10. Commencing the proceedings

INTRODUCTION

A patient may apply to a tribunal or his case may be referred to a tribunal. Section 65(1) provides for the establishment of Mental Health Review Tribunals for the purpose of dealing with applications and references made by and in respect of patients. Where authorised by the statute, an application may be made by a patient, by his nearest relative, by the person presently exercising the nearest relative's statutory functions, or by the High Court in the case of a ward. In certain circumstances, the Act imposes on the managers of a hospital or the Secretary of State a duty to refer a patient's case to a tribunal (**632**), and it also provides that the Secretary of State may at his discretion make such a reference at any other time (**637**).

MATTERS ARISING

On receipt of an application or reference, the tribunal is required to give notice of it to the persons specified in the rules and, where an assessment application has been made, to hear it within the following seven days (**638**). The tribunal will decide whether it may and should postpone its consideration of an application (**641**) and also whether to appoint a representative for the patient (**878**). If a prior application or reference is outstanding in respect of the same patient, it will decide whether to join the proceedings (**639**). If the patient moves to the area of another tribunal during the proceedings, his case may be transferred to that tribunal (**648**). Because assessment applications must be heard within seven days of their receipt and their consideration may not be postponed, these joinder and transfer provisions are rarely relevant in such cases. In certain circumstances, an application of reference may be withdrawn (**649**) or deemed to be withdrawn (**650**).

RIGHTS OF APPLICATION

Applications must be in writing and should include the information prescribed by the Mental Health Review Tribunal Rules 1983 (**619**). The application must be authorised by statute and no application may be made by or in respect of a patient except in such cases and at such times as are expressly provided by the Act.[1] The rights of application vary according to the authority for the patient's detention, guardianship or supervision. The tables on pages 614 and 615 summarise the rights conferred by the Act, other than an unrestricted patient's right to apply following reclassification. The relevant sections of the Act are set out in full in Appendix IA.

[1] Mental Health Act 1983, s.77(1).

DIFFERENT KINDS OF AUTHORISED APPLICATION

Most patients, and sometimes their nearest relatives also, are entitled to periodically apply to a tribunal for the patient's discharge. However, there are in essence two kinds of authorised application. Firstly, these periodic general rights of application, which arise simply because the person is liable to be detained or is subject to guardianship or supervision, and, secondly, various contingent rights of application, the acquisition of which is dependant upon one of the additional events specified in paragraphs 66(1)(d)(fb)(g)(gb)(h) first occurring.[2] These events are—

- the furnishing under section 16, 21B or 25F of a report reclassifying the form of mental disorder from which an unrestricted patient is recorded as suffering — the common feature and consequence of these reports is to reclassify the patient in between renewals. *Relevant to all unrestricted patients.*
- the furnishing by a responsible medical officer of a report under section 25, preventing the nearest relative of a section 3 patient from making an order for his discharge. *Applies only where the patient is liable to be detained under section 3.*
- the making of an order by a county court under section 29, directing that the functions of the patient's nearest relative be exercisable by some other person or authority. *Relevant only to Part II patients: those liable to be detained under section 2 or 3 or subject to guardianship under section 7.*

Who acquires the right of application

Only the first of these events results in the patient acquiring an additional right of application, although the patient's nearest relative may jointly acquire a right to apply (**610**). The second event gives rise to a right of application which is exercisable by the nearest relative who has been prevented from ordering the patient's discharge. In relation to the third event, which involves the appointment of an acting nearest relative, it is the patient's actual nearest relative ("the displaced nearest relative") who acquires the right, this right being in substitution for the loss of his right to personally order the patient's discharge. Thus, in the second and third cases, the right to apply is acquired by the person whose statutory powers have been interfered with or curtailed in some way.

The importance of the distinction

The usefulness of distinguishing between general and contingent rights of application is that it simplifies the statutory scheme—

[2] Since these events can never occur in the case of restricted patients, consequently they possess only the periodic rights of application set out in sections 69,70 and 75.

- A restricted patient has y general periodic rights of application and the person who would ordinarily be his nearest relative has no rights of application at all.
- If an unrestricted patient is or is to be subject to after-care under supervision, or he is liable to be detained or subject to guardianship under Part III, both the patient and his nearest relative have the right to periodically apply to a tribunal. However, unless the patient is reclassified, no additional right to apply can ever arise.
- Lastly, if the patient is liable to be detained or subject to guardianship under Part II, the occurrence of any of the three events set out above will to a right to apply to a tribunal and applications may only ever be the patient unless one of these events has occurred.

Number of applications authorised

Where a right of application is granted by the Act it must be exercised during ... period specified. This is referred to in section 66 as "the relevant period."[3] Section 77(1) states that where under the Act any person is authorised to make an application within a specified period, not more than "one such application" may be made by him within that period. However, for these purposes, any application previously made by him during the same period which was later withdrawn is to be disregarded.[4]

"One such application"

The defining phrase in section 77(1) is "one *such* application." While each right of application may only be exercised once during the period prescribed for exercising *such* a right, each separate right has its own period during which it may be exercised once. For example, if a section 3 patient in his first six months of detention has already exercised his general right to apply to a tribunal during that initial period of detention (which right arises under section 66(1)(b)), he may still make a further application if he is reclassified during that period. As to his right under section 66(1)(b), he has made one *such* application during the period specified for making *such* an application. And, as to section 66(1)(d), he has similarly made only one *such* application during the period prescribed for exercising that right. Conversely, therefore, if he is reclassified before he has exercised his general right of application for that period of detention, and he applies as a result of being reclassified, he may later apply again during the current period of detention. However, it should be noted that a tribunal may often postpone its consideration of an application which is made shortly after the determination of a previous application or reference (**641**).

[3] Where a supervision application is accepted in respect of a hospital order patient, it is clear from the Act that he may immediately apply to a tribunal. However, a drafting error means that no relevant period for making this initial application is prescribed. Nevertheless, it is clear from the statutory framework that the tribunal application may be made at any time during the six-month period following the Health Authority's acceptance of the supervision application. See Mental Health Act 1983, ss.40(4), 55(4), 66, 145(3), Sched. 1, Pt. I, para. 9, as amended by Mental Health (Patients in the Community) Act, s.1(2) and Sched. 1, paras. 6, 7, and 14.

[4] Mental Health Act 1983, s.77(2).

UNAUTHORISED APPLICATIONS

The effect of sections 65(1) and 77(1) is that patients and their nearest relatives have no implied rights of application and tribunals have no jurisdictional discretion to "deal with" applications not expressly authorised by the statute. Since in law no application has been made none can have been received for a tribunal to consider.

Examples of unauthorised applications

An application will be unauthorised if no right to apply exists or if the person making the application is not an eligible applicant and so not entitled to exercise any right which does exist. More particularly, an application will *inter alia* be unauthorised if no right of application exists[5]; the application has been made outside the prescribed time limits[6]; the same right of application has already been exercised and determined during the relevant period[7]; the person applying is not the nearest relative as defined by sections 26–28[8]; the person applying has not been properly authorised by the nearest relative to exercise his statutory functions[9]; the patient is a ward of court and his nearest relative has not obtained the court's leave to make the application.[10]

Ambiguities and anomalies

Ambiguities in the drafting mean that it is not always immediately apparent whether or not a person has a general right to periodically apply to a tribunal. However, in order to avoid confusion, consideration of these ambiguities and anomalies is postponed until after the general scheme has been explained. See page 623.

Irregular applications, orders or directions

According to dicta of Ackner L.J. in the case of *ex p. Waldron*, a tribunal's jurisdiction following a patient's admission to hospital "is limited to entertaining applications made by a person who is liable to be detained under the Act."[11] That being so, if a section 2 or 3 application is so irregular as not to confer any legal authority for the patient's detention, no liability to detention under the Act can exist for a tribunal to review. The appropriate course is for him to apply for habeas corpus. It should, however, be noted that Glidewell and Slade L.JJ. declined to express a view on the matter and expressly left the point open.[12] The issue is considered in greater detail on pages 574 *et seq.*

5 Mental Health Act 1983, s.77(1).

6 *Ibid.*

7 *Ibid.*, s.77(2).

8 Various duties imposed by the Act require an approved social worker or the managers of a hospital to consult or notify the person "appearing to be" the patient's nearest relative. See *e.g.* Mental Health Act 1983, ss. 11(3) and (4), 132(4), 133(1). However, Part V of the Act does not similarly allow a tribunal to deal with an application by a person who appears to be the patient's nearest relative. Only applications made by the "actual" nearest relative are authorised.

9 Where, in accordance with the 1983 regulations, a patient's nearest relative authorises some other person to exercise his functions under Part II, the person authorised may also exercise the former's tribunal rights of application — notwithstanding that, in contrast to the wording used in section 29(1) and (6), a person authorised under section 32 is superficially authorised only to exercise the nearest relative's functions under Part II, not those exercisable under Part V. See p.110.

10 Mental Health Act 1983, s.33(2). This limitation does not appear to apply to the nearest relative of a Part III patient: Mental Health Act 1983, ss.40(4), 55(4), 145(3), Sched. 1, Part I.

11 *R. v. Hallstrom and another, ex p. Waldron* [1986] 1 Q.B. 824 at 846, *per* Ackner L.J.

12 *Ibid.*, at 848, *per* Neill L.J., and at 852–53, *per* Glidewell L.J.

GENERAL PERIODIC RIGHTS OF APPLICATION

In the cases prescribed by Part V, a patient or his nearest relative may periodically apply to a Mental Health Review Tribunal. Section 77(2) provides that where a person is authorised to make an application to a tribunal within a specified period, not more than one *such* application shall be made by that person within that period, but for that purpose there shall be disregarded any application which is withdrawn in accordance with rule 19. Rights of application not exercised during the periods in which they arise cannot be accumulated and carried forward.

Patients admitted to hospital for assessment

A patient admitted to hospital in pursuance of an application for assessment may make an application to a tribunal during the 14 day period beginning with the date of his admission for assessment. Because a patient's liability to detention under section 2 may not be renewed for a further period upon the expiration of the 28 day period of detention, the Act does not provide such patients with any further periodic rights of application.[13]

Patients detained for treatment or subject to guardianship or supervision

Patients admitted to hospital for treatment, or placed under guardianship or statutory supervision, remain subject to the compulsory powers for a potentially indefinite period, albeit that the authority for an unrestricted patient's detention, guardianship or supervision requires periodic renewal. That being so, the Act provides that they may apply for their discharge at periodic intervals.

Applications during the first six months

The general rule is that all such patients, both restricted and unrestricted, may apply to a tribunal during the six month period beginning with—

- In the case of Part II patients, the date of their admission for treatment or the date on which the guardianship or supervision application was accepted;
- In the case of Part III patients, the date of the order or direction authorising their admission, removal or reception into guardianship.

The only patients who may not make an application during this initial six month period are persons admitted for treatment under a hospital order (made with or without restrictions) imposed by a criminal court following conviction or, not having been convicted, under section 37(3) or 51(5).[14]

13 In particular, no further right to apply arises if a section 2 patient's liability to detention is extended beyond 28 days because an application is made to the county court under section 29 (see ss. 2(4) and 29). In practice, this may have the effect of extending the section 2 period by several weeks or, if an appeal is then lodged in respect of the court's order, by several months. Where the delay is protracted, the appropriate remedy will usually be to ask the Secretary of State (for Health) to refer the patient's case to a tribunal under section 67(1).

14 The rationale for this is often said to be that a court in England and Wales has already recently reviewed and approved the necessity for the use of compulsory powers. However, a patient may apply during the six month period following the making of a guardianship order or an order imposed under the Criminal Procedure (Insanity) Act 1964.

Subsequent applications

Where a patient remains liable to detention for treatment or subject to guardianship or supervision for longer than six months, the Act places all patients in the same position. A patient may make an application to a tribunal during his second six month period of detention, guardianship or supervision and thereafter make an application during each subsequent twelve month period he remains so liable.

Conditionally discharged patients

A conditionally discharged restricted patient may not make an application during the first year following his discharge from hospital.[15] He may apply during the second year and thereafter make an application during each subsequent two year period. If he is subsequently recalled to hospital, he may apply during the second six month period following his return and make a further application during each subsequent year. This is because a recalled patient is treated for these purposes only as if the hospital order and restriction order, or the transfer direction and restriction direction, had been made on the day of his return to hospital.[16]

Periodic applications by nearest relatives

The underlying principle is that if the Act gives the nearest relative a power to order the patient's discharge under section 23 then that relative has no right to periodically apply to a tribunal for his discharge: the right is unnecessary since he may himself discharge. Where, however, the nearest relative of an unrestricted patient has no such power, the Act compensates him for this limitation, and protects the patient's position, by periodically allowing him to apply to a tribunal for the latter's discharge. Since a restricted patient has no statutory nearest relative, it is necessarily the case that the person who would be that relative if restrictions had not been imposed possesses no rights of application whatsoever.[17]

Patients liable to be detained or subject to guardianship under Part II

The nearest relative of a patient who is liable to be detained or subject to guardianship under Part II may himself order that patient's discharge. It is presumed that he will resort to this power in the first instance, rather than apply to a tribunal for the patient's discharge. Consequently, the Act does not give that relative any general right to periodically apply to a tribunal and such a person may only make an

15 Where a tribunal defers its direction for the patient's conditional discharge, the one year waiting period necessarily commences only from the day (if any) on which the tribunal brings the period of deferment to an end and actually directs his discharge. Until then, he is not a conditionally discharged patient. The point was considered in *R. v. Canon's Park Mental Health Review Tribunal, ex p. Martins* (1995) 26 B.M.L.R. 134. In that case, Ognall J. said that the year begins on the day of the patient's actual release, meaning the date on which the tribunal gave the direction and ordered the patient's release. As with directions for a patient's immediate conditional discharge, the patient may in practice remain in hospital for a further day or two after the tribunal's direction has been given, so that practical arrangements, such as transport, can be finalised.

16 See Mental Health Act 1983, s.75(1). It should be noted that future application periods are calculated by reference to the date of the patient's return to hospital rather than the date of the warrant of recall. Following the issue of a warrant, the patient is thereafter absent from hospital without leave until such time as he returns or is returned to hospital. See *ibid.*, s.42(4)(b).

17 As to this, the exceptions and modifications of Part II of the Act mentioned in Sched. 1, Pt. I, para 1 may be compared with those listed in Sched. 1, Pt. II, para 1. Sections 26–28, which define who is a patient's statutory nearest relative, apply to unrestricted hospital order patients but not to those subject to restrictions.

application if one of the events specified in s.66(1)(d), (fb), (g) or (h) has occurred. In guardianship cases, the relative's power to order discharge is unfettered. In the case of section 3 patients, the responsible medical officer may bar the discharge in certain circumstances and, where this happens, this event gives rise to the right to apply under section 66(1)(g) (**612**).

Unrestricted patients subject to a hospital or guardianship order or to supervision

The nearest relative of a Part III patient, or a patient in respect of whom a supervision application has been accepted, is in a different position. He may not make an order terminating the authority for the patient's detention, guardianship or supervision. Consequently, the Act gives him certain rights to apply to a tribunal for the authority's termination, these rights being compensatory and in lieu of a power of discharge—

- Following the acceptance of a supervision application, the nearest relative may make one application to a tribunal during each six or twelve month period the authority remains in force, provided he was entitled to be consulted about the application being made or last renewed, as the case may be.
- Upon the making of a guardianship order, the patient's nearest relative may apply to a tribunal once during each year the order is in force, beginning with the date of the order.
- Where a hospital order is made, the nearest relative may make an application during the second six-month period following the date of the order and thereafter apply once during each subsequent period of 12 months.
- As can be seen, the nearest relative's entitlement is the same in all of these cases once a supervision application, guardianship order or hospital order has been in force for one year — he may make an application during each subsequent twelve month period the order remains in force.

CONTINGENT RIGHTS OF APPLICATION

It has been noted that, in addition to any general rights to periodically apply to a tribunal, an additional or substitutional right to apply may arise if one of three events occurs. These are the reclassification of the form of mental disorder from which an unrestricted patient is recorded as suffering otherwise than in the course of renewal; the furnishing of a report by the responsible medical officer barring the discharge of a patient detained under section 3; the making of an order under section 29 directing that the nearest relative's statutory functions shall be exercisable by some other person or authority. With regard to the table below, unless a section 29 order has been made, the person exercising the nearest relative's functions will be the nearest relative himself or the person authorised by him under section 32. If a section 29 order has been made authorising some other person to exercise the nearest relative's functions, the displaced nearest relative loses the right to apply following reclassification or the issue of a barring report.

CONTINGENT TRIBUNAL RIGHTS OF APPLICATION

	Patient	Person exercising nearest relative's functions	Displaced nearest relative
Reclassification of an unrestricted patient under s.16	•	•	
Reclassification of a patient subject to after-care under supervision under s.25F	•	*see note below*	
Reclassification of an unrestricted patient previously absent without leave under s.21B(8)	•		
Issue of report barring the discharge of a patient detained under s.3		•	
Making of county court order under s.29 in respect of a patient detained or subject to guardianship under Part II			•

Caveat: In the case of patients subject to after-care under supervision, the nearest relative only acquires a right of application following reclassification if he is entitled to be informed that the report reclassifying the patient has been furnished. *See p.451.*

RECLASSIFICATION UNDER SECTION 16, 21B OR 25F

With three exceptions, where a patient is admitted to hospital for treatment or placed under guardianship or supervision, the application, order or direction authorising this will specify the form or forms of mental disorder from which he has been found to suffer.[18] If it later appears that an unrestricted patient is suffering from a form of disorder other than the form(s) specified, the Act provides various mechanisms for amending the application, order or direction (**054**). This process is known as "reclassification."

