Example 2

If the hospital order in the previous example was imposed by a Crown Court and quashed by the Court of Appeal on 15 December, the period for which the patient was subject to it, and during which he is deemed to have been continuously in custody, extends from 30 May until 15 December and so exceeds six months. Section 40(5) therefore does not save the pre-existing guardianship application because it has lapsed by virtue of section 22(1).

Effect of a successful appeal on tribunal proceedings

Where a previous application, order or direction is reactivated as a result of a successful appeal against a hospital order or a guardianship order, the effect of 40(5) is that any tribunal application or reference which was outstanding on the date the quashed order was imposed, but which was deemed withdrawn, is also reactivated. Secondly, upon the revival of the earlier authority, the hospital's managers may be required to forthwith refer the patient's case to a tribunal under section 68.

Cessation due to removal outside the jurisdiction

Where a patient who is detained or subject to guardianship in England and Wales is removed to Scotland, Northern Ireland, the Channel Islands or the Isle of Man under Part VI of the Act, the application, order or direction under which he was previously liable to be detained or subject to guardianship in England and Wales — including any restriction order or direction — ceases to have effect.[267]

Removal to countries outside the UK, Channel Islands or Isle of Man

An application, order or direction — other than a restriction order or direction — ceases to have effect upon a patient's removal to a hospital or other institution in a country outside the United Kingdom, Channel Islands or Isle of Man in pursuance of arrangements made under section 86.[268]

[267] Mental Health Act 1983, s.91(1).
[268] *Ibid.*, s.91(2).

5. Orders and directions under Part III

INTRODUCTION

Part III of the Mental Health Act 1983 comprises provisions dealing with "patients concerned in criminal proceedings or under sentence." In some cases, admission to hospital under Part III gives rise to a right of application to a tribunal. Criminal proceedings involving persons suffering from mental disorder may be viewed as comprising six distinct stages: (a) the commission of an alleged offence; (b) arrest, detention and charge; (c) pre-trial procedures, including remands, jurisdiction, mode of trial, and committals; (d) the trial process, including a defendant's fitness to plead and to stand trial; (e) sentencing and disposal; (f) the post-sentencing stage. Special legal provisions apply at each stage but Part III is mainly concerned with the formalities relating to the admission and detention of persons during or following criminal proceedings.[1]

ORDERS AND DIRECTIONS UNDER PART III

The table on page 311 summarises the orders and directions which may be made under Part III, their purpose, and the ways in which a person may challenge his detention under the Act. Persons admitted to hospital under sections 35, 36 and 38 are in a fundamentally different position from persons admitted under the other orders and directions.[2] The Part II provisions concerning the duration, discharge and renewal of the authority for a patient's detention, and related matters such as leave and transfer, do not apply to them. The termination of a patient's detention under sections 35, 36 or 38 is a matter for the court with jurisdiction to deal with him.

Remands and orders under sections 35, 36 and 38

Sections 35 and 36 provide that a criminal court may remand an accused person to hospital during the course of criminal proceedings, for the preparation of a report on his mental condition or for treatment. Section 38 further provides that, before sentencing an offender, the court may direct his admission to hospital in order to assist it in determining the most appropriate way of disposing of the case. In each instance, the admission is directed by the court having jurisdiction to deal with a

[1] *Important Note*: The Crime (Sentences) Act 1997 received the Royal Assent on 21 March 1997. Many of its provisions came into force on 1 October 1997 (**398**). The final section of the chapter summarises the new laws concerning mandatory life sentences and the imposition of hospital directions and limitation directions. Less fundamental amendments of sections of the 1983 Act are referred to in the appropriate part of the text, or in footnotes.
[2] See *e.g.* the references to sections 35, 36 and 38 in sections 30(4)(a), 43(3), 80(1), 81(1), 85(1), 91(1), 123(1), 138(4) and 145(3) of the Mental Health Act 1983.

defendant whose case it has not yet disposed of. Because the c retains jurisdiction over the defendant, his detention in hospital is a matter for that court and Part II of the Act does not apply. If it did, the patient could be discharged from detention (including by a tribunal), or granted leave to be absent from the hospital (in effect bail), or transferred to another hospital without reference to the court. The effect would be to undermine the court's jurisdiction over the defendant and possibly to interfere with the administration of justice.

Other orders and directions

The position is different with hospital and guardianship orders, and transfer directions made by the Secretary of State. The making of a guardianship order or a hospital order is a final order which brings the criminal proceedings to an end. Consequently, the defendant may not go back to the court which imposed the order to seek its termination. Such orders are, however, orders of potentially indefinite duration. Provisions are therefore required which define their effect and enable the necessity for compulsory powers to be periodically reviewed and, if appropriate, discharged. The Act achieves this by providing that such patients are generally to be treated as if they had been admitted to hospital for treatment or received into guardianship under Part II, subject to certain necessary exceptions and modifications. They may therefore apply to a tribunal at defined intervals. Patients who are transferred from custody to hospital by direction of the Secretary of State are in a similar position insofar as their detention may be for a potentially indefinite period. Furthermore, since their detention was not ordered by a court, arrangements must be made for their detention to be judicially reviewed. The Act again provides that such patients are deemed to have been admitted under Part II, subject to necessary exceptions and modifications, and they may apply to a tribunal for a review of the justification for their detention. If the transferred patient is involved in criminal proceedings, the court with jurisdiction may also terminate the direction.

THE FOUR FORMS OF MENTAL DISORDER

The making of any order or direction under Part III requires evidence that the defendant suffers from, or is suspected to suffer from, one of the four particular forms of mental disorder set out in sub-section 1(2).[3] In contrast to the framework under Part II of the Act, mental disorder *simpliciter* never suffices. Certain orders and directions may only be made if the individual suffers from one of the two "major forms" of mental disorder: mental illness or severe mental impairment. Conversely, the new hospital and limitation directions may presently only be given in respect of offenders who suffer from a psychopathic disorder.[4]

[3] It should be emphasised that a person may not be classified as mentally impaired unless his handicap is associated with abnormally aggressive or seriously irresponsible conduct (**051, 078**). A mentally handicapped person therefore has the benefit of the Part III provisions if his conduct is disordered but not otherwise. The anomaly arises because, in 1982, Mind and Mencap lobbied to ensure that mentally handicapped persons could not be "sectioned" under Part II unless their conduct was disordered. This was achieved by making a conduct disorder a precondition of any statutory finding that an individual is mentally impaired. However, achieving this objective had the (presumably unintended) effect of taking handicapped people whose conduct is not disordered outside the operation of Part III — even though the absence of disordered conduct does not make such a person less vulnerable or less unfitted to prison.

[4] Mental Health Act 1983, s.45A(2)(a), as inserted by Crime (Sentences) Act 1997, s.46. The new directions are considered on p.398 *et seq.*

Mental illness and severe n al impairment

All of the orders and directions found in Part III of the Act are presently available in cases where a person suffers from, or in the case of section 35 is suspected to suffer from, a "major" form of mental disorder and the other conditions for making the particular order or direction are satisfied.

Psychopathic disorder and mental impairment

The majority of the provisions of Part III of the Act also apply to any person who is suffering from, or in the case of section 35 is suspected to suffer from, a "minor" form of mental disorder. However, there are important exceptions. Sections 36 and 48 are not available and it is therefore not possible during the course of criminal proceedings to remand or remove to hospital under Part III an unconvicted person who suffers only from psychopathic disorder or mental impairment, however urgent his need for treatment and however treatable the condition. Section 37(3) also does not apply so that a magistrates' court may not make a hospital or guardianship order in respect of a person who suffers only from a minor form of mental disorder unless it has first convicted him.

MEDICAL EVIDENCE

As with applications under Part II, the making of any order or direction under Part III requires medical evidence from one or two medical practitioners. Remands under section 35 may be founded upon the evidence of a single medical practitioner approved for the purposes of section 12 as having special experience in the diagnosis or treatment of mental disorder (**146**). In all other cases, the evidence of two practitioners is required, at least one of whom must be so approved.[5]

The medical practitioners

Section 12 does not apply to the making of orders or directions under Part III except for the requirement that evidence is received from a medical practitioner approved for the purposes of that section by the Secretary of State. A medical practitioner is not disqualified from giving evidence because he has some personal or financial interest in the matter. A court may therefore direct a defendant's admission to a private mental nursing home on the evidence of a doctor employed there. It may also order admission to an NHS hospital on the evidence of two medical practitioners employed there. However, except in the case of interim hospital orders, there is no requirement that evidence be received from a doctor on the staff of the hospital to which admission is sought.

Oral medical evidence

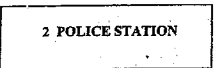
Court orders under Part III may be founded upon oral or written medical evidence, subject to the caveat that a restriction order may not be made unless at least one of the medical practitioners whose evidence is taken into account by the court under section 37 has given evidence orally before the court.[6] Directions under sections 48 to 49 are necessarily founded upon medical reports rather than oral evidence.

[5] Mental Health Act 1983, s.54(1).

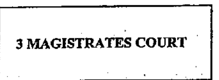
[6] *Ibid.*, s.41(2). The doctor giving the oral evidence need not be section 12 approved.

MENTALLY DISORDER OFFENDERS AND THE C(RTS

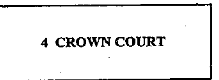
Mental Health Act 1983, s.136, enables mentally disordered person to be diverted to a place of safety instead of arrested.



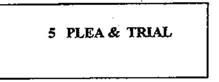
Arrested person may be admitted to hospital under sections 2, 3 or 4, rather than charged and taken before a court. Appropriate adult procedures, under the Police and Criminal Evidence Act 1984, designed to minimise the risk of an unreliable confession being made.



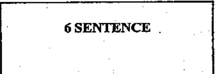
Question arises of where the defendant should reside or be held pending trial: (1) remand on bail (with condition of residence in hospital if appropriate): (2) remand in custody; (3) remand to hospital under section 35; (4) removal to hospital under section 48.



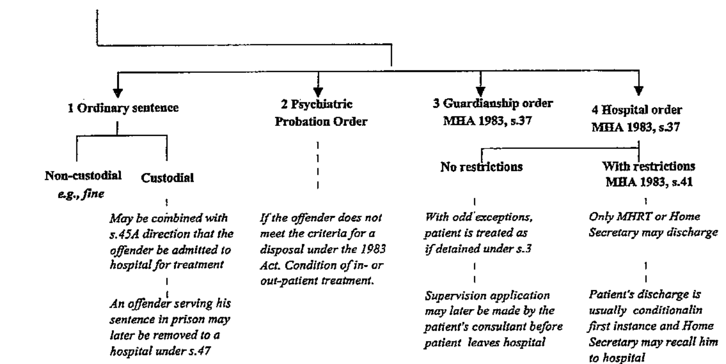
Question of where the defendant should reside or be held pending trial remains relevant. The options are the same as during the magistrates' court stage, save that the Crown Court may also remand a defendant to hospital for treatment, under section 36.



The issues of whether the defendant is fit to plead (his current mental state) and whether he was insane at the time of the alleged offence (his mental state at that time) are dealt with in the Crown Court under the Criminal Procedure Insanity Act 1964.



If it is unclear whether a hospital order (or direction) is appropriate, the court may make an interim hospital order, under section 38, before sentencing.



PART III OF THE MENTAL HEALTH ACT

Section	*Jurisdiction*	*Purpose*	*Appeals*	
Court orders made during the course of the criminal proceedings				
35	Magistrates or Crown Court	Remand to hospital for a report on the accused's mental condition.	Application to court for termination of the remand.	**315**
36	Crown Court	Remand of accused to hospital for treatment.	Application to court for termination of the remand.	**315**
38	Magistrates or Crown Court	Admission to hospital to determine whether a hospital order is an appropriate disposal.	Appeal against conviction or sentence. Court may terminate order.	**322**
43/44	Magistrates' court	Committal of defendant to the Crown Court with a view to a restriction order.	No right of appeal unless the committal was unlawful, in which case judicial review.	**372**
Court orders which bring criminal proceedings to an end				
37	Magistrates or Crown Court	1. Guardianship order 2. Order directing admission to hospital	Appeal against conviction or sentence. Right to apply to a MHRT — 1. Immediate right. 2. right after six months.	**325** **328**
37/41	Crown Court	Restriction order. To protect the public from serious harm by restricting the application of the Act to a patient made the subject of a hospital order.	Appeal against conviction or sentence. Right to apply to a MHRT after six months.	**333**
51	Crown Court	Hospital (with restriction order if appropriate) made in the absence of a section 43 or 48 patient.	Appeal against conviction or sentence. Right to apply to a MHRT after six months.	**329** **374**
45A	Crown Court	Sentence of imprisonment accompanied by hospital and limitation directions; offender begins his sentence by being removed to hospital for treatment.	Appeal against conviction or sentence. Immediate right to apply to a MHRT.	**398**
Directions by warrant of the Secretary of State				
46	Home Secretary	Transfer to hospital of services personnel detained during Her Majesty's Pleasure.	Immediate right to apply to a MHRT.	**376**
47	Home Secretary	Transfer to hospital of a person serving a term of imprisonment who is in need of treatment.	Immediate right to apply to a MHRT.	**378**
48	Home Secretary	Transfer to hospital of a non-prisoner in urgent need of treatment.	Immediate right to apply to a MHRT.	**378**

Important note. The power to give a hospital direction and a restriction direction under section 45A was brought into force on 1 October 1997 (398). However, such directions may only be given in respect of offences committed prior to that date.

Written medical evidence

In contrast to the position under section 12(1), the Act does not require that medical reports are based upon recent or proximate examinations of the person concerned, and it is not uncommon in practice for orders to be founded upon medical reports prepared several weeks or months previously, or at significant intervals.

Proof of signature and qualifications

A court may receive a written medical report in evidence without requiring proof that the signature is genuine or that the doctor who has furnished the report is a fully registered medical practitioner or approved under section 12; but the court may require the signatory of any such report to be called to give oral evidence.[7]

Disclosure of reports and patient's right to require oral evidence

Where, in pursuance of a direction of the court, a medical report is tendered in evidence otherwise than by or on behalf of the person who is the subject of the report, then—

- if that person is represented by counsel or a solicitor, a copy of the report is to be given to his counsel or solicitor;
- if that person is not represented, the substance of the report must be disclosed to him or, if he is a child or young person, to any parent or guardian of his present in court; and
- that person may require the signatory of the report to be called to give oral evidence, and evidence to rebut the evidence contained in the report may be called by or on behalf of that person.[8]

THE NEED FOR THE MANAGERS' OR THE GUARDIAN'S CONSENT

The duty of ensuring that patients are appropriately placed in hospitals which can adequately contain them generally rests with the courts in the light of their experience and the medical advice. However, a court may not make an order under Part III unless it is satisfied on evidence that arrangements have been made for the person's admission to a hospital or, as the case may be, that the proposed guardian is willing to receive the patient into guardianship. Under sections 35 and 36, the court must be satisfied that arrangements have been made for the accused's admission within the period of seven days beginning with the date of the remand.[9] In the case of hospital orders, interim hospital orders and hospital directions, the statutory period is 28 days.[10] The hospital specified in a court order may be an NHS hospital or a "private

7 Mental Health Act 1983, s.54(2).

8 *Ibid.*, s.54(3). A defendant does not have a statutory right to require a psychiatrist who has provided a report on behalf of the defence to give oral evidence, should the report be furnished to the court and he dispute some aspect of it, or later disagree with the recommendation made. Where a report relates only to arrangements for a person's admission to a hospital, that person has no right to require its signatory to give oral evidence or to rebut the evidence contained in the report. Any such report purporting to be signed by a person representing the hospital managers may be received in evidence without proof of his signature and without proof that he has the requisite authority. See *ibid.*, s.54(2).

9 Mental Health Act 1983, ss.35(4), 36(3).

10 Mental Health Act 1983, ss. 37(4), 37(6), 38(4). *Ibid.*, 45A(5), as inserted by Crime (Sentences) Act 1997, s.46.

hospital," that is a mental nursing home which is registered under the Registered Homes Act 1984 to receive patients detained under the 1983 Act.

Obtaining evidence as to the availability of a hospital bed

Where a court is minded to make a hospital order or an interim hospital order, or to give hospital and limitation directions, it may request the Health Authority for the region in which the defendant resides or last resided — or any other Health Authority that appears to it to be appropriate — to furnish it with such information as that Authority has, or can reasonably obtain, with respect to any hospital or hospitals in its region or elsewhere at which arrangements could be made for the defendant's admission.[11] The Authority specified must comply with any such request.[12] In *R. v. Birch*, the court observed that this power to require the Health Authority to furnish information under section 39 was not used as often as it might be.[13]

Removal to a place of safety pending admission by court order

Where a court makes any order under Part III, upon being satisfied that arrangements have been made for the defendant's admission to a particular hospital within the prescribed period, it may further direct that he be removed to, and detained in, a place of safety pending admission to that hospital.[14]

Definition of a place of safety

A "place of safety" in relation to a person aged 17 or over means a police station, prison or remand centre, or any hospital the managers of which are willing to temporarily receive the patient.[15] In the case of a person aged under 17, the expression has the same meaning as in the Children and Young Persons Act 1933 and so excludes a prison or remand centre.[16]

Persons removed to hospital by the Secretary of State

The Home Secretary is responsible for securing the admission to hospital of mentally disordered prisoners who meet the criteria in sections 47 and 48 of the 1983 Act. The Home Secretary is also responsible for securing the admission to hospital of persons found unfit to plead or not guilty by reason of insanity under the Criminal Procedure (Insanity) Act 1964.

11 Mental Health Act 1983, s.45A(8), as inserted by Crime (Sentences) Act 1997, s.46.

12 *Ibid.*, s.39(1). Subsection (2) provides that, in relation to Wales, references to the Health Authority refer to the Secretary of State for Wales and the words "in Wales" are to be substituted for references to "in its region or elsewhere." A local social services authority may similarly be required to furnish information to a court about the arrangements which might be made for a patient's reception into guardianship. See *ibid.*, s.39A.

13 *R. v. Birch* (1989) 11 Cr.App.R.(S.) 202, C.A.

14 Mental Health Act 1983, ss.35(4), 36(3), 37(4) and 38(4).

15 *Ibid.*, s.55(1). In practice, the place of safety is usually a prison or remand centre.

16 *Ibid.*, s.55(1). Section 107 of the Children and Young Persons Act 1933 provides that "place of safety" means "a community home provided by a local authority or a controlled community home, any police station, or any hospital, surgery or other suitable place, the occupier of which is willing temporarily to receive a child or young person."

Locating a bed for the patient

In practice, the Secretary of State will not direct a person's removal from prison to hospital unless the managers of that hospital are willing to receive him there, although, as a matter of law, their consent is unnecessary.[17] The Home Secretary generally relies on the prison medical officer to arrange a bed with a local or secure hospital before submitting the necessary medical reports with his request for a warrant authorising transfer. Once these are received, the issue of whether the placement will provide adequate security for the protection of the public is considered. In the case of remand prisoners, it is always necessary for the Home Office to make enquiries of the police or Crown Prosecution Service about the circumstances of the offence before reaching a decision. The placement of sentenced prisoners can usually be decided more easily, since reports on their offences, their behaviour in prison and prison category are usually readily available. These contain sufficient evidence to enable the Home Office to decide how dangerous they are, and how likely to abscond. As a general rule of thumb, only non-violent offenders who seem amenable to treatment are considered suitable for open conditions at local hospitals; the remainder are placed in locked wards, secure units and special hospitals.[18]

Transfer to a mental nursing home

Prior to 1 October 1997, the Act did not permit Home Secretary to remove a patient in custody to a "private hospital" under section 47 or 48. It was, however, not uncommon for him to do so (**381**). This limitation ceased to have effect when section 49(3) of the Crime (Sentences) Act 1997 was brought into force on that date, although its introduction cannot retrospectively validate transfers made before then.[19]

Power to specify hospital units

The Crime (Sentences) Act 1997 empowers a court which makes a restriction order or gives a limitation direction to specify the hospital unit to which the defendant is to be admitted.[20] The Home Secretary is given an identical power where he transfers a prisoner to hospital under sections 47 and 49.[21] The term "hospital unit" means any part of a hospital which is treated as a separate unit. Where a unit is specified, references in the Act to the patient being detained, or being liable to be detained, in a hospital are to be construed accordingly. The purpose of the new power is to prevent patients from whom the public may be at risk of serious harm from being allowed parole within the hospital grounds, or from being moved to an open ward, without the Home Secretary's consent.

APPLICABILITY OF PART III TO YOUNG OFFENDERS

There are few age limits in Part III of the Act. A guardianship order may only be made in respect of a person who has attained the age of 16 years and a child may not

17 See Mental Health Act 1983, ss.47 and 48.

18 See A. Pickersgill, "Balancing the public and private interest" in *Risk-taking in Mental Disorder: Analyses, Policies and Practical Strategies* (ed. D. Carson, S.L.E Publications Ltd., 1990).

19 Crime (Sentences) Act 1997, ss. 49(3), 56(2); Sched. 6.

20 Crime (Sentences) Act 1997, s.47. The power extends to restriction orders imposed under the Criminal Procedure (Insanity) Act 1964.

21 The power does not extend to persons transferred to hospital under section 48, even where a restriction direction is also given under section 49.

be committed to the Crown Court under section 43. For the purposes of Part III of the Act:

- "child" means a person under the age of 14 years and "young person" someone who has attained the age of 14 years but is under the age of 18 years.[22]
- any reference to an offence punishable on summary conviction with imprisonment is to be construed without regard to any prohibition or restriction imposed by or under any enactment relating to the imprisonment of young offenders.[23]
- the term "guardian" in relation to someone aged under 18 includes any person who has for the time being the care of that child or young person.[24]
- references to a magistrate court include references to the youth court.

REMANDS TO HOSPITAL UNDER SECTIONS 35 AND 36

Section 35 provides that, where the conditions specified in the Act are satisfied, the Crown Court or a magistrates' court may remand an accused person to a hospital for a report on his mental condition. Under section 36, the Crown Court may, instead of remanding an accused person in custody, remand him to hospital for medical treatment.

RELATIONSHIP TO PART II

Although section 35 refers to assessment, it is not the judicial equivalent of an admission for assessment under Part II. The purpose of section 35 is limited to obtaining a report on someone who is merely suspected, on the basis of a single medical opinion, to suffer from a form of mental disorder. Because nothing more than a reasonable suspicion has to be established, it does not render the individual liable to compulsory treatment. Likewise, section 36 is not equivalent to section 3 and the power to remand for treatment only arises where the Crown Court would otherwise remand in custody, not *per se* because section 3 would be appropriate if the accused was not before the court.

CRITERIA FOR IMPOSITION

The conditions imposed by the Act in respect of remands to hospital under section 35 or section 36 are set out in the table on the following page.

22 Mental Health Act 1983, s.55(1); Children and Young Persons Act 1933, s.107(1). Section 99 of the 1933 Act (which relates to the presumption and determination of age) applies for the purposes of Part III of the 1983 Act: see Mental Health Act 1983, s.55(7).

23 Mental Health Act 1983, s.55(2).

24 *Ibid.*, s. 55(1); Children and Young Persons Act 1933, s.107(1).

The medical grounds

The same medical grounds apply under section 36 as for hospital orders under section 37. However, when a defendant who remains detained for treatment under section 36 comes to be sentenced, the court must also consider whether a hospital order is the most appropriate way of disposing of the case.

CONDITIONS OF REMANDS UNDER SECTIONS 35 AND 36

Section 35	*Section 36*
Bail is inappropriate	
• The court is of the opinion that it would be impracticable for a report on the accused's mental condition to be made if he were remanded on bail. (s.35(3)(b))	• "Instead of remanding an accused person in custody", the court may remand him to hospital under section 36. (s.36(1))
The court is satisfied as to the medical grounds	
• The court is satisfied, on the written or oral evidence of a registered medical practitioner who is approved under section 12, that "there is reason to suspect that the accused is suffering from mental illness, psychopathic disorder, severe mental impairment or mental impairment." (s.35(3)(a))	• The court is satisfied, on the written or oral evidence of two registered medical practitioners, one of whom is approved under section 12, that "the accused person is suffering from mental illness or severe mental impairment of a nature or degree which makes it appropriate for him to be detained in a hospital for medical treatment." (s.36(1))
The defendant is an "accused person"	
• The defendant is "an accused person" within the meaning of section 35(2). (s.35(2), **317**)	• The defendant is "an accused person" within the meaning of section 36(2). (s.36(2), **317**)
A hospital bed is available	
• The court is satisfied, on the written or oral evidence of the medical practitioner who would be responsible for making the report or of some other person representing the managers of the hospital, that arrangements have been made for his admission to that hospital within the period of seven days beginning with the date of the remand. (s.35(4))	• The court is satisfied, on the written or oral evidence of the medical practitioner who would be in charge of his treatment or some other person representing the managers of the hospital, that arrangements have been made for his admission to that hospital within the period of seven days beginning with the date of the remand. (s.36(3))

"ACCUSED PERSON"

A defendant may only be remanded to hospital under Part III if he is "an accused person" within the meaning of sections 35 and 36. The meaning of the term is defined in the table below.

STATUTORY DEFINITIONS OF "AN ACCUSED PERSON"

Section 35	*Section 36*
In relation to a magistrates' court	
• "any person who has been convicted by the court of an offence punishable on summary conviction with imprisonment and any person charged with such an offence if the court is satisfied that he did the act or made the omission charged or he has consented to the exercise by the court of the powers conferred by this section." (s.35(1)(b))	• *Not applicable — a magistrates' court has no power to remand under section 36.*
In relation to the Crown Court	
• any person who "is awaiting trial before the court for an offence punishable with imprisonment or who has been arraigned before the court for such an offence and has not yet been sentenced or otherwise dealt with for the offence on which he has been arraigned" other than a person who has been convicted of an offence the sentence for which is fixed by law. (s.35(1)(a) and (3))	• "any person who is in custody awaiting trial before the Crown Court for an offence punishable with imprisonment (other than an offence the sentence for which is fixed by law) or who at any time before sentence is in custody in the course of a trial before that court for such an offence." (s.36(2))

"Accused persons" and magistrates' courts

A magistrates' court may not remand a defendant to hospital for treatment and may only remand under section 35 defendants who are charged with an offence which is punishable on summary conviction with imprisonment. Accordingly, neither section 35 nor section 36 is available to magistrates in respect of a defendant who is charged with an indictable only offence. It might be argued that the final phrase of section 35(2)(b) ("or he has consented to the exercise by the court of the powers conferred by this section") is to be read disjunctively so that, if a defendant consents to being remanded under section 35, the class of offence with which he is charged is immaterial. However, a natural reading of the paragraph is against such a

construction. Furthermore, although the recent emphasis on diverting mentally disordered offenders from prison often involves invoking section 35, its statutory purpose is not diversion *per se*, but to obtain a report to assist the court in relation to the defendant's fitness for trial and the most appropriate way of dealing with him. In relation to a person who is charged with an indictable only offence, only the Crown Court can deal with these matters and make these decisions.

Purpose of section 35

The purpose of section 35 is to enable a court to obtain a medical report on a defendant whose case it may dispose of, in particular to assist it in determining whether the medical grounds for making a hospital order are satisfied. Prior to the introduction of section 35, magistrates' courts could remand an accused person for the preparation of a medical report under sections 10 or 30 of the Magistrates' Courts Act 1980. Where the accused was charged with an offence punishable upon summary conviction with imprisonment, they could do so without first convicting him if satisfied that he had done the act or made the omission charged.[25] However, if the preparation of a report on an out-patient basis was inappropriate, the defendant had to be remanded in custody or granted bail with a condition of hospital residence. The Butler Committee recommended that courts should have the option of remanding an accused directly to hospital where bail was inappropriate and section 35 gave effect to this recommendation. In effect therefore, section 35(2)(b) provides that a magistrates' court may remand a person to hospital for the preparation of a report in similar circumstances to those in which it could previously have remanded him on bail or in custody for that purpose.

"Accused persons" and the Crown Court

A person charged with murder, but not convicted of it, may be remanded by the Crown Court to a hospital for the preparation of a report under section 35 but he may not be remanded there for treatment under section 36.[26] The Government's reasons for this restriction were that any court finding that a defendant satisfied the medical grounds for detention under section 36 "would inevitably prejudice any subsequent consideration of his mental state during the course of the trial ... the question of the accused's responsibility for his actions assumes a crucial importance in cases where the offence with which he is charged is one of murder and for this reason such offences have been excluded from the application of the clause."[27]

"At any time before sentence is in custody in the course of a trial"

Section 36 provides that an accused person is a defendant who is "in custody awaiting trial before the Crown Court" or who "at any time before sentence is in custody in the course of a trial before that court." In *R. v. Grant*,[28] it was said that a trial was not complete until sentence had been passed or the offender was discharged. The purpose of these rather inelegant phrases appears to be to exclude persons who have been committed for sentence to the Crown Court.

25 Magistrates' Courts Act 1980, s.30. Section 10 of the Magistrates' Courts Act 1980 gave magistrates' courts a general power to adjourn a case after conviction for the purpose of enabling enquiries to be made.

26 Following conviction, a life sentence is the only course available to the court.

27 *Mental Health (Amendment) Bill: Notes on Clauses, House of Commons* (D.H.S.S., 1982), p.123.

28 *R. v. Grant* [1951] 1 K.B. 500.

Offences triable only upon indictment

The customary view is that the Crown Court may not remand under Part III an accused person who is charged with an indictable only offence until after committal or transfer. It may, however, be argued that such a defendant is from the outset of the proceedings "in custody awaiting trial before the Crown Court for an offence punishable with imprisonment." Accordingly, if he is remanded in custody by a magistrates' court and applies to the Crown Court for bail, the Crown Court may remand him to hospital for treatment if bail is inappropriate. Likewise, the Crown Court may remand under section 35 an accused person charged with an indictable only offence who has appealed to it against a magistrates' court's refusal to grant bail. The problem with this view is that any further remands and any reports on the accused's mental condition prior to committal would also need to be dealt with by the Crown Court. The better view is therefore that where a mentally ill or severely mentally impaired defendant who is charged with an indictable only offence requires urgent treatment pending committal or transfer, his removal to hospital must be arranged under section 48. Nor may a court remand him to hospital for a report on his mental condition prior to committal or transfer.

Relationship between sections 35, 36 and 48

A defendant who is charged with murder may not be remanded under section 36. He may, however, be removed to hospital for urgent treatment under section 48 if he suffers from mental illness or severe mental impairment.[29] Except where the Crown Court requires a report under section 35, persons charged with murder who suffer only from psychopathic disorder or mental impairment must be dealt with under the ordinary criminal provisions pending trial, and either remanded in custody or granted bail. In non-murder cases, sections 35, 36 and 48 are all available at some stage in respect of defendants who suffer from mental illness or severe mental impairment, provided the other conditions for exercising the powers exist. However, in the case of defendants who suffer only from psychopathic disorder or mental impairment, the defendant may be remanded for the preparation of a report under section 35, if the other conditions for exercising that power are satisfied, but not admitted to hospital for treatment under either section 36 or 48.[30]

EFFECT OF THE REMAND

Where an accused person is remanded to hospital under Part III, a constable or other person directed by the court is required to convey the accused person to the specified

29 Under the 1959 Act, the Secretary of State could transfer a defendant awaiting trial or sentence who was suffering from mental illness or severe subnormality of a nature or degree which warranted his detention in hospital for medical treatment. In practice, the power was only used if a defendant was in need of urgent treatment. With the introduction of section 36, a need for urgent treatment was made a condition of giving a transfer direction under section 48, and only section 36 is available in cases where an accused's need for treatment is not urgent.

