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The Nearest Relative and the Courts

Dr Benjamin Andoh

Introduction

The nearest relative is one of the important persons in the life of a mental health patient because, apart from any relationship to the patient, he or she plays certain roles before a person, suffering from mental disorder (defined by the Mental Health Act 2007 as “any disorder or disability of the mind”) is admitted to a mental hospital (especially, involuntarily) during the period of the patient’s hospitalisation and in some cases after the patient has left hospital. Specifically, the role involves: (a) making an application for compulsory admission (for assessment or treatment) of a patient or consenting to an application for treatment of that patient if he/she is not the applicant; (b) making an order for a patient’s discharge, subject to some limitations such as medical approval; (c) making application in respect of a patient to the Mental Health Review Tribunal, and so forth. This short paper looks at the approach of the courts in

England and Wales to matters relating to the nearest relative. To date, this has not been addressed comprehensively, and thus this paper aims to contribute to the literature.¹ Before analysing the cases, however, two preliminary issues are looked at; namely, the origin of the concept of the nearest relative, and who the nearest relative is.

Origin of the term, “nearest relative”

The term, “nearest relative” is a statutory one. Before 1959 the term was not used in relation to the admission of patients to hospital. Rather, the expression, “husband or wife or a relative” was used. For example, according to Section 5 of the Mental Treatment Act 1930, for a patient to be admitted to hospital for temporary treatment without certification, a written application must be made by “the husband or wife, or by a relative

¹ See, e.g., S. Jones, “Identification of Nearest Relative”, *Legal Action*, January 1998, 24; F. Cooke, J. Watkins and C. Adams, “Rescinding Responsibilities as Nearest relative and Displacing the Nearest relative”, *Psychiatric Bulletin*, (1994), 18(11), pp 665-7; A. Shah, “Displacement of the Nearest relative under the Mental Health Act 1983”, *Med Sci Law*, 1996, 36(4), 325-7; S. Simblett, “Displacing the Nearest Relative. *SJ*”, 1999, 142(7), 156-8; S. Eaton, “Displacement of the Nearest relative”, *Med Sci Law*, 1997, 37(2), pp 182-3; K. Gledhill and A. Stokoe, “Displacement of Nearest relative”, *Legal Action*, 1 September 1997, 24; J. Rapaport, “Rise and Demise of the Nearest Relative”, *Professional Social Work*, June 1999, 14-15; J. Rapaport, “The Ghost of the Nearest Relative under the Mental Health Act 1983”, *Journal of Mental Health Law*, July 2003, pp. 51-65; J. Rapaport (2004), “A Matter of Principle: the Nearest Relative under the Mental Health Act 1983 and Proposals for Legislative Reform”, *JSWFL*, vol.26, no.4, Dec. 2004, pp. 377-396; and J. Rapaport and J. Man Thorpe (2008), “Family Matters: developments concerning the Role of the Nearest Relative and Social worker under Mental Health Law in England and Wales”, *BJSW*, 2008, 38(6), 1115-1131.

of the person to whom it relates, or, on the request of the husband or wife or of a relative ...”²

The concept was first introduced by the Mental Health Act 1959. That statute went on to grant that person certain powers relating, *inter alia*, to the admission and discharge of a patient. Later, the Mental Health Act 1983, which consolidated previous legislation, retained the provisions relating to the nearest relative, including his/her powers³ and circumstances under which he/she may be displaced.

Who is the nearest relative?

Section 26(1) of the Mental Health Act 1983, as amended by the Mental Health Act 2007, defines “nearest relative” as the person first described in the following list and who is surviving for the time being: (a) husband or wife or partner (within the meaning of the Civil Partnership Act 2004), (b) son or daughter, (c) father or mother, (d) brother or sister,

² See also Section 11(1) of the Lunacy Act 1890 regarding petitions for urgency orders.

