worker attending the hearing will often bring his report with him, rather than send it to the tribunal or responsible authority in advance. The time of the hearing may affect a patient's ability to participate in the proceedings or the manner in which he gives his evidence and so, in practice, also affect the decision made. For example, the mood of many depressed patients is subject to diurnal variation and lifts as the day progresses. In other cases, where medication is due immediately prior to or during the hearing, the patient may be unduly sedated or become aroused as time passes. Similar problems arise if the hearing takes place shortly before or after depot medication is administered.

Failure to give notice of the hearing

The importance of giving notice was emphasised in the *Oxford case*.[63] In that case, the tribunal determined an application by a restricted patient having failed to give notice of the hearing to the Secretary of State. Lord Bridge described the tribunal's omission as "a breach of the most fundamental rule of natural justice, in that the Secretary of State, as a vitally interested party, was denied a hearing ... Such a fundamental flaw as vitiated the proceedings leading to that decision must surely call for a complete rehearing de novo." Previously, in the Court of Appeal, Lawton L.J. had described the tribunal's failure as "a classic case of a failure of natural justice entitling the court to intervene by ordering judicial review," adding that in future "tribunals, before starting to hear any application when the Secretary of State is not represented, should inquire, and note, whether he has been given notice of the application and when."

Failure to give notice to a party

Although it is well established that a tribunal's decision will be quashed if the Secretary of State did not receive notice of the hearing, it is unclear whether a failure to give notice of the hearing to a party listed in rule 7 would have the same consequence. Their role in the proceedings is less fundamental and they have no right under the rules to see the reports or to take a full part at the hearing, in terms of calling evidence and questioning witnesses. The effect of their absence would rarely be so material as to affect the decision reached, although one can never be entirely sure. On the other hand, the main reason for designating them as parties appears to be to entitle them to notice of the hearing, and of any step which affects whether and where a hearing will take place, so the omission is fundamental in this respect. Judicial review being a discretionary remedy, it may be that the court would simply look at any affidavit setting out the evidence which the absent party would have given, compare this with the reasons for the decision reached, and then decide whether the omission may have affected the decision reached and whether the matter is in any case now academic.

[63] *R. v. Oxford Regional Mental Health Review Tribunal, ex p. Secretary of State for the Home Department* [1988] 1 A.C. 20.

14. The hearing

INTRODUCTION

Hearings take place at the hospital where the patient is liable to be detained, most often in the board-room or a committee room. That is also the normal venue if the case involves a patient who has been conditionally discharged or who is subject to after-care under supervision. In guardianship cases, the hearing takes place at the offices of a local authority guardian or, if convenient, at a hostel where the patient is required to reside. Rules 21 and 22 set out the basic hearing procedure but, more importantly, the proceedings must be conducted in a way which is fair and accords with the principles of natural justice. From a legal viewpoint, the issues to be considered in relation to the hearing are whether it should or must be held in private or public (**797**); who is entitled or may be required to attend or appear at the hearing (**800**); who may be excluded from the hearing (**801**); the pre-hearing deliberations (**805**); the hearing itself and the taking of evidence (**807**); the effect of irregularities in the conduct of the proceedings, including failure to comply with the rules (**806, 816**); the power of adjournment (**817**); and sanctions (**826**).

ATTENDANCE AT THE HEARING

The rules provide that a tribunal shall sit in private unless the patient requests a hearing in public and the tribunal is satisfied that a hearing in public would not be contrary to his interests.[1] In practice, it is exceptional for a patient to request a public hearing and virtually all hearings are held in private.

THE RIGHT TO A PUBLIC HEARING

The onus is on the patient to satisfy the tribunal that a public hearing would not be contrary to his interests. Persons other than the patient, including a nearest relative applicant, have no right to request a public hearing. Equally, the fact that a public hearing would be contrary to some other person's interests is not a material

[1] Mental Health Review Tribunal Rules 1983, r.21(1). The test under the 1960 Rules was different. Rule 24(1) required a tribunal to hold a public hearing if the patient requested one provided it was satisfied that such a hearing "would not be detrimental to the interests of the patient and would not for any other reason be undesirable." This provision was considered in the case of *R. v. Mental Health Review Tribunal, ex p. Royston* (CO517/83), 10 May 1983, in which the court held that "detrimental" did not refer to the patient's relationship with his responsible medical officer and there had been no specific reason why one should not be held.

consideration: the sole test is whether a public hearing is contrary to the patient's interests. The statutory test differs from that applicable to decisions about withholding documents from the patient, which is whether their disclosure would be likely to adversely affect his health or welfare or that of others.[2] Consequently, a public hearing will be justified if any detriment to the patient's health is outweighed by the benefits to him of such a hearing.

Giving reasons for refusing a public hearing

Where the tribunal refuses a request for a public hearing or directs that a hearing begun in public shall continue in private, it is required to record its reasons in writing and to inform the patient of them.[3] It may be inferred from rule 21 that the grounds upon which a tribunal may discontinue hearing a case in public are that it is no longer satisfied that a public hearing is not contrary to the patient's interests. For example, because of the effect on his mental health or because of the adverse consequences *for him* of any publicity which the hearing is attracting.

PUBLIC AND PRIVATE HEARINGS : MHRT RULES 1983, r.21

Privacy of proceedings

21.—(1) The tribunal shall sit in private unless the patient requests a hearing in public and the tribunal is satisfied that a hearing in public would not be contrary to the interests of the patient.

(2) Where the tribunal refuses a request for a public hearing or directs that a hearing which has begun in public shall continue in private the tribunal shall record its reasons in writing and shall inform the patient of those reasons.

(3) When the tribunal sits in private it may admit to the hearing such persons on such terms and conditions as it considers appropriate.

(4) The tribunal may exclude from any hearing or part of a hearing any person or class of persons, other than a representative of the applicant or of the patient to whom documents would be disclosed in accordance with rule 12(3), and in any case where the tribunal decides to exclude the applicant or the patient or their representatives or a representative of the responsible authority, it shall inform the person excluded of its reasons and record those reasons in writing.

(5) Except in so far as the tribunal may direct, information about proceedings before the tribunal and the names of any persons concerned in the proceedings shall not be made public.

(6) Nothing in this rule shall prevent a member of the Council on Tribunals from attending the proceedings of a tribunal in his capacity as such provided that he takes no part in those proceedings or in the deliberations of the hearing procedure.

2 Mental Health Review Tribunal Rules 1983, r.12(2).
3 *Ibid.*, r.21(2).

The nature of a public hearing

Unless a case has attracted public attention, the holding of a public hearing usually means no more than that the doors to the hospital room where the hearing is taking place are left open, so that other persons may listen to the evidence and observe the proceedings if they so wish. Because a tribunal which sits in public has a general power to exclude persons or classes of persons from the hearing or part of it and, conversely, may admit persons to a private hearing on such terms and conditions as it considers appropriate, it might be thought that the distinction between the two is academic. However, that is not the case. Whether it is appropriate to admit persons who are not parties to a private hearing depends on whether they have some interest in the case being considered other than as general members of the public. For example, a person who is not a party to the proceedings may nevertheless have relevant information to impart and be admitted to part of the hearing in order to enable him to assist the tribunal. It is also usually considered appropriate to admit as an observer a person who is applying for some professional qualification which, once obtained, will involve him in undertaking tribunal cases. In both instances, the individuals admitted will be bound by the normal legal provisions which protect the essential privacy of those proceedings. The nature of a public hearing is fundamentally different. It is that all members of the public may observe the hearing unless there is some cogent reason why a particular person or class of persons should be differentiated from other members of the public and excluded on that basis. The intendment of paragraph (4) cannot be that a tribunal which is obliged to hear a patient's case publicly nevertheless retains the same discretion to exclude interested members of the public as it does in the case of a private hearing — the hearing would not then be a public hearing. Although the reference to a class of persons being excluded is most often taken to mean that the press may invariably be excluded from a public hearing, that must be doubtful. Section 12 of the Administration of Justice Act 1960, which concerns the publication of information relating to the proceedings, applies only to hearings held in private. Furthermore, the usual prohibition in rule 21(5), that information about the proceedings and the persons concerned shall not be made public unless the tribunal otherwise directs, cannot apply once a tribunal has directed that the matters be heard publicly — the information is already public by virtue of the fact that a public hearing is being held. If the issues must be publicly heard, to prohibit what is publicly heard from being publicised is contradictory. A tribunal must reflect on all of these considerations before deciding if it is satisfied that a public hearing will not be contrary to the patient's interests, and then be clear about whether it is holding a public or a private hearing, and the implications of that.

The construction of rule 21

Having regard to the above, it is submitted that paragraphs (1) and (2) of rule 21 go together: their effect is that a tribunal may cease to sit in public if it is no longer satisfied that continuing in public is not contrary to the patient's interests. Paragraphs (4) and (5) primarily relate to paragraph (3) and private hearings. However, paragraph (4) also empowers a tribunal to exclude a person or class of persons from a public hearing if they are interfering with, or likely to interfere with, the proper conduct of the proceedings. Their exclusion on this basis would not affect the fact that the hearing remains generally open to the public. Nevertheless, that the main purpose of paragraph (4) is to enable confidential matters to be dealt with in private can be inferred from the fact that it would be inappropriate to exclude the parties and their representatives from a public hearing while allowing the public to remain.

Publicising the proceedings

Rule 21(5) provides that, except in so far as the tribunal may direct, information about proceedings before the tribunal and the names of any persons concerned in the proceedings shall not be made public. This provision is considered later in relation to publication of the tribunal's decision but, as the case law summarised in the following chapter shows, it can be relevant prior to the hearing if the case is attracting publicity.

RIGHT TO APPEAR AT THE HEARING

If a hearing is held in public then, by definition, members of the public have a general right to attend the hearing as observers and to hear the evidence. They do not, of course, have any right to "appear" at the hearing nor any right to observe a hearing held in private.

