

GLS Human Rights Webinar

CASE REFERENCE

**R. (on the application of H) v Mental Health Review Tribunal
for North and East London Region**

Also known as:

**R. (on the application of H) v London North and East Region
Mental Health Review Tribunal**

**R. (on the application of H) v North and East London Regional
Mental Health Review Tribunal**

Court of Appeal (Civil Division)

28 March 2001

Westlaw Case Analysis 14 pages

Official Transcript 10 pages

Status:  Positive or Neutral Judicial Treatment

R. (on the application of H) v Mental Health Review Tribunal for North and East London Region

Also known as:

R. (on the application of H) v London North and East Region Mental Health Review Tribunal

R. (on the application of H) v North and East London Regional Mental Health Review Tribunal

Court of Appeal (Civil Division)

28 March 2001

Case Analysis

Where Reported

[2001] EWCA Civ 415; [\[2002\] Q.B. 1](#); [\[2001\] 3 W.L.R. 512](#); [\[2001\] H.R.L.R. 36](#); [2001] U.K.H.R.R. 717; (2001) 4 C.C.L. Rep. 119; [2001] Lloyd's Rep. Med. 302; (2001) 61 B.M.L.R. 163; [2001] M.H.L.R. 48; [\[2001\] A.C.D. 78](#); (2001) 98(21) L.S.G. 40; (2001) 145 S.J.L.B. 108; Times, April 2, 2001; Independent, April 3, 2001; [Official Transcript](#)

Case Digest

Subject: Mental health

Keywords: Burden of proof; Discharge; Human rights; Mental patients' rights; Right to liberty and security

Summary: Section 73 of the Mental Health Act 1983, which concerned the right of a restricted patient to apply to a mental health review tribunal for his discharge, contravened the right to liberty provided for by the Human Rights Act 1998 Sch.1 Part I Art.5 since it placed the burden of proving that the patient was no longer suffering from a mental disorder warranting his detention on the patient himself.

Abstract: H, a restricted patient, appealed against the dismissal of his application for judicial review of a decision of a Mental Health Review Tribunal refusing to discharge him from detention. H had been detained in a secure hospital following his conviction for manslaughter and had applied to the tribunal for a discharge pursuant to the [Mental Health Act 1983 s.73](#). It was submitted that the test contained in s.73, which a tribunal applied for the purpose of determining a restricted patient's entitlement to release, was incompatible with the right to liberty enshrined in the Human Rights Act 1998 Sch.1 Part I Art.5.

Held, allowing the appeal and making a declaration of incompatibility, that s.73 of the 1983 Act did contravene Art.5 as the burden of proof rested on the patient to show that he no longer suffered from a mental disorder which warranted his detention. As the requirements of the 1998 Act could only be fulfilled if a tribunal was obliged to order a patient's discharge unless it could be shown that all three of the conditions for his continued detention had been met, both s.72 and s.73 of the 1983 Act were incompatible. The concept of burden of proof and the applicable test for discharge were inseparable and the failure of the 1983 Act to require a tribunal

to discharge a patient where it could not be shown that he suffered from a mental disorder warranting detention amounted to unlawful detention and infringed a person's right to liberty.

Judge: Lord Phillips of Worth Matravers, M.R.; Kennedy, L.J.; Dyson, L.J.

Counsel: For the claimant: R Gordon QC, P Bowen. For the defendant: J Richards. For the intervenor: J Singh.

Solicitor: For the claimant: Scott-Moncrief, Harbour & Sinclair. For the defendant: Treasury solicitor. For the intervenor: Treasury solicitor.

Appellate History & Status

Queen's Bench Division (Administrative Court)

R. (on the application of H) v Mental Health Review Tribunal for North and East London Region

[\[2000\] M.H.L.R. 242; Official Transcript](#)

Reversed

Court of Appeal (Civil Division)

R. (on the application of H) v Mental Health Review Tribunal for North and East London Region

[\[2001\] EWCA Civ 415; \[2002\] Q.B. 1; \[2001\] 3 W.L.R. 512; \[2001\] H.R.L.R. 36; \[2001\] U.K.H.R.R. 717; \(2001\) 4 C.C.L. Rep. 119; \[2001\] Lloyd's Rep. Med. 302; \(2001\) 61 B.M.L.R. 163; \[2001\] M.H.L.R. 48; \[2001\] A.C.D. 78; \(2001\) 98\(21\) L.S.G. 40; \(2001\) 145 S.J.L.B. 108; Times, April 2, 2001; Independent, April 3, 2001; Official Transcript](#)

