## Chapter 19

# REMOVAL AND RETURN OF PATIENTS AND REPATRIATION OF PRISONERS



## 19.01 Introduction

Part IV of the Mental Health Act 1983 is concerned with the removal and return of patients within the United Kingdom. This should be read in conjunction with other relevant legislation in other parts of the U.K. such as Part VI of the Mental Health (Scotland) Act 1960 (which also concerns removal and return of patients). The purpose of these provisions is to authorise the Secretary of State to transfer a patient who is liable to be detained (other than patients remanded to hospital or under an interim hospital order) or subject to guardianship to another part of the United Kingdom without a break in the powers of detention or guardianship (ss. 80–85). Generally, the Secretary of State must first be satisfied that a transfer is in the patient's interests and that arrangements have been made for his admission to hospital (*i.e.* a hospital bed has been found and agreed to by the managers) or reception into guardianship (*i.e.* an appropriate guardian must have agreed to accept responsibility). When the person is transferred it is as if he were admitted to hospital or subject to guardianship under the corresponding section of mental health legislation in the place to which he is removed. The patient is treated as if he were first admitted under the corresponding section so that he begins the period of detention afresh. This, in turn, means that he can exercise any right to a Mental Health Review Tribunal as if he had just been admitted under that section. There are no provisions which authorise the forcible removal of informal patients. However, because these provisions do apply to patients **liable** to be detained they could authorise the forcible removal of a patient on a leave of absence. When a patient is removed **from**

England or Wales and is duly admitted into hospital or placed under guardianship, the application, order or direction in England and Wales ceases to have effect (s. 91(1)).

Regulation 11 applies to patients removed **to** England or Wales (s. 90; see ss. 82, 84 and 85). Any patient removed to England or Wales is treated as if suffering from such form of mental disorder as may be recorded under reg. 11. The appropriate medical officer (see reg. 2(1), s. 16(5) and para. **6.17.3** *ante*) must record in Form 32 his opinion as to the form or forms of mental disorder from which the patient is suffering. He must do this as soon as reasonably practicable after the patient's removal or, if the patient is subject to restrictions, as soon as reasonably practicable after he ceases to be so subject (reg. 11(2)).

The managers must record in Form 33 the date on which the patient is admitted to hospital; and must as soon as reasonably practicable, inform the nearest relative of the admission (reg. 11(3)). Similar duties are placed upon the guardian in the case of patients subject to guardianship (reg. 11(4)).

Section 86 authorises the Secretary of State to authorise the removal of patients who do not have a right of abode in the U.K. The criteria are similar to those which apply to removals within the U.K. However, section 86 applies only to longer-term patients who are **actually** detained (not simply any patient **liable** to be detained). The Secretary of State must also have the approval of a Mental Health Review Tribunal before removing alien patients under section 86.

Part VI also concerns the return of patients who are absent without leave. If such a patient is absent from hospital and found in another part of the U.K. he can be returned to the hospital from which he absented himself (ss. 87–89).

### 19.02 Removal of Patients to Scotland

The Secretary of State may authorise the removal of a patient liable to be detained or subject to guardianship in England and Wales to Scotland,[1] and he may give any necessary directions for conveyance to the destination (s. 80(1)); section 80 does not apply to patients remanded to hospital (s. 35 or 36) or under an interim hospital order (s. 38). See paras. **14.14–14.16** *ante*). Before authorising the patient's removal the Secretary of State must be satisfied that it is in the interests of the patient to remove him to Scotland, and that arrangements have

[1] The Secretary of State may, with consent of the Minister exercising corresponding functions in Scotland, transfer responsibility for a patient subject to a restriction order who has been conditionally discharged (s. 80A). A patient for whom responsibility has been transferred shall be treated as if on the date of transfer he were conditionally discharged under the corresponding enactment in force in Scotland. If the original restriction order was of limited time duration, the order should expire on the date set by the original order, as if the transfer had not been made.

been made for admitting him to a hospital[1] or receiving him into guardianship (s. 80(1)).[2] Thus removal under section 80(1) must be for the patient's benefit and an appropriate hospital or guardian in Scotland must have agreed to admit or receive him.

