Casenotes

The Incompatible Burden of Proof at Mental Health Review Tribunals

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R v Mental Health Review Tribunal, on the application of H [2001] EWCA Civ 415
Court of Appeal (28th March 2001). Lord Phillips MR, Kennedy and Dyson LJJ

Introduction

H was detained in a high security hospital in pursuance of hospital and restriction orders made under sections 37 and 41 of the Mental Health Act 1983.

On 29 March 2000, a mental health review tribunal reviewed his detention and decided not to discharge him. The written reasons for the decision stated that H was still experiencing auditory hallucinations and that, if discharged, he would not continue to take his medication. The tribunal were 'clear that this patient needs to be detained in hospital for treatment for his own health and safety.'

On 15 September 2000, Crane J dismissed H's application for judicial review. In doing so, he refused to declare that the statutory test in section 73(1) of the 1983 Act was incompatible with Article 5 of the European Convention on Human Rights. This refusal to make such a declaration was the only issue pursued before the Court of Appeal.

Legal Provisions

The essence of a restriction order is that the usual powers by which a detained person may be discharged or granted greater freedom are restricted.

Section 73(1) of the Mental Health Act 1983, which incorporates section 72(1)(b)(i) and (ii), requires a tribunal to conditionally discharge a detained patient who is subject to a restriction order if they are satisfied as to one or both of the following matters:

1. that he is not then suffering from a form of mental disorder of a nature or degree which makes it appropriate for him to be liable to be detained in a hospital for medical treatment; or
2. that it is not necessary for his health or safety or for the protection of others that he should receive such treatment.

Absolute discharge is mandatory if, in addition to being satisfied on one or both of these matters, the tribunal are also satisfied that it is not appropriate for the patient to be liable to recall to hospital for further treatment. Its effect is to bring the hospital and restriction orders to an end.

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European Convention on Human Rights

Article 5 of the European Convention on Human Rights provides that:

> '1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: ...(e) the lawful detention of... persons of unsound mind...
>
> 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.'

The case law on Article 5 establishes that a person's detention on the ground of unsoundness of mind is only lawful if it can 'reliably be shown' that he or she suffers from a mental disorder sufficiently serious to warrant detention (*Winterwerp v The Netherlands* 2 EHRR 387, para. 39-40).

Counsels' Submissions

H's counsel submitted that a tribunal's function in such cases is to enable the patient to challenge the legality of his detention; that it is 'a court' for the purposes of Article 5(4); that the statutory criteria which it has to consider are the same as those that govern admission under section 3; and that the wording of section 73 means that a tribunal is not required to discharge unless *satisfied* that at least one of the statutory grounds for detention do not exist. The effect is to place the burden of proof on the patient, and this reversal of the burden of proof is incompatible with Article 5(1) and (4). It is the patient who has to prove that the admission criteria are not satisfied, whereas s/he should be entitled to be discharged if it cannot be demonstrated that they are satisfied.

Counsel for the Secretary of State accepted that a provision which requires the patient to prove the absence of grounds for her or his detention is incompatible with Article 5(1). However, it is possible to read the words in a way which avoids this. The section is silent on the question of the burden of proof, and the negative formulation used in section 72(1)(b) ('not then suffering...') can be read as simply reflecting the fact that the grounds for admission in section 3 are no longer present. Furthermore, the phrase 'burden of proof' suggests an adversarial process, whereas tribunal proceedings are inquisitorial in nature.

Lord Phillips MR

His Lordship referred to the case of *Reid v. Secretary of State for Scotland* [1999] 2 A.C. 513, HL, where Lord Clyde had observed, at p.533, that

> '...the decision is not one which is left to the discretion of the sheriff once he is satisfied on the particular criteria. If he is satisfied, he is obliged to grant a discharge. Secondly, the burden of establishing the particular propositions to the satisfaction of the sheriff will lie on the patient, although in practice it may well be that questions of the burden of proof will not often arise.'

