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**).

tribunal was not upon the patient. And, in *ex p. A.*,[3] Kennedy L.J. obser that the first thing to be noted about the duty to discharge in section 72(1)(b) was that the tribunal is only required to direct discharge if it is satisfied of a negative: if the patient may be suffering from a form of mental disorder of the requisite nature or degree then the obligation to discharge under sub-paragraph (i) does not arise. His Lordship added that "the approach is not surprising, because the tribunal is not intending to duplicate the role of the responsible medical officer. His diagnosis stands until the tribunal is satisfied that it is wrong." Because a tribunal is not obliged to discharge if it is *not* satisfied that the patient is *not* suffering from a disorder of the requisite nature or degree, the statutory test is sometimes referred to as the "double-negative," and many decisions not to discharge are phrased in this way. Thus, while the tribunal discharge criteria are cast as a double-negative, the admission and renewal criteria are not.

European Convention on Human Rights

As to whether the statutory provisions violate the European Convention on Human Rights, the domestic law is most vulnerable in relation to the non-judicial detention of citizens under Part II. The central issue is whether it is lawful to require a citizen who has been deprived of his liberty otherwise than by judicial process to prove to a judicial authority that there are no lawful grounds for depriving him of his liberty before he is entitled to be released. Stated differently, if those detaining a person cannot satisfy a judicial authority that there are lawful grounds for his detention is it nevertheless lawful to continue to detain him because he cannot demonstrate the absence of such grounds? Although a tribunal may discharge a person at its discretion if the facts are finely balanced, this does not affect the fact he is not entitled to be set at liberty.[4]

THE STANDARD OF PROOF

Because a patient is only entitled to be discharged if the tribunal reviewing his case is satisfied that the grounds obliging it to discharge exist, the natural next question is what standard of proof is imposed by the word "satisfied"? Given that the onus is on the patient, to what degree must a tribunal be persuaded by the evidence before it can be satisfied and so under an obligation to discharge? Does "satisfied," it is sometimes said, mean satisfied beyond all reasonable doubt or satisfied on the balance of probabilities? One senior legal member used to take the view that a tribunal may never be satisfied because the word implies certainty or virtual certainty and that is *never* possible when dealing with mental disorder. However, if this were true then restricted patients could never be discharged and such an approach is unlawful. The issue was touched upon in *ex p. Hayes,*[5] where Ackner L.J. observed that the patient's counsel had "sought to raise questions as to the standard of proof required." In that case, His Lordship could find nothing in the decision which indicated that the tribunal had imposed any undue standard of proof upon the patient, nor therefore any arguable point of law. In *ex p. Ryan,*[6] Nolan J. referred to the "double-negative" aspect of the discharge test, saying:

3 *R. v. Canons Park Mental Health Review Tribunal, ex p. A* [1994] 3 W.L.R. 630 (**223**).

4 It is noteworthy that, prior to 1959, it was generally for the applicant to satisfy a court that the statutory grounds for detention existed rather than for the citizen to satisfy a court, in the form of a tribunal held after the event, that there were no grounds for detention.

5 *R. v. The Mental Health Review Tribunal, ex p. Hayes, supra.*

6 *R. v. Trent Mental Health Review Tribunal, ex p. Ryan* [1992] C.O.D. 157, D.C (**839**).

> "The negative form of the re ment required them to be satisfied — a fairly strong word — that the patient was not suffering from psychopathic disorder. So far as the clinical and medical evidence was concerned, it seems to me that they were entitled to say they were not satisfied and in so far as they went on to conclude that his conduct towards young females has been seriously irresponsible resulting from the psychopathic disorder... Once again there was material upon which the tribunal could properly link the two."

"Satisfied"

Although a tribunal which is satisfied that a patient is entitled to be discharged has no discretion about whether or not to discharge him, in deciding whether or not it is satisfied that he is entitled to be discharged, it has a very broad discretion. Hence, in reality, the effect of the double-negative test is that almost all decisions to discharge are discretionary. It has been variously held in relation to legislation not concerned with mental health that "satisfied" means to be persuaded[7]; to make up one's mind, coming to a conclusion on the evidence which, together with its other conclusions, leads to the judicial decision[8]; to be satisfied beyond reasonable doubt[9]; that there must be solid grounds upon which the court can found a reliable opinion[10]; that the term is indicative of judicial discretion[11]; and that the word simply says on whom the burden of proof rests, leaving the court itself to decide what standard of proof is required in order to be satisfied.[12]

The use of the word "satisfied" elsewhere in the Act

The word "satisfied" is used in many places in the 1983 Act. It is the duty of an approved social worker to make an application under Part II in any case where he is satisfied that such an application ought to be made.[13] A patient's responsible or appropriate medical officer is under a duty to furnish a report renewing the authority for the patient's detention or guardianship for a further period if it appears to him that the criteria for renewal are "satisfied."[14] A criminal court may authorise a patient's detention or guardianship under Part III if "satisfied" on medical evidence as to the statutory criteria for detention or guardianship[15] and no such order may be made unless the court is also satisfied that a bed is available or, as the case may be, that a proposed guardian consents to acting in that capacity.[16] In the case of detention under section 35 or 37, a magistrates court must in certain circumstances additionally be "satisfied" that the patient did the act or omission charged.[17] Similarly, the Secretary of State may remove a patient to hospital for treatment where he is satisfied on medical evidence as to the medical criteria for transfer.[18] Under section 42, the Secretary of State may direct that a patient shall cease to be

7 See *Briginshaw v. Briginshaw* (1938) 60 C.L.R. 336, *per* Dixon J.

8 See *Blyth v. Blyth* [1966] 1 All E.R. 524 at 541, H.L., *per* Lord Pearson.

9 See *Preston-Jones v. Preston-Jones* [1951] A.C. 391. In general, however, the legislature is quite capable of inserting the words "beyond all reasonable doubt" if it means that.

10 See *R. v. Liverpool City Justices, ex p. Grogan, The Times*, 8 October 1990.

11 *Birch v. County Motor & Engineering Co.* [1958] 1 W.L.R. 980, C.A.

12 See *Blyth v. Blyth* [1966] 1 All E.R. 524 at 536, H.L., *per* Lord Denning.

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

14 *Ibid.*, ss.20(3)(b), 20(6)(b).

15 *Ibid.*, ss.35(3)(a), 36(1), 37(2), 38(1)(a), 43(1)(a).

16 *Ibid.*, ss.35(4), 36(3), 37(4), 37(6), 38(4), 44(1).

17 *Ibid.*, ss.35(2)(b), 37(3).

18 *Ibid.*, ss.47(1), 48(1).

restricted if he is satisfied that a restriction order is no longer required for the protection of the public from serious harm.[19] The court with jurisdiction to deal with a defendant who has been transferred to hospital under section 48 may remit him to custody where satisfied on medical evidence that he no longer requires in-patient treatment or that no effective treatment can be given.[20] A magistrates court may commit such a defendant in his absence if satisfied on medical evidence that the accused is unfit to take part in the proceedings.[21] The functions of the judge under Part VII of the Act are also exercisable where, after considering medical evidence, he is satisfied that a person is incapable, by reason of mental disorder, of managing and administering his property and affairs.[22] A receiver shall be discharged on the judge being satisfied that that patient has later become capable.[23] The duty to provide after-care under section 117 applies until such time as the relevant health and social services authorities are satisfied that the person is no longer in need of such services.[24]

Other qualifying words — satisfied about what?

It should be noted that the criteria for discharge include other qualifying words, which vary according to the particular authority being reviewed. For example, a tribunal must discharge a patient detained under section 3 if it is satisfied that it is not "necessary" for his health or safety, or for the protection of others, that he receives treatment in hospital. In relation to section 2 patients, the duty to discharge arises if the tribunal is satisfied that the patient's detention is not "justified" in the interests of his health or safety or for the protection of others. Many things which are not necessary may nevertheless be justified. Similarly, while a tribunal must discharge a section 3 patient if it is satisfied that continued liability to detention is not "appropriate," it must discharge a section 2 patient if satisfied that his detention is not "warranted" for assessment or treatment following assessment. Whether the use of a power is appropriate is again rather more subjective than whether or not it is warranted. The use in the criteria of words such as "appropriate" and "justified" means that it is not particularly meaningful to approach the criteria for discharge in terms of being satisfied beyond reasonable doubt or on the balance of probabilities. One cannot easily talk of a course of action being appropriate beyond all reasonable doubt and whether something is or is not justified may have little to do with probability. The tribunal must therefore act judicially and give proper consideration to all of the evidence, ensuring that it has sufficient evidence concerning the statutory matters before reaching its decision. For example, adequate evidence about whether the patient is or may still be mentally disordered and whether his health or safety or other persons would be at risk if set at liberty.[25] The finding reached must be based on some material that tends logically to show the existence of facts supportive of the finding and the reasoning behind the finding must be internally consistent. Beyond that, the tribunal must simply be persuaded, content in their own minds on the evidence before them, that there are no longer any grounds for de-

19 Mental Health Act 1983, s.42(1).
20 *Ibid.*, ss.51(4), 52(5).
21 *Ibid.*, s.52(7)(a).
22 *Ibid.*, s.94(2). The position is essentially the same with periodic payments made under s.142(1).
23 *Ibid.*, s.99(3).
24 *Ibid.*, s.117(2).
25 In *Shepherd*, the Secretary of State asked the tribunal to state a case in December 1984 but later decided not to proceed. The issue was whether a tribunal which conditionally discharged a patient had given adequate consideration to the requirement in s.41 to protect the public from serious harm.

tention, guardianship or supervision. If the patient's detention followed the commission of very serious offences, it will clearly be more difficult for them to be satisfied that his detention is no longer necessary to protect others or that it is not appropriate for him to remain liable to be detained. However, the fact that it will be more difficult to persuade the tribunal that there are no longer any grounds for his detention does not involve any elevation of the standard of proof. The basic need to be persuaded remains the same. The fact that a particularly persuasive argument is necessary in order to rebut a particularly persuasive argument for continued detention does not involve any alteration in the meaning of the word "satisfied," nor therefore increasing the standard of proof in such cases.

THE MEANING OF DISCHARGE IN UNRESTRICTED CASES

In the context of a restricted case, Mann J. said that "the word 'discharge,' as employed in sections 72 to 75 ... means, and in my judgment can only mean, release from hospital ...."[26] In the context of an unrestricted case, McCullough J. observed that "discharge means not merely discharge from hospital but discharge from the authority to detain."[27] If either of these constructions is correct, tribunals have been misinterpreting the provisions since they came into force. The customary view is that discharge in relation to unrestricted patients means merely discharge from liability to detention while, in relation to restricted patients, it means discharge both from hospital and liability to detention.