³ E.g., the power to apply for compulsory admission (for assessment or treatment) or consent to an application for treatment if he/she is not the applicant, the power to make an order for a patient’s discharge, subject to some limitations (s.25), and the right to apply to a Mental Health Review Tribunal (s.66). Other rights/functions of the nearest relative under the Mental Health Act 1983 include:(a) the right to require examination of the patient (s.24), (b) the right, after the admission of a patient to hospital and in the absence of objection by the patient, to information relating to the patient’s detention, making an application to a Mental Health Review Tribunal, discharge from hospital, compulsory treatment, and the Mental Health Act Commission: s.132(4)); (c) the right to be informed of the review by the hospital managers or the Mental Health Review Tribunal (e.g., s.25(2)); (d) the right to apply for the patient’s discharge (s23(2)), and (e) the right to be given early notice of the patient’s discharge unless the patient objects (s.133).

(e) grandparent, (f) grandchild, (g) uncle or aunt, and (h) nephew or niece.

The nearest relative must not live outside the United Kingdom.

Where a patient ordinarily resides with or is cared for by a relative or relatives (or, if he/she is in hospital as an in-patient, he/she last resided ordinarily with, or was cared for by, his/her relative/s), that relative or those relatives will be given preference in determining his/her nearest relative. If there are two or more such relatives, preference will be given to the person who is higher on the list in Section 26(1), or the elder/eldest where there are two or more of them; and whole-blood relatives will be preferred to half-blood relatives of the same description (Section 26(3) and (4)(b)).⁴ Moreover, it is noteworthy that the Act of 2007 allows cohabittees (“common-law spouses” of patients) to become nearest relatives in certain circumstances. Section 26(6) makes it possible for a person who has been cohabiting with the patient for six months (or, if he is an in-patient, for six months until his admission) to be treated as his nearest relative.

In addition, where a patient has ordinarily resided (not cohabited) with any person not on the list in Section 26(1) (e.g., a cousin or a friend)

⁴ Where that person/relative (a) is not resident in the United Kingdom, Channel Islands or the Isle of Man, or (b) is the spouse or civil partner of, but permanently separated from, the patient or has deserted or been deserted by the patient for the time being, or (c) not being the patient’s spouse, civil partner, father or mother, is under 18 years of age, the nearest relative shall be determined as if that person were dead (s.26(5)). The determination will then be done by working down the list in s.26(1).)

for at least five years, then that person shall be treated as the nearest relative (Section 26(7)).

If, however, no person qualifies under the rules, then the County Court can appoint someone to act as such. The appointment of that person is dealt with by Section 29.

Approach of the courts

The decided cases reveal an interesting picture and may be separated into six strands: (1) cases on definition of the nearest relative, (2) cases on whether the nearest relative was consulted at the right time, (3) cases on the nearest relative's power relating to discharge of a patient, (4) cases on displacement of the nearest relative, (5) cases where, despite a nearest relative's clear objection, an approved social worker still applied for admission for treatment without first using Section 29, and (6) cases where there was a breach of Article 8, European Convention on Human Rights. These are discussed separately below.

(1) Definition of the nearest relative

The definition of nearest relative was, *inter alia*, in question in *Re v D (Mental Patient: Habeas Corpus)*.⁵ There the patient's younger daughter provided care for, and visited, the patient. The eldest child of the patient, on the contrary, provided no such care. Under those circumstances, the court held that, for the purposes of Section 3, the patient's younger daughter was the nearest relative because, as a carer, she took priority over the other relative, in accordance with Section 26(4). Care, however, did not, in the court's view, mean 24-hour care because any significant level of care would suffice. Otton LJ stated that the amount of care provided had to be "more than minimal", even if it fell short of the type of long-term care (i.e., "substantial amount of care on a regular basis") envisaged in Section 1(b) of the Carers (Recognition and Services) Act 1995.

R v Liverpool County Council (ex p. F),⁶ also concerned the interpretation of Section 26. The question in this case was whether the patient's nearest relative was his mother or grandmother. The patient was,

⁵ [2000] 2 FLR 848; [2000] Fam Law 804; [2001] 1 FCR 218.