Where a patient liable to be detained is removed to Scotland under section 80(1) he is treated as if he were admitted to hospital in pursuance of an application to the relevant Health Board of the Scottish hospital or an order or direction[3] under the corresponding enactment in Scotland (s. 80(2)).[4] There is no equivalent in the Scottish Act to an admission for assessment under section 2 of the 1983 Act. Accordingly, where a person immediately before he was removed was detained under section 2 for assessment, he is treated as if he were admitted to hospital in pursuance of an emergency recommendation under section 31 of the Mental Health (Scotland) Act 1960, which lasts for seven days (s. 80(4)).

Where a patient subject to guardianship is removed to Scotland under section 80(1) he is treated as if he were received into guardianship in pursuance of an application, order or direction under the corresponding enactment in Scotland (s. 80(3)). Similarly, where the patient was in hospital by virtue of a transfer direction given while he was serving a sentence of imprisonment (see s. 47(5)) imposed by a court in England and Wales, he is treated as if the sentence had been imposed by a court in Scotland (s. 80(5)).

## 19.03 Removal To and From Northern Ireland

### 19.03.1 *Removal of patients to Northern Ireland*

The Secretary of State may authorise the removal of a patient liable to be detained (except a patient remanded to hospital or under an interim hospital order) or subject to guardianship in England and Wales to Northern Ireland (s. 81(1)).[5] The details for removal are

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[1] In s. 80 "hospital" has the same meaning as in s. 111(1) of the Mental Health (Scotland) Act 1960 (s. 80(7)): "(*a*) any hospital vested in the Secretary of State under the National Health Service (Scotland) Act 1978; (*b*) any private hospital registered under Part III of [the 1960] Act; and (*c*) any State hospital [*i.e.* Carstairs]".

[2] The position of the nearest relative on the patient's transfer to Scotland is covered by s. 76 of the 1960 Act.

[3] Where the patient immediately before his removal was subject to a restriction order or restriction direction he will be subject to the corresponding order or direction in Scotland (s. 80(2)). If the restrictions were for limited duration, they will expire at the time they would have expired if he had not been removed (s. 80(6)).

[4] Amended by the Mental Health (Amendment) (Scotland) Act 1983, s. 39(2), Sch. 2, para. 1(*a*).

[5] The Secretary of State may, with consent of the Minister exercising corresponding functions in Northern Ireland, transfer responsibility for a patient subject to a restriction order who has been conditionally discharged. A patient for whom responsibility has been transferred shall be treated as if on the date of transfer he were conditionally discharged under the corresponding enactment in force in Northern Ireland. If the original restriction order was of limited time duration, the order should expire on the date set by the original order, as if the transfer had not been made.

virtually identical to removal to Scotland under section 80: the Secretary of State must consider that removal is in the patient's interests and that arrangements have been made for the patient's admission to hospital or reception into guardianship in Northern Ireland (s. 81(1)); when the patient is removed he is treated as if he were admitted to the hospital (s. 81(2)) or received into guardianship (s. 81(3)) under the corresponding enactment in Northern Ireland. Where the patient was detained for assessment under section 2 of the 1983 Act he will be treated as if he were admitted under Article 4 of the Mental Health (Northern Ireland) Order 1985 which provides for compulsory admission for up to 14 days (s. 81(4)). Where the patient was detained for treatment under section 3 of the 1983 Act he will be treated as if he were admitted under Article 12 of the 1985 Order (s. 81(5)) under which the patient can be detained for up to six months from the date of admission).

### 19.03.2 *Removal to England and Wales of patients from Northern Ireland*

Similar arrangements can be made for the removal to England and Wales of patients from Northern Ireland (s. 82).[1] The decision rests with the "responsible authority" who is the Department of Health and Social Services for Northern Ireland or, in the case of a restricted patient, the Secretary of State (s. 82(7)). It must appear to the responsible authority that removal is in the patient's interests and that arrangements have been made for the patient's admission to hospital or reception into guardianship in England and Wales (s. 82(1)). The patient is admitted to hospital or received into guardianship in England and Wales under the provision in the 1983 Act which corresponds with the provision in the Mental Health (Northern Ireland) Order 1985 under which the patient had been detained or under guardianship immediately before removal (s. 82(2), (3)).

