

Chapter 16

TRANSFER TO HOSPITAL OF PERSONS SERVING SENTENCES OF IMPRISONMENT

16.01 *Background*
16.02 *Criteria and Procedures*
16.03 *Effect of Transfer Direction*

16.04 *Discharge of Life Sentence
Prisoners who have been
Transferred to Hospital*
16.05 *Technical Lifers*

16.01 Background

Once an offender is given a hospital order he is outside the penal system and cannot be transferred to prison. However, an offender serving a sentence of imprisonment may be mentally disordered and require transfer to hospital. His disorder may have been present at the time of sentencing but no hospital bed could be found; he may have been suffering from only a mild form of mental disorder which is exacerbated by the rigidity of the prison regime; or a mental disorder may develop, or may be first detected, once he is in prison. Minor forms of mental disorder can be managed by the prison medical officer, but the hospital wing does not have sufficient facilities or staffing to adequately care for and treat those with serious forms of mental disorder; further, there is no right to treat a prisoner without his consent. Very urgent and serious cases have occasionally been transferred to a hospital on the advice of the prison medical officer and with the agreement of the receiving hospital. Such emergency arrangements are made on the authority of the Prison Governor and are usually used to deal with urgent physical illness such as appendicitis. The patient remains in technical custody, often attended throughout by a prison officer.¹

If a person serving a sentence of imprisonment is found to be suffering from one of the four specified forms of mental disorder under the Mental Health Act, the Home Secretary, upon medical evidence, can direct his transfer to hospital. The transfer direction can be with or

¹ See R. Bluglass (1983) *A Guide to the Mental Health Act 1983*, Churchill Livingstone, London, p. 64.

16.01 TRANSFER TO HOSPITAL OF PERSONS SERVING SENTENCES

without restrictions. A restriction direction is usually made and in such cases the offender is still subject to the prison sentence and can, under certain circumstances, be transferred back to prison.

A prisoner has the same right to psychiatric assessment and treatment as any other person. Mentally disorder prisoners are vulnerable, particularly to the risk of suicide or other self-destructive behaviour. A prison hospital, moreover, is not a hospital within the meaning of the Act, and treatment facilities are limited. Assessment of the prisoner and, if necessary, transfer to hospital must be carried out without delay. Clear and prompt communication among the prison and hospital doctors, and the Home Office is essential. In addition, the transfer of a prisoner to hospital should not be delayed until close to his release date. The timing of the transfer may be seen by the prisoner as being primarily intended to extend his detention.

All medical, social, and other relevant information should be made available to the patient's responsible medical officer and other professional staff at the time of transfer. This includes up-to-date medical reports in the possession of the prison medical officer and social reports in the possession of the probation service.

The managers and responsible medical officer should receive, and comply with, the Home Office letter explaining their role in relation to restriction directions for patients transferred under section 47 or 48. (Code of Practice, paras 3.1, 3.2, 3.13, 3.14, 7.1, 7.2).

16.02 Criteria and Procedures

The Home Secretary may, if he is of opinion having regard to the public interest and all the circumstances that it is expedient to do so, by warrant direct that a person serving a sentence of imprisonment¹ should be transferred to a hospital.² This direction is known as a "transfer direction". The Home Secretary must first be satisfied, by reports of two registered medical practitioners (one of whom must be approved under section 12—s. 54(1)) that the prisoner is suffering from mental illness, psychopathic disorder, severe mental impairment or mental impairment of a nature or degree which makes it appropriate for him to be detained in hospital for medical treatment. In the case of psychopathic disorder or mental impairment the Home Secretary must also be satisfied that the prisoner is treatable—(*i.e.*, medical treatment is likely to alleviate or prevent a deterioration of his condition (s. 47(1)). See para. 11.06.1 *ante*). Factors which are taken into account by the

¹ References in Part III of the Act to a person serving a sentence of imprisonment include the references mentioned in s. 47(5).

² Section 49(3) of the Crime (Sentences) Act 1997 amends section 47(1) of the Mental Health Act 1983 to enable the transfer of prisoners to mental nursing homes. This means that the Home Secretary can order the transfer of both sentenced and remand prisoners to private psychiatric hospitals.