Similarly, in *Perkins v. Bath District Health Authority* [1989] 4 BMLR 145, Lord Donaldson MR had observed that, 'If a tribunal is to make an order under s72(1)(a)(i), clearly they have to be satisfied, and should state that they are satisfied, that he is not then suffering from mental disorder. That is not the same thing as saying the tribunal is not satisfied that he is so suffering.'

The existence of a 'reversed burden of proof' had also been referred to in other cases, including a

recent decision of Latham J in *R v. London and South Western Mental Health Review Tribunal ex p. M* [2000] Lloyd's LR Med 143 at p. 150.

The essential question was whether a patient was only entitled to be released if the tribunal were satisfied that one or both of the statutory grounds for detention were not made out. If this was the position then it was not inappropriate, in cases where a patient applied under section 73, to say that the burden of proof was on the patient.

The courts had to strive to interpret statutes in a manner compatible with the Convention, and in some instances this had involved straining the meaning of statutory language. However, such an approach did not extend to interpreting a requirement that a tribunal must act if satisfied that a state of affairs does not exist as meaning that it must act if not satisfied that a state of affairs exists. The two were patently not the same. A test which allowed a patient's continued detention simply because it could not be shown that his mental condition did not warrant detention violated Article 5(1) and (4). This followed from the following statement of principle in the seminal case of *Winterwerp v. Netherlands* [1979] 2 E.H.R.R. 387 at paragraph 39:

> 'In the Court's opinion, except in emergency cases, the individual concerned should not be deprived of his liberty unless he has been reliably shown to be of 'unsound mind'. The very nature of what has to be established before the competent national authority - that is, a true mental disorder - calls for objective medical expertise. Further, the mental disorder must be of a kind or degree warranting compulsory confinement. What is more, the validity of continued confinement depends upon the persistence of such a disorder.'

Further observations

The court wished to make a number of further observations regarding matters which had not been addressed in detailed argument.

Firstly, it did not follow from the court's decision that Article 5 requires that a patient must be discharged whenever any one of the three criteria in section 3 cannot be demonstrated on the balance of probability. Although detention cannot be justified under Article 5(1)(e) unless it is established that the patient is 'of unsound mind', once this is established, the Convention does not restrict the right to detain to circumstances where treatment is likely to alleviate or prevent a deterioration of the condition (as section 3 does). Nor is it necessary under the Convention to demonstrate that such treatment cannot be provided unless the patient is detained in hospital (see section 3(2)(c)).

Secondly, H's circumstances, which were similar to those considered by Latham J. in *ex p. M*, were not uncommon, and Article 5 did not require that a patient must always be discharged in such circumstances:

> '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 the result of

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.'

Having regard to these considerations, it would be rare that the provisions of sections 72 and 73 constrained a tribunal to refuse an order of discharge in circumstances where continued detention infringed Article 5. Indeed, when a tribunal refused an application for a discharge, it usually gave reasons for doing so that involved a positive finding that the patient was suffering from a mental disorder that warranted his or her continued detention.

Declaration of incompatibility made. Counsel to be heard on the precise form of the declaration. On 4 April 2001, the following declaration was made:

'A declaration under section 4 Human Rights Act 1998 that sections 72(1) & 73(1) Mental Health Act 1983 are incompatible with Articles 5(1) and 5(4) of the European Convention on Human Rights in that, for the Mental Health Review Tribunal to be obliged to order a patient's discharge, the burden is placed upon the patient to prove that the criteria justifying his detention in hospital for treatment no longer exist; and that articles 5(1) and 5(4) require the tribunal to be positively satisfied that all the criteria justifying the patient's detention in hospital for treatment continue to exist before refusing a patient's discharge.'

Commentary

As drafted, sections 72 and 73 require a tribunal to decide whether it is 'satisfied' that the conditions there set out for detention, guardianship or supervision no longer exist. This requirement has given rise to comment about the burden and standard of proof in tribunal proceedings.[1]

It is possible to argue, and was argued in *H*, that the concept of a burden of proof is not relevant to tribunal proceedings, which are inquisitorial in nature. According to this view, it is for the tribunal to satisfy itself that there are no grounds for detention, and the idea of a burden of proof lying on a particular party or person is not germane. There is not always an applicant, the patient may occasionally not attend, and the detaining authority may support a restricted patient's application to be discharged.