THE CRITERIA FOR DISCHARGE

Section 72(1)(b), which applies to undischarged restricted and unrestricted patients, provides that a tribunal shall direct the discharge of a patient who is liable to be detained for treatment if they are satisfied either that he is not then suffering from any 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" or that it is neither necessary for his health or safety or for the protection of others "that he should receive such treatment" (**485**).

Patients absent from hospital with leave

As McCullough J. observed in *ex p. W*,[28] those "liable to be detained" are those who are detained and those who have been granted leave of absence. The reference to the appropriateness of liability to detention in section 72(1)(b) means that a tribunal is not bound to discharge a patient who has indefinite leave to be absent from hospital, or an in-patient whom it considers should be granted such leave, solely because his condition does not presently make in-patient treatment appropriate. It is only obliged to discharge him if it is satisfied that his mental state no longer makes it appropriate for him to be liable to further detention in a hospital for medical treatment.

26 *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**).
27 *R. v. Hallstrom, ex p. W.; R. v. Gardner, ex p. L.* [1986] 1 Q.B. 1090.
28 *Ibid.*

The converse situation is that of an unrestricted in-patient who, although in need of further hospital treatment, no longer requires compulsory treatment because he has recovered sufficiently to appreciate his need for treatment. Adopting the language of section 72(1)(b)(i), the nature or degree of his disorder remains sufficiently serious for further treatment in hospital to be appropriate but not so serious that it is appropriate for him to be "liable to be detained" there for that purpose.

THE ARGUMENT THAT THE WORD BEARS THE SAME MEANING

A plausible argument may be advanced for saying that the word "discharge" bears the same meaning in restricted and unrestricted cases, and tribunals chaired by members of the judiciary have been known to proceed on this basis—

- It may be said that Parliament would not have defined the discharge criteria in restricted cases by incorporating without qualification the criteria applied in unrestricted cases if it intended that the words in section 72(1)(b) should bear a different meaning in such cases.

- Furthermore, the framework of section 72 suggests that discharge means discharge from hospital.

- Subsection (2) provides that a tribunal shall, when considering whether to discharge at its discretion, have regard to the likelihood of a mentally ill or severely mentally impaired patient "if discharged" being able to care for himself, to obtain the care he needs or to guard himself against serious exploitation — considerations which are not pertinent unless the patient is being discharged from hospital.

- Section 72(3) then provides that a tribunal may direct the "discharge" of a patient on a future date, which suggests the making of arrangements outside hospital prior to discharge from hospital.

- The same subsection then states that a tribunal which does not discharge a patient may, "with a view to facilitating his discharge on a future date," recommend that he is granted leave of absence or is transferred to another hospital or into guardianship. A patient on leave, although no longer an in-patient, is therefore not "discharged" and, accordingly, discharge means both discharge from hospital and discharge from liability to detention. Similarly, the purpose of recommending transfer to another hospital can only be to facilitate the patient's future "discharge from hospital." And, as to a patient's reception into guardianship, this necessarily involves discharge both from hospital and from liability to detention.

- Finally, it is noteworthy that in guardianship cases a tribunal has no power to discharge on a future date nor, where it does not discharge, any power to make statutory recommendations with a view to facilitating the patient's discharge in the future. This must be because Parliament considered that, since the patient was already in the community, the section 72(3) powers — being exclusively concerned with making arrangements for "discharge" into the community — were irrelevant.

THE ARGUMENT THAT T[illegible] WORD BEARS DIFFERENT MEANINGS

Customary usage aside, the view that the word "discharge," and the statutory criteria for discharge, are to be interpreted differently in unrestricted cases relies both on the statutory framework and a natural and literal reading of section 72(1).

- Under the Mental Health Act 1959, a tribunal's powers of discharge were limited to discharging unrestricted patients who were liable to be detained for treatment or subject to guardianship. Patients who were liable to be detained and patients subject to guardianship were in an identical position: the tribunal was under a duty to discharge forthwith where the statutory criteria were satisfied; could discharge forthwith at its discretion if this was not the case; or not discharge.[29] Fairly clearly, therefore, discharge meant the same in both cases, that is discharge from the compulsory powers to which the patient was then subject.

- Consistent with this, section 47 was cast in similar terms to the current section 23 and it provided that various other persons and bodies could make "an order for discharge." According to section 47, "a patient who is for the time being liable to be detained or subject to guardianship ... shall cease to be so liable or subject if an order in writing discharging him from detention or guardianship (in this Act referred to as an order for discharge) is made in accordance with the following provisions ..."

- That is what one would expect given the historical context. It is inconceivable that, when repealing the Mental Treatment Act 1930, Parliament intended to impose a more restrictive regime whereby patients, once compulsorily admitted, were to remain subject to compulsion until such time (if ever) as sufficiently well to leave hospital. Furthermore, there is nothing in the present statute to indicate that Parliament intended that "discharge" was henceforth to bear a different meaning in unrestricted cases to that which it had borne in the 1959 Act.

- The purpose of extending the range of a tribunal's powers in 1982 was simply to enable them to deal more effectively with different situations frequently encountered by them. So, for example, a patient's discharge could be postponed *if* the patient wanted to immediately leave hospital but arrangements for this first needed to be made.

- Even if "discharge" means discharge from hospital, it can only mean "deemed discharge" in this context. In other words, just as an informal in-patient is deemed for the purposes of the Act to have been admitted to hospital on the date the application is received, so he is deemed to have been discharged from hospital for statutory purposes when an order for his discharge is made, notwithstanding that he remains in hospital informally.[30]

---

29 A tribunal could not discharge on a future date and, if it did not discharge, it had no power to make statutory recommendations with a view to facilitating the patient's discharge in the future.

30 See Mental Health Act 1983, s.5(1), **260**.

Conclusion

In unrestricted cases, discharge means discharge from guardianship or from liability to detention. That this is so is beyond doubt.

THE LEGALITY OF THE APPLICATION OR ORDER

The conventional view is that the function of a tribunal in both restricted and unrestricted cases is to review the grounds for the patient's detention or guardianship at the time of the hearing. Accordingly, a tribunal has no power to determine whether the original admission was lawful and it has no power to deal with complaints about matters such as the effects of a particular treatment, consent to treatment, and the use of restraint, except insofar as they relate to the exercise of the tribunal's powers under the Act. More particularly, a tribunal cannot be competent to review the validity of an order made by a criminal court, which is subject to appeal following sentence.[31] Nor can it quash an application made under Part II or determine the *vires* of a person's admission. These are matters for the High Court.

RESTRICTED PATIENTS

Because a tribunal has no discretionary power of discharge in restricted cases, it clearly may not consider the lawfulness of the patient's detention. Section 73 makes it clear that a tribunal must discharge a restricted patient who satisfies the criteria for discharge set out there and not discharge him unless that is so. It has no other powers and may not discharge on any other basis.

UNRESTRICTED PATIENTS

As regards these patients, a tribunal must likewise discharge if satisfied that the conditions for discharge exist, which involves considering their mental state and the risks involved in discharge. However, the tribunal may also discharge the patient at its discretion, because section 72 commences by stating that a tribunal may "in any case" direct a patient's discharge before going on to set out the circumstances in which it is obliged to discharge. The question arises whether a tribunal may have regard to any irregularities in the authority for a patient's detention when it decides whether to exercise its discretionary power of discharge. If so, a tribunal could not be obliged to discharge a patient simply because it was of the opinion that the use of

[31] Where the order is defective because it does not accurately reflect the order made by the court, judicial review will also lie if no other remedy is available. In *R. v. Reading Crown Court, ex p. Norris*, a case dealt with by the author during 1991–1992, the copy of the judge's order made by the clerk to the court indicated that a restriction order had been imposed and it was sent to the Home Office. For various reasons, the patient's solicitor at a tribunal held some six years later entertained the thought that the clerk might have mistakenly forgotten to cross through the section of the printed form which stated that restrictions had been attached to the hospital order. Lengthy enquiries revealed this to be the case. Judicial review proceedings were commenced and the order was amended by consent to show that only a hospital order had been imposed.

compulsory powers had not been properly authorised. However, it could take that possibility into account, along with all of the other relevant circumstances, such as any risks involved in discharging the patient.

Unrestricted Part II patients

The statutory framework in relation to patients admitted to hospital by court order is manifestly different from that pertaining to citizens admitted under Part II without any prior court order or judicial involvement. The nature of these civil procedures is unique within English law in that a British citizen is deprived of his liberty upon the completion of procedures involving the exercise of powers which in other contexts would be regarded as judicial or executive. These procedures cannot properly be described as administrative because, in constitutional terms, they involve the detention or restraint of one of the Queen's subjects but, equally, it would be inaccurate to describe them as a judicial process since no judicial authority is involved. It would therefore not be altogether surprising if tribunals, being judicial bodies, could take into account an apparent lack of authority for such a patient's detention when deciding whether to direct his discharge.

Unrestricted Part III patients

The discretionary power of discharge extends to cases involving unrestricted patients admitted to hospital or received into guardianship under Part III. In the case of admission in pursuance of a hospital order, no tribunal application may be made during the following six months. By that time, the statutory period for challenging the order, if its validity is contested, will have expired. In the case of guardianship orders, the patient may immediately apply to a tribunal although, by the time any tribunal sits, the order will be before an appeal court or the time for disputing its validity have passed.

CASE LAW

The authority invariably given for the proposition that a tribunal may not grant relief to an unrestricted patient who is not lawfully detained is *ex p. Waldron*. According to dicta of Ackner L.J. in that case, a tribunal's jurisdiction "is limited to entertaining applications made by a person who is liable to be detained under the Act."[32] However, Glidewell and Slade L.JJ. declined to express a view and expressly left the point open.[33] Notwithstanding this, the dicta of Ackner L.J. have since routinely been cited by counsel without *ever* drawing to the court's attention the reservations of these two eminent Lord Justices. Accordingly, the case cannot without more be considered as authority for the proposition commonly derived from it. It is also noteworthy that no consideration was given in *ex p. Waldron* to the earlier decision of the Court of Appeal in *Re V.E* (577). In that case, the court held that a tribunal had been obliged to discharge a patient because there was no lawful authority for her detention. Thus, against the dicta of Ackner L.J. must be set this decision and the fact also that the two other judges in *ex p. Waldron* left the point open.

[32] *R. v. Hallstrom and another, ex p. W.* [1986] 1 Q.B. 824 at 846, *per* Ackner L.J.
[33] *Ibid.*, at 848, *per* Neill L.J., and at 852-53, *per* Glidewell L.J.