Reclassification under the 1983 Act

Where the form or forms of disorder specified in a renewal report differ from that or those previously specified, sections 20, 21B(7) and 25G provide for the patient's automatic reclassification (**054**). Such automatic reclassification in the course of renewal does not give rise to any additional right of application to a tribunal. This is because a right to apply arises anyway by virtue of the renewal of the authority, albeit that it is not one exercisable until the new period of detention, guardianship or supervision has actually begun.

[18] The exceptions are (1) where an order is made under the Criminal Procedure (Insanity) Act 1964; (2) where a section 2 patient is transferred into guardianship under section 19; (3) where a hospital direction is given under section 45A. As to the third exception, such a direction may only be given in respect of a person who suffers from a psychopathic disorder and the Act therefore does require the form of disorder to be specified in it.

Reclassification otherwise than during renewal

Sections 16, 21B(7)–(8) and 25F enable an unrestricted patient's condition to be reclassified at a time other than when furnishing a report renewing the authority for the compulsory powers.[19] Because the justification for compulsion has materially changed since the present period of detention, guardianship or supervision was authorised, the Act provides that the patient, and in some cases his nearest relative also, may apply to a tribunal within 28 days of being informed of the reclassification.[20] This takes account of the fact that the patient may already have used his general right to make an application during the existing period, and might otherwise not be entitled to have the justification for the compulsory powers again reviewed for some months. It may also give a nearest relative who would not have consented to the application being made had it been made on the newly revised grounds the option of having the new reasons for using the powers independently reviewed.

Reclassification under section 16 or 25F

Where a report is furnished under section 16 or 25F, sections 66(1)(d) and 66(1)(gb) respectively provide that an application may be made to a tribunal "by the patient or ... by his nearest relative if he has been (or was entitled to be) informed under this Act of the report."[21] This application must be made within the relevant period, which is "28 days beginning with the day on which the applicant is informed that the report has been furnished."[22] The 28 day period for making the application therefore begins on the day the prospective applicant "is informed" that a report has been furnished, rather than on the date of the reclassification. Where the managers, the responsible after-care bodies or the guardian initially omit to notify either or both prospective applicants, the right may therefore be exercisable some time after the event.

"by the patient or ... by his nearest relative"

Hoggett has noted that the reference in section 66 to the effect that an application may be made by the patient or by his nearest relative suggests that one or the other of them may apply under section 66(1)(d) or (gb) but not both. However, as she implies, the wording is ambiguous.[23] Section 77(2) states that where under the Act any person is authorised to make an application to a tribunal "not more than one such application shall be made *by that person* within that period." The most natural reading of this provision is that both the patient and the nearest relative may apply

[19] Under the 1959 Act, the same renewal criteria applied whatever the form of mental disorder recorded in the application, order or direction and, indeed, the criteria made no reference to the form of mental disorder from which a patient was recorded as suffering. A patient could only be reclassified by his responsible or appropriate medical officer under what is now section 16 and therefore a right of application to a tribunal always arose upon reclassification. This is not now the case.

[20] The present rationale may be inferred from the fact that the reclassification provisions do not apply to restricted patients, whose detention does not require periodic renewal, and from the fact that no right of application arises if reclassification occurs in the course of renewal. It may more precisely be formulated in the following way: Where during the course of period of detention, a patient's mental state, or his responsible medical officer's assessment of it, is so materially different to that upon which the current period of detention was authorised as to require legal reclassification, the continuance of that detention for the remainder of the authorised period should always be susceptible to independent review. Similarly where a patient is subject to guardianship or after-care under supervision.

[21] Mental Health Act 1983, s.66(1)(d)(i) and (gb)(i). As to whether the nearest relative is entitled to be informed in supervision application cases, see page 451.

[22] Mental Health Act 1983, s.66(2)(d).

[23] B. Hoggett, *Mental Health Law* (Sweet & Maxwell, 4th. ed., 1996), p.178.

and, where this happens, the rules provide for hearing both applications ther. If both apply, both have the rights of an applicant.

Reclassification under section 21B

Rather anomalously, where a patient who has been absent without leave for more than 28 days is reclassified under section 21B upon his return, and a right to apply to a tribunal arises, this is exercisable only by the patient. There seems to be no logical reason for distinguishing this situation from other reclassifications between renewals so the omission may be unintentional.

ISSUE OF A SECTION 25 REPORT BARRING DISCHARGE

The nearest relative of a Part II patient may make an order directing his discharge from detention or guardianship under the Act.[24] In guardianship cases, the power is absolute and no notice is required. However, where the patient is detained under section 2 or section 3, section 25 provides that an "order for discharge" may not be made by his nearest relative except after giving 72 hours notice to the managers of the hospital.[25] If, during that period, the patient's responsible medical officer furnishes to the managers a report certifying that in his opinion the patient would "if discharged .. be likely to act in a manner dangerous to other persons or to himself," any order made at the expiration of that period is of no effect.[26] "No further order" for discharge shall then be made by "that relative" during the six months beginning with the date of the responsible medical officer's report.[27] Where no "barring report" is served within 72 hours, any order for discharge made after the expiration of that period takes effect.[28]

Right of application to a tribunal

Where a "barring report" is furnished to the managers of a hospital in respect of a section 3 patient, they are under a duty to ensure that the nearest relative is informed

24 The order must be in writing and served on the managers or the responsible local social services authority. It "may be" in the form set out in Form 34 or 35 of Schedule 1 to the Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983. See Mental Health Act 1983, s.23(1) and (2)(b), s.32(2)(a) and (b); Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, regs. 2(1) and 15.

25 Mental Health Act 1983, s.25(1). There is no prescribed form for giving this notice.

26 A report furnished under section 25 by the responsible medical officer must be in the form set out in Part I of Form 36 to Schedule 1 to the Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983. Receipt of the form by the managers must take place within the 72–hour period and be recorded in Part II of the same form. See sections 25(1) and (2)(a), s.32(2)(a) and (b), and regulations 2(1) and 15(3). On a literal reading of the section, it suffices that the patient is likely to be dangerous even if the patient is no longer mentally disordered or any likely dangerous conduct is not a consequence of the fact that he is mentally disordered. For example, a patient with previous convictions for robbery may be likely to reoffend for reasons entirely unconnected with his psychiatric condition. However, unless psychopathy is an issue, it is submitted that a barring report based on a patient's likely dangerousness must relate to dangerousness associated with or arising from mental disorder.

27 Mental Health Act 1983, s.25(1)(b). Where, therefore, a different person becomes the patient's nearest relative during the following six months, he is not debarred from making an order for discharge within that period.

28 Any order for discharge completed by the nearest relative following the expiration of the 72 hours must be in writing and served upon the managers of the hospital where the patient is liable to be detained. The order for discharge "may be" in the form set out in Form 34 of Schedule 1 to the Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983. See section 23(1) and (2)(a), section 32(2)(a) and (b), and regulations 2(1) and 15(1).

of that fact.[29] The reason for this is ause section 66(1)(g) provides that the nearest relative may apply to a tribunal for the patient's discharge during the 28 day period beginning with the day on which he was informed that the report had been furnished. If he does, the discharge criteria which then apply are more favourable to discharge than in any other kind of tribunal proceedings. Specifically, the tribunal which determines the application is required to discharge the patient if it is satisfied that he would not, "if released, ... be likely to act in a manner dangerous to other persons or to himself."[30]

Patients who are liable to be detained for assessment

No right of application arises where a barring report is issued in respect of a patient who is detained for assessment.[31] However, the fact that the nearest relative has attempted to discharge the patient from detention under section 2 will generally mean that he also objects to the patient being detained under section 3. Where this is so, the patient may not be detained beyond the 28 day section 2 period unless an application is first made to the county court on the ground that the nearest relative's objection to admission under section 3 is, viewed objectively, unreasonable.

COUNTY COURT ORDERS UNDER SECTION 29

Section 29 of the Act provides that the county court may appoint a person or local social services authority to exercise a nearest relative's statutory functions on one or more of four grounds: that a patient has no ascertainable nearest relative; that a patient's nearest relative is incapacitated; that the nearest relative has unreasonably objected to the making of a guardianship application or an application under section 3; or that the nearest relative has exercised "without due regard to the welfare of the patient or the interests of the public his power under Part II to discharge the patient from hospital or guardianship, or is likely to do so" (**111**).

Duration of county court orders

An order made under section 29 lapses if the patient is not placed under guardianship or admitted or removed to hospital for treatment under Part II or III (otherwise than under section 36 or 38) within three months of the date of the court's order. If the patient becomes so liable during that three month period, or was already under guardianship or so detained when the court order was made, the order remains in force until the patient ceases to be liable to be detained or subject to guardianship.[32] For this purpose, transfers under section 19 are to be ignored.

Effect of section 29 orders on tribunal proceedings

Where an order under section 29 is in force, the nearest relative's ordinary rights of application under sections 66 and 69 are exercisable by the court appointee. However, section 66(1)(h) gives the displaced nearest relative a right to apply to a tribunal during the "12 months beginning with the date of the order, and in any subsequent period of 12 months during which the order continues in force."

29 Mental Health Act 1983, s.25(2).

30 Mental Health Act 1983, s.72(1)(b)(iii).

31 Thus, a nearest relative's objection to a patient's detention under section 2 does not preclude such an admission nor, where dangerousness is an issue, its continuance.

32 There are two possible exceptions to this rule although they are rare. They are where the order is made for a specified period (**112**) or where it is discharged by the court prior to the patient ceasing to be liable to be detained or subject to guardianship (**113**).

PATIENTS' GENERAL PERIODIC RIGHTS OF APPLICATION

Authority for the patient's detention or guardianship	*First six months*	*Subsequent rights*
PART II PATIENTS		
• **Patients detained for assessment** (including patients admitted under s.14A of the Criminal Appeal Act 1968 and assessment patients removed to England or Wales under Part IV or under the Mental Health (Scotland) Act 1984)).	During first 14 days, s.66(1)(a).	Not applicable.
• **Patients detained for treatment under s.3**	Yes, s.66(1)(b).	The patient may make an application during the second six months and during each subsequent 12 month period: ss.66(1)(f) and (gc), 70(a) and 75(1)(b). In the case of Part II patients, the application periods are calculated by reference to the date on which the existing application for the patient's detention, guardianship or supervision under Part II was accepted. In the case of Part III patients, the tribunal application periods commence from the date on which the order or direction was made by the court or the Secretary of State.
• **Patients received into guardianship under s.7** (including section 2 or 3 patients transferred into guardianship under s.19 and guardianship patients removed to England or Wales under Part VI or the Mental Health (Scotland) Act 1984)	Yes, s.66(1)(c).	
• **Patients in respect of whom a supervision application made under s.25A has been accepted**	Yes, s.66(1)(ga)	
• **Part II patients transferred from guardianship to hospital under s.19**	Yes, s.66(1)(d).	
PART III PATIENTS		
• **Part III patients transferred from guardianship to hospital under s.19**	Yes, s.66(1)(d)	
• **Detained Part III patients (including restricted patients) removed to a hospital in England or Wales under Part VI of the 1983 Act or under the Mental Health (Scotland) Act 1984**	Yes, s.69(2)(a)	
• **Patients received into guardianship under s.37** (including hospital order patients transferred into guardianship under s.19 and guardianship patients removed to England or Wales under Part VI or the Mental Health (Scotland) Act 1984))	Yes, s.69(1)(b)(i)	
• **Patients (including restricted patients) removed to hospital under s.45B(2), 46, 47 or 48**	Yes, s.69(2)(b)	
• **Patients deemed to have been admitted under a notional hospital order after the cessation of restrictions**	Yes, s.69(2)(a)	
• **Patients admitted to hospital under s.5(1) of the Criminal Procedure & Insanity Act 1964.**	Yes, s.69(2)(a)	
• **Patients made the subject of a hospital order (including restricted patients) otherwise than above.**	[redacted]	In second year after discharge and during each subsequent 2 years.
• **Conditionally discharged patients who have been recalled to hospital**		
• **Conditionally discharged restricted patients**		

NEAREST RELATIVES' RIGHTS OF APPLICATION

	Person exercising the nearest relative's functions under Part V			**Displaced nearest relatives**
Authority for the patient's detention or guardianship	*Right to make periodic applications*	*Right to apply following reclassification*	*Right to apply following a barring report under s.25*	*Right to make periodic applications*
• **Patients detained for assessment** • **Patients liable to be detained under s.3**	[redacted]	No (not applicable)	No Within 28 days of being informed that a report has been furnished.	A displaced relative may apply in the year following the date of the court order and in each subsequent year it remains in force.
• **Patients received into guardianship under s.7** • **Patients in respect of whom a supervision application made under s.25A has been accepted**	The nearest relative may make one application during each six or 12 month period the application remains in force if previously entitled to be consulted about the application being made or renewed.	Within 28 days of being informed that a report has been furnished. *In the case of patients subject to statutory supervision, if the nearest relative is not entitled to be informed that a report has been furnished then no right to apply arises.*		[redacted]
• **All unrestricted patients admitted to hospital under Part III** (including patients transferred to hospital under ss.19, 47 or 48 and detained Part III patients removed to England or Wales under Part VI or the Mental Health (Scotland) Act 1984))	The nearest relative may apply during the period of 6 and 12 months beginning with the date of the order or direction and in each subsequent year.		No (not applicable)	
• **All patients subject to a guardianship order** (including those transferred into guardianship under s.19 and guardianship patients removed under Part VI or the Mental Health (Scotland) Act 1984)	The nearest relative may apply in the year beginning with the date of the order and in each subsequent year.			
• **All restricted patients**	A restricted patient's nearest relative has no rights of application.			

Section 132 requires the managers of a hospital or mental nursing home to take such steps as are practicable to ensure that every patient who is detained understands what rights of applying to a tribunal are available to him. Those steps are to be taken as soon as practicable after the commencement of the patient's detention under the provision in question and must include giving him the information both orally and in writing.[33] The managers are not under a corresponding duty to inform the person who appears to be the nearest relative of his rights of application. However, unless the patient has requested otherwise, they must furnish him with a copy of the written information given to the patient setting out the latter's rights.

Guardianship

Section 132 does not impose a duty on a guardian or local social services authority to inform patients who are received, or transferred, into guardianship of their rights of application.

European Convention on Human Rights

Article 5(2) of the Convention, which provides that everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him, applies to persons detained under Part II. This arguably imposes a wider obligation on hospitals than does section 132 and requires patients to be notified of the reasons for their detention and not merely the consequences of being detained, the statutory authority for that detention, and the methods of challenging it.[34]

MEDICAL ADVICE AVAILABLE TO PROSPECTIVE APPLICANTS

Any patient entitled to apply to a tribunal may authorise a registered medical practitioner to visit and examine him in private for the purpose of advising him whether to make an application.[35] Likewise, where the patient's nearest relative, or a person exercising his functions, is entitled to make an application, he may similarly authorise such a practitioner to visit and examine the patient for the purpose of advising whether an application should be made.[36] A prospective applicant may instruct some other person, such as a solicitor, to authorise a medical practitioner on his behalf. Any person who without reasonable cause refuses to allow a medical practitioner so authorised to visit, interview or examine a patient, or who refuses to withdraw when required to do so by that practitioner for the purpose of enabling him

33 The Department of Health publishes patients' rights leaflets which are commonly used by hospitals to provide patients with the written information required by section 132. It is questionable whether these leaflets fully comply with the requirements of the section and, in any case, most of them are inaccurate in a number of respects. The information is also available in Braille and spoken versions are available on cassettes for those who require them.

34 See *Van der Leer v. The Netherlands* (1990) 12 E.H.R.R. 567–575. The court held that the word "arrest" in Article 5(2) embraces a deprivation of liberty on the ground of unsoundness of mind (see paras. 27-28). Any person who is entitled to take proceedings to have the lawfulness of his detention speedily decided cannot make effective use of that right unless he is promptly and adequately informed of the reasons why he has been deprived of his liberty" (at para. 28). The requirement would probably be satisfied by giving the patient a copy of the application. As to a patient's right to a copy of the application, see *Re Dell* (1891) 35 Sol. Journ. 783.

35 Mental Health Act 1983, s.76(1).

36 *Ibid.*

to examine a patient in private, who otherwise obstructs him in the exercise of his functions, commits an offence. Despite its wording, section 76 applies to all tribunal applications without modification, including those concerning Part III patients, whether restricted or not.[38] It does not extend to proceedings commenced by reference. No regulations have been made under section 32 regulating the conduct of the medical examination or the production of records.

INDEPENDENT MEDICAL ADVICE AND OPINIONS

Visiting and examination of patients

76.—(1) For the purpose of advising whether an application to a Mental Health Review Tribunal should be made by or in respect of a patient who is liable to be detained or subject to guardianship *or to after-care under supervision (or, if he has not yet left hospital, is to be subject to after-care under supervision after he leaves hospital)* under Part II of this Act or of furnishing information as to the condition of a patient for the purposes of such an application, any registered medical practitioner authorised by or on behalf of the patient or other person who is entitled to make or has made the application—

(a) may at any reasonable time visit the patient and examine him in private, and
(b) may require the production of and inspect any records relating to the detention or treatment of the patient in any hospital *or to any after-care services provided for the patient under section 117 below.*

(2) Section 32 above shall apply for the purposes of this section as it applies for the purposes of Part II of this Act.

The italicised words were inserted by the Mental Health (Patients in the Community) Act 1995, s.1(2) and Sched. 1, para.11.

Production and inspection of records

Provided that their production is required for one of the statutory purposes, the medical practitioner may require the production and inspection of "any records relating to the patient's detention or treatment in any hospital."[39] "Hospital" in this context includes a mental nursing home which is registered to receive detained patients. Any person who without reasonable cause refuses to produce a document or record for inspection the production of which is *duly* required of him by an authorised medical practitioner, commits an offence.[40]

37 Mental Health Act 1983, s.129(1)(b).

38 *Ibid.*, ss.40(4), 55(4), Sched.1, Pt. I, para.1., etc.

