

Number 13

Hospital Managers' Reviews

The decisions of Hospital Managers regarding the discharge of patients (S23 MHA 1983) are increasingly the subject of challenge by way of Judicial Review. In light of this, we hope it will be of assistance to set out in summary the considerations which Managers must address when conducting reviews to protect them, as much as possible, from having their decisions overturned by the Courts. If Managers do not adhere strictly to the provisions of the new Code of Practice and the Memorandum when conducting reviews, this failure may make their decisions vulnerable to attack by Judicial Review and may give rise to claims for damages for wrongful imprisonment.

This briefing note focuses on the conduct of oral reviews although there are situations when paper reviews may be undertaken, and the general principles outlined below apply to both.

Conduct of Reviews

When undertaking a review the Managers:

- a) must adopt and apply a procedure which is fair and reasonable;
- b) must not make irrational decisions, that is, decisions which no body of Managers, properly directing themselves as to the law and on the available information, could have made; and
- c) must not act unlawfully, that is, contrary to the provisions of the MHA Act 1983, and any other applicable legislation and regulations.

The Code states that the Managers should consider the following questions, in the order stated:

- (i) Is the patient still suffering from mental disorder?
- (ii) If so, is the disorder of a nature or degree which makes treatment in a hospital appropriate?
- (iii) Is detention in hospital still necessary in the interests of the patient's health or safety, or for the protection of other people?

If the panel are satisfied from the evidence presented to them that the answer to any of these questions is "no", the patient should be discharged.

Although not stated in the Code it would be good practice for Managers to consider additionally the specific criteria in the Act by which the individual patient is detained.

Section 25 – Barring Order

If the RMO has barred the discharge by the Nearest Relative and the Managers consider that a review should be held, they should not only consider the three questions above, but also the following question:

- (iv) Would the patient, if discharged, be likely to act in a manner dangerous to other persons or to himself?

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

Question (iv) focuses on the probability of dangerous acts such as causing serious physical injury, not merely a patient's general need for safety and others' general need for protection. It provides a narrower test for continuing detention than the first three questions. If the Managers disagree with the RMO and decide that the answer to question (iv) is "no" they should usually discharge the patient.

Consider all Relevant Evidence

The Managers need to consider these questions in the light of all relevant evidence e.g.

- CPA Documentation;
- Risk Assessment Report;
- Any Other Reports: (e.g. from the patient's RMO and others who are directly involved in the patient's care such as the keyworker, named nurse, social worker and clinical psychologist).

The patient should receive copies of the reports unless the Managers are of the opinion that the information disclosed would be likely to cause harm to the physical or mental health of the patient or any other individual.

Nearest Relative

If the Patient consents, his/her Nearest Relative should be informed of the review. It is recommended that the patient's Nearest Relative is invited to put his/her views to the panel in person.

Conduct of the Hearing

It is for the Managers to decide the procedure for the conduct of the hearing, but generally it needs to balance informality against the rigour demanded by the importance of the task. All those giving evidence to the panel should be questioned carefully by both the Managers and the representative of the patient. At the end of the evidence the patient's representative should be invited to present his/her representations to the panel. Applications for Judicial Review of Manager's decisions have been made on the basis that the Managers did not give the patient's representative the proper opportunity to present submissions on all four of the above questions.

Before commencing the review the Managers should make it clear to all those attending how the review will be conducted. Whilst the panel must give full weight to the views of all the professionals concerned in the patient's care, its members will not, as a rule, be qualified to form clinical assessments of their own. If there is a difference of views about whether the patient meets the clinical grounds for continued detention, especially in matters such as risk assessment, the panel should consider an adjournment to seek further medical or other professional advice.

In applying the criteria set out above and in deciding whether or not to discharge the patient, the panel needs to consider very carefully the implications for the patient's subsequent care. The presence or absence of adequate community care arrangements may be critical in deciding whether continued detention is necessary in the interests of the patient's health or safety or for the protection of others. If the panel conclude that the patient ought to be discharged but arrangements for aftercare need to be made, they may adjourn the panel, for a brief period, to enable a full CPA/Care Planning Meeting to take place.

Decision

The Manager's decision following the review and the reasons for it, should be recorded. A decision should be communicated immediately, both orally and in writing, to the patient, to the Nearest Relative and to the professionals concerned. At least one of the Members of the Panel should see the patient to explain in person the reasons for the decision. Copies of the papers relating to the review, and the formal record of the decision, should be placed on the patient's records.

In the record of their decision the Managers should set out the questions which they considered in reaching their decision, and the answer to each. When considering a Barring Order the Managers must also set out that they have additionally considered the fourth question in relation to dangerousness. In the case of Huzzey¹ it was made clear that even where the Managers decide that the first three questions can be answered in the affirmative, if they are not persuaded by the Barring report, then this would mean, in almost all circumstances, that the Managers should discharge. For if they are not so persuaded, they will have reached the position that the Nearest Relative would have been entitled to an order for discharge if the RMO had not come to what they have decided was an erroneous conclusion as to the danger presented by the patient.

The Managers should state in their reasoned decision the fact that they have considered all of the evidence before them and should set out whose evidence they preferred in reaching their decision.

If the Managers do not record their reasoned decisions as set out above then they are vulnerable to an application for a Judicial Review of those decisions.

However, a caveat to the above is that the Managers are not expected to provide decisions in the same manner and detail that a Mental Health Review Tribunal (“MHRT”) is. It would be quite inappropriate for any Court to expect the Managers to apply the high levels of precision and expertise required of the MHRT as the Managers are not a similarly qualified body. The Code of Practice obliges Managers to give reasons for their decisions but it is doubtful whether the case law relating to the reasons to be given by the MHRT can be imported wholesale into the obligation on the Managers to give reasons. The requirements placed on the MHRT emanate from an entirely separate statutory framework (Mental Health Tribunal Rules 1983) and apply to a different body which is required to have both legally and medically qualified members, unlike the Managers.

RadcliffesLeBrasseur
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For more information on Mental Health Law contact Andrew Parsons at RadcliffesLeBrasseur on 020 7227 7282, 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.

¹ R –v- Riverside Mental Health NHS Trust ex parte Huzzey [1998]