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IN THE HIGH COURT OF JUSTICE
IN THE QUEENS BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Monday 17th January, 2005

B e f o r e:

THE HONOURABLE MR JUSTICE MUNBY

– – – – – – –

R (ON THE APPLICATION OF SC)
Claimant

– v –

(1) THE MENTAL HEALTH REVIEW TRIBUNAL
(2) THE SECRETARY OF STATE FOR HEALTH
Defendants

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Interested Party

– – – – – – – – –

(Transcript of the Handed Down Judgment of
Smith Bernal Wordwave Limited, 190 Fleet Street
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Official Shorthand Writers to the Court)

Mr Roger Pezzani (instructed by Christian Khan) for the claimant
Mr Martin Chamberlain (instructed by the Treasury Solicitor) for the Tribunal
Mr Tim Ward (instructed by the Treasury Solicitor) for the Secretary of State for the Home Department
The Secretary of State for Health was neither present nor represented

J U D G M E N T
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Mr Justice Munby :

1. This is an application for judicial review, pursuant to permission granted by Owen J on 20 May 2004, whereby SC seeks to challenge a decision of the Mental Health Review Tribunal dated 15 January 2004.

2. The relevant facts can be shortly stated. On 7 September 1998 SC was convicted at the Crown Court of an offence of causing grievous bodily harm with intent. On 19 May 1999 the Crown Court made a hospital order under section 37 of the Mental Health Act 1983, being satisfied that SC was suffering from mental illness within the meaning of section 1(2) of the Act, and further ordered that SC should be subject indefinitely to the special restrictions set out in section 41 of the Act.

3. So far as is material for present purposes section 37 of the Act provides as follows:

> "(1) Where a person is convicted before the Crown Court of an offence punishable with imprisonment other than an offence the sentence for which is fixed by law × and the conditions mentioned in subsection (2) below are satisfied, the court may by order authorise his admission to and detention in such hospital as may be specified in the order ×
>
> (2) The conditions referred to in subsection (1) above are that -
>
> (a) the court is satisfied, on the written or oral evidence of two registered medical practitioners, that the offender is suffering from mental illness, psychopathic disorder, severe mental impairment or mental impairment and that either -
>
> > (i) the mental disorder from which the offender is suffering is of a nature or degree which makes it appropriate for him to be detained in a hospital for medical treatment and, in the case of psychopathic disorder or mental impairment, that such treatment is likely to alleviate or prevent a deterioration of his condition; or
> >
> > (ii) × ; and
>
> (b) the court is of the opinion, having regard to all the circumstances including the nature of the offence and the character and antecedents of the offender, and to the other available methods of dealing with him, that the most suitable method of disposing of the case is by means of an order under this section.

(7) A hospital order × shall specify the form or forms of mental disorder referred to in subsection (2)(a) above from which, upon the evidence taken into account under that subsection, the offender is found by the court to be suffering; and no such order shall be made unless the offender is described by each of the practitioners whose evidence is taken into account under that subsection as suffering from the same one of those forms of mental disorder, whether or not he is also described by either of them as suffering from another of them."

4. Section 41(1) provides as follows:

> "Where a hospital order is made in respect of an offender by the Crown Court, and it appears to the court, having regard to the nature of the offence, the antecedents of the offender and the risk of his committing further offences if set at large, that it is necessary for the protection of the public from serious harm so to do, the court may, subject to the provisions of this section, further order that the offender shall be subject to the special restrictions set out in this section, either without limit of time or during such period as may be specified in the order; and an order under this section shall be known as "a restriction order"."

A patient who is subject to a restriction order is referred to in the relevant parts of the Act as a "restricted patient": section 79(1).

5. Section 41(3) of the Act sets out the special restrictions which are applicable to a patient in respect of whom a restriction order is in force. For present purposes two are important. Section 41(3)(a) provides that:

> "none of the provisions of Part II of this Act relating to the duration, renewal and expiration of authority for the detention of patients shall apply, and the patient shall continue to be liable to be detained by virtue of the relevant hospital order until he is duly discharged under the said Part II or absolutely discharged under section 42, 73 × or 75 below."

Section 41(3)(c) provides that various powers under the Act shall be exercisable only with the consent of the Secretary of State, that is, the Secretary of State for the Home Department.

6. Both the Secretary of State for the Home Department and a Mental Health Review Tribunal have power in appropriate circumstances, in the case of the Secretary of State in accordance with section 42(2) of the Act and in the case of the Tribunal in accordance with section 73, to direct the discharge of a restricted patient, either conditionally or absolutely. In either case, and consistently with section 41(3)(a), an absolute discharge has the consequence that the restriction order ceases to have effect: see sections 42(2) and 73(3). Conversely, and again consistently with section 41(3)(a)

a restricted patient who is only conditionally discharged remains subject to the restriction order - in other words remains a restricted patient - and can at any time be recalled to hospital by the Secretary of State: see sections 42(3) and 73(4)(a). Additionally, both the Secretary of State and the Tribunal have power in appropriate circumstances, in the case of the Secretary of State in accordance with section 42(1) of the Act and in the case of the Tribunal in accordance with section 75(3)(b), to direct that a restriction order shall cease to have effect.

7. I ought to add, as Mr Martin Chamberlain on behalf of the Tribunal pointed out, that the Secretary of State's power to recall a restricted patient is not unfettered. In recalling a restricted patient, the Secretary of State has to act compatibly with the patient's rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms. This means that the Secretary of State must have up–to–date medical evidence that the patient is, at the time of recall, suffering from a true mental disorder, and that evidence must show that the criteria for detention are met: see *Kay v United Kingdom* (1994) 40 BMLR 20 at paras [47] and [50], referring to *Winterwerp v The Netherlands* (1979) 2 EHRR 387, and *R (B) v Mental Health Review Tribunal* [2002] EWHC 1553 (Admin), [2002] All ER (D) 304 (Jul) at para [31]. If those criteria are not met, the Secretary of State's decision to recall will be judicially reviewable. Quite apart from that, section 75(1)(a) requires the Secretary of State to refer the case of any recalled restricted patient to a Tribunal within one month. In practice, such references are usually made very quickly: see *B* at para [29]. So, as Mr Chamberlain comments, although it is true that a recalled restricted patient can be re–detained without the need for a prior judicial decision, the discretion to exercise the power of recall is far from unfettered and, moreover, any detention which results from recall must be swiftly endorsed by a Tribunal.

8. I think I should set out these various provisions. So far as material section 42 provides that:

> "(1) If the Secretary of State is satisfied that in the case of any patient a restriction order is no longer required for the protection of the public from serious harm, he may direct that the patient cease to be subject to the special restrictions set out in section 41(3) above; and where the Secretary of State so directs, the restriction order shall cease to have effect ×
>
> (2) At any time while a restriction order is in force in respect of a patient, the Secretary of State may, if he thinks fit, by warrant discharge the patient from hospital, either absolutely or subject to conditions; and where a person is absolutely discharged under this subsection, he shall thereupon cease to be liable to be detained by virtue of the relevant hospital order, and the restriction order shall cease to have effect accordingly.
>
> (3) The Secretary of State may at any time during the continuance in force of a restriction order in respect of a patient who has been conditionally discharged under subsection (2) above by warrant recall the patient to such hospital as may be specified in the warrant."