Notwithstanding these observations, the reality usually is that it is the applicant who is seeking discharge, and it is that person who must satisfy the tribunal that there are no statutory grounds for compulsion. The risk of non-persuasion - the burden of proof - lies with her or him.

Indeed, because sections 72 and 73 are unambiguous in this respect, attempts to argue that a different construction should be inferred from the statutory framework have failed. Thus, in *ex p. Hayes*,[2] Ackner LJ said that counsel had 'rightly' not pursued his submission that the onus of satisfying the tribunal was not upon the patient. And, in *ex p. A.*,[3] Kennedy LJ observed that the first thing to be noted about the duty to discharge in section 72(1)(b)(i) 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 that paragraph does not arise.

1 *See e.g. Eldergill, A*, Mental Health Review Tribunals - Law & Practice *(Sweet & Maxwell, 1997), p.46 & pp.567-571.*

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

3 R v Canons Park Mental Health Review Tribunal, ex p. A *[1994] 3 WLR 630.*

According to Part V of the Act, therefore, the burden 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.

Following these cases, the question which remained open was whether it is lawful under the Convention to require a detainee to prove the absence of grounds for detention before s/he is entitled to be released. Put differently, if the detaining authority cannot satisfy a tribunal that there are lawful grounds for the detention, is it nonetheless lawful to continue to detain the individual because s/he cannot demonstrate their absence?

Here, it may be noted that the *Green Paper*[4] indicated that the burden of proof would be reversed in any new Mental Health Act, but the more recently published *White Paper*[5] was silent on the point.

The declaration in H

In *H*, the transcript of the Court of Appeal's decision states that imposing the burden of proof on the patient (or applicant) is, in one respect, contrary to Article 5. For the detention to be lawful, it must reliably be shown that the individual is of unsound mind. Accordingly, the Convention requires that the patient is released unless the tribunal is satisfied by objective medical evidence that s/he is of unsound mind. However, provided that the tribunal is satisfied on this point, it is lawful to continue the detention even though it is not satisfied as to the existence of one or both of the other conditions forming the section 3 admission criteria: that the patient's condition is treatable in the statutory sense and that treatment cannot be provided unless he or she is detained in hospital.

The terms of the declaration of 4 April go wider than this. It states that 'articles 5(1) and 5(4) require the tribunal to be positively satisfied that all the criteria justifying the patient's detention in hospital for treatment continue to exist before refusing a patient's discharge.'

Nature of the mental disorder

The Master of the Rolls made the further observation that Article 5 does not require a tribunal to discharge a patient where the nature of the illness is such that if s/he ceases to take medication s/he will relapse and pose a danger, and there is uncertainty as to whether s/he will continue to take it if discharged. Continued detention can be justified if it is a proportionate response having regard to the risks involved in discharge.

This observation links with the decisions of the House of Lords in *Reid v. Secretary of State for Scotland* [1999] 2 A.C. 513; of the Divisional Court in *R v. London and South Western Mental Health Review Tribunal ex p. M* [2000] Lloyd's LR Med 143, to which the Court of Appeal referred; and of the Administrative Court in H itself (Administrative Court, 15 November 2000).

In *Reid*, the House of Lords held that the same criteria have to be applied in relation to admission and discharge, but the burden of proof is reversed when a tribunal considers discharge. Notwithstanding this, the application of the discharge test in cases where the medical practitioner

4 Reform of the Mental Health Act 1983. Proposals for Consultation *(Department of Health, 1999, Cm 4480)*.

5 Reforming the Mental Health Act. Part I: The new legal framework *(Department of Health/Home Office, December 2000, Cm 5016-I)*.

would not recommend a fresh admission given present circumstances is a practical question which must be resolved in each case on the evidence.

