HOUSE OF LORDS SESSION 2004–05
[2005] UKHL 32

on appeal from: [2003] EWCA Civ 1152

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Ward (Respondent)
v.
Commissioner of Police for the Metropolis and others (Appellants)

ON
THURSDAY 5 MAY 2005

(Re-issued 10 May – paragraph 15 amended at lines 9, 10 and 11)

The Appellate Committee comprised:

Lord Steyn
Lord Hutton
Lord Rodger of Earlsferry
Baroness Hale of Richmond
Lord Carswell

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LORD STEYN

My Lords,

1. I have had the advantage of reading the opinion prepared by my noble and learned friend Baroness Hale of Richmond. For the reasons which she has given I would allow the appeal and dismiss the claim against both defendants.

LORD HUTTON

My Lords,

2. I have had the advantage of reading in draft the opinion of my noble and learned friend Baroness Hale of Richmond. I agree with it and for the reasons which she gives I would allow the appeal and dismiss the claim against both defendants.

LORD RODGER OF EARLSFERRY

My Lords,

3. The issue of principle in this appeal is whether, when issuing a warrant under section 135 of the Mental Health Act 1983, a magistrate has power to impose a condition that the constable executing it should be accompanied by a particular approved social worker and/or medical practitioner. The wording of subsection (1) shows that the magistrate has a discretion whether or not to grant a warrant.

4. Under the somewhat similar provision in section 15(2) of the Mental Deficiency Act 1913 it was necessary to name the constable and the doctor, but both of these requirements have been abolished. Now section 135(4) simply says that, when executing the warrant, the constable is to be accompanied by an approved social worker and by a registered medical practitioner. The contention for the Trust is that where Parliament has regulated, in this more relaxed way, the class of persons who are to accompany the constable, there is no room for implying any power for the magistrate to stipulate any particular member of that class.

5. In *Attorney-General v Great Eastern Railway Co* (1880) 5 App Cas 473, 478 Lord Selborne LC held that the doctrine of ultra vires

> "ought to be reasonably, and not unreasonably, understood and applied, and that whatever may fairly be regarded as incidental to, or consequential upon, those things which the Legislature has authorised, ought not (unless expressly prohibited) to be held, by judicial construction, to be ultra vires."

Lord Blackburn said, at p 481, that:

> "those things which are incident to, and may reasonably and properly be done under the main purpose, though they may not be literally within it, would not be prohibited."

Here there is no express prohibition on the magistrate imposing the condition. So, looking at the matter reasonably, can imposing such a condition be fairly regarded as incidental to the magistrate's power to issue the warrant?

6. The requirement relates to the manner of execution of the warrant. Obviously, as my noble and learned friend, Baroness Hale of Richmond, points out, a requirement of this kind could often make it more difficult in practice to execute the warrant. So it could never be appropriate for a magistrate to impose the requirement unless, in his considered judgment, there was a justification for doing so which would outweigh that potential disadvantage. On any view it would only be appropriate in exceptional cases. But the magistrate might be told of circumstances where, exceptionally, such a condition seemed appropriate. The execution of the warrant will often be upsetting for the patient. Sometimes, a specially vulnerable patient might be greatly reassured if the constable were accompanied by a social worker or a medical practitioner whom she knew and trusted. Conversely, the presence of a social worker or medical practitioner whom she distrusted might make the situation much worse. In such cases, if made aware of the position, a magistrate might reasonably consider that, in order to facilitate the execution of the warrant, he should specify or exclude a particular social worker or medical practitioner. In my view, a power to impose such a condition in the interests of the patient could properly be regarded as incidental to the statutory power to issue the warrant. The same would apply, for instance, to a condition that the warrant should not be executed at night.

7. It appears that in this case the informant completed the form containing the warrant and did so most ineptly. The informant inserted the names of two medical practitioners and an approved social worker who were to accompany the constable. The magistrate signed the form. There is nothing in the affidavit of Mr Reed, the principal administrative clerk of the court, to suggest that, in signing and issuing the warrant, the magistrate would actually have applied his mind to whether, or why, these individuals should be specified. In particular, there is nothing to show why he specified the names of two medical practitioners. This was plainly ultra vires since section 135(4) provides that only one need be present. That being so, it is clear that in this case there was no legitimate exercise of any power to specify the names. In the circumstances they can be severed from the rest of the warrant. Shorn of the names, the warrant was valid, as was its execution.

