

# Mental Health Law Briefing

Solicitors

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## Section 63: A further challenge to its compatibility with the Human Rights Act

Even before the Human Rights Act came into force, there were numerous suggestions that Section 63 of the Mental Health Act was incompatible with the European Convention on Human Rights (“ECHR”), in particular Articles 3 and 8.

Since the Human Rights Act came into force there have been several cases where these arguments have been advanced. The challenges have all failed to date. In R (B) v Ashworth Hospital<sup>1</sup> the House of Lords held that compulsory treatment under Section 63 was lawful and compatible with the ECHR if justified by therapeutic necessity. The Court of Appeal considered a challenge to Section 58 (and the treatment provisions of Section 63) in R (B) v S<sup>2</sup> and again rejected that challenge, again invoking the principle of medical necessity.

However there continue to be challenges to the utilisation of the compulsory treatment sections of the Mental Health Act and the Court has once again recently considered these issues<sup>3</sup>.

### The Facts

The Claimant was admitted to Hospital under Section 2 and subsequently detained under Section 3. She was diagnosed as suffering from a persistent delusional disorder and schizophrenia. The RMO wished to treat her with Risperidone. The patient refused this and treatment was therefore given pursuant to Section 63.

The patient sought to bring proceedings for Judicial Review on the basis that (1) treatment was in breach of her rights under Article 8 (although this ground was not pursued before the Court), (2) Section 63 was incompatible with the Human Rights Act to the extent that medication was given within the first three months of the patient’s detention without the authority of a SOAD, and (3) that where a patient with capacity refuses consent under Section 63 then this would amount to a breach of Articles 8 and 14 where treatment is not required to protect the patient or the public from harm.

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<sup>1</sup> [2005] 2 AC 278

<sup>2</sup> [2006] EWCA CIV. 28

<sup>3</sup> R(on the application of AM) v Central and North West London Mental Health NHS Trust (unreported) 1 February 2007

## Court Decision

The Court was able to dispose of the third ground of challenge immediately as it was bound by the previous decision of the Court of Appeal in the S case<sup>2</sup>. Although the Claimant sought to argue that the S case could be distinguished as the patient there was incapacitated whereas a patient here had capacity, the Court was not prepared to depart from the reasoning in the S case.

The substantive ground of challenge was therefore the second basis advanced, namely that Section 63 did not comply with the Human Rights Act because until a patient had been detained for three months there was no need to obtain a SOAD's Certificate, and accordingly, the initial period of 3 months reflected a period of incompatibility. In support of this argument the Claimant cited the Recommendation of the Council of Europe Committee of Ministers<sup>4</sup> which required that in order to comply with the ECHR, there must be approval at the time of detention or at the time of compulsory administration of medication by a Court or other competent body. After three month's detention, the Certificate of the SOAD under Section 58(3)(b) would meet this requirement but during the initial period of detention, any treatment given would not have this approval and therefore to that extent, treatment under Section 63 during that period was not compliant with the Mental Health Act.

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The Court rejected this argument. When the Recommendation was passed, the UK representative had indicated that the UK Government reserved the right not to comply with the Recommendation as a whole. Furthermore, the Courts in Scotland had previously held that their equivalent of the Mental Health Act did comply with the European Convention on Human Rights and there was no material difference in this respect between those Acts<sup>5</sup>. The approach in the WM case was consistent with the approach of the Court of Appeal in the S case<sup>2</sup> and accordingly the Court held that there was no incompatibility with the Human Rights Act. The Claimant's application for Judicial Review was therefore rejected.

## Comment

At present it is not known whether the Claimant will be seeking permission to appeal to the Court of Appeal. However, as the law stands, Section 63 may be used to provide medication to a patient without their consent, whether the patient has capacity or not, where treatment is justified by medical necessity.

The Mental Health Bill has finally completed its passage through Parliament (on 4<sup>th</sup> July) as yet a date for it to receive Royal Assent has not been fixed, nor a date for the Act to come into force. Some delay is inevitable as the government wish to publish an amended Code of Practice and Regulations to underpin the legislation.

The Bill includes, as passed, what the government characterise as "improvements" to existing legislation including:

- Community treatment Orders
- Detention only where treatment is available
- Treatment for children and young persons in appropriate environment
- Statutory Advocacy services
- More rights for victims of violent and sexual crimes
- Amendments to the nearest relative provisions
- A protected care regime for those in the "Bournewood Gap"

A more detailed briefing will be circulated in the near future.

<sup>4</sup> 2004/10/22.9.04

<sup>5</sup> WM[2002]1MHLR367