15. The tribunal's decision and appeals

INTRODUCTION

The decisions by which a tribunal may determine an application or reference — its powers — are limited 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 subject to various procedural requirements set out in the rules. A decision may be set aside if the tribunal had no power to make it, it was founded on an error of law, it was reached in an unfair manner, it was irrational, or the reasons given for it were inadequate or unintelligible. If a tribunal's decision is legally flawed, it may be challenged by asking it to state a point of law for the High Court's determination (**854**) or by way of judicial review (**857**).

THE TRIBUNAL'S DECISION AND REASONS

Rule 23(2) requires a tribunal to record its discharge decision and any recommendations; to state whether it was satisfied that the statutory grounds requiring discharge exist; and to record its reasons for being, or not being, satisfied. The material comprised in the third of these tasks constitute the "reasons" for the decision.

THE TRIBUNAL'S DECISION & REASONS : MHRT RULES 1983, r.23

23.—(1) Any decision of the majority of the members of a tribunal shall be the decision of the tribunal and, in the event of an equality of votes, the president of the tribunal shall have a second or casting vote.

(2) The decision by which the tribunal determines an application shall be recorded in writing; the record shall be signed by the president and shall give the reasons for the decision and, in particular, where the tribunal relies upon any of the matters set out in section 72(1), (4) *or (4A)* or section 73(1) or (2) of the Act, shall state its reasons for being satisfied as to those matters.

(3) Paragraphs (1) and (2) shall apply to provisional decisions and decisions with recommendations as they apply to decisions by which applications are determined.

Mental Health Review Tribunal Rules 1983, as amended by the Mental Health Review Tribunal (Amendment) Rules 1996, r.11.

THE DECISION OF THE TRIBUNAL

Rule 23(1) states that any decision of the majority of the members of a tribunal shall be the decision of the tribunal and, in the event of an equality of votes, the president of the tribunal shall have a second or casting vote. It would appear from the word- ing that a vote must be taken, that each member must cast a vote and that absten- tions are not permitted. Consequently, an equality of votes may only arise where an even number of members, being at least four in number, have been appointed to deal with a case and not because one of the usual panel of three members has abstained. The decision by which the tribunal determines an application or reference shall then be recorded in writing and the record signed by the president.[1] There is no prescribed form but tribunals have devised their own standard forms for each type of case. The use of these forms is, however, not mandatory.[2]

THE REASONS FOR THE TRIBUNAL'S DECISION

A tribunal's record of its decision shall give the reasons for the decision and, in particular, where the tribunal relies upon any of the matters set out in section 72(1), (4) or (4A), or section 73(1) or (2) of the Act — the mandatory discharge criteria — the record shall state its reasons for being satisfied as to those matters.[3] Any state- ment of the reasons for a decision forms part of the decision and shall be taken to be incorporated in the record.[4] There is no prescribed form but the standard forms in use include space for recording the reasons for the decision.[5] As to the need for reasons to be adequate and intelligible, and to refer to any substantial points raised by the parties, see page 833 *et seq.* As to the publication of the decision and the reasons for it, see page 843.

PROVISIONAL DECISIONS AND RECOMMENDATIONS

Rule 23(3) provides that the requirements imposed by paragraphs 23(1) and 23(2) above, that a tribunal records its decision and the reasons for that decision, apply to provisional decisions and decisions with recommendations as they apply to decis- ions by which applications are determined. Rule 23(3) does not expressly provide that paragraphs 23(1) and 23(2) extend to directions for a patient's reclassification made under section 72(5). However, the decisions in *Bone* **(833)** and *ex p. P.D.* **(551)** suggest that reasons must be given for any direction of this kind.

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1 Mental Health Review Tribunal Rules 1983, r.23(2). The Interpretation Act 1978 provides that the term "writing" includes typing, printing, and other modes of representing or reproducing words in a visible form.

2 Previously, rule 27(2) of the Mental Health Review Tribunal Rules 1960 did prescribe a specific form for recording the decision, which was set out in the Fourth Schedule. This basic form consisted of alternative clauses, for deletion or otherwise, specifying whether or not the tribunal had directed the patient's discharge or reclassification.

3 Mental Health Review Tribunal Rules 1983, r.23(2).

4 Tribunal and Inquiries Act 1992, s.10(6). It will therefore be difficult to argue that although the reasons are defective, the decision itself discloses no error of law.

5 Rule 27(4) of the Mental Health Review Tribunal Rules 1960 did prescribe a form for recording the reasons for the tribunal's decision, which was set out in the Fifth Schedule. However, this form merely provided a space for doing so, prefaced by a short parenthetical note in italics stating that the tribunal's reasons should indicate whether it was or was not satisfied as to the criteria for discharge referred to in section 123. That apart, the form contained only alternative clauses for recording whether or not the tribunal considered that it was undesirable that the recorded reasons for its decision should be communicated on request to the applicant or to the responsible authority.

Decisions with recommend…s

Unless the context otherwise requires, a *"decision with recommendations"* means a decision with recommendations made in accordance with section 72(3)(a) or (3A)(a) of the Act.[6] A tribunal must therefore record any statutory recommendations which it makes and the reasons for making such recommendations. Where a tribunal makes a decision with recommendations, the decision shall specify the period at the expiration of which the tribunal will consider the case further in the event of those recommendations not being complied with.[7] The tribunal has a discretion to reconvene, on giving proper notice to the parties, if its recommendation is not being complied with.[8]

Provisional decisions

Unless the context otherwise requires, a *"provisional decision"* includes a deferred direction for conditional discharge under section 73(7) and a notification to the Secretary of State in accordance with section 74(1) of the Act."[9] Where a tribunal defers a direction for a patient's conditional discharge, or notifies the Secretary of State whether a detained patient subject to a restricted direction satisfies the statutory criteria for absolute or conditional discharge, it must therefore record that "decision" and the reasons for it.

THE DUTY TO GIVE REASONS FOR THE DECISION

It has been noted that a tribunal's record of its decision must give the reasons for the decision. In particular, where the tribunal relies upon any of the matters set out in section 72(1), (4) or (4A), or section 73(1) or (2) — the mandatory discharge criteria — the record shall state its reasons for being satisfied as to those matters.

FIRST PRINCIPLES

Since 1983, there have been a number of cases where the adequacy of the reasons given for a tribunal's decision has been challenged. The first of them was *Bone v. Mental Health Review Tribunal* [1985] 3 All E.R. 330. Just over a fortnight later, Nolan J.'s judgment in Bone was referred to in the case of *R. v. Mental Health Re- view Tribunal, ex p. Clatworthy* [1985] 3 All E.R. 699. R. v. Mental Health Review Tribunal, ex p. Pickering [1986] 1 All E.R. 99 was then decided some four months after Clatworthy, although not reported until the following year. These three report- ed cases are the best known, and the most often cited, cases on the need to give reasons and the following principles can be extracted from them. The overriding test must always be whether the tribunal is providing both parties with the materials which will enable them to know that the tribunal has made no error of law in

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6 Mental Health Review Tribunal Rules 1983, r.2(1), as amended by the Mental Health Review Tribunal (Amendment) Rules 1996, r.2. The recommendations are that leave of absence be granted, that the patient be transferred into guardianship or to another hospital, that a supervision application be considered. There is no power to make such recommendations in restricted cases.

7 Mental Health Review Tribunal Rules 1983, r.24(2). The Act itself does not require this **(474)**.

8 *Ibid.*, r.25(2) **(474, 853)**.

9 *Ibid.*, r.2(1).

reaching its finding of fact.[10] The patient must know why the case advan[illegible] in detail on his behalf had not been accepted.[11] Proper, adequate and intelligible reasons should be given which grapple with the important issues raised and can reasonably be said to deal with the substantial points that have been raised.[12] However, the reasons for the decision cannot be read "in the air". Although the reasons may not be clear or immediately intelligible on their face, the decision is addressed to parties, who are an informed audience and so well aware of what issues were raised and the nuances raised by those issues.[13] Nor should the reasons be subjected to the analytical treatment more appropriate to the interpretation of a statute or a deed. The necessity for giving reasons is often underscored by the fact that it is often very important to know the reason why an application has been turned down. The doctor in charge of a restricted patient's treatment may often be the initiator of an application for discharge and he should know why the application has been refused. He may be particularly interested in the diagnostic question and want to know why his view as to the correct diagnosis was rejected.[14]

CASE LAW

The case law falls into distinct classes: whether there is an obligation to give reasons at all; whether the reasons are adequate in the sense that they enable the applicant to know why his case was rejected; whether the reasons are intelligible and comprehensible, in that one can discern the tribunal's reasons for not being satisfied about each of the statutory grounds which entitle a patient to be discharged; whether the reasons disclose that the tribunal misdirected itself as to the law.

THE NEED TO GIVE REASONS AT ALL

In *Bone v. Mental Health Review Tribunal*,[15] the tribunal's decision included no reasons for its finding that the statutory discharge criteria were not satisfied. The case is therefore best seen as resolving the issue of whether a tribunal which does not discharge a patient has a duty to give reasons at all, rather than as a case dealing with the adequacy of the reasons — since none were given. Nolan J. held that the requirement imposed by the first part of rule 23(2) ("The decision by which the tribunal determines an application ... shall give the reasons for the decision") was unambiguous. The following words starting "and, in particular" were words of

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10 *Bone v. Mental Health Review Tribunal* [1985] 3 All E.R. 330; *Alexander Machinery (Dudley) Ltd. v. Crabtree* [1974] I.C.R. 120 at 122. In *ex p. O'Hara*, it was not clear if the tribunal had addressed the question of whether it had power in a restricted case to make a statutory recommendation under section 72(3). If it had considered the issue, and answered it adversely to the applicant, then no reasons were given in the decision and, given the decisions in *Bone*, *ex p. Clatworthy*, and *ex p. Pickering*, it was common ground that the decision should be quashed. See *Grant v. The Mental Health Review Tribunal for the Trent Region*; *R. v. The Mersey Mental Health Review Tribunal ex p. O'Hara*, *The Times*, 26 April 1986, *per* McNeill J. (549).

11 *R. v. Mental Health Review Tribunal, ex p. Clatworthy* [1985] 3 All E.R. 699.

12 *R. v. Mental Health Review Tribunal, ex p. Pickering* [1986] 1 All E.R. 99; *Bone v. Mental Health Review Tribunal* [1985] 3 All E.R. 330; *Seddon Properties Ltd. v. Secretary of State for the Environment* (1978) 42 P. & C.R. 26; *Re Poyser and Mills's Arbitration* [1964] 2 Q.B. 467 at 478.

13 *R. v. Mental Health Review Tribunal, ex p. Pickering* [1986] 1 All E.R. 99. The importance of not reading a decision in a vacuum was seen in *ex p. Ryan*, where Nolan J. accepted that although the tribunal did explicitly state why the patient's detention was necessary for his health or safety or to protect others— the second limb of the statutory test for discharge — the tribunal's overall view on that matter appeared with complete clarity from their reasons. *R. v. Trent Mental Health Review Tribunal, ex p. Ryan* [1992] C.O.D. 157.

14 *R. v. Mental Health Review Tribunal, ex p. Pickering [1986] 1 All E.R. 99.*

15 *Bone v. Mental Health Review Tribunal* [1985] 3 All E.R. 330.

elaboration and emphasis. T[illegible] in no way limited or derogated from the overall obligation imposed by the paragraph that reasons be given for a decision whichever way it went, including therefore decisions not to discharge a patient.

Bone v. Mental Health Review Tribunal

[1985] 3 All E.R. 330 — *Q.B.D., Nolan J.*

The tribunal did not discharge the patient, who was subject to a restriction order, from which it could be inferred that it was not satisfied as to the statutory criteria for discharge set out in section 72(1)(b)(i) and (ii). The tribunal's "reasons" for its decision did not more than recite this fact: "The Tribunal are not satisfied that the patient is not suffering from mental impairment which makes it appropriate for him to be liable to be detained. The Tribunal are not satisfied that it is not necessary for the health and safety of the patient or for the protection of other persons that the patient should receive medical treatment in hospital." The president contended that rule 23 required only that a tribunal give reasons in cases where it was satisfied, on applying the mandatory discharge criteria, that a patient was entitled to be discharged — it did not did not require that reasons be given as to why a tribunal decided that those criteria were not satisfied. The question of law stated for the High Court's determination was whether the reasons given for the tribunal's decision were "adequate and/or satisfy the requirement of Rule 23(2) Mental Health Review Tribunal Rules 1983 ... bearing in mind that the above reasons give to an applicant no further information than that which he can infer from the fact that the Tribunal decided not to discharge him."

Nolan J.

The president's construction of rule 23(2) was wrong. The requirement imposed by the first part of the paragraph ("The decision by which the tribunal determines an application ... shall give the reasons for the decision") was unambiguous. The following words starting "and, in particular" were words of elaboration and emphasis. They in no way limited or derogated from the initial obligation imposed by the paragraph that reasons be given for a decision, whichever way the decision went. That, strictly speaking, disposed of the question stated for the court's determination but it was right to amplify the nature of the requirement that reasons be given by reference to two very well-known authorities. The first was a passage from the judgment of Megaw J. in *Re Poyser and Mills's Arbitration* [1963] 1 All E.R. 612 at 616, [1964] 2 Q.B. 467 at 478, where he said: "... Parliament having provided that reasons shall be given, in my view that must clearly be read as meaning that proper, adequate, reasons must be given; the reasons that are set out ... must be reasons which not only will be intelligible, but also can reasonably be said to deal with the substantial points that have been raised ..." The second case was *Alexander Machinery (Dudley) Ltd. v. Crabtree* [1974] I.C.R. 120 at 122 where Donaldson P said: 'It is impossible for us to lay down any precise guidelines. The overriding test must always be: is the tribunal providing both parties with the materials which will enable them to know that the tribunal has made no error of law in reaching its finding of fact?"

REASONS WHICH DO NOT DISCLOSE WHY CASE WAS REJECTED

The decision in *Bone* was referred to in *ex p. Clatworthy*, which was heard just over a fortnight later. In *Clatworthy*, the patient suffered from sexual deviancy but the 1983 Act included a new prohibition that no person was to be dealt with under the

Act as suffering from any form of mental disorder by reason only of sexual deviancy. Given this new state of affairs, the unanimous medical evidence before the patient's tribunal was that he was not suffering from a psychopathic disorder. The tribunal stated that the patient's condition included features of psychopathic disorder, as defined in the 1983 Act, but without specifying what these were. Mann J. quashed the tribunal's decision. In doing so, he described the tribunal's reasons as a bare traverse of the circumstances in which discharge could be contemplated. Looking at the reasons, one was compelled to conclude that the patient would not know why the case advanced in detail on his behalf had not been accepted.