W. was admitted to hospital under section 3 on the basis of medical recommendations submitted by Dr. Hallstrom and Dr. Morgan (the doctors). The patient contended that the application was unlawful and she applied to the Court of Appeal for leave to apply for judicial review, in the form of an order of certiorari quashing it.

Prior to making that application, she had unsuccessfully applied to a tribunal for her discharge. At that hearing, her solicitor had submitted to the tribunal that they should quash the original application for admission because it was invalid, being founded on a written recommendation which did not in fact represent the opinion held by Dr. Hallstrom at any material time.

Ackner L.J.

It was apparent from the tribunal's reasons for its decision that it did not fully grasp the point which the solicitor was seeking to make. That was not altogether surprising since it was being said that the patient was not liable to be detained and yet the section under which the discharge of such liability was being made provided only for applications being made "by or in respect of a person who was liable to be detained under this Act." Counsel for the doctors maintained that a person who considered that her admission for treatment was a nullity, having been made without jurisdiction, and who considered that she was not a person who was liable to be detained under the Act, could apply to a tribunal, as the patient had done. If dissatisfied with the tribunal's decision, the patient could then ask the tribunal to state a question of law for determination by the High Court. However, the jurisdiction given to the tribunal was limited to entertaining applications made by a person who was liable to be detained under the Act. The tribunal's powers were thus confined to granting or refusing relief to persons liable to be detained. It had no power to consider the validity of the admission which gave rise to the liability to be detained. The tribunal could not be used where it was sought to challenge the underlying validity of the admission, as a route to the High Court.

Counsel for the doctors sought to rely on section 66(1)(b) to get over this difficulty. That subsection provided that where a patient was admitted in pursuance of an application for admission for treatment an application could be made to a tribunal within the relevant period. However, section 77(1) prohibited an application being made to a tribunal except in such cases and at such times as were expressly provided by the Act. The section 66(1)(b) case had to be a person who was liable to be detained under the Act because he had been admitted in pursuance of a section 3 application and that required the fulfilment of the conditions specified in that section. Such an applicant, being admitted to the hospital in pursuance of such an application, thereby acquired a liability to detention. That a section 66(1)(b) patient was necessarily a person liable to be detained was recognised by section 6(4), which dealt with the effect of an application for admission. It provided that where a patient was admitted in pursuance of an application any previous application under Part II by virtue of which he was liable to be detained, or subject to guardianship, ceased to have effect. It followed that the applicant was not entitled to seek from the tribunal a decision as to the *vires* of her admission. It had no jurisdiction to entertain such an application.

Neill L.J.

"I agree with the order proposed by Ackner L.J. I intend to confine my decision, however, to the question whether the High Court has jurisdiction to entertain the applicant's claim for judicial review ... For my part I do not consider ... it would be appropriate at this stage to express any view as to the possibility of obtaining some effective relief in a case such as the present from the mental health review tribunal itself."

Glidewell L.J.

If the court decided that section 139(1) did not prevent a challenge by way of judicial review, there might be a second question, namely whether leave should nevertheless be refused because there was an alternative procedure by which the same question could be decided? That procedure was an application to a tribunal under section 66, followed by a case stated on a point of law for the decision of the High Court under section 78(8). However, in the circumstances, counsel for the doctors accepted that, if the court decided the section 139 point against Dr. Hallstrom, leave should be granted. There was clearly an important point at issue as to the limits of a doctor's power under section 3. Moreover, the tribunal in this case had not dealt directly with the section 139 point. Instead, its decision rose another point of law with which the court was not concerned, namely whether, even if an original application under section 3 was invalid, a patient may nevertheless be "liable to be detained" within section 72(1)(b) of the Act at the time the tribunal hears his application. It had always been a principle that certiorari would go only where there was no other equally effective and convenient remedy. Whether the alternative statutory remedy would resolve the question at issue fully and directly, whether the statutory procedure would be quicker or slower than procedure by way of judicial review, whether the matter depended on some particular or technical knowledge which was more readily available to the alternative appellate body, were some of the matters which a court should take into account when deciding whether to grant relief by way of judicial review when an alternative remedy was available. Counsel as amicus argued that the procedure by way of an application to a tribunal and a case stated was not apt to decide the question whether the powers of the Act had been exceeded. That, he said, was not a question with which the tribunal was or could be concerned. If he was correct (and it was not necessary to decide whether he was), there was, of course, no alternative remedy available in any case such as this. *Leave to apply for judicial review granted.*

Re V.E.

In *Re V.E. (mental health patient),*[34] the application for the patient's admission to hospital for treatment stated that she was suffering from mental illness. V.E. applied to a tribunal for her discharge. The tribunal did not discharge but concluded that her condition had been wrongly diagnosed and directed under section 123(3) of the 1959 Act — which subsection is repeated in the 1983 Act as section 72(5) — that the application for her admission be amended so as to substitute "psychopathic disorder" for "mental illness." Under the 1959 Act, an application for treatment could not be made in respect of a patient aged over 21 if she suffered only from that form of disorder. The patient was aged 40. The question arose whether the tribunal's direction that the patient be reclassified was incompatible with its direction that

[34] *Re V.E. (mental health patient)* [1973] 1 Q.B. 452.

she not be discharged. Did its reclassification have the effect that must be discharged on the ground that, as a person over 21 suffering from psychopathic disorder, no application could be made for her detention under the 1959 Act? The tribunal stated a case for the High Court's determination.[35] The Court of Appeal held that, as the application remained throughout the only authority for the patient's compulsory detention, if an amendment of the application so altered its averments that they no longer alleged circumstances which would justify detention, the patient had to be discharged. Accordingly, since the amended application alleged no more than psychopathic disorder in a patient aged 40, her continued detention could not be justified under the Act and she was entitled to be discharged. In any event (*per* Lord Widgery C.J.) she was entitled to discharge by reason of the fact that on a proper diagnosis she had never qualified for detention at all.[36]

Re V.E. (mental health patient)

[1973] 1 Q.B. 452 *C.A. (Lord Widgery C.J., Willis and Bridge JJ.)*

On 11 June 1971, the patient was admitted to hospital under section 26. Both recommendations recorded the opinion that the patient was suffering from mental illness. At the hearing on 14 January 1972, the responsible medical officer's evidence was that she was not suffering from mental illness, nor had she been when her detention was authorised. The tribunal was, however, satisfied that the patient was suffering from psychopathic disorder. Having decided not to discharge, it directed that the application be amended by substituting "psychopathic disorder" for "mental illness." One of the questions of law stated by the tribunal for the High Court's determination was whether, by reason of the substitution of "psychopathic disorder" for "mental illness," the patient might thereafter be detained pursuant to the Act.

Lord Widgery C.J.

The question of law to be considered was whether, notwithstanding that the tribunal had refused to order the patient's discharge on medical grounds, she was nevertheless entitled to be discharged on the ground that as a person over 21 suffering from psychopathic disorder she was never liable to be detained under the Act at all. The argument for the hospital board was that if a patient was once detained by virtue of a valid application, his detention could be continued so long as he continued to suffer from some mental disorder and his release was undesirable in his own or the public interest. While it would not be wholly surprising if the Act had this effect, His Lordship was satisfied that it did not. To begin with it was clear that the application and its supporting recommendations must specify the particular form of mental disorder relied on and that, if the relevant disorder was psychopathic disorder, an application could not be made if the patient was over 21. In deciding whether a particular patient was detained "as a psychopath," one's attention was directed to the form of the application, and, what was more significant, that provision was made for

35 Section 124(5) of the 1959 Act was identical to section 78(8) of the present statute. It stated that a tribunal tribunal "may, and if so required by the High Court shall, state in the form of a special case for determination by the High Court any question of law which may arise before them."

36 Although the Law Report states this as being the opinion of Widgery C.J., it would seem that Bridge J. was also of that view. He said that unless the patient was entitled to be discharged, a patient detained on the basis of an erroneous diagnosis, who could not have been lawfully detained at all if correctly diagnosed at the outset, would have no redress under the Act if the error was only discovered and corrected at a later stage.

the amendment of the application as necessary. If it was intended that a reclassification under section 123(3) might itself produce a situation requiring the discharge of the patient, it was strange that this was not specifically recognised. However, there was no reason why reclassification by a tribunal under section 123(3) should have a different effect from one made under section 38 by the responsible medical officer. The conclusion must be that if an amendment of the application so altered its averments that they no longer alleged circumstances which would justify detention, the patient must be discharged. In the present case the amended application alleged psychopathic disorder in a patient aged 40. This was not a situation which justified detention under the Act and the patient was entitled to be discharged. His Lordship concluded,

> "Even if I had taken a different view of the general scheme of the Act I should have held that this patient was entitled to discharge by reason of the fact that on a proper diagnosis she never qualified for detention under section 26 at all. It was one thing to say that a patient once properly detained can remain in detention notwithstanding a change in circumstances, and quite a different thing to say that an initial mistake in diagnosis can be upheld. I would answer the question put by saying that the patient must be discharged."

Willis J.

It seemed clear that the necessary medical recommendations on which the original application was based were erroneous. It followed that if what the tribunal found in January 1972 to be the correct diagnosis had been the medical view in June 1971 there would have been no lawful basis for the application made under section 26. The question arose whether the amendment of the application by the tribunal had effectively invalidated its authority for the patient's continued detention. The application for admission, in its original form or as amended, remained throughout the only lawful authority for a patient's compulsory detention in hospital. As soon as that application ceased to reflect the type of mental disorder on which a patient could have been lawfully admitted and detained under section 26(2), so soon did there cease to exist any lawful authority for that patient's continued detention.

Bridge J.

