Neutral Citation Number: [2018] EWCA Civ 2852

Case No: C1/2017/3082

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
QUEEN'S BENCH DIVISION, ADMINISTRATIVE COURT
Ms Dinah Rose QC (sitting as a Deputy High Court Judge)
[2017] EWHC 2311 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/12/2018

Before:

LORD JUSTICE BEAN
LORD JUSTICE LEGGATT
and
LORD JUSTICE HADDON-CAVE

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Between:

THE QUEEN on the application of CXF (acting by his mother and litigation friend)	**Appellant/ Claimant**
- and -	
(1) CENTRAL BEDFORDSHIRE COUNCIL **(2) NHS NORTH NORFOLK CLINICAL COMMISSIONING GROUP**	**Respondents / Defendants**

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Ian Wise QC and **Shu Shin Luh** (instructed by **Campbell-Taylor Solicitors**) for the **Appellant**
Mike O'Brien QC and **Varsha Jagadesham** (instructed by **LGSS Law**) for the **First Respondent**
Eleanor Grey QC and **Peter Mant** (instructed by **Capsticks Solicitors LLP**) for the **Second Respondent**
Amanda Weston QC and **Michael Henson-Webb** made written submissions on behalf of **MIND** as **Intervenor**

Hearing date: 5 December 2018

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Approved Judgment

Lord Justice Leggatt:

1. This appeal raises a question of interpretation of section 117 of the Mental Health Act 1983 (the "Act"), which imposes a duty to provide "after-care" services to persons who are detained under the Act and then "cease to be detained and … leave hospital". The question is whether this duty applies to a person granted leave of absence from hospital under section 17 of the Act to go on a day trip in the custody of hospital staff.

The statutory framework

2. I will identify the provisions of the Act directly relevant for present purposes before summarising the facts.

3. Section 117 is headed "after-care" and makes provision for "after-care services". By section 117(2), it is the duty of the clinical commissioning group and "local social services authority" to provide, or arrange for the provision of, after-care services for any person to whom section 117 applies until such time as they are satisfied that the person concerned is no longer in need of such services. For this purpose, the relevant clinical commissioning group and local social services authority are specified by section 117(3) as those:

> "(a) if, immediately before being detained, the person concerned was ordinarily resident in England, for the area in England in which he was ordinarily resident;
>
> …; or
>
> (c) in any other case for the area in which the person concerned is resident or to which he is sent on discharge by the hospital in which he was detained."

4. "After-care services" are defined in section 117(6) as services which have both of the following purposes:

> "(a) meeting a need arising from or related to the person's mental disorder; and
>
> (b) reducing the risk of a deterioration of the person's mental condition (and, accordingly, reducing the risk of the person requiring admission to a hospital again for treatment for mental disorder)."

5. By section 117(1):

> "This section applies to persons who are detained under section 3 above … and then cease to be detained and (whether or not immediately after so ceasing) leave hospital."

It is the meaning of the final words of this provision which is at the centre of this dispute.

6. It is not disputed that the claimant in this case falls within the opening words of section 117(1), as he is a person who is detained under section 3 of the Act. Section 3 provides that a patient may be admitted to a hospital and detained there for treatment in pursuance of an application made in accordance with that section.

7. Under section 6 of the Act, a duly completed application for the admission of a patient to a hospital for treatment under section 3 is sufficient authority to convey the patient to the hospital and, where the patient is in the hospital, "for the managers to detain the patient in the hospital in accordance with the provisions of this Act": see section 6(2).

8. Section 17 of the Act is concerned with leave of absence from hospital. Pursuant to section 17(1):

> "The responsible clinician may grant to any patient who is for the time being liable to be detained in a hospital under this Part of this Act leave to be absent from the hospital subject to such conditions (if any) as that clinician considers necessary in the interests of the patient or for the protection of other persons."

