
Casenotes

Hospital Orders: Detention in a Place of Safety Pending Transfer

David Hewitt¹

R (DB) v Nottinghamshire Healthcare NHS Trust

[2008] EWCA Civ 1354

Laws, Longmore and Stanley Burnton LJJ

A hospital order will cease to have effect if its subject is not admitted to hospital within 28 days

Introduction

Where, in the course of criminal proceedings, a person is made subject to a hospital order, the court may direct that he or she be taken to a place of safety and detained there for up to 28 days, pending his transfer to hospital. Occasionally, a transfer cannot take place in time, in which case two questions become relevant: must the person be released from the place of safety and may he still be detained in hospital subsequently? The decision in this case provides a clear answer to each question. That clarity is welcome, because at first instance, the High Court had held that in such circumstances, the person's continued detention would be unlawful, but only until he was finally admitted to hospital.

The facts

In September 2003, the appellant, DB, was convicted of affray and sentenced to a community rehabilitation order. When he breached that order, he was taken into custody, pending a return to court. While there, his behaviour gave cause for concern and he was seen by two forensic psychiatrists, each of whom recommended that he be placed under a hospital order and admitted to a medium secure unit, namely Arnold Lodge in Leicester (of which the respondent NHS trust is 'the managers' for the purposes of the *Mental Health Act 1983*).²

The matter came before the Crown Court at Nottingham on 17 December 2004, when His Honour Judge Teare made a hospital order under section 37 of the *Mental Health Act 1983* (MHA 1983), providing for DB's admission to hospital within 28 days – in other words, by 14 January 2005. For reasons that are unclear, however, the order named not Arnold Lodge, but a hospital in Nottingham that was not a medium secure unit.³

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² Stanley Burnton LJ at [3].

³ *Ibid* at [4].

The mistake was noticed before DB was transferred from prison, and on 21 December 2004, Judge Teare amended the order, so as to name Arnold Lodge as the hospital to which he would be admitted and in which he would be detained.⁴ (In fact, the amended order was again completed incorrectly, so that there would not have been a power either to convey DB to or to detain him in a place of safety pending his transfer to Arnold Lodge. No issue was, however, taken on this point.⁵)

Teare J made it clear that although the order had subsequently been amended, it was to be regarded as having been made on 17 December, and that DB might therefore expect to be admitted to hospital within 28 days – in other words, by 14 January 2005.⁶ It seems, however, that those responsible for implementing the order took the view that it was operative only from the date it was amended, and, accordingly, that DB need not be admitted to hospital until 17 January. That more modest goal was achieved, DB being transferred to Arnold Lodge on 17 January 2005.⁷ Subsequently, DB's liability to detention was renewed under section 20(3) of MHA 1983 and his case considered twice by a Mental Health Review Tribunal, which on each occasion decided he should not be discharged.

DB sought judicial review of the decision of the respondent to detain him pursuant to the hospital order. On 7 May 2008, Mr Justice Foskett held that the hospital order ran from 17 December 2004 and therefore required DB to be admitted to Arnold Lodge by 14 January 2005; that because DB had not in fact been transferred for a further three days, his admission and subsequent detention had been unlawful; but that because the order had neither been set aside nor varied, it remained valid, had to be complied with and would permit DB's continued detention in hospital.⁸ The present case was DB's appeal against that decision.

The issue

There was but a single issue in this case: does a hospital order cease to have effect if the offender who is its subject is not admitted to the hospital named in the order within 28 days from the day it is made? Although DB was the subject of a simple hospital order, Lord Justice Stanley Burnton made plain the wider significance of that issue. He said:

“The importance of the point is all the greater if the offender is sufficiently dangerous for a restriction order to have been made under section 41, since a restriction order has no effect if there is not an effective hospital order.”⁹

It seems that the Ministry of Justice was notified of DB's challenge, but that it chose neither to intervene in the appeal nor make representations about it.¹⁰

The legislation

Where a person has been convicted of an offence punishable with imprisonment, section 37 of MHA 1983 permits a court to make a hospital order in respect of him. That order will authorise the person's admission to and detention in the hospital named in the order.¹¹ This power is, of course, subject to a number of conditions, not least that the making of the order be supported by two medical

4 *Ibid* at [6].

