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BRIEFING

Number 66

Seclusion after the Human Rights Act: Important New Court Guidance

MENTAL HEALTH LAW

The power to seclude a patient has long been recognised as a necessary element in dealing with patients who are detained under the Mental Health Act 1983 and who pose a risk of significant harm to others. The Code of Practice defines seclusion as "the supervised confinement of a patient in a room, which may be locked to protect others from significant harm. Its sole aim is to contain severely disturbed behaviour which is likely to cause harm to others"[1].

Seclusion had been a practice that, in view of its nature, inevitably has given rise to concerns. These concerns include the misuse of seclusion as a punitive measure and the risk of "therapeutic nihilism", where the clinical team become hopeless about the chances of successful treatment. It is therefore unsurprising that this practice has recently been challenged, with the aid of the Human Rights Act 1998, by patients who had been subject to seclusion. The case is particularly interesting in the importance that the Court of Appeal gave to the Code of Practice, which lacks statutory weight, in the protection of patients who by reason of their seclusion may be extremely vulnerable to breach of their human rights.

The Court of Appeal considered the lawfulness of seclusion in respect of psychiatric patients detained in hospital in connection with the cases of two separate patients who had challenged the lawfulness of the use of seclusion.[2] Firstly, Colonel Munjaz challenged the nature of his seclusion at Ashworth Hospital, where he had been detained under a transfer from a medium secure unit (having committed various criminal offences). He had initially spent his first two years in seclusion at Ashworth and in later years had been placed in seclusion on 4 separate occasions. He did not challenge the decisions to place him in seclusion or the length of the seclusion. His challenge was to the lawfulness of Ashworth's policy which he claimed departed from the Judgment in a previous case in which he had successfully raised issues concerning the policy and also departed from the Code of Practice. A fundamental element of the patient's challenge related to the practice of review adopted by Ashworth, which he argued was a departure from the Code which posed a risk of breach of his rights under Articles 3 and 8 of the Human Rights Act. Ashworth's policy (which had been reviewed following the original challenge by the Colonel) provided for medical reviews twice daily from days 2-7 of seclusion but thereafter for 3 each week (including one by the patient's RMO) together with a weekly multidisciplinary review (also including the RMO).

S, the other Applicant in the case before the Court of Appeal, challenged the reasonableness of his seclusion. He had been admitted to Airedale General Hospital for treatment under Section 3 after an initial period of detention under Section 2, when he had shown aggression to the police and had been secluded. He had been assessed for possible admission to a secure unit in York, but that unit could not take the patient for another few days. When reviewing his seclusion, S's RMO decided that S should not come out of seclusion until either a bed was available in a secure unit *or* he improved. His transfer did not take place because his family objected to him being moved so far away and threatened judicial review. He was then allowed out of seclusion and later transferred to a low secure unit where

[1] Paragraph 19.16 Code of Practice Mental Health Act 1983.
[2] R (on the application of Munjaz) v Mersey Care NHS Trust and R (on the application of S) v Airedale NHS Trust [2003]

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he was treated without any need for seclusion. He was transferred back to Airedale about 3½ weeks later where he remained without seclusion until he was discharged a few days later. The patient argued that the latter period of continued seclusion had only been used because the Hospital had not been able to transfer him to another unit in the relevant period. Accordingly, the patient argued that seclusion had been used for a purpose not sanctioned by the Code of Practice; from the time when the decision should have been made to release the patient from seclusion amounted to a breach of his rights under Article 5 i.e. the right to liberty.

The Case of Colonel Munjaz – Departures from the Code

The Code requires review of seclusion every 2 hours by two nurses and every 4 hours by a doctor or a multidisciplinary review should the seclusion continue for more than 8 hours continuously or 12 hours intermittently over a period of 48 hours. Ashworth sought to justify departure from these requirements with reference to the nature of Ashworth as a special hospital and the risk assessment and risk management plan procedures that applied to all patients in the hospital. Ashworth held some very dangerous patients who were secluded for a long period of time; the hospital argued that the factors that rendered these patients dangerous were unlikely to be resolved in the short term and therefore their departure from the review requirements of the Code was justified. In contrast, where patients were on a short period of seclusion there was a real purpose for them to be subject to twice daily reviews, to check any improvements in their condition which would justify release from seclusion.

The Court of Appeal held that seclusion was capable of amounting to inhuman or degrading treatment as prohibited by Article 3. The Court referred to the test set down in the Strasbourg jurisdiction[3] which stated, inter alia, that when considering whether treatment is degrading under Article 3 the Court should have regard to "whether its object is to humiliate or debase the person concerned and whether as far as the consequences are concerned it adversely affected him or his personality in a manner incompatible with Article 3. This has also been described as involving treatment such as to arouse feelings of fear, anguish and inferiority capable of humiliating or debasing the victim and possibly breaking their physical or moral resistance." The Court of Appeal stated that the detention of psychiatric patients was a means to an end i.e. the assessment and treatment of their mental disorder and a condition of detention which defeated rather than promoted that end was much more likely to amount to inhuman or degrading treatment. In this case, the patients did not argue that their rights under Article 3 had been breached but that given the State's obligations not only to refrain from such treatment but more positively to protect the health of people deprived of liberty, there would always be a risk that seclusion would be in breach of Article 3. The State had a duty to prevent breach of patient's human rights in this way. The Court emphasised the importance of the Code of Practice in achieving the State's obligations to avoid ill-treatment of patients detained and, in these circumstances, secluded.