⁶ (1997) *Legal Action*, 1-1-98, p.24.

at the relevant time, not ordinarily resident⁷ with his grandmother (or mother). Also, the court was satisfied his grandmother was not caring for him. Therefore, as parents have precedence over grandparents,⁸ the court concluded that the patient's mother (rather than grandmother) was his nearest relative.

(2) Was the nearest relative consulted or not consulted at the right time?

According to Section 1(4), Mental Health Act 1983, an Approved Social Worker (now, according to the Mental Health Act 2007, an “approved mental health professional“) must consult the nearest relative of the patient before making an application for admission for treatment under Section 3 of the Act. But, the proviso to the subsection (Section 11(4)) makes it possible for a Section 3 application to be made without consultation with the nearest relative: where “it appears to that social worker that in the circumstances such consultation is not reasonably practicable or would involve unreasonable delay”. Failure to comply with

⁷ In *Shah v Barnet London Borough Council* [1983] 1 All ER 226, at 235, Lord Scarman defined ordinary residence as “... a man's abode in a particular place ... which he has adopted voluntarily ... as part of the regular order of his life for the time being, whether short or long duration”.

⁸ See s.26(1), Mental Health Act 1983.

the provisions of Section 11(4) makes the subsequent admission for treatment under Section 3 illegal.⁹ Thus, *habeas corpus* applications were granted by the court in the following two cases because the proper procedure was not followed: *BB v Cygnet Health Care and another*¹⁰ and *GD v The Hospital Managers of the Edgware Community Hospital, London Borough of Barnet*¹¹ In both cases the approved social workers in question did not properly consult the patients' nearest relatives in accordance with Section 11(4) of the Mental Health Act 1983 before making the applications for admission under Section 3. In the first case (*BB v Cygnet Health Care*) the approved social worker consulted the nearest relative through an intermediary, the nearest relative's daughter; however, that consultation was not full and effective¹² so as to ensure that the nearest relative had the chance to play his part in the process fully - it, therefore, did not amount to real consultation. In the latter case, Burnett J said that the consultation must be real rather than a token exercise; so, where, as happened in that case, the approved social worker and others had set in motion a course of events designed to leave consultation with the

⁹ *Re S-C (Mental Patient - Habeas Corpus)* [1996] 1 QB 599.

¹⁰ [2008] EWHC 1259 (March 2008).

¹¹ [2008] EWHC 3572 (Admin); [2008] WL 6113092.

¹² As such a consultation ought to be, as remarked by Laws J (as he then was) in *R v Managers of South Western Hospital, ex parte M* [1993] QB 683, [1994] 1 All ER 161, at 175-6.

patient's nearest relative to the very last moment, thereby seriously impeding his chances of having any effective input into the process and of objecting to the application under Section 3, that constituted "a misuse of power".¹³ Similarly, in *M v East London NHS Foundation Trust*¹⁴, where the approved mental health professional concerned, despite having acted properly throughout the day of the Section 3 application, in the end formed an unreasonable opinion that the patient's nearest relative (brother) had withdrawn his objection to the application, the admission under Section 3 was held unlawful. According to Burton J, the most appropriate test was whether, on the facts, the approved mental health professional had acted reasonably in coming to a conclusion that the nearest relative had or had not raised an objection.

Another case on Section 11(4) is *In re Whitbread (Mental patient: Habeas Corpus: Compulsory Admission)*.¹⁵ There the approved social worker consulted a psychiatrist before seeing the nearest relative, who consented. Nevertheless, the court held that the nearest relative had been rightly seen at the proper time because Section 11(4) only required consultation between the approved social worker and the patient's nearest

¹³ [2008] EWHC 3572 (Admin), para. 51.

¹⁴ Q.B.D., 11 Feb. 2009 (unreported).

¹⁵ *The Times* 14-7-97.

relative, and should not be construed as imposing a chronological sequence for complying with the pre-conditions to an application for admission. Rather, flexibility in an approved social worker's approach to any possible admission was desirable and, therefore, the Section 3 admission was proper.

