MILLS & REEVE

briefing

October 2013

An NHS Trust v Dr A

The Honourable Mr Justice Baker gave judgment in this case following a long process. The application was issued in January but the judgment was only published at the end of August 2013.

The judgment sets out the relationship between the Mental Health Act (MHA), Mental Capacity Act (MCA) and the court's inherent jurisdiction to make orders in respect of individuals who may lack capacity, where they do not fall within the scope of the other two acts. It also urges caution with regard to the use of section 63 MHA to authorise treatment for physical disorder for patients detained due to mental disorder.

Summary

This case examines whether force feeding under the MHA can be permitted under section 63 and concluded that it could not in the circumstances of Dr A's detention. Partly, this was because the treating Trust did not "see food as a treatment for his mental illness"

Guidance was given that where there is any doubt as to whether or not the need to provide artificial nutrition and hydration is as treatment for the mental disorder suffered by the patient an application to Court for a declaration should be made. The Court should be reluctant to extend the scope of section 63.

The previous judgments that confirm that force feeding for *anorexia nervosa* and self harm arising from personality disorder remain good law. *Dr A* was distinguished from *B v Croydon* and *Brady* but care needs to be exercised about the situations in which force feeding requiring restraint, in particular, can be lawfully given.

Background

Dr A was an Iranian doctor. He had worked as a GP in Iran before coming to the UK on a study visa. He had previously been treated with antidepressants and antipsychotics in Iran but had stopped his medication before travelling to the UK.

He applied for asylum on a number of occasions but all his applications were refused. His passport was confiscated by the UK Border Agency in 2012. He had initially been taken to the detaining hospital under a "place of safety order" under section 136 MHA because of an incident at the Border Agency's offices and he then went on hunger strike in an attempt to get his passport back.

In June 2012 he was admitted to hospital suffering from dehydration, pneumonia and suicidal ideas and claiming to have taken an overdose. He was discharged about a week later but continued with his hunger strike. He was admitted as a result of concerns about his physical condition in July 2012 and had remained an inpatient in hospital since then.

At an early stage, those treating him considered that he might be suffering from a delusional disorder or a paranoid personality disorder, although the diagnosis was complicated by cultural differences. Capacity assessments were carried out frequently and the prevailing view (although not held unanimously by all those assessing him) was that

he probably did lack capacity. Some assessing him thought, however, that he did have capacity and was making a political point through his refusal of food and fluids.

Assessments carried out at the start of August 2012 concluded that he lacked capacity to make decisions about eating and drinking so an NG tube was inserted to “facilitate feeding”.

Following the insertion of the NG tube it was noted that Dr A did not want people to wear or show him red, due to its political connotations. He felt that individuals wearing red were trying to make him join the Red Party in Iran.

His health then deteriorated further and he was diagnosed with pneumonia and a urinary infection. He refused to accept the diagnosis, believing that he had been operated on without his consent on his admission to hospital.

On 8 August 2012 the UK Border Agency refused his latest request for asylum. Following this Dr A pulled out his NG tube, saying that he wanted to die.

He was reassessed and nearly two weeks later was detained under section 2 MHA for assessment. He appealed to a Tribunal, which upheld his detention and accepted a diagnosis of delusional disorder. This was possibly in part due to evidence given by Dr A that he believed that the Iranian Government had been monitoring him through his computer and adversely affecting his medical treatment.

He was subsequently transferred onto section 3 of the MHA when his section 2 detention was due to expire. He remained detained for about 6 weeks, after which it was felt that his mental state had improved sufficiently for him to taken off section 3. He indicated that he did not want to continue on medication as he did not think that he had any mental health problems. He did not try to take out his NG tube.

Until the start of December 2012 Dr A was not eating solid food but was taking some fluids and cooperating with the tube feeding. However, he then removed the tube and refused to let it be reinserted. He provided the hospital with a document stating that his refusal to eat and drink was a protest against his application for asylum being turned down and asking not to be saved as he has decided to “refuse any treatment and receiving fluid or food”.

There was some doubt as to the level of Dr A’s capacity (or incapacity) and so an application to court was made and an interim declaration obtained that Dr A lacked capacity and that, pending a further hearing, it was lawful for him to be provided with artificial hydration and nutrition using reasonable force, restraint and sedation, if necessary. On some occasions, Dr A pulled out the NG tube and required sedation, but not all.

During the court process, and between interim and final hearings, Dr A was detained again under section 3 MHA and medication was given to him via the NG tube.

Issues to be determined

1. Capacity

The first issue for the court was whether Dr A had capacity to make decisions about his nutrition and hydration. The judge had to determine whether his refusal to eat was a result of his mental disorder or whether it was a capacitous decision made by him to emphasise a political point.

Mr Justice Baker confirmed the principles that:

- if Dr A has capacity to make decision as to whether to take food and drink, he is entitled to starve himself to death if he chooses;

- even though the consequences of the decision would be fatal, the court should be particularly careful not to treat him as lacking capacity merely because the decision is thought to be extremely unwise;
- the court should resist being drawn towards an outcome that is protective of the adult involved at the expense of a detached and objective capacity assessment.

In Dr A's case, there was general agreement that he was suffering from a mental disorder so as to cause an impairment in the functioning of the brain and this was accepted by the Judge.