If the patient was detained under Article 4 of the 1985 Order, he is admitted for assessment under section 2 of the 1983 Act; if he was detained under Article 12 of the 1985 Order, he is admitted for treatment under section 3 of the 1983 Act (s. 82(4)). (As to the effect of a section 19 report, see para. **19.03.1** above).

Where a patient is admitted to hospital or received into guardianship in England or Wales after having been removed under section 82, he can apply to a Mental Health Review Tribunal in the same way as if he were originally admitted under the particular provision—for example, if upon his removal, he is admitted to hospital for treatment, he is entitled to apply to a tribunal within the first six months of his removal (s. 66(1)(*b*), (2)(*b*)). Note that even if he is admitted to hospital in England and Wales as if under a hospital order he can apply to a

[1] Section 82A of the Act permits transfer of responsibility for conditionally discharged patients with restriction orders or restriction directions to England and Wales from Northern Ireland.

tribunal during the **first** six months of admission (s. 69(2)(*a*); see further para. **18.04.7** *ante*).

## 19.04 Removal To and From the Channel Islands and Isle of Man

### 19.04.1 *Removal of patients to the Channel Islands or the Isle of Man*

The Secretary of State may authorise the removal of a patient liable to be detained (except if remanded to hospital or under an interim hospital order) or subject to guardianship under the 1983 Act to any of the Channel Islands or to the Isle of Man.[1] He must consider that such removal is in the patient's interests and that arrangements have been made for his admission to hospital or reception into guardianship (s. 83).

### 19.04.2 *Removal to England and Wales of offenders found insane in the Channel Islands and Isle of Man*

The Secretary of State may direct that any offender found by a court in the Channel Islands or the Isle of Man to be insane (at the time of the offence or the trial) and ordered to be detained under H.M. Pleasure, be removed to hospital in England or Wales (s. 84(1)). The patient will then be detained under H.M. Pleasure in England or Wales as if detained under section 46 (see further para. **15.21** *ante*). The Secretary of State can also direct that any person removed can be transferred back to the Channel Islands or the Isle of Man (s. 84(3)).

### 19.04.3 *Patients removed from the Channel Islands or Isle of Man*

Section 85 applies to any patient who is removed to England and Wales from any of the Channel Islands or the Isle of Man under a provision corresponding to section 83 above (s. 85(1)). If the patient was liable to be detained or subject to guardianship before his removal, he will be admitted to hospital or received into guardianship under the corresponding provision of the 1983 Act (except for remands to hospital or interim hospital orders) (s. 85(2), (3)).[2]

A patient removed to England and Wales under section 85 is entitled to apply to a Mental Health Review Tribunal as if he were originally admitted under the section of the 1983 Act in question. For example, if admitted for treatment or under a hospital order, he could apply within the first six months of admission (ss. 66(1)(*b*), (2)(*b*), 69(2)(*a*)).

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[1] Section 83A of the Act permits transfer of responsibility for conditionally discharged patients with restriction orders or restriction directions to the Channel Islands or the Isle of Man.

[2] If the responsibility for a conditionally discharged patient is transferred to the Secretary of State from the corresponding authority in the Channel Islands or the Isle of Man, the patient is treated as if he were conditionally discharged under section 42 or 73 of the Act and as if he were subject to a restriction order or restriction direction under section 41 or 49 of the Act (s. 85A).

## 19.05 Removal of Alien Patients

The Secretary of State has the power in respect of certain alien patients (see below) to authorise their removal to a country or territory outside the United Kingdom, the Isle of Man and the Channel Islands, and to give directions for their conveyance there and for their detention in any place or on board ship or aircraft until their arrival (s. 86(2)).

