conditional so that a supervision application may only be made where there will be a substantial risk of serious harm *if* the patient were not to receive the after-care services provided for him. In some cases, a substantial risk of suicide, or of serious harm to others, may exist regardless of whether the patient receives those services. In practice, the courts may take the view that if there will or may be a substantial risk of serious harm if the patient does not receive after-care, it is irrelevant that such a risk currently exists even though he is receiving after-care.

Likelihood of benefit from supervision

If there will or may be a substantial risk of serious harm should the patient not receive the proposed after-care services, the third condition requires consideration to be given to the practicalities of the situation — will providing those after-care services under formal supervision be likely to help to secure that the patient receives them and so reduce the substantial risk of serious harm which has been identified? As to the third ground and, in particular, the phrase "likely to help secure," see page 430 *et seq.*

DISCRETIONARY DISCHARGE

There are no matters which a tribunal must have regard to as a matter of law before determining whether to exercise its discretionary power of discharge.

RECLASSIFICATION

As to the power of reclassification conferred by section 72(5), see page 499. For two reasons, reclassification has no legal consequences in terms of the likelihood of renewal. Firstly, the renewal criteria are the same whatever the form of mental disorder which the patient suffers from. Secondly, whether or not a patient is suffering from a particular form of disorder at the time a renewal report is furnished is a matter for the patient's community responsible medical officer to determine; he is not bound by any previous reclassification (**057**).

8. A tribunal's powers in restricted cases

INTRODUCTION

This chapter deals with a tribunal's powers in respect of restricted patients. These patients comprise —

- Patients who are liable to be detained for treatment in pursuance of a hospital order and a restriction order, under sections 37 and 41 or section 46. **511**
- Patients who are liable to be detained for treatment in pursuance of a transfer direction and a restriction direction, made under sections 47 and 49 or 48 and 49, or a hospital direction and a limitation direction imposed under section 45A. **555**
- Patients who are subject to a restriction order or a restriction direction but have been conditionally discharged from hospital by a tribunal or by the Secretary of State. **560**

DETENTION SUBJECT TO A RESTRICTION ORDER

A tribunal's powers when dealing with the case of a patient who is liable to be detained in hospital and subject to a restriction order are set out in section 73 of the Act. Section 72 does not apply except insofar as the criteria for discharge set out in section 72(1)(b) are incorporated within section 73.[1]

SUMMARY OF POWERS

The essence of a restriction order is that the usual powers by which a patient who is liable to be detained for treatment in pursuance of a hospital order may be discharged or granted greater freedom are restricted. This principle extends to tribunals so that its usual powers either do not apply or only in a restricted way. The single superficial similarity is that a tribunal must discharge a patient who satisfies

[1] Mental Health Act 1983, s.72(7); *Grant v. The Mental Health Review Tribunal for the Trent Region; R. v. The Mersey Mental Health Review Tribunal ex p. O'Hara*, *The Times*, 26 April 1986 (**549**).

the same statutory criteria that apply to unrestricted patients who have been detained for treatment. However, "discharge" in this context means discharge from hospital, not merely discharge from liability to detention in hospital for the time being. The effect is that a tribunal may not discharge a restricted patient who requires further treatment in hospital.[2] That being so, although the same statutory discharge criteria set out in section 72(1)(b) apply to all patients who are liable to be detained for treatment, those criteria only apply to restricted patients in a restricted way. Furthermore, a tribunal has no discretionary power of discharge in restricted cases. It must discharge a patient whom it is satisfied meets the criteria for being discharged and not discharge a patient unless it is satisfied that is the case.[3] Where a patient is entitled to be discharged, the discharge may be absolute or subject to conditions.

Absolute discharge

Absolute discharge is mandatory if a tribunal is also satisfied that it is not appropriate for a patient whom it must discharge to be liable to be recalled to hospital for further treatment by the Secretary of State. Its effect is to bring both the hospital order and the attendant restriction order to an end. If a patient is entitled to be absolutely discharged, the tribunal's direction has immediate effect and it cannot direct that his absolute discharge take effect only on a specified future date.[4] A tribunal is not obliged to absolutely discharge a patient whom it must discharge merely because it is satisfied that he is not presently suffering from a form of mental disorder. The patient may relapse and later require recall to hospital for further treatment.[5] Nor, in the case of restriction orders imposed under the 1959 Act, is it obliged to absolutely discharge a patient whom it must discharge even though it is satisfied that the protection of the public does not require that he be subject to conditions of discharge and recall. Consequently, once a restriction order is in force, it is not inappropriate for a patient to be subject to recall for further treatment by the Secretary of State solely for therapeutic reasons associated with his own personal health and safety.[6]

2 See *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 (**516, 365**).

3 See *R. v. Oxford Regional Mental Health Review Tribunal, ex p. Secretary of State for the Home Department* [1988] 1 A.C. 120 (**544**). Although it is sometimes thought that limited term restriction orders are invariably of short duration, this is not the case. For example, restriction orders of 40 and 44 years' duration were imposed in the *R. v. Sowle* (*The Times*, 20th October 1960) and *R. v. Upchurch* (*The Times*, 25th March 1965). However, where a limited term restriction order has been imposed, a tribunal's powers, and the statutory criteria to be applied, are the same as in cases involving restriction orders made without limit of time. Similarly, because the statutory criteria are determinative, and because a restriction order is not a form of punishment, there can be no element of retribution or of a tariff operating in discharge decisions. As to this, the tribunal in *ex p. M.A.R.C.* (1989, unreported) conceded an application for judicial review because there was an element of retribution in its decision.

4 See Mental Health Act 1983, s.73(1) and (7). In *ex p. M.S.* (1991, unreported), the tribunal directed that absolute discharge be deferred for 12 months so that arrangements could be made for the patient's future care. Judicial review was granted by consent.

5 *R. v. Merseyside Mental Health Review Tribunal, ex p. K.*, 20 May 1988, Q.B.D. (unreported) (**527**); [1990] 1 All E.R. 694, C.A. (**529**). Such a patient must, however, be discharged: see Mental Health Act 1983, s.73(1). In *ex p. Gill* (CO/180/85, unreported), the tribunal found the patient not to be suffering from mental disorder but did not discharge him. By consent, its decision was quashed and the tribunal was ordered to consider and direct the patient's absolute or conditional discharge.

6 *R. v. North West Thames Mental Health Review Tribunal, ex p. Cooper* [1990] C.O.D. 275 (**530**).

Conditional discharge

Where a restriction order patient satisfies the criteria for mandatory discharge, but the tribunal is not also satisfied that it is inappropriate for him to remain liable to recall for further treatment, it must direct his conditional discharge. The effect of conditional discharge is that both orders remain in force and the patient must comply with any conditions imposed on his discharge. The conditions of discharge are initially a matter for the tribunal's discretion although the Secretary of State may later vary those conditions or impose further conditions. Common conditions include a condition of residence and further conditions that he be supervised by, and attend appointments with, a nominated psychiatrist and a supervising social worker or probation officer. If the patient later relapses, or fails to comply with the conditions of his discharge, or the public may be at risk from him, he may be recalled to hospital for further treatment by the Secretary of State.

Deferred conditional discharge

Provided satisfactory arrangements outside hospital are in place which enable the conditions imposed on a patient's discharge to be satisfied forthwith, the direction for his discharge takes effect forthwith and, as with absolute discharge, may not be postponed to a specified future date. However, where a patient is conditionally discharged, it may be impossible for the conditions imposed on his discharge to be satisfied immediately. For example, where it is a condition of discharge that he resides at a supervised hostel but no suitable place is available. The Act therefore provides that a tribunal may defer a direction for a patient's conditional discharge until such time as it is satisfied that suitable arrangements have been made which meet the conditions imposed — "deferred conditional discharge." The tribunal will reconsider the patient's case upon being notified that suitable arrangements have been made and, if satisfied with them, it may direct his discharge. If it transpires that arrangements cannot be made which allow the conditions attached to the patient's discharge to be satisfied, the fact that the tribunal has already determined the application means that it may not reconvene or reconsider its decision to discharge him on those conditions. The tribunal's direction for his discharge will eventually be deemed never to have been made.[7] A tribunal's power in restriction order cases to defer its direction for a patient's conditional discharge should not be confused with its power to direct the discharge of an unrestricted patient on a specified future date. In the latter case, the tribunal's direction discharging the patient is effective and complete the moment it is made: it is not provisional upon future events.

Duty to determine suitability for discharge if sufficient information available

Provided a tribunal has sufficient information to determine the patient's current suitability for discharge, it must determine whether or not it is satisfied that he is presently entitled to be discharged. It may not adjourn the hearing to see if his condition improves, with a view to discharge at a later reconvened hearing.[8] Nor can it defer a direction that a patient be conditionally discharged in the expectation or hope that he will be suitable for discharge by the time the conditions can be met.

7 Mental Health Act 1983, s.73(7).

8 *R. v. Nottingham Mental Health Review Tribunal, ex p. Secretary of State for the Home Department; R. v. Northern Mental Health Review Tribunal, ex p. Secretary of State for the Home Department*, *The Times*, 25 March 1987, Q.B.D.; *The Times*, 15 September 1988, C.A. (**818**)

Tribunal's powers short of directing discharge

It has been noted that a tribunal is obliged to discharge a patient subject to a restriction order if satisfied that the criteria for mandatory discharge exist. Furthermore, if it is not satisfied that the patient is entitled to be discharged, it may not discharge him, for it has no discretionary power of discharge. Further still, a tribunal which does not discharge such a patient from hospital has no power to make recommendations of the kind it may make in unrestricted cases.[9] Specifically, it cannot, with a view to facilitating his discharge on a future date, recommend that he is granted leave to be absent from hospital, or transferred to a different hospital or into guardianship — nor, necessarily, if it makes such a recommendation in error may it further consider his case if that recommendation is not complied with. It is unlikely that a tribunal has any power to reclassify a restricted patient (**551**).

RESTRICTION ORDER PATIENTS LIABLE TO BE DETAINED

Mandatory absolute discharge

73.—(1) Where an application to a Mental Health Review Tribunal is made by a restricted patient who is subject to a restriction order. or where the case of such a patient is referred to such a tribunal, the tribunal shall direct the absolute discharge of the patient if satisfied—

[(a)(i) that he is not then suffering from mental illness, psychopathic disorder, severe mental impairment or mental impairment or from any of those forms of disorder of a nature or degree which makes it appropriate for him to be liable to be detained in a hospital for medical treatment; or

(ii) that it is not necessary for the health or safety of the patient or for the protection of other persons that he should receive such treatment;] and

(b) that it is not appropriate for the patient to remain liable to be recalled to hospital for further treatment.

Mandatory conditional discharge

(2) Where ... the tribunal are satisfied as to the matters referred to in paragraph (a) [above] but not as to the matter referred to in paragraph (b) ... the tribunal shall direct the conditional discharge of the patient.

Deferred conditional discharge

(7) A tribunal may defer a direction for the conditional discharge of a patient until such arrangements as appear to the tribunal to be necessary for that purpose have been made to their satisfaction; and where by virtue of any such deferment no direction has been given on an application or reference before the time when the patient's case comes before the tribunal on a subsequent application or reference, the previous application or reference shall be treated as one on which no direction under this section can be given.

[9] *Grant v. The Mental Health Review Tribunal for the Trent Region; The Queen v. The Mersey Mental Health Review Tribunal ex p. O'Hara, The Times*, 26 April 1986 (**549**).

TERMINOLOGY

For the meaning of the words used in the admission and discharge criteria, see— "discharge" (**515**); "patient" (**098**); "detention" (**215**); "detained" and "liable to be detained" (**487**); "satisfied" (**567**); "then" (**466**); "suffering from" (**213**); "mental illness" (**060**); "psychopathic disorder" (**082**); "severe mental impairment" (**070**); "mental impairment" (**070**); "nature or degree" (**213**); "appropriate" (**490**); "hospital" (**131**); "medical treatment" (**216**); "necessary" (**221, 485**); "health" (**217**); "safety" (**218**); "protection of other persons" (**219**); "recall" (**345, 768**); "absolute discharge" and "conditional discharge" (**340**). For a short summary of the meaning of many of these terms, see page 484.

THE CRITERIA FOR MANDATORY DISCHARGE

Section 72(1)(b)(i) requires a tribunal to discharge a patient who is liable to be detained for treatment if satisfied that he is not then suffering from a form of mental disorder "of a nature or degree which makes it appropriate for him to be liable to be detained in a hospital for medical treatment." Section 72(1)(b)(ii) requires a tribunal to discharge such a patient if satisfied that it is not necessary for his health or safety or for the protection of others that he should receive such treatment.

The meaning of "discharge" in unrestricted cases

The effect of these provisions in unrestricted cases is that a tribunal must terminate a patient's liability to detention in hospital if it is satisfied that it is either not necessary for his health or safety or to protect others that he receives further in-patient treatment or it is satisfied that it is no longer appropriate for him to be liable to be detained there for treatment (**485 et seq.**). Discharge in this context therefore means "discharge from liability to detention" rather than "discharge from hospital." Because the Act provides that the same criteria for discharge shall apply to restricted patients who are liable to be detained for treatment, without any qualification or amendment, it might be thought that Parliament intended that they would be entitled to be discharged in identical circumstances. However, this is not the case for the reasons given below.

The meaning of "discharge" in restricted cases

Section 73(7) provides that a tribunal "may defer a direction for the conditional discharge of a patient until such arrangements as appear to the tribunal to be necessary for that purpose have been made to their satisfaction." Section 73(4) further provides that a patient who has been conditionally discharged by a tribunal may be "recalled" by the Secretary of State under section 42(3). Section 42(3) is more specific still and it states that the Secretary of State may "by warrant recall the patient to such hospital as may be specified in the warrant." Where a patient is subsequently recalled, section 75(1) requires the Secretary of State to refer his case to a tribunal. Sections 42 and 75 distinguish between discharge from hospital and a termination of the restrictions. As can be seen, these provisions specific to restricted patients imply that discharge in their case does actually entail discharge from hospital. If so, the provisions are at least superficially at variance with the criteria for mandatory discharge: those criteria oblige a tribunal to discharge a patient if satisfied that it is not appropriate for him to be liable to be detained in a hospital for medical treatment. In

unrestricted cases, continued liability to detention has always been considered inappropriate where the patient is both reliable and willing to receive any necessary in-patient treatment informally and without compulsion. This apparent contradiction was considered by the Divisional Court in the following case.

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 *Q.B.D., Mann J.*

Secretary of State for The Home Department v. Mental Health Tribunal for Wales

The patient was detained in Ely Hospital in pursuance of a hospital order together with a restriction order made without limitation of time. His case was reviewed by a Mental Health Review Tribunal on 21 December 1983. Section 72(1)(b)(i) requires a tribunal to discharge a restricted patient whom it is satisfied is not suffering from a form of mental disorder "of a nature or degree which makes it appropriate for him to be liable to be detained in a hospital for medical treatment." The tribunal was satisfied that the patient was suffering from severe mental impairment of a degree which made it appropriate that he should continue to receive treatment in the form of rehabilitation, supervision and guidance as to personal hygiene, and training in elementary social skills. However, the patient was entitled to be conditionally discharged because—

a. the supervision, guidance and rehabilitation which the patient required could be given in a hostel or other suitable community provision — it did not necessarily have to be given by nursing or medical staff, or under medical supervision and, in the tribunal's opinion, thus did not constitute "medical treatment" as defined by section 145(1); and

b. it was appropriate that the patient should remain liable to be recalled to hospital for further treatment.

There were no suitable residential placements available which would provide the sort of supervision and rehabilitation treatment which the patient needed. Since it was necessary that the patient reside in some place where he could be supervised, and he could not in common humanity be turned out of the hospital which had been his home for over 21 years without some alternative placement being available, the tribunal directed that he be conditionally discharged subject to a condition of residence at Ely Hospital. Should a suitable hostel become available, the Secretary of State could vary the condition of residence imposed by the tribunal.

Mann J.

Mann J. held as follows—

a. As defined by section 145(1), the expression "medical treatment" includes "nursing, and also includes care, habilitation and rehabilitation under medical supervision ..." The tribunal had misdirected itself in holding that the treatment which the patient required (supervision and guidance as to personal hygiene, and rehabilitation in training in elementary social skills) did not constitute medical treatment as defined.

b. Given that the patient required "medical treatment," and given the tribunal's finding that it was appropriate to impose a condition that he reside in hospital, it could not by definition have been satisfied under section 72(1)(b)(i) that his mental disorder was not of a nature or degree which made it appropriate for him to be liable to be detained in a hospital for medical treatment. There was an obvious inconsistency between (a) a tribunal being satisfied that the patient's condition no longer made it appropriate for him to be liable to be detained in a hospital for medical treatment and (b) its imposition of a condition that he continue to reside in hospital.

c. The word "discharge" in sections 72 to 75 could only mean release from hospital, a release which could be absolute or conditional. It was therefore not possible to discharge a patient from hospital subject to a condition that he reside in a hospital. Section 73(4)(a), with its reference to "recall" strongly supported the inconsistency of such a condition with the concept of discharge.

Secretary of State for the Home Department v. Mental Health Review Tribunal for Mersey Regional Health Authority

The patient was detained in a special hospital under a hospital order with a restriction order attached, the form of mental disorder recorded being psychopathic disorder. The tribunal stated that it was satisfied as to the statutory criteria for discharge in both section 72(1)(b)(i) and (ii). However, on the facts, it was satisfied that the patient would be unable to cope if discharged from a special hospital directly into the community. He first needed to spend a period of time in a local hospital, namely Winwick Hospital. The tribunal directed that the patient be discharged on condition that he accept psychiatric and social services supervision for two years. It deferred its direction for his discharge until arrangements had been made for the patient's admission to Winwick Hospital "with a view to his subsequent discharge to a local hostel or to his home."

Mann J.