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

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

Following the expiration in 1972 of a limited-term restriction order, the patient had been liable to be detained as an unrestricted patient under a notional hospital order imposed under section 37 of the 1983 Act. At the time of his tribunal in April 1984, he was detained in a medium secure unit. The medical evidence before the tribunal, given by the responsible medical officer and a psychiatrist instructed by the patient, was that he was not suffering from a psychopathic disorder (or from any other form of disorder) as defined by section 1 of the Act, subsection (3) of which provides that a person shall not be dealt with as suffering from a psychopathic disorder by reason only of sexual deviancy. The tribunal's decision was that the patient not be discharged, its reasons being as follows: "...the rmo is concerned that the change in definition of "psychopathic disorder" in the 1983 Mental Health Act and in particular the terms of Section subs. (3) of the Act puts the patient outside the provisions of the 1983 Act. We do not agree that this is so ... he shows sexual deviancy but he also has the features of psychopathic disorder as defined in the Act and repeatedly diagnosed by doctors while he was detained in a special hospital. We see no change in his condition from the time he was first admitted to (that special hospital) in 1967."

Mann J.

The two consultant psychiatrists who gave evidence spoke in one voice as to the statutory matters which fell to the tribunal to consider. Thus apparently stood the matter at the hearing but the conclusion of the hearing was a decision that the patient not be discharged. The reasons given by the tribunal were not satisfactory and a bare traverse of a circumstance in which discharge could be contemplated. The grounds for those reasons did not enable one to see why the medical evidence was not accepted and immediately invited the question: what are the features of psychopathic disorder as defined by the 1983 Act apart from sexual deviancy? The evidence was that there was no other feature and sexual deviancy was to be discounted under the Act. Although the tribunal referred to psychopathic disorder as defined in the Act and repeatedly diagnosed by doctors when the patient was in a special hospital, the present definition of psychopathic disorder was one first introduced in 1983. Those earlier repeated diagnoses were not diagnoses which were the subject of exposition before the tribunal. They were terse and, in some instances, it could reasonably be questioned whether they were properly diagnoses of psychopathic disorder. Standing back and looking at the reasons for the decision, one was compelled to conclude that the patient would not know why the case advanced in detail on his behalf had not been accepted.

Cases since ex p. Clatworthy

The tribunal in *ex p. Davies* also rejected unanimous medical evidence that a patient with a history of sexual offending involving children did not suffer from a psychopathic disorder as defined in the 1983 Act. Although reliance was placed on the observations of the Secretary of State, those observations appear to have been confined to the likely consequences of releasing the patient given his sexual deviancy. If attention is confined to the adequacy of the reasons given for the decision, the case can be distinguished from *ex p. Clatworthy* in that the tribunal certainly spelt out why it had rejected the patient's case and the unanimous medical evidence. As to whether there was evidence entitling the tribunal to its finding, the tribunal did refer to characteristics other than sexual deviancy which in its opinion were consistent with such a diagnosis, namely sullen, morose and disruptive behaviour and an inability to learn from past events. Again, the tribunal in *ex p. Clatworthy* did not do this. Whether repeated sexual offending against children can properly be categorised as "sexual deviancy" must also be considered **(089)**.

R. v. Mental Health Review Tribunal (Mersey Region), ex p. Davies

CO/1723/85, 21 April 1986 — *Q.B.D., Russell J.*

In May 1967, the patient was convicted of "an offence or offences" of indecent assault. The patient had many previous convictions, including malicious damage by fire and other offences of indecent assault on girls. The court imposed a hospital order and a restriction order and he was admitted to a special hospital. He remained there until December 1982 when he was transferred to a less secure hospital. Having then been granted leave of absence, he resided with his mother. However, whilst on leave, he was observed to approach some children and to show them a pornographic magazine. As a result, his leave was revoked and he was transferred back to the special hospital in April 1983. His case was considered by a tribunal in July of that year.

The evidence before the tribunal

The medical reports prepared for the tribunal by two psychiatrists both concluded that the patient was not suffering from mental illness or psychopathic disorder, or from any other form of mental disorder, as defined by section 1 of the 1983 Act. One of the doctors further noted that he was not receiving any formal treatment and was of the opinion that he did not require treatment, was not a significant danger to anybody else, and was being inappropriately detained. In his statement, the Secretary of State observed that special hospital medical reports concerning the incident in April 1983 had described the patient as a danger to others by reason of his inability to control his deviant sexual impulses and his total lack of insight. He was conscious that the incident was not thought by those then responsible for his care to be a spontaneous act of foolishness but a serious, sinister, premeditated attempt to lure the girls away. The Secretary of State was satisfied that the patient continued to suffer from a form of mental disorder of the requisite nature or degree and that he required further treatment in hospital; was unconvinced that he had made sufficient progress to reduce appreciably his potential dangerousness towards young girls; and was of the opinion that rehabilitation should take place with extreme caution, preferably via transfer to a local hospital, where his sexual attitudes could be closely monitored.

The tribunal's decision and reasons

On 29 July 1985, the tribunal considered the patient's case and directed that he not be discharged. The tribunal expressed its finding as an affirmative, rather than as a double-negative, stating that it was satisfied that the patient was suffering from a psychopathic disorder of a nature or degree which made it appropriate for him to remain liable to be detained in a hospital for medical treatment. Such treatment was necessary for the protection of other persons. The reasons stated that the tribunal was not satisfied that the patient could overcome the enormous problems he would be faced with if released into the community without giving way to the uncontrollable impulses which resulted in the offence in 1967. The tribunal rejected the medical opinions of the two psychiatrists that the patient was not suffering from psychopathic disorder: "We accept the observations contained in the statement of the Secretary of State. We have considered the history of the applicant and his conduct in hospital since the making of the order ... The applicant's conduct whilst on leave in 1983 which resulted in his return to (the special hospital), and in recent months when he has become sullen and morose and been disruptive is consistent in the view of the Tribunal of one suffering from psychopathic disorder. The incident in [April] 1983 demonstrates an inability to learn from past events ... We take the view that the psychopathic disorder is of a nature and degree which makes it appropriate for him to be liable to be detained in a Hospital for medical treatment. In the light of the applicant's conduct as recently as [April] 1983 it is necessary for the protection of other persons that the applicant should receive medical treatment in Hospital."

Russell L.J.

Counsel had agreed that, for the purposes of the case, the effective questions which confronted the tribunal were two in number. The tribunal had to ascertain from the evidence whether the applicant was suffering from a treatable psycho-pathic disorder and whether it was satisfied that it was necessary for the protection of other persons that the applicant should be detained. The tribunal was entitled to reject the evidence of the two psychiatrists in the light of the totality of the evidence, coming as it did not only from those two eminent practitioners, but also from the observations of both the Secretary of State and the tribunal itself during the course of the hearing, when the applicant was cross-examined by the psychiatric member of the tribunal. The crucial issue was whether, in reaching those conclusions, the tribunal expressed its reasons adequately. Each case must, to a substantial extent, depend upon its own facts and that comment could be applied to the three authorities to which the court's attention was directed — Bone v. Mental Health Review Tribunal, ex p. Clatworthy, ex p. Pickering. On the facts of this case, the reasons were adequate and there was no unfairness: those affected by the reasons were adequately told of the basis of the decision. Application dismissed.

Ex p. G.

The following case is best viewed as wholly misconceived. It is axiomatic that it is not a tribunal's function to direct that a patient shall be prescribed certain medication or to give reasons why a particular drug should be prescribed. It seems to have been perfectly clear from the responsible authority's case what treatment it was proposed to give the patient and why that treatment was considered to be necessary for her health and safety.

R. v. South East Thai Iental Health Review Tribunal, ex p. G.

Unreported, 4 May 1993 — *C.A. (Ralph Gibson, McCowan, Steyn L.JJ.)*

The medical evidence before the tribunal was unanimously of the view that the patient suffered from a very serious mental illness which had had devastating consequences for her health, safety and general welfare. One of the medical reports indicated that it was unlikely that any amount of medication would have any influence on her very systematised delusions. A later medical report, prepared by the responsible medical officer, stated that unless she was detained it would be impossible to offer her the opportunity of receiving clozapine, the most modern antipsychotic drug available. The tribunal did not discharge the patient. It's reasons included the fact that no previous treatment had alleviated or improved her mental state and her condition was likely to deteriorate and her vulnerability increase without treatment. The patient applied for judicial review on the basis that the reasons for the decision were inadequate, in that the tribunal did not specify the particular drug that she was to be given. Macpherson J. refused leave and the patient renewed her application for leave before the Court of Appeal.

The application for leave to apply for judicial review

McCowan L.J. said that the fact that any amount of medication would not influence the patient's systematised delusions did not mean that medication was contra-indicated. It might at the very least prevent the patient's condition deteriorating. There was no statutory requirement that a tribunal should specify the drug which a patient was to be given and that might very well be unwise. The statement that "without treatment her condition is likely to deteriorate and increase her vulnerability" gave perfectly sufficient information as to the reason why the application was refused. The patient's chances of succeeding with the application for judicial review were absolutely minimal. *Steyn L.J.* said that he had more difficulty in that the reasons were not very informative. Nevertheless, having read the reasons in the context of what was common ground on the medical evidence, there was no realistic prospect of success. *Ralph Gibson L.J.* agreed. *Application for leave to apply refused.*

REASONING UNINTELLIGIBLE OR INCOMPREHENSIBLE

The following case in many ways represents a high-water mark in terms of a tribunal's obligation to give proper reasons for its statutory findings. A patient is always entitled to be discharged on at least two alternative statutory grounds. Hence it is, or should be, necessary for a tribunal to set out in turn the reasons why it was not satisfied that each of those grounds were met. In *ex p. Pickering*, Forbes J. therefore held that it should be clear from the decision to which of the statutory grounds each reason was directed. Otherwise, it is impossible to know what (if any) were the tribunal's reasons for rejecting each one of the discharge grounds.

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

[1986] 1 All E.R. 99 — *Q.B.D., Forbes J.*

The patient, who was a restricted patient, had been detained in special hospitals since his conviction and sentence in 1972. On 1 August 1984, a tribunal refused an application for discharge made by him. The written evidence before the tribunal included four psychiatric and psychological reports. Apart from a caveat entered by one of the psychiatrists, the general psychiatric opinion was

that the patient was not suffering from a psychopathic disorder. The un...ous finding of the tribunal members was, however, that they were not satisfied as to the existence of any of the statutory criteria for discharge set out in section 72(1)(b). Many of the matters set out in the tribunal's reasons for its decision related either to the patient's history between 1960–1972 or were consequential on its finding that he suffered from a psychopathic disorder, e.g. "it cannot yet be foreseen when the danger of his psychopathic disorder will diminish sufficiently for his release." The reasons which might have been intended as the tribunal's explanation of why it rejected the evidence that the patient no longer suffered from psychopathic disorder referred to it not being persuaded that it necessarily followed from his improved behaviour within a secure hospital setting that such behaviour would be maintained in the community.

Forbes J.

It was accepted that one of the major issues in the case was whether or not the patient was then suffering from psychopathic disorder: "the diagnostic question." The tribunal also had to consider whether it was necessary for the protection of others (it was not suggested it was necessary for his own protection) that he should continue to receive medical treatment in hospital: a question which had a medical content but was to some extent a policy question of whether it was safe to discharge him. It was essential for a tribunal to bear in mind the distinction between the two matters to which they were directing their attention. The fact that the tribunal was not persuaded that the patient's improved behaviour over a short period of time in a strict, special hospital setting necessarily meant that such behaviour would be maintained in the community could be a legitimate reason for not being satisfied that he no longer suffered from psychopathic disorder. Equally, it was capable of being a valid reason for not being satisfied that his continued detention was unnecessary in order to protect others. It was perfectly open to the tribunal to come to either or both of those conclusions. However, it was impossible to detect from the passage whether what was said was directed to the diagnostic issue or a wholly different issue, the necessity for the protection of other persons that the applicant be detained in hospital. Either interpretation was equally possible. As such, the reasons did not grapple with the diagnostic issue of whether or not the patient was still suffering from a psychopathic disorder. *Certiorari granted.*

Cases since Pickering

It is impossible to reconcile the decision in *ex p. Pickering* with that in the following case and it must be said that *ex p. Ryan* much more closely reflects the very unsatisfactory quality of the reasons often given for tribunal decisions. The reality may simply be that pragmatism dictates that a low standard is set, otherwise the number of tribunal decisions susceptible to review would become an embarrassment. Whether or not this is now the position, the decision-making process in *Ryan*, involving as it did the liberty of the subject, seems to have been grossly inadequate. For example, the tribunal "was not satisfied that the patient was not suffering from a psychopathic disorder" but "it was satisfied that the patient was suffering from a psychopathic disorder of a nature or degree which made it appropriate for him to remain liable to be detained." Furthermore, the decision wholly failed to state whether or not the tribunal was satisfied that in-patient treatment was not necessary for the patient's health or safety or to protect others. It is difficult to see how the conclusion could be avoided that the tribunal's decision gave rise to a real risk that it had failed to properly address the statutory criteria which should determine such decisions.

The patient was convicted in 1972 of three offences of indecent assault on young girls and a hospital order was made together with a restriction order. In 1973, he was convicted of a burglary committed whilst absent from hospital without leave and the court again made a hospital order and a restriction order, this time authorising his detention in a special hospital. He was conditionally discharged at the end of 1981. In October 1986, he was sentenced to four years' imprisonment for burglary and a year's consecutive imprisonment for indecent assault. When his sentence expired, his conditional discharge was revoked, he was recalled to the special hospital, and his case referred to a tribunal.

The evidence before the tribunal

The tribunal received medical reports and oral evidence from two consultant psychiatrists, extracts from previous medical reports, and a letter from a senior clinical psychologist. The responsible medical officer's first medical report concluded that there was little doubt that the patient's condition fell within the broad definition of psychopathic disorder in section 1 of the 1983 Act. He had shown seriously irresponsible behaviour in his behaviour towards young children, was egocentric, had an alcohol problem, a long history of housebreaking, and difficulties in sustaining satisfactory interpersonal relations. The responsible medical officer's second and more recent report was equally clear that the patient was suffering from a "sociopathic personality disorder" but more guarded about whether he satisfied the legal classification of psychopathic disorder, which involved making a value judgment — whether his conduct was seriously irresponsible or abnormally aggressive. The second psychiatrist whose evidence the tribunal received stated that the patient was not suffering from a psychopathic disorder as statutorily defined.

The tribunal's decision and reasons

The tribunal directed that the patient not be discharged. Its findings were that — (i) it was not satisfied that the patient was not suffering from a psychopathic disorder and (ii) it was satisfied that the patient was suffering from a psychopathic disorder of a nature or degree which made it appropriate for him to remain liable to be detained in a hospital for medical treatment. Its decision did not expressly state that it was not satisfied that such treatment was not necessary for the patient's health or safety or to protect others. The tribunal's reasons for its first finding were that, having reminded itself of the statutory definition in section 1(2), it could not be satisfied that the patient was not suffering from psychopathic disorder — "His conduct towards young females has been 'seriously irresponsible' resulting from the psychopathic disorder." As to its second finding, the patient had resisted all attempts to co-operate in psychological treatments and denied the need for help of any kind and there was a danger of repetition of offences against young females which treatment might cure.

Nolan J.

