

Number 94

The Decision of the House of Lords in Munjaz: giving less significance to the Code of Practice?

In 1994 Mr Munjaz, having spent a number of spells in prison and hospital, was admitted to Ashworth Hospital. This was not the first occasion on which he had been admitted to that hospital, having remained an inpatient for a period of approximately 8 years previously, prior to his earlier discharge. Since his subsequent admission he had been secluded on a number of occasions for the protection of others. Following an unsuccessful judicial review application he had brought a successful challenge to Ashworth's policy dealing with seclusion of patients before the Court of Appeal¹. In what had been regarded as a very important judgment for the protection of the human rights of mental health patients held in seclusion, as well as in a broader context, the Court of Appeal had held that the Code of Practice should be observed by all hospitals unless they had a good reason for departing from it in relation to an individual patient. The Code was acknowledged as being of great importance in providing safeguards where there was a risk that patients might be treated in a manner which contravened their human rights. The State was required to take positive action to avoid breaches of human rights and had done so through publication of the Code of Practice; the Court of Appeal held that accordingly the hospital, as an agent of the State, was obliged to follow the Code unless it had good reason to depart from it.

The Trust appealed against the decision. Mr Munjaz maintained that the hospital's policy was unlawful because, in particular, it provided for less frequent medical review of seclusion than was laid down in the Code. He also argued that the policy was incompatible with, inter alia, articles 3, 5, and 8 of the European Convention on Human Rights as enacted in the Human Rights Act 1998. He did not submit that his seclusion had been unnecessary.

The Trust contended that the Code did not fall within Section 118(1) of the Mental Health Act 1983 which requires the Secretary of State to prepare and revise, from time to time, a Code of Practice in relation to "the admission of patients to hospital and mental nursing homes" and "for the guidance of registered medical practitioners and members of other professions in relation to the medical treatment of patients suffering from mental disorder". The Trust argued that the subject matter of the seclusion policy did not relate to "admission" or "medical treatment" and thus did not fall within Section 118; alternatively the Trust argued that if the policy did come within that Section, the Code amounted only to guidance and not instruction that required absolute compliance.

The House of Lords rejected the Trust's argument that Section 118 did not apply to the seclusion policy. The Court followed the interpretation of "admission" and "medical treatment" adopted by the Court of Appeal and expressed the view that "medical treatment" was sufficiently wide in scope to cover the nursing and caring for a patient in seclusion, even though seclusion could not properly form part of the treatment programme.

A 3:2 majority of the House of Lords, nevertheless, accepted the arguments put forward by the Trust in relation to the nature of the Code, referring to the introduction to the Code itself that stated that "the Act does not impose a legal duty to comply with the Code". It acknowledged that the nature of paragraph 19.17 of the Code that provides that hospitals should have clear written guidelines on the use of seclusion indicated that hospitals were not bound to reproduce the terms of the Code, but had some discretion as to the contents of such policies. Nevertheless, the fact that failure to follow the Code could be referred to as evidence in legal proceedings (as stated in the introduction to the Code) implied that the Code was more than mere advice which could be followed or not, depending on the

MENTAL HEALTH LAW

RadcliffesLeBrasseur
5 Great College Street
Westminster
London SW1P 3SJ

Tel +44 (0)20 7222 7040
Fax +44 (0)20 7222 6208
LDE 113

6-7 Park Place
Leeds LS1 2RU

Tel +44 (0)113 234 1220
Fax +44 (0)113 234 1573
DX 14086 Leeds Park Square

25 Park Place
Cardiff CF10 3BA

Tel +44 (0)29 2034 3035
Fax +44 (0)29 2034 3045
DX 33063 Cardiff 1

info@rlb-law.com
www.rlb-law.com

¹ See previous Mental Health Law Briefing number 66 (August 2003)

choice of the relevant individuals responsible for drafting hospital policies. In reviewing any challenge to a departure from the Code, the Court should scrutinise the reasons given by the hospital for departure “with the intensity which the importance and sensitivity of the subject matter requires”.

The House of Lords was satisfied that the evidence adduced by the Trust showed that the Code had been very carefully considered when the seclusion policy had been drafted; that policy reproduced important parts of the Code and cross referred to it.

Ashworth, in having taken the decision to depart from the provisions in the Code regarding the frequency of medical review, were entitled to take into account the following issues:

- The Code was directed to the generality of mental hospitals and did not address the special problems of high security hospitals, who inevitably contained the most dangerous patients.
- The Code did not recognise the special position of patients whom it was necessary to seclude for longer than a very few days. The Trust had experience of the fact that the condition of those secluded for more than a week did not change rapidly and it was important to allow time to pass to give grounds for confidence that improvement would be maintained.
- The statutory scheme, whilst providing for the State to give guidance, deliberately left the power and responsibility of final decision to those who bear the legal and practical responsibility for detaining, treating, nursing and caring for patients.
- The majority of the House of Lords expressed the view that the Trust had supported the contents of their seclusion policy by cogent reasoned justification and as such the Court could not condemn it as unlawful, even though many eminent professional experts would take a different view.

