

REFERENCES MADE UNDER SECTION 68(7) Mental Health Act 1983 (as amended)

THIS Guidance relates to references made by Hospital Managers under section 68(7), after a patient's Community Treatment Order (CTO) has been revoked under section 17F(4). It is frequently the case that, by the time the reference is listed for hearing, the patient is living back in the community on a new CTO. The patient is then often reluctant to return to take any part in the tribunal process, particularly if this means returning to a hospital for a hearing.

This situation is not the same as that of a patient who has a hearing pending, based on their detention under s.3, and who is then discharged on a CTO. In such a situation the application or referral does not lapse and the panel will consider the case under section 72(1)(c). But where the only reason for a referral was the recall to hospital from a CTO and the subsequent revocation of the CTO (a section 68(7) referral) then, in logic, that reason completely disappears if the patient returns back to the community under a new CTO.

It is, of course, important that the safeguards provided by the obligation to refer under section 68(1)(c) remain. But if the section 68(7) reference lapses so that section 68(3)(c) does not apply, then both the obligation to refer a community patient in the usual way, and the date when that obligation arises, remain entirely unaffected by the recall, CTO revocation, and the subsequent second discharge back onto a CTO.

To set up unnecessary hearings in such cases is expensive in terms of the costs to public funds of both tribunal panels and legal representation, and also in terms of the commitments of the very busy professional witnesses who would normally attend to give evidence. It can also cause distress to patients who do not wish to participate in a hearing. Consequently, this approach relieves the Tribunal and witnesses of the expense and time of continuing hearings which are often unpopular with the patient who may feel coerced to attend a hearing which s/he has not requested, at a point just after s/he has been discharged from hospital.

The recent comprehensive Upper Tribunal decision of KF,MO and FF v Birmingham and Solihull NHS Mental Health Foundation Trust (2010) UKUT 185(AAC) was silent on section 68(7) references. However, these decisions made it plain that referrals generally survive changes in status – not least because, periodically, a patient is entitled to an independent review of their circumstances under the Act and these periodic reviews should not be de-railed by changes in status. But a 68(7) referral is triggered not by the passage of time but by the revocation of the CTO.

Therefore, after careful consideration of the overriding objective, and to enable the tribunal to deal with its cases proportionately, I have decided that following a reference under section 68(7), if the patient is subsequently placed on a new CTO, the 68(7) reference will be treated as having lapsed, and no further action will be taken by the tribunal in relation to it.¹ As I have said above, this does not prevent the patient making an application if they wish to contest the new CTO, and it does not apply to other time-triggered references arising under section 68 which do not lapse, pursuant to the UT decision of *KF*. Indeed, if one referral lapses and another doesn't then it must be made clear to all parties that the surviving referral will still go ahead.

Accordingly, if a CTO patient is recalled and the CTO is revoked under section 17F, Hospital Managers must continue to refer cases to the tribunal pursuant to section 68(7) - but must then notify the tribunal immediately if the patient is placed on a new CTO.

Following such notification the referral will be treated as having lapsed, the parties should be notified, and the file will be closed unless there are other outstanding references or applications, in which case consideration will be given to the management, consolidation and listing of any continuing proceedings.

Mark Hinchliffe, Deputy Chamber President.

¹ There are similarities with how the tribunal treats a reference made by a conditionally discharged restricted patient who is recalled to hospital, resulting in a reference being made pursuant to section 75(1)(a). If, before the reference is determined by the tribunal, the patient is conditionally discharged again, then the reference lapses.

(1/8/2010)

Paraphrased extract from: Mental Health Act 1983 (as amended)

68 Duty of managers of hospitals to refer cases to tribunal

(1) This section applies in respect of ... (c) a community patient and (d) a patient whose CTO is revoked under section 17F;

(2) On *expiry of the period of six months beginning with the applicable day*, the Managers of the hospital shall refer the patient's case to a Mental Health Tribunal...

(3) ... unless a reference² has been made in respect of the patient under section 68(7).
...

(5) In subsection (2) above, "*the applicable day*" means ...

(b) in the case of a patient who is admitted to a hospital in pursuance of an application for admission for treatment –

(i) *the day on which the patient was so admitted; or*

(ii) *if, when he was admitted (under s.3), he was already liable to be detained (under s.2), the day on which he was originally admitted for assessment;*

(c) in the case of a community patient, or a patient whose CTO is revoked under section 17F, the day mentioned in (i) or (ii) above, as the case may be;

(6) The Managers of the hospital shall also refer the patient's case to a Mental Health Tribunal if a period of more than three years (or, if the patient has not attained the age of 18 years, one year) has elapsed since his case was last considered by such a tribunal, whether on his own application or otherwise.

(7) If, in the case of a community patient, the CTO is revoked under section 17F above, the managers of the hospital shall *also* refer the patient's case to a Mental Health Tribunal *as soon as possible after the order is revoked*.

² However, if the reference under section 68(7) lapses then, of course, it is of no effect - and so it will not prevent the Hospital Managers from subsequently making a section 68(1)(c) referral, in the usual way, after 6 months have elapsed from the date of initial admission under section 2 or 3, as appropriate.

If a referral is made prematurely under section 68(2), i.e. before the full 6 months have elapsed, then even if the 6 months will have elapsed by the time of the hearing, the tribunal has no jurisdiction and, under Rule 8(3)(a), *must* strike out the proceedings for lack of jurisdiction.