Neutral Citation Number: [2014] EWCA Civ 712

Case No: C1/2013/2740

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CO/6487/2013

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/05/2014

Before :

LORD JUSTICE MOSES
LORD JUSTICE KITCHIN
and
MR JUSTICE BEAN

- -

Between :

R **on the application of** **WILTSHIRE COUNCIL**	**Claimant**
- and -	
HERTFORDSHIRE COUNTY COUNCIL	**Defendant**
- and -	
SQ	**Interested Party**

- -
- -

Hilton Harrop-Griffiths (instructed by **Solicitor, Wiltshire Council**) for the **Appellant**
Rhodri Williams QC & Nazeer Chowdhury (instructed by **Legal and Member Services, Hertfordshire County Council**) for the **Respondent**
The Interested Party did not appear and was not represented
Hearing date : 19th May 2014

- -

Judgment

Mr Justice Bean :

1. This case involves a dispute between two local authorities over who has responsibility under section 117 of the Mental Health Act 1983 ("the Act") for the aftercare of a person, originally made the subject of a hospital order with restrictions by an order of the Crown Court, who has been conditionally discharged for the second time from detention at a hospital.

2. SQ, who was born on 23rd March 1971, lived in Wiltshire until 1995. He has been almost continuously in contact with local authority psychiatric services since he was 18 years old.

3. On 4th December 1995 in the Crown Court at Swindon he was made subject to a hospital order under section 37 of the Act with restrictions under section 41. He was detained under that order for more than 13 years, until 2003 in Hampshire and thereafter in Cambridgeshire. On 20th November 2006 a Mental Health Review Tribunal, Judge Reynolds presiding, ordered that he should be conditionally discharged subject to conditions which included residence in a 24 hour staffed hostel approved by the Responsible Medical Officer and the Social Supervisor, but further directed that his discharge was to be deferred until the Tribunal was satisfied that the necessary arrangements had been made to meet those conditions. By a further decision on 7th July 2008 the same Tribunal reached the same decision, that is to say a deferred conditional discharge.

4. On 19th January 2009 the First Tier Tribunal (as it had by then become) directed a conditional discharge and noted that they were now satisfied that appropriate accommodation had been secured and that a consultant psychiatrist in the community and a social supervisor had been appointed. One of the conditions of his discharge was that SQ was "to reside at Winnett Cottage, Stevenage, or such other 24 hour staffed hostel as [may be] approved by the RMO and Social Supervisor".

5. On 2nd March 2009 SQ was conditionally discharged from hospital to a placement at Winnett Cottage, Stevenage, Hertfordshire. He remained living there until 5th September 2011, when he was recalled under section 42(3) of the Act by the Secretary of State and once again detained in a hospital, this time in Hertfordshire.

6. On 20th February 2014 he was again conditionally discharged from hospital to Winnett Cottage. Before his discharge there had been correspondence between Wiltshire and Hertfordshire on the subject of which authority would owe him the duty to provide after-care services under section 117. By letter of 9th January 2012 Hertfordshire rejected Wiltshire's contention that it (Hertfordshire) was the responsible authority.

7. Wiltshire issued a claim in the Administrative Court for judicial review of the decision contained in that letter. On 4th July 2013, after consideration of the case on the papers, Judge Seys-Llewellyn refused permission. Wiltshire renewed the application at an oral hearing. This took place on 11th September 2013 before Judge Denyer QC, who also refused permission. Wiltshire applied to this court for permission to appeal. On 21st December 2013 Arden LJ granted permission and directed that, as the points of law involved were "reasonably urgent and important", the case should be retained in the Court of Appeal.

8. Section 117 of the Act provides, so far as material, as follows:-

> (1) This section applies to persons who are detained under section 3 above, or admitted to a hospital in pursuance of a hospital order made under section 37 above, … and then cease to be detained and (whether or not immediately after so ceasing) leave hospital.
>
> (2) It shall be the duty of the clinical commissioning group … and of the local social services authority to provide, in co-operation with relevant voluntary agencies, after care services for any person to whom this section applies until such time as the clinical commissioning group … and the local social services authority are satisfied that the person concerned is no longer in need of such services.
>
> (3) In this section "the local social services authority" means the local social services authority for the area in which the person concerned is resident or to which he is sent on discharge by the hospital in which he was detained.

9. The critical provision is section 117(3) and in particular the question of where, for the purposes of that subsection, SQ is now "resident". The final words of the subsection are in the nature of a fallback provision. As Scott Baker J observed in *R v Mental Health Review Tribunal ex parte Hall* [1999] 3 All ER 132 at 143F,

> "the words 'or to whom he is sent on discharge by the tribunal' are included simply to cater for the situation where a patient does not have a current place of residence. The subsection does not mean that a placing authority where the patient resides suddenly ceases to be 'the local social services authority' if on discharge the applicant is sent to a different authority."

10. On behalf of Wiltshire Mr Harrop-Griffiths submits that two issues arise on this appeal: firstly, whether the recall to hospital in 2011 resulted in SQ being owed a fresh duty under section 117 on leaving hospital in 2014; and secondly, if so, whether SQ was for the purposes of Section 117 "resident" in Hertfordshire's area as at the date of the recall in 2011. I propose to deal with these in reverse order, since in my view the residence issue is both free-standing and determinative.

11. There was and remains no dispute that, when SQ was conditionally discharged from hospital for the first time on 2nd March 2009, he was "resident" in Wiltshire for section 117 purposes. This is because of the decision in *Hall* and its approval by this court in *R (Hertfordshire County Council) v Hammersmith and Fulham London Borough Council* [2011] LGR 536; [2011] EWCA Civ 77. In the latter case, which I shall refer to as *Hammersmith,* Carnwath LJ said at [24]:-

> "I am happy to accept that in deciding where a patient 'is resident' the period of actual detention under the 1983 Act is to be disregarded."