9. Although section 72(1) does not, as such, apply to restricted patients - see section 72(7) - I should nonetheless set out some parts of section 72. As amended by The Mental Health Act 1983 (Remedial) Order 2001, SI 2001/3712, following the decision of the Court of Appeal in *R (H) v London North and East Region Mental Health Review Tribunal (Secretary of State for Health intervening)* [2001] EWCA Civ 415, [2002] QB 1, section 72 provides so far as material that:

> "(1) Where application is made to a Mental Health Review Tribunal by or in respect of a patient who is liable to be detained under this Act, the tribunal may in any case direct that the patient be discharged, and -
>
> (a) the tribunal shall direct the discharge of a patient liable to be detained under section 2 above if they are not satisfied -
>
>> (i) that he is then suffering from mental disorder or from mental disorder of a nature or degree which warrants his detention in a hospital for assessment (or for assessment followed by medical treatment) for at least a limited period; or
>>
>> (ii) that his detention as aforesaid is justified in the interests of his own health or safety or with a view to the protection of other persons;
>
> (b) the tribunal shall direct the discharge of a patient liable to be detained otherwise than under section 2 above if they are not satisfied -
>
>> (i) that he is 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; or
>>
>> (ii) that it is necessary for the health of safety of the patient or for the protection of other persons that he should receive such treatment; or
>>
>> (iii) in the case of an application by virtue of paragraph (g) of section 66(1) above, that the patient, if released, would be likely to act in a manner dangerous to other persons or to himself.
>
> (2) In determining whether to direct the discharge of a patient detained otherwise than under section 2 above in a case not falling within paragraph (b) of subsection (1) above, the tribunal shall have regard -
>
> (a) to the likelihood of medical treatment alleviating or preventing a deterioration of the patient's condition; and

(b) in the case of a patient suffering from mental illness or severe mental impairment, to the likelihood of the patient, if discharged, being able to care for himself, to obtain the care he needs or to guard himself against serious exploitation.

(5) Where application is made to a Mental Health Review Tribunal under any provision of this Act by or in respect of a patient and the tribunal do not direct that the patient be discharged × the tribunal may, if satisfied that the patient is suffering from a form of mental disorder other than the form specified in the application, order or direction relating to him, direct that that application, order or direction be amended by substituting for the form of mental disorder specified in it such other form of mental disorder as appears to the tribunal to be appropriate.

(7) Subsection (1) above shall not apply in the case of a restricted patient except as provided in section × 73 × below."

Section 2, of course, provides for someone to be detained for not more than 28 days for the purposes of assessment.

10. Restricted patients, as I have said, are dealt with by sections 73 and 75. Section 73, as amended by The Mental Health Act 1983 (Remedial) Order 2001, provides so far as material:

"(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 -

(a) the tribunal are not satisfied as to the matters mentioned in paragraph (b)(i) or (ii) of section 72(1) above; and

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

(2) Where in the case of any such patient as is mentioned in subsection (1) above -

(a) paragraph (a) of that subsection applies; but

(b) paragraph (b) of that subsection does not apply,

the tribunal shall direct the conditional discharge of the patient.

(3) Where a patient is absolutely discharged under this section he shall thereupon cease to be liable to be detained by virtue of the relevant hospital order, and the restriction order shall cease to have effect accordingly.

(4) Where a patient is conditionally discharged under this section -

(a) he may be recalled by the Secretary of State under subsection (3) of section 42 above as if he had been conditionally discharged under subsection (2) of that section; and

(b) the patient shall comply with such conditions (if any) as may be imposed at the time of discharge by the tribunal or at any subsequent time by the Secretary of State.

(5) The Secretary of State may from time to time vary any condition imposed (whether by the tribunal or by him) under subsection (4) above."

11. Section 75 so far as material provides as follows:

"(1) Where a restricted patient has been conditionally discharged under section 42(2) [or] 73 × above and is subsequently recalled to hospital -

(a) the Secretary of State shall, within one month of the day on which the patient returns or is returned to hospital, refer his case to a Mental Health Review Tribunal; and

(b) ×

(2) Where a restricted patient has been conditionally discharged as aforesaid but has not been recalled to hospital he may apply to a Mental Health Review Tribunal -

(a) in the period between the expiration of 12 months and the expiration of two years beginning with the date on which he was conditionally discharged; and

(b) in any subsequent period of two years.

(3) Section × 73 × shall not apply to an application under subsection (2) above but on any such application the tribunal may -

(a) vary any condition to which the patient is subject in connection with his discharge or impose any condition which might have been imposed in connection therewith; or

(b) direct that the restriction order × to which he is subject shall cease to have effect;

and if the tribunal give a direction under paragraph (b) above the patient shall cease to be liable to be detained by virtue of the relevant hospital order × "

12. I return to the facts. On 15 March 2001 SC was conditionally discharged by the Tribunal in accordance with section 73(2). One of the conditions imposed was that he was to reside in an approved hostel. His discharge was deferred pending the availability of a suitable hostel place and he was finally released on 15 June 2001. He remains, of course, a restricted patient, liable to be recalled by the Secretary of State under section 73(4)(a), though he has not in fact been recalled.

13. On 14 March 2003 SC applied to the Tribunal in accordance with section 75(2)(a), as he was entitled to, seeking a direction under section 75(3)(b) that the restriction order cease to have effect, in other words, that he cease to be a restricted patient and cease to be liable to be recalled by the Secretary of State. The hearing before the Tribunal took place on 12 December 2003. The Tribunal read and heard a substantial volume of medical and other evidence, including statements by the Secretary of State and oral evidence from SC. Also, and importantly, the Tribunal had evidence, both written and oral, from SC's RMO, Dr A, who was supportive of SC's application. The Secretary of State opposed SC's absolute discharge.

14. In its written decision, dated 12 December 2003 but sent to SC under cover of a letter dated 15 January 2004 and received by him the following day, the Tribunal refused his application for an absolute discharge and directed that SC was to remain subject to the restriction order. But it varied the conditions of his discharge, in particular by removing the condition that he reside in an approved hostel. The present proceedings were issued on 8 April 2004.

The grounds of challenge

15. SC raises two matters of complaint:

i) First, he asserts that the Tribunal's decision discloses that it adopted an unlawful approach and relied upon an irrelevant matter in coming to its decision under section 73(3), namely that it took into account evidence from previous psychiatric assessments that diagnosed ‘psychopathic personality' whereas the only form of mental disorder specified by the Crown Court when it imposed the restriction order was, as will be recalled, mental illness. Mr Roger Pezzani, on behalf of SC, puts the point very crisply when he says that "On the face of the Tribunal's written reasons, it has relied upon a matter, a previous *diagnosis* but not *classification* of personality disorder, that is clearly irrelevant in deciding whether to uphold SC's liability to detention."

ii) Secondly, SC asserts that section 75(3) is itself incompatible with his rights under the Convention in that, as he puts it in his Form N461, "it does not indicate the scope of the discretion conferred on the Mental Health Review Tribunal and the manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference". Fundamentally SC's complaint is that the 1983 Act provides no criteria whatsoever where the Tribunal is considering an application under section 75(2) - all it does is to state the

criteria which do *not* apply - and that there is no judicial authority on the proper considerations for the Tribunal to take into account in such a case.

SC accordingly seeks (a) an order quashing the decision of the Tribunal together with a mandatory order requiring the Tribunal to rehear his application and (b) a declaration under section 4 of the Human Rights Act 1998 that section 75(3) of the 1983 Act is incompatible with Articles 6 and 8 of the Convention.

16. There is no dispute that the Tribunal did direct itself in the manner of which SC makes complaint. Thus in paragraph (2) of its reasons the Tribunal said:

> "Section 73 of the MHA 1983 has no application at all in deciding the issue, and it by no means follows from the fact that a man no longer has a mental disorder at all that he should be absolutely discharged. That would only follow in the rare case where it can clearly be seen that the recovery is permanent come what may. In other cases all the circumstances need to be weighed up."

In paragraph (3), referring to Dr A's evidence, the Tribunal said:

> "In our judgment he was heavily influenced by the fact that the only classification of this patient was mental illness. We consider it likely that Dr A had probably not adequately taken into account the assessments made in 1997 and 1998 of the applicant's psychopathic personality. Even if, as the RMO states, the applicant only has ever had a minor mental breakdown which is normally managed in a primary care setting, this is not a normal case in terms of his personality and history of violence when ill. Finally, we do not accept that sufficient weight has been given to the evidence about the applicant's conduct since being on conditional discharge. The future safety of the public is the main consideration, the needs of the applicant hardly matter by comparison."

