

The Balancing Act

*Helen Kingston*¹

R (on the application of E) v Bristol City Council

Queen's Bench Division (Administrative Court) Bennett J., 13 January 2005

EWHC (Admin) 74

Introduction

This case involved further consideration of the difficulties created by provisions in the Mental Health Act 1983 ('the Act') relating to the nearest relative. In particular the court was asked to consider the definition of 'practicability' in the context of section 11 of the Act and paragraph 2.16 of the Code of Practice ('the Code').

The Facts

The claimant, E, had a history of mental health problems, having been detained in Broadmoor for some four years, then in a low secure unit for a two year period, followed by further periods of detention, the latest being in September 2002.

In accordance with section 26 of the Act, E's nearest relative was her sister S.

E and S had not seen each other since February 2003. E did not want S involved with her or her care. Although details of the relationship were not given in open court, in the Judge's words, they 'did not get on'.

E's consultant psychiatrist confirmed, in a letter to E's solicitors, that, in his clinical opinion, it would not be in the interests of E's mental health for S to be E's nearest relative, and, further, that consultation with S without E's consent, about E's admission to hospital, 'would further damage [E's] mental health because of the very strained relationship between the two of them'. In the proceedings, Bristol City Council (the defendant) accepted that were S to be involved, this would be 'positively harmful 'to E.

In correspondence with the defendant, E's solicitors set out her concerns, seeking assurances that S would not be notified or consulted. The defendant's response indicated that, whilst the defendant wished to respect E's wishes, section 11(3) and (4) of the Act prevented it from completely excluding S. With E's agreement, the defendant wrote to S to see if she would be

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prepared to delegate her nearest relative functions (see regulation 14 of the Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983). Following S's response, that she would 'consider delegating [her] nearest relative functions to the guardianship of Social Services with Power of Attorney', whilst agreeing that this could be interpreted as S's agreement that she was prepared to so delegate, the defendant indicated that this did not, however, in its view, relieve Social Services of its legal obligations in relation to the nearest relative and that 'the fact that [S] appears to be willing to delegate her functions to Social Services does not mean it is not reasonably practicable to consult with her'.

Proceedings

Consequently E issued judicial review proceedings seeking:

- A declaration that it was unlawful for the defendant or its employee to notify/consult with S, under section 11, without E's consent
- An order prohibiting the defendant or its employees from so doing.

The defendant was not represented at the hearing, filing a skeleton argument mainly dealing with costs issues.

The Law

The Judge adopted the summary of the nearest relative's functions set out by Maurice Kay J in the case of *R (on the application of M) v Secretary of State for Health*². These, as summarised, include the power to make an application for admission to hospital under sections 4, 2 or 3, and the right to be informed (section 2) or consulted (section 3), subject to 'practicability' and delay (section 3 only). Other rights include, in certain circumstances, the right to information (section 132), the right to direct discharge from section (section 23) and the right to apply to a Mental Health Review Tribunal (section 66) and to otherwise be involved in proceedings (Mental Health Review Tribunal Rules 7(d), 22(4), 31(c).) As Bennett J concluded, '[t]hus it can be seen that the nearest relative is entitled to take actions affecting the fundamental rights of the patient and to have access to sensitive information concerning the patient'.

Section 26 of the Act sets out the process for identifying the nearest relative. This does not allow any element of choice for the patient. Once the nearest relative is identified there is then only a 'limited mechanism' for this to be changed, through a court order displacing the nearest relative, in the circumstances set out in section 29 of the Act. This does not include a situation where the patient, no matter how reasonably, objects to the person identified by the application of the provisions of section 26. The dual effect of sections 26 and 29, together with the rights and function of the nearest relative, as described, create a situation which in *JT v. the United Kingdom* (Application No.26494/95) caused *JT* to claim that her Article 8 right (to respect for private and family life, home and correspondence) under the European Convention on Human Rights and Fundamental Freedoms ('the Convention'), had been interfered with, that such interference could not be justified under 8(2), and consequently was a breach of Article 8. The claim was held admissible by the European Commission, but was subsequently settled, apparently on agreement by the Government to amend the law to allow for removal of the nearest relative in certain

² [2003]EWHC(Admin)1094

circumstances. The current draft Mental Health Bill 2004 contains provisions for a 'nominated person' to 'replace' the nearest relative. In the meantime, the effect of sections 26 and 29 was declared to be incompatible with Article 8 by Maurice Kay in *Re M*.