Although the duration of the authority to detain a patient conferred by an application, order or direction could be renewed from time to time as provided by the Act, it was nevertheless the application, order or direction which remained the essential foundation for that authority throughout its duration. There were four forms of mental disorder and it was convenient to refer to two of them as "major disorders" (mental illness and severe subnormality) and to the second pair as "minor disorders" (psychopathic disorder and subnormality). This dichotomy was certainly of crucial importance to the initial liability to detention of a person in respect of whom an application, order or direction was to be made. It had been argued for the hospital board that the reclassification of a patient over 40 years of age and the consequential amendment of the application, to substitute a minor for a major disorder, had no effect on the application as a continuing authority for her detention in hospital. However sensible that result might be in the particular circumstances of this case, there was no basis for the contention in the provisions of the Act and much greater anomalies were involved in accepting the argument. A patient detained, as here, on the basis of an erroneous diagnosis, who could not have been lawfully

detained at all if correctly diagnosed at the outset, would have no redress under the Act if the error was only discovered and corrected at a later stage. The problem of construction, which looked so formidable at first blush, arose from the absence of any express provision in sections 38(1) or 123(3) indicating that amendment might lead to *immediate* discharge. The explanation of that drafting peculiarity must lie in the fact that reclassification and amendment could have a variety of different consequences in different circumstances, none of which were spelt out in those sections but must be sought elsewhere in the Act. The draftsman might have sacrificed clarity to economy of language but, if one looked at the Act as a whole, there could be no real doubt of his legislative intent. *Determination accordingly.*

Commentary

Under section 123 of the 1959 Act, a tribunal was required to discharge an unrestricted patient who was liable to be detained for treatment if satisfied either (a) that he was not then suffering from mental illness, psychopathic disorder, subnormality or severe subnormality; or (b) that it was not necessary in the interests of his health or safety, or for the protection of other persons, that he should continue to be liable to be detained. In *Re V.E.*, the tribunal was not satisfied as to either of those grounds for mandatory discharge. Nevertheless, the court held that the patient was entitled to be immediately discharged because the effect of the tribunal's finding was that there was no lawful authority for her detention. Furthermore, the point was resolved by way of a tribunal, followed by that tribunal stating a case. It is possible to distinguish the case from *ex p. Waldron* on the basis that the effect of the tribunal's finding concerning the statutory criteria in *Re V.E.* was that there was *no longer* any authority for the patient's detention. There was authority to detain her at the commencement of the hearing and the tribunal did not involve itself in reviewing whether the application procedures had been complied with. Nevertheless, against this, three things must be acknowledged: (1) the patient was entitled to be immediately discharged even though she did not satisfy the statutory criteria for mandatory discharge; (2) this was because there was no lawful authority for her continued detention under the Act; and (3) she was apparently also entitled to be discharged because "she never qualified for detention under section 26 at all" (*per* Widgery C.J.) and "could not have been lawfully detained at all if correctly diagnosed at the outset" (*per* Bridge J.). That immediate discharge meant discharge by the tribunal is clear both from the use of the case stated procedure and the subsequent enactment of the Mental Health (Amendment) Act 1975, which removed any obligation on a tribunal to discharge if the circumstances should arise again.

THREE APPROACHES ADOPTED BY TRIBUNALS

The illegality of a guardianship application or an application for admission is occasionally obvious. For example, the doctors providing the medical recommendations have failed to specify a common form of mental disorder or the authority was not renewed during the prescribed period. In clear-cut cases, a tribunal could, and sometimes does, refuse to hear a patient's application on the basis that there is no existing authority to discharge. Although having no power to quash the application, the tribunal is nevertheless considering its validity to the extent of verifying that it has jurisdiction. If habeas corpus or judicial review is later refused, because the tribunal was mistaken in its ruling, or because of the discretionary nature of the

remedy, the situation is unsatisfactory.[37] Likewise, if the patient is immediately released by the managers in the light of the tribunal's decision. Consequently, other tribunals proceed on the basis that there is authority to detain the patient, holding that the sufficiency of the application is wholly irrelevant. Liability to detention is presumed. In section 2 cases, where a copy of the section papers must be furnished to the tribunal, and presumably therefore read, the approach can seem artificial if the patient's detention has clearly not been properly authorised. Yet other tribunals adopt a third approach, which is that issues concerning the lawfulness of the patient's detention and treatment (whether those issues relate to a failure to observe the formalities set out in Parts II and IV or the conditions of detention) are relevant to the exercise of its discretion. However, in most cases, such as that in *ex p. Waldron*, the sufficiency of the application, and whether or not the patient is lawfully detained, is a matter of dispute.[38] Moreover, in section 2 cases, the application may be defective and invalid in its present form but the rectification period not have expired. Sometimes, the lawfulness of the detention or guardianship cannot be separated out from the issues which comprise the mandatory discharge criteria. For example, in *ex p. E*,[39] a mentally impaired patient was, with the approval of her guardian, being detained in the residential care home where she was required to reside. It was said on the guardian's behalf that the efficacy of the guardianship programme depended upon staff being able to detain her there. Given the patient's detention, and the fact that the application was being enforced in an unlawful manner, the patient's solicitor argued that it could not be the case that the guardianship was "necessary in the interests of the welfare of the patient." It was contrary to her welfare that she should be subject to the authority of a guardian which was abusing its powers over her and the tribunal should discharge her from that authority. In the event, the patient was discharged by the guardian a matter of days before the subsequent habeas corpus and judicial review proceedings were due to be heard by the Divisional Court.

QUESTIONS TO BE DETERMINED

It is clear that a tribunal has no power to quash any application, order or direction. Only the High Court has jurisdiction to determine the lawfulness of an application made under Part II. The purpose of the case stated procedure in section 78 is limited to enabling patients to apply to the High Court where it is contended that a tribunal's decision was based on some mistaken understanding of the law — in the case of *Re V.E.*, the fact that the patient was entitled to be immediately discharged by the tribunal. However, while a tribunal may not *determine* the lawfulness of a Part II

37 For an example of the dangers of this approach, see *Re E (Mental Health: Habeas Corpus), 10 December 1996 (unreported)*. In that case, a tribunal sitting on 27 September refused to review the patient's detention on the basis that his detention under section 3 was not authorised and there was no authority in existence for it to review. The High Court later refused to grant habeas corpus, being satisfied that his detention under the Act was authorised.

38 Although it is not uncommon to find that 20 per cent of applications at a particular hospital are incorrect or defective in some respect, on average only some 2–3 per cent of them are so grossly irregular as to be obviously invalid. The reference to the admission documents in the 1983 regulations as "forms" has led to a widespread failure to distinguish their importance from non-statutory forms, such as after-care forms. Furthermore, while their effect is the same as that of a warrant committing a person to prison, in that total deprivation of liberty is effected, the modern judicial approach has tended not to insist on strict compliance with the law, which of course leads to there being no strict compliance with the law. See *e.g. R. v. South Western Hospital Managers, ex p. M* [1993] Q.B. 683 (597).

39 *R. v. London Borough of Lewisham, R. v. South East Thames Mental Health Review Tribunal, ex p. E* (CO1094/89, 1095/89,1096/89).

application, in the sense of quashing it or awarding damages for unl[illegible]l imprisonment, that does not necessarily mean that it is not obliged to direct the release of a patient if *it* is of the opinion that his detention is unauthorised.[40] Nor that it may not have regard to the possibility that the patient's detention is unauthorised when deciding whether to direct his discharge at its discretion. The fact that section 72 provides that a tribunal may in any case direct that the patient (rather than the application or order) shall be discharged allows for the interpretation that it may order a patient's release because his detention appears to be irregular, without quashing the application or order, or legally determining the point. The issues are essentially fourfold—

- Firstly, whether an application however defective remains in force until it is quashed or until an order or direction is given releasing the patient from any liability to detention in pursuance of it.[41]

- Secondly, whether a patient who is, or may be, unlawfully detained can still apply to a tribunal for his discharge.

- Thirdly, if the patient is or appears to be unlawfully detained, whether any authority exists for a tribunal to review and discharge or whether "discharge" means simply "to direct the release of."

- Fourthly, whether Parliament, in conferring a discretionary power of discharge on tribunals in unrestricted cases, nevertheless intended that they should have no discretion to take account of any defects in the authority for the patient's detention. In other words, whether it intended that they should confine their attention to the issues mentioned in section 72, reserving the power to finely balanced cases where the patient could not satisfy the statutory criteria because they are phrased as a double-negative.

Before considering these questions it is necessary to consider the historical development of a tribunal's functions and how they came to have a discretionary power of discharge.

HISTORICAL DEVELOPMENT OF THE TRIBUNAL'S POWERS

It is pertinent to briefly summarise the origins of the tribunal system, with particular regard to a tribunal's duty to discharge in certain circumstances and its discretion to discharge in all cases. The history of tribunals dates back to the Percy Commission of 1954–57, which reviewed the law relating to mental illness and mental deficiency.[42] Prior to 1959, the order of a justice of the peace, or other judicial authority, was generally necessary before a person could be compulsorily admitted

40 According to *Re V.E.*, once the tribunal's finding was that there was no authority for the patient's deten tion, or that there never had been, it should have discharged the patient. Although it generally has a discretion as to whether or not to discharge a patient whose medical condition and circumstances do not come within the specified grounds, it has no discretion if the patient's liability to detention was unauthorised.

41 If the application may only be quashed by certiorari, and the patient only released from detention in pursuance of an application which has not been quashed by habeas corpus or an order or direction for his discharge, then a tribunal must necessarily consider the patient's application.

42 *Report of the Royal Commission on the Law relating to Mental Illness and Mental Deficiency*, Cmnd. 169 (1957).

to hospital or received into gu[illegible]nship. The Percy Commission advocated the repeal of these certification proce[illegible]es. In their place, it recommended that a person's detention or reception into guardianship should be authorised if an application supported by two medical recommendations was accepted by the hospital to which admission was sought or, in the case of guardianship, was accepted by the social services authority concerned. Because the proposed new procedures did not involve any judicial body, the Percy Commission recommended that, if a patient then wished the justification for his detention to be formally reviewed, rather than merely to apply to the hospital's own management committee or the local authority to exercise its power of discharge, this need should be met by the establishment of a new independent review body. The functions of such a tribunal would be to review the continuing need for compulsion:[43]

> "We should make it clear that these review tribunals would not be acting as an appellate court of law to consider whether the patient's mental condition at the time when the compulsory powers were first used had been accurately diagnosed by the doctors signing the recommendations, or whether there had been sufficient justification for the use of compulsory powers at that time, nor to consider whether there was some technical flaw in the documents purporting to authorise the patient's admission ... The review tribunal's function would be to consider the patient's mental condition at the time when it considers his application, and to decide whether the type of care which has been provided by the use of compulsory powers is the most appropriate to his present needs, or whether any alternative form of care might now be more appropriate, or whether he could now be discharged from care altogether."

Scrutiny of statutory documents

Prior to the introduction of the 1959 Act, applications were forwarded to the Board of Control for scrutiny and it had a discretion to direct the patient's discharge if unamended statutory documents were materially defective.[44] The Percy Commission recommended that the Board should be abolished and this function performed by hospital or local health authority staff at the time of the patient's admission. It stated that where the admission documents did not appear to be in the form required by law, the hospital or health authority should not accept them as authorising them to detain the patient or exercise powers of guardianship. If necessary, the patient

43 *Report of the Royal Commission on the Law relating to Mental Illness and Mental Deficiency*, Cmnd. 169 (1957), pp.150-151.