Thus, in *In re Whitbread*, we see a case where the nearest relative consented and the problem was the time at which that consent should have been obtained. The next question which arises is whether that consent should be written or oral. Thankfully, some judicial guidance on this was given in *Re Shearon*¹⁶. In that case the issue was whether the approved social worker consulted the patient's nearest relative (father) before making her application under Section 3 and thereby learned that the nearest relative did not object to the application, as provided for by Section 11(4) of the Mental Health Act 1983. There was conflicting evidence: according to the approved social worker, the nearest relative was consulted but he did not object to the application, whereas the nearest relative stated that he objected to the making of the application. After looking at the evidence, the court held that there was consultation by the approved social worker with the nearest relative and that he did not, at the crucial time,

¹⁶ (1996) C.O.D. 223 (QBD).

object to the Section 3 application. Simon Brown LJ observed that consent (to an application for admission under Section 3 of the Mental Health Act 1983) by way of a signed document would be a sensible and valuable administrative practice. In similar vein, Scott Baker J, delivering a concurring judgment, stated:

... in future although there is no statutory requirement, a social worker ... will be well advised to invite the nearest relative to sign a document signifying his non-objection to an application for a s 3 Order. In that way needless litigation will be avoided.

Comment

This is very sound advice indeed, because problems can arise where the consent is orally given without a witness present, or digital or other recording of it, and later the nearest relative denies having given such consent. How can an approved social worker then prove or establish there was consent or that the nearest relative did not object

to the application?¹⁷ Unfortunately, the judicial observation in *Re Shearon* has not yet been taken on board because, as they are required to do, approved social workers only record on the Section 3 application form itself the fact that the nearest relative does not object to the application being made. The nearest relative is not asked to sign that part of the application or indeed any document stating that he does not object to the application being made. This is regrettable because use of a document signed by the nearest relative stating that he does, or does not, object to the application under Section 3 being made would dispel any doubts: it would discourage nearest relatives from claiming later on that they objected to the application being made but that the approved social worker wrongly recorded that there was no such objection. Thus, use of a signed document could help save time and money in relation to applications to the court for displacement of a nearest relative or where there is any other dispute.

¹⁷ In fact the Mental Health Act 1983 does not state that, if the application for admission for treatment is made by an approved social worker, the nearest relative must “consent” to it. It only requires that that relative does not object to the application. See Sections 11(4) and 29(3) (c), Mental Health Act 1983.

(3) Nearest relative's power re discharge of a patient

Whereas a nearest relative has power to apply for the discharge of a patient detained for treatment under Section 3, Mental Health Act 1983¹⁸ (although there are limitations on the exercise of that power under, for example, Section 25 of the Mental Health Act 1983), there is no such power, or indeed any power to intervene, in respect of a patient under a hospital order with restrictions (i.e., under Section 41, Mental Health Act 1983); such patients can be discharged only with the consent of the Home Secretary. It was so held in *R v Mental Health Review Tribunal*.¹⁹

As regards a patient under Section 3, the nearest relative's application for the patient's discharge may be made to the hospital managers²⁰ or the Mental Health Review Tribunal.²¹ (Presently, if the patient himself/herself applies to the Mental Health Review Tribunal for discharge, the fixing of a hearing beyond eight weeks following

¹⁸ *R v Riverside M.H. Trust, ex p. Huzzey* [1998] BMLR 167, *The Times*, 18/5/98 (QBD).

¹⁹ [2000] WL 33122363. The point to stress here is that the restrictions on those patients relate to their discharge, leave of absence, etc., in order to protect the public from serious harm.

²⁰ Sections 23 and 25, Mental Health Act 1983.