In *ex p M*, the issue was whether a patient who suffers or has suffered from mental illness must be discharged if the admission criteria are no longer met. According to Latham J, provided a tribunal acts rationally, it may disagree with the views of any psychiatrists whose evidence is put before them. Furthermore, *ex hypothesi*, a detained patient is in a different situation from a person in the community. S/he is receiving care and medication in the controlled environment of a hospital and so is not free to exercise her or his own wishes. Consequently, the assessment of risk must involve a judgment as to the extent to which release will give rise to the likelihood of non-compliance with medication, with the consequences described by the psychiatrists. Whether the nature of the illness makes liability to detention appropriate depends on an assessment of the probability that s/he will relapse in the near future if not subject to compulsion. That value judgment must be made in the context of the reversed burden of proof. This is part of the key to understanding how the admission and discharge criteria can be given equivalence, as required by *Reid*.

In *H* itself, Crane J stated in the Administrative Court that it is not fatal if a tribunal decision does not consider, or include in its reasons, a specific answer to the admission criteria question. Provided that it considers the discharge criteria, and in the process effectively considers all of the criteria that would be relevant to admission, its decision is not flawed simply because it does not ask itself separately the question of whether the admission criteria would be fulfilled.

Standard of proof

An important issue not addressed in *H* is that of the standard of proof. 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?

The issue was touched upon in *ex p. Hayes*,[6] where Ackner LJ 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*,[7] Nolan J. referred to the 'double-negative' aspect of the discharge test, saying:

> 'The negative form of the requirement 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.'

Although a tribunal which is satisfied that a patient is entitled to be discharged has no discretion about whether or not to discharge her or him, in deciding whether or not it is satisfied that s/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.

6 R v The Mental Health Review Tribunal, ex p. Hayes, *9 May 1985, unreported (see Eldergill, supra, p.66).*

7 R v Trent Mental Health Review Tribunal, ex p. Ryan *[1992] COD 157, DC.*

It has been variously held in relation to legislation not concerned with mental health that 'satisfied' means to be persuaded[8]; to make up one's mind, coming to a conclusion on the evidence which, together with its other conclusions, leads to the judicial decision[9]; to be satisfied beyond reasonable doubt[10]; that there must be solid grounds upon which the court can found a reliable opinion[11]; that the term is indicative of judicial discretion[12]; 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.[13]

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. 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 detention, 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.

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

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

10 *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.*

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

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

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

Section 73 and restriction order patients

Having regard to the above decisions, it is useful to try to summarise the current state of the law with regard to tribunals applications and references concerning detained restriction order patients.

The criteria governing the imposition of hospital orders and, where restrictions are attached, their discharge are found in sections 37 and 73. Section 73(1) and (2) deal with a mental health review tribunal's power to absolutely or conditionally discharge restricted patients. These subsections, which incorporate section 72(1)(b), are set out below, together with the guidance concerning their proper application given in *Reid* and subsequent cases.

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

that he is not then suffering from mental illness, psychopathic disorder, severe mental impairment or mental impairment or from any of those forms of disorder of a nature or degree which makes it appropriate for him to be liable to be detained in a hospital for medical treatment [s72(b)(i)]; or

Although a reverse burden of proof is incompatible with Article 5 of the European Convention, section 73 must be applied as drafted until such time as this incompatibility is removed by Parliament. It remains the case that it is for the patient to satisfy the tribunal that one or both of the conditions justifying detention no longer exist (see Human Rights Act 1998, s.4(6)).

The tribunal should approach the decision-making process in the following manner:

1 Presence of mental disorder

The tribunal must first decide whether the appellant has a mental disorder. If satisfied that s/he does not, then the tribunal must order discharge.

2 The disorder's nature and degree

If the patient has a mental disorder the tribunal must identify the nature and degree of it.

3 The nature and effectiveness of treatment in hospital

The tribunal should turn to the matter of medical treatment in hospital. They will have to consider the nature and effectiveness of any possible treatment.

If the patient is classified as suffering only from psychopathic disorder or mental impairment, the tribunal must consider whether such treatment is likely to alleviate or prevent a deterioration of the condition. If they are satisfied that such treatment is not likely to do

so, then they are bound to grant a discharge.

