

The Nearest Relative Again (Case Comment: *E v Bristol City Council* [2005] EWHC 74 (Admin))

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Introduction

The nearest relative is generally an important person in the life of a patient because he/she is often there to help the patient and/or protect his/her interests in every way possible. Thus, he/she is involved usually, among other things, in the processes of a patient's admission to hospital and discharge from there. This role relatives have been playing, with statutory backing, too, for a long time.¹

So important was the role that the Mental Health Act 1959 created the "nearest relative" and gave him/her statutory rights in relation to his/her involvement in the compulsory admission and discharge processes. That position is preserved by the Mental Health Act 1983. Section 26 of the Act defines "nearest relative" as the person first described in the following list and who is surviving for the time being: (a) husband or wife, (b) son or daughter, (c) father or mother, (d) brother or sister, (e) grandparent, (f) grandchild, (g) uncle or aunt, and (h) nephew or niece.² The powers/rights of the nearest relative under the Mental Health Act 1983 include: (a) the right to apply for compulsory admission (for assessment or treatment) or consent to an application for treatment if he/she is not the applicant,³ (b) the right to make an order for a patient's discharge⁴ though some limitations are imposed on that right,⁵ (c) the right to apply to a

¹ See, e.g., ss.52 and 65 of the Lunatic Asylums and Pauper Lunatics Act 1845, and ss.5, 72 and 79 of the Lunacy Act 1890.

² Mental Health Act 1983, s.26. Thus, whole-blood relatives are preferred to half-blood relatives of the same description, and the elder/eldest of two or more relatives are preferred to the other/s of those relatives.

³ S.11, Mental Health Act 1983.

⁴ *Ibid.*, s.23(2).

⁵ *Ibid.*, s.25.

Mental Health Review Tribunal,⁶ (d) the right to require examination of the patient,⁷ (e) 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,⁸ (f) the right to be informed of the review by the hospital managers or the Mental Health Review Tribunal⁹ and (g) the right to be given early notice of the patient's discharge unless the patient objects.¹⁰

One unsavoury fact, however, is that, despite the extent of the nearest relative's role, mental hospital patients themselves cannot choose, or initiate proceedings to displace, their nearest relative. This is a significant defect in the current legal provisions relating to the nearest relative. No wonder there was challenge to it by *JT v United Kingdom*,¹¹ *FC v United Kingdom*¹² and *R (on the application of M) v Secretary of State for Health*.¹³

Although the law has not yet been changed, the Mental Health Bill 2004¹⁴ still has a provision replacing the nearest relative with the "nominated person", who may be described as a "second-class nearest relative" because of the much more reduced rights that he/she is given. This unsatisfactory position has already been discussed elsewhere.¹⁵

The nearest relative system was again challenged in early 2005 in *R v Bristol City Council*.¹⁶

⁶ *Ibid.*, s.66.

⁷ *Ibid.*, s.24.

⁸ *Ibid.*, s.132(4).

⁹ *Ibid.*, s.25(2), for example.

¹⁰ *Ibid.*, s.133.

¹¹ 2000 1 FLR 909.

¹² (1999) App. No. 37344/97.

¹³ [2003] EWHC 1094 (Admin); [2003] 3 All ER 672.

¹⁴ Introduced after the earlier Bill of 2002 had been withdrawn.

¹⁵ B. Andoh and E. Gogo, "The Nearest Relative in Mental Health Law", *Med. Sci Law* (2004), vol. 44, no. 2, pp. 140-150.

¹⁶ [2005] EWHC 74 (Admin).

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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 issued, on 15-9-04, 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 her (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 her proposed admission to hospital would breach her rights under Art. 8 of the European Convention on Human Rights.

The court acknowledged that, in the claimant's case, s.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. However, if that were to happen, it would be contrary to the express wishes of the claimant as well as be 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.¹⁷

Comment

As already mentioned, the nearest relative, to which system this case is another challenge, is a creature of statute. It was first introduced by the Mental Health Act 1959 with good intentions. The nearest relative was intended by Parliament to have a significant role to play 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 concept, "nearest relative", was imposed by statute on patients. He/she was 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 initiate proceedings under the Mental Health Act 1983 to remove that nearest relative. That is still the legal position today.

This is clearly undesirable and unsatisfactory, and may militate against the patient's health as well as pose other problems, especially, where (a) the patient and nearest relative do not get on, (b) where the patient does 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 is unreasonable and would readily have the patient compulsorily admitted to a mental hospital.

R v Bristol City Council also reminds us of *JT v United Kingdom*, *FC v United Kingdom* and *R (on the application of M) v Secretary of State for Health*. In all those four cases the nearest relative system under the Mental Health Act 1983, which preserved the position under the 1959 Act, was under challenge.

In *JT v United Kingdom* a female patient, 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/change her nearest relative who was her mother, who she did not want as her nearest relative. In fact she had had a very difficult relationship with her mother who was still (after having been divorced from him) living with the complainant's step-father, against whom the complainant had made allegations of sexual abuse.

¹⁷ [2005] EWHC 74 (Admin), para. 20.