²¹ *Ibid.*, Section 66(1).

the application would be a violation of Article 5(4) of the European Convention on Human Rights.²²⁾

(4) Displacement of the nearest relative

The nearest relative can be displaced by way of an application to the court under Section 29 of the Mental Health Act 1983, as amended by the Mental Health Act 2007. However, the person to be appointed must be nominated in the application to the County Court, which may be made by the patient,²³ any relative of the patient, any other person with whom the patient is residing or by an approved mental health professional (Section 29(2)). The grounds for displacement (any one of which is sufficient), specified in Section 29(3) of the Act of 1983, as amended, are that:

(a) the existing nearest relative is not capable of acting as such because of mental disorder or some other illness;

²² *R v Mental Health Review Tribunal, aka R v London South and SW Region MHRT* [2001] WLR 176 (C.A.). Art. 5(4) requires the lawfulness of a person's detention to be decided speedily.

²³ This is a new development, much to be applauded because it affords the patient an opportunity to be involved in the displacement of his/her nearest relative.

(b) the existing nearest relative unreasonably objects to an application for compulsory admission of the patient or for placement of the patient under guardianship;

(c) the existing nearest relative has, without due regard to the patient's welfare or to the interests of the public, exercised his power to discharge the patient; or

(d) the nearest relative is not a suitable person to act as such.²⁴

Where a nearest relative is sought to be displaced on grounds (b) or (c) above (i.e., Section 29(3)(c) and (d)), Section 29(4) provides that the patient's period of detention under Section 2 becomes extended until final disposal of the application under Section 29. According to the House of Lords in *R (H) v Secretary of State for Health*,²⁵ Section 29(4) is not incompatible with Article 5(4) of the European Convention on Human Rights, as embodied in the Human Rights Act 1998. In that case the House of Lords reasoned as follows: (1) under Section 66 of the Mental Health

²⁴ This addition by the Act of 2007 is equally laudable from the patient's point of view because it supplies another ground on which the patient himself can apply to the court (even if another person has the right to do so but does not exercise it for one reason or another).

²⁵ [2005] UKHL 60; [2006] 1 AC 441.

Act 1983 a patient could choose to apply to a mental health review tribunal during the first 14 days of detention under Section 2, and, because the county court proceedings under s.29 might be determined speedily, Section 29(4) could operate compatibly with Article 5(4); even where there was a delay in the determination of those proceedings, the preferable way to ensure bringing the patient's case before a tribunal was to seek, under Section 67, a reference by the Secretary of State; and (2) as remedies like judicial review and *habeas corpus* were also available to the patient anyway, Section 29(4) could not be incompatible with Article 5(4).

The cases concerned with displacement of the nearest relative can be put into three subgroups. The cases in the first subgroup are mostly about nearest relatives' unreasonable refusal to consent to an application for admission for treatment, after which an application is made to the court for the nearest relative to be replaced.²⁶

In the second subgroup are cases concerning the unreasonable behaviour of the nearest relative in discharging a patient without due regard for the patient's welfare or the public's interests, and where that was likely to occur again. An illustration of this is *Barnet London Borough*

²⁶ See, e.g., *AB v LB (Mental Health Patient), aka. B v B* [1980] 1 WLR 116 (C.A.); [1979] 3 All ER 494; *W v L* [1973] 3 All ER 884; [1973] 3 WLR 859 (where Lord Denning MR stated the proper test as what a reasonable woman in the position of the patient's wife (the nearest relative) "would do in all the circumstances of the case"); and *H v Essex County Council*, (1997) *Legal Action*, Sept. 1997, p.24 (where the nearest relative's refusal was reasonable in the circumstances). See also *S v G* (1981) *JSWL*, 174.

Council v Robin.²⁷ In that case R was a schizophrenic (with a long history of informal admissions to hospital since he was a teenager) whose mother had a habit of taking him home against medical advice. His behaviour had increasingly become more aggressive and unpredictable. He was admitted to hospital for treatment under Section 3 of the Mental Health Act 1983 after he had ransacked his mother's flat and threatened her with a knife. His mother promptly applied to the Mental Health Review Tribunal for his discharge from hospital because, she argued, it would be in his best interests for him to reside with her until he got a place at a residential home. The local authority sought transfer of her powers of discharge (as R's nearest relative) to them under Section 29. The county court granted the order sought because she was likely to seek R's discharge in the future and that would not be in his best interests. Her appeal to the Court of Appeal failed for the same reason.

