



Neutral Citation Number: [2024] EWHC 1274 (Fam)

Case No: FD23P00225

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/05/2024

Before :

MRS JUSTICE THEIS

Between :

| | | |
|--|--|---------------------------|
| | Surrey Police | <u>Applicant</u> |
| | - and - | |
| | [1] PC (by his litigation friend, the Official Solicitor) [2] Surrey and Borders Partnership NHS Foundation Trust [3] Surrey County Council | <u>Respondents</u> |

Mr Justin Slater (instructed by **Weightmans LLP**) for the **Applicant**
Mr Ian Brownhill (instructed by **The Official Solicitor**) for the **1st Respondent**
Miss Katie Gollop KC (instructed by **Hill Dickinson LLP**) for the **2nd Respondent**
Ms Amanda Scally (instructed by **Surrey CC**) for the **3rd Respondent**

Hearing date: 26th April 2023
Judgment Date: 24 May 2024

Approved Judgment

This judgment was handed down remotely at 10.00am on 24th May 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE THEIS DBE

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the first respondent PC must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Mrs Justice Theis DBE :

Introduction

1. Surrey Police made an Out of Hours Urgent application seeking orders in relation to PC, age 26 years, in circumstances where he was in the police station. The police sought orders to manage the difficult circumstances they found themselves in. It is a situation that should not have arisen had the relevant services been communicating and operating in a more collaborative way.
2. Having dealt with the urgent situation, the matter was restored back to court on notice the next day with each party being represented. At that hearing I directed a joint skeleton and other documents were filed to enable the court to give this judgment to try and avoid a similar situation taking place again.
3. I am very grateful to counsel for the material that has been submitted and am particularly grateful to Mr Brownhill, who not only assisted the court at very short notice in the Out of Hours hearing but has also taken the lead in making sure the court has all the relevant information to give this judgment. The focus of this judgment is the relevant practice in situations as arose in this case, with the accompanying message of the need for better and more effective operational collaboration between the relevant public bodies to avoid such applications being made in the way that happened in this case.

Relevant background

23 April 2023

4. On 23 April PC was arrested regarding an offence of criminal damage. The arresting officers had concerns in respect of PC's mental health. Although consideration was given as to whether he should be removed to a place of safety under the Mental Health Act 1983 an ambulance was called. Due to delays in the ambulance arriving the officers decided to take PC to a hospital that was operated by Surrey and Sussex NHS Healthcare Trust ('the Trust').
5. PC was taken to the Emergency Department of the East Surrey Hospital where he was given a 1mg tablet of lorazepam at 10.22, with a further 2mg dose at 10.47. PC was assessed by a psychiatric liaison nurse employed by the Trust, the notes describe PC as '*agitated, aggressive, shouting and swearing, flushed*'. The plan was to see how his mental state was over the next 24 hours given the suggestion of drug use. He was medically fit to be discharged and PC was taken to a police station.
6. The police raised concerns about the circumstances of PC's discharge from hospital. The Trust responded that PC was discharged from the psychiatric liaison service and the pathway for people under arrest is for them to be assessed by the Criminal Justice Liaison and Diversion Service ('CJLDS') and that was the plan in place for him.
7. PC arrived at the Police custody centre just after noon. Following being booked in he is recorded as having spent the rest of the afternoon sleeping in a cell.

24 April 2023

8. The following morning there remained an issue regarding PC's mental health. He was seen by the CJLDS nurse. The Approved Mental Health Professional service ('AMHP' pursuant to s114 Mental Health Act 1983 'MHA 1983') at the local authority was contacted by CJLDS. They did not arrange a Mental Health Act assessment as they were advised that PC was not fit to be assessed. They suggested that he was kept in the police station as a place of safety under s 136 MHA 1983, which was done at 10.44. CJLDS and the Trust attended a meeting and updated the police about midday, informing them that PC was in line for the next bed. The local authority were advised that his PACE clock would expire around 12.30 pm so there was no legal framework to hold PC after that time. The local authority also suggested that PC was transferred to a Health Based Place of Safety ('HBPoS') as soon as one was available.
9. During the morning the records describe PC's presentation was mixed; at times he appeared florid and delusional and at other points was aggressive and threatening self-injury. By 11.58 the police noted their very real concern that he remained in their custody and that PC was '*clearly having a mental health crisis*'.
10. At 2pm there was a meeting to discuss the availability of a bed at a place of safety. Although different accounts are given by the various public bodies as to the availability of beds, the result was nothing was available. During the afternoon the nurse who was responsible for healthcare in police custody became increasingly concerned. The local authority state they did not receive any update regarding PC's presentation nor were they advised that he could be assessed under the MHA 1983.
11. At around 7pm the AMHP and psychiatrists arrived at the custody centre. Both psychiatrists recommended that PC be detained under s2 MHA 1983, however there was no bed available for him. By 7.46pm it was known that there may be an issue in respect of the legal framework that would enable PC to remain in police custody until a suitable bed was found.
12. The detailed chronology prepared by the Trust sets out the efforts made by them to locate a bed for PC. At around this time the police referred to PC by a different name and he was not known on the Electronic Health Record, which caused some confusion.
13. By just before 10 pm the police record they were informed by the Trust there was no bed available for the foreseeable future, although this description of the time frame is disputed by the Trust. In any event, it was said there would be an urgent review in the morning. Around that time PC was becoming more agitated in the cell, he started to demand sedation and the custody sergeant described PC as '*unmanageable*' at this time.
14. The police asked for help stating they required help from a mental health professional to keep PC safe. The Trust's on call Registrar agreed to prescribe sedative medication and the Home Treatment Team ('HTT') East & Mid Surrey confirmed that lorazepam was available in stock and the HTT Night Nurse would take it to the custody centre.