In paragraph (4) the Tribunal said that "there is a strong case for keeping the applicant on conditional discharge", one of the reasons given being, as set out in paragraph 4(b), that:

> "He had previously been diagnosed as having a drug induced psychosis and underlying psychopathic disorder. Following the offence it is clear that both these conditions were diagnosed. The only classification at the time of sentence (May 1999) was mental illness, but that does not imply that his personality falls to be disregarded thereafter."

17. I need go no further into the Tribunal's reasoning, nor need I consider the evidence before the Tribunal. The only ground of challenge to its decision is that it misdirected

itself in law in circumstances where there is no dispute as to the nature of the direction but merely a dispute as to whether or not it was, in law, a misdirection.

18. The Secretary of State for Health, although joined as a defendant, has understandably played no part in the proceedings, taking the view that, although the 1983 Act is an Act for which the Department of Health is responsible, the incompatibility claim relates to section 75, and therefore to restricted patients, for whom the Secretary of State for the Home Department has responsibility. It is therefore the Secretary of State for the Home Department, represented by Mr Tim Ward, who has appeared before me to resist the second limb of the proceedings. The Tribunal, represented by Mr Chamberlain, has appeared before me to resist the first limb of the proceedings.

The complaint against the Tribunal - misdirection

19. Since, as Mr Pezzani correctly observes, section 75(3) does not specify any particular criteria which the Tribunal must take into account in reaching its decision, it follows, as Mr Chamberlain submits, that the starting point is the principle conveniently stated by Laws LJ in *R (Jones) v North Warwickshire Borough Council* [2001] EWCA Civ 315 at para [20]:

> "The general law as regards the duty of a public decision−maker to take relevant considerations into account is well−known.
>
> (1) If the operative statute provides a lexicon of relevant considerations to which attention is to be paid, then obviously the decision−maker must follow the lexicon.
>
> (2) If however the statute provides no such lexicon, or at least no exhaustive lexicon, then the decision−maker must decide for himself what he will take into account. In doing so he must obviously be guided by the policy and objects of the governing statute, but his decision as to what he will consider and what he will not consider is itself only to be reviewed on the conventional *Wednesbury* principle: see the judgment of the New Zealand Court of Appeal in *CREEDNZ Inc v Governor−General* [1981] 1 NZLR 172, approved by Lord Scarman for the purposes of the law of England in *In re Findlay* [1985] AC 319."

As Mr Chamberlain points out, this approach has recently been applied in the context of the 1983 Act: see *R (MH) v Secretary of State for Health* [2004] EWHC 56 (Admin), [2004] All ER (D) 188 (Jan) at paras [82]−[83]. To this I would add only that in appropriate cases, and where rights under the Convention are engaged, decisions must not merely be rational; they must also be informed by the Convention principles of necessity and proportionality.

20. How then does Mr Pezzani put his case? His sheet anchor is the judgment of Dyson LJ in *R (B) v Ashworth Hospital Authority* [2003] EWCA Civ 547, [2003] 1 WLR 1886, and especially what Dyson LJ said at para [16] (emphasis added):

> "The Act provides a detailed and carefully worked out scheme for the admission of mentally disordered patients to hospital for treatment, the review of their condition from time to time, and their discharge when they are no longer liable to be detained. As I shall seek to show, *a theme that runs through the Act is that the liability to detention is linked to the mental disorder from which the patient is classified as suffering* and that this disorder is considered to be treatable by the person or body making the classification. For convenience I shall refer to this as "the classified disorder", although it is to be noted that the language of classification is not used in the Act (save only in the heading to section 16 "Reclassification of patients")."

21. In that case the claimant, who had been convicted of manslaughter, was classified by the court as suffering from mental illness and was ordered to be detained under section 37 of the Act. On the basis of a diagnosis by clinicians that he also suffered from psychopathic disorder he was detained by the hospital authority in a personality disorder ward so as to be compulsorily treated for that disorder under section 63 of the Act. This provides that:

> "The consent of a patient shall not be required for any medical treatment given to him for the mental disorder from which he is suffering, not being treatment falling within section 57 or 58 above, if the treatment is given by or under the direction of the responsible medical officer."

22. As Dyson LJ pointed out at para [2]:

> "The sole issue that arises on this appeal is whether this provision sanctions compulsory treatment of a detained patient for any mental disorder which has been diagnosed by the clinicians or whether it only authorises such treatment (in the case of a patient who has been made the subject of a restriction order under section 41(1) of the Act) for the mental disorder specified by the court under section 37(7) of the Act or by the mental health tribunal under section 72(5) of the Act."

Dyson LJ (with whose judgment Scott Baker and Simon Brown LJJ both agreed) held that on its true construction in its statutory context section 63 does not permit compulsory medical treatment for a mental disorder which was not specified in the hospital order under which the patient is detained.

23. The core of Dyson LJ's reasoning is to be found in para [42]:

> "It is true that if Part IV is considered in isolation from the rest of the Act it might appear to apply to any mental disorder from

> which the patient is diagnosed as suffering, whether classified or not. But Part IV must be interpreted in its context. The Act contains detailed provisions for the admission to and detention in hospital of patients who suffer from classified mental disorders. It also contains provisions which are designed to ensure that they remain liable to be detained only so long as they continue to suffer from classified mental disorders × Part IV apart, Mr Thorold was unable to draw our attention to any provision in the Act which deals with non−classified mental disorders. Part IV apart, the Act is no more concerned with non−classified mental disorders than it is with physical disorders. The Act is concerned with mental disorders which are treatable and which justify detention for their treatment. In these circumstances I do not find it at all surprising that Part IV does not define the mental disorder for which medical treatment may be given without the patient's consent as the classified mental disorder. That is assumed. Part IV is not dealing with the definition of the mental disorder: that is determined elsewhere in the Act. Part IV is dealing with the very important ancillary question of defining the circumstances in which forcible treatment for the mental disorder may be given."

24. Mr Pezzani referred me to other passages in Dyson LJ's judgment. In para [26] Dyson LJ referred to the provisions of section 37 as demonstrating:

> "the essential link between a patient's mental disorder which justifies his detention in hospital and his treatment *for that disorder* " (emphasis in original).

In para [31] he said that:

> "in section 72(5) there is a further assertion of the link between the liability to be detained and the mental disorder specified in the application (in the case of civil patients) and in the order or direction relating to the patient (in the case of criminal patients)."

In para [50] he said that:

> "the elaborate provisions in the Act for classification and reclassification are intended to serve a real purpose."

And in para [67] he said:

> "the natural and correct interpretation of section 63 is that it permits compulsory medical treatment only for classified mental disorders. Were it otherwise the carefully drafted provisions for reclassification in sections 16, 20 and 72(5) would serve no real purpose. Those provisions are designed to

> ensure that the essential link is maintained between the mental disorder which justifies the patient's detention and his treatment for that disorder and no other."

In para [60], having referred to classification as being "the touchstone for detention", he identified the reason for a reclassification under section 72(5) as being:

> "to provide a touchstone for lawful detention: to ensure that the application or hospital order (as the case may be) accurately describes the mental disorder which justifies the patient's lawful detention in hospital."

25. Finally, Mr Pezzani took me to an interesting discussion by Dyson LJ at para [46] of comorbidity:

> "The problem presented by comorbidity is inherent in the scheme of the Act. At the very outset the doctors who recommend the patient's admission for treatment have to decide which mental disorders are of a nature or degree which "makes it appropriate for [the patient] to receive medical treatment in a hospital": section 3(2)(a). Similar judgments have to be made by the doctor furnishing a report under section 16 or 20, and by the tribunal when considering whether to direct a discharge under section 72 or 73. If a separately identifiable mental disorder does not satisfy the statutory criteria for compulsory detention the patient cannot be detained or treated against his or her will for that disorder. That applies at all stages of the process. Thus the patient cannot be admitted by compulsion for such a disorder and may not continue to be detained for treatment for that disorder if it ceases to satisfy those criteria."

