First tier tribunal (mental health) (the tribunal).

ASSIGN BUSTER

Therefore the MHA contains a number of measures aimed at protecting the rights of individuals but ensuring compliance with the safeguards requires judicial oversight. This oversight function is initially carried out by the First Tier Tribunal (Mental Health) (the Tribunal) with rights of appeal to the Upper Tribunal and then to the usual appellate courts. To effectively carry out these functions and to be ‘ human rights compliant’ the Tribunal needs sufficient powers and sanctions to ensure that the law is obeyed. The Tribunal has wide ranging powers to review and overturn decisions of authorities and to compel compliance with procedures but whether these powers are sufficient is open to question. Many patients are deprived of their liberty using powers conferred by other legislation[1]and as such cannot apply to the Tribunal.[2]The MHA applies only to patients being treated in a hospital and does not apply to patients in, for example care homes. Thus there are a significant number of patients to whom the MHA does not apply and who are not protected by rights of appeal to the Tribunal.

The Tribunal has to balance a number of issues when reaching decisions including the freedom of the patient, the protection of the public and the best interests of the patient. The Tribunal has the power to discharge a detained patient either immediately or after a further specified time. The Tribunal may also recommend supervised discharge, leave of absence from hospital or transfer to an alternative hospital.

The detention and treatment of patients under the MHA raises a number of issues regarding compliance with the European Convention on Human Rights (ECHR). In particular issues concerning Article 2, the right to life, Article 3, the prohibition on inhuman and degrading treatment, Article 5, the right to

liberty and Article 8, the right to respect for private and family life, are raised when authorities seek to take action under the MHA.[3]

Therefore to be a fully ' human rights compliant' safeguard to the rights of detained patients, mental health law and the Tribunal must protect Article 2 rights. In the case of Osman v UK[4]the court held that public authorities have obligation not to end the life citizens and also a positive obligation to protect life. In the case of Savage v South Essex NHS Trust[5]the House of Lords held that where a compulsorily detained patient presented a ' real and immediate' risk of suicide and the health authority knew or ought to have known of that risk then the health authority had a obligation to take reasonable steps to prevent the patient from committing suicide. Thus there are safeguards in place requiring that health authorities protect the patient's right to life by implementing a system for assessing suicide risk. However the protection given to Art. 2 rights will vary according to whether the patient is detained or attending hospital voluntarily. In the case of Rabone v Pennine Care NHS Trust[6]Simon J. held that the positive obligation to protect life only applied to detained patients and that the NHS trust had not infringed the patient's Art. 2 rights. Thus the Tribunal is unable to provide ' human rights compliant' safeguards to all patients in these circumstances.

Secondly the law and the Tribunal must protect a patient's Art. 3 rights not to be subjected to inhuman and degrading treatment. In the case of Herczegfalvy v Austria[7]the ECtHR held treatment that was a ' therapeutic necessity' would not be considered inhuman or degrading treatment. In the case of R(PS) v Dr G & Dr W[8]the court held that treating detained patients without consent was not incompatible with Article 3 so long as the treatment

was medically necessary, in the patient's best interests and was proportionate to the need to protect the patient's health. Thus in order to protect patient rights and to be ' human rights compliant' the Tribunal must ensure that the conditions set out in the PS case are met. The amended Mental Health Act has altered the position slightly and it is now no longer possible to carry out certain treatments without consent despite there being a medical necessity.[9]Parliament thus recognised that operation the Tribunal and the ECHR were not always sufficient to protect the rights of the detained patient.

Art. 5 ECHR states: "" Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:" Art. 5(4) continues: "…the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts, or vagrants."[10]Therefore a person's right to liberty may be interfered with or even curtailed if it is shown that they are of ' unsound mind.' In the leading case of Winterwerp v The Netherlands[11]the ECtHR stated that ' unsound mind' was:"…a true mental disorder – calls for objective medical expertise." Thus it must be shown, by reference to medical evidence that the patient is of ' unsound mind.' If this is done and the detention is a proportionate response then the authorities will have gone a significant way towards proving that the infringement of the patient's Art. 5 rights is lawful. Article 5 creates a two-stage test and authorities must also show that the patient's case has been dealt with according to a ' procedure prescribed by law.' The Tribunal must therefore assess if the exercise of powers under Ss 2

& 3 MHA is lawful and proper. There are a number of procedural requirements which must be followed for detention of a patient to be lawful. Firstly, the person or body authorising the detention must have statutory power to do so.[12]The court must also hear evidence from both sides[13], the patient must have the right to apply to a tribunal for a review of his detention[14]and that detention must be reviewed at regular intervals and within a reasonable time.[15]Also in the case of Nowika v Poland[16]the ECtHR stated that detention should be for no longer than was necessary to achieve the intended purpose.