Mann J. held as follows—

a. Section 73(7) provides that a tribunal "may defer a direction for the conditional discharge of a patient until such arrangements as appear to the tribunal to be necessary for that purpose have been made to their satisfaction." The word "discharge" means release from hospital and the statutory purpose of deferral is to enable "arrangements" for the patient's *discharge* from hospital to be made. In this case, the tribunal deferred the patient's "discharge" until arrangements had been made for his admission to another hospital rather than for his discharge from hospital. Once the arrangements had been made the period for which the patient's discharge from hospital was deferred came to an end. However, those arrangements, being for his admission to another hospital, ensured not his discharge from hospital but his continued detention in hospital. Thus, although the tribunal's direction purported to discharge the patient from hospital, the arrangements to be made were inconsistent with the direction that he be discharged.

b. The fact that the tribunal was satisfied that the patient's condition was such that he required a further period of medical treatment in hospital before discharge was appropriate was inconsistent with its purported finding that the statutory criteria for discharge from hospital were satisfied.

Commentary

It seems clear that the tribunal in *Secretary of State for the Home Department v. Mental Health Review Tribunal for Mersey Regional Health Authority* was not satisfied that the patient met the criteria for being discharged. It was merely satisfied that his condition was no longer such that medical treatment in a special hospital was necessary. Accordingly, he should be transferred to a less secure hospital "with a view to his subsequent discharge to a local hostel or to his home." Because a tribunal which does discharge a restricted patient has no power to direct or recommend his transfer to another hospital, with a view to facilitating his discharge in the future, it in effect attempted to use the power to defer conditional discharge under section 73(7) as a mechanism for effecting the patient's transfer. The decision in *Secretary of State for The Home Department v. Mental Health Tribunal for Wales* is more problematic. The tribunal was found to have misdirected itself both as to what constituted medical treatment and in thinking that it could impose as a condition of discharge a condition of residence in hospital. The other question of law stated for the court's determination was whether, given that the treatment which the patient required was medical treatment,

> "the tribunal could have been satisfied under section 72(1)(b)(i) ..., on the facts found by it, that the patient's mental disorder was not of a nature or degree which made it appropriate for him to be liable to be detained in a hospital for medical treatment when at the same time it decided that it was appropriate for him to remain in hospital as the condition of his discharge."

The court answered that question "no." However, to say that because the tribunal imposed a condition of hospital residence, and found that the patient required medical treatment, therefore it could not have been satisfied that it was no longer appropriate for him to be *liable to be detained* in a hospital for medical treatment is, arguably, looking at the matter the wrong way round. The tribunal's finding was essentially that the patient could be discharged to a suitable hostel if one was available and liability to detention in a hospital was not appropriate. Faced with the unavailability of suitable accomodation, the appropriate course was to direct the patient's discharge subject to a condition of residence at a suitable hostel and to then defer its direction until satisfactory arrangements could be made. However, faced with this problem that suitable accomodation was not immediately available, and considering that the patient could not in common humanity be turned out of hospital, the tribunal instead directed his immediate conditional discharge, subject to a condition of residence in hospital. It did this with a view to the Home Secretary later varying that condition if a suitable place became available. In other words, the inconsistency lay not in the finding that the discharge criteria were satisfied — the tribunal was entitled to find that medical treatment in a hospital was no longer *necessary*[10] — but in the fact that, having come to that finding, it considered it

[10] See *R. v. Oxford Regional M.H.R.T., ex p. Secretary of State for the Home Department* [1988] 1 A.C. 120, *per* Lord Bridge: "The tribunal may perfectly properly be satisfied that hospital detention is no longer necessary provided that the patient can be placed in a suitable hostel ... These are matters to be secured by imposing appropriate conditions."

necessary to discharge forthwith [illegible], in the absence of alternative arrangements, to impose a temporary condition of residence in hospital. In short, the imposition of a condition of hospital residence may have been an error but it was not evidence that the patient's mental state made residence in hospital appropriate or necessary, only unavoidable until suitable arrangements for his discharge could be made.

Applying the section 72(1)(b) criteria in restricted cases

The legislation is unsatisfactory insofar as a natural reading of the discharge criteria appears to oblige a tribunal to "discharge" a patient if his mental condition is no longer of a nature or degree which makes it appropriate for him to be "liable to be detained" in a hospital for medical treatment — including therefore persons for whom further in-patient treatment, but not compulsory in-patient treatment, is appropriate. It might be thought that if "discharge" means "discharge from hospital" then a tribunal has no option but to discharge from hospital a patient who no longer requires detention there notwithstanding that informal in-patient treatment is more appropriate than medical treatment in the community. However, Mann J. came to the opposite conclusion, namely that a tribunal which discharged a restricted patient subject to a condition that he resides in hospital could not have been satisfied that the criteria for discharge were made out. One view is that this involves rewriting section 72(1)(b)(i) so that the words "liable to be detained" are omitted and a duty to discharge arises only if a tribunal are satisfied that an in-patient is not suffering from a disorder "of a nature or degree which makes it appropriate for him to be ... in a hospital for medical treatment." Since the second ground for discharge is that it is not necessary for the patient's health or safety or for the protection of others that he receives such treatment, the difference between the two grounds becomes rather indistinct. For patients already no longer in hospital, because they have been granted leave of absence, the criteria in section 72(1)(b) are presumably to be given their natural and literal meaning, in which case "discharge" means discharge both from hospital and from liability to detention for the time being. The effect of the decision is, at any rate, that a restricted patient who requires further in-patient treatment, or a trial period of leave before being discharged from hospital, is suffering from a mental disorder of a nature or degree which makes it appropriate for him to be "liable to be detained" for treatment. Having regard to the *Mersey case*, it would seem that section 72(1)(b) must be construed in restricted cases in the following way—

- *A tribunal must discharge a restricted patient if it is satisfied that it is not necessary for his health or safety or to protect others that he should receive further in-patient treatment.*

  If the patient is temporarily absent from hospital on trial leave, a tribunal may not discharge him unless it is satisfied that the period of in-patient treatment which began when he was admitted to hospital, or most recently recalled, has been completed. In other words, further treatment in hospital is unnecessary in this sense.† Similarly, a tribunal which considers that an in-patient requires a period of trial leave before it can be satisfied that further treatment in hospital is unnecessary may not discharge him.

- *A tribunal must discharge a restricted patient if it is satisfied that he is not then suffering from a form of mental disorder the nature or degree of which makes it appropriate for him to be liable to be detained in a hospital for medical treatment.*

If an in-patient requires further trea t in hospital, a tribunal cannot be satisfied that it is inappropriate for him to be detained for that purpose — *quaere* whether the statute therefore requires that restricted in-patients are detained and subject to those restrictions. If the patient is not in hospital because he is on trial leave, it may be too early to say whether or not it is appropriate for him to remain liable to be detained in the hospital for further treatment there.

The common theme is therefore whether the period of in-patient treatment brought about by the patient's admission or recall to hospital has been completed.

† *It cannot be the case that the tribunal is being asked to consider whether it is satisfied that further treatment in hospital for the target condition will never be necessary, i.e. that the patient is cured.*

Reconciling the apparent contradictions

Various explanations may be advanced in an attempt to reconcile any apparent contradictions in the drafting:

1.) The statutory framework is such that if a restricted patient requires treatment in hospital he must necessarily be subject to restrictions on leaving that hospital, transfer, discharge, etc.

2.) The *Mersey case* was wrongly decided, having regard to the decisions in *ex p. D.* and *ex p. Stewart*. "Discharge" means discharge from liability to detention in pursuance of the relevant hospital and restriction orders. Accordingly, there is nothing to prevent a tribunal from discharging a restricted patient subject to a condition of residence in hospital and, if no (or no alternative) condition of residence is imposed, the patient may reside in hospital informally. Similarly, the law does not prevent a patient who does leave hospital from being readmitted informally or under Part II.

3.) Although "discharge" means discharge from hospital, and neither the Home Secretary nor a tribunal may discharge a patient from hospital on the basis that he remains in hospital, the Home Secretary has a discretion as to whether or not to recall to hospital a discharged patient who requires treatment there, even one sufficiently ill to require detention there.

First interpretation: restricted in-patient must always be restricted

Until the decisions in *ex p. D.* and *ex p. Stewart* (**355 et seq.**), the decision in the *Mersey case* was most satisfactorily explained by holding that the matter turned on the statutory framework for restricted patients and, more particularly, the fact that

the absolute-conditional disch regime was in force before tribunals ever acquired a power to discharge such patients. They remained liable to be detained in hospital until such time as the Secretary of State considered it appropriate to discharge them or to consent to their discharge. If they merely had leave to be absent from hospital and were in the community on a trial basis, they had not been discharged from hospital. Whatever the hospital records might show, they remained in-patients on trial leave. When tribunals then also acquired a power to discharge such patients, it was unfortunate that the discharge criteria used for ordinary hospital order patients, and other unrestricted patients detained for treatment, were adopted without any sort of qualification. This appeared to put restricted patients on exactly the same footing in terms of their entitlement to be discharged when this was not in fact the case. As Part III of the Act and section 73 made clear, restricted patients always remained liable to be detained in hospital until formally discharged from there. Their status could only be one of two things — (1) that of an in-patient liable to be detained and subject to restrictions on discharge; (2) that of a patient in the community following discharge who was subject to conditions and recall. The usual third possibility in unrestricted cases of being an informal in-patient, or a patient detained without restrictions, was not an option. If a restricted patient's mental state was sufficiently unstable for him to need to be in hospital he could not leave that hospital without the Secretary of State's consent. Whether he could have leave to be absent from there, or be transferred to a less secure hospital, or be discharged, were not decisions which could ever be made by his consultant or by the hospital's managers acting alone. The terminology in section 72(1)(b) had to be understood in the context of this framework. Unless a tribunal was satisfied that it was unnecessary for an in-patient to receive further treatment in hospital, it could not by definition be satisfied that it was appropriate for him not to be detained there — the statutory framework being such that all restricted in-patients are necessarily detained and subject to special restrictions on being granted leave, transferred, or discharged. Thus, a consequence of the original court's finding that hospital treatment under special restrictions was necessary to protect the public from serious harm was that a tribunal had no jurisdiction in relation to the patient's legal status during any period for which in-patient treatment was or might be necessary. Its powers were limited to determining his suitability to be discharged from hospital. While the Secretary of State could direct that a restricted in-patient cease to be subject to the restrictions, so enabling him to receive informal treatment there, a tribunal did not have this option. From this, it could be inferred that Parliament intended that the functions of tribunals should be confined to determining whether the patient was actually suitable for discharge.

Second interpretation: Mersey case wrongly decided

An alternative explanation is that the decision in the *Mersey case* is wrong, having regard to the subsequent Court of Appeal decisions in *ex p. D.* (**355**) and *ex p. Stewart* (**356**). 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, then it must also be the case that (4) a tribunal may conditionally discharge a patient who, although requiring further in-patient treatment, does not presently need to be detained in the hospital in pursuance of the relevant hospital order and associated restrictions. Using the

language adopted in *ex p. Stewart*, where a tribunal discharges a patient from his present liability to detention in pursuance of the relevant hospital order (to which the restrictions attach), he is thereby discharged from liability to detention there *qua* restricted patient. That does not prevent him from remaining there informally or in accordance with any condition of residence imposed by the tribunal, nor, where necessary, in pursuance of an application made under Part II at some later time.

Third interpretation: Home Secretary's discretion

The counter-argument to the position just advanced is that neither the Home Secretary nor a tribunal have a discretion to discharge a patient who requires further in-patient treatment but the Home Secretary does have a discretion not to recall to hospital a discharged patient who requires further in-patient treatment. This seems to be the effect of the case law and, if so, one is presently bound to hold that this is the correct interpretation. Perhaps the best way of reconciling the three cases is as follows. The fact that the Home Secretary may not discharge a restricted patient on the basis that he remains in hospital does not affect the fact that who is discharged and who is recalled is *otherwise* a matter for his discretion: he need not discharge a patient whom he could legally discharge, or who a tribunal would be bound to discharge, and need not recall a patient whom he could legally recall. However, tribunals have no discretion and, in their case, the decision in the *Mersey case* is the only one of the three that is relevant. The third interpretation does produce the anomaly that that the Home Secretary may not "discharge from hospital" a patient who needs to be in hospital but need not "recall to hospital" a patient who needs to be in hospital.

Whether further treatment in hospital is necessary or appropriate

Although the statutory test in restricted cases is essentially whether the patient's condition makes a further period of treatment in a hospital unnecessary or inappropriate, whether treatment in hospital remains necessary, and whether liability to detention for treatment remains appropriate, is not uncommonly relative. The determining factor is often whether safe alternative arrangements can be made for the patient's supervision, management and treatment outside hospital. Thus, Lord Bridge said in the leading case on tribunals that their "satisfaction or lack of satisfaction as to ... the paragraph (b) matters will ... inevitably be coloured by the conditions they have in mind to impose. Thus the answers to the questions ... may be vitally influenced by the conditions which are to be imposed to regulate his life style upon release into the community ... the tribunal may perfectly properly be satisfied that hospital detention is no longer necessary provided that the patient can be placed in a suitable hostel and required to submit to treatment as an out-patient by a suitable psychiatrist. These are matters to be secured by imposing appropriate conditions ..."[11]

The importance of the statutory definition of a hospital

Whether the patient's condition makes further treatment in a hospital appropriate, and whether in-patient treatment is necessary for his health or safety or to protect

[11] *R. v. Oxford Regional Mental Health Review Tribunal, ex p. Secretary of State for the Home Department* [1988] 1 A.C. 120, *per* Lord Bridge.

others, must also be understood the context of the statutory definition of a hospital.[12] This definition is a broad one (**131**) and it includes mental nursing homes which are registered to receive detained patients. It also includes community-based facilities attached to the main hospital (**137**). These outlying units are often referred to as hospital hostels or as community wards. Consequently, if a tribunal believes that the appropriate next step is for the patient to reside in such a facility, that amounts to a finding that further in-patient treatment remains necessary and appropriate. Even if the unit is several miles from the main hospital and has the outward appearance of not being part of a hospital, the tribunal may not discharge the patient on condition that he resides there. It is therefore crucially important to verify the legal status of any hostel-type place being proposed.

The importance of the statutory definition of medical treatment

Just as the statutory definition of a hospital is a broad one, so too is that given to the term "medical treatment" (**216**). The definition includes nursing and care so that, for legal purposes, all in-patients are necessarily receiving medical treatment. This makes it impossible to successfully judicially review a tribunal decision on the basis that the patient was merely being detained in hospital and there was no evidence that it was necessary that he should receive further treatment in hospital. The point usually arises in cases where an in-patient classified as having a psychopathic disorder is not receiving any medical treatment in the form of medication or psychotherapy. Adopting the statutory phraseology, if the need to protect others means that he requires nursing care in secure conditions, it cannot be said that there was no evidence before the tribunal that it was appropriate for him to remain liable to detention in hospital *for medical treatment* and that *such treatment* is necessary to protect others. The point arose in the case of *ex p. Ryan*.

R. v. South East Thames Mental Health Review Tribunal, ex p. Ryan

CO/98/87, 30 June 1987 — *Q.B.D., Watkins L.J. and Mann J.*

In June 1970, the patient was convicted at the Central Criminal Court of arson He was found to be suffering from a psychopathic disorder and the court directed his admission to a special hospital in pursuance of a hospital order with a restriction order attached. The patient was detained in a local hospital when a tribunal reviewed his case in 1986. The tribunal found that although he had not recently been a management problem in the structured environment of the hospital his behaviour continued to be unpredictable. He had very little insight into his own condition and was liable to react impulsively when frustrated. Before any discharge could be contemplated, a period of trial leave in a suitably supervised hostel needed to be considered. The tribunal concluded that the patient "continues to suffer from psychopathic disorder of such a nature and degree which makes it appropriate for him to be liable to be detained in a hospital for medical treatment which is necessary for his own health and safety and the protection of other persons." The patient applied for judicial review of the tribunal's decision not to discharge him. He submitted that although he was receiving care in hospital he was not receiving any medical treatment. By implication, it could not be the case that it was necessary for him to be in hospital for treatment or that it was appropriate to detain him for that purpose.

[12] Unless the context otherwise requires, the definition of a hospital given in section 34(2) applies for the purposes of tribunal proceedings: Mental Health Act 1983, s.79(6).

Watkins L.J.

The question for the tribunal was whether the applicant was still suffering from a psychopathic disorder the nature or degree of which made it appropriate for him to continue to be liable to be detained. The challenge to the decision rested on the basis that it was arrived at without the requisite evidence being available to the tribunal. The Tribunal consisted of, among others, a consultant psychiatrist. It was therefore well equipped to reach the conclusion that the patient still needed to be kept in a hospital for the benefit of himself and for the protection of the public and that he was in need of treatment as defined in section 145.

Medical treatment

It had been submitted that the tribunal had misdirected itself in considering the definition of "medical treatment" in section 145. The court was referred to *Minister of Health v. Royal Midland Counties Home for Incurables, Leamington Spa, General Committee* (1954) 2 W.L.R. 755, and to words used by Lord Evershed, M.R. at page 760 as to the definition of the word "treatment." It was, however, to be noted that Denning L.J. at page 165 said of that word:

> "The key to the legal position lies in the fact that the Act draws a sharp distinction between 'treatment' and 'care '..... If an institution is provided for the reception and 'treatment' of incurables, it is a hospital and is to be taken over by the State; but if it is provided only for the reception and 'care' of them it is not. Where is the line, then, to be drawn in this regard between 'treatment' and 'care'? Neither is defined in the Act, but 'treatment' means, I think, the exercise of professional skill to remedy the disease or disability, or to lessen its ill effects or the pain and suffering which it occasions; whereas 'care' is the homely art of making people comfortable and providing for their well-being so far as their condition allows. 'Nursing', too, is not defined, but it covers, I think, both treatment and care."