All Cases Cited

JA Pye (Oxford) Ltd v Graham

[\[2001\] EWCA Civ 117; \[2001\] Ch. 804; \[2001\] 2 W.L.R. 1293; \[2001\] H.R.L.R. 27; \(2001\) 82 P. & C.R. 23; \[2001\] 2 E.G.L.R. 69; \[2001\] 18 E.G. 176; \[2001\] 7 E.G. 161 \(C.S.\); \(2001\) 98\(8\) L.S.G. 44; \(2001\) 145 S.J.L.B. 38; \[2001\] N.P.C. 29; \(2001\) 82 P. & C.R. DG1; Times, February 13, 2001; Independent, February 13, 2001; Official Transcript; CA \(Civ Div\); 2001-02-06](#)

HM Advocate v McIntosh (Robert) (No.1)

[\[2001\] UKPC D 1; \[2003\] 1 A.C. 1078; \[2001\] 3 W.L.R. 107; \[2001\] 2 All E.R. 638; 2001 S.C. \(P.C.\) 89; 2001 S.L.T. 304; 2001 S.C.C.R. 191; \[2001\] 2 Cr. App. R. 27; \[2001\] H.R.L.R. 20; \[2001\] U.K.H.R.R. 463; \(2001\) 98\(11\) L.S.G. 43; \(2001\) 145 S.J.L.B. 83; 2001 G.W.D. 6-206; Times, February 8, 2001; Independent, February 16, 2001; Official Transcript; PC \(Sc\); 2001-02-05](#)

R. v Benjafield (Karl Robert) (Confiscation Order)

[\[2001\] 3 W.L.R. 75; \[2001\] 2 All E.R. 609; \[2001\] 2 Cr. App. R. 7; \[2001\] 2 Cr. App. R. \(S.\) 47; \[2001\] H.R.L.R. 25; 10 B.H.R.C. 19; \[2001\] Crim. L.R. 245; \(2001\) 98\(12\) L.S.G. 41; Times, December 28, 2000; Independent, January 31, 2001; Official Transcript; CA \(Crim Div\); 2000-12-21](#)

R. v Offen (Matthew Barry) (No.2)

[\[2001\] 1 W.L.R. 253; \[2001\] 2 All E.R. 154; \[2001\] 1 Cr. App. R. 24; \[2001\] 2 Cr. App. R. \(S.\) 10; \[2000\] Prison L.R. 283; \[2001\] Crim.](#)

[L.R. 63; \(2001\) 98\(1\) L.S.G. 23; \(2000\) 144 S.J.L.B. 288; Times, November 10, 2000; Independent, November 17, 2000; Official Transcript; CA \(Crim Div\); 2000-11-09](#)

R. v London South and South West Region Mental Health Review Tribunal Ex p. M

[\[2000\] Lloyd's Rep. Med. 143; Times, February 10, 2000; Official Transcript; QBD; 1999-12-21](#)

R. v DPP Ex p. Kebeline

[\[2000\] 2 A.C. 326; \[1999\] 3 W.L.R. 972; \[1999\] 4 All E.R. 801; \[2000\] 1 Cr. App. R. 275; \[2000\] H.R.L.R. 93; \[2000\] U.K.H.R.R. 176; \(2000\) 2 L.G.L.R. 697; \(1999\) 11 Admin. L.R. 1026; \[2000\] Crim. L.R. 486; \(1999\) 96\(43\) L.S.G. 32; Times, November 2, 1999; Official Transcript; HL; 1999-10-28](#)

R. v DPP Ex p. Kebeline

[\[1999\] 3 W.L.R. 175; \(1999\) 11 Admin. L.R. 785; \[1999\] Crim. L.R. 994; \[1999\] C.O.D. 207; Times, March 31, 1999; QBD; 1999-03-30](#)

R v Secretary of State for Scotland

[\[1999\] 2 A.C. 512; \[1999\] 2 W.L.R. 28; \[1999\] 1 All E.R. 481; 1999 S.C. \(H.L.\) 17; 1999 S.L.T. 279; 1999 S.C.L.R. 74; \(1999\) 96\(4\) L.S.G. 37; 1998 G.W.D. 40-2075; Times, December 7, 1998; Independent, December 8, 1998; HL; 1998-12-03](#)

Johnson v United Kingdom

[\(1999\) 27 E.H.R.R. 296; \(1998\) 40 B.M.L.R. 1; \[1998\] H.R.C.D. 41; Times, December 4, 1997; ECHR; 1997-10-24](#)

R. v Parole Board Ex p. Watson

[\[1996\] 1 W.L.R. 906; \[1996\] 2 All E.R. 641; \(1996\) 8 Admin. L.R. 460; \[1997\] C.O.D. 72; Times, March 11, 1996; CA \(Civ Div\); 1996-03-04](#)