The court was referred to a passage in the judgment of Forbes J. in *R. v. Mental Health Review Tribunal, ex p. Pickering* [1986] 1 All E.R. 99, in which his Lordship criticised, and indeed quashed, the decision of a tribunal because of the inadequacy of the reasons given for it. He criticised, in particular, the manner in which the tribunal had dealt with the evidence relating to the existence or otherwise of a psychopathic disorder. He took the view that the tribunal had among other things not clearly distinguished between the diagnostic ques-

tion on the one hand (whether the patient suffered from a psychopa[illegible] disorder) and the questions of whether it was necessary for his health or safety or the protection of others that he should receive medical treatment, these being quite plainly separate questions under the statute. However, it seemed that the definition of a psychopathic disorder in section 1(2) imported questions which were not strictly of a clinical or medical nature because part of the definition consisted of the words, "which results in abnormally aggressive or seriously irresponsible conduct on the part of the person concerned." No doubt whether the conduct was the result of the disorder was again a medical question; whether it amounted to seriously irresponsible or abnormally aggressive behaviour raised questions other than of a purely clinical nature. So far as the clinical and medical evidence was concerned, the tribunal were entitled to say they were not satisfied that he did not suffer from a persistent disorder or disability of mind. And, insofar as they then concluded that his conduct towards young females has been seriously irresponsible resulting from the psychopathic disorder, there was material upon which the tribunal could properly link the two. The fact that the patient tended to play down the severity of his sexual offending was material capable of justifying a finding that his conduct towards young females had been seriously irresponsible. It was undoubtedly open to the tribunal to conclude that his disorder was of a nature and degree which made it appropriate for him to be liable to be detained in hospital because of the danger of repetition against young females. The tribunal contemplated further treatment involving psychological counselling, psychiatric counselling, nursing with a view to helping him live with other people without conflict, and rehabilitation under medical supervision. The tribunal was entitled to reach their findings and the reasons for their decision were adequate. The critical question was put succinctly by Mann J. in *ex p. Clatworthy* [1985] 3 All E.R. 699, 704: "Standing back and looking at these reasons and asking, would the applicant from those reasons know why the case advanced in detail on his behalf had not been accepted?" Although the tribunal did not express their decisions in terms of the necessity to detain the patient for his own health or to protect others, the view of the tribunal appeared with complete clarity from their reasons and the omission did not afford a ground for quashing the decision. *Application refused.*

RECORDING OTHER COMMENTS

The standard forms used to record and communicate tribunal decisions have for many years concluded with a space for recording "any other comments" which a tribunal wishes to make. Care needs to be taken to ensure that any further comments do not appear to undermine, or to be at variance with, the decision and the reasons just recorded. In *ex p. D*, the tribunal's "other comments" included the statement that it "sympathised with those responsible for the patient's care in that they found themselves unable to adopt any form of treatment other than containment in conditions of high security." Russell L.J. described it as unfortunate that the tribunal's other comments had been phrased in that way but there was no evidence that the tribunal had misdirected itself. Otton J. said that the comments had to be seen in context, did not go to the heart of the decision, nor formed part of it.[16] In *ex p. Merrils*, the "other comments" concerned unsubstantiated and strongly contested allegations about the patient's past behaviour. The tribunal amended it's decision by adding that the allegations had been wholly disregarded, as a result of which no further steps were taken to proceed with the judicial review.[17]

16 *R. v. Mersey Mental Health Review Tribunal, ex p.* D, *The Times*, 13 April 1987, Q.B.D. (525).
17 *R. v. Mental Health Review Tribunal, ex p. Merrils*, April 1994 (unreported). There would not appear to be any provision in the rules which enables a tribunal to amend its decision.

SUMMARY

The *Bone*, *Clatworthy* and *Pickering* decisions firmly established a requirement to give proper, adequate and intelligible reasons for all tribunal decisions. Subsequently, no unreported case based on the supposed inadequacy of the reasons for a decision has been successful. However, in a number of other cases, the existence of an arguable case led to leave to apply for judicial review being granted but the case was not heard because the remedy sought became academic.[18]

COMMUNICATING THE DECISION AND REASONS

Rule 24, which concerns the communication of the tribunal's decision and reasons, applies to provisional decisions and decisions with recommendations as it applies to decisions by which applications and references are determined. The decision by which a tribunal determines an application may, at the discretion of the tribunal, be announced by the president immediately after the hearing of the case. This is not uncommon in section 2 cases.

COMMUNICATION OF DECISIONS : MHRT RULES 1983, r.24

Communication of Decisions

24.—(1) The decision by which the tribunal determines an application may, at the discretion of the tribunal, be announced by the president immediately after the hearing of the case and, subject to paragraph (2), the written decision of the tribunal, including the reasons, shall be communicated in writing within 7 days of the hearing to all the parties and, in the case of a restricted patient, the Secretary of State.

(2) Where the tribunal considers that the full disclosure of the recorded reasons for its decision to the patient in accordance with paragraph (1) would adversely affect the health or welfare of the patient or others, the tribunal may instead communicate its decision to him in such manner as it thinks appropriate and lay communicate its decision to the other parties subject to any conditions it may think appropriate as to the disclosure thereof to the patient; provided that, where the applicant or the patient was represented at the hearing by a person to whom documents would be disclosed in accordance with rule 12(3), the tribunal shall disclose the full recorded grounds of its decision to such a person, subject to any conditions it may think appropriate as to disclosure thereof to the patient.

(3) Paragraphs (1) and (2) shall apply to provisional decisions and decisions with recommendations as they apply to decisions by which applications are determined.

(4) Where the tribunal makes a decision with recommendations, the decision shall specify the period at the expiration of which the tribunal will consider the case further in the event of those recommendations not being complied with.

18 See *e.g. Coates v. M.H.R.T.* (1986), *ex p. Stevenson* (1987), and *ex p. S.B.R.* (1989).

WRITTEN COMMUNICATION OF THE DECISION

Unless the tribunal considers that the full disclosure of the recorded reasons for its decision to the patient would adversely affect his health or welfare or that of others, the written decision of the tribunal, including the reasons for its decision, must be communicated in writing within seven days of the hearing to all the parties and, in the case of a restricted patient, the Secretary of State.[19] In section 2 cases, the period within which the written decision must be communicated is three days.[20]

DISCLOSURE OF THE TRIBUNAL'S REASONS

In *Pickering v. Liverpool Daily Post and Echo Newspapers plc and others,*[21] Lord Bridge of Harwich observed that the 1960 Rules previously empowered a tribunal to prohibit the publication of the text or a summary of the whole or part of their decision or of their reasons.[22] However, the present rule no longer gave them a general power to prohibit publication. It merely released them from the duty to disclose the reasons to the patient in certain circumstances.[23] In practice, it is virtually unheard of for the full reasons for the tribunal's decision not be disclosed to the patient. However, where a tribunal considers that the full disclosure of the recorded reasons for its decision to the patient would adversely affect his health or welfare or that of others, the tribunal may communicate its decision to him in such manner as it thinks appropriate and to the other parties subject to any conditions it thinks appropriate as to their disclosure to the patient. The tribunal must disclose the full reasons to a solicitor acting for the patient, but again subject to any conditions deemed appropriate as to their disclosure to the patient.[24] The rules do not authorise a tribunal to limit the disclosure of the reasons for its decision to a nearest relative applicant or to the nearest relative of a patient. As drafted, the decision and reasons must be communicated to all of the parties referred to in rule 7 (**779**).

Informing persons of the patient's discharge

Where a patient who is liable to be detained is to be discharged otherwise than by his nearest relative, the managers must take such steps as are practicable to inform the person who appears to be the nearest relative of that fact. The information shall, if practicable, be given at least seven days before the date of discharge.[25]

19 Mental Health Review Tribunal Rules 1983, r.24(1).

20 *Ibid.*, r.33(d).

21 *Pickering v. Liverpool Daily Post and Echo Newspapers plc and others* [1991] 2 AC 370, [1991] 1 All E.R. 622, [1991] 2 W.L.R. 513, 6 B.M.L.R. 108.

22 Mental Health Review Tribunal Rules 1960, r.27(6).

23 Rule 27 of the 1960 Rules required the tribunal to communicate its decision in writing within seven days. However, the rules also provided that the applicant or the responsible authority could, within three weeks of receiving written notice of the decision, request the tribunal to give their reasons for it. The tribunal was obliged to comply with such a request except where they considered that it would be undesirable to do so in the interests of the patient or for other special reasons." That rule closely corresponded to the statutory authority for it, which was cast in identical terms to the present section 78(2)(i). The paragraph provides that the rules may in particular make provision for requiring a tribunal, if so requested in accordance with the rules, to furnish such statements of the reasons for any decision as may be prescribed by the rules, subject to any provision made by the rules for withholding such a statement from a patient or any other person in cases where the tribunal considers that furnishing it would be undesirable in the interests of the patient or for other special reasons. As can be seen, the present rule 24 departs from the position envisaged in the Act.

24 Mental Health Review Tribunal Rules 1960, rr.24(2) and 33.

25 Mental Health Act 1983, s.133(1). The requirement does not apply if the patient or his nearest relative has "requested" that such information should not be communicated to the latter.

PUBLISHING INFORI TION ABOUT THE PROCEEDINGS

Issues concerning confidentiality, privacy and the disclosure of information may arise in various contexts during the proceedings. The confidentiality of psychiatric reports prepared on behalf of an applicant was considered in *W. v. Egdell and others* (**712**) and that of records of the Aarvold Board in *ex p. Powell* (**167**). As to solicitor's obligations where there is a conflict between the client's instructions and his safety or that of the public, see page 886. Various legislation has been passed concerning the confidentiality and disclosure of medical and social services records (**708**): Data Protection Act 1984, Access to Personal Files Act 1987, Access to Medical Reports Act 1988, Access to Health Records Act 1990. The question of whether there exists a common law right of access to medical records was considered in *R. v. Mid-Glamorgan Family Health Services and Another, ex. p. Martin* (**709**). Section 12 of the Administration of Justice Act 1960 is concerned with the publication of information about proceedings before a Mental Health Review Tribunal (*infra*). As to the Mental Health Review Tribunal Rules 1983, rule 12 deals with the disclosure of documents furnished to a tribunal (**702**), rule 21(5) with the publication of information about the proceedings (**798, 844**), and rule 24 with the disclosure of the reasons for a tribunal's decision (**841**).

THE PUBLICATION OF INFORMATION

The two most important provisions concerning the publication of information relating to tribunal proceedings are section 12 of the Administration of Justice Act 1960 and rule 21(5) of the Mental Health Review Tribunal Rules 1983.

The Administration of Justice Act 1960

Section 12 of the Administration of Justice Act 1960 is concerned with the publication of information relating to proceedings in private. Insofar as material, it provides that—

> "(1) The publication of information relating to proceedings before any court sitting in private shall not of itself be contempt of court except in the following cases, that is to say—
>
> (a) where the proceedings relate to the wardship or adoption of an infant or wholly or mainly to the guardianship, custody, maintenance or upbringing of an infant, or rights of access to an infant
>
> (b) where the proceedings are brought under Part VIII of the Mental Health Act 1983, or under any provision of that Act authorising an application or reference to be made to a Mental Health Review Tribunal or to a county court ...
>
> (e) where the court (having power to do so) expressly prohibits the publication of all information relating to the proceedings or of information of the description which is published.
>
> (2) Without prejudice to the foregoing subsection, the publication of the text or a summary of the whole or part of an order made by a court sitting in private shall not of itself be contempt of court except where the court (having power to do so) expressly prohibits the publication.

(3) In this section references to ... a tribunal and to any person exercising th... ...nctions of a court, a judge or a tribunal and references to a court sitting in private include references to a court sitting in camera or in chambers.

(4) Nothing in this section shall be construed as implying that any publication is punishable as contempt of court which would not be so punishable apart from this section."

The 1983 Act and rules

Section 78(2)(e) provides that the tribunal rules may prohibit the publication of reports of tribunal proceedings or the names of any persons concerned in such proceedings. Rule 21(5) of the Mental Health Review Tribunal Rules 1983 provides that, "Except in so far as the tribunal may direct, information about proceedings before a tribunal and the names of any persons concerned in the proceedings shall not be made public."[26]

THE PICKERING CASES

The issue of the private nature of tribunal proceedings, and whether the publication of certain information relating to those proceedings constitutes contempt, was extensively considered in the 1980s as a result of the Home Office practice of leaking information about pending proceedings to the press, presumably with a view to influencing the outcome since no other purpose could conceivably be served by doing so. The matter came to a head in a series of cases involving a restricted patient called Pickering. The patient's case was referred to in the Annual Report of the Council on Tribunals for the year 1985–86, in which the Council emphasised that it was "most important that tribunals make decisions on the basis of evidence before them and that they are not influenced or thought to have been influenced by comments made elsewhere, for example in Parliament or in the Press."[27] The report also contained details of an agreement reached between the Council and the responsible Minister at the Home Office concerning the Home Office's disclosure of information about patients to the press. The Mental Health Act Commission's Second Biennial Report reported that a further similar case had been brought to the Commission's attention, details of which had been referred to the Council on Tribunals and the Attorney-General. The Commission deplored "the occurrence of such leaks which inevitably have the effect of prejudicing a fair hearing and are almost certain to work in a manner adverse to the interests of detained patients, without any countervailing advantages to anyone."[28]

Chronology and facts of the Pickering cases

The chronology and facts of the cases are difficult to assimilate because the events spanned seven years, and more than one set of tribunal proceedings, and they are therefore summarised on the opposite page.

[26] Rule 27(6) of the Mental Health Review Tribunal Rules 1960 provided as follows: "Subject to the provisions of this rule, the tribunal may, where they think it proper to do so, prohibit the publication of the text or a summary of the whole or part of their decision or of their reasons, or direct that the text or summary may be published only to such persons and on such conditions as they may prescribe."

[27] *Annual Report of the Council on Tribunals 1985-86* (H.M.SO.,1986), para. 4.21.

[28] Mental Health Act Commission, *Second Biennial Report, Session 1985-87* (H.M.S.O., 1987), para. 18.4.

