Mind's legal enewsletter

Issue 8, March 2011

Welcome to issue 8 of Mind's legal enewsletter

Here you'll find items that will inform or refresh your knowledge on legal matters of importance in the mental health sector, through a variety of articles and reports from Mind's Legal Unit and Penny Letts, Member of the Administrative Justice and Tribunals Council.

This newsletter includes coverage and analysis of:

- Patients' experiences of the First-tier Tribunal (Mental Health)
- Legal Aid cuts – Mind's response
- Equality Act 2010 – answering an employer's question about health
- Media Publicity and the Court of Protection
- Mental capacity and debt
- Public Equality Duty

Several of our articles invite your responses on current issues. Please do get in touch to share your experiences, preferably by e-mailing us at legalunit@mind.org.uk. If you need to contact us by phone for any reason, you may call us on 020 8215 2339.

For better mental health

FEATURE

Patients' experiences of the First-tier Tribunal (Mental Health): A joint project of the Administrative Justice and Tribunals Council and the Care Quality Commission

The First-tier Tribunal (Mental Health) is the primary mechanism in England for appeal against the use of Mental Health Act powers of detention, guardianship or supervised community treatment. It is an independent judicial body administered by the Tribunals Service (an agency of the Ministry of Justice) and provides one of the key safeguards under the Act.

People who exercise their right to apply to the Tribunal place a great deal of hope in the process as a means of participating in their care and treatment and restoring their liberty. The Tribunal system as a whole has been subject to a number of changes over the past decade. However, in the mental health field, these changes have taken place with little or no input from the people who use the service, and have not taken account of their experiences of a Tribunal because of the practical difficulties in gaining access to them. It is important that people who have been detained should be treated with dignity and respect and have their rights protected - and their views heard - by each part of the mental health and justice systems affecting them.

The Care Quality Commission (CQC) is responsible for monitoring how the Mental Health Act is used in England and for protecting the interests of people whose rights are restricted under the Act. It does this through its Mental Health Act Commissioners, who meet and interview people who are subject to the Act's powers to hear about their experience. **The Administrative Justice and Tribunals Council** (AJTC) is responsible for keeping under review the administrative justice system (mainly concerned with disputes between citizens and the state) to make it accessible, fair and efficient. It has a particular responsibility to keep under review, and report on, the constitution and working of Tribunals, including the First-tier Tribunal (Mental Health), and AJTC members have the right to observe Tribunal hearings.

In 2010, the AJTC and CQC undertook a jointly sponsored project, with the aim of giving a voice to people who use mental health services, and to improve the operation of the Tribunals that adjudicate on their detention and treatment. The project represents, for the first time, an assessment of people's direct experiences of the Tribunals Service and the First-tier Tribunal on the basis of first-hand accounts. It sets out service users' views and comments on the Tribunal's performance and procedures, identifying individual examples of what is happening in practice and making some recommendations for improvement.

Methodology

In the period June to August 2010, CQC's Mental Health Act Commissioners visited 16 hospitals in two pilot areas (Greater London and the East of England). They carried out structured interviews with 152 patients who were, or had been, detained in hospital, seeking views on their experiences of applying to and appearing before the Tribunal. These patients volunteered to participate after the hospitals sent out a general invitation. The project was designed as a small-scale illustrative pilot and was not intended to be statistically significant or representative of the population of detained patients.

The report

The report of the joint project was published on 30 March 2011 is available on the websites of both the AJTC and CQC. The link is here:

http://www.ajtc.gov.uk/docs/AJTC__CQC_First_tier_Tribunal_report_FINAL.pdf

While the report attempts to identify possible trends and to suggest approaches to improving the Tribunal system, most importantly the project aimed to allow patients to speak for themselves. The report therefore quotes directly from patients' responses to the questions and provides illustrations, in order to highlight their particular views and comments in describing their own experiences.

The people interviewed had different experiences of the Tribunal process. Less than a quarter had received the outcome they wanted at their Tribunal hearing. Nonetheless, over half the respondents had positive comments to make, not least on the importance of being heard. These comments confirm that the Tribunal is an important safeguard for patients, not only as a means of challenging their detention, but also in finding out about and measuring their progress and in checking whether care plans are appropriate and meeting their needs.

Some key points emerged from the findings:

- This report breaks new ground in accessing and communicating patients' direct views of the Tribunal system.
- It is both possible and worthwhile collecting user feedback from detained patients about Tribunals.
- Patients' experiences of Tribunals were diverse, ranging from positive to strongly negative.
- Those who received a positive outcome were, not surprisingly, much more positive of the system than those who received a negative outcome.
- Patients are not always well placed to ensure their lawyers are providing a good standard of advice and representation.
- Delays are a substantial factor in many patients' negative experiences of Tribunals.