2. What then is in his best interests in terms of nutrition and hydration?
Essentially, what the judge had to consider here was whether it was in Dr A's best interests to be force fed by NG tube (or some other means). To reach this decision, Mr Justice Baker adopted the "balance sheet approach" first used in the case of *Re A (Male Sterilisation) (2000)*, setting factors of actual benefit from the treatment against any counterbalancing factors and then noting the potential gains and losses to assist him in making his decision. It is only if "the account is in significant credit" that the judge will conclude that the application is in the patient's best interests.

In this case, the Judge determined that the balance came down in favour of an order permitting the forcible feeding of Dr A by artificial nutrition and hydration. The question then for the court was whether it had the power to make such an order.

A new eligibility gap?

The court was concerned with the power to authorise force feeding for Dr A.

The particular type of treatment proposed (NG tube feeding) required a deprivation of liberty (DOL) within the meaning of the European Convention On Human Rights. For this to be lawful there must be:

- Confinement or control in a limited space for a not negligible time.
- A subjective element: that the person has not consented to the DOL.
- State responsibility for the DOL.

In this case, there was no question that Dr A would be deprived of his liberty during the NG feeding process. He would need to be sedated and restrained, and this may need to continue to prevent him from removing the NG tube.

In this case, the DOL safeguards were not used. No authorisation was given by the detaining hospital (presumably because it was felt that Dr A would not be eligible as he was suffering from a mental disorder within the meaning of the MHA). The judge therefore had to decide whether there was power to authorise the treatment under:

- Section 63 of the MHA
- The MCA in any event
- Under the Inherent Jurisdiction

MHA

He considered the leading cases on force feeding (*B v Croydon (1995)* and *Brady (2000)*), neither of which were felt to be on point to support the position of the Official Solicitor that feeding and associated measures could be taken under the provisions of the MHA. Importantly in this case, the Trust did **not** consider s63 to be appropriate. In Dr A's case, the treating psychiatrist did not think that force feeding was treatment within the meaning of the MHA, saying that whilst it would undoubtedly keep him alive, it was not treatment for his mental disorder (as might have been the case were he suffering from anorexia, for example).

In this case, the judge preferred the view of the treating clinician that the force feeding was treatment for a physical disorder that arose from Dr A's decision not to eat and drink, notwithstanding that the decision to refuse food was affected by his mental disorder. The physical condition was therefore in part a consequence of Dr A's mental disorder, but not obviously either a manifestation or a symptom of it. He therefore concluded that it could not be authorised under the MHA.

MCA

It was argued by the Official Solicitor on behalf of Dr A that, even though Dr A was subject to detention under the MHA, he could still fall within the provisions of the DOL safeguards under the MCA, as the court is under a duty to interpret legislation in such a way as to give effect to the European Convention and that therefore, the section that prohibits the Court from making any deprivation of liberty order which may include welfare issues where the patient is detained under the MHA should be reinterpreted to allow an order to be made where the patient's life may be in danger.

The judge was not prepared to do this and found that the MCA could **not** apply to Dr A's situation.

Inherent Jurisdiction

The Judge held that it was possible for him to use the Inherent Jurisdiction of the court to make an order in this case.

He found this on the basis that the court has retained a common law power of jurisdiction over incapacitated adults described by Lord Donaldson in 1992 as "the great safety net which lies behind all statute law and is capable of filling gaps left by that law, if and insofar as those gaps have to be filled in the interest of society as a whole." Recently Munby J described it as being "indistinguishable from its well-established parens patriae or wardship jurisdictions in relation to children. The court exercises a "protective jurisdiction" in relation to vulnerable adults just as it does in relation to wards of court."

In all the circumstances of the case, Mr Justice Baker therefore exercised that power and made an order for the force feeding of Dr A.

He confirmed that, unless and until a court clarifies the interpretation of section 16A of the MCA (the section that prevents a welfare order from being attached to a deprivation of liberty authorisation where the patient is detained under the MHA), it will be necessary for a hospital that wishes to provide treatment to such a patient to apply to court for a declaration under the inherent jurisdiction where that treatment may not fall within section 63 and a deprivation of liberty is involved.

What should I do differently with my patients?

Review your patients who currently have treatment being given under section 63 of the MHA. Ask:

- Whether the treatment is treatment for mental disorder.
- Do you clearly fall within the scope of section 63 and section 145 of the MHA (the definition of medical treatment)?
- Is there a clear connection between the mental disorder and the treatment you are giving?
- Is restraint required?
- Is there a deprivation of liberty?
- Are you confident that you are covered by section 63? If there is doubt as to whether you are covered, you may need to consider seeking advice and making an application to court under the Inherent Jurisdiction.

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Keeping your team up to date

There is quite a lot happening in the world of MHA/MCA (see our recent briefing on the SLAM judgment). We are also expecting a Supreme Court Judgment on DOLS *(Chester v Cheshire West*) before the end of the year. We will be covering all these issues in our 2014 Mental Health Update seminars but if you would like training delivered before then, please do let us know.

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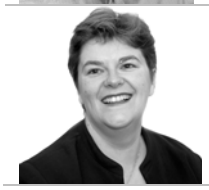

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