By section 17(2), such leave of absence may be granted to a patient "either indefinitely or on specified occasions or for any specified period." Section 17(3) gives the responsible clinician power to direct that the patient remain in custody during his absence and provides that:

> "where leave of absence is so granted, the patient may be kept in the custody of any officer on the staff of the hospital, or of any other person authorised in writing by the managers of the hospital …"

Section 17(4) confers a power to revoke the leave of absence and recall the patient to the hospital where it appears to the responsible clinician that it is necessary so to do in the interests of the patient's health or safety or for the protection of other persons.

The facts

9. The claimant (who is also the appellant) was born on 10 August 1998 and was therefore 18 years old when he commenced this claim in November 2016. He has been diagnosed with autistic spectrum disorder, severe to profound learning disabilities, speech and language impairment and attention deficit hyperactivity disorder. Since 22 June 2016, the claimant has been detained as a patient for the purposes of treatment under section 3 of the Act. Because of his complex needs and challenging behaviour, there are a limited number of specialist residential placements at which suitable treatment is available. This has resulted in his being detained since 4 July 2016 at Cawston Park Hospital in Norfolk, which is a long way (120 miles) from his family home in Bedfordshire.

10. Since August 2016, the claimant has been granted daily leave of absence from the hospital under section 17 of the Act by the clinician responsible for his care to go on bus trips. These bus trips have taken place up to three times a day. It is a condition of his leave of absence on these trips that the claimant is escorted on each occasion by

two members of hospital staff. The purposes of the leave of absence are stated on the forms granting it to be leisure, treatment, and relaxation.

11. Once a week, the claimant's mother makes the long journey from her home in Bedfordshire to visit him, and back, travelling by car. During her visits, she accompanies her son on his bus trips and helps him to engage in a variety of activities including shopping, walks on the beach and visits to a local aviation museum and a local dinosaur park. Although there is some dispute as to the importance of his mother's presence on the trips, it is not disputed that the bus trips, the associated activities and the claimant's face-to-face contact with his mother are all therapeutically beneficial to him.

12. As found by the judge, the cost of the weekly visits made by the claimant's mother is, for her, substantial and causes her real financial hardship. Until the claimant's 18th birthday, the expenses were reimbursed by the first respondent under section 17 of the Children Act 1989 as part of the assistance provided to the claimant as a child "in need". This funding ceased, however, when the claimant turned 18 and, since then, his mother has had to bear the costs of visiting him herself from her own social security benefits.

The proceedings

13. In these proceedings the claimant seeks judicial review of the refusal of each of the defendants (and respondents to this appeal) to fund his mother's travel costs under section 117 of the Act. The first respondent is the local authority for the area in Bedfordshire where the claimant's family home is situated and where he was ordinarily resident before he was detained under section 3 of the Act. The second respondent is the clinical commissioning group for the area of Norfolk in which the hospital is located. Neither respondent is funding the cost of the care and treatment which the claimant is receiving at Cawston Park Hospital. That is being funded by the NHS Bedfordshire Clinical Commissioning Group, which is the clinical commissioning group for the area in which his family home is situated. The NHS Bedfordshire Clinical Commissioning Group was originally a party to these proceedings but the claim against it was subsequently discontinued.

14. The respondents both deny that section 117 of the Act is applicable in this case. In addition, the second respondent contends that, if there is a duty under section 117 to provide after-care services to the claimant, the duty falls on the NHS Bedfordshire Clinical Commissioning Group jointly with the first respondent, and not on the second respondent.

The issues

15. The first issue raised by the claim, and the main issue raised on this appeal, is whether, when he goes on an escorted day trip for which he is granted leave of absence under section 17, the claimant is a person to whom section 117 of the Act applies. This depends on whether, when he goes on such trips, the claimant "ceases to be detained and … leaves hospital" within the meaning of section 117(1).

16. If that issue is decided in the claimant's favour, further issues arise as to: (1) whether the after-care services which there is a duty to provide under section 117 may in

principle require the provision of funding to cover the transport costs incurred by the claimant's mother; (2) if so, whether there is a duty to provide such funding on the facts of this case; and (3) if so, whether the duty falls on the first and second respondents jointly or (as the second respondent argues) on the first respondent jointly with the NHS Bedfordshire Clinical Commissioning Group.