R. v Secretary of State for Employment Ex p. Equal Opportunities Commission

[\[1995\] 1 A.C. 1; \[1994\] 2 W.L.R. 409; \[1994\] 1 All E.R. 910; \[1995\] 1 C.M.L.R. 391; \[1994\] I.C.R. 317; \[1994\] I.R.L.R. 176; 92 L.G.R. 360; \[1994\] C.O.D. 301; \(1994\) 91\(18\) L.S.G. 43; \(1994\) 144 N.L.J. 358; \(1994\) 138 S.J.L.B. 84; Times, March 4, 1994; Independent, March 9, 1994; Guardian, March 7, 1994; HL; 1994-03-03](#)

R. v Canons Park Mental Health Review Tribunal Ex p. A

[\[1995\] Q.B. 60; \[1994\] 3 W.L.R. 630; \[1994\] 2 All E.R. 659; \[1994\] C.O.D. 480; \(1994\) 91\(22\) L.S.G. 33; \(1994\) 138 S.J.L.B. 75; Times, March 2, 1994; CA \(Civ Div\); 1994-02-16](#)

Open Door Counselling Ltd v Ireland (A/246)

[\(1993\) 15 E.H.R.R. 244; Times, November 5, 1992; Independent, November 3, 1992; Guardian, November 3, 1992; ECHR; 1992-10-29](#)

Megyeri v Germany (A/237A)

[\(1993\) 15 E.H.R.R. 584; Guardian, June 3, 1992; ECHR; 1992-05-12](#)

Eriksson v Sweden (A/156)

[\(1990\) 12 E.H.R.R. 183; ECHR; 1989-06-22](#)

Waldron, Re

[\[1986\] Q.B. 824](#); [\[1985\] 3 W.L.R. 1090](#); [\[1985\] 3 All E.R. 775](#); [\(1986\) 83 L.S.G. 199](#); [\(1985\) 129 S.J. 892](#); [Times, October 8, 1985](#); CA (Civ Div); 1985-10-02

Luberti v Italy (A/75)

[\(1984\) 6 E.H.R.R. 440](#); ECHR; 1984-02-23

X v United Kingdom (A/46)

[\(1982\) 4 E.H.R.R. 188](#); ECHR; 1981-10-24

Winterwerp v Netherlands (A/33)

[\(1979-80\) 2 E.H.R.R. 387](#); ECHR; 1979-10-24

Key Cases Citing

Followed

X, Re

[\[2008\] NIQB 22](#); [\[2008\] M.H.L.R. 97](#); HC (NI); 2008-02-20

R. (on the application of N) v Mental Health Review Tribunal (Northern Region)

[\[2005\] EWHC 587 \(Admin\)](#); [\[2005\] M.H.L.R. 56](#); [\[2005\] A.C.D. 92](#); [Times, April 18, 2005](#); [Official Transcript](#); QBD (Admin); 2005-04-11

Considered

RH v South London and Maudsley NHS Foundation Trust

[\[2010\] EWCA Civ 1273](#); [\[2011\] Med. L.R. 270](#); [\(2011\) 117 B.M.L.R. 47](#); [\[2010\] M.H.L.R. 341](#); [Official Transcript](#); CA (Civ Div); 2010-11-12

DL-H v Devon Partnership NHS Trust

[\[2010\] UKUT 102 \(AAC\)](#); [\[2010\] M.H.L.R. 162](#); [Official Transcript](#); UT (AAC); 2010-04-12

Hutchison Reid v United Kingdom (50272/99)

[\(2003\) 37 E.H.R.R. 9](#); [14 B.H.R.C. 41](#); [Times, February 26, 2003](#); ECHR; 2003-02-20

R. (on the application of C) v Secretary of State for the Home Department

[\[2001\] EWHC Admin 501](#); [\[2001\] M.H.L.R. 100](#); [Official Transcript](#); QBD (Admin); 2001-06-19

All Cases Citing

Considered

RH v South London and Maudsley NHS Foundation Trust

[\[2010\] EWCA Civ 1273](#); [\[2011\] Med. L.R. 270](#); [\(2011\) 117 B.M.L.R. 47](#); [\[2010\] M.H.L.R. 341](#); [Official Transcript](#); CA (Civ Div); 2010-11-12

Mentioned by

DB v Secretary of State for Work and Pensions

[\[2010\] UKUT 144 \(AAC\)](#); [Official Transcript](#); UT (AAC); 2010-05-12

Considered

DL-H v Devon Partnership NHS Trust

[\[2010\] UKUT 102 \(AAC\)](#); [\[2010\] M.H.L.R. 162](#); [Official Transcript](#); UT (AAC); 2010-04-12