Section 86 applies to any patient who is neither British nor a Commonwealth citizen having the right of abode in the U.K. under section 2(1)(*b*) of the Immigration Act 1971. The patient must be receiving treatment for mental illness as an in-patient in hospital and is detained for treatment under section 3 or a hospital order under section 37 or an order or direction having the same effect as a hospital order (s. 86(1)).[1]

Note that section 86 is more narrowly drawn than the other provisions for removal in Part VI of the Act. Alien patients can only be removed if they are **actually detained** in hospital under a **longer-term** section; and it applies only to those classified as suffering from **mental illness** and not the other forms of mental disorder. Finally, the Secretary of State cannot remove an alien patient under section 86 until he obtains the approval of a Mental Health Review Tribunal (s. 86(3)). This is a new function for tribunals, first introduced in the Mental Health (Amendment) Act 1982. The tribunal is not given any criteria upon which to make such a decision; and there is no reference to this power in Part V of the Act relating to tribunals. Nor is there any special reference to this power in the Tribunal Rules of Procedure. It is to be assumed that the criteria to be used are those given to the Home Secretary: (*a*) that removal is in the patient's interests (*i.e.* it would be of benefit to the patient); (*b*) that satisfactory arrangements for the patient's removal have been made; and (*c*) that satisfactory arrangements have been made in the country to which he is to be removed for his care or treatment. It may be assumed that the tribunal hearing is to be treated procedurally as any other reference case.

There is nothing to prevent a patient who has been removed under section 86 from applying for re-admission to the United Kingdom. However, if the patient before his removal was subject to a restriction order he will upon his re-admission still be subject to restrictions if the order would still have been in force had he not been removed (s. 91(2)).

## 19.06 Return of Patients Absent Without Leave

### 19.06.1 *Patients absent from hospital in Northern Ireland*

Section 87 is concerned with patients who have escaped from custody or who are absent without leave from a hospital in Northern

[1] Section 86 also applies to patients detained for treatment (s.12), a hospital order (s. 48) or an order or direction with the same effect as a hospital order under the Mental Health Act (Northern Ireland) 1961.

Ireland; it does not apply to guardianship patients (s. 87(2)). Such patients may be taken into custody in England and Wales and returned to Northern Ireland by an approved social worker, by any constable or by any person authorised by virtue of the Mental Health Act (Northern Ireland) 1961 (s. 87(1)). An equivalent provision exists in respect of patients from Scotland in section 83 of the Mental Health (Scotland) Act 1960.

**19.06.2** *Patients absent from hospital in England or Wales*

Any patient liable to be detained who is absent from hospital without leave (s. 18), (see paras. **11.14–11.17** *ante*) or who has escaped from legal custody (s. 138), (see para. **21.18** *post*) may be taken into custody in any part of the United Kingdom, Channel Islands or Isle of Man and returned to England and Wales (s. 88(1)). Such a patient may only be taken into custody if he could have been so taken in England and Wales; thus the time limits specified in sections 18 and 22 are still applicable. Section 88 does not apply to guardianship patients (s. 88(4)). (See further para. **11.15** *ante*.)

**19.06.3** *Patients absent from hospitals in the Channel Islands or Isle of Man*

Any person who is absent without leave or escapes from custody under the corresponding provision to section 18 or 138 in any of the Channel Islands or the Isle of Man can be taken into custody in England or Wales by a constable or approved social worker and returned to the place from which he absconded (s. 89(1)). This does not apply to guardianship patients (s. 89(2)).

## 19.07 Repatriation of Prisoners

The Repatriation of Prisoners Act 1984 makes provision for facilitating the transfer into and out of the United Kingdom of persons detained in prisons, hospitals or other institutions by orders made by the courts in the exercise of their criminal jurisdiction. This includes patients detained by virtue of an order made by a court under Part III of the Mental Health Act 1983. It also includes patients who have been transferred within the United Kingdom (see paras. **19.01–19.04** above) who were originally required to be detained by virtue of an order made by a criminal court. The intention behind the 1984 Act is humane, so a British subject abroad can be transferred to this country to serve his period of detention, and *vice versa*. The Act enables the United Kingdom to ratify the Council of Europe Convention on the Transfer of Sentenced Persons signed on 25 August 1985.[1]

[1] The Act received Royal Assent on 26 July 1984 and comes into force on a date to be appointed.