39 *Ibid.*, s.76(1). He is not, however, empowered to take copies of those documents unless such a right is implied by the right of inspection. Section 76 derives from section 37(1) of the Mental Health Act 1959 and from section 9(2) of the Mental Health (Amendment) Act 1982. Under the 1959 Act, a medical practitioner authorised under what is now section 76 had no power to require the production or inspection of any records relating to the patient's detention or treatment in any hospital. Section 9(1) of the Mental Health (Amendment) Act inserted in section 37 the provision now found in section 76(1)(b).

40 Mental Health Act 1983, s.129(1)(c). The prosecution must prove, *inter alia*, that the production of the documents or records in issue was required for the purpose of giving advice under section 76.

"Any records relating to the patient's detention or treatment in an_ _spital"

Insofar as detained patients are concerned, the phrase could hardly be broader. The sole qualification is that the medical practitioner may only require the production of records which he requires either (1) for the purpose of giving advice about the making of an application or (2) if an application has already been made, for the purpose of furnishing the applicant with information as to his own or the patient's condition. Subject to this caveat, the words are wide enough to cover records held at a hospital other than that where the patient is then liable to be detained, including records relating to previous periods of detention; documents which would not be disclosable to the prospective applicant under the Access to Health Records Act 1990; records held by social services authorities concerning the patient's detention; and various records held off the ward, such as occupational therapy records, clinical complaints files, incident and accident reports.

Patients subject to guardianship

The words "any records relating to the patient's detention or treatment in any hospital" are of limited relevance in such cases. As drafted, the authorised medical practitioner may not require the production of any records relating to the guardianship, not even a copy of the application or order. Many of the other records he would wish to inspect will relate to care which the patient receives in the community rather than to any treatment in a hospital. For example, files held at a social services area office and records kept at a residential home where the patient is required to reside or at a training centre he is required to attend. Where a patient is receiving psychiatric treatment, that is more likely to involve his attending a clinic run by a community mental health team than a hospital.[41] Moreover, if he has a private guardian, his nominated medical attendant may well be a general practitioner rather than a hospital-based consultant.

Restricted patients who are detained

According to Schedule 1 to the Act, section 76 applies without qualification to restricted patients. As drafted, the phrase "*any* records *relating to* the patient's detention or treatment in any hospital" is wide enough to cover records in the possession of the Secretary of State which relate to the patient's detention or treatment in any hospital. For example, periodic reports submitted under section 41(6), documentation concerning the imposition of the order or direction, and arguably written advice concerning a patient's continued detention or treatment tendered by the Aarvold Board (**165**).[42]

Conditionally discharged patients

A conditionally discharged patient remains liable to be detained in a hospital under the hospital order or transfer direction by virtue of which he was originally admitted. However, the records disclosable under section 76 are those which relate to his "detention or treatment in any hospital" rather than his liability to detention in

41 It should be noted that the statutory definition of a "hospital" in the Act includes clinics, dispensaries and out-patient departments maintained in connection with an institution for the reception and treatment of persons suffering from mental disorder: see Mental Health Act 1983, s.145(1); National Health Service Act 1977, s.128(1).

42 Section 76 empowers the authorised doctor to require the production and inspection of "any records relating to the patient's detention or treatment in any hospital." This power did not exist under the 1959 Act when the High Court reached its decision in *R. v. Secretary of State for the Home Department, ex p. Powell* concerning the confidentiality of reports prepared by the Board (**167**).

hospital. In some cases, the p_ _uction of records compiled by a social supervisor may not, on a strict interpretation, be duly "required."

Disclosure of information

In deciding what information gathered in the course of his interview, examination and inspection should be disclosed to a prospective applicant in support of any advice tendered, the medical practitioner will owe that person and, in certain cases, third parties a duty of care. In exceptional circumstances, it may be lawful for a medical practitioner to disclose information arising from his interview with a patient to some other person or body against his client's wishes.[43] No action will lie against a medical practitioner if he acts in good faith and with reasonable care.[44]

OTHER RELEVANT ENACTMENTS

Section 24 provides that a nearest relative who is considering whether to exercise his power to make an order for discharge has a similar right to obtain an independent medical report on the patient. The powers of a medical practitioner under section 24(2) are identical to those conferred by section 76.

FORM AND CONTENTS OF THE APPLICATION

There is no prescribed form. A letter therefore suffices provided it is clear that an application is being made and it includes wherever possible the information specified in the rules. However, tribunals have drafted forms which may be used to make an application and they are generally available from tribunal offices, hospitals and social services authorities.

ASSESSMENT APPLICATIONS (SECTION 2 CASES)

An assessment application must be in writing and signed by the patient or any person authorised by him to do so on his behalf.[45] The application must indicate that it is made by or on behalf of a patient detained for assessment,[46] the reason being so that the tribunal is aware of the need to hear the case within seven days of its receipt. Wherever possible, an assessment application shall include the following information[47]—

- the name of the patient;
- the address of the hospital or mental nursing home where the patient is detained;
- the name and address of the patient's nearest relative and his relationship to the patient;

43 See *W. v. Egdell and others* [1990] Ch 359, [1990] 2 W.L.R. 471 (**711**).

44 Mental Health Act 1983, s.139.

45 Mental Health Act 1983, s.77(3); Mental Health Review Tribunal Rules 1983, r.30(1).

46 Mental Health Review Tribunal Rules 1983, r.30(2).

47 *Ibid.*

- the name and address of any representative authorised by the patient in accordance with rule 10 (877) or, if none has yet been authorised, whether the patient intends to authorise a representative or wishes to conduct his own case.

Applications not including the specified information

If any of the above information is not included in the assessment application, the rules provide that, where requested by a tribunal, it shall in so far as is practicable be provided by the responsible authority.[48]

ALL OTHER APPLICATIONS

The application must be in writing[49] and signed by the applicant or any person authorised by him to do so on his behalf.[50] It shall wherever possible include the information specified in rule 3(2)—

- the name of the patient;
- the patient's address, which shall include —
  - i. the address of the hospital or mental nursing home where the patient is detained; or
  - ii. the name and address of the patient's private guardian; or
  - iii. in the case of a conditionally discharged patient or a patient to whom leave of absence from hospital has been granted, the address of the hospital or mental nursing home where the patient was last detained or is liable to be detained; together with the patient's current address;
- where the application is made by the patient's nearest relative, the name and address of the applicant and his relationship to the patient;
- the section of the Act under which the patient is detained or is liable to be detained;
- the name and address of any representative authorised in accordance with rule 10 or, if none has yet been authorised, whether the applicant intends to authorise a representative or wishes to conduct his own case.

Applications relating to after-care under supervision

In the case of a patient who is, or who is to be, subject to after-care under supervision, the application shall also contain the following information in addition to that just specified[51]—

48 Mental Health Review Tribunal Rules 1983, r.30(3).
49 Mental Health Act 1983, s.77(3); Mental Health Review Tribunal Rules 1983, r.3(1).
50 Mental Health Review Tribunal Rules 1983, r.3(1).
51 Mental Health Review Tribunal Rules 1983, r.3(2)(e), as inserted by Mental Health Review Tribunal (Amendment) Rules 1996, r.3.

- the names of the persons who are (or who are to be) the patient's supervisor and community responsible medical officer;
- the name and address of any place at which the patient is (or will be) receiving medical treatment;
- where the patient is subject to after-care under supervision, his current address;
- where the patient is not yet subject to after-care under supervision, the address of the hospital where he is, or was last, detained or is liable to be detained.

Applications not including the specified information

As in the case of assessment applications, if any of the information specified above is not included in the application, it shall in so far as is practicable be provided by the responsible authority or, in the case of a restricted patient, the Secretary of State, at the request of the tribunal.[52]

SUBMITTING THE APPLICATION

The Act provides that the application shall be addressed to the tribunal for the area in which the hospital where the patient is detained is situated.[53] Where the application relates to a conditionally discharged patient, or a patient who is subject to guardianship or after-care under supervision, it shall be made to the tribunal for the area in which the patient resides.[54] Only the tribunal to which the application is required to be addressed has jurisdiction to deal with it.[55]

Patients granted leave of absence

Where the application involves a patient who has leave to be absent from hospital, rule 2(1) provides that the tribunal with jurisdiction is that for the area in which the hospital where the patient is liable to be detained is situated. A patient may, of course, be granted leave to reside at a hospital other than that where he is liable to be detained. The power is often used to enable a special hospital patient to spend a period of trial leave at a regional secure unit with a view to his formal transfer there. Where a patient is residing in a hospital under leave of absence, he is not liable to be detained there. Rather, until such time as he is transferred, he remains liable to be detained at the hospital from which he has leave to be absent. Similarly, his responsible medical officer remains unchanged and it is the managers of that hospital who have authority to detain him and who are therefore the responsible authority for the purpose of the tribunal proceedings. According to section 77(3) and rule 2, applications in such cases should be made to the hospital from which the patient is on leave since that is the hospital where he is liable to be detained — he is neither detained, nor liable to be detained, at the hospital where he is residing.[56]

52 Mental Health Review Tribunal Rules 1983, r.3(3).
53 Mental Health Act 1983, s.77(3)–(4), as amended by Mental Health (Patients in the Community) Act 1995, s.1(2) and Sched. 1 para. 12; Mental Health Review Tribunal Rules 1983, r.2(1).
54 Mental Health Act 1983, s.77(3); Mental Health Review Tribunal Rules 1983, r.2(1).
55 Mental Health Act 1983, s.66(1); Mental Health Review Tribunal Rules 1983, r.2(1).
56 See the Memoranda on the 1959 and 1983 Acts. *Mental Health Act 1983: Memorandum on Parts I to VI, VIII and X*, (D.H.S.S., 1987), para. 83; *Mental Health Act 1959: Memorandum on Parts I, IV to VII and IX*, (D.H.S.S., 1960), para. 100.

Applications by patients not yet subject to after-care under supervi

Where the patient is not yet subject to after-care under supervision, the Act provides that the application shall be made to the tribunal for the area in which he is to reside on becoming so subject after leaving hospital.[57] It is that tribunal which has jurisdiction to deal with the case.[58] If the patient will be residing some distance away from the hospital where he is liable to be detained, this necessarily creates some problems. For example, if he is in a private hospital in the Midlands and will be returning home to Devon when he leaves hospital, the hearing will either have to be held in the Midlands (with the South & West Tribunal members travelling there) or the patient, the responsible medical officer, and the like, will need to travel to Devon for the hearing.

Regional offices

Although there exists a tribunal for each health service region, several tribunals share the same office. Applications should therefore be forwarded to the following administrative offices and addressed to the clerk for the particular regional tribunal.[59] Applications concerning patients detained at Ashworth Hospital are dealt with by the Liverpool office; those concerning Rampton Hospital patients by the Nottingham office, and those concerning Broadmoor patients by the Hinchley Wood (London South) office.

THE MENTAL HEALTH REVIEW TRIBUNALS

▪ South Thames ▪ South & West	London South Office, Hinchley Wood, Block 3, Crown Offices, Kingston-By-Pass Road, Surbiton, Surrey KT6 5QN. Tel.: 0181 398 4166. Fax 0181 339 0709.
▪ North Thames ▪ Anglia & Oxford	London North Office, Canons Park, Government Buildings, Honeypot Lane, Stanmore, Middlesex HA7 1AY. Tel: 0171 972 2000. Fax 0171 972 3731.
▪ Trent ▪ Northern & Yorkshire	Nottingham Office, Spur A, Block 5, Government Buildings, Chalfont Drive, Western Boulevard, Nottingham NG8 3RZ. Tel: 0115 9294222. Fax 0115 9428308.
▪ North West ▪ West Midlands	Liverpool Office, Cressington House (3rd Floor), 249 St Mary's Road, Garston, Liverpool, Lancs L19 0NF. Tel: 0151 494 0095. Fax 0151 270133.
▪ Wales	MHRT for Wales, 1st Floor, Crown Buildings, Cathays Park, Cardiff CF1 3NQ. Tel: 01222 825111. Fax 01222 823117.

57 Mental Health Act 1983, s.77(3), as amended by the Mental Health (Patients in the Community) Act 1995, s.1(2) and Sched. 1 para. 12.

58 Mental Health Review Tribunal Rules 1983, r.2(1).

59 As to the areas covered by each regional tribunal, see p.192. It is not safe to make assumptions. For example, South Yorkshire is in the Trent region rather than the Northern & Yorkshire Region.

Some of the provisions which deal with patients' periodic rights of application are ambiguous, obtuse or have somewhat anomalous consequences. In order to avoid confusion, their consideration was postponed until this stage. They are now considered here.

PATIENTS DETAINED UNDER SECTION 4

Section 66(1)(a) provides that "a patient who is admitted to hospital in pursuance of an application for admission for assessment" may apply to a tribunal during "the relevant period," which section 66(2)(a) defines as "14 days beginning with the day on which the patient is admitted as so mentioned." Opinion varies as to whether a patient who is detained for assessment using the emergency procedure in section 4 may apply under section 66(1)(a). Jones, Gostin and Fennell take the view that they may not, Hoggett that they may.

The case against a right of application

Section 2(1) provides that applications for assessment made under that section are "in this Act referred to as 'an application for admission for assessment'," while section 4(1) states that an admission for assessment made under that section "is in this Act referred to as 'an emergency application.'" Those definitions extend to Part V of the Act.[60] The alternative, generic, expression "an application for admission to hospital" is used where, as in section 13, a particular provision is intended to apply to all applications under sections 2, 3 and 4. Consequently, section 66(1)(a) only confers a right of access to a tribunal following admission under section 2. That this is so is clear from reading the mandatory discharge criteria in section 72(1)(a) which state that "a tribunal shall direct the discharge of a patient liable to be detained under section 2 above ..." This reference to section 2 is then repeated twice in the section. Such an interpretation is consistent with a statutory framework which provides that section 2 and section 4 applications have different legal consequences. In particular, section 56 provides that a section 4 patient shall not be given treatment without his consent: it is in this way that Parliament decided to protect such patients, and other patients detained for 72 hours or less, rather than by giving them a right of application to a tribunal.

The case for a right of application

Section 4 provides that, in cases of urgent necessity, "an application for admission for assessment may be made in accordance with the following provisions of this section." A patient who is admitted under section 4 is therefore "admitted to hospital in pursuance of an application for admission for assessment" and, accordingly, is entitled to apply to a tribunal under section 66(1)(a). Section 145(1) provides that the term "an application for admission for assessment" is not to be interpreted according to the meaning given in section 2(1) if "the context otherwise requires." Case law demonstrates that a word or phrase used in the context of Part V may require a different meaning.[61] The references to section 2 in section 72 simply acknowledge the fact that if the patient is still detained when the tribunal hearing

60 Mental Health Act 1983, s.145(1).

61 See *R. v. Merseyside Mental Health Review Tribunal, ex. p. K.* [1990] 1 All E.R. 694 at 699, *per* Butler-Sloss L.J.

takes place the second medical recommendation will by then have bee nished. Section 66(2)(a) makes it clear that the 14 day period for making a tribunal application under section 66(1)(a) commences, like the 28 day detention period, from the date of admission for assessment. Where the emergency procedure is used, a patient's date of admission for assessment is the date of his admission under section 4. Therefore he may apply to a tribunal on that day. The alternative view has the effect that section 4 patients lose up to three days during which to make a tribunal application and leads to an unnecessarily complicated position: if the second recommendation is received on the day following admission, a patient may apply between the second and fourteenth days following admission and so forth. The right of application, and the speed with which the detention is reviewed, becomes dependant upon the speed with which the second recommendation is furnished. As a matter of policy, a person should not be prejudiced because their admission for assessment is founded upon one rather than two medical recommendations unless the Act makes it clear that this was Parliament's intention.

Summary

It may be noted that essentially the same problem arises in terms of the construction of section 23, which empowers various persons or bodies other than tribunals to discharge a patient (**284**). On a strict reading of this section, a section 4 patient may not be discharged under section 23. This is because it only provides for making an order for discharge in respect of a patient who is liable to be detained in pursuance of "an application for admission for assessment." Likewise, section 23 does not apply to other civil patients detained for 72 hours or less under sections 5(2), 135 and 136. The purpose of these short-term powers is to authorise a person's detention for a period of time sufficient to enable the application procedures to be undertaken or completed. In the case of detention under section 4, the patient may not be compulsorily treated until such time (if ever) as a second recommendation is furnished. Its purpose is to allow the application process to be completed within a hospital setting where its completion outside hospital would involve unacceptable risks. Only if a second recommendation is furnished is the patient in exactly the same position as a person admitted under section 2. If no second recommendation is furnished within 72 hours, the patient ceases to be liable to be detained at the expiration of that period. Otherwise he may be detained for up to 28 days and, being then in the same position as any other section 2 patient, may apply to a tribunal. Although the matter is finely balanced, it is submitted that the Act differentiates patients detained for more than 72 hours from those detained for lesser periods in the context of tribunal rights, discharge, and liability to compulsory treatment—

- *Detention for 72 hours or less under sections 4, 5, 135 and 136* — Patient not liable to compulsory treatment under Part IV and he has no right of application to a tribunal. No formal statutory mechanisms for discharging the patient's liability to detention.
- *Detention for up to 28 days or more, under sections 2, 3 and 37* — Patient liable to compulsory treatment under Part IV but he has a right to apply to a tribunal. Various formal statutory mechanisms for discharging the patient's liability to detention.

