

Mental Health Law Briefing

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Court upholds the smoking ban in psychiatric hospitals

The Administrative Court has recently given judgment on an application made by patients detained at Rampton¹ to quash regulations which provide limited exemptions to the smoking ban on grounds that they were incompatible with the rights of detained mental health patients under the European Convention of Human Rights.

The regulations subject to challenge provide that certain “designated rooms” in care homes, hospices and prisons are not smoke free. Similar temporary exemption was granted to mental health units but that exemption comes to an end on 1 July 2008.

The patients claimed that these regulations were unlawful, being in breach of their rights under Article 8 and 14 of the European Convention of Human Rights.

The Court went into some detail when explaining the background to the legislation, including reference to the 1998 White paper “Smoking Kills” and consultations produced in anticipation of the smoking ban. Much of this evidence emphasised the risks of passive smoking and the dangers to health connected to smoking. The Court also had before it the statistics showing that nearly 70% of patients in mental health units smoke and that not being able to smoke can add to the distress of patients at a difficult time. Indeed, one of the experts giving evidence to the Court argued that smoking can produce benefits for

some mental health patients, for example, in coping with stress.

The Court noted that the evidence showed that since the smoke-free policy was introduced at Rampton the nicotine withdrawal had not led to behavioural disturbance, but had had a positive overall benefit to the health of patients.

The patients argued that the smoking ban was in breach of their right to a private life, on the basis that this right involved permitting someone to do whatever they wanted to do, however foolish others might consider the activity. Counsel for the patients argued that denying an individual the right to smoke demonstrated a lack of respect for that person’s “moral integrity”, given the importance of smoking to some people.

In addition, it was argued that the ban was discriminatory of mental health patients and contrary to Article 14. Some people detained in public places such as hospices and care homes were exempt from the ban, so it was not legally justified to discriminate against mental health patients on grounds of their “status”. Accommodation in which to smoke should, it was argued, therefore be provided in psychiatric hospitals.

The Court held that the “respect” required by Article 8 was no coextensive with the right of independence contemplated by J S Mill², that had been relied on by the

¹ R on the application of G & others v Nottinghamshire Healthcare NHS Trust & others

² On Liberty

patients. The Court rejected the concept of an absolute right to smoke wherever a person lived. In considering the nature of the respect owed one had to consider the circumstances in which a person was living. The Court made a distinction between a private home and an institution. The Court also rejected the patients' arguments under Article 14. Accordingly, Article 8 did not impose a general obligation on those responsible for the care of detained people to make arrangements enabling them to smoke.

Nevertheless, the Court recognised that "there could be cases, though on the evidence we would expect them to be rare, in which the protection of mental health requires that facilities to smoke be made available".

The Court went on to consider, contrary to the conclusion that they had reached, in the event that the patients' Article 8 rights were engaged whether the smoke-free policy at Rampton which enacted the smoke-free legislation was justified under Article 8(2) of the European Convention on Human Rights. The Court stated that the legislative objectives underlying the smoke-free legislation included protecting the rights of citizens to enjoy smoke-free air and increasing the

benefits of a smoke-free enclosed public space and work places for people trying to give up smoking. Preventing patients at mental hospitals from smoking was clearly a consequence of and was connected with the objective of reducing smoking and exposure to second hand smoking. The Court rejected the patients' arguments that the smoking ban was disproportionate to the aim sought in the legislation. The Court considered that there was powerful evidence that, in the interests of public health, strict limitations upon smoking and a complete ban in appropriate circumstances were justified. Thus, the qualification in Article 8(2) was satisfied.

This judgment will not only have relevance to secure psychiatric hospitals but will be of importance to psychiatric hospitals who are unable to provide smoking facilities outside the hospitals buildings, for example because patients within intensive care units in such hospitals are considered inappropriate to be walked out on the street in view of the risk that they may go absent without leave.

Since there is now very little time before the temporary exemption on the smoking ban is lifted from mental health units, it is extremely important that all psychiatric hospitals have in place a "no smoking policy". RadcliffesLeBrasseur has already advised on a number of such policies. Should you require assistance with the drafting of such policies or any other advice on this topic you should not hesitate to contact us

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