

Number 93

Hospital managers given an over-riding discretion

Although the powers of discharge given to Managers are not subject to any specific express criteria in the Mental Health Act, the Courts have held on several occasions that there are criteria to be adopted. This has included:

- Confirmation that the discharge criteria mirror the admission criteria¹
- When reviewing detention following a Barring Order by the RMO, in addition to considering the three discharge criteria the Managers should also consider the fourth criteria of dangerousness pursuant to Section 25 (2)²

However as a result of a recent case³, the Court has held that Hospital Managers have a discretion above and beyond the Section 25 dangerousness test to detain a patient even if they consider that the patient is not dangerous.

This is a newly clarified facet of the Hospital Managers' powers and will require a change in the Code of Practice and many of the forms used at Hospital Managers' Hearings.

The Facts

The patient was an adolescent diagnosed with bipolar disorder and suspected schizophrenia detained under Section 3. Her father, as nearest relative, sought her discharge but this was barred by the RMO.

At the hearing to review this, although the managers felt that she met the S.3 detention criteria, they did not consider that there was sufficient evidence to demonstrate that it was probable that she would be a danger to herself or others if she were discharged. The RMO took a different view but the Managers were adamant that the evidence was insufficient to show a probability of dangerousness.

The Arguments

The detention was challenged on 6 grounds namely:

1. The managers had unduly fettered their discretion under S.23 by treating the dangerousness test as decisive
2. The managers placed too much weight on the Code
3. They considered irrelevant matters
4. The managers failed to particularise the after-care package needed
5. They failed to give proper reasons
6. The managers acted irrationally in that no reasonable managers could have concluded that the patient was not dangerous

¹ R v London South & South West Region MHRT Ex Parte Moyle [1999] All ER 150C

² R v RMHT Ex Parte Huzzey [1998] All ER (D) 164

³ R (SR) v Huntercombe Maidenhead Hospital [2005] All ER (D) 115

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Court Decision ⁴

The Judge came to the conclusion that there was sufficient evidence of dangerousness and that on the facts, the Managers had acted perversely in concluding that this was insufficient.

However, more importantly the Judge also held that the Managers had mis-directed themselves as a matter of law when deciding that they were duty bound to discharge if the dangerousness test was not met.

The Judge held that there was a further residual discretion vested in the Managers (notwithstanding that they did not consider the patient met the dangerousness test) which would permit them to refuse discharge. He held that S.23 gave the managers a wide discretion whether or not to discharge and there was no inflexible rule that if the RMO's view of dangerousness was not upheld, then discharge had to be ordered.

Comment

Whilst the evidence as to whether a particular patient meets the dangerousness test or not is going to depend on the circumstances of that particular case, the Judge's finding regarding the Managers' residual discretion will require a new approach for many managers.

Although the Huzzey case had suggested that if a patient failed to meet the dangerousness test he would usually be discharged it had been thought that the qualification imported by the word "usually" was of little practical consequence. The decision in RS makes it plain that the Managers have a greater discretion than this and that even if the patient is not considered to be dangerous, they have the power to decide not to discharge.

In effect, this requires the managers to adapt a 5 step approach to barring Order hearings: to consider the 3 detention criteria, to consider dangerousness and to consider their general discretion. However, the extent of that discretion was not addressed by the Judge!

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⁴ RadcliffesLeBrasseur acted for the hospital managers