With regard to the argument put forward by Mr Munjaz that the seclusion policy of Ashworth Hospital was incompatible with his rights under the European Convention on Human Rights, the majority of the House of Lords expressed the following views:

Article 3

The majority of the House of Lords did not consider that the Trust had adopted a policy which exposed patients to a significant risk of treatment of an inhuman or degrading nature. The policy should be considered as a whole and given the provisions regarding review of a patient in seclusion, the fact that seclusion of a patient must be monitored by the hospital’s Seclusion Monitoring Group, the requirement that the Mental Health Act Commission be informed once the patient had been secluded for 7 days and thereafter should receive regular progress reports and the patient’s right to seek judicial review of the decision to seclude or to continue to seclude him; it could not be said that a policy containing those safeguards exposed the patient who was secluded for more than 7 days to any material risk of treatment prohibited by Article 3.

Article 5

The majority of the House of Lords held that the Ashworth policy, properly applied, did not permit deprivation of a patient’s liberty insofar as seclusion must be for a short period and in conditions that would afford reasonable protection to others who required protection from the patient.

Article 8

The argument that seclusion may violate the patient’s Article 8 rights was one that had originally been raised by MIND as an interested party when presenting its case to the Court of Appeal; this argument was then also adopted by Mr Munjaz. It was not clear in the minds of all their Lordships that Article 8 was in fact engaged.

Whilst the majority of the House of Lords acknowledged that seclusion may violate a patient’s Article 8 rights and thus found a claim for relief in the context of Ashworth’s policy; it was questioned how seclusion, if the only means of protecting others from violence or intimidation, and used for the shortest necessary period could violate the secluded patient’s Article 8 rights. Lord Bingham

considered that such a patient would, during lucid intervals, not wish to be free to act in such a way and would recognise that his best interests were served by being prevented from such acts of violence.

In any event, the majority considered that seclusion in accordance with Ashworth's policy was necessary for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others and thus satisfied the qualification in Article 8(2) of the Human Rights Act. Properly used, seclusion would not be disproportionate because it would match the necessity giving rise to it.

As to the argument that the qualification was not properly satisfied as not being in "accordance with the law", this was rejected. The House of Lords took the view that the requirement that any interference with the right guaranteed by Article 8(1) was directed to substance and not form; it was intended to ensure that any interference was not random and arbitrary. Lord Scott noted that Ashworth owed a duty of care to *all* patients, stating that "a dangerous patient's Article 8 rights could not justifiably be pitched at a level that required the hospital to leave other inmates in unacceptable danger of physical harm". The procedure adopted by the Trust did not allow arbitrary or random decision making, having regard to the contents of the policy and accordingly it could not be said that it had failed to comply with the law.

The conclusion of the majority of the House of Lords was that the Court of Appeal had given excessive weight to the Code of Practice which was not intended by Parliament and which the European Convention on Human Rights did not require.

MIND, together with other similar patient focussed groups, has criticised the decision of the House of Lords on grounds that the judgment will justify the Code being ignored. This perhaps demonstrates that such groups have put too much emphasis on the fact that the House of Lords allowed the appeal from the Court of Appeal, without fully appreciating the implications of the Lords' judgment. The House of Lords did acknowledge that the Code should be given very considerable weight. In the words of Lord Bingham "It...is much more than mere advice which an addressee is free to follow or not as it chooses. It is guidance which any hospital should consider with great care, and from which it should depart only if it has cogent reasons for doing so". Lord Hope, another member of the judicial committee, stated "Cogent reasons [must be given] if in any respect they decide not to follow [the Code]. Those reasons must be spelled out clearly, logically and convincingly".

The nature of the judgment makes it clear that departures from the Code must be backed up by cogent reasoning; the principle is not restricted to seclusion policies, thus, although the Code is to be treated as guidance, rather than absolute instruction, it is clear that the Code may be departed from only where there are cogent reasons for doing so. This does not appear such a very far departure from the Court of Appeal's view that hospital and professionals should only depart from the Code if they had "good reason" for so doing.

What is clear from the Munjaz case is that where policies relating to matters connected with the treatment of Mental Health patients depart from the Code, it will be very important for hospitals to be able to explain, preferably by reference to convincing evidence, why the policy does not comply with the Code. Accordingly, any departure from the Code will need detailed consideration by those responsible for drafting and implementing the relevant policy and a full record of that reasoning should be made.

Alexandra Johnstone
© RadcliffesLeBrasseur
November 2005

For more information on Mental Health Law contact Andrew Parsons or Alexandra Johnstone at RadcliffesLeBrasseur on 020 7227 7040, or email: andrew.parsons@rlb-law.com.
Out of office emergency advice available 24hrs on 07802 506 306.
Readers are advised to take specific advice before acting in reliance on the matters set out in this briefing.
Future editions can be received by email. Please e-mail: marketing@rlb-law.com or telephone 020 7227 7476.