

Mental Health Law Briefing

Number 96

Mental Health Review Tribunals: a miscellany of recent decisions

Standard of Proof

The question of the correct standard of proof to be applied by the MHRT has been considered in previous cases. This has now been addressed definitively by the Court of Appeal¹.

The patient challenged the burden of proof adopted by the MHRT. On the hearing of his judicial review the Judge held that the correct standard of proof was the ordinary civil standard of proof, namely the balance of probabilities. He also found that issues under Sections 72 and 73 of the 1983 Act as to the appropriateness and necessity of continuing detention or the appropriateness of the patient remaining liable to be recalled were not susceptible to a defined standard of proof. Rather, they involved a process of judgement, evaluation and assessment.

The Judge's conclusions were considered by the Court of Appeal who held that the civil standard of proof was the correct one. English law recognised only two standards of proof, the civil standard (the balance of probabilities) or the criminal standard of proof (beyond reasonable doubt). There was no intermediate standard, nor could the civil standard be broken down into various sub-categories. However, the civil standard did have

flexibility in that the more serious the allegation, the stronger the evidence required to prove an allegation on the balance of probabilities.

The Court did not accept the Judge's comments regarding whether certain matters under Sections 72 and 73 were capable of proof, as the Court felt it was axiomatic that cogent evidence would, in practice, be required in order to satisfy the Tribunal, and on the balance of probabilities the evidence needed to demonstrate a continuing need for detention would need to be cogent. However, the Tribunal had to apply the balance of probabilities as the standard of proof to all issues that it had to determine.

Approach to Section 72 criteria

Under Section 72 the MHRT has to ask itself if:

- a) The patient is suffering from an illness etc. (as defined in the Act) of a nature or degree which makes it appropriate for him to be liable to be detained in hospital for treatment
- b) That it is necessary for the health or safety of the patient or the protection of others that he should receive treatment.

The Court has considered whether these requirements are cumulative and has confirmed that they are¹. The Court

¹ R (on the application of AN) v Mental Health Review Tribunal (Northern Region) [2005] EWCA CIV1605

of Appeal confirmed that the Tribunal is obliged to discharge a patient if the detaining authority fails to satisfy it as to *either* of the criteria set out in Section 72.

Tribunal Hearings where Order for Supervised Discharge made

The Court has recently considered² whether a Tribunal hearing has to proceed if an Order for Supervised Discharge is made before the Tribunal hearing takes place.

The facts

The patient was detained under Section 3 and applied under Section 66 to the Tribunal to challenge his detention. This was listed for hearing on 23rd February, but his RMO made an application for supervised discharge pursuant to Section 25A, and that was accepted on 22nd February. The claimant asked the Tribunal to proceed with the hearing, but this was cancelled by the Tribunal on the basis that the Tribunal would have no power to deal with it now that the supervision application had been accepted. The Tribunal rejected the submission that the patient's new status could be reviewed under Section 66(1)(ga).

Court Decision

An application to the Tribunal to review detention was different to an application to review supervised discharge under Section 66(1)(ga). The consequences of detention and supervised discharge were substantially different. Supervised discharged should not engage Article 5 of the European Convention on Human Rights.

In view of Parliament's decision under Section 66(2) to restrict the applications that may be made by a patient to the Tribunal under Section 66(1) within specified periods of time, the Court held that Parliament had clearly intended that the applications were to be treated differently.

In the circumstances the Court held that the Tribunal had been correct not to proceed with the hearing of the

application to review the detention under Section 3 following the acceptance of the application for supervised discharge.

Discharge by the MHRT : Monitoring the provision of aftercare under Section 117

To what extent are the responsible aftercare bodies required to monitor the provision of aftercare?

The patient was detained under Sections 37 and 41. The MHRT ordered his discharge subject to a condition that suitable hostel accommodation be identified and that his discharge be deferred until all conditions had been satisfied.

The responsible aftercare bodies were notified late of the Tribunal's decision, and although a possible hostel placement was identified there were issues as to how this should be funded. The Tribunal was ultimately able to confirm the conditions were met, but this funding issue led to a delay in discharge, which was challenged by the patient. He contended that the Section 117 authorities were not entitled to delay discharge to consider funding. The issue arose as to whether Section 117 required the responsible authorities to monitor the progress of a detained patient with a view to the expeditious provision of future aftercare services.

The Court rejected this suggestion³. It held that the duty under Section 117 applies only to a person who *ceased* to be detained and had left hospital. Section 117 did not require the relevant authorities to monitor the condition of patients subject to a provisional decision of the Tribunal for conditional discharge.

The Court therefore held that the Section 117 authorities were under no duty to monitor the patient's progress or the result of the Tribunal hearing, and were under no duty to take steps in consequence of the MHRT decision until they had been informed of it. It was unrealistic, thereafter, to expect the Section 117 authorities to act without exploring the funding issues. Furthermore, on the facts, given the need to satisfy other conditions prior to the patient's discharge, the delays in making the arrangements had not led to a delay in his discharge.

Andrew Parsons
© RadcliffesLeBrasseur
January 2006

² R (SR) v MHRT [2005] EWHC 2923

³ R (B) v Camden LBC [2005] EWHC 1366