"INTERIM RESTRICTION DERS" UNDER SECTION 44(3)

Where a magistrates court commits an offender to hospital pending sentence by the Crown Court, he is deemed to be subject to a hospital order together with a restriction order until such time as his case is disposed of.[62] In practice, even if such a patient has a right of application to apply to a tribunal, his case is likely to be disposed of before he has been subject to the restrictions for a period of six months. However, it might be argued that if a restriction order is subsequently made by the Crown Court, the six month waiting period is to be treated as having commenced on the date of the magistrates court's order rather than on the day when his case is disposed of. Throughout this whole period the patient has been subject to a restriction order. Similarly, if he does not then apply to a tribunal, the date on which his case must eventually be referred to a tribunal is to be calculated by reference to the former date. It is submitted that this view is incorrect. The six months referred to in section 70 relates to the "relevant hospital order," *i.e.* that imposed by the Crown Court.[63] Furthermore, the definition of a restricted patient in section 79 appears to exclude persons *treated as* subject to a restriction order by virtue of section 44.

UNCONVICTED HOSPITAL ORDER PATIENTS

Where an unconvicted person is admitted for treatment under a hospital order imposed under section 5(1) of the Criminal Procedure (Insanity) Act 1964, he may apply to a tribunal during the six month period beginning with the date of the order. This is so whether or not a restriction order was also made. However, where a patient's case is disposed of without trial under the 1983 Act, by way of a hospital order made pursuant to section 37(3) or 51(5), no such right arises. Although unconvicted, the patient must still wait for six months before he is entitled to apply to a tribunal.

CONDITIONALLY DISCHARGED PATIENTS AND PART II

The Home Office for many years argued that a conditionally discharged restricted patient who was readmitted to hospital under section 2 or 3, rather than by way of recall under section 42(3), was not entitled to apply to a tribunal for his discharge. The Court of Appeal has now determined that this is not the case.[64] The effect of recent case law is that a conditionally discharged patient may be readmitted under Part II; that the Home Secretary is not obliged to recall that patient upon being notified that he is receiving in-patient treatment; that a conditionally discharged patient detained under Part II has the same rights of application as other patients detained under the same provision (**365**).

PATIENTS TRANSFERRED TO HOSPITAL UNDER SECTION 19

Section 66(1)(e) provides that a patient who is transferred from guardianship to hospital may apply to a tribunal during the six month period beginning with the day of his transfer. One consequence of this is that his rights of application do not initially correspond to the renewal periods under Part II. This is because his detention is deemed to have commenced on the date of his original reception into guardianship

62 Mental Health Act 1983, s.44(3).
63 *Ibid.*, s.79(2). Note the significance of the word "is" in the subsection.
64 *R. v. Managers of the North West London Mental Health NHS Trust, ex p. Stewart* (CO/1825/95), 25 July 1997, C.A.

but his initial general right to apply to a tribunal following transfer is c lated by reference to the transfer date. Similarly, the managers' duty to refer his case if no application is made under section 66(1)(e) arises six months after the date of his transfer. This has the consequence that the patient's detention may be renewed, and a further right of application come into being, before the time for exercising the right conferred by the transfer has expired. Furthermore, on a strict reading of section 68(1), if the right to apply following a renewal is exercised within six months of the transfer, but not the right of application under section 66(1)(e), the managers must still refer his case to a tribunal at the expiration of that period.

Example

A patient is received into guardianship under section 7 on 1 January. On 1 March, he is transferred to hospital under section 19. This takes effect as if he had been admitted to hospital under section 3 on 1 January. The patient's detention is later renewed for six months with effect from 1 July. His rights of application are as follows—

a. He has a right of application under section 66(1)(e) during the six months following his transfer, *i.e.* during the period between 1 March and 31 August.

b. Following the section's renewal for what is deemed to be a second period of detention, he also acquires a right of application under section 66(1)(f), *i.e.* between 1 July and 31 December.

Accordingly, during the period 1 July to 31 August, the patient has two concurrent rights of application. On a strict reading of the Act, the managers must refer his case to a tribunal if he does not exercise his right to apply under section 66(1)(e) by 1 September, whether or not he has made a previous application under section 66(1)(f).[65]

TRANSFERS INTO GUARDIANSHIP UNDER SECTION 19

A transfer in the opposite direction — from hospital into guardianship — similarly takes effect as if the original application, order or direction which authorised the patient's admission to hospital were a guardianship application or order.[66] However, it is noticeable that, although section 66(1)(e) specifically provides that a patient who is transferred from guardianship to hospital may apply to a tribunal during the following six months, it does not confer such a right of application following transfer from hospital into guardianship.[67] The reason for the distinction can be discerned from the fact that, under both the 1959 and the 1983 Acts, the tribunal rights of a patient transferred from one hospital or guardian to another are also unaffected by any transfer.

Additional right to apply arises	*No additional right to apply arises*
▪ Transfer from guardianship to hospital	▪ Transfer from one guardian to another
	▪ Transfer from one hospital to another
	▪ Transfer from hospital into guardianship

The distinction reflects the fact that, whereas a transfer from hospital into guardianship involves few formalities and represents a relaxation of the pre-existing regime, with the patient ceasing to be liable to detention and compulsory treatment, the transfer to hospital procedures essentially duplicate those for making a fresh application under section 3, and have the same consequences. Accordingly, as regards the patient's tribunal rights of application, he is in this respect also placed in a position identical to that of a patient admitted afresh under section 3 — he may apply during his first six months of detention in hospital and his case must be referred to a tribunal after six months if no such application has by then been made. This appears to be the most sensible construction and the two anomalies which result from it are best viewed either as drafting omissions or as the natural secondary consequences of the draftsman's primary aim. The first anomaly has already been referred to. Where a patient is transferred from guardianship to hospital, a further right of application will arise upon any renewal of the authority for the patient's detention before the time for exercising the right of application which arose upon his transfer has expired. The second anomaly is that where a section 2 patient who has exercised his right of application under section 66(1)(a) is transferred into guardianship, he may not apply to a tribunal during what remains of the initial six-month period of guardianship. As to this, it seems likely that Parliament simply missed the point, just as it failed to address the fact that such a patient has no legal classification under the Act.

Summary

A patient who is transferred from one hospital or guardian to another may apply to a tribunal during what remains of the existing period of detention or guardianship if he has not already done so. Similarly, it would seem that a patient who is transferred from hospital to guardianship may apply to a tribunal if he has not already exercised his general right to apply once during that period, but not otherwise. If he did exercise that right, he will not be entitled to reapply until the second six-month period of guardianship has commenced, unless he is reclassified before then. For a further consideration of the point, see page 654.

65 Section 68(1) requires the managers to refer a patient's case unless by that date an application has been made under paragraphs 66(1)(e), (d), (g) or (h). Applications under section 66(1)(f) are not counted, probably because the draftsman missed the point. Because a patient transferred under section 19 is deemed to have been admitted to hospital under section 3 on the date of his original reception into guardianship, it might be contended that the patient in the above example is also entitled to make an application under section 66(1)(b) prior to 1 July. However, the wording of section 68(1) indicates that the rights of application under paragraphs 66(1)(b) and 66(1)(e) are mutually exclusive and the proposition is untenable.

66 A first reading of section 19(2)(b) might suggest that the patient is deemed to have been received into guardianship on the date of his transfer rather than the date on which the original application was made. This is because paragraphs 19(2)(a), (c) and (d) all conclude by referring to the time when the application was originally accepted whereas paragraph (b) provides instead that the provisions of Part II apply to the patient "as if the application were a guardianship application duly accepted at the said time." However, consideration of section 41(2)(b) of the 1959 Act, and of Sched. 1, Pt. I, para. 5 to the 1983 Act, makes it clear that this is not so and any ambiguity is unintentional.

67 At first sight, the reason for the distinction may seem to be consequential upon the mandatory reference provisions in section 68(1), which refer back to section 66(1)(e). In other words, the purpose served by section 66(1)(e) is to avoid imposing any duty on the managers to immediately refer the case of a patient who had been under guardianship for more than six months but not had a tribunal. In fact, this cannot be the reason. The 1959 Act included no mandatory reference provisions yet it also provided for a patient applying to a tribunal within six months of being transferred if the transfer was from guardianship to hospital but not if it was in the opposite direction (Mental Health Act 1959, s.41(5)). Section 66(1)(e) of the 1983 Act merely repeats the pre-existing provision.

UNRESTRICTED PATIENTS ABSENT WITHOUT LEAVE

The Mental Health (Patients in the Community) Act 1995 rather unnecessarily introduced the following provisions into section 66—

> **66.**—(1) Where ... (fa) a report is furnished under subsection (2) of section 21B above in respect of a patient and subsection (5) of that section applies (or subsections (5) and (6)(b) of that section apply) in the case of the report ... an application may be made to a Mental Health Review Tribunal within the relevant period ... (i) by the patient.
>
> (2) In subsection (1) above "the relevant period" means ... (f) in the case mentioned in paragraph ... (fa) of that subsection, the period or periods for which authority for the patient's detention or guardianship is renewed by virtue of the report;

Statutory framework

The law concerning absence without leave and its effect on the individual's liability to detention or guardianship under the Act has already been considered (**289**). The table on the following page summarises the tribunal rights of patients who are returned after a period of absence.

Patients absent without leave for 28 days or less

Although section 21 has been redrafted, where a patient is absent without leave for 28 days or less the position set out in the 1983 Act as originally enacted has been retained—

- Unless the patient's return occurs during the final week of a period of detention or guardianship, or after such a period would ordinarily have expired had he not been absent, no legal consequences arise. The existing period of detention or guardianship simply continues in the normal way. If the patient had not exercised his right to apply to a tribunal before absenting himself, he may do so upon his return during whatever remains of that period.

- If the patient's return within 28 days occurs during the final week of a period of detention or guardianship, or after it would ordinarily have expired, a renewal report may be furnished after the period would ordinarily have expired.

- Where this happens, the effect of the report is to retrospectively renew the authority for a further period and the new period of detention or guardianship is deemed to have commenced on the day it would have began had the patient never been absent. The patient then has exactly the same right to apply to a tribunal as any other patient whose detention or guardianship has been renewed. Pursuant to section 66(1)(f), he may make one application during the new six or twelve month period of detention or guardianship.

Patient absent for 28 days or less and renewal reports furnished under s.20

No retrospective renewal of the authority for the patient's detention or guardianship not necessary.	▪ No consequences. If he has not already applied, patient may exercise his usual right to apply during whatever remains of the period of detention or guardianship in existence both when he left and returned.
Retrospective renewal of the authority for the patient's detention or guardianship necessary.	▪ The patient has the ordinary right to make one application to a tribunal during (whatever remains of) what is now the current period of detention or guardianship.

Patients absent for more than 28 days and reports furnished under s.21B

Report furnished prior to the final two months of the period of detention or guardianship which was in force when the patient absented himself.	▪ No consequences unless patient also reclassified. If he has not already applied, patient may exercise his usual right to apply during whatever remains of the period of detention or guardianship in existence both when he left and returned. ▪ If the report has the secondary effect of reclassifying the patient, a right to apply does arise by virtue of this fact (**630**).
Report furnished during the final two months of the period of detention or guardianship which was in force when the patient absented himself.	▪ If the report provides that it shall also have effect as a renewal report furnished under s.20, patient has the ordinary right to make one application to a tribunal once the new period of detention or guardianship has commenced. ▪ If the report does not provide that it shall also have effect as a renewal report furnished under s.20 but has the effect of reclassifying the patient, a right to apply arises by virtue of this fact (**631**).
Report furnished after the period of detention or guardianship which was in force when the patient absented himself would ordinarily have expired	▪ The patient has the ordinary right to make one application to a tribunal during (whatever remains of) the period of detention or guardianship which, following the report, is now the current period of detention or guardianship. ▪ If the report also has the effect of renewing the authority for the patient's detention or guardianship for a further year upon the expiration of what is now the current period of detention or guardianship, once that further period has commenced the patient has the ordinary tribunal rights of application of any renewed patient.

Patients absent without leave for more than 28 days

The new provisions introduced by the 1995 Act concern patients who are taken into custody or who return to the required place after having been absent without leave for more than 28 days. The authority for the patient's detention or guardianship will lapse after one week unless his appropriate medical officer has furnished a report stating that it appears to him that the patient satisfies the "relevant conditions."

The effect of a report furnished under section 21B

The precise effect of such a report in terms of the patient's continued liability to detention or guardianship depends upon exactly when it is furnished in relation to the period of detention or guardianship which was in force when he absented himself. Put like this, there are three possibilities. The report might be furnished—

- prior to the final two months of that period (before any renewal report was due);
- during the final two months of that period (at a time when a renewal report can legally be furnished); *or*
- after that period of detention or guardianship would ordinarily have expired (after the time when a renewal report would ordinarily need to be furnished).

The effect of a report in terms of the patient's tribunal rights

A patient's tribunal rights similarly depend upon within which of these three periods the report is furnished. The effect in each case is as follows—

- Where the report is furnished on a date before the final two months of the period of detention or guardianship which was in force when the patient absented himself, that period of detention or guardianship simply continues as if the patient had never been absent. He may apply to a tribunal during what remains of the existing period of detention or guardianship if he had not already exercised that right before absenting himself. No additional right to apply to a tribunal arises simply because a report has been furnished authorising his continued detention or guardianship. However, if the form of mental disorder specified in the report is different from that previously specified, the report has the secondary effect of reclassifying the patient. In this case a right to apply does arise, but it arises by virtue of the fact that the patient's condition has been reclassified otherwise than during the course of renewal.[68]

- Where the report is furnished during the final two months of a period of detention or guardianship, it *may* also provide that it shall take effect as the renewal report which is now due. If so, the effect is the same as with any other renewal report. Under section 66(1)(f), the patient may make one application during the new six or twelve month period of detention or guardianship. Furthermore, as with all other renewals, even if the report has the secondary effect of reclassifying the patient no additional right to apply to a tribunal arises by virtue of this fact: he is already entitled to apply once the new period authorised by the report has begun. However, if the report does not also provide that it shall also take effect as the renewal report now due, but has the secondary effect of reclassifying the patient, an additional right to apply to a tribunal does arise. However, as before, it arises by virtue of the fact that the patient's condition has been reclassified otherwise than during the course of renewal.[69]

- Where the report is furnished after the date on which the period of detention or guardianship in existence when the patient absented himself would ordinarily have expired, it automatically has the effect of retrospectively renewing the authority for the patient's detention or guardianship. It is this retrospective renewal which gives rise to the new right of application referred to in section 66(1)(fa). That right is exercisable during whatever remains of what is, following the report, now the current period of detention or guardianship. Because the report automatically has the effect of renewing the authority for the patient's detention or guardianship, and so gives rise to a right to apply to a tribunal by virtue of that fact, no additional right to apply arises if it also has the secondary effect of reclassifying the patient.

- It has just been noted that if a report is furnished after the date on which the statutory period in existence when the patient absented himself would ordinarily have expired, the authority for the patient's detention or guardianship is thereby retrospectively renewed for a further period of six or twelve months. However, it is possible that there will already be less than two months left of that new period of detention or guardianship or that period may itself have already expired. The Act allows for this by providing that the single report may renew the patient's detention or guardianship for two further periods if necessary. This is why section 66(2)(f) provides that the right to apply to a tribunal under section 66(1)(fa), following retrospective renewal, is exercisable during the "period or periods" for which authority for the patient's detention or guardianship is renewed by virtue of the report.

Summary

The above provisions may seem unnecessarily complicated to some people and this is indeed the case. It is simply bad drafting. The same effect could have been achieved by providing that, if the authority for a patient's detention or guardianship is retrospectively renewed for a further period or periods, he may make one application to a tribunal under section 66(1)(f) during what is then his current period of detention or guardianship. Secondly, if the effect of a report is not to renew his detention or guardianship but to reclassify him, he may apply to a tribunal during the following 28 days under section 66(1)(d). This is certainly the easiest way to remember the logic of these verbose provisions.

[68] The right to apply following such a reclassification is conferred by section 66(1)(fb).

[69] The right to apply following such a reclassification is conferred by s.66(1)(fb).

REFERENCES

In certain circumstances, the Act imposes a duty on the managers of a hospital or the Secretary of State to refer a patient's case to a tribunal ("mandatory references") or allows the Secretary of State to refer a case at his discretion ("discretionary references"). Where a reference is made, the tribunal is required to deal with it as if the patient had in fact made an application, subject to certain modifications of the rules relating to pre-hearing matters.[70]

THE REFERENCE PROVISIONS

Unrestricted patients

- Mandatory references in respect of patients who are liable to be detained in a hospital — Section 68
- Discretionary references in respect of such patients and other unrestricted patients (those subject to guardianship or after-care under supervision) — Section 67

Restricted patients

- Mandatory references in respect of patients who are liable to be detained in a hospital — Sections 71, 75
- Discretionary references in respect of such patients and other restricted patients (those who have been conditionally discharged) — Section 71

AUTHORISED AND UNAUTHORISED REFERENCES

Section 77(1) provides that no application shall be made to a tribunal except in such cases and at such times as are expressly provided by the Act. Although it is therefore silent as to references, the wording of section 65 and the 1983 Rules[71] makes it clear that tribunals may only deal with references made in accordance with the statutory provisions, that is authorised references. A tribunal therefore has no discretion to consider a reference made by hospital managers in respect of a patient whose case falls outside the terms of section 68 nor, for example, a reference by a local social services authority in respect of a patient subject to guardianship.

MANDATORY REFERENCES

In the circumstances prescribed by Part V, the case of a patient who is liable to be detained in hospital for treatment must be referred for review to a Mental Health Review Tribunal.

70 See Mental Health Review Tribunal Rules 1983, r.29. The rules relating to adjournments (r.16), the hearing procedure (rr.21–22), the recording and communication of the tribunal's decision (rr. 23–24), and the legal effect of any failure to comply with the rules apply equally to applications and references. Rules 3,4,9 and 19 do not apply and rules 5,6,7 apply as modified by rule 29(c).