Attorney-General v. Ass...ciated Newspapers Group Plc and Others

Date	Event
7 December 1984	The patient applied to the Mental Health Review Tribunal.
23 August 1985	A hearing date of 11 November 1985 was fixed.
2 November 1985	Two newspaper articles were published, relating to the patient's forthcoming tribunal— (i) 'Storm over bid to free sex killer' published in the Daily Mail newspaper, the editor (Sir David English) and owners (Associated Newspapers Group plc) of which later became the first respondents in the subsequent contempt proceedings; (ii) 'Storm over sex killer', published in the Liverpool Echo newspaper, the editor (Christopher John Oakley) and owners (Trinity International plc) of which later became the second respondents in the subsequent contempt proceedings.
11 November 1985	The hearing commenced as scheduled but was adjourned part-heard on the second day as a result of the publicity which the proceedings had attracted following the publication of the newspaper articles.
24–26 March 1986	The tribunal hearing was resumed on the 24 March. The tribunal directed that the patient not be discharged and also made the following statement : "The Tribunal has been severely hampered by ill informed and irresponsible media coverage before and during its hearings. This coverage persisted after the Tribunal had drawn attention to the fact that the proceedings are private in their nature and that such privacy is the result of Rules approved by Parliament and which only allow for media coverage to the extent permitted by the Tribunal. Such privacy is essential for the proper conduct of necessarily difficult matters pertaining to the mental health of an individual as well as to the protection of the public. The nature and extent of coverage in this case put unreasonable pressure upon all the parties before the Tribunal and creates a wholly false impression that the result of a Tribunal may be influenced by pressure of this kind."
22 January 1987	The Divisional Court (Watkins L.J. and Macpherson J.) granted the Attorney-General leave to commence proceedings for orders of committal in respect of contempts allegedly committed by the first and second respondents in publishing the articles of 2 November 1985.
27 January 1987	The motions for contempt were initiated.
May 1988	Before the contempt proceedings were determined, the patient made a further application to the tribunal for his discharge, due to be heard in November 1988 — the publication in the press of further information about the patient ahead of the hearing of this second application became the subject of separate court proceedings: *Pickering v. Liverpool Daily Post and Echo Newspapers plc and others*.
7, 8 and 26 July 1988	The substantive hearing took place, at the conclusion of which Mann L.J. announced that the applications would be dismissed for reasons to be given later.
20 October 1988	The judgments were delivered.

Pickering v. Liverpool Daily Post and Echo Newspapers plc and others, CA.

Date	Event
October and November 1988	Following the decision of the Divisional Court, "a number of newspapers, believing that they were not now in danger of being held in contempt in respect of anything they said about the proceedings before the tribunal, published in October and November 1988 a series of more or less sensational articles amounting to nothing less than a chorus of protest against the possible release from detention in hospital of a man with the plaintiff's appalling record of violent sexual crimes. The hearing of the plaintiff's application was again postponed."

5 May 1989	The tribunal hearing was rescheduled for 17/18 July 1989. The p[illegible]at instituted proceedings seeking a declaration and injunctions designed to prevent the defendant newspaper publishers from publishing any information whatever relating to his outstanding tribunal application. Simon Brown J. granted the patient an injunction restraining the defendants, (1) Liverpool Daily Post and Echo Newspapers plc, (2) Associated Newspapers Holdings plc and (3) Yorkshire Post Newspapers Ltd, from publishing and disseminating any information about the patient's application to the Mersey Mental Health Review Tribunal, including the names of any persons concerned with the proceedings. It may be noted that the first and second defendants were also respondents in the initial action brought by the Attorney-General.
12 May 1989	Roch J. refused to continue the interlocutory ex p. injunction granted by Simon Brown J. on 5 May 1989. Roch J. held that the plaintiff was not entitled to injunctive relief on the grounds, first, that he had no cause of action against the defendants and, secondly, that the matters which the defendants intended to publish were not within the ambit of the prohibition imposed by r 21(5). He nevertheless continued the interlocutory injunction to the extent necessary to enable the plaintiff to apply to the Court of Appeal, which the plaintiff did on the same day. Because the patient's tribunal hearing was scheduled to take place in five days' time and there was no possibility of the appeal being properly heard and determined prior to the scheduled tribunal hearing, the Court of Appeal continued the injunction granted by Simon Brown J. until the determination of the appeal and ordered the tribunal not to hear the plaintiff 's application until the expiration of seven days after the court had given judgment.
11,12, 13 July 1989	At the commencement of the substantive hearing, the court made a further injunctive order to preserve the rights of the parties pending the court's decision.
27 July 1989	The Court of Appeal held that a mental health review tribunal was a court for the purposes of s.19 of the Contempt of Court Act 1981 because it was a 'tribunal .. exercising the judicial power of the State', that the plaintiff had sufficient locus standi to bring proceedings and that he was entitled to an injunction prohibiting the defendants from publishing the date of the hearing and the actual decision of the tribunal but not the fact that he had applied for his discharge or the result of the proceedings.

Pickering v. Liverpool Daily Post and Echo Newspapers plc and others, H.L.

3, 4, 5, 6, 10 December 1990	Appeals and cross-appeals in respect of the decision of the Court of Appeal were heard by the House of Lords.
31 January 1991	Their Lordships delivered their judgments.

Summary of the final judgment

The decision ultimately reached by the House of Lords as to what information may be published can be summarised as follows—

1. The publication of the fact that a named patient, whether a restricted patient or not, has applied to a tribunal does not disclose any information about the proceedings which ought to be kept secret.

2. The essential privacy afforded by each of the exceptions in section 12(1) attaches to the substance of the matters which the court has closed its doors to consider, not to the fact that the court will sit, is sitting or has sat at a certain date, time or place behind closed doors to consider those matters.

3. To the extent that the [illegible]ded reasons for the decision disclose the evidential and other material on which it is based, that falls within the protected area. It is not contempt to publish the fact that a tribunal has directed that a patient shall be absolutely or conditionally discharged. However, the conditions imposed on the discharge of a restricted patient are matters relevant to the patient's mental condition which ought by their nature to remain subject to protection from publication.

4. Where a newspaper threatens to publish part of the evidence, whether the patient is entitled to obtain an injunction restraining it from committing that threatened contempt, without the intervention of the Attorney General, was not resolved.

5. It could be expected that a repetition of the kind of inflammatory matter which characterised some of the newspaper articles published in October and November 1988 would be calculated to create a substantial risk of serious prejudice to the course of justice.

The cases

It should be emphasised that the first case referred to below no longer accurately states the law but is briefly summarised because it provides the context of what followed.

Attorney General v. Associated Newspapers Group plc and others

[1989] 1 W.L.R. 322 *Q.B.D., Mann L.J., Henry J.*

The respondents, who were the editors and publishers of two newspapers, published articles about a patient shortly before a tribunal was due to hear an application for his release, those articles being partly based on information and opinions communicated to the newspapers by the Home Office. The tribunal hearing was subsequently adjourned part heard because of the publicity that had been aroused. The Attorney General applied for an order that the two papers were guilty of contempt of court because the articles had tended "to interfere with the course of justice in particular legal proceedings," within section 1 of the Contempt of Court Act 1981.

Mann L.J.

Section 19 of the 1981 Act provided that references to a court in the Act included "any tribunal or body exercising the judicial power of the State" and the expression "legal proceedings" is to be construed accordingly. The live issues before the court were twofold: (1) whether a mental Health Review Tribunal was a "tribunal ... exercising the judicial power of the State" and therefore a court for the purposes of the Contempt of Court Act 1981? (2) Was there a substantial risk of prejudice? It was axiomatic that such a tribunal must act judicially in discharging its functions otherwise it would be susceptible to judicial review but that fact was not in any way indicative of whether it was a court. The fact that tribunals were inheritors of an executive function, reviewed a patient's position against specified criteria on an annual basis, and could not deprive a person of liberty were powerful contra-indications to the suggestion that they dealt with the liberty of the subject. With that in mind, and the caution

which the House of Lords had admonished the Divisional Court to obs... on the matter of extending the law of contempt to tribunals, the Divisional Court concluded that a Mental Health Review Tribunal was not a court for the purposes of the 1981 Act. In the alternative, any risk of prejudice to the tribunal's proceedings created at the time publication occurred had on the facts been remote. It followed that the Attorney General's application would be dismissed.

Pickering v. Liverpool Daily Post and Echo Newspapers plc & others

[1990] 2 W.L.R. 494 — *C.A., Lord Donaldson of Lymington M.R., Glidewell and Farquharson L.JJ.*

In 1988, the patient (plaintiff) made a further application to the tribunal for his discharge. Pending the hearing, he applied to the High Court under rule 21(5) of the Mental Health Tribunal Rules 1983 for an injunction restraining the defendants from publishing in their newspapers any information about his application to the tribunal. The Attorney General had been invited to lend his name to relator proceedings but had refused. The plaintiff contended that rule 21(5) conferred on him a private right breach of which could be restrained by injunction. The Divisional Court held that he had no such right or remedy and refused an injunction. The plaintiff appealed. At the hearing in the Court of Appeal, the defendants asserted that they had no wish or intention to report what took place at the hearing before the tribunal. The plaintiff conceded that the defendants were entitled to publish information which was in the public domain but sought to prevent them from publishing— (i) that he had made an application, (ii) the date of the hearing, and (iii) the tribunal's decision.

Whether a Mental Health Review Tribunal is a court

The Court of Appeal held unanimously that a mental health review tribunal is a court for the purposes of the contempt of court provisions. Lord Donaldson M.R. said that under the 1983 Act, tribunals were given the functions of applying statutory criteria and, on the basis of their findings, ordering or refusing to order the release of restricted patients from detention to which they had been subjected by courts. Such tribunals were also given power to summon witnesses by subpoena. Given the absence of any indication that the word "court" bore a different meaning in the Convention from that in English law, if a tribunal was not a "court" for all purposes then the European Human Rights Convention was not being complied with. Contrary to what was said in the *Newspaper Group case* (847), such tribunals did not inherit an executive function: they were given a new and quite different function. There appeared to be no reason why the touchstone for determining whether a body was a court should be its ability to deprive a citizen of his liberty. Insofar as *A-G v. Associated Newspapers Group plc* decided that a Mental Health Review Tribunal was not a court, it was wrongly decided.

Glidewell L.J.

The reference in section 12(1)(b) of the Administration of Justice Act 1960 to the publication of information relating to proceedings before such a tribunal being an exception to the normal rule that publication of information is not in itself a contempt suggested that tribunals had, since 1959, been courts.

Farquharson L.J.

Tribunals were independent of the state and they did not exercise a purely administrative function; they were required to act judicially and made their findings on the basis of the evidence submitted to them; they could administer an oath to witnesses called before them; and had the power to release patients detained under the Mental Health Act. Decisions of such consequence, affecting the release of patients subject to hospital orders made by the criminal courts, came within the description of "any tribunal ... exercising the judicial power of the State."

What is prohibited — "information concerning the proceedings"

The court was also unanimous in holding that the defendants were not prohibited from publishing the fact that the plaintiff was applying to the tribunal.

The majority (Lord Donaldson M.R. and Farquharson L.J.) also held that publishing the hearing date and the tribunal's decision were matters the publication of which was prohibited by rule 21(5), although this did not prevent publishing the fact that the plaintiff had or had not been discharged, inferentially as a result of the tribunal's decision.

Glidewell L.J. held that all of the information which the defendants wished to publish, including the date of hearing of the plaintiff's application, fell outside the ambit of the prohibition imposed by rule 21(5) and that the intended publication involved no contempt under section 12 of the 1960 Act. He would accordingly have dismissed the appeal.

Plaintiff's cause of action for breach of r.21(5)

Lord Donaldson M.R. and Glidewell L.J. held that the plaintiff could sue in his own name.[29] Rule 21(5) was enacted for the benefit of all persons concerned in tribunal proceedings, the benefit of privacy being something generally accepted as appropriate in matters concerning the mental health of individuals. A statutory prohibition was so enforceable where the prohibition was imposed for the benefit or protection of a particular class of individuals.[30] The rights of individual citizens were not any less because a statute provided no machinery for a prohibition's enforcement.

Farquharson L.J. rejected the view that rule 21(5) gave the plaintiff any such right.

Plaintiff's entitlement to an injunction

Lord Donaldson M.R. and Glidewell L.J. were of the opinion that an injunction should be issued arising from the plaintiff's cause of action.

Lord Donaldson M.R. and Farquharson L.J. held that the court could grant an injunction under section 37 of the Supreme Court Act 1981, Lord Denning M.R. having held in *Chief Constable of Kent v. V.*[31] that it enabled the court to grant injunctive relief to anyone who had "a sufficient interest" if it appeared just and convenient so to do. The plaintiff satisfied this test. Glidewell L.J. did not find it necessary to consider the plaintiff's entitlement to an injunction on this basis.

29 Glidewell L.J. would, of course, have dismissed the appeal.
30 *Lonrho Ltd. v. Shell Petroleum Co. Ltd.* [1982] A.C. 173 at 185.
31 *Chief Constable of Kent v. V.* [1982] [1983] Q.B. 34 at 42.

Pickering v. Liverpool Daily Post and Echo Newspapers plc & others

[1991] 2 A.C. 370

House of Lords — Lord Bridge of Harwich, Lord Brandon of Oakbrook, Lord Templeman, Lord Goff of Chieveley, Lord Lowry.

The defendants appealed to the House of Lords and the plaintiff cross-appealed.

Lord Bridge of Harwich

When men convicted of serious sexual crimes against young girls were ordered to be detained indefinitely in a secure mental hospital, the question whether and when they could safely be released was a matter of great public concern. The question of what criteria ought to be applied in determining whether such an offender should be released was controversial and an entirely proper subject for public debate. It was important that any restraints which the law imposed to ensure that a tribunal was not impeded in the proper discharge of its functions by media reports or comments should be clearly defined and should be effective.

The Administration of Justice Act 1960, s.12

The enactment of central importance to the issues raised was section 12 of the Administration of Justice Act 1960. The general rule was that it was not a contempt to publish information relating to proceedings in court merely because the proceedings were heard in private. But the exceptions to that rule expressed in paragraphs (a) to (d) of subsection (1) indicated that it was, at least *prima facie*, a contempt to publish information relating to proceedings in the cases indicated, including therefore proceedings before a mental health review tribunal. These exceptions to the broad principle that courts must administer justice in public reflected the yet more fundamental principle that the chief object of Courts of Justice must be to secure that justice was done. The proceedings before a mental health review tribunal were, for obvious reasons, included in the exceptions as proceedings which required for their just and effective conduct the same cloak of privacy as the common law had always drawn around proceedings in the other categories mentioned. The inclusion of such proceedings in section 12(1)(b) was an unequivocal indication that Parliament always intended that the tribunal should be a court to which the law of contempt applied. The reasoning of Lord Donaldson MR in the Court of Appeal led equally cogently to the same conclusion.

MHRT Rules 1960 and 1983

Under the Mental Health Review Tribunal Rules 1960, the prohibition now found in rule 21(4) applied only to formal hearings although the need for privacy in proceedings determined informally was the same. It followed that the functions previously served by rule 24(4) were: *Firstly*, to ensure that where a tribunal conducted a formal hearing the cloak of privacy, backed by the sanction of the law of contempt, was not lifted (unless the tribunal so directed). *Secondly*, to indicate that "the names of any persons concerned in the proceedings" fell within the protection of that cloak of privacy. That explained why the rules themselves contained no sanction for a breach of the rule: the draftsman contemplated that the only sanction necessary was that afforded by the law of contempt to which section 12(1)(b) of the 1960 Act had made the proceedings subject. The purpose now served by rule 21(5) was that previously served by rule 24(4) of the 1960 rules: to ensure that the protection given by the law of contempt to the privacy of the proceedings generally applied to the subject matter of the hearing, including the names of persons concerned, except insofar as the tribunal directed otherwise.