8. For these reasons I agree that the appeal should be allowed and the claim against both defendants dismissed.

BARONESS HALE OF RICHMOND

My Lords,

9. This case concerns a little known and little used provision in the Mental Health Act 1983, designed to cater for people who are believed to be suffering from mental disorder and may be in need of care or protection. Mrs Ward, who complains about its use in her case, is acting in person, so I shall try to give a fuller explanation of how and why the case has come before us than would be necessary had she had lawyers acting for her. She has been in the unenviable situation of being deprived of her liberty so that assessments could be made which revealed that compulsory intervention was not warranted. Anyone who has been through that distressing experience would feel deeply aggrieved and a profound sense of injustice. It can only have made matters worse that she has had to defend a judgment of the Court of Appeal in her favour without legal representation. We are grateful to Mr Hugo Keith, who has done his best to uphold that judgment, but as our *amicus curiae* and not as her representative.

10. For centuries it was assumed that people of unsound mind (a much narrower category than the mental disorders of today) should be locked up, whether in their own homes or, increasingly during the 19th century, in institutions designed for that purpose. The 20th century saw a progressive retreat from that position. Now it is assumed that people with mental disorders and disabilities should be treated just like everyone else: see *Royal Commission on the Law relating to Mental Illness and Mental Deficiency 1954 – 1957*, Cmnd 169, para 7. But we have kept the possibility of detaining and treating them against their will in the interests of their own health or safety or for the protection of others. We rightly regard this as a serious step which should only be taken when the patient has reliably been shown to have a mental disorder of a nature or degree which warrants it: see *Winterwerp v Netherlands* (1979) 2 EHRR 387.

11. Hence the compulsory procedures require that there be a professional assessment and diagnosis before the patient is compulsorily

admitted to hospital. Unless there is an emergency, the opinions of two doctors, one of them an approved specialist in mental disorder and if possible one of them having prior knowledge of the patient, are required: Mental Health Act 1983, ss 2(3), 3(3), 12(2). Both must have examined the patient before making their recommendations: s 12(1). In an emergency, one is sufficient: s 4(3). Admission is on the application, either of the patient's nearest relative or of an approved (ie specialist) social worker, who must have seen the patient within the 14 days ending when the application is made: s 11(1), (5). The social worker must interview the patient before making an application: s 13(2). These days, the nearest relative rarely makes the formal application, although he or she has a right to require that a social worker assess the case: s 13(4).

12. Very occasionally, a crisis will arise in which there is good reason to suppose that a person ought to be admitted to hospital (or otherwise taken care of) but the necessary assessments cannot be made in advance because of problems in gaining access and speaking to the prospective patient. Section 135(1) of the Mental Health Act 1983 is designed to cater for that difficulty. In certain quite narrowly defined circumstances, an approved social worker may apply to a magistrate for a warrant authorising a police officer to gain access to premises, by force if need be, and if thought fit to remove the person to a place of safety, such as a hospital or nursing home, with a view to making an application for her compulsory admission or other arrangements for her treatment and care. When executing the warrant, the police officer must have with him an approved social worker and a doctor: s 135(4). In practice, it is likely that the social worker will have co-ordinated the arrangements for everyone to attend. Once access has been gained, the professionals may be able to complete the formalities for an emergency admission there and then. But if that is not possible or appropriate, the professionals should be able to help the police officer to decide whether or not it is 'fit' to take the person concerned to a place of safety. If removed, the person is in legal custody with all that that entails: s 137(1). Once at the place of safety, she may be detained for up to 72 hours: s 135(3); but there is no power to impose medical treatment: see s 56(1)(b).

13. Of necessity, therefore, section 135(1) applies to a person who is 'believed to be suffering from mental disorder' but has not yet reliably been shown to be so. Fortunately, the power is comparatively rarely used, although it appears to be on the increase. It is not known how many warrants are applied for or granted. Nor is it known how many people are admitted to places of safety other than hospitals. But there are official figures for hospital admissions under this section. In England,

these rose from 108 in 1993-4 to 337 in 2003-04. Nevertheless, this is a serious step which ought only to be taken when there is no other solution to the problem and with the greatest possible care to ensure that its criteria and requirements are observed.

