R v Mental Health Act Commission ex p Smith

Queen's Bench Division
Latham J
11 May 1998

Mental Health Act 1983 s120(1)(b)(ii) gives the Mental Health Act Commission jurisdiction to consider complaints arising out of the exercise of the power to detain, manage and control and the duty to treat, in respect of persons who are or who have been detained.

Facts

The applicant was the sister of a patient who committed suicide whilst detained in hospital under Mental Health Act 1983 (MHA) s3. She and her mother complained to the Mental Health Act Commission (the Commission) that:

1 her brother's original detention had been neither appropriate nor legal;
2 he had been inappropriately detained in a secure unit for a period of time;
3 he had been given drugs in such quantities that it was unlikely he could have given consent, and such dosages were inappropriate;
4 he was inadequately cared for and his condition had not been adequately assessed for the purposes of determining whether there was any risk of self-harm.

The Commission accepted it had jurisdiction in relation to complaint 1 and (to a limited extent) complaint 3, but did not accept it had jurisdiction to investigate complaints 2 and 4. The Commission has power by virtue of MHA 1983 s120(1)(b):

> *To investigate-*
> *(i) any complaint made by a person in respect of a matter that occurred while he was detained under this Act in a hospital or mental nursing home and which he considers has not been satisfactorily dealt with by the managers of that hospital or mental nursing home; and*
> *(ii) any other complaint as to the exercise of the powers or the discharge of the duties conferred or imposed by this Act in respect of a person who is or has been so detained.*

The Commission contended that its jurisdiction to investigate complaints was limited to complaints relating to specific powers or duties expressed in MHA 1983 as applying to detained persons; it did not extend to the functions of management, control and treatment which would be applicable to any patient, detained or not.

Held:

1 Bearing in mind the purpose for which the Commission was established, it makes more sense to approach MHA 1983 s120(1) on the basis that the powers and duties referred to are all those powers and duties which flow necessarily and by implication from detention, as well as such other powers and duties as are expressly identified in the Act. Any complaints arising out of the exercise of the power to detain, manage and control, and the duty to treat, are complaints in respect of which the Commission has jurisdiction. Management, control and treatment all form part of the package of compulsion which is the essence of detention and which it is the duty of the Secretary of State, delegated to the Commission, to keep under review under MHA 1983 s120(1).

2 Restrictions can be placed on the ambit of investigations by the Commission, either generally or in any particular case, by virtue of MHA 1983 s120(2).

3 The Commission's jurisdiction under MHA 1983 s120(1)(b)(ii) does not extend to complaints which are not related to detention, management, control or treatment, for example, food or bed linen, although a patient him/herself could ask the Commission to investigate such matters under s120(1)(b)(i).

4 The Code of Guidance promulgated under MHA 1983 s118 provides guidance as to whether or not a power or duty, identified as arising by virtue of MHA 1983, has been correctly exercised or breached. It is not however capable of creating new duties not in the MHA 1983.

Cases referred to in judgment:

Pountney v Griffiths [1976] AC 314; [1975] 3 WLR 140; 119 SJ 493; [1975] 2 All ER 881; [1975] Crim LR 702, HL.

R v Broadmoor Special Hospital Authority and Secretary of State for Health ex p S (1998) *Times*, 17 February, CA.

Legislation/guidance referred to in judgment:

Mental Health Act 1959 s141 — Mental Health Act 1983 Part VII and ss3, 6, 57, 58, 62, 63, 118, 120, 121, 139 and 145 — Mental Health Act 1983: Code of Guidance (Department of Health, 1993).

This case also reported at:

(1998) *Times*, 18 May.

Representation

Richard Gordon QC (instructed by Ritchie Samuel) appeared on behalf of the applicant.

Rabinder Singh (instructed by Treasury Solicitors) appeared on behalf of the respondent.

