

Casenotes

Two Steps Forward, One Step Back

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In the matter of DE (an adult patient) and JE v (1) DE (by his litigation friend, the Official Solicitor) (2) Surrey County Council
[2006] EWHC Fam 3459 (Munby J)

Introduction

In October 2004, in the case of *HL v UK*², the European Court held that the provisions of the Mental Health Act that allowed incapacitated, compliant individuals to be detained in hospital informally were unlawful, in that there were no detention criteria, there was no formal detention process, and there was no right of access to a Court which could overturn the decision to detain. This was a terrific step forward in the quest to provide legal safeguards for vulnerable people informally detained in institutions. However the decision that HL was detained was based on the specific facts of his case, following the principle articulated in *Guzzardi v Italy*³:

“In order to determine whether someone has been ‘deprived of his liberty’ within the meaning of Article 5, the starting point must be his concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question.”

As the facts of HL's case were quite unusual, those caring for people who might fall into the category of the informally detained, and those advising them, were not left with clear guidance to establish whether or not a particular set of circumstances amounted to detention. The consequences of the judgment are particularly problematic for those institutions that are not authorised to detain patients under the Mental Health Act, as, if they find that they are detaining any of their residents, they either have to seek authorisation from the High Court, or register to take detained patients or transfer them to establishments that are so registered. All these options would be expensive or disruptive or both, but nonetheless, the law being the law, one or other of these steps would need to be taken to remain on the right side of the law.

In December 2004 the Department of Health issued draft guidance⁴ to NHS bodies and local authorities which would be purchasing or providing care for people likely to be affected by the HL decision. The guidance set out the ways in which those caring for such patients could try and ensure that anyone being

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2 (2004) 40 EHRR 761

3 (1980) 3 EHRR 333

4 Advice on the decision of the European Court of Human Rights in the case of *HL v UK* (The ‘Bournewood’ Case) [Gateway reference 4269] (Department of Health) (10/12/04)

deprived of their liberty could have their care altered so that they were merely having restrictions placed on their liberty, which would not attract any ECHR requirements for legal safeguards or formal procedures. Curiously, although the guidance pointed out that detention under the MHA would not be available for all those who continued to need to be detained, it only obliquely mentioned the lawful solution to this problem, and appeared to suggest that detaining bodies should be parsimonious in their use of the MHA and perhaps should just sit tight, wait for amending legislation and hope not to get challenged. It is difficult not to get the impression that those drafting the guidance didn't really feel that the safeguards required by the ECtHR were truly necessary to protect vulnerable people.

At the time that the HL case was going through the domestic courts, the Department of Health estimated that some 48,000 people would be affected by the outcome.⁵ One would have expected, therefore, that following the HL judgment there would have been a surge in the number of people being detained, particularly under s.3 of the MHA1983. Far from it. Official statistics⁶ show that in 2003/04 there were 7,145 detentions under ss.2 or 3 following an informal admission, but in 2004/05, the last 5 months of which followed on from the HL v UK judgment, this figure had only gone up to 8,104, an increase of 959. Furthermore, the total of direct admissions from the community under ss2 and 3 went up from 21,885 in 2003/04 to 22,563 in 2004/05, an increase of 678. So even if all of the increases in both groups were as a result of hospitals assessing, and where appropriate detaining for treatment, informally detained patients, that still only accounts for 1,637 of the DoH's estimate of 48,000; and of course, in reality, some of the increase will have had nothing to do with Bournemouth at all, but will be a result of the normal fluctuations in the detained patient population.

So where have all these people gone? One possibility is that a huge effort was made to ensure that nearly all the 48,000 had their care plans amended to ensure that they were no longer deprived of their liberty, and the few that were sectioned were those for whom there really was no alternative.

The other possibility, which seems more likely, is that the country's hospitals and care homes are still full of unlawfully detained, vulnerable and mentally incapacitated people, many of them in places with very limited official oversight. The case of *JE v DE and Surrey CC*⁷ shines a bright light on a situation that is, aside from circumstantial details, probably only unusual because of the determination of the detained man's wife to challenge what was happening.

The Facts

DE was aged 76 at the time of the 2006 judgment. A major stroke in 2003 left him blind and with significant short-term memory impairment. He is disorientated and needs assistance with all the activities of daily living, including a guide when walking. Although he suffers from dementia he is able to express his wishes and feelings with some clarity and force, though expert evidence suggested that he has a psychological dependence on others which is greater than that arising from his physical disabilities, so there is room for debate as to just how genuinely independent his expressions of wish actually are. The available evidence strongly suggests that DE lacks the capacity to decide where he should live.

