RadcliffesLeBrasseur

BRIEFING

Number 38

Latest cases from the Tribunals

MENTAL HEALTH LAW

The last three months have seen a rush of reported cases on Mental Health Review Tribunals. Some of the decisions, particularly the Brandenburg case provide important guidance on the application of the Act.

1. Adjournment of Tribunal hearings to consider transfer[1]

The patient suffered from a psychopathic disorder. She was detained under Section 37/41 and applied for discharge under Section 73. Before the hearing her legal adviser requested an adjournment to obtain information about a possible transfer to an all-woman unit. The adjournment was granted under Rule 16(1) MHRT Rules.

The Secretary of State sought a declaration that the Tribunal was wrong in law to grant an adjournment and that it had no jurisdiction in connection with transfer. The Court held that the Tribunal does indeed have no transfer jurisdiction and that Section 73 provides only a power of discharge. Although in this case the Tribunal purported to adjourn to obtain further information (namely whether the transfer was possible) this was not within its powers.

2. Tribunal hearings 8 weeks after admission – a breach of the Human Rights Act? [2]

The Claimant, who was detained under Section 3, applied to the Tribunal for discharge. The hearing was listed 8 weeks after his admission. He sought judicial review on the grounds that this did not comply with Article 5(4) European Convention of Human Rights, which requires proceedings to decide the lawfulness of detention to be determined "speedily."

The Court held that a hearing no later than 8 weeks after admission for treatment was not a violation of Article 5(4) [*Note: This leaves open the possibility that a hearing later than this might indeed be a breach of the Human Rights Act*].

3. Use of Section 3 as a Community Treatment Order[3]

The patient suffered somatoform disorder. She was detained under Section 3. She was fitted with a PEG tube in hospital and returned to a nursing home pursuant to Section 17. The Section 3 Order was renewed subsequently and a further leave of absence under Section 17 granted. The patient applied for discharge under Section 72(1)(b) on the basis that detention under Section 3 was being unlawfully used as a sort of Community Treatment Order. The Tribunal agreed that her detention was unlawful as there had been no element of in-patient treatment in a hospital. She had not been detained in a registered mental nursing home. The Tribunal therefore made an order for discharge.

The NHS Trust responsible for the patient applied for judicial review of the decision contending that the Tribunal had erred in law. Whilst the Tribunal accepted that a patient liable to be detained under

[1] R (on the application of the Secretary of State for the Home Department) v. Mental Health Review Tribunal for the North East Thames Region [2000] All ER(D) 2308
[2] R (on the application of C) v. Mental Health Review Tribunal [2000] All ER (D) 2452
[3] R (on the application of Epsom and St Helier NHS Trust) v. Mental Health Review Tribunal [2001] All ER (D) 194

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

Section 3 but who was on Section 17 leave was not automatically entitled to discharge under Section 72(1)(b), the Trust contended that the Tribunal had wrongly concluded that the position was different where there had been no element of in-patient treatment in a hospital throughout the period of detention. It submitted that there was a certainty at some unspecified time that the patient would require in-patient treatment, and that the Tribunal had failed to take account of the fact that she had attended hospital regularly for outpatient assessment and review.

The application for judicial review was however dismissed. The Court held that the likelihood of treatment being required in the future, although a relevant consideration, was so uncertain that it was no longer appropriate for the patient to continue to be liable to detention. It could not be said that the Tribunal's decision was perverse.

4. Reviewability of decisions – Section 3 and Section 37[4]

The patient was detained under Section 37. He applied to the Tribunal for review of his grounds of detention. The Tribunal ordered an adjournment for trial leave. The Health Authority objected and in fact no leave took place. At the renewed hearing the patient was discharged. The Health Authority sought judicial review of the decision contending it was irrational. However, in the meantime, the RMO, believing the patient could not be detained concurrently under Section 3 and Section 37, discharged the patient from the Section 37 detention, exercising the discretion in Section 23, and then sought further detention under Section 3. The Health Authority also sought judicial review of this decision of the RMO on the basis that it was made under a misapprehension of law.

The two sets of proceedings were combined and the patient was joined as an interested party.

By the hearing the Health Authority, Tribunal and RMO agreed the decisions should be quashed but the patient did not, arguing that the decision under Section 23 was a clinical decision and thus not reviewable. Further, once discharged, he contended that the Section 37 was not reviewable.

The court held that although a decision under Section 23 was a clinical one, it was reviewable if it was unlawful as a result of an error of law. The RMO had been labouring under an error of law as detention under Sections 3 and 37 was not mutually exclusive. Furthermore the Tribunal had given no justification for rejecting the evidence against discharge or for moving away from its own requirement that the patient undergo a trial leave period. Accordingly the Court quashed both decisions.

5. Re-sectioning following discharge[5]

This is an issue that has been the subject of previous Court decisions - see Mental Health briefing No. 32.

In this case, the patient had initially been admitted to hospital under Section 4, which was converted the same day to Section 2. The patient applied for a Tribunal hearing. At the hearing evidence from the RMO and another doctor advised against discharge. The Tribunal nevertheless ordered discharge, to be deferred for 7 days. Discharge was ordered on the basis that there was evidence of mental illness but the Tribunal felt that it was not of a degree that justified detention.

The day before the deferral expired the patient was detained under Section 3. He sought judicial review on the grounds that where a Tribunal had directed discharge it was not lawful to re-admit him under either Section 2 or Section 3 unless it could be demonstrated that there was a material change in the circumstances.

---

[4] R (on the application of Wirral Health Authority) v. Mental Health Review Tribunal and v. Finnegan [2001] All ER (D) 52
[5] R (on the application of Von Brandenburg) v. East London and the City Mental Health NHS Trust [2001] All ER (D) 251

At first instance, the Judge refused judical review on the grounds that those applying for further detention under Section 3 were not bound by an earlier decision of the Tribunal as they had to exercise their own independent judgment. The patient appealed this decision.

The Court of Appeal dismissed the appeal. The Court found that a sequence of discharge, re-admission, discharge and re-admission was not uncommon. The implied statutory requirement that there be a change of circumstances for which the patient contended was therefore neither necessary nor sensible.

The position was different however where the application to re-section the patient was made within a matter of days of a Tribunal's discharge decision. That Tribunal decision implied that the criteria for admission were not present. This was particularly so if the patient had remained in hospital because discharge was deferred. This suggested a difference of opinion between the RMO and the Tribunal but in such a situation the Tribunal's opinion should prevail. This would also mean that it would be very difficult for an ASW to be satisfied[6] that an application ought to be made unless there were circumstances which the Tribunal had not been aware of and which would have invalidated its decision. Without any such circumstances however a further attempt to re-section the patient would be held unlawful on grounds of irrationality. It was not open to professionals effectively to seek to overrule the decision to discharge by the Tribunal.

Although not overruling the previous cases on this point[7], Brandenburg does provide further clarification of how and when re-sectioning may take place. It is clear that there are restrictions on doing so in circumstances such as those outlined in this case (ie immediately after a Tribunal Hearing unless there has been a change in circumstances).

It was also argued that if it was possible to re-section a patient following a Tribunal's decision to discharge, this would amount to a breach of Article 5(4) of the European Convention on Human Rights. This was however rejected.

RadcliffesLeBrasseur

April 2001

For more information on Mental Health Law contact Andrew Parsons at RadcliffesLeBrasseur on 020 7227 7282, or email: andrew.parsons@rlb-law.com.

[6] As required by Section 13 Mental Health Act
[7] R v South Westen Hospital Managers ex p M [1993] QB 683