Mentioned by

R. (on the application of Lumba) v Secretary of State for the Home Department

[\[2010\] EWCA Civ 111](#); [\[2010\] 1 W.L.R. 2168](#); [\[2010\] 4 All E.R. 489](#); [\[2010\] U.K.H.R.R. 366](#); [\(2010\) 107\(9\) L.S.G. 18](#); [Official Transcript](#); CA (Civ Div); 2010-02-19

Mentioned by

DC v Ealing LBC

[\[2010\] UKUT 10 \(AAC\)](#); [Official Transcript](#); UT (AAC); 2010-01-11

Followed

X, Re

[\[2008\] NIQB 22](#); [\[2008\] M.H.L.R. 97](#); HC (NI); 2008-02-20

Mentioned by

R. (on the application of RD) v Mental Health Review Tribunal

[\[2007\] EWHC 781 \(Admin\)](#); [\(2007\) 104\(18\) L.S.G. 29](#); [\(2007\) 151 S.J.L.B. 506](#); [Official Transcript](#); QBD (Admin); 2007-04-04

Mentioned by

R. (on the application of N) v Mental Health Review Tribunal (Northern Region)

[\[2005\] EWCA Civ 1605](#); [\[2006\] Q.B. 468](#); [\[2006\] 2 W.L.R. 850](#); [\[2006\] 4 All E.R. 194](#); [\(2006\) 88 B.M.L.R. 59](#); [\[2006\] M.H.L.R. 59](#); [Times, January 12, 2006](#); [Official Transcript](#); CA (Civ Div); 2005-12-21

Followed

R. (on the application of N) v Mental Health Review Tribunal (Northern Region)

[\[2005\] EWHC 587 \(Admin\)](#); [\[2005\] M.H.L.R. 56](#); [\[2005\] A.C.D. 92](#); [Times, April 18, 2005](#); [Official Transcript](#); QBD (Admin); 2005-04-11

Mentioned by

R. (on the application of C) v Mental Health Review Tribunal

[\[2005\] EWHC 17 \(Admin\)](#); [\[2005\] M.H.L.R. 31](#); [\[2005\] A.C.D. 102](#); [\[2005\] A.C.D. 89](#); [\(2005\) 102\(9\) L.S.G. 30](#); [Times, January 24, 2005](#); [Official Transcript](#); QBD (Admin); 2005-01-17

Mentioned by

Ghaidan v Godin-Mendoza

[\[2004\] UKHL 30](#); [\[2004\] 2 A.C. 557](#); [\[2004\] 3 W.L.R. 113](#); [\[2004\] 3 All E.R. 411](#); [\[2004\] 2 F.L.R. 600](#); [\[2004\] 2 F.C.R. 481](#); [\[2004\] H.R.L.R. 31](#); [\[2004\] U.K.H.R.R. 827](#); [16 B.H.R.C. 671](#); [\[2004\] H.L.R. 46](#); [\[2005\] 1 P. & C.R. 18](#); [\[2005\] L. & T.R. 3](#); [\[2004\] 2 E.G.L.R. 132](#); [\[2004\] Fam. Law 641](#); [\[2004\] 27 E.G. 128 \(C.S.\)](#); [\(2004\) 101\(27\) L.S.G. 30](#); [\(2004\) 154 N.L.J. 1013](#); [\(2004\) 148 S.J.L.B. 792](#); [\[2004\] N.P.C. 100](#); [\[2004\] 2 P. & C.R. DG17](#); [Times, June 24, 2004](#); [Official Transcript](#); HL; 2004-06-21

Mentioned by

R. (on the application of Li) v Mental Health Review Tribunal
[\[2004\] EWHC 51 \(Admin\)](#); [\[2004\] M.H.L.R. 150](#); [\[2004\] A.C.D. 74](#); [Official Transcript](#); QBD (Admin); 2004-01-22

Mentioned by

R. (on the application of Sim) v Parole Board
[\[2003\] EWCA Civ 1845](#); [\[2004\] Q.B. 1288](#); [\[2004\] 2 W.L.R. 1170](#); [\[2004\] H.R.L.R. 15](#); [\[2004\] Prison L.R. 44](#); [\(2004\) 101\(5\) L.S.G. 29](#); [\(2004\) 148 S.J.L.B. 60](#); [Times, January 2, 2004](#); [Official Transcript](#); CA (Civ Div); 2003-12-19

