

The European Court of Human Rights' decision in *MH v UK* highlights the shortcomings in Britain's mental health law

By Democratic Audit

The European Court of Human Rights has ruled in *MH v UK* that the inability of a woman with Down's Syndrome to challenge her detention in a hospital under the Mental Health Act 1983 violated her human rights. **Claire Overman** argues that this judgment throws a spotlight on the issue of the protection available to those with mental illnesses, and demonstrates that there are shortcomings in the existing regime of admission to hospital under the Act.

The Criteria for Assessment

It should be emphasised at the outset that the detention of individuals suffering from mental disorder is not inherently unjustifiable. Article 5(1)(e) of the Convention specifically allows for an exception to the right to liberty with regard to "persons of unsound mind." The issue with respect to the Mental Health Act is that it fails to accord sufficient

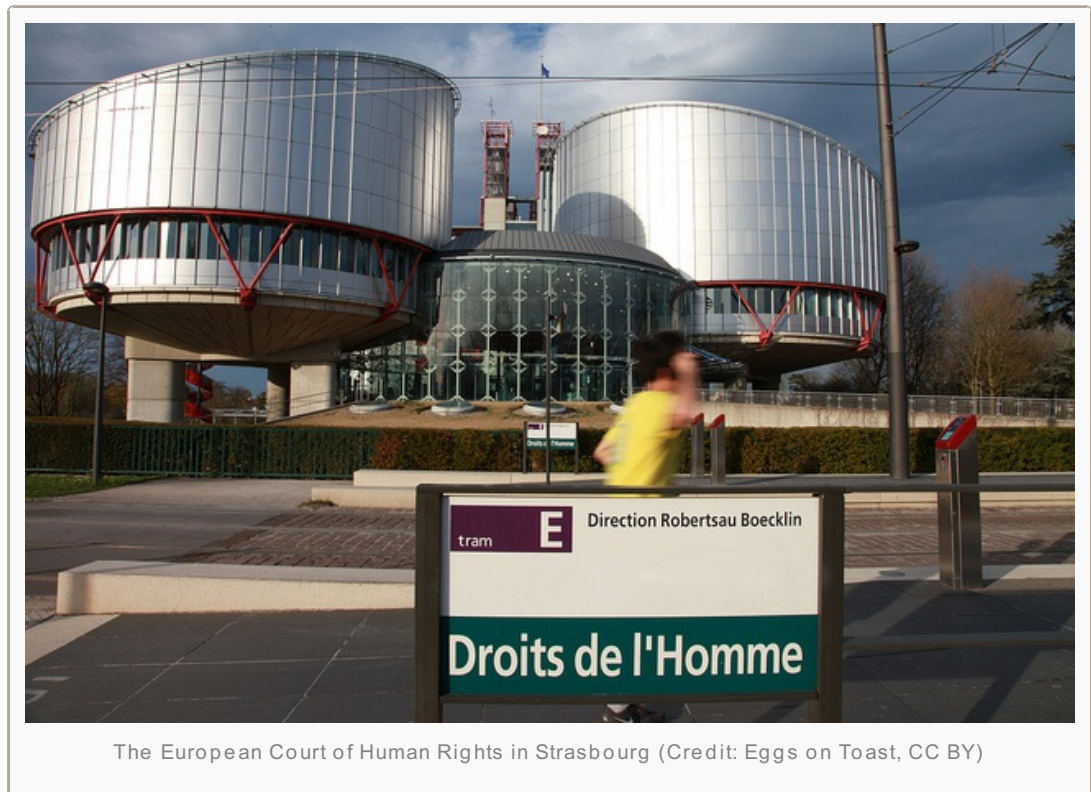
importance to the liberty of individuals, by allowing medical practitioners a broad discretion to authorise detention when it is perceived to be in their best interests.

Under section 2, an individual may be detained in a hospital for up to 28 days for assessment, on the grounds that:

"(a) he is suffering from mental disorder of a nature or degree which warrants the detention of the patient in a hospital for assessment (or for assessment followed by medical treatment) for at least a limited period; 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."

An application for admission under section 2 must be founded on the written recommendation of two registered medical practitioners, who must state that the conditions for detention are satisfied.