JE had married DE in June 2005. She had known him for many years and had taken him out of X home

5 Quoted by Lord Goff in the House of Lords hearing – *R v Bournemouth Community and Health NHS Trust* [1998] 3 All E.R. 289

6 *In-patients formally detained in hospital under the Mental Health Act 1983 and other legislation, NHS trusts, Care*

Trusts, Primary Care Trusts and Independent Hospitals, England; 1995-96 to 2005-06 (Information Centre – part of the Government Statistical Service)

7 *JE v DE (1) and Surrey CC(2)* [2006] EWHC Admin 3459

to live at her home in August 2004. He was placed by SCC again at the X home on 4 September 2005 following an incident earlier that day at the matrimonial home. JE, who has intermittent mental health problems of her own, felt that she could not care for DE and was not getting adequate help from social services. She placed him in a chair on the pavement in front of their house and called the police.

The following is an extract from SCC's case note dated 5 September 2005⁸:

"19-30hrs. PC Black rang to inform [JE] had put her husband out on the street. Following a report from a neighbour he attended home address to find [DE] who is 75 & blind, wandering down the road. [JE] told him she is not getting help from the Social Services & has thrown him out. This having happened about half an hour ago, & [DE] not having eaten all day. PC had taken him to PS for a meal. [JE] is refusing to open the door & he does not have keys. He is dressed only in pyjama bottoms & shirt with slippers. No-one locally available to take him in. Following discussion with Homecare RRT rang [JE]. She spoke almost incessantly & very critical of Social Services & [JE]'s family. She said she could no longer afford to keep him in Fags, food & pay his bills. Said [DE] should ring his family in Devon, for which she had 4 tel. no's and tell them to Fuck off out of his life for good & to unfreeze his money. She said this should happen at the police station, where it should be recorded. Said not prepared to have him home till that happened. She was very critical of services being provided & of some services not being provided at all. Referred to [DE] needing 24 hr care but she only got 2 hrs help a day during week & 1 hour at W/E's. Said carer had not brought shopping as requested yesterday & did not turn up today at all. Consequently neither of them had eaten today. Following further discussions with RRT to confirm attendance of [carer] tomorrow spoke again to [JE] but she was adamant she would not let her husband home till her demands met that he contact his family. Subsequently in liaison with police & [DE] emergency placement arranged for him at [the X home] & escorted there by police. Message left for daughter ... but no reply."

DE was placed by SCC initially at the X home and, since 14 November 2005, at the Y home. Throughout the time that DE was away from home he wanted to return, and his wife, JE wanted him back, and both had said so to anyone who would listen and many who would not. In the end JE went to court to get her husband home. The Official Solicitor represented DE's interests. The court considered whether in all the circumstances DE had been "deprived of his liberty", as "essentially a question of fact, to be considered in the light of all the circumstances and focussing upon the "concrete situation of the individual concerned" – here DE...."⁹.

The Judgment

The judgment identifies considerable discrepancies between the contemporaneous record of what took place during DE's stay at the Y home, and what was asserted in court to have taken place, but the judge accepted that:

"... DE had within the X home, and has had and has within the Y home, a very substantial degree of freedom, just as he had and has a very substantial degree of contact with the outside world. And I can agree with Ms Morris that DE has never been subjected to the same invasive degree of control within the X home and the Y home, let alone the same complete and effective control within the two homes, to which HL ..was apparently subjected. For example, as she correctly points out, DE has never been subjected to either physical or chemical restraint within either institution." (para114)

8 Quoted in *JE v DE(1) and Surrey CC(2)*, para 82

9 *ibid*, para 83

However he went on to say:

“But the crucial question in this case, as it seems to me, is not so much whether (and, if so, to what extent) DE’s freedom or liberty was or is curtailed within the institutional setting. The fundamental issue in this case, in my judgment, is whether DE was deprived of his liberty to leave the X home and whether DE has been and is deprived of his liberty to leave the Y home. And when I refer to leaving the X home and the Y home, I do not mean leaving for the purpose of some trip or outing approved by SCC or by those managing the institution; I mean leaving in the sense of removing himself permanently in order to live where and with whom he chooses, specifically removing himself to live at home with JE.