30 It may be thought an anomaly that a court can obtain a medical report on such a defendant under section 35 but not then remand him to hospital for treatment if that report indicates that he requires treatment. However, the purpose of reports under section 35 is to assist the court in disposing of the case and not *per se* diversion, ascertaining whether the defendant requires treatment prior to disposal. Furthermore, the fact that both sections 36 and 48 are not available indicates that Parliament did not consider that the treatment needs of defendants suffering from "minor" forms of mental disorder would be sufficiently pressing to require provision to be made for them to receive in-patient treatment prior to trial or sentence.

hospital within the period of seven days beginning with the date of the ...nand; and the managers of the hospital to admit him within that period and thereafter detain him in accordance with the provisions of section 35 or 36, as the case may be.[31] The court may, pending the accused's admission, give directions for his conveyance to, and detention in, a place of safety.[32]

Application of Part II of the Act

Part II of the Act does not apply to persons detained under sections 35 and 36. The responsible medical officer therefore has no authority to grant leave of absence, nor may such patients be removed or transferred to another hospital under section 19, or discharged from liability to detention under section 23.

Consent to treatment and section 35

Part IV of the Act does not apply to persons remanded to hospital under section 35[33] and they may only be given treatment to which they consent or which is justified under common law. Because section 35 patients are not liable to compulsory treatment under the Act, the practice has arisen of detaining such persons under section 2 or 3 upon their admission under section 35, the two authorities for the patient's detention existing in parallel. Jones summarises some of the objections to this practice, including several of those set out in a legal advice furnished by the author.[34]

Consent to treatment and section 36

Persons detained in hospital under section 36 are subject to Part IV of the Act and may be treated without their consent. Where a section 36 patient who is awaiting admission to the hospital specified in the remand is removed to another hospital as a place of safety, it appears that Part IV of the Act also applies to treatment given there.[35]

Effect of remands on existing applications and orders

Remands to hospital under Part III do not have the effect of bringing to an end any pre-existing application, hospital order or guardianship order in respect of the same patient. Because the remand is to hospital rather than in custody, section 22 does not apply.

DURATION OF REMAND AND FURTHER REMANDS

An accused person may not be remanded under section 35 or 36 for more than 28 days. However, a court may further remand an accused person—

31 Mental Health Act 1983, ss.35(9) and 36(8).
32 *Ibid.*, ss.35(4) and 36(3).
33 *Ibid.*, s.56(1)(b).
34 An "Advice on sections 2, 3 and 35 and other related provisions of the Mental Health Act 1983" prepared by the author is referred to in B. Chaffey, "Detaining the detained: an injustice" *The Journal of Forensic Psychiatry* (1991) Vol. 2 No. 3, 331–335, and summarised in R. Jones, *Mental Health Act Manual* (Sweet & Maxwell, 5th ed., 1996), pp.160–161.
35 This may be a drafting error because Part IV of the Act does *not* apply to patients who are detained in a place of safety while awaiting admission under section 37.

- in section 35 cases, if it appears to the court on the written or oral evidence of the registered medical practitioner responsible for making the report, that a further remand is necessary for completing the assessment of the accused person's mental condition.[36]
- in section 36 cases, if it appears to the court, on the written or oral evidence of the responsible medical officer, that a further remand is warranted.[37]

The power to further remand may be exercised without the accused being brought before the court if he is represented by counsel or a solicitor and his counsel or solicitor is given an opportunity of being heard.[38] An accused person may not be remanded under section 35 for more than 12 weeks in all and the same maximum period applies in section 36 cases.[39]

Termination of the remand

The court may at any time terminate a remand under section 35 or 36 if it appears to the court that it is "appropriate" to do so.[40]

Absconders

The Act expressly provides that the court may terminate the remand upon application by the accused or upon his being brought before the court having absconded from the specified hospital.[41] If an accused person absconds from the hospital to which he has been remanded, or while being conveyed to or from that hospital, he may be arrested without warrant by any constable and shall, after being arrested, be brought as soon as practicable before the court that remanded him. The court may thereupon terminate the remand and deal with him in any way in which it could have dealt with him if he had not been remanded under the section in question.

CHALLENGING DETENTION UNDER SECTIONS 35 AND 36

A person remanded under section 35 or 36 has a statutory right to obtain at his own expense an independent report on his mental condition from a registered medical practitioner chosen by him and to apply to the court on the basis of it for his remand to be terminated.[42] In practice, the cost of any medical reports prepared by the defence is likely to be met by the legal aid fund at no cost to the accused person.

Mental Health Review Tribunals

A person remanded to hospital under section Part III may apply to the court for the remand to be terminated but has no right to apply to a tribunal for his discharge from hospital.[43] However, because section 35 patients may in practice also be detained under section 2 or 3, tribunals are sometimes called upon to deal with the cases of Part II patients who are also detained in hospital under section 35.

36 Mental Health Act 1983, s.35(5).
37 *Ibid.*, s.36(4).
38 *Ibid.*, ss.35(6) and 36(5).
39 *Ibid.*, ss.35(7) and 36(6).
40 *Ibid.*
41 *Ibid.*, ss.35(10) and 36(8).
42 *Ibid.*, ss.35(8) and 36(7).
43 See, in particular, *ibid.*, s.145(3).

INTERIM HOSPITAL ORDERS

Before making a hospital order or direction or dealing with an offender in some other way, the Crown Court or a magistrates' court may make an "interim hospital order" authorising his admission to hospital.[44] The purpose of the provision is to enable the court to determine whether a defendant who suffers from one of the four forms of mental disorder satisfies the criteria for making a hospital order or, more generally, whether such a disposal is appropriate.

CRITERIA FOR IMPOSITION

The following conditions are imposed by section 38—

- The person has been convicted before the Crown Court of an offence punishable with imprisonment, other than an offence the sentence for which is fixed by law, or by a magistrates' court of an offence punishable on summary conviction with imprisonment.[45]

- The court is satisfied, on the written or oral evidence of two registered medical practitioners, one of whom is approved under section 12, that "the offender is suffering from mental illness, psychopathic disorder, severe mental impairment or mental impairment and that there is reason to suppose that the mental disorder from which the offender is suffering is such that it may be appropriate for a hospital order to be made in his case."[46]

- The court is further satisfied, on the written or oral evidence of the registered medical practitioner who would be responsible for making the report or of some other person representing the hospital managers, that arrangements have been made for his admission to that hospital and for his admission to it within the period of 28 days beginning with the date of the order.[47]

Magistrates courts

A magistrates' court may in certain circumstances make a hospital order without convicting an accused person who suffers from mental illness or severe mental impairment but the making of an interim hospital order always requires that the defendant has been convicted. Accordingly, where such a defendant is unfit to plead or to be tried, and the court is not satisfied that he did the act or omission charged, it may remand him to hospital under section 35 if he consents to being so remanded; otherwise, it is no powerless to direct his admission to hospital under Part III.[48]

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44 Section 45A of the Mental Health Act 1983 was brought into force on 1 October 1997. It provides that the Crown Court may also make an interim hospital order in order to assist it in deciding whether to give hospital and limitation directions in connection with offences committed on or after that date. See Mental Health Act 1983, ss.38(1), 38(5) and 45A(8); Crime (Sentences) Act 1997, s.46.

45 Mental Health Act 1983, s.38(1).

46 *Ibid.*, s.38(1)(a) and (b).

47 *Ibid.*, s.38(4).

48 It may be argued that a person who is unfit for trial will also lack capacity to give a valid consent.

EFFECT OF AN INTERIM HOSPITAL ORDER

Where an interim hospital order is made, a constable or any other person named by the court is required to convey the offender to the hospital specified in the order within 28 days.[49]

Authority for the patient's detention

An interim hospital order authorises the managers of the hospital specified in the order to admit the patient at any time within the 28 day period and thereafter detain him in accordance with the provisions of section 38.[50]

Application of Part II of the Act

The provisions of Part II of the Act do not apply. The responsible medical officer therefore has no authority to grant leave of absence, nor may such patients be removed or transferred to another hospital under section 19, or discharged from liability to detention under section 23.[51]

Consent to treatment

Persons detained in hospital under an interim hospital order are subject to Part IV of the Act and so may be administered treatment without their consent in the circumstances set out in sections 56 to 63 of the Act.[52] Part IV also appears to apply to section 38 patients detained in a place of safety while awaiting admission to the specified hospital but this is probably a drafting error.[53]

Effect on previous applications and orders

The making of an interim hospital order does not have the effect of bringing to an end any pre-existing application, hospital order or guardianship order which is in force in respect of the patient.[54]

DURATION AND FURTHER ORDERS

An interim hospital order may be in force for such period, not exceeding 12 weeks, as the court may specify when making the order. It may be renewed for further periods of not more than 28 days at a time if it appears to the court, on the written or oral evidence of the responsible medical officer, that the order's continuation is warranted, but it may not continue in force for more than 12 months in all.[55] The power of renewing an interim hospital order may be exercised without the offender being brought before the court if he is represented by counsel or a solicitor and his counsel or solicitor is given an opportunity of being heard.[56]

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49 Mental Health Act 1983, s.40(3)(a).

50 *Ibid.*, s.40(3)(b).

51 See, in particular, *ibid.*, ss.40(4) and 145(3).

52 *Ibid.*, s.56.

53 See the reference to s.37(4), but the absence of any reference to s.38(4), in s.56(1)(b) of the 1983 Act.

54 See Mental Health Act 1983, s.40.

55 *Ibid.*, s.38(5), as amended by Crime (Sentences) Act 1997, s.49(1). Section 49(1) of the 1997 Act, which came into force on 1 October 1997, extended the maximum duration of an interim hospital order from six months to twelve months.

56 *Ibid.*, s.38(6).

Termination of the interim hospital order

The court is required to terminate an interim hospital order if it makes a hospital order or decides, after considering the written or oral evidence of the responsible medical officer, to deal with the offender in some other way.[57]

Absconders

If an offender absconds from a hospital in which he is detained in pursuance of an interim hospital order, or while being conveyed to or from such a hospital, he may be arrested without warrant by a constable and shall, after being arrested, be brought as soon as practicable before the court that made the order. The court may thereupon terminate the order and deal with him in any way in which it could have dealt with him if no such order had been made.[58]

The making of a hospital order

Where an interim hospital order is in force, the court may make a "hospital order" without the offender being brought before the court if he is represented by counsel or a solicitor and his advocate is given an opportunity of being heard. It is, however, doubtful whether the court may make a restriction order in the offender's absence.[59]

CHALLENGING DETENTION UNDER SECTION 38

In contrast to the position where an accused person has been remanded under section 35 or 36, the offender has no express statutory right to apply to the court which imposed the order for its termination on the basis of an independent medical report. Rather, an interim hospital order is a sentence for the purposes of the appeal against sentence provisions in the Criminal Appeal Act 1968.[60]

Section 38 and Mental Health Review Tribunals

Because the offender's case has not been disposed of by the court, he has no right to apply to a tribunal for his discharge.

[57] Mental Health Act 1983, s.38(5).
[58] *Ibid.*, s.38(7).
[59] The wording used in section 51(5) — "the court may make a hospital order (with or without a restriction order) in his case in his absence" — is not adopted in s.38(2), which provides that "the court may make a hospital order without his being brought before the court". Furthermore, it would appear that hospital and limitation directions cannot be given in the offender's absence once section 45A is in force. See the references to subsections (1) and (5) of section 38 in section 45A(8) of the Mental Health Act 1983, but the absence of any reference to subsection (2).
[60] Criminal Appeal Act 1968, s.50(1). It is not, however, a sentence for the purposes of section 36(1) of the Criminal Justice Act 1988 (which provides that where it appears to the Attorney General that the sentencing of a person in the Crown Court has been unduly lenient, he may in certain circumstances refer the case to the Court of Appeal, for them to review the sentencing of that person). Criminal Justice Act 1988, s.35(5).

GUARDIANSHIP ORDERS

Under section 37, the Crown Court or a magistrates' court may by order place a person under the guardianship of a local social services authority or of such other person approved by a local social services authority as may be specified.

CRITERIA FOR IMPOSITION

The following conditions apply in all cases—

- Subject to certain exceptions, the accused has been convicted by a magistrates' court of an offence punishable on summary conviction with imprisonment[61] or has been convicted by the Crown Court of an imprisonable offence, other than one the sentence for which is either fixed by law or falls to be imposed under sections 2–4 of the Crime (Sentences) Act 1997.[62]
- the court is satisfied, on the written or oral evidence of two registered medical practitioners, one of whom is approved under section 12, that the offender is suffering from mental illness, psychopathic disorder, severe mental impairment or mental impairment of a nature or degree which warrants his reception into guardianship under the Act.[63]
- the court is of the opinion, having regard to all the circumstances including the nature of the offence and the character and antecedents of the offender, and to the other available methods of dealing with him, that the most suitable method of disposing of the case before it is by means of a guardianship order under section 37.[64]
- the offender is at least sixteen years of age.[65]
- the court is satisfied that that the proposed guardian is willing to receive the offender into guardianship and, by inference, that any proposed private guardian has been approved by the local social services authority.[66]

[61] A magistrates' court cannot therefore make a guardianship order if the offence is indictable only (326).
[62] Mental Health Act 1983, s.37(1), as amended by Crime (Sentences) Act 1997, s.55(1), Sched. 4, para. 12(1); Crime (Sentences) Act 1997, ss.2(2) and 55(2). The Crown Court may not make such an order if the sentence is one which falls to be imposed under section 2 of the 1997 Act. In other words, there are no exceptional circumstances relating to the offences or the offender which justify the court not imposing the required mandatory life sentence for a second serious offence. The new position under section 37 is, however, ambiguous as regards the order's availability where a person has been convicted of a third class A drug trafficking offence. Subs. (1) merely prohibits such an order being made if a life sentence is mandatory. However, subs. (1A) then states that nothing in sections 3(2) and 4(2) of the Crime (Sentences) Act 1997 shall prevent a court from making a hospital order under section 37(1). It does not say that nothing in those sections shall prevent a court from making an order under section 37(1), that is a hospital order *or* a guardianship order. A natural reading of section 37(1A) leads to the conclusion that sections 3 and 4 of the 1997 Act are intended to prevent a court from imposing a guardianship order if the sentence is one which falls to be imposed under either of those sections. The intention may be that, unless the nature or degree of the offender's disorder is sufficiently serious that compulsory treatment in hospital is warranted, the law should take its normal course.
[63] Mental Health Act 1983, ss.37(2)(a)(ii) and 54(1).
[64] *Ibid.*, s.37(2)(b).
[65] *Ibid.*, s.37(2)(a)(ii).
[66] *Ibid.*, s.37(6).

order, provided he was not detained in hospital under some other pr[illegible]ion of the Act to which Part IV applies immediately prior to the order's imposition.

After-care under supervision

An application for an unrestricted hospital order patient to be subject to after-care under supervision after he leaves hospital may be made in the same circumstances as may a supervision application in respect of a patient liable to be detained under section 3 (**426 et seq.**).

APPEALS AGAINST CONVICTION OR SENTENCE

The patient has the usual rights of appeal where a hospital order is imposed following conviction. For the purposes of the Criminal Appeal Act 1968, the term "sentence" includes a hospital order made under Part III.[92]

Appeals to the Crown Court

Where a magistrates' court makes a hospital order without convicting the accused, he has the same right of appeal against the order as if it had been made on his conviction; and on any such appeal the Crown Court has the same powers as if the appeal had been against both conviction and sentence. Any such appeal by a child or young person with respect to whom any such order has been made, whether the appeal is against the order or against the finding upon which the order was made, may be brought by him or by his parent or guardian on his behalf.[93]

Effect of a successful appeal

Where a hospital order is imposed, any pre-existing application, hospital order without restrictions or guardianship ceases to have effect. However, if the hospital order, or the conviction on which it was made, is quashed on appeal, section 22 has effect as if during any period for which the patient was liable to be detained under the hospital order he had instead been detained in custody as mentioned in that section (**304**).[94]

MENTAL HEALTH REVIEW TRIBUNALS

Where a hospital order is made, the patient and his nearest relative may apply to a tribunal during the period between the expiration of six months and the expiration of twelve months beginning with the date of the order, and thereafter make a further application each year the order remains in force. The patient may also ask the hospital managers to review his case, with a view to them exercising their power of discharge under section 23.

PATIENTS SUBJECT TO A NOTIONAL HOSPITAL ORDER

Where a restricted patient is an in-patient at the time his restrictions cease to have effect, he is deemed to have been admitted to hospital under a second, notional, hospital order made, without restrictions, on the day when the restrictions ceased to

92 Criminal Appeal Act 1968, s.50(1).
93 Mental Health Act 1983, s.45.
94 *Ibid.*, s.40(5).

have effect.[95] Such patients are often referred to as being subject to a "notional hospital order."[96] They are thereafter in exactly the same legal position as any other section 37 patient, with the single exception that they may apply to a tribunal for their discharge during the six month period commencing with the date of the notional hospital order.[97] This reflects the fact that they will already have been detained in hospital for same time under the hospital order imposed by the court.

RESTRICTION ORDERS

Where a hospital order is made by the Crown Court, and it appears to the court that it is necessary for the protection of the public from serious harm, the court may further order that the offender shall be subject to the special restrictions set out in section 41 of the Act, either without limit of time or during such period as may be specified in the order; and any such order is known as "a restriction order."

CRITERIA FOR IMPOSITION UNDER SECTION 41

The Act lays down the following conditions in relation to the imposition of a restriction order under section 41 —

- the Crown Court has made a hospital order;
- at least one of the registered medical practitioners whose evidence is taken into account by the court under section 37(2)(a) has given evidence orally before the court;
- it appears to the court, having regard to the nature of the offence, the antecedents of the offender and the risk of his committing further offences if set at large, that it is necessary for the protection of the public from serious harm that the offender shall be subject to the special restrictions set out in section 41, either without limit of time or during such period as may be specified in the order.

PARASITIC NATURE OF RESTRICTION ORDERS

A restriction order is parasitic in nature and cannot exist on its own. If the hospital order to which it is attached ("the relevant hospital order") ceases to have effect then so too does the attendant restriction order. In theory, the converse is not also true so that the restriction order may cease to have effect but the patient continue to be detained in hospital under the relevant hospital order. However, the Act provides that where this happens the patient is to be treated as if he had been admitted under a second, notional, hospital order made without restrictions on the date on which the restrictions ceased to have effect. In practice therefore, the cessation of either of the two orders made by the court also brings the other to an end.

95 Not the date on which the hospital order or transfer direction with restrictions attached was originally made by the court or the Secretary of State.
96 Sometimes confusingly abbreviated on the Part A statement as "not 37."
97 Mental Health Act 1983, ss.41(5), 55(4).

RESTRICTION ORDERS WITH AND WITHOUT LIMIT OF TI

Where a restriction order is made without limit of time, the patient remains subject to the special restrictions and liable to be detained under the relevant hospital order until such time as the restriction order is discharged. If a restriction order is made for a limited period then, subject to a single minor exception, the patient becomes an unrestricted patient at the expiration of that period. Accordingly, if he is detained in hospital at that time, he may thereafter be discharged in the same way as any other hospital order patient, without conditions and without being liable to recall by the Secretary of State. If he has already been discharged from hospital, he ceases to be liable to detained altogether. The making of restriction orders of limited duration has generally been discouraged and the Aarvold Report observed that of 232 restriction orders made by the courts in 1971 only 13 were with a time limit.[98] In *R. v. Gardiner*, Lord Parker C.J. observed that "since in most cases the prognosis cannot be certain, the safer course is to make any restriction order unlimited in point of time. The only exception is where the doctors are able to assert confidently that recovery will take place within a fixed period when the restriction order can properly be limited to that period."[99] The Butler Report of 1975 noted that it was a widely held view that a restriction order without a time limit was preferable to an order the duration of which was prescribed by the court and it approved removing from the statute the power to make orders limited in time.[100] In *R. v. Birch*, Mustill L.J. stated that "the observations of Lord Parker, C.J. in *Gardiner* (supra) as to the imprudence in any but the most exceptional case of imposing a restriction for a fixed period rather than for an unlimited period still hold good under the 1983 Act."[101] In *R. v. Haynes*, the Court of Appeal held that where a limited-term restriction order was made it was wrong to fix its term by reference to the sentence of imprisonment which would have been imposed had a custodial sentence been passed instead.[102]

THE SPECIAL RESTRICTIONS

Section 41(3) sets out the special restrictions applicable to patients who are subject to both a hospital order and a restriction order. The effect of the restriction order is to restrict the ways in which the hospital order to which it is attached may cease to have effect and, more generally, the circumstances and ways in which the patient may leave hospital. For as long as the restriction order remains in force, the authority to detain the patient which is conferred by the underlying hospital order also remains in force, requiring no periodic renewal, never lapsing through effluxion of time, its termination always requiring a positive act in the form of an order or direction discharging it. In the main, the restrictions operate only indirectly on the patient. Most often, it is the exercise of the statutory powers ordinarily granted to doctors and hospital managers in respect of detained patients which are restricted. For example, the patient's responsible medical officer cannot grant him leave to be absent from hospital without the Home Secretary's consent and nor can the hospital's managers transfer him to another hospital without that consent. Similarly, the responsible medical officer and the managers cannot discharge the patient from

98 *Report on the Review of Procedures for the Discharge and Supervision of Psychiatric Patients subject to Special Restrictions*, Cmnd. 5191 (1973), para. 7.
99 *R. v. Gardiner* [1967] 1 W.L.R. 464.
100 *Report of the Committee on Mentally Abnormal Offenders*, Cmnd. 6244 (1975), para. 14.25.
101 *R. v. Birch* (1989) 11 Cr.App.R.(S.) 202.
102 *R. v. Haynes* (1981) 3 Cr.App.R.(S.) 330.

hospital under section 23 wit... the Secretary of State's prior consent. However, while the exercise of these legal powers is restricted, the Home Secretary has no responsibility for the patient's medical treatment or his day to day management throughout his stay in hospital. These are professional matters for the doctors, nurses, psychologists and others to decide.

Application of Part II of the Act

A patient who is admitted to hospital in pursuance of a hospital order and a restriction order is treated for the purposes of the provisions of Parts II and V of the Act mentioned in Part II of Schedule 1 to the Act as if he had been admitted to hospital on the date of the order in pursuance of an application duly made under section 3 of the Act, but subject to the exceptions and modifications specified in that Part of the Schedule.[103] The nature and effect of these exceptions and modifications are described below.

DURATION, RENEWAL AND EXPIRY OF THE HOSPITAL ORDER

None of the provisions of Part II of the Act relating to the duration, renewal and expiration of hospital orders apply during the period the restriction order remains in force. The authority for the patient's detention which is conferred by the relevant hospital order does not require periodic renewal. Nor does it cease to have effect because the patient has been absent without leave for a certain period of time; detained in custody for a continuous period exceeding six months; made the subject of a subsequent application, order or direction under the Act, including a further restriction order or restriction direction; or removed to a country outside England and Wales under section 86.[104] In short, if a restriction order is also made, the hospital order remains in force for as long as the restriction order does and a positive act is required, in the form of an order or direction for discharge, to bring the patient's liability to detention to an end.

Absence with and without leave

A restricted patient who has been absent without leave for a certain period of time does not cease to be liable to be detained[105] and the power to take a restricted patient into custody and to return him under section 18 may be exercised at any time.[106]

Restricted patients in prison, etc.

A restriction order does not cease to have effect by virtue of the fact that a restricted patient has been continuously in custody in pursuance of a sentence or court order for a period exceeding six months. Upon the patient's release from prison or some other place of custody, section 18 applies as if the patient had absented himself without leave on the day of his release.[107]

103 Mental Health Act 1983, s.41(3).
104 *Ibid.*, ss.41(3)(a) and 91(2).
105 *Ibid.*, s.41(3); Sched. 1, Pt. II, paras. 2 and 4(b).
106 *Ibid.*, s.41(3)(d).
107 *Ibid.*, s.41(3), Sched. 1, Pt. II, para. 6.

Subsequent applications, orders or directions

Section 40(5) does not apply and the making of a subsequent application, order or direction under the Act in respect of the same patient does not have the effect of discharging any pre-existing restriction order or hospital order to which it is attached.[108]

Removal under Part VI of the Act

Where, under section 86, a restricted patient is removed to a country outside the United Kingdom, the Isle of Man and the Channel Islands, the hospital order and the restriction order continue in force so as to apply to the patient if he returns to England and Wales at any time before the end of the period for which the orders would otherwise have continued in force.[109]

RESTRICTIONS AS TO LEAVE OF ABSENCE

A restricted patient's responsible medical officer may not grant him leave to be absent from hospital except with the consent of the Secretary of State.[110]

Revocation of leave and recall to hospital

Leave may be revoked and the patient recalled to hospital if it appears to the responsible medical officer *or* to the Secretary of State that it is necessary to do so either in the interests of his own health or safety or for the protection of others. Notice of the leave's revocation must be given in writing to the patient or (if he is in custody) to the person for the time being in charge of him.[111] The Secretary of State may recall the patient at any time, provided the conditions referred to above appear to him to be satisfied.[112] However, a patient's responsible medical officer may not recall him to the hospital where he is liable to be detained after the expiration of twelve months beginning with the first day of his absence from that hospital on leave.[113] Visiting friends or attending an out-patient appointment at a hospital does not bring to an end a continuous period of leave of absence since the patient does not thereby become an in-patient.[114] However, where a patient voluntarily stays overnight in hospital, this may do so.[115] For the avoidance of doubt, where a patient is absent without leave during the twelve month period, he has not been absent *with* leave for twelve months at the expiration of one year from the date on which leave was originally granted.

RESTRICTIONS ON TRANSFER TO ANOTHER HOSPITAL

A restricted patient may not be transferred from one hospital to another, in pursuance of regulations made under section 19, except with the consent of the

108 Mental Health Act 1983, s.41(4).
109 *Ibid.*, s.91(2).
110 *Ibid.*, ss.17(1), 41(3), 41(3)(c)(i) and 145(3); Sched. 1, Pt. II, paras. 2 and 3(a). Note that the Secretary of State has no power to grant a restricted patient leave of absence.
111 *Ibid.*
112 *Ibid.*, ss.17(5), 41(3), 41(3)(c) and (d), 145(3); Sched. 1, Pt. II, paras. 2 and 3(c).
113 *Ibid.*, ss.17(5), 41(3) and 145(3); Sched. 1, Pt. II, paras. 2 and 3(c).
114 *R. v. Hallstrom, ex p W (No. 2)* [1986] 2 All E.R. 306, at 319 and 320, *per* McCullough J.
115 *Ibid.*, at 319. An alternative view would be that a patient remains continuously absent with leave for these purposes until such time as a notice revoking that leave is served under s.17(4).

Secretary of State.[116] Where a restricted patient is transferred under section 19, the hospital order takes effect as if it were an order for his admission to the hospital to which he is transferred.

Transfer of special hospital patients

For the purposes of the Act, the special hospitals are all managed by the Secretary of State. Section 123(1) provides that the Secretary of State may direct the "removal" of a patient from one special hospital to another and, by sub-section (2), he may also direct the "transfer" of a special hospital patient to a hospital which is not a special hospital. The powers apply equally to unrestricted patients but, since the majority of special hospital patients are restricted, the power is of particular relevance in this context.[117]

Removal to a hospital under the same managers

Sections 19 and 123 both distinguish between the "removal" of a patient to another hospital (that is his removal from one hospital to another hospital under the same managers) and the "transfer" of a patient to another hospital (which is the only option available if moving a patient involves transferring the authority to detain him to different statutory managers).[118] Section 41(3)(c)(ii) provides that the "power to *transfer* a patient in pursuance of regulations under section 19" shall, in the case of a restricted patient, be exercisable only with the consent of the Secretary of State. However, prior to 1 October 1997, no similar qualification applied to removals under subsection (3). The managers were therefore able to remove a restricted patient from one hospital under their management to another without the Home Secretary's consent.[119] This lacuna has now been rectified.

CRIME (SENTENCES) ACT 1997

Prior to 1 October 1997, the legal position was that the Home Secretary's consent was not required before a restricted patient was granted ground parole; moved to an open ward within the same hospital; or removed from one hospital to another under the same statutory management (including, possibly, a community ward). However,

116 Mental Health Act 1983, ss.19(1) and (2), 41(3)(c), 145(3); Sched. 1, Pt. II, paras. 2, 5.
117 Parts VIII–X of the Act do not incorporate the definition given to "hospital" by section 34(2). The definition of a hospital in section 145(1), which excludes mental nursing homes ("private hospitals") therefore applies for the purposes of section 123, unless the context requires a different meaning. If the definition in section 145(1) does apply, the Secretary of State may not, under section 123, direct the transfer of a special hospital patient to a mental nursing home. It may be difficult to argue that the context requires another meaning since various other provisions in Parts VIII–X specifically refer to both hospitals and mental nursing homes. For example, sections 120 (Mental Health Act Commission), 127 (ill-treatment of patients), 131 (informal admission), 132 (duty to give information to detained patients), 133 (duty to inform nearest relative of discharge), and 135 (definition of a place of safety) refer to "hospitals" and "mental nursing homes." On the other hand, sections 117 (after-care) and 122 (pocket money for in-patients) are also expressed to apply only to hospitals, rather than to hospitals and mental nursing homes.
118 Section 19(3) provides that a patient who is for the time being liable to be detained may at any time be removed to any other hospital or accommodation which is managed by the same managers. Upon the patient's removal, the hospital order made by the court is deemed to have directed the patient's admission to the hospital to which he has been removed.
119 Section 41(3) and Part II of Schedule 1 to the Act provide that section 19 applies in relation to a restricted patient subject to the exclusions and modifications in the Schedule, neither of which related to subsection 19(3) until the Crime (Sentences) Act 1997 modified the position. Section 19(3) therefore applied in full.

the Crime (Sentences) Act 1997 enables the Home Secretary to exert ... ter control in some of these areas—

- The Home Secretary's consent is now required before a patient may be removed from one hospital to another hospital under the same managers.[120]

- Provided that restrictions are attached, a hospital order, section 47 transfer direction, or hospital direction, may specify the hospital unit to which the patient is to be admitted. For example, secure unit x at hospital y.[121] In this context, a "hospital unit" is "any part of a hospital which is treated as a separate unit."[122] Where a particular hospital unit is specified, any reference in the 1983 Act to a hospital — for example, in sections 17(1) and 19(3) — is to be construed accordingly. In such cases, the effect will be that the Home Secretary's consent is required before a patient who is to be detained in a specific unit may lawfully be taken, or allowed, outside that building or unit or be removed under section 19(3) to an open ward on the same site.

- However, at least initially, most restricted in-patients will not be detained in pursuance of an order or direction which specifies a particular unit. The new provisions do not prevent the managers moving these patients between a locked unit and an open ward within the *same* hospital, or granting them ground parole, without the Home Secretary's consent.