5 *Ibid* at [6] & [26].

6 *Ibid* at [5].

7 *Ibid* at [7].

8 *Ibid* at [1] & [8]. See: *X v An NHS Trust* [2008] EWHC 986 (Admin).

9 At [1].

10 *Stanley Burnton LJ* at [2].

11 MHA 1983, section 37(1).

recommendations.¹² Crucially, section 37(4) of the Act states that a hospital order shall not be made unless the court is satisfied,

*“that arrangements have been made for [the person’s] admission to [the named] hospital in the event of such an order being made by the court, and for his admission to it within the period of 28 days beginning with the date of the making of such an order”.*¹³

Once a hospital order has been made, section 40 of MHA 1983 states that it shall be sufficient authority:

- (a) for the person to be conveyed to the named hospital “within a period of 28 days”;¹⁴ and
- (b) for him to be admitted to that hospital and detained there in accordance with the provisions of the order.¹⁵

Pending a person’s admission to hospital within the specified 28-days, the court may, under section 37(4) of MHA 1983, “give such directions as it thinks fit for his conveyance to and detention in a place of safety.”¹⁶ Furthermore, section 37(5) says that if, within the relevant period, it appears to him that “it is not practicable for the patient to be received into the hospital specified in the order”, the Secretary of State may direct that the person be admitted to another hospital.¹⁷ Finally, and by virtue of section 54A of MHA 1983, the Secretary of State may reduce the 28 day period.

The judgment

Stanley Burnton and Longmore LJ each gave judgments of their own, while Lord Justice Laws agreed with both of them.¹⁸

Lord Justice Stanley Burnton’s was the lead judgment. He noted sections 37(4) and 40(1) of MHA 1983:

*“The effect of a hospital order is set out in section 40, which expressly limits the authority conferred by an order made under section 37 to the period of 28 days from the date of the making of the order.”*¹⁹

Applying that analysis to the facts of this case, he concluded:

*“It follows that, once the period of 28 days from 17 December 2004 had expired, the hospital order relating to [DB] ceased to have effect and ceased to provide authority for his conveyance to Arnold Lodge ... or for his detention in that hospital thereafter.”*²⁰

Thus did His Lordship resolve the issue in this case.

For the respondent, it had been noted that section 37(1) of MHA 1983 imposes no time limit, and suggested that as a result, a hospital order need not be complied with within 28 days. Stanley Burnton LJ disagreed. He said:

*“It is immaterial that the period of 28 days is not mentioned in section 37(1), which deals with the making of the order, not its effect. There is nothing in section 40 to limit its purpose in the manner contended for by [the respondent], and no good reason for the reference to the 28-day period to have been included if [the respondent’s] submission as to its purpose were, contrary to my view, correct.”*²¹

12 MHA 1983, section 37(2)-(4).

13 MHA 1983, section 37(4).

14 MHA 1983, section 40(1)(a).

15 MHA 1983, section 40(1)(b).

16 MHA 1983, section 37(4).

17 MHA 1983, section 37(5).

18 Laws LJ at [37].

19 At [16].

20 *Ibid.*

21 *Ibid.*

Lord Justice Longmore suggested that, had section 37 stood alone, a different result might have been achieved, for that section “provides for only two conditions to be met and the 28-day period is not one of them.”²² However, he continued:

*“[E]ven in that situation it would still be the case that the authority to detain a defendant in a place of safety (normally in prison) pursuant to section 37(4) only lasts ‘pending his admission within that period’. Once that period lapses, his detention in a place of safety pending admission to a hospital is unauthorised. In other words, he has to be released, although no doubt consideration can rapidly be given to the question whether the defendant can be compulsorily admitted to a hospital pursuant to Part II of the Act rather than Part III.”*²³

Stanley Burnton LJ commented also upon the effect of section 37(4) and (5) of MHA 1983: it is because the authority for the application of a hospital order expires after 28 days that the first requires a court to be satisfied that there are arrangements for an offender’s admission to hospital within that period; and as for the second,