- A large part of the distress caused by delays was due to a lack of information about timescales.
- The way pre-hearing medical examinations are carried out is very variable.
- Patients had positive experiences of some parts of the Tribunal process, but there were concerns about the provision of information and access to reports.
- A significant minority said they were not given enough opportunity to be heard.
- Nearly all said they received a very rapid decision. However, follow-up information was lacking and patients felt poorly informed of any further right to appeal.

The report (available on the AJTC website) makes a number of recommendations to suggest ways in which procedures and processes might be changed. Some suggest new actions, while others were included to highlight and add support for initiatives and processes that are already in place to improve practice or address people's needs. It is hoped that this joint project will be the first step in involving the people who use the service in measures to improve the operation of the First-tier Tribunal (Mental Health).

Penny Letts
Member of the Administrative Justice and Tribunals Council

ARTICLE

Legal Aid cuts – Mind's response

In February 2011, Mind and Rethink responded jointly to the Ministry of Justice's Green Paper, "Proposals for the reform of Legal Aid" published on 15 November 2010. The link is here:

www.justice.gov.uk/consultations/legal-aid-reform-151110.htm

Mind is deeply concerned these proposals will have a disproportionate impact on people with mental health problems and prevent access to justice.

Scope

The government wants to limit the scope of Civil Legal Aid. It proposes to retain Legal Aid for public law challenges, mental health, mental capacity, asylum appeals, discrimination and community care. It intends to abolish civil Legal Aid for welfare benefits and asylum support, employment, education, most immigration problems and clinical negligence. Legal Aid for debt is to be limited to situations where a person's home is at stake and similarly for housing, although homelessness will still be covered. There will be no Legal Aid for most family disputes as the government expects couples to use mediation.

Single telephone gateway

People who want Legal Aid advice will be expected to access it by telephone.

Financial eligibility

The means test is to be tightened so that fewer people on low incomes qualify for Legal Aid. People with capital over £1000 are required to contribute from their savings to secure representation.

Some of Mind's concerns

Mind opposes limiting the scope of Legal Aid or reducing financial eligibility. These proposals will prevent people with mental health difficulties from having effective representation in civil disputes that profoundly affect their daily lives, for example, welfare benefit appeals and employment claims. These proposals come at a time when wide-reaching welfare reforms like the work capacity assessments are creating a huge demand for advice.

Poor mental health may lead to legal difficulties like debt and homelessness. It can mean you are dependent on benefits. People with mental health problems face particular barriers in representing themselves. Pressure of court appearances can exacerbate underlying mental health difficulties.

Mind argues that a telephone gateway as the **sole** point of access for Legal Aid will prevent people who are experiencing mental distress from getting the legal help they need. Mind runs a legal advice line, and it is our experience that people with mental health difficulties often need face-to-face advice, and sometimes access to advocates as well, in order to explain their problems and understand the advice that they are given.

You can read the full text of Mind and Rethink's response at:

www.mind.org.uk/campaigns_and_issues/current_campaigns/another_assault/legal_aid

Angela Truell
Mind Legal Unit

ARTICLE

Equality Act 2010 - Answering an employer's questions about health

Disclosing information about a mental health condition to a prospective employer can often be very problematic.

Mind was successful in its campaign to ban employers from using pre-employment health questionnaires during the recruitment process. There was considerable evidence that applicants who disclosed a disability did not get past the sifting stage – and that they would be in a much better position if questions about health and disability came after they had the chance to show their skills in an interview situation.

Since the Equality Act 2010 came into force last October, employers should generally seek health information only after a job offer has been made. S. 60 makes clear that some questions are still allowed beforehand – but this should be restricted to asking about reasonable adjustments at interview and certain health questions if these are of key importance to the job.

From the enquiries we are receiving, it is clear that not all employers have removed health questions from their application forms. It is unlawful to ask detailed health questions, but only the Equality and Human Rights Commission can bring a claim against an offending employer. It will be important to inform the EHRC about employers who have not changed their forms. In the meantime, what should a disabled job applicant do if health questions are still being asked?

Applicants should read questions carefully and answer only what is being asked – if this is unclear, one option may be to delay answering the questions and instead clarify what the employer wants to know. Remember that employers are still allowed to enquire on application forms whether reasonable adjustments may be needed to assist an applicant at the interview stage. If this won't be necessary, then just say 'Not applicable' or 'No'. It follows that if reasonable adjustments will be needed, then the employer will have some indication of possible disability.