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[120] Mental Health Act 1983, s.41(3)(c), Sched. 1, Pt. II, para. 5, as amended by Crime (Sentences) Act 1997, s.49(2) and 49(3). As amended, section 41(3)(c) reads, "the following powers shall be exercisable only with the consent of the Secretary of State, namely— ... (iii) power to transfer the patient in pursuance of regulations under section 19 above *or in pursuance of subsection (3) of that section.*"

[121] Crime (Sentences) Act 1997, s.47.

[122] Crime (Sentences) Act 1997, s.47(3). A medium secure unit located away from the main building in part of the hospital grounds is clearly treated as a separate unit, as is any specialist psychiatric intensive care unit located in the main hospital building. Whether one of several open wards can be said to be part of a hospital which is treated as a separate unit is less clear. All wards are separate units in the sense that they are self-contained and separate from the other wards. If this is the correct sense, the Home Secretary's leave will be required before a patient admitted to a specific open ward in pursuance of such an order or direction may lawfully leave, or be allowed to leave, the designated ward (for example, to go to the hospital shop or have ground parole) or be removed to another open ward within the same hospital. The alternative view is that the word "unit" denotes a separate building (as in the phrase "industrial unit") or a self-contained and separately-staffed facility which provides a specialised service for a particular class of patients (as in the phrase "intensive care unit"). The provision is not designed for patients who are considered suitable for admission to an open ward. In support of this argument, it may be argued that: (1) Parliament could not have intended that the Home Secretary's leave should be necessary before a patient on an open ward may attend the occupational therapy unit, ECT suite, hospital psychology department, and so on. Such a provision would interfere with the treatment programme, when what treatment is given in a hospital, and when, is a matter for the responsible medical officer; (2) Similarly, Parliament did not intend that the management of open wards within the same hospital should be restricted. (3) Such an interpretation is supported by an examination of the equivalent provisions in the Crime and Punishment (Scotland) Act 1997. Section 9 of that Act is, insofar as material, identical to section 47 of the Crime (Sentences) Act 1997. However, in Scotland, the Mental Welfare Commission must be notified of compulsory admissions to hospital (**170**) and section 62(2) of the Mental Health (Scotland) Act 1984, as inserted by section 7(1) of the Crime and Punishment (Scotland) Act 1997, provides as follows: "62.— (2) Where the managers of a hospital specified in a hospital direction propose to admit the patient to a hospital unit in that hospital, they shall, if that unit was not so specified, notify the Secretary of State and the Mental Welfare Commission of the patient's proposed admission to and detention in that unit; and the patient shall not be so admitted unless the Secretary of State has consented to the proposed admission." That suggests that an ordinary ward is not a hospital unit.

Limits of the Secretary of State's powers

By way of summary, the Secretary of State may direct the transfer or removal of a restricted or unrestricted patient who is detained in a special hospital but he has no power to direct the transfer of a patient who is liable to be detained in a hospital which is not a special hospital. In such cases, his power is limited to either consenting to or refusing to consent to any proposed transfer. Furthermore, unless the order or direction specified a particular hospital unit, provided that the patient remains within the grounds of the hospital where he is liable to be detained, he is not absent from that hospital, either with or without leave. Consequently, moving him from a locked ward to an open ward within the hospital, or granting him permission to spend time in the hospital grounds, whether with or without an escort ("ground parole), does not require the Secretary of State's consent.[123]

RESTRICTIONS ON TRANSFER INTO GUARDIANSHIP

A restricted patient may not be transferred into guardianship, with or without the Secretary of State's consent.[124]

RESTRICTIONS ON DISCHARGE FROM HOSPITAL

Where a patient is detained under a hospital order and a restriction order is in force, the Secretary of State or a Mental Health Review Tribunal may discharge him from hospital, either absolutely or subject to conditions.[125] This power to discharge a patient from hospital subject to conditions, and without discharging the hospital order itself, is unique to cases involving restricted patients. A restricted patient who has been conditionally discharged from hospital may be recalled to hospital at any time during the period for which the restriction order remains in force.[126]

Absolute discharge from hospital

Either the Secretary of State or a Mental Health Review Tribunal may absolutely discharge a patient who is detained under a hospital order with a restriction order

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[123] The legal status of community wards is an interesting variation on the theme that the Home Secretary's consent is not required before a patient may be moved to another ward within the same hospital. A tribunal may not discharge a patient whom it considers should be moved to a hospital "community ward" situated away from the main institution in the local town. Because the legal status of such accommodation is that it forms part of the hospital, as much as if it were a ward within the main hospital grounds, such a direction necessarily rests on a finding that the patient requires a further period of in-patient treatment. Hence, the tribunal cannot possibly have been satisfied that the patient meets the statutory criteria for being discharged from hospital: *Secretary of State for the Home Department v. Mental Health Review Tribunal for Mersey Regional Health Authority Same v. Mental Health Review Tribunal for Wales* [1986] 1 W.L.R. 1170. However, this suggests that the Secretary of State's consent may not be required if the responsible medical officer wishes to move the patient to such accommodation, because the move does not involve (a) discharging him; (b) transferring him to another hospital; or (c) granting him leave to be absent from hospital. The Secretary of State may argue that the community ward constitutes a different hospital for these purposes so that the patient is being removed under section 19(3), since this now requires the Home Secretary's consent. Alternatively, it is possible that a court would hold that taking up residence at the ward in the community involves the patient leaving the hospital in order to undertake the journey between the two sites. Hence the Secretary of State's consent is required, because the patient requires section 17 leave to be absent from hospital for whatever time it takes him to complete the journey. See p.135.

[124] Mental Health Act 1983, ss.41(3), 40(4),145(3); Sched. 1, Pt. II, paras. 2 and 5(a).

[125] *Ibid.*, ss.42 and 73.

[126] *Ibid.*, s.42(3).

attached. Where a patient is absolutely discharged from hospital, he c[illegible]s to be liable to be detained under the relevant hospital order and the restriction order, being parasitic in nature, also ceases to have effect.[127]

Absolute discharge by a tribunal

A tribunal must absolutely discharge a patient from hospital if satisfied as to the matters specified in section 73(1) of the Act. Equally, it may not absolutely discharge a patient unless satisfied as to those matters. It has no discretion either way (**512**).

Absolute discharge by warrant of the Secretary of State

Section 42(2) provides that the Secretary of State may, if he thinks fit, by warrant absolutely discharge from hospital a restricted patient who is detained there under a hospital order. In contrast to the power of absolute discharge exercisable by a tribunal, the issue of a warrant of absolute discharge is a matter for the Secretary of State's discretion: the Act does not impose any statutory criteria by reference to which his decision is to be made.

Orders for discharge under section 23

In the case of unrestricted patients, the responsible medical officer or the managers may make an order for discharge under section 23, the effect of which is that the patient ceases to be liable to be detained under the hospital order.[128] Where a restriction order is in force, no such order may be made except with the Secretary of State's consent.[129] If the Secretary of State gives consent then, because a restriction order is parasitic in nature, discharging the hospital order has the effect of also bringing the restriction order to an end. Consequently, such an order is equivalent to a direction for the patient's absolute discharge.

Conditional discharge

Either the Secretary of State or a Mental Health Review Tribunal may direct the conditional discharge of a restricted patient who is detained under a hospital order. Where a patient is discharged from hospital subject to conditions, both the hospital order and the restriction order continue in force and the patient may by warrant be recalled to hospital by the Secretary of State at any time (**345**).[130]

Conditional discharge by a tribunal

A tribunal must conditionally discharge a patient from hospital if satisfied as to the matters specified in section 73(2) of the Act. Equally, it may not conditionally discharge a patient from hospital unless it is satisfied as to these matters. As in the

127 Mental Health Act 1983, ss.42(2) and 73(3).

128 The nearest relative has no power of discharge and the reference in section 23(1) to section 25 (and, indeed, in section 23(3) to applications for admission for assessment) is therefore a drafting error. In the case of restricted patients who are detained in a mental nursing home, the Secretary of State may himself discharge the patient under section 23 (as an alternative to discharging him under section 42) and certain other persons may also do so with his consent; namely, any health authority or NHS trust which has contracted with the mental nursing home for the patient to be treated there.

129 Mental Health Act 1983, ss.23(1) and 2(a), 41(3) and 41(3)(c)(iii); Sched. 1, Pt. II, para. 7(b).

130 *Ibid., s.42(3).*

case of absolute discharge, it h[illegible]o discretion either way (**511**). Liability to recall is by inference a condition of the discharge and it is not necessary as a matter of law to impose any express conditions.[131]

Conditional discharge by warrant of the Secretary of State

Section 42(2) provides that the Secretary of State may, if he thinks fit, by warrant conditionally discharge from hospital a restricted patient who is detained there under a hospital order. As in the case of absolute discharge, the issue is again a matter for the Secretary of State's discretion and the Act does not impose any statutory criteria by reference to which his decision is to be made.

The conditions of discharge and their variation

Section 73(5) provides that the Secretary of State may, following a patient's conditional discharge by a tribunal, subsequently vary any of the conditions attached by the tribunal to the discharge or impose further conditions. In contrast, section 42 does not expressly provide that where the Secretary of State himself directs the patient's conditional discharge he may later vary those conditions or impose further conditions, whether more onerous or not. Although the drafting is imprecise, this may be inferred from section 73 and the general framework of the Act. Unless such an inference is drawn, patients would have to be recalled to hospital each time their conditions required variation, whereas the Act envisages a gradual relaxation of the conditions in cases where a patient settles in the community without incident and moves towards absolute discharge. Furthermore, taking any other view means that where problems are reported by a patient's supervisors the Secretary of State may only recall or not recall, even if the difficulties could adequately be dealt with by a temporary tightening of the conditions of his discharge.

Cessation of the special restrictions

It has been noted that an absolute discharge has the effect not only of discharging the patient from hospital but also of bringing to an end both the hospital order under which he was liable to be detained there and the attendant restriction order, which is incapable of independent existence. However, the option of absolute discharge is only available if the patient is ready to be discharged from hospital. A mechanism is therefore required which enables the restriction order to be brought to an end on other occasions, whether prior to a patient's discharge from hospital or following his conditional discharge from hospital.

Cessation of restrictions prior to discharge

Section 42(1) provides that if the Secretary of State is satisfied that a restriction order is no longer required to protect of the public from serious harm, he may direct that the patient shall cease to be subject to the special restrictions, in which case the restriction order ceases to have effect. Such a direction does not *per se* discharge the relevant hospital order. However, the Act provides that, where such a direction is given, the patient shall be treated as if he had been admitted to the hospital where he is liable to be detained in pursuance of a second, notional, hospital order made

131 Mental Health Act 1983, s.73(4)(b). Notwithstanding the absence of the words "(if any)" from section 42(2), it is submitted that, for the same reason, the Secretary of State is not obliged as a matter of law to impose express conditions of discharge.

without restrictions on the date when the restrictions ceased to have effe[illegible] may be noted that where a tribunal does not discharge a restricted patient from hospital, it does not have this option of directing that he shall no longer be subject to the special restrictions.

Conditionally discharged patients

Where the Secretary of State gives a direction under section 42(1) in respect of a conditionally discharged patient, the patient is deemed to have been absolutely discharged on the date when the restriction order ceases to have effect. Accordingly, he ceases to be liable to be detained under the relevant hospital order. In the case of conditionally discharged patients, a tribunal also has power to give such a direction. Section 75(3)(b) provides that where a tribunal considers the case of a patient who has been conditionally discharged, it may direct that the restriction order shall cease to have effect. Where such a direction is given, the Act provides that the patient shall also cease to be liable to be detained under the relevant hospital order.

Expiration of restriction order of limited duration

Where a restriction order is made for a limited period, it will (with one exception) cease to have effect at the expiration of the period specified by the court. The effect of the period's expiration depends upon the patient's legal status at that time. In essence, the position is identical to that where the Secretary of State gives a direction under section 42 that restrictions imposed without limit of time shall cease to have effect.

Patients detained in hospital

Where, at the time the restriction order expires, the patient is detained in hospital in pursuance of the hospital order, he is treated as if he had been admitted there under a notional hospital order made, without restrictions, on the date when the restriction order ceased to have effect.[132]

Conditionally discharged patients

Where a patient has been conditionally discharged prior to the expiration of the period for which the order was imposed, and no warrant of recall is outstanding, the patient is deemed to be absolutely discharged.[133] Where a warrant of recall is outstanding at the expiration of the period specified by the court, because the patient is still absent without leave from the hospital specified in that warrant, the period of the restriction order continues until the patient eventually returns or is returned to the hospital. Upon his return, the restriction order expires and the patient is deemed to have been admitted to the hospital specified in the warrant under a notional hospital order made, without restrictions, on the date of his return to the hospital.[134]

Summary of discharge powers

The different ways in which a restriction order and the hospital order to which it is attached, may cease to have effect are summarised in the following table.

132 Mental Health Act 1983, s.41(5).
133 *Ibid.*, ss.42(5), 73(8).
134 *Ibid.*, s.42(3)(b).

DISCHARGE OF RESTRICTION ORDER PATIENTS : SUMMARY

Order, direction or event	*Effect*
• Direction of Secretary of State that the special restrictions shall cease to have effect made in respect of a patient who is liable to be detained in hospital. • Expiration of a limited-term restriction order in respect of a patient who at the time is liable to be detained in hospital.	The restriction order ceases to have effect but the patient remains liable to be detained under the relevant hospital order. However, the Act provides that the patient shall be deemed to have been admitted under a hospital order without restrictions made on the date the restriction order came to an end.
• Direction of Secretary of State or a Mental Health Review Tribunal that a detained patient shall be conditionally discharged from hospital.	Both the hospital order and the restriction order remain in force. The patient remains liable to be detained under the hospital order and may be recalled to hospital by the Secretary of State.
• Direction of Secretary of State or a Mental Health Review Tribunal that a detained patient shall be absolutely discharged from hospital. • Order for discharge under section 23. • Direction of Secretary of State or a Mental Health Review Tribunal that the special restrictions shall cease to have effect in respect of a patient who has been conditionally discharged. • Expiration of a limited-term restriction order after a patient has been conditionally discharged from hospital.	Both the hospital order and the restriction order cease to have effect.

TRANSFERS OF CONDITIONALLY DISCHARGED PATIENTS

Section 48(1) of the Crime (Sentences) Act 1997 was brought into force on 1 October 1997. It provides that responsibility for a conditionally discharged patient in Northern Ireland or Scotland may be transferred to the Home Secretary, and vice-versa. Conditionally discharged patients transferred to England or Wales are deemed to have been conditionally discharged by the Home Secretary or by a Mental Health Review Tribunal on the date of their transfer. Accordingly, the patient must wait a further year before he may apply to a Mental Health Review Tribunal. If the restriction order or direction is of limited duration, it expires on the date on which it would have expired had the patient not been transferred.

Crime (Sentences) Act 1997

Section 48(1) provides that the Mental Health Act 1983 and the Mental Health (Scotland) Act 1984 shall have effect subject to amendments in Schedule 3 to the 1997 Act concerning transfers within the British Islands of responsibility for conditionally discharged patients.

Transfers to Scotland and Northern Ireland

- Sections 80A and 81A of the 1983 Act are concerned with the transfer of conditionally discharged patients to Scotland and Northern Ireland respectively. A patient so transferred is treated as if he were subject to a restriction order, and as if he had been conditionally discharged, under the corresponding provisions in the Mental Health (Scotland) Act 1984 or the Mental Health (Northern Ireland) Order 1986, as the case may be.[135]

Transfers to England and Wales

- Section 82A provides that if it appears to the relevant Minister that it would be in the interests of a conditionally discharged patient who is subject to a restriction order or restriction direction under Article 47(1) or 55(1) of the Mental Health (Northern Ireland) Order 1986 to transfer him under that section, that Minister may, with the consent of the Home Secretary, transfer responsibility for him to the Secretary of State.

- Section 77A of the Mental Health (Scotland) Act 1984 similarly provides that if it appears to the Secretary of State for Scotland that it would be in the interests of a conditionally discharged patient subject to a restriction order under section 59 of the Criminal Procedure (Scotland) Act 1995 to transfer him under that section, the Secretary of State may, with the consent of the Home Secretary, transfer responsibility for him to the latter.

- Where responsibility for such a patient is transferred, he is to be treated as if he were subject to a restriction order or restriction direction under section 41 or 49 and as if he had been conditionally discharged under section 42 or 73 on the date of the transfer. The restriction order or direction will, if of limited duration, expire on the date on which it would have expired had the transfer not been made.

135 Mental Health Act 1983, ss.80A and 81A, as inserted by Crime Sentences Act 1997, Sched. 3, Pt. I, paras. 1 and 2.

WARRANTS OF RECALL

While a restriction order remains in force, the Secretary of State may at any time by warrant recall the patient to such hospital as may be specified in the warrant.[136] A conditionally discharged patient remains liable to detention in this limited sense.[137] Upon a warrant being issued, the hospital order and the restriction order have effect as if the hospital specified in the warrant were substituted for that specified in the hospital order.[138] Pending his admission to the named hospital, the patient is to be treated as absent from there without leave.[139] Section 18 applies, with the modification that the patient does not cease to be liable to be taken into custody after he has been absent for a certain length of time.[140] He may at any time be taken into custody and conveyed to the named hospital by any approved social worker, by any officer on the staff of the named hospital, by any constable, or by any person authorised in writing by the managers of the named hospital.[141] If it appears to a justice of the peace that there is reasonable cause to believe that the patient is to be found on private premises within the jurisdiction of the justice, and that admission to the premises has been refused, or that a refusal is apprehended, he may issue a warrant authorising any constable to enter those premises (if need be by force) and to remove the patient.[142]

Home Office policy concerning the recall of patients

The Home Office requires psychiatric and social supervisors to submit quarterly or six-monthly reports on the patient's mental state and ability to cope, although supervisors must also notify the Home Office of any worrying developments as soon as they occur. The Home Office's policy concerning the recall of restricted patients has been summarised by Pickersgill[143]—

- When a psychiatrist or social supervisor notifies the Home Office of problems, account is taken of any representations and supporting evidence which suggests that the patient should not be compulsorily recalled to hospital. However, while wishing to avoid any possibility of over-reacting and unnecessarily depriving a patient of his freedom, the Home Secretary always gives paramount consideration to the public's safety and he will exercise his power of recall whenever there is an element of doubt.

136 Section 42(3) provides that, "The Secretary of State may at any time during the continuance in force of a restriction order ... by warrant recall the patient to such hospital as may be specified in the warrant." Section 73(4)(a) provides that where a patient is conditionally discharged by a tribunal under that section, "he may be recalled by the Secretary of State under subsection (3) of section 42 above as if he had been conditionally discharged under subsection (2) of that section."

137 The phrase "liable to be detained" is used elsewhere in the Act to denote a patient who has leave to be absent from hospital under section 17 but who has not yet been discharged from hospital. Conditionally discharged restricted patients remain "liable to be detained" under the relevant hospital order in the more limited sense that, although discharged, the hospital order remains in force.

138 Mental Health Act 1983, s.42(4)(a).

139 *Ibid.*, s.42(4)(b).

140 *Ibid.*, ss.18(1), 41(3) and 41(3)(d); Sched. 1, Pt. II, para. 4.

141 *Ibid.*, s.18(1).

142 *Ibid.*, s.135(2). Although the Home Office has been known to advise social workers that it is not necessary to first obtain a warrant before entering and searching private premises where it is suspected that an absent restricted patient is staying, the section 135 procedure applies to restricted and unrestricted patients alike.

143 A. Pickersgill, "Balancing the public and private interests" in *Risk-taking in Mental Disorder: Analyses, Policies and Practical Strategies* (ed. D. Carson, S.L.E. Publications, 1990).

- If the patient is engaging in odd or anti-social behaviour inside o side his home, such as threatening violence, exposing himself, or acting in a way similar to that prior to the index offence, he will normally be recalled to hospital, whether or not his supervisors advocate such action.
- Patients who come to the Home Office's attention only when they have been charged with re-offending are usually left in the community or in prison to be tried and sentenced.[144] Exceptions may be made where the patient is on bail and shows signs of committing further offences as the result of his mental state.
- There are a number of occasions when measures falling short of recall can be taken. Warning letters can be used where a patient has not kept appointments with his supervisors or is showing signs of resuming heavy drinking which played a part in his index offence. Consent may be given to the patient's readmission to hospital as an informal patient (**365**).

The exercise of the power to recall

As can be seen from the table below, patients discharged by a tribunal are more likely to be reconvicted during the following two years. However, this probably reflects the fact that the Home Secretary has, since 1984, left it to tribunals to decide whether to discharge in borderline cases, declining to do so himself. Bearing this in mind, it does not appear that the Secretary of State is more likely to recall patients whom a tribunal has discharged.

Number of conditionally discharged patients recalled and/or convicted

Period	No. discharged		% RECALLED within 2 years		% CONVICTED WITHIN 2 YEARS OF: A grave offence		Any standard list offence	
	MHRT	*SofS*	*MHRT*	*SofS*	*MHRT*	*SofS*	*MHRT*	*SofS*
1975–77	—	402	—	10.0%	—	1.7%	—	14.9%
1978–80	—	373	—	8.0%	—	2.1%	—	17.7%
1981–83	—	336	—	3.9%	—	2.7%	—	13.4%
1984–86	237	138	18.6%	13.0%	2.1%	1.5%	14.4%	8.0%
1987–89	173	142	12.1%	12.7%	1.2%	0%	5.8%	0.7%

Source: Home Office Statistical Bulletin (Home Office, 1994), Issue 18/94.

144 For an example of this, see *R. v. Trent Mental Health Review Tribunal., ex p. Ryan* [1992] C.O.D. 157, D.C.

Constraints on the Secreta of State's power of recall

In *R. v. Secretary of State for the Home Department, ex p. K.*,[145] McCowan L.J. dealt with the breadth of the Secretary of State's power to recall a restricted patient to hospital—

> "Counsel for the appellant submitted that if the section is given this literal interpretation the Secretary of State would be provided with an unbridled power at his whim and without cause to deprive a conditionally discharged patient of his liberty. That is only so, however, if one ignores the public law constraints recognised by the decisions in *Associated Provincial Picture Houses Ltd. v. Wednesbury Corp.*[146] and *Padfield v. Ministry of Agriculture Fisheries and Food.*[147]
>
> Counsel for the appellant argues that, even if the convention cannot assist him, Padfield 's case should. The discretion given to the Secretary of State by s.42(3) can only be used to promote the policy and objects of the Act, which are, according to his submission, that persons should not be deprived of their liberty unless they are shown, on the basis of objective medical evidence, to be suffering from mental disorder of such a degree as to warrant their compulsory confinement. In our judgment, that defines the policy and objects of the Act on far too narrow a basis. We prefer the view of McCullough J.[148] ... : These are to regulate the circumstances in which the liberty of persons who are mentally disordered may be restricted and, where there is conflict, to balance their interests against those of public safety."

The Wednesbury and Padfield cases

The principles which derive from the *Wednesbury* case are that, subject to complying with the law, the discretion of a body to whom a discretion is entrusted by statute is absolute. However, it must be a real exercise of the discretion: the body must have regard to matters to which it is expressly or by implication referred by the statute conferring the discretion; it must ignore irrelevant considerations; it must not operate on the basis of bad faith or dishonestly; it must direct itself properly in law; it must act as any reasonable person would act and must not be so absurd in its actions that no reasonable person would act in that way.[149] According to *Padfield's case*, which concerned the Milk Marketing Board,[150]

> "Parliament must have conferred the discretion with the intention that it shall be used to promote the policy and objects of the Act; the policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter of law for the Court. In a matter of this kind it is not possible to draw a hard and fast line, but if the Minister, by reason of having misconstrued the Act or for any other reason, so uses his discretion, as to thwart or run counter to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to the protection of the Court."

145 *R. v. Secretary of State for the Home Department, ex p. K.* [1991] 1 Q.B. 270, C.A.
146 *Associated Provincial Picture Houses v. Wednesbury Corporation* [1948] 1 K.B. 223.
147 *Padfield v. Ministry of Agriculture Fisheries and Food* [1968] A.C. 997.
148 *R. v. Secretary of State for the Home Department, ex p. K.* [1990] 1 W.L.R. 168 at 174.
149 *Associated Provincial Picture Houses v. Wednesbury Corporation*, supra., at 228. See K. Bagnall Q.C., *Judicial review* (Profex, 1985), p.12.
150 *Padfield v Ministry of Agriculture Fisheries and Food, supra.*, at 1030.

The need for a material change of circumstances and medical evidenc

Whether the Home Secretary must have medical evidence that the mental state of a patient conditionally discharged by a tribunal has subsequently deteriorated before he may recall him to hospital was considered in *ex p. K.* The Court of Appeal held that Parliament's intention was that the Secretary of State should, at any time during the continuance of a restriction order, be empowered in his discretion to recall a restricted patient to hospital. More particularly, there is no requirement in section 42 that the Secretary of State may not recall a patient unless he has medical evidence that the patient is suffering from mental disorder. The exercise of the power of recall is simply subject to the ordinary public law constraints recognised by the decisions in *Associated Provincial Picture Houses Ltd v. Wednesbury Corp. [1948] 1 K.B. 223* and *Padfield v. Ministry of Agriculture Fisheries and Food [1968] A.C. 997.*

Ex p. K.

According to McCullough J., in the Divisional Court, it would be unlawful for the Secretary of State to recall a patient who had been discharged the previous week by a tribunal in the absence of some fresh development: it does not matter whether one castigates such an action as irrational, illegal, or as frustrating the objects and policy of the Act. Nor would it be a proper exercise of the power of recall if the Secretary of State realised that the patient's condition was such that he would be released when his case was considered by a tribunal. However, it is, in general, sufficient that he has reason to believe that the patient's condition is such that, after recall, he might not be released by a tribunal considering his case under section 75(1). Despite a lack of medical evidence of any subsequent change in a patient's mental condition since his discharge by a tribunal, it is open to the Secretary of State to take, and act upon, the view held by him of the patient's mental state, provided he does so in a way which is consistent with the purposes of the Act.

R. v. Secretary of State for the Home Department, ex p. K.

[1990] 1 W.L.R. 168 — *Q.B.D., McCullough J.*

In January 1971, the patient was convicted of the manslaughter of a neighbour's 12-year-old daughter. Her condition when found indicated that she had been raped, asphyxiated, cut with a sharp instrument and bitten. The patient had been before the courts on 11 previous occasions and had previous convictions for rape, indecently assaulting a girl aged seven, and having sexual intercourse with a girl aged between 13 and 16. He had only been out of prison for some six weeks before committing the index offence. The court was satisfied that he was suffering from a psychopathic disorder and it directed his admission to a special hospital in pursuance of a hospital order and a restriction order made without limit of time. The patient was transferred to a different special hospital in November 1981. In March 1985, a tribunal reviewed his case. A special hospital consultant gave evidence that in his opinion the patient was not a danger to himself or others and the chief psychologist there said that he was now functioning at a normal level. An experienced nursing officer well acquainted with the patient said that he would "welcome him as a next door neighbour." Given the unanimous medical evidence that the patient was not presently suffering from any form of mental disorder, but taking the view that it was appropriate for him to remain liable to recall, the tribunal conditionally discharged him from hospital.

In October 1985, some seven months after being discharged, the patient made an unprovoked attack on a girl of 16 whom he saw walking along a road in the afternoon. He put both hands round her throat and applied some pressure but she managed to run off. The next night, at about 11.30 pm, he attacked a young woman of 21. After speaking to her, he held her neck in an arm lock and put his hand over her mouth, pulling her into an entry and then pushing her to a crouching position. She pretended to weaken and, as he began to let her go, she screamed and he ran off. On being interviewed, the patient said only that he did not know why he had done it. A sexual motive for each assault was suspected but could not be proved. The patient's supervising psychiatrist and probation officer had not been aware of any signs of the impending violence. Subsequently, in April 1986, the patient pleading guilty in each case to assault occasioning actual bodily harm. He was described in court by his leading counsel as "so disturbed mentally that he cannot control the impulses from which he suffers." A special hospital medical report concluded that he had a severe personality disorder, probably with some psycho-sexual involvement, and an alcohol problem. However, this could not be equated with a psychopathic disorder which either needed or would respond to treatment. In the doctor's opinion, he was not suffering from a mental disorder as defined by section 1 of the 1983 Act. A disposal under Part III of the Act was therefore impossible. Having considered the medical and other evidence, the judge sentenced the patient to a total of six years imprisonment, describing him as "a very dangerous man ... in particular to young girls and young women." The patient remained conditionally discharged, notwithstanding that he was serving a sentence of imprisonment, and in 1986 he reapplied to the tribunal, again seeking his absolute discharge from the hospital and restriction orders. At the hearing in December 1986, the Home Secretary emphasised the importance of the restrictions, in that they enabled the patient to be recalled to hospital at the expiration of his current sentence, or subsequently, should that be deemed necessary in the interests of public safety. The medical evidence before the tribunal was again unanimously of the view that the patient was not suffering from any form of mental disorder. The tribunal accepted this evidence but, as before, also considered it appropriate for him to remain liable to be recalled. In particular, supervision would still be required after his release from prison and it was necessary to test his behaviour in the community before it would be appropriate to absolutely discharge him.

The issue of a warrant of recall

The patient's his earliest date of release was 24 October 1989 and, on 1 September 1989, with the prospect of release approaching, the Secretary of State issued a warrant authorising the patient's detention in a special hospital upon his release from prison. A letter of the same date informed the patient of the decision and the reasons for it: "The Home Secretary, having considered the nature of your further offences of assault occasioning actual bodily harm and wounding, of which you were convicted on 14 April 1986, has concluded that he cannot be satisfied that you no longer present a serious risk to public safety, and he has therefore authorised your recall to [a particular special hospital] under section 42(3) of the Mental Health Act 1983 when your prison sentence expires on 24 October 1989." The Secretary of State issued the warrant without seeking any further expert medical opinion. However, he had never at any time agreed with the medical opinion that the patient was not suffering from a psychopathic disorder and was of the opinion that his grave misgivings on this point had been fully confirmed by the two offences following the patient's conditional discharge.

The application for judicial review

The applicant applied for judicial review by way of (1) an order of certiorari to quash the warrant of recall dated 1 September 1989 and (2) an order of prohibition restraining the Secretary of State from so recalling him. He contended (1) that it was to be implied that the Secretary of State could only exercise his power to recall a patient to hospital on the recommendation of a medical practitioner and (2) that the Secretary of State could not exercise his power of recall in circumstances where a Mental Health Review Tribunal was obliged to order his conditional discharge because he was not suffering from any mental disorder. McCullough J. heard the application on 23 October 1989, the day before the appellant was due to be released from prison. Unless a lawful warrant of recall could be issued in the circumstances, the patient would return to the community on the following day.

McCullough J.