That seemed admirably to explain the meaning of those different words, in the context of the Act in which they appeared and which the court in that case was considering. It was, however, of no assistance in the present case, notably because in section 145 Parliament has deliberately provided that treatment and care shall not be different but that treatment shall include care, nursing, habilitation and rehabilitation under medical supervision. As defined, the patient unhappily still needed to be kept and cared for in the setting of a mental hospital. *Application dismissed.*

Patients whose conditions are untreatable

In unrestricted cases, the treatability of the patient's condition and whether he would be vulnerable if discharged are matters relevant to the renewal criteria and the exercise of a tribunal's discretionary power of discharge. When it comes to restricted cases, the authority for their detention never requires periodic renewal and may never lapse, whether because their conditions prove to be untreatable or for any other reason. Furthermore, a tribunal has no discretionary power of discharge. Consequently, the fact that a restricted patient who is not vulnerable is untreatable has no legal effect on the exercise of its discharge power. If the nature of the patient's disorder is such that further medical treatment in a hospital is both appropriate and necessary in order to protect other people, because nursing in secure conditions prevents him from harming them, he may not be discharged even though

that treatment is neither alleviating his condition nor preventing its deterioration. It is at least alleviating the consequences of his deteriorating condition. The application of the discharge criteria in relation to restricted patients who are being detained for treatment, but whose conditions are untreatable, was considered in *ex p. D.* The case covers some of the same ground as *ex p. Ryan.* However, in addition, the tribunal was of the opinion that the patient's treatment in a special hospital was neither alleviating nor preventing a deterioration of his condition. Since treatment in hospital was wholly ineffective, the issue was raised of whether it had been open to the tribunal to find, firstly, that it was nevertheless appropriate for him to be detained there for treatment and, secondly, that such treatment was necessary for his health or safety or to protect others.

R. v. Mersey Mental Health Review Tribunal, ex p. D

The Times, 13 April 1987 — *Q.B.D., Russell L.J. and Otton J.*

D. had been detained in a number of special hospitals since 1939, following a finding that he was insane in relation to a charge of murder. During the first ten years in hospital he was involved in some aggressive incidents but these had no sexual connotation. Much later, in 1969, it was reported that he had been involved in sexual acts with men of "infantile mentality" involving a measure of violence on his part. On two occasions he had placed his hands around the throats of his partners, causing one of them to become unconscious. The patient admitted to being attracted to young boys and, in March 1984, was found to have a photograph of a boy wearing swimming trunks in his possession. D. himself did not wish to be discharged from the hospital where he was detained.

The patient's case was considered by the Mersey Mental Health Review Tribunal on 1 August 1986. The tribunal heard evidence from the responsible medical officer and a psychologist both of whom were of the opinion that he no longer suffered from a psychopathic disorder. Notwithstanding this evidence, the tribunal stated that it was satisfied that the patient was suffering from a psychopathic disorder of a nature or degree which made it appropriate that he remain liable to be detained in a hospital for medical treatment. Furthermore, although such treatment would neither alleviate nor prevent a deterioration of his condition, it was necessary for his own health or safety or for the protection of others.

The tribunal's decision finished with a passage under the heading "Other comments." In this the tribunal stated that it sympathised with those responsible for the patient's care in that they found themselves unable to adopt any form of treatment other than containment in conditions of high security. However, the index offence and the patient's subsequent conduct had led the tribunal to the conclusion that "such containment was the only course open in the case of one from whom the community needs to be protected." The patient applied for judicial review of the tribunal's decision.

Russell L.J.

The tribunal included a psychiatrist. Having listened to the evidence, it had the task of making its own assessment of it. It did not accept the views of the responsible medical officer and psychologist. Given the patient's behaviour between January 1969 and July 1971, and the discovery of the photograph as recently as 1984, he could not be described as suffering only from a tendency towards sexual deviation (**089**). The patient's counsel had realistically conceded that this finding was open to it. It had then been submitted that the tribunal's

"other comments" indicated that it had misdirected itself concern... the discharge criteria set out in section 72(1)(b)(i). That passage, it was said, did not make it plain that the tribunal had had proper regard to the question of medical treatment. It gave the impression that the tribunal considered that the patient's continued detention was appropriate simply because, having regard to the history, he ought to be contained in conditions of high security. The test was, however, whether it was appropriate for him to be liable to be detained there for medical treatment. As to this submission, medical treatment as defined in section 145(1) included nursing and care under medical supervision. The Act did not require the patient's discharge simply because such treatment was not likely to alleviate or prevent a deterioration of his condition. Although it was unfortunate that the tribunal's other comments were phrased in the way that they were, there was no evidence that the tribunal had misdirected itself.

Otton J.

The tribunal's "other comments" had to be seen in context. They did not go to the heart of the tribunal's decision nor form any part of it. They were not used by way of explanation or enlargement of the decision but simply in recognition of the difficulty which the patient's case presented for the hospital authorities. When using the expression "containment in conditions of high security," the tribunal would inevitably have known that this meant containment in a special hospital which would provide medical treatment within section 145(1) of the 1983 Act. *Application dismissed.*

WHEN A PATIENT MUST BE ABSOLUTELY DISCHARGED

If a patient is entitled to be discharged, a tribunal must absolutely discharge him if it is also satisfied that "it is not appropriate for the patient to remain liable to be recalled to hospital for further treatment." As to this obligation, the courts have held that a tribunal is not obliged to absolutely discharge a patient whom it must discharge simply because it is satisfied that he is not presently suffering from any form of mental disorder: *R. v. Merseyside Mental Health Review Tribunal, ex p. K.* (**527**). Nor, even though the sole statutory purpose of the restriction order regime and of the Secretary of State's involvement is to protect the public from serious harm, is it obliged to absolutely discharge a patient whom it is satisfied has never posed a risk of serious harm to the public and who, if he relapsed, would not pose such a risk. Notwithstanding that the restrictions and the Secretary of State's involvement are designed to ensure that the public are protected from such harm, it is not inappropriate or unlawful for him to remain liable to recall by the Secretary of State for therapeutic reasons associated only with his own personal health and safety: *R. v. North West Thames Mental Health Review Tribunal, ex p. Cooper* (**529**).

Ex p. K.

In ex p. K, the patient raised the technical argument that because the tribunal had been satisfied that he was not then suffering from mental disorder, he was not a patient within the meaning of the Act, and the Act no longer applied to him. Since he was no longer a patient, he could not be a conditionally discharged patient and so was entitled to be absolutely discharged.

CO/532/88, 20 May 1988 *Q.B.D., Parker L.J. and Simon Brown 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. 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 this. 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 pleaded 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 and any 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. In 1986 he reapplied to the tribunal, again seeking his absolute discharge from the hospital and restriction orders. 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 application for judicial review

The patient sought judicial review of the tribunal's decision on the ground that it was wrong in law. As soon as the tribunal had found that he was not suffering from mental disorder he ceased to be a "patient" within the meaning of the Act because a "patient" was defined in section 145(1) as a person suffering or appearing to suffer from mental disorder. Having found that the patient was not suffering from mental disorder, the tribunal had been under a statutory duty to absolutely discharge him from the restriction order. The Act no longer applied to him.

Parker L.J.

Section 145(1) provided that the definition of a patient given there applied unless the context required a different meaning. That permitted the word to bear a different meaning in Part V if the context required that. The basic dispute was whether the definition of a "patient" in section 145(1) did or did not apply to the tribunal discharge provisions set out in sections 72–75. The patient's counsel accepted that if the word "patient" in those sections meant a person who is or had been a patient then both of the decisions of the tribunal were beyond challenge.

Turning to the statutory framework, it was useful to consider the consequences of the argument forwarded on the patient's behalf. It would mean that, even if there was ample evidence before the tribunal that the patient was liable to have a relapse at some time in the future, the tribunal would be obliged to let him loose upon the public. That was not a conclusion at which one would readily arrive unless the wording of the Act was plain.

In fact, the wording of the Act was plain, but plain in the opposite sense. It was plain that the initial tribunal properly applied the wording of the section and did what it would appear was intended by Parliament — namely maintain the right to recall and make the discharge subject to conditions so that there could be some measure of control over the patient, albeit that at the particular time he was not suffering from any mental condition. That this was plainly Parliament's intention was clear from the fact that someone should remain subject to conditional discharge unless a tribunal was satisfied that it was no longer appropriate that he should remain liable to recall.

As to the meaning of "patient" in Part V of the Act, it also seemed clear that the context did require that a different meaning be given to the word. Once a restriction order is made in respect of an offender he is then a patient. There is then a provision that that person, who now is referred to as a 'patient', shall not be discharged save under certain sections. He is thereafter referred to as a 'patient' but it is the same person. Since it was provided in the Act that the patient shall not be discharged unless certain conditions were satisfied, and they plainly were not, that was the end of the matter.

Brown J.

I agree. Were the patient's counsel correct in his central contention, and a tribunal was under a duty to absolutely discharge a restricted patient who is not then suffering from any relevant mental disorder, one would have expected the legislation both to say so with crystal clarity and also to impose upon the tribunal a clear requirement to reach a specific finding upon that basic question. *Application dismissed.*

[1990] 1 All E.R. 694 *C.A. (Kerr, Butler-Sloss L.JJ. and Sir Denys Buckley)*

As to the facts of the case and the decision in the Divisional Court, see above. The Court of Appeal dismissed the appeal for the following reasons.

Kerr and Butler-Sloss L.JJ.

Having regard to the purpose of the 1983 Act, which was to lay down a framework for the admission and detention of persons convicted of crimes who were found to be suffering from mental disorder and were capable of being treated, and to provide a procedure designed to give them the opportunity of being discharged back into the community by making an application to an independent body, namely a Mental Health Review Tribunal, an offender became a restricted patient when he was detained under an order made under section 41 and he remained a patient until he was discharged absolutely, if at all, by the tribunal under section 73(1). The term "patient" in section 145(1) was to be interpreted accordingly.

While the offender remained a patient, the tribunal had the statutory power to make an order that his discharge be subject to conditions. Section 73 gave to the tribunal power to impose a conditional discharge and retain residual control over patients not then suffering from mental disorder or not to a degree requiring continued detention in hospital. That would appear to be a provision designed both for the support of the patient in the community and the protection of the public, and was an important discretionary power vested in an independent tribunal, one not lightly to be set aside in the absence of clear words. Accordingly, the tribunal had been acting within its statutory powers in imposing a conditional discharge under section 73(2).

Sir Denys Buckley

There was no irregularity in the tribunal's decision since it did not effect any discharge of the patient but merely suspended the operation of the 1985 tribunal's conditional discharge so long as he remained in prison. From the moment the 1985 tribunal imposed conditions, the patient ceased to be a restricted patient subject to a restriction order and became instead, and continued to be, a person subject to the conditions imposed and to the powers of recall vested in the Home Secretary.

Ex p. Cooper

In *R. v. Mental Health Review Tribunal, ex p. Cooper*, the patient had been admitted to Broadmoor following his conviction for a passport offence in 1963. He was one of the many old-style "Eaton and Toland patients" who ended up in special hospitals on restriction orders because they were social nuisances and their petty thefts, and the like, were seen as harmful to the public's interests.[13] The case again involved an application for judicial review founded on the ground that a patient conditionally discharged by a tribunal had been entitled to an absolute discharge.

[13] *R. v. Eaton* (1975) Current Sentencing Practice F.2.4(d), C.A.; *R. v. Toland (Michael Henry)* (1973) Current Sentencing Practice F.2.4(b).

In 1963, following his conviction for making a false statement for the purpose of obtaining a passport, the applicant was detained in Broadmoor Hospital pursuant to a hospital order with restrictions under sections 60 and 65 of the Mental Health Act 1959. His admission to a special hospital was considered to be appropriate because there was a risk that he might abscond from a local hospital and he would benefit from the recreational facilities at Broadmoor. On 12 February 1985, he was transferred to Ealing Hospital. In September 1985, a tribunal which considered his case specifically referred to the fact that he was not a danger to others while in April 1986 it was recorded that violence towards the individual was not part of his pattern of behaviour. On 17 February 1989, the matter again came before a tribunal, which directed that he be conditionally discharged. The reasons given for the tribunal's decision were that the patient had for some years been in substantial but not total remission. He had, since September 1985, been free to come and go by day and throughout that time there had been no serious incident of anti-social behaviour nor any relapse in his condition. However, after 30 years of institutional care, re-integration into the community would be stressful and the tribunal was therefore satisfied that for his own health and safety he should have the protection of continued treatment and supervision and of liability to recall should his condition deteriorate.

The application for judicial review

The patient applied for judicial review of the tribunal's decision on the ground that, since it was not necessary to protect the public from serious harm that he should be discharged subject to conditions and be liable to recall by the Secretary of State, he was entitled to be discharged absolutely under section 73. The restriction order had been imposed under the 1959 Act. Paragraph 14.24 of the Butler Report had referred with concern to the fact that restriction orders under that statute had sometimes been imposed for trivial matters in respect of persons who were essentially nothing more than social nuisances.[14] This was such a case. As a result of such concerns, a requirement that such an order be necessary to protect the public from serious harm was introduced by virtue of section 28(1) of the Mental Health (Amendment) Act 1982. Paragraph 10(1) of Schedule 5 to the 1982 Act expressly provided that that amendment applied in relation to existing restriction orders made under the 1959 Act. When a hospital order was imposed, the same discharge criteria applied regardless of whether the patient was restricted or unrestricted. The purpose of a hospital order was therapeutic and it put the patient in essentially the same position as a section 3 patient. An unrestricted hospital order patient was entitled to be unconditionally discharged once it was no longer necessary for his health or safety or to protect others that he receive further in-patient treatment. However, if a restriction order had been attached, because that was necessary to protect the public against a risk of future serious harm, the position was fundamentally different. The criteria which determined whether the patient was detained or discharged were the same as in a section 3 or ordinary hospital order case. The patient was *inter alia* entitled to be discharged once it was no longer necessary for his health or safety or to protect others that he receive further in-patient treatment. However, because of the restriction order, the patient could be discharged on conditions and be liable to recall by the Home Secretary. The purpose of this conditional discharge regime was, as the Butler Report and many court judgments made clear, to protect the public against the possibility of serious harm following the patient's return to the community. It ensured that patients who might, when ill, cause the public serious harm were subject to proper supervision in the community and could be recalled if there were any grounds for concern about the possibility of such behaviour — *inter alia*, because they were becoming unwell and again required to be in hospital so as to avoid harm to others being caused. Whether liability to recall was appropriate, and what conditions should be imposed, were matters for the tribunal's discretion but subject to the policy and objects of the Act. A tribunal which was dealing with one of the old "social nuisance" cases, and which was satisfied that the patient had never posed any risk of serious harm to the public, when ill or otherwise, and was further satisfied that this would not be the case if he relapsed in the future, was by definition satisfied that liability to recall by the Home Secretary was inappropriate. For it was satisfied that the statutory purpose behind conditional discharge and recall did not apply in his case. It was then simply using the restrictions for therapeutic purposes, as a form of community treatment order or as a form of hospital order of indefinite duration.

Rose J.

It had been submitted that the tribunal were seeking to direct a conditional discharge solely for therapeutic reasons. The powers exercisable over a conditionally discharged patient, to supervise and recall him, were not necessary for the protection of the public. Furthermore, it was contended that the maintenance of liability to recall under section 73(1)(b) could only be proper if the applicant posed some danger to others. Accordingly, the tribunal had taken into account an immaterial consideration and failed to take into account that a restriction order could not be made now because the patient did not pose a serious risk to others. However, Butler-Sloss L.J. had said in *R. v. Merseyside Mental Health Review Tribunal, ex p K* [1990] 1 All E.R. 694 at 699, 700 that section 73 gave a tribunal "power to impose a conditional discharge and retain residual control over patients not then suffering from mental disorder or not to a degree requiring continued detention in hospital. This would appear to be a provision designed both for the support of the patient in the community and the protection of the public, and is an important discretionary power vested in an independent tribunal, one not lightly to be set aside in the absence of clear words." The application would therefore be dismissed.

Kerr L.J.

Mr. Pleming, on behalf of the tribunal, relied upon dicta of Butler-Sloss L.J. in *ex p. K.* It was possible for a tribunal to be satisfied that no serious harm to others was anticipated or likely but not to be satisfied that it is not appropriate for him to remain liable to be recalled to hospital. He emphasised that a tribunal had no power to order that a patient shall cease to be subject to a restriction order. That was a power which by virtue of section 42(1) was vested in the Secretary of State and it was to the Secretary of State that a patient must in appropriate cases seek a cessation of the restriction order. Furthermore, Ackner L.J. had said in *R. v. Hallstrom, ex p. W.* [1986] 1 Q.B. 824 at 846 that a tribunal had no power to consider the validity of the admission which gave rise to the liability to be detained. Having regard to the material before the tribunal and the above judgments, the argument that the tribunal's conclusion was irrational could not be sustained. The words of the statute plainly permitted, and indeed only permitted, the tribunal, if it was in the state of mind with regard to satisfaction which this tribunal was, to make a conditional discharge order. The decision of a tribunal was one which the courts would be reluctant to interfere with unless challenge on the well-known lines had been substantiated. No such challenge had been substantiated. *Application dismissed.*

14 *Report of the Committee on Mentally Abnormal Offenders*, Cmnd. 6244 (1975).

Commentary[15]

It seems unsatisfactory to take the short passage in *ex p. K* as constituting authority for the proposition that it is not inappropriate for a passport offender to be liable to recall for purely therapeutic purposes.[16] As another Court of Appeal decision involving K made clear, the policy and objects of the Act in restricted cases 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.[17] K's case involved a patient who was highly dangerous and, although presently not mentally disordered, had previously committed serious offences while on conditional discharge. The support of the patient in the community in that case was therefore necessary to protect the public and the two issues went together.[18] While a tribunal has no power to direct that a patient who requires further in-patient treatment shall cease to be subject to restrictions, it has power to direct that a patient who does not require in-patient treatment shall not be subject to recall — in order words, it may absolutely discharge him. If he does not satisfy the criteria for being detained in pursuance of the hospital order, the issue then becomes whether liability to recall is inappropriate. If that issue is not to be determined by reference to the statutory purpose and function of liability to recall, and the policy and objects of the Act, then it is difficult to see by what other test it is to be determined. The decision in *Hallstrom* is plainly irrelevant since the lawfulness of the original order was not being challenged. It was simply factually relevant that the public had never been at risk of serious harm from the patient, the order having been made at a time when that was not a precondition of such orders. The issue was instead whether the patient, once entitled to be discharged, was entitled to be absolutely discharged given the law as it stood on the day of the tribunal's decision and its finding on the facts — *viz.*, that (1) it was possible that readmission for treatment might be necessary in the future for the patient's own health or safety but (2) if he relapsed, there was no likelihood of a risk of serious harm to the public. The decision is unfortunate because it simply gives credence to the arguments of those lawyers who contend that restricted patients are never entitled to be absolutely discharged, however harmless. As to whether the case might be decided differently today, see page 370.