In 1997, the relevant parts of section 135 read as follows:

> "*135 Warrant to search for and remove patients*
>
> (1) If it appears to a justice of the peace, on information on oath laid by an approved social worker, that there is reasonable cause to suspect that a person believed to be suffering from mental disorder-
>
> (a) has been, or is being, ill-treated, neglected or kept otherwise than under proper control, in any place within the jurisdiction of the justice,
>
> or
>
> (b) being unable to care for himself, is living alone in any such place,
>
> the justice may issue a warrant authorising any constable…to enter, if need be by force, any premises specified in the warrant in which that person is believed to be, and, if thought fit, to remove him to a place of safety with a view to the making of an application in respect of him under Part II of this Act, or of other arrangements for his treatment or care.
>
> …
>
> (3) A patient who is removed to a place of safety in the execution of a warrant issued under this section may be detained there for a period not exceeding 72 hours.
>
> (4) In the execution of a warrant issued under subsection (1) above, a constable shall be accompanied by an approved social worker and by a registered medical practitioner, . . .
>
> (5) It shall not be necessary in any information or warrant under subsection (1) above to name the patient concerned.
>
> (6) In the section "place of safety" means residential accommodation provided by a local social services

> authority under Part III of the National Assistance Act 1948, a hospital as defined by this Act, a police station, a mental nursing home or residential home for mentally disordered persons or any other suitable place the occupier of which is willing temporarily to receive the patient."

14. The issue before us is whether the magistrate is entitled to impose additional conditions in the warrant, other than those expressly provided for in the section, and in particular whether he or she is entitled to insist that only named professionals are involved in its execution. That is the only issue for us to decide. It is a pure question of law. Putting the case before a jury, as Mrs Ward would have liked, would have made no difference. The jury is only there to decide upon the facts. The judge would always have had to rule upon the question of law. If the answer to that question is 'yes', the case goes back for the facts to be found and damages assessed. If it is 'no', then that is the end of the matter. This must be a source of great concern and frustration to Mrs Ward, who has seen her case come all the way to the highest court in the land without anyone having heard any evidence or decided whether this was indeed a proper case for the use of the power. Her problem is that it was never alleged that the power should not have been invoked, merely that the formalities were not properly complied with.

15. The relevant facts are these. On 10 July 1997, an approved social worker (named in the warrant as David Alan Baker) applied to a magistrate for a warrant under section 135(1). The warrant granted was unsatisfactory in a number of respects. First, it consisted of a typed pro forma which left gaps for names to be filled in where there is no longer any requirement for the people concerned to be named. Second, the form was sloppily completed. It recited that the informant 'states that there is reasonable cause to suspect that a person Mrs Susannah Ward believed to be suffering from a mental disorder (a) kept otherwise than under proper control at the address below (b) being unable to care for herself is living alone at Ashleigh, 22 Golfside, Cheam, Surrey . . . ' Too much of (a) was crossed out, while (b) was left in when it almost certainly should have been crossed out. On the information which we have, Mrs Ward was not living alone at the time. The warrant itself states among 'the grounds for the said suspicions' that her husband had requested an assessment. Third, it directs a constable of the Metropolitan Police Force 'on one occasion within one month of the date hereof, to enter, if need be by force, premises at . . . . . ' but no address is filled in along that dotted line. Fourth, it continues '. . . accompanied by Dr A.N. Forrest, Consultant Psychiatrist, Mrs H.

C'Arcomo-Morley, an approved social worker, and Dr D.V.P. Thomas, a Medical Practitioner' The typed form left gaps for the approved social worker and a Medical Practitioner to be named. The warrant itself went even further and named two doctors, one of them a consultant psychiatrist at the hospital to which Mrs Ward was taken.

16. In the afternoon of 24 July 1997, an approved social worker, Mrs M C'Arcomo-Harley attended at Mrs Ward's address with a Dr Frances from Dr Forrest's team at the hospital, but not with Dr Thomas. Dr Thomas was Mrs Ward's general practitioner, who had known her for a long time and was also familiar with the context of marital breakdown in which these events occurred. Mrs Ward locked herself in her car, but Police Constable Welch gained access to the car and eventually Mrs Ward was taken to Sutton Hospital in an ambulance. She remained there until the following day when she was interviewed by Dr Thomas, who concluded that there was no reason for her to be detained in hospital. He later wrote to Mrs Ward stating that whenever he had seen her in the years since 1993 he had 'never found her to have a psychiatric problem but considered that there was considerable marital disharmony'.

17. Mrs Ward brought an action for false imprisonment against the Metropolitan Police Commissioner and the relevant NHS Trust. The Particulars of Claim, drafted by counsel, alleged that her removal and later detention were unlawful for two reasons: first, because the police officer was not accompanied by Dr Thomas and second, because the warrant did not specify the premises which the officer was entitled to enter. There was no separate claim in negligence against anyone involved. There was no claim that the information resulting in the warrant should never have been laid. Accordingly, we are not in a position to make any comment about that. The Particulars of Claim did allege that the police officer had acted without reasonable care; but this was because section 139(1) of the 1983 Act provides that no person shall be liable to any civil proceedings in respect of any act 'purporting to be done in pursuance of' that Act 'unless the act was done in bad faith or without reasonable care'; this does not apply to an NHS Trust: s 139(4). Section 139(2) required her to obtain the leave of a High Court judge in order to sue the police and this was granted by Smedley J in November 1999. No leave was required to sue the NHS Trust and at first they took no steps to defend the action, seeking instead to come to some agreement with Mrs Ward. Judgment in default was entered against them on 30 June 2001.