Although it had been contended that, because any exercise of the power of recall under section 42(3) led to a deprivation of liberty, therefore any doubt about its scope should be resolved so as to give effect to the right to liberty, that principle could only come into play if it was first apparent that there was a doubt. On its face, section 42(3) required only a patient who had been conditionally discharged and in respect of whom a restriction order was in force. Other than what might be called the ordinary public law constraints recognised by the decisions in *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation [1948] 1 KB 223* and *Padfield v. Ministry of Agriculture Fisheries and Food [1968] AC 997,* the Secretary of State's discretion appeared to be unfettered. If any further restriction could be implied, it could only derive from a consideration of the Act as a whole. The policy and objects of the Act were to regulate the circumstances in which the liberty of persons who are mentally disordered may be restricted and, where there is conflict, to balance their interests against those of public safety. In relation to persons who were under sentence and subject to restrictions, Parliament had cast on the Secretary of State, and in many instances on him alone, the direct responsibility for taking decisions in each individual case. None of the Home Secretary's powers in section 41 and 42 were expressed to be exercisable only if their use had been recommended by one or more doctors. Indeed, the power of recall might sometimes need to be exercised very quickly. It was therefore clear that Parliament advisedly left the Secretary of State's power of recall uncircumscribed by the need to act on medical opinion. In requiring the Secretary of State to refer the case to a tribunal within one month of the patient's recall, rather than sooner or later, Parliament was striking a balance and intended to enable the Secretary of State to act under section 42(3) without medical evidence if he saw fit. This point also disposed of the applicant's reliance on a passage in the judgment of the European Court of Human Rights in *Winterwerp v. The Netherlands* (1979) 2 E.H.R.R. 387, 403 about the need for objective medical expertise before a person could be deprived of his liberty on the basis of unsoundness of mind. It was clear that the Secretary of State believed that the applicant presented a danger to the public and that it could not safely be said that he was no longer suffering from psychopathic disorder. His belief about the applicant's mental condition was not unreasoned. The reports which were before the tribunal of 18 December 1986 were, in the view of the Secretary of State, unsatisfactory in a number of respects. For example, one report concluded that "I do not feel that, if seen *a priori* without his previous hospitalisation history, any psychiatrist would take the view that he was psychopathically disordered within the meaning of the Act of 1983 or would attempt to admit him to hospital for treatment." Why, one might ask, should one

express a view without regard to his previous hospitalisation history? The opinion of the Secretary of State as to the question of psychopathic disorder was based on reason and one did not have to be a doctor to evaluate the worth of reports which had such features. Judges, for example, had to do it all the time. So, in the exercise of a number of his functions, did the Home Secretary. Further, the confidence of the responsible medical officer and of all the others who predicted that the applicant could safely be released from hospital in March 1985 had been shown to have been misplaced, a factor which must case doubt on their overall judgment.

Limitations of Secretary of State's power

It was not entirely right to submit that the Secretary of State had power under section 42(3) to order a recall in circumstances in which a tribunal would be obliged to order the patient's conditional discharge. He could not properly exercise his power of recall if he realised that the patient's condition was such that, when his case was considered by a tribunal, he would be released. However, it was, in general, enough that the Secretary of State had reason to believe that the patient's condition was such that, after recall, he might not be released by a tribunal considering his case under section 75(1). That is, he believed the patient was or might well be mentally disordered and that, for the protection of others, he should be in hospital for treatment. If that was his state of mind then he acted in conformity with the purposes and intendment of the Act and his decision could only be open to challenge on the usual Wednesbury grounds. Thus, adopting the wording of section 73, he could, in general, properly recall if, with reason, he feared (i) that the patient was suffering from mental disorder to an extent which made it appropriate for him to be liable to be detained in a hospital for medical treatment; and (ii) that it was necessary for his own health and safety or for the protection of others that he should receive such treatment. "In general" because the observation was subject to a qualification which represented the only point which had caused His Lordship any real difficulty. This was the extent to which a tribunal's decision to conditionally discharge a restricted patient subsequently bound the Secretary of State. The point had been most tellingly made by the patient's counsel when he asked if it could be lawful for the Secretary of State, a week after a patient had been conditionally discharged by a tribunal, to exercise his power of recall in the absence of some fresh development. The answer was plainly not. It did not matter whether one castigated such an action as irrational, or illegal, or as frustrating the objects and policy of the Act. According to the patient's counsel, this was what has happened here since there was no evidence that the patient's condition has deteriorated; indeed there was no evidence about it at all. There were, no doubt, occasions when the Secretary of State had to act with speed under section 42(3) but this was not one of them. For years the applicant has been safely in prison. What the Secretary of State was in fact doing was overturning a decision with which he did not agree. His views were put to the tribunal on that occasion and they were rejected. He did not like the result so he was going to frustrate it by what could only be regarded as a misuse of section 42(3). The submission had more than a hint of *res judicata* in it and it was useful to see what was in fact decided in December 1986. The tribunal was constituted because the patient, who had earlier been discharged conditionally, wanted to be discharged absolutely. The issue in December 1986 had been confined to the issue of whether the patient should remain liable to recall and nothing was decided at that hearing which procured his conditional release. That was procured by the earlier decision of 19 March 1985 since when the events of October 1985 had occurred. Thus, insofar as considerations of *res judicata* might apply in the field (on which no submissions had been made and the court expressed no opinion), there was nothing in the tribunal's decisions to prevent

the Secretary of State from alleging that further events had occurred [illegible]e March 1985 which had a bearing on the question of the patient's mental condition — namely the attacks of October 1985. Despite the lack of evidence of any subsequent change in the patient's mental condition, it was open to the Secretary of State to take and act upon the view held by him provided he did so in a way consistent with the purposes of the Act. It would, however, be unlawful for the Secretary of State to recall a restricted patient to hospital when only the previous week or month he had been conditionally discharged from hospital by direction of a tribunal, unless meanwhile something has happened which justified the belief that a different view might now be taken about one of the factors on which his release had depended. But that was not the situation here. The hypothetical situation would frustrate the purposes of the Act but the present one did not. The essential factual difference between December 1986 and September 1989 was that in December 1986 there was no imminent prospect of the applicant coming into contact with members of the public, in particular young females; now there was. That was why the Secretary of State did not then act but now did. In terms of the application of the Wednesbury criteria [1948] KB 223, 229, it was important for the court to remember that the Secretary of State, before exercising his power under section 42(3), must give full weight to the fact that his decision will affect the liberty of the person recalled, but his interests were not the only ones for the Secretary of State to consider. *Application dismissed.*

The Appeal

K appealed against the decision of McCullough dismissing his application for judicial review and the case was therefore considered by the Court of Appeal.

R. v. Secretary of State for the Home Department, ex p. K.

[1991] 1 Q.B. 270 *C.A. (Slade, Balcombe and McCowan L.JJ.)*

As to the facts of the case and the decision in the Divisional Court, see p.348.

McCowan L.J.

The words of section 42(3) being plain and unambiguous, it was clear from the decision in *R. v. Secretary of State for the Home Department, ex p. Brind [1990] 2 W.L.R. 787* that it was not open to courts in this country to look to the European Convention on Human Rights for assistance in their interpretation. There was no requirement in section 42 that the Secretary of State could not by warrant recall a patient unless he had medical evidence that the patient was suffering from mental disorder. The submission that a literal interpretation of the subsection gave the Secretary of State an unbridled power, at his whim and without cause, to deprive a conditionally discharged patient of his liberty was only so if one ignored the public law constraints recognised by the decisions in *Associated Provincial Picture Houses Ltd v. Wednesbury Corp. [1948] 1 K.B. 223* and *Padfield v. Ministry of Agriculture Fisheries and Food [1968] A.C. 997*. As to Padfield's case, the policy and objects were as stated by McCullough J. in the Divisional Court. There were many powers in the 1983 Act which could not be exercised except on the recommendation of one or more doctors. It was therefore no accident or omission on the part of the legislature that section 42(3) did not require that, before exercising his power of recall, the Secretary of State first be satisfied by medical evidence that the patient was suffering from mental illness, etc. The clear intention was that the Secretary of State should be empowered, at any time during the continuance of a restriction order, in his

discretion to recall a p[atien]t to hospital. In exercising that discretion, the Secretary of State would no doubt find it necessary to balance the interests of the patient against those of public safety. The intention of the 1983 Act was that the interests of the patient shall be safeguarded by the provision in section 75(1) that, within one month of the patient being returned to hospital, the Secretary of State must refer his case to a tribunal. For all these reasons, counsel for the appellant had failed to persuade the court that the Secretary of State had acted contrary to *Padfield* principles.

Whether the Home Secretary's decision had been irrational

It was furthermore not factually correct that the Secretary of State had addressed his mind only to the aspect of public safety and not also to the appellant's mental condition. This was clear from his letter of 1 September. Nor could it be said that the Secretary of State's decision to recall the appellant was Wednesbury unreasonable because there had been no change of circumstances since the decision of the tribunal in December 1986; he had no medical evidence that the appellant was now suffering from any mental disorder; and, if he had had any doubts, the only proper course had been to ask the appellant to subject himself to another psychiatric examination prior to his release. Against these arguments, it was necessary to weigh, *inter alia*, the appellant's record of offences of violence against women prior to the index offence; the nature of the index offence and the manner in which it was dealt with by the court; the diagnosis that the appellant was suffering from psychopathic disorder between 1970 and 1985; his commission of two further serious offences of violence to women six months after his release from hospital; what was said by the appellant's counsel in mitigation on 14 April 1986; the unsatisfactory nature of the responsible medical officer's report before the tribunal on 18 December 1986; the fact that no tribunal had seen fit to discharge the appellant absolutely, because they thought there was a danger of him suffering a relapse; that nearly three years had passed since a tribunal last looked at the case, during which time he had been in prison; that the best method of coming to an up-to-date conclusion on his mental state and the possible danger to the public would be by another reference to a tribunal; and that the Secretary of State believed that such a tribunal might well conclude that the appellant was suffering from psychopathic disorder. Taking account of all those factors, it was impossible to say that the Secretary of State's decision had been irrational. *Appeal dismissed.*

Whether patient must have breached a condition of his discharge

The case of *Roux v. United Kingdom*,[151] which is presently before the European Court of Human Rights, raises the issue of whether a restricted patient who has not breached a condition of his discharge may be recalled to hospital by the Secretary of State. The patient was conditionally discharged by a tribunal, subject to conditions that he submit to supervision, accept any psychological treatment considered necessary, and reside at an address approved by his supervisors. He left hospital on 11 April 1994. His behaviour from that time until the issue of a warrant of recall on 25 May gave the Home Secretary and his medical supervisors cause for concern: he returned to his sheltered accommodation in a drunken and distressed state on the first night; described himself as suicidal on 16 April and was informally admitted to

[151] *Roux v. United Kingdom* (App. No. 25601/94), European Commission First Chamber Decision as to admissibility, 4 September 1996.

a psychiatric clinic the next day; allegedly brought a prostitute back to [illegible]lat and argued with her about money; and was exceeding the agreed levels of alcohol intake. There was particular concern that he was beginning to repeat the pattern of behaviour prior to the commission of his two offences against prostitutes and the medical opinion was that he should be recalled because his mental state was likely to deteriorate if he remained at the flat.

The complaints

The patient complained that his recall was in breach of Article 5, because there was no non-compliance with a court order and no breach of an obligation prescribed by law. In particular, he should not have been recalled as he had not breached any condition of his discharge and no court had determined the state of his mental health at the time. The Government submitted that the Secretary of State's power of recall was not limited by the conditions attached to release and there could be occasions where recall was appropriate even though no conditions had been breached. Conversely, some breaches of the conditions of discharge from hospital would not warrant recall to hospital. The Commission unanimously declared the patient's application admissible, without prejudging the merits of the case.

Domestic law

As a matter of domestic law, it must be correct that it is not a precondition of recall that a patient is in breach of one or more of the conditions of his discharge. Firstly, it was held in *R. v. Secretary of State for the Home Department, ex p. K.* [1991] 1 Q.B. 270 that Parliament's intention was that the Secretary of State should, at any time during the continuance of a restriction order, be empowered in his discretion to recall a restricted patient to hospital. Secondly, a patient may be conditionally discharged but no express conditions be imposed on his discharge: nevertheless, the patient remains liable to recall **(535)**. Thirdly, a patient's recall may be justified if his mental state has deteriorated, although this does not involve any breach of a condition attached to his discharge. Fourthly, it is also the case that there will generally be grounds for recall if the patient has reoffended, although being of good behaviour is never an express condition of discharge. If the complaint is upheld, the consequence is likely to be merely that the Home Secretary will attach ever more numerous conditions to each and every discharge, to the benefit of no one.

Whether patient may be recalled to hospital where he already is

Whether a conditionally discharged patient may be recalled to a hospital to which he has already been readmitted informally or under Part II of the Act was considered in *ex p. D.* It was held that the fact that a patient is already receiving in-patient treatment in a hospital, and is liable to detention there under some other provision of the Act, does not prevent the Home Secretary from issuing a warrant under section 42(3), formally recalling him to that hospital. A warrant under section 42(3) authorises *both* the patient's compulsory readmission and detention *and* the reinstatement of the regime of control under section 41. The purpose of the Secretary of State authorising the patient's recall is so that he may resume the restrictive powers which he seeks to exercise over that patient. In short, the word "recall" should not be regarded in purely physical terms but should be viewed as reinstating the restrictive regime of control under section 41. The judgment is commented on below **(365)**.

R. v. Secretary of State [illegible] the Home Department and another, ex p. D.

The Times, 1 April 1996 — *Q.B.D., Hidden J.*

The patient was subject to a restriction order. In October 1993, a tribunal directed that he be conditionally discharged. He left the unit on 22 March 1994 and moved to a hospital in Brighton (*sic.*). On 10 January 1995, his condition deteriorated and he was readmitted to the regional secure unit under section 3. On 5 May, a warrant was issued by the Secretary of State, recalling him to that unit under section 42(3). The authority to detain the patient conferred by the section 3 application was not renewed in July. In November 1995, a tribunal reviewed the patient's case but did not direct his discharge from hospital.

The application for habeas corpus

The patient applied for an order of habeas corpus on the ground that the warrant of recall had been issued without jurisdiction. The question to be determined by the court was whether the Secretary of State could recall a patient to a hospital where he already was and where he was already receiving treatment. Counsel for the patient submitted that the words "recall the patient to ... hospital" had to be given their ordinary and natural meaning, which meant that the power could only be exercised if the patient was not a patient in that hospital.

Hidden J.

Section 42(4) made it clear that the hospital mentioned in the warrant might be either the hospital from which the patient had been conditionally discharged or any other hospital. The word "recall" meant "order to return, call back, permanently or temporarily." Nothing in the Act prevented the issue of such a warrant in respect of a person who was present at the relevant hospital but without there being in existence any hospital order and restriction order in relation to that hospital. The argument forwarded on the patient's behalf would mean that the hospital to which the patient was recalled could not be the hospital where he was being treated and happened to be. *Application refused.*

D. v. Mental Health Review Tribunal for the South Thames Region

The Times, 10 May 1996 — *C.A. (Sir Thomas Bingham M.R., Ward and Evans L.JJ.)*

Sir Thomas Bingham M.R.

The most obvious meaning of "recall" was to authorise the bringing back of someone to where he once was. However, Parliament could not have intended the provisions to have the limited and narrow effect contended by the patient's counsel. A warrant under section 42(3) authorised both the compulsory readmission and detention of the patient *and* the reinstatement of the regime of control under section 41. That was the purpose of the Secretary of State authorising the recall, so that he could resume the restrictive powers which he sought to exercise over that patient. It would be absurd if the effect of a section 3 admission was to deny the Secretary of State powers which he might well wish to exercise pursuant to section 41. It would further be absurd if he could only exercise those powers if the patient were ceremonially allowed to leave one hospital in order that the warrant could be properly issued. It would also be absurd if the fact that he was in one hospital justified his recall to any hospital other than that hospital, not least because if he were recalled to any other hospital he could then be transferred to that hospital. *Appeal dismissed.*

The fact that *D.* was not recalled until he had been detained in hospital under Part II for some four months seems to have been accepted by the court as a valid exercise of the Home Secretary's discretion. Certainly, the Secretary of State sometimes agrees to restricted patients being admitted informally, or under section 2 or 3, as an alternative to formal recall under section 42. Similarly, on being notified that a conditionally discharged patient has been readmitted informally or under Part II, he may not always immediately recall the patient. At the same time, the Secretary of State has contended that a patient readmitted to hospital under section 2 or 3 cannot then apply to a tribunal for his discharge from hospital. This is because section 41(3)(b) provides that "no application shall be made to a Mental Health Review Tribunal in respect of a (restricted) patient under section 66 or 69(1) below." Having been informed of the Secretary of State's view, some tribunals have therefore refused to consider applications made by such patients on the basis that they are not applications authorised by the Act. All of these issues were later considered in the case of *ex p. Stewart*. It was held in the Divisional Court that Parts II and III of the Act can operate independently and in parallel; that a restricted patient readmitted to hospital under section 3 has the same rights to apply to a tribunal as any other section 3 patient; that because a restricted patient detained under section 3 is also liable to detention under the relevant hospital order, the Home Secretary may subsequently recall him to hospital under section 42(3), for example if he is discharged by a tribunal from liability to detention there under section 3. That decision was subsequently affirmed by the Court of Appeal.

R. v. Managers of the N.W. London Mental Health NHS Trust, ex p. Stewart

CO/1825/95, 19 July 1996 *Q.B.D., Harrison J.*

The patient was subject to a hospital order and a restriction order made without limit of time. He was conditionally discharged by a tribunal in July 1993. The psychiatrist in charge of his treatment was of the opinion that he required a short readmission to hospital and that recalling him under section 42 would result in an unnecessarily protracted stay in hospital. Following consultation with the relevant officer at the Home Office, the patient was readmitted to hospital under section 3 on 1 June 1995 and then released from hospital on 15 June.

The application for judicial review

The patient sought an order of certiorari, quashing the trust's decision to detain him in hospital pursuant to section 3. He also sought four declarations. Firstly, a declaration that there was no power under section 3 to detain a conditionally discharged restricted patient. Secondly, a declaration that the patient's detention by the trust was unlawful. Thirdly, a declaration that the *Notes for the Guidance of Supervising Psychiatrists*, issued by the Home Office and the Department of Health, were erroneous in law insofar as they advised that conditionally discharged restricted patients could lawfully be detained under section 3.[152] Fourthly, a declaration that the *Code of Practice*, published by the Department

[152] Paragraph 49 of the *Notes of Guidance* provided that a supervising psychiatrist could decide to take immediate local action to admit a conditionally discharged patient to hospital for a short period, either with the patient's consent or using civil powers such as those under section 3. However, according to the Notes, it was generally inappropriate for such a patient to remain in hospital for more than a short time under civil powers of detention, and the Home Secretary would usually wish to consider issuing a warrant of recall if the period of in-patient treatment seemed likely to be protracted.

of Health pursuant to section 118 of the 1983 Act, was erroneous in law insofar as it contained identical advice.[153] The patient also claimed damages for false imprisonment, but it was agreed that this claim should be adjourned pending a decision as to the legality of his detention. The Secretary of State for the Home Department and the Secretary of State for Health were later joined as second and third respondents.

The patient's submissions

It was contended on the patient's behalf that the continued liability of a restricted patient to detention under the relevant hospital order was one of the special restrictions imposed by section 41(3)(a). That continuing liability necessarily excluded authority to detain him under any other statutory provision. The whole statutory scheme was founded on the basis of one source of liability to detention and the Part II and III regimes were mutually exclusive. This was clear for a number of reasons:

- In the first place, section 41(3)(a) provided that none of the Part II provisions concerning the duration, renewal and expiration of the authority for a patient's detention applied to restricted patients: such language was incompatible with the use of section 3.
- Secondly, sections 40(4) and 41(3) provided that a patient subject to a restriction order was to be treated for the purposes of the statutory provisions mentioned in Part II of Schedule 1 as if he had been admitted in pursuance of a section 3 application, subject to any modifications referred to in the Schedule. Treating a restricted patient *as if he had been* detained under section 3, in order to bring in a modified Part II regime applicable to such patients, would be unnecessary *if he had actually been* detained under section 3. Furthermore, the omission of any reference to section 3 in the Schedule 1 list of Part II provisions which applied to restricted patients in an unmodified form necessarily implied an intention to exclude the operation of section 3 in respect of a restricted patient.
- Thirdly, a conditionally discharged restricted patient could only apply to a tribunal under section 75 and that section only contemplated readmission to hospital by way of recall. That the intention was that restricted patients requiring in-patient treatment would be recalled was borne out by section 41(3)(b). That paragraph prohibited a restricted patient from applying to a tribunal under section 66. Furthermore, section 72(7) provided that a tribunal's usual section 72(1) powers in respect of section 2 and 3 patients did not apply in the case of restricted patients.
- Fourthly, if a conditionally discharged patient could be detained under section 3, the Secretary of State's control over such patients would be reduced, because the responsible medical officer could discharge the patient from hospital under section 23 without the Secretary of State's consent.
- Fifthly, it was a condition of admission under section 3 that the treatment could not be provided unless the patient was detained under that section. That indicated that Parliament had not intended section 3 to be used in such cases, because any necessary in-patient treatment could be provided by recalling the patient to hospital under section 42(3).

[153] The *Code of Practice* provided that, if a conditionally discharged restricted patient required hospital admission, it would not always be necessary for the Home Secretary to recall him to hospital; in some cases, it might be appropriate to consider admitting him under Part II.

- Sixthly, any ambiguity should be resolved in favour of the liberty of the subject and in a manner consistent with the European Convention on Human Rights. The statute should not be interpreted so as to deprive a restricted patient readmitted under section 3 of the right to apply to a tribunal under section 66.

The trust's submissions

On the trust's behalf, it was contended that there could be more than one source of liability to detention and the Part II powers could be exercised independently of those in Part III of the Act. More particularly—

- There was nothing in section 41(3) which expressly excluded the application of section 3 and the absence of any reference to section 3 in schedule 1 showed that section 3 was intended to operate independently from the exercise of Part III powers. A restriction order and a section 3 application had different and quite distinct purposes. The former was imposed to protect the public from serious harm, the latter made for essentially therapeutic purposes, when treatment was required for a patient's health or safety. That being so, it was questionable whether the Secretary of State could properly recall a conditionally discharged restricted patient if the public was not at risk of serious harm from him, for instance where he was suicidally depressed.

- As drafted, the exceptions and modifications referred to in Schedule 1 only applied to a patient admitted "in pursuance of a hospital order," not to a patient subject to a hospital order who was admitted to hospital in pursuance of some other authority, such as a section 3 application. Accordingly, the restrictions in section 41(3) had no application if a restricted patient who was liable to be detained in pursuance of a hospital order was in fact detained in pursuance of an application made under section 3: he was not being detained and treated in a hospital *as a* restricted patient. Consequently, the restriction in section 41(3)(b) concerning the making of a tribunal application under section 66 did not apply.

- The case of *D. v. Mental Health Review Tribunal for the South Thames Region* **(355)** involved a conditionally discharged patient detained in hospital under section 3 who was then recalled to that hospital by the Secretary of State. Although the question of whether his detention under section 3 was lawful was not canvassed, it provided an example of how the two regimes could operate independently, resulting in that case in the patient's detention under two separate powers.

- Where only a short admission was necessary, a more protracted admission, resulting from bureaucratic delay in obtaining the patient's further discharge, was not in his interests. The patient's interpretation would, for no good reason, frustrate the purpose of the Act by depriving doctors and conditionally discharged patients of the use of Part II powers.

Submissions of amicus curiae (instructed by the Treasury Solicitor)

There was presently a case before the European Commission for Human Rights in which the Government was arguing that the section 3 power did co-exist with the Part III powers, while conceding that a restricted patient had no right to a tribunal unless and until recalled. The Department's opinion was that, unless such a patient was recalled, there would appear to be a breach of Article 5(4) of

the European convention on Human Rights. Counsel disagreed with that view. Section 41(3)(b), which disapplied section 66, only applied to a patient in his capacity as a restricted patient. Section 72(7) similarly only applied to a patient who was detained and appearing before a tribunal in his capacity as a restricted patient. The right of access to the tribunal for Part II patients under section 66 remained available. The Part II and Part III regimes were perfectly capable of coexisting independently of each other and they had different purposes. If a conditionally discharged patient became depressed and suicidal then a civil admission under section 3, for his own health or safety, would be appropriate, rather than recall to hospital as a restricted patient, the purpose of which was to protect the public from serious harm.

Harrison J.

The main issue was whether a conditionally discharged patient could lawfully be detained under section 3. There was no authority on the point but it had hitherto been common practice in appropriate cases to admit and detain such patients under that section. That practice has been endorsed by the Home Office and the Department of Health in the *Notes for Guidance* and *Code of Practice.* The rival contentions were whether, as the patient contended, the two parts of the Act were mutually exclusive or whether, as the trust contended, they could operate independently of each other.

Absence of any express prohibition

- Had Parliament intended that the exercise of Part III powers excluded the operation of the Part II powers, it might be assumed that the legislation would have expressly so provided. However, the statute did not expressly exclude the operation of Part II in the case of a restricted patient. It was therefore necessary to consider whether it was excluded by necessary implication, having regard to the various statutory provisions.

Sections 40(4) and 41(3)

- There was nothing in the language of section 41(3) to negate the trust's submission that the special restrictions set out there applied to a restricted patient only insofar as he was detained or liable to be detained in pursuance of the relevant hospital order. In other words, they applied to him *qua* restricted patient. That did not in itself exclude a liability to be detention under the separate power in, and for different purposes of, section 3.

- The wording of section 40(4), which applied Schedule 1, referred to a patient admitted to hospital "in pursuance of a hospital order." That made it clear that the section and the Schedule were not intended to relate to a person who was admitted to hospital under some other power, for instance under section 3. There was therefore nothing in section 40(4) or Schedule 1 which was inconsistent with the independent operation of the Part II or Part III regimes.

Tribunal applications

- It would be inconsistent to conclude that the Part II and Part III regimes could co-exist and operate independently and yet also hold that, if a conditionally discharged patient was admitted under section 3, the effect of the restriction order was to deprive him of his right as a section 3 patient to apply to a tribunal under section 66. Once the restriction set out in section

41(3)(b) was understood as referring only to the patient in his capa[illegible]s a restricted patient readmitted under the relevant hospital order, it had no impact on him in respect of any detention pursuant to the separate power of detention conferred by section 3.

- The purpose served by section 72(7) was simply to make it clear that a tribunal's powers under section 72(1) did not apply to a restricted patient who was detained pursuant to the relevant hospital order and who applied to the tribunal under section 70. There were, however, two separate routes to a tribunal. The route for a person detained under section 3 was via section 66 and section 72. In contrast, the route for a restricted patient detained under the hospital order was via sections 70 and 73, and via section 75 for a conditionally discharged restricted patient.

Purpose of the Part II and III powers and their parallel operation

- A restriction order was imposed because the court had decided that it was "necessary for the protection of the public from serious harm" that the special restrictions in section 41(3) should apply to the patient, having regard to the nature of his offence, his antecedents, and the risk of him committing further offences. Although the Secretary of State was not bound to direct that a restriction order cease to have effect when it was no longer required for the protection of the public from serious harm, and he also had a wide discretionary power when deciding whether to recall a conditionally discharged patient, the primary purpose of the exercise of the recall power was to protect the public from serious harm, because that was the whole purpose of making the restriction order in the first place.

- Admission under section 3 did not arise out of criminal proceedings. Admission and detention for treatment under that section had to be necessary for the health or safety of the patient or for the protection of other persons, while in the case of a restriction order it must be necessary for the protection of the public from serious harm.

- If it was necessary to compulsorily readmit a conditionally discharged patient in the interests of his own health or safety, and not for the protection of the public from serious harm, it would be appropriate to detain him under section 3 rather than to recall him. Although it was not necessary to decide the point, it was doubtful whether there would be power to recall a conditionally discharged restricted patient in those circumstances: the primary purpose of any recall should be to protect the public from serious harm from the conditionally discharged restricted patient.

- The contention that a restricted patient could not properly be admitted under section 3, because any necessary in-patient treatment could be provided without detaining him under that section, by recalling him under section 42(3), was not convincing. If the phrase "and it (such treatment) cannot be provided unless he is detained under this section (section 3)" had any significance, it did no more than make clear that the patient's admission and detention was for the purposes there specified. Those purposes would include detaining a patient whose detention was not needed to protect the public from serious harm but necessary solely for his own health or safety. The patient's admission and detention under that section might also be necessary "for the protection of other persons" without other persons being at any risk of serious harm from the patient and without the public at large being at risk, serious or not.

- The potential length of detention arising from delay obtaining a patient's discharge following recall was not a good reason for admitting a patient under section 3 rather than recalling him under section 42(3). Admission under section 3 should comply with the statutory purposes specified in section 3(2)(c) — the necessity to detain the patient for his own health and safety or the protection of others, rather than the protection of the general public from serious harm.

- The parallel operation of Part II and Part III powers was illustrated in the Court of Appeal case of *D. v. Mental Health Review Tribunal for the South Thames Region*. The then Master of the Rolls had proceeded on the implicit assumption that the two powers could co-exist. The facts of that case provided a good example of how the two regimes could co-exist and operate independently of each other, and the court had been told that no practical difficulties had arisen as a result of their dual operation.

- It was appropriate and desirable that the section 3 power should be available as well as the recall power under Part III. Parliament could not have intended to deprive a patient who needed treatment solely for his own health or safety of treatment by admission under section 3 simply because he had been convicted of an imprisonable criminal offence which resulted in him being subject to a restriction order. If he were discharged by the tribunal, it would be a discharge in relation to his liability to detention under section 3 which would in no way affect the Secretary of State's powers to recall him as a restricted patient.[154]

Decision

The various relevant statutory provisions did not demonstrate an intention on the part of the legislature to exclude the application of section 3 in respect of a conditionally discharged patient. Nor were they ambiguous so as to dictate an interpretation in favour of the liberty of the subject. Moreover, the conclusion reached did not involve the patient being deprived of his right to apply to a tribunal under section 66, so that the question of a breach of the Convention did not arise. *Application dismissed with costs. Leave to appeal allowed.*

R. v. Managers of the NW London Mental Health NHS Trust, ex p. Stewart

CO/1825/95, 25 July 1997 *C.A. (The President, Schiemann and Saville L.JJ.)*

The patient appealed on the following ground: "The learned Judge was wrong in law in holding that the Applicant could lawfully be detained pursuant to the said Section 3, notwithstanding that, at the time of his detention pursuant to the said Section 3, as a conditionally discharged restricted patient he remained liable to be detained pursuant to Sections 37 and 41 of The Mental Health Act 1983." In addition to the submissions made before the Divisional Court, the patient's counsel also relied on section 56(1), which provides that the consent to treatment provisions in Part IV apply "to any patient liable to be detained under this Act except ... (c) a patient who has been conditionally discharged ... and has not been recalled to hospital." Part IV therefore applied to section 3 patients,

154 The Home Secretary's power to recall the patient might, of course, not be available in a particular case if the prior observation, that it is doubtful whether a conditionally discharged patient may be recalled unless the public are at risk, is correct. And, if section 3 is only appropriate and recall inappropriate where it is the patient's health or safety which is in issue, this would seem to mean that the Home Secretary may often not be empowered to recall a section 3 restricted patient discharged by a tribunal.

who could be subjected to compulsory treatment, but not to condit[illegible]ly discharged patients, who could not be treated compulsorily. The distinction drawn there clearly indicated that the civil admission and restricted patient recall provisions were incompatible and intended to be kept distinct.