71 Rule 2 defines a reference as meaning a reference which is made under sections 67, 68, 71 or 75.

Patients detained under Part II

Where the conditions specified in section 68 exist, the managers of a hospital are required to refer to a tribunal the case of a patient who is liable to be detained for treatment there under Part II.

MANDATORY REFERENCES UNDER SECTION 68

Duty of managers of hospitals to refer cases to tribunal

68.—(1) Where a patient who is admitted to a hospital in pursuance of an application for admission for treatment or a patient who is transferred from guardianship to hospital does not exercise his right to apply to a Mental Health Review Tribunal under section 66(1) above by virtue of his case falling within paragraph (b) or, as the case may be, paragraph (e) of that section, the managers of the hospital shall at the expiration of the period for making such an application refer the patient's case to such a tribunal unless an application or reference in respect of the patient has then been made under section 66(1) above by virtue of his case falling within paragraph (d), (g) or (h) of that section or under section 67(1) above.

(2) If the authority for the detention of a patient in a hospital is renewed under section 20 or 21B above and a period of three years (or, if the patient has not attained the age of sixteen years, one year) has elapsed since his case was last considered by a Mental Health Review Tribunal, whether on his own application or otherwise, the managers of the hospital shall refer his case to such a tribunal.

Upon the commencement of a second period of detention (s.68(1))

Section 68(1) applies to patients who are admitted to hospital under section 3 or transferred from guardianship to hospital under section 19. It provides that if such a patient has not exercised his general right to apply to a tribunal within the following six months, the managers shall refer his case to a tribunal at the expiration of that period, unless an application or reference was made in respect of him by some other person during that period.[72] Applications or references previously made but subsequently withdrawn are to be discounted.[73] If the managers did not refer a patient's case because an application or reference was pending at the commencement of the second six month period of detention, but it is subsequently withdrawn, they must refer the patient's case to a tribunal as soon as possible after its withdrawal.[74]

72 However, section 68(1) is imprecisely drafted. Unless some other person has applied, the duty to refer the patient's case arises if he has not applied during the first six months "by virtue of his case falling within" section 66(1)(b) or (e). However, it is possible for a patient to apply during that period under various other provisions. He may apply under s.66(1)(f) if he has been transferred from hospital to guardianship; and under section 66(1)(fb) if he has been reclassified on returning to hospital after more than 28 days absence without leave. As drafted, the exercise of either of these rights has no bearing on the matter. Consequently, the managers must refer the patient's case after six months unless one takes the pragmatic view that *any* application made during the first six months releases the managers from the obligation.

73 Mental Health Act 1983, s.68(5).

74 *Ibid.*

Subsequent references (s.68(2))

Subsection (2) provides that where the authority for the detention of a patient is "renewed" under section 20 or 21B and a period of three years (or if the patient has not attained the age of sixteen years, one year[75]) has elapsed since his case was last considered by a tribunal, whether on his own application or otherwise, the managers of the hospital shall refer his case to a tribunal.[76]

"Renewed"

The authority for a patient's detention is renewed on the day his responsible medical officer furnishes a report to the managers stating that the statutory conditions for renewal are satisfied.[77] Such a report may be furnished on any day during the final two months of the period of detention which is then drawing to a close. The wording in subsection (2) is therefore materially different to that in subsection (1). The managers' duty to refer a patient's case under subsection (1) arises on the day the second six-month period of detention commences, not on the day the responsible medical officer furnishes his report authorising that further period of detention. Conversely, when calculating the three year period under subsection (2), the material date is that on which the renewal report was furnished.[78]

Example

A patient has been detained under section 3 since 1 January 1990. His case was last considered by a tribunal on 15 November 1990. The position on 1 November 1993 is that the authority for his detention will expire on 31 December unless his responsible medical officer furnishes a report under section 20(3) during the following two months. If he furnishes the report on 3 November, three years will not have elapsed since a tribunal had last considered the patient's case and no reference will be due for another year or thereabouts. If, however, he furnishes his report on or after 15 November 1993, the managers are required to refer the patient's case to a tribunal at that time.

Renewals under section 21B

Section 21B applies to unrestricted patients who, being liable to detention for treatment or subject to guardianship, are returned after having been absent without leave for more than 28 days. If the patient's appropriate medical officer then furnishes a report under section 21B, its effect may be to renew the authority for the patient's detention or guardianship for a further period or periods. If the report has

75 The material factor is the minor's age on the day the authority is renewed and the authority is (literally) renewed on the day the renewal report is furnished.

76 Mental Health Act 1983, s.68(2), as amended by s.2(7) of the Mental Health (Patients in the Community) Act 1995.

77 Mental Health Act 1983, subss. 20(3) and (8).

78 As to retrospective renewals, the renewal is deemed to take effect on the last day of the previous period of detention or guardianship (see sections 21A and 21B). In such cases, that is therefore the relevant date, not the date on which the report is actually furnished. Although the view expressed in the text equates to what section 68 says, the above example illustrates that the position is unsatisfactory. There is therefore room to argue that a patient's detention for these purposes is not renewed until he has actually commenced the renewed period of detention. On this basis, the managers who receive a report renewing the detention or guardianship should wait to see if the patient applies during what remains of the existing period and refer the patient's case if no application has been made by the time it expires.

this effect, and the patient's case was last considered by a tribunal three or more years ago, the managers must refer the patient's case to a tribunal under section 68(2).[79]

"Since his case was last considered by" a tribunal

Where the previous tribunal made a recommendation under section 72(3) and later "further considered" his case because that recommendation was not implemented, it is not entirely clear when the patient's case was last considered for these purposes. If a tribunal reconvenes because its recommendation has not been complied with, and then further considers whether the patient must or should be discharged, it is strictly speaking considering his case at that second hearing. However, it may be argued that this is too literal an interpretation of the reference provisions, and the three-year period commences from the initial determination required under the Act.

Unrestricted patients detained under Part III

Section 68(1) does not apply to patients who are subject to a hospital order or a transfer direction, other than patients who are deemed to be subject to a hospital order following their transfer from guardianship under section 19.[80] The better view is that section 68(2) does apply.[81] The managers are required to refer to a tribunal the case of any hospital order patient whose detention is renewed "if three years (or, in the case of a patient aged under 16, one year) have elapsed since his case was last considered by a tribunal." The final phrase is unfortunate in Part III cases because the patient's case may never have been considered by a tribunal: there may be no last occasion. The words, "and his case has not been considered by a tribunal during the previous three years," are presumably to be substituted for the offending phrase in subsection (2).[82]

79 In the case of retrospective renewals, the relevant date (when determining whether a tribunal has considered the patient's case during the past three years) appears to be the last day of the previous period of detention or guardianship, not the date on which the report is actually furnished. See s.21B(6).

80 See Mental Health Act 1983, ss.19(2), 40(4), 66(1)(e), 68(1), Sched. 1, Pt. I, paras. 2, 5, 9.

81 The drafting is again imprecise. In the first place, sections 66–68 are expressed to be concerned with "applications and references concerning Part II patients" and sections 69–71 with "applications and references concerning Part III patients." Section 145(3) then provides that any reference in the Act to an enactment in sections 66 and 67, shall be construed as a reference to that enactment as it applies by virtue of sections 40(4) and 55(4), and some of the provisions are extended to Part III patients.. Sections 40(4) and 55(4) provide that a patient who is detained under a hospital order or a transfer direction shall be treated for the purposes of the provisions mentioned in Part I of Schedule 1 to the Act as if he had been admitted for treatment under Part II, subject to any modifications specified. The schedule provides that section 66 (applications) shall apply to hospital order patients subject to various modifications and section 67 (discretionary references) without modification. Section 68(2) (mandatory references after three years) is not mentioned as applying to hospital order patients, either with or without modification. The answer is probably that any lack of clarity only arises because of the ambiguous cross-headings and recent cases suggest that English courts are not prepared to take account of them when construing a statute. When one reads section 68 without reference to them, the words used in subsection 68(1) are applicable to hospital order patients who have been transferred under section 19 and subsection 68(2) applies to any patient whose detention is renewed and who has not had a tribunal for the specified period. A reading of section 40(2) of the Mental Health (Amendment) Act 1982, and the provisions in section 71 concerning restricted patients, supports this view.

82 If this is correct, the subsection in effect reads as follows: "(2) If the authority for the detention of a patient in a hospital is renewed under section 20 or 21B above *and his case has not been considered by a Mental Health Review Tribunal during the previous three years* (or, if the patient has not attained the age of sixteen years, one year), whether on his own application or otherwise, the managers of the hospital shall refer his case to such a tribunal."

Mandatory references and restricted patients

The Secretary of State is required to refer to a tribunal the case of any restricted patient detained in a hospital whose case has not been considered by a tribunal within the last three years.[83] Where a conditionally discharged patient is recalled to hospital, the Secretary of State is also required to refer his case to a tribunal within one month of the date of his return to hospital.

MANDATORY REFERENCES UNDER SECTION 71

References by Secretary of State concerning restricted patients

71.—(1) The Secretary of State may at any time refer the case of a restricted patient to a Mental Health Review Tribunal.

(2) The Secretary of State shall refer to a Mental Health Review Tribunal the case of any restricted patient detained in a hospital whose case has not been considered by such a tribunal, whether on his own application or otherwise, within the last three years.

(3) The Secretary of State may by order vary the length of the period mentioned in subsection (2) above.

(4) Any reference under subsection (1) above in respect of a patient who has been conditionally discharged and not recalled to hospital shall be made to the tribunal for the area in which the patient resides.

(5) Where a person who is treated as subject to a hospital order and a restriction order by virtue of an order under section 5(1) of the Criminal Procedure (Insanity) Act 1964 does not exercise his right to apply to a Mental Health Review Tribunal in the period of six months beginning with the date of that order, the Secretary of State shall at the expiration of that period refer his case to a tribunal.

Conditionally discharged patients

There is no corresponding duty to refer to a tribunal the case of a conditionally discharged patient. Since patients subject to guardianship or after-care under supervision are in the same position in this respect, the rationale would seem to be that the mandatory reference provisions are intended to protect patients who are liable to be detained and subject to compulsory treatment.

Patients found insane or unfit to plead

Section 71 makes special provision for patients who are treated as subject to a restriction order under by virtue of an order under section 5(1) of the Criminal Procedure (Insanity Act) 1964, following a finding of insanity or unfitness to plead. Where such a patient does not apply to a tribunal during the six month period

[83] In contrast to the position set out in section 68(2), no special provision is made for children subject to restrictions and the usual three-year rule applies to them.

beginning with the date of the order, the Secretary of State is required to refer his case at the expiration of that period.[84] Where no such reference is made because at the expiry of that period an application is under consideration by a tribunal, but the patient later withdraws it, the Secretary of State must refer his case as soon as possible after that date.[85]

Patients subject to guardianship and after-care under supervision

The duty, under Section 68, to refer to a tribunal the case of a patient who has not applied for a tribunal for a certain period of time is one imposed only on hospital managers and therefore only relevant to patients who are liable to be detained. No corresponding duty is imposed on a guardian, responsible social services authority or Health Authority in respect of patients who are subject to guardianship or after-care under supervision. They are therefore not entitled to a mandatory reference if no application has been made for a certain period of time.

DISCRETIONARY REFERENCES

Section 67(1) provides that the Secretary of State may, if he thinks fit, at any time refer to a tribunal the case of an unrestricted patient, including a patient who is subject to guardianship or to after-care under supervision under Part II of the Act.[86] Section 71(1) contains a similar power in respect of restricted patients, including conditionally discharged patients. Tribunal proceedings under section 86 are commenced by way of a discretionary reference under sections 67 or 71.

FORM AND CONTENTS OF THE REFERENCE

Rule 29 of the 1983 Rules does not specify any particular form which a reference shall take nor specify any information which it shall wherever possible include.[87] The form which the reference takes is therefore a matter for the managers', or the Secretary of State's, discretion.

SUBMITTING THE REFERENCE

Although section 77 does not extend to references, rule 2(1) provides that the tribunal which has jurisdiction to deal with a reference is that which has jurisdiction in the area in which the patient is detained or liable to be detained. If the discretionary reference relates to a conditionally discharged patient, or a patient subject to guardianship or after-care under supervision, the tribunal with jurisdiction is that for the area in which the patient resides.[88]

[84] However, the Secretary of State is not required to refer the case of a patient who is admitted to hospital for treatment under s.5(1) but without any restriction order also being made.

[85] Mental Health Act 1983, s.71(6).

[86] Mental Health Act 1983, ss.67(1), 40(4) and 55(4), s.67(1), as amended by the Mental Health (Patients in the Community) Act 1995, s.1(2) and Sched. 1, para. 8. As drafted, there is, however, no power to refer the case of a patient who "is to be" subject to after-care under supervision on leaving hospital.

[87] Nor do the Act or rules expressly say that the reference must be made in writing unless this may be inferred from the use of the word "receipt" in rule 29(a).

[88] Mental Health Review Tribunal Rules 1983, r.2(1); Mental Health Act 1983, s.71(4).

PROCESSING THE APPLICATION OR REFERENCE

On receipt of an application or reference, the tribunal is required to give notice of it to the persons specified in the rules and, where an assessment application has been made, to arrange to hear it within the following seven days (**638**). If a prior application or reference is outstanding in respect of the same patient, the tribunal will decide whether to join the proceedings (**639**). It will also consider whether its consideration of an application may be postponed (**641**) and whether a representative should be appointed for the patient (**878**). If the patient moves to the area of another tribunal during the proceedings, his case may be transferred to that tribunal (**648**). In certain circumstances, an application of reference may be withdrawn (**649**) or deemed to be withdrawn (**650**).

NOTICE OF THE APPLICATION, etc.

The purpose of giving notice of the application or reference is to notify the persons responsible for preparing reports of the proceedings and, where relevant, to inform a patient that an application or reference has been made concerning him. In assessment cases, the notice of application also constitutes the notice of hearing.

Assessment applications

On receipt of an assessment application, a tribunal is required to fix a hearing date, being one within the following seven days, and to give notice of the date, time and place fixed for the hearing to the patient, the responsible authority, the nearest relative (where practicable),[89] and any other person who, in the opinion of the tribunal, should have the opportunity of being heard. The members appointed to deal with the case are appointed by the regional chairman. Upon receiving notice of the application, or a request from the tribunal, whichever may be the earlier, the responsible authority is required to furnish the tribunal with copies of the admission papers and the various reports required under the rules (**663**).[90]

Other applications

Following receipt of the application, the tribunal sends notice of the application to the patient, unless he made the application, the "responsible authority" and, if the patient is a restricted patient, to the Secretary of State.[91] The notice of application must be sent whether or not the tribunal exercises any power to postpone its consideration of the application (**641**).[92]

Notifying the nearest relative

An application by a patient is not required to specify the person who is his nearest relative and the rules do not require notice of the application's receipt to be sent to that person. However, the responsible authority must furnish this information and the nearest relative is given notice of the proceedings at a later stage, once the reports have been received. (**779**).[93]

89 Mental Health Review Tribunal Rules 1983, r.31. An "assessment application" is one made under section 66(1)(a) by a patient who is detained for assessment. The rules are drafted on the basis that a nearest relative will not apply in respect of a patient who is detained for assessment.

90 Mental Health Review Tribunal Rules 1983, r.32(1).

91 *Ibid.*, r.4(1).

92 *Ibid.*, r.4(2).

93 *Ibid.*, r.7(d).

References

Where a reference is made by the Secretary of State, the tribunal is required to send notice of the reference to the responsible authority and to the patient. Where it is made by the managers of a hospital, the tribunal send notice of its receipt to the patient and a request to the managers for a copy of the authority's statement in respect of the patient (**664**).[94]

TWO OR MORE OUTSTANDING APPLICATIONS OR REFERENCES

When an application or reference is made, it may happen that there is already an application or reference outstanding in respect of the same patient. Where this is the case, the rules provide that a tribunal may consider more than one application or reference in respect of a patient at the same time, including in due course conducting a single hearing.[95] Furthermore, where a tribunal has previously postponed its consideration of an earlier application, it may direct that the latter be determined at the same time as the subsequent application or reference.[96] Where more than one applicant is involved in tribunal proceedings, each has the same rights under the rules as he would have if he were the only applicant.[97]

Nearest relative applications

The existence of concurrent applications or references usually results from applications having been made by both a patient and his nearest relative. Where this is the case, they will need to consider whether it would be preferable from their point of view for one of them to withdraw his application. This may then allow that right of application to be exercised at a later date in the event that the application which proceeds does not result in the patient's discharge. However, no purpose is served by withdrawing a right of application which will then lapse before there is an opportunity to exercise it, and consideration will also need to be given to the effect of the postponement provisions in rule 9 (**641**). Where the nearest relative's application is made under section 66(1)(g), following the issue of a barring report, that application should not be withdrawn since the discharge criteria to be applied will be more favourable to discharge than those which apply in respect of the patient's application (**491**).

References

A mandatory reference may not be withdrawn. From a prospective applicant's viewpoint, it will generally be a waste of a right of application to exercise it before the date on which any pre-existing mandatory reference is determined.

Assessment and guardianship applications

An application for assessment does not discharge any pre-existing guardianship application or order. Where a patient under guardianship makes a tribunal application and he is then admitted to hospital for assessment, he may make a further

94 Mental Health Review Tribunal Rules 1983, r.29(b).

95 *Ibid.*, rr.18(1) and 29.

96 *Ibid.*, r.9(6).

97 *Ibid.*, r.18(2).

application in respect of his detention. This subsequent application must be heard within seven days. Generally, it will be preferable to hear the two applications separately and to deal first with the question of the patient's liability to detention. Significant problems are likely to result from any attempt to deal with the two matters together. There will be two responsible authorities, two responsible medical officers (and possibly a nominated medical attendant also), two sets of reports, different discharge criteria and different rules applicable in respect of each application.