18. When the case eventually came on for trial before Mr Recorder Layton QC on 21 October 2002, Mrs Ward was acting in person. It was agreed that the issue of the lawfulness of the warrant and its execution be tried first, before any of the evidence was heard, because if the warrant and its execution were lawful, there was no false imprisonment and thus on the pleaded case there could be no liability. The Recorder held that the warrant was lawful, because it sufficiently identified the address to be entered. He also held that it was lawfully executed, because, as he read it, it authorised but did not require the officer to take the named doctors with him. This meant that the detention in hospital was also lawful. He therefore set aside the default judgment against the NHS Trust.

19. Before the Court of Appeal Mrs Ward had the benefit of counsel instructed by the Bar Pro Bono Unit. On 30 July 2003, the Court of Appeal ([2003] EWCA Civ 1152) allowed her appeal on the second point (relating to who had gone with the police officer to execute the warrant). There was an implied power for the magistrate to impose 'any condition which can sensibly relate to the execution of a warrant in a way which protects the interests of the person liable to be removed whilst furthering the object of the grant of the warrant' (para 15). The conditions imposed had not been complied with and the removal was unlawful. Hence they remitted the case for a determination of the merits of the claim for damages. The NHS Trust now appeal to this House.

20. The simple issue is whether the magistrate had power to identify the professionals who were to accompany the police officer in the execution of the warrant. If he had, it is common ground that the warrant was unlawfully executed and thus that Mrs Ward's removal to and detention in hospital were unlawful. If he had not, it is also common ground that the names were surplusage and the requirements of the section were complied with. Several factors point strongly to the conclusion that on its true construction section 135 contains no such power.

21. First, the statutory history indicates a progressive relaxation of the requirement to name names in the warrant. The origins of section 135(1) can be found in section 15(2) of the Mental Deficiency Act 1913, dealing with people with a mental disability. There was no exact equivalent in the Lunacy and Mental Treatment Acts, dealing with people who were mentally ill. It has always been and remains necessary to name the premises to be entered. General warrants are not allowed. It has never been necessary to name the patient, for the obvious reason that

in the circumstances contemplated by paragraph (a) or (b) of section 135(1) the patient may be completely unknown to the authorities. But section 15(2) of the 1913 Act did require that the constable and doctor be named. (Duly authorised officers, the forerunners of today's approved social workers, had their own powers to take defectives to a place of safety and to admit mentally ill patients to hospital without medical advice.) When mental health law was fundamentally recast in the Mental Health Act 1959, section 15(2) of the 1913 Act was adapted to cater for all forms of mental disorder. There was no longer any requirement to name the doctor but it remained necessary to name the constable. That last requirement was removed by the Police and Criminal Evidence Act 1984 (PACE), s 119, Sched 7 and Sched 6, para 26.

22. Second, if, when retaining the requirement to name the constable, while removing the need to name the doctor, Parliament had wished to include the power to name the professionals, it would have been simple to say so. But nothing in the section itself, or elsewhere in the 1983 Act, gives the magistrate power to impose conditions in the warrant or to name the professionals to be involved in its execution. Nor is there any equivalent of section 12(2), which prescribes the qualifications but not the identity of the doctors who make recommendations for compulsory admission to hospital. There is thus no requirement that the doctor who accompanies the police officer either knows the patient or has specialist expertise in mental health.

23. Third, as a general principle, there can be implied into a statutory power such incidental powers as are necessary for its operation: see Bennion, *Statutory Interpretation*, 4th edition, section 174. Thus a magistrate's power to order the detention of someone who wilfully interrupted the proceedings of the court included 'all incidental powers necessary to enable the court to exercise the jurisdiction in a judicial manner', specifically the power to direct that the person be brought before him: see *Bodden v Commissioner of Police of the Metropolis* [1990] 2 QB 397. In section 135(1), for example, the power to enter the premises in question must also include the power to search those premises in order to find the person believed to be suffering from mental disorder. It would be ridiculous to give the police officer power to break down the door to get into the premises but not the power to search them once he was inside. Section 135 is headed 'warrant to search for and remove patients'. It may also be that the police officer can authorise others, such as the ambulance service or an approved social worker, to transport the person to the place of safety rather than doing it himself.