*After all, and this is the point made by Judge Loucaides in the passage in his dissenting opinion in *HM v Switzerland* (2002) 38 EHRR 314 which I set out in paragraph [44] above, prisoners detained in an open prison may be subject to virtually no physical restraint within the prison, may be allowed to have extensive social and other contact with the outside world and may even be allowed to leave the prison from time to time, yet they are indubitably “deprived of their liberty.” And the reason why this is so is because, as Judge Loucaides put it, they “are not permitted to leave the place where they are detained and go anywhere they like and at any time they want.” And, as *Ashingdane v United Kingdom* (1985) 7 EHRR 528 demonstrates, and as was recognised both by Judge Loucaides in his dissenting opinion in *HM v Switzerland* (2002) 38 EHRR 314 (see paragraph [44] above) and by the Strasbourg court in *HL v United Kingdom* (2004) 40 EHRR 761 at para [92] (see paragraph [57] above), exactly the same point can be made in relation to persons in mental and other similar institutions”¹⁰.*

In passing, I find it interesting that the judge refers to the statement of principle in *Guzzardi v Italy*¹¹, and refers to the analogy of an open prison made by the dissenting judge in *HM v Switzerland*, but doesn’t directly rely on the decision in *Guzzardi v Italy*.

Signor Guzzardei was a suspected mafiosi required to live within an area of about 2.5 sq km on an island just off the coast of Sardinia. Leaving aside the circumstantial details, there are many points of similarity between the accumulated restrictions placed on Signor Guzzardi and those that applied to DE.

Mr. Guzzardi was housed in part of the hamlet of Cala Reale which consisted mainly of the buildings of a former medical establishment, a carabinieri station, a school and a chapel. He lived there principally in the company of other persons subjected to the same measure and of policemen. The area around which he could move far exceeded the dimensions of a cell and was not bounded by any physical barrier, but there were few opportunities for social contacts other than with his near family, his fellow “residents” and the supervisory staff. Supervision was carried out strictly and on an almost constant basis. Thus, Mr. Guzzardi was not able to leave his dwelling between 10 p.m. and 7 a.m. without giving prior notification to the authorities in due time. He had to report to the authorities twice a day and inform them of the name and number of his correspondent whenever he wished to use the telephone. He needed the consent of the authorities for trips off the island which were rare and made under the strict supervision of the carabinieri. He was liable to punishment by “arrest” if he failed to comply with any of his obligations.

The Court in *Guzzardi v Italy*¹² stated that:

“...it is admittedly not possible to speak of “deprivation of liberty” on the strength of any one of these factors taken individually, but cumulatively and in combination they certainly raise an issue of categorisation from the viewpoint of Article 5 (art. 5). In certain respects the treatment complained of

¹⁰ *ibid*, paras 115 and 116

¹² (1980) 3 EHRR 333

¹¹ (1980) 3 EHRR 333

*resembles detention in an “open prison” or committal to a disciplinary unit....The Court considers on balance that the present case is to be regarded as one involving deprivation of liberty....*¹³

The 2006 hearing of *JE v DE* dealt only with the question of whether there had been a deprivation of liberty, and a further hearing will consider the lawfulness of that deprivation of liberty. One would hope that the Government would welcome the clarity that this judgment brings to the definition of deprivation of liberty, but, as it will undoubtedly throw out current calculations about the cost of implementing the Bournewood Gap proposals, I would not be enormously surprised if it intervenes to seek to have the decision overturned.

However it is the behaviour of Surrey County Council and the care home staff in this case that should be a real wake-up call to the Government that it would be rash to ignore.

The evidence that DE wanted to return home to be with his wife was overwhelming; the judgment quotes many examples of DE having made his wishes absolutely clear. The judgment also quotes from the records relating to DE, from which it is clear that the staff at Y home understood that they had both the right and the duty to prevent DE going home, and could restrict JE's access to him to ensure that she did not simply take him home. This position was communicated to JE, who was told, and understood, that if she attempted to take her husband home the police would be called.

However in her witness statement the manager of the Y home, Ms Soper, claimed that she was well aware that neither she nor the police could prevent JE from taking DE home, and that when she had referred to calling the police if JE sought to do so she meant that:

“the police would be called to inform them that a vulnerable adult was being removed from [the Y home]. I would not ask the police (and the police would not be able) to prevent [JE] from removing [DE] from [the Y home].” (para101).

The judge commented:

“Mr Bowen submits tartly that these assertions belie the evidence, not least that filed by SCC itself. As he points out, some of the care notes kept by the Y home are actually signed by Ms Soper herself, including for example, as I have already mentioned, the very first note I referred to in paragraph [90] above: “[DE] continually requested to go home with [JE]. I have informed him he cannot leave, neither can [JE] take him home.” In fact, during his cross-examination of her, Mr Bowen got Ms Soper to accept that she had told DE that he could not leave to return home with JE, just as she confirmed her understanding that DE was not free to go home with his wife.” (para 102).