The scope of the prohibition in section 12

In *Re F (a minor) (publication of information)*,[32] Scarman L.J. said that what was protected from publication by section 12 "was the proceedings of the court: in all other respects a ward enjoyed no greater protection against unwelcome publicity than other children. If the information published related to the ward, but not to the proceedings, there was no contempt ..." As to what was meant by "proceedings," Geoffrey Lane L.J. had said—

> "Obviously a report of the actual hearing before the judge or part of it was included. But the words must include more than that, otherwise it would have been unnecessary to use the expression 'information relating to proceedings ...' The object was to protect from publication information which the person giving it believes to be protected by the cloak of secrecy provided by the court. 'Proceedings' must include such matters as statements of evidence, reports, accounts of interviews and such like, which are prepared for use in court once the wardship proceedings have been properly set on foot. Thus in the instant case the reports of the Official Solicitor and the social worker were clearly part of the proceedings and were protected by section 12."

Whether embargo was necessarily perpetual

The embargo on publication of matters disclosed in a private hearing was not necessarily perpetual. Silence should only be enforced for so long as was necessary to protect the interests of those for whose benefit the rule was made.

Publication of the fact that an application has been made

There was nothing in the judgments in *Re F* to suggest that publication of the fact that wardship proceedings were or had taken place in relation to an identified ward fell within the protection of section 12, and, in *Re W. (wards) (publication of information)*,[33] Sir Stephen Brown P. held that publication of the name and address of a ward did not amount to a contempt at common law or under section 12 in the absence of an express order of the court prohibiting such publication. The mere disclosure that a child was a ward disclosed nothing within the mischief which the cloak of privacy in relation to the substance of the proceedings was designed to guard against. By parity of reasoning the publication of the fact that a named patient, whether a restricted patient or not, had applied to a tribunal did not disclose any information about the proceedings which ought to be kept secret. Although rule 21 of the Mental Health Review Tribunal Rules 1983 referred to "the names of any persons concerned in the proceedings," it was concerned only with proceedings at the hearing. If it had been intended to prohibit publishing the fact that an application or reference had been made, it was likely this would have been made clear and, in any case, it was highly doubtful that any such ban would be *intra vires*.

Information about the date, time or place when proceedings are to be or have been heard

Information as to the date, time or place when proceedings of any kind were to be or had been heard was in one sense information relating to those proceedings. In a wardship case, in which no express prohibition was imposed on publication of the ward's name, it would be no contempt to publish the fact that there was to be, or had been a hearing, at the Royal Courts of Justice at 10.30 am on a certain date. The essential privacy afforded by each of the exceptions in section 12(1) attached to the substance of the matters which the court had closed

32 *Re F (a minor) (publication of information)* [1977] 1 All E.R. 114.
33 *Re W (wards) (publication of information)* [1989] 1 F.L.R. 246.

its doors to consider, not to the fact that the court would sit, was si[illegible] or had sat at a certain date, time or place behind closed doors to consider those matters. Accordingly, it was not possible to agree with the majority of the Court of Appeal on this issue.

Publication of the decision of the tribunal

The publication of the tribunal's decision might be of no great practical importance since the only matter likely to be of public interest was whether the patient had been released from detention. It was common ground that publication of this fact was not prohibited. Section 12(2) of the 1960 Act contemplated that the formal order made by a court, as distinct from its reasoned judgment, would not normally be such as to disclose information relating to the proceedings. However, the phrase "without prejudice to the foregoing sub-section" recognised the possibility that it might do so. In the ordinary case, therefore, the formal order of the court could be published in the absence of an express prohibition, as the subsection provided. Rule 24(2) of the Mental Health Review Tribunal Rules 1983 enabled a tribunal to restrict disclosure of the recorded reasons for its decision to the patient if it considered that such disclosure would adversely affect his health or welfare or that of others. However, there was no general power to prohibit the decision's publication of the kind previously found in r.27(6) of the Mental Health Review Tribunal Rules 1960. To the extent that the recorded reasons for the decision disclosed the evidential and other material on which it was based, there was no difficulty in holding that that fell within the protected area. However, a direction given by a tribunal that a patient be discharged, either absolutely or conditionally, was analogous to the kind of formal court order which section 12(2) excluded from the protected area. It would therefore not be a contempt to publish the fact that such a direction had been given. On the other hand the conditions imposed on the discharge of a restricted case were matters relevant to the patient's mental condition which ought by their nature to remain subject to protection from publication.

Summary as to the scope of section 12

The above considerations led to the conclusion that, whether or not the plaintiff was competent to seek an injunction, there was no ground on which the defendants could properly be enjoined from publishing any of the information which they intended and claimed to be entitled to publish. On this ground, the appeal was allowed and the cross-appeal dismissed.

Restraining publication by injunction

It was not necessary to decide whether, if the defendants had been threatening to publish part of the evidence, they could have been restrained by injunction from committing such a threatened contempt at the instance of the plaintiff and without the intervention of the Attorney General. It was, however, impossible to construe that rule 21(5) gave a cause of action for breach of statutory duty in respect of the unauthorised publication of information about the proceedings. Although the publication of such unauthorised information might in one sense be adverse to the patient's interest, it was incapable of causing him loss or injury of a kind for which the law awards damages.

Contempt of Court Act 1981

The strict liability rule under the Contempt of Court Act 1981 related to contempt of a different kind. The conclusion that the media may, so far as section 12 of the 1960 Act and the 1983 rules were concerned, report the fact that a tribunal application had been made, the date and place of hearing, and any order

made directing discha[illegible] was very far from asserting that they had unlimited freedom to comment on those circumstances. The plaintiff was understandably apprehensive that the media would use their freedom to mount another campaign of public protest against his release. It was impossible to determine in advance what kind of public comment on pending proceedings would create a substantial risk of the course of justice being seriously impeded or prejudiced. However, editors and publishers would be well advised to exercise great care not to overstep the mark in this regard. Although one would not expect tribunal members or medical witnesses to allow their judgment to be consciously influenced by the media, it by no means followed that a media campaign against the release of a patient would not create a substantial risk of serious prejudice to the course of justice. It could certainly be expected that a repetition of the kind of inflammatory matter which characterised some of the newspaper articles published in October and November 1988 would be calculated to do just that. *Lords Brandon of Oakbrook, Templeman, Lord Goff of Chieveley, and Lord Lowry agreed.*

FURTHER CONSIDERATION OF THE CASE

Where a tribunal makes a decision with recommendations or a provisional decision, the effect is that the proceedings have not been concluded in the sense that some further step will or may still be necessary.

TAKING FURTHER STEPS: MHRT RULES 1983, r.25

Further Consideration

25.—(1) Where the tribunal has made a provisional decision, any further decision in the proceedings may be made without a further hearing.

(2) Where the tribunal has made a decision with recommendations and, at the end of the period referred to in rule 24(4), it appears to the tribunal after making appropriate inquiries of the responsible authority that any such recommendation has not been complied with, the tribunal may reconvene the proceedings after giving 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 fixed for the hearing.

Decisions with recommendations

Where a tribunal makes a statutory recommendation under section 72(3) in respect of an unrestricted patient, the Act provides that it may further consider his case in the event that its recommendation is not being complied with.[34] The rules made under the Act give the tribunal a discretion to reconvene the proceedings in cases of non-compliance. Where, under section 72(3A), a tribunal recommends that consideration be given to making a supervision application in respect of an unrestricted

[34] These recommendations are that the patient be granted leave of absence or be transferred into guardianship or to another hospital.

patient, it may similarly reconsider his case if no such application is made, even though its recommendation has been complied with. The nature and limits of these powers, and whether a tribunal may discharge the patient at a reconvened hearing, have already been considered (**474, 495**).

Provisional decisions

Where a tribunal directs that a patient be conditionally discharged or, in the case of a patient subject to a restriction direction, recommends to the Secretary of State that a patient be discharged, its decision is final. However, its decision is provisional in the sense that whether or not it has effect is contingent upon future events, which may or may not come to pass. If it later becomes possible for the decision to take effect, rule 25.(1) allows for this by providing that any further decision in the proceedings may be made without a further hearing. It should be noted that the rules do not provide for reconvening the proceedings on proper notice (**539, 853**).

APPEAL BY WAY OF CASE STATED

Section 78 of the Mental Health Act 1983 provides that a tribunal may state a point of law for determination by the High Court and shall do so if required by the court. The procedure is governed by Order 56 of the Rules of the Supreme Court 1965 and the jurisdiction of the High Court is exercisable by a single Judge of the Queen's Bench Division. Judicial review (**857**) is an alternative procedure and the two are not combined.

CASE STATED PROCEDURE: MENTAL HEALTH ACT 1983, s.78

78.—(8) A Mental Health Review Tribunal may, and if so required by the High Court shall, state in the form of a special case for determination by the High Court any question of law which may arise before them.

THE REMEDY

The court will determine the question of law stated for its determination. If it is of the opinion that the decision of the tribunal on the question of law was erroneous, it may give any direction which the tribunal "ought to have given" under Part V of the Act.[35] Accordingly, in appropriate cases, the court may direct the patient's discharge.

REQUESTS TO STATE A CASE

The patient or other party writes to the clerk to the tribunal specifying the point of law upon which a determination is sought. The case must be signed by the president of the tribunal and served on the party at whose request the case was stated. The tribunal must give notice to every other party to the tribunal proceedings that the case has been served on the party named on the date specified in the notice.[36] For

[35] R.S.C. 1965, O.94, r.11(6). As drafted, the court may not give any recommendation under section 72(3) or 72(3A) which the tribunal could have given.

[36] RSC 1965, O.56, r.9(3).

these purposes, the parties are the patient, the responsible authority, any nearest relative applicant, and (in restricted cases or those commenced by discretionary reference) the Secretary of State.[37] The court proceedings must be begun by originating motion by the person on whom the case was served.[38] The applicant is required to serve notice of the motion, together with a copy of the case, on the clerk to the tribunal and every party as defined above.[39] That notice of motion must set out the applicant's contentions on the question of law raised.[40] The motion must be entered for hearing, and the notices served, within 14 days after the case stated was served on the applicant.[41] The motion shall not be heard sooner than seven days after service of the notice of motion unless the court otherwise directs.[42] The tribunal is entitled to appear and to be heard at the hearing determining the case[43] and it would appear that the president has a separate personal entitlement to this.[44]

APPLICATIONS TO REQUIRE A TRIBUNAL TO STATE A CASE

An application to the High Court for an order directing the tribunal to refer a question of law to the court by way of case stated must be made by originating motion.[45] Notice of motion must be served on the clerk to the tribunal and every party to the proceedings to which the application relates.[46] The notice must state the grounds of the application, the question of law on which it is sought to have the case stated, and any reasons given by the tribunal for its refusal to state a case.[47] No party may apply for such an order unless within 21 days after the tribunal's decision was communicated to him he made a written request to the tribunal to state a case and either the tribunal failed to comply with that request within 21 days or refused to comply with it.[48] The period for entering the originating motion, and for service of the notice of motion, is 14 days after receipt by the applicant of notice that his request has been refused or, if the tribunal simply failed to comply with the request

[37] RSC 1965, O. 94, r.11(2).

[38] RSC 1965, O.56, r.10(1). The form of a notice of originating motion prescribed by RSC 1965, O.1, r.9(1) is Form No. 13 in Appendix A to the Rules of the Supreme Court 1965. Although the contrary has occasionally been contended, it seems unlikely that the procedure constitutes civil proceedings for the purposes of section 139(2). It is the tribunal which is stating the case, not the patient. Furthermore, if application is made to require a tribunal to state a case, whether the point being raised has any possible merit can be determined at that stage. Section 139 would merely duplicate this procedural filter. In any case, determining a point of law concerning a tribunal's powers has nothing to do with individual liability, and involves no assertion of negligence or *mala fides*, and one could not readily accept that it is implied that the law may only be determined if there is evidence of negligence or bad faith. There seems to be no evidence in the case law that leave under section 139(2) has ever been considered to be a prerequisite.

[39] RSC 1965, O.56, r.10(2). The form of a notice of motion prescribed by RSC O.1, r.9(1) is Form No. 38 in Appendix A to the Rules of the Supreme Court 1965.

[40] RSC 1965, O.56, r.10(3).

[41] RSC 1965, O.56, r.10(4). The 14-day period may be extended by order of the court: RSC 1965, O.56, r.10(5). Applications for orders extending time may be made to any Judge or a Master of the Queen's Bench Division: O.56, r.13. If the applicant fails to enter the motion within the 14-day period, any other party may, within the following 14 days, bring proceedings for the determination of the case: RSC 1965, O.56, r.10(5).

[42] RSC 1965, O.56, r.10(7). The provisions of *Practice Directions* [1987] 1 W.L.R. 232 and [1991] 1 W.L.R. 280 which govern applications for expedited hearings apply in relation to all cases stated which are required to be entered in the Crown Office list.

[43] RSC 1965, O.94, r.11(5).

[44] RSC 1965, O.56, r.12.

[45] RSC 1965, O.56, r.8(1).

[46] RSC 1965, O.56, r.8(1).

[47] RSC 1965, O.56, r.8(2).

[48] RSC 1965, O.94, r.11(3).

within the 21 day period referred to, 14 days after the expiration of t... period.[49] If the court orders the president to state a case, the case must be signed by him and must be served on the party as a result of whose application to the court the case was stated.

TRIBUNAL STATING CASE WITHOUT ANY REQUEST

It would appear that a tribunal may state a case of its own motion, without any request being made to it by a party to the proceedings.[50] The case must be served on such party to the tribunal proceedings as the tribunal thinks appropriate and notice given to every other party that the case has been served on the named party on the date specified in the notice.[51] The proceedings must be begun by originating motion by the secretary to the tribunal.[52]

FORM OF THE CASE

The form of the case is simply a short statement of the point of law for determination. For example, the question of law stated in *Grant*[53] was whether a tribunal considering an application made by a restricted patient had the power to make a statutory recommendation for his transfer to another hospital under section 72(3) and to further consider his case in the event that its recommendation was not complied with. The court hearing a case may amend the case or order it to be returned to the tribunal for amendment, and may draw inferences of fact from the facts stated in the case.[54]

CASE STATED OR JUDICIAL REVIEW

In *Bone v. Mental Health Review Tribunal*, Nolan J. suggested that the judicial review procedure should be considered as an alternative to a case stated because it allowed a broader consideration of the issues and offered a much more comprehensive range of reliefs.[55] However, the case stated procedure continues to be used and has two particular benefits. Firstly, it avoids disputes as to the tribunal's finding on the facts and any need for affidavit evidence. Secondly, it ensures that a point of general importance is ruled upon. It is not uncommon for the court to decline to judicially review a tribunal's decision if the patient has since been discharged or is entitled to reapply to a tribunal. This is because the remedy sought (that the tribunal's decision be quashed or the patient's discharge be directed) is now academic.[56] Furthermore, the court may direct a patient's discharge under the case stated procedure and that is usually the only remedy of interest to him. If he is indeed entitled to apply for a further tribunal, certiorari carries no personal benefit.

