

Number 47

## Yet more Human Rights

The anticipated impact of the Human Rights Act on mental health continues. It seems that every reported case includes an argument related to human rights! We have also now seen the Government make the first Remedial Order to be laid under the Human Rights Act amending legislation as a result of non-compliance with the Human Rights Act, in this case the Mental Health Act.

### First Remedial Order

The Court of Appeal held that Sections 72(1) and 73(1) Mental Health Act 1983 were incompatible with Article 5 of the European Convention of Human Rights. Where such a declaration is made, the Secretary of State may (but is not obliged to) lay a Statutory Instrument before Parliament amending the offending legislation. The first such Remedial Order has now been made<sup>1</sup>.

The need for the Remedial Order arises from a previous Court of Appeal case<sup>2</sup> in which the patient sought judicial review of the decision of the Tribunal on the basis that these sections were not compatible with human rights.

The central issue in this case was that the existing effect of Sections 72 and 73 of the Act put the burden of proof on the patient to show that the criteria for release were satisfied. It was not necessary for those detaining the patient to prove that he was unwell. The incidence of the burden of proof in such cases has often been criticised and the Court of Appeal held that it was incompatible with Article 5 for the burden to be placed on the patient to prove that the criteria to justify his detention no longer existed. Rather, Articles 5(1) and 5(4) required the Tribunal to be positively satisfied that 'all the criteria justifying the patient's detention in hospital for treatment continued to exist before refusing a patient's discharge'.

The Remedial Order amends Sections 72 and 73 and now provides that a Tribunal shall direct the discharge of a patient if they are not satisfied that the criteria justifying his detention in hospital for treatment continue to exist. The Order came into force on 26 November 2001.

### Right to Treatment

The Court has recently considered whether a detained patient has any greater rights to receive treatment under the NHS Act 1977 than a voluntary patient<sup>3</sup>. The Court held that a detained patient has no greater right than any other patient. Even though an RMO recommends treatment for a detained patient, this does not make any difference when the matter is subsequently considered by the referral priorities forum of an NHS Trust, as an RMO is obliged to operate under the practical constraints of the resources available. In this case, the dispute related to whether a patient should be transferred from Broadmoor Hospital to a medium secure unit within the local area or, as the patient was requesting, out of area to be nearer to his parents.

<sup>1</sup> The Mental Health Act 1983 (Remedial) Order 2001 Statutory Instrument 2001 No. 3712.

<sup>2</sup> R(H) -v- Mental Health Review Tribunal North & East London Regions [2001] EWCA CIV415; (2001) 145SJLB 108.

<sup>3</sup> R (on the application of F) -v- Oxfordshire Mental Healthcare NHS Trust [2001] All ER (D) 19 July 2001.

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

### Cross-dressing

The Court has also recently considered whether the refusal by a hospital to permit a patient detained in a high security hospital to cross-dress was a breach of Article 8, the patient's right to a private and family life<sup>4</sup>.

The Claimant was detained in a high security hospital. He wished to dress and assume the appearance of a woman. This was restricted by the hospital for security reasons. It was accepted by the parties that this in principle infringed Article 8 but the hospital contended it was an interference that was justified under Article 8(2). This was accepted by the Court which held that the power of detention and treatment necessarily carried with it a power of control and discipline. This would include the power to deprive patients of their own possessions for their own safety, including a power to control what patients wore<sup>5</sup>. There was therefore no breach of human rights.

© RadcliffesLeBrasseur  
January 2002

For more information on Mental Health Law contact Andrew Parsons at RadcliffesLeBrasseur on 020 7227 7282, or email: [andrew.parsons@rlb-law.com](mailto: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](mailto:marketing@rlb-law.com) or telephone 020 227 7476.

<sup>4</sup> R (on the application of E) -v- Ashworth Hospital Authority. Administrative Court 9 December 2001.

<sup>5</sup> The dicta in this case is also helpful when considering powers of search of patients, on which each hospital should also have a clear policy.

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](mailto:info@rlb-law.com)  
[www.rlb-law.com](http://www.rlb-law.com)