The third category of cases, however, deals with both the question of the nearest relative and procedural issues. An example is *R v Central London County Court and another, ex. p. London*.²⁸ There the nearest relative (the mother) of a patient unreasonably objected to an application

²⁷ [1999] 2 C.C.L. Rep. 454 (C.A.).

²⁸ (1999), *The Independent*, 18th March.

for admission for treatment. The county court, under Section 29(3)(c), Mental Health Act 1983, made an order on an *ex parte* application: the order purported to displace the nearest relative until further order. One week later another county court order extended the previous order; but before the final determination of the Section 29(3)(c) matter, the Social Services Department, purportedly acting as the applicant/patient's nearest relative, applied for his admission to hospital for treatment and he was duly admitted. On the patient's application for judicial review of the county court order, the Court of Appeal held, *inter alia*, that the county court had jurisdiction to make *ex parte* and *interim* orders including a Section 29 order displacing a nearest relative (although it was preferable that Section 29(3)(c) issues should be finally determined before an application for admission for treatment was made, such an application was not rendered unlawful). This was confirmed by *R. (on the application of M) v Homerton University Hospital* [2008] EWCA Civ 197. There the Court of Appeal held, *inter alia*, that nothing in the Mental Health Act 1983 suggested that, where a hospital chose to try to displace a nearest relative by going down the Section 29 route, that hospital had to conclude those proceedings before taking action under Section 3. There was also no suggestion in the Act that it was Parliament's intention that the two

regimes (Sections 3 and 29) could run *in tandem* only in exceptional circumstances.

Another case concerning procedural issues is *R v Wilson, ex p. Williamson*,²⁹ where the nearest relative of a patient admitted for assessment (i.e., under Section 2, Mental Health Act 1983) objected to an application for admission for treatment (under Section 3) and the hospital authorities, instead of applying to the court under Section 29 to have the nearest relative displaced, put the patient on another Section 2 when the first one expired. The Court (QBD) held that the second Section 2 was illegal, that Section 2 should not be used as a stop-gap measure and that the hospital authorities should have made an application under Section 29 for displacement of the nearest relative, followed by an application for admission for treatment under Section 3.

Also there is *R v Uxbridge County Court, ex p. B.*³⁰ The Queen's Bench Division held there that, where a Section 29 order was made without notice to, and service upon, the nearest relative, the effect of the order was that it was an *interim* order (not a final one). The right of the nearest relative to challenge or contest the order was, therefore, preserved.

²⁹ *The Independent*, 19th April 1995.

³⁰ [2000] WL 1421163.

In addition, *Re Whitbread (Habeas Corpus: Continued Detention)*³¹ confirmed that, if a patient is subject to Section 2, Mental Health Act 1983 and, in respect of arrangements for that patient's admission for treatment, an application under Section 29 is made to the county court, the Section 2 period becomes statutorily extended until the Section 29 application is decided on by the court.

As can be seen, some cases on displacement of the nearest relative are also about procedural issues, but the fact that there is a statutory procedure for displacing a nearest relative for, *inter alia*, unreasonable objection to a Section 3 application strongly suggests that some nearest relatives have actually been posing problems for the social services instead of assisting them to provide or get professional help for the patients concerned.

(5) Where, after a nearest relative's objection, the approved social worker applies for a Section 3 admission without using Section 29

This category, though quite similar to category 2 above (whether the right nearest relative was consulted at the right time) is worthy of separate

³¹ [1999] C.O.D. 370 (QBD).

