopathic disorder or mental impairment, such treatment is likely to alleviate or prevent a deterioration of his condition; and

(c) it is necessary for the health or safety of the patient or for the protection of other persons that he should receive such treatment and it cannot be provided unless he is detained under this section.

(3) An application for admission for treatment shall be founded on the written recommendations in the prescribed form of two registered medical practitioners ..."

In the case of a section 3 admission there is a need for consent by the patient's nearest relative by reason of section 11(4). If the nearest relative refuses consent, an application may be made to the County Court under section 29 to displace the nearest relative if the refusal of consent is unreasonable.

As I have explained, this Applicant was admitted under section 2. The Applicant applied to the Mental Health Review Tribunal for his discharge pursuant to section 72, which confers power on the Tribunal to order the discharge of a patient who has been admitted under section 2.

On 10th December the Tribunal reached the following conclusions:

"It is not our function to consider the appropriateness of the admission on 26th November 1998 under section 2 rather than section 3, since the doctors wished to assess the impact that alcohol may have played at that time. Indeed his legal representative did not argue that the admission should not have been under section 2. It was, at that stage, in our view reasonable to leave open the possibility of the assessment and treatment both being concluded within the 28 day period. It is now, however, abundantly clear that the treatment envisaged will take longer than 28 days and section 3 should

already have been put in motion. We bear in mind the Code of Practice, (5)(3)(c) and order the patient's discharge, but because the actions of the doctors have not been shown to be unreasonable we exercise our power to delay discharge until 12 noon on Wednesday 16th December 1998."

On 15th December (the day prior to that on which the Order for discharge was due to have effect) the London Borough of Richmond issued an Originating Summons under section 29 of the Act to replace the Applicant's father as the nearest relative.

Section 29 provides as follows:

"(1) The county court may, upon application made in accordance with the provisions of this section in respect of a patient, by order direct that the functions of the nearest relative of the patient under this Part of this Act and sections 66 and 69 below shall, during the continuance in force of the order, be exercisable by the applicant, or by any other person specified in the application, being a person who, in the opinion of the court, is a proper person to act as the patient's nearest relative and is willing to do so.

(2) An order under this section may be made on the application of-

(a) any relative of the patient;

(b) any other person with whom the patient is residing ... or

(c) an approved social worker;

but in relation to an application made by such a social worker, subsection (1) above shall have effect as if for the words 'the applicant' there were substituted the words 'the local social services authority'.

(3) An application for an order under this section may be made upon any of the following grounds, that is to say -

...

(c) that the nearest relative of the patient unreasonably objects to the making of an application for admission for treatment ...

"(4) If, immediately before the expiration of the period for which a patient is liable to be detained by virtue of an application for admission for assessment, an application under this section, which is an application made on the ground specified in subsection (3)(c) or (d) above, is pending in respect of the patient, that period shall be extended-

(a) in any case, until the application under this section has been finally disposed off; and

(b) if an order is made in pursuance of the application under this section, for a further

period of seven days;

and for the purposes of this subsection an application under this section shall be deemed to have been finally disposed of at the expiration of the time allowed for appealing from the decision of the court or, if notice of appeal has been given within that time, when the appeal has been heard or withdrawn, and 'pending' shall be construed accordingly. ..."

The hearing at Kingston County Court of the section 29 application has been adjourned until 25th January. The court also has before it an affidavit from Dr Obuayo explaining his current view. He states at paragraph 12:

"... the Applicant is suffering from mental illness and that his mental disorder is of a nature or degree which makes it appropriate for him to receive treatment in the hospital. ... The potential danger he poses to others when unwell makes it inappropriate to treat him at the present time in the community. ..."

At paragraph 13 Dr Obuaya adds:

"... I consider the Applicant, if discharged, would be likely to act in a manner dangerous to "others or himself. ..."

On behalf of the Applicant, Mr Gledhill, in his forceful submissions, has taken two points. The first point taken on behalf of the Applicant is that the section 2 detention could not lawfully continue after the discharge by the Tribunal was due to take effect. There is no dispute that normally the decision of the Tribunal under section 72 is determinative. It is a binding Order requiring the discharge of a patient. The question is whether the effect of that otherwise binding Order is altered by the express statutory provision in section 29(4) to which I have already drawn attention.

Mr Gledhill's submission, in essence, is that the section 2 detention cannot continue once the Tribunal has ordered discharge. I cannot accept that submission. In my judgment, the proper interpretation of the Act is as follows. First of all, the section 72 Order identifies the date on which the section 2 detention must cease. By reason of the Order of the Tribunal, the period for which the Applicant was liable to be detained under section 2 ceased on 16th December at midday.

