

Nearest Relatives of Gay and Lesbian Patients

Nicola Cho*

R (on the application of SSG) v Liverpool City Council (1) Secretary of State for Health (2) and LS (Interested Party).

Administrative Court (22nd October 2002) – Mr. Justice Maurice Kay

Introduction

In this case the Administrative Court approved the naming of gay and lesbian partners of mental health patients as nearest relatives under Section 26 of the Mental Health Act 1983. An agreement was reached between the parties which brought an end to the discrimination faced by those in same sex relationships. Although the resulting order is limited to a nearest relative case, the principles are of much wider application and reflective of recent developments both in the Courts and in the corridors of Government.

The facts

Ms. SSG had lived with her female partner, Ms. ESG, in a stable sexual relationship since August 1999. She had a diagnosis of paranoid schizophrenia and depression, which she had suffered from for a number of years and which required treatment. She received that treatment in the community. This consisted of prescribed medication, outpatients appointments with a consultant psychiatrist and regular visits from a community psychiatric nurse.

Ms. SSG had been detained under the provisions of Section 2 of the Mental Health Act 1983 on one occasion in the past. She was subsequently discharged from hospital on 31st December 1997. Although she had not been admitted to hospital since that time, it was accepted that the chronic nature of her condition could result in her being admitted in the future.

The person thought to be Ms. SSG's nearest relative was her mother, LS, the interested party in the proceedings. Ms. SSG no longer had a good relationship with her mother and had effectively been estranged from her since October 2000. She did not feel that her mother would ever give due consideration to exercising her power of discharge¹ should she be detained under the Mental Health Act 1983 at some time in the future. She would have preferred her partner, Ms. ESG, to be informed or consulted about any admission for treatment, assessment or other care. Ms. SSG contended that whilst she and her partner were not free to marry, they had lived together as spouses since August 1999 and the fact that they were not afforded the same rights and recognition as unmarried heterosexual couples was discriminatory.

* Solicitor and partner with Jackson & Canter (Liverpool). Solicitor instructed by the Applicant in the case under review.

1 The nearest relative's power of discharge is contained in section 23(2) Mental Health act 1983, and is subject to the restrictions set out in section 25(1)

Solicitors correspondence was sent to the First Defendant, (Liverpool City Council), asking for it to amend its records and to treat Ms. ESG as Ms. SSG's nearest relative. Their Executive Director initially acceded to this request but the First Defendant then confirmed that it could not grant Ms. SSG's request after all as the legislation did not permit a patient to choose a nearest relative. The First Defendant pointed out that a nearest relative could authorise another person to perform the functions of nearest relative² or that an application could be made to the County Court to displace the nearest relative, in accordance with the provisions of Section 29 Mental Health Act 1983. Unfortunately, although LS was invited to delegate her powers of nearest relative to Ms. ESG, no response was received, and none of the four grounds provided for in Section 29(3) of the Act applied to Ms. SSG's case.

Ms. SSG therefore applied for judicial review of the First Defendant's determination that it would not treat her partner, Ms. ESG, as her nearest relative. The Secretary of State for Health was brought into the proceedings as Second Defendant, in view of the implications of the case beyond its own particular facts.

The Law

Nearest Relative

The nearest relative has a number of important functions in respect of certain patients subject to the compulsory provisions of the Mental Health Act 1983 namely unrestricted patients³ and those patients subject to guardianship or supervised discharge. These include:

- (i) The Approved Social Worker is required to consult with the nearest relative before any application for admission for treatment under Section 3 or for guardianship under Section 7 is made (unless such consultation is not reasonably practicable or would involve unreasonable delay) (Section 11 (4));
- (ii) If practicable, the nearest relative must be informed of an admission for assessment under Section 2 (Section 11 (3));
- (iii) The nearest relative can apply for admission for assessment, treatment or for guardianship (Section 11 (1));
- (iv) The nearest relative can require a Social Services Authority to direct an Approved Social Worker to consider making an application for admission into hospital and is entitled to written reasons if no such application is made (Section 13 (4));
- (v) Decisions not to make applications for admission to hospital must be discussed with the nearest relative (Code of Practice, paragraph 2.32);
- (vi) The nearest relative can direct the discharge of certain patients from detention or guardianship (Section 23 (2)) (although the discharge from hospital detention may be barred by the Responsible Medical Officer (Section 25 (1)));
- (vii) The nearest relative has certain rights in respect of applications to the Mental Health Review Tribunal (Section 66 (1));

2 In accordance with the provisions of Regulation 14 of the Mental Health (Hospital, Guardianship and Consent to Treatment) Regulation 1983

3 In effect the nearest relative does not have any functions

in relation to restricted patients. See R (on the application of H) v Mental Health Review Tribunal for the West Midlands and North West Region [2000] MHLR 203.