12. Carnwath LJ added at [51]:-

> "The present context seems to me to point to an interpretation of "residence' which excludes the period of compulsory detention under the section. It can be seen as implicit in s 117(3) that the area of residence is something distinct from the place of detention. "The hospital in which he [is] detained" is referred to separately in the same provision for the purpose of defining the fallback position, but not as relevant to the primary criteria. Since there is no suggestion that the hospital of detention should itself be responsible for his aftercare, there is no reason for its area to define responsibility. That to my mind provides a legally acceptable explanation of the interpretation in *ex parte Hall*, based on the wording of the section itself."

13. Mr Harrop-Griffiths, however, submits that following SQ's recall in 2011 and discharge for the second time in 2014 the position is now different.

14. The principal difficulty with that argument is that it becomes impossible to define at what moment and for what reason SQ ceased to be "resident" in Wiltshire's area for the purposes of section 117. It is accepted that he was so "resident" at the moment of his discharge on 2nd March 2009: that is settled by the decisions in the *Hall* and *Hammersmith* cases to which I have referred. Mr Harrop-Griffiths submitted in oral argument that the change must have been within a few days of his arrival at Winnett Cottage. But, using the language of Scott Baker J in *Hall*, Wiltshire did not suddenly cease to be the local services authority in whose area SQ was "resident" for section 117 purposes because on discharge he was sent to an address in Hertfordshire.

15. Nor am I impressed by the attempt to draw a distinction between the first period of detention and the second. It is important that, in contrast to the case of a patient who has not been the subject of a hospital order by a criminal court and who is from time to time admitted compulsorily to a hospital under section 3, and also with a patient formerly subject to a hospital order who has been granted an absolute discharge, SQ's liability to be detained, or to be recalled to detention following a conditional discharge, still derives from the original order made by the Swindon Crown Court in 1995. As Judge Denyer put it, the chain of causation has never been broken. In the case of a patient "sectioned" under s 3, on the other hand, each admission to hospital involves a fresh decision, and generally the patient has been living in the community beforehand without restrictions.

16. Wiltshire submit that policy should make the most recent developments relevant rather than what happened 20 years ago. But if that argument were correct, it would surely have applied on SQ's first conditional discharge in 2009. It is not correct, because in accordance with the decisions in *Hall* and in *Hammersmith* the period of detention between 1995 and 2009 was to be excluded. In *R (Sunderland City Council) v South Tyneside Council* [2013] 1 All ER 394; [2012] EWCA Civ 1232 Lloyd LJ said at [38]:-

> "The exclusion of the place of detention during the period of detention for sound policy reasons leads to what may seem a somewhat artificial test in some cases, requiring that the position immediately prior to detention be examined, which

> may be several or even many years in the past. That is inherent in the legislation."

17. Wiltshire further submit that on discharge both in 2009 and again in 2014 SQ "did not want to return to Wiltshire's area where he has not lived since 1995. He chose to stay in or close to the area of Kneesworth House [in Cambridgeshire], where he had been living since 2003. His residence at Winnett Cottage was voluntary rather than compulsory, particularly when compared with detention in a hospital or prison."

18. I accept that (as confirmed by a letter from solicitors acting for him), SQ considers Hertfordshire to be his home, would like to remain in the Stevenage area and has no wish to return to Wiltshire. But this does not make his residence at Winnett Cottage voluntary for the purposes of the 1983 Act. He has to live there, because it is a condition of his discharge imposed by the Tribunal that he must do so. Lloyd LJ said in the *Sunderland* case at [31]:-

> "I agree with the comment made in other cases that, in general, when considering any case in which there is doubt as to the place of a person's residence, the question is not only that of physical presence and that it may be relevant o consider why the person is where he or she is, and to what extent his or her presence there is voluntary, Thus, if a person has a home, the fact that he or she is not there on a given date or for a particular period does not mean that he or she is not resident there, if the absence is accounted for by, for example, a holiday, a business trip or having to spend time in hospital, whether following an injury, an operation or some other form of treatment, possibly over a long period, or, for that matter a period of imprisonment following a criminal conviction."

19. For these reasons I consider it clear that where a person has been made subject to a hospital order with restrictions, then conditionally discharged, then recalled to hospital, and then conditionally discharged for a second time, for the purposes of s 117(3) of the Act he is still to be treated as "resident in the area" of the same local authority as that in which he lived before the original hospital order was made. This makes it unnecessary to consider whether or not a fresh duty to provide after-care services arose on SQ's second discharge earlier this year. Whether the duty is a fresh one or a continuing one, on the facts of this case it is Wiltshire's duty.

20. At the conclusion of the argument counsel drew to our attention that on 14 May 2014 Royal Assent was given to the Care Act 2014. This will make significant amendments to s 117 of the 1983 Act by introducing a test of where the person concerned was "ordinarily resident" immediately before being detained; by giving the Secretary of State power to resolve disputes between local authorities as to where a person was ordinarily resident; and creating by a new s 117A the power to make regulations to ensure that in future, and subject to conditions to be prescribed, the local authority must provide or arrange for the provision of the accommodation which he prefers. It was not suggested that these amendments, yet to be brought into effect, are a useful guide to the interpretation of the present provisions.

21. I would dismiss this application for judicial review.

Lord Justice Kitchin:

22. I agree.

Lord Justice Moses

23. I also agree.