Home Secretary include the length of time remaining on the sentence of imprisonment; whether the prisoner could receive treatment in the prison; and whether it is necessary for the protection of the public that the offender should remain in prison.¹

A transfer direction ceases to have effect after 14 days of the date of the direction unless the person has been admitted to hospital (s. 47(2)). Note that there is no explicit statutory requirement for the hospital managers to consent to the transfer; however, the Home Secretary observes the practice of seeking agreement before making a transfer direction. If transfer to a hospital (other than a special hospital) is recommended then the Regional Health Authority (in Wales, the District Health Authority) for the prisoner's home area will be sent copies of the medical reports and will be asked to inform the Home Secretary and Prison Medical Officer which hospital can admit the prisoner.²

A transfer direction must specify the form(s) of mental disorder from which the prisoner is found to be suffering; and no direction can be made unless he is described in each medical report as suffering from the same form of disorder, whether or not he is also described as suffering from another form (s. 47(4)).

16.03 Effect of Transfer Direction

A transfer direction has the same effect as a hospital order (s. 47(3)).³ The Home Secretary can make the direction either with or without restrictions on discharge (s. 49(1)). If the transfer direction is made without restrictions the person ceases to be subject to the prison sentence; hence he may be discharged by the responsible medical officer, the hospital managers or a tribunal.

A direction that the transfer will be subject to restrictions has the same effect as a restriction order⁴, and is known as a "restriction direction" (s. 49(2)). Thus he cannot be discharged, transferred to another hospital or given a leave of absence without the Home Secretary's consent. During the time a person is subject to a restriction direction the RMO must, at intervals (not exceeding one year) specified by the Home Secretary, examine the patient and report to the Home Secretary; each report must contain such particulars as the Home Secretary may require (s. 49(3)). It must be remembered that a patient under a restriction direction is still technically subject to the prison sentence, and will not necessarily be discharged into the community

¹Home Office (1982) Unpublished Notes on Clauses in the Mental Health (Amendment) Bill.

² See DHSS (1983) *Mental Health Act 1983: Memorandum on Parts I to VI, VIII and X*, para. 171.

³ As to the effects of a hospital order see para. 15.10 *ante*.

⁴ As to the effect of a restriction order see para. 15.15 *ante*.

16.03 TRANSFER TO HOSPITAL OF PERSONS SERVING SENTENCES

even if the responsible medical officer or the tribunal feels it is clinically appropriate. Thus, the RMO or a Mental Health Review Tribunal, (see para. 18.17 *post*) at any time before the expiration of the person's sentence, can notify the Home Secretary that he no longer requires treatment in hospital or that no effective treatment can be given for his mental disorder in the particular hospital. After receiving such notification the Home Secretary has two options: (i) if the offender would have been eligible for release on parole the Home Secretary can discharge him; or (ii) the Home Secretary can direct that he be remitted to prison to serve the remainder of his sentence. When the Home Secretary exercises either option, both the transfer direction and the restriction direction cease to have effect, and the prisoner is treated like any ordinary offender (s. 50(1)).

If the person is not transferred back to prison or discharged as above, the restriction direction ceases to have effect on the expiration of the sentence of imprisonment (s. 50(3)). Under the 1959 Act the restriction direction did not lapse until the prisoner's full sentence of imprisonment (not taking remission into account) had lapsed. This was subject to criticism because a prisoner would ordinarily have expected to be released with remission after the completion of two thirds of his sentence.¹ The Mental Health Act 1983 (s. 50(3), (4)) now provides that the restriction direction ceases to have effect on the earliest date the person would have been released from prison if he had not been transferred to hospital.² Once the restriction direction ceases to have effect, unless he was previously transferred back to hospital or discharged, the patient continues to be liable to be detained as if subject to a hospital order without restrictions.

The Home Secretary's current practice is almost invariably to impose restrictions on transfer of a prisoner, the only exceptions being prisoners transferred a month or less before their earliest date of release from prison (though in exceptional cases some of these are also transferred with restrictions). The reasons for this are: (i) to preserve the right to send a patient back to prison if his condition improves significantly or is found not to be treatable; (ii) to ensure that a transferred prisoner is not set at liberty substantially earlier than he would have been if he had remained in prison; (iii) to enable arrangements for compulsory supervision of a patient to be made as a condition of his discharge where this takes place before the earliest date he would have been released from prison. Despite these considerations there has been concern expressed about the propriety of transferring a prisoner to hospital at a relatively late stage in his sentence.³

¹ See L. Gostin (1977; vol. 2) *A Human Condition*, pp. 112-133; DHSS et. al. (1978) *Review of the Mental Health Act 1959*, Cmnd. 7320, paras. 5.45-5.51.