Employers are also allowed to ask if applicants will be able to do certain key parts of the job, so again may have advance notice of disability. As an example, EHRC guidance makes clear that if recruiting staff to work in a warehouse, an employer should be able to ask whether applicants can lift heavy objects (or whether they could do so if certain reasonable adjustments were made).

This seems understandable in situations where someone's disability would make the job inherently unsuitable for them. However, we would not expect that an employer would be permitted to ask questions about an applicant's ability to cope in a stressful environment, for example. If forms do contain these or similar questions, this is again something that EHRC may be able to challenge. Mind's Legal Unit would also be keen to be kept informed.

If answering a question about health, then we always recommend answering honestly because giving a dishonest or misleading answer, raises issues about trust. Often in relation to mental health issues, an employee who did not disclose may well have a strong argument that this was only out of concern about stigma around mental illness and not because of any intention to deceive – which should hopefully be taken into account by the employer in deciding how to tackle such a situation. However, it is still possible that giving untruthful or misleading answers could result in disciplinary action.

We hope that the changes in the law will discourage intrusive questions. If questions are asked, then a disabled candidate who loses out on a job may understandably suspect that disability is the reason, giving a possible claim for disability discrimination. Under the previous legislation, such a claim was quite difficult to win because the candidate bringing the claim had to prove the direct link with disability. Now, under section 60 of the Equality Act, an employer who has asked unlawful health questions will be assumed to have discriminated against an unsuccessful disabled candidate and will have the more difficult task of proving to a Tribunal that disability did not play a part in the decision. If the employer cannot do this, then the applicant will have a good chance of winning a discrimination claim.

One of the key things to remember is that the law should work to protect anyone with a disability. We are keen to hear from anyone who is faced with awkward questions in an application form or at interview so that we are able to review how these provisions are working in practice. Our contact details are on page 1 of this newsletter.

Pauline Dall
Mind Legal Unit

ARTICLE

Media Publicity and the Court of Protection

The Court of Protection (CoP) was created by the Mental Capacity Act 2005. Its powers include:

- Deciding whether a person has capacity to make a particular decision for themselves
- Making declarations, decisions or orders on financial or welfare matters affecting people who lack capacity to make such decisions
- Appointing deputies to make decisions for people lacking capacity to make those decisions
- Deciding whether a Lasting Power of Attorney (LPA) or Enduring Power of Attorney (EPA) is valid
- Removing deputies or attorneys who fail to carry out their duties
- Hearing cases concerning objections to register an LPA or EPA and make decisions about whether or not an LPA or EPA is valid.

Private Hearings

The general rule is that CoP hearings should be held in private (Rule 90 Court of Protection Rules 2007). This is based on the principle that these are private matters and should remain so, whether or not that person has capacity. The Court may authorise publication of information about proceedings but in choosing to do so can impose restrictions on publicising the identity of parties and others (Rule 91). The rules do give the Court power to order a hearing to be held in public (Rule 92). Decisions relating to publicity are only to be made where it appears to the Court that there is "**good reason**" for making the order (Rule 93).

The Court has no separate website of its own. Cases with wider impact are publicised without names of the parties being disclosed.

The Media and the Court of Protection

Last year, the Court of Appeal considered in what circumstances the media might be authorised to attend or report proceedings (**A v Independent News and Media Ltd and Others (2010) EWCA Civ 343**). A was a 30 year old professional pianist. There was a dispute about who should be appointed to be his deputies for financial and welfare matters. The Independent had already published stories about him and wanted to attend the hearing. The Court confirmed the presumption in favour of private hearings is "one longstanding exception to the principle that justice must be done in open court". An applicant seeking permission to publicise had first to establish that there was a matter of legitimate public interest that should be published – a **good reason** for making an order relating to publicity. If that is established, then the Court has to consider the balance between competing human rights under the European Convention, namely the interests

of privacy (Article 8 considerations) and the interests of wider disclosure in the particular case (Article 10 considerations).

A recent case

In the recent case of **The London Borough of Hillingdon v Neary and Another 2011 (COP) (28 February 2011)**, applying this approach, the Court gave permission for designated journalists from five organisations to attend CoP proceedings and report information about the case, recognising that it was in the public domain already. The media was permitted to identify the parties by name rather than by initials. The Court would determine what information might be disclosed from the private hearing.

Steven Neary was a young man with autistic spectrum disorder and severe learning disability. He lived with his father Mark Neary. After taking up a placement for respite care arranged by the London Borough of Hillingdon in December 2009, a disagreement arose about his return home. He finally went back to live with his father after the matter came before the Court in December 2010. His case had been covered by the BBC in August 2010. There had been an online petition for his return home.