The Court also acknowledged that seclusion infringed a patient's rights to private and family life under Article 8 unless it could be justified under the qualification in Article 8(2), any conduct that purported to be justified under 8(2) was required to be "in accordance with the law". The Court accepted that the Code of Practice had an important role to play in the safeguarding of the Article 8 rights of detained patients who were subject to seclusion.

The Court of Appeal held that the policy of Ashworth was unlawful insofar as it departed from the Code's requirements on reviewing patients subject to seclusion. The hospital could not justify departure from the Code by reference to how long patients had been secluded. The Court stated that the Code should be observed by all hospitals *unless* they had a good reason for departing from it in relation to an individual patient. The Court recognised that because of the nature of the patient population at hospitals such as Ashworth, there were likely to be more individual cases in such hospitals in which there might be a good reason to depart from the Code. It might be possible to

[3] Keenan v United Kingdom (2001)

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define specific characteristics which justified particular departures and for hospitals therefore to develop general guidelines which could be applied to all individuals who share those characteristics. However, the length of time in seclusion could not in itself amount to a good reason for such departure. The need for safeguards which was provided by regular medical reviews did not simply depend upon the period of time for which patients were secluded.

Comment

It will therefore be important, in the light of the Court's comments, for hospitals to avoid having blanket policies which deny patients the safeguards such as regular reviews as provided for in the Code. Any guidance relating to particular categories of patients must be worded in a manner that allows discretion and consideration of the individual requirements of patients, rather than imposing a policy decision in connection with specific groups of patients.

The Case of Mr S – A Justified Seclusion?

At the hearing of the original application, which formed the subject matter of this appeal, expert evidence in psychiatry had been given on behalf of S and the hospital respectively. The hospital's expert had expressed the view that the seclusion had been necessary and justifiable as there did not appear to be an effective and safe alternative at the time. The records had not confirmed that all the nursing and medical reviews required by the Code of Practice had taken place, but it did not appear that this had had a material effect. The expert called on behalf of the patient took the view that the initial decision to seclude was reasonable, but it was not necessary to continue seclusion for the length of period for which S had been detained. The expert stated that the decision to continue the seclusion appeared to have been largely precipitated by the information received from the police about the Claimant's past history of sexual offending rather than by any change for the worse in his current mental state and behaviour. There had been no incident of current aggression to justify continued seclusion. While the history of past offending should have alerted staff to the risk of offending on the ward, the ward could have been locked to protect the public and the patient could have been "specialled" one to one to minimise the risk to other staff or patients.

The Court of Appeal identified the criterion for lawful seclusion as being that of reasonable necessity judged against the purpose for which the restraint is employed. The same criteria applied regardless of whether the underlying purpose of the seclusion was for treatment or control of the patient. Taking these considerations into account, the Court of Appeal held that the hospital were not justified in keeping Mr S in seclusion from the time when to do so was no longer a necessary or proportionate response to the risk he presented to others. The Court favoured the expert evidence given on behalf of the patient and stated that the evidence put forward on behalf of the hospital that seclusion was being used by the hospital because there was no other alternative at the time was not an adequate justification. The question of "proportionality" should now always be considered when patients are to be placed in seclusion.

Although the Court held that the seclusion of Mr S was unlawful in public law terms, it did not amount to a breach of the patient's rights under Article 5, which the Court held was not concerned with the *condition* of detention. This was not a case where the patient had been detained in a type of institution which was inappropriate to meet the Article 5(1) purpose i.e. the lawful detention of persons of unsound mind.

The importance of the Code for Seclusion

The Court of Appeal, in reversing the decision of the lower Courts, held that the Code should be observed by all hospitals unless they had a good reason from departing from it in relation to an individual patient (see above). The Code was prepared for "the guidance" of doctors and others and the Court held that it would fly in the face of the original purposes of the Code if hospitals or professionals were free not to follow it without good reason. The safeguards provided by the Code

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were particularly important where there was a risk that patients might be treated in a manner which contravened their human rights. The Court held that the State should take steps to avoid such breaches of human rights through publication of a Code of Practice which its agents were obliged to follow unless they had a good reason to depart from it.

The Code requires that hospitals must have clear written guidelines on the use of seclusion[4] it is advised that hospitals review their guidelines in the light of this recent judgment of the Court of Appeal.

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If you would like your seclusion policy checked for compliance with these cases and the Human Rights Act, RadcliffesLeBrasseur can do this for a fixed fee of £250 + VAT.

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Readers are advised to take specific advice before acting in reliance on the matters set out in this briefing.

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[4] See paragraph 19.17 of the Code of Practice.

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