Right of the parties to appear

According to the rules, the parties must be given notice of the hearing and they may appear at the hearing and take such part in the proceedings as the tribunal thinks proper.[4] This limitation reflects the inquisitorial aspect of tribunal proceedings. The following persons or bodies are parties—

- in the case of assessment applications (section 2 cases), the patient, the responsible authority, any person to whom notice of the hearing was "sent" under rule 31(c), and any other person added as a party by direction of the tribunal.[5]
- in all other cases, the patient, any nearest relative applicant, the responsible authority, any person to whom notice of the proceedings was given under rule 7, and any other person added as a party by direction of the tribunal.[6]

Rights of other persons to appear or attend

Persons who are not parties may, with the permission of the tribunal, also appear at the hearing and take such part in the proceedings as the tribunal thinks proper.[7] This includes the Secretary of State in restricted cases and, in assessment cases, persons on whom it has not been possible to send notice of the hearing during the time available. It is, however, axiomatic that the Secretary of State, although not a party, must be allowed to appear if he wishes and to take a full part in the proceedings. In addition to the parties and other persons wishing to appear and take part, a tribunal may admit other persons to a hearing held in private on such terms and conditions as it considers appropriate.[8] As has been noted, these persons may include solicitors observing a tribunal as part of their preparation for panel membership, trainee doctors, researchers, or social workers training for approval under the 1983 Act.

4 Mental Health Review Tribunal Rules 1983, r.22(4).
5 *Ibid.*, r.2(1).
6 *Ibid.*, r.2(1).
7 *Ibid.*, r.22(4).
8 *Ibid.*, r.21(3).

Privacy of proceedings

21.—(3) When the tribunal sits in private it may admit to the hearing such persons on such terms and conditions as it considers appropriate.

(4) The tribunal may exclude from any hearing or part of a hearing any person or class of persons, other than a representative of the applicant or of the patient to whom documents would be disclosed in accordance with rule 12(3), and in any case where the tribunal decides to exclude the applicant or the patient or their representatives or a representative of the responsible authority, it shall inform the person excluded of its reasons and record those reasons in writing.

Hearing procedure

22.—(4) Subject to rule 21(4), any party and, with the permission of the tribunal, any other person, may appear at the hearing and take such part in the proceedings as the tribunal thinks proper; and the tribunal shall in particular hear and take evidence from the applicant, the patient (where he is not the applicant) and the responsible authority who may hear each other's evidence, put questions to each other, call witnesses and put questions to any witness or other person appearing before the tribunal.

The status of those attending or appearing

The rights of persons to appear at or attend a hearing fall into four categories. In the first category are the patient, any nearest relative applicant, the responsible authority and, although not a party, the Secretary of State in a restricted case. They have all the rights of a party (**781**) but they also have a general right to receive copies of all documents and reports concerning the patient, to hear each other's evidence, to call witnesses, and to question persons attending the hearing. In the second category are persons who are parties by virtue of the fact that they were entitled to notice of the proceedings. They are entitled to notice of the hearing, to appear at it and to be represented. However, they are not entitled to copies of reports and they have no general right under the rules to hear the evidence, or to put questions, or to call witnesses. In the third category are persons who are not parties but who have some interest in the proceedings, legitimate or otherwise. They may with the tribunal's permission appear at the hearing and take such part as the tribunal thinks proper. In the fourth category are people present as observers — members of the public who attend a public hearing, members of the Council on Tribunals, and those admitted to a private hearing at the tribunal's discretion.

EXCLUDING PERSONS FROM A HEARING

Notwithstanding the general right of the parties to appear and participate at the hearing, a tribunal which sits in private may exclude from the hearing, or part of it, any person or class of persons other than a representative of the applicant or the patient to whom documents would be disclosed in accordance with rule 12(3).[9]

9 Section 78(2)(e) merely states that the rules may in particular provide for enabling a tribunal to exclude members of the *public*, or any specified class of members of the *public*, from any proceedings of the tribunal. The statutory authority for this rule, if there is any, therefore appears to be para. (j), which simply provides that the rules may confer on tribunals such ancillary powers as the Lord Chancellor thinks necessary for the purposes of the exercise of their statutory functions.

Necessarily therefore, a solicitor, barrister or registered medical practitioner who is representing a patient or nearest relative applicant can never be excluded from part of the hearing but the representative of any other party or person may.[10] The power of exclusion is often used to temporarily exclude a patient while his relatives give evidence. This may be because they have requested a confidential interview or because it is clear from their responses to questions that they are inhibited by the patient's presence from giving detailed answers of the kind necessary to enable the tribunal to obtain all relevant evidence. Likewise, if the patient requests his relatives' exclusion while he gives evidence, his request will usually be granted.[11] A patient or nearest relative applicant will also be excluded when the tribunal considers the evidence contained in any documents withheld from them, unless circumstances have materially changed since the decision not to disclose was made. It must be emphasised that the parties have a general right to appear at the hearing and to be represented, and some of them a general right also to hear and call evidence and to put questions. Consequently, the discretion to exclude parties from a hearing or part of it may not be used without good cause.

Giving reasons for excluding persons

If a tribunal excludes a person from the hearing, or part of it, it is not generally under a duty to explain and record its reasons for doing so. However, where a tribunal excludes any of the following persons, it must inform the person excluded of its reasons and record those reasons in writing: the patient; a nearest relative applicant; a representative of the responsible authority; the representative of a patient or applicant to whom documents have not been disclosed under rule 12(3).[12]

PAYMENT OF ALLOWANCES TO THOSE ATTENDING

Section 78(7) of the Act provides that a tribunal may pay allowances in respect of travelling expenses, subsistence and loss of earnings to any person attending the tribunal as an applicant or witness, to the patient if he attends otherwise than as the applicant or a witness, and to any person (other than counsel or a solicitor) who attends as the representative of an applicant. A tribunal is therefore authorised to pay an allowance to any medical practitioner who represents the applicant, covering his loss of earnings and other expenses. Where, however, a patient refuses to sign legal aid forms or to instruct a solicitor, and the tribunal appoints a solicitor to act for him, there is no authority to pay that person's professional fees. Similarly, there is never any authority to pay an allowance to a person representing the patient unless he is also the applicant.

ENFORCING ATTENDANCE OF WITNESSES

The Act states that the rules may in particular provide for regulating the methods by which information relevant to an application may be obtained by or furnished to a tribunal[13] and confer on tribunals such ancillary powers as the Lord Chancellor thinks necessary for the purposes of the exercise of their functions.[14] Rule 14 provides that a tribunal may subpoena any witness to appear before it or to produce documents. However, no person may be compelled to give any evidence, or to produce any document, which he could not be compelled to give or produce on the trial of an action.

10 Mental Health Review Tribunal Rules 1983, r.21(4). Rule 21(6) also provides that the rule shall not prevent a member of the Council on Tribunals from attending provided that he takes no part in those proceedings or in the deliberations of the tribunal.
11 See also Mental Health Review Tribunal Rules 1983, r.22(2).
12 *Ibid.*, r.21(4).
13 Mental Health Act 1983, s.78(2)(g).
14 Mental Health Act 1983, s.78(2)(j).

Use made of the power

In general, the rule is only invoked as a last resort, and a warning that the power is available almost invariably suffices to bring about the desired action. When the power is occasionally used, it is most often used upon adjourning, to require a local social services authority to arrange for an officer of the authority to attend the hearing in order to give oral evidence as to the patient's social circumstances or to produce relevant documents.

SUBPOENAS : MHRT RULES 1983, r.14

Evidence

14.—(1) For the purpose of obtaining information, the tribunal may ... subpoena any witness to appear before it or to produce documents, and the president of the tribunal shall have the powers of an arbitrator under section 12(3) of the Arbitration Act 1950 and the powers of a party to a reference under an arbitration agreement under subsection (4) of that section, but no person shall be compelled to give any evidence or produce any document which he could not be compelled to give or produce on the trial of an action.

Writ of subpoena

A writ of subpoena ad testificandum or a writ of subpoena duces tecum in aid of a tribunal may be issued out of the Crown Office and no court order is necessary.[15] Issue takes place upon the writ being sealed by an officer of the Crown Office.[16] The writ has effect until the disposal of the tribunal proceedings at which the attendance of the witness is required.[17] Where there is disobedience to a subpoena duces tecum, the Court has jurisdiction to enforce obedience by committal, even though the disobedience is not wilful.[18]

Service of the writ

The writ must be served personally.[19] Unless it is served on the person to whom it is directed not less than four days (or such other period as the court may fix) before the day on which his attendance before the tribunal is required by the writ, that person is not liable to any penalty or process for failing to obey it.[20] An application to set aside the writ may be heard by a Master of the Queen's Bench Division.[21]

15 R.S.C. 1965, O.38, r.19; *Soul v. Inland Revenue Commissioners* [1963] 1 W.L.R. 112.
16 R.S.C. 1965, O.38, rr. 14, 19(1).
17 R.S.C. 1965, O.38, r.19(2).
18 *R. v. Daye* [1908] 2 K.B. 333.
19 R.S.C. 1965, O.38, r.19(3).
20 R.S.C. 1965, O.38, r.19(4).
21 R.S.C. 1965, O.38, r.19(5).

Form of the writ

A writ of subpoena must be in the form specified in Appendix A to the Rules of the Supreme Court 1965.[22] Form No.30 sets out a specimen form and should be modified as necessary (for example, where a subpoena is to be limited to compelling the production of certain documents).

Form No. 30 — Writ of subpoena issued under an enactment

In the matter of C.D. a patient
and
In the matter of the Mental Health Act 1983
and
In the Matter of the Arbitration Act 1950

ELIZABETH THE SECOND, by the Grace of God, of the United Kingdom of Great Britain and Northern Ireland and of Our other realms and territories Queen, Head of the Commonwealth, Defender of the Faith.

To [*name of witness*]

We command you to attend before the Mental Health Review Tribunal constituted under the Mental Health Act 1983 at [*address where tribunal will be sitting*] on the day of 199 at o'clock and so from day to day until the application in the above matter is heard, to give evidence on behalf of [And we also command you to bring with you and produce at the time and place aforesaid *describe documents or things to be produced*].

Witness Lord High Chancellor of Great Britain the day of 199—

Issued on the day of 199— by

The powers of an arbitrator

Apart from subsections 12(3) and 12(4), the Arbitration Act 1950 does not apply to proceedings before a Mental Health Review Tribunal.[23] The incorporated provisions merely reinforce what can already be discerned from the rule itself. It has been noted that rule 14 provides that a tribunal may subpoena any witness to appear before it (writ of subpoena *ad testificandum*) or to produce documents (writ of subpoena *duces tecum*) and, for that purpose, the president has the powers of a party to a reference under an arbitration agreement under section 12(4) of the Arbitration Act 1950. Insofar as material, that subsection provides that such a party "may sue out a writ of subpoena *ad testificandum* or a writ of subpoena *duces tecum*, but no person shall be compelled under any such writ to produce any document which he could not be compelled to produce on the trial of an action, and the High Court or a Judge thereof may order that a writ of subpoena *ad testificandum* or of subpoena *duces tecum* shall issue to compel the attendance before an arbitrator of a witness wherever he may be within the United Kingdom. For attendance before an arbitrator, a subpoena therefore issues as of course without order.