44 See Lunacy Act 1890, s.34(2). It was not unlawful on the part of an asylum to detain a patient until they had proper authority for his discharge, even if he was of sound mind at the time of his admission: *Mackintosh v. Smith* 4 Macq. H.L. 913. The word "discharge" in the 1890 Act seems to have meant "to order the release of," the patient remaining liable to be detained until the order was quashed or he was discharged. As in *Re V.E.*, no particular significance was attached to the objection that there was, on a literal view, no authority in existence to be discharged. Rather, the patient was being discharged, not the order. While an irregular order for a patient's detention could only be discharged by the High Court (in the sense of being declared unlawful and set aside), various persons and bodies could make an order for his discharge (in the sense of releasing him from the effects of that order). Thus, the Board of Control had a discretion to order a patient's discharge if a certificate seemed incorrect or defective (which did not involve determining the issue) or the patient appeared to be detained without sufficient cause. If the patient's discharge was ordered, this had the effect of prospectively annulling the order, that is reducing it to nothing, whatever was its status before — which is somewhat different from legally determining the issue of whether it ever had any status in law. In other cases, the Board of Control and its predecessors sometimes recommended the discharge of the patient otherwise than by their own order, with a view that the patient should be immediately re-certified: *Archbold's Lunacy and Mental Deficiency Practice* (ed. J.W. Greig & W.H. Gattie, Butterworth & Co./Shaw & Sons, 5th ed., 1915), p.195.

should be cared for informally, or by use of emergency procedures while the documents were corrected or new documents prepared.[45] The 1959 Act accepted this particular recommendation and it is clear that the function of scrutinising documents, in order to ensure that they conferred the necessary authority, was one transferred to the managers, rather than to tribunals, under the new scheme. This was perhaps not surprising because many patients detained under the civil procedures would not have a tribunal hearing, nor therefore would tribunals have an opportunity to scrutinise their statutory documents. It may be noted that the function of scrutinising documents was not restored in 1983 to the body which is the modern day successor of the Board of Control, namely the Mental Health Act Commission.

Mental Health Act 1959 and discretionary discharge

As originally drafted, the 1959 Bill only required a tribunal to consider the matters set out in the criteria for mandatory discharge and to discharge if satisfied that the grounds for detention did not exist, not discharging otherwise. The Minister of Health explained the functions of tribunals by reference to the above passages from the Royal Commission's report.[46] However, later on during the Bill's passage, a discretionary power of discharge was added, for reasons given by the then Minister of Health—

> "The Clause as it stands in the Bill requires a tribunal to discharge when satisfied on the criteria ... but it does not permit it discretionally to discharge in other circumstances. In the Amendment, we propose to give the tribunal discretion to discharge in any case, and to require it to discharge if it is satisfied in respect of the criteria which are specified in the Bill. I think that is the right approach, because the other people who have the power to discharge, that is to say, the nearest relative, the hospital managers, the responsible medical officer and so on, have complete discretion to discharge if they think fit. So it is right that these tribunals, which we are carefully constituting with balanced representation and which have judicial or quasi-judicial functions to perform, should not be at a disadvantage, and that, in addition to having a duty to discharge when satisfied of the criteria, should have a discretion to discharge in any case."[47]

In contrast to the present position, there were never any matters which a tribunal constituted under the 1959 Act had to consider before deciding on whether to exercise its discretion to order a patient's discharge. Its discretion was unfettered, subject to the usual need to act in accordance with the statutory framework. Likewise, there was, and is, nothing to prevent the managers, or the patient's nearest relative, from making an order for discharge under section 23, on account of their concerns about the validity of the authority. Albeit that the managers could alternatively take the view that no order for discharge is necessary if they conclude that they have no authority to detain the patient. This, though, assumes that an order for patient's discharge is not the same thing as an order for his release: If an order for discharge is an order discharging a patient from an existing liability to detention then it is not necessary to make such an order if the managers correctly conclude that the application being considered did not authorise them to detain the patient in the first place. If, however, an application once accepted remains in force, and so renders the patient liable to detention, until the High Court quashes the application (by judicial

45 *Report of the Royal Commission on the Law Relating to Mental Illness and Mental Deficiency*, Cmnd. 169 (1957), para. 483.

46 The Minister for Health, Mr. Derek Walker-Smith M.P., *Hansard*, Standing Committee E Official Report, cols. 705–707 (14 April 1959).

47 The Minister for Health, Mr. Derek Walker-Smith M.P., *Hansard*, H.C. Vol. 605, col. 331 (5 May 1959).

review) or some authorised body considers the patient's release (by habeas corpus or an order or direction for his discharge) then, the defective authority not having been quashed, the managers should order the patient's discharge in such a case.[48]

DEALING WITH APPLICATIONS MADE UNDER SECTION 66

Sections 66 and 77 do not refer to applications being authorised if made by patients who are liable to be detained in pursuance of an application for admission for treatment.[49] On a natural reading of section 66, a patient admitted under section 3 is being detained in pursuance of the application made to and accepted by the managers of the relevant hospital. "Pursuant to" simply means to follow on from and his detention follows on from the application. He is not being detained in pursuance of any purported common law authority. Since the patient has been admitted in pursuance of the application, he may therefore apply to a tribunal during the relevant period. Likewise, where a report is furnished under section 16 or 20, he may make an application during the relevant period. All these applications are applications made in cases and at times expressly provided by the Act and hence, according to a similarly natural reading of section 77, authorised applications. The purpose of a tribunal is to "deal" with applications and references made by and in respect of patients under the statutory provisions.[50] Nowhere in Part V does it state that it may or shall not deal with an application if it becomes apparent that the authority being reviewed is, or may be, invalid. That, arguably, constitutes part of the review in the case of a Part II patient, since there has been no prior judicial scrutiny of the justification for the citizen's detention. Given the wording of section 66(1), it is submitted that if it is the case that a tribunal may not consider applications made by patients who are, or may not be, liable to be detained then this limitation cannot be discerned from this section.

LIABILITY TO DETENTION AND SECTION 72

The next question is whether the terms of section 72 prevent a tribunal from hearing, or continuing to hear, an application if it becomes apparent immediately before or

48 In this context, mention must be made of Lord Denning's judgment in *D.P.P. v. Head* [1959] A.C. 83. In that case, His Lordship said that "if the original order was only voidable, then it would not be automatically void. Something would have to be done to avoid it. There would have to be an application to the High Court for certiorari to quash it .. And being only voidable, the court would have a discretion whether to quash it or not. It would do so if justice demanded it, but not otherwise. Meanwhile the order would remain good and a support for all that had been done under it." Furthermore, a defective application could be cured by a valid renewal (what was then known as a continuation order). Clearly, if the authority conferred by an application is valid until set aside by the High Court, the patient remains liable to be detained under it for the purposes of any prior tribunal hearing and a tribunal may review his case. However, Lord Denning's view is not now the conventional view and Lord Somervell distanced himself from it in that case: "I am not satisfied that the order was not void. On the wording of section 9 of the Mental Deficiency Act, 1913, I think the certificates may well be for this purpose part of the order to be looked at in order to see whether it is good on its face. If they are not part of the order it might, I think, be maintained that they afford no evidence on which the order could validly have been based. In either case I would wish to reserve the question whether the order would not be void rather than voidable." Lord Reid and Lord Tucker concurred with these reservations but Viscount Simmonds did not.

49 Section 66(1) *inter alia* provides that where (b) a patient is admitted to a hospital in pursuance of an application for admission for treatment; or (c) a patient is received into guardianship in pursuance of a guardianship application; or (d) a report is furnished under section 16 above in respect of a patient; or (f) a report is furnished under section 20 above in respect of a patient and the patient is not discharged; an application may be made to a Mental Health Review Tribunal within the relevant period.

50 Mental Health Act 1983, s.65(1).

during the hearing that the authority for the patient's detention, guardianship or supervision is flawed. Insofar as material to the present question, section 72(1) provides as follows:

> "72. —(1) Where application is made to a Mental Health Review Tribunal by or in respect of a patient who is *liable to be detained* under this Act, the tribunal may in any case direct that the patient be discharged, and
>
> (a) the tribunal shall direct the discharge of a patient *liable to be detained* under section 2 above if they are satisfied—
>
> (i) that he is not then suffering from mental disorder or from mental disorder of a nature or degree which warrants his *detention* in a hospital for assessment (or for assessment followed by medical treatment) for at least a limited period; or
>
> (ii) that his *detention* as aforesaid is not justified in the interests of his own health or safety or with a view to the protection of other persons.
>
> (b) the tribunal shall direct the discharge of a patient *liable to be detained* otherwise than under section 2 above if they are satisfied—
>
> (i) that he is not 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;" ..."

The phrase "liable to be detained" is not used in the statute in any one universal way but, insofar as section 72(1) is concerned, three views are possible:

- If the two references in paragraph 72(1)(b) to patients who are "liable to be detained" bear the same meaning, and are both simply meant to embrace patients who have leave, it is unlikely that the opening references in section 72 to patients who are liable to be detained bear a different meaning.
- The word "detained" embraces patients who have leave of absence whereas the word "liable" means that a legal authority to detain the patient exists.[51]
- The three opening references to patients who are liable to be detained in section 72(1), 72(1)(a) and 72(1)(b), which do not form part of the criteria for discharge, refer to patients who are liable *in law* to be detained, while the subsequent reference in section 72(1)(b)(i) bears a different meaning, referring to patients either detained or on leave.

If the last view is correct, and it is perhaps the strongest interpretation, a tribunal may not review the case of a patient whose detention seems to it to be unauthorised unless it is the case that a patient remains liable to detention in pursuance of the application or order made under the Act until (a) such time as the High Court quashes it or (b) such time as the High Court orders his release or his release is ordered or directed under section 23 or 72.

[51] This construction is supported by various cases prior to 1959, such as *Safford v. Safford* [1944] P.61, but contradicted by the use of the word "detained" in section 72(1)(a)(i) and (ii) but "liable to be detained" in section 72(1)(b)(i).

Arguments against any power to take account of irregularities

The main arguments in favour of the now customary views that a tribunal may either not hear a patient's case if it is satisfied that his detention is not authorised or, if it may, that it may not have regard to any irregularities in the authority giving rise to the tribunal proceedings, may be summarised as follows—

1. The function of a tribunal at a hearing is to review the patient's current mental condition, and the risks associated with it, not to review whether his detention, guardianship or supervision is authorised.
2. The dicta of Ackner L.J. in *ex p. Waldron* accurately state the legal position and have, in effect, subsequently been adopted as such by the courts, albeit that the reservations of Glidewell and Slade L.JJ. were regrettably never brought to their attention.
3. In those places where the phrase "liable to be detained" does not form part of the statutory criteria, it refers to a patient whose detention is legally authorised. This is clear from a reading of both sections 20 and 72. If a patient is not liable to be detained, or subject to guardianship or supervision, there is no authority in existence for a tribunal to review or discharge.
4. A tribunal must either proceed on the basis that there is authority for the use of the compulsory powers being reviewed or, alternatively, it may take a view as to the sufficiency of that authority, but only to the extent of determining if it has jurisdiction to hear the application or reference.[52]
5. The underlying statutory purpose of discretionary discharge is to enable a tribunal to discharge a patient who cannot displace the double-negative test, that is a person who cannot demonstrate that there are no grounds for his detention, but whose mental state and circumstances make discharge appropriate.
6. If the contrary view were correct, a tribunal might discharge a patient subject to a guardianship order because it was of the opinion that the order was irregular in some material respect. This would involve reviewing the order of a criminal court and a tribunal has no jurisdiction to do that.