Secondly, however, that date is subject to extension under section 29(4). The section 72 Order simply identifies, for the

purposes of section 29(4) as well as for all other purposes, "the period for which a patient is liable to be detained". But section 29(4) allows for an extension of that period where a section 29(4) application is made. As Mr McCarthy submitted, section 29(4) is very clear in its terms and is not limited by section 72. In my judgment, by reason of the application under section 29, the period for which the Applicant was liable to be detained under section 2, which would otherwise have ended on 16th December, continues pending the County Court's decision. The mandatory duty to discharge under section 72 is, in my judgment, subject to section 29(4) which provides a further basis for detention.

Thirdly, any other conclusion would, in my judgment, frustrate the purpose of section 29(4) which is plainly intended to preserve the position pending a proper consideration by the County Court of a section 29 application for a section 3 admission.

Fourthly, it would, in my judgment, be very surprising if a section 72 determination were decisive in this context, as Mr Gledhill submits, notwithstanding the application under section 29. It is important to bear in mind that the Tribunal was making no finding whatsoever about the substantive issue of whether section 3 treatment was appropriate. All that the Tribunal was deciding was that detention was inappropriate under section 2. At present, by reason of section 29(4), the Applicant is detained for the purpose of ensuring that a proper decision can be taken on whether section 3 treatment is appropriate.

Fifthly, reference has been made to the European Convention on Human Rights, in particular Article 5. I can see nothing inconsistent within the Convention in continuing the detention of the Applicant pending consideration later this month of whether treatment is appropriate for section 3 purposes. The Applicant has access to the County Court as a judicial body which will determine the section 29 issue, and all parties are agreed that it is incumbent on the County Court to ensure that those proceedings are determined expeditiously. Further, and in any event, the Applicant will have access to the Tribunal to challenge the appropriateness of section 3 detention although I do accept, as Mr Gledhill submitted, that that hearing in practice would not take place for two months or so after a section 3 decision is taken.

Sixthly, there is authority for the proposition that a Tribunal discharge under section 72 does not prevent the valid imposition of section 3 detention: see R v South Western Hospital Managers, ex parte M [1993] 3 WLR 376, the

judgment of Laws J. I accept Mr Gledhill's point that the position is not exactly the same in this case, as here currently the detention is still based on section 2 albeit the detention is for the purposes of preserving the position until a proper decision can be taken for the purposes of section 3. But, in my judgment, Mr McCarthy is correct that the decision in ex parte M is helpful in showing that a Tribunal discharge does not limit the scope and effect of the statutory provisions in the 1983 Act (here, section 29(4)).

Therefore, in conclusion on this point, giving, I hope, full recognition (as Mr Gledhill rightly submits I must) to the liberty of the subject, I have concluded that the construction for which Mr Gledhill contends is inconsistent with the language of the legislation and inconsistent with the evident purpose of section 29(4).

The second issue raised by Mr Gledhill concerns the role of the hospital managers who are the detaining authority by reason of section 6(2). On 7th and 23rd December 1998 the hospital managers made and upheld a barring Order under section 25 preventing the Applicant from being discharged from section 2 admission by his nearest relative under section 23.

Section 23 deals with discharge of patients. Section 23(2) provides:

"An order for discharge may be made in respect of a patient-
"(a) where the patient is liable to be detained in a hospital in pursuance of an application for admission for assessment or for treatment by the responsible medical officer, by the managers or by the nearest relative of the patient...."

Section 25 imposes a restriction on discharge by the nearest relative. It provides:

"(1) An order for the discharge of a patient who is liable to be detained in a hospital shall not be made by his nearest relative except after giving not less than 72 hours' notice in writing to the managers of the hospital; and if, within 72 hours after such notice has been given, the responsible medical officer furnishes to the managers a report certifying that in the opinion of that officer the patient, if discharged, would be likely to act in a manner dangerous to other persons or to himself,-

(a) any order for the discharge of the

patient made by that relative in pursuance of the notice shall be of no effect; and

(b) no further order for the discharge of the patient shall be made by that relative during the period of six months beginning with the date of the report."

Mr Gledhill emphasises that the test under section 25 is whether, in the opinion of the managers, "... the patient, if discharged, would be likely to act in a manner dangerous to other persons or to himself. ..." He also emphasises that this is a test which is stricter than is the test for admission under section 2(2)(a).

The decision of the hospital managers on 23rd December 1998 is in these terms:

"The RMO [Responsible Medical Officer] has furnished a report certifying that in his opinion the patient, if discharged, would be likely to act in a manner dangerous to other persons or himself.