The President

The patient's case, which was that Parts II and III were mutually exclusive, with the effect that a conditionally discharged patient could not be readmitted to hospital otherwise than by way of recall under section 42, would necessarily fail if those parts were in fact capable of operating independently. On 24 April 1996 the Court of Appeal, presided over by Sir Thomas Bingham M.R., had given judgment in the case of *D. v. Mental Health Review Tribunal for the South Thames Region*. The issue there was whether, given that the patient was already in hospital, a warrant for his recall to the same hospital could properly be issued. It was noteworthy that the lawfulness of his initial admission under section 3 was not raised or queried, despite the fact that the court gave detailed consideration to the relevant provisions of Parts II and II. It was also noteworthy that both the *Code of Practice* and the Home Office's *Notes for the Guidance of Supervising Psychiatrists* sanctioned the practice of readmitting restricted patients under Part II and that guidance had been in force for some years without having previously been challenged. In the Divisional Court, the learned judge had held that nothing in any section of the Act was inconsistent with the independent operation of the Part II admission and Part III recall regimes. He had further held that a conditionally discharged patient detained under section 3 had a right to apply to a tribunal under section 66. A restricted patient recalled under section 42 was liable to more stringent restrictions than was the case following detention under section 3. As the guidance indicated that it might be convenient and in the patient's interests not to resurrect the full stringency of recall in certain cases, the flexibility given to the supervising psychiatrist was something which could operate both in the patient's interests and in the public's interests. That the Secretary of State retained his power of recall following readmission to hospital under Part II had been confirmed by the Court of Appeal in *D. v. Mental Health Review Tribunal for the South Thames Region*. Having reviewed the statutory provisions in great detail, in the context of the submissions made, Harrison J. had come to the clear conclusion that the powers provided by Part II could be invoked in the case of a conditionally discharged restricted patient. He said:

> "I accept the argument ... that the Part II and Part III powers can co-exist and operate independently of each other. The provisions relating to restricted patients relied upon by the applicant are, in my view, dealing solely with patients in their capacity as restricted patients liable to be detained pursuant to a hospital order, a capacity which is not applicable to the power of admission and detention under section 3. That power is not excluded by the provisions of Part III and the rights of a patient detained under that power exist, including those of access to the tribunal under section 66 whether or not he happens also to be a conditionally discharged restricted patient. If he were discharged by the tribunal it would be a discharge in relation to his liability to detention under section 3 which would in no way affect the Secretary of State's powers to recall him as a restricted patient. Such a conclusion ensures that patients and those treating them can take advantage of the benefits of treatment for the purposes mentioned in section 3(2)(c)."

His Lordship agreed with that conclusion and would accordingly dismiss the appeal.

Schiemann L.J.

The provisions in sections 40(4) and 41(3) did not *expressly* prevent an application being made under Part II in respect of a conditionally discharged patient and there was no advantage to anyone in holding that the subsections implicitly inhibited their use. Parliament had seen fit to make the use of the powers in Part II available in respect of individuals who had not been convicted of any crime and there was no need to inhibit their use in respect of individuals who has been convicted and were subject to orders made under sections 37 and 41.

The construction advanced on the patient's behalf would be productive of considerable harm in certain circumstances. For example, a doctor examining a person who was evidently severely mentally ill and a danger to himself or others would need to establish whether that person was subject to a conditional discharge before he could determine whether his admission to hospital under Part II would be lawful. That information might not be easily obtainable if the patient was unco-operative. If the patient was in fact subject to restrictions and the doctor proceeded he would be acting illegally. While the decision in *Re S-C (mental patient: habeas corpus)* [1996] 1 All E.R. 532 might mitigate the consequences of the illegality, it hardly dealt with the substantive point.

Lastly, even if it was correct that section 56(1)(c) made it impossible to lawfully treat a conditionally discharged patient without his consent unless and until he was recalled — and it was not necessary to decide the point — the only consequence would be that the recall procedures needed to be activated prior to treatment. That fact would not prevent the patient's detention in the meanwhile. *Saville L.J. agreed with both judgments. Appeal dismissed.*

The European Convention

Counsel as amicus in the case of *ex p. Stewart* referred to a case before the European Court of Human Rights, in which the Government was arguing that a restricted patient could be readmitted to hospital under section 3 and, if so, had no right to a tribunal unless and until recalled. The Department's opinion was said to be that, unless such a patient was recalled, there would appear to be a breach of Article 5(4) of the European Convention on Human Rights.[155] The case referred to is that of *Pauline Lines v. United Kingdom*. On 17 January 1997, the Government was still maintaining its position, notwithstanding Harrison J.'s judgment in *ex p. Stewart*, and what was there expressed to be the Department's view as to the requirements of the European Convention. The Government nevertheless indicated to the European Commission that guidance was being issued to psychiatrists requesting them not to use their powers under section 3 in respect of conditionally discharged patients: they should instead put in train the formal recall procedure, so as to ensure an early tribunal review. The European Commission unanimously declared admissible the patient's complaint that she was deprived of a tribunal by virtue of the fact that she was readmitted to hospital under section 3, rather than formally recalled.

155 Article 5(4) provides that, "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."

Pauline Lines v. United Kingdom

App. No. 24519/94, 17 January 1997 *European Commission of Human Rights*[156]

The patient was detained as if subject to a hospital order and a restriction order made without limit of time. She was conditionally discharged by the Secretary of State on 30 June 1993 but, following a suicide attempt, was readmitted to hospital under section 3 on 27 July 1993. Reports on her condition and progress were received by the Home Office on 28 August 1993, 6 October 1993 (by telephone) and 18 November 1993. She was formally recalled to hospital by the Secretary of State on 3 December 1993, on the ground that her condition had not sufficiently improved to make her return to the community likely in the immediate future. On 7 December 1993, the Secretary of State referred the case to a tribunal, which heard the matter on 23 February 1994. The tribunal found that she continued to suffer from mental illness requiring detention in hospital for medical treatment, and continued to present a danger to herself and the public, and did not direct her discharge.

The complaints

The patient complained, *firstly*, that she was not entitled to apply to a tribunal whilst detained under section 3 and, *secondly*, about the length of time it took for her to have a review following admission, in both cases contrary to Article 5(4) of the Convention. The formal recall procedure would not necessarily have been any more complex or slower than the section 3 procedure, and it would have accorded the patient an entitlement to a tribunal review prior to 3 December 1993. The conduct of reviews by health professionals and Home Office officials could not constitute a "court" within the meaning of Article 5(4). Furthermore, the review which did eventually take place was not speedy, since it took place seven months after her compulsory admission to hospital in July 1993. What the tribunal subsequently decided was irrelevant: the fact that a person might not be discharged when her case was reviewed had no bearing on her entitlement to a speedy and independent review.

The Government's submissions

The Government indicated that section 3 was used to readmit some restricted patients in order to allow health professionals to retain control over the patient's treatment and thereby facilitate a possible early discharge. Use of the formal recall procedure could leave the patient with a sense of failure and delay that person's early discharge. A conditionally discharged patient readmitted to hospital under section 3, rather than by warrant of recall, was not entitled to apply for a tribunal review, because section 41(3)(b) of the 1983 Act deprived her of the rights of application granted to other section 3 patients by section 66(1). This deliberate distinction between the rights of patients liable to be detained under Parts II and III of the Act was one which the Government wished to maintain.[157] Following an admission under section 3, the case was reviewed monthly and, as soon as it became apparent that discharge might not be imminent, the patient was formally recalled and the case referred to a tribunal. The Home Office policy was to recall restricted patients readmitted to hospital under section 3 well within the six month period during which an unrestricted patient detained under that provision was entitled to a tribunal review, and as soon as it was clear that their detention would be of significant duration. There was no violation of Article 5(4) provided that such a patient's case was referred to a tribunal within that six month period. The Government nevertheless recognised that it was undesirable for patients to be deprived of their entitlement to a review in such circumstances, even if the motives were good. Accordingly, guidance was being issued to psychiatrists requesting them not to use their powers under section 3 in respect of conditionally discharged patients. They should instead put in train the formal recall procedure, so as to ensure an early tribunal review. In the present case, the patient had not been immediately recalled because of evidence that her condition was likely to lead to imminent discharge. Article 5(4) had not been violated because the patient's case had been kept under constant review by both health professionals and Home Office officials. Her right to apply for a review was only deferred because it was hoped that her discharge was imminent and the formal recall procedure could be avoided. Furthermore, the patient had suffered no detriment because the tribunal subsequently found that her continued detention was necessary. Her review was speedy in that it was determined seven months after the commencement of her detention and the delay was not caused by any desire to prolong her detention, but rather to facilitate her early discharge.

The Commission's findings

The patient's period of detention between 27 July 1993 and 23 February 1994 raised serious issues under Article 5(4) which required determination on their merits. These complaints could not be dismissed as manifestly ill-founded and no other ground for declaring them inadmissible had been established. *The Commission therefore unanimously declared admissible, without prejudging the merits, the patient's complaints about the lack of entitlement to take proceedings by which the lawfulness of her detention after 27 July 1993 could be decided speedily by a court.*

Commentary

The decisions in *D. v. Mental Health Review Tribunal for the South Thames Region, ex p. Stewart*, and *Lines v. United Kingdom* do not conclusively resolve all of the issues raised in those cases. This is because the judgment of the European Court of Human Rights is still awaited. It is important to separate out the three questions of whether a restricted patient may be readmitted to hospital under Part II; whether the Home Secretary is obliged to recall a restricted patient upon being notified that he is in hospital; and whether a conditionally discharged patient detained under Part II may apply to a tribunal. As far as the domestic law is concerned, the effect of the cases is that a conditionally discharged patient may be readmitted under Part II; that the Home Secretary is not obliged to recall that patient upon being notified that he is receiving in-patient treatment; that a conditionally discharged patient detained under Part II has the same rights of application as other patients detained under the same provision. However, Harrison J.'s observations concerning the third question would appear to be *obiter* because the declarations sought concerned the lawfulness of the patient's detention. At the same time they are a necessary consequence of the declarations made and it is therefore puzzling that the Government has pursued its argument before the European Commission that such a patient has no right to apply to a tribunal. Because the issues have not all been finally resolved, it is worthwhile summarising some additional arguments concerning them.

[156] First Chamber Decision as to admissibility.

[157] The Government has never specified why it wishes to maintain this distinction. The reason why the Home Office has encouraged readmission under section 3 has generally been interpreted by patients as deriving from its insistence that such patients have no right to a tribunal. Furthermore, the corollary is that the responsible medical officer may not exercise his usual powers to discharge a section 3 patient or to grant him leave without the Home Secretary's consent. In other words, the distinction enables the Home Secretary to circumvent the decision in *X. v. United Kingdom* — which gave recalled patients a right to a tribunal —and to maintain absolute control over the issue of when the patient is discharged. The expectation is that the Home Secretary will now revert to the recall procedure if readmission under section 3 no longer has this advantage.

Arguments that the Home Secretary is obliged to recall

The decisions in *D.* and *ex p. Stewart* are particular interesting because of the absence of any reference to the earlier decision in *Home Department v. Mental Health Review Tribunal for Mersey Regional Health Authority* (**516**). In that case, the court held that the word "discharge" in the context of restricted patients means release from hospital, a release which could be absolute or conditional. Accordingly, it is not possible to discharge a patient from hospital subject to a condition that he resides there: a patient cannot both be in hospital and discharged from hospital. More particularly, the fact that a tribunal is satisfied that a patient requires in-patient treatment means that it cannot also be satisfied that he meets the criteria for being discharged from hospital. The argument that discharge means merely discharge from liability to detention in hospital under the relevant hospital order (and the accompanying restrictions on leave, transfer, and so forth) was one rejected in the *Mersey case.* If a restricted patient cannot be both a discharged patient and an in-patient, it might be thought that this distinction must also apply when a discharged patient returns to hospital. Allowing the patient to reside there as an informal in-patient, or to be detained there under the ordinary civil procedures, is incompatible with his existing legal status as a discharged patient: he becomes a discharged in-patient. The underlying rationale is that the in-patient –discharge–recall regime set out in sections 42 and 73 is simple and exhaustive and, in the absence of some express provision to the contrary, should not be complicated unnecessarily by incorporating additional civil powers.

As Part III of the Act and section 73 make clear, restricted patients always remain liable to be detained in hospital until formally discharged from there. Their status can only be one of two things — (1) that of an in-patient liable to be detained and subject to restrictions on discharge, transfer and leave; (2) that of a patient in the community following discharge who is subject to conditions and recall. The usual third possibility in unrestricted cases of being an informal or unrestricted in-patient is not an option: the purpose of the restrictions being to restrict the operation of the usual provisions concerning leave, transfer and discharge from hospital during periods when the mental state of certain patients — those from whom the Crown Court was satisfied the public are at risk of serious harm when unwell — is of a sufficiently serious nature or degree as to require them to be in hospital. That is the purpose of providing that the restrictions remain in force following conditional discharge. Until such time as the Secretary of State or a tribunal is satisfied that the public no longer need the protection of these special restrictions, decisions about whether or not the patient may be absent from hospital, or be transferred to a less secure hospital, or be discharged, are not decisions which can ever be made by his consultant or by the hospital's managers acting alone (**520**). To summarise, the Secretary of State has a discretion about whether to recall to hospital a patient who is in the community (section 42 says that he "may" issue a warrant of recall). However, if his opinion is that further in-patient treatment is appropriate, or he is notified that the patient has been taken to hospital in an emergency, he must recall the

patient. He cannot deal with a restricted in-patient's case on the factual basis that he remains a discharged patient. In particular, it would be unlawful to vary the patient's condition of residence to one of residence in hospital. Accordingly, the Home Secretary has a discretion about whether to recall a patient to hospital but no discretion as to whether or not to recall to hospital a patient who, in the exercise of his discretion, he considers should be in hospital. The Act says that he may recall the patient to hospital, not that he may not recall a patient who is or needs to be in hospital, and the discretion conferred on him does not extend to waiving his duty to protect the public by vetting proposals for leave, and so forth. While the regime may seem punitive, a further warrant of conditional discharge can be speedily effected. If a patient requires only a short period in hospital, there is no legal reason why he cannot again be discharged by warrant after a few days or weeks.[158] Indeed, the reason why the Home Secretary has one month within which to refer a recalled patient's case to a tribunal is to avoid any need for him to refer the cases of patients who can be redischarged by him within that period. As concerns tribunals, the effect of the statutory scheme is that they have no jurisdiction to consider an application made under section 66 or 69(1) following readmission under Part II. Such applications are unauthorised for the very reason that Parliament never intended that restricted patients would be detained under Part II, certainly not for any longer than was necessary for the Secretary of State to take a view about the need for recall to hospital. That would allow the patient's suitability for discharge to be determined by a tribunal presided over by a lawyer who was not a member of the judiciary.

Counter-argument that there is no obligation to recall

Against the above interpretation of the law may be set at least four competing arguments. It may be argued that the exercise of the power of recall is discretionary and not fettered by any statutory criteria while the exercise by a tribunal of its power of discharge involves no discretion. It must discharge if satisfied that the patient no longer requires in-patient treatment, and that he meets the other criteria for being discharged, and it may not discharge otherwise. In contrast, the Home Secretary may direct that a person who requires further in-patient treatment shall cease to be restricted, has a discretion not to discharge a patient whom he believes a tribunal would be bound to discharge, and so is similarly not obliged to recall a patient who requires further in-patient treatment. While this sounds plausible, the reasoning is not wholly convincing. Although the Home Secretary may direct that a person shall cease to be restricted if he is satisfied that restrictions are no longer necessary to protect the public from serious harm, he, no more than a tribunal, may discharge a restricted patient on condition that he remains in hospital. If the exercise of his power to discharge a restricted patient is limited to exercising it in respect of patients who he believes no longer require to be in hospital, it is then inconsistent to contend that he may nevertheless allow a discharged patient to return to and reside in hospital — whether by varying the condition of residence to residence there or by allowing him to reside at a place other that where he is required to reside. A second argument in favour of the practice is that it is not expressly prohibited and it has

[158] The only formality involved in redischarging a recalled restricted patient involves drawing up a warrant of recall. These days that consists of nothing more than a signed sheet of A4 paper containing the standard wording. Accordingly, reaching such decisions is only as prolonged as the Secretary of State makes it. There is a certain inconsistency in the Home Secretary's view that patients who require a short admission may be more appropriately detained under Part II and the contention that, if the law required him to take the decision, this would be a prolonged affair. If the public are not at risk, and the responsible medical officer notifies him that the patient no longer needs in-patient treatment, why need his decision be prolonged? The risks involved are the same.

been common practice for some years. Had Parliament not intend hat the Secretary of State should have this discretion, it would have made this plain in the 1983 Act. However, the fact that a practice is common does not make it lawful. It has similarly been commonplace for the Secretary of State to transfer prisoners to mental nursing homes but no one could realistically argue that the Act permits that. Furthermore, the rather tired device that "if Parliament had intended that provision *x* should not apply in circumstances *y*, it would have said so" must always be tested by reversing the proposition and seeing if there is any loss of plausibility: here there is none.[159] It may, thirdly, be argued that the statutory framework for restricted patients set out in section 42 is one where the Home Secretary recalls patients, and resubmits them to the restricted regime, if they can no longer, in his opinion, safely be allowed to remain in the community. The purpose of recall, as was made clear in *D. v. Mental Health Review Tribunal for the South Thames Region*, is merely to reinstate the regime of control under section 41. It would be punitive to formally recall restricted patients who can be treated informally or under the ordinary civil provisions. Against this, the judgment in *D.* is not wholly reconcilable with that in the *Mersey case* nor, arguably, the statutory framework. Furthermore, if it really is the case that the patient can be adequately treated, and the public adequately protected, on an informal basis, or under the ordinary civil provisions, then the Home Secretary should lift the restrictions. If, however, the patient has a potential for dangerous behaviour when mentally unwell, the restrictions are appropriate.[160] Finally, it might be said that, if a patient cannot be readmitted informally or under the ordinary civil provisions, there might be undesirable delays in cases where mental health professionals have to act urgently. Even if a patient may be readmitted under Part II in an emergency, that does not necessarily mean that the Secretary of State is not obliged to recall upon being notified of the fact.[161] Moreover, the issue of a warrant requires no medical evidence and may be communicated by telephone in urgent cases, which is a somewhat speedier process than the procedures set out in Part II for non-offenders. The Home Secretary may then review the situation during the following days and decide whether or not the patient needs to remain in hospital or can be redischarged by him. To summarise the counter-argument, a restricted patient may be readmitted informally or under Part II for in-patient treatment without special restrictions. It is a matter for the Home Secretary's discretion as to whether to reimpose the special restrictions applicable to in-patients. He may not consider that is necessary where the patient is willingly residing in hospital or being detained there under some other provision. If the patient is discharged from detention under Part II by a tribunal or, if informal, attempts to leave hospital, the option of recall may be delayed until that time.

[159] In this case, an alternative proposition might be, "if, having provided a particular statutory mechanism for recalling restricted patients to hospital, Parliament had intended that a restricted patient could be recalled to hospital under some civil provision unconnected with the protective framework it laid down for restricted patients, it would have said so."

[160] In other words, the Secretary of State may direct that an in-patient shall cease to be subject to the restrictions if he is satisfied that they are no longer necessary in order to protect the public from serious harm. If he is not satisfied they are unnecessary, and so they remain in force, he has no more discretion to deal with that in-patient on the basis that the special restrictions shall not apply to him for the time being than he has a discretion to deal with a conditionally discharged patient on the basis that he is in the community informally.

[161] If a conditionally discharged patient may be admitted under Part II, there exists one authority for his discharge from hospital and another authorising his detention in hospital. If he is then recalled, it might be thought that his admission in pursuance of the warrant discharges the earlier authority for his detention under Part II. However, the wording of sections 40(5), 42(4)(a) and 55(3) does not support such a construction — although it would be logical for those sections to so provide if Parliament contemplated that a patient's readmission might initially be effected under Part II.

The purpose served by section _ (3)(b)

Three views are possible concerning the ambit of section 41(3)(b): that restricted patients who require further in-patient treatment must be recalled to hospital by the Secretary of State under section 42(3), and hence the question of whether a tribunal may review their detention under Part II should not arise; that they may be readmitted under section 2 or 3 and, if so, have the normal tribunal rights of such patients; that they may be readmitted under section 2 or 3 but, if so, have no right to apply to a tribunal for their discharge. The third of these views is, it is submitted, absurd. As with the other paragraphs of the subsection, paragraph 41(3)(b) lists those provisions which apply to unrestricted patients who are *detained* in pursuance of a hospital order which do not apply, or only in a restricted way, to patients who, although also *detained* in pursuance of a hospital order, are subject to restrictions. The common feature of all the provisions set out there — transfer, leave of absence, absence without leave, discharge, tribunal applications under sections 66 and 69 — is that they are restrictions on the powers exercisable in respect of patients who are detained under the relevant hospital order. They are not restrictions on restricted patients who have been (conditionally) discharged. Consequently, if a restricted patient is recalled, and he again becomes a detained patient, the restrictions take effect. However, until a discharged patient is recalled, the restrictions referred to in section 41(3) do not come into play. The intention of section 41(3)(b) is limited to making clear that, while a detained unrestricted hospital order patient or his nearest relative may apply to a tribunal under section 66 or 69(1), neither may do so if the patient is detained in pursuance of such an order with restrictions: the patient's rights of application are then those set out in section 70. Alternatively, since section 41(3)(b) refers only to applications in respect of a patient, rather than to applications by or in respect of a patient, which is the usual statutory wording, the purpose is simply to rule out applications by nearest relatives. What, it is submitted, one cannot do is to readmit restricted patients otherwise than by recall and then claim that, not only is the Home Secretary under no statutory duty to refer their cases to a tribunal within one month of readmission, but, furthermore, they may not apply for their discharge. The concept of a patient being detained under section 2 or 3 with restrictions attached, a sort of restriction application rather than a restriction order, is one unknown to law.[162] It would mean that patients could be detained under section 3 for an indefinite period without a tribunal having any jurisdiction to review the necessity for that. Such a view is contrary to the decision in *X. v. United Kingdom*,[163] which obliged Parliament to provide for an independent judicial review of the cases of restricted patients readmitted to hospital. Because Parliament complied with that judgment by requiring the Secretary of State to refer such cases to a tribunal, he is in breach of his duty in contending that he need not recall or refer the cases of patients readmitted under Part II, and nor may they apply to a tribunal.[164]

[162] Although the Home Secretary argues that patients may be detained in pursuance of an application with restrictions attached, and not merely detained under a hospital order with restrictions, that proposition is untenable. If the purpose of issuing a warrant is to reintroduce the restrictions in the case of a patient initially detained under Part II (as was stated in *D. v. Mental Health Review Tribunal for the South Thames Region*), this necessarily means that he was not subject to those restrictions whilst detained only under Part II. Accordingly, his tribunal rights of application in respect of his detention under Part II cannot have been restricted *prior to* recall and the restoration of a restricted regime. The concept of being an informal patient subject to formal restrictions on leaving hospital is likewise a *non-sequitur*. The patient is either free to leave or he is not.

[163] *X. v. United Kingdom* (1981) 4 E.H.R.R. 188.

[164] It has been known for conditionally discharged patients to be readmitted under section 3 and detained in hospital for up to eight years without being formally recalled. Because such patients are notionally still conditionally discharged, their cases are not referred to a tribunal every three years.

Summary as to the Part II, recall and tribunal provisions

It has been decided in the domestic courts that restricted patients may be readmitted under Part II. Furthermore, the Home Secretary is not obliged to immediately recall the patient upon being notified of that fact. However, *obiter,* such patients are entitled to apply to a tribunal. As to the case of *Lines v. United Kingdom*, either the Secretary of State has erred in his view that he is not obliged to recall and refer or he is in error in contending that patients so admitted can be detained under a restriction application and have no tribunal rights. Either way, he is in breach of the European Convention.

The Mersey case[165]

The decision in the *Mersey case* in effect removed the words "liable to be detained" from section 72(1)(b)(i), with the consequence that a tribunal may only discharge restricted patients who no longer need to be in hospital. If it is correct — and one is presently bound to take this view — that (1) the purpose of the power of recall is to reintroduce the restrictions, (2) a restricted patient may be recalled to a hospital within which he is already detained or residing informally, and (3) a restricted patient may lawfully be both in hospital and conditionally discharged from hospital, this raises the issue of whether the *Mersey case* was correctly decided. In other words, whether tribunals may in fact conditionally discharge patients who, although requiring further in-patient treatment, do not need to be detained in the hospital in pursuance of the relevant hospital order and associated restrictions. The counter-argument is simply that the statute confers a discretion on the Home Secretary but not on a tribunal. A tribunal may not discharge a patient who requires further in-patient treatment but the Home Secretary need not recall a patient who does (**522**). That observation takes one back to issue already raised of the meaning of the word "discharge" and whether the statutory framework requires the Home Secretary to recall a patient whom he is satisfied needs to be in hospital.

Ex p. Cooper[166]

The observations in *D.* and *ex p. Stewart* concerning the purpose of the restrictions and the power of recall raise the possibility that *ex p. Cooper* was wrongly decided. The tribunal in that case was satisfied that the patient had never posed any risk of serious harm to the public, when ill or otherwise; that this would also not be the case if he relapsed in the future; and that it was not necessary to protect the public from serious harm that he should be discharged subject to conditions and liability to recall by the Secretary of State. Nevertheless, the tribunal only discharged him conditionally. The patient applied for judicial review, contending that he had been entitled to an absolute discharge. Because the tribunal had been satisfied that the statutory purpose behind conditional discharge and recall did not apply in his case, it was by definition satisfied that liability to recall was inappropriate: it was simply using the restrictions for therapeutic purposes, as a form of community treatment order, or as a form of hospital order of indefinite duration. The issue was therefore whether a tribunal which is satisfied that it will not in future be appropriate to recall a patient to hospital in order to protect the public may nevertheless not be satisfied that it is inappropriate for him to remain liable to recall by the Home Secretary, and

165 *Home Department v. Mental Health Review Tribunal for Mersey Regional Health Authority, Same v. Mental Health Review Tribunal for Wales* [1986] 1 W.L.R. 1170 (**515**).

166 *R. v. North West Thames Mental Health Review Tribunal, ex p. Cooper* 1990 [C.O.D.] 275 (**529**). When assessing the objectivity and correctness of the observations which follow, the reader should be aware that the author was the solicitor in this case.

so lawfully decline to absolu[illegible] discharge him. The court refused the application, relying on dicta of Butler-Sloss L.J. in *R. v. Merseyside Mental Health Review Tribunal, ex p. K.*,[167] where it had been said that the power to impose a conditional discharge and retain residual control over patients "would appear to be a provision designed both for the support of the patient in the community and the protection of the public."

OTHER EXCEPTIONS AND MODIFICATIONS

Various other statutory provisions either do not apply to restricted patients or only in a modified way.

Reclassification

Because allowing a restricted patient to be reclassified would serve no legal purpose in terms of the duration of his liability to detention, the reclassification provisions in sections 16 and 20 of the Act do not apply.[168] This is because the authority to detain a restricted patient does not require periodic renewal and the fact that such a patient's condition proves to be untreatable never entitles him to be discharged. It is, moreover, also the case that some restricted patients have no legal classification.

Nearest relative provisions

Restricted patients do not have a statutory nearest relative and sections 26–28 do not apply to them.[169]

Consent to treatment

Part IV of the Act applies to restricted patients who are detained in hospital or who are absent with leave from hospital. It does not, however, apply to conditionally discharged patients, with the effect that they may not be administered treatment without their valid consent unless justified under common law.[170] It should, however, be emphasised that it is usually a condition of discharge that the patient takes such medication as may be prescribed by, or under the direction of, the consultant in charge of his treatment. Consequently, a patient who fails to comply with such a condition risks being recalled to hospital by the Secretary of State.

Supervision applications

A supervision application may not be made in respect of a restricted patient, the pre-existing statutory scheme for conditional discharge and recall making the new powers unnecessary.[171]

PERIODIC REPORTS

In deciding whether to exercise his powers under the Act, the Secretary of State is assisted by periodic reports furnished to him by the patient's responsible medical officer. The responsible medical officer is required to examine the patient and to

167 *R. v. Merseyside Mental Health Review Tribunal, ex p. K.* [1990] 1 All E.R. 694.

168 Mental Health Act 1983, ss.41(3) and 145(3).

169 *Ibid.*, ss.41(3) and 145(3); Sched. 1, Pt. II, paras. 1 and 2.

170 *Ibid.*, s.56(1).

171 *Ibid.*, s.41(3)(aa), as inserted by the Mental Health (Patients in the Community) Act 1995, s.1(2) and Sched. 1, para. 5.

report on him to the Secretary of State at such intervals (not exceeding [illegible] year) as the Secretary of State may direct; and every report must contain such particulars as the Secretary of State may require.[172]

MENTAL HEALTH REVIEW TRIBUNALS

Where a court makes a restriction order, a convicted patient has no right to apply to a tribunal during the period of six months commencing with the date of the relevant hospital order.[173] This prohibition also applies to unrestricted patients admitted under a hospital order. Restricted patients have the same rights to obtain an independent medical opinion under section 76 as unrestricted persons.

The effect of section 41(3)(b)

Section 41(3) sets out the special restrictions applicable to a patient in respect of whom a restriction order is in force and paragraph (b) states that, "no application shall be made to a Mental Health Review Tribunal in respect of a patient under section 66 or 69(1) below." As to the proper interpretation of this provision in relation to conditionally discharged patients admitted under Part II, see page 365.

COMMITTALS UNDER SECTIONS 43 AND 44

A magistrates' court has no power to impose a restriction order. The Butler Committee considered whether they should be given such a power, possibly for a short limit of time, but rejected the suggestion because it considered that restriction orders should be more sparingly used in the future, rather than the provisions extended.[174] However, if the conditions for imposing a hospital order are satisfied, a magistrates' court may commit an offender to the Crown Court where it considers that, if a hospital order is made, a restriction order should also be made. Bail may not be granted and the offender is to be detained in prison custody or remanded to hospital pending sentence. Where he is remanded to hospital, he is deemed to be subject to a restriction order until such time as the Crown Court deals with his case.

CRITERIA FOR IMPOSITION

A magistrates' court may, instead of making a hospital order or dealing with an offender in any other manner, commit him in custody to the Crown Court to be dealt with by that court where the following conditions are satisfied[175]—

- the offender has been convicted of an offence punishable on summary conviction with imprisonment.[176]

[172] Mental Health Act 1983, s.41(6).
[173] *Ibid.*, s.70.
[174] *Report of the Committee on Mentally Abnormal Offenders*, Cmnd. 6244 (1975), para. 14.27.
[175] Mental Health Act 1983, s.43(1).
[176] The magistrates may not make a hospital order and then commit the offender to the Crown Court for it to determine whether a restriction order should also be made. Because a conviction is necessary, a magistrates' court which is minded to make a hospital order under section 37(3) cannot commit the case to the Crown Court under section 43. Accordingly, if the magistrates find that the defendant is not guilty of the charge against him by reason of insanity, they may impose a hospital order but may not commit him to the Crown Court under section 43: *R. v. Horseferry Road Stipendiary Magistrate, ex p. Koncar* [1996] C.O.D. 197, D.C.

- the offender is at leas[illegible]teen years of age.
- the conditions in section 37(1) for making a hospital order are satisfied in respect of the offender.
- it appears to the court that, having regard to the nature of the offence, the antecedents of the offender and the risk of his committing further offences if set at large, that if a hospital order is made a restriction order should also be made.