The decision of the High Court

17. In her judgment given on 15 September 2017, Ms Dinah Rose QC, sitting as a Deputy High Court Judge, decided that the claimant is not a person to whom section 117 applies in this case because, on the facts, he remains at all times detained in the hospital and has not "ceased to be detained" nor "left hospital", even when he is on leave of absence under section 17. The judge reached that conclusion on the basis of the wording of section 117 and its purpose, which she identified as being to ensure that patients are provided with appropriate support and services (including accommodation and social care) after they cease to be under the care of a detaining hospital. The judge considered that this purpose, and section 117, are not applicable in circumstances where (as in the present case) the patient has not been discharged from hospital and remains at all times in the full-time residential care and custody of the hospital and its staff but is simply being permitted to take a short trip outside the hospital grounds.

18. In the light of this conclusion, the other issues did not arise and the judge expressed no opinion on them except to say that, had she found that the duty under section 117 was triggered, she would have required the decision to refuse funding to be reconsidered, specifically addressing the test under section 117(6). As it was, the claim for judicial review was dismissed.

Statutory interpretation

19. As I have indicated, the main issue on this appeal is one of statutory interpretation. Given its prevalence and importance, the interpretation of statutes is a much neglected area of the law. The same was once true of the interpretation of contracts. In the last 20 years, however, the principles applicable to the interpretation of contracts have been considered in a series of cases by the House of Lords and Supreme Court. Many legal scholars have also written on the subject. It is now common practice for advocates when making submissions on points of contractual interpretation to identify the applicable principles and cite authority for them (even when they are well-known). The same cannot at present be said of statutory interpretation. As Sir Philip Sales observed in an address to the Society of Legal Scholars in 2016:

> "Most of the law which the courts are called on to apply is statutory. Yet statutory interpretation languishes as a subject of study. For the most part, law students are expected to pick it up by a sort of process of osmosis."

Moreover, cases in which the applicable principles of statutory interpretation have been considered by the UK's highest court in recent years are comparatively few, and they are not well-known. It is likewise unusual for authority to be cited when questions of statutory interpretation arise – the present case being no exception.

20. The lack of attention to this subject was highlighted by Professor Andrew Burrows in his 2017 Hamlyn Lectures. In the first of those lectures Professor Burrows gave a helpful summary of the present English law on statutory interpretation. He showed that the modern emphasis is on a contextual approach designed to identify and give effect to the purpose of the statute: see e.g. *Inland Revenue Commissioners v McGuckian* [1997] 1 WLR 991, 999 (Lord Steyn); *R v Secretary of State for the Environment, Transport and the Regions, ex parte Spath Holme Ltd* [2001] 2 AC 349, 397 (Lord Nicholls); *R v (Quintavalle) Secretary of State for Health* [2003] UKHL 13; [2003] 2 AC 687, paras 8 (Lord Bingham) and 21 (Lord Steyn). The governing principle was succinctly stated by Toulson LJ in *An Informer v A Chief Constable* [2012] EWCA Civ 197; [2013] QB 579, para 67, when he said:

> "Construction of a phrase in a statute does not simply involve transposing a dictionary definition of each word. The phrase has to be construed according to its context and the underlying purpose of the provision."

21. The relevant context of a statutory provision is both internal and external to the statute. The internal context requires the interpreter to consider how the provision in question relates to other provisions of the same statute and to construe the statute as a whole. The external context includes other relevant legislation and common law rules, as well as any policy documents such as Law Commission Reports, reports of Parliamentary committees, or Green and White Papers, which form part of the background to the enactment of the statute. When the strict conditions specified by the House of Lords in *Pepper v Hart* [1993] AC 593 are satisfied, reference may also be made to Parliamentary debates as reported in Hansard.

Status of the code of practice

22. A particular question arising on this appeal is whether, in interpreting the Act, it is relevant and legitimate to have regard to the contents of a code of practice prepared by the Secretary of State and issued under section 118 of the Act. Section 118 requires this code and any alteration to it to be laid before Parliament before it takes effect and to be withdrawn if subject to a negative resolution of either House.