Arguments concerning the protection of a detained patient's Article 8 rights are closely linked to those concerning Article 5. Restrictions on a patient's freedom of movement that fall short of a breach of Article 5 may be a breach of Article 8. Article 8 will also form the basis of many challenges to the day to day conduct of the patient's treatment. Article 8 is also relevant to treatment and supervision of the discharged patient or a patient on temporary leave of absence from hospital. In the case of G v E[17]the court held that removing the patient from his long term carer was a breach of Article 8.

The Tribunal will be concerned with assessing whether the treatment of patient is compatible with the ECHR and also with the compatibility of mental health law in general. The principle provisions of the MHA concerning compulsory detention of patients are S. 2. MHA which allows the authority to apply for the compulsory admission of a patient to a hospital for assessment so long as: "(a) he is suffering from a mental disorder of a nature or degree which warrants the detention of the patient in a hospital for assessment… and (b) he ought to be so detained in the interests of his own health or

safety or with a view to the protection of other persons." and S. 3 MHA which gives the appropriate authority the power to make: " An application for admission for treatment may be made in respect of a patient on the grounds that: – (a) he is suffering from a (mental disorder) of a nature which makes it appropriate for him to receive medical treatment in a hospital; and (b) it is necessary for the health or safety of the patient or the protection of other persons that he should receive such treatment and it cannot be provided unless he is detained under this section. and (c) appropriate medical treatment is available for him." There are also provisions within the MHA for appropriate authorities to apply for orders securing the short-term detention of a person.[18]Patients have the right to apply to the Tribunal to review the exercise of powers under Ss. 2 & 3 MHA.

Whilst assessing the validity of the exercise of powers under Ss. 2 & 3 MHA the Tribunal must assess if the patient is suffering from a mental disorder " of a nature or degree which warrants admission to hospital." The Tribunal will hear evidence from both sides before reaching a decision. The MHA also requires that detention should be necessary for " the health and safety of the patient or protection of other persons." Once again the Tribunal will hear evidence from both sides before making a decision. Thus the Tribunal is initially an effective mean of protecting patients' rights.

The MHA has been amended and the latest version represents an obstacle the Tribunal becoming a truly ' human rights compliant' safeguard for patient rights. The previous version of the MHA stated that detention could only be authorised of treatment ' likely to alleviate or prevent a deterioration of the patient's condition' was available. This was known as the ' treatability

requirement'. The amended version of the MHA requires that medical treatment ' be available'. There is no requirement that the treatment is effective[19]and thus many more patients are bought within the scope of the MHA. There is thus a potential for the rights of patients previously deemed to be ' untreatable' to be infringed. However as these patients may now be made subject to orders under the MHA, they acquire formal rights to apply to the Tribunal that were previously denied them and thus the Tribunal is able to safeguard the rights of a greater number of people.

The Tribunal will also be called upon to oversee the treatment of detained patients. Ss. 62 & 63 MHA allow patients to be treated for the mental disorder they are suffering from without their consent. However Ss 57 & 58 MHA prohibit the administration of certain types of treatment without the patient's consent and/or a second opinion.[20]Also in the case of St George's Hospital v S[21]the court held that a patient detained for treatment did not automatically lack capacity, stating: "…a woman detained under the Act for mental disorder cannot be forced into medical procedures unconnected with her mental condition unless her capacity to consent to such treatment is diminished."[22]

However the Tribunal and the courts have shown themselves to be willing to authorise treatment that may in the circumstances be an infringement of patient rights. In R v Collins ex parte Brady[23]the court authorised force feeding of the patient on somewhat dubious grounds.