PERSONS COMMITTED IN CUSTODY

Provided that the usual conditions for exercising the following powers are satisfied, an offender who has been committed in custody may, prior to the disposal of his case by the Crown Court, be—

- remanded to hospital by the Crown Court under section 35 (for the preparation of a report on his mental condition) or section 36 (for treatment).[177]
- removed to hospital by the Secretary of State for urgent treatment under section 48(2)(a).[178]

PERSONS COMMITTED TO HOSPITAL

Where a magistrates' court is satisfied, on oral or written evidence,[179] that arrangements have been made for the offender's admission to a hospital in the event of his being committed to the Crown Court under section 43 the court may, instead of committing him in custody, order his admission to that hospital, to be detained there until the case is disposed of by the Crown Court.[180] The court may give directions for his production from the hospital to attend the Crown Court by which his case is to be dealt with.[181]

Detention in a place of safety pending admission

The court may, pending the patient's admission to the hospital specified in its order, give directions for his conveyance to and detention in a place of safety.[182] If, prior to the offender's admission to that hospital, it appears to the Secretary of State that, "by reason of an emergency or other special circumstances," it is not practicable for him to be received there, he may direct the patient's admission to such other hospital as appears to be appropriate.[183] Upon the patient's admission to the hospital specified by

[177] Mental Health Act 1983, s.43(3).
[178] *Ibid.*, s.48(2)(a). In which case, it is mandatory to also give a restriction direction under section 49.
[179] The evidence is to be given by the registered medical practitioner who would be in charge of the offender's treatment or by some other person representing the managers of the hospital in question: Mental Health Act 1983, s.44(2).
[180] *Ibid.*, s.44(1) and (3). It is not the case that the magistrates must be satisfied that arrangements have been made for the offender's admission to hospital within 28 days.
[181] *Ibid.*
[182] *Ibid.*, ss.44(3) and 37(4).
[183] *Ibid.*, ss.44(3) and 37(5).

the court or the Secretary of State, the managers of that hospital sh[illegible] thereafter detain him in accordance with the provisions of the Act.[184]

Effect of committal to hospital

Where a magistrates' court commits an offender to hospital, he is deemed to be subject to a hospital order together with a restriction order until such time as his case is disposed of by the Crown Court.[185] Notwithstanding this, the patient has no right to apply to a tribunal (**625**).

CROWN COURT'S POWERS TO DEAL WITH OFFENDER

Where an offender has been committed under section 43, the Crown Court shall inquire into the circumstances of the case and may[186]—

- exercise any power to make an interim hospital order or a hospital order (with or without restrictions) which the Crown Court would possess if the offender had been convicted by it of an offence punishable with imprisonment;[187] *or*
- deal with the offender in any other manner in which the magistrates' court might have dealt with him.

Disposal of the case in the patient's absence

In the case of a person committed to hospital under section 44, the court having jurisdiction to deal with him may make a hospital order (with or without a restriction order) in his absence if[188]—

a. it appears to the court that it is impracticable or inappropriate to bring him before the court; *and*

b. the court is satisfied, on the written or oral evidence of at least two registered medical practitioners, that the patient is suffering from mental illness or severe mental impairment of a nature or degree which makes it appropriate for him to be detained in a hospital for medical treatment; *and*

c. the court is of the opinion, after considering any depositions or other documents required to be sent to the proper officer of the court, that it is proper to make such an order.

[184] Mental Health Act 1983, ss.40(1) and 44(3).
[185] *Ibid.*, s.44(3).
[186] *Ibid.*, s.43(2).
[187] The Crown Court is not, however, empowered to give hospital and limitation directions under section 45A because the offender has not been convicted by it.
[188] Mental Health Act 1983, s.51(7). This power also applies to section 48 patients, according to the same criteria.

COMMITTAL TO THE CR[illegible]N COURT UNDER OTHER POWERS

Section 41 only empowers the Crown Court to make a restriction order in respect of a person convicted before that court. While section 43(1) allows it to make a restriction order in respect of a person who has been committed under the 1983 Act, specifically with a view to the making of a restriction order, it does not allow the court to make such orders in respect of a person convicted by a magistrates' court and committed to it for sentence under the ordinary criminal powers. Additional provisions are therefore required if it is to have power to impose a restriction order in such cases.

Committals under section 38 of the Magistrates' Courts Act 1980

Where a person aged 18 or over is convicted of an offence triable either way, a magistrates' court may commit him in custody or on bail to the Crown Court for sentence if it is of the opinion that—

a. the offence, or the combination of the offence and one or more offences associated with it, was so serious that greater punishment should be inflicted for the offence than the court has power to impose (s.38(2)(a)); or

b. in the case of a violent or sexual offence, that a sentence of imprisonment for a term longer than the court has power to impose is necessary to protect the public from serious harm from him (s.38(2)(b)).[189]

Mental Health Act 1983, s.43(4)

Section 43(5) provides that the power of a magistrates' court to commit an offender under section 38(2)(a) "shall also be exercisable ... where it is of the opinion that greater punishment should be inflicted as aforesaid on the offender unless a hospital order is made in his case with a restriction order." The effect of the provision is that a magistrates' court may commit an offender notwithstanding that its opinion that greater punishment is necessary is not an absolute opinion but conditional upon a restriction order not being made. It is therefore relevant where a magistrates' court considers that an ordinary hospital order is an inappropriate disposal and the case should be disposed of either by way of a restriction order or a more substantial custodial sentence than it has power to impose. The first of these alternatives does not legally constitute greater punishment than the magistrates may themselves inflict on the offender[190] although the second obviously does. Section 43(5) therefore ensures that an offender may be committed under section 38 notwithstanding that it is legally arguable that the court is not of the opinion that "greater punishment" than it has power to impose is necessary.

Purpose of committals under the 1980 and 1983 Acts

It may be asked why section 43(1) is necessary if a magistrates' court can commit an offender under section 38. The answer is that the usual committal procedure in the

[189] See Magistrates Courts' Act 1980, s.38; Criminal Justice Act 1967, s.56; Powers of Criminal Courts Act 1973, s.42; Criminal Justice Act 1991, ss. 25, 31, Part I; Criminal Justice Act 1993, s.66.
[190] See *R. v. Bennett* [1968] 2 All E.R. 753, where the Court of Appeal substituted a hospital order and a restriction order for a sentence of three years' imprisonment, emphasising that such an order was "a remedial order designed to treat and cure the appellant and could not be regarded as more severe than a sentence of imprisonment."

Magistrates Court Act 1980 does not cater for the situation where a [illegible]gistrates' court considers that its powers of punishment are sufficient but not its powers to deal with the offender otherwise than by way of punishment under the 1983 Act.

Committal of incorrigible rogues under the Vagrancy Act 1824

The Vagrancy Act 1824 provides that where a person who is deemed to be a rogue and vagabond, because he has been convicted of an offence under section 4 of the Act, is convicted by a magistrates' court of a further offence under section 4, that court may[191] commit him to the Crown Court, either in custody or on bail, to be dealt with there as an "*incorrigible* rogue and vagabond." The Crown Court may, if it thinks fit, impose a sentence of imprisonment not exceeding one year. Section 43(5) of the 1983 Act provides that where a person has been committed as an incorrigible rogue and vagabond, the Crown Court may make a hospital order, with or without a restriction order, in the same circumstances as it can under section 41 in respect of a person who has been convicted before it of an offence.

RESTRICTION ORDERS UNDER SECTION 46

The Secretary of State may by warrant direct the removal to hospital of a person who is detained in custody during Her Majesty's pleasure in pursuance of an order made under the Service Discipline Acts. A direction under section 46 has the same effect as a hospital order together with a restriction order made without limitation of time. The transitional provisions provide that certain other patients are deemed to be subject to a restriction order of unlimited duration made under section 46.

PERSONS TO WHOM SECTION 46 APPLIES

Section 46 applies to persons who are required to be kept in custody during Her Majesty's pleasure, or until the directions of Her Majesty are known, by virtue of an order made under[192]—

- section 16 of the Army Act 1955
- section 116 of the Air Force Act 1955.
- section 63 of the Naval Discipline Act 1957.
- section 16 of the Courts-Martial (Appeals) Act 1968.

The four enactments provide that, where a court enters a finding that an accused person is unfit for trial or not guilty of an offence by reason of insanity, that person shall be kept in custody until the directions of Her Majesty are known, who may give directions for the safe custody of the accused in such place and in such manner as Her Majesty thinks fit.[193]

[191] Subject to section 70 of the Criminal Justice Act 1982.
[192] Mental Health Act 1983, s.46(2).
[193] The Queens Regulations for the Army (1975), the Royal Navy and the Royal Air Force contain provisions relating to the psychiatric examination of persons liable to trial by Courts-Martial.

Appeals from Courts-Mart[illegible]

Appeals from Courts-Martial go to the Courts-Martial Appeal Court which is the Criminal Division of the Court of Appeal under a different name. Not surprisingly therefore, the court's powers under the Courts-Martial Appeals Act 1968 when dealing with appeals involving special findings correspond to those conferred upon the Criminal Division—

- Where, on an appeal against conviction, the Courts-Martial Appeal Court is of the opinion that the proper finding would have been that the appellant was unfit to stand trial or not guilty by reason of insanity, it must order that he be kept in custody under the relevant service Act (see above).
- Where the Courts-Martial Appeal Court allows an appeal against a finding that the appellant was unfit to stand trial then, unless it substitutes a verdict of acquittal, he may be tried for the offence with which he was charged and the court may make such orders as it thinks necessary or expedient for his continued detention pending trial.[194]
- Where, on appeal, the Courts-Martial Appeal Court substitutes a finding of not guilty for a finding that the appellant was not guilty by reason of insanity, it has the same powers as the Court of Appeal in such a case to direct that the appellant be detained for assessment under section 2 **(226)**.[195]

Directions under section 46

Section 46(1) provides that the Secretary of State may by warrant direct that a person to whom the section applies shall be detained in such hospital (not being a mental nursing home) as may be specified in the warrant and, where that person is not already detained in the hospital, give directions for his removal there.[196] Where a direction under section 46 is given in respect of a person who is already in the specified hospital, he is deemed to be admitted in pursuance of, and on the date of, the direction.[197]

Effect of a direction under section 46

A direction under section 46 has the same effect as a hospital order together with a restriction order, made without limitation of time **(334 et seq.)**.[198] A reference to a hospital order or a restriction order in sections 40, 41 or 42 or in section 69(1) is to be construed as including a reference to a direction made under section 46.[199]

[194] Courts-Martial Appeals Act 1968, ss.25(1) and (4).
[195] *Ibid.*, ss.23(1) and (2).
[196] The prohibition on removing a patient to a mental nursing home under section 46 was not removed by section 49(3) of the Crime (Sentences) Act 1997. Section 46 is now the only application, order or direction under the 1983 Act which may not specify a mental nursing home.
[197] Mental Health Act 1983, s.46(3).
[198] *Ibid.*
[199] *Ibid.*, s.55(4).

ARMED FORCES ACT 1996

Section 46 will be revoked when Part III of Schedule 7 to the Armed Forces Act 1996 is brought into effect.[200] Section 8 of, and Schedule 2 to, that Act lay down a new statutory scheme for dealing with the issues of insanity and fitness to plead at Courts-Martial. The effect is to bring military law into line with civilian law, as set out in the Criminal Procedure (Insanity) Act 1964. Accordingly, where a person is found to be not guilty by reason of insanity, or unfit to stand trial by Court-Martial, the court may make any of the following orders: a guardianship order, an admission order, a supervision and treatment order, an order discharging him absolutely.[201] As in the case of civilians, restrictions may be attached to an order for admission but are no longer mandatory,[202] and it is the Secretary of State who specifies the hospital to which the patient is to be admitted.[203] Guardianship orders and admission orders made under the new provisions have effect as if made under section 37 of the 1983 Act, and restriction orders likewise take effect as if they had been imposed under section 41.[204]

THE 1983 ACT TRANSITIONAL PROVISIONS

It is not uncommon for a tribunal to deal with an application or reference concerning a patient who is detained under section 46. However, the majority of such patients are not former armed forces personnel. This is because the transitional provisions in the 1959 and 1983 Acts provide that certain other classes of patients shall be deemed to be subject to a direction made under section 46.[205] In particular, persons initially detained as Broadmoor patients[206] or under the following provisions: section 2 of the Criminal Lunatics Act 1800; section 2 of the Trial of Lunatics Act 1883; the Colonial Prisoners Removal Act 1884; section 5(4) of the Criminal Appeal Act 1907; section 8(4) or 9 of the Mental Deficiency Act 1913; and section 63(3) or 64 of the Criminal Justice Act 1948.

TRANSFER DIRECTIONS AND RESTRICTION DIRECTIONS

Sections 47 and 48 provide that the Secretary of State may direct the removal of a person from prison, or some other place of custody, to hospital for treatment. Any such direction is known as "a transfer direction"[207] and has the same effect as if a hospital order had been made in the patient's case.[208] Where the Secretary of State gives a transfer direction, he may — and must in the case of persons awaiting trial or sentence before the Crown Court or a magistrates' court — also direct that the

200 Armed Forces Act 1996, s.35(2), Sched. 7, Pt. III.
201 Army Act 1955, s.116A(2); Air Force Act 1955, s.116A(2); Naval Discipline Act 1957, s.63A(2).
202 Army Act 1955, s.116B(2); Air Force Act 1955, s.116B(2); Naval Discipline Act 1957, .s.63B(2)
203 Army Act 1955, s.116B(1); Air Force Act 1955, s.116B(1); Naval Discipline Act 1957, s.63B(1).
204 Army Act 1955, s.116A(5); Air Force Act 1955, s.116A(5); Naval Discipline Act 1957, s.63A(5).
205 Mental Health Act 1983, s.148(1), Sched. 5, para 37(2); Mental Health Act 1959, s.71.
206 Other than Broadmoor patients who had been conditionally discharged under section 5 of the Criminal Lunatics Act 1884 by the time the 1959 Act came into force. These patients were deemed to also be conditionally discharged patients under the new legislation.
207 Mental Health Act 1983, ss.47(1) and 145(1).
208 *Ibid.*, ss.47(3) and 48(3).

patient shall be subject the special restrictions set out in section 41. Where restrictions are attached to the transfer, the Secretary of State's direction is known as a "restriction direction" (**383**). In contrast to the position where the court makes a restriction order, there is no provision in the Act for the Secretary of State to make a restriction direction for a limited period.

TRANSFER DIRECTIONS UNDER SECTIONS 47 AND 48

Section 47 provides that the Secretary of State may by warrant direct that a person serving a sentence of imprisonment may be removed to and detained in such hospital as may be specified in the warrant (not being a mental nursing home). Section 48 gives the Secretary of State a like power to remove to hospital persons detained in prison, or some other place of custody, otherwise than in pursuance of a sentence of imprisonment.

"Sentence of imprisonment"

Section 55(6) provides that references in Part III of the Act to persons serving a "sentence of imprisonment" shall be construed in accordance with section 47(5). Accordingly, for the purposes of sections 47 and 48, references to a person serving a sentence of imprisonment include—

- a person detained in pursuance of any sentence or order for detention made by a court in criminal proceedings (other than an order under any enactment to which section 46 applies);
- a person committed to custody under section 115(3) of the Magistrates' Courts Act 1980 (which relates to persons who fail to comply with an order to enter into recognisances to keep the peace or be of good behaviour); *and*
- a person committed by a court to a prison, or other institution to which the Prison Act 1952 applies, in default of payment of any sum adjudged to be paid on his conviction.

STATUTORY CONDITIONS

The table on the following page sets out the statutory conditions which must be met before a transfer direction may be given under section 47 or 48. In essence, the patient must be a patient to whom the section applies and the Secretary of State be satisfied that the patient meets the medical criteria for detention in hospital and of the opinion that it is appropriate to give such a direction.

The medical grounds

As the table indicates, it is not a condition of removal under section 47 that the patient is in urgent need of hospital treatment and section 47 applies to persons who are suffering from mental impairment or psychopathic disorder, and not merely to persons suffering from mental illness or severe mental impairment. The distinctions reflect the fact that some persons serving prison sentences will be serving life sentences or long custodial sentences.

TRANSFER DIRECTIONS UNDER SECTIONS 47 AND 48

Directions under section 47	*Directions under section 48*
Categories of patient in respect of whom a direction may be given	
• Section 47(1)(a) : Persons serving a sentence of imprisonment (379)	• Section 48(2)(a) : persons detained in a prison or remand centre, not being persons serving a sentence of imprisonment or persons falling within the following paragraphs. • Section 48(2)(b) : persons remanded in custody by a magistrates' court. • Section 48(2)(c) : civil prisoners, that is to say, persons committed by a court to prison for a limited term (including persons committed to prison in pursuance of a writ of attachment), who are not persons falling within section 47. • Section 48(2)(d) : persons detained under the Immigration Act 1971.
Medical evidence and criteria	
• The Secretary of State is satisfied, by reports from at least two registered medical practitioners (at least one of whom is approved under section 12), that the person is suffering from mental illness, psychopathic disorder, severe mental impairment or mental impairment of a nature or degree which makes it appropriate for him to be detained in a hospital for medical treatment. • In the case of psychopathic disorder or mental impairment, the Secretary of State is further satisfied, on the reports, that such treatment is likely to alleviate or prevent a deterioration of his condition.	• The Secretary of State is satisfied, by reports from at least two registered medical practitioners (at least one of whom is approved under section 12), that the person is suffering from mental illness or severe mental impairment of a nature or degree which makes it appropriate for him to be detained in a hospital for medical treatment and that he is in urgent need of such treatment.
Expediency ground	
• The Secretary of State is of the opinion having regard to the public interest and all the circumstances that it is expedient to by warrant direct that that person be removed to and detained in the hospital specified in his direction (not being a mental nursing home).	

Removal to a mental nursing home

Prior to 1 October 1997, sections 47 and 48 prohibited the Secretary of State from directing a person's removal to a mental nursing home (a "private hospital") under those sections.[209] It was nevertheless quite common for him to give the directions, although recent practice tended to involve invoking the transfer provisions in section 19 as a way of circumventing the prohibition. The usual sequence of events was for the transfer direction to direct the patient's removal to an NHS hospital, notwithstanding that the Secretary of State, and all the other involved parties, knew when the direction was given that the patient's real destination was a mental nursing home — the prison medical notes recorded this as the destination and the availability of a bed there was verified prior to removal. The direction having been given, the patient was driven to the NHS hospital. The prison van remained outside the NHS hospital's offices for the few minutes it took an administrator to complete a form authorising the patient's transfer to the home under section 19. The Home Secretary's consent to the transfer had already been given in advance. It was then contended that although the patient was not admitted to a bed at the NHS facility, and it was used as no more than a staging post, he had been "received" there for the purpose of section 47 or 48. Furthermore, the Act did not expressly prohibit the transfer to a "private hospital" of a restriction direction patient removed to an NHS hospital under section 47 or 48.[210] Whether sitting in a van parked in the courtyard of an NHS hospital constituted being received at that hospital was at best open to doubt. But, in any case, section 19(2) provides that where a patient is transferred under that section the provisions of Part II apply to him as if the direction were a direction for his removal to the hospital to which he is transferred. Thus, the direction took, and takes, effect as if the mental nursing home (rather than the NHS unit) was specified in the warrant — and such a direction could not at that time be given for a patient's removal to, and detention in, such a home. Where a patient is detained in a private hospital in pursuance of a direction given under section 47 or 48 prior to 1 October 1997, High Court proceedings may therefore be appropriate if he wishes to be remitted to custody.

Form of the direction

A transfer direction is required to specify the form or forms of mental disorder from which the patient is, upon the medical reports, found by the Secretary of State to be suffering; and no such direction may be given unless the patient is described in each of those reports as suffering from the same form of disorder, whether or not he is also described in either of them as suffering from another form.[211]

The necessity for removal within 14 days

A transfer direction ceases to have effect at the expiration of the period of 14 days beginning with the date on which it is given unless the person to whom it relates has by then been received to the hospital specified in the direction.[212]

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209 The prohibition was removed on 1 October 1997 when section 49(3) of the Crime (Sentences) Act 1997 was brought into force.

210 The Secretary of State sometimes also contended that the statutory prohibition on directing a patient's removal to a mental nursing home did not extend to section 48. However, section 48 expressly provides that the Secretary of State has the *same* power of giving a transfer direction under that section as he does under section 47.

211 Mental Health Act 1983, ss.47(4) and 48(3).

212 *Ibid.*, ss.47(2) and 48(3).

Sections 48 and 36 contrasted

Section 48(2)(a) provides that the Secretary of State may remove to hospital a defendant who suffers from mental illness or severe mental impairment and who is in custody awaiting trial or sentence before the Crown Court. Section 36 gives the Crown Court a similar power to remand a person who suffers from either of these forms of disorder to hospital for treatment. The two powers differ, however, in a number of respects—

- a person whose case is before a magistrates' court may be removed to hospital under section 48 but not remanded there for treatment under section 36.
- it is not a condition of a remand under section 36 that the patient is in urgent need of hospital treatment.
- the accused cannot be admitted to a mental nursing home under section 48.
- a remand for treatment under section 36 may not be made unless the court is satisfied that a bed is available whereas the Secretary of State may direct a patient's removal to a hospital under section 48.
- defendants transferred under section 48 are subject to the special restrictions set out in section 41.
- defendants detained under section 48 are entitled to apply to a Mental Health Review Tribunal.
- where a person is detained under section 48, his liability to detention in hospital may be terminated by the Home Secretary as well as by the Crown Court.
- persons detained under section 48 may, in the circumstances specified in section 51, be made the subject of a hospital order (with or without restrictions) without being brought before the court, tried or convicted of the alleged offence.

The legal effect of a transfer direction

Provided the patient is admitted within the statutory 14 day period, the Act provides that "a transfer direction ... shall have the same effect as a hospital order made in his case."[213] Unless a restriction direction is also given **(383)**, the usual provisions applicable to patients who are liable to be detained under a hospital order therefore apply **(330)**.

Effect on previous applications and orders

The giving of a transfer direction has the effect of bringing to an end any previous application or order which was in force in respect of the same patient, other than a hospital order with restriction order.[214]

213 Mental Health Act 1983, ss.47(3) and 48(3).

214 Section 55(4) provides that any reference to a hospital order in s.40(4) and (5) is to be construed as including a reference to a direction under Part III having the same effect as a hospital order.

Application of Parts II and \ the Act

Where a patient is admitted to hospital in pursuance of a transfer direction, he is treated, for the purposes of the provisions in Parts II and V of the Act mentioned in Part I of Schedule 1, as if he had been admitted on the date of the direction in pursuance of an application duly made under section 3, but subject to the exceptions and modifications specified in that Part of the Schedule.[215] These exceptions and modifications apply equally to patients admitted to hospital under a hospital order and their effect has already been summarised **(331)**.

Part IV and consent to treatment

Part IV of the Act applies to patients who are liable to be detained under a transfer direction (with or without restrictions) and they may therefore be administered treatment without their consent in the circumstances there set out.[216]

Duration, renewal, expiration and discharge

Where a transfer direction only is given in respect of a patient, he is deemed to have been admitted to hospital under a hospital order made without restrictions on the date of the direction. If the patient was, prior to his removal, serving a sentence of imprisonment, the Secretary of State may not remit him to prison to serve out his sentence and usual provisions concerning the duration, renewal and discharge of hospital orders apply.[217]

Civil prisoners and persons detained under the Immigration Act 1971

The position is different where the patient is a civil prisoner or a person detained under the Immigration Act 1971. In such cases, the patient is, as before, treated as if a hospital order had been made under section 37 on the date of the transfer direction and he may not be remitted to custody by the Secretary of State. However, the transfer direction expires on the date that the patient would have ceased to be liable to be detained in the place from which he was removed had no direction been given. If the patient's mental state is such that he requires detention under the 1983 Act beyond that date then an application must be made under section 2 or 3.[218]

Mental Health Review Tribunals

The patient may apply to a tribunal during the period of six months beginning with the date of the transfer direction.[219] He may make a further application during the following six months and one application during each subsequent year that he remains liable to be detained.[220] His nearest relative may apply to the tribunal in the circumstances set out in section 69(1).

RESTRICTION DIRECTIONS UNDER SECTION 49

Section 49 provides that where the Secretary of State gives a transfer direction in respect of a patient who has been remanded in custody by a magistrates' court or

215 Mental Health Act 1983, ss.47(3), 48(3), 55(4), and 40(4).

216 *Ibid.*

217 Section 50(1) applies only to restricted patients.

218 See Mental Health Act 1983, s.53.

219 *Ibid.*, s.69(2).

220 Under section 66(1)(f).

who is detained in a prison or remand centre but who is not serving a sentence of imprisonment — generally persons awaiting trial or sentence before the Crown Court — he shall also by warrant further direct that the patient shall be subject to the special restrictions set out in section 41. In other cases, it is a matter for the Secretary of State's discretion as to whether or not to also give a "restriction direction."[221]

Whether restrictions necessary to protect public from serious harm

Given that it may be mandatory to give a restriction direction, a person may be restricted under section 49 even though it is common ground that restrictions are not necessary to protect the public from serious harm. Furthermore, where a discretion exists, the Act does not provide that restrictions may only be imposed if the Secretary of State is satisfied they are necessary for that purpose. These facts may be highly relevant to any subsequent tribunal proceedings.

THE GIVING OF A RESTRICTION DIRECTION

Mandatory	*discretionary*
Section 48(2)(a) : persons awaiting trial or sentence in the Crown Court	Section 47(1)(a) : persons serving a sentence of imprisonment **(379)**
Section 48(2)(b) : persons remanded in custody by a magistrates' court,	Section 48(2)(d) : persons detained under the Immigration Act 1971.
	Section 48(2)(c) : civil prisoners

LEGAL EFFECT OF A RESTRICTION DIRECTION

Just as the making of a transfer direction has the same effect as if a hospital order had been made in respect of the patient so a restriction direction has the same effect as a restriction order made under section 41.[222] Accordingly, for the purposes of the pa- provisions of Parts II and V of the Act referred to in Part II of Schedule 1, the tient is treated as if he had been admitted on the date of the restriction direction in pursuance of an application duly made under section 3, but subject to the exceptions and modifications specified in that Part of the Schedule.[223] These exceptions and modifications apply equally to patients admitted to hospital following the imposition of a restriction order and their effect is set out above **(335)**. In summary, unless the Act expressly provides otherwise, patients subject to a restriction direction are to be treated as if both a hospital order and a restriction order had been made on the date of the transfer direction.

Medical reports

While a person is subject to a restriction direction, the responsible medical officer must examine the patient and report to the Secretary of State at such intervals (not exceeding one year) as the Secretary of State may direct; and every report shall contain such particulars as the Secretary of State may require.[224]

221 Mental Health Act 1983, s.49(1).
222 *Ibid.*, s.49(2).
223 *Ibid.*, ss.49(2), 55(4), 41(3) and 145(3).

Persons remanded in custody by a magistrates court

As has been noted, the Secretary of State must also give a restriction direction under section 49 in such cases. Following the giving of the directions, the court may further remand the accused in his absence provided that he has appeared before the court within the previous six months.[225] The effect of a further remand in custody is that the transfer and restriction directions continue in force. A remand on bail brings the directions to an end.[226] Committal proceedings, whether under section 6(1) or (2) of the Magistrates' Courts Act 1980, may be conducted in the accused's absence, provided he is legally represented and the court is satisfied, on the written or oral evidence of the responsible medical officer, that he "is unfit to take part in the proceedings."[227] Where the patient is committed in custody, whether for trial or sentence, he is thereafter deemed to be liable to detention in hospital pursuant to a transfer direction made under section 48(2)(b). Thereafter, the provisions of section 51, instead of those set out in section 52, apply.[228]

Alternative means of disposal available to the magistrates

A transfer direction under section 48 may only be given in respect of a person suffering from mental illness or severe mental impairment who is in urgent need of treatment. Section 37(3) provides that a magistrates' court may in certain circumstances make a hospital order without convicting such a person, unless he is charged with an offence triable only on indictment.

Persons awaiting trial or sentence before the Crown Court

Where, under section 48(2)(b), the Secretary of State directs the removal to hospital of a person who is awaiting trial or sentence before the Court Crown, he must also give a restriction direction. Consequently, all defendants who are removed to hospital by the Secretary of State during the course of criminal proceedings are subject to a restriction direction. The court having jurisdiction to try or otherwise deal with the detainee may make a hospital order (with or without a restriction order) in his absence, and without convicting him, if[229]—

a. it appears to the court that it is impracticable or inappropriate to bring him before the court; *and*

b. the court is satisfied, on the written or oral evidence of at least two registered medical practitioners, that the detainee is suffering from mental illness or severe mental impairment of a nature or degree which makes it appropriate for the patient to be detained in a hospital for medical treatment; *and*

c. the court is of the opinion, after considering any depositions or other documents required to be sent to the proper officer of the court, that it is proper to make such an order.

224 *Ibid.*, s.49(3).
225 Mental Health Act 1983, s.52(4).
226 *Ibid.*, ss.48(2)(b) and 52(2).
227 *Ibid.*, s.52(7).
228 *Ibid.*, s.52(6).
229 *Ibid.*, s.50(5)–(6).

DURATION AND DISCHARGE OF RESTRICTION DIRECTIO.

The Act provides that a restriction direction will cease to have effect upon the patient's remission to custody (**386**); the giving of a direction by the Secretary of State or a Mental Health Review Tribunal (**387**); the expiration of the direction (**389**).

TREATMENT INEFFECTIVE OR NO LONGER REQUIRED

The Act provides for the remission to prison, or some other place of custody, of restricted patients previously removed to hospital under sections 47 or 48. Both the transfer direction and the restriction direction cease to have effect upon the patient's arrival at the place to which he is remitted. The statutory criteria by reference to which a patient may be remitted to prison are the same in all cases, namely that he "no longer requires treatment in the hospital to which he has been removed" or that "no effective treatment can be given to him there."[230] Where the person removed is involved in criminal proceedings, the court with jurisdiction to deal with his case always has power to remit him.

REMISSION TO PRISON OR OTHER PLACE OF CUSTODY

	By Secretary of State	*By the Court*
• Patients serving a sentence of imprisonment removed under sections 47/49	Section 50(1)	Not applicable
• Civil prisoners and Immigration Act detainees	Section 53(2)	Not applicable
• Persons remanded in custody by a magistrates' court and detained under s.48(2)(b)	No power to remit	Section 52(5)
• Persons awaiting trial or sentence before the Crown Court and detained under s.48(2)(a)	Section 51(3)	Section 51(4)

Remission by the Secretary of State

With the exception of patients removed under section 48(2)(b) whose cases are still before a magistrates' court, the Secretary of State may direct that any restriction direction patient be remitted to any place in which he might have been detained had he not been removed to hospital. He may do so upon being notified by the responsible medical officer, any other medical practitioner, or a Mental Health Review Tribunal, that the patient "no longer requires treatment in the hospital to which he has been removed" or that "no effective treatment can be given to him there."[231]

230 The transfer direction may therefore be terminated if no effective treatment can be given in the hospital where the patient is detained, even though effective treatment could be given in some other hospital.

231 Mental Health Act 1983, ss.50(1), 51(3) and 53(3).

Remission by a magistrates' court

In the case of patients removed under section 48(2)(b) whose cases are still before a magistrates' court, the magistrates' court dealing with the case may direct that the restriction direction shall cease to have effect if satisfied, on the written or oral evidence of the responsible medical officer, as to either of the above grounds for remission.[232] The court may so direct notwithstanding that the period of remand has not expired or that, in the course of the same hearing, it has just committed the accused to the Crown Court for trial or sentence.[233] Unless the court then remands the patient on bail, he will necessarily be returned to custody.

