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High Court confirms it's unlawful for assessments for detention under s.2, s.3, s.4 and s.7 Mental Health Act 1983 to be conducted remotely

On 22 January 2021, the High Court confirmed that under the Mental Health Act 1983, the phrases “personally seen” in s. 11(5) and “personally examined” in s. 12(1) require the physical attendance by the AMHP and s.12 Doctor on the patient when an assessment is being carried out for detention under the Act.

26 January 2021

Devon Partnership NHS Trust v Secretary of State for Health and Social Care and NHS Commissioning Board [2021] EWHC 101 (Admin)

Summary

On 22 January 2021, the High Court confirmed that under the Mental Health Act 1983, the phrases “personally seen” in s. 11(5) and “personally examined” in s. 12(1) require the physical attendance by the AMHP and s.12 Doctor on the patient when an assessment is being carried out for detention under the Act. Attendance conducted under these provisions by any form of remote technology is not permitted by the MHA 1983. The court understood the considerable challenge this presented in the current context of the Covid-19 pandemic but considered this was a matter for parliament to urgently address:

> *“63We are acutely aware of the difficulties to which the statutory provisions – as we have construed them – give rise for the Trust and for others exercising functions under the MHA. Nothing we have said should be taken as minimising those difficulties. Whether and how to address them will be for Parliament to decide.”*

The judgment can be accessed here.

Background

Prior to detention (under s2 and s3), admission for assessment in emergency cases (s4) or an application for guardianship (s7), an application must be made by either the nearest relative or an approved mental health professional (AMHP).

In relation to s2 and s3 detention, and guardianship (s7), the application cannot be made “unless the [AMHP (or nearest relative if they are making the application)] has personally seen the patient within the period of 14 days ending with the date of the application” (s11(5) MHA 1983). Where an application for admission to hospital is made by an AMHP, they must “...interview the patient in a suitable manner” (s13(2) MHA 1983). Such applications must be “founded on the written recommendations in the prescribed form of two registered medical practitioners”. In the case of emergency admission under s. 4, the application can be founded on one such recommendation. S12 (1) MHA 1983 requires that the medical recommendations “shall be given by practitioners who have personally examined the patient”.

Prior to the Covid-19 pandemic, it was understood that s11(5) and s12(1) both required a visit to the patient in person to either interview (if an AMHP) or medically examine them (if a medical practitioner). The Code of Practice issued by the Secretary of State provides that a medical examination for these purposes must involve “direct personal examination of the patient and their mental state” (paragraph 14.71). Those exercising functions under the MHA 1983 are obliged as a matter of public law to follow the Code of Practice absent a cogent reason to depart from it: R (Munjaz) v Mersey Care NHS Trust [2005] UKHL 58, [2006] 2 AC 148.

Shortly after the start of the first “lockdown”, on 30 March 2020, NHS England issued a document entitled Legal Guidance for mental health, disability and autism, and specialised commissioning services supporting people of all ages during the coronavirus pandemic. This was issued in May 2020. The guidance stated:

“It is the opinion of NHS England and NHS improvement and the DHSC that developments in digital technology are now such that staff may be satisfied, on the basis of video assessments, that they have personally seen or examined a person in a “suitable manner”. Bearing in mind the need to prevent infection and to ensure the safety of the person and staff, in some circumstances the pandemic may necessitate the use of such digital technology for MHA assessments. Providers should follow the guidance below to inform this decision. While NHS England and NHS improvement and DHSC are satisfied that the provisions of the MHA do allow for video assessments to occur, providers should be aware that only courts can provide a definitive interpretation of the law.

….“Even during the Covid-19 pandemic it is always preferable to carry out a Mental Health Act assessment in person. Under specific circumstances where this cannot happen……it is possible for video assessments to occur. Decisions should be made on a case-by-case basis and processes must ensure that a high-quality assessment occurs.”

