

Number 91

Nearest Relatives: A Miscellany of Latest Case Law

The role of the nearest relative is an important safeguard under the Mental Health Act 1983 and the abolition of this role is one of the aspects of the proposed new Mental Health Bill that has been severely criticised. The powers and role of the nearest relative have been addressed in previous briefings¹. However, there have been several cases over the last couple of years which have had a significant impact on the role of the nearest relative.

Choosing the Nearest Relative

The Mental Health Act gives patients no scope to choose their nearest relative. The individual who is to act as nearest relative is identified in the order of precedence set out in the Act². The patient has no choice. The nearest relative can delegate his powers and an application may be made to displace the nearest relative but the patient cannot choose that individual in the first place.

In the case *J T v United Kingdom*³ the European Court held that the Mental Health Act was incompatible with Article 8 of the Human Rights Act as a result of the failure to allow patients to choose their nearest relative. In that case the patient wished to avoid her mother exercising that role. Her mother lived with the patient's stepfather, who, it was alleged, had abused the patient. The European Court held that she had the right to do this.

As yet the Government has failed to amend the Mental Health Act on the basis that the Mental Health Bill will correct this issue. However the Bill has been considerably delayed and the incompatible nearest relative provisions of the Mental Health Act remain on the Statute Book.

Gay Partners

The categories of nearest relative envisaged by the Mental Health Act do not include any express provision for gay partners. However, where a gay partner has resided with a patient for more than 6 months that person may be the nearest relative pursuant to Section 26(6)⁴.

Taking Account of the Patient's Health and Well-Being

Section 11 (3) and (4) of the Act makes reference to the words "practical" and "reasonable" when considering the obligation of informing the patient's nearest relative of an application for admission. In a case earlier this year⁵ the Court held that these words should be interpreted in accordance with Section 3 (1) of the Human Rights Act and Article 8 to take account of the patient's wishes and her health and well-being. In that particular case the Claimant had suffered for many years with mental health problems and had been detained for long periods between 1982 – 2002. The Claimant's nearest relative was her sister. However, they did not get on and she had not seen her since February 2003. The Claimant did not want her sister to be consulted or involved in any of the decisions about her mental health care. The Claimant also did not want her sister to have the powers of the nearest

¹ See briefings no 22, 29, 31, 35, 62 and 87

² Section 26

³ *JT -v- UK* (Case 26494/95) [2000] 1FLR 909

⁴ *R (SSG) v Liverpool County Council* 22 October 2002

⁵ *R (E) v Bristol City Council* 13 January 2005

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relative. Medical evidence was adduced indicating that any involvement by the sister without the consent of the Claimant could further damage the Claimant's mental health. The Court found in the patient's favour preventing Claimant's sister being involved as this was not practicable in the circumstances.

Incompatibility of Sections 26 and 29 Mental Health Act

The Court has also held that Sections 26 and 29 of the Mental Health Act are incompatible with Article 8 of the Human Rights Act⁶. In that case the patient, who suffered from a range of mental illnesses, and was allegedly abused by her adoptive father when she was a child. The particular nearest relative was her adoptive father. Medical evidence was adduced to indicate that the patient's inability to change her nearest relative could adversely affect her mental state. Again the Court found in the patient's favour and a declaration of incompatibility was made.

Discharge by Nearest Relative if Patient Not Dangerous

The nearest relative may apply to discharge the patient. However the RMO may issue a Barring Order and the question of discharge will then be referred to the Hospital Managers. In addition to considering whether the patient continues to meet the normal admission criteria, the Managers are required to consider the test of dangerousness set out in Section 23. The operation of this Section was considered by the Court earlier this year⁷. In that case the RMO had issued an Barring Order on the grounds that the patient was likely to act in a manner dangerous to himself or to others. The Managers reviewed this decision and concluded that whilst the patient had improved considerably as a result of the medication received, the Managers felt that further detention was warranted in order to enable them to assess whether the patient could recognise his illness.

However, the decision did not appear specifically to consider the question of dangerousness and therefore the Courts held that the Managers' decision should be set aside. It was essential in such cases expressly to consider the test of dangerousness.

Referring the Detention of Incapacitated Patients to the MHRT

A previous Briefing commented on the case of R (MH) v Secretary of State for Health and Others⁸. In that case the patient lacked capacity and was detained under Section 2. Proceedings were taken to displace the nearest relative which took 20 months to resolve during which the patient's detention was prolonged. The nearest relative was not permitted to refer the detention to the MHRT and the question of detention was therefore not reviewed during that extended period.

The Court held that this did not comply with the provisions of Article 5(4) of the Human Rights Act which require a review of an individual's detention. The current practice and the Mental Health Act are therefore also not compliant with the Human Rights Act. In our previous Briefing we suggested steps to minimise the risk in such cases, but we gather this case is going on appeal to the House of Lords.

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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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⁶ R (M) v Secretary of State for Health [2003] EWHC

⁷ R (O) v West London Mental Health Trust 16 March 2005

⁸ [2004] EWCA CIV 1690 – see Mental Health Law Briefing no 88.