When making decisions regarding the rights of patients The Tribunal will consider the provisions of The Code of Practice attached to the MHA. Mental

health practitioners have a legal duty to ‘ have regard’ to a number of principles when making decisions about detained patients. The Tribunal will regard failure to abide by the ‘ guiding principles’ of the Code of Practice as grounds for carrying out a review of the patient’s detention. The five principles are the ‘ purpose principle’, the ‘ least restriction’ principle, the ‘ respect principle’, the ‘ participation’ principle and the ‘ effectiveness, efficiency & equity principle’. By enforcing compliance with these principles the Tribunal can ensure that mental health law safeguards the rights of the patient.

However despite the requirements of the Code of Practice there is an underlying emphasis running throughout mental health law to protect the rights of third parties at the expense of the rights of patients. In extreme cases the law and the courts have shown a tendency to view the mentally ill as dangerous persons. Also appropriate authorities can apply for detention of patients if it is in the ‘ best interests’ of that patient. Such cases allow authorities to act in a manner that may infringe the rights of patients. The complicity of the courts to such breaches shows that in certain circumstances the courts are far from ‘ human rights compliant.’ In the case of R(B) v SS[24]Lord Phillips stated: “ If detention of a patient for treatment pursuant to S. 3 is justified for the protection of others, it is illogical to content that a higher standard has to be applied to justify the administration of the treatment itself.”

Also there are other means by which a patient may be compulsorily detained. S. 4A Mental Capacity Act 2005 (MCA) allows for patients to be deprived of their liberty if certain conditions are met. These conditions are

contained in the Schedule[25]attached to the Act and in The Deprivation of Liberty Code of Practice[26]. Patients who are dealt with under the MCA have a right to apply for review to the Court of Protection but are excluded from the ‘ human rights compliant’ regime of the Tribunal. Also in the case of R v Bournewood Community Mental Health NHS Trust, ex parte L[27]. The House of Lords was called upon to assess a situation where a voluntarily admitted patient had indirectly become a detained patient as the authority accepted that should the patient attempt to leave hospital he would be prevented from doing so. The House of Lords held that there had been no detention but the ECtHR disagreed stating: “ the situation was that the applicant was under constant supervision and control and was not free to leave…The Court therefore concludes that the applicant was deprived of his liberty within the meaning of Article 5(1) of the convention…The Court finds striking the lack of any fixed procedural rules by which admission and detention of compliant incapacitated persons is conducted.”[28]Thus the courts have been forced to recognise the human rights of patients in such situations but such patients would be dealt with by reference to the Mental Capacity Act and thus fall outside the jurisdiction of the Tribunal. However in the case of GJ[29]the Court held that the MHA takes precedence over the MCA and that it is wrong for authorities to arbitrarily decide which act to use. If a patient is suffering from a ‘ mental disorder’ then detention must be authorised under the MHA and thus the patient’s rights will be protected by the MHA regime and the patient will have the right to apply to the Tribunal.

The patient’s right to be informed of the views of those treating him and the powers of the Tribunal to enforce those rights are governed by the Tribunal

Procedural Rules.(TPR)[30]Rule 14 TPR states that the Tribunal may prevent disclosure of documents only if “ it would be likely to cause that person or some other persons serious harm”[31]. Also the TPR require that it is in the ‘ interests of justice’ for disclosure to be prevented. In the case of Roberts v Nottingham Healthcare NHS Trust[32]the court held that the patient: “ does not have an absolute or unqualified right to see every document.” Also in Dorset Healthcare NHS Trust v MH[33]the court concluded that it would be proportionate to prevent disclosure if there was a serious risk of harm to the patient or to others. However in the case of RM v St Andrews Healthcare[34]the court ordered full disclosure of all relevant documents, stating: “(non-disclosure) would exclude the claimant completely from knowing the real process that was being followed and allow him to participate only in a pretence of a process. They would severely hamper his legal team in participating effectively in that process.” Therefore the Tribunal shows a more robust attitude towards protecting he human rights of detained patients when matters concerning procedure are involved. The Tribunal is thus ‘ human rights compliant’ in ensuring that detained patients receive a fair hearing, although once again the Tribunal does not entirely exclude the possibility of permitting the infringement of a patient’s right to a fair hearing if it is necessary to protect the rights of third parties.