[52] Paragraphs (3) and (4) are not entirely compatible. If, as was stated by Ackner L.J. in *ex p. Waldron*, a tribunal "has no power to consider the validity of the admission" then its lawfulness must be presumed, unless "to consider" means "to legally determine." Unless it means this, the dicta cannot be reconciled with a second observation made in that case, namely that an application is only authorised, and so may only be dealt with, if the patient is actually liable to detention. For, unless a tribunal can consider and come to a view about the validity of the admission, it cannot establish if the patient is actually liable to detention and his tribunal application is authorised. However, if its view on the point is not determinative, because only the High Court can determine the validity of the admission, it has no authority to refuse to hear his case on the ground that, in its opinion, he is unlawfully detained and his application is unauthorised. Ackner L.J.'s two observations therefore seem to be contradictory. Thus, the dicta of Ackner L.J. in fact lead to the conclusion that the patient remains liable to be detained until the application is quashed, habeas corpus is granted, or an order or direction for discharge is made under section 23 or 72. The only outstanding question becomes whether the tribunal may have regard to any irregularities it is aware of when deciding whether to exercise its power of discharge under section 72.

7. Furthermore, because the same discretionary power of dis[illegible]ge applies equally to all unrestricted patients, it cannot be correct that there is a discretion to take account of irregularities in applications but not irregularities in court orders.

Arguments in favour of a power to take account of irregularities

The main arguments in favour of the proposition that a tribunal may have regard to irregularities in the authority can be summarised as follows—

1. *Re V.E.* is authority for the proposition that a tribunal which is satisfied that a civil patient's detention is not authorised under the Act is obliged to direct his discharge, notwithstanding that it is not satisfied that he is entitled to be discharged according to the statutory criteria for mandatory discharge.[53]

2. A patient's detention may not be authorised under the Act but the hospital managers nevertheless be entitled to act upon the application. And, if the managers may act upon an application which appears to be duly made, and so detain the patient in pursuance of it, that patient thereby becomes liable to detention by them notwithstanding that there is no authority for his detention under the Act. For it can hardly be said that the managers are entitled to act on the application but the patient is not thereby liable to detention by them. Furthermore, if they may detain him in pursuance of that application, it must also be the case that he may apply to a tribunal in respect of his detention in pursuance of the application.[54]

[53] This proposition is, of course, incompatible with the contention that flaws in the authority are matters relevant *only* to the exercise of the discretionary power of discharge. The more restrictive ratio of the decision in *Re V.E.* is that a tribunal must discharge the patient if the effect of a direction which it may lawfully make is that there is, or was, no authority to detain the patient.

[54] Section 6 deals with the effect of applications made under Part II. Subsections (1) and (2) provide that a "duly completed" application for admission constitutes sufficient authority for the patient's conveyance to, and detention in, the hospital named in the application. Subsection (3) then provides that an application for admission "which appears to be duly made and to be founded on the necessary medical recommendations may be acted upon without further proof of the signature or qualification of the person by whom the application or any such medical recommendation is made or given or of any matter of fact or opinion stated in it." The effect of these subsections was considered by Laws J. in *R. v. Managers of South Western Hospital, ex p. M.* [1993] Q.B. 683 at 700 and then by Sir Thomas Bingham M.R. in *Re S.-C. (Mental Patient: Habeas Corpus)* [1996] W.L.R. 146 at 156–157. Laws J. observed that an application which is not "duly completed" may nevertheless "appear to be duly made" on its face, as where an approved social worker applicant states that the nearest relative has not objected to the application being made when in fact he has. He then said that it followed that "although the managers were not authorised to detain the patient by section 6(2) standing alone, they were entitled to act upon the application, and thus to detain the patient, by virtue of section 6(3). Accordingly, the applicant's detention is not unlawful." As to this, the then Master of the Rolls said that he "would accept almost everything in that passage as correct with the exception of the last sentence. The judge goes straight from a finding that the hospital managers were entitled to act upon an apparently valid application to the conclusion that the applicant's detention was therefore not unlawful. That is, in my judgment, a non-sequitur. It is perfectly possible that the hospital managers were entitled to act on an apparently valid application, but that the detention was in fact unlawful. If that were not so the implications would, in my judgment, be horrifying."

3. If only the High C[illegible] has jurisdiction to quash an application made under Part II, it follows that, until then, the application continues to have an existence and the patient's detention is in pursuance of it. It is not in pursuance of any common law authority. While an irregular application may only be discharged by the High Court (in the sense of being quashed), various persons and bodies may make an order or direction for the patient's discharge under sections 23 and 72 (in the sense of releasing him from his detention pursuant to that application).

4. No particular significance is to be attached to the objection that if a patient's detention is unauthorised then there is no authority in existence for a tribunal to review. It has already been explained that the managers may lawfully act on an application and detain the patient even though his detention is not authorised. Furthermore, it is the patient who is being discharged, not the application or order. In the context of unrestricted cases, to order or direct a patient's discharge means to authorise his release. If the patient's discharge is ordered, this has the effect of prospectively annulling the application, that is reducing it to nothing, whatever was its status before — which is different from legally determining the issue of whether it ever had any status in law.

5. To authorise a person's release, because that seems to be appropriate in all the circumstances, including the possibility that his detention is not authorised, is therefore not the same thing as judicially determining the lawfulness of his detention. That is no more so than it was when the Board of Control could make an order for a patient's discharge having regard to mistakes and defects in a reception order. Just as the Board had a discretion to order a patient's discharge on that basis, but only the High Court could determine the issue, tribunals (which inherited the Board's discharge functions) have a discretion to discharge that basis, but only the High Court can determine the issue.[55]

6. In any case involving an unrestricted patient, a tribunal may at its discretion direct that the patient shall be discharged. Although, in some cases, the Act requires a tribunal to have regard to certain matters before exercising that power, in no case does it provide that there are certain matters which it may not have regard to. That was because it was of the opinion that a tribunal should not be at a disadvantage vis-à-vis the other persons and bodies who may make an order for the patient's discharge under section 23. If the hospital managers, and the nearest relative of a Part II patient, may have regard to the possibility that a patient's detention is unauthorised, when deciding whether to exercise their discretion to make an order for his discharge, there is no reason why a tribunal's discretion should be interpreted as being any narrower in this respect.

[55] In *Re Shuttleworth*, Lord Denman C.J. remarked that, if the patient was dangerous, it was better that she should remain in custody till the commissioners acted. *Re Shuttleworth* (1846) 9 Q.B. 651 at 662. The commissioners, and later the Board of Control, had a discretion to discharge a patient whose detention appeared to be irregular or without good cause and tribunals arguably inherited this independent discretionary power of discharge in 1959.

7. The fact that it is not the duty of tribunals to scrutinise applications following their acceptance is irrelevant. Tribunals could not possibly have been charged with such an administrative function. Moreover, it does not logically follow from the fact that it is not their duty to rectify defective documents that they may not take account of evidence that the use of compulsory powers is unauthorised.

8. Mandatory discharge by a tribunal aside, every other statutory power to discharge an unrestricted patient is discretionary. That is because no person can be required to order or direct a patient's release if to do so would place him or others at risk. He may in effect be required to seek a determination from the High Court that his detention is unauthorised.

9. The objection that such a discretion might mean that a tribunal may have regard to the fact that a hospital or guardianship order was apparently not imposed in accordance with the requirements of Part III is not as significant as first appears. In the first place, it is indisputably the case that a tribunal, or the managers, can lawfully discharge a patient from guardianship immediately after the order was imposed even though there has been no change of circumstances. That in effect involves overturning an order made by a criminal court. Secondly, the standard section 37 form completed by the clerk to the court, and sent to the hospital, is merely a record of the order made by the judge. It is equivalent to the Form 14 completed in Part II cases following the acceptance of an application. Hence, one can never proceed on the basis that a patient's detention is unauthorised simply because this form is defective (see *ex p. Norris*, **574**). Thirdly, it may be that, unless the patient avails himself of his statutory right of appeal in respect of an order, he cannot in any subsequent legal proceedings question its validity, including within tribunal proceedings.[56] And, if an appeal to a superior criminal court was dismissed, that is conclusive proof that the irregularity was immaterial. Fourthly, and in the alternative, if the detaining authority or local authority can properly have regard to any obvious irregularities in the authority for a Part III patient's detention, whether in terms of the order or subsequent renewals, it is unclear why their discretion should be unfettered in this respect but a tribunal's be fettered. Furthermore, there can in justice be no objection to a tribunal having a discretion to release a patient from the effect of an order which is subsequently shown to be invalid. Better that than that injustice should prevail because a person was too mentally incompetent to query the order at the relevant time.

10. In summary, subject to the precise effect of the decision in *Re V.E.*, a tribunal may, but may not be required to, discharge a patient whose mental condition does not entitle him to be discharged, having regard to all the circumstances of the case, including any evidence of a lack of authority for his detention, supervision or guardianship. That is not in any sense the same thing as determining the validity of the application. It involves going no further than directing the patient's discharge and finding the irregularity to be a material circumstance.

[56] See *Re Corke* [1954] 1 W.L.R. 899.

CONCLUSION AND SUMMARY

The issue is quite finely balanced. However, as to the four questions previously raised, it is submitted that—

1. For the purposes of the 1983 Act, a patient remains liable to be detained in pursuance of an application until it is quashed, the High Court orders his release, his release is ordered or directed under sections 23 or 72, or the application is not renewed.

2. Accordingly, until the patient's release is authorised, or those entitled to detain him lose their entitlement because the authority is not renewed, the patient is liable to be detained in pursuance of the application and may apply to a tribunal. A tribunal's function is to deal with applications duly made under section 66, *e.g.* within 28 days of a report reclassifying the patient, not to deal merely with those applications authorised under section 66 which are made by persons whose detention is duly authorised.