22 R.S.C. 1965, O.38, r.14(1). See R.S.C. 1965, Appendix A, Forms No. 28, 29 and 30.
23 Mental Health Act 1983, s.78(9); Mental Health Review Tribunal Rules 1983, r.14.

PRE-HEARING DELIBERATIONS

The tribunal members meet approximately half an hour before the commencement of the actual hearing in order to discuss and agree preliminary matters. These may include questions of privacy, disclosure, exclusion and conflict of interest; the order in which witnesses should give evidence; and, if appropriate, which of the tribunal members should lead the questioning of particular witnesses. This period also provides an opportunity for the tribunal to identify the issues likely to be relevant. The medical member, who will already have seen the patient, will often have a good idea of what they are likely to be and of any difficulties which might affect the patient's ability to give evidence. However, it is now not usually considered appropriate to ask the medical member about his opinion of the patient's mental condition at this stage.[24]

THE MEDICAL MEMBER'S OPINION

Notwithstanding the above, the approved custom until recently was for the medical member, during the half-hour prior to the hearing, to summarise for the benefit of the other members any information relevant to the proceedings arising out of his examination of the patient, his inspection of the case notes, and other steps taken by him to form an opinion of the patient's mental condition (**793**). According to recent annual reports of the tribunals, it is usually more appropriate for the medical member to confine his pre-hearing report to factual matters, reserving his opinion until after the evidence has been taken so that it forms part of the deliberative process.

Ex p. Clatworthy

The importance of not proceeding on the basis of some information or opinion known only to the tribunal members themselves was considered in the *ex p. Clatworthy*. The underlying principle is that if a tribunal has information which is relevant to the decision it is to make but which does not appear in the reports, or the medical member's opinion of the patient's mental condition differs significantly from that of the responsible medical officer, so that there may be grounds for his detention which he is not aware of, these matters must be brought into the open in the course of the tribunal's questioning.[25]

R. v. Mental Health Review Tribunal, ex p. Clatworthy

[1985] 3 All E.R. 699 — *Q.B.D., Mann J.*

The medical evidence received by the tribunal was that the applicant was not suffering from a form of mental disorder as defined by section 1 of the Act. The tribunal did not direct the patient's discharge and the applicant sought judicial review of its decision.

Mann J.

The reasons given for the tribunal's decision did not show why the medical evidence presented to the tribunal had not been accepted. It might be suggested that there was a medical member of the tribunal who had made his own

24 *Mental Health Review Tribunals for England and Wales, Annual Report 1994* (Department of Health, 1995), Appendix 13.
25 *Ibid.*

examination of the patient and the tribunal had proceeded on the ba[illegible]f his opinion rather than on the basis of the opinions laid before the tribunal. While there was no explicit suggestion that was the case, if a tribunal desired to proceed on the basis of some point which had not been put before it, and which on the face of the matter was not in dispute, it was in the highest degree desirable that the person whose case was being considered should be alerted to the possibility. In *Mahon v. Air New Zealand Ltd* [1984] 3 All ER 201 at 210, [1984] AC 808 at 821, Lord Diplock referred to the rules of natural justice, one of which was the rule which—

> 'requires that any person represented at the inquiry who will be adversely affected by the decision to make the finding should not be left in the dark as to the risk of the finding being made and thus deprived of any opportunity to adduce additional material of probative value which, had it been placed before the decision-maker, might have deterred him from making the finding even though it cannot be predicated that it would inevitably have had that result.'

Were it the case that the tribunal had proceeded on some basis unknown to others but known to themselves, then His Lordship would have regarded the decision as flawed by reference to that principle of natural justice.

PROCEDURAL IRREGULARITIES

Prior to the hearing, it is important to verify that all persons entitled to notice of the hearing have received notice of it and to consider whether any procedural irregularities have occurred which may have prejudiced the patient or any other person.[26]

IRREGULARITIES: MHRT RULES 1983, r.28

28.— Any irregularity resulting from failure to comply with these Rules before the tribunal has determined an application shall not of itself render the proceedings void, but the tribunal may, and shall, if it considers that any person may have been prejudiced, take such steps as it thinks fit before determining the application to cure the irregularity, whether by the amendment of any document, the giving of any notice, the taking of any step or otherwise.

Curing irregularities

Rule 28 provides that any irregularity resulting from a failure to comply with the rules before the tribunal has determined the case shall not render the proceedings void. The tribunal may, and shall, if it considers that any person may have been prejudiced, take such steps as it [illegible]ks fit before determining the case to cure the irregularity, whether by the amendment of any document, the giving of any notice, the taking of any step or otherwise. The rule applies only to a failure to observe the rules, not to a failure to comply with the basic principles of natural justice or the provisions of the Act itself. Its effect is therefore mainly confined to failure to observe time limits or to serve required notices, provided the omissions are discovered prior to the application being determined. If the proceedings must be adjourned in order to cure an irregularity, a tribunal has no jurisdiction to award costs against a party. In general, the only consequence is that the patient is detained, perhaps unnecessarily, for a further period of time.

Case law

In *Crozier*,[27] a tribunal had adjourned a restricted patient's case in order to monitor his progress. The High Court held that, once it had all the evidence necessary to determine the patient's mental state and had concluded that section 73(1) had not been satisfied, it was then its duty to refuse the application. Farquharson J. dealt briefly with the submission that, because rule 28 enabled a tribunal to correct its own irregularities, therefore judicial review was not appropriate because an alternative remedy was available: the error went beyond mere irregularity and involved the exercise of a power not conferred by statute. In the *Oxford case*,[28] the tribunal failed to give the Secretary of State notice of the hearing of a restricted patient's case. In the Court of Appeal, Lawton L.J. observed that rule 28 had no applicability once an application had been determined while, in the House of Lords, Lord Bridge of Harwich said that such a fundamental flaw as vitiated the proceedings leading to the tribunal's decision called for a complete rehearing *de novo*.

THE HEARING PROCEDURE

Subject to the rules of natural justice, rule 22 gives the tribunal a wide discretion as to how to conduct the hearing, which has been described as being inquisitorial, rather than adversarial, in nature.[29]

FORMALITY AND INFORMALITY

It is often said that the rules require the hearing to be conducted "informally" in the sense in which persons other than lawyers use the word. In fact, rule 22(1) provides that the tribunal may conduct the hearing in such manner as it considers most appropriate bearing in mind the health and interests of the patient and it shall, so far as appears to it appropriate, seek to avoid formality in its proceedings.[30] This is

26 The Secretary of State must receive copies of all reports furnished to the tribunal and have an opportunity to comment on them. If professionals seek to submit supplementary reports immediately prior to the hearing, these may, if only brief up-dates, sometimes be sent by fax to the Home Office. The Secretary of State often has no further observations to make, so the hearing can proceed. In other cases, the reports are refused and the evidence is given orally. This is not satisfactory if the report contains information materially different to that set out in the reports possessed by the Secretary of State, since it amounts to circumventing his right to receive relevant written information about the case.

27 *R. v. Nottingham Mental Health Review Tribunal, ex p. Secretary of State for the Home Department (Thomas); R. v. Northern Mental Health Review Tribunal, ex p. Secretary of State for the Home Department (Crozier), The Times*, 25 March 1987 (**818**).

28 *R. v. Oxford Regional Mental Health Review Tribunal, ex p. Secretary of State for the Home Department* [1986] 1 W.L.R. 1180, C.A.; [1988] 1 A.C. 120, H.L. (**544**).

29 By Scott J. (as he then was) in *W. v. Egdell and Others [1989] 2 W.L.R. 689* (**712**). Nevertheless, the proceedings cannot properly be described as exclusively inquisitorial in nature.

30 The 1960 Rules provided for informally determining cases in certain circumstances (see [illegible].17–20).

rather different and it may sometimes be quite inappropriate to avoid formality. A distinction must be drawn between maintaining an informal atmosphere, which reassures the patient, and following a formal approach to the taking of the evidence, which is not only essential to the proper discharge of the tribunal's powers but also reassures the patient that his liberty is highly regarded. The reference to avoiding formality must be understood in the historical context of the, now obsolete, distinction made in the 1960 Rules for determining applications either informally or by way of formal hearing. The provision previously made for disposing of cases informally was found not to be helpful. The 1983 Rules now provide only for what used to be called a formal hearing but also, because of this and by way of uneasy compromise, that tribunals shall seek to avoid formality so far as is appropriate. As to the general approach, "questioning should always be conducted politely and courteously: searching questions can be asked without being abusive or threatening, and members should bear in mind that nothing should be done to undermine professional and family relationships. A tribunal hearing is a judicial procedure which needs to be structured, although in a relatively informal way, and it should be more inquisitorial than adversarial. However, it is neither a case conference nor a seminar. Needless to say, members should be objective and impartial."[31]

HEARING PROCEDURE : MHRT RULES 1983, r.22

Hearing procedure

22.—(1) The tribunal may conduct the hearing in such manner as it considers most suitable bearing in mind the health and interests of the patient and it shall, so far as appears to it appropriate, seek to avoid formality in its proceedings.

(2) At any time before the application is determined, the tribunal or any one or more of its members may interview the patient, and shall interview him if he so requests, and the interview may, and shall if the patient so requests, take place in the absence of any other person.

(3) At the beginning of the hearing the president shall explain the manner of proceeding which the tribunal proposes to adopt.

(4) Subject to rule 21(4), any party and, with the permission of the tribunal, any other person, may appear at the hearing and take such part in the proceedings as the tribunal thinks proper; and the tribunal shall in particular hear and take evidence from the applicant, the patient (where he is not the applicant) and the responsible authority who may hear each other's evidence, pub questions to each other, call witnesses and put questions to any witness or other person appearing before the tribunal.

(5) After all the evidence has been given, the applicant and (where he is not the applicant) the patient shall be given a further opportunity to address the tribunal.

31 *Mental Health Review Tribunals for England and Wales, Annual Report 1994* (Department of Health, 1995), Appendix 13.

