

Number 69

House of Lords rules on mental health issues: a win for RadcliffesLeBrasseur

Two important decisions on mental health law issues

The House of Lords on 13 November 2003 gave judgment in two important cases, *Brandenburg*¹ and *IH*². They help to define the way mental health professionals must take into account recent rulings by Mental Health Review Tribunals (MHRTs) when making their own decisions about the care of patients discharged under the Mental Health Act.

Brandenburg – facts

In *Brandenburg*, RadcliffesLeBrasseur represented the mental health trust. The patient, who liked to be known as Count von Brandenburg, was detained in St Clement's Hospital under section 2 of the Mental Health Act 1983. He applied to the MHRT which on 31 March 2000 ordered him to be discharged with effect from 7 April, deferring the discharge for 7 days to allow accommodation in the community to be found and a care plan to be made, including possible medication. On 6 April 2000, the patient, who had not left the hospital, was again detained, this time under section 3 of the Act. The application was made by the same approval social worker (ASW) who had made the initial application. The medical recommendations were made by the patient's RMO (who had resisted the application for discharge when giving evidence to the MHRT) and a second doctor who had supported the earlier admission.

Brandenburg – legal issues

The patient's lawyers brought judicial review proceedings to challenge the lawfulness of the detention under section 3, which were heard by Mr Justice Burton in the High Court. The legal dispute was confined to this issue: whether, when the MHRT has ordered the discharge of a patient, it is lawful to re-admit him under section 2 or section 3 of the Act where it cannot be demonstrated that there has been a relevant change of circumstances. The case was dismissed by the High Court. The patient appealed to the Court of Appeal, which unanimously dismissed the appeal. Leave was then given by the House of Lords for the appeal to be pursued further.

In his judgment, Lord Bingham said that the problem at the heart of the case was to accommodate the statutory duty imposed on ASWs within the governing legal principles:

- that under common law the personal freedom of the individual may not be curtailed save for a reason and in circumstances sanctioned by the law of the land;
- that the law may properly provide for the compulsory detention in hospital of those who suffer from mental disorder if detention is judged to be necessary for the health and safety of the patient or the protection of others; and
- (a right expressed in article 5(4) of the European Convention on Human Rights) that a person compulsorily detained on mental health grounds should have the right to take proceedings by which the lawfulness of his detention may be decided by a court and his release ordered if the detention is not lawful.

¹ R v East London and the City Mental Health NHS Trust and another *ex parte* von Brandenburg (aka Hanley) [2003] UKHL 58

² R v Secretary of State for the Home Department and another *ex parte* IH [2003] UKHL 59

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

Duties of ASW and doctors

He held that an ASW may not lawfully apply for the admission of a patient whose discharge has been ordered by the decision of an MHRT of which the ASW is aware unless the ASW has formed the reasonable and *bona fide* opinion that he has information not known to the Tribunal which puts a significantly different complexion on the case as compared with that which was before the Tribunal. The ASW has (as was accepted by counsel for the ASW in this case) a limited duty to inform a patient why an earlier Tribunal decision is not thought to govern his case when making an application for admission that is inconsistent in effect with the earlier Tribunal decision. Even so there are limits on that duty, for example if it would involve making a disclosure potentially harmful to the patient or others.

As far as the doctor making a medical recommendation is concerned, Lord Bingham said that the doctor is not required to do more than express his or her best professional opinion.

This decision is clearly good news for doctors and other professionals in the mental health field. It would have been a nightmare for them if they had been obliged, before admitting a patient under the Act, to make detailed enquiries about the existence and basis of any earlier MHRT decision and then to reduce to writing the reasons for their conclusion that there had been a relevant change of circumstances since the date of the Tribunal decision.