CONDITIONAL DISCHARGE

Where a tribunal conditionally discharges a patient, he must comply with such conditions as may be imposed at the time of discharge by the tribunal or at any subsequent time by the Secretary of State. The latter may from time to time vary any

15 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 and he formulated the case outlined above.

16 Furthermore, what Butler-Sloss L.J. said was that the provision made for conditional discharge would appear to be a provision designed *both* for the support of the patient in the community and the protection of the public.

17 *R. v. Secretary of State for the Home Department, ex p. K.* [1991] 1 Q.B. 270, *per* McCowan L.J., approving dicta of McCullough J. in *R. v. Secretary of State for the Home Department, ex p. K.* [1990] 1 All E.R. 703 at 709, [1990] 1 W.L.R. 168 at 174.

18 As to this point, see the Home Office's own guidelines: "The purpose of formal supervision resulting from conditional discharge *is to protect the public from further serious harm in two ways*: first by assisting the patient's successful reintegration into the community ... second, by close monitoring of the patient's mental health or of a perceived increase in the risk of danger to the public so that steps can be taken to assist the patient and protect the public." *Supervision and After-Care of Conditionally Discharged Restricted Patients— Notes for the Guidance of Supervising Psychiatrists* (DHSS and the Home Office, 1987), paras. 7 and 8.

condition imposed by the tribunal at the time of discharge or by him. The patient may be recalled to hospital by the Secretary of State in the same way as if he had conditionally discharged the patient himself and his powers under section 42 are not affected by those given to a tribunal under section 73.[19]

Effect of conditional discharge by a tribunal

73.—(4) Where a patient is conditionally discharged under this section—

(a) 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; and

(b) the patient shall comply with such conditions (if any) as may be imposed at the time of discharge by the tribunal or at any subsequent time by the Secretary of State.

(5) The Secretary of State may from time to time vary any condition imposed (whether by the tribunal or by him) under subsection (4) above.

(8) This section is without prejudice to section 42 above.

The conditions of discharge

Common conditions of discharge include a condition of residence; a condition that the patient submits to supervision by, and attends appointments with, a supervising social worker or probation officer; a condition that he similarly be supervised by, and attend appointments with, a supervising psychiatrist; and a condition that he complies with any treatment prescribed by the latter.

Conditions of residence

The condition of residence is usually expressed in terms "that the patient shall reside at accommodation approved by his responsible medical officer."[20] The terminology is unfortunate because a conditionally discharged patient has no responsible medical officer. The underlying rationale is presumably either that the consultant is better placed to decide what accommodation is suitable or that phrasing the condition in this way avoids the need to later vary the condition if the patient moves. The legal justification for the practice presumably rests on a literal construction of section 73(4)(b), which merely requires the patient to comply with any conditions imposed by the tribunal at the time of his discharge. That paragraph being silent on all other matters, it is not necessary to impose a condition of residence and, equally, if a condition of residence is imposed, it is not necessary that the tribunal itself specifies the residence. Section 73 leaves such decisions entirely to its discretion. It suffices that the tribunal has considered whether it is necessary for the patient to be subject to

19 Mental Health Act 1983, s.73(8).

20 According to the *Memorandum*, "The Conditions which *the Home Secretary* would normally think it appropriate to attach to a conditional discharge are that the patient shall live in a particular household ..." *Mental Health Act 1983: Memorandum on Parts I to VI, VIII and X* (D.H.S.S., 1987), para. 164.

a condition of residence and, if so, whether it should itself specify particular address for him. If, having considered those issues, it is satisfied that the patient is entitled to be discharged without a particular place of residence being specified, such as a specialist hostel, the decision about where the patient shall live may properly be left to a supervisor's judgement, rather than the patient's. Indeed, the tendency with such legislation is for supervisors to nominate a residence. Furthermore, if the other common conditions of discharge can be cast in that form — those requiring the patient to accept any treatment, and to attend any out-patient appointments and other activities, prescribed by his supervisors — then so too may conditions which relate to decisions about where he shall live.

Whether common practice lawful or advisable

The practice of leaving the decision about where the patient lives to his consultant is not beyond objection, notwithstanding that conditions phrased in this way have been referred to without comment in several law reports. The Act requires the patient to comply with any conditions imposed by the tribunal discharging him or by the Secretary of State, who may later vary any existing conditions. In contrast, the patient's responsible medical officer has no power to impose conditions of discharge on the patient, or to vary them, and the patient cannot therefore be required to comply with any conditions that he does impose. The statutory intention is arguably that the patient shall reside at an address specified by the tribunal or by the Secretary of State unless it is inappropriate to impose a condition of residence. In this respect, their respective roles mirror those performed by them when the patient was in hospital: the patient's consultant may propose that the patient be given greater freedom, including that he have leave to reside at an address outside hospital, but any actual decision having that effect requires the Secretary of State's consent or, in the case of discharge, a judicial direction. That being so, a patient discharged by a tribunal and living in a hostel cannot move into his own flat simply because his consultant consents to that. Although that would not involve breaching the tribunal's direction, if phrased in the above form, the prior question is whether the tribunal had power to phrase the condition in a way which vested in the consultant a decision vested in the Secretary of State. As to the justification that the phraseology avoids any need to vary the condition if the patient moves, the purpose of section 73(5) in this context may therefore be precisely to ensure that a patient cannot move unless an existing condition of residence is first varied. This restriction ensures that any such proposals must first be approved by the Secretary of State or, if his consent is withheld, by a tribunal under section 75. In terms of the practicalities, the position is unsatisfactory if a tribunal does not specify the place of residence and the responsible medical officer does not agree to the patient residing at the address which the tribunal had in mind when it reached its finding that he was entitled to be conditionally discharged. It may be difficult to be sure that the tribunal would have been satisfied that liability to detention in hospital was no longer necessary or appropriate had the alternative arrangement been canvassed.[21] From the patient's viewpoint, the position will be unsatisfactory if, as has been known, the responsible medical officer withholds his approval to the patient immediately taking up residence outside hospital, so that the patient is still languishing in hospital some

[21] " ... the tribunal's satisfaction or lack of satisfaction as to ... the paragraph (b) matters may be vitally influenced by the conditions which are to be imposed to regulate his life style upon release into the community ... The tribunal may perfectly properly be satisfied that hospital detention is no longer necessary provided that the patient can be placed in a suitable hostel ... These are matters to be secured by imposing appropriate conditions." *R. v. Oxford Regional Mental Health Review Tribunal, ex p. Secretary of State for the Home Department* [1988] 1 A.C. 120, at 127, *per* Lord Bridge.

weeks after the tribunal directed his discharge. A tribunal in those circumstances has no power to reconvene to specify an address if the supervisor interprets the decision as being conditional in the sense that discharge is to be effected once the conditions of discharge are satisfied, which involve him being satisfied that a particular address outside hospital is suitable.

Summary

Regardless of whether it is lawful to leave the issue of where the patient resides to his supervisors, the Home Office's practice of nominating the place where the patient shall reside has much to commend it. It ensures that the supervisors' proposals are properly vetted and prevents any possibility of the patient's discharge being delayed because no residence is immediately specified. It is perhaps noteworthy that where a tribunal defers giving a direction for the patient's discharge, because suitable accommodation is not immediately available, its direction is deferred "until such arrangements *as appear to the Tribunal* to be necessary for that purpose have been made to *their* satisfaction."[22] It must likewise be the case that a tribunal which discharges forthwith must first have satisfied itself about the suitability of the arrangements which may immediately be made for the patient's discharge. And if, having satisfied themselves that suitable arrangements have been made for the patient in the community, including a suitable residence, it is arguably at best poor practice not to specify the conditions upon which its discharge decision rests, leaving the decision about what will in fact happen to the doctor's judgment and discretion.

Whether any express conditions must be imposed

It is clear from section 73(4)(b) that it is not mandatory for a tribunal which conditionally discharges a patient to impose any express conditions of discharge. The patient's discharge is still conditional because the orders remain in force and he may be recalled to hospital. A failure to appreciate this led to the lawfulness of the warrant of recall issued in the following case being challenged.

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

The Times, 30 March 1993 *Q.B.D., Watkins L.J., Rougier J.*

In 1973, the patient was conditionally discharged, subject initially to the usual conditions as to supervision and residence. In January 1979, he received a letter from the Home Office which included the following statement: "I am pleased to inform you that the Home Secretary has now decided that the conditions attaching to your discharge from hospital on 5 September 1973 may be allowed to lapse. As Doctor C. has already explained, your liability to recall to hospital remains but this power would only be exercised should you again be in need of compulsory long-term in-patient treatment ..." In December 1991, the Secretary of State issued a warrant under section 42(3), revoking the conditional discharge granted in 1973 and recalling the patient to hospital.

The application for judicial review

The patient applied for judicial review, submitting that the revocation of the conditions in 1979 brought the conditional discharge to an end, at which time the discharge being no longer conditional became absolute and the restriction

[22] Mental Health Act 1983, s.73(7).

order came to an end. Consequently, no order existed in January under which a warrant could be issued recalling the patient to hospital. The warrant of recall was therefore unlawful and certiorari should issue to quash it.

Rougier J.

Before a restriction order can be brought to an end, the Secretary of State must either make a direction to that effect or must discharge the patient absolutely. Each of these is a positive act. There is no room for the situation whereby a restriction order ceases to have effect by inference or implication. It followed that by merely allowing the conditions under which the patient was discharged to lapse, the Secretary of State did not thereby bring to an end the operation of the restriction order. It further followed that the issue of the warrant was *intra vires* the Secretary of State and valid. *Application dismissed.*

Whether any conditions may not be imposed

A condition of residence in hospital cannot be specified.[23] Apart from this, there is no case law on the issue of whether there are certain conditions which may not be imposed by a tribunal, or indeed by the Secretary of State. Conditions which are sometimes imposed in practice include that the patient shall not take drugs; that he shall not consume alcohol; that he shall not frequent a particular address, such as the former matrimonial home or a school; that he shall not enter a particular locality; and that he shall not communicate directly or indirectly with his spouse or children, save via his legal representatives. Some of these conditions might be objected to on the grounds that they are equivalent to a civil injunction or, in the case of consuming alcohol, interfere with a lawful activity. Others have essentially the same quality as conditions of bail, although this is not objectionable *per se* since the individual's liberty in both cases is conditional and an alternative to lawful custody. Some of them also resemble conditions imposed as part of a probation order. Perhaps all that can be said is that the purpose of such conditions must be the statutory purpose of protecting the public from harm, whether by helping to ensure that the patient's mental state and behaviour are properly supervised; or that he receives any treatment and care necessary for his mental health; or that he avoids any particular conduct or situations believed to be associated with the existence of a risk to others.[24] It is obviously desirable that the conditions are unambiguous so that the patient and his supervisors are clear about what is required of the patient and whether any condition has been broken. Requiring that a patient refrains from the excessive consumption of alcohol is ambiguous because what is excessive is largely subjective.

Whether the conditions may be immediately changed

If a tribunal directs a patient's immediate discharge, the Home Office's Mental Health Unit are notified of the after-care details and the conditions of discharge imposed by the tribunal. According to Pickersgill, the Home Office will then consider whether the detailed arrangements are satisfactory, consulting as necessary the patient's responsible medical officer or the newly appointed supervisors, before reaching a decision. The Home Secretary might vary the conditions, for example

23 *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.

24 The conditional discharge regime is unique to restricted patients and it is one of the main ways in which the public is protected against the risk of serious harm identified by the court.

changing the condition of residence or imposing supervision conditions where none were imposed by the tribunal.[25] This practice can be objected to as amounting to reviewing and redrafting the terms of a court's order, with reliance being placed on dicta in *ex p. Fox*[26] and *ex p. K.*[27] In the latter case, McCullough J. said that it would be unlawful for the Secretary of State to recall a patient who had recently been conditionally discharged by direction of a tribunal, unless something had happened which justified the belief that a different view might now be taken about one of the factors on which his release had depended. The conditions of discharge form part of the tribunal's direction and are often inseparable from the factors upon which the patient's release depended.[28] The tribunal's decision and direction is that the patient is entitled to be discharged subject to, and on, those conditions. If the Home Secretary is able to immediately vary those conditions, the patient is then not entitled to apply to a tribunal for those conditions to be varied back, so as to accord with the original conditions, until he has been discharged for a year. Where a tribunal imposes a condition that the patient resides in unsupervised lodgings, and the Home Secretary immediately varies that condition by requiring residence in a supervised hostel, it is certainly arguable that the practice is objectionable for the reasons given by McCullough J. As to the statute, section 73 provides that the Secretary of State may "from time to time" vary any condition imposed by the discharging tribunal and may impose additional conditions "at any subsequent time." Having set out a tribunal's power of conditional discharge, section 73 therefore immediately provides that any conditions imposed on the discharge may be varied by the Secretary of State, who is then the person responsible for the discharged patient. Because the effect of the tribunal's decision is that the Home Secretary becomes responsible for a patient in the community who he considers should be in hospital, he is clearly given broad powers to tailor the conditions when he considers that is necessary in order to properly discharge his statutory function of protecting the public. However, it is notable that the powers to impose and vary conditions are not exercisable on precisely the same terms. There must be some difference between a power which may be exercised "at any subsequent time" and one set out in the same subsection which is exercisable "from time to time." The imposition of a further condition, which may be done at any subsequent time, is not *per se* inconsistent with any condition imposed by the tribunal itself and does not involve any variation of the terms of its order. The variation of a condition imposed by the tribunal is, however, inconsistent with that part of its decision; those conditions form part of the decision and cannot be severed from it. This may be why the power is expressed not to be exercisable "at any subsequent time" but only from "time to time." The phrase is that used in section 12 of the Interpretation Act 1978, which provides that where a statute confers a power then, unless the contrary intention appears, it may be exercised from time to time "as occasion requires." That, it is submitted, means that the conditions can be varied as and when something happens which requires that but not if the occasion remains unchanged.

25 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).

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

27 *R. v. Secretary of State for the Home Department, ex p. K* [1990] 1 W.L.R. 168 (**348**).

28 See *R. v. Oxford Regional Mental Health Review Tribunal, ex p. Secretary of State for the Home Department* [1988] 1 A.C. 120, *per* Lord Bridge: " ... the tribunal's satisfaction or lack of satisfaction as to ... the paragraph (b) matters may be vitally influenced by the conditions which are to be imposed to regulate his life style upon release into the community." See also *Pickering v. Liverpool Daily Post and Echo Newspapers plc & others* [1991] 2 A.C. 370 (**850**), where it was held that a direction that a patient be discharged, either absolutely or conditionally, was analogous to a formal court order.

DEFERRED CONDITIONAL DISCHARGE

If it is not possible for a patient to be immediately discharged from hospital because arrangements in the community need to be made before the conditions imposed on the patient's discharge can be complied with, the tribunal may defer its direction for the patient's discharge.[29]

Duties arising following deferred conditional discharge

The obligations of those involved in making the necessary arrangements following deferred conditional discharge were set out by Lord Bridge in *R. v. Oxford Regional Mental Health Review Tribunal, ex p. Secretary of State for the Home Department:*[30]

> "Whoever is responsible for making the arrangements should then proceed with all reasonable expedition to do so and should bring the matter to the attention of the tribunal again as soon as practicable after it is thought that satisfactory arrangements have been made. Pursuant to rule 25 the tribunal may then decide that the arrangements are to their satisfaction without a further hearing."

Duty to provide after-care under section 117

The above judgment was applied in *R. v. Ealing District Health Authority, ex p. Fox.*[31] In that case, a tribunal directed the patient's conditional discharge but deferred discharge until such time as it was satisfied that arrangements had been made which enabled the conditions of discharge to be satisfied. In particular, it was necessary for the Health Authority to appoint a responsible medical officer to provide psychiatric supervision for the patient in the community. Because the consultants in the relevant catchment area were not willing to supervise the patient, the Health Authority did not appoint a responsible medical officer and the patient remained in hospital. The tribunal was due to reconvene in March 1992, in order to reconsider the patient's case, but the patient cancelled the hearing, applying instead for judicial review. The High Court held that the mere acceptance by the Health Authority of its doctors' opinions was not of itself sufficient discharge of its obligation to proceed with reasonable expedition and diligence to give effect to the arrangements by the tribunal; that where the doctors did not agree with the conditions imposed by the tribunal and were unwilling to make the necessary arrangements, the Health Authority was under an obligation to endeavour to provide arrangements from its own resources or to obtain them from other appropriate Health Authorities; that the Health Authority's obligations were not ended by any intervening deterioration in the patient's condition; and, accordingly, the authority had erred in law in failing to fulfil its obligations. Accordingly, it was appropriate to make a declaration in the following terms:

29 In practice, immediate discharge is not always immediate. Implementing the arrangements may, as with any move, take a few days to implement. However, no further arrangements need to be made and submitted to the tribunal for approval. The arrangements already made simply required the tribunal's say-so to be put into effect.

30 *R. v. Oxford Regional Mental Health Review Tribunal, ex p. Secretary of State for the Home Department* [1988] 1 A.C. 120 (**544**).

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

> (1) that the authority had e[illegible]n law in not attempting with all reasonable expedition and diligence to make arrangements so as to enable the applicant to comply with the conditions imposed by the Mental Health Review Tribunal;
>
> (2) that a [district] Health Authority is under a duty under section 117 of the Mental Health Act 1983 to provide aftercare services when a patient leaves hospital, and acts unlawfully in failing to seek to make practical arrangements for after-care prior to that patient's discharge from hospital where such arrangements are required by a Mental Health Review Tribunal in order to enable the patient to be conditionally discharged from hospital."