Put simply, it is never 'appropriate' for a patient to be liable to be detained in a hospital for medical treatment' for one of these conditions if s/he is not at that point in time treatable. The policy of the Act, in relation to patients with psychopathic disorders, is treatment not containment.

4 The appropriateness of detention in hospital for medical treatment

If the tribunal are not satisfied that the psychopathic disorder or mental impairment is untreatable, or if dealing with either of the other form of mental disorder, they must consider 'the propriety' of the patient receiving the medical treatment under detention in hospital. In doing so, they must look to the nature and degree of the mental disorder. If they are satisfied in the light of all the evidence before them, and in the whole circumstances, that the patient is not suffering from mental disorder of a nature or degree which makes it appropriate for her or him to be detained in a hospital for medical treatment, then they must discharge.

The circumstances which they may consider can include the matter of the health and safety of the patient and the safety of other persons, including members of the public; that is to say the propriety, as distinct from the necessity, of his continued detention in hospital.

If the tribunal are satisfied that the patient is entitled to be discharged under paragraph (a), the issue then is whether this discharge should be absolute or conditional.

that it is not necessary for the health or safety of the patient or for the protection of other persons that he should receive such treatment [s72(b)(ii)] and

5 Whether medical treatment in hospital is necessary for the patient's health or safety or to protect others

The single question under paragraph (b) is whether the tribunal are satisfied that it is not necessary for the health or safety of the patient

or for the protection of other persons that the patient should receive medical treatment in hospital. The standard here is one of necessity, not desirability. If the tribunal are so satisfied then they must discharge the patient, either conditionally or absolutely.

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

6 Whether liability to recall to hospital for further treatment is appropriate

Finally, if the tribunal are obliged to discharge, paragraph (c) requires them to consider whether it is or is not appropriate for the patient to remain liable to be recalled to hospital for further treatment. The decision on this point determines whether the patient's discharge is conditional or absolute.

It is hard to reconcile an opinion that the medical treatment of mental impairment or a psychopathic disorder in a hospital is not, and never will be, likely to alleviate the condition or to prevent it from deteriorating with the view the tribunal should be invited to order a conditional discharge. The only purpose of a conditional discharge is to enable the patient to be recalled to hospital for 'further treatment', which means treatment which satisfies the treatability test. In other words, a conditional discharge is not an option in these cases. If the treatability test cannot be satisfied, the only option is an absolute discharge.

'Medical treatment' [s145(1)]

The expression "medical treatment" is given a wide meaning by section 145(1) of the Act. The width of the expression is not diminished where it requires to be examined in the context of the "treatability" test. Its scope is wide enough to include treatment which alleviates or prevents a deterioration of the symptoms of the mental disorder, not the disorder itself which gives rise to them. So, if the patient's anger management improves when s/he is in the structured setting of a supervised environment, it will be open to the tribunal to find that the treatability test is satisfied. This will also allow the tribunal to grant a conditional discharge if

> detention for medical treatment in a hospital is no longer appropriate or necessary. The aim of such a carefully designed rehabilitation programme will be to reduce the level of control to a point where a conditional discharge will enable the patient to demonstrate her or his ability to cope with symptoms after release under supervision into the community.
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> In mental illness cases, where the nature of the illness is such that if s/he ceases to take prescribed medication s/he will relapse and pose a danger to her/himself or others, and there is uncertainty as to whether s/he will continue to take it if discharged, continued detention can be justified if it is a proportionate response having regard to the risks that would be involved in discharge.

Section 72 and unrestricted cases

Arguably, the fact that tribunals have a discretionary power of discharge in unrestricted cases means that they need not, and therefore ought not to, rely on section 4(6) of the Human Rights Act 1998. In other words, it is always within their power to comply with the Convention and, more particularly, the citizen's right to be released unless the detaining authority can establish all of the statutory grounds for the detention. Consequently, they act unlawfully if they refuse to discharge in circumstances where they are not satisfied that such grounds exist. Such a refusal would certainly be held unlawful by the European Court of Human Rights, which may award compensation to the victim; and arguably it also contravenes the 1998 Act, because the tribunal is not bound by legislation to act in this way.