Five media organisations applied for designated journalists to attend the proceedings and report information about them as the Court permitted .They argued that:

- there was considerable public interest in the work of the Court
- this case alleged serious infringements of rights of Steven and his father
- the issues had been aired in the public domain and the parties named.

The Judge reviewed Article 8 and Article 10 considerations - the balancing exercise. He drew a distinction between cases that have been in the public eye already and those that have not. There was a genuine public interest in ensuring that the work of the Court is understood:

> "It is not in the interests of individual litigants or of society at large for a court that is by definition devoted to the protection of the welfare of disadvantaged people to be characterised … as 'secretive'."

In this case there was no evidence whatsoever that Steven had suffered from the publicity already generated. Decisions about opening up CoP proceedings are likely to be taken only after very careful consideration of the facts in a particular case.

Angela Truell

ARTICLE

Mental capacity and debt

We have featured some of Mind's work on mental capacity and debt in previous issues of this e-newsletter. Over recent months we have been looking again at the difficulties people can face when they lack mental capacity to make financial decisions.
The starting point generally is that everyone is assumed to have mental capacity in relation to any decision. Wherever possible people should be supported in making decisions and even if those decisions are unwise, this does not indicate a lack of capacity to make it. However, a person will not have capacity (using the test set out in s. 3(1) of the Mental Capacity Act (MCA) 2005) to make a particular decision if at the time of doing so he or she is unable to:

- understand information relevant to the decision
- retain that information;
- use that information as part of the decision-making process, or
- communicate his or her decision.

Mind's Legal Unit helped clarify some of these legal issues in a very upsetting case where a woman with a severe mental health condition, which at times affected her mental capacity to look after her business and financial affairs, had been made bankrupt. The case was reported in February 2011: **Nicola Haworth (a bankrupt) v Cartmel and Commissioners for HMRC [2011] EWHC 36 (Ch).**

Ms Haworth was being represented by the Official Solicitor (who appointed Bevans Solicitors, based in Bristol to act). She had not dealt with her tax assessment or with a subsequent Statutory Demand or Bankruptcy Petition and a Bankruptcy Order was made. In fact this resulted because of the costs that had accumulated, and despite the discovery that she had not made any profit on her stables business, and so no tax was due.

The judge in the case looked at medical evidence about her lack of capacity at the time that she had been required to respond to the Statutory Demand and at the time the Bankruptcy Petition was served. Using the MCA test, the Judge concluded that Ms Haworth did not have the mental capacity to understand information about either of these financial matters at the time or to use information in order to decide what she should do to resolve the problem. As a result the bankruptcy order was annulled.
The Judge also considered the possibility that HMRC – which had some knowledge of Ms Haworth's condition and how it appeared to affect her ability to deal with her affairs – may have discriminated against her. As a service provider, HMRC is under a duty to adapt its normal procedures so that a disabled person is not placed at a significant disadvantage, and this had not happened. Instead the enforcement regime carried on, taking no account of Ms Haworth's health difficulties.

We were then able to take account of some of the issues raised in the case when responding to the Office of Fair Trading (OFT) Consultation: **Mental capacity – Draft OFT guidance for creditors**, December 2010.

The draft guidance seeks to balance the needs of people obtaining overdrafts or credit cards (referred to as debtors in the draft Guidance) - at times when they may lack the mental capacity to do so – with the responsibilities owed by creditors when extending credit.

As can be seen from the Haworth case, difficulties can arise from the assumption that debtors have capacity to make financial decisions. A creditor may have information about the debtor's health and possible impact this may have on mental capacity, but if no steps have been taken to appoint an attorney (for example), then often no further enquiries are made, even if the decision seems to be 'unwise'.

We do not want to see assumptions being made about mental capacity because a creditor knows someone has a mental health condition, and certainly don't want to find that people are being denied credit because of misunderstandings about mental health problems or stigma. This would be challengeable as unlawful discrimination under the Equality Act 2010.

One useful development may be for more research to be undertaken into assessing mental capacity in financial decision-making, which creditors should then follow. We also see considerable merit in tackling the problem by stamping out irresponsible lending – this way all vulnerable debtors are protected. A debtor trying to unwind a contract entered into when he or she lacked mental capacity – which the debtor has the difficult job of proving – may then find it easier to do.

We will be keeping an eye on developments in this area – and welcome any thoughts or examples that may reinforce the case for change. Our contact details are on page 1 of this newsletter.