Mentioned by

R. (on the application of H) v Secretary of State for the Home Department
[\[2003\] UKHL 59](#); [\[2004\] 2 A.C. 253](#); [\[2003\] 3 W.L.R. 1278](#); [\[2004\] 1 All E.R. 412](#); [\[2004\] H.R.L.R. 5](#); [\[2004\] U.K.H.R.R. 115](#); [15 B.H.R.C. 571](#); [\(2004\) 7 C.C.L. Rep. 147](#); [\(2004\) 76 B.M.L.R. 179](#); [\[2004\] M.H.L.R. 51](#); [\(2004\) 101\(2\) L.S.G. 30](#); [\(2003\) 147 S.J.L.B. 1365](#); [Times, November 14, 2003](#); [Independent, November 18, 2003](#); [Official Transcript](#); HL; 2003-11-13

Mentioned by

R. (on the application of von Brandenburg) v East London and the City Mental Health NHS Trust
[\[2003\] UKHL 58](#); [\[2004\] 2 A.C. 280](#); [\[2003\] 3 W.L.R. 1265](#); [\[2004\] 1 All E.R. 400](#); [\[2004\] H.R.L.R. 6](#); [\(2004\) 7 C.C.L. Rep. 121](#); [\[2004\] Lloyd's Rep. Med. 228](#); [\(2004\) 76 B.M.L.R. 168](#); [\[2004\] M.H.L.R. 44](#); [\(2004\) 101\(5\) L.S.G. 28](#); [\(2003\) 147 S.J.L.B. 1366](#); [Times, November 14, 2003](#); [Independent, November 19, 2003](#); [Official Transcript](#); HL; 2003-11-13

Mentioned by

R. (on the application of T) v Central and North West London Mental Health NHS Trust
[\[2003\] EWCA Civ 330](#); [\[2003\] 1 W.L.R. 1272](#); [\[2003\] M.H.L.R. 326](#); [Times, April 18, 2003](#); [Official Transcript](#); CA (Civ Div); 2003-03-12

Considered

Hutchison Reid v United Kingdom (50272/99)
[\(2003\) 37 E.H.R.R. 9](#); [14 B.H.R.C. 41](#); [Times, February 26, 2003](#); ECHR; 2003-02-20

Mentioned by

R. (on the application of Sim) v Parole Board
[\[2003\] EWHC 152 \(Admin\)](#); [\[2003\] 2 W.L.R. 1374](#); [\[2003\] Prison L.R. 256](#); [\[2003\] A.C.D. 62](#); [\(2003\) 100\(13\) L.S.G. 26](#); [Times, February 21, 2003](#); [Independent, March 17, 2003](#); [Official Transcript](#); QBD (Admin); 2003-02-11

Mentioned by

R. (on the application of Secretary of State for the Home Department) v Mental Health Review Tribunal

[\[2002\] EWCA Civ 1868](#); [\(2003\) 6 C.C.L. Rep. 319](#); [\[2003\] M.H.L.R. 202](#); [\(2003\) 147 S.J.L.B. 56](#); [Independent, February 17, 2003](#); [Official Transcript](#); CA (Civ Div); 2002-12-19

Mentioned by

R. (on the application of T) v Central and North West London Mental Health NHS Trust

[\[2002\] EWHC 2803 \(Admin\)](#); [\[2003\] M.H.L.R. 321](#); [\(2003\) 100\(8\) L.S.G. 29](#); [Times, December 13, 2002](#); [Independent, February 17, 2003](#); [Official Transcript](#); QBD (Admin); 2002-12-09

Mentioned by

R. v Lichniak (Daniella Helen)

[\[2002\] UKHL 47](#); [\[2003\] 1 A.C. 903](#); [\[2002\] 3 W.L.R. 1834](#); [\[2002\] 4 All E.R. 1122](#); [\[2003\] 1 Cr. App. R. 33](#); [\[2003\] H.R.L.R. 8](#); [\[2003\] U.K.H.R.R. 62](#); [13 B.H.R.C. 437](#); [\[2003\] Prison L.R. 55](#); [\(2003\) 100\(5\) L.S.G. 29](#); [\(2002\) 146 S.J.L.B. 272](#); [Times, November 26, 2002](#); [Official Transcript](#); HL; 2002-11-25

Mentioned by

R. (on the application of Hirst) v Parole Board

[\[2002\] EWHC 1592 \(Admin\)](#); [Official Transcript](#); QBD (Admin); 2002-05-31

Mentioned by

R. (on the application of C) v Secretary of State for the Home Department

[\[2002\] EWCA Civ 647](#); [\[2002\] M.H.L.R. 105](#); [\(2002\) 99\(25\) L.S.G. 35](#); [\(2002\) 146 S.J.L.B. 162](#); [Times, May 24, 2002](#); [Official Transcript](#); CA (Civ Div); 2002-05-15