3. Since only the High Court may quash a Part II application, so rendering it *void ab initio*, an authority exists for a tribunal to review. However, the point is not of central importance because a patient detained following the acceptance of an application is liable to be detained in pursuance of it; the managers may be entitled to detain him although the application does not authorise that; and "discharge" means "to order the release of".

4. A tribunal's discretion is unfettered by statute and it is objectionable that its discretion should be impliedly fettered when that of a person acting under section 23 is not. Accordingly, it may have regard to the possibility that the patient's detention is unauthorised when exercising its power to discharge a patient at its discretion.

With the passing of years, this is very much a personal opinion. Although the Court of Appeal's judgment in *Re V.E.* has disappeared from view, and both counsel and textbooks have failed to acknowledge the reservations of Slade and Glidewell L.JJ. in *ex p. Waldron*, so that the dicta of Ackner L.J. have taken hold in a rather unconsidered fashion, that does not mean that the view expressed by him does not state the law. Only that the statement has not been subjected to proper scrutiny. Most tribunals are likely, and would be wise, to adhere to Ackner L.J.'s statement that they may not consider applications made by patients whose detention under the Act is not authorised. Nevertheless, because the practice of refusing to hear an application on account of the tribunal's opinion that the patient's detention is unauthorised is fraught with danger, and full of contradictions, other tribunals will no doubt continue to proceed on the assumption, or presumption, that the patient is liable to detention, with which issue the tribunal is not concerned. Assuming that the author's opinion will be held to be wrong, it does indeed seem preferable to deal with applications on the basis that (1) the authority is valid until such time, if ever, as the High Court determines otherwise; (2) the patient remains liable to detention in pursuance of it until the application is quashed or his release is ordered, either by the High Court or by virtue of an order or direction made under sections 23 or 72; and (3) the tribunal must confine its attention to those matters expressly referred to in section 72.

THE EXTENT TO WHICH DIRECTIONS ARE BI[illegible]ING

The extent to which a tribunal's direction that a patient shall be discharged is binding on those who may reauthorise his detention under the Act was considered in the cases of *ex p. K* and *ex p. M*.

Ex p. K.

In *ex p. K*, a restricted patient who had been conditionally discharged by a tribunal was later recalled to hospital by the Secretary of State. 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.

R. v. Secretary of State for the Home Department, ex p. K.[57]

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

In January 1971, the patient was convicted of the manslaughter of a neighbour's 12-year-old daughter. 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. 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. The next night, at about 11.30 pm, he attacked a young woman of 21. A sexual motive for each assault was suspected but could not be proved. Subsequently, in April 1986, the patient pleading guilty in each case to assault occasioning actual bodily harm. Having considered the medical and other evidence, the judge sentenced the patient to a total of six years imprisonment. In 1986 and whilst in prison, the patient reapplied to the tribunal. At the hearing in December 1986, the medical evidence 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. The patient's earliest date of release was 24 October 1989 and, on 1 September 1989, with the prospect of release approaching, the Secretary of State issued a warrant authorising the patient's detention in a special hospital upon his release from prison. The applicant applied for judicial review by way of an order of certiorari to quash the warrant of recall dated 1 September 1989 and an order of prohibition restraining the Secretary of State from so recalling him.

McCullough J.

The only point which had caused real difficulty was the extent to which a tribunal's decision to conditionally discharge a restricted patient subsequently bound the Secretary of State. The point had been most tellingly made by the patient's counsel when he asked if it could be lawful for the Secretary of State, a week after a patient had been conditionally discharged by a tribunal, to exercise

[57] For a fuller summary of the judgment, see page 348.

his power of recall in the a[illegible]ce of some fresh development. The answer was plainly not. It did not matter whether one castigated such an action as irrational, or illegal, or as frustrating the objects and policy of the Act. According to the patient's counsel, this was what has happened here since there was no evidence that the patient's condition has deteriorated; indeed there was no evidence about it at all. There were, no doubt, occasions when the Secretary of State had to act with speed under section 42(3) but this was not one of them. For years the applicant has been safely in prison. What the Secretary of State was in fact doing was overturning a decision with which he did not agree. His views were put to the tribunal on that occasion and they were rejected. He did not like the result so he was going to frustrate it by what could only be regarded as a misuse of section 42(3). The submission had more than a hint of *res judicata* in it and it was useful to see what was in fact decided in December 1986. The tribunal was constituted because the patient, who had earlier been discharged conditionally, wanted to be discharged absolutely. The issue in December 1986 had been confined to the issue of whether the patient should remain liable to recall and nothing was decided at that hearing which procured his conditional release. That was procured by the earlier decision of 19 March 1985 since when the events of October 1985 had occurred. Thus, insofar as considerations of *res judicata* might apply in the field (on which no submissions had been made and the court expressed no opinion), there was nothing in the tribunal's decisions to prevent the Secretary of State from alleging that further events had occurred since March 1985 which had a bearing on the question of the patient's mental condition — namely the attacks of October 1985. Despite the lack of evidence of any subsequent change in the patient's mental condition, it was open to the Secretary of State to take and act upon the view held by him provided he did so in a way consistent with the purposes of the Act. It would, however, be unlawful for the Secretary of State to recall a restricted patient to hospital when only the previous week or month he had been conditionally discharged from hospital by direction of a tribunal, unless meanwhile something has happened which justified the belief that a different view might now be taken about one of the factors on which his release had depended. But that was not the situation here. The hypothetical situation would frustrate the purposes of the Act but the present one did not. The essential factual difference between December 1986 and September 1989 was that in December 1986 there was no imminent prospect of the applicant coming into contact with members of the public, in particular young females; now there was. That was why the Secretary of State did not then act but now did. In terms of the application of the Wednesbury criteria [1948] KB 223, 229, it was important for the court to remember that the Secretary of State, before exercising his power under section 42(3), must give full weight to the fact that his decision will affect the liberty of the person recalled, but his interests were not the only ones for the Secretary of State to consider. *Application dismissed.*

In re M

In *ex p. M*, the patient, who was detained under section 2, applied to a tribunal which heard the matter on 14 December 1992. The tribunal was satisfied that she was not suffering from mental disorder of a nature or degree which warranted her detention in a hospital for assessment and accordingly directed her discharge. However, the tribunal directed that she be discharged on 17 December in order that social services could first make arrangements for a suitable support programme. During the period between the giving of the direction and the date fixed by the tribunal for the patient's discharge, she was detained under section 3. Laws J. said that he could see no basis for construing the statute so as to produce the result that an approved social worker's

duty or discretion to make a section 3 application was to any e : impliedly limited or abrogated by the existence of an earlier tribunal decision to discharge. There was no sense in which those concerned in making a section 3 application were at any stage bound by an earlier tribunal decision.

R. v. South Western Hospital Managers, ex p. M.

[1993] Q.B. 683 *Q.B.D, Laws J.*

The patient was admitted to hospital under section 4 on 30 November 1992. The admission took effect as a section 2 application on 1 December 1992, upon receipt of the second medical recommendation. On 14 December, a tribunal reviewed her case. Before the tribunal was a medical report prepared by the responsible medical officer, Dr. Lawrence, and a social circumstances report prepared by a social worker. The medical report stated that the patient had an 11 year history of bipolar affective disorder; was currently manic and without insight; had endangered her life and the lives of others by setting fires within the past two weeks; was unwilling to stay in hospital or to accept medication; and that the doctor therefore planned to place her under section 3. The tribunal received oral evidence from the writers of the two reports, the patient's uncle (a priest), and a friend of the patient. The responsible medical officer was excused from the hearing after giving his evidence and being questioned on it, but before the other oral evidence was taken. Having considered all the evidence, the tribunal was satisfied that the patient was not suffering from a mental disorder of a nature or degree which warranted her detention in a hospital for assessment and, accordingly, discharged her.[58] It postponed the date of her discharge until 17 December so that the social services could make arrangements for a suitable support programme for both her and her family. The recorded reasons for the decision stated that, although the tribunal did not accept that the patient's behaviour leading to her admission was merely eccentric, "there was, however, no firm evidence that her children were at risk and she had a good deal of support from neighbours and relatives when in her own home. We were persuaded to accept her undertaking that she would co-operate with a programme of treatment organised for her by the hospital and would take medication as advised and attend hospital when required."

The patient's admission under section 3

The tribunal's decision and the reasons for it were communicated to Dr. Lawrence on the day of the hearing. Having received a copy of the decision, Dr. Lawrence saw the patient but did not carry out a further medical examination. Having seen her, he completed a medical recommendation for her compulsory admission under section 3, that recommendation being based on an examination conducted earlier that day prior to the hearing. He took into account the tribunal's decision but "remained concerned that the patient would not take her medication or fulfil her undertaking to the tribunal because she continued to insist both during and after the tribunal hearing that she was not mentally ill." Furthermore, after the tribunal hearing, he had been informed by a ward nurse that the patient was pretending to take her medication, but in fact hid it under her tongue and spat it out afterwards. The second medical recommendation was provided on the following day by a General Practitioner from the practice at which the patient was registered. She described bizarre behaviour, incoherence, and pressure of speech on the patient's part, and was of the opinion that someone who considered it normal to light a fire in their home was not fit to be

[58] The tribunal's decision was silent as to whether the patient was also entitled to be discharged under sub-paragraph 72(1)(a)(ii).

discharged and to look af r children. She was not aware of the tribunal's decision but stated that, had she known of it, it would not have affected her recommendation. She had been told that the patient had refused to accept medication. On the same day, the case was referred to an approved social worker, who interviewed the patient and was told by her that she was not taking her medication but was hiding it under her tongue. Her assessment was that the patient would refuse out-patient treatment, continue to not take her medication, and continue to act in a bizarre manner and to threaten her neighbours. That evening, she was informed by another social worker that the latter had been in touch with the patient's mother in the Republic of Ireland. That social worker had been informed by the mother that she had no objection to the section 3 process. It was, of course, the case that the patient's mother was disqualified from being the statutory nearest relative because she was ordinarily resident outside the United Kingdom, the Channel Islands and the Isle of Man (see s.26(5)(a)). The patient's uncle, who was the statutory nearest relative, was also consulted by the second social worker, although not in his capacity as nearest relative. He disagreed with the tribunal decision. The section 3 application was accepted by the managers on 17 December.

The applications for judicial review and habeas corpus

On 22 December 1992 an application for leave to move for judicial review was refused by Potts J. The patient then applied for a writ of habeas corpus.

Laws J.