26. Mr Pezzani's submission, in the light of Dyson LJ's analysis, is simple. The Tribunal explicitly relied upon a reason for detention not related to SC's classified mental disorder - mental illness -; so his liability to detention is not linked to the mental disorder from which he was classified as suffering; he remains liable to recall because of that unclassified disorder; and that is not lawful. SC could not, he submits, lawfully be recalled because of a diagnosis of personality disorder, because he would thereby be detained as a result of a mental disorder from which he has not been classified as suffering.

27. As Mr Chamberlain correctly observes, Mr Pezzani's case is based squarely on Dyson LJ's judgment in *R (B) v Ashworth Hospital Authority* [2003] EWCA Civ 547, [2003] 1 WLR 1886. But he submits, and I agree, that there is nothing in what Dyson LJ said to support the edifice which Mr Pezzani seeks to erect upon it. There is, in my judgment, nothing in *R (B) v Ashworth Hospital Authority* [2003] EWCA Civ 547, [2003] 1 WLR 1886, to compel the result for which Mr Pezzani contends. On the other hand, as we will see in due course, Mr Pezzani's case, were I to accept it, would involve my departing from the very recent decisions of Moses J in *R (Secretary of*

State for the Home Department) v Mental Health Review Tribunal [2004] EWHC 1029 (Admin) and Collins J in *R (L) v Secretary of State for the Home Department* [2004] EWHC 1025 (Admin), [2004] All ER (D) 227 (Apr). These are decisions which judicial comity demands that I follow unless convinced they are wrong: *R v Greater Manchester Coroner ex p Tal* [1985] QB 67 at p 81. But far from being convinced that they are wrong, these decisions seem to me, with all respect to my brethren, to be plainly correct.

28. In the first place, it is, I think, important to bear in mind the context in which Dyson LJ was speaking. He was, as he pointed out in para [2], concerned solely with the question of compulsory treatment under section 63. I am not concerned with the question of whether SC should be treated, whether compulsorily or otherwise, nor with the question of whether, were he to be recalled by the Secretary of State for this reason or that, his detention would be lawful. I am concerned only with the question of whether he should have been discharged absolutely or conditionally - and that is not a topic which was at the forefront of Dyson LJ's analysis. Indeed, as Mr Chamberlain correctly points out, Dyson LJ was concerned with a power - the power of compulsory treatment in accordance with section 63 of the Act - which applies only to patients who are actually detained, and not to those who, having been conditionally discharged, are merely liable to be detained: see section 56(1)(c).

29. In any event, the "theme" identified by Dyson LJ is not of universal application and cannot, in my judgment, simply be applied mechanically to every patient who is, within the meaning of the Act, "liable to be detained". As Mr Chamberlain points out, referring to sections 135 and 136 of the Act, read in conjunction with section 56(1)(b), the Act itself contemplates at least some situations in which a person can be "liable to be detained" even though he is not, and never has been, classified as suffering from any form of mental disorder.

30. But the critical point, as Mr Chamberlain submits, and I agree, derives from section 73. As Mr Chamberlain points out, the effect of section 73(2)(b) of the Act, read in conjunction with sections 72(1)(b), 73(1) and 73(2)(a), is that the Tribunal has power to direct a conditional discharge, even where it concludes that the patient is not suffering from *any* mental disorder whatsoever - for example, where the patient was previously classified as suffering from mental illness but is now in remission - if it is not satisfied that it is not appropriate for him to remain liable to recall (the inelegant double negative reflects the referential drafting of sections 73(2)(b) and 73(1)(b)).

31. This seems to have been accepted by the Court of Appeal in *R (H) v Secretary of State for the Home Department* [2002] EWCA Civ 646, [2003] QB 320, at paras [76] and [90]. It is made explicit by the decision of Moses J in *R (Secretary of State for the Home Department) v Mental Health Review Tribunal* [2004] EWHC 1029 (Admin). In that case a restricted patient had been diagnosed and detained under a restriction order on the basis that he was suffering from a psychopathic disorder. The Tribunal was not satisfied that he was suffering from any mental disorder of a nature or degree which made it appropriate for him to be liable to be detained. In particular it was not satisfied that he was suffering from a psychopathic disorder. It therefore concluded that it was bound to direct his absolute discharge. Moses J quashed the decision of the Tribunal as erroneous in point of law, the Tribunal having misunderstood its powers

under section 73. His reasoning appears clearly enough from the following extracts from his judgment:

> "[18] × It is plain from the structure of the statute that the Tribunal is only required to direct an absolute discharge where it is both not satisfied as to the matters referred to in section 72(1)(b)(i) or (ii), and where it is satisfied that it is not appropriate for the patient to remain liable to be recalled to hospital for further treatment. As to that, the Tribunal says nothing. The Tribunal merely struck a line through the reference to that provision under 2(c) of the form and made no findings whatever as to why either it was or was not satisfied that it was appropriate for Mr Wilson to remain liable to be recalled to hospital for further treatment. All the Tribunal did was say, as I have said, that it concluded that the patient should be discharged.
>
> [21] It is plain to me, even where the Tribunal conclude that a patient is not suffering from a psychopathic disorder, or any of the other conditions referred to in section 72(1)(b)(i), it is incumbent upon the Tribunal in cases of restricted patients to go on to consider whether it is satisfied that it is not appropriate for the patient to remain liable to be recalled to hospital for further treatment. That is clear from the words of section 73(1)(b).
>
> [27] × The decision cannot stand in a case where, in respect of a restricted patient, the Tribunal concludes that he is not suffering from one of the conditions referred to in section 72(1)(b)(i), but fails to deal with the requirement about which it has to be satisfied under section 73(1)(b)."

32. These are decisions on the effect of section 73 as amended in 2001. But as the Court of Appeal pointed out in *R (H) v Secretary of State for the Home Department* [2002] EWCA Civ 646, [2003] QB 320, at para [10], the effect of the amendment was that, whereas previously the Tribunal was required to discharge a patient only if satisfied that the conditions for detention no longer prevailed, now the Tribunal has to discharge a patient unless satisfied that the conditions for detention continue to be satisfied. However, as the Court of Appeal went on to add, "the legislative scheme has not altered".

33. What is for present purposes the important aspect of the legislative scheme had been recognised by the Court of Appeal in *R v Merseyside Mental Health Review Tribunal ex p K* [1990] 1 All ER 694 per Butler–Sloss LJ at p 699:

> "Section 73 gives to the tribunal power to impose a conditional discharge and retain residual control over patients not then suffering from mental disorder or not to a degree requiring continued detention in hospital. This would appear to be a provision designed both for the support of the patient in the community and the protection of the public, and is an

> important discretionary power vested in an independent tribunal".

As Moses J commented in *R (Secretary of State for the Home Department) v Mental Health Review Tribunal* [2004] EWHC 1029 (Admin) at para [25]:

> "It might very well be in such a case that, whilst a Tribunal would not be satisfied at one particular moment that someone was suffering from a psychopathic disorder, later on symptoms might emerge which would make it highly appropriate and indeed necessary for such a patient to be recalled to hospital."

34. As Mr Chamberlain correctly submitted, the same process of reasoning underlies the decision of Collins J in *R (L) v Secretary of State for the Home Department* [2004] EWHC 1025 (Admin), [2004] All ER (D) 227 (Apr). In that case a conditionally discharged restricted patient who had previously been classified as suffering from mental illness sought to challenge the decision of the Secretary of State to recall him to hospital. The evidence was that on recall the patient was suffering from psychopathic disorder, not mental illness, and the basis of his challenge, relying on Dyson LJ's judgment in *R (B) v Ashworth Hospital Authority* [2003] EWCA Civ 547, [2003] 1 WLR 1886, was that his detention following recall could only be lawful on the basis of the condition from which he had been classified as suffering. Collins J dismissed the claim, rejecting the claimant's interpretation of Dyson LJ's judgment, and holding that the claimant's recall on the basis of the diagnosed (but non–classified) disorder was lawful.