EXPLAINING THE PROCEDURE

The rules provide that at the beginning of the hearing the president shall explain the manner of proceeding which the tribunal proposes to adopt.[32] The main differences in procedure adopted by presidents relate to the order in which the evidence is taken and the order in which the tribunal members and any representatives ask questions of each witness in turn. On some occasions, a medical or other witness may need to be released, or the tribunal will need to be updated on the present situation because of the age of the reports, and these necessities will dictate the order of the evidence. Hearing from the responsible medical officer first also enables the patient to know the present reasons for detaining him, so that he can then seek to satisfy the tribunal that those grounds do not in fact apply. In other cases, hearing the patient first may save time or be more appropriate. For example, if it is likely to be rapidly apparent that he is very seriously ill. Or because the absence of any symptoms will enable the tribunal to rapidly focus on the real issue of the likelihood of relapse and whether liability to detention, rather than actual detention, is appropriate. It also allows the patient to give his evidence while he can, and to then return to the ward if necessary, when he is heavily sedated, agitated, unable to concentrate, or unable to settle and remain quiet. In unrestricted cases, the president will often ask the patient's representative if he or the patient has a preference as to the order in which evidence is taken. Apart from the fact that enlisting the representative's view may serve to shorten the proceedings, for the reasons just given, such inquiries also convey the impression that the tribunal is anxious to ensure that the patient has every opportunity to present his case for discharge effectively. Even if the patient is later disappointed by the tribunal's decision, he generally retains the impression of a hearing fairly and impartially conducted and is more likely to apply for a further review in future. The order in which the evidence is taken is therefore a matter for the tribunal's discretion and there is no requirement that the applicant is heard from first. There are very good reasons for not imposing such a requirement and to insist on this because it is the procedure adopted in the county court, when the rules do not, is not appropriate.

ABSENCE OF THE PATIENT

The patient occasionally does not attend, most often where his case has been referred to the tribunal or where it is being held following an application by the nearest relative. Less frequently, a patient who has applied but who does not wish to present his case personally simply asks his representative to present that case in his absence, in accordance with his instructions. It is obviously important that the patient is advised that this approach is likely to undermine the application but the point also arises as to whether a tribunal can proceed in the patient's absence. This is because rule 22(4) provides that a tribunal "shall in particular hear and take evidence" from the patient. Some presidents view this requirement as a bar to proceeding in such circumstances unless some other rule can be invoked which empowers them to proceed. They therefore attempt to resolve the problem by formally excluding the patient from the hearing under rule 21(4). The reasoning seems dubious because the purpose of that rule in this context is to exclude a patient who wishes to appear and be present, as can be seen from the requirement that he be given reasons for his exclusion. The correct position has to be inferred from the statutory framework, supported by the rules insofar as they are not inconsistent with it. That framework is essentially that a patient's case must be periodically reviewed by an

32 The 1960 Rules contained no equivalent provision.

independent tribunal whether he desires that or not; often not since by definition he has not himself applied to the tribunal for some time. Furthermore, a nearest relative's right to apply is not dependent on having the patient's consent and that right would be undermined if the patient could prevent the application from being determined simply by not attending the hearing of it. As to the position where the patient does not attend on his own application, the Act itself envisages the possibility of an application being disposed of without a formal hearing[33] and the rules still provide for this to a limited extent. In particular, rule 22(2) provides that, at any time before the application is determined, the tribunal or any one or more of its members may interview the patient and shall interview him if he so requests. The normal practice in such cases is to visit the patient on the ward and to offer him the opportunity of making any points which he wishes to make in support of his application. Rule 21(4) simply provides that a party (the patient being a party) *may* appear at the hearing and take such part in the proceedings as the tribunal thinks proper. The rest of the rule, after the semi-colon, sets out the position where the party does appear. In *ex p. Mackman*,[34] the patient applied for an adjournment and, when this was refused, he withdrew. He applied for judicial review of the tribunal's decision to hear and determine his application in his absence and the absence of his counsel. The point does not appear to have been actively pursued in the Divisional Court. At any rate, the court did not decide that the proceedings had to be adjourned when the patient withdrew. It is submitted therefore that if the patient does not attend the hearing the tribunal must ascertain the reasons for that and should offer him an interview in private with them. They must then consider whether they have sufficient information with which to determine the application and whether it would be fair and just to determine it in all the circumstances. In other words, they should consider the need to adjourn the proceedings *sine die*. An adjournment has the benefit that the patient's right to appear at the hearing of his application is preserved and this will be more appropriate if he has simply had a temporary attack of nerves.[35] However, ultimately, a tribunal has a discretion to proceed in the applicant's absence where he declines to attend but their discretion must not be abused.[36]

EVIDENCE AND QUESTIONING

The rules provide that, subject to the power to exclude a person from a hearing or part of it, a tribunal shall in particular hear and take evidence from a nearest relative applicant, the patient and the responsible authority, who may hear each other's evidence, put questions to each other, call witnesses, and put questions to any witness or other person appearing before the tribunal.[37] A tribunal may call for further information and reports during the hearing, adjourn the hearing if necessary

33 Mental Health Act 1983, s.78(2)(d).

34 *R. v. Oxford Regional Mental Health Review, ex p. Mackman*, *The Times*, 2 June 1986, Q.B.D.

35 Rule 16(3) provides that where the patient requests that an adjourned hearing be resumed, the hearing shall be resumed provided that the tribunal is satisfied that resumption would be in the interests of the patient.

36 *R. v. Seisdon Justices, ex p. Dougan* [1982] 1 W.L.R. 1476. See also *ex p. S.B.R.* (CO/89/3908, unreported).

37 The 1960 Rules provided as follows: "25.—(2) The tribunal shall give an opportunity to the applicant to address the tribunal, to give evidence and call witnesses; and the responsible authority, and with the permission of the tribunal any other person, may put questions to the applicant or to any witness called by him or on his behalf. (3) The tribunal shall give the responsible authority and any other person notified of the hearing ... an opportunity to address them, to give evidence and to call witnesses and may permit any other person whom they think fit to do so; and the applicant and the responsible authority, and with the permission of the tribunal any other person, may put questions to any person giving evidence before the tribunal."

for that purpose, and give directions as to the manner in which and the persons by whom the material is to be furnished. It may, for the purpose of obtaining information, take evidence on oath[38] and subpoena a witness to appear before it; but it may not compel a person to give evidence which he could not be compelled to give on the trial of an action. Similarly, a tribunal may subpoena a witness to produce documents but not compel a witness to produce a document which he could not be compelled to produce on the trial of an action.

Evidence and the rules of natural justice

The rules provide that a tribunal may receive in evidence documents and oral evidence which would be inadmissible in a court of law, including hearsay. Furthermore, the technical rules of evidence form no part of the rules of natural justice, which allow a tribunal to use evidence from other hearings, so long as the parties have an opportunity to deal with it.[39] Tribunals are therefore entitled to act on any material which is logically probative even though it would not be admissible as evidence in a court of law. Evidence is relevant if it is logically probative or disprobative of some matter which requires proof and all relevant evidence is *prima facie* admissible.[40] Its weight is determined by the degree of probability, both intrinsically and inferentially, which is attached to it by the tribunal once it is established to be relevant and admissible.

Allowing the patient an opportunity to deal with evidence

Fairness to the patient normally requires that the factual basis of expert medical opinion is open to challenge, both by cross-examination and by evidence. It is unfair, and so contrary to the rules of natural justice, to prevent cross-examination of the responsible medical officer about the factual basis for his conclusions and to prevent evidence being led by the patient on the same topic. If the factual basis of the expert opinion cannot be tested in this way then the patient is unable to conduct his case in a proper manner with any prospect at all of success. More particularly, where the expert opinion that other persons are at risk is founded on an assumption that allegations of recent offending are true, a tribunal cannot simply exclude any consideration of, or evidence, about the factual basis upon which such the expert has arrived at his opinion. Although it will not usually be practical to conduct a quasi-trial of the alleged offence, and there must be limits as to the extent of any cross-examination on such matters, it is nonetheless possible to hear second-hand evidence about what is alleged to have happened, to consider any relevant documents available, and to hear the patient's version of what happened. If the tribunal does not allow that then it is bound to be indirectly assuming that the patient did commit the alleged acts if the medical opinion was based on an assumption that he had committed them. To summarise the position, the patient must be given a proper opportunity to challenge the evidence upon which is founded the opinion that he is mentally disordered and that he or others are at risk. [41]

38 The terms "'oath' and 'affidavit' include affirmation and declaration, and "swear" includes affirm and declare."

39 *R. v. Deputy Industrial Injuries Commissioner, ex p. Moore* [1965] 1 Q.B.D. 456.

40 *D.P.P. v. Kilbourne* [1973] A.C. 729, *per* Lord Simon. Evidence may be excluded. *i.e.* not admitted, if its prejudicial effect grossly exceeds its probative significance.

41 The rules of natural justice are further considered on page 858.

R. v. Merseyside Mental Health Review Tribunal, ex p. P.K.

CO3519/96, 22 April 1997 *Q.B.D., Keene J.*

Having been convicted in 1984 of arson, being reckless as to whether life would be endangered, the patient was detained at a special hospital in pursuance of a hospital order together with a restriction order made without limit of time. On 14 June 1995, a mental health review tribunal conditionally discharged him to a hostel under medical supervision. On 11 September 1995, the patient was arrested on suspicion of criminal damage, involving throwing a brick through the window of a public house. He denied the allegation. On 30 September 1995, he was again arrested, this time on suspicion of having assaulted women on 18 and 29 September 1995. Again, he denied the allegations. Subsequent to his arrest it was suggested that he had attempted to kiss the leg of a female member of staff at a day centre in August of that year. Once more he denied that suggestion. On 12 October 1995, he absconded from his hostel but returned of his own accord, following which, on 14 October 1995, he was recalled to the special hospital by the Secretary of State. His case was referred to a tribunal under section 75.

The tribunal hearing

At the tribunal hearing in August 1996, the president ruled that it was not within the tribunal's jurisdiction to consider the correctness or otherwise of the decision to recall. The only matter which the tribunal had to consider and decide upon was whether the patient should be conditionally discharged or recommended for transfer to a regional secure unit, as suggested in the psychiatric report filed by the patient. Although the patient's solicitor sought to submit evidence from the patient that he had not committed the various offences for which he had been arrested, the president indicated that the tribunal was not the forum to decide such issues. Similarly, when questions were raised about the degree of supervision which the patient had actually received outside hospital, the president said that such matters could not go to whether the patient suffered from a mental disorder such that he required hospital treatment. The president also intervened when the tribunal's medical member asked a number of questions of the patient about events following his recall, on the basis that such matters were irrelevant to the issue of whether or not he should be discharged. The tribunal did not discharge the patient. As to its reasons, the tribunal was satisfied on the responsible medical officer's evidence, the reports of the psychiatrist instructed by the patient, and the other medical evidence, that the patient suffered from psychopathic disorder. Furthermore, since his recall there had been several incidents which had caused disquiet. The tribunal agreed with the responsible medical officer that it was necessary to investigate the patient's sexual attitudes although that would be difficult in view of the patient's present reaction to his recall. In the meantime, the tribunal was satisfied that he was appropriately detained in the special hospital. According to the affidavit subsequently filed by the president, the medical member was also of the view that further treatment in hospital was required before the patient could be considered for discharge; the tribunal was satisfied on the evidence and the responsible medical officer's report that the patient was properly and appropriately detained in hospital; and the tribunal did not proceed on the basis that the patient might have been guilty of any offence or might have attempted suicide.