And:

“In the light of this substantial and consistent volume of material it seems to me that DE quite plainly was not ‘free to leave’ the X home and has not been and is not ‘free to leave’ the Y home, with the consequence, in my judgment, that he has been and continues to be “deprived of his liberty” – a state of affairs that has continued since 4 September 2005 and is still continuing. The fact is that DE has repeatedly expressed his wish to be living at home with JE and has made it clear that he is in the Y home, as previously the X home, “against his will.” It is suggested by SCC that he would not have been prevented from leaving had he actually tried to. That, in my judgment, simply will not wash. In the first place, the assertion simply does not accord with the historical reality as noted in contemporaneous records. Secondly, and in any event, as Ms Richards points out, this was never communicated to either

¹³ *Guzzardi v Italy*, para 95

DE or JE. On the contrary, the 'message' consistently given to them was understood by them, and reasonably and unsurprisingly understood by them, as being to precisely the opposite effect: the Police would be called in order to foil any attempt to take DE back home.

Ms Morris takes a number of points in her ultimately vain attempt to escape this conclusion. She suggests that DE's repeated statements of his wishes were, in significant measure, more the product of JE's urgings rather than of his own true wishes and feelings. Even if that were so, I do not see how it would affect the outcome, for even if DE had capacity (which is extremely doubtful) there could, in the light of what he was undoubtedly saying, be no sensible basis for any inference that he was consenting to his confinement. And in any event, Dr Jefferys expressed the view ... that DE's stated wish to be with JE "appears to be deeply held and consistent." Secondly, she submits that SCC has no objection in principle to DE living elsewhere than at the Y home, for instance either with his daughter or in some other residential establishment. That may be, but it wholly fails to meet the charge that he is being "deprived of his liberty" by being prevented from returning to live where he wants and with those he chooses to live with, in other words at home and with JE. And that, after all, as Ms Morris herself has to concede, is the very thing that SCC "will not agree" ... Thirdly, she submits that the Police would not in fact have had any power to prevent DE being removed, unless, for example there was a breach of the peace or some criminal offence being committed. This, I have to say, is little better than a piece of legal sophistry, and in large measure *ex post facto* legal sophistry at that. It is quite plain that SCC's purpose in repeatedly making it clear (both to the institutions and to JE) that the Police would and should be called was to prevent DE being removed and, as it was explained on 14 December 2005 ..., to facilitate his being returned if he was in fact removed. That, as I have already said, was how JE reasonably and unsurprisingly understood what she was being told by SCC. These threats, whether or not they were as devoid of legal content as SCC would now have us believe, were intended to achieve and, as it seems to me, did achieve, the desired objective of preventing DE's removal first from the X home and then from the Y home. A person can be as effectively "deprived of his liberty" by the misuse or misrepresentation of even non-existent authority as by locked doors and physical barriers. In my judgement, none of Ms Morris's points has any substance." (paras 124/5)

Surrey County Council knew from the outset that it would need specific authority to keep DE in residential accommodation. The minutes of an adult case protection conference on 28 September 2005 included advice from a member of the County Council's legal services:

"Common Law Doctrine of Necessity: This could be used to keep [DE] at [the X home] and would allow time to be taken to plan decisions but as time goes on a decision will need to be made of how specific authority is going to be obtained to make the placement..."

An attempt to place DE under guardianship failed when JE refused to consent to this, and the County Council made no other attempt to regularise the position, until in the end JE issued proceedings just over 10 months after DE was admitted to residential care.

So it would seem that Surrey ignored its own legal advice that it needed to obtain authority to detain DE; kept DE in residential care by misleading DE into believing that he was not entitled to go home and JE into believing that it had the right to prevent her from taking DE home, and then brazenly attempted to argue in court that it had never attempted to mislead either JE or DE.

Comment

The long awaited legislation to deal with the HL judgment will amend the Mental Capacity Act 2005 to require care homes and hospitals to seek authority to detain incapacitated people who need to be detained and will require PCT's and local authorities to authorise such detentions, following a full assessment.¹⁴ There will be no independent judicial assessment, for instance by the equivalent of the MHRT, unless a concerned person, such as JE makes an application to the Court of Protection. In effect those involved in the process will be trusted to administer it properly and will rarely be challenged, as people with the determination of JE, and with her willingness to challenge the authorities, are, understandably, thin on the ground.

JE put DE in the street because she couldn't look after him without help, and the help she received from the local authority was either absent or insufficient. Leaving aside the obvious fact that if help to the value of the cost of DE's residential care had been available, JE probably could have managed fine, it is also important to look at the way in which financial considerations are bound to distort "in principle" decisions about whether someone is being, or needs to be, detained.