You can access the OFT Guidance and our response from Mind's website. The link is here:

http://www.mind.org.uk/campaigns_and_issues/current_campaigns/in_the_red

Pauline Dall

For better mental health

CASE REPORTS

Jane Clift v Slough Borough Council
Court of Appeal 21 December 2010
[2010] EWCA Civ 1484

Ms Jane Clift reported to the Council an incident of anti-social behaviour in a park by a couple whose identity was known to her. The discussion with the council employee went horribly wrong and became acrimonious. Ms Clift reported the employee to an administrator in the Chief Executive's office. Inflammatory words were spoken by Ms Clift and were fairly aggressive. The result was that her name was placed on the Council's Violent Persons Register.

An email was sent to a wide group of Council employees and "Partner Organisations" together with a copy of the register. In all, about 150 people would have been notified. The register described the "incident" as "threatening behaviour on a number of occasions".

Ms Clift took proceedings for defamation. The Council pleaded justification and alleged that the publication of the register was protected by qualified privilege.

Ms Clift also argued that the Council was a public body and therefore had a duty to respect her private life (including reputation) under Article 8 unless such interference could be justified under Article 8(2).

In the High Court, the judge held that qualified privilege only applied to publication to a limited group of "customer facing staff". In relation to publication to the remainder, the jury dismissed the defence of justification and awarded damages of £12,000. The Council appealed.

The Court of Appeal dismissed the Council's appeal. It held that the Council had a duty to respect Ms Clift's Article 8 rights. The publication of the register to the wider group of people who did not really need to know was disproportionate and therefore the Council could not rely on the justification defence in Article 8(2). In addition, because such interference with Ms Clift's private life was unlawful, the Council could not argue that it had a duty to so publish and therefore the defence of qualified privilege was not available.

Comment:
This is a very interesting case and sets important limits on the extent to which public bodies might feel free to disclose information about a person to employees and other parties. The defence of qualified privilege is often used when information may be false and therefore cannot be justified. This case shows how useful Article 8 can be in trumping this defence.

Michael Konstam
Mind Legal Unit

X v Mid Sussex CAB and anor [2011] EWCA Civ 28

Miss X has had a long-running battle over her right to be protected from discrimination in connection with her role as a volunteer adviser with Mid-Sussex CAB, and her case is of great interest to those who provide their services on a voluntary basis.

Her case is that volunteers should have the same level of protection from discrimination as employees or other workers, but UK legislation and the ruling Directive use a specific form of words that exclude those in unpaid roles.

The Equality and Human Rights Commission intervened to support her argument for protection for volunteers.

Unfortunately for Miss X, the Court of Appeal has now agreed that her role did not come within the definition of an 'occupation' under EC Directive 2000/78 on Equal Treatment in Employment and Occupation, and so UK anti-discrimination law needs to be read in the same way.

One hopeful sign is the comment from the Court of Appeal that 'Volunteers come in many shapes and sizes, and it cannot be assumed that all will have the same status in law', which may open the door to claims from those with slightly different voluntary arrangements in future.

Pauline Dall

TTM v London Borough of Hackney and Others [2011] EWCA Civ 4 14 January 2011

The Facts

The Appellant, M, having come to the UK with his brother from Lithuania to find work but then fallen ill, was admitted to Homerton Hospital and detained there, first under s. 2 and then s. 3 Mental Health Act 1983 (MHA).

Initially M's brother had not objected to the treatment, but later on, having developed concerns about the treatment, gave notice as his nearest relative under s. 23 MHA to discharge M, but agreed that M should stay in hospital in the meantime as a voluntary patient.

As M refused to consent to the medication, he was sectioned again between 30 January and 11 February 2009, on the application of an approved mental health professional (AMHP) for whom the hospital had accepted responsibility. The hospital clinical team were divided as to whether M should be sectioned, but both independent psychiatrists

consulted took the view that he should be. The AMHP, believing that the brother's objection as nearest relative had been withdrawn, had applied for the section 3 without taking account of the objection.

M, with his brother acting as Litigation Friend, challenged the lawfulness of this detention by applying for a writ of *habeas corpus* at the High Court, which was granted in February 2009, and M discharged from detention. The judge, Burton J, found that there had been a breach of s. 11(4) MHA 1983, as although the AMHP had honestly believed that M's brother had agreed to the sectioning, it was not reasonable for her to believe that he had so agreed.

M had also brought a claim for judicial review against the Local Authority and hospital Trust, seeking damages for his detention, or, in the alternative, if this was barred by s.139 MHA, a declaration of incompatibility under the Human Rights Act 1998 (HRA) between domestic law and Article 5 of the European Convention on Human Rights 1950. Mr. Justice Collins of the High Court dismissed the claim for judicial review on 11 June, on the basis of the AMHP's honest mistake. M's detention was lawful because the Trust was authorised to detain him under s. 6(3) MHA, since the application for admission appeared to be duly made, as prescribed by the Act. He held that there was no incompatibility between domestic law and Article 5 of the Convention, but gave leave to appeal on limited grounds.