IH – facts

The facts in *IH* were more complex. The patient had severely mutilated his three-year-old son and was charged with causing the boy grievous bodily harm. In 1995 the Crown Court found him not guilty by reason of insanity and he was admitted to Rampton Hospital. His status was that of a patient subject to a restriction order without limit of time made under sections 37 and 41 of the Mental Health Act 1983. He was diagnosed as suffering from paranoid psychosis. His case came before the MHRT on a series of occasions, over the course of which it appeared that his condition was improving. The MHRT then adjourned a hearing in 1999 for a care plan to be drawn up including residence at a suitable hostel under supervision of a named forensic psychiatrist. The health authority responsible under section 117 of the Act (advised by RadcliffesLeBrasseur) was unsuccessful in attempting to find forensic psychiatric supervision for the patient and the case went back to the MHRT on 3 February 2000. It then ordered that the patient be discharged, the discharge to be deferred until satisfactory arrangements had been made to place him in a hostel under supervision by a named psychiatrist. In the event, the health authority was again unable to find a psychiatrist willing to supervise him and he continued to be detained. The Home Secretary referred the case back to the MHRT and there was a further decision in March 2002. On this occasion, the Tribunal found that he was and always had been suffering from a recurrent mental illness which was in remission but with a significant risk of relapse and that it was appropriate for him to be detained in hospital for treatment.

IH – legal issues

The patient challenged the lawfulness of his detention between February 2000 and March 2002. He argued that his rights under Article 5 of the ECHR had been violated because (i) the MHRT had lacked the power to secure compliance with its conditions (and, failing compliance, had not discharged him absolutely), and (ii) the MHRT had been unable to re-open and reconsider the case and also because (iii) the psychiatrists had failed to afford him psychiatric supervision and treatment in accordance with the MHRT's conditions. The House of Lords therefore had to consider in some detail the interplay between the provisions for discharging such patients contained in the Mental Health Act 1983 and the European jurisprudence on human rights issues.

Lord Bingham did not accept that the inability of the MHRT to secure compliance with its conditions was contrary to Article 5 of the ECHR. If there was any possibility of treating and supervising a patient in the community, the imposition of conditions permitted that possibility to be explored; however the alternative, if the conditions proved impossible to meet, was not discharge (either absolutely or subject only to a condition of recall) but continued detention. This individual was never detained when there were no grounds for detaining him and so his claim to have been unlawfully detained was rejected.

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

Duty of health authority or PCT

It was held that the duty of the health authority, whether under section 117 of the 1983 Act or in response to the MHRT's order, was to use its best endeavours to procure compliance with the conditions laid down by the Tribunal. This it had done. It was not subject to an absolute obligation to procure compliance and was not at fault in failing to do so. It had no power to require any psychiatrist to act in a way that conflicted with the conscientious professional judgment of that psychiatrist. Thus the patient could base no claim on the fact that the Tribunal's conditions were not met. The House of Lords was therefore able to avoid deciding whether, in a context such as this, psychiatrists were or could be a "hybrid public authority" for the purposes of section 6(3) of the Human Rights Act 1998.

Oxford ruling set aside

The one point on which the patient's claim was upheld was in relation to the MHRT not being able to reconsider its February 2000 order when it proved impossible to secure compliance with the conditions. The MHRT was at that stage precluded by the decision of the House of Lords in the *Oxford* case from reconsidering it. The *Oxford* ruling has now been set aside, so that the MHRT is able to review its decision to deal with any contingency such as where proposed conditions have proved not to be viable.

Conclusion

The actions of professionals in the mental health field have for many years been subject to review by the courts. Decisions have to be taken in good faith, for sound reasons and with lawful authority if they are not to be challenged in judicial review proceedings and overturned. Professionals' actions must also be viewed through the filter of the European Convention on Human Rights, but the impact of the Human Rights Act is not as profound as might have been expected: the approach that must be taken to avoid infringement of a patient's human rights is broadly the same as what has always been required to comply with the principles of English public law. The Mental Health Act does not have to be interpreted in a new way in order to comply with the Human Rights Act.

MHRTs' decisions are to be complied with but the extent to which they limit the subsequent actions of ASWs and doctors depends on a number of factors. In *IH*, as in *Brandenburg*, the House of Lords has taken a pragmatic and realistic approach intended to help both tribunals and practitioners to operate in the best interests of the patients without being unnecessarily restricted by additional procedural legal obstacles.

© RadcliffesLeBrasseur
November 2003

For more information on these cases in particular or Mental Health Law in general contact Stephen Janisch at RadcliffesLeBrasseur on 020 7227 6705, or email: stephen.janisch@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 or telephone 020 7227 7388.

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

³ R v Oxford Regional Mental Health Review Tribunal *ex parte* Secretary of State for the Home Department [1998] AC 120