attention because it also clearly concerns procedural impropriety on the part of an approved social worker (now approved mental health professional) or a social services department. A good illustration is *In re S-C (Mental patient: habeas corpus)*.³² In that case the nearest relative unequivocally objected to the Section 3 application, but the approved social worker still went ahead and applied for admission for treatment under Section 3, Mental Health Act 1983. The validity of the admission was, therefore, challenged by the patient. The Court of Appeal held that, where a mental patient sought to impugn the lawfulness of his admission to hospital and detention there on the grounds that the application under Section 3 (on which his admission and detention were authorised) had in fact not been completed in accordance with the provisions of the Mental Health Act 1983, his challenge lay to adhere to jurisdiction and not to any administrative decision, and, so, *habeas corpus* was appropriate. In so ruling, the Court of Appeal disapproved of *R v SW Hospital Managers, ex parte M*,³³ where, on fairly similar facts, the Section 3 admission in

³² *The Times*, 4th Dec. 1995 (C.A.).

³³ [1993] QB 683.

question was not ruled unlawful, a decision that actually provoked considerable criticism by commentators.³⁴

(6) Breach of Article 8, European Convention on Human Rights

This last category represents the position where the patient concerned contended that the statutory denial to him/her of the right to apply to the court to have his/her nearest relative displaced constituted a violation of Article 8 of the European Convention on Human Rights, which guarantees the right to respect for private and family life. The celebrated case on this issue is *JT v United Kingdom*.³⁵

In that case, JT, who had a history of mental disorder, was admitted to a mental institution in 1984 under Section 3 of the Mental Health Act 1983. Until her discharge in January 1996 her detention was renewed several times. She complained to the European Commission of Human Rights that, in violation of Article 8 of the European Convention on Human Rights, Section 29 of the Mental Health Act 1983 prevented her from applying to the court to displace her nearest relative who was her

³⁴ See, e.g., F. Morris, "Detaining Mental Patients", *Solicitors' Journal*, 16th July 1993, 682-3; and J. Gibbons, "A Coach and Horses", *NLJ*, 4th June 1993, pp. 817-9.

³⁵ [2000] 1 F.L.R. 909; *The Times*, April 5, 2000.

mother, a person she did not wish to act as her nearest relative. In fact she had had a very difficult relationship with her mother who³⁶ was still living with JT's step-father, against whom she (JT) had made allegations of sexual abuse.

The UK Government however agreed to initiate a friendly settlement of the case. The terms of the settlement were, *inter alia*, that the Government would amend the Mental Health Act to (a) give patients the right to apply to a court to displace a nearest relative they had reasonably objected to, and (b) exclude certain persons from acting as nearest relatives. In addition, compensation of £500 plus reasonable legal costs was to be paid to the applicant.

This case is very similar to an earlier case, *FC v United Kingdom*,³⁷ where the UK Government admitted that Section 26, Mental Health Act 1983, violated Article 8 of the European Convention and, apart from agreeing to pay the patient concerned damages of £2,000, promised to change the legal position as part of the general review of the mental health law in the United Kingdom.

³⁶ Despite having been divorced from her step-father.

³⁷ (1999) App. No. 37344/97.

Moreover, in 2003 the High Court decided, in *R (on the application of M) v Secretary of State for Health*,³⁸ where the facts were similar to *JT v United Kingdom* (except that in *R's case* the nearest relative was the patient's adoptive father), that Sections 26(1) and 29 of the Mental Health Act 1983 were incompatible with the applicant's right to respect for her private life under Article 8(1) of the European Convention on Human Rights. This was because she had no choice over the appointment of her nearest relative and also no legal means to change the appointment of that nearest relative. The Mental Health Act 2007 has partially rectified this (as commented on below).

The nearest relative system was again challenged in 2005 in *R v Bristol City Council*.³⁹ The patient in that case, E, had suffered for many years from chronic mental health problems. Her nearest relative was her sister, Mrs. S, with whom she did not get on and whom she had not seen for nearly two years. She did not want Mrs. S to have anything to do with her mental health care. She argued that Mrs. S's involvement as her nearest relative would cause her significant distress and would be unhelpful to her health. Her consultant psychiatrist agreed with this. She

³⁸ [2003] EWHC 1094 (Admin); [2003] 3 All ER 672.