It is intended that people in residential care will be means- tested, even if they are detained. This is, of course, obnoxious, as no other detained person has to pay for his or her detention in this country, and DE's case makes very clear the inextricable inter-relationship between the care part of the package and the detention part of it. Therefore there is bound to be a calculation as to whether it would be cheaper to detain someone if the equity in his/her house can then be brought into the means-testing calculation, rather than to offer them care in their own home. Once in the care home it may be financially attractive to care for them in conditions amounting to detention as a justification for higher charges (particularly as the Government has agreed to re-imburse the cost of the authorisation process). Even if the person's detention can be justified, it is possible that in independent homes he or she will be paying over the odds for the detention/care, as it is openly acknowledged that self-funders are often charged far more (often about £50-£100 but in some cases it can be as much as £200 per week)¹⁵, than those funded by the local authority. One care home provider gave information to the Wanless Report detailing the difference between the local authority base line fees and what the home charged self funders in three southern authorities. The difference ranged between £133 per week and £219 per week. Anecdotally it is reported that some care providers are willing to confirm that this premium subsidises the cost of caring for state-funded residents. In their 2005 report 'Care Homes for Older People in the UK – a Market Study', the Office of Fair Trading reported that one in five homes were charging more than local authority funded residents for a similar package of care.

Unless guidance makes it clear that it would be unacceptable, someone moving to residential care from a period of s3 inpatient treatment may be detained under the MCA in preference to being cared for under s117 (which of course only applies when someone 'ceases to be detained'), because s117 aftercare is not means-tested.

An incapacitated person without relatives could have an employee of the local authority appointed as his or her deputy, and the same local authority may be the provider of the care home in which the person is detained and the body authorising detention. How many incapacitated people like DE will be detained

14 See Clause 38 Mental Health Bill, 2006. See also 'Amending the Mental Capacity Act 2005 to provide for deprivation of liberty' by Robert Robinson in this issue of the JMHL

15 'Securing Good Social Care for Older People' Sir Derek Wanless (30 March 2006) (The King's Fund)

against their will and have their homes sold from under them when the MCA kicks in? It seems likely that it is happening in an unofficial way already (why should public bodies that are willing to ignore the law on detention be too fussy about funding?) and the the MCA, once the Bournewood provisions come in, will make it even easier to subsume the interests of the vulnerable individual to the interests of the public body.

Of course many, probably most, providers of care, PCTs and local authorities will do their best to comply with the law as they understand it, but this case illustrates the risks of trusting public bodies to act scrupulously - the law reports are littered with many other examples. Furthermore, even those that follow the law to the letter will be dependent on the statutory assessments which will be made by health and social work professionals, as to whether the individual is detained and whether the detention is necessary. Mr Justice Munby's judgment in this case is enormously helpful, but nonetheless there remain many areas of opacity and it will be up to individual professionals to interpret the guidance as best they can. The fact that they are not legally qualified isn't particularly a problem (after all it is not as if the lawyers, as a profession, have displayed any great evidence of understanding the principles), but it is a problem that there will be so many assessors, and that generally their decisions will not be subject to the routine judicial scrutiny that leads, over time, to consistency in decision-making.

The case of Mr and Mrs E displays the problems in the proposed legislation in all their grisly inadequacy. Luckily, the provisions are not due to be implemented until April 2008 (at the earliest), so it is not too late for the government to bring in proper safeguards.

Automatic tribunals are probably not necessary, but the alternative must be a robust advocacy system, not only for the unbefriended, but for all incapacitated people in residential or hospital care, so that it is not left to relatives to have to identify between: those who are informally detained who shouldn't be detained; those who are informally detained who should be detained under the MCA or MHA; those who are detained under the MCA and should be under the MHA; those who are detained under the MCA and shouldn't be detained at all; those who are detained in residential care who should be receiving services at home; and those who are correctly detained under the MCA. Without such independent, professional, scrutiny, the new law will inevitably lead to scandals of wrongful detention and financial abuse being added to the scandals of abuse in care abuse such as those identified in Cornwall¹⁶ and Sutton and Merton.¹⁷ Contrariwise, a robust system of personal advocacy will not only reduce the risk of people being wrongly detained and overcharged, but will also reduce abuse in residential care across the board, which is surely what all of this, including the ECHR, is ultimately intended to ensure.

16 *Joint investigation into the provision of services for people with learning disabilities at Cornwall Partnership NHS Trust*, Commission for Social Care Inspection and Healthcare Commission (July 2006)

17 *Investigation into the service for people with learning disabilities provided by Sutton and Merton PCT* Healthcare Commission (January 2007)