23. Counsel for the claimant have sought to rely on certain provisions of the code of practice to support their interpretation of section 117. They did not identify any legal principle which permits such a code of practice to be used as an aid to interpreting the Act of Parliament under which it is issued. As authority for its status they relied on *R (Munjaz) v Mersey Care NHS Trust* [2005] UKHL 58; [2006] 2 AC 148, paras 20-21, where the House of Lords held that the code issued under section 118, although it does not have binding effect and is not instruction, contains guidance which any hospital authority should consider with great care and from which it should depart only if it has cogent reasons for doing so. However, the question in the *Munjaz* case was what weight a hospital authority should give to the code of practice when deciding how to exercise a function under the Act. There is nothing in the judgment of the House of Lords which suggests that the code can legitimately be treated as guidance on what the language of the Act itself means.

24. Both in principle and on authority, it cannot be used for this purpose. Its position is analogous in this respect (and certainly not superior) to that of statutory regulations or

other delegated legislation made under an Act of Parliament. Such regulations can only be used as an aid to the interpretation of the Act under which they are made if they were contemporaneously prepared, so that the draft regulations formed part of the background against which Parliament was legislating. As Cranston J explained in *Legal Services Commission v Loomba* [2012] EWHC 29 (QB); [2012] 1 WLR 2461 at para 51:

> "That accords with constitutional principle. If Parliament, in passing a Bill, knows of the putative regulations to be made under it when enacted, the Parliamentary intention behind the Bill is formed with that background knowledge. The regulations are thus a reliable guide to the meaning of the Act. Later regulations made under the Act will be formulated by the executive. If Parliament has a role in relation to them it will be to approve or reject them as a whole. By exercising the power delegated by Parliament to make such regulations, the executive can in no way alter the intention behind the enabling Act. Those regulations made by the executive can have no bearing on what an Act means."

25. The same is true of the code of practice issued under section 118 of the Mental Health Act 1983. The code was originally prepared in 1999 and was revised in 2008 and 2015. It therefore cannot be used to construe section 117(1) of the Act, which is part of the original text.

The claimant's case

26. As advanced by Mr Ian Wise QC, the claimant's case on the meaning of section 117(1) of the Act was based on two propositions. First, Mr Wise submitted that, when the Act is read as a whole, it can be seen that the word "detained", as it is used in the Act, means detained *in a hospital*. Second, he submitted that a person cannot at the same time be detained in a hospital and absent from that hospital. A person absent from a hospital may be "liable to be detained" in the hospital (a phrase also used in the Act) but, simply as a matter of language, a person cannot be said to be detained in a hospital unless he or she is physically present on the hospital premises (and prevented from leaving the premises).

27. Mr Wise supported the first of these propositions by reference to the wording of section 3(1), which provides that a patient "may be admitted to a hospital and *detained there*" (emphasis added) in pursuance of an application for admission for treatment. It is clear from this wording, he submitted, that the authority conferred by an application for admission for treatment under section 3 is an authority to detain a patient in a specified hospital, and nowhere else. This is confirmed by the wording of section 6(2), which provides that the application "shall be sufficient authority for the managers to detain the patient *in the hospital* in accordance with the provisions of this Act" (emphasis added).

28. It follows, Mr Wise submitted, that, where a patient is granted leave of absence from hospital under section 17, the patient during such absence is not "detained". This is so however long or short the period of absence and even if the patient remains in custody during his absence pursuant to a direction to that effect made under section

17(3). Indeed, Mr Wise submitted that the use of the expression "remain in custody" rather than "remain detained" in section 17(3) provides further confirmation that a patient absent from hospital on leave, even if still deprived of his liberty during his absence, is not "detained" within the meaning of the Act.

29. Turning to section 117 itself, Mr Wise submitted that the word "detained" in section 117(1) must be understood in the same sense as elsewhere in the Act such that, whenever a patient who is detained in a hospital leaves the hospital premises pursuant to a leave of absence granted under section 17, the patient thereupon "ceases to be detained". He submitted that the patient likewise "leaves hospital" in the ordinary meaning of that phrase. Mr Wise suggested, plausibly, that the reason why both expressions are used is that a person detained in a hospital may cease to be liable to be detained (because the authority for their detention expires or an order is made for their discharge) but may nevertheless remain in hospital as a patient voluntarily. It is not intended that the duty to provide after-care services under section 117 should apply to such a person while he or she remains in hospital.