In relation to an application for admission to hospital for assessment under section 2, section 11(3) requires the approved social worker ('ASW') before, or within a reasonable time of making the application, to 'take such steps as are *practicable*' (emphasis added) to inform the (person appearing to be the) nearest relative of the application. In relation to an application for admission for treatment under section 3, section 11(4) states that no such application shall be madeexcept after consultation with ...the nearest relative...unless it appears to that social worker that in the circumstances such consultation is *not reasonably practicable* or would involve unreasonable delay' (emphasis added). Section 11(4) prevents such an application being made where the nearest relative objects. The Code at paragraph 2.16, comments on the '[c]ircumstances in which the nearest relative need not be informed or consulted' and states (emphasis added) '[p]racticability refers to the *availability* of the nearest relative and *not to the appropriateness* of informing or consulting the person concerned.'

Section 3 of the Human Rights Act 1998 requires the court to interpret, so far as possible, legislation in such a manner so as to be compatible with rights under the Convention.

Issue

Against this legal background the question in this case was the extent to which the defendant's hands were tied by the obligation to inform and/or consult S, in her role as nearest relative, prior to any application under section 2 or 3 being made, even where it was contrary to E's capable wishes, could be harmful to her, and could breach E's Article 8 rights.

Court's Findings

The Judge concluded that there was credible evidence that 'significant distress' would be caused to E if S were to exercise functions of the nearest relative role, namely being involved in decisions relating to E's admission to hospital or taking any 'action' herself in this regard. Bennett J stated '[i]t would seem clear to me that Mrs S is not an appropriate person to carry out the many powers and responsibilities given to her as the Claimant's nearest relative under the Mental Health Act 1983. I say that because (i) the claimant does not want her as her nearest relative, (ii) it might be positively harmful to the patient's mental and emotional well being for Mrs S to act, and (iii) Mrs S it seems, does not wish to so act. Indeed if it is necessary I would go so far as to find that it is not in the best interests of the claimant for Mrs S to be involved in any way with the claimant and, in particular, with the assessment and/or treatment of the claimant's mental health problems' (paragraph 9).

In indicating that E's Article 8 rights had been, or were in 'real danger' of being, interfered with, Bennett J went on to consider the provisions of section 11(3) and 11(4). Acknowledging the obligation on the court imposed by section 3 of the Human Rights Act 1998, in fact Bennett J found that it was 'perfectly possible' to interpret the words of section 11(3) and (4) in a way which was compatible with E's rights, by interpreting the words so as to take into account E's 'wishes and/or health and well-being'. Whilst noting that the Code is issued for guidance, the Judge went on to state that the relevant guidance in paragraph 2.16 is wrong, falling 'into the trap of confusing

the different concepts of ‘possibility and ‘practicability’” and ‘contrary to ...common sense’.

The question, in the particular circumstances of the case, whether or not it was ‘practicable’ to inform and/or consult, involved a ‘balancing act’. Parliament’s intention that the nearest relative plays a ‘significant role’ should ‘not lightly be removed by invoking impracticability. On the other hand, to confine practicability, as does the Code..., is far too restrictive and could lead to positive injustice in the breach of the claimant’s right under Article 8’. In this case Bennett J held that the ‘balance’ came down in favour of E and that it was not practicable for the defendant to inform/consult for the purposes of section 11(3) and (4).

Conclusion

The Judge declared that it was not practicable for the defendant to carry out its duties to inform the nearest relative under section 11(3) and /or to consult under section 11(4) and ordered that the defendant pay E’s costs.