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Judgment

MR JUSTICE LATHAM: The Mental Health Act Commission (the respondent) is a Special Health Authority. It was first established in 1983 to implement a recommendation made in the Report of the Review on Rampton Hospital. It proposed that an appointed body should be established to 'inspect and monitor' institutions where patients were detained under the Mental Health Act 1959. Its existence was continued by Section 121 of the Mental Health Act 1983. Its functions include the functions of the Secretary of State under Section 120(1) of the Act which provides as follows:

> *The Secretary of State shall keep under review the exercise of the powers and the discharge of the duties conferred or imposed by this Act so far as relating to the detention of patients or to patients liable to be detained under this Act and shall make arrangements for persons authorised by him in that behalf –*
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> *(a) to visit and interview in private patients detained under this Act in hospitals and mental nursing homes;*
>
> *(b) to investigate –*
>
> *(i) any complaint made by a person in respect of a matter that occurred while he was detained under this Act in a hospital or mental nursing*

home and which he considers has not been satisfactorily dealt with by the managers of that hospital or mental nursing home; and

(ii) any other complaint as to the exercise of the powers or the discharge of the duties conferred or imposed by this Act in respect of a person who is or has been so detained.

The applicant is the sister of a young man, Kenneth Sappleton (the patient), who committed suicide on 2 July 1995 whilst detained in hospital under Section 3 of the Act. Complaints were made on behalf of her and her mother by the Solicitor for MIND in particular by letters of 22 July 1996 and 23 December 1996 about the way in which the patient had been cared for and treated whilst in hospital. There were four essential complaints:

(i) It was said that the patient's original detention on 1 April 1995 was neither appropriate nor legal.
(ii) It was said that he was inappropriately detained in a secure unit for a period.
(iii) It was alleged that the patient was given drugs in such quantities that it was unlikely that he could have given consent, and the level of dosage was inappropriate.
(iv) It is said that the patient was inadequately cared for during his detention, and his condition was not adequately assessed for the purposes of determining whether there was any risk of self-harm.

The respondent is and always has been prepared to accept jurisdiction to entertain complaint (i). The respondent has been persuaded that it has jurisdiction to accept complaint (iii), but only to a limited extent. It considers that it does not have jurisdiction to entertain complaints (ii) and (iv). In the letter in which it set out its reasoned decision, on 17 April 1997, the respondent stated that it would welcome a broad jurisdiction to investigate the complaints which were being made, but did not consider that it had jurisdiction under Section 120(1)(b)(ii). It was not persuaded that these were complaints in relation to 'the exercise of the powers or the discharge of the duties conferred or imposed by this Act'.

The sad history of the patient's last few weeks, culminating in his suicide, do not need to be rehearsed any more than I have already set them out. Suffice it to say that, as far as the patient's family was concerned, there appeared to be good reason for each of the complaints. In particular the level of prescribed drugs was remarkably high. And, although there were indications that he was a high suicide risk when he was first detained, he does not appear to have been under observation at the time he was able to hang himself in a lavatory.

The resolution of this case depends entirely on the proper construction of Section 120(1)(b)(ii) of the Act. Mr Gordon's basic submission is that on a proper analysis of the Act, the managers and the doctors are given not only an express power to detain a patient, but the necessary implied powers to manage, control and treat patients. Mr Rabinder Singh submits that the only relevant powers and duties are those which are expressly set out in the Act; that there are no express powers or duties which deal with the management or control of patients, that the only powers and duties in relation to treatment are those set out in Sections 57, 58 and 63 (to which I will refer hereafter) and there was certainly no power or duty imposed by the Act which related to risk assessment. It was for these reasons, he argues, that the respondent refused to entertain complaints (ii) and (iv), and was prepared to accept complaint (iii) to a limited extent.

A The general scheme of the Act, so far as is relevant, is as follows.

By Section 3 of the Act, power is given to the hospital to admit and detain a patient for the purposes of treatment, provided that the conditions set out in the Section have been met.

By Section 6 of the Act, a proper application for the admission of a patient
B under Section 3 shall be sufficient authority to justify the detention of the patient and his conveyance to hospital, and his subsequent detention in hospital.

By Section 63 of the Act, the consent of the patient shall not be required for any medical treatment given to him for the mental disorder from which he is suffering, apart from treatments falling within Section 57 or Section 58, provided the
C treatment was given by or under the direction of the responsible medical officer.

Section 57 requires that extreme forms of treatment, such as surgical operations for destroying brain tissue, require the patient's consent, together with other safeguards to ensure that not only is the treatment necessary, but that the patient understands the nature, purpose and likely effect of the treatment.