Patients in respect of whom a supervision application has been accepted

An unrestricted patient who is liable to be detained in hospital for treatment may generally apply to a tribunal once during each statutory period of detention. If a supervision application is then accepted in respect of him, he does not actually become subject to after-care under supervision until he has both ceased to be liable to be detained and left hospital in the conventional sense. However, upon the supervision application being accepted, he may apply to a tribunal for it to terminate the authority to supervise him upon leaving hospital. If the tribunal does not terminate the authority conferred by the supervision application, it will in any case lapse if he has not both ceased to be liable to be detained for treatment and left hospital within six months of its acceptance. During that six months, a tribunal may receive two applications from the same patient — one made under section 66(1)(b) or (f) concerning his liability to detention and one made under section 66(1)(ga) concerning the power to supervise him. These applications could be considered together or separately but, neither having yet been determined, it may not be possible to postpone the consideration of either. As to what will generally be the most suitable course of action the following points may be borne in mind. The area within which the patient is to reside on leaving hospital may be different from that where the hospital is located, in which case the two applications must be made to different tribunals (**621, 622**). Apart from being generally unsatisfactory, this means that the applications cannot be joined. The required content of the medical and social circumstances reports are identical in all material respects so that the same reports could suffice for the purposes of both applications. The factual information required under Parts A and E of Schedule 1 to the rules differ but these basic statements of the case history complement each other and would not *per se* necessitate hearing the applications separately. Details of the after-care services to be provided, and of any requirements imposed or to be imposed under section 25D, must also be furnished where tribunal proceedings relate to a supervision application. Again, this is not an onerous obligation and the former will generally consist of a copy of the already prepared after-care plan. In terms of preparing the cases for hearing, the very real problems associated with joining tribunal applications made by a patient subject both to detention under section 2 and guardianship may therefore often not apply. The first main determinant when deciding whether to join the applications is likely to be whether there would then be unacceptable delay in hearing the earlier of the applications. However, this must be balanced against the benefit of hearing the later application speedily upon the same reports. The second main factor is likely to be the fact that different statutory criteria will apply when determining the two applications. The evidence will need to be taken with this in mind, which might be confusing for the patient. Balancing this, the tribunal will be able to decide whether liability to detention is still appropriate in the context of the arrangements made for the patient's supervised discharge. If those arrangements seem to be sound and in place, this may be a very telling reason why continued liability to detention is no longer appropriate, or no longer necessary for the patient's health or safety or to protect others. If they will soon be in place, it might alternatively be a telling reason for discharging the patient's liability to detention on a defined future date. Having regard to the above, where the timescale permits the two applications to be heard together, there are perhaps two main arguments as to whether or not this is possible or desirable—

1. Firstly, it might be contended that the ambit of rule 18 is limited to enabling a joint hearing of two applications made by the same patient, or applications made by him and his nearest relative, in relation to the same authority. It is not intended to enable tribunals to simultaneously hear applications which concern different authorities, and so involve applying different statutory criteria, and making two decisions. Consequently, if the timescale permits, the ideal is for the same tribunal to hear both applications during the same day, one after the other. The applications may largely be determined on the basis of the same reports, and the duplication of evidence can be minimised in this way, but the parties to the proceedings will be different, as may the persons giving oral evidence. Most importantly, it ensures that the statutory issues are separately considered.

2. Secondly, there is no reason why the applications must be heard separately and, if heard together, applying the different statutory criteria does not cause any particular problems. Considering whether the patient is entitled to be (or should be) discharged from liability to detention, and then whether his after-care should be provided under statutory supervision, is straightforward. Indeed, separating the two issues by requiring them always to be addressed at separate hearings will often be artificial and the rules do not require that.

It is submitted that the first approach is preferable. While the second approach has certain advantages, experience suggests that hearing the issues together might well degenerate into chaos. Where the timescale permits, it would seem better to hear the supervision application case first. That way the tribunal will be clear about whether the patient, if discharged, will be being discharged subject to supervision.

POSTPONING CONSIDERATION OF A REFERENCE

A tribunal cannot postpone its consideration of a reference.[98]

POSTPONING CONSIDERATION OF AN APPLICATION

A tribunal may postpone its consideration of certain classes of application if it has determined a previous application or reference in respect of the same patient within the previous six months. The power is exercisable by the regional chairman, or by another member of the tribunal appointed to act on his behalf, but is rarely used.[99]

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98 Mental Health Review Tribunal Rules 1983, r.29(a).

99 *Ibid.*, rr.2(1) and 5.

The basic framework

On receipt of an application, the issue of postponement may be approached in four stages—

1. Is there a power of postponement? (**643**)
2. If yes, for how long may consideration be postponed? (**645**)
3. Is postponement in the patient's interests? (**647**)
4. If yes, for how long should consideration be postponed? (**647**)

POSTPONEMENT: MHRT RULES 1983, r.9

Powers to postpone consideration of an application

9.—(1) Where an application or reference by or in respect of a patient has been considered and determined by a tribunal for the same or any other area, the tribunal may, subject to the provisions of this rule, postpone the consideration of a further application by or in respect of that patient until such date as it may direct, not being later than—

(a) the expiration of the period of six months from the date on which the previous application was determined; or

(b) the expiration of the current period of detention, whichever shall be the earlier.

(2) The power of postponement shall not be exercised unless the tribunal is satisfied, after making appropriate inquiries of the applicant and (where he is not the applicant) the patient, that postponement would be in the interests of the patient.

(3) The power of postponement shall not apply to—

(a) an application under section 66(1)(d) *or (gb)* of the Act;

(b) an application under section 66(1)(f) of the Act in respect of a renewal of authority for detention of the patient for a period of six months *or an application under section 66(1)(gc) of the Act in respect of a report furnished under section 25G(3) concerning renewal of after-care under supervision*, unless the previous application or reference was made to the tribunal more than three months after the patient's admission to hospital, reception into guardianship *or becoming subject to after-care under supervision*;

(c) an application under section 66(1)(g) of the Act;

(d) any application where the previous application or reference was determined before a break or change in the authority for the patient's detention or guardianship *or his being (or being about to be) subject to after-care under supervision* as defined in paragraph (7).

(4) Where the consideration of an application is postponed, the tribunal shall state in writing the reasons for postponement and the period for which the application is postponed and shall send a copy of the statement to all the parties and, in the case of a restricted patient, the Secretary of State.

(5) Where the consideration of an application is postponed, the tribunal shall send a further notice of the application in accordance with rule 4 not less than 7 days before the end of the period of postponement and consideration of the application shall proceed thereafter, unless before the end of the period of postponement the application has been withdrawn or is deemed to be withdrawn in accordance with the provisions of rule 19 or has been determined in accordance with the next following paragraph.

(6) Where a new application which is not postponed under this rule or a reference is made in respect of a patient, the tribunal may direct that any postponed application in respect of the same patient shall be considered and determined at the same time as the new application or reference.

(7) For the purposes of paragraph (3)(d) a breach or change in the authority for the detention or guardianship *or his being (or about to be) subject to after-care under supervision* of a patient shall be deemed to have occurred only—

(a) on his admission to hospital in pursuance of an application for treatment or in pursuance of a hospital order without an order restricting his discharge; or
(b) on his reception into guardianship in pursuance of a guardianship application or a guardianship order; or
(c) on the application to him of the provisions of Part II or Part III of the Act as if he had been so admitted or received following—
(i) the making of a transfer direction or
(ii) the ceasing of effect of a transfer direction or an order or direction restricting his discharge; or
(d) on his transfer from guardianship to hospital in pursuance of regulations made under section 19 of the Act.
(e) on his ceasing to be subject to after-care under supervision on his reception into guardianship in accordance with section 25H(5)(b).

Mental Health Review Tribunal Rules 1983, as amended by the Mental Health Review Tribunal (Amendment) Rules 1996, r.7.

Whether a power of postponement exists

Whether a power of postponement exists depends upon the right of application being exercised and whether there has been a break in the authority for the patient's detention, supervision or guardianship since the previous application or reference was determined.

Restricted patients

Where an application is made by a restricted patient and a previous application or reference concerning him has been determined during the previous six months, a tribunal may always postpone its consideration of the new application if it is satisfied that is in the patient's interests.

Patients detained for assessment

The postponement provisions do not apply to an "assessment application," that is an application made by a patient who is detained for assessment.[100]

[100] Mental Health Review Tribunal Rules 1983, rr.33 and 2(1). The rules do not take account of the possibility that an application may be made by the nearest relative of a section 2 patient.

Unrestricted patients detained for treatment or subject to guardianship

The general rule is that each time a tribunal determines an application or reference, the consideration of any application made during the following six months concerning that patient may be postponed. However, the rule does not apply if the patient was a restricted patient at the time of the previous determination or subject to a application, order or direction different from that to which the new application relates.[101] Even where there has been no such break in the authority for the patient's detention or guardianship, a tribunal may not postpone its consideration of certain types of application, however recent its last determination. It may not postpone an application arising from a patient's reclassification (under section 66(1)(d)) or the barring of his discharge (under section 66(1)(g)). Similarly, an application made by a patient under section 66(1)(f) during his second six month period of detention or guardianship may only be postponed if it is made during the first three months of that period and the previous application or reference was made during the final three months of the first period of detention or guardianship.[102] Once these exceptions and modifications to the general rule have been accounted for, it may be seen that consideration of the following types of application may always be postponed where that is in the patient's interest and there has been a determination during the previous six months: applications made by a nearest relative under section 69 in respect of a Part III patient; applications made by the displaced relative of a Part II patient under section 66(1)(h); applications made under section 66(1)(f) by a patient who has been detained or subject to guardianship under the same provision of the Act for one year or more; applications made under section 66(1)(fa) or (fb) by a patient who has returned to hospital or the place where he is required to be after more than 28 days absence without leave.[103]

Proceedings involving after-care under supervision

The consideration of a tribunal application made by the patient or his nearest relative may be postponed in the following circumstances—

- Where a tribunal application is made under section 66(1)(ga) during the six month period following the supervision application's acceptance, its consideration may apparently be postponed if a previous application or reference in respect of the patient has been considered during the past six months. The intention may be to enable a tribunal to postpone considering a patient's case until he has left hospital or to enable it to postpone its consideration of a supervision application made in response to its own recent recommendation.[104]

- Where the authority for a patient's supervision is renewed, section 66(1)(gc) provides for a further application during each subsequent six or twelve month period the authority remains in force. Consideration of such an application may be postponed if a previous application or reference was determined during the past six months unless that application or reference was made during the three months following the acceptance of the supervision application.

- Where a patient or his nearest relative applies under section 66(1)(gb) following the patient's reclassification, consideration of such an application may not be postponed.

- Where a patient who is or has been subject to after-care under supervision becomes liable to be detained for assessment or treatment, or is received into guardianship, any tribunal application previously made under sections 66(1)(ga)–(gc) in respect of his liability to statutory supervision is never a ground for postponing the consideration of any tribunal application then made in respect of his detention or guardianship.[105]

The maximum period of postponement

The maximum period of postponement is set out in rule 9(1). Because the drafting of the paragraph is ambiguous, it is worth considering it alongside the enactment in the 1960 Rules from which it derives—

MHRT Rules 1960, r.4(1)

"4.—(1) Where an application by or in respect of a patient has been considered and determined by a tribunal for the same or any other area, the tribunal ... may, subject to the provisions of this rule, postpone the consideration of a further application by or in respect of that patient until such time as they or he may direct, not being later than the expiration of the period of twelve months from the date on which the previous application was determined."

MHRT Rules 1983, r.9(1)

"9.—(1) Where an application or reference by or in respect of a patient has been considered and determined by a tribunal for the same or any other area, the tribunal may, subject to the provisions of this rule, postpone the consideration of a further application by or in respect of that patient until such date as it may direct, not being later than—

(a) the expiration of the period of six months from the date on which the previous application was determined; or
(b) the expiration of the current period of detention, whichever shall be the earlier."

101 Mental Health Review Tribunal Rules 1983, rule 9(7). There is one exception to this rule. Where a patient is transferred from hospital into guardianship under section 19 and an application or reference has been determined within the past six months while the patient was detained in hospital, this does give rise to a power of postponement following transfer.

102 The opening words in rule 9(3) ("the power of postponement") refer back to rule 9(1). In other words, the previous application or reference must have been determined before consideration may be given to postponing an application made during the first three months of the second period of detention or guardianship. Applications or references made during the first six months which have not been determined, including applications which were withdrawn, are therefore ignored and so do not give rise to any power of postponement.

103 Where a patient who is liable to be detained or subject to guardianship returns to the hospital or place where he is required to be after more than 28 days absence without leave, a right to apply to a tribunal will arise either (1) under section 66(1)(fa), if the authority for his detention or guardianship is *retrospectively* renewed for a further period or periods or (2) under section 66(1)(fb), if he is reclassified otherwise than in the course of *prospectively* renewing the authority for a further period. The failure to insert in rule 9(3)(a) a reference to applications made under section 66(1)(fb) following such a reclassification is odd, as is the failure to insert a reference to section 66(1)(fa) in rule 9(3)(b). It seems likely that the draftsman did not understand the effects of these provisions since there is no logical reason for dealing with renewal or reclassification under section 21B in a different manner to applications under section 66(1)(d), (gb), and (f). Indeed, all of the amendments to rule 9 made by the Mental Health Review Tribunal (Amendment) Rules 1996 appear to make little legal or grammatical sense.

104 However, since no person or body other than a tribunal may terminate the liability to supervision of a patient who is to be subject to supervision upon leaving hospital, and since the consideration of a first tribunal application cannot usually be postponed, the drafting is suspicious. It must therefore be doubtful whether a power to postpone the consideration of a first application made by a patient who is to be subject to supervision would be *intra vires* section 78.

105 This is the combined effect of rr.9(7)(a)–(e) and 33. The insertion of r.9(7)(e) appears to be superfluous since reception into guardianship always constitutes a break or change of authority: see r.9(7)(b). It seems unlikely that r.9(7)(e) is meant to imply that where a patient ceases to be subject to after-care under supervision because he is admitted to hospital for treatment in accordance with s.25H(5)(a), this does not constitute a break or change, so that consideration of any application then made under s.66(1)(b) may be postponed. Again, such a provision would seem to be *ultra vires*.

The phrases "previous application" and "further application"

Gostin and Fennell suggest that rule 9(1)(a) does not apply if the previous determination involved a reference, and the postponement period is by default that specified in rule 9(1)(b): "the expiration of the current period of detention." However, restricted patients by definition do not have a current period of detention. It appears in fact that an error was made when the previous rule was redrafted in 1983 to take account of the introduction of the new automatic reference provisions. The old rule was both simple and coherent: where a "previous application" had recently been determined, consideration of a "further application" could be postponed. The continued use in the new rules of the word "further," in the phrase "further application," can only be an omission on the part of the draftsman. There may have been no "previous application," the previous determination being of a reference.[106] This tends to suggest that both the continued use of the phrase "further application" and the failure to add the words "or reference" after "previous application" are two consequences of a single oversight on the draftsman's part; the continued inclusion of the phrase "new application" in rule 9(6) being a third. The ambiguous terms of rule 9(3)b) reinforce the impression of indifferent draftsmanship.[107] The likelihood of a drafting error is further strengthened if one considers the application of the present rules to restricted patients.

Restricted patients

In any case where a previous application or reference has been determined within the past six months, a tribunal may postpone its consideration of any further application until the expiry of that six-month period.

Unrestricted patients

The effect of rule 9(1) is that the consideration of a reference cannot be postponed but the consideration of an application involving an unrestricted patient may be postponed for up to six months from the date on which the previous application or reference was determined or until the expiration of the current statutory period, whichever is the earlier.

"Determination"

An application is determined by a tribunal when it makes its decision as to whether a patient is to be discharged.[108] Consequently, an application may not be postponed because an undetermined application or reference has been considered during the preceding six months. For example, one which was subsequently withdrawn, has yet to be heard, or stands adjourned. In such cases, a decision should be taken as to whether the proceedings should be considered together. Similarly, where a tribunal defers a direction for conditional discharge or makes a recommendation under

106 It cannot be argued that the purpose of the phrase "further application" is to indicate that the consideration of an application may only be postponed if the previous determination related to a reference. Had that been the intention, the rule would not have been changed and the inclusion of the word "reference" in the opening line would be meaningless.

107 As enacted, rule 9(3)(b) provided that, "The power of postponement shall not apply to ... an application made under section 66(1)(f) in respect of the renewal of authority for *detention* of the patient for a period of six months, unless the previous application or reference was made to the tribunal more than three months after the patient's *admission to hospital or reception into guardianship*."

108 See rules 23(2) and (3) and *R. v. Oxford Regional Mental Health Review Tribunal, ex p. Secretary of State for the Home Department* [1988] 1 A.C. 120.

section 72(3), and it later reconvenes the proceedings or further considers the patient's case, the period after the substantive hearing is to be discounted when calculating whether a power of postponement exists.[109]

Whether postponement is in the patient's interests

The power of postponement may not be exercised unless the tribunal is satisfied, after making "appropriate" inquiries of the applicant and (where he is not the applicant) the patient, that postponement would be in the interests of the patient.[110] Where no such inquiries are made before the power is exercised, the appropriate remedy in the first instance will be to invite the tribunal to cure that irregularity by making the necessary inquiries. Only the patient's interests are relevant: whether a nearest relative applicant is from his point of view acting reasonably in exercising his right of application, and whether he has applied before, is ultimately academic.

Relevant factors

The following considerations are likely to be relevant in determining whether postponement is in the patient's interests: whether the current application is made by the patient or by his nearest relative; the patient's attitude to any application by his actual or acting nearest relative; whether the previous proceedings were commenced by reference; where a patient has applied, whether he made the previous application; the length of time which has elapsed since the previous application or reference was determined; whether the new application is likely to merely duplicate the issues considered at the previous hearing; the tribunal's decision on the previous occasion (in particular its recorded reasons for not discharging and any recommendations made under section 72); the period for which consideration may be postponed.