30. Applying this interpretation to the present case, Mr Wise submitted that the claimant is a person to whom section 117 applies during the periods that he is absent from hospital on day trips and that the services provided to him in taking him on such trips are "after-care services" provided under section 117.

31. The court was not persuaded by these submissions and did not find it necessary to call on counsel for the respondents to answer them. For the following reasons, they do not in my view call in question the essential reasoning and conclusion reached by the judge.

The statutory language

32. I accept the starting point of the claimant's argument that the term "detained" as it is generally used in the Act refers to detention in a hospital. This is confirmed by the recent decision of the Supreme Court in *MM v Secretary of State for Justice* [2018] UKSC 60; [2018] 3 WLR 1784, which held that there is no power under the Act to impose a condition of detention in a place which is not a hospital (save for the emergency powers under sections 135 and 136 to detain a person at a place of safety). But I do not accept that, as a matter of language, it is inappropriate to describe a patient who is permitted to leave the hospital premises to go on a short escorted trip and then return as a person who is still "detained" in the hospital. That description may reasonably be used to refer to the person's general situation, even if the person is not confined within the hospital premises at all times.

33. That the term "detained" not only can be but is actually used in the Act in this more general sense is confirmed by the decision of the Court of Appeal in *R v Barking Havering and Brentwood Community Healthcare NHS Trust, ex parte B* [1999] 1 FLR 106. In that case the appellant had been granted leave of absence to stay away between Thursday and Monday each week from the hospital in which she was detained. The question arose whether the authority to detain the appellant under section 3 for treatment could be renewed under section 20 of the Act. The procedure for such renewal under section 20(3) requires the responsible clinician to furnish to the managers of "the hospital where the patient is detained" a report certifying that certain conditions are satisfied. One of these conditions, specified in section 20(4)(c),

is that the patient requires treatment in a hospital which cannot be provided "unless he continues to be detained." It was argued in the *ex parte B* case that these requirements were not met because, on the day when the responsible clinician furnished a report, the appellant was absent from the hospital on leave and was therefore not "detained" for the purpose of these provisions.

34. The Court of Appeal rejected that argument. Lord Woolf MR, with whose judgment Hobhouse and Thorpe LJJ agreed, said (at 114):

> "It is to the managers of the hospital where the 'patient is detained' that the report is to be furnished. However, I do not find it inappropriate to describe the hospital of a patient who is on leave in this way. As Mr Grey submits the detention does not have to be continuous, as s.17 makes clear, but even when on leave the patient still has a hospital at which he is detained when not on leave. Equally, he will for the purpose of s.20(4) continue to be detained whether when the report is furnished he is in hospital or liable to be required to return to the hospital."

In so far as a different view had been expressed by McCullough J in *R v Hallstrom, ex parte W; R v Gardner, ex parte L* [1986] QB 1090, that case was held to have been wrongly decided.

35. I am not suggesting that the decision in the *ex parte B* case determines what is meant by the phrase "cease to be detained" in section 117(1) of the Act. But it does show that the term "detained" is capable of being used, and is used in at least one place in the Act, to encompass a person who is on leave of absence under section 17 from the hospital in which he or she is detained.

36. I also think it wholly unrealistic to suggest, as Mr Wise QC sought to do, that the expression "leave hospital" in section 117(1) necessarily applies to any absence from the hospital premises, irrespective of its length or nature. As Haddon-Cave LJ pointed out in the course of argument, there is a distinction in ordinary speech between the expressions "leave hospital" and "leave *the* hospital" (with a definite article). I agree with the judge when she said at para 40(2) of her judgment:

> "As a matter of ordinary language, the phrase 'left hospital' is commonly used to refer to discharge from the care of a hospital, rather than simply leaving the premises for any period of time or any reason. If one person asks another 'have you left hospital yet?' they are not asking whether they have gone outside for a shopping trip. I note that, by contrast, s.17(4) refers to a patient on leave as 'absent from a hospital'. In short, a person may be 'absent from a hospital' (e.g. to go on a short trip outside the grounds), without having 'left hospital'."