Identifying the Nearest Relative

Section 26 contains complex provisions for identifying the nearest relative. Section 26(1) provides a list of relationships to the patient which determine whether someone is a 'relative' of the patient. Section 26(3) in effect confirms that subject to the effect of other sub-sections, the list is a pecking-order for determining which of the patient's relatives is deemed the 'nearest relative'. Top of the list is 'husband or wife'. Section 26(6) ensures that this phrase extends beyond marriage to include a person who has been living with the patient 'as husband or wife' for six months or more (provided the spouse of a married patient can be disregarded by reason of Section 26(5) on the grounds of desertion or separation). Provision is also made for a person who has been residing with the patient for not less than five years to become a relative (Section 26(7)), and indeed by reason of Section 26(4), to become the nearest relative.

Further, Regulation 14 of the Mental Health Regulations 1983 allows a nearest relative to delegate his or her powers to another person thus authorising that person to exercise the functions of nearest relative. However, any delegation of authority is not final and can be revoked in writing and further the authorisation lapses on the death of the original nearest relative so that the statutory pecking order in Section 26 must be invoked once more.⁴ An application can also be made to the County Court under Section 29 of the 1983 Act for a person to be displaced as nearest relative and for someone else to be appointed. Such an application may only be made on one of four specific grounds, set out in Section 29(3) namely

- (i) That the patient has no nearest relative or it is not reasonably practicable to ascertain whether there is such a relative or who that relative is;
- (ii) That the nearest relative is incapable of acting by reason of mental disorder or other illness;
- (iii) That the nearest relative unreasonably objects to the making of an application for admission for treatment or guardianship;
- (iv) That the nearest relative has exercised without due regard to the welfare of the patient or the interests of the public his or her power to discharge the patient from detention or guardianship or is likely to do so.

Human Rights

It was accepted that the functions of the nearest relative brought this case within the ambit of Article 8 of the European Convention on Human Rights, by which everyone has the right to respect for his or her private and family life. Any interference by a public authority with the exercise of these rights is prohibited unless it is for a legitimate purpose and is proportionate.

It was submitted on behalf of Ms. SSG that not only do issues of personal choice and identity fall within Article 8, but that a patient should be able to choose his or her own nearest relative (although this point was not central to her case). This was supported by the European Court of Human Rights decision on 30th March 2000, in the case of *J.T. v United Kingdom*,⁵ in which the Commission had declared admissible a complaint that the absence of any power enabling the

⁴ In Ms. SSG's case, it was subsequently discovered by the First Defendant that Ms. SSG's father was in fact her correct nearest relative and he went on to delegate his powers to Ms. ESG. Ms. SSG was estranged from him also which highlights the difficulties involved in

identifying nearest relatives and raises questions as to whether they can perform any useful function if they are no longer in touch with the patient.

⁵ [2000] 1 FLR 909

patient to specify a nearest relative whom the patient liked and trusted, was a potential breach of Article 8. That case was ultimately dealt with by way of friendly settlement on the understanding that the legislation would be changed. Nearly three years later, no amending legislation has been passed, and indeed it would appear that none is planned prior to the proposed wide-reaching mental health law reforms. The Government's proposals for the replacement of a "nearest relative" with a "nominated person", appointed in accordance with the patient's wishes but subject to certain safeguards, are of course set out in the Draft Mental Health Bill.⁶

In the light of the fact that the case fell within the ambit of Article 8, it was also accepted that Article 14 was engaged. This Article prohibits discrimination in the manner in which Convention rights are afforded. It was acknowledged that sexual orientation was a ground covered by Article 14.