Remission by the Crown Court

In the case of a patient awaiting trial or sentence before the Crown Court, that court may remit the patient to custody or release him on bail if satisfied, on the responsible medical officer's evidence, as to the existence of either of the grounds for remission.[234] In Crown Court proceedings, therefore, either the court or the Secretary of State may terminate the direction, although the court may only do so if "satisfied" upon the responsible medical officer's evidence as to the existence of either ground. In contrast, the Secretary of State's power is exercisable upon his being "notified" by the responsible medical officer, another medical practitioner, or a tribunal, that either ground exists: he would not appear to have to personally satisfy himself that this is so. A further distinction is that, whereas the Secretary of State must either remit or not remit, the Crown Court may grant bail as an alternative to remission (subject to section 25 of the Criminal Justice and Public Order Act 1994).[235] It is therefore generally in the patient's interests to encourage his responsible medical officer to report to the court rather than to the Home Secretary, if a report is to be made.

DISCHARGING THE DIRECTIONS

As drafted, the Secretary of State has the same statutory powers in respect of a patient who is subject to a restriction direction as he does in a case involving a patient who is subject to a restriction order. There are, however, a number of practical differences and a tribunal's powers are more limited when dealing with the case of a patient who is subject to a restriction direction.

Absolute discharge from hospital

Section 42(2) provides that the Secretary of State may, if he thinks fit, by warrant absolutely discharge from hospital a restricted patient who is detained under a transfer direction. A patient who is absolutely discharged ceases to be liable to be detained under the transfer direction, and the restriction direction, being parasitic in nature, accordingly also ceases to have effect. It is exceptional for a patient involved in criminal proceedings, who has been removed to hospital under section 48(2)(a) or (b), to be absolutely discharged.

232 Mental Health Act 1983, s.52(5).

233 *Ibid.*, s.52(5).

234 *Ibid.*, s.51(4).

235 *Ibid.*

Orders for discharge under section 23

The managers of a hospital may, with the Secretary of State's consent, order the discharge of a restricted patient who is liable to be detained there under a transfer direction. Any such order for discharge is equivalent to a direction for the patient's absolute discharge and both the transfer direction and the restriction direction cease to have effect.

Conditional discharge

The Secretary of State may direct the conditional discharge of a restricted patient who is detained under a transfer direction.[236] Where a patient is discharged from hospital subject to conditions, both the transfer direction and the restriction direction remain in force and the patient may by warrant be recalled to hospital by the Secretary of State at any time.[237]

Directions under section 42(1)

Section 42(1) provides that if the Secretary of State is satisfied in the case of any patient that a restriction direction is no longer required for the protection of the public from serious harm, he may direct that the patient shall cease to be subject to the special restrictions, in which case the restriction direction ceases to have effect. If the patient is detained in hospital at the time when such a direction is given, he is treated as if he had been admitted to that hospital in pursuance of a hospital order made without restrictions on the date when the restrictions ceased to have effect.[238] If the patient has already been conditionally discharged, he is deemed to have been absolutely discharged on the date when the restrictions cease to have effect, and accordingly ceases to be liable to be detained under the transfer direction.[239]

Home Office practice

As concerns patients involved in criminal proceedings who have been removed to hospital under section 48(2)(a) or (b), the Secretary of State will only exceptionally discharge, or consent to the discharge of, such a person, or give a direction under section 42 that the special restrictions shall cease to have effect in respect to him.[240] If the patient has recovered his health, he will generally be remitted to custody. A patient who is serving a sentence of imprisonment, and has been removed to hospital under section 47, will also generally be remitted to prison to serve out his sentence upon recovering his health. There are, however, exceptions. For example, patients whose sentences are about to expire (**558**) and persons serving life sentences whom the Secretary of State deems to be "technical lifers" and suitable for rehabilitation under the Mental Health Act 1983 (**392**).

Mental Health Review Tribunals

A tribunal's powers are limited and it either has no power to discharge a restriction direction patient from hospital or may only do so with the Secretary of State's

236 Mental Health Act 1983, s.42(2).
237 *Ibid.*, s.42(3).
238 *Ibid.*, s.41(5).
239 *Ibid.*, s.42(5).
240 Since Parliament has required the Home Secretary to give a restriction direction in the case of patients involved in criminal proceedings, leaving him no discretion, it is somewhat anomalous that he may at his discretion then direct that the mandatory special restrictions shall cease to have effect.

consent (**555**). However, once a patient has been conditionally discharged (whether by the Secretary of State or with his consent), he is in exactly the same position as any other conditionally discharged patient and a tribunal may direct that the restrictions shall cease to have effect.[241]

POWERS OF TRIBUNALS (555)

Patients who are liable to be detained in hospital

• Section 48 patients	No power to direct the patient's absolute or conditional discharge from hospital.
• Section 47 patients	Power to direct the patient's absolute or conditional discharge from hospital but only with the Secretary of State prior consent.

Conditionally discharged patients

• All restriction direction patients	Power to direct that the transfer direction and restriction direction shall cease to have effect, without the Secretary of State prior consent.

EXPIRATION OF THE DIRECTIONS

With the exception of persons serving a life sentence, both the transfer direction and the restriction direction will eventually cease to have effect through effluxion of time even if no direction is given having that effect and the patient has not been remitted to prison or some other place of custody.

EXPIRATION OF DIRECTIONS IN RESTRICTED CASES

• Patients serving a determinate sentence of imprisonment removed under sections 47/49	The restriction direction ceases to have effect on the expiration of the patient's sentence. However, unless he is a conditionally discharged patient, the patient is deemed to be admitted to hospital under a hospital order made, without restrictions, on the date of the sentence's expiration. If conditionally discharged, the patient ceases to be subject to any form of order or direction, unless a warrant of recall is outstanding.†
• Civil prisoners and Immigration Act detainees	Both the transfer direction and the restriction direction expire on the date on which the patient would have ceased to be liable to be detained in the place from which he was removed had no direction been given. If the patient's mental state is such that he requires detention under the 1983 Act beyond that date, an application must be made in the ordinary way under section 2 or 3.

241 Mental Health Act 1983, ss.74 and 75.

• Accused persons remanded in custody under s.48(2)(b)	Both the transfer direction and the restric direction cease to have effect if the accused's case is disposed of by the magistrates' court otherwise than by way of committal in custody to the Crown Court. Following such a committal, the patient is deemed to be subject to a transfer direction made under s.48(2)(a) [see below].
• Persons awaiting trial or sentence before the Crown Court and detained under s.48(2)(a)	Both the transfer direction and the restriction direction cease to have effect upon the patient's case being disposed of by the court having jurisdiction to try or otherwise deal with him.

† *Where a warrant of recall is outstanding, because the patient is absent from hospital without leave at the expiration of his sentence, the transfer and restriction directions continue to have effect until the patient eventually returns or is returned to the hospital. Upon his return, the directions expire and the patient is deemed to have been admitted to the hospital specified in the warrant under a notional hospital order made, without restrictions, on the date of his return.*

LIFE SENTENCE PRISONERS

Every life prisoner must serve the penal part of his sentence (the "tariff") before there is any prospect of release. In murder cases, the Home Secretary sets the tariff if the offence was committed by a person aged 18 or over. Although he seeks recommendations from the trial judge and the Lord Chief Justice as to the appropriate term to be served, he is not bound by their advice.[242] In other cases — where an life sentence is required under section 2 of the Crime (Sentences) Act 1997, or a discretionary life sentence is imposed;[243] or a person is detained during Her Majesty's pleasure — the relevant part of the sentence which must be served is set by the sentencing judge, having regard to the seriousness of the offence.

Release into the community

If a life prisoner is transferred to hospital under sections 47 and 49 of the 1983 Act, there are three possible ways in which he may be released back into the community after the expiry of the tariff period—

- Release on life licence under the Crime (Sentences) Act 1997. This is possible because section 50(1)(b) of the Mental Health Act provides that, if the Secretary of State is notified that a prisoner no longer requires treatment in hospital for mental disorder, or that no effective treatment can be given to him there, he may exercise any power of releasing him on licence which would have been exercisable were he in prison.
- Discharge by the Secretary of State under section 42(2) of the 1983 Act, whether absolutely or subject to conditions.
- Discharge by a tribunal under section 74(2) of that Act, upon the Secretary of State notifying it within 90 days that the patient may be discharged in accordance with its finding.

[242] *Doody v. Secretary of State for the Home Department* [1994] 1 A.C. 531 at 566, *per* Lord Mustill; . *R. v. Secretary of State, ex p. Hickey (No. 1)* [1995] 1 All E.R. 479 at 484, C.A.

[243] If the maximum sentence for an offence is life imprisonment, the court may impose such a sentence if the individual is dangerous and unpredictable and the offender cannot adequately be dealt with under the Mental Health Act 1983. The purpose of the sentence is to ensure that the offender is detained for as long as he may be dangerous to others. *R. v. Wilkinson* (1983) 5 Cr.App.R.(S.) 105.

A prisoner who is absolutely discharged under the 1983 Act is not subject to supervision and nor is he liable to be recalled to hospital or prison. If he is discharged conditionally, he is subject to supervision and he may be recalled to hospital, but not to prison. However, a person who has been conditionally discharged may later be absolutely discharged by a tribunal without the consent of the Secretary of State. In 1985, the then Home Secretary announced to the House of Commons that transferred life sentence prisoners would henceforth normally be discharged by way of life licence, rather than absolutely or conditionally discharged under the 1983 Act.[244] The Home Secretary's power in section 50(1)(b) of the 1983 Act would, he said, be used to release such prisoners under the same arrangements as those they would have been subject to had they remained in, or been returned to, prison. In *R. v. Secretary of State for the Home Department, ex p. S, The Times*, 19 August 1992, Henry J. held that this new policy was lawful. In exceptional circumstances, the usual policy is departed from and the Home Secretary's discretion to absolutely or conditionally discharge a prisoner under section 42, or to consent to his discharge by a tribunal, remains unfettered. Persons whom the Home Secretary is willing to treat and release under the ordinary Mental Health Act procedures for detained patients are referred to by him as "technical lifers." Experience has shown the principal categories into which these "exceptional cases" fall. According to an affidavit filed on the Home Secretary's behalf in *ex p. S.*:

> "This might be justified in a number of circumstances, for example, where evidence, not available to the sentencing court, suggests that the person was in fact suffering from a mental disorder at the time the offence was committed, or that the court had wished to make a hospital order but had been prevented from doing so because no hospital place was available. In such circumstances, as indicated in the statement, the Home Secretary would normally consult the trial judge and the Lord Chief Justice at some stage prior to the discharge decision to see whether they were content for him to treat the case as though a hospital order had been made in the first instance. If so, the Home Secretary would exercise his own power to discharge the person under section 42(2) of the Mental Health Act 1983."

Life prisoners other than those who committed murder when aged 18 or over

Section 28 of the Crime (Sentences) Act 1997 governs the release on licence of those sentenced to life imprisonment under section 2 of that Act, those serving a discretionary life sentence, and those detained during Her Majesty's pleasure. Once the prisoner has served the tariff part of his sentence he can, under section 28(7) of the 1997 Act, require the Home Secretary to refer his case to the Parole Board.[245] The Home Secretary must then release the prisoner if the Parole Board direct that but the Board may only give such a direction if satisfied that it is no longer necessary for the protection of the public that the prisoner should be detained. However, it has been held that a life sentence prisoner who continues to require detention in hospital for treatment under sections 47 and 49 has no right to have his case referred to the Parole Board.[246] The duration of his detention in hospital is governed by the

[244] It had previously been his practice to release such persons by way of conditional discharge under the 1983 Act.

[245] In *Thynne v. United Kingdom* [1990] 13 E.H.R.R. 666, the European Court of Human Rights held that the United Kingdom was in breach of the convention in not providing a court rather than a minister to consider at reasonable intervals the lawfulness of the continued detention of discretionary lifers. Accordingly, Parole Board discretionary lifer panels, which are somewhat similar to Mental Health Review Tribunals, were constituted to periodically consider whether a section 28 prisoner who has served his tariff still needs to be in prison or may be released on life licence.

[246] *R. v. Secretary of State, ex p. Hickey (No. 1)* [1995] 1 All E.R. 479 at 487, C.A.

procedures set down in the 1983 Act. It is only when the Home Secret[illegible] notified, by the responsible medical officer or a tribunal, that a lifer no longer requires further treatment in hospital that the Parole Board procedures come into play. At that time, the Home Secretary will either remit the patient to prison, where he has the benefit of section 28, or, if that is inappropriate, arrange for the his case to be referred to a Parole Board panel while he remains in hospital, followed by release from hospital on life licence if the panel directs that.[247]

Life prisoners who committed murder when aged 18 or over

The position of persons convicted of a murder committed when aged 18 or over is different and is dealt with in section 29 of the 1997 Act. The Secretary of State has a broad discretion whether and when to release such a prisoner, and is not bound by judicial advice as to the tariff period.[248] Parole Board recommendations that a prisoner be released are advisory only and mandatory lifers do not have any right to a review by a judicial body, such as a Parole Board panel, either under domestic law or the Convention.[249] They do, however, have the benefit of the Home Secretary's policy in relation to life prisoners detained in hospital under sections 47 and 49. Their cases will be referred to the Parole Board if and when they no longer require, or can no longer effectively be given, hospital treatment, provided that the tariff period has expired and it is not appropriate to remit them to prison.

"Technical lifers"

The term "technical lifer" applies to any life prisoner transferred to hospital whom the Home Secretary, after consultation with the judiciary, believes should have been made subject to a hospital order and a restriction order following conviction. Insofar as possible, a "technical lifer" is dealt with by the Home Office as if he were subject to a hospital order and a restriction order. He will not be remitted to prison and eventual discharge is by way of absolute or conditional discharge under the 1983 Act, without the Parole Board playing any role.[250] The exceptional circumstances which may be considered to justify this are generally—

- that the mental disorder which led to the patient being transferred existed at the time of the offence and was relevant to it;
- that the sentencing court would have wished to dispose of the case by making a hospital order but was for some reason prevented from doing so. For example, because no hospital bed was available or because the defendant refused to raise a defence of diminished responsibility, thereby leading to his conviction for murder and a mandatory life sentence.[251]

247 *Hansard* (1994) H.C. Vol. 245, col. 9.
248 *Doody v. Secretary of State for the Home Department* [1994] 1 A.C. 531 at 566, *per* Lord Mustill; *R. v. Secretary of State, ex p. Hickey (No. 1)* [1995] 1 All E.R. 479 at 484, C.A.
249 *Wynne v. United Kingdom, The Times*, 27 July 1994
250 As to patients sentenced before the Criminal Justice Act 1991 was in force, the fact that punishment is inappropriate means that the tariff is incapable of certification under para. 9 of Sched. 12 to that Act. However, the Secretary of State has power to discharge such a patient from hospital under section 42(2) of the 1983 Act: see *R. v. Secretary of State, ex p. Hickey (No. 1)* [1995] 1 All E.R. 479 at 485.
251 Home Office decisions refusing to treat a patient as a "technical lifer" are susceptible to judicial review: *R. v. Secretary of State for the Home Department, ex p. Pilditch* [1994] C.O.D. 352, Jowitt J.

LIFE PRISONERS — CRIME (SENTENCES) ACT 1997

28.—(l) A life prisoner is one to whom this section applies if—

(a) the conditions mentioned in subsection (2) below are fulfilled; or
(b) he was under 18 at the time when he committed the offence for which his sentence was imposed.

(2) The conditions referred to in subsection (l)(a) above are—

(a) that the prisoner's sentence was imposed for an offence the sentence for which is not fixed by law; and
(b) that the court by which he was sentenced for that offence ordered that this section should apply to him as soon as he had served a part of his sentence specified in the order.

(3) A part of a sentence specified in an order under subsection (2)(b) above shall be such part as the court considers appropriate taking into account—

(a) the seriousness of the offence, or the combination of the offence and other offences associated with it; and
(b) the effect of any direction which it would have given under section 9 above if it had sentenced him to a term of imprisonment.

(4) Where in the case of a life prisoner to whom this section applies the conditions mentioned in subsection (2) above are not fulfilled, the Secretary of State shall direct that this section shall apply to him as soon as he has served a part of his sentence specified in the direction.

(5) As soon as, in the case of a life prisoner to whom this section applies—

(a) he has served the part of his sentence specified in the order or direction ("the relevant part"); and
(b) the Parole Board has directed his release under this section, it shall be the duty of the Secretary of State to release him on licence.

(6) The Parole Board shall not give a direction under subsection (5) above with respect to a life prisoner to whom this section applies unless—

(a) the Secretary of State has referred the prisoner's case to the Board; and
(b) the Board is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined.

(7) A life prisoner to whom this section applies may require the Secretary of State to refer his case to the Parole Board at any time—
(a) after he has served the relevant part of his sentence ....

29.—(1) If recommended to do so by the Parole Board, the Secretary of State may, after consultation with the Lord Chief Justice together with the trial judge if available, release on licence a life prisoner who is not one to whom section 28 above applies.

(2) The Parole Board shall not make a recommendation under subsection (1) above unless the Secretary of State has referred the particular case, or the class of case to which that case belongs, to the Board for its advice.

Remission to prison

- On being advised that a transferred prisoner no longer requires treatment in hospital, the Home Secretary's normal course is to remit him to prison under section 50(1)(a) of the 1983 Act, where he will be eligible for a Discretionary Lifer Panel review or a Parole Board hearing in the normal manner. However, this general policy is departed from in some cases, and the patient discharged into the community without first being remitted to prison.

Release from hospital —

- A transferred prisoner subject to a restriction direction who is not remitted to prison can be discharged from hospital in three ways, each of which can be initiated only by the Secretary of State—

1. Home Secretary's direction for the patient's absolute or conditional discharge

1. Section 42(2) of the 1983 Act gives the Secretary of State power, if he thinks fit, to discharge the patient either absolutely or subject to conditions.

2. MHRT direction for the patient's absolute or conditional discharge under the 1983 Act

2. Under Section 74 of the 1983 Act, where a tribunal notifies the Home Secretary that a transferred prisoner would be entitled to be absolutely or conditionally discharged if subject to a restriction order, the tribunal must so discharge him if the Home Secretary consents but not otherwise.

3. Release from hospital under life licence

3. Under section 50(1)(b) of the 1983 Act, where the Home Secretary is notified by the responsible medical officer, any other registered practitioner, or a tribunal, that the person no longer requires treatment in hospital for mental disorder, or that no effective treatment can be given there, he may, instead of remitting him to prison, exercise any power of releasing him on life licence under the Crime (Sentences) Act 1997 which would have been exercisable if the patient had been remitted.

Release from hospital on life licence usual

- As to these three options, where the Home Secretary agrees to a transferred patient being discharged direct from hospital, his policy since 1985 has been to use the power in section 50(1)(b). That is, to authorise the offender's release on the same basis as if he had remained in prison — on life licence, post tariff, and following consideration of the case by the Parole Board and the judiciary (persons who committed murder when aged 18 or over) or the Discretionary Lifer Panel (other cases). This policy, which ensures lifelong control, was found to be lawful in *R. v. Secretary of State for the Home Department, ex. p. Stroud* [1993] C.O.D. 75.

- owever, the effect of the decision in *R. v. Secretary of State for the Home Department, ex p. Hickey (No. 1)* [1995] 1 All E.R. 479 is that transferred lifers whose tariffs have expired, but who require further treatment in hospital, do not qualify for the regular Discretionary Lifer Panel and Parole Board reviews to which they would have been eligible had they remained in prison.

Exceptions to the general rule

- There are two main exceptions to the general policy that life prisoners will usually be remitted to prison and that those not remitted will be released from hospital under life licence, rather than by absolute or conditional discharge under the 1983 Act—

1. "Technical lifers"

1. If the patient has been designated a "technical lifer" by the Home Secretary then his discharge will be under section 42 or 74 — that is he will be absolutely or conditionally discharged under the 1983 Act, and recalled to hospital under that Act if necessary.

2. Other prisoners

2. The Home Secretary accepts that release on life licence direct from hospital will sometimes be appropriate even though the patient does not meet the Home Office criteria for technical lifer status—

a. Where recommended by the responsible medical officer as being the best option for the individual patient, the Home Office is willing to *consider* proposals for the patient's rehabilitation through the hospital system and, after the tariff has expired, his eventual release on life licence direct from hospital, under section 50(l)(b).

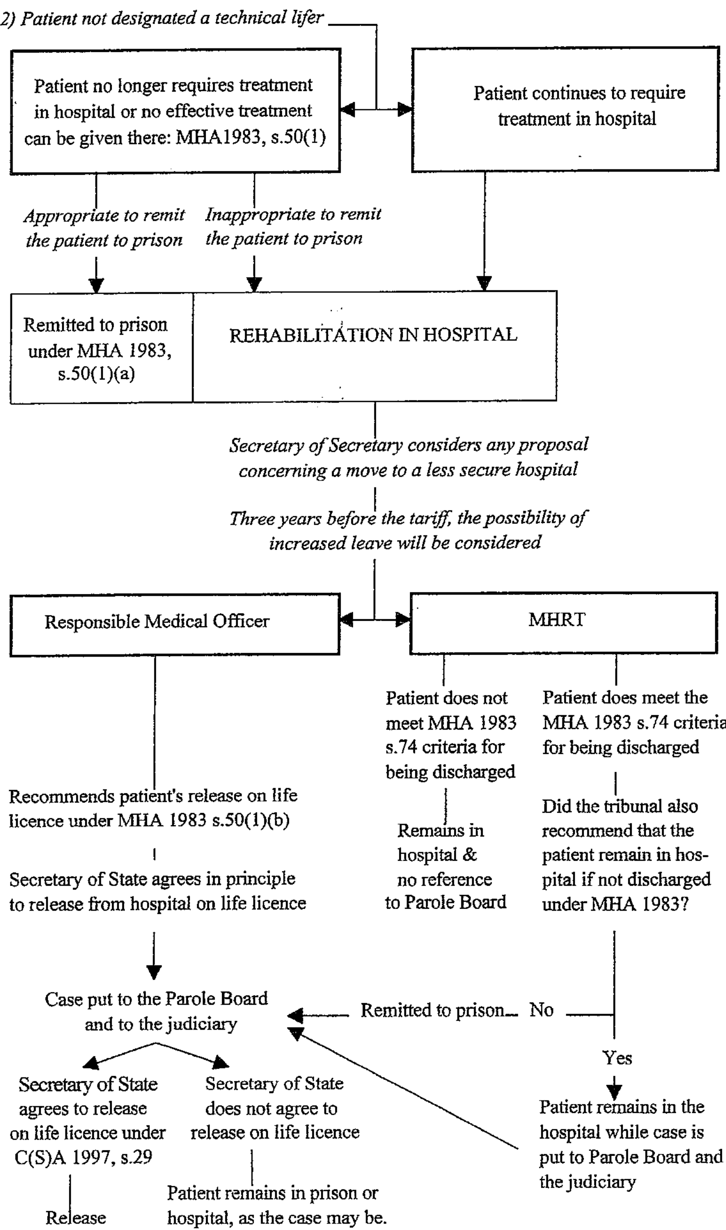
b. Where a Mental Health Review Tribunal notifies the Home Secretary under section 74(1)(a) that a patient whose tariff has expired would be entitled to be conditionally discharged if subject to a restriction order, and the tribunal also recommended that the patient should remain in hospital if not discharged, the Secretary of State will refer the case to the DLP or Parole Board while the person remains in hospital, even if he does not agree with the tribunal's recommendation.

c. The Home Secretary will normally only refer the case of a patient whose tariff has expired to the DLP or Parole Board if he has been notified by the responsible medical officer or a tribunal that the patient no longer requires treatment in hospital.

LIFERS TRANSFERRED TO HOSPITAL UNDER SECTIONS .../&49
I. PERSONS WHO COMMITTED MURDER WHEN AGED 18 OR OVER

1) Patient designated a technical lifer (342): dealt with under the 1983 Act as if a hospital order and a restriction order had been made by the sentencing court

2) Patient not designated a technical lifer

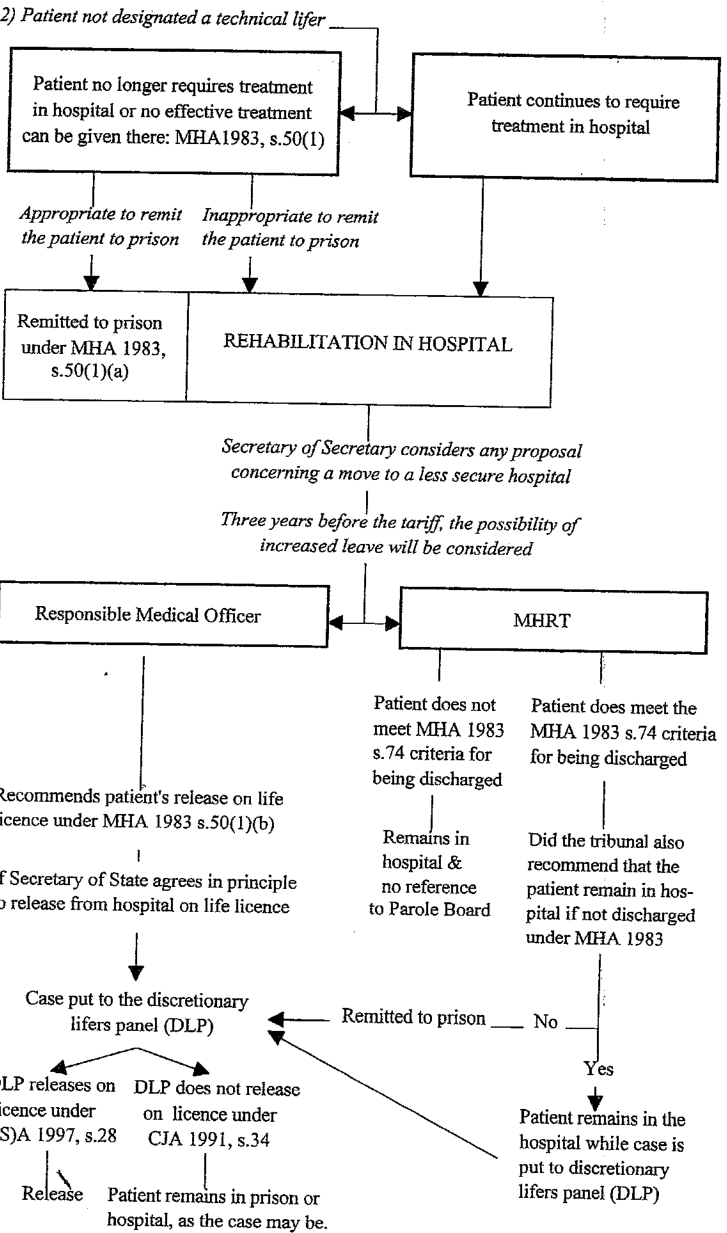


Source: Adapted from Home Office Mental Health Unit flowchart

LIFERS TRANSFERRED TO HOSPITAL UNDER SECTIONS 47&49
II. OTHER CASES

1) Patient designated a technical lifer (342): dealt with under the 1983 Act as if a hospital order and a restriction order had been made by the sentencing court

2) Patient not designated a technical lifer



Source: Adapted from Home Office Mental Health Unit flowchart

HOSPITAL AND LIMITATION DIRECTIONS

The Crime (Sentences) Act 1997 received the Royal Assent on 21 March 1997. Many of its provisions were brought into force on 1 October 1997, including those directly relevant to persons with mental health problems.[252] The Act requires the Crown Court to impose a life sentence for a second serious offence, unless there are exceptional circumstances. It also inserted a new power in the 1983 Act which enables the Crown Court in certain cases to impose a sentence of imprisonment and at the same time to direct the offender's removal to hospital for treatment. These new "hybrid orders" are referred to in the Act as hospital directions and limitation directions. Once made, their effect is identical to that where the Home Secretary transfers a serving prisoner to hospital for treatment by giving a hospital direction together with a restriction direction, under sections 47 and 49 (384).

INTRODUCTION

Where the Crown Court sentences an offender who suffers from a psychopathic disorder to imprisonment, it may in certain circumstances also direct that, instead of being removed to and detained in a prison, he be removed to and detained in a specified hospital ("a hospital direction") and be subject to the special restrictions set out in section 41 (a "limitation direction").[253] A hospital direction has effect as a transfer direction made under section 47[254] and a limitation direction has effect as a restriction direction made under section 49.[255] Prior to October 1997, a court sentencing an offender could impose a hospital order or a prison sentence, but could not combine the two. However, in some cases, a sentencing court is of the opinion that the circumstances of the offence merit a custodial sentence, for example because the offender's personality disorder did not greatly diminish his culpability, but it is also concerned to minimise the risk of repetition by ensuring that he is given any medical treatment likely to be beneficial. In other cases, the sentencing court may be satisfied that the defendant is mentally disordered but not satisfied that successfully treating his mental disorder will prevent further serious offending following release from hospital. A prison sentence has the disadvantage that it does not guarantee that the offender will receive the psychiatric treatment he requires. A hospital order has

252 The following provisions were, *inter alia*, brought into force on 1 October 1997: automatic life sentence for a second conviction for a serious sexual or violent offence (Section 2); mandatory minimum sentence of seven years for a third Class A drug trafficking conviction (Section 3); new provisions for the release of those sentenced to detention during Her Majesty's pleasure (Sections 28–33); abolition of consent requirements for certain community penalties (Section 38, and related paragraphs of Schedule 4); hospital and limitation directions for sentencing mentally disordered offenders (Section 46, and Schedule 4, paragraph 12); power to specify hospital units for detention of mentally disordered offenders (Sections 47, 49(2) and 49(4)); movement of conditionally discharged patients between jurisdictions in the United Kingdom (Section 48 and Schedule 3); extended maximum duration of interim hospital order (Section 49(1)); transfer of prisoners to private psychiatric hospitals for treatment (Section 49(3)). See The Crime (Sentences) Act 1997 (Commencement No. 2 and Transitional Provisions) Order 1997 (1997 S.I. No. 2200). Note that sections 38 (abolition of consent requirements for certain community penalties) and 46 (hospital and limitation directions) do not apply to offences committed before 1 October 1997. *Ibid.*, reg. 5(1)(a).

253 Mental Health Act 1983, s.45A(3), as inserted by Crime (Sentences) Act 1997, s.46. It is not possible for the Crown Court to impose a hospital direction without at the same time making a limitation direction ("The court may give *both* of the following directions, namely (a) ... ; *and* (b) ...").

