Do statutory tests for detention under the MeHA 1983 require a proportionality assessment pursuant to ECHR? [Djaba v West London Mental Health Trust & Anor]

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Fiona Paterson, barrister at Serjeants' Inn, examines the Court of Appeal ruling that mental health tribunals do not have jurisdiction to consider matters other than a patient's discharge and cannot examine the conditions and circumstances of a patient's detention.

Original news

Djaba v West London Mental Health Trust & Anor [2017] EWCA Civ 436

The Court of Appeal dismissed the appellant's appeal concerning his accommodation in a super seclusion suite. It ruled that the First-tier Tribunal (Health, Education and Social Care Chamber) did not have jurisdiction to conduct an assessment beyond a patient's detention and discharge and cannot examine whether the patient's rights have been breached by the circumstances of their detention.

What issues did this case raise?

This case considered whether a First-tier Tribunal should limit its deliberations to whether a patient meets the statutory criteria for detention, or whether it can also consider if the patient's rights under the European Convention of Human Rights (ECHR) have been breached by the detention or circumstances of the detention.

Put more precisely, the question was whether the statutory tests within sections 72, 73 and 145 of the Mental Health Act 1983 (MeHA 1983) require a 'proportionality assessment' to be conducted, pursuant to Articles 5 and 8 of EHCR and the Human Rights Act 1998, taking into account the conditions of the appellant's detention. Dismissing Mr Djaba's appeal, the Court of Appeal held that they do not.

Mr Djaba suffered from paranoid schizophrenia. Before his current detention which began in 2007, he had no criminal convictions. After he was detained, his mental health deteriorated until he was eventually moved to Broadmoor in 2009. He was placed in a 'super-seclusion suite' within Broadmoor, consisting of a single room with bathroom facilities, where he remained ever since. Generally, only nursing staff in protective clothing were allowed to enter his suite to administer medication and visitors spoke to him through a glass screen.

In November 2015, Mr Djaba appeared before the First-tier Tribunal for a review of his detention under MeHA 1983, s 73, having been referred by the Secretary of State. He had not sought a review of his detention himself in the preceding three years.

It was argued on Mr Djaba's behalf that his detention and its conditions infringed his rights under Articles 5 and 8 of the ECHR. Furthermore, it was argued that as there had been no improvement in his mental health, he should be transferred to a medium secure unit, or the First-tier Tribunal should make an extra-statutory recommendation regarding his further treatment. The judge found that the statutory criteria under MeHA 1983, s 73, for Mr Djaba's detention were met and made no further orders or recommendations. However, she did not address Mr Djaba's ECHR rights and whether there had been any breaches of those rights in her decision.

On appeal, Upper-tier Tribunal Judge Jacobs held that the First-tier Tribunal had fallen into error by failing to address Mr Djaba's ECHR rights, a cogent submission having been made by his counsel. However, he refused to remit the case for a further hearing before the First-tier Tribunal, on the basis that an analysis of whether any infringement of Mr Djaba's Article 5 and 8 ECHR rights was proportionate could be achieved through the proper application of MeHA 1983, s 73, to the factual evidence.

What is the relationship between this case and the decisions in Re MM and PJ?

Shortly before the appeal hearing, the Court of Appeal handed down judgment in *Secretary of State for Justice v MM and Welsh Ministers v PJ* [2017] EWCA Civ 194 ('*PJ*'). The issue in *PJ*—which was more relevant to Mr Djaba's appeal—was whether a mental health tribunal could authorise a deprivation of liberty under the Community Treatment Order (CTO) framework under MeHA 193, ss 17A–E, or put more simply, could the tribunal authorise a detention in circumstances, which fell outside the powers conferred on it pursuant to MeHA 1983?

Charles J, who had sat in the Upper–tier Tribunal, had held that it could. In reaching that conclusion he had relied upon Baroness Hale's reasoning in *R (H) v Secretary of State for Health* [2005] UKHL 206; [2006] 1 AC 441 (R(H)). That case had concerned a challenge to the compatibility of the MeHA 1983 with Article 5(4) ECHR. Charles J's judgment contained extensive passages from Baroness Hale's judgment and, in particular, one in which she had acknowledged the relative ease with which a patient could challenge their detention before a tribunal as compared with bringing a judicial challenge, '…mental health review tribunals are much better suited to determining the merits of a patient's detention and doing so in a way which is convenient to the patient, readily accessible, and comparatively speedy…'

Over-turning Charles J's decision, the Court of Appeal held that a tribunal could not authorise a detention in circumstances which fell outside its statutory powers. First, the power invested in the tribunal by the MeHA 1983 was 'to discharge the patient from detention not to "discharge the CTO." There [was] no power to revise the conditions or examine the legality of the CTO including the proportionality of the interference with the patient's article 5 or other ECHR rights.'

Second: 'The remedy for any illegality, including any ECHR illegality, was to challenge the CTO by judicial review…a tribunal which exercises a jurisdiction which is itself ECHR compatible, ie possessing effective and practical safeguards for the patient is not as a public authority acting unlawfully in not assuming what would have to be an inherent jurisdiction to scrutinise the Convention compatibility of the CTO.'

Third: '[The] power to discharge a patient in the circumstances provided for in MeHA 1983, s 72, does not extend to a power exercisable by a tribunal to scrutinise the lawfulness of the conditions imposed by the responsible clinician. That challenge must go to the High Court in judicial review where the court can take steps to remedy an unlawful condition without risking discharge of a patient in respect of whom the criteria for discharge are not made out.'

To what extent is the judgment helpful in clarifying the law in this area?

Dismissing Mr Djaba's appeal, the court held that while *PJ* had been concerned with MeHA 1983, ss 17A–E, (as opposed to ss 72, 73 and 145), the reasoning behind the judgment was 'to be properly carried over directly into that part of the legislation applicable in the [present appeal].'

While it acknowledged that a specialist tribunal was arguably better placed to consider the conditions of a patient's detention than the courts, it was clear that Parliament had decided in enacting the MeHA 1983 to limit the tribunal's jurisdiction to the issue of discharge alone. By affording patients access to a tribunal for a review of their detention, Article 5(4) of ECHR had been complied with.

In his judgment, McCombe LJ acknowledged '[it was] perhaps unfortunate that [in PJ] the court did not address the passages from the speech of Baroness Hale in H [and] had some difficulty in understanding why it had not done so.' However, having decided that the tribunal did not have jurisdiction to consider matters other than a patient's discharge, McCombe LJ considered that the court had not been obliged to address R (H).

For the time being it appears that the MeHA 1983 can only deal with detention and discharge. It cannot examine the conditions and circumstances of a patient's detention. However, an application for leave to appeal to the Supreme Court on behalf of Mr Djaba will be made shortly.

Interviewed by Alex Heshmaty.

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