The application for judicial review

The patient applied to quash the tribunal's decision, principally on the basis that the hearing was unfair and in breach of the rules of natural justice. It was

contended that, while it was not for the tribunal to consider the correctness of the Secretary of State's decision to recall, the circumstances leading up to that recall could not be ignored by the tribunal when considering the patient's condition at the time of the hearing. The tribunal was required to decide whether he was suffering from a psychopathic disorder of a nature and degree which made it appropriate for him to be detained in hospital for medical treatment, and whether it was necessary for his own health and safety or for the protection of others that he should receive such treatment. The patient's behaviour, or alleged behaviour, whilst on conditional discharge was plainly relevant to those issues. The tribunal could not ignore what had happened to the patient while he was on conditional discharge, because the questions about his current condition at the date of the hearing could not be dealt with in a vacuum. More particularly, the tribunal was wrong to exclude evidence and to prevent cross-examination in relation to the events prior to recall, including the degree of supervision afforded, and likewise to prevent exploration of the behaviour of the patient following recall. The patient was prevented from giving evidence about those matters and the responsible medical officer was allowed to decline to answer certain questions on those matters in cross-examination. Although it might be difficult to deal with alleged criminal conduct which has not been the subject matter of a trial, the medical reports upon which the tribunal relied, particularly those from the responsible medical officer, were predicated on the basis that the patient had behaved in a particular way both before and after his recall. Yet those facts about his behaviour were in dispute. Consequently, the tribunal in failing to hear the patient's side of the case was acting unfairly. As to the degree of supervision which the patient had received when in the community, had the issue been explored the tribunal might have concluded that with a more structured and high level of supervision the patient would have been able to cope on a conditional discharge basis.

The tribunal's case

Counsel for the tribunal made essentially three points. Firstly, the patient's solicitor had outlined his case by saying that the Secretary of State's recall was not justified or necessary and it was therefore understandable that the president ruled that the tribunal was not sitting in judgment on the correctness of that recall. Secondly, since conditional discharge was, on the expert evidence, not in issue, the tribunal was entitled to rule that the matters which the patient's representative sought to explore were irrelevant. Thirdly, once the primary question of whether or not the patient was entitled to be discharged had been determined against the patient, the tribunal did not need to go into the conditions, whether those be conditions of supervision or of any other kind.

Keene J.

The patient's application before the tribunal was that he should be conditionally discharged. That application, therefore, raised as issues those matters set out in section 73(1)(a), which incorporated the statutory discharge criteria set out in section 72(1)(b)(i) and (ii). In general terms, events leading up to a patient's recall might be irrelevant to the issues arising under those paragraphs, which were essentially concerned with his mental state at the time of the hearing, and with his health or safety and the protection of others then and in the future. However, on the other hand, the events prior to a patient's recall might be relevant. The diagnosis and opinions about the matters referred to in the relevant statutory paragraphs were not arrived at by ignoring events which had happened. The patient's behaviour might very well be material to the diagnosis and such opinions. It would depend, at least partly, on how the expert witness or witnesses had arrived at their conclusions. In the present case, the responsible medical officer's reports for the tribunal placed considerable reliance on his

alleged behaviour prior to recall. They referred to the alleged suicide attempt prior to recall; to a number of occasions when he was said to have drunk excessively; to his alleged offending; to reports concerning the alleged offences furnished by the police. From this behaviour, the responsible medical officer had formed the opinions expressed in his report, namely that it was reasonable to believe that the patient had committed the alleged sexual offences, and possibly also criminal damage; that his denial of the offences precluded a full risk assessment; that it was therefore appropriate that he remain detained in hospital, primarily to protect others; that the sexual behaviour was a new development which needed to be clearly understood before any transfer to conditions of lesser security could be recommended; that he had recently shown his inability to cope with the freedom in the community despite living in a staffed hostel under supervision; that he suffered from psychopathic disorder. It would not usually be practical for a tribunal to conduct a quasi-trial of an alleged offence and there had to be limits as to the extent of any cross-examination on such matters. Since the responsible medical officer was not himself a witness of fact to the alleged actions but appeared to assume that most of the allegations were true, he could no doubt fruitfully be asked what his opinion would be if they were not. Nonetheless, it was difficult to see that the tribunal could simply exclude any consideration of, or evidence, about the factual basis upon which such an expert witness arrived at his opinion. It would be possible for a tribunal in such cases to hear evidence, albeit second-hand, about what was alleged to have happened. It would no doubt have a number of relevant documents available and could also hear the patient's version of what had happened. If it did not do so, the tribunal was bound to be indirectly assuming that the patient did commit the alleged acts if the medical opinion was based on an assumption that he had committed them. Normally, therefore, fairness to the patient required that the factual basis for the expert medical opinion was open to challenge, both by cross-examination and by evidence. Otherwise the patient would feel a justifiable sense of grievance and there would be a breach of the rules of natural justice. Although the medical evidence may have meant that the patient's application to be conditionally discharged was unlikely to succeed, it was going too far to submit that conditional discharge was not really an issue before the tribunal. The affidavit submitted by the president made it clear that that was not how the tribunal itself saw it. Furthermore, the report submitted by the psychiatrist instructed by the patient did not expressly exclude conditional discharge as an outcome. It was open to the tribunal, had it considered it appropriate, to decide that conditional discharge was an appropriate order. If that was so, the basis for the responsible medical officer's opinion became highly relevant, since he was clearly and firmly recommending against conditional discharge. There was no doubt that the tribunal attached great weight to his evidence and report. The issue before the tribunal was one upon which his evidence was highly material, and the basis for his opinion was very much to be found in his beliefs about the patient's behaviour before and after recall. It was therefore unfair procedurally of the tribunal to prevent cross-examination of the responsible medical officer about the factual basis for his conclusions and to prevent evidence being led by the patient on the same topic. If the factual basis for the responsible medical officer's expert opinion could not be tested in that way, one could only wonder how it was that the patient would be able to conduct his case in a proper manner with any prospect at all of success. Given the circumstances, the tribunal acted in a way which was contrary to the rules of natural justice and its decision was therefore *ultra vires*. Because of the passage of time since the tribunal's decision a further review had already been arranged. *Application granted — certiorari and declaration that the tribunal's decision was not reached according to law.*

Rejecting evidence

A tribunal is always entitled to take note of the fact that it finds evidence unsatisfactory, not least when it is provided by the person upon whom the burden of proof rests; that burden lying on the patient (or a nearest relative applicant) in all cases except those involving conditionally discharged patients, where it lies unallocated. More particularly, a tribunal is always entitled to reject medical evidence which it receives provided its decision is not irrational; is supported by adequate reasons; and those affected are alerted to the possibility that it desires to proceed on the basis of some point which has not been put before it and which appears not to be in dispute.[42] The fact that medical evidence is involved in the definition of psychopathic disorder is not in itself a reason why the issue of whether a patient has such a disorder should not be decided by the tribunal members in the light of their own expertise and examination of the patient.[43]

Taking evidence on oath

It is virtually unheard of for evidence to be taken on oath. However, rule 14 provides that the tribunal may do, although no person may be compelled to give any evidence which he could not be compelled to give on the trial of an action.

EVIDENCE : MHRT RULES 1983, r.14

14.—(1) For the purpose of obtaining information, the tribunal may take evidence on oath and subpoena any witness to appear before it or to produce documents, and the president of the tribunal shall have the powers of an arbitrator under section 12(3) of the Arbitration Act 1950 and the powers of a party to a reference under an arbitration agreement under subsection (4) of that section, but no person shall be compelled to give any evidence or produce any document which he could not be compelled to give or produce on the trial of an action.

(2) The tribunal may receive in evidence any document or information notwithstanding that such document or information would be inadmissible in a court of law.

The powers of an arbitrator

The reference in the rule to the powers of an arbitrator under the 1950 Act merely reinforces what can already be discerned from the rule itself. Section 12(3) simply provides that an arbitrator shall have power to administer oaths to, or take the affirmations of, the parties to and witnesses on a reference under an agreement. As to what evidence a person may not be compelled to give, the mere statement by a witness of his belief that his answer to a question will tend to criminate him is not sufficient to excuse him. The court or tribunal must see from the circumstances of the case and the nature of the evidence required that there is reasonable ground to apprehend danger to the witness if he is compelled to answer.[44]

42 *R. v. Mental Health Review Tribunal, ex p. Clatworthy* [1985] 3 All E.R. 330; *R. v. Mental Health Review Tribunal (Mersey Region), ex p. Davies* (CO/1723/85), 21 April 1986; *R. v. Royse* (1981) 3 Cr.App.R.(S) 58.

43 *R. v. Trent Mental Health Review Tribunal, ex p. Ryan* [1992] C.O.D. 157, D.C..

44 *Ex p. Reynolds* (1882) 20 Ch.D. 294; *Triplex Safety Glass Co. v. Lancergaye Safety Glass (1934) Ltd.* [1939] 2 K.B. 395; *Rio Tinto Zinc Corp. v. Westinghouse Electric Corp.* [1978] A.C. 547.

INTERVIEWING THE PATIENT IN PRIVATE

Before an application or reference is determined, the tribunal or one or more of its members may interview the patient, and shall interview him if he so requests, and that interview may take place in the absence of any other person.[45] The provision represents something of a compromise between those tribunal members who wished to retain a power to dispose of cases informally and those who did not.[46] Its main function now is to emphasise that the patient has an unqualified right to speak privately with the tribunal, notwithstanding that it "shall" in any case hear and take evidence from him and "may" while doing so exclude other persons from that part of a hearing.[47]

IRREGULARITIES

Once a tribunal has determined the proceedings, it will be too late to cure any irregularity by the use of rule 28 (**544**). Before the parties disperse, it is therefore important that a tribunal verifies that it has observed all procedural requirements. Provided that those entitled received notice of the hearing, the most common omissions are not notifying the patient of his right to be interviewed by one or more tribunal members in the absence of any other party; not giving or recording reasons for excluding the patient or a nearest relative applicant[48]; and considering supplementary reports brought to a restricted hearing and then determining the matter without the Secretary of State having seen or had an opportunity to comment on them. The rules aside, the most common error is to fail to ascertain the legal status of the hostel where it is proposed that a restricted patient should reside as a condition of discharge. It is preferable to review the situation before any closing address, otherwise further evidence may be taken after the patient's representative has summed up his case, which is unsatisfactory and can be a cause of embarrassment.

