BRIEFING

Number **53**

Compulsory Treatment

The SOAD Procedure and a Review of Doctors' Clinical Judgment

MENTAL HEALTH LAW

In a previous Bulletin[1] we looked at a potential challenge to the SOAD procedure under the Human Rights Act. This bulletin develops the issues raised in the case of *R(Wilkinson) –v- RMO Broadmoor Hospital*.

Facts

The patient had been detained at Broadmoor for 34 years. His RMO prescribed anti-psychotic medication to which the patient was opposed. The SOAD authorised the treatment plan and the patient was forcibly injected. He contended that compulsory treatment was contrary to Articles of the European Convention on Human Rights in that it infringed his right to life, the prohibition of inhuman and degrading treatment, his right to a fair hearing (in respect of the decision in the SOAD) and his right to a private and family life.

In common with most Judicial Review proceedings, evidence on behalf of the Hospital and the RMO was provided by means of written witness statements rather than live oral evidence. The patient applied for an Order requiring the doctors to attend at Court for cross-examination on their witness statements. This is a rare but nevertheless permissible part of Judicial Review proceedings.

Court Decision

The Court of Appeal allowed the patient's application. In order properly to deal with the matter, the Court accepted the view that it was necessary for there to be cross-examination of the medical witnesses. The Court held that if the patient had the capacity to refuse consent to the treatment proposed, it was difficult to accept that he should nevertheless be forced to have compulsory treatment. It was appropriate for the doctors to attend for cross-examination on the issues of the patient's capacity and the appropriateness of the treatment plan. The Court would therefore be able fully to consider the desirability and appropriateness of the proposed treatment. Therefore, it could not be said that there would be a breach of Article 6 (the right to a fair hearing) in the implementation of the SOAD procedure under the Mental Health Act.

[1] Mental Health Law Briefing No. 46.

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@radleb.com
www.radleb.com

Comment

Part of the central area of challenge was the suggestion that the SOAD procedure did not comply with the Human Rights Act. This was based upon the argument that the SOAD procedure under the Mental Health Act did not give the patient any right to challenge a decision of his RMO and SOAD and was therefore a breach of Article 6. The solution adopted by the Court of Appeal, namely to have the relevant doctors attend before the Court for cross-examination, avoids a finding that the Mental Health Act is incompatible with the Human Rights Act but does potentially lead to significant ramifications in clinical practice, namely the possibility of any patient facing compulsory treatment who has the necessary mental capacity to make a treatment choice, asking the Court to adjudicate on whether he should in fact receive that treatment. This is very much a departure from the previous practice in Judicial Review cases where the Courts were more concerned with administrative process and would not seek to question a doctor's clinical judgment. The *Wilkinson* case very much moves the parameters of review for the Courts, following the implementation of the Human Rights Act, and could potentially lead to a significant number of challenges to clinical practice.

The Court of Appeal did, however, recognise the great inconvenience that it would cause if numerous challenges were to follow. The Court therefore expressed the view that they would expect such challenges to be rare. They would expect a patient to be able to pursue any such claim only where an independent doctor was prepared to act on his behalf to support his claim and the Court stated that doctors should "surely hesitate long before being prepared to join issue with the RMO and SOAD".

Since this decision was handed down at the end of last year, there have not in fact been a significant number of cases following the same lines although one case[2] has made it clear that the SOAD must give written reasons on the substantive basis for his opinion. Indeed, to the contrary, a subsequent decision[3] somewhat retreated from this view and expressed the view that it was not in the public interest for the Courts to "second guess" a medical practitioner's honest judgment. This seems to hark back to the previous approach of not reviewing purely clinical decisions.

The *Wilkinson* case also has potentially significant ramifications on the enforced treatment of detained patients. Although the matter was not dealt with at a final hearing, if compliance with the Human Rights Act prohibits enforced treatment (notwithstanding the provisions of the Mental Health Act) where a patient with mental capacity objects to this, the ramifications for psychiatric practice are immense. In that respect, clarity from a new Mental Health Act cannot come too soon.

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.

[2] R (on the application of Wooder) –v- Feggetter [2002] EW CA Civ 554
[3] R (on the application of H) –v- Nottingham Healthcare NHS Trust [2001] All ER (d) 47.