² Mental Health Act 1983, s. 50(3) as amended by the Criminal Justice Act 1991, s. 101(2), Sch. 13.

³ See DHSS et. al. (1978) *Review of the Mental Health Act 1959*, Cmnd. 7320, paras. 5.45-5.51.

16.04 Discharge of Life Sentence Prisoners who have been Transferred to Hospital

Where a prisoner sentenced to life has been transferred to hospital under sections 47 and 49 of the Mental Health Act 1983, there are three routes available to release back into the community. First, he may be released on licence under section 61 of the Criminal Justice Act 1967. This is possible because section 50(1)(b) of the 1983 Act authorizes the Home Secretary to exercise any power to release a person on licence which would have been exercisable if he had been remitted back to prison. The Home Secretary can exercise this power only after being notified by the responsible medical officer or tribunal that the person no longer requires treatment in hospital. See paras. 16.03 above and 18.17.5 *post*.

The second route to release is under section 42(2) of the Mental Health Act 1983. This provides the Home Secretary with the discretion to absolutely or conditionally discharge restricted patients. (See para. 15.16 *ante*.)

The third route is under section 74(2) of the 1983 Act where the Home Secretary within ninety days approves a tribunal's recommendation for discharge. (See para. 18.17 *post*.)

In 1985 the Home Secretary announced in the House of Commons that transferred life sentence prisoners would normally be discharged by way of licence under section 61 of the 1967 Act rather than by either of the Mental Health Act routes.² Previously, it had been the Home Secretary's practice to discharge such persons on a warrant of conditional discharge under section 42(2) of the Mental Health Act. In *R. v. Secretary of State for the Home Department ex parte Stroud*,³ the applicant challenged the legality of the current practice. The court found the current policy to be "not only reasoned but rational." It accepted the reasons provided by the Home Department that release by way of section 61 ensured that the person remains subject to life licence when discharged. In contrast, discharge under the Mental Health Act may be either conditional or absolute. The court also found that the Home Secretary had not unreasonably fettered his own discretion by implementing the policy. The Home Department would review "exceptional cases" where a different route of release would be considered. The court concluded that "properly implemented, such policies

¹ Under section 61 of the Criminal Justice Act 1967, the Home Secretary may, if recommended by the Parole Board, release on licence a person serving a sentence of life imprisonment. The Home Secretary must first consult with the Lord Chief Justice and the trial judge if available. See *R. v. Parole Board ex parte Bradley* [1991] 1 WLR 134; *R. v. Findlay* [1985] 1 AC 318.

² The policy statement is published in its entirety in the decision of Henry J. in *R. v. Secretary of State for the Home Department ex parte Stroud*. *The Times* August 19, 1992, CO/388/92 (Transcript: Marten Walsh Cherer).

³ *Id.*

16.04 TRANSFER TO HOSPITAL OF PERSONS SERVING SENTENCES

or practices lead to like justice in like cases, and to the consistency and predictability that are both attributes of good administration.”

In *Thynne, Wilson and Gunnell v. United Kingdom*¹ the European Court of Human Rights held that the United Kingdom was in breach of Article 5(4) of the European Convention on Human Rights by failing to provide a “court” (as opposed to a government minister) to consider at reasonable intervals the lawfulness of the continued detention of discretionary life sentence prisoners after they have served the punitive element in their sentences. Following this ruling, Parliament enacted s. 34 of the Criminal Justice Act 1991 which enables a trial judge imposing a discretionary life sentence to specify the part of the sentence to be served to reflect the seriousness of the offence or offences committed, after which the case has to be transferred to the Parole Board. If the Board directs the prisoner’s release, the Secretary of State is under a duty to comply.² At any time after the prisoner has served the relevant part of his sentence, he is entitled to require the Secretary of State to refer his case to the Parole Board, and it will be heard by a “Discretionary Life Prisoner Panels.”

