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BRIEFING

Number 6

Mental Health Law and the new Human Rights Act

MENTAL HEALTH LAW

It is expected that the Human Rights Bill will be enacted soon. The provisions of the European Convention of Human Rights will then effectively become part of English Law. An individual who considers that he or she has suffered a breach of their rights under the Convention will be able to seek a remedy in the English courts. It will still be open to appeal to the court in Strasbourg provided that the applicant has exhausted his rights to legal recourse within this country.

Those who claim to be "victims" of an act which it is alleged is in breach of one of the "convention rights" under the Human Rights Act will be entitled to bring proceedings but only against Public Authorities or quasi-public bodies. There is little doubt that a Mental Health NHS Trust would be regarded as a "Public Authority" by the courts, but a private provider will probably not be unless they are providing a public function. However, an individual could sue a private provider on the basis of a domestic law issue and attach a Convention argument to that so the ramifications could be very wide.

The English courts will be able to grant injunctions, judicial review and damages where they find a breach of a "convention right". They will also have powers to grant a "Declaration of Incompatibility" where the court is satisfied that there is an irreconcilable conflict between legislation passed by our Parliament and the provisions of the European Convention of Human Rights. Such a Declaration will not have the effect of setting aside the legislation in question but it will bring this to the attention of Parliament who may amend the legislation.

When considering whether there has been a breach of a Convention right under the Human Rights Act, the courts will consider whether the alleged interference with the right was "necessary" notwithstanding the aims and objectives underlying the protection of human rights given by the Convention. The European Court of Human Rights has held that "necessity" implies that an interference corresponds to a pressing social need and, in particular, that it is a reasonable way to pursue the particular issue.

"Convention rights" are most likely to be significant in the field of mental health law under Article 3 which provides that

"no one shall be subjected to torture or to **inhuman or degrading treatment** or punishment" (our emphasis).

Article 5 which provides the right to liberty and security is also likely to be of particular relevance in this field.

It is too early to assess all the likely effects of the new Act. However, the Human Rights Act is likely to have some impact on the following areas of mental health practice:-

1. The treatment of patients who are incapable of giving consent at common law

This has found legal justification under the common law through the UK legal principle of "necessity"

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

which requires the patient to be treated in accordance with his or her "best interests". As Lord Steyn has pointed out in his judgment in the recent House of Lords' decision in Bournewood[1], there is a discrepancy in the legal protection given under the 1983 Act which provides certain safeguards for mentally ill patients detained under that Act and the total absence of such safeguards for mental patients detained under the common law e.g. in relation to decisions about the incapacity of patients and what treatment is in their "best interests". This issue may now demand the long awaited reform of mental health legislation to implement such safeguards and prevent treatment being challenged under the Human Rights Act as "degrading". Hospitals might also be required to ensure guidelines are in place in an attempt to ensure proper judgements are made concerning a patient's incapacity and subsequent treatment.

2. Detention of patients under the MHA 1983 and the common law

There is likely to be potential scrutiny of the detention of patients under the Mental Health Act 1983 to ensure that such detention is in compliance with Convention rights. It will not follow that because detention is lawful under the Mental Health Act, it is in accordance with the articles of the Convention. Much will depend on the facts of the case, but there are circumstances in which the administration of compulsory medical treatment might be construed as amounting to "inhuman and degrading treatment" in contravention of Article 3. However, as referred to above, a court will be required to consider whether the interference with a patient's rights in this manner is justified in accordance with the need to protect the patient or other members of society and the treatment is a proportionate means to that end. It is questionable whether the House of Lord's judgment in Bournewood would be upheld on challenge under the new Act.

Article 5(1) provides that

"no one shall be deprived of his liberty save in the following cases and in accordance with the procedure prescribed by law:.... (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants".

Case law on the Convention has established that the following three minimum conditions must be complied with for a detention to be lawful:

(i) Valid detention depends upon the individual concerned being reliably shown by objective medical expertise to be of unsound mind.

(ii) The individual's mental disorder must be of a nature and degree as to justify detention.

(iii) Detention is only justified if and so long as the mental disorder persists[2].

On the basis of this interpretation, the following implications may result from the new Act:-

(a) Under Section 42(3) of the Mental Health Act, the Home Secretary may recall a patient conditionally discharged by him or by a Tribunal. This can be done without requesting a medical recommendation. However, in the light of Article 5, the absence of such medical recommendation is likely to be in breach of the Act. This is subject to an emergency situation arising where the courts will consider whether it has been impracticable to comply with the stated requirements and in the event that the circumstances did not practicably allow a compliance, it would appear that the court will not find a breach of the Act.

(b) There will be a need for safeguards to ensure that any deferment of discharge of the patient is not unreasonably delayed.

[1] R v. Bournewood Community Mental Health Trust ex p. L [1998] 3 WLR 106
[2] Winterwerp v. Netherlands (1979) 2 EHRR 387

3. Legal representation of mental patients and access to the courts

It has been stressed by the Court of Human Rights that in order for an individual to be afforded the "fundamental guarantees or procedure applied in matters of deprivation of liberty" they should have an opportunity of being heard either in person or, where necessary, through some form of representation. These safeguards are regarded as essential to protect the interests of mentally ill persons who, on account of their disabilities, are not fully capable of acting for themselves. Hospitals will thus be advised to ensure that mental patients are given appropriate access to legal representation in circumstances where decisions are being made that might have bearing on their rights. This may again call for guidelines to be put in place.

Article 5(4) provides that

"everyone who is deprived of his liberty... shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful".

The Court of Human Rights has held that this right was not secured by, for example, the intervention of a Responsible Medical Officer because this did not constitute an "independent" review procedure. As a result of his decision, the Mental Health Act 1983 was amended to allow restricted patients the right of access to tribunals which had power to order their discharge (a power previously vested only in the Home Secretary).

It is therefore important to bear in mind that existing law is not necessarily compatible with the rights to be granted under the Human Rights Act and will therefore be open to challenge.

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