At the Court of Appeal hearing, which concerned M's appeal against the dismissal of his judicial review action, M argued that his detention was unlawful on two grounds: (1) his brother (who was known to the AMHP) had objected to the application; and (2) neither of the doctors who provided the medical assessment had had previous acquaintance with M, so that the application failed to comply with s.12(2) MHA. He was claiming for unlawful detention, trespass to the person, negligence, breach of statutory duty under MHA 1983 and breach of duty under s.6 HRA.

Judgment

The Court of Appeal allowed M's appeal, in part, holding that, notwithstanding the lawful detention by the hospital managers, M had been wrongfully deprived of his liberty owing to the unlawful action of the AMHP. Lord Justice Toulson gave the leading judgment, overruling the High Court Judge, holding that M had been unlawfully detained under both domestic and European law, and was therefore entitled to pursue a claim against the Local Authority for compensation. Delivering judgment, he affirmed that:

> "[t]he right to freedom enshrined in Magna Carta is a fundamental constitutional right. From ancient times two writs were fashioned for its enforcement – the writ of *habeas corpus* for obtaining release and the writ of trespass to the person for obtaining compensation where the right has been infringed." (Judgment, para 33)

It was a recognised common law principle that:

> "[t]here may be false imprisonment by A, although it was B who took the person into custody and B acted lawfully, provided that A directly caused B's act and that A's act was done without lawful justification". (para 35)

On the one hand, the hospital managers were lawfully exercising their powers of detention under s. 6(3) MHA following an application for admission appearing to be made in accordance with the MHA, so the Trust could not be held liable. However, on the other hand, M was wrongfully deprived of his liberty by the unlawful conduct of the social worker who had made the application for admission. While he had considerable sympathy with the Local Authority's position, and the social worker was "clearly conscientious":

> "[i]t cannot be right, because of the division of responsibility, to regard the resulting state detention as consistent with Article 5, when the fundamental cause of the detention was an application made in contravention of the Act." (para 64)

Toulson LJ also held, following the judgment of Sir Thomas Bingham in **Re SC (Mental Patient: Habeas Corpus)** [1996] QB 599, that the fact that the Trust was entitled to act as it did, did not cure the underlying unlawfulness of the detention as carried out by the AMHP.

Moreover, although s.139(1) MHA operated to limit civil liability for the AMHP's unlawful act to cases of bad faith or action without reasonable care, this could not take precedence over the provisions of the HRA, which applied here, therefore M should have been given leave to pursue a claim for compensation against the respondent Local Authority.

> "Our system of law is rightly scrupulous to ensure that in matters affecting individual liberty the law is strictly applied. It is a hallmark of constitutional democracy." (para 100)

The second ground on which M had been given leave to appeal was the arguable breach of s.12(2) MHA, given that neither of the doctors providing the recommendation on the application for M's admission had had previous acquaintance with him. Toulson LJ noted that there had been changes in the way that the courts approach the consequences of non-compliance with procedural requirements in the exercise of statutory powers. He found that the breach in the procedural requirement here was not fatal to the validity of the application for admission.

> "In these circumstances there was no breach of the underlying purpose of s.12(2), even if there was a failure to comply with the letter of the law." (para 95)

The High Court Judge had therefore been right to reject the argument that the AMHP acted in breach of s.12(2), and so any claim against the Trust could not stand, since the application made to the Trust was not invalid under s.12(2), and not invalidated by anyone acting on behalf of the Trust.

M's appeal against the Local Authority was allowed, Toulson LJ holding that the detention was unlawful, and had been from its inception, under common law and under article 5 of the ECHR (right to liberty and security of person).

Comment:
Question: When is a lawful detention not a lawful detention? On this occasion, the Court chose to accept the Trust's argument that the Local Authority, not itself, should be liable to the Claimant. It argued that it had acted properly in accordance with a procedure prescribed by law, but the Local Authority had acted in breach of the law. Although hospitals traditionally have been held liable for false imprisonment (unlawful detention), as this case demonstrates, if procedures are not followed by the representatives of local authorities, these authorities too can be held liable. It also confirms that, under the case of ***Re SC*** *(above), Hospital Managers are entitled to rely on an application for MHA admission which appears to comply with formalities prescribed by the Act. In such cases, it may instead be possible for a claimant to pursue the local authority responsible for the AMHP. In this case, although the AMHP was not found to be negligent, the statutory defence provided in s.139(1) failed to absolve the Local Authority from all civil liability, owing to the primacy of Human Rights Act provisions and Article 5 ECHR, under which M had the right not to be deprived of liberty except in accordance with a procedure prescribed by law, a procedure the Local Authority failed to follow here.*

Joanna Sulek

R (Khela) v Brandon Mental Health Unit [2010] EWHC 3313 (Admin)
12 November 2010

This case concerns the application of K for leave to launch a judicial review action in respect of a Mental Health Tribunal decision on 31 March 2010 and a challenge to the previous mental health diagnosis of a Responsible Clinician.