**19.07.1** *Consent of the prisoner is required*

A warrant providing for the transfer of a prisoner into or out of the United Kingdom under section 1 of the Repatriation of Prisoners Act 1984 requires the consent of the prisoner. Once the consent is given it cannot be withdrawn after a warrant for the prisoner's transfer has been issued. The consent must be given in a manner authorised by the international arrangements in accordance with which the prisoner is to be transferred. The consent must be given by the prisoner himself; or, if it appears to the Secretary of State that it is inappropriate for the prisoner to act for himself by reason of his physical or mental condition or his youth, the consent can be given by a person appearing to the Secretary of State to be an appropriate person to act on the prisoner's behalf.

The Under-Secretary of State at the Home Office, Mr. David Mellor, made a number of important statements in a letter to Mr. Gerry Bermingham, MP, which were subsequently re-affirmed in *Hansard*[1]; a copy of the letter dated 28 June, 1984 was placed in the House of Commons Library so that it is on record.

Mr. Mellor stated that:

> "It will only very rarely, and perhaps never, be neccessary to transfer a person on the basis of a consent given by another person on his behalf. There is certainly no presumption that because a person is detained in hospital by reason of mental disorder, he is at no time capable of taking decisions on his own behalf. In our view, it would rarely be the case that the mental disorder was so extreme that the patient did not have lucid and rational periods during which he was capable of making such a decision for himself. . . .
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> "If such an exceptional case should arise we would adhere as closely as possible to the procedure which Parliament laid down in the Mental Health Act 1983 for the removal abroad of alien mental patients [see para. **19.05** above]. This would entail the Secretary of State being satisfied that transfer was in the patient's best interests and that proper arrangements had been made for the transfer and for his care or treatment in the other country. Since it would be outside the formal remit of a Mental Health Review Tribunal to advise on such a case, we should propose, in a case of mental incapacity, to seek the views of a panel of experts similarly constituted and consisting of persons who sit on such tribunals. In a case of physical incapacity, appropriate medical advice would be obtained.
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> "The interests of the patient would always be the paramount consideration. If the Secretary of State was not satisfied that transfer would be in the patient's best interest, he could withhold his consent."

[1] July 4, 1984, cols. 429–432.

### 19.08 Removal to Suitable Premises of Persons in Need of Care and Attention under the National Assistance Act 1948

Section 47 of the National Assistance Act 1948 authorises the removal to suitable premises of persons in need of care and attention. Section 47 applies to persons who "(*a*) are suffering from grave chronic disease or, being aged, infirm or physically incapacitated, are living in unsanitary conditions; and (*b*) are unable to devote to themselves, and are not receiving from other persons, proper care and attention."

The application is made by the local authority for the area in which the person is residing to a magistrate's court having jurisdiction in that area. The application must be supported by a community physician[1] certifying to the authority that he is satisfied after thorough inquiry and consideration that it is necessary to remove the person from the premises in which he is residing "in the interests" of the person or "for preventing injury to the health of, or serious nuisance to, other persons."[2]

The magistrates court can make a removal order if satisfied on oral evidence of the statements made in the certificate and that it is expedient to do so. The order authorises a specified officer of the local authority to remove the person to a suitable hospital or other place in, or within convenient distance of, the local authority. The order authorises the person's detention and maintenance in that place. Section 47 encompasses many people with mental disorders.[3] The suitable premises is usually residential accommodation provided by a local authority or a nursing home. But "suitable premises" can be a hospital for mental illness or mental handicap, including a special hospital.

The person managing the premises must have been heard in the proceedings or have received seven clear days' notice of the application and the time and place of the hearing. The person in respect of whom the application is made or some person in charge of him must also receive seven clear days' notice of the application and the time and place at which it will be made.

The court order may authorise the person's detention for a specified period not exceeding three months, and the court may, from time to time, extend that period for periods not exceeding three months.