CLOSING ADDRESS

The rules provide that after all the evidence has been given the applicant and (where he is not the applicant) the patient shall be given a further opportunity to address the tribunal.[49]

45 Mental Health Review Tribunal Rules 1983, r.22(2). Section 78(2)(g) provides that "the rules may in particular provide for authorising the members of a tribunal, or any one or more of them, to *visit and interview* in private any patient by or in respect of whom an application has been made."

46 The rule derives from rule 12(1) of the 1960 Rules but that rule only applied to cases which did not proceed to a formal hearing. Rule 25(4), which related to formal hearings of the kind now held in all cases, empowered the tribunal to interview the patient or to take his evidence in private if they considered that was desirable in the interests of his health. The power to informally determine an application was not carried over to the present rules but rule 12(1) rather than 25(4) was incorporated in the revised hearing procedures.

47 See rules 21(4) and 22(4).

48 Rule 9(4) provides that a tribunal which postpones considering an application shall state in writing the reasons for postponement, and the period for which the application is postponed, and send a copy of the statement to all the parties and, in the case of a restricted patient, the Secretary of State. Rule 21(2) requires a tribunal which refuses a request for a public hearing, or directs that a hearing which has begun in public shall continue in private, to record its reasons in writing and inform the patient of those reasons (not any other party). Rule 21(4) requires a tribunal which excludes the applicant or the patient or their representatives or a representative of the responsible authority, from a hearing, or part of a hearing, to inform the person excluded of its reasons and record those reasons.

49 Note that the 1960 Rules contained no equivalent provision.

A. OURNMENTS

The decisions which a tribunal may reach, its powers, are regulated by statute. The manner in which it reaches its decision, the recording of that decision and the reasons for it, and their communication to the parties, are regulated by the rules. However, the first "decision" for any tribunal to make is whether it has sufficient information to determine the proceedings. If not, it should adjourn and rule 16 provides for this. Before determining the application or reference, it should also satisfy itself that there have been no irregularities in the proceedings themselves which may have a bearing on the validity of any determination.

ADJOURNMENTS

A tribunal may at any time adjourn a hearing for the purpose of obtaining further information or for such other purposes as it may think appropriate.[50] A tribunal which adjourns may do so *sine die* or it may specify a date for the hearing's resumption. Before adjourning, the tribunal may give such directions as it thinks fit for ensuring the prompt consideration of the application at an adjourned hearing.[51]

ADJOURNMENTS : MHRT RULES 1983, r.16

16.—(1) The tribunal may at any time adjourn a hearing for the purpose of obtaining further information or for such other purposes as it may think appropriate.

(2) Before adjourning any hearing, the tribunal may give such directions as it thinks fit for ensuring the prompt consideration of the application at an adjourned hearing.

(3) Where the applicant or the patient (where he is not the applicant or the responsible authority requests that a hearing adjourned in accordance with this rule be resumed, the hearing shall be resumed provided that the tribunal is satisfied that resumption would be in the interests of the patient.

(4) Before the tribunal resumes any hearing which has been adjourned without a further hearing date being fixed it shall give to all parties and ,in the case of a restricted patient, the Secretary of State, not less than 14 days' notice (or such shorter notice as all parties may consent to) of the date, time and place of the resumed hearing.

Use of the power to adjourn

The power is most often used where the prescribed reports have not been prepared, further reports are necessary, the patient is absent, no person is available to present the responsible authority's medical or social work evidence, or legal representation is appropriate. More rarely, the proceedings must be adjourned because the Secretary of State or some other party has not received notice of the hearing, or because some

50 Mental Health Review Tribunal Rules 1983, r.16(1). Rule 26(1) of the 1960 Rules provided only for adjourning a formal hearing where it appeared that was desirable in order to obtain further information on a particular matter.

51 Mental Health Review Tribunal Rules 1983, r.16(2).

other material irregularity needs to be cured. Assessment cases are not ;quently adjourned to enable the patient to obtain an independent psychiatric report, but it is not mandatory to do so. In the case of section 48 patients awaiting trial, the representative should already have considered whether it is appropriate to proceed, bearing in mind that the patient's answers to questions may prejudice the conduct of his defence at the subsequent trial or make a certain disposal more or less likely.

Adjournment must be for an authorised purpose

Where a tribunal requires further information about a patient's present state of mental health, it may properly exercise its power of adjournment in order to obtain that information. However, a tribunal has no power to adjourn the proceedings in order to allow an opportunity for a restricted patient's condition to improve, or to ascertain if an improvement already made is sustained, so as to see if such developments may enable it to change its mind. Provided a tribunal has all the evidence necessary to determine the patient's current mental state, and his entitlement to be discharged according to the statutory criteria, it is under a duty to determine the application.

R. v. Nottingham Mental Health Review Tribunal,
ex p. Secretary of State for the Home Department (Thomas)

R. v. Northern Mental Health Review Tribunal,
ex p. Secretary of State for the Home Department (Crozier)

The Times, 25 March 1987 *Q.B.D., Farquharson J.*

The applications were heard together with the consent of the parties. In both cases, the Home Secretary sought declarations that the tribunal's decisions to adjourn the proceedings were contrary to law.

Thomas

The tribunal heard the application on 4 August 1986 when it was accepted by all of the parties that the patient continued to suffer from mental illness. The tribunal considered that the only possible alternative to the patient's continued detention in a special hospital was to ascertain whether it was appropriate to recommend to the Home Secretary that he be transferred to a regional secure unit. Because the patient had been involved in an attack upon another patient two months before the hearing, the responsible medical officer felt unable to advise transfer at that time. The tribunal therefore adjourned the hearing for six months and gave the following reasons—

> "1. On the medical evidence the patient's illness is such that an episode of violence might recur and indeed has occurred as recently as the 7 June 1986. The tribunal accepted the responsible medical officer's evidence and that contained in the nursing notes of the events of that day.
>
> 2. Likewise in the medical evidence and in the opinion of the medical tribunal member, it is premature to recommend the patient's transfer to another hospital. The patient requires, in his own and the public's interests, further treatment at (a secure hospital) before he could be transferred to a less secure hospital which is the next objective in his rehabilitation."

Crozier

A tribunal heard the patient's application for discharge on 20 August 1986. The responsible medical officer gave evidence of a recent and considerable improvement in the patient's mental health since the commencement of lithium treatment. He wished to have an opportunity to monitor the patient's further progress as a result of the treatment and all the parties requested an adjournment. The tribunal granted an adjournment for a period not exceeding six months to enable the patient's further progress to be monitored. It was clear on the evidence before it that the tribunal could not properly have discharged the patient, either absolutely or conditionally.

The Secretary of State's case

Relying on the judgment of Lawton L.J. in *R. v. Oxford Regional Mental Health tribunal* [1986] 1 W.L.R. 1180, the Secretary of State contended that the powers granted to a tribunal by section 73(1) enabled it to come to one of only three decisions: (i) to grant the applicant's discharge absolutely; (ii) to grant the applicant's discharge conditionally; or (iii) to refuse the application. The tribunal had no discretion to refuse discharge if satisfied as to the criteria for discharge; similarly, once a decision had been made that the tribunal was not so satisfied, it had no choice but to refuse the application. The power of adjournment granted by rule 16 existed for the purposes of the exercise of the tribunal's functions under the Act. The reality of the matter was that each of the tribunals had arrogated to itself a supervisory power which enabled it to monitor the progress of the patient. That was not its proper function, which is to enable patients to be released when there were no grounds for them remaining in hospital, so as to prevent their illegal detention. They had no continuing function. Any intermediate release of a patient between applications was the business of the Home Secretary under section 42. Tribunals had to grant adjournments from time to time where reports were incomplete and further reports or information was required but that was for the purpose of determining the application before them. It was perfectly clear that the tribunals had concluded that they could not discharge on the evidence before them. Accordingly, it was not open to them to adjourn the cases for up to six months in the hope that the conditions of the patients might improve.

The case for the tribunals and the patients

The argument advanced by the Secretary of State was a far too restrictive construction of the Act and misunderstood the functions of tribunals. They were not courts in the ordinary sense but a meeting of experts to discuss the best interest of the patient in an informal setting, where the usual rules of evidence were ignored and the tribunal members and the parties worked towards a solution in the best interests of the patient. Although tribunals were bound by the mandatory provisions of section 73(1), their powers of adjournment were much wider than contended by the Home Secretary. There were many occasions when the interests of the patient were best served by a period of delay, in order to ascertain the effects of the treatment being provided. The work of tribunals would be fettered by the constraints suggested. In neither case was it said that the exercise of the power to adjourn had been capricious or unreasonable on *Wednesbury* principles.[52] The adjournments were granted with the assent of all sides and nobody was prejudiced or suffered as a result.

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52 *Associated Provincial Picture Houses v. Wednesbury Corporation* [1948] 1 K.B. 223.

Farquharson J.

The scheme of the Act cast tribunals in a judicial rather than an administrative role. Their task was to decide, on the basis of the reports and other available evidence, whether the patient should be released conditionally or otherwise or whether his application should be refused. The power of adjournment given by rule 16 was limited to what was necessary for the tribunal to fulfil this function, as set out more specifically in section 73(1). If a tribunal had all the evidence necessary to determine the patient's mental state, and concluded that the requirements of section 73(1) had not been satisfied, it was then its duty to refuse the application. If it was necessary to grant an adjournment in order to determine the patient's *present* suitability for discharge that must be on the basis that the further information would throw more light on his *existing* mental state. What a tribunal could not do was to adjourn a case for a period to see if his mental state altered or improved, whether as a result of further treatment or otherwise. A tribunal which took such a course would be delaying the completion of the case to see if any later developments would enable it to change its mind. The tribunal could not adjourn in the hope that a projected or existing course of treatment would at some point in the future cause a sufficient improvement to enable them to discharge the patient before he made a further application. Any alteration in the patient's condition between applications which would justify discharge must be dealt with by the Secretary of State, who could exercise his own power of discharge under section 42 or refer the case again to the tribunal. It was evident that in the case of Thomas the tribunal had concluded that the requirements of section 73(1) had not been met. In those circumstances, it was obliged to dismiss the application: it had no power to postpone the disposal of the case in the hope that, after a period of up to six months, his condition would have improved sufficiently for it to be able to recommend his transfer. In any case, the Act did not empower a tribunal to make such a recommendation. Similarly, in the case of Crozier, the tribunal was not empowered to adjourn his application to monitor his progress. As the applicants were not seeking an order of certiorari, having regard to the lapse of time, the court would make a declaration in the terms of the motion. *Declaration granted.*

R. v. Nottingham Mental Health Review Tribunal, ex p. Secretary of State for the Home Department (Thomas)

R. v. Northern Mental Health Review Tribunal, ex p. Secretary of State for the Home Department (Crozier)

The Times, 12 October 1988 *C.A. (Balcombe, Woolf, Russell L.JJ.)*

The tribunals appealed in respect of the declaration granted by Farquharson J. As to the facts, *see above.*

Balcombe L.J.

