

Number 74

Detention under the Mental Health Act when suitable discharge facilities are unavailable

Difficulties often arise, particularly in the case of those with learning disabilities, when it is felt that detention under the Mental Health Act is not entirely necessary. However detention in hospital is felt to be more appropriate than the facilities available in the community.

The Court has recently had to consider this issue and the criteria to be applied¹.

The patient was a 32 year old woman with Downs Syndrome. She suffered from severe mental disability. She lived with her mother, her sole carer.

Because of concerns about her care, a social worker obtained a warrant under Section 135 of the Mental Health Act, entered the home occupied by the patient and her mother, and removed the patient to a place of safety (i.e. the local hospital). The patient was detained there under Section 2.

Her mother as nearest relative sought her discharge. This was barred by the RMO under Section 25.

The social worker sought the mother's consent to a Guardianship Order being made. The mother refused. The Local Authority therefore commenced proceedings under Section 29 to displace the mother as nearest relative – this of course had the effect of extending the period of the patient's detention pursuant to Section 29(4) until those proceedings were determined.

At that point the Mental Health Review Tribunal could have discharged the patient but no application was made to the Tribunal within the fourteen days required by statute. Nevertheless, around two months later, solicitors acting on behalf of the patient requested the Secretary of State to refer her case to the MHRT. This was done.

The MHRT declined to discharge the patient. The patient sought judicial review on the basis that this was a breach of her rights under the European Convention on Human Rights. She contended:

1. The fact that the onus was on the patient to apply to the MHRT to review her detention was a breach of Article 5(4)²
2. Article 5(4) requires an automatic review of the lawfulness of detention when a patient lacks capacity
3. Article 5(4) requires a review of detention when a Section 29 application is made
4. The MHRT unlawfully failed to consider the issue of 'dangerousness' when deciding not to discharge her

The judicial review was unsuccessful. The court held that the contentions advanced with regard to Article 5(4) were not sustainable.

¹ R(MH) –v- Health Secretary and MHRT [2004]EWHC56

² The right to a review of a detention infringing the right to liberty

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

The Court also held that the MHRT had acted reasonably in concluding that the criteria for detention had been met. There was no 'dangerousness' criteria to apply in such Section 2 cases. The Tribunal had two choices. Either the patient could remain detained in hospital or she could be discharged into the care of her mother. The Tribunal felt that the patient "would be at an unacceptable level of risk to her health and wellbeing" if she were discharged to her mother's care. Even though it could not be said that the patient was "dangerous", she would still have been discharged to a person who was unsuitable to act as her nearest relative. The patient would therefore have been at a greater risk than if she had remained in hospital. The Court did not consider that Parliament could have intended such an absurd outcome and the application for judicial review was therefore refused.

Comment

Given that it is often difficult to arrange appropriate residential facilities, this case is therefore useful guidance on the role of detention in hospital, in appropriate cases, when suitable discharge facilities are not available. It also provides useful clarity on the point that there is no 'dangerousness' criteria to consider in such cases

© RadcliffesLeBrasseur
April 2004

MENTAL HEALTH LAW

Detention in Hospital Booklet Published

The Department of Health have just published a booklet providing information on detentions under the Mental Health Act. The booklet provides a summary of the detention provisions and statistics on the use of these. It is available on the Department of Health website at <http://www.publications.doh.gov.uk/public/inpatients2003.htm>

For more information on Mental Health Law contact Andrew Parsons at RadcliffesLeBrasseur on 020 7227 7282, or email: 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 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