The court may vary the order by substituting another suitable place

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[1] Medical officers of health were originally specified in the 1948 Act as responsible for issuing certificates. These officers were employed by local authorities in their health and welfare departments before the reorganisation of local government (Local Authority Social Services Act 1970) and the health service (National Health Service Reorganization Act 1973) in the early 1970s. See Law Commission Consultation Paper No. 119, Mentally Incapacitated Adults and Decision Making: An Overview, London: HMSO, 1991, p. 84.

[2] A form for a "*Certificate of Need for Removal of Persons to Hospital or other Place*" is published by Shaw & Sons, Cat. No. N.A. 21.

[3] Age Concern (1986) *The Law and Vulnerable Elderly People*, p. 40.

in, or within a convenient distance of, the area of the local authority. Before an order is varied, the person managing the new place must have been heard or given seven clear days' notice of the hearing.

An application may be made to the court by or on behalf of the person at any time after six weeks from the order for the revocation of the order. The community physician must receive seven clear days' notice of an application to revoke the order.

Any person who wilfully disobeys, or obstructs the execution of, an order is guilty of an offence under the 1948 Act.

The National Assistance (Amendment) Act 1951 created an emergency procedure allowing removal of persons with minimal formality and delay. The community physician and another registered doctor must certify that "it is necessary in the interests of that person to remove him without delay." Under this amendment, the person may be detained initially for three weeks and has no right to apply for revocation of the order during that time.

The emergency procedure removes many of the safeguards required in the 1948 Act. First, the application can be heard by a full magistrates' court or by a single justice. Orders may be made *ex parte* if the court considers it necessary. Second, the person subject to the order and, if he agrees to accommodate the person, the manager of the premises, need not receive notice of an emergency application. Third, an application for revocation of an emergency order may not be made.

Removal orders under the National Assistance Act have been used to detain some 200 people each year.[1] A significant proportion of these cases are emergency applications.[2] Persons removed to hospitals for mental illness or mental handicap are not thereby subject to the compulsory powers or restraints in the Mental Health Act.[3] These persons conceptually should be regarded as informal patients under the Mental Health Act, even though they may be detained under other legislation.

The 1948 Act has been criticised as restrictive and stigmatising without modern safeguards to protect against unwarranted loss of liberty.[4] The Act does not have clear criteria justifying detention to prevent a significant risk to health or safety. Ambiguous phrases such as "unsanitary conditions", "unable to devote themselves", and "proper care and attention", particularly when applied to vulnerable persons with chronic disease, illness, physical disability, or old people, are subject to inconsistent application and sometimes misuse.

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[1] Gray M (1981) Section 47, *J. Med. Ethics*, vol. 7, pp. 146–149.

[2] The Law Commission Consultation Paper No. 119, *Mentally Incapacitated Adults and Decision-Making: An Overview*, London, HMSO, 1991, p. 76.

[3] See J. Williams (1990) *The Law of Mental Health*, London: Fourmat Publishing, p. 44.

[4] Law Commission Consultation Paper No. 119, *op cit.*, pp. 77–78.

The Act also does not ensure the rigorous procedures and advocacy required when loss of liberty is at state. While the person is usually allowed a judicial hearing, there is no assurance the person will appear or receive legal representation; and in an emergency application he may not have a right to appear. The person must wait six weeks before applying for a revocation of a section 47 order. This is in contrast to the expeditious right to apply to a Mental Health Review Tribunal spurred on by the European Court of Human Rights.

Many doctors in charge of treatment discharge the person from hospital before the expiration of the order. The lawfulness of early discharge, in the absence of a revocation order, is open to question.[1] A removal order is legally binding and the 1948 Act does not specify any mechanism other than a revocation order, for discharging the order. Alternatively, section 47 may be viewed as merely giving authority to remove and detain the person. Under this view, the approriate authority, in consultation with the managers of the premises, might decide not to enforce the order.

[1] Counsell E (1990) Compulsory Removal and Medical Discretions, *New Law Journal*, May 25, pp. 750–751.