K was seeking to challenge the procedure followed, contending that it resulted in her case being considered unfairly, asserting, in particular, that:

1. The Tribunal did not show her case the respect to which it was entitled
2. It did not fully consider or fairly evaluate evidence advanced on her behalf
3. It made findings that were not appropriate, particularly in relation to medication she should take.
   (Judgment, para 1)

The decision of that Tribunal had been not to discharge her, based partly on the medical evidence of her diagnosis provided by her Responsible Clinician. In his judgment reported here, Judge Thornton considered that the decision had been reached by following the appropriate steps and applying the appropriate law, but the Claimant's concern was the method by which the Tribunal reached their decision.

K had previously been sectioned under s.2 MHA and that was the reason for the Tribunal hearing on 31 March 2010, at which she had been represented by a solicitor. Following the Tribunal's decision not to discharge her, K's section 2 detention was then converted to a section 3 on 16 April 2010, shortly after the Tribunal hearing. She was finally discharged from section and from hospital on 22 June 2010. Although a notice of appeal had been served in relation to the 31 March decision, the Claimant, representing herself at this present hearing, reported that she had been advised by her solicitor that, as she had been discharged, the appeal could not be heard and must be abandoned.

Thornton J found that, had the complaint actually concerned the Tribunal hearing itself, then it should have been addressed to the First-tier Tribunal – i.e. the Mental Health Tribunal sitting in its appeal capacity, and not to the hospital. However, K was also challenging her diagnosis from her Responsible Clinician, and therefore seeking relief from the Administrative Court (the High Court), in a bid to exercise her right under the Human Rights Act [and under the Articles of the European Convention on Human Rights 1950 (ECHR)] to be diagnosed correctly.

According to Thornton J, however, even had she brought the proceedings in the correct format, the remedy she was seeking was not one open to her in law:

> "[t]here is no remedy currently available that enables the court to order that the diagnosis of a doctor should be changed and corrected." (para 6).

Although the failure to include the correct Defendant as a party to the action would not in itself have been fatal to her claim (para 7), there was also no remedy available against the Tribunal, even had they been named as a party in relation to the second complaint (the diagnosis). Thornton J also declined to express any views as to whether the

Tribunal was disrespectful or entitled to reach conclusions as to the medication that K should take or any past or present diagnosis of her illness. In any event it was now too late for the Claimant to bring a complaint about those findings, because she had now been discharged, and, as she had been advised, the law provides no further avenue of appeal. He added that the Court would not intervene as, in his view, she had had the full remedy for the complaint she had had at the time in question.

It was simply not useful for the Claimant "to seek to unscramble a diagnosis of a historic nature about her in relation to a condition which she no longer suffers from." (para 7). The Court, in conclusion, declined to re-investigate procedures that were followed at the time of the original decision, because by the time of this present hearing, it was many months after that decision had ceased to have any practicable purpose, and so lay in the past.

For these reasons, the Judge dismissed the Claimant's application, and, on invitation from the Defendant's Counsel, agreed to mark the case as being totally without merit.

We are indebted to Mental Health Law OnLine (www.mentalhealthlaw.co.uk) for information on this judgment.

Comment:
Claimants cannot use the Judicial Review procedure to re-open questions of medical diagnosis, but it would have been of interest to discuss more amply the rejection of the Claimant's bid under the Human Rights Act to receive an accurate diagnosis of her condition. People who have received treatment and care from the mental health services have frequently expressed to Mind a desire to challenge the accuracy or reasonableness of their diagnosis, sometimes after being declared free of the condition. There would clearly be difficulties in pursuing a claim under Articles 5 or 8 of the European Convention. Anyone seeking to establish a misdiagnosis under negligence principles would need to show that the diagnosis is one that other specialists would not have considered reasonable at the time in question ***(Bolam v Friern Hospital Management Committee [1957] 1 WLR 582****), or that it fell below a reasonable standard of care for some other reason (****Bolitho v City and Hackney Health Authority [1997] 3 WLR 1151****). The same would apply to a complaint against the Trust under the NHS Complaints Procedure. For many reasons, it is unusual for such actions to be pursued to a successful conclusion.*