³⁹ [2005] EWHC 74 (Admin).

issued proceedings for judicial review, seeking a declaration that it was unlawful for the defendants or any approved social worker in the defendants' employment to notify or consult Mrs. S (her nearest relative) without E's consent, and also an order prohibiting the defendants or any approved social worker in their employment from doing the same. Her argument was that informing or consulting Mrs. S about E's proposed admission to hospital would breach her rights under Article 8 of the European Convention on Human Rights.

The court acknowledged that, in the claimant's case, Section 11(3) and (4) of the Mental Health Act 1983 obliged the approved social worker to inform the nearest relative and to consult her in relation to an application for compulsory admission to hospital for treatment. If that was to happen, however, it would be contrary to the express wishes of the claimant, as well as harmful to her health. Such contact with Mrs. S (her nearest relative) would, therefore, in Bennett J's view, be futile. So, as United Kingdom courts are required under the Human Rights Act 1998 to interpret Acts of Parliament in a way compatible with Convention rights, the court was able to interpret the Mental Health Act 1983 in a way that took account of the applicant's wishes and health. It, therefore, made a declaration that it was impracticable for the defendants (Bristol City

Council) to inform or consult the applicant's nearest relative. In the words of Bennett J:

Section 3(1) of the Human Rights Act 1998 requires the Court, in construing Section 11 of the Mental Health Act 1983, so far as possible, to interpret it in a way which is compatible with the claimant's rights under the European Convention. In my judgment that is perfectly possible. Indeed, even without that statutory imperative, "practicable" and "reasonably practicable" can be interpreted to include taking account of the claimant's wishes and/or her health and well-being.⁴⁰

Comment

As already mentioned, the nearest relative was introduced by the Mental Health Act 1959 with good intentions - to play a significant role in protecting a patient and/or acting in his/her interests at all important times, e.g., during the processes of admission to hospital and discharge from there. However, the nearest relative was imposed by statute on patients,

⁴⁰ [2005] EWHC 74 (Admin), para. 20.

being defined by statute but not chosen by the patient concerned, even if the patient was competent to do so. In addition, the patient himself/herself could not at first (until enabled to do so by the Mental Health Act 2007) initiate proceedings to remove that nearest relative. That was clearly undesirable and unsatisfactory, and could militate against the patient's health as well as pose other problems, especially where (a) the patient and nearest relative did not get on, (b) where the patient did not want to have anything to do with the nearest relative, or (c) where, for whatever reasons (not excluding malice or spite), the nearest relative was unreasonable and would readily have the patient compulsorily admitted to a mental hospital. Now, thanks to the Mental Health Act 2007, which amended, *inter alia*, Sections 26 and 29 of the Mental Health Act 1983, the patient can initiate proceedings to remove/displace the nearest relative, as already stated. In connection with this, one of the grounds for applying for displacement of the nearest relative is his/her unsuitability to act as such.

The Mental Health Act 2007, in amending the Mental Health Act 1983, does not, however, go far enough. It only gives patients the opportunity to be involved in displacing their nearest relative - they can themselves initiate proceedings for the replacement, as already stated. This, however, is not the same as enabling or entitling a competent patient

(not an incompetent one) to choose their nearest relative in the first place - Section 26 of the Mental Health Act 1983, as amended, does not do so. It is, therefore, suggested that the choice of who should be their nearest relative be given to patients capable of making decisions for themselves. That can be made an exception to the definition in Section 26, Mental Health Act 1983.

Conclusion

As can be seen from the foregoing, the courts and Parliament have made important progress in protecting the interests of mental health patients by means of the “nearest relative” since 1959; however, further changes are still needed. In particular, the advice of Simon Brown LJ in *Re Shearon* that a nearest relative’s consent or objection to a Section 3 application ought to be recorded in writing and signed, and should be specified by statute. Also, although the Mental Health Act 2007 has made some important amendments to the Mental Health Act 1983, it has not given competent patients the opportunity to choose their “nearest relative“. This should also be done by an amendment of the Act.

Dr. Benjamin Andoh

Southampton Solent University