The patient had been refused leave to apply for judicial review. Since that was done after a hearing, His Lordship had no power to grant such leave and no renewed application had been made to him. However, the court would deal with the merits and substance of the argument. Although it had been contended that there had been an abuse of the process of the court, the application process under Part II did not involve any step within court proceedings. The argument was therefore misconceived. The suggestion that the section 3 process was unlawful because the issue with which it purported to deal was *res judicata* had rightly been abandoned by counsel. As to issue estoppel, it could only apply in a second set of proceedings where an issue had been conclusively decided in an earlier set of proceedings. Here, there was no second set of proceedings. Ultimately, the principal argument depended on the proposition that, on the true construction of the Act, the hospital managers had no power to detain a patient under section 3 if a tribunal had recently decided that the patient be discharged and there had been no change of circumstances since that decision. So regarded, the question became one of pure statutory construction.

Statutory construction

The construction advanced on the patient's behalf could not be sustained, not least because section 13 imposed a duty on an approved social worker to make a section 3 application in the circumstances which the section specified. That duty was not abrogated or qualified in a case where there had been a recent tribunal decision directing discharge. If that were the case, it would say so. Accordingly, the managers were obliged to consider on its merits any application made by an approved social worker in pursuance of his or her duty. The existence of a recent tribunal decision could no more fetter this obligation than it could the social worker's own express duty under section 13. Furthermore, if the legislature had intended otherwise one would expect a clear qualification to have been imposed within the terms of sections 3, 6 or 13. It could not sensibly be suggested that if the intention was that a patient should not be liable to

detention under section 3 in cases where there was a recent tribunal dec to discharge and no change of circumstances, that would not be clear and express on the face of the statute. The patient's counsel had then submitted that some period of time must be allowed to elapse after a tribunal decision, at least while there was no significant change in the patient's condition and circumstances, before a section 3 application was permissible. Alternatively, there must be a significant change in the condition or circumstances of the patient before a further application could be made. That could not be right. Honest and responsible doctors and other experts would differ upon such questions as the significance of any apparent change in a patient's condition. To make the legality of a detention depend upon issues of that sort would be to abandon any claim in the area to a reasonable degree of legal certainty and would put the experts involved in individual cases in an invidious if not impossible position. Nor was there anything in the statute to suggest that such a state of affairs was intended. The court had been referred to dicta of McCullough J. in *ex p. K* (**592**). However, the Act expressly gave the Secretary of State a power to recall to hospital a patient who has been conditionally discharged by a tribunal. There was therefore a plain nexus between the Secretary of State's power to recall and a tribunal's power to conditionally discharge. Even if the legality of a warrant of recall depended upon the Secretary of State having had regard to the basis of the earlier tribunal decision, so as to avoid any frank inconsistency with it, no such reasoning could apply to the relationship between the section 3 regime and the tribunal's functions under sections 66 and 72(1). There was no cross-reference between them and no basis for construing the statute so the duty and discretion of the approved social worker to make a section 3 application, and the function of the managers in considering it, were impliedly limited or abrogated by the existence of an earlier tribunal decision to discharge.

Multiple applications

In theory, the legal position outlined by the court might produce an impasse with a section 3 patient being alternately discharged and readmitted a number of times in quick succession. In reality, that was highly unlikely to happen, given good faith and the procedures and safeguards which coloured the section 3 process. Moreover, the public law safeguards enshrined in the *Wednesbury* and *Padfield* rules applied to all exercises of administrative power (**347**).

Alternative ground for refusing the application

The reasons for the tribunal's decision stated that they were persuaded to accept the patient's undertaking that she would co-operate with a programme of treatment organised for her by the hospital and would take medication as advised. On the facts there had been a change of circumstances since the tribunal's decision. It had become apparent that she was not taking her medication but hiding it under her tongue. Even though the tribunal was clearly told, and by the patient herself, that she had refused much of her medication in hospital, and this was borne out by the contemporary hospital notes, the fact was that the situation continued after the tribunal hearing. Thus, even if a section 3 application was only be good in the event of some change of circumstances or fresh development since an earlier tribunal decision to discharge, that was sufficiently established in this case.

Habeas corpus and judicial review

For all of the above reasons, the primary argument that the patient's detention under section 3 was flawed, because it was inconsistent with the tribunal's decision to discharge, must be rejected. That argument would in any event go to

judicial review and not to hab corpus. The reason was that, by section 6, if an application appeared to be made the managers could act upon it. That meant that the managers were not bound to investigate the possibility that there might be a latent defect in the application caused by a failure to respect a recent tribunal decision. A sufficient return to a writ of habeas corpus was made where it was shown that there existed *ex facie* a statutory authority for the detention.

Summary

There was no sense in which those concerned in a section 3 application were at any stage bound by an earlier tribunal decision. The doctors, social worker, and managers must under the statute exercise their independent judgment whether or not there was an extant tribunal decision relating to the patient. They would no doubt wish to have regard to any such decision, where they knew of it, in order to ensure that they had the maximum information about the facts of the case. But it could not confine or restrict their own exercise of the functions which the Act conferred on them. *Application dismissed.*

COMMENTARY

The judgment in *ex p. M.* must be approached with caution because the basis on which the court rejected the patient's application for habeas corpus has since been disavowed.[59] As to the other half of the judgment, it is noteworthy that, having decided that the question of the effect of a tribunal's direction was one "of pure statutory construction," the court managed to construe the statute without once referring to Part V of the Act. At no stage did it consider for a moment what inferences might be drawn from the tribunal framework and the powers vested in them, confining its attention to the powers vested in doctors and prospective applicants. Nor did it contemplate the fact that the European Convention on Human Rights requires that persons detained on the ground of unsoundness of mind must have access to an independent and impartial court which can speedily determine the issue and direct their release.[60] A tribunal's powers under section 72 are of two sorts. It has power to direct (discharge and reclassification) and power to recommend (leave of absence,

[59] The court held that a patient's detention was lawful provided that the application on its face appeared to be duly made. The patient could be detained on the basis of a medical examination conducted prior to a judicial decision that he be discharged (without that doctor further examining the patient) together with a recommendation given by a second doctor who was not informed that a judicial direction for the patient's discharge was outstanding. Nor did it matter that the application was then made by a person who did not consult the nearest relative, or correctly identify that relative, but arranged for another relative to be consulted by another person not making the application, or that those accepting it knew that it was defective because the nearest relative had not been consulted. The court's remarks were *obiter* and the opinion that a writ of habeas corpus is not available if an application appears on its face to be duly made was criticised by the Court of Appeal in *Re S-C (Mental patient: habeas corpus)* [1996] W.L.R. 146 (**866**). Sir Thomas Bingham M.R. said that the implications of such an interpretation were "horrifying" and would mean that a patient's detention was lawful "even though every statutory safeguard built into the procedure was shown to have been ignored or violated."

[60] Article 5(4) of the Convention provides that "Everyone who is deprived of his liberty ... shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful." Lawful in this context means both the substantive and technical lawfulness of the patient's detention. As to this, if a decision on the substantive lawfulness of a patient's detention (the facts/merits) is not binding then, by definition, it is not a decision — the substantive lawfulness of the patient's detention has not been decided. It may be noted that it was the breach by the United Kingdom of Article 5(4) that led to the domestic law having to be revised, as a result of which section 2 patients acquired a right to apply for their discharge to a tribunal.

transfer, supervision). The difference is that a direction must be given effect to while a recommendation need not be complied with.[61] To direct means to order, to rule, to command, and section 72 empowers a tribunal to "direct that the patient be discharged." The power is not one limited to recommending the patient's release to the hospital managers or notifying them of the tribunal's opinion about whether grounds for detaining him exist. In contrast, a tribunal's power in restriction direction cases is so limited by statute, the decision as to whether the patient is actually discharged lying elsewhere. The tribunal's direction that a patient is released is one addressed to those detaining him, the hospital managers. It is therefore difficult to see how the managers in ex p. M, being in possession of an outstanding court order directing them to discharge the patient on 17 December, could properly accept any application which authorised them to detain a patient whom they had been directed to release. It is similarly difficult to see how a social worker could be satisfied that an application "ought to be made" for the patient's detention in the very hospital from which his release had been ordered, the more so because the section 3 admission criteria are more stringent than in section 2 cases. Furthermore, as McCullough J. observed in *ex p. K.*, one cannot rule out that some principle similar to res judicata applies. Since the application process is unique, and nowadays involves an application made to a body other than a court, it is not irrational to suppose that such a body may be bound by a recent judicial finding on the same issues any less than was the case when such applications were actually made to a court. Finally, the contention that, if Parliament had intended that a patient could not be readmitted before being discharged in accordance with a judicial direction, then it would have said so, is wholly unconvincing.[62] It is therefore submitted that the correct position is that set out by McCullough J. in *ex p. K.*, the observations there holding good for restricted and unrestricted patients alike. If a tribunal directs a patient's discharge, he must be discharged. A further application may not be made in the absence of some fresh development. Some further event must occur which has a bearing on the question of the patient's mental condition and justifies the belief that a different view might now be taken about one of the factors on which his release had depended. Where this is not the case, any further application frustrates the objects and policy of the Act. In this context, they are that a person who is detained in pursuance of an application or order is entitled to have the substantive justification for his detention reviewed and decided by a court. Tribunals review decisions to make applications, applicants do not review tribunal decisions. They have no power to review or overturn the decision of a court, otherwise it is not a decision, and the issue of whether existing circumstances constitute grounds for the patient's detention has not been determined. Any other view means that the law has moved not only

61 Thus, a recommendation under section 72(3) that a patient be granted leave of absence does not oblige the responsible medical officer to grant leave. Similarly, a recommendation that a patient be transferred does not bind the hospital managers. In both cases, the tribunal may reconvene to further consider the patient's case if its recommendation is not complied with but it may not direct that the patient be granted leave or transferred.

62 Any proposition to the effect that "if Parliament had intended that provision x should not apply in circumstances y, it would have said so" should always be tested by reversing it, so that it reads "if Parliament had intended that provision x should apply in circumstances y, it would have said so," and then seeing if there is any loss of plausibility. In this case, an alternative proposition might be, "if Parliament had intended that a patient whose discharge had been directed by a judicial body, because it was satisfied that there were no grounds for detention, could be readmitted before he had been discharged, it would have said so." Or, less fairly, "if Parliament intended that a doctor could give evidence in the morning to a court which was reviewing the grounds for a patient's detention and then, in the afternoon, sign a medical recommendation on being notified of that court's finding that his evidence had been rejected and the patient was entitled to be discharged, and do that on the basis of an examination conducted prior to the hearing, it would have said so."

from the position that a court order is required before a person can be denied his liberty to the position that he has a right to have the justification for his detention judicially reviewed after the event, but to the further position that such retrospective decisions do not entitle the person concerned to be set at liberty. Social workers and doctors become the ultimate judges of when a person may be detained when that is for judges of law to decide. If this is what Parliament's intended, that really is something one would have expected it to make clear.

Tribunal procedure and practice