*“it is impossible to see why the power conferred on the Secretary of State by that subsection is restricted to the period of 28 days from the making of the order ... if a hospital order remains effective after the expiration of that period.”*²⁴

There were other reasons for doubting the respondent’s case. It would, for example,

*“be quite illogical for Parliament to have limited the authority to detain an offender in a place of safety to the 28-day period, so that the offender would then be entitled to walk free, but to have authorised his admission and detention in hospital thereafter.”*²⁵

Moreover,

*“the respondent’s case does not explain how an offender can lawfully be conveyed under compulsion from prison to the hospital after the 28 days have expired.”*²⁶

Finally, the amendment represented by section 54A of MHA 1983

*“indicates that [Parliament] appreciated the importance of compliance with the 28-day time limit. It is difficult to see why the power to shorten the period should have been conferred on the Secretary of State if Parliament’s understanding of the existing statutory provisions were ... that an offender could be lawfully admitted and detained after the expiration of the statutory time limit.”*²⁷

The appeal would be allowed and the decision at first instance overturned. Mr Justice Teare had asked the wrong question:

*“He asked, ‘Was the hospital order valid?’ ... However, the validity of the hospital order was not in issue. The judge should have asked, ‘What was the effect (and in particular what was the duration) of the order made on 17 December 2004 as amended on 21 December?’”*²⁸

Finally, Stanley Burnton J dealt with a number of ‘practical considerations’:

- (a) He recommended that the standard form on which a hospital order is recorded be amended, so as to specify the date by which a patient must be admitted to hospital.²⁹

22 At [29].

23 At [30].

24 At [18].

25 Stanley Burnton at [19]. See also: Longmore LJ at [31].

26 Stanley Burnton at [19].

27 Ibid at [20].

28 Ibid at [23].

29 At [25]. See also: Longmore LJ at [36].

(b) He also suggested that it would be sensible for the form to contain a recommendation of the kind already contained in official guidance. A Home Office circular issued in 1980 recommends that if, in the case of a person upon whom a hospital order is imposed, it appears unlikely that he will be admitted to hospital within the 28 days permitted for the purpose, the matter should be reported to the court, so that alternative disposal options can be considered.³⁰

(c) In this regard, the judge noted that a sentencing court now has the power to vary, or even rescind, its order. He said that if one hospital order were rescinded, another might be made subsequently. (He did, however, suggest that this should be a last resort, “since the consequence will usually be to prolong a patient’s detention in prison.”)³¹

A declaration was made that DB’s admission to and subsequent detention in hospital on and after 17 January 2005 were not authorised by the hospital order made on 17 December 2004 and varied on 21 December 2004. However, Stanley Burnton LJ concluded:

*“Whether this will result in his detention under Part II of the Mental Health Act 1983 is, in the first place, a matter for the respondent.”*³²

Discussion

This was not a happy case: not for the patient or the hospital to which he was admitted; not for Foskett J, who, it seems, asked the wrong question; and not for the, doubtless hard-pressed, judicial and clerical staff of Nottingham Crown Court, who managed first to misstate the hospital to which the hospital order applied, and then to miscalculate the period during which DB might be held in a place of safety and to nullify the powers that might be brought to bear upon him there.

Neither is this the first time the intricacies of mental health law have left judges studying their own entrails, if not their navels. The question of whether the law means what it says, and if so, what the consequences will be if it is breached, have come before the senior courts before – most recently in July 2007, when the House of Lords considered the fate of MHA proceedings commenced without the leave section 139 seems to demand.³³ The hard-nosed yet, surely, logical decision in that case is mirrored in this.

30 At [25]. See: Home Office Circular 66/1980.

31 At [25]. See: Powers of Criminal Courts (Sentencing) Act 2000, section 155.

32 At [28].

33 *Seal v Chief Constable of South Wales Police* [2007] UKHL 31. See also: David Hewitt, *Protection from what? The nullifying effect of section 139*, *Journal of Mental Health Law*, November 2007, page 224.