R v. Secretary of State for the Home Department ex parte T,³ reported on appeal sub nomine a *R v. Secretary of State for the Home Department ex parte H and others*,⁴ concerned the position of life prisoners transferred subject to a restriction direction under ss. 47 and 49 of the 1983 Act from prison to psychiatric hospital. The question was whether, whilst they remain patients, they could exercise the right which they would have enjoyed had they remained in prison to have their case referred to a DLPP with the power to order release. Section 34 of the 1991 Act made this an important issue. Previously the decision to release a discretionary life prisoner on licence had been for the Home Secretary. Inmates transferred from prison by the Home Secretary under a restriction direction, remain essentially prisoners and, although they can seek periodic review of detention before a MHRT, the MHRT only has the right to make recommendations to the Home Secretary, not to order discharge. Once discretionary life prisoners were given a right to review by a DLPP with the power to order release on licence, their position as prisoners was no longer subject to the ultimate discretionary authority of the Home Secretary. They would therefore be better off under s. 34 of the 1991 Act than under the Mental Health Act safeguards where the MHRT would only be able to make recommendations to the Home Secretary.

There were six applicants in the case, all seeking to establish entitlement to review under the Criminal Justice Act rather than the Mental Health Act. All had been transferred on restriction directions and had

¹ (1990) 13 EHRR 666.

² Criminal Justice Act 1991, s. 34(3)(b).

³ [1994] 1 All E.R. 794 (QBD).

⁴ [1994] 3 W.L.R. 1110 (CA).

completed the tariff part of their sentence whilst detained in psychiatric hospital. Five were discretionary life sentence prisoners who complained that the Home Secretary's policy not to certify discretionary life sentence prisoners transferred to psychiatric hospital for review by the DLPPs under s. 34 of the 1991 Act was unlawful. The other, Hickey, was a mandatory lifer, who complained that he was entitled to have his case referred to the Local Review Committee of the Parole Board under s. 35(2) of the 1991 Act which provides that "If recommended to do so by the board, the Secretary of State may, after consultation with the Lord Chief Justice, together with the trial judge, if available, release on licence a life prisoner who is not a discretionary life prisoner."

One important point established before the Divisional Court, and not amongst the questions appealed by the Home Secretary, was that when a prisoner is transferred to a mental hospital, time continues to run so far as his sentence is concerned. If he is transferred back to prison his time in hospital is to be taken into account in calculating whether he has served the tariff part of the sentence.

The Divisional Court held that a life prisoner who becomes a mental patient during his sentence nevertheless remains entitled to review by the Parole Board under ss. 34(5) and 35(2) of the 1991 Act and therefore the Secretary of State's policy not to certify that he was eligible for review by the Parole Board or to refer his case to the Board in the case of a mandatory life prisoner was unlawful. The Court of Appeal granted the Secretary of State's Appeal and reversed the decisions at first instance, holding that although for the period when they were in psychiatric hospital, all the applicants remained "life prisoners" for the purposes of the 1991 Act, this did not entitle them to a hearing under that Act. That right was conferred only on those who were subject solely to the 1991 Act's provisions, and not on those who were both life prisoners and detained psychiatric patients. The latter's rights of review arose not under the Criminal Justice Act, but under the Mental Health Act, which gives them a right to apply once a year for a hearing before a MHRT, and if they do not exercise this right within a three year period the Home Secretary is under a duty to refer their case to a MHRT.

The MHRT cannot itself discharge patients subject to a transfer direction with restrictions. It can only "notify" the Home Secretary as to patients' entitlement under the Mental Health Act to absolute or conditional discharge. The patient can then be discharged only with the Home Secretary's permission, which, if it is going to be given, must be given within 90 days of the notification. If the Home Secretary refuses discharge or indeed does not respond within 90 days, the patient is transferred back to prison. The MHRT may prevent return to prison only where: (a) their decision was that the patient was entitled to *conditional* discharge; and (b) they have made a recommendation that

16.04 TRANSFER TO HOSPITAL OF PERSONS SERVING SENTENCES

the patient should stay in hospital if not discharged. In such cases the patient must remain in hospital, but if no recommendation to that effect has been made by the MHRT, the patient must be transferred back to prison.¹

Where the MHRT decides that a patient transferred from prison whose sentence remains unexpired no longer needs treatment the Home Secretary must consider release on licence as an alternative to return to prison. Section 50(1) of the 1983 Act provides that if the MHRT or the consultant in charge of the patient's treatment or indeed any other doctor notifies the Home Secretary that a transferred prisoner no longer requires treatment in hospital or that no effective treatment can be given, the Home Secretary may direct his remission to prison, discharge or release on licence. In argument before the Court of Appeal counsel for the Secretary of State revealed that the latter draws a distinction between the view of a MHRT and that of any of the doctors specified in s. 50(1). In the case of notification by a MHRT, he could not, it was submitted, fail to exercise his discretionary powers of remittal to prison, release on licence or discharge without laying himself open to challenge on grounds of irrationality.² If not released, once back in prison, such a person would become subject solely to the Criminal Justice Act and therefore entitled to require the Home Secretary to refer his case to the Parole Board to consider his release on licence. In contrast to the advisory role of the MHRTs, if the Parole Board decides to grant licence, the Home Secretary is bound by their decision.