37. Again, I would not go so far as to say that is impossible to use the phrase "leave hospital" in the narrow sense contended for by counsel for the claimant. But it is a perfectly ordinary and natural use of language to say that a patient who is allowed to leave the hospital in which he is detained to go on a short trip in the custody of hospital staff is not a person who has "left hospital".

The purpose of section 117

38. As discussed, in interpreting a statutory provision it is not sufficient to consider the ordinary meanings of the words used and how the same words are used elsewhere in the Act: it is necessary to identify the purpose of the provision, read in its context. The clear purpose of section 117 is to arrange for the provision of services to a person who has been, but is not currently being, provided with treatment and care as a hospital patient. That purpose is implicit in the very expression "after-care", which is used not only in the heading but throughout the body of section 117 in the phrase "after-care services". It is further articulated by the definition of "after-care services" in section 117(6). As specified in section 117(6)(b), to constitute after-care services, the services must have the purpose of "reducing the risk of a deterioration of the person's mental condition (and, accordingly, reducing the risk of the person requiring admission to a hospital again for treatment for mental disorder)." That purpose is only capable of being fulfilled if the person concerned is not currently admitted to a hospital at which he or she is receiving treatment for mental disorder.

Leaves of absence

39. Interpreting section 117(1) in the light of this purpose, I readily accept that there will be cases in which a patient granted leave of absence from hospital under section 17 does "cease to be detained" and "leave hospital" within the meaning of section 117(1) so as to become eligible to receive after-care services during the period of their absence. I would also accept the submission made by Mr Wise QC that it is not necessary in order to trigger section 117 that the person concerned should have been "discharged" from hospital in either of the two senses, discussed in the *MM* case at paras 19-20, in which that term is used in the Act. I see no reason why section 117 should not apply to a person who is living in the community on leave of absence – either full-time or for part of the week like the claimant in the *Barking* case – without having been conditionally discharged from hospital under section 42(2) or 73(2) of the Act, let alone "absolutely" discharged from the liability to be detained.

40. This is illustrated by *R v Richmond London Borough Council, ex parte Watson* (1999) 2 CCLR 402. The principal issue in that case was whether the four claimants who had each been discharged from hospital and provided with residential accommodation by a local authority fell within section 117(1). Sullivan J held that they did. There was a period during which one of the claimants had moved into residential accommodation on a trial basis. During this period he was on leave of absence under section 17 and had not yet been discharged. On the question whether section 117 applied to this claimant whilst he was on leave, the judge said (at 417):

> "In my view, this section is dealing with a practical problem: what after care is to be provided for a patient who has suffered from mental illness requiring inpatient treatment when he actually leaves hospital? A person on leave under section 17 is in just as much, if not more, need of care when he leaves hospital as a person who leaves hospital subject to guardianship or supervision. For the purposes of section 117, he has ceased to be detained, and left hospital. It would be remarkable if, in such circumstances, there was no duty to provide him with after care under section 117, even though it would almost certainly

> have been a condition of his being given leave that he should reside in particular accommodation."

41. These observations must, however, be understood by reference to the factual situation with which Sullivan J was concerned. He was addressing the situation of a person who was living in residential accommodation in the community, although still on leave of absence under section 17 and therefore subject to the possibility of recall to hospital. It is plain that the judge was not considering a case of the present kind of a patient who, while resident at and in the care of a hospital, is granted leaves of absence to go on day trips in the custody of one or more members of the hospital staff.