35. Having (at para [30]) set out the submission that Dyson LJ's judgment "shows that classification applies in order to justify detention, and detention therefore can only be continued on the basis of the correct classification of the correct mental disorder for which treatment is to be provided", Collins J continued:

> "[31] As a general proposition that is no doubt correct when one is looking to continue detention. One must bear in mind that the only power to reclassify is contained in s 72(5) when one is dealing with restricted patients and it will inevitably take time for the matter to be referred to the Tribunal and for the necessary reclassification to take place in any ordinary case. It cannot be sensibly suggested, in my judgment, that there has to be an automatic discharge between the time that it becomes apparent that reclassification is needed and the time that that reclassification takes place. Indeed, Mr Seligman does not so submit and does not suggest that the argument he is presenting will justify that conclusion.
>
> [32] What he submits is that here the claimant was conditionally discharged and thus the hospital order was continuing against him but of course did not require his detention whilst he complied with the conditions and that therefore any continued detention under that order following recall had to be based upon the same mental disorder, in this

> case, mental illness. The contention therefore is that once Dr Croy's report was to hand it was plain that there was no longer any mental illness and that therefore the basis upon which the claimant had been detained fell away.
>
> [33] It seems to me that that is a reading of *B* which is not justified. The court in *B* was not concerned with the situation when an individual was initially detained on the basis of a need to discover what indeed was the mental disorder which required treatment. Nor was it concerned with recall where similar situation might arise. In this case it was plain × that there was an element of psychopathic disorder but the Tribunal did not think it necessary to reclassify at that stage. Here the emergency, and indeed the subsequent report showed, that there was a real danger to the public and to the individual because of a worsening of the psychopathic disorder and it was the clear view of Dr Croy that hospitalisation was necessary in order to treat that condition.
>
> [34] That being so, since the only way in which reclassification could take place was before the Tribunal, and since there was a requirement in the statutory provisions that a Tribunal consider the matter as speedily as reasonably possible, it seems to me that the powers of detention in those circumstances were lawful.
>
> [35] The situation is, as I have said, very different from that which was considered in *B* and the general proposition that continuing detention must depend upon correct classification is clearly correct, but that does not, as I said, cover in my judgment initial detention with a view to discovering what is the particular disorder or recall where there may be a different mental disorder which has flared up and which has produced a situation where to permit the individual to remain at large would create an obvious danger to the public. In those circumstances, in my judgment this claim must fail."

36. These cases show that the purpose of conditional discharge is not necessarily to impose a requirement for ongoing treatment for a classified mental disorder. It may be no more, to use the words of the Tribunal in the present case, than to ensure monitoring "in case the clinical picture unexpectedly changes in the future". As Mr Chamberlain submits, it makes no sense to demand a link between the mental disorder from which the patient is classified as suffering and the grounds for believing, within the meaning of section 73(1)(b), that it is "appropriate for the patient to remain liable to be recalled to hospital for further treatment."

37. It follows, not merely from the cases but, as it seems to me, quite clearly from the language of section 73 itself, that there is no necessary link between the disorder from which a restricted patient was previously classified as suffering and the grounds for conditional discharge in accordance with section 73. And if there is no such necessary link when the Tribunal is considering the exercise of its powers under section 73 there

is, as it seems to me, no reason to import any such link when the Tribunal, as in this case, is considering the exercise of its powers under section 75.

38. In my judgment, in just the same way as it is perfectly lawful for a Tribunal in deciding how to exercise its powers under section 73 to bear in mind disorders other than that from which the patient was previously classified as suffering, it is perfectly lawful for a Tribunal, in deciding whether to exercise its power under section 75(3)(b), to bear in mind disorders other than that from which the patient was classified as suffering - classified, that is, whether by the Crown Court in accordance with section 37 or subsequently by the Tribunal in accordance with section 72(5).

39. It follows, in my judgment, that SC's challenge to the decision of the Tribunal fails and his claim for relief against the Tribunal must be dismissed. There was, in my judgment, no error of law on the part of the Tribunal.

The incompatibility claim

40. Mr Pezzani's case is straightforward. He submits that:

i) A conditionally discharged patient is subject to statutory control which substantially interferes with his civil rights and obligations under Article 8. For example,

a) he is or may be required to follow the instructions of his RMO;

b) he is or may be required to reside at a particular address; and

c) if re–called he may be taken by force to hospital, if need be by the police: see sections 42(4) and 18 of the Act.

The interference with his Article 8 rights implicit in his status of a conditionally discharged patient, says Mr Pezzani, engages the requirements of Article 6 in proceedings under section 75(2) of the Act, because the Tribunal on such an application is, within the meaning of Article 6(1), determining the patient's civil rights and obligations.

ii) Both Article 6(1) and Article 8(2) contain express requirements relating to lawfulness: Article 6(1) requires an "independent and impartial tribunal established by law" and Article 8(2) requires any interference with a protected right to be "in accordance with the law". It is, says, Mr Pezzani, well established that the 'lawfulness' requirement embraces a 'quality' requirement: the law must be sufficiently precise to protect the individual against arbitrary interference by public authorities and to enable him to regulate his conduct in accordance with the law. Section 75(3) is silent as to the criteria to be applied by the Tribunal, confining itself to a description of criteria which, he says, are

not applicable. There is no domestic jurisprudence on the proper criteria to be applied by the Tribunal. There is nothing, he says, to indicate the scope of the discretion conferred on the Tribunal or the manner of its exercise. He points to a discussion by a well–known commentator (*Eldergill,* Mental Health Review Tribunals Law and Practice, Sweet & Maxwell, 1997 pp 561–562) as indicative of the fact that the purpose of the unlimited discretion under section 75(3) is, as he would have it, very far from clear.

41. So, says Mr Pezzani, section 75(3) is incompatible with the Convention. The patient, he says, is not protected against the most basic arbitrariness. He cannot know what matters are relevant or irrelevant to his application. He cannot know whether one Tribunal will apply different criteria from another. He cannot know whether the criteria applied by the Tribunal are correct in law, and therefore cannot know whether he has grounds to challenge the decision. He does not even know where the burden of proof lies at the hearing before the Tribunal.

42. Mr Ward on behalf of the Secretary of State takes issue with both assertions. He submits that:

i) The exercise of the Tribunal's power under section 75(3) does not entail any breach of Convention rights and accordingly cannot be the subject of a declaration of incompatibility.

ii) In any event, when viewed in its proper context, it is clear that what he calls the parameters upon the exercise of that power provided by the 1983 Act itself, by the Human Rights Act 1998 and by the principles of public law are more than sufficient to satisfy the requirements of the Convention.

I shall take the two points in turn.

43. Mr Ward argues that for the following reasons there is no incompatibility per se:

i) Article 6 is of no application to the present case because it does not concern a dispute as to the determination of civil rights and obligations. In support of this proposition he relies, by analogy, upon the decision in *AR v United Kingdom* (1996) EHRLR 324, where the Commission held that "detention in a psychiatric hospital does not as such concern the applicant's "civil rights and obligations"." And the bare fact that Article 8 is engaged (if, indeed it is) does not, he says, entail that Article 6 is also engaged.

ii) In relation to Article 8, Mr Ward accepts that the imposition of conditions upon the discharge of a patient is plainly *capable* of giving rise to an interference with interests protected by Article 8. But, he says, whether the exercise of the Tribunal's discretion under section 75(3) will actually give rise to any such interference is entirely dependent upon the facts of a particular case. If, for example, the Tribunal acts to discharge all the conditions which

apply to a patient, the exercise of the power cannot be said to be a failure to respect the rights protected by Article 8(1), for in such a case Article 8(2), and the requirement that interference with the exercise of this right should be in accordance with the law, simply will not arise for consideration.

iii) Thus, he says, the Tribunal's discretion pursuant to section 75(3) is capable of being exercised without even engaging Convention rights, still less giving rise to a violation of those rights.

iv) Accordingly the power cannot be *incompatible* with Convention rights.