However, the U.K. Government initiated a friendly settlement of the case. The representative of JT and the Government then confirmed to the European Court of Human Rights by letters dated 25 March 1999 and April 1, 1999, respectively, that JT, the applicant, had accepted the Government's offer of settlement. The terms of the settlement, as outlined by letter dated October 12, 1999, included the Government's promise to amend the Mental Health Act 1983 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 were to be paid to the applicant.

JT v United Kingdom is very similar to *FC v United Kingdom*, where the U.K. Government admitted that section 26 of the Mental Health Act 1983, breached Article 8 of the European Convention, agreed to pay the patient concerned damages of £2,000 and promised to change the legal position as part of the general review of mental health law in the United Kingdom.

Moreover, in 2003 the High Court decided, in *R (on the application of M) v Secretary of State for Health*, 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.

All the three cases (*JT*, *FC* and *M*) ought to be applauded because they revealed how unsatisfactory the law relating to the nearest relative was and still is. *JT* and *FC*, in particular, caused the Government to promise to change the law. To date, however, that promise has not been kept. Instead of doing so simply *via* an amendment of sections 26 and 29 of the Mental Health Act 1983 to give patients with capacity the right to choose their nearest relative and to commence proceedings to replace the same, the Government promised the electorate a root-and-branch reform of the law relating to mental health, which is yet to be accomplished. Where, then, has the morality of promise-keeping gone?

The Mental Health Bill 2002 did contain provisions replacing the nearest relative with the "nominated person", but the latter was to have much fewer rights than the nearest relative. Thankfully, for reasons other

than the inappropriate or unsatisfactory way the Bill dealt with the nearest relative issue, the Bill was withdrawn.

The new Bill, the Mental Health Bill 2004, also contains provisions replacing the nearest relative with the nominated person, again with much fewer rights. For example, it does not give the nominated person a right to discharge a patient, which currently can be exercised by a nearest relative, subject to a veto by the responsible medical officer: in clauses 60 and 61, regarding discharge of an order authorising assessment or medical treatment by the clinical supervisor and Tribunal, respectively, the nominated person is not mentioned as having any right to discharge a patient; he will only be informed about the position after the decision has been made.

Does the Bill solve the problem relating to the nearest relative? The answer is “No” because its provisions do not clearly give a patient the right to appoint his/her nominated person. Also, although the patient can apply to the Mental Health Tribunal to revoke an appointment and appoint another person,¹⁸ which shows respect for the patient’s rights under Art. 8 of the European Convention on Human Rights, it is still highly objectionable that a competent patient can only select, but cannot appoint, the nominated person. The appointment is done primarily by the appropriate approved mental health professional.¹⁹

The Bill has also broken away from tradition unnecessarily in replacing the nearest with the nominated person, who is to have diluted rights, which do not measure up to those of the nearest relative. Moreover, the term, “nominated person”, is loose and rather artificial, failing to reflect any family closeness.

Although the Bill does not solve the problem relating to the nearest relative, it contains some good provisions about the nominated person. The Bill makes a distinction between selection (choice) of a nominated person and appointment of that person: clause 233(4) provides that the appointer must give the patient reasonable opportunity to select a nominated person unless the patient is incapable of making a selection; and clause 233(5) states that the appointer must appoint any suitable eligible person, who is selected by the patient. This is very commendable indeed and, if the Bill is passed in its present form, will not (because it gives patients the right to choose their nominated person) violate Art. 8 of the European Convention on Human Rights.

¹⁸ See clauses 243 and 244 of the Bill.

¹⁹ See, e.g., clause 19(2) and (5).

Clause 233(6), taking clause 233(5) further, provides that, if the appointer cannot appoint the person chosen/selected by the patient, the appointer can appoint the most suitable eligible person or the local social services authority. One can, however, say that the effect of clause 233(5) and (6) is to take control over the issue of the nominated person away from the patient's hands - someone else, not the patient, decides who is a suitable eligible nominee (regarding, especially, clause 233(5)), while the provisions of clause 233(6) imply that a competent patient's choice can still be by-passed if the appointee deems the selected person not to be most suitable.

Nevertheless, as regards the nominated person, the provisions of clause 233(5) and (6) are progressive, being clearly more thought-through than the provisions of the withdrawn Mental Health Bill 2002. The provisions of the said clause 233(5) and (6) of the Mental Health Bill 2004 play a very useful role: they provide a solution to the problem/s likely to arise whenever a competent patient selects as his/her nominated person a person who, in actual fact, is unsuitable for one reason or another.

Conclusion

Given that four cases, including *R v Bristol City Council*, have all been successful in challenging the present nearest relative system, which is unsatisfactory and constitutes a violation of Art. 8 of the European Convention on Human Rights, it is difficult to understand why the Government has not yet kept its promise to the European Court. Why does the Government not simply amend sections 26 and 29 of the Mental Health Act 1983²⁰ and thereby let patients be able to choose, and commence proceedings to replace, their nearest relative, until the root-and-branch reform of the law actually takes place after the present Bill has been thoroughly scrutinised?

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²⁰ As argued elsewhere (see Andoh and Gogo, *op. cit.*).