The specified period of postponement

The factors to be considered when deciding what period of postponement to direct will necessarily be similar to those which are relevant when determining whether to exercise the power at all and reflect the reasons for deciding to exercise the power.

Giving notice of the postponement and the reasons for it

Where a tribunal postpones consideration of an application, it must state in writing the period for which consideration of the application is postponed and the reasons for postponement[111]; and serve that statement on the parties[112] and, in the case of a restricted patient, the Secretary of State. It must also still serve the notice of application required under rule 4.

109 By way of example, take the case of a patient who on 1 January 1990 was detained under section 3. On 3 March 1993, a tribunal does not direct that he be discharged and makes a recommendation under section 72(3). This is not complied with and, on 9 September 1993, the tribunal reconvenes the hearing. If the patient then makes a further application on 2 January 1993, its consideration may not be postponed because more than six months have elapsed since the last determination.

110 Mental Health Review Tribunal Rules 1983, r.9(2).

111 Mental Health Review Tribunal Rules 1983, r.9(4). Proper and adequate reasons must be given which deal with any substantial points raised and enable the parties to determine whether the tribunal has made any error of law in making its decision. See *Bone v. Mental Health Review Tribunal* [1985] 3 All E.R. 330, 333; *Re Poyser and Mills' Arbitration* [1964] 2 Q.B. 467; *Alexander Machinery Ltd. v. Crabtree (N.I.R.C.)* [1974] I.C.R. 120.

112 At this stage of the proceedings, the "parties" will be the applicant, the patient (if he is not the applicant), and the responsible authority: see Mental Health Review Tribunal Rules 1983, r.2(1).

Commencing consideration of the application

If the application is withdrawn or deemed to be withdrawn before the postponement period expires, no further steps need be taken.[113] Where a further application is made during the postponement period by or in respect of the same patient and its consideration is not postponed, the tribunal may direct that the postponed application be considered and determined at the same time as the new application.[114] In all other cases, the tribunal is required to send a further notice of application under rule 4 not less than 7 days prior to the expiry of the postponement period and "consideration of the application shall proceed thereafter."[115]

PATIENTS WHO ARE TRANSFERRED DURING THE PROCEEDINGS

The rules provide that where, in the course of the proceedings, a patient moves within the jurisdiction of another tribunal, the proceedings shall be transferred to that other tribunal if the chairman of the tribunal originally having jurisdiction over those proceedings so directs.

TRANSFERRING THE PROCEEDINGS: MHRT RULES 983, r.17

Interpretation

2.—(1) "tribunal" in relation to an application or a reference means the Mental Health Review Tribunal constituted under section 65 of the Act which has jurisdiction in the area in which the patient, at the time the application or reference is made, is detained or is liable to be detained or is subject to guardianship or is (or is to be) subject to after-care under supervision, or the tribunal to which the proceedings are transferred in accordance with rule 17(2), or in the case of a conditionally discharged patient, the tribunal for the area in which the patient resides.

Transfer of proceedings

17.—(1) Where any proceedings in relation to a patient have not been disposed of by the members of the tribunal appointed for the purpose, and the chairman is of the opinion that it is not practicable or not possible without undue delay for the consideration of those proceedings to be completed by those members, he shall make arrangements for them to be heard by other members of the tribunal.

(2) Where a patient in respect of whom proceedings are pending moves within the jurisdiction of another tribunal, the proceedings shall, if the chairman of the tribunal originally having jurisdiction over those proceedings so directs, be transferred to the tribunal within the jurisdiction of which the patient has moved and notice of the transfer of proceedings shall be given to the parties and, in the case of a restricted patient, the Secretary of State.

113 Mental Health Review Tribunal Rules 1983, r.9(5).

114 *Ibid.*, r.9(6). This would generally happen where the subsequent application was of a kind the consideration of which may not be postponed. As to the tribunal's general power to direct that two or more outstanding applications or references be considered together, see rule 18.

115 *Ibid.*, r.9(5). A minor drafting error. For obvious reasons, rule 4(1)(b) should be read in this context as referring to, "the applicant and (where he is not the applicant) the patient."

Application of rule 17(1)

A patient may move within the jurisdiction of another tribunal because he is transferred from one hospital to another under section 19 or 123; or is granted leave to reside at another hospital or outside hospital under section 17; or because the place of residence of a conditionally discharged patient, or a patient subject to guardianship or after-care under supervision, changes. Mental Health Review Tribunal proceedings pending in Northern Ireland at the time of a patient's removal to England and Wales may not been transferred to a tribunal in England and Wales.

WITHDRAWING AN APPLICATION OR REFERENCE

An application or a discretionary reference may be withdrawn, but not a mandatory reference.

WITHDRAWAL OF APPLICATION : MHRT RULES 1983, r.19

Withdrawal of Application

19.—(1) An application may be withdrawn at any time at the request of the applicant provided that the request is made in writing and the tribunal agrees.

(2) If a patient ceases to be liable to be detained or subject to guardianship *or after-care under supervision* in England and Wales, any application relating to that patient shall be deemed to be withdrawn.

(2A) Where a patient subject to after-care under supervision fails without reasonable explanation to undergo a medical examination under rule 11, any application relating to that patient may be deemed by the tribunal to be withdrawn.

(3) Where an application is withdrawn or deemed to he withdrawn, the tribunal shall so inform the parties and, in the case of a restricted patient, the Secretary of State.

Mental Health Review Tribunal Rules 1983, as amended by the Mental Health Review Tribunal (Amendment) Rules 1996, r.10.

Withdrawing an application

A request by an applicant to withdraw his application must be made in writing and its withdrawal requires the tribunal's consent.[116] Such a consent may be given by the regional chairman.[117] Where an application is withdrawn, the tribunal is required to notify the parties of this.[118] Applications which have been withdrawn are discounted for the purpose of determining whether an applicant has exercised his right to apply to a tribunal during a specified period.

116 Mental Health Review Tribunal Rules 1983, r.19(1).

117 *Ibid.*, r.5.

118 *Ibid.*, r.19(3).

The need for the tribunal's consent

As sections 68(5) and 71(6) make clear, withdrawing an application may in certain circumstances simply result in the patient's case being immediately referred to the same tribunal by the hospital managers or by the Secretary of State. Providing that withdrawal requires the tribunal's consent allows proceedings which are shortly to be heard, and in respect of which reports have already been received, to proceed if their discontinuance would simply result in the same matter immediately coming back before the tribunal. The provision also has the secondary benefit of ensuring that applications are not withdrawn because of any undue pressure on the patient or his nearest relative.

Withdrawing a reference

A discretionary reference may be withdrawn by the Secretary of State at any time before it is "considered" by the tribunal and, where a reference is withdrawn, the tribunal shall inform the patient and the other parties of that fact.[119] The word "considered" is inconsistently used in the tribunal rules. Its use in this context suggests that it refers to the commencement of the hearing.

DEEMED WITHDRAWAL OF AN APPLICATION OR REFERENCE

Rule 19(2) provides that an application or reference "shall be deemed to be withdrawn" if the patient "ceases to be liable to be detained or subject to guardianship or after-care under supervision in England and Wales."[120] Where an application is deemed to have been withdrawn, the tribunal shall notify the parties of this.[121] As drafted, the rule appears to provide that an application or reference shall not be deemed withdrawn merely because during the proceedings the patient becomes liable to be detained or subject to guardianship under a different statutory provision. The various ways in which a patient may generally cease to be detained or subject to guardianship under a particular statutory provision have already been considered (**283 et seq.**). For these purposes, four distinct situations can be identified and the correct approach must be to try to discern the statutory framework rather than to construe the statute according to what the rules say. In any case, it seems clear that a literal reading of rule 19 does not cater for all of the possible eventualities.

Patients ceasing to be subject to any form of compulsion under the Act

In many cases, the effect of an order discharging the patient is that he ceases to be subject to any application, order or direction under the Act. In unrestricted cases, this will also be the effect of not renewing the authority for his detention, guardianship or supervision, of his being absent without leave or in judicial custody for a certain period of time, and of his removal outside the jurisdiction under Part VI. In all these cases, the effect of rule 19 is to allow the tribunal to cease its consideration of the application or reference and to close the file. The effect is therefore procedural in that the rule simply confirms what would still be the case if it did not exist, namely that there is no longer any authority in existence for the tribunal to review.

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119 Mental Health Review Tribunal Rules 1983, r.29(d).

120 *Ibid.*, r.19(2).

121 *Ibid.*, r.19(3).

Patients who are subject to more than one provision

A patient who is liable to be detained or subject to guardianship or supervision may become subject to a second application, order or direction but this not have the effect of discharging the earlier authority which a tribunal is reviewing. Examples of this second situation are the making of a supervision application in respect of an unrestricted patient who is liable to be detained for treatment; the admission for assessment of a patient subject to guardianship or after-care under supervision; the making of a further application, order or direction in respect of a restricted patient; and the making of an order under section 35, 36 or 38. In all these cases, the patient continues to be subject to the earlier authority which the tribunal is reviewing and it is clear that the application or reference cannot be deemed to be withdrawn.

One provision ceasing to have effect upon another coming into effect

The third situation is that where a patient whose case is being considered by a tribunal ceases to be subject to that particular authority because of a subsequent application, order or direction. There are many ways in which this may happen although the most common of them is that a patient ceases to be detained under section 2 upon the acceptance of a section 3 application. Other examples are that a section 2 or section 3 patient is received into guardianship; a hospital order or a guardianship order is made in respect of an unrestricted patient; a patient subject to after-care under supervision is admitted to hospital for treatment or received into guardianship; or a patient subject to guardianship is admitted to hospital for treatment. In none of these cases has the patient, in the words of rule 19, "ceased to be liable to be detained or subject to guardianship or after-care under supervision in England and Wales." In most cases, however, he will have ceased to be subject to whichever particular form of compulsion gave rise to the tribunal application — detention, guardianship or supervision — and now be subject to one of the other two forms.

Change in what is authorised by the application, order or direction

The final situation is that where a patient is transferred from hospital to guardianship or vice-versa. In these cases, the application or order which gave rise to the tribunal proceedings continues in existence but the form of compulsion authorised by it has changed. Here, therefore, the patient has ceased to be liable to be detained or subject to guardianship without the authority or order being discharged or lapsing. In contrast, a transfer from one hospital or guardian to another involves no change in the form of compulsion which is authorised.

A tribunal's powers under Part V

The next stage is to consider whether an application is to be deemed withdrawn in the last two of these situations. This involves examining the terms of Part V and then considering the consequences of deeming, or not deeming, an application to be withdrawn in the particular situations. As to the first step, the following sections seem particularly relevant—

- Section 72(4) commences: "Where application is made to a Mental Health Review Tribunal by ... a patient who is subject to guardianship under this Act, the tribunal may ..." This suggests that the application must have been made by a patient subject to guardianship, not merely that the patient is subject to guardianship at the time of the hearing.

- Section 72(4A) commences: "Where application is made to a Mental Health Review Tribunal by or in respect of a patient who is subject to after-care under supervision (or, if he has not yet left hospital, is to be so subject after he leaves hospital), the tribunal may ..." This subsection similarly suggests that the application must have been made by a patient who was subject to supervision, not merely that he is being supervised at the time of the hearing.

- Section 73(1) commences, "Where an application to a Mental Health Review Tribunal is made by a patient who is subject to a restriction order, ... the tribunal shall ..." Again, this subsection points in the same direction. The patient must both be subject to such an order at the time of the hearing and have made the application at a time when he was so subject.

- Section 74(1) commences, "Where an application to a Mental Health Review Tribunal is made by a patient who is subject to a restriction direction, ... the tribunal shall ..." A natural reading leads to the same conclusion.

- Section 75(3) sets out a tribunal's powers in respect of applications made under subsection (2), which again suggests that the patient must also have been a conditionally discharged patient when he applied for the review.

- Section 78(2) provides that rules made under that section may in particular make provision (c) for restricting the persons qualified to serve as members of a tribunal *for the consideration of any application, or of an application of any specified class*; (d) *for enabling a tribunal to dispose of an application* without a formal hearing where such a hearing is not requested by the applicant. Again, the wording of these paragraphs suggests that it is the particular application authorised by the Act which is being considered and disposed of.

Although one must bear in mind that any general rule may be subject to exceptions, the general intention seems to be that a tribunal may only deal with an application or reference if the patient is subject to the particular compulsory power which gave rise to the right to a review of the justification for that power. Whether this is correct and, if it is, whether there are any exceptions to the rule, leads to the second step. This is to consider the consequences of deeming, or not deeming, an application to be withdrawn following the power's revocation or a patient's transfer.

Patients detained for treatment under Part II

Ignoring various fanciful possibilities, a patient will cease to be liable to be detained for treatment under section 3 if he is received into guardianship or, having become involved in criminal proceedings, is admitted to hospital for treatment under section 37 or 48. Unless restrictions have been attached, the status of a patient admitted for treatment under either of those provisions will be virtually unchanged. However, unless he is reclassified, a patient who is admitted under section 37, whether with or without restrictions, is not entitled to apply to a tribunal during the initial six month period of detention authorised by the court. If, however, he is entitled to proceed with a tribunal application previously made whilst detained under section 3, because it is not deemed to have been withdrawn, the effect of this will necessarily be that his liability to detention under section 37 is reviewed during the first six months. For two reasons, the statutory intention must be that the tribunal application ceased to have effect at the time when the patient ceased to be liable to be detained under the provision to which the right of application attached. Firstly, it is clear that patients detained under a hospital order, with or without restrictions, are not entitled to have the present justification for their detention reviewed by a tribunal during the initial period of detention authorised by the court. Secondly, if one allows tribunal applications previously in force to continue then hospital order patients would, if previously detained under section 2, 3 or 48, be entitled to a review during the first six months by virtue of that fact, rather than by virtue of their detention under the relevant hospital or restriction order. However, patients previously detained for treatment under section 36 or 38 would still need to wait the full six months. There is nothing in the Act to suggest that Parliament intended that some patients are entitled to a review within six months of the order's imposition, and others not, depending on their previous legal status. Indeed, such a scheme would introduce an unwelcome degree of unfairness into the matter.[122]

Patients detained under section 48

The point just made is perhaps best illustrated by reference to the position of defendants who, pending trial, are detained in hospital for treatment under sections 48 and 49. Under section 69(2)(b), such a patient may immediately apply to a tribunal in respect of his detention in pursuance of those directions. However, it is not always the case that the tribunal can determine that application before the criminal proceedings are concluded and, not infrequently, the court disposes of the case by making a hospital order *and* a restriction order. Sections 51(2) and 52(6) provide that the transfer direction ceases to have effect when the case is disposed of and the attendant restriction direction, being parasitic in nature, also ceases to have effect at that time. The patient may not apply to a tribunal during the initial six month period of detention authorised by the court unless he is entitled to proceed with his outstanding application, because it is not deemed to have been withdrawn by him. Again, it cannot have been Parliament's intention that patients who were previously detained in hospital for treatment under section 48 should be entitled to an early review of the hospital and restriction orders but not patients who were detained for treatment there under section 36 or 38. Accordingly, the right conferred by section 69(2)(b) must be a right to have the present justification for the patient's transfer to hospital reviewed in accordance with section 74.[123] If the criminal proceedings are concluded before that can be done, section 69(2)(b) does not give rise to a right to an immediate review of the justification for any hospital order or restriction order then imposed. Unless the patient appeals against the sentence imposed, he must wait for six months, along with all other patients detained under the same provision. Indeed, the contrary notion seems absurd and, insofar as rule 19 implies otherwise, the draftsman must have misunderstood Parliament's intention.

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122 The position must be the same where a court imposes a hospital order in respect of an unrestricted patient who was already detained under a previous hospital order, in which case the second order discharges the first. Where a hospital order and a restriction order is made in respect of a patient who is already subject to a hospital order and a restriction order, the earlier orders continue in force as does any tribunal application relating to them. In practice, the Home Secretary sometimes rationalises the position by absolutely discharging the patient from one of the pairs of orders.

123 Similarly, where a patient who is liable to be detained ceases to be subject to restrictions, because they were imposed for a limited term or his sentence of imprisonment expires, any outstanding tribunal application is deemed withdrawn. The Act in effect acknowledges this by giving the patient notionally detained under a new hospital order an immediate right to apply to a tribunal.

Patients subject to after-care under supervision

A patient who is subject to after-care under supervision ceases to be so subject if he is admitted to hospital for treatment or received into guardianship. The issues affecting liability to detention and guardianship on the one hand and supervision on the other are sufficiently distinct that different reports are required under the rules and different responsible authorities are required to furnish them. Some of the parties will also be different. For example, notices will have been served on the community responsible medical officer and the supervisor although, following readmission, the patient no longer has any such officers. Furthermore, if the outstanding tribunal application had been made by the nearest relative, he will no longer be an authorised tribunal applicant — allowing the application to proceed would involve the tribunal hearing an application concerning the patient's detention by a person not authorised to apply for it's review. Likewise, if the outstanding application was made following reclassification, it is difficult to see how that gives rise to any right to an independent review following admission — it is then the patient's classification on the admission documents which is relevant and that has not been amended. And, where a patient who has been detained in pursuance of a hospital order for less than six months applies to a tribunal because he is to be subject to after-care under supervision upon leaving hospital, it must be the case that the tribunal is not entitled to also review his liability to detention. In other words, the tribunal's jurisdiction is limited to reviewing the justification for the power upon which the right of application is founded. It may only exercise those powers under section 72 which relate to the specific right of application exercised under section 66. For all these reasons, it is therefore difficult to believe that the consequence of readmission for treatment or reception into guardianship can ever be anything other than the deemed withdrawal of any pre-existing tribunal application concerning the patient's supervision.