44. Mr Pezzani's riposte was pithy. If the Secretary of State accepts that conditions of discharge are *capable* of interfering with the patient's Article 8 rights (as he does) then, says Mr Pezzani, it follows that a decision as to whether or not that interference should continue engages Article 6, because it is a determination of the patient's civil rights and obligations under Article 8. Mr Ward's argument, he says, misses the point: it is the act of determination which is central to the claim of incompatibility, not its result.

45. Mr Pezzani supported his submissions with reference to the decisions of the Strasbourg court in *Pudas v Sweden* (1987) 10 EHRR 380 at para [35] and of the Court of Appeal in *Secretary of State for Health v Personal Representatives of Christopher Beeson* [2002] EWCA Civ 1812 at paras [15]–[18] and [28] and *R (PD) v West Midlands and North West Mental Health Review Tribunal* [2004] EWCA Civ 311 at para [5], where the court referred to *Aerts v Belgium* (1998) 29 EHRR 50 at para [59]. The latter case, it seems to me, is particularly important, for the Strasbourg court expressly rejected the conclusion of the Commission in that case (see at para [58]) that "proceedings relating to the detention of a person of unsound mind [do] not concern civil rights and obligations". But this is the very proposition for which Mr Ward relies upon the Commission's decision some two years earlier in *AR v United Kingdom* (1996) EHRLR 324. It is difficult to see how *AR v United Kingdom* (1996) EHRLR 324 can have survived *Aerts v Belgium* (1998) 29 EHRR 50, which may go some way to explaining why, for example, there appears to be no reference to the earlier case in *Clayton & Tomlinson's* The Law of Human Rights.

46. In the event, Mr Ward did not show much enthusiasm for this part of his case, indicating that he did not intend to pursue it before me, whilst reserving his position on it for another place. He was, I think, wise to adopt this course, for there seems to me to be little if any merit in the argument.

47. I turn therefore to consider the second and much more substantial point.

48. The core principles upon which Mr Pezzani relies are not in doubt. They are to be found set out in a number of judgments of the Strasbourg court to which I was taken. The first is *The Sunday Times v United Kingdom* (1979) 2 EHRR 245 at para [49]:

> "In the Court's opinion, the following are two of the requirements that flow from the expression "prescribed by law". Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice."

49. The Court summarised matters in *Malone v United Kingdom* (1984) 7 EHRR 14. Referring to its judgment in *Silver v United Kingdom* (1983) 5 EHRR 347 it continued at para [68]:

> "In that judgment, the Court held that "a law which confers a discretion must indicate the scope of that discretion", although the detailed procedures and conditions to be observed do not necessarily have to be incorporated in rules of substantive law. The degree of precision required of the "law" in this connection will depend upon the particular subject–matter. Since the implementation in practice of measures of secret surveillance of communications is not open to scrutiny by the individuals concerned or the public at large, it would be contrary to the rule of law for the legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference."

50. In *Olsson v Sweden* (1988) 11 EHRR 259 at para [61] the Court said:

> "Requirements which the Court has identified as flowing from the phrase "in accordance with the law" include the following:
>
> (a) A norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen - if need be, with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail; however, experience shows that absolute precision is unattainable and the need to avoid

excessive rigidity and to keep pace with changing circumstances means that many laws are inevitably couched in terms which, to a greater or lesser extent, are vague.

(b) The phrase "in accordance with the law" does not merely refer back to domestic law but also relates to the quality of the law, requiring it to be compatible with the rule of law; it thus implies that there must be a measure of protection in domestic law against arbitrary interferences by public authorities with the rights safeguarded by, inter alia, paragraph 1 of Article 8.

(c) A law which confers a discretion is not in itself inconsistent with the requirement of foreseeability, provided that the scope of the discretion and the manner of its exercise are indicated with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference."

51. In relation to the compulsory detention of persons of unsound mind Mr Pezzani also referred me to *Ashingdane v United Kingdom* (1985) 7 EHRR 528 at para [44] where the Court said:

"Certainly, the "lawfulness" of any detention is required in respect of both the ordering and the execution of the measure depriving the individual of his liberty. Such "lawfulness" presupposes conformity with domestic law in the first place and also, as confirmed by Article 18, conformity with the purposes of the restrictions permitted by Article 5(1). More generally, it follows from the very aim of Article 5(1) that no detention that is arbitrary can ever be regarded as "lawful"."

Mr Ward did not, of course, quarrel with this, pointing himself to *Amuur v France* (1992) 22 EHRR 533 at para [50] where the Court said:

"Where the "lawfulness" of detention is in issue, including the question whether "a procedure prescribed by law" has been followed, the Convention refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules of national law, but it requires in addition that any deprivation of liberty should be in keeping with the purpose of Article 5, namely to protect the individual from arbitrariness.

In laying down that any deprivation of liberty must be effected "in accordance with a procedure prescribed by law", Article 5(1) primarily requires any arrest or detention to have a legal basis in domestic law. However, these words do not merely refer back to domestic law; like the expressions "in accordance with the law" and "prescribed by law" in the second paragraphs of Articles 8 to 11, they also relate to the quality of the law,

> requiring it to be compatible with the rule of law, a concept inherent in all the Articles of the Convention.
>
> In order to ascertain whether a deprivation of liberty has complied with the principle of compatibility with domestic law, it therefore falls to the Court to assess not only the legislation in force in the field under consideration, but also the quality of the other legal rules applicable to the persons concerned. Quality in this sense implies that where a national law authorises deprivation of liberty × it must be sufficiently accessible and precise, in order to avoid all risk of arbitrariness."

52. As can be seen, the requirement that interference with Convention rights should be in accordance with the law embodies three principles:

    i) the interference in question must have some basis in domestic law;

    ii) the law must be adequately accessible; and

    iii) the law must be so formulated that it is sufficiently foreseeable.

    The dispute between the parties in the present case is essentially whether the law - section 75(3) - provides a sufficient degree of foreseeability to satisfy the third requirement.

53. I acknowledge, of course, that these principles are of fundamental importance. As the Court itself has repeatedly recognised (for example, in *Malone v United Kingdom* (1984) 7 EHRR 14, in *Olsson v Sweden* (1988) 11 EHRR 259 and again in *Amuur v France* (1992) 22 EHRR 533), they are fundamental to the very concept of the rule of law, a concept which, as the Court has made clear, is inherent in all the Articles of the Convention. But as the Strasbourg jurisprudence also makes clear, the law need not be known with absolute certainty. What is required is that it must be foreseeable to a degree that is "reasonable in the circumstances", having regard to "the particular subject–matter" and to "the legitimate aim of the measure in question", and affording the individual "adequate protection against arbitrary interference". The fundamental principle is that ‘the law' must be formulated with sufficient precision to give the individual adequate protection against what the Court has called "arbitrary interferences by public authorities". As the Court said in *Amuur v France* (1992) 22 EHRR 533 at para [50]:

    > "where a national law authorises deprivation of liberty × it must be sufficiently accessible and precise, in order to avoid all risk of arbitrariness"

54. What is the context in which the question arises in the present case? It seems to me that there are four separate elements that have to be borne in mind:

i) First, we are concerned with liberty. True it is, as Mr Ward points out, that the Tribunal's power under section 75(3) is not concerned directly with the compulsory detention of the patient; whatever the Tribunal decides, the patient will not actually lose his liberty unless recalled by the Secretary of State. But the fact is, nonetheless, that the decision of the Tribunal under section 75(3) will be determinative of whether or not the Secretary of State retains the power of recall.

ii) Secondly, we are concerned with the exercise by State authorities of compulsory powers in relation to persons suffering from mental disorder. That calls for increased vigilance in reviewing whether the Convention has been complied with: see the Strasbourg and other cases referred to in *R (Burke) v General Medical Council* [2004] EWHC 1879 (Admin), [2004] 2 FLR 1121, at paras [67]–[72].

iii) On the other hand, we are not here concerned with the exercise of powers conferred on officials or Ministers, as for example, in *Malone v United Kingdom* (1984) 7 EHRR 14 or, in the context of mental health, in *Ashingdane v United Kingdom* (1985) 7 EHRR 528 and, very recently, in *HL v United Kingdom* (2004) 5 October (the Strasbourg proceedings arising out of the decision of the House of Lords in *R v Bournewood Community and Mental Health NHS Trust ex p L* [1999] 1 AC 458). The relevant power in section 75(3) is entrusted to the Tribunal, a body which acts judicially and on the basis of a contested hearing.

iv) Finally, we are not here concerned with a statutory provision defining the circumstances which entitle the State to intervene in the first place. SC applied to the Tribunal under section 75(2), as a restricted patient who had previously been conditionally discharged. He is a restricted patient as a result of decisions by the Crown Court (i) that he was guilty of an offence under section 18 of the Offences against the Person Act 1861 and (ii) that he met the criteria set out in sections 37 and 41 of the 1983 Act. He is a conditionally discharged restricted patient as a result of the decision of the earlier Tribunal exercising its powers under section 73 of the Act.