49 RSC 1965, O.94, r.11(4).

50 Mental Health Act 1983, s.78(8); RSC 1965, O.56, r.9(2). Section 78(8) does not provide that a case may only be stated if requested by a party to the proceedings. It has also been contended that a tribunal may state a special case prior to determining an application or reference. This seems unlikely because an application to require a tribunal to state a case must be made within 21 days of the tribunal's *decision* being communicated to the party.

51 RSC 1965, O.56, r.9(3).

52 RSC 1965, O.56, r.10(1).

53 *Grant v. The Mental Health Review Tribunal for the Trent Region, The Times*, 26 April 1986.

54 RSC 1965, O.56, r.11.

55 *Bone v. Mental Health Review Tribunal* [1985] 3 All E.R. 330 at 334, *per* Nolan J.

56 A consequence of this is that there is no case law on a tribunal's powers in section 2 proceedings and very little guidance as to their powers in respect of other unrestricted patients.

JUDICIAL REVIEW

Judicial review is the means by which the High Court exercises a supervisory jurisdiction over inferior courts. It is a public law remedy, not an appeal against the tribunal's finding on the facts.[57] The court will only interfere if the tribunal's decision was defective because it acted unlawfully (it made a material error of law); irrationally (no reasonable tribunal could have made the decision); or improperly (the tribunal failed in its duty to act fairly).[58] The facts determined by the tribunal are rarely open to review and the court will not substitute its judgment or discretion for that of the tribunal. No application for judicial review based on the assertion that a tribunal or the Secretary of State acted irrationally, or abused a discretion vested in them under the 1983 Act, has been successful. Almost every successful application concerning that statute has involved a tribunal exceeding its jurisdiction (exercising a power which it did not have) or failing to give adequate and proper reasons for its decision.[59] The procedure is governed by Order 53 of the Rules of the Supreme Court 1965.

THE GROUNDS

It has been noted that the three grounds upon which judicial review may be granted are those of illegality, irrationality, and procedural impropriety.

Illegality

Any error of law that is material to a particular decision is susceptible to judicial review.[60] Judicial review may lie if a tribunal adjourns a patient's case for an excessive period; refuses to reconvene an adjourned hearing on being requested to do so by the patient; or postpones the date of an unrestricted patient's discharge for a period which either (i) exceeds that reasonably necessary to give effect to the arrangements which, once in place, entitled the patient to be discharged or (ii) is irreconcilable with the direction for his discharge.[61]

Irrationality and the exercise of discretion

The court will not substitute its judgment or discretion for that of the body under review and the facts determined by that body are rarely open to review.[62] The test is

57 Judicial review applies to any body of persons having legal authority derived from public law to determine questions affecting the rights of subjects whether that right is derived from statute or from the common law.

58 *Council of Civil Service Unions v. Minister for the Civil Service* [1985] A.C. 314, *per* Lord Diplock at 410.

59 *Bone v. Mental Health Review Tribunal* [1985] 3 All E.R. 330; *R v. Mental Health Review Tribunal, ex p Clatworthy* [1985] 3 All E.R. 699; *R v. Mental Health Review Tribunal, ex p Pickering* [1986] 1 All E.R. 99.

60 See *R. v. Greater Manchester Coroner, ex p. Tal* [1985] Q.B. 67 at 81.

61 See *e.g. R. v. Southampton Justices, ex p. Lebern* (1907) 71 J.P. 332.

62 If there was no evidence reasonably capable of supporting a conclusion, review is available under the "no evidence" rule laid down in *Edwards v. Bairstow*. "The facts — except where the claim that a decision was invalid on the ground that the statutory tribunal ... failed to comply with the procedure prescribed by the legislation under which it was acting or failed to observe the fundamental rules of natural justice or fairness — can seldom be a matter of relevant dispute on an application for judicial review, since the tribunal or authority's findings of fact, as distinguished from the legal consequences of the facts that they have found, are not open to review by the court in the exercise of its supervisory powers except on the principles laid down in *Edwards (Inspector of Taxes) v. Bairstow* [1956] 1 W.L.R. 1302]." *Per* Lord Diplock in *Reilly v. Mackman* [1983] 2 A.C. 237.

whether a tribunal directing themselves on the relevant law and acti[illegible] easonably could have made a particular decision.[63] A decision, such as a very prolonged postponement of discharge, which strays outside discretionary limits whilst remaining within the technical ambit of statute, will be amenable to review.[64] Although a positive finding of mental illness must be founded upon some medical evidence, a tribunal is not otherwise bound to follow medical advice or opinion.[65]

Procedural impropriety and unfairness

Judicial review is the appropriate remedy if there has been a breach of natural justice.[66] The twin pillars of natural justice are the rule against bias and the right to be heard (*audi alteram partem*). Instances of bias susceptible to judicial review include those where a decision-maker had a pecuniary or personal interest in the outcome[67] or there was there was prejudging.[68] If the applicant knew of the risk of bias at the hearing but made no objection, review may be refused.[69] Parliament is presumed not to have intended that a tribunal should be authorised to act in contravention of the *audi alteram partem* principle.[70] The patient must be given a fair opportunity of hearing the case for his detention and of presenting his case and have a reasonable opportunity for preparation.[71] The right to be heard may be violated if a person entitled to be heard did not receive notice of the date, time and place of hearing,[72] or he was not given full disclosure or proper notice of anything affecting the way in which his case was presented.[73] A tribunal would appear to have a discretion to proceed in the patient's absence, if he declines to attend, but their discretion must not be abused.[74] There is no rule that parties must be allowed to call every witness they wish to call.[75] As to breaches of the tribunal rules, it is a question of construction, to be decided by the court, whether a particular procedural provision is mandatory, so that its non-observance makes the subsequent decision a nullity, or merely directory, so that the statutory tribunal has a discretion not to comply with it if, in its opinion, exceptional circumstances justify departing from it.[76]

A discretionary remedy

The Divisional Court has not infrequently held that the issue raised by an application for judicial review has become academic because the patient has acquired a

63 *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 233, *per* Lord Greene M.R. **(347)**.
64 See *e.g. R v. Tottenham Justices ex p. Dwarkados Joshi* [1982] 1 W.L.R. 631.
65 *R. v. Royse* (1981) 3 Cr.App.R.(S.) 58.
66 *Rigby v. Woodward* [1957] 1 All E.R. 391.
67 *R v. Sussex Justices, ex p. McCarthy* [1924] 1 K.B. 256.
68 *R v. Halifax Justices, ex p. Robinson* (1912) 76 J.P. 233.
69 *R v. Nailsworth Licensing Justices, ex p. Bird* [1953] 1 W.L.R. 1046.
70 *O'Reilly v. Mackman and others* [1983] 2 A.C. 237.
71 See *R. v. Merseyside Mental Health Review Tribunal, ex p. P.K.*, CO/3519/96, 22 April 1997, Q.B.D., Keene J. **(812)**.
72 See *R. v. Oxford Regional Mental Health Review Tribunal, ex p. Secretary of State for the Home Department* [1988] 1 A.C. 120 **(544)**.
73 *R. v. Mental Health Review Tribunal, ex p. Clatworthy* [1985] 3 All E.R. 330 **(794, 805)**; *R. v. Leyland Justices, ex p. Hawthorn* [1979] Q.B. 283.
74 *R. v. Oxford Regional Mental Health Review, ex p. Mackman, The Times*, 2 June 1986, Q.B.D **(790)**.; *R v. Seisdon Justices, ex p. Dougan* [1982] 1 W.L.R. 1476. See also the unreported case of *ex p. S.B.R.* (1989).
75 R v. Grays Justices, ex p. Ward, The Times, 5 May 1982. See also *R. v. Mental Health Review Tribunal, ex p. C.*, unreported, 28 June 1989, C.A. **(823)**.
76 *O'Reilly v. Mackman and others* [1983] 2 A.C. 237.

further right to apply to a tribunal. The possibility also exists that this might be the effect of the Secretary of State referring the patient's case to a tribunal under section 67 or 71, at least if he undertakes not to later withdraw the reference. The discharge of the patient or agreement to a consent order may also serve to avoid any decision which would bind the party concerned and so restrict the practice complained of. The point was well illustrated in the unreported case of *ex p. E.* **(581)**. From the patient's point of view, judicial review has these serious weaknesses and the need often to show irrationality on the part of the decision-maker further limits its usefulness. The case stated procedure is therefore most often to be preferred. It was some time ago predicted by Richard Gordon QC that the refusal to grant relief on the basis that the remedy sought had been rendered academic by subsequent events might, if taken too far, result in judicial review being held by the European Court not to constitute an adequate safeguard for patients in certain circumstances. The recent decision of the European Commission of Human Rights in the case of *A.T. v. United Kingdom* is interesting in this context.[77] The Government contended that the applicant's complaints should not be admitted because Article 26 required him to first exhaust all domestic remedies and he had not applied for judicial review. The Commission rejected the argument because of the limited nature of judicial review based on grounds of irrationality or *Wednesbury* unreasonableness. Judicial review will no doubt continue to be granted to patients on rare occasions but, more often, its main value for restricted patients may simply be to ensure that all domestic remedies are first exhausted before an application is made to the European Court of Human Rights.

THE ORDERS

Any application for an order of certiorari, prohibition, or mandamus shall be made by way of an application for judicial review. An application for a declaration or an injunction may also be made by judicial review. The High Court may stay the tribunal's direction pending the outcome of the review.[78]

Certiorari

Certiorari is an order which brings up into the High Court a decision of a tribunal for it to be quashed. Where certiorari is granted, the court has power to remit the matter to the tribunal, with a direction to reconsider it and to reach a decision in accordance with the judgment given by the court. In *ex p. A.*, Roch L.J. said that the court could take note of the medical member's affidavit in deciding whether to remit the case for a fresh hearing or to remit with a direction to discharge.[79] There has, however, never been a reported case of judicial review resulting in a direction for the patient's discharge. Indeed, there appears to be no reported case of a patient's application for judicial review of a tribunal's decision ever having succeeded other than on the limited ground that adequate reasons were not given by the tribunal for refusing his application.

Prohibition

Prohibition is an order restraining a tribunal from acting outside its jurisdiction. It may be invoked before the tribunal has made any decision. It would appear to be of

77 *A.T. v. United Kingdom, LAG Bulletin*, January 1996, p.19.
78 RSC 1965, O.53, r.3(10)(a); *R. v. Wessex Mental Health Review Tribunal, ex p. Wiltshire County Council; Perkins v. Bath District Health Authority* (1989) 4 B.M.L.R. 145, C.A.
79 *R. v. Canons Park Mental Health Review Tribunal, ex p. A* [1994] 3 W.L.R. 630.

limited relevance to Mental Health Review Tribunals, except when th[illegible]ɔunal is dealing with an unauthorised application (**606**).

Mandamus

Mandamus is an order requiring a tribunal to carry out its judicial duty. For example, to compel it to hear an authorised application which it erroneously considers is unauthorised or to compel it to record its adjudication.

Declarations

There are isolated examples of the Divisional Court making a judicial declaration as to the powers and duties of tribunals or of those involved in such proceedings. For example, *ex p. Fox*[80] and what is usually referred to as the *Crozier case*.[81]

PROCEDURE

All applications must be filed in the Crown Office. The applicant must first apply ex parte for leave and must do so promptly and in any case within three months of the decision complained of. This is done by filing Form 86A, supported by an affidavit and the requisite fee. The leave application is normally dealt with initially by a single judge without a hearing, and a copy of the order made is sent to the applicant by the Crown Office. Where leave is granted, the substantive application is made by originating motion.[82] Within 14 days of the date on which leave was granted, the applicant must serve the notice of motion, Form 86A and affidavit on any other parties interested in the decision and enter the matter for hearing. This is done by lodging with the Crown Office an affidavit of service and a copy of the originating motion. The application will proceed to a substantive hearing unless it is withdrawn by the applicant; conceded by the tribunal beforehand; or subsequent events render the granting of any relief academic. Unless the court ordered that the proceedings be expedited, and abridged the time for filing any affidavit in reply, the tribunal has 56 days from the date of service of the motion on it within which to file an affidavit. The fact that it does not do so does not preclude it from contesting the application.

JUDICIAL REVIEW AND PART II

Tribunal decisions aside, judicial review has also been used to quash applications or renewals made under Part II of the Act (**869**).

80 *R. v. Ealing District Health Authority, ex p. Fox* [1993] 1 W.L.R. 373, *per* Otton J. (**415**).

81 *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**).

82 If leave is refused without a hearing, the applicant may renew his application by lodging in the Crown Office Form 86B (Notice of renewal) within ten days of being served with notice of the refusal.

[illegible]ABEAS CORPUS

The writ of habeas corpus *ad subjiciendum* (commonly known as habeas corpus) remains of the highest constitutional importance, for by it the liberty of the subject is vindicated and his release from any manner of unjustifiable detention is assured. It is a writ familiar to the common law at least as long ago as the thirteenth century, and its efficiency has been furthered by a number of statutes (the Habeas Corpus Acts of 1640, 1679 and 1816). It is a writ of right and granted *ex debito justitiae*, but not as of course and it may be refused where another remedy lies whereby the validity of the restraint can be effectively questioned.[83] The jurisdiction enables the court to demand an account of the restraint and, where unjustified or unlawful, to put an end to it by an order for release. The writ itself requires the production before the court of the person restrained and is directed to the person having custody of him. The only accepted occasion when an action lies against any Judge of the Supreme Court in respect of any act done by him in his judicial capacity is in the case of denial of a writ of habeas corpus under the Habeas Corpus Act 1679. Habeas corpus is declaratory in that it does not quash the impugned decision but it does result in an order for release. Applications for habeas corpus take precedence over all other court business.

THE BASIC PROCEDURE

The procedure concerning applications for a writ of habeas corpus is governed by Order 54 of the Rules of the Supreme Court 1965. The application is made ex parte to a judge in court[84] and must be supported by an affidavit by the person restrained showing that it is made at his instance and setting out the nature of the restraint.[85] Three copies of the affidavit are required for the use of the court, to be lodged, if possible, the day before the application.[86]

The classical procedure

The court may make an order forthwith for the writ to issue, in which case the court or judge shall give directions as to the court or judge before whom, and the date on which, the writ is returnable. However, this is only done if the facts and law are clear or there is a likelihood that delay may defeat justice. There must be served with the writ of habeas corpus (Form 89) a notice (Form 90) stating the court or judge before whom, and the date on which, the person restrained is to be brought, and that in default of obedience proceedings for committal of the party disobeying will be

83 The term "*ex debito justitiae*" refers to that which an applicant is entitled to as of right — the court may only properly refuse relief on the grounds that there is no legal basis for the application and habeas corpus may never be refused on discretionary grounds such as inconvenience. A writ of right is a writ obtainable as a matter of right, as contrasted with a prerogative writ, granted in the exercise of the royal prerogative as a matter of discretion only. "Not as of course" means that the writ cannot be had for the asking upon payment of a court fee, but will only be issued where there appear to be proper grounds. There is a long established practice of having a preliminary hearing to determine whether there is sufficient merit in the application to warrant bringing in the other parties. See R.J. Sharpe, *The Law of Habeas Corpus* (Clarendon Press, 2nd. ed., 1989), p.58.