Whether decision to discharge final or provisional

Although such a decision is described in the tribunal rules as a "provisional decision" that is only so in the limited sense that whether or not the direction is eventually given is provisional upon future events, that is whether arrangements can be made which satisfy the tribunal that the conditions attached to the discharge can now be fulfilled. The tribunal's actual decision, that the patient be conditionally discharged, is a final decision which cannot be reversed or amended. These points were all considered in a series of cases which ended in the House of Lords.[32] As will be seen, two judgments of the Divisional Court were heard together on appeal, and reversed, and the House of Lords then upheld the decision of the Court of Appeal. It is nevertheless useful to summarise briefly the judgments in the Divisional Court because they provide the context for what followed.

R. v. Oxford Regional Mental Health Review Tribunal and Campbell, ex p. the Secretary of State for the Home Office

CO/576/85, 8 November 1985 — *Q.B.D., Woolf J.*

The Home Secretary applied for an order of certiorari in respect of the tribunal's decision on 12 February 1985 that the patient be conditionally discharged. The grounds of the application were that the Secretary of State was not provided with a copy of a psychiatric report commissioned on behalf of the patient and furnished to the tribunal in support of his application to be discharged, and nor was he given notice of the hearing. In consequence, he had no opportunity to submit supplementary observations on that report which might have affected the tribunal's decision and was unable to seek the tribunal's leave to be represented at the hearing or to make oral representations to it.

32 There have also been a number of unreported cases in which tribunals which deferred a direction for the patient's conditional discharge later reconvened and directed the patient's absolute discharge: *e.g. ex p. Hughes, ex. p. Cummings, ex p. Stowell, and ex p. Tinnion.* In all of these cases, the tribunal's decision was quashed. Although the practice is not uncommon, the rules do not authorise a tribunal to reconvene because satisfactory arrangements which comply with the conditions imposed by it have not been made. Rule 25(1), which applies to deferred conditional discharge decisions ("provisional decisions"), simply provides that a further decision can be made without a further hearing. The power conferred by rule 25(2), to reconvene upon giving notice to the parties, applies only where a tribunal has made a recommendation under section 72(3). Consequently, unless an implied power to reconvene can be inferred from section 73(7) itself, there is no power to reconvene following deferred conditional discharge.

Woolf J.

The Secretary of State had a very important role to play in tribunal proceedings, ensuring that matters relevant to the public's interests were placed before the tribunal, so that it was in a proper position when exercising its jurisdiction not only to do what was in the patient's interests but also to do what was in the public's interests.

The Mental Health Review Tribunal Rules 1983 and the Mental Health Act 1983 made it clear that a decision which resulted in discharge being deferred was a truly provisional decision: it was a decision in principle and not a final decision. A tribunal could later consider any change in the patient's mental state and circumstances before deciding whether to make a direction discharging him. Equally, if the arrangements envisaged by it could not be made, but satisfactory alternative discharge arrangements could, the provisional nature of its decision meant that it could discharge the patient on conditions based on those alternative arrangements. Moreover, because a decision under section 73(7) was a provisional decision, the Secretary of State still had an opportunity to put before the tribunal those matters which, through an unfortunate error, he was prevented from putting before the tribunal at the original hearing. Rule 28 of the Mental Health Review Tribunal Rules 1983, which dealt with procedural irregularities, was wide enough to deal with such a situation albeit that it was not exhaustive, because it did not cover breaches of natural justice which did not necessarily involve a breach of the rules.

A tribunal's direction for a patient's deferred conditional discharge stood unless good reason was shown for re-opening the matter. Unless there was an exceptional change of circumstances, or an occurrence of the sort that occurred in this case, a tribunal would be perfectly entitled not to re-open matters that had been subject to a provisional decision. It would only do so if it considered that necessary so as to comply with the intent of the Act, and the rules then allowed matters to be re-opened that had previously been decided. Although rule 25 gave a tribunal a discretion to dispense with a further hearing where it had made a provisional decision, that discretion had to be exercised in a responsible and proper manner. Where there was a need for a further hearing, to enable the Secretary of State properly to perform his statutory responsibilities, the tribunal had to ensure that there was ample opportunity for him to put forward those matters which he wanted to. In this case, there was therefore an alternative and more appropriate remedy than judicial review open to the Secretary of State and the application was therefore dismissed.

R. v. Yorkshire Mental Health Review Tribunal, ex p. Secretary of State for the Home Department (Mollie Lord)

CO/936/85, 21 January 1986 — *Q.B.D., Kennedy J.*

The patient was subject to a restriction order without limit of time. On 23 January 1985, a tribunal reviewed the patient's case, adjourning the hearing for three months to see if a hostel place could be found. However, no hostel place had been found by the time the tribunal met again on 1 April 1985. The tribunal directed that the patient be conditionally discharged but that its direction be deferred until the following arrangements had been made to their satisfaction: 1. that the patient be received and accommodated in a supervised hostel; 2. that she be subject to such periodic psychiatric out-patient treatment as may be advised; and 3. that she remain under the supervision of an officer of the relevant social services department. The tribunal further directed that, if the

necessary arrangements had been made within the following six months, it would reconvene to reconsider the case and, in the light of the patient's progress, whether its conditional discharge decision could be perfected without the attachment of any specified arrangements: "there is always a possibility that at that time we may feel able to conclude that the statutory criteria for conditional discharge without deferment have been satisfied." It was that part of the tribunal's decision which the Secretary of State objected to and upon which his application for judicial review was based.

The application for judicial review

It was submitted on the Secretary of State's behalf that the proper exercise of the power of deferral conferred by section 73(7) required that a final decision that the patient be conditionally discharged had first been taken. The effect of deferral was simply that the normal consequence of that decision — the patient's actual discharge — was postponed until the arrangements thought to be necessary by the tribunal had been made. The power to defer a direction for a patient's discharge was not to be confused with a simple power to adjourn the decision as to whether or not the patient should be discharged. Once a tribunal had reached a finding that a patient satisfied the criteria for being discharged it had no option but to discharge. The wording of section 73(7) pointed to the same conclusion since it spoke of arrangements being made "for that purpose," which would be inappropriate if it was intended to convey a power to postpone the decision about whether there should be a conditional discharge at all. More significantly, section 73(7) provided no mechanism for deciding at a later date what, if any, form of discharge there should be. If a tribunal was still free to consider the basic question of whether or not there should be a discharge, it could under the rules do so without a further hearing, without notice to the parties or the Secretary of State, and without recording what it decided. In fact, the power to reconsider the case of a patient granted a deferred conditional discharge conferred by rule 25(1) was confined to approving or not approving the arrangements for the patient's discharge made during the intervening period.

Kennedy J.

His Lordship referred to the conclusions reached by Woolf J. in R. v. Oxford Mental Health Review Tribunal and Campbell, ex p. Secretary of State for the Home Department.

When a tribunal exercised its power to defer, its decision in favour of conditional discharge was provisional in the limited sense that it was ineffective until the necessary arrangements had been made to the tribunal's satisfaction. It was clear in the present case that the tribunal never had in mind any disposal other than conditional discharge and that the tribunal's decision as to that was complete. However, if the arrangements originally considered to be necessary could not be made, the tribunal could upon reconvening the proceedings consider if any other arrangements were appropriate. If the tribunal was minded to significantly alter or to revoke the arrangements originally considered to be necessary then, since it must act judicially, it would no doubt consider a further hearing to be necessary unless all parties agreed otherwise. Whether or not there was a further hearing, the tribunal would be making a further decision and it would be a decision determinative of the application. In accordance with rule 23(3), the decision would have to be in writing and supported by reasons.

As to the facts of the present case, the position was that (1) the tribunal at its hearing on 1 April 1985 decided that the patient should be conditionally discharged, being satisfied as to the criteria for discharge; (2) nothing in the

tribunal's reasoning or the directions it gave led to the conclusion that tribunal envisaged ever reconsidering its decision that the patient be conditionally discharged; (3) the tribunal did envisage reconvening if necessary to reconsider, in the light of the patient's progress, whether the direction for conditional discharge could be given without the arrangements being made which at the time of deferring the tribunal considered to be necessary. The tribunal was entitled to act in that way without exceeding the powers granted to it by section 73(7).

The power of deferral could not be used just to see how the patient progressed so that, when it was used, it must be used by a tribunal which had determined — as this tribunal did — that the patient should be conditionally discharged if certain specified arrangements could be made to the tribunal's satisfaction. Once the power was exercised, it was inevitable that time would pass and during that period it might well emerge that the arrangements originally envisaged were unnecessary, or could not be made, or that other satisfactory arrangements could be made in their place. If that emerged, it was still open to the tribunal to heed the additional information and, having altered the arrangements it originally specified so as to take account of developments, to direct the patient's conditional discharge. *Application dismissed.*

R. v. Oxford Regional Mental Health Review Tribunal, ex p. Secretary of State for the Home Department; Same v. Yorkshire Mental Health Review Tribunal, ex p. Same

[1986] 1 W.L.R. 1180 *C.A. (Lawton and Stephen Brown L.JJ., Sir John Megaw)*

Lawton L.J.

Both cases substantially raised the same point, namely the powers of a tribunal under section 73(2) of the Mental Health Act 1983.

R. v. Oxford Regional MHRT

The Secretary of State was entitled to notice of the hearing and also to early notice of any psychiatric reports relied upon by the patient. The Secretary of State did not receive either prior to the hearing on 12 February 1985 when the tribunal directed the patient's conditional discharge. When the Secretary of State was sent a copy of the tribunal's decision, it was apparent that there had been a very serious breakdown in the administrative arrangements contained in the Mental Health Review Tribunals Rules 1983 and he therefore applied for judicial review. Woolf J. broadly held that, because the tribunal could reconvene and reconsider the position, the Secretary of State had an opportunity to make his representations to the tribunal at that time and this provided a more appropriate remedy than judicial review.

R. v. Yorkshire MHRT

On 1 April 1985, the tribunal considered the patient's case and directed that she be conditionally discharged. However, the tribunal directed that, if the necessary discharge arrangements could not be made within six months, it would reconvene to reconsider the case and whether the patient's progress during the intervening period enabled its direction to be perfected without the specified arrangements being attached.

Deferred conditional disch[illegible]s

The problem turned on the construction of the 1983 Act and the ordinary canons of construction applied. Under that Act, the Secretary of State was the guardian of the public welfare. As a consequence, the Act gave him certain powers and the rules made pursuant to it envisaged that he was entitled to make representations to a tribunal. It was clear that the intention of Parliament under section 72(1)(b) was that people should not be detained in hospital if it was no longer appropriate that they should be there for medical treatment. Under section 73(1) and (2), discharge was mandatory if a tribunal was satisfied that a patient meets the criteria for discharge and, equally, it could not discharge unless it was satisfied that was the case. Although it had been submitted that a tribunal were entitled to look at the need for social support when considering whether those criteria have been established, that meant writing something into the section which was not there. The tribunal had to ask themselves whether the criteria had been established to their satisfaction and confine their attention to those criteria; they were not entitled to look at any other matter. Thus, a tribunal had only three options: to grant an absolute discharge, to grant a conditional discharge, to refuse discharge. Section 73(7) provided for deferring a direction for the conditional discharge of a patient until such arrangements as appeared to the tribunal to be necessary for that purpose had been made to their satisfaction. The Oxford tribunal decided that the first of the criteria applicable in subsection (2) had been established and they directed conditional discharge. That was their decision. In the case of Miss Lord, the Yorkshire tribunal persuaded themselves that they could go back over the whole case again if she made progress during the time she was waiting for suitable arrangements to be made. However, once they had decided that the patient was entitled to a conditional discharge they could not go back on that part of the order. The arrangements referred to in section 73(7) were solely for the purpose of conditional discharge, not for reconsidering whether there should be conditional discharge at all. In neither case had there ever existed a power to reconsider the decision to discharge made by the tribunal. Once a decision had been made, a tribunal must stand by it and all that they were concerned with thereafter was the approval of such arrangements as they thought necessary for accomplishing conditional discharge. In Miss Lord's case, the tribunal misdirected themselves in thinking that they had power to reconsider her case, and, accordingly, to that extent their decision was wrong and could, and should, be remedied by the court.

Failure to give notice in the Oxford case

The fact that the Secretary of State was not given an opportunity of making representations to the Oxford tribunal was a classic case of a failure of natural justice entitling the court to intervene by ordering judicial review. In order to avoid such a mishap recurring in cases where the Home Secretary was not represented, tribunals should, before starting to hear the application, inquire and note whether he had been given notice of the application and when. As to the application of rule 28, which dealt with procedural irregularities, once the tribunal had made the decision which they made on 12 February 1985, the irregularity could not be cured. The Secretary of State had lost his right to make any representations about the patient's suitability to be discharged and, as the tribunal had no power to reconvene to reconsider its finding in this respect, it followed that there was nothing that the Secretary of State could do. *Appeals allowed.*

Campbell v. Secretary of State for the Home Department

[1988] 1 A.C. 120 — *House of Lords (Lord Bridge of Harwich, Lord Brandon of Oakbrook, Lord Ackner, Lord Oliver of Aylmerton and Lord Goff of Chieveley)*

The patient involved in the case of R. v. Oxford Regional Mental Health Review Tribunal appealed against the decision of the Court of Appeal.

Lord Bridge of Harwich

It was common ground that the tribunal's decision had been made in breach of the 1983 rules. What was more important was that there had been a breach of the most fundamental rule of natural justice, in that the Secretary of State, as a vitally interested party, was denied a hearing. It was difficult to see how the tribunal's decision could properly stand. Such a fundamental flaw as vitiated the proceedings leading to the tribunal's decision called for a complete rehearing *de novo*. If every issue remained open for decision under section 73(7), and that provided the appropriate occasion for the rehearing, the earlier purported decision was at best irrelevant, at worst an embarrassment which the tribunal would have to do their best to put out of mind, but which would make it difficult for justice to be seen to be done at a rehearing before them. There was an inherent inconsistency in the argument forwarded on the patient's behalf. That argument accepted, on the one hand, that the tribunal proceedings were defective and relied on a rehearing under section 73(7) to cure that defect whilst claiming, on the other hand, that he was entitled to rely on the earlier decision in his favour. If the construction adopted by the Court of Appeal was right, and there was no power under subsection (7) to re-open any issue already decided under subsection (2), the earlier decision must be quashed. That would enable the rehearing to take place before a differently constituted tribunal.

The construction of section 73

As to the true construction of section 73, the first issue which a tribunal must address was whether they were satisfied as to one or other of the matters referred to in section 72(1)(b). If they were so satisfied and also satisfied that the patient need not remain liable to recall it was mandatory to direct his absolute discharge. If the tribunal thought that the patient should remain liable to recall, they could only contemplate a conditional discharge. Here, the tribunal's satisfaction or lack of satisfaction as to one or other of the matters in section 72(1)(b) would inevitably be coloured by the conditions they had in mind to impose. Whether or not the tribunal was satisfied that the patient's disorder was not of a nature or degree which made it appropriate for him to be liable to be detained in hospital for medical treatment, or that it was not necessary for his own health or safety or for the protection of others that he should receive such treatment, might be vitally influenced by the conditions which are to be imposed to regulate his life style upon release into the community. To take obvious examples suggested by the decision of the tribunal in this case, the tribunal might perfectly properly be satisfied that hospital detention was no longer necessary provided that the patient could be placed in a suitable hostel and required to submit to treatment as an out-patient by a suitable psychiatrist. These were matters to be secured by imposing appropriate conditions. Once the tribunal was satisfied as to one or other of grounds for discharge it was mandatory to direct his conditional discharge. But if the tribunal was only able to be so satisfied by the imposition of conditions on the

patient's release, it was obvious that in many cases some time must elapse between the decision that conditional discharge was appropriate and the effective order directing the patient's discharge — the purpose being to enable the necessary practical arrangements to be made which would enable the patient to comply with the conditions, *e.g.* securing a suitable hostel placement for him and finding a suitable psychiatrist who was prepared to undertake his treatment as an out-patient.

Whether tribunal's decision was provisional or merely the implementation of it

The words of section 73(7) reserved to the tribunal the further decision as to whether the necessary arrangements had "been made to their satisfaction" but they were wholly inapt to indicate a deferment of the decision as to whether the tribunal was or could be satisfied that the patient must be discharged according to the statutory criteria. If the contrary argument were right, and a tribunal could not make a decision about whether it was satisfied as to the criteria for conditional discharge unless and until suitable discharge arrangements were in place, the two stage procedure contemplated by sections 73(2) and (7) would not seem to serve any useful purpose at all. However, the wording of section 73(7) clearly contemplated the possibility that it might not be possible to make suitable arrangements which complied with the conditions, in which case the decision that the patient was entitled to be discharged was deemed never to have been made. This clearly indicated a two stage process and the provision would be otiose if the decision as to whether the patient should be discharged was only one made once satisfactory arrangements had been made.

Patients who deteriorate while the arrangements are being made

Since a tribunal had no power to re-open the issue of a patient's suitability to be discharged under subsection (2) and must direct his discharge once satisfactory arrangements enabling the conditions to be met had been made, the question arose whether they could be compelled to discharge a patient whose condition had deteriorated during the intervening period. It might be that the second part of section 73(7) was designed to meet this very contingency. Whether that was so or not, it certainly enabled the Secretary of State, when a deterioration in the condition of the patient was brought to his attention, to forestall the patient's discharge by exercising his power under section 71 to refer the patient's case to the tribunal afresh.