55. This last point leads on to another and, as it seems to me, very important aspect of section 75(3). As Laws LJ said in the passage of his judgment in *R (Jones) v North Warwickshire Borough Council* [2001] EWCA Civ 315 which I have already set out, a provision such as section 75(3) has to be construed having regard to "the policy and objects" of the statute. As Mr Ward helpfully expressed it, the exercise of the Tribunal's powers pursuant to section 75(3) is informed by the statutory context.

56. Section 75(3) applies only to a restricted patient who, like SC, has been conditionally discharged. Bearing in mind the provisions of sections 37, 41 and 73 of the Act, one can, as it seems to me, readily identify the most important of the factors that are likely to feed into the exercise of discretion under section 75(3). Any patient applying under section 75(3) will, by definition, have been, just as SC was:

i) convicted of a criminal offence sufficiently grave as to merit a possible sentence of imprisonment: section 37(1);

ii) found to be suffering from mental disorder meriting his detention in hospital for treatment: section 37(2)(a)(i);

iii) found to be someone whose risk of re–offending is such that a restriction order is "necessary for the protection of the public from serious harm": section 41(1); and

iv) found by the Tribunal (unless previously discharged by the Secretary of State under section 42(2)) to be someone who, although not requiring for the time being to be detained in hospital for medical treatment (sections 72(1)(b), 73(1)(a), 73(2)(a)), should nonetheless remain liable to be recalled to hospital for further treatment: section 73(2)(b).

57. It is against this background that the exercise by the Tribunal of its powers under section 75(3) takes place. Accordingly the Tribunal when exercising these powers will need to consider such matters as the nature, gravity and circumstances of the patient's offence, the nature and gravity of his mental disorder, past, present and future, the risk and likelihood of the patient re–offending, the degree of harm to which the public may be exposed if he re–offends, the risk and likelihood of a recurrence or exacerbation of any mental disorder, and the risk and likelihood of his needing to be recalled in the future for further treatment in hospital. The Tribunal will also need to consider the nature of any conditions previously imposed, whether by the Tribunal or by the Secretary of State, under sections 42(2), 73(4)(b) or 73(5), the reasons why they were imposed and the extent to which it is desirable to continue, vary or add to them.

58. As Mr Ward submits, in exercising the powers under section 75(3) questions as to the patient's mental health, his safety and questions of public safety are evidently relevant. They are, unsurprisingly, the very questions which the Tribunal considered in the present case. And they are moreover, as Mr Ward says, directed to the evidently legitimate policy aims served by the existence of the broad discretion which is conferred by section 75(3). I agree with Mr Ward that this broad discretion serves to ensure that the Tribunal can respond flexibly and appropriately to the varied and potentially complex situations which may arise when a restricted patient has been conditionally discharged. This enables the Tribunal to ensure that both the interests of the patient and the interests of public safety which arise in the case of a restricted patient are adequately served. In practice, as he says, such an exercise is fact–intensive and strongly dependant upon the clinical details of each particular case - as, indeed, the decision of the Tribunal in the present case illustrates.

59. The Convention does not preclude the exercise of a broad discretion by authorities acting in a judicial capacity. But even if the discretion conferred by section 75(3) is broad and on the face of it unfettered, the statute itself, as I have sought to demonstrate, contains a number of powerful indications as to the kind of factors that the Tribunal is likely to have to consider. Moreover, as Mr Ward points out, section

73 also points the way to a crucial question which the Tribunal will need to consider when exercising its powers under section 75(3). The consequence of an order under section 75(3)(b) is that the restriction order ceases to have effect; in other words, that what was previously only a conditional discharge becomes in effect an absolute discharge. But, as section 73 demonstrates, the difference between the two is the difference between the patient who is, and the patient who is no longer, liable to be recalled to hospital for further treatment. So, in effect, one of the key questions that the Tribunal will wish to ask itself when considering how to exercise its powers under section 75(3) is whether it is - as section 73(1)(b) puts it - "satisfied that it is not appropriate for the patient to remain liable to be recalled to hospital for further treatment." If the Tribunal is not so satisfied, then it is difficult to see that it could be appropriate for it to make an order under section 75(3)(b).

60. Mr Pezzani correctly points out that section 73 "shall not apply" to an application under section 75(2). But this, with respect to him, does not mean, as he puts it, that the matters which are referred to in sections 72(1)(b)(i) and 72(1)(b)(ii) are "excluded" by section 75(3) from the Tribunal's consideration of an application under section 75(2). Nor, specifically, does it mean that there is "explicitly excluded" from consideration by section 75(3), as Mr Pezzani submits, the question of whether it is appropriate that the patient remains liable to be recalled. As Mr Ward rightly submits, the effect of section 75(3) is not to *preclude* the Tribunal from considering the kind of factors which fall for consideration under section 73. Rather, as he puts it, the effect is that the Tribunal, when exercising its discretion under section 75(3), is not constrained by the mandatory terms of section 73, which bind the approach of the Tribunal when considering the exercise of its powers under section 73.

61. For all these reasons it seems to me that the statutory context, and the provisions of sections 37, 41 and 73 in particular, go a long way to identifying not merely the various factors which the Tribunal is likely to take into account when exercising its powers under section 75(3) but also, importantly, what is likely to be one of key questions that the Tribunal will wish to ask itself. In other words, the 1983 Act itself goes a significant way, in my judgment, towards making the law sufficiently foreseeable.

62. Mr Ward draws attention to another strand in the Strasbourg jurisprudence. In *Silver v United Kingdom* (1983) 5 EHRR 347 the Court, having reiterated what it had earlier said in the *Sunday Times* case, added at para [90]:

> "However, the Court does not interpret the expression "in accordance with the law" as meaning that the safeguards must be enshrined in the very text which authorises the imposition of restrictions. In fact, the question of safeguards against abuse is closely linked with the question of effective remedies".

63. In *Gillow v United Kingdom* (1986) 11 EHRR 335 at para [51] the Court said:

> "A law which confers a discretion is not in itself inconsistent with the requirement of foreseeability, provided that the scope of the discretion and the manner of its exercise are indicated

> with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference. In the present case, the Court finds that the scope of the discretion, coupled with the provision for judicial control of its exercise, is sufficient to satisfy the requirements of the Convention inherent in the expression "in accordance with the law"."

64. That theme was picked up by the Court in *Olsson v Sweden* (1988) 11 EHRR 259 at para [62]:

> "The Swedish legislation applied in the present case is admittedly rather general in terms and confers a wide measure of discretion, especially as regards the implementation of care decisions. In particular, it provides for intervention by the authorities where a child's health or development is jeopardised or in danger, without requiring proof of actual harm to him. On the other hand, the circumstances in which it may be necessary to take a child into public care and in which a care decision may fall to be implemented are so variable that it would scarcely be possible to formulate a law to cover every eventuality. To confine the authorities' entitlement to act to cases where actual harm to the child has already occurred might well unduly reduce the effectiveness of the protection which he requires. Moreover, in interpreting and applying the legislation, the relevant preparatory work provides guidance as to the exercise of the discretion it confers. Again, safeguards against arbitrary interference are provided by the fact that the exercise of nearly all the statutory powers is either entrusted to or is subject to review by the administrative courts at several levels; this is true of the taking of a child into care, a refusal to terminate care and most steps taken in the implementation of care decisions. Taking these safeguards into consideration, the scope of the discretion conferred on the authorities by the laws in question appears to the Court to be reasonable and acceptable for the purposes of Article 8."