84 It may be made to a judge otherwise than in court at any time when no judge is sitting in court.

85 Where the person restrained is unable for any reason to make the affidavit, the affidavit may be made by some other person on his behalf and that affidavit must state that the person restrained is unable to make the affidavit himself and for what reason.

86 Affidavits must be supplied to other parties on demand.

taken. The return to a writ of habeas corpus must be indorsed on or an[illegible]ed to the writ and must state all the causes of the detainer of the person concerned.[87] The court has power to examine by affidavit evidence the truth of the facts alleged in the return. At the hearing of the writ, the return to the writ is first read. Motion is then made for discharging or remanding the person restrained, or amending or quashing the return. The patient's counsel is heard first, then any counsel for the Crown, and then one counsel for the person restrained in reply. If the return discloses a lawful cause, the detainee is remanded; if the return is insufficient or unlawful, he is released.

The adjournment procedure

In most cases, if the court is satisfied that there is an arguable case for the writ, the matter is adjourned for notice to be served on such persons as the court directs (using Form 88).[88] Upon the adjourned hearing, the respondent produces the alleged justification for the restraint by affidavit and full argument from all sides is presented. The procedure avoids having to deal with formal returns. If the application succeeds, the writ may be ordered to issue, in which case its function here is limited to having the patient brought up and formally released. More often, the court hearing the application simply orders that the person restrained be released and such order is sufficient warrant to any person for the release of the person under restraint. In this case, the writ is not formally issued; the Master of the Crown Office writes directing his discharge.

Further applications for habeas corpus

Where an application for habeas corpus has been made, no further application may be made on the same grounds in respect of the same person unless fresh evidence is adduced in support of the application.[89]

Appeals in civil cases

Appeal lies to the Court of Appeal (Civil Division) and is by way of rehearing. Leave is not required. An appeal lies both against an order for the release of the person restrained as well as against refusal of such an order.[90] However, the lodging of an appeal does not affect the right of the person restrained to be discharged in pursuance of the order under appeal and to remain at large regardless of the decision on appeal.

87 By analogy, it is doubtful that a return which simply states that the patient is being detained under section 3 of the Mental Health Act 1983 is sufficient: see *R. v. Secretary of State for the Home Department, ex p. Iqbal* [1978] Q.B. 264.

88 Where an application is made to a judge in court, he may alternatively direct that an application be made by originating motion to a Divisional Court, in which notice of the motion (Form 87) must be served on the person against whom the issue of the writ is sought and on such other persons as the court or judge may direct. Unless otherwise directed, there must then be at least eight clear days between the service of the notice and the date named therein for the hearing of the application. Where no judge is sitting in court and an application is made to a judge outside court, that judge may similarly direct that an application be made by originating motion to a Divisional Court, or he may direct that an originating summons for the writ be issued. Either way, the same provisions as to service and the number of clear days required after service apply.

89 Administration of Justice Act 1960, s.14(2).

90 *Ibid.*, s.15(1).

Criminal causes

With two exceptions, if the applicant is detained in pursuance of an order or direction made under Part III of the 1983 Act, the application for habeas corpus is deemed to constitute a criminal cause or matter.[91] This means that an order for his release may only be refused by a Divisional Court, whether application is made in the first instance to such a court or to a single judge. However, it also means (1) that a patient may only appeal against any refusal of habeas corpus by a Divisional Court to the House of Lords, and this requires the leave of either court; and (2) if the prosecutor is granted leave to appeal, or gives notice that he intends to apply for leave, the court may order that the patient shall not be released pending appeal, or only on bail.

Civil cause or matter	*Criminal cause or matter*
• Patients detained under Part II of the Act • Patients subject to guardianship under s.7 or 37. • Patients detained under s.48(2)(c) or (d) [civil prisoners and persons detained under the Immigration Act 1971]	• Patients detained in pursuance of an order or direction made under Part III of the Act, otherwise than under s.48(2)(c) or (d)

Further applications under Part II of the Act

It has been held that it is possible to supply a new and better cause for the detention as the court commences the hearing.[92] Sharpe concludes that it would seem that as long as material proffered tends to show present justification, it will be accepted by the court at any stage of the proceedings.[93]

The need for representation or a next friend

In *Pharaoh*, a patient detained under section 3 submitted an application for habeas corpus challenging the psychiatric diagnosis. The Health Authority declined to produce him for the purpose of the hearing unless directed to do so by the court. The court refused to order his production but invited the Official Solicitor to produce a report which disclosed that in 1985 the patient had been made subject to an order of the Court of Protection. In refusing his application, Schiemann J. expressed himself satisfied that the patient was lawfully detained, but in any event the patient was not entitled to apply for habeas corpus because (i) he was a patient of the Court of Protection and thus, by operation of Ord.80, r.2, he could only bring proceedings by his next friend and (ii) he was not represented by counsel.[94] It is submitted that Sharpe gives the correct position:[95]

91 Administration of Justice Act 1960, s.14(3).

92 *Anon* (1673) 1 Mod. 103.

93 R.J. Sharpe, *The Law of Habeas Corpus* (Clarendon Press, 2nd ed., 1989), p.182. See *R. v. Secretary of State for the Home Department, ex p. Iqbal* [1978] Q.B. 264; *R. v. Governor of Durham Prison, ex p. Hardial Singh* [1984] 1 W.L.R. 704. Section 15 of the 1983 Act also allows for the rectification of incorrect or defective applications during the fortnight following admission.

94 *Re Pharaoh*, CO/1279/87 (unreported). See *The Supreme Court Practice 1995* (Sweet & Maxwell, 1995), vol. 1, p.878. Litigants may with sufficient reason be allowed to apply in person.

95 R.J. Sharpe, *The Law of Habeas Corpus* (Clarendon Press, 2nd ed., 1989), p.221.

> "Any person restrained may apply for the writ. There are no restrictions [illegible] on lack of capacity to sue. The technical reason for this is the prerogative nature of the writ. This was explained in a Canadian case where it was objected that a minor could not bring proceedings: 'As the writ issues in the King's name, the status of the petitioner is immaterial, and his detention may be inquired into even if legal disabilities would prevent his taking an action for the enforcement of civil rights.'"

Medical evidence of the patient's condition

In *Pharaoh*, the Official Solicitor was invited to prepare a report and there is a history of obtaining medical evidence in cases involving detained patients. In *R. v. Turlington*, where it was alleged that the applicant was improperly held in a madhouse, Lord Mansfield said that, "The court thought it fit to have previous inspection of her, by proper persons, physicians and relations; and then to proceed, as the truth should come out upon such inspection."[96]

Whether the patient would be dangerous if released

There is no agreement about whether the likelihood of the patient acting in a dangerous manner if released is a factor which entitles the court to refuse habeas corpus and, if so, on what basis, since it is not a discretionary remedy. The two competing arguments are, *firstly*, that it must be shown that the detention was improper *and* that the applicant is not dangerous and, *secondly*, that the principle that no one can be deprived of his liberty except by due process of law must be vindicated. The often repeated authority for the first view is *Re Shuttleworth*, where Lord Denman C.J. said:[97]

> "If the Court thought that a party, unlawfully received or detained, was a lunatic, we should still be betraying the common duties of members of society if we directed a discharge. But we have no power to set aside the order, only to discharge. And should we, as Judges or individuals, be justified in setting such a party at large? It is answered that there may be a fresh custody. But why so? Is it not better, if she be dangerous, that she should remain in custody till the Great Seal or the commissioners act? Therefore, being satisfied in my own mind that there would be danger in setting her at large, I am bound by the most general principles to abstain from so doing; and I should be abusing the name of liberty if I were to take off a restraint for which those who are most interested in the party ought to be the most thankful."

Because habeas corpus is not a discretionary remedy, the only way in which the two positions can be reconciled is by reference to the common law. This is because the existence of some vitiating defect in the statutory procedure for detaining the patient will not entitle him to be discharged if his detention or restraint is not unlawful because it justified for the moment at common law. Thus, in *Re Shuttleworth*, Erle J. said that, "The prohibition is that no one shall be received or detained in a licensed house as a lunatic, without an order and certificates. It is not a general prohibition against confining lunatics. That is left as at common law." In *Re Greenwood*, Coleridge J. concluded that the proper statutory requirements had not been complied with and, after considering *Re Shuttleworth* (to which he had been a party), said:[98]

96 *R. v. Turlington* (1761) 2 Burr. 1115.
97 *Re Shuttleworth* (1846) 9 Q.B. 651 at 662.
98 *R. v. Pinder, re Greenwood* (1855) 24 L.J.Q.B. 148 at 152. **(263)**.

> "I was reminded of what had fallen from the Court on several occasions when defects of a formal nature in orders or certificates have been urged as the ground for discharging lunatics; ... in such cases when, on the affidavits, it appears clear that the party confined is in such a state of mind that to set him at large would be dangerous either to the public or himself, it becomes a duty and is within the common law jurisdiction of the Court ... to restrain him from his liberty, until the regular and ordinary [statutory] means can be resorted to of placing him under permanent restraint."

Having found that the patient was not dangerous, Coleridge J. ordered his discharge under habeas corpus on the ground that, "If ... his present custody is illegal, I must determine it; and the power which I possess for the public safety of the individual must not be strained to continue his confinement." Having regard to these cases, there are two situations in which the common law recognises as lawful actions in relation to patients which, in the case of fully competent adult, would be tortious as constituting false imprisonment or trespass to the person: (1) it is lawful at common law to restrain, and if need be detain, a "furious" or "dangerous" lunatic whose state of mind is such that he is a standing danger to himself and others[99]; (2) it is lawful to administer to a patient who "lacks the capacity to give or to communicate consent to that treatment whatever treatment,"[100] judged by the Bolam test,[101] is in the best interests of the patient as being "necessary to preserve the life, health or well being of the patient" or "to ensure improvement or prevent deterioration in his physical or mental health."[102] The position appears to be therefore that (1) habeas corpus is not a discretionary remedy and always lies if a patient's detention is unlawful; but (2) the fact that there is no statutory authority for his detention does not invariably mean that his detention is unlawful. His restraint is within the law for that short period necessary for the proper statutory procedures to be effected.[103]

WHEN HABEAS CORPUS MAY BE GRANTED

The leading recent case is *Re S-C (Mental health patient: habeas corpus)*.[104] This restored habeas corpus to its proper constitutional place after the decision in *R. v. South Western Hospital Managers, ex p. M.*[105] It has the weight of having been delivered by Sir Thomas Bingham M.R., whose judgments in mental health cases are highly esteemed, and rank equivalent to those of Coleridge J. in the nineteenth century. Where the prescribed statutory procedures are not followed, there are grounds for habeas corpus: *R. v. Pinder, re Greenwood* (1855) 24 L.J.Q.B. 148; *R. v. Board of Control, East Ham Corporation and Mordey, ex p. Winterflood* [1938] 2 KB 366, C.A.; *Re Dell* (1891) 91 L.T.O.S. 375; *R. v. Rampton Board of Control, ex p. Barker* [1957] Crim L.R. 403. Where the statute has been misconstrued, there are similarly grounds: *Re Steneult* (1894) 29 L.Jo. 345; *Re Wilkinson* (1919) 83 J.P. Jo. 422; R. v. *Board of Control and Others, ex p. Rutty [1956] 2 Q.B. 109.*[106]

99 *Brookshaw v. Hopkins* (1772) Lofft. 240 at 243; *Anderton v. Burrows* (1830) 4 Car. & P. 210 at 213; *R. v. Pinder, re Greenwood* (1855) 24 L.J.Q.B. 148; *Fletcher v. Fletcher* (1859) 1 El. & El. 420; *Scott v. Wakem* (1862) 3 F. & F. 328 at 333; *Symm v. Fraser* (1863) 3 F. & F. 859 at 882–883; *Re Shuttleworth* (1846) 9 Q.B. 651; *Re Gregory* (1901) A.C. 128; *Black v. Forsey and others*, 1987 S.L.T. 681.
100 *Re F* [1989] 2 W.L.R. 1025 at 1054E and 1065E.
101 *Bolam v. Friern Hospital Management Committee* [1957] 1 W.L.R. 582.
102 *Re F* [1989] 2 W.L.R. 1025.
103 The issue arose in the case of *ex p. Ede*, which was not heard because the remedy sought became academic, but which enabled the author to receive advice from James Munby Q.C.
104 *Re S-C (Mental health patient: habeas corpus)* [1996] 1 All E.R. 532, C.A.
105 *R. v. South Western Hospital Managers, ex p. M* [1993] Q.B. 683 **(597)**.
106 *R. v. Board of Control and Others, ex p. Rutty* [1956] 2 Q.B. 109.

Re S-C (Mental patient: Habeas corpus)

[1996] 1 All E.R. 532 *C.A. (Sir Thomas Bingham, M.R.; Neill and Hirst L.JJ.)*

On July 10, 1995 the patient was admitted to Victoria Hospital under section 3 following an application made by an approved social worker employed by Lancashire County Council. At that time the patient's nearest relative was his father. The applicant knew that and also that the patient's father objected to the application being made. Nevertheless, she stated on the application form that she had consulted the patient's mother who, to the best of her knowledge and belief, was his nearest relative and who had not objected to the application being made. Following admission, the patient was transferred to a different hospital for which Warrington Community Health Care was responsible, then transferred back to the Victoria and later placed on home leave. The patient applied for the issue of a writ of habeas corpus and his application was dismissed by Turner J. He appealed.

The grounds of the application

The patient's argument was that: (1) the nearest relative objected to the patient's admission and detention; (2) no order was made overriding the nearest relative's right to object; (3) the application was made despite the prohibition in section 11(4); (4) it was accordingly not in pursuance of an application made in accordance with section 3; (5) there was therefore no authority to detain the patient; and (6) since the patient sought to show an absence of jurisdiction, not to overturn an administrative decision, habeas corpus was an appropriate remedy. Counsel for the local authority acknowledged that the patient's detention was unlawful but questioned the appropriateness of habeas corpus, inviting the court to proceed by way of judicial review.

Sir Thomas Bingham, M.R.

No adult citizen was liable to be confined in any institution against his will save by the authority of law. The law sanctioned detention in various situations, such as in the cases of those suspected or convicted of crime and of those who were unlawful immigrants. In each situation, the powers to arrest and detain were closely prescribed, by statute and the common law in the first case and by primary and subordinate legislation in the second. Mental patients presented a special problem since they might be liable, as a result of mental illness, to cause injury to themselves or others, but the very illness which was the source of the danger might deprive the sufferer of the insight to ensure access to proper medical care. The 1983 Act contained a panoply of statutory powers combined with detailed safeguards for their protection. In particular,

- section 11(4) provided that that no application under section 3 was to be made by an approved social worker except after consultation with the person appearing to be the nearest relative, nor if the nearest relative had notified that social worker, or the relevant local social services authority, that he objected to the application being made;
- section 6(1) and (2) provided that an application duly completed in accordance with the Act was sufficient authority for the patient to be conveyed to the hospital and the hospital managers to detain him; *and*
- section 6(3) provided that any application which appeared to be duly made and to be founded on the necessary medical recommendations might be acted on without further proof of the matters contained in the application.