25 April 2023

15. In the early hours of the next day PC's presentation deteriorated further. He was recorded as being '*out of control*'. He was placed in a body cuff. The lorazepam arrived about the same time and a health care Practitioner (nurse), employed by Mountain Healthcare was able to give the medication to PC. It was 2x1mg tablets, which he eventually took with water whilst still in the body cuff. Due to high level of concern about PC he had been on constant observation since the previous evening.
16. The lorazepam had a calming effect and the body cuff could be removed. At 6.32 the custody sergeant reviewed PC's ongoing detention and noted the real concern about PC's continuing detention describing it as '*lawful and the only reasonable place for him to be held until the appropriate services facilitate their duty of care*'.
17. During the morning conversations took place between the police and Trust. PC became agitated, at times he was placed in a body cuff and restrained by five police officers. A further period of detention under s 136 MHA 1983 was implemented.
18. Ongoing discussions between the public bodies covered the limits to the use of s 136. At one stage a senior manager at the Trust was reported to suggest the police could rely on the common law doctrine of necessity to detain PC, the Trust do not accept this report. The AMHP advised that common law could not be used but that a second s136 could be used, which accorded with the advice from the police legal adviser. They considered whilst it was not good practice it was lawful. There were discussions as to whether an application to court would be necessary but none of the public bodies alerted the Official Solicitor.
19. In the early evening the police made an urgent out of hours application to the court to authorise the deprivation of PC's liberty in the police custody suite due to their concern that a second period of detention under s 136 would expire later that evening. Initially the application was made seeking orders in the Court of Protection, they were ultimately made under the inherent jurisdiction due to the urgency of the situation and to cover the short period of time before a bed was available. I was informed the next morning PC's s2 detention had been effected by his conveyance to a bed at 1.48 26 April 2023.
20. The hearing took most of the evening on 25 April due to delays in making effective contact with the relevant public bodies to enable them to join the urgent hearing. The recitals in the Out of Hours order I made are set out at the end of this judgment which succinctly summarise the position. In accordance with the practice outlined by Baker LJ in *Mazhar v Birmingham Community Healthcare Foundation NHS Trust & Ors* [2020] EWCA Civ 1377 at [74] I listed the matter back before the court the following morning.

The Official Solicitor's position

21. The overarching concern of the Official Solicitor is that PC was clearly vulnerable and ill yet had been left in a police custody suite with what the Official Solicitor considered was inadequate care and support. In *The Mental Health Act 1983 (Places of Safety) Regulations 2017 SI 2017 No 1036* Parliament limited the circumstances in which a police custody suite may be used as a place of safety, yet there was no apparent urgency or significant concern about this situation on behalf on the relevant statutory agencies.