The position following the Court of Appeal ruling is as follows:

- (1) time spent by a life prisoner in hospital following transfer on a restriction direction counts towards the tariff part of the sentence.
- (2) Prisoners transferred to psychiatric hospital during sentence who wish to have their detention reviewed may apply to a MHRT, but are not entitled to a DLPP hearing. If the MHRT decides against discharge the applicant remains a detained patient first and a prisoner second, and remains subject to the Mental Health Act safeguards.
- (3) If the Home Secretary receives notice under s. 50(1) of the 1983 Act that the patient no longer needs treatment in hospital, but is also told that it is inappropriate for him to be remitted to prison, he may discharge. If he does not, and the person remains in hospital, according to a Parliamentary answer given by the Secretary of State on 20 June 1994, the latter is entitled to have his case referred to the Parole Board under s. 34 in the same way as if he had been remitted to prison.³ This is presumably because he is in hospital for reasons other than medical, and the Mental Health Act safeguards are for those who are detained for the purpose of having medical treatment.

¹ Mental Health Act 1983, s. 74(3).

² [1994] 3 W.L.R. 1118.

³ Parliamentary answer Hansard HC Debs. 20 June 1994, col. 9.

(4) If the MHRT decides that a restriction direction patient can be discharged they advise the Home Secretary, who then may decide to release him on licence. If not released on licence, the patient is then transferred back to prison, unless the MHRT recommended against it. Once back in prison, a discretionary lifer is entitled to certification of entitlement to apply for a Discretionary Life Prisoner Panel hearing, which can overrule the Home Secretary and grant licence.

The sixth applicant, Hickey, was a mandatory lifer. In his case, the Divisional Court granted a declaration that the Home Secretary could seek the recommendation of the Parole Board in relation to section 35(2) of the 1991 Act before he was in a position to exercise his powers under s. 50(1) of the 1983 Act. When the case reached the Court of Appeal in July 1994, Hickey had a MHRT hearing pending in September. Rose LJ, giving judgment in the Court of Appeal agreed with the Divisional Court that if Hickey were not in hospital he would be entitled to the benefit of s. 35(2) of the 1991 Act. However, he saw nothing improper or irrational in the Home Secretary awaiting the outcome of the MHRT hearing in September before deciding whether the patient should be released or returned to prison. If the latter, Hickey could then set the s. 35(2) process in motion.

If the MHRT decided that he could not be discharged, Hickey would remain in psychiatric hospital. Counsel for the Secretary of State accepted that the Parliamentary answer of 20 June applies to mandatory as well as discretionary life prisoners. Therefore, if the MHRT or his doctor decided that he no longer needed treatment in hospital for mental disorder, but that it was inappropriate for him to be transferred back to prison, he would be entitled to have his case referred under s. 35(2) of the 1991 Act. Even though he remained in hospital, his rights would be those of a prisoner. Although s. 35(2) gives a right to review by the Parole Board, the Secretary of State retains the ultimate decision to release a mandatory lifer. The Court of Appeal's ruling clarifies the position regarding the respective regimes of safeguards applicable to life prisoners when they are patients in hospital, and when they are prisoners in prison. However, because it can take three months or more from application to MHRT hearing, the disadvantage for "prisoner patients" in hospitals is that going through Mental Health Act channels first may significantly delay their release.

In 1997, the European Commission of Human Rights held admissible a claim by life sentence prisoners who had been transferred to hospital claiming that there is no tribunal to which they can turn that is empowered to test the legality of their detention: they have been denied access to the DLPP, and the Mental Health Review Tribunal has only advisory powers. Consequently, the applicants alleged a violation of Article 5(4) of the Convention.¹

¹ *Benjamin and Wilson v. the United Kingdom*, Appl. No. 28212/95 (23 October 1997). See *Tomsett v. the United Kingdom*, Appl. No. 25895/94, Report of the Commission Adopted on 21 May 1997 (friendly settlement reached on a similar set of facts).