S. 117 MHA states that patients who have been detained under Ss. 3, 37 or 47 MHA are entitled to aftercare in the community when discharged. Aftercare must be provided free of charge and includes social work, help with employment, accommodation, day care and other needs.[35]Patients may apply to the Tribunal for a review of decisions by the authorities concerning

aftercare and for a refund a money if they are erroneously charged for aftercare. However S117 is of limited application only, as voluntary patients, MCA patients and patients detained under S2 MHA are not eligible for aftercare provision. Also the right to receive aftercare will cease when the medical authorities decide it is no longer needed by the patient. To do this the medical authorities will have regard to the best interests of the patient but as the decision to end aftercare is basically a medical decision, the reasonableness or otherwise of the decision will be decided by reference to the Bolam Test[36]. Thus the Tribunal will be reluctant to question the decision to end aftercare, so long as it is shown to be in " accordance with a competent body of medical opinion" and the rights of the patient may be infringed.

S. 17A MHA enables appropriate authorities to apply for patients to be made subject to Community Treatment Orders. (CTOs). However Ss 57 & 58 MHA apply to CTOs and prevent the CTO being used to compulsorily treat a discharged patient in the community. Once discharged the patient has the right to withhold consent to treatment. In the case of R (H) v Mental Health Review Tribunal[37]Holman J. stated: " An adult with full capacity has an absolute right whether to choose whether the consent to medical treatment…Thus in this case, on each occasion that SH attends for his fortnightly depot injection, he has an absolute right to choose whether to consent to it or not."

There are other limitations placed on the capacity of CTOs to infringe the rights of patients in the community. A CTO may only be imposed on a patient if certain conditions are met. A CTO does allow for the patient's recall to

hospital and once detained in hospital the patient can be treated without their consent. The Tribunal thus has powers to protect the rights of patients in the community. However in certain circumstances the courts and the common law have been used as a means of bypassing patient rights. In the cases of R (DR) v Mersey Care NHS Trust[38]and R (C) v MHRT[39]the courts authorised the compulsory treatment of patients in the community. The NHS trusts in those cases sought orders continuing compulsory treatment "…to end the claimant's passage around what was described as the revolving door; namely around the circle of detention, of recovery, of discharge, of refusal to take her prescribed medication, of deterioration, of detention, of recovery, of discharge and etc."[40]The Courts were willing to authorise treatment without consent deciding that there had been no infringement of the claimants rights under Articles 3 & 5 ECHR as the actions of the NHS Trusts were proportionate to the aims to be achieved. In the CS case, the judge stated: " The application of the principle of proportionality to this case leads in any event, in my view, to only one conclusion: the interference with the claimant's freedom of movement and choice were minimal in the context of the object to be achieved, namely her satisfactory return to community care."[41]These decisions call into question the ability of the Tribunal to protect human rights, highlighting as they do the emphasis that UK mental health law places on the protection of the rights of the public to the detriment of the rights of individual patients. As Richardson states: " Thus while the common law grants patient autonomy a central role in relation to both physical and mental disorder, in relation to treatment of mental disorder of sufficient severity, statute requires patient autonomy to cede to the values of paternalism and social protection."[42]

Also in Camden & Islington HA ex parte K[43]the court held: "…in which circumstances there can be no question of interpreting Article 5 as requiring the applicant's discharge without the conditions…" Therefore the courts have shown that in certain circumstances they are prepared to allow infringement of individual rights in order to protect the public and thus they are not truly ' human rights compliant.'

In conclusion, the Tribunal has wide powers to oversee the detention and treatment of patients detained under the MHA. The Tribunal's powers are ' human rights compliant' but it is questionable whether exercise of these powers is in accordance with human rights principles. Also the legislation that the Tribunal is called on to oversee is not truly compatible with the ECHR, as indicated by the vast number of actions that seek to challenge its application. Mental health law in the UK displays: " a lack of respect for (persons with mental illness) as individuals and the absence of humane consideration for their situation."[44]and despite apparently ' human rights compliant' intentions, the actual decisions of the Tribunal do more to protect the rights of local authorities and the medical profession than those of vulnerable patients.