Deferring discharge to a specified future date

Neither the Act nor the rules provided any authority for deferring the conditional discharge of a patient to a specified future date. It was impossible for a tribunal which deferred a direction to predict how long it would take to make the necessary arrangements. The decision should simply indicate that the direction was deferred until the necessary arrangements had been made to the satisfaction of the tribunal and specify what arrangements were required, which could normally be done, no doubt, simply by reference to the conditions to be imposed. Whoever was responsible for making the arrangements should then proceed with all reasonable expedition to do so and should bring the matter to the attention of the tribunal again as soon as practicable after it was thought that satisfactory arrangements had been made. Pursuant to rule 25, the tribunal could then decide that the arrangements were to their satisfaction without a further hearing. *Lord Brandon of Oakbrook, Lord Ackner, Lord Oliver of Aylmerton and Lord Goff of Chieveley agreed. Appeal dismissed.*

Commentary

The House of Lords decision in the *Oxford case* is the most important case on a tribunal's powers when reviewing the case of a restricted patient who is liable to be detained in a hospital. Apart from ruling on the nature of the power to defer conditional discharge, it also established the fact that the criteria for discharge are essentially relative, rather than absolute. Lawton L.J. took the opposite view in the Court of Appeal, stating that this was reading something into section 72(1)(b) that was not there. However, according to the decision in the House of Lords, whether or not a tribunal is satisfied that a patient's mental disorder is not of a kind which makes it appropriate for him to remain liable to detention in a hospital for medical treatment will often depend on the conditions of discharge it has in mind. Similarly, whether a tribunal is satisfied that it is not necessary for a patient's health or safety, or for the protection of others, that he receives such treatment will often depend upon the conditions to be imposed. Consequently, to take the Mollie Lord case, the tribunal could not later reconsider or revise the conditions of discharge if the arrangements originally envisaged could not be made: that amounted to reconsidering the decision as to whether she should be discharged at all. The tribunal's decision was that, on the conditions imposed by it, it was not appropriate or necessary for her to be further detained in hospital. Reconsidering those conditions necessarily involved reconsidering whether she should be discharged, that is whether she might satisfy the criteria for discharge on other conditions. Thus, the tribunal was reopening the issue already determined of her entitlement to be discharged under section 73.[33]

Patient's condition deteriorating before arrangements completed

The problem of what to do if a patient's condition declines prior to the arrangements for his discharge being completed was canvassed in each of the above cases, at each stage of the appeals process. Counsel for the Secretary of State submitted to Woolf J. that there was always the Home Secretary's power to recall a patient where that was necessary. On the assumption that a patient cannot be recalled to hospital until he has been discharged from it, and that to attempt to do so before then would be to interfere with the uncompleted judicial process, this was presumably a reference to the patient being immediately recalled upon leaving hospital — the equivalent of a prison gate arrest.[34] The position then forwarded by the Secretary of State in the Court of Appeal was that those responsible for the patient and for making the arrangements would be aware of any deterioration and there would be "no need to do anything more than to say that, in all the circumstances, the arrangements are not satisfactory." That, as Lawton L.J. pointed out, was a pragmatic approach to the problem. It was also a contradictory one because, as the same counsel pointed out at some length, the tribunal's role on reconsidering the case is limited to considering whether satisfactory arrangements which comply with the conditions imposed have been made, not whether the patient is entitled to be discharged. The approach

[33] Where arrangements complying with the conditions imposed by the tribunal cannot be made, there is, of course, nothing to prevent the Home Secretary discharging the patient on alternative conditions: see Mental Health Act 1983, s.73(8).

[34] The Secretary of State's power of recall under section 42(3) is exercisable in respect of a patient "who has been conditionally discharged." As section 73(7) makes clear, a patient is not discharged under section 73 unless and until arrangements for his discharge have been made to the tribunal's satisfaction. Furthermore, discharge may only be deferred until the necessary arrangements have been made, and for no longer and for no other purpose.

amounts to reconsidering the decision to discharge. The answer then given in the House of Lords was that the Secretary of State could refer the patient's case to the tribunal, in which case the direction that he be discharged would be deemed never to have been given. However, it is only when the case actually comes before a fresh tribunal that the previous decision is deemed not to have been made. There are strict limits as to the extent to which any new hearing may be expedited and the patient would be unlikely to consent to the time limits being abridged. So the question might then become whether it was lawful for the previous tribunal to deliberately delay the matter, by refusing to consider whether the conditions it had imposed were now met, in effect subverting its own final decision that the patient be discharged by refusing to implement it. Not to allow it to do so might damage public confidence in the tribunal system by seeming to place the public at unnecessary risk. To allow it to do so might damage public confidence in the tribunal system, by seeming to undermine the impartiality of the tribunal and allowing it to resile on its decisions — the tribunal would be colluding in the patient not being discharged. It seems better therefore to take the position set out by McCullough J. in *R. v. Secretary of State for the Home Department, ex p. K.*[35] In that case, a patient previously conditionally discharged by a tribunal was recalled at the prison gate upon serving a prison sentence for two offences committed following his discharge. It was submitted that what the Secretary of State did was to overturn 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). McCullough J. held that it would 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. However, in K's case, there was nothing in the tribunal's decision to prevent the Secretary of State from alleging that further events had occurred since the tribunal's decision which had a bearing on the question of his mental condition, namely the commission of two serious offences. Accordingly, it was lawful to detain K. at the prison gate and to recall him to hospital. Similarly, if a patient's condition on leaving the hospital gate is such that there is evidence that his condition requires his immediate recall to hospital, recalling him is no more groundless than recalling him two weeks, two months or two years later on exactly the same grounds. All three situations are factually the same in the one material respect — his condition has significantly deteriorated during the period since the decision to discharge him was made and it is unlikely that the same tribunal would now discharge him if his case was before it. They are factually different in one immaterial respect, which is simply how long it has taken the patient to deteriorate since the discharge decision was made. The advantages of this approach are several:

1.) it leaves the power of recall where it belongs, in the Secretary of State's hands, rather than involving tribunals in the recall process, which would undermine the confidence of patients in their impartiality;

2.) it leaves the tribunal's functions as being to discharge patients, including reviewing the justification for their recall to hospital, and discharging them again if appropriate;

[35] *R. v. Secretary of State for the Home Department, ex p. K.* [1990] 1 W.L.R. 168, McCullough J.

3.) it allows for a speedy hearing of the justification for such an exceptional recall — the Secretary of State can immediately refer the patient's case back to the tribunal and both he and the patient can consent to the usual time limits being abridged, so that a speedy hearing is held;

4.) it may be possible for the satisfactory arrangements already made for the patient's discharge to be kept open if the case can be dealt with quickly;

5.) it represents a reasonable balance of the need to protect the public and the need to protect the patient's interests, and to generally give effect to tribunal decisions in all but the most exceptional circumstances.

Secretary of State's powers prior to discharge

During the deferral period, the patient remains liable to be detained and the Secretary of State has his usual powers in respect of such patients. In particular, he may consent to the patient being granted leave of absence while the necessary arrangements for his discharge are being made. Although he has power to impose further conditions of discharge or to vary the conditions of discharge, these powers are not exercisable until the patient has actually been discharged.[36] Thus, the Home Secretary cannot impose further conditions or vary the conditions while the arrangements stipulated by the tribunal are being made. That would throw the process into complete confusion. On considering whether satisfactory arrangements had been made which complied with the conditions imposed by it, the tribunal would find that those conditions no longer existed and that alternative arrangements had been made.

RECOMMENDATIONS AND RESTRICTED CASES

Unless a tribunal is satisfied that the patient comes within the statutory grounds for discharge set out in section 73(1), it may not discharge the patient. This limitation naturally leads on to the issue of whether a tribunal has any powers short of discharge. In particular, whether it may recommend under section 72(3) that the patient be granted leave of absence, transferred to another hospital, or transferred into guardianship, and further consider his case in the event that its recommendation is not complied with.

Application of section 72(3) in restricted cases

Section 72(7) provides that section 72(1) shall not apply in the case of a restricted patient except as provided in sections 73 and 74. The wording is superficially ambiguous insofar as it implies that the other subsections in section 72 do apply, including, where a patient is not discharged, the power to make recommendations and to reclassify him. The point was considered in the following cases and it was resolved that this is not in fact so. Consequently, a tribunal's powers are limited to those conferred by section 73. It has a duty to discharge in certain circumstances, otherwise no powers at all. The subsections of section 72 referred to in the judgment below are set out on pages 482 and 483.

[36] If a tribunal's direction for a patient's conditional discharge has been deferred then, by definition, he has not yet been conditionally discharged. Consequently, subsections 73(4) and (5) do not apply.

Grant v. The Mental Health Review Tribunal for the Trent Region
The Queen v. The Mersey Mental Health Review Tribunal ex p. O'Hara

The Times, 26 April 1986 *McNeill J.*

The two matters raised substantially the same point and were heard together, with the parties' consent.

Grant

In Grant, the tribunal received evidence that the patient, who was detained at a special hospital, would be accepted on transfer at a local NHS hospital. The tribunal's view was that such a transfer was appropriate. However, it did not consider that it had any statutory power to make such a recommendation and declined to do so. The tribunal was asked to state a case, pursuant to section 78(8) of the Mental Health Act 1983. The question of law for the opinion of the court was whether a tribunal considering an application made by a restricted patient had the power to make a statutory recommendation for his transfer to another hospital under section 72(3) and to further consider his case in the event that its recommendation was not complied with.

O'Hara

In O'Hara's case, the patient's solicitor conceded at the outset that he was not in a position to put forward evidence which would justify the patient's discharge. However, the responsible medical officer recommended his transfer from the special hospital where he was detained to a local NHS hospital. The question again raised was whether, when dealing with a restricted patient, a tribunal had power to go beyond the express provisions of section 73 — including such parts of section 73 as expressly incorporated provisions of section 72 — and to exercise the power to make a recommendation in section 72(3).

McNeill J.

Although an advisory role in terms of a power to make recommendations existed under section 74 in the case of patients subject to restriction directions, and there was a similar power to make recommendations in respect of unrestricted patients under section 72(3), there was no similar provision in section 73. It therefore seemed that Parliament did not intend tribunals to have such an advisory role when considering the case of a detained patient who was subject to a restriction order.

MHA 1983, s.72(6)

Section 72(6) provided that subsections (1) to (5) — which dealt with the mandatory and discretionary discharge of patients and the making of recommendations and reclassification of those not discharged — "apply in relation to references to a Mental Health Review Tribunal as they apply in relation to applications made to such a tribunal by or in respect of a patient." The effect and purpose of the subsection was nothing more than that if the preceding subsections applied to tribunal proceedings commenced by application, they applied equally to those commenced by way of reference. The intention was not that the whole of section 72 applied to restricted patients.

MHA 1983, s.72(7)

Section 72(7) provided that subsection (1) "shall not apply in the case of a restricted patient except as provided in sections 73 and 74 below." The intended

effect was not that all of the subsections in section 72 other than subsection (1) applied to restricted patients. The effect was simply to make it clear that, subject to the express incorporation of sub-paragraphs 72(1)(b)(i) and (ii) in section 73, section 72(1) only applied to applications made by or in respect of a "patient." It did not to applications made by "restricted patients" as defined by section 79.

MHA 1983, s.72(5) — reclassification

Although it had been contended that the power of reclassification conferred by section 72(5) was relevant both to unrestricted and to restricted patients, and its applicability in all cases was suggested by the absence of any comparable provision in section 73, such a provision would be unnecessary in unrestricted cases. A restriction order was "a further order" upon a hospital order and a change in a patient's mental condition did not involve any variation of a restriction order. Moreover, even if section 72(5) did apply to restricted patients, it did not support the contention that section 72(3) did.

MHA 1983, s.72(3) — recommendations

It was noteworthy that the subsection 72(3) authorised a tribunal to direct the patient's discharge on a future date and it was only if immediate or future discharge was declined that the power to make a recommendation under that subsection arose. That section 72(3) did not apply in restricted cases was clear given that this power of future unqualified discharge was irreconcilable with the power conferred on tribunals under section 73(7) to defer giving a direction for a restricted patient's discharge. Parliament plainly intended to repose wider powers on a tribunal dealing with an unrestricted patient.

MHRT Rules 1983, r.25

Although rule 25 provided for a tribunal reconvening a restricted patient's case if its recommendation was not complied with, this apparent inconsistency in a statutory instrument could not confer a jurisdiction not given in the governing statute. Nor could the wording of the rules be a guide to the construction of the statute. While rule 25(2) was not *ultra vires*, its effect was limited to the circumstances in which the statute empowered making a recommendation and to an extent it was procedural. In summary, the statute neither expressly nor by implication empowered a tribunal dealing with the case of a restricted patient to exercise the power given to it by section 72(3) in unrestricted cases. While the Secretary of State could request, or a tribunal offer, informal advice, there was no statutory power requiring or authorising that. *Applications dismissed*

Commentary

The 1983 Act was a consolidating Act and the present provisions repeat those set out in Schedule 1 to the Mental Health (Amendment) Act 1982. The benefit of consulting that statute is that the drafting is much clearer. All of the tribunal provisions which apply to restricted patients are set out in the Schedule while those which apply to unrestricted patients are set out in the body of the Act. Thus, there can be little confusion about which powers apply in which type of case. It is noticeable that the Schedule does not include any power to make recommendations and the decision in *Grant* was therefore clearly the correct one. Furthermore, since a restricted patient cannot be transferred into guardianship, it is difficult to see how any other interpretation is tenable.[37]

[37] That being one of the recommendations that can be made under section 72(3). See Mental Health Act 1983, ss. 41(3), 55(4) and 145(3); Sched. 1, Pt. II, paras. 2 and 5.

RECLASSIFICATION IN RESTRICTED CASES

Apart from the power to make recommendations, the other power possessed by a tribunal which does not discharge an unrestricted patient is that of reclassifying his condition. The nature and limits of this power have already been considered (**499**). However, a further issue, to be addressed here, is whether that power extends to tribunal proceedings involving restricted patients.

RECLASSIFICATION — SECTION 72(5)

72.—(5) Where application is made to a Mental Health Review Tribunal under any provision of this Act by or in respect of a patient and the tribunal do not direct that the patient be discharged *or, if he is (or is to be) subject to after-care under supervision, that he cease to be so subject (or not become so subject)*, the tribunal may, if satisfied that the patient is suffering from a form of mental disorder other than the form specified in the application, order or direction relating to him, direct that that application, order or direction be amended by substituting for the form of mental disorder specified in it such other form of mental disorder as appears to the tribunal to be appropriate.

(6) Subsections (1) to (5) above apply in relation to references to a Mental Health Review Tribunal as they apply in relation to applications made to such a tribunal by or in respect of a patient.

(7) Subsection (1) shall not apply in the case of a restricted patient except as provided in sections 73 and 74.

Case law

The question of whether a tribunal may reclassify a restricted patient was touched upon but not resolved in *Grant v. The Mental Health Review Tribunal for the Trent Region* (**549**). However, McNeill J. appeared to have reservations about whether such a power existed. More recently, leave to apply for judicial review of a tribunal's decision on the ground that it had reclassified a restricted patient when it had no such power was refused.

R. v. South West Thames Mental Health Review Tribunal, ex p. P.D.

FC3 95/6604/D, 12 June 1996 *C.A. (Aldous, Phillips and Potter L.JJ.)*

The patient was liable to be detained in pursuance of a hospital order and a restriction order. The form of disorder recorded on the hospital order was mental impairment. In December 1992, a tribunal which did not discharge the patient considered and rejected the responsible medical officer's argument that he should be reclassified as suffering only from a psychopathic disorder. According to the written reasons for its decision, the tribunal was satisfied that the patient continued to suffer from mental impairment and there were no grounds for reclassification. Another tribunal considered the patient's case in September 1994 and it had before it reports from the patient's new responsible medical officer and from a psychiatrist instructed by the patient. The tribunal did not direct the patient's discharge but it did direct that "the patient be reclassified by substituting for the present form of mental disorder, namely mental impairment, psychopathic disorder."

The patient's application for judicial review

The patient's application for judicial review was founded on three principle grounds. Firstly, that a tribunal has no power to reclassify a restricted patient as suffering from some form of mental disorder other than that specified by the sentencing court in the original hospital order. Secondly, if it had such a power, it was nevertheless bound by the decision of the earlier tribunal to the contrary because there had been no change of circumstances or new evidence of psychopathic disorder since that time. Thirdly, the reasons given for the tribunal's decision to reclassify were inadequate and/or were Wednesbury unreasonable. Leave to apply for judicial review on these grounds was refused and the patient appealed against this refusal.

Aldous L.J.

The first submission was that the tribunal had no power to reclassify a restricted patient. Although section 72 was in wide terms, the powers to deal with restricted patients were to be found in section 73. The judge considered that submission and said that the submission that the exercise of jurisdiction by the tribunal under section 72(5) was *ultra vires* was, in his opinion, an unarguable proposition: "It seems to me having regard to the total terms in which that section is couched and having regard to the remainder of the relevant provisions of the statute, section 72(5) is the appropriate vehicle for dealing with the reclassification of patients detained in a mental hospital, whether under compulsory detention by way of order of the court or otherwise." That seemed to be the right conclusion, particularly when one took into account section 72(7).

Whether the patient should have been exercised

The argument that any power to reclassify the patient should not have been exercised in the absence of some new circumstances amounted to a submission that the earlier tribunal's conclusion concerning the patient's condition constituted a judicial finding that was *res judicata* or analogous thereto. There could not be res judicata in these cases. A tribunal had its statutory duty to perform and it could not avoid that by accepting a submission that it was bound to follow another tribunal's decision, even if there had been no change of circumstances. It must apply itself and come to its own decision. In each case there must inevitably be an update on the patient's condition. It was right that a tribunal should apply its mind to the matters before it and not feel itself fettered by a previous decision, but of course pay due regard to it.

Whether the reasons for the decision were adequate

A decision to reclassify a patient was an important decision and the tribunal set out five paragraphs of reasons as to why it had decided to do so. However, it was arguable that the reasons given for reclassifying the patient were inadequate or, if adequate, showed that the tribunal had not turned its mind to the relevant legal matters that had to be considered under the statute. The matter was sufficiently arguable for leave to be granted. *Phillips and Potter L.JJ. agreed. Leave to appeal granted.*

Commentary

Whether the court was referred to the decision in *Grant*, in particular in relation to the effect of section 72(7), and what arguments were advanced, is not recorded in the Court of Appeal transcript. However, for the reasons given below, it is submitted that the decision on the substantive point of whether a restricted patient may be

reclassified is extremely difficult to sustain. The point therefore deserves to be fully argued.