The Secretary of State for Health as Second Defendant accepted that there was a difference in treatment by the 1983 Act between non-married heterosexual couples who had been living together for six months and same sex couples who had been living together for the same length of time. The heterosexual partner would be the nearest relative on the basis of six months residence (provided the married patient's spouse could be disregarded on grounds of separation or desertion) but the homosexual partner would not. For a partner to be recognised as a nearest relative, same sex couples would have to live together for a minimum period of five years. There was no recognition within the statutory provisions of their actual relationship and in effect they were treated no differently than flatmates. It was accepted that this difference in treatment could not be justified.

Compatibility

The question remained, was it possible to interpret Section 26 of The Mental Health Act 1983 in a manner which avoided incompatibility, pursuant to Section 3 of the Human Rights Act 1998?⁷ If not, then a declaration of incompatibility would be appropriate.⁸ It was submitted by the parties that Section 26 (6) could be so interpreted and compatibility thus achieved.

It was accepted by the Second Defendant that factors such as the closeness of relationship, degree of stability and permanence were just as capable of being present in a same sex couple as in an unmarried heterosexual couple. There was nothing to suggest that a same sex partner who had been living with the patient for six months would not be as capable as a heterosexual partner in performing the functions of the nearest relative. The Second Defendant submitted that there were no major practical repercussions or policy issues in interpreting Section 26 (6) so as to include same sex partners living with the patient for six months within its scope.

6 See clauses 148–156 of the Draft Mental Health Bill, Department of Health 2002. Cm 5538-1.

7 Section 3(1) Human Rights Act 1998 states that 'so far as it is possible to do so, primary legislation and

subordinate legislation must be read and given effect in a way which is compatible with the Convention rights'.

8 Section 4 Human Rights Act 1998

Order

The matter was dealt with by consent and the subsequent order was pronounced in open court on 22nd October 2002.

The order provided for the following:–

- (1) The determination by the First Defendant that it would not treat the partner of Ms. SSG as her nearest relative within the meaning of Section 26 of the Mental Health Act 1983 was quashed;
- (2) It was declared that the same sex partner of a patient could be treated as a “relative” within Section 26 (1) of the Mental Health Act 1983, and that having regard to the specific statutory context and applying Section 3 of the Human Rights Act 1998, the same sex partner could be treated as falling within the phrase “living with the patient as the patient’s husband or wife as the case may be” in Section 26 (6) and accordingly as a relative within Section 26 (1) of The Mental Health Act 1983;
- (3) It was declared that, having regard to the length of her cohabitation with Ms. SSG, that Ms. ESG was her nearest relative for all purposes under the MHA 1983; and finally that
- (4) The First Defendant was ordered to treat Ms. ESG as Ms. SSG’s nearest relative for all relevant purposes under 1983 Act and to record that she was the nearest relative and to inform any hospital authority or other relevant body with whom it might have to deal in regard to Ms. SSG’s condition that Ms. ESG was the nearest relative.

Comment

This is a case of immense importance to patients in same sex relationships. They can now be assured that their partners will be involved in making decisions regarding their treatment and care and will be consulted about and advised of appropriate applications made by Approved Social Workers, provided of course firstly they have lived together for six months or more, and secondly (in the case of married patients) their spouse can be disregarded because of separation or desertion.

Although the concession by the Second Defendant was limited to the specific statutory context of nearest relatives under The Mental Health Act 1983, it is another step towards full legal recognition of the rights of gay and lesbian couples. Since the consent order was made, there have been two other particularly significant developments in this area of human rights. Firstly the Court of Appeal on 5th November 2002, in a housing case (*Antonio Mendoza v Ahmed Raja Ghaidan*⁹) declared that a gay man could succeed to a statutory tenancy on his partner’s death. Secondly on 6th December 2002, Barbara Roche, the Minister for Social Exclusion, announced proposals to allow same-sex couples to register their unions as ‘civil partnerships’, giving them property and inheritance rights and recognition as next-of-kin.¹⁰ The Secretary of State for Health would clearly have been flying in the face not just of the judiciary (both here and at Strasbourg) but also his own Government colleagues if he had done anything in this case other than make the concession which he did. That said, his attitude must be welcomed and applauded. It stands in marked contrast to the inertia which has followed the undertaking given in *JT v United Kingdom*.¹¹

⁹ [2002] EWCA Civ 1533

¹¹ See footnote 5, above.

¹⁰ Reported in the *Guardian* newspaper 7th December 2002