**MENTAL HEALTH LAWYERS ASSOCIATION**

**PRESS RELEASE**

**LEGAL AID RESTORED FOR MANY PATIENTS DETAINED UNDER THE MENTAL CAPACITY ACT**

The Mental Health Lawyers Association (MHLA)[[1]](#endnote-1) is pleased to confirm that free legal aid (that is non-means tested) has been restored for many of those who are detained under the provisions of the Mental Capacity Act 2005 ("MCA"). This is following a case heard on the 21st November.

***Background***

The MCA allows for the detention of those said to lack capacity because of a mental disorder if this is in their best interests as assessed by care professionals. Typically those detained could be those suffering from a varying degree of impairment of any age, perhaps autism, and elder people said to be suffering from dementia. The MCA gives Local Authorities and Health Trusts, with a level of judicial scrutiny, the powers to remove someone from their home and keep them in a locked environment with limited access to the community and perhaps family and friends.

In 2004 the European Court on Human Rights ruled that those detained in this way should have a right to seek an independent judicial review of their detention[[2]](#endnote-2). This is in line with the rights of those detained under the Mental Health Act. The Government responded by changing the MCA to recognise this ruling and acknowledged the need for automatic legal aid for those making this challenge. This put such detainees on a similar footing as patients detained under the Mental Health Act and suspects under arrest in a police stations. However by a recent change to the “small print” made by the Government this year, such legal aid effectively removed this in the majority of cases.[[3]](#endnote-3)

As part of the safeguarding procedure protecting, and allowing an appeal, for those detained under the MCA a system of “authorisations” should be put in place. Free legal aid is available to challenge such “authorisations” to the relevant court (here the Court of Protection). However when the case gets to this court it was the practice of most judges to temporarily authorise detention whilst the court looks into whether the applicant does indeed lack mental capacity and if so whether detention is required or whether the applicant could live somewhere else; for example back home with a better care package, or to staying with a family member or friend. Judges have been adopting this practice since last year following guidance from a senior judge[[4]](#endnote-4).

***Recent Crisis***

New Legal Aid Regulations were introduced April 2013 sometime after this judicial guidance was effective and the implications of their interpretation has only recently become apparent. Their effect has been that subsequent to the judge making the customary interim order legal aid disappears. The party advocating for detention will frequently be the local authority who will usually be represented in court by a barrister and a solicitor; together with those professionals, such social workers, who originally wanted the detention. The applicant will often have mental health problems and if he or she is assisted by family or friends they will normally have no experience of court procedure or requirements. They will also usually have no means to pay for expensive independent experts which the court frequently requires for a proper review of the case.

The infamous case involving Steven Nearey[[5]](#endnote-5) demonstrated how the local authority got it badly wrong with the removal from his father of a son suffering from autism. The MHLA believes that local authorities get it wrong in other cases as well, especially as many are struggling with financial cutbacks.

***Resolution***

At a hearing on the 21st November 2013, the Ministry of Justice accepted that non-means tested legal aid was necessary to meet the requirements of Article 5 of the European Convention. In these cases The MOJ also accepted that it was proper for the court to make an interim decision to take control of the situation whilst it determined whether there should be a deprivation of liberty[[6]](#footnote-1)

Richard Charlton, Chair of the Mental Health Lawyers Association said

*“ The restoration of legal aid for such clients was essential for compliance with the Convention, and should make a real difference for those who wish to challenge their challenge the appropriateness of their detention under the Mental Capacity Act. Whilst I am very pleased that the Government has seen sense here, it is of considerable concern that a case such as this was necessary to change policy.”*

Full judgement in this case will be available shortly

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1. The Association represents around 80% of firms who have a legal aid contract to practice in the category of mental health law, and thus many of the firms who represent clients in welfare matters before the Court of Protection especially under legal aid. The Association is recognised in this specialist role by, amongst others, the Law Society, the Legal Aid Agency, the Department of Health, the Ministry of Justice, members of the judiciary and the charity Mind.

   In case of *HL v UK 45508/99 [2004] ECHR 471*

   Paragraph5(g) of the Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013

   HA [2012] EWHC 1068 (COP)

   LB Hillingdon v Steven Neary [2011] EWHC 1377 [↑](#endnote-ref-1)
2. vi Using the provisions of s21A(3)(a) of the MCA [↑](#endnote-ref-2)
3. [↑](#endnote-ref-3)
4. [↑](#endnote-ref-4)
5. [↑](#endnote-ref-5)
6. [↑](#footnote-ref-1)