22. The specific concerns the Official Solicitor identified arising from this situation is summarised as follows.
23. First, the AMHP service upon initial request on the morning of 24 April 2023 appears to have delayed the mental health assessment on the basis that PC may have been intoxicated. By the time of that initial request PC had been detained for 24 hours. The local authority state they were told PC was intoxicated, which is not accepted by other agencies. Whatever was said the essential facts raised further questions that were not followed up, when they should have been.
24. Second, by 2pm on 23 April the AMHP service further delayed any assessment on the basis that PC may have been intoxicated but they had not seen PC, he had by then been in custody for about 29 hours. The local authority state this view was based on prior information the AMHP received which had not been updated. Again, this raised further questions that were not followed up, when they should have been.
25. Third, by 7.46 pm on 24 April it was known to the police and the local authority that there might be an issue as to the legal framework under which PC was detained in police custody but it took a further 24 hours, and only after intervention of the court, for there to be any proper consideration as to the legality of PC's situation and for him to have any form of independent representation.
26. Fourth, the Official Solicitor has concerns about the circumstances of the lorazepam being given in custody. It was prescribed by a medical practitioner who had not seen PC. The Trust have acknowledged this concern and confirmed it is raising it internally. Also, it was given to PC whilst he was in the body cuff and no consideration is recorded as having been given as to whether PC had capacity to consent to being medicated with lorazepam.
27. Fifth, on the morning of 25 April there was no recorded handover between the AMHP from the Emergency Duty Team, which the local authority accept. By 2.45 pm on that day it was clear the AMHP who had conducted the first assessment was not going to be available until later in the day to make any application for admission. Effectively, there was no means to admit PC to hospital under s 2 MHA 1983 unless a further assessment was undertaken. The Official Solicitor considers that this could and should have been obvious by just after 9.30 am that morning when the AMHP realised they could not access either of the medical recommendations of the previous day. The local authority state it was apparent to the AMHP that there was no bed, so a further assessment would not have resolved the issue regarding the ongoing legal framework regarding PC's deprivation of liberty.
28. Whilst the Court and the Official Solicitor recognise the difficulties the public bodies are operating under in such a difficult and dynamic situation it is nevertheless important the focus remains on the relevant legal authority being exercised to detain PC. Article 5(1) ECHR guarantees that no one will be deprived of their liberty save in accordance with a procedure prescribed by law. The notion of 'lawfulness' requires a fair and proper procedure offering the person sufficient protection against arbitrary deprivation of their liberty.
29. I endorse the guidance advocated by the Official Solicitor for future cases that involve an application to the court to authorise the deprivation of an individual's liberty in the

police station either under the inherent jurisdiction of the High Court or section 4A of the Mental Capacity Act 2005.

- (1) Any such application should only be made in exceptional circumstances. Every effort should be made to avoid such an application having to be considered by the Out of Hours judge.
 - (2) If such an application is made, or is being considered, it should be brought before the court as soon as possible during normal court sitting hours. In particular, as soon as an issue is identified that there may not be a suitable legal framework for continued detention to take place.
 - (3) Each public body involved in the circumstances of the deprivation of liberty should be joined as a party to the proceedings and/or given sufficient notice (preferably during office hours) that such an application is going to be made and the court will consider if they should be joined as a party. In PC's case that would have included the local authority that provided the AMHP service, the Trust which is providing/commissioning the bed and the police force which is physically detaining the person.
 - (4) The application should be supported by evidence, ideally in the form of one statement, which explains the relevant chronology, the steps that have been taken to find an alternative and what care and support the person will receive/has received whilst in police custody and the relevant legal framework. Should the application include authority for physical or chemical restraint the legal basis of that restraint should be set out clearly, as well as the underlying factual/medical evidence as should details of the nature of any such restraint sought.
 - (5) The Official Solicitor should be alerted in good time prior to any application being issued.
 - (6) The relevant public bodies involved in the application must actively consider in advance of any application being issued how the person who is deprived of their liberty will be enabled to participate in the proceedings. If this is to involve the Official Solicitor acting as litigation friend or advocate to the court consideration must be given by the public bodies as to how to provide the Official Solicitor security for her costs.
30. Finally, the Official Solicitor makes an application for either all her costs to be paid by the local authority, or for her costs to be shared between the public bodies. The application is founded on the late stage the Official Solicitor was notified of the application and the lack of clarity about the legal basis for the application.
 31. The Official Solicitor recognises the lack of experience by the police in making such an application however they had demonstrated concern for PC's rights and welfare during his detention.
 32. In relation to the Trust the police suggest the level of communication between them and the police was sub-optimal, which the Trust do not accept however they realistically recognise the Official Solicitor's concerns surrounding the prescription of lorazepam. Although there remains a dispute about the context of any suggestion

about using the common law doctrine of necessity to deprive PC of his liberty, this was clearly mis-placed. The better course would have been to support the police to bring any application to the court in a timely way. The Official Solicitor recognises that steps were taken by the Trust to secure a bed for PC which he was ultimately admitted to.