Joanna Sulek

NEWS

Safeguarding Vulnerable Groups Act 2006 Vetting and Barring Scheme (VBS)

A Government Review was announced in June 2010, and a further review to include the Criminal Records regime announced in October 2010. The future of the Independent Safeguarding Authority (ISA) was also to be considered. On 11 February 2011 the Coalition Government published the findings of its Review into the Vetting and Barring Scheme, which can be read at:

www.homeoffice.gov.uk/crime/vetting-barring-scheme/

Key recommendations include:

- merging the Criminal Records Bureau (CRB) and Independent Safeguarding Authority (ISA) to form a streamlined new body
- those working or volunteering with vulnerable groups will no longer be required to register with ISA under the VBS.

In the meantime, CRB checks continue as normal and certain duties under the VBS, many of which came into force in October 2009, remain in force. These include the employer's duty to prevent a barred individual from engaging in Regulated Activity, and to carry out enhanced CRB checks on individuals to be engaged in Regulated Activity, and the duty to refer certain information to the ISA where it has withdrawn permission for an individual to engage in such activity. However, the case of **R v Royal College of Nursing & Others v Secretary of State for the Home Department and Independent Safeguarding Authority [2010] EWHC 2761 (Admin),** 10 November 2010, produced a declaration of incompatibility between the Safeguarding Vulnerable Groups Act 2006 and Article 6 of the European Convention, on account of the Act's provisions which trigger automatic inclusion of an individual within the Vetting and Barring Scheme when certain specific criminal offences are committed.

Mental Health Lawyers Association

The Mental Health Lawyers Association reports that, with Social Services departments greatly reducing their aftercare budgets, it has heard of cases of patients, both informal and formal, left in hospital awaiting aftercare funding and blocking beds for others, even though many of these are eligible for s.117 aftercare. In its response to the Legal Aid Green Paper, it argues that a 10 per cent reduction in Legal Aid would be disastrous for the future of representation in Mental Health Law. It also comments on other proposals such as the removal of certain legal areas from the ambit of Legal Aid and the impact of a single telephone gateway to Civil Legal Aid on mental health clients.

http://www.mhla.co.uk/modules/smartsection/item.php?itemid=555

It is in addition seeking to argue that matter starts have no place in Mental Health Legal Aid work as the Government is bound to provide legally-aided representation to all who need it at a Mental Health Tribunal.

Autism

The Government in December 2010 produced new guidance on implementing the national autism strategy, **Implementing Fulfilling and Rewarding Lives: Statutory guidance for local authorities and NHS organisations to support implementation of the autism strategy,** available at:

http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_122847

Care Quality Commission

Recent guidance is available on the Care Quality Commission's website for care homes and hospitals on what to do when applying for authorisation to deprive a person of their liberty under the Mental Capacity Act 2005 Deprivation of Liberty Safeguards (DOLS), as are application forms for initiating the procedure. In its Annual Report, its first on the operation of the Mental Health Act, the CQC also highlights its concerns about the use of Community Treatment Orders (CTOs). For example, significant delays have been occurring in providing Second Opinion Appointed Doctors' (SOADs) certificates for community patients' treatment. The report is available at:

http://www.cqc.org.uk/_db/_documents/CQC_Annual_Report_2009-10_WEB.pdf

Joanna Sulek

Public Equality Duty comes into effect on 5 April

The Equality Act 2010 replaces previous anti-discrimination laws with a single Act. The Government has confirmed that the new general public sector equality duty contained in the Equality Act 2010 (s.149) will now come into effect on 5 April 2011. It has stated that the draft regulations relating to the specific duties for England are to be revised and will not come into force yet. Comments on the new draft regulations are invited until 21 April 2011.

See the Government Equalities Office website.

http://www.equalities.gov.uk/equality_bill.aspx

The specific duties are intended to help public authorities meet the new general equality duty.

What is the general duty?

The duty requires a public authority to have a due regard to the need to:

- Eliminate discrimination, harassment, victimisation and any other conduct prohibited by the Act
- Advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it
- Foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

Having due regard to the need to advance equality means having due regard to the need to:

- remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic
- take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it
- encourage persons who share a relevant protected characteristic to participate in public life or other activities where their participation is disproportionately low.

Who is covered by the duty?
The Equality Act broadens the scope of the public duty so that it now applies to age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation. It replaces the old public equality duties for race (s.71 of the Race Relations Act 1976), gender (s. 76A Sex Discrimination Act 1975), and disability (s.49A Disability Discrimination Act 1975).

Angela Truell

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