

Number 80

## The European Court of Human Rights overturns the House of Lords decision on Bournemouth

The European Court of Human Rights has just published its judgment in the appeal from the decision of the House of Lords on Bournemouth. The Court held that detaining an involuntary patient for treatment under the common law violated his rights under Article 5 of the European Convention on Human Rights.

### Background facts

In 1998 the House of Lords ruled in R v Bournemouth Community and Mental Health Trust (in re L) that patients who lack the capacity to agree, but do not object, to their admission to hospital for treatment may be admitted informally. The judgment was given before the Human Rights Act 1998 came into force.

The case concerned Mr L, a 40 year old autistic man who had been admitted to Bournemouth hospital (a National Health Service Trust hospital), where he had been cared for for over 30 years. He was an inpatient at the hospital's Intensive Behavioural Unit and had been admitted to the hospital informally on the basis that he was "quite compliant" and had "not attempted to run away". He was later discharged on a trial basis to paid carers and then in 1995 began attending a day care center on a weekly basis.

On 22 July 1997, while at the day-centre, he became particularly agitated, hitting himself on the head with his fists and banging his head against the wall. Staff could not contact his carers, so called a local doctor, who gave him a sedative. The applicant remained agitated and, on the recommendation of his social worker, was taken to hospital. A consultant psychiatrist diagnosed him as requiring in-patient treatment. With the help of two nurses, he was transferred to the hospital's IBU as an "informal patient".

Dr M., the medical officer responsible for Mr L since 1977, considered detaining him compulsorily under the Mental Health Act 1983, but concluded that it was not necessary, as Mr L was compliant and had not resisted admission or tried to run away.

In or around September 1997 the applicant sought leave to apply for judicial review of the hospital's decision to admit him. The High Court rejected his application, finding that he had not been "detained" but had been informally admitted in accordance with the common law doctrine of necessity. The applicant appealed.

Following an indication from the Court of Appeal (on 29 October 1997) that the appeal would be decided in the applicant's favour, Mr L was admitted for treatment in the hospital as an involuntary patient under the 1983 Act.

The Court of Appeal found that the applicant had been "detained" in July 1997 and that, as a patient could only be lawfully detained for the treatment of a mental disorder under the 1983 Act, he had been unlawfully detained. The relevant health-care authorities appealed.

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The applicant had applied, in the meantime, to the Mental Health Review Tribunal for a review of his detention. An independent psychiatric report was prepared, recommending his discharge. He was released from the hospital on 5 December 1997 and officially discharged to his carers on 12 December 1997.

On 25 June 1998 the House of Lords ruled, by a majority, that the applicant had not been detained and that he had been lawfully admitted as an informal patient on the basis of the common law doctrine of necessity.

### Summary of the European Court judgment

#### Complaints

The applicant mainly alleged that his treatment as an informal patient in a psychiatric institution amounted to detention and that this detention was unlawful, in violation of Article 5(1) of the Human Rights Act (right to liberty and security), and that the procedures available to him for a review of the legality of his detention did not satisfy the requirements of Article 5(4). In addition, relying on Article 14 (prohibition of discrimination), he alleged that he was discriminated against as an “informal patient”.

#### Decision of the Court

##### *Article 5(1): The Right to Liberty*

##### *Was the applicant detained?*

The Court observed that, between 22 July to 29 October 1997, the applicant was under continuous supervision and control and was not free to leave. It made no difference whether the ward in which he was being treated was locked or lockable. The Court therefore concluded that the applicant was “deprived of his liberty”, within the meaning of Article 5(1), during this period.

##### *Was his detention lawful?*

The Court noted that it was not disputed that the applicant was suffering from a mental disorder on 22 July 1997, that he was agitated, self-harming and controllable with sedation only while in the day-care centre or that he had given rise to an emergency situation on that day. Having regard to the detailed consideration of the matter by Dr M (who had cared for the applicant since 1977) and by the other health care professionals on that day, together with the day-care centre’s report, the Court considered there was adequate evidence justifying the initial decision to detain the applicant on 22 July 1997.