D By Section 58, for less dramatic treatment, but none the less treatment which the Secretary of State considers to be of a nature requiring added safeguards, the treatment may not be given unless the patient has consented or the relevant medical practitioner has certified in writing, subject to safeguards, that the patient is not capable of understanding the nature, purpose and likely effects of
E the treatment.

By Section 62, Sections 57 and 58 are not to apply in certain situations of urgency.

By Section 145 of the Act, 'medical treatment' includes nursing, and also includes care, habilitation and rehabilitation under medical supervision.

F It can be seen that whilst the Act makes express provision for the admission and detention of a patient, it does not give any express powers as to the management and control of the patient whilst so detained. So far as treatment is concerned, the Act imposes the specific duties in relation to the obtaining of consent in Sections 57 and 58, otherwise provides an express power to give medical treatment to a
G patient without his consent in Section 63. Mr Gordon's argument is that, in order to give efficacy to the statutory structure, a power to manage and control a patient is to be implied into the Act, as is a duty to treat the patient in order to give effect to the purpose of Section 3. In support of his argument, he has referred me to *Pountney v Griffiths* [1976] AC 314. In that case the statute in question was the
H Mental Health Act 1959, the precursor of the Act, and the Section in question was Section 141, which has become Section 139 of the Act. This provided:

> *(1) No person shall be liable, whether on the ground of want of jurisdiction or on any other ground, to any civil or criminal proceedings to which he would*
I *have been liable apart from this section in respect of any act purporting to be done in pursuance of this Act . . . unless the act was done in bad faith or without reasonable care.*
>
> *(2) No civil or criminal proceedings shall be brought against any person in any court in respect of any such act without leave of the High Court . . .*

J The applicant was a male nurse at Broadmoor, was on duty on visiting day, and, at the end of visiting, in order to hurry up a patient, allegedly punched him on the shoulder and said 'come on you'. The patient instituted a prosecution for assault. In the Divisional Court Lord Widgery CJ at page 139, said:

> K *In my judgment where a male nurse is on duty and exercising his functions for controlling the patients in the hospital, acts done in pursuance of such control or*

purportedly in pursuance of such control are acts within the scope of Section 141, and are thus protected by the Section.

In the House of Lords, Lord Edmund-Davies, at page 336, stated that Lord Widgery's view was the correct view to take of the case.

Mr Gordon submits that the only basis on which the courts could have come to this conclusion is that the male nurse was purportedly exercising a power under the Act, namely the power of control which is to be implied from the power to detain. He supports this argument by reference to a decision of the Court of Appeal on 5 February 1998 in *R v Broadmoor Special Hospital Authority and Secretary of State for the Department of Health ex parte S, HD*. In that case the applicants all complained about a policy which the hospital authorities sought to implement purporting to authorise random and routine searches of patients with or without their consent. In his judgment, Auld LJ came to the conclusion that the express power to detain for treatment necessarily implied power to search with or without cause. The justification was that such a power was a necessary power in order to maintain a safe therapeutic environment for all patients and to ensure the safety of staff and visitors. Judge LJ delivered a concurring judgment, in which he identified the need to ensure 'control and discipline' as a necessary part of the power to detain. It follows, says Mr Gordon, that any complaint about the way in which those powers have been exercised is a relevant complaint for the purposes of Section 120(1)(b)(ii).

He further argues that since the power to detain under Section 3 of the Act is solely for purposes of treatment, implicit in the power to detain is the duty to treat. It follows, he argues, that any complaint in relation to the treatment provided is a complaint about the discharge of that duty, and therefore equally a relevant complaint for the purposes of the subsection.

