



Mental Health Alliance

Referral to the Secretary of State by hospital manager

House of Lords Committee Stage briefing

Referral to the Secretary of State by hospital manager

After Clause 31

Insert the following new Clause—

"Referral to Secretary of State by hospital manager

After section 67 of the 1983 Act insert—

"67A Referral to Secretary of State by hospital manager

(1) Where a patient who is admitted to hospital in pursuance of an application for admission does not exercise his right to apply to the Mental Health Review Tribunal under section 66(1) above, the managers of the hospital shall, before the expiration of the period for making such application, consider whether—

(a) the patient lacks capacity to decide whether to make such an application; and

(b) there is any good reason why such an application should not be made.

(2) In considering whether there is any good reason why an application under subsection (1) above should not be made, the hospital manager shall have regard to the wishes and feelings of the patient so far as they can be ascertained.

(3) Where the hospital manager reasonably believes that the patient lacks capacity and that there is no good reason why an application under subsection (1) above should not be made, he shall refer the patient's case to the Secretary of State in order that he may exercise his power under section 67 to refer the case of any patient to the Mental Health Review Tribunal."

Purpose of the amendment

To ensure that hospitals comply with their legal duty to refer patients who lack capacity to apply for a tribunal, to the Secretary of State in order that she may decide whether or not to refer the patient to a Mental Health Review Tribunal.

Briefing

*The case of R (MH) v Secretary of State*¹

The facts

The case concerned the compatibility or otherwise of the Mental Health Act with the Human Rights Act insofar as it allows detained patients who do not have the mental capacity to make their own applications to the Mental Health Review Tribunal to have their case considered by the Tribunal on equal terms with those detained with those detained patients who do have the capacity to make their own applications.

MH was a woman with down's syndrome detained under section 2 of the Mental Health Act. She made no application to the Mental health Review Tribunal and it was agreed that she lacked capacity to make such an application.

The clinical team felt that MH's needs would be best met by placing her in long term residential accommodation. Her mother – who was her nearest relative – objected and the authorities made an application to displace her as the nearest relative.

In accordance with section 29(4) the period of detention under section 2 was automatically extended until the displacement was finally disposed of. This process lasted 2 years until the Court of Appeal in 2005 dismissed the mother's appeal against the county court's decision to displace her as nearest relative.

During this period MH's case was considered by the Mental Health Review Tribunal after her lawyers asked the Secretary of State to use her discretionary power to refer any case to the Tribunal under section 67 of the Mental Health Act.

Judicial review was brought on the ground that MH was denied the right to have the lawfulness of her detention determined speedily by a court – as a result of her lack of capacity to make an application and the provisions of section 2 and section 29.

In 2004 the Court of Appeal had decided that the Mental Health Act was incompatible with the Human Rights Act, but the House of Lords overturned the Court of Appeal judgment on the basis that section 67 of the Mental Health Act gives the Secretary of State for Health a discretionary power to refer any case to the Mental Health Review Tribunal, and that this power could be used to ensure that patients incapable of making their own applications had their cases considered within the same time frames as those who are capable of making their own applications.

It is clear from the judgment that in the absence of anyone else to help, the Hospital Managers have a duty to ensure that patient's rights are protected. In the context of this situation, this means that the Hospital Managers have a duty to refer the case to the Secretary of State, with a request that it is referred to the Mental Health Review Tribunal, if the patient lacks the capacity to make a tribunal application, and there is evidence that the patient would make an application if she had the capacity to do so – for instance evidence that the patient was not happy in hospital.

¹ U.K.H.L 60

Hospital Manager Referrals to the Secretary of State

Every year there are approximately 45000 detentions under section 2 and section 3 of the Mental Health Act, which are the sections that entitle a patient to make an immediate application to the Mental Health Review Tribunal.

In contrast according to the Department of Health the annual number of Section 67 requests made to the Secretary of State in recent years:

2002 – 6 requests
2003 – 15 requests
2004 – 4 requests
2005 – 7 requests
2006 – 9 in the first 5 months

We do not have this year's figures but they are unlikely to have fallen below this by any significant amount.

It is extremely unlikely that all but a small minority of patients detained under the Mental Health Act have the capacity to make a tribunal application. For example some of these patients will have had learning difficulties which will have prevented them from understanding the nature and purpose of the Tribunal. Others by reason of their mental illness will not have had the capacity to apply for a Tribunal because, for instance, their depressive symptoms make them feel that there is no point in applying, or their delusional symptoms make them suspicious of the Tribunal's motives.

Just taking section 2 detentions - in 2004/05 section 2 was used over 21000 times, and there were just over 6000 section 2 tribunal applications. The figures for the current year are unlikely to be very different. It follows that in the last 12 months about 15,000 people detained under section 2 did not apply for a tribunal. Some of them would have been discharged very quickly, and some of them would have made a capacious decision not to challenge their detention, but there must have been many who lacked the either the mental ability or legal capacity to make a decision on whether or not to apply, and these people should have been referred to the Mental Health Review Tribunal. Even if only 10% of the non-apppliers fell into this category (and it is likely that the proportion would be much higher), this would still have resulted in about 1,500 referrals for section 2 tribunals in the last year. In fact, in the 12 months since the House of Lords judgment, there have been 16 referrals in total, some of which may have been for section 3 or section 37 detentions.

The Alliance is concerned that hospital managers are not complying with their legal obligations to ensure that suitable cases are referred to the Tribunal. It is difficult to avoid the conclusion that people with mental disorders, and particularly those who lack capacity, are subject to institutional disability discrimination from those who should be protecting them.

The Government's response at Committee stage

The Government rejected a similar amendment at Committee stage for the following reasons:

- If a patient does not use the right to apply to the tribunal - section 68 already places a duty on hospital managers to refer a case to the tribunal where no application has been made in the first 6 months. Following this adult patients are automatically referred ever 3 years and every year if they are children
- The Bill introduces the option to reduce these periods – when sufficient resources are available.

- The amendment would lead to an immediate increase in tribunal referrals which may or may not be wanted by the patients concerned
- It forces managers to assess capacity indiscriminately and because capacity is decision specific – it cannot be assumed that this assessment will be carried out anyway as a routine part of patient care.

Alliance response

The amendment is intended to help NHS trusts not to fall foul of the law – rather than change the law. The case of MH clearly established that Hospital Managers have a duty to refer the case to the Secretary of State, with a request that it is referred to the Mental Health Review Tribunal, in certain cases – i.e. if the patient lacks the capacity to make a tribunal application, and there is evidence that the patient would make an application if she had the capacity to do so.

Baroness Hale concluded in this case:

“...every sensible effort should be made to enable the patient to exercise that right [to appeal to the MHRT] if there is reason to think that she would wish to do so.”

It was considered by Baroness Hale that the Secretary of State’s discretionary power under section 67 to refer any case to the MHRT provided practical and effective access to the MHRT, particularly as the Secretary of State has “..a duty to act compatibly with the patient’s Convention rights and would be well advised to make such a reference as soon as the position is drawn to her attention.”

The duty under section 68 to refer all cases for a tribunal hearing where no application has been made after 6 months – is not a sufficient safeguard according to the judgment for this particular group of vulnerable patients. It is indeed likely that this amendment may lead to an increase in tribunal hearings – however this is because these patients are currently being denied access to the Tribunal.

We agree with the Government that Hospital Managers in general have no system to identify those detained patients who are incapable of applying for a Tribunal, and that therefore many people are being denied the right to have their cases heard by a Mental Health Review Tribunal. The Department of Health has also failed to issue any guidance on this point.