Mentioned by

R. (on the application of H) v Secretary of State for the Home Department

[\[2002\] EWCA Civ 646](#); [\[2003\] Q.B. 320](#); [\[2002\] 3 W.L.R. 967](#); [\[2002\] M.H.L.R. 87](#); [\[2002\] A.C.D. 86](#); [\(2002\) 99\(25\) L.S.G. 35](#); [\(2002\) 146 S.J.L.B. 146](#); [Times, May 24, 2002](#); [Independent, May 24, 2002](#); [Official Transcript](#); CA (Civ Div); 2002-05-15

Mentioned by

R. (on the application of P) v Mental Health Review Tribunal for the East Midlands and North East Regions

[\[2002\] EWCA Civ 697](#); [\[2002\] M.H.L.R. 253](#); [Official Transcript](#); CA (Civ Div); 2002-04-16

Mentioned by

International Transport Roth GmbH v Secretary of State for the Home Department

[\[2002\] EWCA Civ 158](#); [\[2003\] Q.B. 728](#); [\[2002\] 3 W.L.R. 344](#); [\[2002\] 1 C.M.L.R. 52](#); [\[2002\] Eu. L.R. 74](#); [\[2002\] H.R.L.R. 31](#); [\[2002\] U.K.H.R.R. 479](#); [\[2002\] A.C.D. 57](#); [Times, February 26, 2002](#); [Daily Telegraph, March 7, 2002](#); [Official Transcript](#); CA (Civ Div); 2002-02-22

Mentioned by

R. v Benjafield (Karl Robert) (Confiscation Order)

[\[2002\] UKHL 2](#); [\[2003\] 1 A.C. 1099](#); [\[2002\] 2 W.L.R. 235](#); [\[2002\] 1 All E.R. 815](#); [\[2002\] 2 Cr. App. R. 3](#); [\[2002\] 2 Cr. App. R. \(S.\) 71](#); [\[2002\] H.R.L.R. 20](#); [\[2002\] Crim. L.R. 337](#); [\(2002\) 99\(10\) L.S.G. 29](#); [\(2002\) 146 S.J.L.B. 37](#); Times, January 28, 2002; Official Transcript; HL; 2002-01-24

Mentioned by

International Transport Roth GmbH v Secretary of State for the Home Department

[\(2002\) 99\(2\) L.S.G. 27](#); [\(2002\) 146 S.J.L.B. 5](#); Times, December 11, 2001; Independent, January 28, 2002; Daily Telegraph, December 13, 2001; Official Transcript; QBD (Admin); 2001-12-05

Mentioned by

R. (on the application of H) v Secretary of State for the Home Department

[\[2001\] EWHC Admin 1037](#); [\(2002\) 5 C.C.L. Rep. 62](#); [\[2002\] M.H.L.R. 77](#); [\[2002\] A.C.D. 21](#); Independent, January 14, 2002; Official Transcript; QBD (Admin); 2001-12-05

Mentioned by

R. (on the application of Kenneally) v Snaresbrook Crown Court

[\[2001\] EWHC Admin 968](#); [\[2002\] Q.B. 1169](#); [\[2002\] 2 W.L.R. 1430](#); [\[2002\] M.H.L.R. 53](#); [\[2002\] A.C.D. 46](#); Times, December 17, 2001; Official Transcript; DC; 2001-11-27

Mentioned by

R. v Grant (Heather)

[\[2001\] EWCA Crim 2611](#); [\[2002\] Q.B. 1030](#); [\[2002\] 2 W.L.R. 1409](#); [\[2002\] 1 Cr. App. R. 38](#); [\[2002\] M.H.L.R. 41](#); [\[2002\] Crim. L.R. 403](#); [\(2002\) 99\(3\) L.S.G. 25](#); [\(2001\) 145 S.J.L.B. 269](#); Times, December 10, 2001; Official Transcript; CA (Crim Div); 2001-11-22

Mentioned by

R. (on the application of H) v Ashworth Hospital Authority

[\[2001\] EWHC Admin 901](#); [\(2002\) 5 C.C.L. Rep. 78](#); [\[2002\] M.H.L.R. 13](#); Official Transcript; QBD (Admin); 2001-11-09

Mentioned by

R. (on the application of the Secretary of State for the Home Department) v Mental Health Review Tribunal

[\[2001\] EWHC Admin 849](#); [\[2002\] M.H.L.R. 260](#); Official Transcript; QBD (Admin); 2001-10-29

Mentioned by

Anderson v Scottish Ministers

[\[2001\] UKPC D 5](#); [\[2003\] 2 A.C. 602](#); [\[2002\] 3 W.L.R. 1460](#); [2002 S.C. \(P.C.\) 63](#); [2001 S.L.T. 1331](#); [\[2002\] H.R.L.R. 6](#); [\[2002\] U.K.H.R.R. 1](#); [\[2001\] M.H.L.R. 192](#); [2001 G.W.D. 33-1312](#); Times, October 29, 2001; Independent, December 17, 2001; Official Transcript; PC (Sc); 2001-10-15