Mr Rabinder Singh submits that this is too wide a reading of the language and intent of the subsection. He points out that the jurisdiction to deal with complaints forms part of the general obligation of the respondent to keep under review the exercise of the powers and the discharge of the duties conferred or imposed by the Act so far as they relate to the detention of patients or to patients likely to be detained under the Act. He argues that this makes it clear that the only jurisdiction of the respondent is to investigate those matters which can properly be described as falling within the category of those powers and duties which are exercised in relation to what I will describe for brevity as Section 3 patients, and do not include the functions of management, control and treatment which would be applicable to any patient, whether a Section 3 patient or an informal patient. He submits that the wording of Section 120(1)(b)(ii) must be distinguished from Section 120(1)(b)(i). It follows, he says, that what has to be determined is whether or not the complaint relates to a specific power or duty expressed in the Act. This, he says, is supported by the fact that Section 120 is expressed by subsection (7) as excluding any power which is conferred under Part VII of the Act. He submits that no assistance can be gained from the case of *Pountney v Griffiths* (above) or *R v Broadmoor Special Hospital Authority* (above). As far as the *Pountney* case is concerned, that raised a different question, which was the meaning of the phrase 'any act purporting to be done in pursuance of this Act', which is not the same concept as that which is the subject matter of the current proceedings. He further argues that the *Broadmoor Special Hospital Authority* case equally raised a very different question. He submits that it is only necessary to look at each of the complaints and ask whether an express power or an express duty has been engaged. Hence, he submits, the respondent is correct. The first complaint does

A engage the power to detain under Section 3. The third complaint is capable of engaging questions under Section 58. But neither the second nor the fourth complaint engage any power or duty under the Act. So far as the fourth complaint is concerned, he submits that, apart from questions under Sections 57, 58 and 62, the only arguable area in respect of which a complaint in respect of B treatment which could arise out of the exercise of a power is when the Responsible Medical Officer has directed treatment under Section 63 against the wishes of the patient, and then only where the treatment is 'given to' the patient, ie some sort of positive step is taken by way of treatment. The logic of his argument is therefore that a failure to treat, or a failure to carry out a risk assessment, which C is the complaint made in the present case, does not engage any power or duty under the Act.

Mr Rabinder Singh's arguments, attractively presented though they have been, are too restrictive, and in relation to treatment, do not take account of the fact that the issue of consent may well become an irrelevance in the context of a D person detained, who knows that it makes no difference whether he consents or not. Once the patient has been detained, he is essentially under compulsion. Bearing in mind the purpose for which the respondent was established, I consider that it makes more sense to approach Section 120(1) on the basis that the rights and duties referred to are all those rights and duties which flow necessarily and by E implication from a Section 3 detention, and such other rights and duties as are expressly identified in the Act. The result is that, in my view, Mr Gordon is correct. Any complaints arising out of the exercise for the power to detain, manage and control, and the duty to treat, are complaints in respect of which the respondent has jurisdiction. It seems to me that management, control and treatment all form F part of the package of compulsion which is the essence of Section 3 detention, which it is the duty of the Secretary of State to keep under review under Section 120(1) of the Act.

It follows that, in my judgment, the respondent has jurisdiction to consider the second and fourth complaints, and has an unrestricted jurisdiction to consider G the third complaint. If it is thought that the jurisdiction which I consider to have been conferred by Section 120(1)(b)(ii) is in practice wider than is either necessary or appropriate either generally or in any given case, then restrictions can be placed upon the ambit of any investigations by virtue of Section 120(2) of the Act which reads as follows:

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> *The arrangements made under this section in respect of the investigation of complaints may exclude matters from investigation in specified circumstances and shall not require any person exercising functions under the arrangements to undertake or continue with any investigation where he does not consider it appropriate to do so.*

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Further, the jurisdiction will not extend to any complaints which are unrelated to detention, management, control or treatment, for example food or bed linen, which are complaints which the patient himself would be entitled to ask the respondent to investigate, provided that he did not consider that the complaint J had been satisfactorily dealt with by the managers, pursuant to Section 120(1)(b)(i).

Mr Gordon also sought to rely upon breaches of the Code of Practice prepared by the Secretary of State pursuant to his duty under Section 118 of the Act. He argues that because, under the Code, managers and medical practitioners are K to have regard to what the Secretary of State considers to be good practice, a breach of the Code amounts to a breach of a duty under the Act. In my view, that

argument fails. The only duty under the Act is the duty of the Secretary of State to prepare and revise the Code. The Code itself expressly states that it does not create any duties which are not in the Act. It follows that the only relevance of the Code is that if a relevant power or duty has been identified, the Code may provide some guidance as to whether or not the power was wrongfully exercised or the duty breached.