It is worth noting that Bennett J did not grant the declarations in the terms requested by E, but in effect relieved the ASW from having to consult/inform in these particular circumstances. If the ASW did decide to contact S the judge said E could return to court. This seems to be very helpful (if contentious from an ASW point of view) because it allows a judgement to be made by the ASW on “practicability”.

Comment

Does the decision mean that a matter of some debate and concern for some time is now finally resolved? Jones has long argued that the Code’s interpretation is in conflict with Article 8. Drawing on the same authorities as subsequently relied upon by Bennett J, he has contended that caselaw “strongly suggest[s] it would not be ‘practicable’ for an approved social worker applicant to consult with a nearest relative if such consultation would have an adverse effect on the patient’s situation by, for example, causing significant emotional distress to the patient or by placing the patient at risk of physical harm”. He has concluded that ASWs ‘should therefore be advised not to interpret this provision in the manner advocated by the Code...’³. For some time, understandably, ASWs have been concerned about their position. No doubt many will have agonised over to whether to follow Jones or the Code, with the prospect of acting unlawfully exacerbating what is often already a difficult decision. This case provides a welcome answer on this point. The Department of Health, in a legal briefing following the decision (gateway reference 4606) accepts that the advice given in paragraph 2.16 of the Code, referred to above, is no longer correct.

This, however, is the easy bit. What are the practical implications for the ASW? As before, in the absence of impracticability or (in the case of a proposed s.3) unreasonable delay the ASW must inform/consult the nearest relative, who will still, of course be ‘automatically’ identified by section 26, and who can still not be removed other than within the narrow provisions of section 29. The incompatibility declared by Maurice Kay J remains. In considering whether it is ‘practicable’ to inform/consult, the ASW will now have to consider the wider definition of ‘practicable’ and the patient’s Article 8 rights. This will involve the ‘balancing act’ as described by Bennett J. This is surely the tricky part. The Department of Health briefing suggests that ASWs should not ‘lightly

3 Most recently, Jones, *Mental Health Act Manual 9th edition (2004; Sweet & Maxwell) paragraph 1–124*

invoke 'impracticality' as a reason for excluding [the nearest relative]'. '[K]ey factors', in the Department's view, in this case, were the very strong objections by E, the fact that S did not want to be involved and the likelihood that S's involvement would have been distressing for E. The Department gives other possible examples where impracticality might arise, which may include a situation 'where the nearest relative is known intensely to dislike the patient and/or would not act in the patient's best interests or where the involvement of the nearest relative might adversely affect the patient's health (e.g. by causing the patient severe distress)'. The Department goes on to stress that 'it is very unlikely that the fact that a nearest relative is expected to object to admission or to seek the patient's discharge would, of itself, make their involvement impracticable and therefore relieve ASWs of the duty to inform or consult them'.

What about the impact of the patient's capacity? How may/should this affect the ASW's assessment of whether or not consultation is 'practicable'? What about risk and thus the dilemma for the ASW of competing duties, where, for example, the nearest relative may have important information relating to risk which the ASW has to assess?

Reflecting on the variety of different circumstances an ASW may face, and issues that may arise, and attempting to analyse when and how this may lead to a conclusion that it will not be practicable to inform/consult, only serves to illustrate in reality how difficult this 'balancing act' may be. In E's case there was time to consider and understand E's views, to seek S's views, to obtain a medical opinion and legal advice, and ultimately to ask the court itself to carry out the 'balancing act'. Clearly this is not often going to be the case. In reality, time may well be short and information limited. In relation to court involvement, it is notable that the defendant, whose reasonableness throughout was praised by the judge, and who did not bring the matter to court through 'any unjustified act' (paragraph 41) ultimately had to bear the costs of the application.

As long as the tension created by the incompatibility of sections 26 and 29 remains, it would seem that, what will often be a precarious balancing act by the ASW, will have to continue. It remains a matter of considerable regret that the Government has failed to act on its undertaking in JT and in response to the declaration of incompatibility in *Re M*.