

Number 88

Section 2: Detention and Incapable Patients

The Court of Appeal has recently passed judgement in *R (MH) v Health Secretary* [2004] All ER (D) 64, and declared Section 2 and Section 29(4) of the Mental Health Act 1983 (MHA 1983) to be incompatible with the European Convention on Human Rights.

Background Facts

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 was issued pursuant to Section 25 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 to displace MH's nearest relative. Pursuant to Section 29(4) MH remained subject to detention under Section 2. The Section 29 application remained unheard some 20 months later at the time of the Court of Appeal's decision.

The Issue

MH brought proceedings on two principle 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 (MHRT) in respect of her Section 2 detention. MH was of the view that Article 5 of the European Convention on Human Rights (ECHR) meant that an incompetent patient should be placed in the same position as a competent patient, and as competent patients had 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 Application to displace her nearest relative had the effect of extending her Section 2 detention beyond the normal 28 day period without provision for review by a MHRT, this was also a breach of Article 5 of the ECHR. She argued that there was insufficient judicial scrutiny of the detention available to patients while held under Section 29(4).

The Court of Appeal found in MH's favour making Declarations of Incompatibility with Article 5 ECHR in respect of both Section 2 and Section 29(4) of the Mental Health Act 1983.

Amending Work in Practice

The decision of the Court of Appeal has wide ranging ramifications for all hospitals and psychiatric units that detain patients under Section 2 of the Mental Health Act 1983. Where a patient is detained under Section 2 and is deemed to be incapable of making their own application to a MHRT, a protocol should be in place ensuring that Hospital Managers automatically assist in referring the incompetent patient to a MHRT. It would be sensible to identify a number of solicitors from the Panel of solicitors who regularly represent patients at Tribunals within the hospital's locality so that the incompetent Section 2 patient can be properly represented. Whilst the Court of Appeal did not specifically focus on incapable Section 2 patients, it would be prudent to have a similar system in place ensuring that where a patient detained under Section 3, is deemed to be incapable of making an application to a Mental Health Review Tribunal without the need for assistance, the necessary assistance should be provided to ensure that that class of patients are provided with the chance to have their detention reviewed by a Mental Health Review Tribunal. Such a system would be over and above the provisions already in place at Section 68(1) & (2) MHA 1983, whereby managers must refer

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section 3 patients to a MHRT at the expiry of six months after initial detention or after 3 years detention if in each case the patient has not applied in the preceding period.

The declaration of incompatibility in respect of Section 29(4) has a potentially greater impact in that *all* Section 2 patients who have their detention extended pursuant to Section 29(4) should be automatically provided with the opportunity to have their detention reviewed by a MHRT. A similar protocol as indicated above should be instigated so that *all* patients whose section 2 detention is extended under section 29(4) have the opportunity for their detention to be reviewed.

Conclusion

It would be sensible therefore, for a protocol to be put in place ensuring that on admission of any patient under Section 2 and even Section 3, an assessment is made of the patient's capacity to make an application to the MHRT in their own right. Once such an assessment has been made, the outcome should be clearly marked in the notes and, if it is found that the patient is incapable of making such an application without assistance, such assistance should be provided. In addition, *all* patients who have their detention extended by Section 29(4) should be provided with the chance to have their extended detention reviewed by a Mental Health Review Tribunal. Where the Section 29 application is taking a considerable time to process, it would be appropriate to provide a facility for review by the Tribunal on a periodical basis. Little judicial guidance has been provided as to the length of period between reviews, however, European case law¹ relating to those detained in prison would suggest that any protocol ensures that reviews are provided not more than 8 weeks apart.

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Execution of Warrants under Section 135 MHA

In a previous Briefing² we reported on a recent case which held that where a Magistrate's Section 135 Warrant required the attendance of specific nominated individuals, failure to have those individuals present (in that case an ASW and two specifically named Medical Practitioners) the Execution of the Warrant would be unlawful.

The House of Lords have now overturned this decision³. They have held that a Magistrate has no power to identify the professionals who are to accompany a Police Officer in the Execution of a Warrant.

For more information on Mental Health Law contact Andrew Parsons at RadcliffesLeBrasseur on 020 7227 7282, or email: andrew.parsons@rlb-law.com.

Out of office emergency advice available 24hrs on 07802 506 306.

Readers are advised to take specific advice before acting in reliance on the matters set out in this briefing.

Future editions can be received by email. Please e-mail: marketing@rlb-law.com or telephone 020 7227 7476.

¹ *E v Norway* [1994] 17 EHRR 30.

² MHLB No. 73

³ *Ward v Metropolitan Police Commissioner 2005 [UKHL 32]*