RadcliffesLeBrasseur

Mental Health Law Briefing

Solicitors

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Re-sectioning Patients: Further Guidelines

The Courts have considered on numerous occasions the legal position of patients who are discharged by the MHRT against the advice of the clinicians, but who are then subject to a fresh application to detain them.

This issue previously reached the House of Lords[1]. The House of Lords held that applications for re-detention cannot lawfully be made unless the social worker making the application has a reasonable and bona fide belief that they have information not known to the Tribunal which puts a different view on the case[2]. The application of the decision in *Von Brandenburg* has recently been reconsidered by the Court[3].

The Facts

A patient with learning disabilities was detained in a medium secure unit following incidents of aggressive behaviour and threats. When his case came before the MHRT they considered that there was insufficient evidence to demonstrate that his behaviour was caused by a mental disorder justifying detention. The Tribunal therefore made an order for deferred discharge to enable an aftercare package to be put in place.

The social worker responsible for the patient felt that the case for continued detention had not been put sufficiently strongly to the Tribunal including evidence of previous incidents of violence. The clinicians were also of the view that the patient's detention should continue. Two steps were taken to address this:

1 The day before the patient was due for discharge, the hospital managers applied ex-parte for judicial review and obtained an order delaying the patient's discharge until the judicial review had been determined.

2 The ASW applied to re-section the patient which was accepted by the hospital managers.

Court Guidance on Re-sectioning

The Court considered both the application for judicial review and the re-sectioning.

The Court considered the test in *Von Brandenburg* and confirmed that the proper test of whether a patient could be re-sectioned was whether there was "new information" available. The Court said that this new information would cover not only what might have happened subsequent to the decision of the MHRT, but also material which had not been taken into account by the Tribunal, if such material were discovered.

In the particular case, the Court held that the re-sectioning was unlawful as no reference to the new material had been made in the social worker's application to the hospital managers.

[1] R (Von Brandenburg) –v- East London and The City Mental Health NHS Trust [2003] UK HL 58 (RadcliffesLeBrasseur acted for the Trust).
See RadcliffesLeBrasseur's Mental Health Law Briefing Number 69.
[3] R (Care Principles Limited) –v- MHRT [2006] EWHC 3194 (Admin).

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Judicial Review

The scope to challenge the MHRT where the clinicians disagree with the Tribunal's view is limited. There is no appeal on the merits of the decision: the administrative court via judicial review proceedings may simply consider errors of law. However, where judicial review is contemplated, the court issued the following guidance:

1. Those acting for detaining authorities should always, unless there are very exceptional circumstances, give notice of the challenge to the patients legal representatives and to the Tribunal, to afford them the opportunity to make representations.

2. It would normally be wrong to issue an interim order preventing a patient's discharge unless there is a very strong claim that the Tribunal erred in law and there is evidence that, if released, the patient would be a danger to himself or others.

Andrew Parsons

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Comment

The law as stated in *Von Brandenburg* therefore remains good law. Re-sectioning is permissible but only if there is "new information". It is important for social workers to consider whether this "new information" really does put a significantly different complexion on the case. If it does then reference to this should be made in the ASW's application to the hospital managers.

Where judicial review is contemplated, this can only address an error of law, not an appeal on the merits of the decision by the MHRT. Alternatively, the MHRT should be asked to state their case under Section 78 (8) Mental Health Act 1983.

RadcliffesLeBrasseur appointment to specialist NHS Panel

RadcliffesLeBrasseur are pleased to announce that they have been appointed to the specialist panel of solicitors advising the NHS bodies that subscribe to the Healthcare Purchasing Consortium and the London Procurement Programme on mental health and healthcare law.

The Partner Andrew Parsons, commented:

"This appointment recognises our expertise and national practice in advising mental health providers. The firm has a pre-eminent healthcare practice and we were delighted to be appointed to the panel".

For more information on Mental Health Law contact Andrew Parsons at RadcliffesLeBrasseur on 020 7222 7040, or email andrew.parsons@rlb-law.com.