The two appeals raised the single issue of whether a tribunal which accepted that the statutory criteria for discharge were not presently satisfied could adjourn the application so as to give an opportunity for the patient's condition to improve. Mr Pleming, for the appellants, had submitted that what happened in the case of Mr. Crozier was a request for further information within rule 16. The Secretary of State accepted that a tribunal which required further information as to the present state of the mental health of a patient could properly exercise its power of adjournment. But that was not the purpose for which the Trent tribunal

had adjourned Mr. Crozier's case. They adjourned it not to monitor it themselves, as apparently was at one time suggested, but to enable the responsible medical officer to monitor it and, in particular, to see whether the improvement in that state brought about by the introduction of lithium was maintained. That could not properly be described as an adjournment for the purpose of obtaining further information within rule 16(1). In both cases, Mr Pleming then relied on the second limb of rule 16, namely the power of a tribunal to adjourn a hearing "for such other purposes as it might think appropriate." As to this, the rules had to be construed in the light of the Act and, in particular, in the light of the powers contained in the Act to make rules. Section 78(2)(j) provided that rules might be made "conferring on the tribunals such ancillary powers as the Lord Chancellor thinks necessary for the purposes of the exercise of their functions under this Act ..." So it became necessary to consider what were their functions under the Act. The question was simply: did they have power under the Act and under the rules to adjourn the applications for the purposes for which they did adjourn them? In the court's judgment, the Act did not give a tribunal any such powers. It had no general supervisory function over the progress of a restricted patient. That was the function of the Secretary of State. It has certain specific judicial powers to be exercised in relation to the application before it. Where a tribunal was satisfied that the criteria for discharge in section 73 were not then fulfilled, it had no power to adjourn the proceedings in order to give the condition of the patient an opportunity to improve or, as in the Crozier case, an opportunity to see if an improvement already made was sustained. Its powers to adjourn under rule 16 were primarily for the specific purpose of obtaining further information. There might well be other matters which would entitle a tribunal within those powers to grant an adjournment but not for the purpose of seeing whether a patient's condition improved or an improvement was sustained. Woolf L.J. and Russell L.J. agreed. *Appeals dismissed.*

Commentary

Some of the reasons why a tribunal may not adjourn a restricted patient's case, so as to monitor his condition and entitlement to be discharged, clearly do not extend to unrestricted cases. Most obviously, the fact that a tribunal has no general supervisory function over the progress of a restricted patient, and that it is the Home Secretary's function to monitor, supervise and discharge such patients between applications, is irrelevant. There can be no question of a tribunal which adjourns an unrestricted patient's case arrogating to itself a function which statutorily belongs to the Secretary of State. Secondly, a tribunal's powers in restricted cases are limited to discharging a patient whom it is satisfied meets the criteria for being discharged and not discharging otherwise. In unrestricted cases, a tribunal has a discretionary power of discharge, a power to make recommendations about matters such as leave and transfer, and a power to reconvene if its recommendations are not complied with. To this extent, it does have a supervisory function. It is therefore arguable that a tribunal could say "yes, we had sufficient information at the hearing to determine whether the patient was then entitled to be discharged but that is not the end of the matter in an unrestricted case. We could not determine whether or not to exercise our discretionary power of discharge. We wanted to see whether his improvement was sustained before deciding whether to exercise that discretion in favour of discharge. How we exercise a discretion vested in us by Parliament doesn't involve us arrogating any function given to someone else. The Act makes it clear that it is a matter for our discretion." Or, alternatively, a tribunal might say that it required

further information before deciding whether to exercise its discretion[a]ower to recommend that the patient be granted leave of absence. That discretionary power having been given to it by Parliament, the adjournment was for a permitted statutory purpose: it is not simply a question of entitlement to discharge in such cases. Against this argument, it may be said that (1) the intention of the Act is still that tribunals must determine the application if they have sufficient information about the patient's present mental state to reach a decision about his current entitlement to, and suitability for, discharge; (2) postponing the decision amounts to having determined that it was not appropriate to direct the patient's discharge given his present mental state — adjourning the hearing involves not postponing the exercise of its discretion but later reconsidering the way it has exercised its discretion; (3) if a tribunal can adjourn, this means that it may either make its decision in two parts (the patient is not entitled to be discharged but we will determine at a later hearing whether to exercise our discretion to discharge him) or it may later reconsider its decision about his entitlement to be discharged — the Act allows for neither (4) functions such as granting patients leave or transferring them between applications are statutorily matters for the hospital managers and the responsible medical officer. The Act allows patients to make periodic applications, so that their suitability for discharge can be periodically determined. It would be intolerable if tribunals had a continuing involvement in, or a watching brief over, a patient's progress and the Act does not contemplate this.

Adjournment a matter for the tribunal's discretion

Provided that an adjournment is for a permitted purpose, and any refusal to adjourn is not contrary to the rules of natural justice, decisions to adjourn are decisions which, on well recognised authority, are within the discretion of a tribunal. Such a decision may only be faulted if that discretion can be shown to have been exercised wrongly according to the principles set out in *Associated Provincial Picture House v. Wednesbury Corporation* [1948] K.B. 223. Where an adjournment sought on the ground that a witness is absent or cannot be located is refused, the matter must be looked at in the light of the evidence which that witness would have given, in order to determine whether the effect of the decision was a material factor likely to have affected the conclusion to which the tribunal came.

R. v. Oxford Regional Mental Health Review, ex p. Mackman

The Times 2 June 1986 — *Q.B.D., McNeill J.*

The tribunal refused to adjourn a hearing so that the patient could seek judicial review of its decision to hear the application notwithstanding that the president had presided over a previous tribunal concerning the same patient some 10 months previously.

McNeill J.

A decision to adjourn was one which, on well recognised authority, was within the discretion of a tribunal. Such a decision could only be faulted if it was shown to be exercised wrongly according to the Wednesbury principles (*Associated Provincial Picture House v. Wednesbury Corporation* [1948] KB 223, [1947] 2 All ER 680). There was no evidence of that and the application was refused.

6 July 1988 (unreported) — *Q.B.D. (Macpherson J.)*
9 December 1988 (unreported). — *C.A. (May, Croom-Johnson, Glidewell L.JJ.)*
21 March 1989 (unreported) — *Q.B.D. (Popplewell J.)*
28 June 1989 (unreported) — *C.A. (Dillon, Russell, Butler-Sloss L.JJ.)*

The Facts

On 17 March 1987, the patient was transferred from prison to hospital under section 47 of the Mental Health Act 1983 and a restriction direction was also made. A three day special hospital psychological assessment of the patient in May 1987 did not indicate that he suffered from mental illness and a second-opinion approved doctor appointed by the Mental Health Act Commission was of the opinion that there was no basis for administering antipsychotic drugs. The patient applied to a tribunal and the hearing was scheduled to commence on 22 February 1988. On 4 January 1988, the patient's solicitors wrote to the clerk to the tribunal, stating that the patient "would like" various persons to attend the hearing to give oral evidence, including two prison doctors whose names were not known. One of them was a female doctor who, following a disciplinary offence, had examined the patient on 13 and 15 December 1986 at HMP Gartree and adjudged him fit to receive three days solitary confinement in a prison cell. The other doctor, who examined him at Wandsworth Prison on 27 January 1987, had also found him fit to remain in a prison cell. Further and quite extensive correspondence was entered into concerning the doctors' attendance during the pre-hearing period. The position reached on 22 February was that, despite making extensive enquiries of the prisons and of the Medical Director to the Home Office, it had been impossible for the patient's solicitors to obtain the doctors' names and that information, if it was available, had not been divulged either to them or their client.

The tribunal hearing

The hearing took four days. The tribunal asked its clerk to make enquiries at the Home Office regarding the existence of reports which the doctors had apparently completed in December 1986 and January 1987. The president notified the clerk that, if the reports could be located, she was to arrange for them to be sent by fax and to enquire as to the availability of the doctors to attend the hearing. During the lunch interval on the first day, the tribunal clerk spoke to one of the principals of C3 Division at the Home Office, who made enquiries but later telephoned to say that it was impossible within the time available to identify either doctor or to locate their reports. This information was conveyed to the tribunal. The tribunal received evidence from a Dr. Cooper, whom the patient cross-examined, on a variety of matters including the role, duties and findings of Prison Medical Officers. The evidence was that the patient would have been seen by Prison Medical Officers on a number of occasions during his detention in various prisons. Most prison medical officers were general practitioners and there were no psychiatrists on the medical staff of Gartree. Prison medical officers should, and would, bring to the attention of their superiors a suspicion of mental illness which arose from their examination. He had not seen or heard any evidence that they had done so. On the last day of the hearing, the patient sought the attendance of the still unidentified prison doctors and a charge nurse and a psychologist. The tribunal granted the last application but refused the others. The tribunal also refused an application that the hearing be adjourned until the two missing medical reports were available.

Tribunal's decision and reasons

The decision of the tribunal ran to some 13 or more pages and was that the patient would not, if subject to a restriction order, be entitled to be discharged. In its reasons, the tribunal stated that in coming to its finding it had assumed in the patient's favour that the many prison doctors who had examined him had not considered that his mental condition required treatment or investigation. It concluded that any doctor who examined the patient for general purposes, without hearing his wider allegations, would have no reason to question his mental health. He functioned normally and well on all aspects of daily life other than the area of delusion. The tribunal considered that it had heard sufficient evidence. It had received the written and oral evidence of three consultant psychiatrists and a consultant physician. In addition, the medical member had spent many hours interviewing the patient, whose evidence the tribunal had heard at length. It was not minded to grant an adjournment of what was a long outstanding and long-running application to enable unknown evidence of unidentified witnesses to be located when it was most unlikely that such evidence would take the matter further than, if as far as, the concessions made by Dr Cooper.