Mentioned by

R. v H (Fitness to Plead)

[\[2001\] EWCA Crim 2024](#); [\[2002\] 1 W.L.R. 824](#); [\[2002\] 1 Cr. App. R. 25](#); [\[2001\] M.H.L.R. 177](#); [\[2002\] Crim. L.R. 57](#); [\(2001\) 98\(41\) L.S.G. 34](#); [\(2001\) 145 S.J.L.B. 236](#); [Times, November 1, 2001](#); CA (Crim Div); 2001-10-05

Mentioned by

R. (on the application of C) v Mental Health Review Tribunal

[\[2001\] EWCA Civ 1110](#); [\[2002\] 1 W.L.R. 176](#); [\[2002\] 2 F.C.R. 181](#); [\(2001\) 4 C.C.L. Rep. 284](#); [\[2001\] Lloyd's Rep. Med. 450](#); [\[2001\] M.H.L.R. 110](#); [\(2001\) 98\(29\) L.S.G. 39](#); [\(2001\) 145 S.J.L.B. 167](#); [Times, July 11, 2001](#); [Independent, July 10, 2001](#); [Official Transcript](#); CA (Civ Div); 2001-07-03

Considered

R. (on the application of C) v Secretary of State for the Home Department

[\[2001\] EWHC Admin 501](#); [\[2001\] M.H.L.R. 100](#); [Official Transcript](#); QBD (Admin); 2001-06-19

Significant Legislation Cited

Human Rights Act 1998 Sch.1 Part I Art.5

[Mental Health Act 1983 \(c.20\) s.72](#)

[Mental Health Act 1983 \(c.20\) s.73](#)

Legislation Cited

European Convention on Human Rights 1950 Art.5

European Convention on Human Rights 1950 Art.5(1)

European Convention on Human Rights 1950 Art.5(1)(e)

European Convention on Human Rights 1950 Art.5(4)

[Human Rights Act 1998 \(c.42\) s.10](#)

[Human Rights Act 1998 \(c.42\) s.4](#)

[Human Rights Act 1998 \(c.42\) s.4\(2\)](#)

[Human Rights Act 1998 \(c.42\) s.7](#)

[Human Rights Act 1998 \(c.42\) s.7\(1\)](#)

[Human Rights Act 1998 \(c.42\) s.7\(1\)\(7\)](#)

Human Rights Act 1998 Sch.1

Human Rights Act 1998 Sch.1 Part I Art.5

[Mental Health \(Scotland\) Act 1984 \(c.36\)](#)

[Mental Health Act 1959 \(c.72\)](#)

[Mental Health Act 1983 \(c.20\) s.2](#)

[Mental Health Act 1983 \(c.20\) s.3](#)

[Mental Health Act 1983 \(c.20\) s.3\(2\)](#)

[Mental Health Act 1983 \(c.20\) s.3\(2\)\(c\)](#)

[Mental Health Act 1983 \(c.20\) s.37](#)

[Mental Health Act 1983 \(c.20\) s.41](#)

[Mental Health Act 1983 \(c.20\) s.71](#)

[Mental Health Act 1983 \(c.20\) s.72](#)

[Mental Health Act 1983 \(c.20\) s.72\(1\)](#)

[Mental Health Act 1983 \(c.20\) s.72\(1\)\(a\)\(i\)](#)

[Mental Health Act 1983 \(c.20\) s.72\(1\)\(b\)](#)

[Mental Health Act 1983 \(c.20\) s.73](#)

[Mental Health Act 1983 \(c.20\) s.73\(1\)](#)

Journal Articles

Happy birthday human rights

Constitutional law; Criminal law; Human rights.

[N.L.J. 2005, 155\(7195\), 1469](#)

Between necessity and chance

Care; Conditional discharge; Consent; Detention; Hospitals; Medical treatment; Mental patients.

[N.L.J. 2004, 154\(7124\), 584-585](#)

Judicial deference and "democratic dialogue": the legitimacy of judicial intervention under the Human Rights Act 1998

Canada; Constitutional law; Human rights; Judicial decision making; Parliamentary sovereignty; Separation of powers.

[P.L. 2004, Spr, 33-47](#)

Two years of the Human Rights Act

Declarations of incompatibility; Human rights; Separation of powers; Statutory interpretation.

[E.H.R.L.R. 2003, 1, 14-23](#)

Call for clarity on scope of convention rights

Declarations of incompatibility; Interpretation; Judicial decision making; Right to fair trial.

[L.S.G. 2003, 100\(11\), 36](#)

Uncomfortable truths

Burden of proof; Detention; Human rights; Mental health review tribunals; Mental patients rights; Procedure; Right to liberty and security.