Mental Health Act 1959

Restricted patients could not be reclassified under the 1959 Act, whether by their responsible medical officer, the Secretary of State, or by a tribunal advising the Home Secretary as to the exercise of his powers.[38] The reason for this limitation cannot have been that a restricted patient's classification had no bearing on the duration of the orders, that liability not requiring periodic renewal. This is because a patient's classification similarly had no bearing on the duration of a hospital order without restrictions and the renewal criteria did not refer at all to the form of disorder from which an unrestricted patient was suffering. The main reason for extending the provisions to unrestricted hospital order patients appears to have been to enable them to apply to a tribunal for their discharge if the original grounds for their detention were considered to no longer hold good (**499**). Restricted patients had no power to apply to a tribunal under the 1959 Act and tribunals had no power to discharge them. Their only right was to periodically require the Secretary of State to refer their cases to a tribunal for advice. There was, however, no point in giving advice about the correctness of the patient's formal classification, because neither the Secretary of State nor any other person had any power to reclassify.

Mental Health (Amendment) Act 1982

The 1982 Act conferred tribunals with power to discharge restricted patients, so the issue becomes whether, in giving tribunals this power, Parliament also intended to confer on them a power to reclassify restricted patients whom they did not discharge.

The argument in favour of such a power

In favour of the contention that tribunals have a power of reclassification in restriction order cases is the reference in section 72(5) to applications made "under any provision of this Act by or in respect of a patient" — although, according to the *Grant case*, the use of the term a "patient" in section 72 but a "restricted patient" in section 73 is significant and represents a deliberate limitation.

The arguments against such a power

Notwithstanding the refusal of leave in *ex p. P.D.*, there are weighty arguments against any interpretation that the statute empowers tribunals to reclassify restricted patients—

- In the first place, it remains the case that neither the Secretary of State nor a restricted patient's responsible medical officer have any power to reclassify. Hence, one needs to establish some reason why Parliament intended that restricted patients should only be reclassified by tribunals. That is because the limitation that only a tribunal had a certain power would be unique within the statutory framework.

[38] Mental Health Act 1959, ss. 38(1), 65(3), 66(6), 123(4), 147(4), Third Schedule.

- Secondly, in *Grant v. Mental Health Review Tribunal*,[39] the court held that section 72(7) did not have the effect that section 72(3) — the power of a tribunal to make recommendations in unrestricted cases — was incorporated into section 73: the powers specified in section 72 were powers expressed to be exercisable in respect only of "patients," not "restricted patients" as defined by section 79. The section was only relevant to restricted patients insofar as expressly incorporated by subsequent sections specifying a tribunal's powers in respect of them. Furthermore, as Neill J. observed, although there was no comparable reclassification provision in section 73, that was because such a provision would be unnecessary. It is difficult to see how section 72(7) can possibly be read as stating that subsection 72(5) but not subsection 72(3) applies to cases determined under section 73.

- Thirdly, the proper construction of the statute tends against any such view. The 1983 Act was a consolidating Act and the present provisions repeat those introduced by Schedule 1 to the Mental Health (Amendment) Act 1982. The benefit of consulting that statute is that the new tribunal powers concerning restricted patients were set out in the schedule while those applicable in unrestricted cases were set out in the body of the Act. Thus, there could be little confusion about which powers applied to which type of case. Section 28(4) of the 1982 Act provided that Schedule 1 had effect "for enabling persons who are subject to restriction orders or restriction directions to be discharged by Mental Health Review Tribunals ..." Schedule 1 conferred on tribunals the present power to discharge, absolutely or conditionally, but no power to reclassify restricted patients who were not so discharged. Section 28(4) did not state that Schedule 1 had effect for enabling restricted patients "to be discharged" by tribunals and the pre-existing power to reclassify unrestricted patients in subsection 123(3) was also to be lifted out from that section and added to the new powers specified in the schedule.

- Fourthly, it seems clear that section 72(5) does not apply to cases dealt with under section 74. A tribunal's powers in such cases are limited to notifying the Secretary of State whether the patient meets the statutory grounds for discharge and a power which arises only when a tribunal does not discharge cannot possibly apply. One therefore needs to establish some reason why Parliament intended that a patient subject to a restriction order, but not a patient subject to a restriction direction, may be reclassified by a tribunal. There appears to be no reason and, indeed, one would expect the opposite to be the case if any distinction was to be drawn.[40]

- Fifthly, restricted patients dealt with under the Criminal Procedure (Insanity) Act 1964 have no classification under the 1983 Act. Although tribunals quite often do it, it is difficult to see how these patients can be "reclassified."

[39] *Grant v. The Mental Health Review Tribunal for the Trent Region; R. v. The Mersey Mental Health Review Tribunal ex p. O'Hara, The Times*, 26 April 1986 (549).

[40] This is because only patients who suffer from a major form of mental disorder may be transferred to hospital under section 48. Hence, the patient's classification might be of some relevance in such cases. See *Re V.E. (mental health patient)* [1973] 1 Q.B. 452 (577). Likewise, when section 45A is brought into force, that power is only exercisable in respect of offenders who suffer from a psychopathic disorder.

- Sixthly, the power of reclassification in section 72(5) is a discretionary power and the general view is that a tribunal's powers in restricted cases do not permit the exercise of any discretion. They have a duty to discharge in certain circumstances, otherwise no powers at all. All in all, one is drawn to the conclusion that it is highly improbable that Parliament intended to confer on tribunals a power to reclassify restricted patients.

DETAINED PATIENTS SUBJECT TO RESTRICTION OR LIMITATION DIRECTIONS

- *Section 45A provides that 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") (398).*[41]

- *Section 47 provides that the Secretary of State may by warrant direct the transfer to hospital of a patient who is serving a sentence of imprisonment. Section 48 similarly provides that the Secretary of State may remove to hospital certain other categories of detained persons, such as defendants remanded in custody pending trial. In each case, the Secretary of State may, and in some cases must, also give a restriction direction under section 49 (383).*

A tribunal's powers are further restricted when it deals with the case of a patient who is subject to a restriction direction and, following the implementation of section 45A, a limitation direction. The reason for this is that there are two authorities for the patient's detention — the earlier of them authorising his detention in prison or some other place of custody, the later authorising his removal from that place and his detention in a hospital for treatment. The fact that a tribunal is satisfied that the usual statutory grounds for detaining and treating such a person in hospital are no longer satisfied may be a reason for not further detaining him there. However, the fact that he no longer requires hospital treatment is not a reason *per se* for also releasing him from the prior authority for his detention in prison.

STATUTORY POWERS

A tribunal's powers in such cases are set out in section 74 of the Act, which is set out below.

[41] Mental Health Act 1983, s.45A(3), as inserted by Crime (Sentences) Act 1997, s.46. The section was brought into force on 1 October 1997 (398).

All patients

74.—(1) Where an application to a Mental Health Review Tribunal is made by a restricted patient who is subject to [a limitation direction or] a restriction direction, or where the case of such a patient is referred to such a tribunal, the tribunal—

Notification of whether the criteria for absolute or conditional criteria are satisfied

(a) shall notify the Secretary of State whether, in their opinion, the patient would, if subject to a restriction order, be entitled to be absolutely or conditionally discharged under section 73 above (**514**); and

Recommendations concerning patients who satisfy the criteria for conditional discharge

(b) if they notify him that the patient would be entitled to be conditionally discharged, may recommend that in the event of his not being discharged under this section he should continue to be detained in hospital.

Section 47 patients

Secretary of State giving notice that patient may be discharged

(2) If in the case of a patient not falling within subsection (4) below—
(a) the tribunal notify the Secretary of State that the patient would be entitled to be absolutely or conditionally discharged; and
(b) within the period of 90 days beginning with the date of that notification the Secretary of State gives notice to the tribunal that the patient may be so discharged,
the tribunal shall direct the absolute or, as the case may be, the conditional discharge of the patient.

Transfer to prison where no such notice is given unless tribunal recommended otherwise in the case of a patient who satisfied the criteria for conditional discharge

(3) Where a patient continues to be liable to be detained in a hospital at the end of the period referred to in subsection (2)(b) above because the Secretary of State has not given the notice there mentioned, the managers of the hospital shall, unless the tribunal have made a recommendation under subsection (1)(b) above, transfer the patient to a prison or other institution in which he might have been detained if he had not been removed to hospital, there to be dealt with as if he had not been so removed.

Section 48 patients

Immediate remission to custody of patients satisfying absolute discharge criteria and, unless tribunal has recommended otherwise, of patients who satisfy the criteria for conditional discharge

(4) If, in the case of a patient who is subject to a transfer direction under section 48 above, the tribunal notify the Secretary of State that the patient would be entitled to be absolutely or conditionally discharged, the Secretary of State shall, unless the tribunal have made a recommendation under subsection (1)(b) above, by warrant direct that the patient be remitted to a prison or other institution in which he might have been detained if he had not been removed to hospital, there to be dealt with as if he had not been so removed.

SUMMARY OF POWERS

A tribunal must approach the case as if the patient was subject to a restriction order rather than a restriction or limitation direction. It must therefore apply the section 73 discharge criteria applicable in such cases and reach a finding as to whether, if that was the case, it would be obliged to direct the patient's absolute or conditional discharge (**515 et seq.**). It must notify the Home Secretary of its finding. What then happens depends upon whether the patient is serving a sentence of imprisonment or is instead detained under section 48.

Restriction direction patients detained under section 48

Where a tribunal notifies the Home Secretary that a restricted patient detained under section 48 satisfies the criteria for absolute discharge, the Secretary of State must direct that the patient be remitted to prison or such other institution in which he might have been detained had he not been removed to hospital. Where a tribunal instead notifies the Home Secretary that the patient satisfies the criteria for conditional discharge then, similarly, the Secretary of State shall remit him to custody under section 74 unless the tribunal also "recommended" that the patient should continue to be detained in hospital.

The rationale behind the tribunal's powers

While it may be appropriate to return to prison a patient who satisfies the criteria for being discharged from the hospital to which he was removed, there is often an important distinction between patients who meet the criteria for absolute discharge and those who only satisfy the criteria for conditional discharge. In the latter case, the patient may merely be in remission. Returning him to the prison where his health deteriorated may only serve to bring about a relapse and a second removal to hospital in the not too distant future. The Act therefore enables a tribunal to "recommend" that the patient remains in hospital rather than be remitted to custody. In other cases, the main reason for a tribunal's finding that the patient would, if subject to a restriction order, only be discharged on conditions does not stem from any fear that his health will deteriorate if he is returned to prison. It reflects instead a belief that conditions of residence and supervision would be necessary in order to protect the public if the patient was in the community. Consequently, a tribunal is not bound to recommend that a patient not be remitted to prison.

Restriction direction patients detained under section 45A or 47

Serving prisoners are in a somewhat more favourable position. Where a tribunal notifies the Secretary of State that the patient satisfies the criteria for absolute discharge, the tribunal shall so discharge the patient if, within the following 90 days, the Secretary of State serves notice on the tribunal that the patient may be absolutely discharged. Otherwise, at the expiration of that period, the managers of the hospital must transfer the patient to prison, or to such other institution in which he might have been detained had he not been removed to hospital. Where a tribunal notifies the Secretary of State that a patient satisfies the criteria for conditional discharge, it may also "recommend" that he continue to be detained in hospital if the Secretary of State does not give notice that he may be conditionally discharged by the tribunal. If the Secretary of State serves notice on the tribunal within 90 days that the patient may be so discharged, the tribunal shall direct his conditional discharge. Failing this,

the managers must transfer the patient to prison at the expiration of that period, unless the tribunal "recommended" otherwise. A tribunal which directs a patient's conditional discharge in accordance with the Secretary of State's notice may where necessary defer its direction until satisfactory arrangements have been made which enable the conditions of discharge to be complied with.

The rationale behind the tribunal's powers

It can be seen that the Act distinguishes between persons serving a sentence of imprisonment and persons in custody for some other reason. In the former case, the prisoner may be nearing the end of his sentence by the time a tribunal considers his case, in which case the restrictions will shortly cease to have effect anyway. If he is fit to be absolutely discharged from hospital, it may be inappropriate to return him to prison to serve out the short residual part of his sentence, the more so because that is the place where his mental health broke down. In other cases, there may be advantages in conditionally discharging a prisoner into the community under the 1983 Act rather than under licence. Allowing a patient to be discharged under the supervision of the professionals with experience in dealing with people who have psychiatric problems may, in particular, confer a greater measure of protection for the public. The position of patients transferred under section 48 is materially different. Most of these patients will have been transferred to hospital during the course of criminal proceedings before the Crown Court or a magistrates court and still be awaiting trial or sentence.

The effect of absolute discharge

Where a patient detained under section 45A or 47 is absolutely discharged under section 74, he ceases to be liable to be detained by virtue of the relevant hospital or transfer direction and the restrictions accordingly also cease to have effect.[42] The patient not having been remitted to prison to serve out his sentence, he is discharged into the community.

The effect of conditional discharge

The effect of conditional discharge is the same as that where a patient subject to a restriction order is conditionally discharged. The patient remains liable to recall to hospital for further treatment and he must comply with any conditions of discharge imposed by the tribunal or subsequently by the Secretary of State.[43] The latter may from time to time vary any existing conditions of discharge.[44] Unless the patient is serving an indeterminate (life) sentence, his sentence will eventually expire. If the patient is still conditionally discharged at that time, because he has not been recalled to hospital during the intervening period, he is deemed to be absolutely discharged on that day.[45] If, having been recalled, he is again liable to be detained in hospital for treatment, the restrictions cease to have effect on that date.[46] However, in this case, the patient remains liable to be detained in hospital for treatment. More particularly, he is treated as if he had been admitted to that hospital under a "new" notional hospital order made without restrictions on the date his sentence expired.[47] He may

42 Mental Health Act 1983, ss.74(6) and 73(3).
43 *Ibid.*, ss.74(6) and 73(4).
44 *Ibid.*, ss.74(6) and 73(5).
45 *Ibid.*, ss.74(6) , 73(6), 50(2)–(4).
46 *Ibid.*, s.50(2).
47 Mental Health Act 1983, ss.41(5) and 55(4).

apply to a tribunal during the following six months[48] and, if the hospital order is then renewed, he may thereafter make one further tribunal application during each six or twelve month period he remains liable to be detained. The final situation to be considered is that where a restriction or limitation direction patient is recalled to hospital prior to the expiration of his sentence. He is again liable to be detained subject to restrictions and the Home Secretary must refer his case to a tribunal.[49] The somewhat unsatisfactory effect is that the tribunal must again deal with his case under section 74. Consequently, his transfer back to prison at this late stage again becomes a possibility albeit that it was not a possibility while he was discharged.[50]

RESTRICTION DIRECTION CASES — SUMMARY OF PROVISIONS

Tribunal's findings, etc.	*Section 45A & 47 patients*	*Section 48 patients*
▪ *Patient does not satisfy the discharge criteria.*	Patient remains in hospital.	
▪ *Patient satisfies criteria for conditional discharge — MHRT recommends that patient not be remitted to custody as a result of its finding.*	Tribunal directs patient's conditional discharge if Secretary of State gives notice within 90 days that it may do so; otherwise patient remains in hospital.	Patient remains in hospital.
▪ *Patient satisfies criteria for conditional discharge — MHRT makes no recommendation about remission to custody.*	Tribunal directs patient's conditional discharge if Secretary of State gives notice within 90 days that it may do so; otherwise patient transferred to prison.	Patient remitted to custody — 90 day rule does not apply.
▪ *Patient satisfies the criteria for absolute discharge.*	Tribunal directs patient's absolute discharge if Secretary of State gives notice within 90 days that it may do so. Otherwise patient transferred to prison.	

The effect of remission to prison

Where a restricted patient detained under section 45A, 47 or 48 is transferred or remitted to prison under section 74, the transfer direction and the restriction direction, or the hospital direction and the limitation direction as the case may be, cease to have effect on his arrival in the prison or other institution.[51]

48 *Ibid.*, s.69(2)(a). It is submitted that any tribunal application outstanding on the date the restrictions cease is deemed to have been withdrawn (**648**).
49 *Ibid.*, s.75(1)(a).
50 See the wording of section 75(1)(b).
51 Mental Health Act 1983, s.74(5).

Recommendations and reclassification

It is clear that a tribunal which deals with the case of a patient who is subject to a restriction or limitation direction has no power to make recommendations. Nor would it seem to have any power to reclassify the patient (**554**).

THE HOME SECRETARY'S POWERS

The Home Secretary's powers under sections 42 and 50–53 apply in the usual way to patients who are not discharged under section 74.[52] This means that a patient who is not discharged under section 74 may still be absolutely or conditionally discharged by the Secretary of State under section 42, and he may similarly direct that the restriction or limitation direction shall cease to have effect in respect of a patient who has not been discharged. Conversely, if the patient is not discharged or remitted to prison under section 74, he may still be remitted to prison by the Secretary of State under sections 50–53 in the circumstances set out there. One of these circumstances is that he has been notified by a tribunal that the patient "no longer requires treatment in hospital for mental disorder or that no effective treatment for his disorder can be given in the hospital to which he has been removed" (**386**).[53] This must be why section 74 refers to a tribunal recommending, rather than directing, that a patient shall not be remitted to prison.

LIFE SENTENCE PRISONERS

It has been noted that where a person serving a determinate sentence is removed to hospital, the restriction direction will cease to have effect on the date on which the sentence expires. In the case of persons serving a sentence of life imprisonment it is necessarily the case that the restrictions cannot lapse in this way. The patient therefore remains subject to the restriction or limitation direction unless and until he is either absolutely discharged, remitted to prison or released on licence. The matter is further complicated by the fact that the release into the community of persons serving life imprisonment is usually by way of life licence. There are therefore two possible routes back into the community: (1) release on life licence; (2) absolute or conditional discharge under the 1983 Act. The inter-relationship of the two schemes has already been summarised (**390**).

CONDITIONALLY DISCHARGED PATIENTS

The powers of a tribunal when determining an application or reference by a conditionally discharged patient are set out in section 75(3) of the Act. The tribunal may vary the existing conditions, impose a fresh condition of discharge, or direct that the restriction order or direction shall cease to have effect, in which case the patient also ceases to be subject to the associated hospital order or transfer direction.[54] A further

52 Mental Health Act 1983, ss. 74(6), 74(7) and 73(8).

53 In this respect, patients remanded in custody by a magistrates court and then removed to hospital under sections 48 and 49 are in a more favourable position than other restriction direction patients. Prior to committal to the Crown Court, the Secretary of State cannot remit them to prison except in the circumstances permitted by section 74.