Applications for leave to apply for judicial review

The patient applied for leave to apply for judicial review, on the ground that he had not been permitted to call the two prison doctors and the charge nurse to give evidence before the tribunal. Macpherson J. had refused the application, holding that the matter was one for the discretion of the tribunal provided that discretion was properly exercised. There was a formidable body of psychiatric evidence before the tribunal indicating that the patient was suffering from mental illness and he had cross-examined those witnesses. It was impossible to call every doctor who had seen the patient, or someone in his position, and there was nothing in the point that the prison doctors were not called. The tribunal had taken account of the silent evidence of the many prison doctors and concluded in favour of the patient that the prison doctors would not have indicated that he was suffering from mental illness. Similarly, whether or not to call the charge nurse was ultimately the decision of the president: a great deal of the nurse's information about the patient's mental health must come from the doctors who had spoken to him and the charge nurse was not qualified to give his opinion as to a person's mental health. The patient appealed against the refusal of leave. On 9 December 1988, the Court of Appeal (May, Croom-Johnson, Glidewell L.JJ.) granted leave on the single ground that the two prison doctors were not allowed to attend or submit reports on the patient's mental condition. May L.J. said that the circumstances in which those witnesses were not enabled to attend and give evidence justified inquiry and were sufficient to entitle the patient to leave to apply for judicial review. The matter was later heard by Popplewell J.

Popplewell J. (CO/819/88)

As a matter of fact, it was clearly impossible for the two doctors to be called on the final day of the hearing. They had not then been identified nor had their reports, if there were reports, been located. The question therefore arose whether the president's failure to allow an adjournment was a breach of natural justice which entitled the patient to have the tribunal's finding quashed. The matter had to be looked at in the light of the evidence which those witnesses would have given in order to determine whether the effect of the decision not to allow them to be called was a material factor likely to have affected the conclusion to which the tribunal came. The patient pointed out, with a good deal of force, that he had been the subject of some 155 adjudications in prison and

that in none of those a[illegible]cations had any medical officer ever written anything casting doubt about his mental ability. It was on this matter that the two doctors would have spoken if they had been allowed to give evidence. Nevertheless, the hearing lasted four days, took evidence from a considerable number of witnesses, and various medical reports and other documents were received in evidence. When the matter was looked at in the round, would the evidence of the two doctors — saying "We have examined this applicant on one or more occasions and we found nothing wrong with him" — have made any difference to the tribunal's conclusion? In the light of the evidence before the tribunal, including its acceptance of the "silent evidence" of the absent doctors, it was impossible to say that the tribunal in any way acted unreasonably in refusing the adjournment. There was nothing unreasonable in the tribunal saying that it did not need to hear the two doctors because it accepted the evidence that they would have given in the applicant's favour. *Application dismissed. The patient appealed.*

Dillon L.J. (Court of Appeal)

The tribunal had been faced with a difficult decision in a difficult case. The crux of the question was the validity of the decision to refuse an adjournment. The patient argued that in a matter so important as the "certification" of a man as "insane" all possibly relevant evidence should be heard and it was one of the functions of a review tribunal to ensure that this was done. On the other hand, the hearing had been adjourned several times and there was no knowing how long it would take to trace the two doctors, obtain their reports and arrange, if appropriate, for them to give oral evidence before a reconvened tribunal It was a difficult decision but that did not mean that it was one to be automatically quashed on judicial review. The course which the tribunal took was one open to it in difficult circumstances. They were endeavouring to give full benefit to the patient, by assuming that the two doctors would give the evidence indicated by him, in the knowledge that the doctors would have been general practitioners rather than specialist psychiatrists. Russell and Butler-Sloss L.JJ. agreed. *Appeal dismissed.*

Resumption of the hearing

Where the patient, a nearest relative applicant, or the responsible authority requests that an adjourned hearing be resumed, the hearing shall be resumed provided the tribunal is satisfied that its resumption is in the interests of the patient.[53] Before the tribunal resumes any hearing adjourned *sine die*, it shall give to all parties and, in the case of a restricted patient, the Secretary of State, not less than 14 days' notice (or such shorter notice as all parties may consent to) of the date, time and place of the resumed hearing.[54]

Transfer of patient prior to resumption of the hearing

As to the position where a patient is transferred to a hospital within the jurisdiction of another tribunal prior to the hearing's resumption, see rule 17 (**648**) and Schedule 2, para. 5 of the 1983 Act (**988**).

[53] Rule 26(2) of the 1960 Rules provided that the hearing be resumed if either (a) the tribunal considered that was desirable or (b) its resumption was requested by the applicant or the responsible authority. If the current discretionary power not to reconvene is *intra vires*, the circumstances in which a patient-applicant could lawfully be denied a resumption and a determination of his application must be exceptional.

[54] Rule 16(4) should be read as if the following italicised words were inserted: "(or such shorter notice as all the parties *and the Secretary of State* may consent to)."

It has been noted that a tribunal has power to issue subpoenas, to take evidence on oath, and to take any steps necessary to cure an irregularity where a party may have been prejudiced by a failure to comply with the rules. As a final note, mention must be made of other sanctions which a tribunal has recourse to if the fair and proper conduct of the proceedings is interfered with. It is appropriate to deal with these matters in the form of a final note, otherwise they might convey the impression that tribunal proceedings have the same imposing nature as proceedings in the criminal and civil courts. They do not and it would be virtually unheard of for a tribunal to have to contemplate resort to the following provisions.

CONTEMPT OF COURT

For the purposes of the Contempt of Court Act 1981, the word "court" includes a mental health review tribunal.[55] Where contempt of court is committed in connection with "proceedings in an inferior court," an order for committal may be made only by a Divisional Court of the Queen's Bench Division. In *Peach Grey & Co. (a Firm) v. Sommers*, it was held that the Divisional Court has jurisdiction to punish contempt of an industrial tribunal, which is an inferior court within Order 52.[56] It was established by Parliament, has a legally qualified chairman appointed by the Lord Chancellor, power to compel the attendance of witnesses and to administer oaths, and a duty to give reasons for its decisions. It satisfied the three tests propounded in *Attorney-General v. BBC*[57] and was a body which discharged judicial functions. The definition of a court in section 19 of the Contempt of Court Act 1981 pointed to the same conclusion. These points are all equally applicable to mental health review tribunals and, having regard to the decision and the judgments of the Court of Appeal and the House of Lords in *Pickering v. Liverpool Daily Post & Echo Newspapers plc*,[58] there is little doubt that a mental health review tribunal is also a court for the purposes of Order 52.

Types of contempt

Civil contempt includes disobedience to a judgment or order to do any act within a specified time.[59] Criminal contempt includes contempt in the face of the court (*e.g.* a solicitor deceiving the court[60]); words, written or spoken calculated to interfere with the course of justice; acts calculated to prejudice the due course of justice (*e.g.* interference with witnesses[61]); impeding the service of process[62]; and disobedience

55 Contempt of Court Act 1981, s.19; *Pickering v. Liverpool Daily Post & Echo Newspapers plc* [1990] 2 W.L.R. 494, C.A.; [1991] 1 All E.R. 622, H.L.

56 *Peach Grey & Co. (a Firm) v. Sommers*, *The Times*, 16 February 1995. The respondent had improperly sought to influence a witness in industrial tribunal proceedings to withdraw his evidence "on the basis of favours for favours." The Divisional Court committed him to prison for one month.

57 *Attorney-General v. BBC* [1981] A.C. 303.

58 *Pickering v. Liverpool Daily Post & Echo Newspapers plc* [1990] 2 W.L.R. 494, C.A.; 1 All E.R. 622, H.L. (**850**).

59 Casual or unintentional disobedience to an order will not justify an order for committal; it must be contumacious (*Fairclough v. Manchester Ship Canal Co.* [1897] W.N. 7, C.A.; *Steiner Products Ltd. v. Willy Steiner Ltd.* [1966] 1 W.L.R. 986).

60 *R. v. Weisz* [1951] 2 K.B. 661.

61 *Bromilow v. Phillips* (1891) 40 W.R. 220; *Att.-Gen. v. Butterworth; Chapman v. Honig* [1963] 2 Q.B. 502, C.A.; *Peach Grey & Co. (a Firm) v. Sommers*, *The Times*, 16 February 1995.

62 *Price v. Hutchison* (1870) L.R. 9 Eq. 534; *Lewis v. Owen* [1894] 1 Q.B. 102.

to a subpoena *ad testificandum* or *duces tecum*.[63] In the context of mental health review tribunal proceedings, refusing to forward an application for a detained patient with the intention of interfering with a right of application, inducing a patient by threats to withdraw an application,[64] interfering with a witness, persuading a patient to give false evidence, disobeying a subpoena, refusing to answer a question which a witness may lawfully be compelled to answer, and wilful disobedience to a direction given by a tribunal, may all be contempt.

PERJURY AND FALSE EVIDENCE

It has been held that perjury committed in an arbitration under the Workmen's Compensation Act was perjury at common law and punishable as such.[65] The Mental Health Act 1983 provides that any person who wilfully makes a false statement in a report or other document required or authorised to be made for any purpose of the 1983 Act is guilty of an offence.[66]

STATUTORY OFFENCES

Various statutory sanctions are set out in Part IX of the Act. In particular, the Act provides that any person who without reasonable cause obstructs or refuses to allow the visiting, interviewing or examination of any person by a person authorised in that behalf by or under the Act shall be guilty of an offence.[67] Similarly, any person who refuses to produce for the inspection of any person so authorised any document or record the production of which is duly required by him commits an offence.[68]

63 Disobedience to a subpoena *ad testificandum* or *duces tecum* though not wilful (R. v. Daye [1908] 2 K.B. 333) or refusal of a witness to answer a question (*ex p. Fernandez* (1861) 30 L.J.C.P. 321; and see *Att.-Gen. v. Clough* [1963] 1 Q.B. 773) may be contempt.

64 By analogy, see *e.g. R. v. Martin*, *The Times*, 23 April 1986, which concerned a person seeking by threats to induce a prosecutor to withdraw a private prosecution.

65 *R. v. Crossley* (1909) 100 L.T. 463, C.A.

66 Mental Health Act 1983, s.126(4)(a).

67 *Ibid.*, s.129(b) and (d).

68 *Ibid.*, s.129(c).