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The Burden of Proof at Tribunal Hearings and Renewing the Detention of Patients on Leave

Tribunal Hearings: The Burden of Proof

Until recently there has been uncertainty as to the correct standard of proof to use in cases before the Mental Health Review Tribunal. In broad terms, was this the criminal standard of “beyond reasonable doubt” or the civil standard of “the balance of probabilities”?

The Court has now considered this¹. The Court considered two Judicial Review Applications at the same time, both concerning the burden of proof. In one case the patient was subject to a hospital order under Section 37 whereas the other patient was subject to Section 37 and Section 41.

The patients contended that the detaining authority had to persuade the Tribunal to the criminal standard of “beyond reasonable doubt” that their detention should continue.

The Court held that this was not practicable. Because psychiatry is not an “exact science” the court held that it would not be appropriate to have such a high standard in psychiatric cases. This may work to the detriment of patients or fail to protect the public.

In the alternative the patients argued for a standard of “clear and convincing evidence” but this too did not find favor with the Court.

The Court held that the appropriate standard was the civil standard of the “balance of probabilities” (i.e. that something is more than 50% certain).

Hearsay

By virtue of an intervention by MIND the Court was also asked to rule on the use of hearsay evidence. The Tribunal Rules allow the use of hearsay² and the use if this seems to be increasing. The Court felt it appropriate to provide some guidance on the use of hearsay.

Tribunals are reminded that there are inherent dangers in relying on hearsay evidence and where assertions are not recorded in contemporaneous notes the MHRT should be cautious of them. Hearsay is particularly to be treated with caution where the only direct evidence is that of the patient.

Renewing the Detention of Patients on Leave

The new Mental Health Bill makes much of the need for a Community Treatment Order. However the Courts seem to have been permitting a type of such order in the recent decisions regarding patients who are detained but on leave with a treatment regime which involves some form of hospital treatment. The courts have ruled in several cases that they may have their detention renewed. Each case is likely to turn on its own facts but this issue was considered carefully in the recent Mersey Care

¹ R (On the application of DJ) –v- MHRT and R (on the application of AM) –v- MHRT [2005] All ER(D)71

² Rule 14(2) MHRT Rules 1983

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Case³. In the Mersey Care Case the Court held that it was lawful to renew the detention of a patient whose treatment plan included aspects of care in a hospital (in that case weekly OT at the hospital and fortnightly CPN visits)

This issue has recently come back before the Court⁴.

The facts:

- The patient suffered from paranoid schizophrenia. She was first admitted to hospital in December 1991 for a five day period and then again in 1993. She had informal contact with psychiatric services in 1998 and was admitted under Section 2 later that year. She was then discharged for community treatment. Further admissions followed in 2000, 2001 and 2003.
- The current admission commenced in May 2003. In July the patient was given a week's leave and then thereafter increasing periods of leave until December 2003 when she went on full time leave attending ward rounds on a fortnightly basis (subsequently amended to a monthly basis).
- In February 2004 the Tribunal reviewed her case and refused discharge. The patient sought judicial review on the basis that it was unlawful to refuse to discharge a patient when she was on full time leave such that she received treatment in the community and no treatment in a hospital other than attending the monthly ward round.

Decision:

The Court held that the Tribunal had been entitled on the evidence to refuse to discharge the patient. The RMO had been engaged in a delicate balancing exercise and was taking a very light touch to the Claimant's discharge. The intention of the RMO had been to give and maintain increasing periods of leave in order to breakdown the cycle of relapse leading to re-admission. On the facts the Tribunal was entitled to come to the decision that it did and judicial review was refused.

Comment

This latest case follows the line of reasoning and authority leading to the Mersey Care case. It is clear that the Courts will accept a low level of hospital involvement in a patient's treatment plan. As long as there is some element of treatment in a hospital then this may be sufficient to continue the patient's detention.

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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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³ R(on the application of DR) –v- Mersey Care NHS Trust [2002]EWHC 1810

⁴ R (On the application of S) –v- Mental Health Review Tribunal [2004] All ER(D)87