54 As to whether this power to terminate the restrictions, and thereby to bring the relevant orders or directions to an end, extends to patients subject to limitation directions, see page 563.

option is, of course, to give no direction at all, in which case the existing conditions of discharge will continue as if there had been no tribunal hearing at all.

CONDITIONALLY DISCHARGED PATIENTS

Tribunal's discretionary powers

"**75.**—(3) Sections 73 and 74 shall not apply to an application [by a conditionally discharged patient] under subsection (2) above but on any such application the tribunal may—

(a) vary any condition to which the patient is subject in connection with his discharge or impose any condition which might have been imposed in connection therewith; or

(b) direct that the restriction order or restriction direction to which he is subject shall cease to have effect;

and if the tribunal give a direction under paragraph (b) above the patient shall cease to be liable to be detained by virtue of the relevant hospital order or transfer direction."

THE ABSENCE OF STATUTORY CRITERIA

Section 75 provides that sections 73 and 74 shall not apply to applications by conditionally discharged patients. A patient who has already been conditionally discharged cannot, strictly speaking, then be absolutely discharged so neither of the discharge powers exercisable under section 73(1) are relevant to the patient's situation. Nevertheless, it is noteworthy that section 75 does not impose a duty on a tribunal to direct that the restrictions shall cease to have effect even where satisfied that it is not appropriate for the patient to remain liable to be recalled to hospital for further treatment. The drafting of section 75(3) carefully avoids giving the patient any entitlement to have the restrictions terminated. There is no statutory test which, if satisfied, obliges their termination and the section avoids using any of the words previously used in section 72 or 73 which might require a tribunal to give a particular direction — "shall," "necessary," "appropriate," "justified," and so forth. Given the absence of any statutory criteria, no burden of proof can exist because there is no statutory issue to be determined to which it could relate. It is not a case of being satisfied or not satisfied about certain issues or facts. The tribunal may simply do or not do any of the things listed in section 75(3) and which kind of order it makes, if any, is a matter for the tribunal's discretion. That discretion is completely unfettered by statute and its scope is similar to that vested in the Home Secretary when exercising his powers, which are similarly unfettered by statute. Provided that a tribunal does not exercise its discretion in a manner which is "Wednesbury unreasonable" or wholly inconsistent with the purposes and objects of the statute, its decision is not susceptible to judicial review. The question arises of why the "appropriateness of liability to recall" test in section 73(1)(b) is not incorporated into section 75, given that decisions about what is appropriate are largely subjective and, as *ex p. Cooper* shows, virtually unreviewable. As a matter of logic, Parliament must have conceived of some situation in which the facts might seem to a tribunal to require it to terminate the restrictions because it was not appropriate for the patient

to remain liable to recall to hospital *for further treatment.* The most likely explanation is that Parliament had in mind the case of a patient who, although said to have been "cured" of his mental disorder and therefore not to be in need of further in-patient treatment in the future, nevertheless remained dangerous. A similar predicament might arise if the condition of a person suffering from a psychopathic disorder was not now considered to be treatable in a hospital. It might also arise as a result of legal as well as clinical changes; as where, a sex offender dealt with under the 1959 Act was not considered to suffer from a psychopathic disorder as defined by the 1983 Act.[55] The tribunal's opinion in each case being that there was no possibility of the patient requiring further in-patient treatment in the future, it might feel constrained to take the view that it could not possibly be appropriate for him to remain liable to be recalled to hospital for further treatment. It might then consider itself to be under a duty to terminate the restrictions — even though it was also of the opinion that the patient was dangerous and that the protection of the public required his continued supervision in the community. Whether the restrictions should be terminated is therefore a matter for the tribunal's unfettered discretion. The fact that events since the patient has left hospital demonstrate that further in-patient treatment is unnecessary is not determinative.

VARYING OR IMPOSING CONDITIONS

A tribunal which decides that a patient should remain conditionally discharged may vary any condition to which he is subject in connection with his discharge or impose any condition which might have been imposed in connection therewith. Two points may be noted. Although a tribunal cannot direct a patient's recall to hospital, it would appear to be lawful for it to impose a more stringent regime of supervision in the community. This is necessarily the effect of imposing an additional condition on him. That being so, it must also be the case that it may tighten up the regime by varying an existing condition of his discharge. For example, by requiring him to attend out-patient appointments weekly instead of monthly. The only argument that can be advanced against this proposition is that the Act in its original form demonstrates a principle that tribunals cannot further restrict a person's freedom. They can only relax the element of compulsion to which he is subject or leave it unchanged. This always used to be the position in relation to unrestricted patients, who could apply to a tribunal safe in the knowledge that, if their application was refused, they would not at any rate be in a worse position. This was, and to the extent that it still holds good is, an extremely valuable principle, because patients might otherwise be afraid to apply to the very judicial body set up to safeguard their liberty. Nevertheless, the wording of section 75 is clear and the statutory framework for restricted patients is distinctive. The policy and objects of the Act in their case 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.[56] It seems probable that section 75 is to be understood as representing a similar balance of these competing interests. On the one hand, the tribunal may not cancel the patient's status as a discharged patient and it may direct

[55] See *R. v. Secretary of State for the Home Department, ex p. K.* [1991] 1 Q.B. 27 for an illustration of this type of case. The medical evidence in that case was unanimously of the view that the patient did not have a psychopathic disorder as defined by the 1983 Act but he had a history of serious sexual offending, which included recent offences.

[56] See *R. v. Secretary of State for the Home Department, ex p. K.* [1991] 1 Q.B. 27, *per* McCowan L.J., approving dicta of McCullough J. in *R. v. Secretary of State for the Home Department, ex p. K.* [1990] 1 W.L.R. 168 at 174.

that he shall cease to be subject to the special restrictions. On the other hand, if he is to remain in the community as a supervised patient, it may impose further conditions or vary the existing conditions. There is no qualification of the kind found in section 72(3), namely that the conditions may only be varied with a view to facilitating the patient's absolute discharge on a later date. Furthermore, while the imposition of a more stringent regime may often be resented, and seem punitive to the patient, it is in his interests that such a power exists if the imposition or variation of conditions is necessary in order to minimise the possibility of relapse, or of an incident or concerns arising which would lead to his recall. The second point to note is that while a tribunal may vary an existing condition, or impose an additional condition, on a strict reading of section 75(3) it may not direct that an existing condition shall cease to have effect. However, on a similarly strict reading of the statutory provisions, the Home Secretary similarly has no such power, nor indeed may he vary conditions previously imposed by himself under section 42. Varying the conditions must therefore be given a general meaning and taken to include directing that a particular condition or conditions shall no longer have effect.

Whether any conditions cannot be varied

For reasons already given, it is necessarily the case that a tribunal cannot vary the conditions of discharge by directing that the patient shall cease to be liable to recall by the Secretary of State. Such liability is part of the statutory scheme and means that the discharge of any restricted patient is always conditional, even if he is not subject to any express conditions of discharge (**535**). Accordingly, in *ex p. Ruff,* a tribunal's direction that the conditions of a patient's discharge be varied, so that he no longer be liable to recall, was quashed by consent.[57]

Patients in prison

Where a conditionally discharged patient reoffends, the Home Secretary usually allows the consequential criminal proceedings to run their course unless the patient is granted bail. This may mean that a future tribunal hearing takes place in prison. *R. v. Secretary of State for the Home Department, ex p. K*[58] contains an example of the kind of approach taken in such circumstances. The decision of the tribunal in that case was that "no direction be made, save that the conditions of discharge be varied to provide that the conditions as to residence, attendance for out-patient treatment, and supervision by a Probation Officer and Consultant Psychiatrist be suspended until the day of the patient's release from prison."

PATIENTS SUBJECT TO LIMITATION DIRECTIONS

Insofar as relevant, section 75(1)(b) of the 1983 Act, as amended by the Crime (Sentences) Act 1997, provides that, following a restricted patient's recall to hospital, "section 70 above shall apply to the patient as if the relevant hospital order, *hospital direction* or transfer direction had been made on that day."[59] That subsection has been amended by inserting the italicised words. Those words both involve and represent a recognition that some conditionally discharged patients recalled to hospital will henceforth be patients subject to the new hospital and limitation direc-

[57] *R. v. Mental Health Review Tribunal, ex p. Ruff* (CO/99/86, unreported).

[58] *R. v. Secretary of State for the Home Department, ex p. K* [1990] 1 W.L.R. 168.

[59] Mental Health Act 1983, s.75(1)(b), as amended by Crime (Sentences) Act 1997, s.55(1), Sched. 4, para. 12(13).

tions. However, when one reads on and considers the position of conditionally discharged patients who have not been recalled to hospital, no similar insertion has been made as regards a tribunal's powers. Subsection (3) still provides as follows:

> "75.—(3)... the tribunal may—
> (a) vary any condition to which the patient is subject in connection with his discharge or impose any condition which might have been imposed in connection therewith; or
> (b) direct that the restriction order or restriction direction to which he is subject shall cease to have effect;
> and if the tribunal give a direction under paragraph (b) above the patient shall cease to be liable to be detained by virtue of the relevant hospital order or transfer direction."

In particular, no reference to a patient subject to hospital and limitation directions has been inserted inside the references to patients subject to hospital and restriction orders or hospital and restriction directions. Because subsection (1) has been amended, as indeed has section 74 with regard to a tribunal's powers in cases involving *undischarged* section 45A patients, this leads to a strong presumption that the omission is deliberate. Such a reference could easily have been added, as in section 74 and 75(1)(b), but was not, and the likelihood of any draftsman missing such an obvious point when he obviously had regard to section 75 must be virtually nil. Furthermore, if the terms of the section are not ambiguous then it matters not what Parliament's reasons were for so providing. When it is clearly established that the legislature has so enacted, the only business of the court is to give full effect to the enactment.[60] Nevertheless, the distinction may reflect the fact that there is a distinction to be drawn between the class of prisoners removed to hospital under section 45A and those removed under section 47. As enacted, the power conferred by section 45A is confined to persons suffering from a psychopathic disorder and the underlying premise is that the public are particularly at risk from such persons (**399**). The new power give courts the option in their case of combining the immediate provision of hospital treatment with the security of a custodial sentence. The effect is that the offender will serve his sentence securely detained in one place or another unless the Home Secretary, rather than a tribunal, is satisfied that he is fit to be absolutely or conditionally discharged from hospital. Where the Home Secretary does conditionally discharge the patient, further providing that only he may bring the directions to an end until the offender has served the term of imprisonment imposed by the court is not inconsistent with the overall aims of the Act which created this new power. The omission must therefore be deliberate and reflect the intention behind the Crime (Sentences) Act 1995, which, with its provision for mandatory life sentences and limitation directions, was to respond to public concern about the release of dangerous offenders. It is also significant that the Mental Health (Patients in the Community) Act 1995, passed in the same Parliament, gave tribunals a power to recommend that a patient whom it does not release should not only not be released but should be subject to a further order restricting his liberty upon eventually being released. The new limitation concerning a tribunal's powers under section 75 is not at odds with the thrust of recent legislation in this area, which has seen an increase in the powers of tribunals to restrict individual liberty whilst not conferring any additional powers to restore liberty (**495**). Accordingly, even if the new power is viewed as misguided, Parliament's intention would seem to be clear.

[60] See judgment of Coleridge J. in *Re Greenwood* (**263**).

Counter-arguments

Because of the consequences of a literal interpretation of the subsection, in terms of a tribunal's powers in respect of conditionally discharged patients, it is possible to raise quite strong arguments against the position just advanced, arguments which deserve to be fully aired before the courts. The essence of the attack will no doubt be along very familiar lines: that the omissions constitute a drafting error; that it can be inferred from the overall statutory framework, and in particular from sections 45B(2) and 75, that Parliament intended to place limitation direction patients in a position identical to that of restriction direction patients; that, in the alternative, the fact that limitation directions are referred to in subsection (1) but not in subsection (3) creates an ambiguity which should be resolved in favour of the liberty of the subject; that any contrary interpretation would involve a breach of the European Convention on Human Rights. More particularly, the following submissions may be made:

1.) Section 45B(2) of the 1983 Act, as inserted by the 1997 Act, provides that a hospital direction shall have effect as a transfer direction made under section 47 and a limitation direction shall have effect as a restriction direction given under section 49.[61]

2.) Accordingly, the references to a hospital direction and a restriction direction in section 75(3) include patients subject to hospital and limitation directions.

3.) Alternatively, there is no other provision in the 1983 Act (as amended) that does not apply identically to all prisoners removed to hospital for treatment under special restrictions. Consequently, the absence of any reference in section 75(3) to section 45A patients must be an oversight.

4.) Either way, had Parliament intended to provide that tribunals were to have no power to terminate the limitation directions, so as to create this single but fundamental exception to the general position brought about by section 45B(2), it would have done so by including such a provision in the body of the Act. More particularly, if Parliament intended to break with precedence by distinguishing two classes of conditionally discharged patients, each with different rights, it would have made this explicit in the body of the statute by including such an amendment in section 49 of the 1997 Act.

5.) As it is, the paragraph said to have the effect complained of is to be found in Schedule 4. Section 55(1) of the 1997 Act provides that those enactments in the 1983 Act mentioned in Schedule 4 shall have effect subject to the amendments there specified, "being minor amendments and amendments consequential on the provisions of this Act." An amendment to the effect that a tribunal may not absolutely discharge a conditionally discharged patient if he is subject to a limitation direction is not a minor amendment of the position set out in section 45B(2). Nor is it one consequential upon the provisions set out in the body of the Act, for section 45A provides that limitation direction patients are to be treated as

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

if subject to a restriction direction. Unless one takes th ew that Parliament was being devious, which is not permissible, one is bound to hold that the paragraph complained of must be interpreted in a way which is minor and inconsequential, *i.e.* in a way which is consistent with section 55(1) and does not violate section 45B(2).[62]

6.) There is a presumption that Acts of Parliament are not intended to derogate from the requirements of international law and the interpretation complained of would mean that the United Kingdom is in breach of the European Convention on Human Rights. Indeed, section 75 was enacted because the fact that restricted patients previously had no right to a tribunal which could order their release was held to constitute a violation of the Convention.[63] Furthermore, if and when the Convention is incorporated into English and Welsh law, as is the present Government's intention, the effect will be that the limitation must be then be ruled to be unlawful.[64]

7.) To summarise, although only persons classified as having a psychopathic disorder may be made the subject of the new directions, once made their effect is the same as if the prisoner had initially commenced his sentence in prison and had then been transferred to hospital by the Secretary of State (**398**). Parliament's intention must have been that if the Home Secretary consented to some of them being released under the 1983 Act, rather than being remitted to prison or released on licence, they would then be dealt with in the same manner as other conditionally discharged patients.

Summary

The paramount rule of statutory construction is that "every statute is to be expounded according to its manifest and expressed intention"[65] and all other rules of interpretation are subordinate to it.[66] Because sections 74 and 75(1) have been amended, so as to refer to hospital and limitation directions, this leads to a strong presumption that the apparent failure to confer on tribunals a power to remove the directions is deliberate. The fact that the amendment having this apparent effect was expressed to be a minor amendment or one consequential on the provisions of this Act would seem to be the strongest argument for giving full effect to section 45B(2). Even so, it must be doubtful whether there is any real ambiguity.

62 The alternative view would be that, although the principal purpose served by Schedules is to enable the presentation of the main sections of the enactment uncluttered by material of secondary or incidental importance, the Schedule is as much part of the enactment as is the section introducing it or any other section. See G.C. Thornton, *Legislative Drafting* (Butterworths, 3rd ed., 1987), pp. 332–333; *A-G v. Lamplough* (1878) 3 Ex D 214 at 229, C.A.; *I.R.C. v. Gittus* [1921] 2 A.C. 81, H.L.

63 *X. v. United Kingdom* (1981) 4 E.H.R.R. 181.

64 The argument against this is that, because the patient is still serving a prison sentence, neither section 74 nor section 75(3) infringes the Convention.

65 *Attorney-General for Canada v. Hallett & Carey Ltd.* [1952] A.C. 427 at 449, *per* Lord Radcliffe.

66 *Prince Ernest of Hanover v. Attorney-General* [1956] Ch. 188 at 201, *per* Evershed M.R.

9. The limits of a tribunal's powers

INTRODUCTION

This chapter is concerned with legal technicalities which are mainly of interest to lawyers. More particularly, it deals with the following legal issues—

THE BURDEN AND STANDARD OF PROOF

In all cases other than those involving conditionally discharged patients, a tribunal must decide whether it is "satisfied" that the statutory grounds for discharge exist. The reference to a tribunal being "satisfied" has given rise to considerable debate in practice about the onus and standard of proof in tribunal cases.

THE ONUS OR BURDEN OF PROOF

Assuming that the concepts are relevant to inquisitorial proceedings of this kind,[1] the onus of proof lies on the applicant in all proceedings except those involving conditionally discharged patients, where no burden can exist either way because there is no statutory issue to be determined. Because sections 72 and 73 are unambiguous in this respect, attempts to argue that a different construction may or must be inferred from the overall statutory framework, or from the terms of the European Convention on Human Rights, have met with failure. In *ex p. Hayes,*[2] Ackner L.J. said that in his judgment counsel had "rightly" not pursued in the Court of Appeal his submission in the Divisional Court that the onus of satisfying the

1 Because it is for the tribunal to satisfy itself whether the grounds for discharge exist, it may be argued that the concept of a burden of proof lying on a particular party or person is not germane. Furthermore, there is not always an applicant and the patient may occasionally not even attend. In restricted cases, the responsible authority and the applicant may jointly support the latter's discharge. Nevertheless, the reality is usually that the applicant is seeking to be discharged and so to satisfy the tribunal that the grounds for his detention advanced by the detaining authority are legally insufficient. The risk of non-persuasion lies with him.

2 *R. v. The Mental Health Review Tribunal, ex p. Hayes*, 9 May 1985, C.A. (unreported) (**066**).