Conditional Discharges – 'Discharge' from what?

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R (on the application of the Secretary of State for the Home Department) v Mental Health Review Tribunal and PH (Interested Party) [2002] EWCA Civ 1868

Court of Appeal (19th December 2002) Keene LJ, Sir Anthony Evans and Kay LJ

The Facts

The patient, PH, was admitted to hospital in 1958 having been found unfit to plead to two counts of wounding with intent. He has remained in Broadmoor hospital as a restricted patient ever since and is now in his 70's. He continues to suffer from paranoid schizophrenia and has entrenched delusional beliefs. His physical health is poor.

In October 2001 a mental health review tribunal directed PH's conditional discharge and deferred the discharge until arrangements had been made to meet the conditions which the tribunal imposed.[1] The conditions were as follows:

1. To continue to take and receive medication as prescribed.
2. To accept and comply with regular supervision by a consultant psychiatrist and social supervisor.
3. To reside at suitable specialist accommodation which provides 24 hour trained psychiatric nursing care and daytime trained psychiatric nursing care and appropriate security.
4. Not to leave the accommodation without an escort.

The Home Secretary sought judicial review of the tribunal's decision. The main ground of challenge was that the tribunal had exceeded its powers: under the guise of discharging PH, the tribunal had imposed conditions which in effect continued his detention. One element of the Home Secretary's case was that the conditions could be met by PH moving to another hospital and that as such the decision amounted to a transfer to lesser security. While under s.73 Mental Health Act 1983 the tribunal can discharge a restricted patient, either conditionally or absolutely, it does not have power to order transfer.[2]

In evidence to the Administrative Court, the President of the tribunal said that among the factors underpinning the decision was the tribunal's awareness of PH's need for assistance and care in respect of his physical needs and "in terms of his interaction with the public and with the outside

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1 *The tribunal hearing took place before the Court of Appeal's Judgment in R (IH) v Secretary of State for the Home Department and Secretary of State for Health [2002] EWCA Civ 646 (for review of which see Deferred Conditional Discharges – The New Regime David Mylan JMHL July 2002 pp 208 – 218)*

2 *Indeed, by contrast with tribunals concerned with unrestricted patients, it has no statutory power to even recommend transfer.*

world''. With reference to the need for ''appropriate security'' the tribunal had not intended to suggest that PH needed any kind of locked facility but that there would be a degree of supervision in place for the benefit of residents, such as that which obtains for residents with problems such as dementia. As for the requirement that PH be escorted when outside the home, this was imposed by the tribunal so as to facilitate rather than inhibit his freedom. The tribunal was aware that he had not lived in the outside world for many years and there were concerns that he would become disorientated or would find it difficult to cope with such things as traffic and the value of money. There was no evidence that the conditions were imposed for the protection of the public, rather they were designed for PH's own protection.

The Administrative Court rejected the Home Secretary's application[3]. In the opinion of Elias J., the word 'discharge' in section 73 of the Mental Health Act 1983 should be read as referring to a cessation of deprivation of liberty. If the order of the tribunal meant the patient was no longer being deprived of his liberty, the discharge was lawful and within the tribunal's powers. Every case was to be decided on its own facts, and in this case, the Judge decided that since ''there will be an opportunity for PH to go into the community and to receive people from the community, albeit that restrictions are imposed'' there was a lawful discharge.

Mann J. in *Secretary of State for the Home Department v Mental Health Review Tribunal for the Mersey Regional Health Authority*[4] had held that 'discharge' could ''only mean release from hospital''. Elias J. disagreed. Although he ruled that on the facts of the case, the institution to which PH was to go was not a 'hospital', he was of the opinion that it could still be a lawful discharge even if the new accommodation was a hospital. He said (at paragraph 30 of his judgment) as follows:

> ''In my view, the fallacy is to treat release from discharge as meaning release from hospital. It seems to me that it means release from detention in hospital or sometimes…..from liability to be detained. Release from hospital is neither a sufficient nor a necessary condition for constituting the discharge. If there is such a release but it is to another institution where the patient is detained in the sense that he is deprived of his liberty, then that would not in my judgment, constitute a proper and lawful discharge. By the same token, in my judgment, if the patient is discharged from detention in a hospital such that he is no longer deprived of his liberty, then there is still an effective discharge notwithstanding that the conditions are such that he is required to reside in another hospital pending further consideration of his absolute discharge. The central issue, it seems to me, is whether or not the conditions constitute a continuing detention. If they do not, it is irrelevant where the patient resides thereafter. Indeed if it were thought by the tribunal that the only appropriate institution to which a conditional discharge could properly be made was another hospital, it would seem to me to infringe Article 5 of the Convention to refuse that discharge simply because the only available alternative institution was another hospital. Of course, the nature of the conditions imposed requiring discharge to that other hospital may well be such that they do not in fact constitute a release from the deprivation of liberty, but that will be because of the overall effect of the conditions, not because the discharge is from one hospital to another.''

When the Home Secretary's appeal reached the Court of Appeal in December 2002, PH was still detained in Broadmoor as it had not proved possible to meet the conditions imposed by the tribunal, but efforts in this regard were continuing.