33. As regards the role of the local authority via the AMHP the Official Solicitor remains concerned as to the decision made not to assess due to supposed intoxication without checking themselves and/or properly considering the impact of the passage of time. The Official Solicitor considers the local authority approach regarding the difficulties in securing a bed was to wait and see without considering their other duties and responsibilities under the Care Act or their positive obligations under Article 5 ECHR. Their approach once the matter was before the court in not sharing contact details, despite the direction to do so from the court, caused further delay. The Official Solicitor considers that the local authority was the most experienced public body in respect of deprivation of liberty applications under the inherent jurisdiction or the Mental Capacity Act 2005. Although a bed had been found by the time of the Out of Hours hearing could be effective PC still remained in custody due to difficulties with the administration of the section 2 application for admission.
34. As regards costs the police submit they had no option but to bring the application as the s136 detention was due to expire late on 25 April. There was, at the time of making the application, no immediate prospect of a bed for PC and he wasn't in fact admitted until the early hours of 26 April.
35. The Trust submit they should not be responsible for any costs as it had secured a PICU bed which was available for PC from 4pm 25 April, which the police were informed of prior to applying to the court.
36. The local authority agree to fund a proportion of the costs but resist sole responsibility. They submit the situation developed due to a lack of a bed, the refusal to take PC to a HBPOS both of which were outside the control of the local authority. The police made the decision to bring an urgent application without notifying the local authority, despite a s136 being in place and with knowledge that a bed was available.
37. In determining the question of costs Poole J recently set out the relevant legal framework in *Re GH (Mastectomy: Best Interests: Costs)* [2023] EWCOP 50 at [47] – [53]. As Jackson J (as he then was) set out in *London Borough of Hillingdon v Neary & Ors* [2011] EWHC 3522 (COP) at [9] “*The questions that must be addressed are these:(1) Is departure from the general rule justified in all the circumstances, including the conduct of the parties, the outcome of the case and the role of Hillingdon as a public body? (2) If so, what order should be made?*”
38. In considering whether the court should depart from the general rule it is necessary to consider the circumstances of the case, having regard to the matters set out in rule 19.5(1) Court of Protection Rules 2017 ('COPR').
39. I have reached the conclusion that there are reasons to depart from the general rule in this case. It must have been clear that in bringing the matter before the court PC was going to need to have a voice and be able to participate in the proceedings, either

directly or indirectly. Whilst the police made the application I accept the submissions on behalf of the Official Solicitor that in this situation the local authority had the most experience and, in my judgment, should have taken a more proactive role, bearing in mind their statutory responsibilities and the growing uncertainty there was about the applicable legal framework. In the end, the police had little choice but to make the application because of the situation they found themselves in. There should be been more active collaboration between the relevant public bodies.

40. As to what order should be made I am satisfied the local authority should pay the Official Solicitor's costs. The Official Solicitor should have been given more notice of this situation and the potential of an application being made. The local authority could and should have taken more active steps to ensure that was done and to support the other public body, the police, who are less experienced in these type of applications.

Recitals in Out of Hours Order

AND UPON the court recording that:

- A. The Official Solicitor has accepted the court's invitation to act as PC's litigation friend in this application, there appearing to be no alternative litigation friend available and there being evidence that PC lacks the capacity to conduct these proceedings. The Official Solicitor has accepted the court's invitation in the expectation that one of the public bodies involved in these proceedings will provide security for her costs.*
- B. PC is at present detained in police custody, purportedly pursuant to section 136 of the Mental Health Act 1983. The Official Solicitor, in the time available to her, has not been able to establish when that authority to detain will, or whether it already has expired.*
- C. The police's initial application being to authorise the ongoing deprivation of PC's liberty under the Mental Capacity Act 2005, the police having reason to believe that PC lacks the mental capacity to make decisions as to his residence, care and support. At the time of the application, the police were waiting for PC to be detained under the Mental Health Act 1983, their understanding being that two section 12 doctors have determined that he is detainable pursuant to section 2 and that the application for admission by the Approved Mental Health Professional being outstanding.*
- D. The Official Solicitor has expressed deep concern on the legality/appropriateness of:
 - a. PC being deprived of his liberty in these circumstances considering The Mental Health Act 1983 (Places of Safety) Regulations 2017;*
 - b. The police having to bring this application in the absence of no other public body having applied to the court to authorise the deprivation of PC's liberty in accordance with the common law and article 5 ECHR;**
- E. The police have expressed difficulty in being provided information in respect of the progress of PC's admission under the Mental Health Act. The police have submitted to the court that it is likely that PC is at real and immediate risk of significant harm to life or limb should he no longer be deprived of his liberty on account of his current mental health presentation.*
- F. On the basis of the information before the court, it agrees with the submission on behalf of the Official Solicitor that it cannot authorise the ongoing deprivation of PC's liberty under the*

Mental Capacity Act 2005 as he would be ineligible due to the provisions of schedule 1A.

- G. *At the time of the hearing, the intention was for PC to be admitted to Surrey and Borders Partnership NHS Foundation Trust but a definitive timeline for the completion of the paperwork or his conveyance to hospital could not be provided.*
- H. *In light of the potential immediate risk to PC's life and limb, it will allow the invocation of the inherent jurisdiction of the High Court to allow the deprivation of PC's liberty until the conclusion of the hearing listed for 11am on 26 April 2023.*