16.05 Technical Lifers

In *R v. Secretary of State for the Home Department ex p. Pilditch*¹ the applicant had been convicted of murder and sentenced to life imprisonment in 1985. No defence of diminished responsibility was put forward on his behalf. Within a few months, he had been transferred to Broadmoor under sections 47 and 49 of the 1983 Act. He sought judicial review of a decision of the Home Secretary not to treat him as a "technical lifer", pursuant to its policy on the subject. The effect of being classified a "technical lifer" is that the patient is treated, for the purposes of discharge, as if a hospital order and a restriction order under sections 37 and 41 had been made instead of a prison sentence. He is treated with a view to rehabilitation and eventual release direct from hospital to the community. His case will not be referred to the Parole Board, and he will not be released on life licence. The Home Office considers conferring "technical lifer" status where it is clear that, even though he was suffering from a mental disorder, the court has not made a hospital order because:

- (a) of the unavailability of a suitable bed;
- (b) of the unavailability of medical reports to the court;
- (c) reports which were prepared appear (in hindsight) not to have recorded accurately the patient's mental state at the time of the offence;
- (d) the offender, though mentally disordered, refused to allow a diminished responsibility defence and was, as a result, convicted of murder, for which the life sentence is mandatory.

Before conferring "technical lifer" status on any prisoner, the Home Office consults the trial judge and the Lord Chief Justice to establish whether they consider that a hospital order would have been made had the Court been in a position to impose one.

Jowitt J granted the application, holding that although there was no matter to bring the case within paragraphs (a)–(c) of the policy, the acceptability of a plea to manslaughter on the ground of diminished responsibility should have been investigated. The fact that a defence of diminished responsibility was unlikely to be successful was only one factor within paragraph (d) of the policy. There remained the question of whether a plea of guilty on grounds of diminished responsibility would have been accepted by the prosecution and approved by the judge. There were available avenues of approach namely consultation with the trial judge and the legal representatives at the applicant's trial, and paragraph (d) called for an investigation of that nature.

In *R v. Secretary of State for the Home Department ex parte Williams*²

¹ [1994] C.O.D. 352.

² Unreported, Judgment of 21 June 1994. CO/2142/93 (Transcript: John Larking) (QBD).

the applicant had been sentenced to eight years six months imprisonment on 7 August 1992, despite the court having before it two medical reports diagnosing him as suffering from schizophrenia and recommending a hospital order. The mental illness persisted after sentencing and on 23 September 1992, following further medical reports, he was transferred from prison to Broadmoor Hospital by Home Secretary's warrant under sections 47 and 49 of the 1983 Act. On 12 March 1993 the Secretary of State notified the applicant that he was not prepared to accord technical lifer status to the applicant and to transfer him to a Regional Secure Unit for rehabilitation through the hospital rather than the penal system.

The applicant sought to argue that, notwithstanding that he had received a determinate prison sentence, he should be treated as a "technical lifer", because if the Home Secretary's policy was not to treat prisoners with determinate sentences as technical lifers, there would be unlawful discrimination between life prisoners and those with determinate sentences. The Home Office had initially indicated in a letter of 20 May 1993 that "Special criteria apply to indeterminate sentences and as you know there is no system similar to 'technical lifer' reviews applicable to determinate sentence prisoners." However, in a later affidavit, they stated that they recognised that there could be exceptional circumstances in which a determinate sentence prisoner should be rehabilitated through the hospital system and not returned to prison, even though his release date was some way ahead. This would be justifiable in cases where there was clear evidence that the sentencing court did not impose a hospital order for the kind of reason which influences the Home Office in conferring "technical lifer" status on a transferred life sentence prisoner. Since the Home Office now recognised that there could be exceptional circumstances where a determinate sentence prisoner could be treated as a technical lifer, McCowan LJ held that the complaint of discrimination failed on the facts, and that the Secretary of State could not be held to be applying an inflexible policy. Buxton J concurred, saying this:

[B]earing in mind that the Secretary of State does not exclude the possibility of acting on the tribunal's recommendation in the limited class of cases that fulfil the requirements of technical lifer status, I am not prepared to hold that he has acted unlawfully by adopting a general policy that prisoners subject to a determinate sentence who happen to be transferred to hospital on medical grounds should serve the sentence that the court has imposed on them, whether in prison or in hospital.

TRANSFER TO HOSPITAL OF PERSONS SERVING SENTENCES