65. As Mr Ward points out, another example of the relevance of the existence of procedural safeguards and guarantees is provided by *Hentrich v France* (1994) 18 EHRR 440 at para [42] where the Court said:

> "While the system of the right of pre–emption does not lend itself to criticism as an attribute of the State's sovereignty, the same is not true where the exercise of it is discretionary and at the same time the procedure is not fair.
>
> In the instant case the pre–emption operated arbitrarily and selectively and was scarcely foreseeable, and it was not attended by the basic procedural safeguards. In particular, Article 668 of the General Tax Code, as interpreted up to that time by the Court of Cassation and as applied to the applicant,

> did not sufficiently satisfy the requirements of precision and foreseeability implied by the concept of law within the meaning of the Convention.
>
> A pre–emption decision cannot be legitimate in the absence of adversarial proceedings that comply with the principle of equality of arms, enabling argument to be presented on the issue of the underestimation of the price and, consequently, on the Revenue's position - all elements which were lacking in the present case."

66. By the time a case such as this reaches a Tribunal considering an application under section 75(2), it will necessarily already have been not merely before the court which made the original restriction order but also (unless the Secretary of State has previously directed conditional discharge under section 42(2)) before a Tribunal which has directed conditional discharge under section 73(2). The decision of that Tribunal will, in principle, have been amenable to judicial review. The Tribunal hearing the section 75(2) application is a body which acts judicially and in accordance with the Mental Health Review Tribunal Rules 1983. These rules provide the patient with a full opportunity to meet any case advanced before the Tribunal that might conceivably engage Article 8 and enable him to respond to the expert and other evidence, whether by instructing his own experts, as happened in this case, by cross–examination or by submissions. As Mr Ward points out, SC does not suggest that the procedure before the Tribunal does not satisfy the substantive requirements of Article 6. The Tribunal, moreover, is itself a public body which must act in a way which is compatible with the patient's Article 8 rights. This means that it is not enough that it acts rationally. Its decision must be informed by the Convention principles of necessity and proportionality. Again, the decision of the Tribunal will in principle be amenable to judicial review. Furthermore, and as I have already observed, whatever the Tribunal decides, the patient will not actually lose his liberty unless recalled by the Secretary of State. And, as I have also pointed out, the Secretary of State himself has to act compatibly with the patient's rights under the Convention and must have up–to–date medical evidence that the patient is, at the time of recall, suffering from a true mental disorder, and showing that the criteria for detention referred to in *Winterwerp v The Netherlands* (1979) 2 EHRR 387 are met. If the *Winterwerp* criteria are not met, the Secretary of State's decision to recall will, as Mr Ward accepts, be judicially reviewable. And quite apart from that, section 75(1)(a) requires the Secretary of State to refer the case of any recalled restricted patient to a Tribunal within one month.

67. So, in short, at each stage of the process important safeguards are available, either in the form of the Tribunal and/or by way of judicial review. Those safeguards, in my judgment, adequately protect the patient from all risk of arbitrariness.

68. Mr Ward points to the decision of the Strasbourg court in *Air Canada v United Kingdom* (1995) 20 EHRR 150, following its earlier decision in *AGOSI v United Kingdom* (1986) 9 EHRR 1, as illustrating the acceptance by the Court of judicial review as a sufficient safeguard to ensure that interference with property is "subject to the conditions provided for by law" within the meaning of Article 1 of Protocol 1 to the Convention - and this even in respect of an *administrative* decision–maker

exercising powers of what the court called "striking" width. The present case, he suggests, is a fortiori, as it concerns decision–making by a tribunal acting judicially.

69. As Mr Pezzani correctly points out, the mere availability of judicial review will not necessarily and in all circumstances save the day. For a recent illustration of the point he drew my attention to *R (Q) v Secretary of State for the Home Department* [2003] EWCA Civ 364, [2004] QB 36, at para [116]. An even more recent example, and one moreover relating to compulsory detention in the field of mental health, is to be found in the decision of the Strasbourg court in *HL v United Kingdom* (2004) 5 October at paras [136]–[140]. Both of these, it may be noted, were cases where the relevant power was exercisable by officials rather than, as here, by an independent and impartial tribunal within the meaning of Article 6(1). Mr Pezzani submits that the mere availability of judicial review of the Tribunal's decision under section 75 does not eliminate what he says is the incompatibility of section 75(3) with the Convention. He complains that the Secretary of State contends for what he (Mr Pezzani) calls a subsequent certainty whereas the Strasbourg court, he says, has clearly stated a requirement of precedent certainty. Foreseeability, he says, is the key: a right to apply for judicial review does not remedy the incompatibility.

70. I entirely accept that the mere availability of judicial review is not necessarily and in all contexts a complete answer to a claim that ‘the law' has not been formulated so as to be sufficiently foreseeable. But that, of itself, does not get Mr Pezzani anywhere. The fact is, as the Strasbourg cases to which Mr Ward has referred me show, that the availability of appropriate mechanisms of judicial control or judicial review of discretionary decision–making may in appropriate cases, and when taken in conjunction with all the other circumstances, suffice to satisfy the requirements of the Convention. The present, in my judgment, is clearly such a case. Moreover, and with all respect to Mr Pezzani, this is not a case of mere subsequent certainty. Mr Ward does not rely only upon the availability of judicial review. There is, in my judgment, a very significant degree of what Mr Pezzani calls precedent certainty, for, as I have already sought to explain, the 1983 Act itself contains powerful indications as to the kind of factors that the Tribunal is likely to have to consider and section 73 points the way to a crucial question which the Tribunal will need to consider when exercising its powers under section 75(3).

71. In my judgment section 75(3) is not incompatible with the Convention. In all the circumstances, and particularly given the combination of the matters to which I have referred in paragraphs [61] and [66] above, ‘the law' is so formulated as to be both sufficiently foreseeable and adequate to protect a patient in SC's position from all risk of arbitrariness. I say that very much bearing in mind the particular context with which we here concerned, in particular, the fact that what is at stake here is liberty and the exercise by State authorities of compulsory powers in relation to someone suffering from mental disorder as also the fact that increased vigilance is therefore called for in reviewing whether the Convention has been complied with.

72. It follows that this part of SC's claim fails and that his claim for relief against the Secretary of State must be dismissed.

Conclusion

73. This claim for judicial review fails and must be dismissed. SC has failed to establish either of his two matters of complaint.

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MR JUSTICE MUNBY: For the reasons set out in a written judgment a draft of which was sent to the parties and which I now hand down, the claim fails and is accordingly dismissed. In particular section 72(3) of the Mental Health Act 1983 is in my judgment fully compatible with the Convention on Human Rights Act 1998.

MR CHAMBERLAIN: I appear on behalf of the tribunal. Mr Pezzani is not here, so I do not know whether he has any application to make or not. I do not have any application.

MR WARD: My Lord, I have no application for the Secretary of State.

MR JUSTICE MUNBY: The fact is that the claimant's representatives are well aware judgment is being handed down today. They have acknowledged receipt of the draft judgment. I can only assume that they have no application to make. Accordingly, subject to anything further either of you, Mr Chamberlain or you Mr Ward, have to say, I dismiss the proceedings in the usual way. Are you seeking orders for costs?

MR CHAMBERLAIN: No, my Lord.

MR JUSTICE MUNBY: I understand the claimant is publicly funded so I will dismiss the proceedings with no orders for costs save for a direction for the appropriate assessment for public funding purposes of the costs of claimant.