Whilst this guidance approved the use of remote assessments in some circumstances and expressed a view as to their lawfulness, it expressly stepped back from providing certainty on the issue to professionals and the public. Medical practitioners, and their employers were concerned about this lack of clarity which left them in a difficult position and the court agreed that there were compelling reasons for the matter to be put before the Court to provide certainty to all.

The Claim was dealt with as a Part 8 claim in the administrative Court. The final hearing was dealt with in the Divisional Court by 2 judges due to the national importance of the case.

The court was provided with detailed evidence about the impact of the pandemic on mental health services, about the new ways of remote working being adopted across a range of clinical disciplines (and for example by the Tribunal) and about the high quality of such remote assessments.

An amicus to the court was appointed to set out the relevant issues from the patient perspective.

It should be noted that these proceedings were issued on an urgent basis in July 2020, but unfortunately the court was unable to list the matter until January 2021. Part 8 is an alternative procedure to the usual method of bringing a legal claim (Part 7) and is aimed at disputes where a claimant is seeking the court's decision on a question which is unlikely to involve a substantial dispute of fact.

The claim

The claimant sought declarations from the Court that, for the duration of the Covid-19 pandemic, MHA remote assessments conducted in relation to s11(5) and s12 MHA 1983 fulfil the requirements to 'personally see' and 'personally examine’ (respectively) the patient, where it is the professional judgment of the AMHP or doctor concerned in applying the guidance that a remote assessment is appropriate in that particular instance. Examples of the type of remote assessment envisage included Skype, Microsoft Teams, Zoom, WhatsApp and FaceTime. The Claim was supported by the Secretary of State for Health and Social Care.

Judgment

The Court dismissed the Claim and did not make the declarations sought. The Court also refused SS DHSC permission to appeal.

Reasoning

The following reasons were provided by the Court for refusing the application:

1. Where the power to deprive people of their liberty is exercised by those other than judges, including those at subsections 11(5) and 12(1) MHA 1983, these powers are to be construed “particularly strictly”

2. Interpretation of the phrases “personally seen” and “personally examined” should reflect how they would have been understood at the time the relevant statutes (MHA 1959 and MHA 1983) came into force, and not how they might be understood in modern parlance by splitting the phrases;

3. Similarly, the words “personally seen” and “personally examined” are to be understood within the context of a ‘medical examination’

and what was understood by this in 1959 and 1983. In so doing, the Court recognised that a psychiatric assessment can necessarily be a multi-sensory assessment and involve a physical examination to rule out differential diagnoses. The Court also rejected the argument that a doctor could decide from a face-to-face assessment whether to physically attend a patient, as they may conclude it was not necessary in the absence of non-visual cues.

4. The MHA intended to address the explicitly recognised problem that doctors had certified patients as liable to detention without physically attending on them. The intention of Parliament's remedy – to include the wording now being discussed – was to indicate the physical presence of the doctor was required;

5. Consideration of the pattern of amendments to the MHA 1983 made by the Coronavirus Act 2020 and the lack of explicit amendments to s11(5) and 12(1) could imply either an authorisation of remote examinations or, conversely that Parliament did not intend to loosen the requirement for physical attendance on a patient. It is for Parliament, even in times of a national emergency, to balance the need to ensure detentions are based on objective evidence and to maintain the system of detention set out in the MHA 1983. In so doing, it would confirm whether assessments could be conducted remotely.

6. If the application was granted, remote assessments would be permitted immediately and remain so for some time after the conclusion of the pandemic. However, the Court preferred this particular issue to be addressed by Parliament, which could control the time during which remote assessments would be permitted.

Implications

We are living in a time of unprecedented pressure on our mental health services, rapidly rising mental health issues within our population, a somewhat depleted workforce and the added risks of the ongoing pandemic. In this context, whilst the clarity as to the correct interpretation of the statute is welcome, the practical implications of this pending new legislation being approved by Parliament is not.

We await with interest further national guidance on this issue. Given the ongoing nature of the pandemic many would take the view that this issue also requires urgent parliamentary attention.

Contact

Rebecca Fitzpatrick

Partner

rebecca.fitzpatrick@brownejacobson.com

+44 (0)330 045 2131

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