The present case

42. On the facts of the present case there is neither any need nor any scope for the claimant to be provided with "after-care services". As he remains in the care of the hospital and its staff even when he goes on the bus trips for which he is granted leave of absence, no question or possibility of "after-care" arises. Nor can it possibly be said in these circumstances that any services provided to the claimant during the trips have the purpose of "reducing the risk of the person requiring admission to a hospital again for treatment for mental disorder", as required by section 117(6)(b). This is not and could not be their purpose because the claimant's return to the hospital at the end of each trip is not a risk which it is the aim of the trip to reduce: it is inevitable, being one of the terms on which leave of absence is granted. In any case, the claimant does not require "admission to a hospital again for treatment" at the end of each trip, as I interpret those words, as he has remained admitted to the hospital for treatment throughout the trip. I would accept that the phrase "admission to a hospital" as it is used in section 117(6), like the phrase "leave hospital" in section 117(1), has to be read in light of the purpose of the provision, and is capable of applying to a person living in the community on leave of absence who is then recalled to hospital. But there is no basis in either the language or the purpose of section 117(6)(b) for regarding a person who returns from a trip during which he has never left the custody of hospital staff as requiring re-admission to the hospital for treatment. That is all the more so when, as noted earlier, one of the very purposes of the leaves of absence granted to the claimant in this case, recorded on the forms signed by the responsible clinician, is "treatment". In other words, the trips are part of the treatment which the hospital is providing to the claimant. Accordingly, the services provided to the claimant in taking him on escorted day trips do not and cannot constitute "after-care services" within the meaning of section 117.

43. Mr Wise sought to avoid this conclusion by suggesting that, even though the claimant is still in the care of the hospital, one of the purposes of the day trips is to reduce the risk that, when he is in future well enough to live in the community, his condition will then deteriorate and, accordingly, require his admission to hospital again for further treatment. That suggestion seems to me completely unreal. The purpose of the treatment which the claimant is currently receiving from the hospital is to bring about an improvement in his condition which will enable him to leave hospital and live in the community. It is not to reduce the risk of a deterioration from a state of health which has not yet been achieved.

44. The inescapable conclusion is that the claimant does not "cease to be detained" or "leave hospital" within the meaning of section 117(1) when he is escorted on day trips

and is therefore not a person to whom section 117 applies. Moreover, even if this were wrong, I think it clear that the services provided during the trips do not constitute "after-care services" within the meaning of section 117(6) because it is not their purpose to reduce the risk of the claimant requiring admission to a hospital again for treatment for mental disorder; they are part of the treatment which he is currently receiving as a hospital patient. The claimant has at all times remained in the hospital's care.

45. No doubt is cast on this conclusion by the recent decision of the Supreme Court in *MM v Secretary of State for Justice* [2018] UKSC 60; [2018] 3 WLR 1784, from which counsel for the claimant sought to derive some assistance. In paras 18 and 36 of the judgment, Lady Hale refers to the distinction drawn in the Act between being detained and being "liable to be detained". At para 36 she said:

> "A patient who is granted leave of absence and a conditionally discharged restricted patient remain liable to be detained but are not in fact detained under the [Act] (at least unless the responsible clinician has directed that a patient given leave of absence remain in custody, under section 17(3))."

The scope of section 117 was not in issue in the *MM* case and these remarks were not directed to the scope of that section. Nor can they reasonably be understood as an attempt exhaustively to define the circumstances in which a patient granted leave of absence is not detained under the Act during their period of absence. In any event in the passage quoted Lady Hale expressly identifies an exception where the responsible clinician has directed that a patient given leave of absence remain in custody under section 17(3). That of course is precisely this case.

Disposition of the claim and the appeal

46. For these reasons, the judge was correct to dismiss the claim on the ground that section 117 has no application in this case and the claimant's appeal must therefore also be dismissed.

47. On this basis the other issues potentially raised by the claim do not arise. In particular, it is unnecessary to decide whether, if there were a duty to provide "after-care services" under section 117, the clinical commissioning group on which that duty would fall jointly with the local authority would be the second respondent or, as the second respondent argues, the NHS Bedfordshire Clinical Commissioning Group. It is also undesirable to express any view on that question in circumstances where the NHS Bedfordshire Clinical Commissioning Group is not now a party to the proceedings and has therefore not had an opportunity to make submissions on the point.

