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CASE AND COMMENT

SCARCE RESOURCES AGAIN

R. v. *Manchester City Council, ex p. Stennett* [2002] UKHL 34, [2002] 4 All E.R. 124 is the latest in a series of cases concerning the welfare of vulnerable members of our society and the scarce resources available to public authorities to meet those individuals' needs. Earlier examples include the education of a child with special needs (*R.* v. *Essex CC, ex p. Tandy* [1998] 2 All E.R. 769), essential non-nursing care for the elderly or infirm (*R.* v. *Gloucestershire CC, ex p. Barry* [1997] A.C. 584), accommodation (*R.* v. *Sefton BC, ex p. Help the Aged* [1997] 4 All E.R. 532) and even access to potentially life-prolonging medical treatment (*R.* v. *Cambridge AHA, ex p. B* [1995] 1 W.L.R. 898). *Ex p. Stennett* concerns the welfare of another vulnerable group, those who have been compulsorily detained under the Mental Health Act 1983.

In this case, the friction between scarce resources and the welfare of detainees under the 1983 Act derives from the duty imposed by section 117 of the 1983 Act on relevant public authorities to provide after-care services for those discharged from compulsory detention. There has been some confusion about whether an authority is entitled to charge individuals for those services. The three local authorities involved in this case did charge for the after-care services they provided, even though numerous indicia exist, including a 1994 Department of Health circular, which state that fees for section 117 services cannot be justified by reference to other sections of the 1983 Act which do allow a charge to be made for different services. The lawfulness of the local authority charges was challenged in these judicial review proceedings. The court of first instance and the

Court of Appeal found that there was no right to charge for section 117 services.

On appeal to the House of Lords, the public authorities offered a number of possible interpretations of section 117. One such interpretation was that whilst the section conferred a duty on an authority to provide after-care services, it was only a "gateway" provision. As such, section 117 led to other statutory sources, including the National Assistance Act 1948 s. 21, which does countenance a charge for provision of services. A further, more strained, interpretation was proposed: section 117 creates a duty but there is no corresponding power to deliver those services without reference to the National Assistance Act 1948 (para. [11]). Either interpretation would allow a charge to be made and thus conserve public authority resources. The decision of the House of Lords definitively rejected these interpretations and should prevent time and money being spent on future litigation. However, there will be a cost: public authorities will have to bear the expense of after-care services themselves. Lord Steyn, with whom the other members of the House agreed, noted that this cost would be considerable (between £30 million and £80 million), stretching what are already limited public resources.

Given that Lord Steyn acknowledged the significant financial impact of disallowing charges, and given that in the past the courts have been unwilling to intervene in questions of public authority resources, what was the basis for this decision? On one hand there is a very simple rationale for the decision. A public body can only do that which it is authorised to do (as noted by Buxton L.J. in the Court of Appeal [2001] Q.B. 370). Section 117 cannot be read as authorising public authorities to raise a charge owing to the "free standing" (para. [10]), as opposed to "gateway", nature of the section. But Lord Steyn also considers counsel's argument that such a reading of section 117 would be incompatible with other statutory provisions allowing a charge to be made for services. In effect, Lord Steyn seeks to identify Parliament's legislative intention so as to distinguish the provision of after-care services for discharged compulsory detainees under the Mental Health Act 1983 from services provided under the National Assistance Act 1948.

His Lordship does make a distinction and it seems to lie in the involuntary aspect of receipt of some services. It would be wrong to charge persons for services which they do not seek but require by virtue of the risk they pose to themselves and to others (para. [15]). Furthermore, as in *R. (on the application of H)* v. *Ashworth Hospital Authority* [2002] EWCA Civ 923, if a detainee does not have after-care arranged his detention may be continued. Therefore,

unwillingness to pay plus assessment as to ability to pay could contribute to delay in arranging after-care, resulting in continued loss of liberty. In contrast, the majority of the precedents concerning scarce resources, for example in education, nursing care or accommodation, relate to potential recipients of services who positively seek those services and are not at risk of continued detention due to non-compliance. They are of course at risk of other losses but not of that very English freedom, liberty.

Lord Steyn's analysis identifies the section 117 duty, in contrast to other welfare services provided by public authorities, as incontrovertibly free-standing. Why then did public authorities defend charges for section 117 services when explicit advices to the contrary exist and the relevant statutory provisions are not ambiguous? The answer must lie in the familiar attempt by public authorities to conserve their scarce financial resources. When this issue has arisen before, the courts have either decided in favour of the authority and limited access to necessary services or, as in *ex p. Tandy*, by narrow interpretation of needs and assessment, carved out niches in which authorities must provide necessary services. However, in *Stennett*, the court was not constrained by its traditional refusal to question resource allocation policies because the question before it was one of raising revenue, not spending or allocating resources. Nonetheless, Lord Steyn goes beyond a simple exposition of statutory interpretation to give a strong defence of the needs of the vulnerable. Sadly however, given the specific statutory provisions relevant to this case, this defence is unlikely to be extended to other vulnerable groups. Thus cases representing the full spectrum of welfare needs are likely to parade before the courts until the problem of scarce resources is addressed, not by the courts, but by the proper forum: Parliament.

ANNE SCULLY

THE END OF ESTOPPEL IN PUBLIC LAW?

THE prospective buyers of a waste treatment plant ("Reprotech") wished to use the site to generate electricity from the waste produced. They asked the Chief Planning Officer of the local council whether this would be a material change of use, for which planning permission would be required, and were assured that it would not. After they bought the land, the council insisted that the Officer lacked authority to make such a determination and required a formal application for planning permission; this was met by local