3 *[2002] EWHC 1128 Admin*

4 *[1986] 1 WLR 1170*

The Decision

The Court of Appeal approached the case by asking whether the effect of the conditions imposed by the tribunal was, as claimed by the Home Secretary, to continue PH's detention, albeit in conditions of lesser security. In answering this question the Court considered the jurisprudence of the European Court of Human Rights on the meaning of detention for the purpose of Article 5 of the Convention[5]. The Court found that the following principles had been established:

1. A basic distinction is to be drawn between mere restrictions on liberty of movement and the deprivation of liberty;
2. The distinction is one of degree and intensity of the restrictions;
3. The court must start with the actual situation of the individual and take account of a range of criteria such as type, duration, effects and manner of implementation of the measure in question;
4. Account must be taken of the cumulative effect of the various restrictions;
5. The purpose of the measures of restriction is a relevant consideration: if the measures are taken primarily in the interests of the individual who is being restricted, they may well be regarded as not amounting to a deprivation of liberty and so no breach of Article 5 would arise.

Applying these principles to PH's situation, Keene LJ, who gave the Judgment of the Court, referred to the evidence of the President of the tribunal and concluded (paragraph 24):

> "I cannot accept that conditions 3 and 4 *inevitably* mean that this man would be in a regime so restrictive that he would be deprived of his liberty. Condition 3 is sufficiently broadly phrased as to allow for measures which would fall short of such a deprivation, and both it (where it deals with security) and condition 4 have as their purpose the protection of PH himself and would therefore be in his interests. I should add that there is some evidence to indicate that, in at least one care home, the staffing arrangements would be such as to enable PH to go out with an escort whenever he chose to do so. On this principal issue, therefore, I conclude that the conditions would not involve his transfer from one state of detention to another state of detention. They are therefore not *ultra vires*."

The second issue was if, under the terms of the conditional discharge, PH went from Broadmoor to a registered care home which qualified as a "hospital" under the Act, whether he could be said to have been discharged. As noted above, Elias J. had declined to follow Mann J.'s decision in the case of *Secretary of State for the Home Department –v– Mental Health Review Tribunal for Mersey Regional Health Authority*[6] that the word "discharge" means release from hospital. Keene LJ agreed:

> "I find the reasoning of Elias J. at para. 30 of his judgment compelling. If a patient is discharged from detention, that is still an effective discharge, even though he may be required to reside in another institution which qualifies as a 'hospital'. So long as he is not detained there, the tribunal has lawfully discharged him."

5 *Specific reference was made to Guzzardi v Italy [1980] 3 EHRR 333; Ashingdane v United Kingdom [1985] 7 EHRR 528; H.M. v Switzerland [2002] MHLR 209; Nielsen v Denmark [1988] EHRR 175*

6 *See footnote 4 above*

Comment

This is one of a number of recent cases in the field of mental health law where the Human Rights Act 1998 has led to a radically new interpretation of provisions of the Mental Health Act 1983. An important implication of the case is that the fundamental question which must now be asked by tribunals dealing with restricted cases is whether the patient's mental disorder warrants deprivation of liberty. This is hardly a surprising proposition given that, as was said by the Court of Appeal in *R (on the application of H) v Mental Health Review Tribunal for North and East London Region*[7], tribunals must weigh the interests of the patient against those of the public and determine whether detention is proportionate to the risks involved. This question needs to be kept separate from the issue whether there is a continuing need for treatment in hospital. Furthermore, in answering this question the tribunal must apply the Strasbourg jurisprudence.

In some cases, the position will be clear because of the patient's present circumstances. For example, the patient may be on an open ward and enjoying sufficient leave such that the conditions amount to a mere restriction on liberty of movement rather than a deprivation of liberty. It could be argued that such a patient is entitled to be discharged from detention under the Act and to remain in hospital as an informal patient under an absolute or conditional discharge. In other cases, as with PH, the patient will at the time of the hearing be deprived of his liberty but the tribunal will be satisfied that the risks could be managed otherwise than by continuing to deprive the patient of his liberty, even though in-patient hospital treatment remains necessary.

However, whether the patient's condition warrants deprivation of liberty is not the *only* question for tribunals. Detention under the Act is not to be equated with deprivation of liberty. Experience of unrestricted cases shows that there are many patients for whom liability to detention is justified, albeit that deprivation of liberty is not necessary. The usual reason for this is that the patient will only accept treatment while "detained" under the Act. Such a patient is not entitled to be discharged if his mental disorder is "of a nature or degree which makes it appropriate for him to be liable to be detained in a hospital for medical treatment", provided also that hospital treatment continues to be necessary for his own health or safety or for the protection of others[8].

Of course, in the case of a restricted patient compliance with treatment may be secured by a conditional discharge under which the patient is required, as was PH, to take and receive medication as prescribed. To this extent, the continuation of liability to detention may be harder to justify in a restricted case than in a comparable unrestricted case. On the other hand, factors such as continuing dangerousness, may point in the opposite direction.

7 *[2001] EWCA Civ 415, where Lord Phillips MR (at paragraph 33) said: "A patient is detained who is unquestionably suffering from schizophrenia. While in the controlled environment of the hospital he is taking medication, and as a result of the medication is in remission. So long as he continues to take the medication he will pose no danger to himself or to others. The nature of the illness is such, however, that if he ceases to take the medication he will relapse and pose a danger to himself or to others. The professionals may be uncertain whether, if he is discharged into the community, he will continue to take the medication. We do not believe that Article 5 requires that the patient must always be discharged in such circumstances. The appropriate response should depend upon weighing the interests of the patient against those of the public having regard to the particular facts. Continued detention can be justified if, but only if, it is a proportionate response having regard to the risks that would be involved in discharge."*

8 *Section 72(1)(b)*