24. Fourth, the issue here is not what can be implied into the constable's power to execute the warrant, but what can be implied into the magistrate's power to grant it. It is not sufficient that such a power be sensible or desirable. The implication has to be necessary in order to make the statutory power effective to achieve its purpose. That simply cannot be said here. The main purpose of section 135(1) is to enable access to be gained in order to make proper arrangements for the treatment and care of someone who is believed to be suffering from mental disorder and suspected of being ill-treated, neglected, out of control or unable to care for herself alone. These are potentially very vulnerable people. The object is to protect them from harm. Far from its being necessary to limit the powers granted by the warrant in this way, that purpose is more likely to be achieved if the powers are not cut down by insisting that named people be present, or by allowing the magistrate to impose other limitations, however 'sensible' they may seem at the time. It may take some time before the warrant can be executed. It may not be possible to assemble the named professionals when it can. A doctor, for example, may go off duty at a particular time but another may take his place. Social services may have a day roster and an out of hours duty team. If there is indeed reasonable cause to suspect that a person is being ill-treated or neglected or is out of control, it makes little sense to delay efforts to protect her until the named professionals are back on duty.

25. Fifth, although principally intended for the protection of the person concerned, the warrant does authorise a substantial interference with her civil liberties. The Court of Appeal called it draconian. The presence of a doctor and social worker is required at least in part so that a person is not removed to a place of safety when they judge that the basis upon which the warrant was granted is not made out. That purpose is assisted if either of them knows the case well or if the doctor is skilled and experienced in mental health. But it cannot be said that it is necessary for the proper functioning of the section that this be so. The prospective patient's civil liberties would be arguably better protected by the professionals' duty to exercise reasonable care and skill in making the judgments they are there to make.

26. Sixth, for the purpose of deciding this case, it is not necessary to consider whether the power to impose other conditions, in particular a time limit, can be implied. Unlike an application for compulsory admission to hospital under sections 2, 3 or 4, section 135 contains no express time limit within which the warrant must be executed: cf s 6(1). The desirability of having such a time limit weighed heavily with the Court of Appeal. People should not be deprived of their liberty on the

basis of stale information. In mental health cases, where the conditions and circumstances of the person concerned may rapidly change, the object is always to try and benefit the sufferer rather than to dwell on the past. But it is possible that section 135 is covered by the safeguards contained in sections 15 and 16 of PACE.

27. There are several good reasons for thinking this. The safeguards apply to 'the issue to constables under any enactment . . . of warrants to enter and search premises': PACE, s 15(1). Although, as already seen, section 135 contains no express power to search, this must be implied. Sections 15 and 16 are expressed to apply to any such power 'under any enactment'. Section 135 was clearly in the minds of the draftsman and legislature when the 1984 Act was passed, as it was amended to enable any constable to execute the warrant. Sections 15 and 16 introduce some sensible safeguards, such as the need for the information to be in writing, a time limit of one month from grant, the limitation to only one attempt at execution, and the insistence on copies and records. Furthermore, by making provision in section 15(2) and (4) for what is to happen if a constable applies for a warrant, the section might be thought also to be contemplating warrants applied for by others, such as the approved social worker in this case. There appears to be no obvious policy reason why sections 15 and 16 should not apply to these warrants. For what it is worth, the proposed successor to section 135 in clause 227 of the draft Mental Health Bill 2004 expressly refers to the application of PACE to this power. If sections 15 and 16 do apply, there is no need to imply a power to impose a time limit into section 135 itself. I therefore incline to the view, previously expressed by Richard Jones in his *Mental Health Act Manual*, 8th edition, 2003, para 1-1183, that these sections do apply. However, the warrant in this case was executed within the month prescribed in section 15 and stated on the face of the warrant and it is unnecessary for us to reach a final conclusion on the point.

28. There are many reasons, however, to conclude that it is not permissible to imply into section 135 of the Mental Health Act 1983 a power to insist that named professionals are there when the police officer executes the warrant. This means that the names in the warrant were surplus to requirements and thus had no effect on the legality of the warrant or of its execution.

29. I would therefore allow this appeal and dismiss the claim against both defendants. However, I would make no order for costs against Mrs Ward either in this House or in the courts below. Mr Pleming QC, on

behalf of the NHS Trust, very properly accepts that this is the proper order. The Trust was not unsympathetic to the position in which Mrs Ward had found herself, but brought the appeal to this House because of its importance for the practical working of the law. It is enough both for them and for the police that they should have achieved the interpretation of the law which they sought.

LORD CARSWELL

My Lords,

30. I have had the advantage of reading in draft the opinion prepared by my noble and learned friend Baroness Hale of Richmond. For the reasons which she has given I would allow the appeal and dismiss the claim against both defendants.