The Court further found that the applicant had been reliably shown to have been suffering from a mental disorder of a kind or degree warranting compulsory confinement which persisted during his detention between 22 July and 5 December 1997.

In determining whether the applicant’s detention was lawful, the Court considered it clear that the domestic legal basis for the applicant’s detention between 22 July and 29 October 1997 was the common law doctrine of necessity. This doctrine, in particular the test of what was in the applicant’s best interests, was still developing at the time of the applicant’s detention.

Whether or not the applicant, with appropriate advice, could reasonably have foreseen his detention, the Court found that a further requirement for lawfulness under Article 5(1), namely that any deprivation of liberty should not be arbitrary, had not been met.

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The Court found striking the lack of any fixed procedural rules by which the admission and detention of compliant incapacitated patients was conducted. The contrast between this dearth of regulation and the extensive network of safeguards applicable to psychiatric committals covered by the 1983 Act was, in the Court's view, significant.

In particular and most obviously, the Court noted the lack of any formalised admission procedures indicating who could propose admission, for what reasons and on the basis of what kind of medical and other assessments and conclusions. There was no requirement to fix the exact purpose of admission (for example, for assessment or for treatment) and, consistently, no limits in terms of time, treatment or care attached to that admission. Nor was there any specific provision requiring a continuing clinical assessment of the persistence of a disorder warranting detention.

The nomination of a representative of a patient who could make certain objections and applications on his or her behalf was a procedural protection accorded to those committed involuntarily under the 1983 Act and which would be of equal importance for legally incapacitated patients with, as in the applicant's case, extremely limited communication abilities.

As a result of the lack of procedural regulation and limits, the Court observed that the hospital's health care professionals assumed full control of the liberty and treatment of a vulnerable incapacitated individual solely on the basis of their own clinical assessments completed as and when they considered fit. While the Court did not question the good faith of those professionals or that they acted in what they considered to be the applicant's best interests, the very purpose of procedural safeguards was to protect individuals against any misjudgement or professional lapse.

The Court therefore found that this absence of procedural safeguards failed to protect against arbitrary deprivations of liberty on grounds of necessity and, consequently, to comply with the essential purpose of Article 5(1). The Court therefore held, unanimously, that there had been a violation of Article 5(1).

#### *Article 5(4): The Right of a person to have his Detention Reviewed*

Finding that it had not been demonstrated that the applicant had available to him a procedure to have the lawfulness of his detention reviewed by a court, the Court held, unanimously, that there had been a violation of Article 5(4).

#### *Article 14: The Prohibition against Discrimination*

The Court considered that the applicant's complaint that he was discriminated against as an informal patient did not give rise to any separate issue not already examined under Article 5(1) and (4).

The European Court awarded €29,500 for costs and expenses, amounting to an award of approximately £20,000. It also held unanimously that the finding of the violation under Article 5 was sufficient (just satisfaction) for any non-pecuniary damage sustained by the Applicant. No further damages were therefore awarded.

### **Conclusion**

The implications of this Judgment are potentially far reaching and it has been reported that it may result in a review of 50,000 people being cared for in UK nursing homes and hospitals.<sup>1</sup> Serious consideration will have to be given regarding the circumstances in which involuntary patients are held depending on whether they are "detained" or whether they are free to leave the premises. Given the European Court's emphasis on the lack of procedure to review the detention and protect the rights of

<sup>1</sup> Report in the Independent by Robert Verkaik on 6 October 2004

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involuntary incapacitated patients, in contrast to the protection received by similar patients who are detained under the Mental Health Act, it currently seems likely that the Judgment will result in a greater number of patients being formally detained under the Mental Health Act. Reliance on the “best interests” principle will now expose those treating incapacitated voluntary patients to claims of unlawfulness. The Mental Capacity Bill, currently before Parliament, is likely to be of considerable relevance to voluntary incapacitated patients and it will be interesting to see whether the Government puts forward proposals to amend the Mental Capacity Bill to take into account the Judgment of the European Court.

RadcliffesLeBrasseur are currently considering the full implications of the European Court’s Judgment and will be producing a further briefing to address those issues.

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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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The above is based on the Press Release by the Registrar of the European Court of Human Rights.

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