Patients transferred to a different guardian or hospital

Where a patient subject to guardianship is transferred into the guardianship of another person or authority, the original application or order continues in force and it is treated as if it had always specified the new person or authority as being the person's guardian. The patient has therefore never ceased to be subject to guardianship, his rights to apply to a tribunal are unaffected, and any outstanding tribunal application cannot be deemed withdrawn. The consequences are the same where a patient who is liable to be detained is transferred to another hospital. Transfers of this kind may involve a change of responsible authority, and they may necessitate transferring the proceedings to another tribunal and the commissioning of further reports, but their effect is not that the existing application or reference is deemed to be withdrawn. The application, order or direction being reviewed continues to have effect and the form of compulsion authorised by it has not changed.

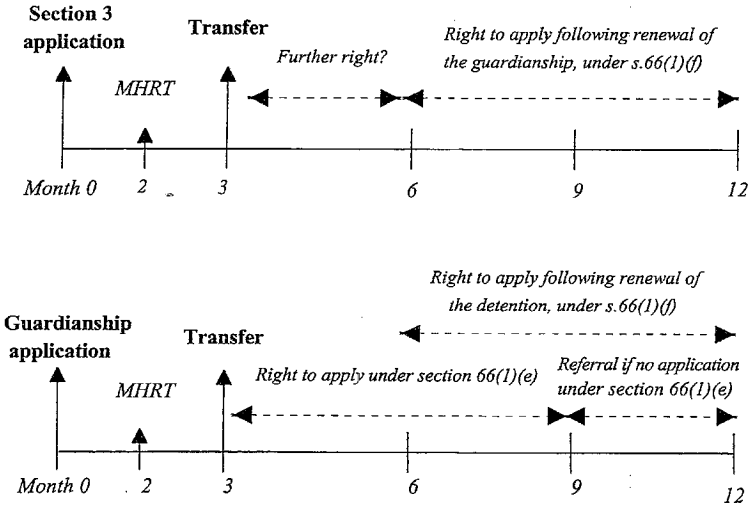
Patients transferred from guardianship to hospital

The position is similar where the transfer is from guardianship to hospital insofar as the application or order is deemed to have always been in its amended form. The effect is that the guardianship application or order is treated as if it had always been a section 3 application or a hospital order. However, following a transfer to hospital, a fresh right of application arises under section 66(1)(e) which is exercisable during

the following six months. The intention here must be to place such patients, insofar as is practical, in exactly the same position as those admitted under section 3. The logical consequence of conferring a new right of application following transfer is that any rights of application exercisable under the pre-existing scheme cease to have effect. Although the rules are not conclusive, the fact that a tribunal may not postpone its consideration of an application made under section 66(1)(e) supports this view. Holding otherwise would mean that some detained patients are entitled to two hearings during their first six months in hospital whilst others are only entitled to one. Furthermore, any other interpretation gives rise to anomalies which suggest that Parliament did not intend that an existing application should continue to have effect. For example, where a Part III patient is transferred from guardianship to hospital during the initial six-month period, any outstanding application made by his nearest relative must be deemed withdrawn — that person has no right to apply during what is now the first six months of the patient's detention under a hospital order.

Patients transferred from hospital into guardianship

Transfers from hospital into guardianship similarly take effect as if the original application, order or direction which authorised the patient's admission to hospital had always been in its amended form. The original authority has not ceased to have effect but now has a different effect, in that the patient is no longer liable to detention in a hospital. However, in this case no new right of application is conferred and the statutory scheme becomes unclear, as the following diagram illustrates.



In particular, it is unclear whether (1) any pre-existing tribunal application made in respect of the patient's detention is meant to continue to have effect; and (2) whether a previous determination in relation to the patient's detention, during what is now the current six or twelve month period of guardianship, prevents a further application

being made during that period.[124] Two views are possible. The first is that a patient transferred from hospital to guardianship has not previously applied to a tribunal for a review of his guardianship during what is now the current period of guardianship. Accordingly, he has yet to exercise his right of application under section 66(1)(c) or (f) and may do so following the transfer. Any previous application in relation to his detention in hospital, whether determined or pending, is ignored — in the latter case, it is deemed withdrawn. This view has the consequence that a hospital order patient transferred within six months of the order's imposition, who had no right to apply before, may apply during what remains of that period.[125] The second view is simply that a patient who is admitted to hospital for treatment under Part II may make one application during the following six months, and a patient admitted under Part III none, and no different rights having been provided following transfer, the patient's position is unaffected by any transfer. If the patient has already had a tribunal during the current period, he is not entitled to make a further application until the authority is next renewed.[126] The corollary is that any outstanding tribunal not disposed of prior to the transfer continues and is not deemed withdrawn. In support of this interpretation, it may be said that it is consistent with sections 19(2)(b) and 72(4).[127] Furthermore, there would be little need for section 66(1)(e) if this were not the case. The purpose of that paragraph is to ensure all detained patients have a right to a tribunal during their first six months of detention, even if they have already had a tribunal during the current period of the authority. The patient always has the same right to a review of his detention following transfer as he would have had he been detained for treatment in pursuance of an application. The point of prescribing a new, fresh, right of application in such cases must be to modify the usual position following transfer, that is to vary the logical consequences of transfer in terms of tribunal rights. Here one is dealing with the unmodified position. It is submitted that the second view is correct, primarily because this must be the position if the transferred patient had previously been detained for more than six months, and section 66(1)(e) would otherwise unnecessarily complicate the scheme set out in section 66 without serving any purpose which compensated for that.

Section 2 patients detained under section 3

It sometimes happens that a section 3 application is accepted in respect of a section 2 patient before that person's application to a tribunal under section 66(1)(a) has been determined. The usual approach over the years has been for the tribunal to still review the case on the appointed date but to determine the application according to the criteria for discharge in section 72(1)(b). The justification for doing so is essentially four-fold: (1) the application was made during the relevant period for making such an application and the patient was authorised to make it; (2) section 72(1) is expressed to apply where an application has been made by a patient who is

124 Note that these questions have already been touched upon (**625 et seq.**).

125 Note that where a transfer is the other way, and a guardianship order patient is transferred to hospital, he may in fact apply under section 66(1)(e), even though he is now deemed to be a hospital order patient in hospital during what is now the initial period of detention.

126 This must be the position after the initial six-month period has expired. All applications then made are made under section 66(1)(f). In other words, if a patient in his second year of detention had a tribunal prior to being transferred, he will already have exercised his right to apply under paragraph (f) for that period.

127 Section 72(4) commences: "Where application is made to a Mental Health Review Tribunal by ... a patient who is subject to guardianship under this Act, the tribunal may ..." Since the patient is deemed to have been subject to guardianship both at the time he made his application and at the time of the hearing so the tribunal must determine it.

liable to be detained; (3) the application having been authorised, and the tribunal's powers under that subsection being exercisable in respect of a person who is liable to be detained, the application must be determined; (4) combining a tribunal's powers in section 2 and 3 cases within a single subsection, and uniquely avoiding any reference to the patient's status at the time he made the application, must have been designed to achieve this unique effect. In short, provided that the patient's application was authorised at the time it was made, the tribunal must determine it and which of the paragraphs in section 72(1) it applies — paragraph (a) or paragraph (b) — depends upon his status at the time the application is dealt with. As to the patient's rights of application, the view taken was that, because the patient has not exercised his right to make an application during the six-month period following the admission under section 3, he could make a further application during that period — in this case, under section 66(1)(b).[128]

The counter-argument

Until recently, there were several grounds upon which exception could be taken to the argument just outlined or to any contention that a patient could not be detained under section 3 whilst a section 2 tribunal was pending —

- Firstly, it had been held that an approved social worker's duty or discretion to make a section 3 application is in no way impliedly limited or abrogated by the existence of an earlier tribunal decision to discharge: there is no sense in which those concerned in making a section 3 application are at any stage bound by an earlier tribunal decision. If this is correct, and the approach is open to criticism (**597**), holding that a section 2 patient cannot be admitted under section 3 until the tribunal has reviewed his detention does not necessarily confer any practical benefit on him. The relevant mental health professionals being of the opinion that the criteria for detention under section 3 exist, they can still make that application, albeit that any tribunal decision in favour of discharge should cause them to reconsider the necessity for that.

- Secondly, there is no reason why a patient detained under section 3 should be entitled to two reviews of the present authority for his detention if he was previously detained under section 2 but only one review if admitted under section 3 at the outset.

- Thirdly, if the tribunal does not vacate the hearing date, but invites the patient to lodge an application under section 66(1)(b), and proceeds on the basis of the reports which have already been prepared, the patient is not thereby to be taken as having been deprived of a right to a hearing later on during the initial six-month period of detention. Rather, in an ideal world, every patient's detention under section 3 would be reviewed as quickly as possible after it had been authorised.

- Fourthly, while some consultants undoubtedly do all they can to avoid a tribunal hearing, if the tribunal deals with the patient's section 66(1)(b) on the date originally set aside for the section 2 hearing, there will then be no incentive for them to attempt to delay hearings in this way.

128 See the wording of section 66(1)(a) and (b).

- Fifthly, it is necessary to separate out the two issues of law concerning section 3 applications and a tribunal's jurisdiction under Part V. Insofar as some consultants are guilty of bad practice in this area, the protection afforded by the Act lies with approved social workers and the patient's nearest relative. If a tribunal hearing is pending, the nearest relative may quite properly object to a section 3 application being made until the outcome of the tribunal is known. Insofar as section 29 is relevant, there is nothing unreasonable about that person objecting to the patient's admission for an indefinite period of treatment until he has the benefit of the tribunal's findings. Similarly, it would be quite lawful, and often good practice, for an approved social worker to conclude that he is not satisfied that such an application ought to be made at present because the patient is safely detained, receiving treatment, and an independent judicial review of the merits of his detention is pending.[129]

- Sixthly, the equivalent provisions in the 1959 Act suggest that any ambiguity in section 72(1) is unintentional.[130] Only patients detained for treatment could apply to have their cases reviewed under section 123 of that Act and, giving that scheme, the drafting was sufficiently precise. The right to a review for patients detained for 28 days was one introduced by the Mental Health (Amendment) Act 1982. The draftsman effected this amendment by inserting what is now section 72(1)(a) after the word "and." However, one cannot easily conclude from that a deliberate intention to place section 2 patients in a unique position.

Ex p. M.

The position of section 2 patients who are detained under section 3 before the tribunal hears their application was recently considered in *R. v. South Thames Mental Health Review Tribunal, ex p. M.*[131] It is understood that Collins J. held that the approach customarily adopted by tribunals was the correct one. The patient's application having been authorised by section 66(1)(a), the tribunal must deal with it. Which criteria the tribunal apply, and what powers it possesses, are determined by section 72. The patient in this instance being detained for treatment at the time of the hearing, the criteria in section 72(1)(b) must be applied. In essence, therefore, the sections 66 and 72 deal with completely different matters (a patient's rights of application and a tribunal's powers) and the answer to the issue raised requires that they be kept distinct.

129 See Mental Health Act 1983, s.13(1).

130 "123.—(1) Where application is made to a Mental Health Review Tribunal by or in respect of a patient who is liable to be detained under this Act, the tribunal may in any case direct that the patient be discharged, and shall so direct if they are satisfied—
(a) that he is not then suffering from mental illness, psychopathic disorder, subnormality or severe subnormality; or
(b) that it is not necessary in the interests of the patient's health or safety or for the protection of other persons that the patient should continue to be liable to be detained."

131 *R. v. South Thames Mental Health Review Tribunal, ex p. M.*, CO/2700/97, 3 September 1997. The transcript had not been printed by the time this book was published. Prior to *ex p. M.*, High Court proceedings concerning the point had previously been initiated but not determined. In *J.M.S. v. Mental Health Review Tribunal*, the tribunal dealt with an application made at a time when the patient was detained under section 2 but applied the discharge criteria in section 72(1)(b). The patient asked the tribunal to state a case as to whether this was the correct approach. However, because the patient was discharged by the tribunal, the matter was academic. In the case of *J.O.L.*, the tribunal dealt with the matter in the same way but did not discharge the patient.

Summary

Although it is particularly important that provisions for the benefit of people with mental health problems should be plain and unambiguous, that is rarely the case with Part V and the rules, and no more so than here. However, it is submitted that—

- The Act provides a particular right of application, exercisable within a particular period of time, for each distinct form of authority for a person's detention, guardianship or supervision.

- The general statutory rule is that a tribunal's jurisdiction to deal with an application ceases if the patient ceases to be subject to the authority to which the right of application attaches. Similarly, although rule 19 does not apply to mandatory references, a tribunal has no jurisdiction to consider a reference made under section 68 if a further application, order or direction is made which has the effect of discharging the earlier authority.

- There are, however, two exceptions to the general rule. Firstly, an application made by a section 2 patient is not deemed to be withdrawn if he is detained under section 3 before it is determined. The rationale appears to be that section 2 is a precursor of section 3 and section 72(1) does not contain any qualifying words to the effect that a tribunal's powers under paragraph (b) are only exercisable if the application was made by a patient who was detained for treatment. The second exception involves patients who are transferred under section 19: unless the transfer is from guardianship to hospital, which gives rise to a new right of application, any outstanding tribunal application should be determined (*transfer from one hospital or guardian to another, or from hospital into guardianship*).[132]

Supervised patients not attending medical examination

Rule 19(2A) was inserted by the Mental Health Review Tribunal (Amendment) Rules 1996. It provides that where a patient subject to after-care under supervision fails without reasonable explanation to undergo a medical examination under rule 11, any application relating to that patient may be deemed by the tribunal to be withdrawn. The provision has such a punitive flavour, so wholly out of keeping with the traditional tolerance of tribunals towards the occasional shortcomings of people suffering from mental ill-health, that it is tempting to say that the provision is *ultra vires*. There seems to be nothing in the Act which entitled the draftsman to single out patients subject to after-care under supervision from other patients who may be residing in the community — patients subject to guardianship, conditionally discharged patients, and those absent from hospital with leave — and to lay down that their applications may be deemed withdrawn if they fail to attend the medical examination, but not those of other patients.[133] The fact that an application can be

132 The alternative interpretation here is that if the effect of a transfer is to terminate the form of compulsion previously authorised by the application, order or direction then the tribunal application is deemed to have been withdrawn, but not otherwise

133 Mental Health Act 1983, section 78(5) allows the rules to make different provisions in different cases. However, that must mean that some rules may apply to section 2 cases and others to restricted cases, and so forth, as the particular features of each kind of case dictates. It cannot have been Parliament's intention that the rules would be selective in this sense, *i.e.* arbitrary.

deemed withdrawn if the patient fails, rather than refuses, to attend a medical examination is highly unsatisfactory. Apart from the fact that the patient may not have received the letter of appointment, there are many reasons associated with a person's mental condition which might reduce his ability to attend an examination. Not all of those grounds would necessarily be reasons for not terminating the supervision application which it is the tribunal's duty to review. It is also highly unsatisfactory that the power can be exercised if the patient has not provided a reasonable explanation for his failure, not where the tribunal has reason to believe that he has refused to attend without good cause. In summary, the Act does not expressly provide that the rules may deem an application to be withdrawn, so rule 19 should be interpreted restrictively. It is one thing for the rules to provide that an application shall be deemed withdrawn if the patient is no longer subject to the particular provision. That is essentially procedural. It is quite another for them to empower a tribunal to withdraw an application by a patient who may still wish it to deal with his case. There is nothing in the statute to suggest that tribunals may do so or that the rules can single out a certain class of patient for such treatment. The appropriate and polite course is to ask the patient to contact the tribunal about fixing a date for the examination and the hearing and to await his response, thereafter appointing a representative, or adjourning the proceedings *sine die,* until contact is established. It is submitted that the rule is *ultra vires* the Act.

11. Obtaining reports on the patient

INTRODUCTION

Where an application or reference has been made to a tribunal, the Mental Health Review Tribunal Rules 1983 impose on the "responsible authority" and, in cases involving restricted patients, the Secretary of State a duty to furnish to the tribunal a statement about the patient.[1] The precise nature of this obligation, and the information and reports which the statement must include, are set out in the rules. The persons whom the authority or the Secretary of State has asked to write the reports should be aware of the need in certain circumstances to prepare the report in two separate parts or to indicate clearly whether part of the report should be withheld from a particular person (**702**).

THE "RESPONSIBLE AUTHORITY"

Rule 2(1) defines the body or authority which is the "responsible authority" for the purposes of the tribunal proceedings—

- In cases involving patients who are liable to be detained in a hospital or mental nursing home, the managers of the hospital or home are the "responsible authority."[2]
- In the case of patients subject to guardianship, the "responsible authority" is the "responsible local social services authority," that is the local authority which is the patient's guardian or, where a private guardian has been appointed, the local social services authority for the area within which the guardian resides.[3]
- In relation to a patient subject to after-care under supervision, the "responsible authority" is "the Health Authority which has the duty under section 117 of the Act to provide after-care services for the patient."[4]
- In cases involving conditionally discharged patients, there is no "responsible authority" but the rules require the Secretary of State to furnish a statement.[5]

1 This power to require a statement derives from Mental Health Act 1983, s.78(2)(g).
2 Mental Health Review Tribunal Rules 1983, r.2(1); Mental Health Act 1983, s.145(1).
3 Mental Health Review Tribunal Rules 1983, r.2(1); Mental Health Act 1983, s.34(3).
4 Mental Health Review Tribunal Rules 1983, r.2(1), as inserted by the Mental Health Review Tribunal (Amendment) Rules 1996, r.2(c).
5 This is because conditionally discharged patients are not liable to be detained in any specific hospital and the Secretary of State is never a party to, nor the responsible authority in, tribunal proceedings.