48. I would, however, add that, even if the claimant had been a person to whom section 117 applies and even if the services provided to him when he is taken on day trips were capable of constituting "after-care services", it is very difficult to see how this could possibly have enabled the claimant's mother to recover her travel costs. I do not for a moment doubt that her visits to see her son and accompany him on trips are of real benefit to him. But she makes those visits as his mother and there is no suggestion in the evidence that she is (or that there is any basis for requiring her to be)

authorised to provide any services on behalf of any clinical commissioning group or local authority.

49. I do not underestimate the financial hardship which the claimant's mother has endured in order to meet the cost of travelling to see her son each week. It is impossible not to feel sympathy and admiration for the sacrifice she has made in spending money which she needs to support herself in order devotedly to make this long journey. However, the financial burden would be just as great whether or not she accompanied her son on bus trips during these visits. The cause of the hardship is not the trips but the fact that the hospital in which the claimant is being treated is so far from where his mother lives. It was therefore gratifying for the court to be told on the day before the hearing that arrangements are being made to move the claimant to a residential placement much nearer to his family home. We were informed that this is expected to occur early next year. Whilst that prospect did not provide a good reason, as Mr O'Brien QC for the first respondent attempted to suggest at the start of the hearing, for this court to decline to hear the appeal (particularly after all or almost all the costs had been incurred), it does address the practical difficulty which prompted these proceedings.

The intervenor's submissions

50. There is a further matter on which I think it necessary to comment. When seeking permission to appeal, the claimant also applied to adduce as fresh evidence on the appeal a letter from MIND concerning the consequences of section 117 "after-care services" not being available to patients on section 17 leave. Although Lindblom LJ granted permission to appeal, he refused the application to adduce MIND's letter in evidence.

51. MIND subsequently applied to intervene in the proceedings. Its application to intervene included a request for permission to present written evidence. On 26 October 2018 McCombe LJ granted MIND permission to intervene but by written submissions only. MIND's application to adduce evidence was refused. The order further stated in clear and explicit terms that the written submissions were to be "confined strictly to the points raised by the grounds of appeal" (which, as McCombe LJ observed, were points of statutory construction) and "are not to stray into the giving of evidence."

52. In these circumstances it is highly regrettable that the written "submissions" signed by leading counsel and filed on behalf of MIND incorporated numerous assertions of fact and opinion that blatantly amounted to the giving of evidence. Although it technically amounted to evidence, no objection could reasonably be taken to the explanation of the role of MIND and of its basis for intervening included at the beginning of the submissions. However, the document also included statistics on the use of section 17 leave and statements about the needs for support that can arise on such leave, the general practice regarding section 117 funding arrangements and the practical consequences if support for patients on section 17 leave is not funded as after-care under section 117. These were precisely the matters on which MIND had applied for permission to adduce evidence but had been refused permission to do so by the court. None of the evidence incorporated in MIND's submissions was of any relevance to the question of statutory interpretation which the court had to decide. But even if it

had been relevant, that would not have excused this flagrant breach of the court's order.

53. When a person or organisation with no right to take part in judicial review proceedings is granted permission to intervene, it is in the expectation that the intervenor will act responsibly to endeavour to assist the court in the public interest. MIND has a long and distinguished track record of performing this role. It is to the credit of leading counsel who acted *pro bono* for MIND in this case that, on reading this judgment in draft, she wrote to the court to take full responsibility for the errors made and to disclaim any fault on the part of MIND. I would accept that in this particular case the lesson has been learned.

54. Looked at more broadly, I recognise that, in preparing submissions on behalf of an intervenor, there is a natural desire to try to make a contribution to the argument which reflects the intervenor's expertise and/or interests and does not simply cover ground already covered by one or other of the parties to the proceedings. In a case like the present case which raised a pure question of statutory interpretation, that may be an impossible ambition. As discussed earlier in this judgment, the matters which are admissible as part of the relevant context are limited in compass and do not include, for example, matters of current general practice. The consequence may be that there is in fact nothing distinctive or useful which an intervenor can contribute in a case of this kind.

Haddon-Cave LJ:

55. I agree.

Bean LJ:

56. I also agree.