254 Mental Health Act 1983, s.45B(2)(a), as inserted by Crime (Sentences) Act 1997, s.46.

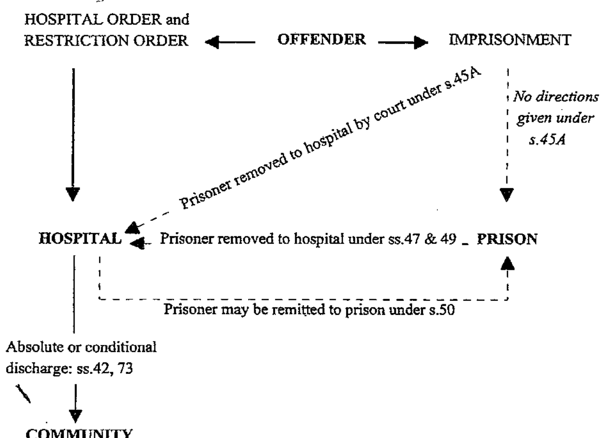
255 Mental Health Act 1983, s.45B(2)(b), as inserted by Crime (Sentences) Act 1997, s.46.

been seen as having the disadvantage that the offender is entitled to be discharged as soon as he is no longer detainable in hospital. The aim of the new power is to combine the security of a custodial sentence with the immediate availability of medical treatment. Whatever else happens, the offender will serve his sentence securely detained unless the Home Secretary (rather than a tribunal) is satisfied that he is fit to be absolutely or conditionally discharged from hospital. The new directions are presently only available in respect of offenders who suffer from a treatable psychopathic disorder. These are the people for whom the power is thought likely to be most appropriate, because of widespread doubts about whether the risk of reoffending in such cases can be influenced through clinical treatment.

BASIC FRAMEWORK

The conditions which must be satisfied before the Crown Court may give the directions are similar to those that must exist before a hospital order and a restriction order may be made under sections 37 and 41. Similarly, the immediate effect of giving the directions, in terms of the patient's removal to a place of safety, his conveyance to hospital and admission by the hospital managers, is identical to that which follows the imposition of a hospital order (**401**). The fact that the directions are given by a court, and that they may only be given if the option of making a hospital order has been rejected, has therefore led to the general framework for making hospital and restriction orders being adopted as the basis of the court procedure. However, once the directions have been given and the offender is detained in the specified hospital, they do not take effect as a hospital order and a restriction order made under sections 37 and 41. Instead, they take effect as if the offender had initially been removed to prison, and had commenced his sentence there, and then been transferred to hospital by the Home Secretary under sections 47 and 49. The effect is that he is first-and-foremost a prisoner and only secondarily a patient. Once he no longer requires further treatment in hospital, or no effective treatment can be given there, he may be remitted to prison to serve out his sentence. Unless he has served his sentence, he has no entitlement to release into the community at that point.

PRISONERS AND THE MENTAL HEALTH ACT 1983



IMPOSING LIMITATION DIRECTIONS AND RESTRICTION ORDERS

Provision	S.45A	S.37/41	Notes
• The defendant has been convicted before the Crown Court of an offence the sentence for which— (i) is not fixed by law (murder) (ii) does not fall to be dealt with under s.2 of the 1997 Act	s.45A(1) —	s.37(1) s.37(1)	A hospital order may not be made if a life sentence is required under section 2, but hospital and limitation directions may be given after the imposition of such a sentence.
• The court is satisfied, on the written or oral evidence of two registered medical practitioners, one of whom is section 12 approved, that the offender is suffering from a psychopathic disorder of a nature or degree which makes it appropriate for him to be detained in a hospital for medical treatment	s.45A(2) s.54(1)	s.37(2) s.54(1)	*Identical requirements.*
• The court is further satisfied, on that evidence, that such treatment is likely to alleviate or prevent a deterioration of his condition;	s.45A(2)	s.37(2)	*Identical requirements.*
• At least one of the registered medical practitioners whose evidence is taken into account by the court in relation to (1) and (2) has given evidence orally before the court.	s.45A(4)	s.41(2)	*Identical requirements.*
• The court is satisfied that arrangements have been made for his admission to the hospital specified within the period of 28 days.	s.45A(5)	s.37(4)	*Identical requirements.*
• The court has imposed a sentence of imprisonment.	s.45A(1)	—	It is a condition of making a hospital order that the court is of the opinion, having considered alternative senten[illegible] such as imprisonment, that a hosp[illegible] order is the most suitable method of disposing of the case: s.37(2)(b).
• Except where a life sentence is required under section 2 of the Crime (Sentences) Act 1997, the court considered making a hospital order before deciding to impose a sentence of imprisonment.	s.45A(1)	—	

Provision	S.45A	S.37/41	Notes
• It appears to the court, having regard to the nature of the offence, the antecedents of the offender and the risk of his committing further offences if set at large, that it is necessary for the protection of the public from serious harm that the patient be subject to the special restrictions.	—	s.41(1)	Restrictions must be imposed (in the form of a limitation direction) if a court gives a hospital direction — regardless of whether they appear to be necessary to protect the public from serious harm.
Effect of the orders or directions up to the time of admission			
• Subject to the effect of a successful appeal, the making of the orders or directions has the consequence that any pre-existing application, unrestricted hospital order, or guardianship order ceases to have effect.	s.45B(2) s.47(3) s.49(2) s.55(4)	s.41(4)	*Identical requirements.*
• Pending admission to the specified hospital within 28 days, the offender may be conveyed to, and detained in, the place of safety specified by the court.	s.45A(5)	s.37(4)	*Identical requirements.*
• A constable, or any other person directed by the court, is authorised to convey the offender to the specified hospital during the 28 day period following sentence.	s.45B(1)	s.40(1)	*Identical requirements.*
• Provided that the offender is admitted within that 28 day period, the managers of the specified hospital are authorised to admit him there and to thereafter detain him in accordance with the provisions of the Act.	s.45B(1)	s.40(1)	*Identical requirements.*
• In an emergency or other special circumstances, the Home Secretary may give instructions/directions for the patient's admission within the 28 day period to a hospital other than that specified by the court.	s.45A(6) s.45A(7)	s.37(5)	*Identical requirements.*

CRITERIA FOR IMPOSITION

The following conditions must be met before the directions may be given—

- The defendant has been convicted before the Crown Court of an offence committed before 1 October 1997 the sentence for which is not fixed by law.[256]

- The court is satisfied, on the written or oral evidence of two registered medical practitioners, one of whom is approved under section 12, that the offender is suffering from a psychopathic disorder of a nature or degree which makes it appropriate for him to be detained in a hospital for medical treatment;[257]

- The court is further satisfied, on that evidence, that such treatment is likely to alleviate or prevent a deterioration of his condition;[258]

- At least one of the registered medical practitioners whose evidence is taken into account by the court in relation to (1) and (2) has given evidence orally before the court;[259]

- The court is satisfied, on the written or oral evidence of the registered medical practitioner who will be in charge of his treatment, or of some other person representing the managers of the hospital, that arrangements have been made for his admission to that hospital within the period of 28 days beginning with the date on which the directions are given;[260]

- The court has imposed a sentence of imprisonment, other than a life sentence for murder;[261]

- Except where a life sentence is required under section 2 of the Crime (Sentences) Act 1997, the court considered making a hospital order before deciding to impose a sentence of imprisonment in respect of the offence.[262]

[256] Mental Health Act 1983, s.45A(1), as inserted by Crime (Sentences) Act 1997, s.46; The Crime (Sentences) Act 1997 (Commencement No. 2 and Transitional Provisions) Order 1997, sub-para. 5(1)(a). A life sentence imposed under section 2 of the 1997 Act for a second serious offence is not to be regarded as a sentence which is fixed by law. Accordingly, the Crown Court may combine a life sentence under section 2 of the 1997 Act with hospital and limitation directions: Crime (Sentences) Act 1997, s.2(4); Mental Health Act 1983, s.45A(1)(b), as inserted by Crime (Sentences) Act 1997, s.46. The power to give such directions is not available to a magistrates' court, and nor may the Crown Court give them in the case of an offender who has been committed for sentence.

[257] Mental Health Act 1983, s.45A(2)(a) and (b), as inserted by *ibid.*; Mental Health Act 1983, s.54(1), as amended by *ibid.*, s.55(1), Sched. 4, para.12(6).

[258] Mental Health Act 1983, s.45A(2)(c), as inserted by *ibid.* Reaching such a decision may sometimes be difficult. Section 45A(8) therefore provides that the sentencing court may make an interim hospital order under section 38(1) before passing sentence.

[259] Mental Health Act 1983, s.45A(4), as inserted by *ibid.*

[260] Mental Health Act 1983, s.45A(5), as inserted by *ibid.*

[261] Mental Health Act 1983, s.45A(1), as inserted by *ibid.*

[262] Mental Health Act 1983, s.45A(1)(b), as inserted by *ibid.*

Commentary

The medical conditions which must be satisfied before hospital and limitation directions are given are identical to those which must exist before a hospital order is made in respect of a person who suffers from psychopathic disorder. As in the case of section 37, the court must also be satisfied that a hospital bed is available within 28 days. Where the sections do diverge is the necessary absence in section 45A of any reference to the remaining condition which must be satisfied before a hospital order is made under section 37 (with or without restrictions). As to this, section 37(2)(b) makes it a condition of imposing a hospital order that the court "is of the opinion, having regard to all the circumstances, including the nature of the offence and the character and antecedents of the offender, and to the other available methods of dealing with him, that the most suitable method of disposing of the case is by means of a hospital order." In contrast, it is a condition of giving the directions under section 45A that the court which has just sentenced the offender to imprisonment considered making a hospital order but was of the opinion (adopting the language of section 37(2)(b)) that the most suitable method of disposing of the case was by way of custodial sentence. "Considered" in this context can be taken to mean that the necessary medical reports were before the court, and a bed was available, and it was therefore in a position to consider making such an order. Where a prisoner's admission to hospital under section 45A is directed, the imposition of the special restrictions set out in section 41, in the form of a limitation direction, is mandatory. There is no requirement that such a direction may not be given unless it appears to the court that the special restrictions are necessary in order to protect the public from serious harm. Restrictions being mandatory, the individual's position in this respect diverges from that of a prisoner transferred under section 47, and is instead the same as that of a person awaiting trial who is transferred to hospital under section 48(2)(a) or (b).

EFFECT OF THE DIRECTIONS

It has been noted that a hospital direction has effect as a transfer direction made under section 47 and a limitation direction has effect as a restriction direction given under section 49.[263] The effect of these directions has already been described (**374**), including in relation to persons sentenced to life imprisonment (**390**). The following additional notes are either by way of emphasis or deal with incidental matters specific to limitation directions—

- A hospital direction and a restriction direction imposed under section 45A constitute a sentence for the purposes of the Criminal Appeal Act 1968.[264]

- Section 50 of the 1983 Act (which deals with the expiration of prisoners' sentences and also their remission to prison or release from hospital on licence) applies to patients subject to limitation directions as it applies to prisoners who are subject to restriction directions (**386 et seq.**).[265]

- The consent to treatment provisions in Part IV apply to patients detained under hospital and limitation directions as they apply to patients detained in

[263] Mental Health Act 1983, s.45B(2), as inserted by Crime (Sentences) Act 1997, s.46.

[264] Criminal Appeal Act 1968, s.50(1), as amended by Crime (Sentences) Act 1997, s.55(1), Sched. 4, para. 6(1)(a).

[265] Mental Health Act 1983, s.50(5), as inserted by Crime (Sentences) Act 1997, Sched. 4, para. 12(5).

pursuance of transfer and restriction directions.[266] Such patients may therefore be given medication and other forms of treatment without their consent in the circumstances specified in that Part of the Act (**273**).

- The patient's position being identical to that of a prisoner transferred to hospital under sections 47 and 49, he may apply to a tribunal during the six month period beginning with the date of the directions, once more during the following six months, and thereafter once during each subsequent year the directions remain in force.[267]
- Persons detained in hospital in pursuance of directions given under section 45A are entitled to after-care under section 117 when they cease to be detained and leave hospital (**413**).[268] However, being restricted patients, a supervision application may not be made in respect of them under section 25A.[269]
- As in other restricted cases, the responsible medical officer must at such intervals (not exceeding one year) as the Secretary of State may direct examine and report to the Secretary of State on the patient; and every report must contain such particulars as the Secretary of State may require."[270]

EXTENDING SECTION 45A TO OTHER DISORDERS

The drafting of section 45A enables a phased introduction of hospital and limitation directions. More particularly, the Secretary of State may by order extend section 45A so that such directions may also be given in respect of offenders who suffer from one or more of the other forms of mental disorder.[271] Any such order may be limited to particular classes of offenders or offences; provide that any reference to a sentence of imprisonment or to a prison includes custodial sentences and institutions of other descriptions; and include such supplementary, incidental or consequential provisions as appear to be necessary or expedient.[272]

THE NEW SENTENCING FRAMEWORK

Section 2 of the Crime (Sentences) Act 1997 requires the Crown Court to impose a life sentence for a second serious offence unless there are exceptional circumstances. Section 3 provides that a minimum sentence of seven years' imprisonment shall be imposed for a third class A drug trafficking offence while section 4 requires a minimum sentence of three years' imprisonment for a third offence of domestic

266 Mental Health Act 1983, Part IV, as amended by Crime (Sentences) Act 1997, s.55(1), Sched. 4, para. 12(7).
267 Mental Health Act 1983, ss.69(2)(b), as amended by Crime (Sentences) Act 1997, s.55(1), Sched. 4, para. 12(8).
268 Mental Health Act 1983, s.117(1), as amended by Crime (Sentences) Act 1997, s.55(1), Sched. 4, para. 12(17).
269 Mental Health Act 1983, s.41(3)(aa), as inserted by Mental Health (Patients in the Community) Act 1995, s.2(1), Sched. 1, para. 5.
270 Mental Health Act 1983, s.45B(3), as inserted by Crime (Sentences) Act 1997, s.46.
271 Mental Health Act 1983, s.45A(10), as inserted by Crime (Sentences) Act 1997, s.46.
272 Mental Health Act 1983, s.45A(11), as inserted by Crime (Sentences) Act 1997, s.46. For example, that a hospital direction shall specify the form(s) of disorder from which the offender has been found to suffer, and shall be of no effect unless the patient is described by both medical practitioners whose evidence is taken into account as suffering from at least one common form of mental disorder.

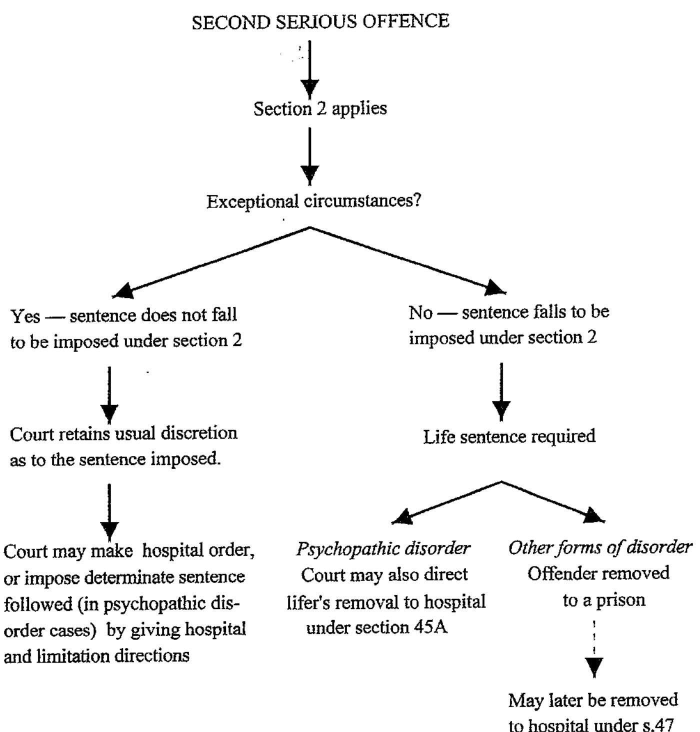
burglary. The effect of section 45A has already been described: the Crown Court may, instead of making a hospital order, imprison an offender suffering from a treatable psychopathic disorder and then direct his removal to hospital for treatment, in which case a tribunal may not direct his release, and he will continue to be detained until *both* his sentence has expired and he no longer requires detention in hospital for treatment (**399**). Taken together, these provisions represent a significant shift in the balance between the respective needs to ensure that the public are protected from repeat offending and that effective medical treatment is given to mentally disordered offenders. The purpose served by the life sentence is to protect the public from a further repetition of the most serious kinds of sexual and violent offences and to ensure that those who commit them, for whatever reason, receive supervision for life unless the circumstances are truly exceptional. A disposal under the mental health legislation cannot achieve that because the individual must be released as soon as he no longer satisfies the criteria for detention in hospital. According to the Government, it would frustrate the purpose of the mandatory sentence, which is to protect the public, if evidence of mental disorder is regarded in itself as an exceptional circumstance which enables the life sentence to be avoided. Furthermore, a life sentence is not inappropriate for, if a conviction is arrived at by the court, some degree of culpability has been established.

Mandatory sentences for a second serious offence

Section 2 applies if a person is convicted of a serious offence committed on or after 1 October 1997 and, at the time of its commission, he was aged 18 or over and had previously been convicted in any part of the United Kingdom of another serious offence.[273] The following offences committed in England and Wales are serious offences: attempted murder, conspiracy to commit murder, incitement to murder, soliciting murder; manslaughter; wounding or causing grievous bodily harm with intent; rape, attempted rape, intercourse with a girl under 13; possession of a firearm with intent to injure, use of a firearm to resist arrest, carrying a firearm with criminal intent; robbery, if the offender had in his possession a firearm or imitation firearm.[274] If section 2 applies, the court shall impose a life sentence[275] unless it is of the opinion that there are exceptional circumstances relating to either of the offences or to the offender which justify it not doing so.[276] Where the court does not impose a life sentence, it shall state in open court that it is of the opinion that there are exceptional circumstances and what those exceptional circumstances are.[277] What

273 Crime (Sentences) Act 1997, s.2(1).
274 *Ibid.*, s.2(5). Subsections (6) and (7) list those offences committed in Scotland and Northern Ireland which are to be regarded as serious offences.
275 A sentence of imprisonment for life in case of a person aged 21 or over; in other cases, a sentence of custody for life under section 8(2) of the Criminal Justice Act 1982. Crime (Sentences) Act 1997, s.2(2). Where a life sentenced is imposed under section 2 in respect of a serious offence, the offence is not to be regarded as an offence the sentence for which is fixed by law. See *ibid.*, s.2(4).
276 *Ibid.*, s.2(2). Section 1(2) sets out the basis on which the court shall carry out its sentencing functions: when determining whether it would be appropriate not to impose a life sentence, the court shall have regard to the circumstances relating to either of the offences or to the offender. This is somewhat different from the basis upon which the court must carry out its sentencing functions under sections 3 and 4. More particularly, under section 2, the life sentence usually required is not required if there are exceptional circumstances which "justify" not imposing it. Under sections 3 or 4, the minimum sentence usually required is not required if the circumstances are such that such a custodial sentence would be "unjust." It is submitted that the section 2 test confers greater discretion. Although the circumstances may not be such that a life sentence would be unjust, they may be sufficiently exceptional that they justify not imposing life imprisonment. As to the meaning of "justify," see pp.221 and 485.
277 Crime (Sentences) Act 1997, s.2(3).

constitutes "exceptional circumstances" is not defined and is a matter f— judicial discretion and interpretation. Unless there are exceptional circumstances ...ch take the case outside section 2, the sentence "falls to be imposed under section 2" and it necessarily follows that the Crown Court may not make a hospital order.[278] However, if the offender sentenced to life imprisonment under section 2 is diagnosed as having a treatable psychopathic disorder and a hospital bed is available, the court may also give a hospital direction and a limitation direction under section 45A of the 1983 Act, so that in-patient treatment can be provided. Until such time as the power to give these directions is extended to persons who suffer from the other forms of mental disorder (mental illness, mental impairment, severe mental impairment), they will be taken to prison and may only be transferred to hospital for treatment if the Home Secretary gives a transfer direction under section 47. Section 2 was brought into force on 1 October 1997.



[278] Mental Health Act 1983, s.37(1), as amended by Crime (Sentences) Act 1997, Sched. 4, para. 12(1).

Minimum sentence for third d... ...estic burglary

Section 4 requires a minimum sentence of three years' imprisonment for a third offence of domestic burglary. For these purposes, "domestic burglary" means a burglary committed in respect of a building or part of a building which is a dwelling. The offender must be aged 18 or over when the third burglary is committed; all three of the burglaries must have been committed after the commencement of the section; and, more particularly, the second committed after he had been convicted of the first.[279] Provided that these conditions are satisfied, the court must impose a custodial sentence for a term of at least three years except where it is of the opinion that there are specific circumstances which relate to any of the offences or to the offender which would make the prescribed custodial sentence unjust in all the circumstances.[280] Where the court does not impose such a sentence, it must state in open court that it is of the opinion that such a sentence would be unjust in all the circumstances and state what the specific circumstances are. Where there are no specific circumstances which justify not imposing the minimum sentence, the sentence "falls to be imposed under section 4." However, section 37(1A) of the 1983 Act provides that, where a sentence would otherwise fall to be imposed under section 4(2), nothing "shall prevent a court from making an order under subsection (1) ... for the admission of the offender to a hospital."[281] The Government does not presently have any plans to bring section 4 into force, given current pressures on prison capacity and available resources.

Minimum sentence for third class A drug trafficking offence

Section 3 contains similar provisions and it requires a minimum sentence of seven years' imprisonment for a third class A drug trafficking offence. The offender must be aged 18 or over when the third offence is committed and one of the prior offences must have been committed after he had been convicted of the first.[282] The remaining statutory provisions are the same as those set out in section 4. Provided that these conditions are satisfied, the court must impose a custodial sentence for a term of at least seven years except where it is of the opinion that there are specific circumstances which relate to any of the offences or to the offender which would make the prescribed custodial sentence unjust in all the circumstances.[283] Where the

[279] Where a person is charged with a third domestic burglary and the circumstances are such that, if he is convicted, he could be sentenced for it under section 4, the burglary is triable only on indictment.

[280] Section 1 sets out the basis on which the court shall carry out its sentencing functions: when determining whether it would be appropriate not to impose a sentence of at least three years, the court shall have regard to the specific circumstances which relate to any of the offences or to the offender *and* would make the prescribed custodial sentence unjust in all the circumstances: *Ibid.*, s.1(3).

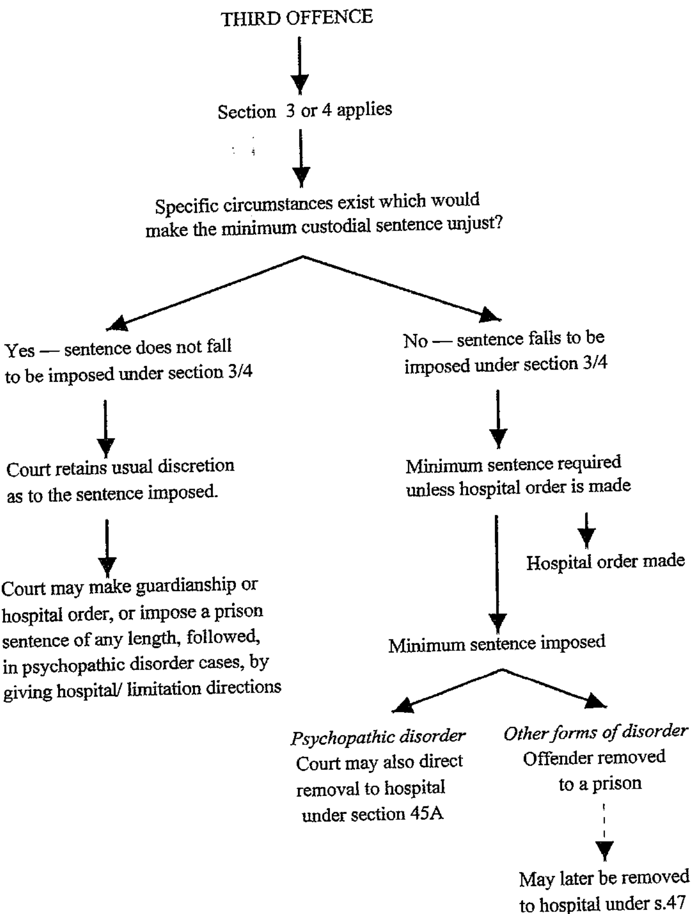
[281] Section 37(1A) of the Mental Health Act 1983, as inserted by paragraph 12(2) of Schedule 4 to the Crime (Sentences) Act 1997. Because the courts may make a hospital order as an alternative to imposing the minimum custodial sentence, there will never be any need to establish that the offender's mental state or psychiatric history constitute exceptional circumstances before such an order can be made. As to the absence of any reference to a guardianship order in section 37(1A), see p.325.

[282] In contrast to the position under section 4, it is not necessary that all three offences have been committed after the commencement of the section. *Ibid.*, s.3(1). Where a person is charged with a third drug trafficking offence and the circumstances are such that, if he is convicted, he could be sentenced for it under section 3, the charge is triable only on indictment. *Ibid.*, s.3(4).

[283] Section 1(3) sets out the basis on which the court shall carry out its sentencing functions: when determining whether it would be appropriate not to impose a custodial sentence of at least seven years, the court shall have regard to the specific circumstances which relate to any of the offences or to the offender *and* would make the prescribed custodial sentence unjust in all the circumstances.

court does not impose such a sentence, it must state in open court th[illegible] is of the opinion that such a sentence would be unjust in all the circumstances [illegible] what the specific circumstances are. Where there are no specific circumstances which justify not imposing the minimum sentence, the sentence "falls to be imposed under section 3." However, section 37(1A) of the 1983 Act provides that, where a sentence would otherwise fall to be imposed under section 4(2), nothing "shall prevent a court from making an order under subsection (1) ... for the admission of the offender to a hospital."[284] Section 3 was brought into force on 1 October 1997.

SECTIONS 3 & 4 AND THE MENTAL HEALTH ACT 1983



[284] Section 37(1A) of the Mental Health Act 1983, as inserted by paragraph 12(2) of Schedule 4 to the Crime (Sentences) Act 1997. Because the court may make a hospital order as an alternative to the minimum custodial sentence, there will never be any need to establish that the offender's mental state or psychiatric history constitute exceptional circumstances before such an order can be made. As to the absence of any reference to a guardianship order in section 37(1A), see p.325.

- **If a person has been convicted of murder then a life sentence is mandatory and the offender may only be admitted to hospital for treatment if he is later removed there by the Home Secretary under section 47.**

- **Under section 2 of the Crime (Sentences) Act 1997, a life sentence will now also be required if a defendant has been convicted of a second serious offence and there are no exceptional circumstances which justify not imposing such a sentence.**

- **Section 2 of the 1997 Act will not apply if a person awaiting trial for a second serious offence is detained in hospital under section 48, on account of the fact that he is mentally ill or severely mentally impaired, and his case is disposed of under section 51(5) of the 1983 Act, that is by making a hospital order in his absence without convicting him.**

- **Section 2 of the 1997 Act also does not apply where a jury is satisfied that a person has committed an act which would constitute a second serious offence if convicted of it but he is not convicted, having been found unfit to plead or not guilty of the offence by reason of insanity. In such cases, the "sentence falls to be imposed" under the Criminal Procedure (Insanity) Act 1964 rather than under the 1997 Act. The disposals available under the former do not include imprisonment, let alone life imprisonment.**

- **Section 2 of the 1997 Act will again not apply where a person is convicted of a serious offence and, sometime in the past, a jury found that he did an act which, had he been convicted of it, would have constituted his first serious offence, but he was not convicted because he was found to be unfit to plead or not guilty of it by reason of insanity. The defendant having only ever been convicted of one serious offence, the court retains its usual discretion as to the most appropriate sentence in such cases. The court may therefore make a hospital order. Equally, though, the fact that the sentence does not fall to be imposed under section 2 does not prevent the court from imposing a maximum sentence of life imprisonment if the circumstances make that appropriate.**

- **Where a person is convicted of a second serious offence, he falls to be sentenced to life imprisonment under section 2 unless the court is of the opinion that there are exceptional circumstances relating to either of the offences or to the offender which justify it not doing so.**

- **What constitutes exceptional circumstances is not defined in the Act and is therefore a matter for judicial discretion and interpretation.**

- **Although the court must have regard to the circumstances relating to the offender and the offences, the fact that the offender is mentally disordered is not without more an exceptional circumstance which empowers the court to refrain from imposing a life sentence.**

- More particularly, the fact that the responsibility of an offender convicted of manslaughter on the grounds of diminished responsibility is diminished by reason of mental illness is not of itself an exceptional circumstance — it is a common feature of all such offences, not an exceptional feature.

- If there are exceptional circumstances, the court retains its usual discretion as to the appropriate sentence: it is not bound to impose a life sentence and may instead make a hospital order under section 37 (or any other order which a first offence could attract, such as a determinate sentence).

- If there are no exceptional circumstances and a life sentence is therefore imposed, the sentencing court may also give hospital and limitation directions under section 45A of the 1983 Act if the offender suffers from a psychopathic disorder and the other statutory conditions for giving such directions are satisfied. These statutory conditions are identical to those which must be satisfied before a hospital order may be made under section 37, with the single exception that the condition specified in section 37(2)(b) is necessarily absent. Having disposed of the case by way of life imprisonment, the court is not required to state its opinion that the most suitable method of disposing of the case is by means of an order under section 37, even if that is its opinion.

- If there are no exceptional circumstances and a life sentence is therefore imposed, the sentencing court will not have any power to also give those directions in respect of an offender who suffers from some other form of disorder, *i.e.* mental illness, severe mental impairment, mental impairment. Whether such an offender receives necessary treatment for his mental disorder depends on the Home Secretary later transferring him to hospital under section 47. The sentencing court may informally recommend that the Home Secretary do so but no more.

- Except for sentences passed under section 2 of the 1997 Act, the sentencing court retains the option in all cases of making a hospital order, as an alternative to imposing the minimum sentence usually required.

- More particularly, where a person is convicted of a third domestic burglary or a third Class A drug trafficking offence, the sentence does not fall to be imposed under sections 3 or 4 if specific circumstances exist, in relation to the offender or the offences, which would make it unjust to impose the minimum sentence. Those special circumstances may include the offender's mental condition.

- If the caveat applies, the court retains its usual discretion as to the appropriate sentence and may, *inter alia*, impose a hospital order, a guardianship order, or a term of imprisonment of less than the minimum length usually required.

- If there are no specific circumstances which would make it unjust to impose the minimum sentence, the fact that such a sentence would not

be unjust does not prevent the court from instead making a hospital order (but not a guardianship order) under section 37.

- If, however, the minimum sentence not being unjust, the court also decides that a hospital order is not the most appropriate way of disposing of the case before it (s.37(2)(b)), it must then impose a sentence of at least the minimum length. Not having found such a sentence to be unjust, and not finding a hospital order to be appropriate, it may not at this final stage do "Solomon's justice" by imposing a prison sentence of less than the minimum.

- Where a sentence of imprisonment is imposed under sections 3 or 4 (whether for more than three or seven years or, if that would be unjust, for some lesser length), the sentencing court may also give hospital and limitation directions under section 45A of the 1983 Act if the offender suffers from a psychopathic disorder and the other statutory conditions for giving such directions are satisfied. The sentencing court does not, however, have any power to also give these directions in respect of imprisoned offenders who suffer from some other form of disorder. In their case, whether or not they receive any necessary treatment depends upon the Home Secretary later giving a transfer direction under section 47.

- Having regard to the above, and the changes introduced by the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991, it may be anticipated that the defence will henceforth more often seek a special verdict in cases where the offender is charged with what will constitute a first or second serious offence if he is convicted. Furthermore, in homicide cases, a verdict of insanity will have particular advantages over a finding that the defendant is guilty of manslaughter by reason of diminished responsibility.