Section 2 brings into sharp relief a conflict of institutional competence, as it provides that medical practitioners are to determine whether the legislative conditions are fulfilled. It seems that, in general, the medical profession is better placed than a court to decide whether the individual is suffering from a mental disorder warranting assessment in a hospital. As the European Court has previously stressed, it is desirable that the existence of mental disorder is verified by objective medical expertise, to prevent powers of detention being misused against those who may simply have views or behaviour which deviate from the norm. However, the case of [St George's NHS Trust v S](#) demonstrates that medical opinion is not infallible. In this case a pregnant woman was detained under section 2 on the basis that she refused treatment for pre-eclampsia, despite the high risk of death for her and her unborn child. The Court of Appeal held that, contrary to the medical practitioners' concerns, a refusal by a competent adult, however unreasonable, of medical intervention could not amount to a "mental disorder" under section 2(2)(a).

A further issue is that the question of whether an individual should be detained in the interests of his own health and safety or for protection of others is also determined by the medical profession. Yet we may ask whether this is an appropriate question for medical practitioners to address. It is not inherently medical in nature: rather, as it involves a weighing up of the liberty of an individual against the protection of himself or others, it would seem to fall within the sphere of competence of the courts. There may be a risk of divergence between the medical profession and the courts with respect to what each would consider to represent a danger to the individual. In particular, a court is required to consider the importance of the individual's right to liberty. On the other hand, the medical profession may unduly prioritise the patient's state of health and his need for hospital treatment.

A [Code of Practice](#) exists to provide guidance to medical practitioners relying on section 2. This Code lays out a series of factors to be considered when determining whether admission to hospital is appropriate. In it, there are some indications of the importance of a patient's right to liberty. For instance, paragraph 4.4 states:

"Before it is decided that admission to hospital is necessary, consideration must be given to whether there are alternative means of providing the care and treatment which the patient requires."

However, this Code is for guidance only, and is not binding. There is therefore a risk that such recommendations will be overlooked. The Code is also very broad in the factors which it permits medical practitioners to consider for the purposes of authorising admission to a hospital under section 2. For example, paragraph 4.6, after listing specific ways in which an individual may be considered to be putting himself at risk, also includes, as a factor, "that their mental disorder is otherwise putting their health or safety at risk." This breadth undermines any idea that the liberty of the individual is also a primary consideration.

The Right to Challenge Detention

Article 5(4) of the European Convention on Human Rights states that "everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful." However, as the Court found in *MH*, under the Mental Health Act there are limited opportunities for an individual to challenge his detention in a hospital during the 28 day assessment period. Section 66 of the Mental Health Act provides that an individual may make an application for discharge to a Mental Health Review Tribunal within the first fourteen days of detention. However, as was the case in *MH*, this proves useless if the individual lacks the capacity to make an application. Certain close relatives are able, under section 23, to make an application on behalf of the individual. However, under section 25, if this is refused because in the opinion of the responsible clinician he is dangerous to others or to himself, then the relative is barred from making a further order for six months.

As the European Court noted in MH, there is therefore a problem where the detainee himself is incapable of making an application, and where the relative has also been barred. It pointed out that “special safeguards are called for in the case of detained mental patients who lack legal capacity to institute proceedings before judicial bodies.” In particular, there is a danger of confusion between lack of capacity and dangerousness. It in no way follows that, simply by virtue of the fact that an individual lacks capacity, he necessarily represents a danger to himself or others, of a kind warranting detention in a hospital. Yet the absence of opportunity for those who lack capacity to challenge their detention means that we risk lack of capacity itself becoming the de facto criterion for detention.

Mental illness is an area in which policy is continually evolving, due to developments in medical understanding. It is crucial that the law adapts to reflect this. However, as the case of MH shows, there remain shortcomings in the present system of safeguards for those who are detained for assessment under the Mental Health Act. In particular, the present system allows medical practitioners to make value judgments as to whether detention is in an individual's best interests, and fails to emphasise the importance of the right to liberty. Further, there is insufficient support for those who lack capacity to meaningfully challenge such decisions.

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