

Mental Health Law Briefing

Number 95

Section 2 Detention and Incapable Patients – House of Lords Decision

We recently reported in Briefing No. 88, the Court of Appeal's decision in *R (M H) -v- Health Secretary [2004] All ER (D) 64*, where S.2 and S.29(4) of the Mental Health Act 1983 were found to be incompatible with the European Convention on Human Rights. That decision has now been overturned by the House of Lords, who found that an incapable patient sectioned under Section 2 of the Act had sufficient protection under the Act.

Background

MH, a 32 year old suffering from Downs Syndrome, was admitted to detention under Section 2 in January 2003. MH's nearest relative sought a Section 23 discharge but a barring Order pursuant to Section 25(1) was issued by MH's RMO. The Section 2 detention was due to expire on 28th February 2003 but on 27th February 2003 an application was made under Section 29(3) to displace MH's mother as nearest relative and appoint an acting nearest relative in her place. Pursuant to Section 29(4) MH was subject to detention under Section 2 until the Section 29 had been disposed of, which was not until May 2005.

The Issue

As previously reported, MH brought proceedings on two principal grounds, the first that due to her mental state she had been unable and incapable of making an application to a Mental Health Review Tribunal in respect of her Section 2 detention. It was MH's contention that Article 5 of the European Convention on Human Rights (ECHR) provided that an incompetent patient should be placed in the same position as a competent patient and, as competent patients have access to a MHRT when detained under Section 2, such an opportunity should also be provided to incapable Section 2 patients.

The second ground was that because the Section 29(3) application to displace her mother as nearest relative had the effect of extending her Section 2 detention beyond the normal 28 day period without formal provision for review by an MHRT, this was also a breach of Article 5 of the ECHR.

House of Lords – Reversing the Court of Appeal

The Court considered first whether or not Section 2 was compatible and considered whether or not the patient was able to “take proceedings” to challenge the lawfulness of their detention, as was their right pursuant to Article 5(4). Although the Court agreed that the previous arguments in the Court of Appeal were “powerful”, it did not feel that Section 2 was in itself incompatible. It concluded that the convention provides “*that every sensible effort should be made to enable the patient to exercise that right [to take proceedings] if there is reason to think that she would wish to do so*”¹. The House of Lords went on to find that the current system pursuant to Section 132² of the Act and Chapter 14³ of the accompanying Code of Practice provided sufficient safeguards to ensure that efforts would be made. The Court also found that an incapable patient’s rights were protected due to the availability of applications being made to a Tribunal on an incapable patient’s behalf as long the patient had sufficient capacity to authorise another person to so act on their behalf. The Court also found that even where a patient’s nearest relative did not have any independent right of application, representation could be made to the Secretary of State requesting that he use his power pursuant to Section 67 (see below).

Section 29

The House of Lords also found that Section 29(4) was compatible with the Convention. In itself, Section 29(4) could operate compatibly with the Convention, the problem only arose where the application to displace the nearest relative was unduly delayed and dragged out as it had been in MH’s case. Although the Court foresaw that a patient’s rights could be violated due to extensive delays it was of the view that the current law already had sufficient safeguards in place to prevent such violations. Section 67(1) of the Act granted the Secretary of State power to refer a case to a Mental Health Review Tribunal. If the Secretary of State was unwilling to exercise his discretion, the Court indicated that Judicial

Review could be used to oblige him to do so. The Court indicated that the Hospital Managers or the local Social Services authority could notify the Secretary of State whenever an application was made under Section 29 so that the Secretary of State could consider the position.

Reviewing Current Practices

In light of the Lords’ decision, where staff are faced with an incapacitated Section 2 patient who is unable to exercise their right to a MHRT, the hospital managers’ duty pursuant to Section 132 and Chapter 14 of the Code should be fully complied with to ensure that “every sensible effort has been made to enable a patient to exercise that right if there is reason to think that they would wish to do so”. Further, if there is concern that a particular Section 2 incapable patient is unable to utilise their rights, consideration should be given to making an authorised application on their behalf⁴. Where a patient lacks the capacity to authorise such an application representations can be made to the Secretary of State requesting that he exercises his rights under Section 67.

A similar line should now be considered where a Section 29 displacement application is made which causes the patient’s detention to be extended beyond 28 days. The patient and their nearest relative should be informed of the Secretary of State’s power under Section 67 and advised that a reference could be made so that the patient’s detention can be reviewed. It may also be sensible to consider setting in place a policy whereby whenever a Section 29 application is made the managers of the hospital notify the Secretary of State of the same so that he is put on notice as to a patient’s position.

Clearly the Lords’ decision relies heavily on informal references being made on behalf of an incapacitated patient to the appropriate parties and it will remain to be seen whether or not Strasbourg would have a similar view. For the time being a proactive approach is advisable when faced with Section 2 incapable patients.

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¹ [2005] UKHL 60 at para. 23

² Which places the managers of a hospital under a duty to take such steps as are practicable to ensure that a patient understands the effect of the provisions under which they are detained and their rights of applying to a MHRT.

³ Chapter 14 of the Code of Practice sets out in detail the information which is to be given to both the patient and their nearest relative on admission under the Act.

⁴ Rule 3(1) of the Mental Health Tribunal Rules 1983.