In considering this matter, we have taken account of the Butler Committee which equated 'dangerousness with a propensity to cause serious physical injury or lasting psychological harm'.

The current risk probability, which takes into account the full history, shows a significant level of risk. Whilst recent incidents do not necessarily indicate the risk of physical violence, we are satisfied from the evidence given by all the professionals present and the patient himself that there is a very high level of probability that lasting psychological harm could be caused to others if the barring order were to be lifted.

We therefore uphold the RMO's action in disbarring the application for discharge by the nearest relative.

He should be so detained for the protection of others and prevent deterioration in his own mental state which would place his own health and safety at risk. ..."

I have also seen an affidavit from Patricia Mary Gregory, who is the Chairman of the Managers of the Tolworth Hospital and is also the Chairman of the Kingston and District Community NHS Trust. She explains in paragraph (5):

"At the managers' meeting the Applicant gave evidence. He was questioned closely about his behaviour with reference to Dr Megan Roberts. During the course of the hearing he admitted that it may not have been appropriate for him to go to the library and look up Dr Roberts' home address, "he talked as though he and Dr Roberts had a relationship by saying phrases like we have got things to sort out together. He suggested that Dr Roberts was having a relationship with his GP and that he, the Applicant, was 'investigating her' (Dr Roberts). The Applicant confirmed that he wanted to give Dr Roberts a fright by sending her letters to her home and I have noted that he said he 'wanted to upset her as much as possible without doing anything illegal'. I was personally satisfied at the conclusion of the managers' hearing that the Applicant met the Butler definition of dangerousness. He had expressed clear delusional beliefs about his relationship

with Dr Roberts. I was left in no doubt that he was suffering from mental illness and met the criteria for detention and that he was dangerous."

I should add that the reference to the Butler Committee's definition of "dangerousness" is a reference to paragraph 4.10 of the Butler Committee Report, which equated "dangerousness" "with a propensity to cause serious physical injury or lasting psychological harm".

Mr Gledhill makes two criticisms of this decision. He first suggests that the managers adopted the wrong legal test by failing to recognise that section 25 imposes a stricter standard than the standard for admission and requires a determination that the Applicant would be likely to act in a manner dangerous to other persons or to himself. In particular, Mr Gledhill draws attention to the reference in the decision to the fact that psychological harm "could" be caused to others if the barring Order were to be lifted.

In my judgment, there is no substance in this criticism. Reading the decision as a whole and having regard also to paragraph (5) of the affidavit of Patricia Mary Gregory, it is clear that the managers correctly directed themselves and formed the conclusion that there was a very significant level of risk that the Applicant, if discharged, would be likely to act in a manner dangerous to other persons. Indeed, the managers approved the recommendation and report of the RMO, who himself had concluded that, if discharged, the patient "... would be likely to act in a manner dangerous to other persons or himself".

The other criticism made by Mr Gledhill is that the managers formed the view that the test of "dangerousness" was satisfied on the basis of the risk of psychological harm to Dr Roberts, the Applicant's former psychiatrist. The Applicant says that there was no evidence whatsoever that Dr Roberts had suffered psychological harm as result of the conduct of the Applicant.

I accept the submission of Mr McCarthy that section 25 is not focusing on the past, but rather is focusing on the future. In all the circumstances to which I have drawn attention, by reference to the concern as to the Applicant's conduct and its connection with Dr Roberts, it was, in my judgment, certainly open to the managers to reach the conclusion that they

did as to the likely impact of the Applicant's conduct on Dr Roberts were detention not to be continued. In my judgment, the conclusion was a perfectly proper and reasonable one in all the circumstances and by reference to what was known about the behaviour of the Applicant and his attempts to make life as difficult and unpleasant as possible for Dr Roberts.

Therefore, notwithstanding the very powerful submissions made on the Applicant's behalf by Mr Gledhill, this second point must also fail.

For these reasons I shall dismiss the application for a writ of habeas corpus.

MR GLEDHILL: My Lord, might I have legal aid taxation?

MR DAVID PANNICK QC: Yes, of course.

MR GLEDHILL: My Lord, I think I am right in saying that issues of leave on habeas corpus do not arise.

MR DAVID PANNICK QC: Leave to appeal?

MR GLEDHILL: My Lord, yes, leave to appeal. The new Practice Direction which has come into effect as of today, I think, still states that in habeas corpus I do not need leave. If I am wrong, might I apply for leave to appeal?

MR DAVID PANNICK QC: If you need it, I would refuse it.

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