Section 6 plainly protecte‿e hospital. It was not obliged to act like a private detective but could take the documents at face value. Provided they appeared to conform with the statutory requirements, the hospital was entitled to act on them.

Notwithstanding that fact, the approved social worker knew that the patient's nearest relative was his father, that he objected to the application, that the mother therefore was not the nearest relative and accordingly did not have such rights. Any delegation of the father's role under the 1983 Regulations was required to be in writing and the approved social worker knew that there was no written document by the father authorising the mother to act in his place or delegating his role to her. The approved social worker's statement on the application form was accordingly entirely false.

Whether habeas corpus appropriate

In *R. v. Secretary of State for the Home Department, ex p. Muboyayi* [1992] Q.B. 244, 254, 267–268), the applicant's challenge had lain to an underlying administrative decision to deport him, not to the jurisdiction to detain under the Immigration Act 1971. In the present case, there was no attempt to overturn any administrative decision, the object simply being to show that there never had been jurisdiction to detain the patient in the first place. That was a which, on agreed evidence, appeared to be plainly made out. In principle, an application for habeas corpus was appropriate.

Whether patient's detention was unlawful

In *R. v. Managers of South Western Hospital, ex p. M [1993] Q.B. 683*, Laws J., having found that the requirements of section 11(4) had not been followed and having held that the hospital managers had been entitled to act on the application by virtue of section 6(3), concluded that the detention was not unlawful. That conclusion was a *non sequitur*. It was perfectly possible that the hospital managers were entitled to act on an apparently valid application, but that the detention was in fact unlawful. Otherwise the implications would be horrifying. It would mean that an application which appeared to be in order would render the detention of a citizen lawful even though it had been shown or admitted that the approved social worker purporting to make the application was not so, that the registered medical practitioners, whose recommendations had founded the application, were not so and had not signed the recommendations, that the approved social worker had not consulted the nearest relative, or had done so and that that relative had objected. In other words, it would mean that the detention was lawful even though every statutory safeguard built into the procedure was shown to have been ignored or violated. Bearing in mind what was at stake that conclusion was wholly unacceptable. On present facts an application for habeas corpus was an, and possibly even the, appropriate course to pursue.

Since the trust responsible for the hospital were not before the court the matter would be adjourned to enable them to show cause why the patient should not be released from their control. *Lord Justice Neill delivered a concurring judgment and Lord Justice Hirst agreed with both judgments.*

On the adjourned hearing, eight days later, at which there were no appearances, the court made no order, having been informed by the managers of the hospital that they had read the court's judgment and had released the patient.

Whether the face of the Part II application must be defective

It was previously sometimes said that habeas corpus is limited to reviewing whether an application or renewal made under Part II of the Act is good on its face.[107] *Re S-C* makes it clear that habeas corpus provides an appropriate remedy if there is good evidence that mandatory requirements of Part II have not been complied with.[108] This is also the classical position. For example, in *Goldswain's Case*, the court "declared that they could not wilfully shut their eyes against such facts as appeared on the affidavits, but which were not noticed upon the return."[109]

Affidavit evidence to show want of jurisdiction

Section 3 of the Habeas Corpus Act 1816 provides that, criminal cases aside, the judge is empowered to inquire into the truth of the facts set forth in the return: "In all cases provided for by this Act, although the return to any writ of habeas corpus shall be good and sufficient in law, it shall be lawful for the justice or baron, before whom such writ may be returnable, to proceed to examine the truth of the facts set forth in such return by affidavit or by affirmation." As to this, Sharpe states that the intended effect was probably to encompass all situations in which the detention did not rest on a judicial determination or order.[110] In *ex p. Rutty*, the court held that it could receive affidavit evidence to enable it to decide whether there had been any evidence before the judicial authority which would justify his finding. It therefore examined the return in the light of the affidavits, in order to ascertain whether, on a proper construction of the Act, there was any evidence on which the judicial authority could properly, that is as a matter of law, find that she was a person who could be made the subject of the order. It was not enough that the judicial authority should rely on the necessary two medical certificates to give him jurisdiction.[111]

The burden of proof

One "of the pillars of liberty is that in English law every imprisonment is *prima facie* unlawful and that it is for the person directing the imprisonment to justify his act."[112] Where a person's detention has not been judicially authorised, the leading

107 *See R. v. South Western Hospital Managers, ex p. M* [1993] Q.B. 683.

108 According to *ex p. Choudhary*, where the order for detention is completely in order, it is *prima facie* good. The burden is then on the applicant for habeas corpus to challenge its validity and to show that he is being unlawfully detained: *R. v. Secretary of State for the Home Department, ex p. Choudhary* [1978] 1 W.L.R. 1177, C.A. Similarly, in *ex p. Hassan*, it was said that if the return to the writ on its face shows a valid authority for the detention, it is for the applicant to show that the detention is *prima facie* illegal: *R. v. Governor of Risley Remand Centre, ex p. Hassan* [1976] 1 W.L.R. 971.

109 *Goldswain's Case* (1778) 2 Wm. Bl. 1207 at 1211. The fact that a return is not now usually required does not affect the basic principle. The law's first duty is to release subjects from unlawful detention, not to justify unlawful detention by adopting a posture of wilful blindness.

110 According to Lord Scarman in *Khawaja v. Secretary of State for the Home Department* [1984] A.C. 74, section 3 marks "the beginning of the modern jurisprudence the effect of which is to displace, unless Parliament by plain words otherwise provides, the Wednesbury principle in cases where liberty is infringed by an act of the executive." If so, habeas corpus might provide an alternative to judicial review as a means of challenging decisions under the 1983 Act by the Secretary of State. In *ex p. Rutty*, Lord Goddard C.J. attributed to the 1816 Act the power to inquire into a particular fact in that case. However, Sharpe states that, "the courts have never really been prevented by the common law rule from reviewing facts essential to the jurisdiction or authority underlying the order for detention." See R.J. Sharpe, *The Law of Habeas Corpus* (Clarendon Press, 2nd ed., 1989), p.70.

111 *R. v. Board of Control and Others, ex p. Rutty [1956] 2 Q.B. 109.*

112 *Liversidge v. Anderson* [1942] A.C. 206, *per* Lord Atkin at 245 (dissenting).

case on the burden of proof is *ex p. Ahsan*. The crucial issue in that case was whether the prisoner had been examined within twenty-four hours of his arrival in England. It was only in that circumstance that the statute authorised the detention order. It was held that the legal burden was cast upon the party called upon to justify the imprisonment. Since the burden rested with the authorities, and as it could not decide the question of fact one way or the other, the issue had to be decided in the prisoner's favour.[113] Where proceedings are taken to challenge the legality of imprisonment, whether by way of habeas corpus or judicial review, the rules derived from habeas corpus are to be applied. Hence the scope of review of the factual inquiry and the burden of proof will be applied consistently according to a common principle. Whatever the formal nature of the proceedings, the burden will be on the party seeking to uphold the detention.[114]

Habeas corpus and guardianship

Sharpe notes that a person's liberty may be curtailed, yet not completely taken away[115] and the distinction is of particular importance as regards patients who are on leave or subject to guardianship, after-care under supervision, or conditional discharge. As to whether habeas corpus is available to patients who are unlawfully restrained, rather than illegally detained, the remedy was granted in *ex p. Rutty*. This was so notwithstanding that the patient had for some time been living with her family on residential licence: she was not to be let out of the house alone and was to be returned to the institution on written request by the medical superintendent. The remedy was also granted in *Re S-C*, where the patient had leave to be absent from hospital. Other possible remedies in such cases are judicial review **(857)** and obtaining relief from a mental health review tribunal **(574)**.

Habeas corpus or judicial review

In *Re S-C (Mental health patient: habeas corpus)*,[116] Sir Thomas Bingham MR held that habeas corpus is an appropriate remedy in cases where the statutory preconditions for detention under Part II do not exist. Such an application does not involve attempting to overturn any administrative decision, the object simply being to show that there never had been any jurisdiction to detain the patient in the first place. The essence is the absence of some essential fact upon which the validity of the detention depends, rather than the exercise of an administrative decision, such as an irrational exercise of discretion.[117] A "writ of habeas corpus will issue where someone is detained without any authority or the purported authority is beyond the powers of the person authorising the detention and so is unlawful. The remedy of judicial review is available where the decision or action sought to be impugned is within the powers of the person taking it but, due to procedural error, a misappreciation of the law, a failure to take account of relevant matters, or taking account of irrelevant matters or the fundamental unreasonableness of the decision or action, it should never have been taken."[118]

113 *R. v. Governor of Brixton Prison, ex p. Ahsan* [1969] 2 Q.B. 222. See R.J. Sharpe, *The Law of Habeas Corpus* (Clarendon Press, 2nd ed., 1989), pp.86–87.

114 *Khawaja v. Secretary of State for the Home Department* [1984] A.C. 74. See R.J. Sharpe, *The Law of Habeas Corpus, supra*, p.90.

115 See R.J. Sharpe, *The Law of Habeas Corpus, supra*, p. 163.

116 *Re S-C (Mental health patient: habeas corpus)* 1 All E.R. 532, C.A.

117 *R. v. Secretary of State for the Home Department, ex p. Khawaja* [1984] A.C. 74.

118 *R. v. Home Secretary, ex p. Cheblak* [1991] 1 W.L.R. 890, *per* Lord Donaldson M.R. at 894.

THE EUROPEAN CONVENTION ON HUMAN R[illegible]HTS

The European Convention on Human Rights and Fundamental Freedoms may provide a remedy where all effective national remedies have been exhausted. The convention has not been incorporated into English law by Act of Parliament, although the present Government has stated its intention to do so. There is a judicial presumption that Parliament intends the United Kingdom to fulfil its international treaty obligations. When interpreting ambiguities in the Mental Health Act 1983, the English and Welsh courts may use the Convention as an aid to judicial interpretation. However, there must first be an ambiguity and *ex p. Brind* is authority for the proposition that, where an English statute is plain and unambiguous, it is not open to the courts to look to the Convention for assistance in its interpretation.[119]

European Convention of Human Rights

Article 3 — 3. No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 5 — 5(1). Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law;

(a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

(e) the lawful detention .. of persons of unsound mind, alcoholics or drug addicts or vagrants;

5(2). Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

5(4). Everyone who is deprived of his liberty by .. detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if his detention is not lawful.

Article 6 — 6(1). In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

6(2). Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

Article 8 — 8(1). Everyone has the right to respect for his private and family life, his home and his correspondence.

[119] *R. v. Secretary of State for the Home Department, ex p. Brind* [1990] 1 All E.R. 469.

2. There shall be n[illegible] interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of .. public safety .., for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others

Article 13 — Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

PROCEDURE

Provided that all effective domestic remedies have been exhausted, the patient may apply to the European Commission of Human Rights for it to hear a petition against the United Kingdom, based on an alleged breach of one or more of the articles set out in the Convention. The application must be made within six months of the final decision made by the domestic courts on the issue in dispute. The Commission will consider whether the complaint is admissible, which requires establishing a *prima facie* case that a right protected by the Convention has been violated. At this stage, some complaints will be dismissed as "manifestly ill-founded" and, indeed, the vast majority do not proceed any further. If the complaint is declared admissible, the Commission will ascertain the facts by examination of the oral and written pleadings of the parties. It will then try to broker a friendly settlement between them. This may involve the payment of compensation and an undertaking to amend domestic legislation. If a friendly settlement cannot be reached, the Commission sends a report to the Committee of Ministers, containing its opinion on the alleged breaches of the Convention. Within three months of that report's submission, the case may be referred by the Commission, or by the United Kingdom itself, to the European Court of Human Rights. The court is concerned with the application and interpretation of the Convention. Its procedure is governed by rules and the patient may be separately represented before it. The court's decision is final and compensation may be ordered if the patient can prove pecuniary loss. Where a case is not referred to the court within the three-month period, it is decided by the Committee of Ministers. The Commission's report is considered by the committee *in camera* and the individual can neither attend nor be represented. In contrast, the Government representative on the Committee of Ministers may comment on the report and cast a vote. The Government gave an undertaking when signing the convention that it will comply with judgments of the European Court of Human Rights and decisions of the Committee of Ministers.

Legal aid

A legal aid scheme ("Legal Fund") is administered by the Secretariat of the European Commission in respect of cases brought before the Commission. Legal aid is automatically extended to cover proceedings before the European Court.

CASE LAW

Space precludes any detailed consideration of the decisions of the European Court of Human Rights. However, cases involving psychiatric patients which have been determined by the court are briefly summarised in the following table.

JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS

Case No.	*Judgment Date*	*Case Name*	*Issue*	*Art.*	*Whether violated*
93	28.5.85	Ashingdane v. UK	Continued confinement in secure rather than ordinary hospital	5.1e	No
				5.4	No
				6.1	No
244	24.9.92	Herczegfalvy v. Austria	Detention and psychiatric treatment of a person of unsound mind	5.1	No
				5.3	No
				5.4	Yes
				3	No
				8	No
				10	Yes
185C	25.10.90	Keus v. Netherlands	Extension of psychiatric confinement after hearing held in absentia (patient absent without leave)	5.2	No
				5.4	No
185B	25.10.90	Koendjbiharie v. Netherlands	Extension of psychiatric confinement decided more than 4 months after lodging of relevant application	5.4	Yes
75	23.2.84	Luberti v. Italy	Lawfulness of psychiatric confinement — speed of determination (18 months, 10 days)	5.1	No
				5.4	Yes
237A	12.5.92	Megyeri v. Germany	Failure to appoint lawyer to assist patient in proceedings concerning his possible release from detention.	5.4	Yes
144	28.11.88	Nielsen v. Denmark	Hospitalisation for 25 weeks of 12-year old child in psychiatric ward by virtue of decision of mother, sole holder of parental rights	27.2	Yes — technical point
170	21.2.90	Van der Leer v. Netherlands	Confinement in a psychiatric hospital authorised without hearing or informing the person concerned	5.1	Yes
				5.2	Yes
				5.4	Yes
185A	27.9.90	Wassink v. Netherlands	Confinement in psychiatric ward ordered after questioning of persons by telephone and following a hearing held without a registrar	5.1	Yes
				5.4	No
				5.5	No
33	24.10.79	Winterwerp v. Netherlands	Psychiatric detention procedures; no means to challenge detention.	5.1	No
				5.4	Yes
				6.1	Yes
46	5.11.81	X v. United Kingdom	Review procedures involving psychiatric detention	5.1	No
				5.4	Yes
Commission	—18.5.95	Johnson v. United Kingdom	Legality of power to defer discharge under s.73(7)	5.1e	Admiss.
				5.4	Admiss.

Source: Gomien, Judgments of the European Court of Human Rights, Human Rights Information Centre, Council of Europe Press, 1995.

The authorised representative