[N.L.J. 2003, 153\(7078\), 661-662](#)

The impact of the Human Rights Act: Parliament, the courts and the executive

Constitutional law; Executive power; Human rights; Judiciary; Parliament.

[P.L. 2003, Sum, 308-325](#)

Environmental rights, statutory authorisation and the Human Rights Act: is clarity possible?

Defences; Environmental law; Human rights; Public authorities;

Statutory authority.

E.L.M. 2002, 14(6), 350-356

Environmental rights, statutory authorisation and the Human Rights Act: is clarity possible?

Defences; Environmental law; Human rights; Public authorities; Statutory authority.

[E.L.M. 2002, 14\(6\), 350-356](#)

Human rights review: mental health and prisoners

Human rights; Mental patients rights; Prisoners rights.

[L. Ex. 2002, Dec, 34-35](#)

Human rights review: mental health and prison law

Human rights; Mental patients rights; Prisoners rights.

[L. Ex. 2002, Sep, 32-33](#)

Implications of the Mental Health Act 1983 (Remedial) Order 2001

Detention; Discharge; Mental patients rights; Right to liberty and security.

[Med. Sci. Law 2002, 42\(3\), 192-194.](#)

Half measures

Compensation; Declarations of incompatibility; Human rights.

[S.J. 2002, 146\(43\), 1039-1040.](#)

The Human Rights Act: One year on

Authorities; Bill of Rights; Bodies; European Court of Human Rights; Freedom of assembly and association; Freedom of expression; Freedom of movement; Injunctions; Joint Committee on Human Rights; Judicial Studies Board; Judiciary; NGOs; Non-governmental organisations; Prisoners; Public sector; Right to liberty and security; Right to respect for private and family life; Self-incrimination; Statements of compatibility; Terrorism; Terrorists.

E.H.R.L.R. 2001, 6, 620-639

Table of Cases Under the Human Rights Act: Commentary (November/December)

Authorities; Declarations of incompatibility; Determination; Judicial review; Positive obligations; Proportionality; Right to respect for private and family life.

E.H.R.L.R. 2001, 6, 677-704

Carry on Planning: Declaration of incompatibility quashed on appeal

H.R. 2001, Sep, 136-141

Case study: The Queen on the application of H v MHRT North & East London Region

Burden of proof; Discharge; Human rights; Mental health review tribunals; Mental patients rights.

[H.R. 2001, Sep, 146-155.](#)

Mental health tribunals - operation of part of the Mental Health

Act 1983 - effect of reversing the burden of proof

Burden of proof; Discharge; Mental patients rights; Right to liberty and security.

[H.R. 2001, Sep, 166-167.](#)

Burden of proof and discharge

Burden of proof; Discharge; Mental patients rights; Right to liberty and security.

[Health Law 2001, 6\(7\) Supp \(Mental health law bulletin\), 2.](#)

Mental health and human rights

Discharge; Mental health review tribunals; Mental patients rights; Right to liberty and security.

[Med. L. Mon. 2001, 8\(11\), 2-3.](#)

Burden of proof and discharge

Burden of proof; Discharge; Mental patients rights; Right to liberty and security.

[Med. L. Mon. 2001, 8\(7\) Supp \(Mental health law bulletin\), 2.](#)

Mental Health Review Tribunal: burden of proof for discharge

Burden of proof; Discharge; Mental patients rights; Right to liberty and security.

[Med. L. Rev. 2001, 9\(2\), 185-188.](#)

Do human rights impact on mental health law?

Mental health review tribunals; Right to liberty and security; Right to respect for private and family life; Seclusion.

N.L.J. 2001, 151(6998), 1278, 1287

A really useful committee

Law Society; Mental patients rights; Right to liberty and security.

[N.L.J. 2001, 151\(7011\), 1789.](#)

Human rights: burden of proof: declaration of incompatibility

Burden of proof; Discharge; Mental patients rights; Right to liberty and security.

[P.L. 2001, Aut, 618.](#)

Incorporation Through the "Front Door": The first year of the Human Rights Act

Declarations of incompatibility; Judicial decision-making; Proportionality.

P.L. 2001, Win, 654-665

Rewriting the MHA

Burden of proof; Discharge; Mental patients rights; Right to liberty and security.

[S.J. 2001, 145\(46\), 1125.](#)

Books

Cross on Local Government Law

Chapter: Chapter 10 - Judicial Control of Local Authorities, Legal Proceedings by and Against Local Authorities and the Human Rights Act 1998

Documents: [10-154 Interpretation of legislation and declarations of incompatibility](#)

De Smith's Judicial Review 7th Ed.

Chapter: Chapter 13 - Convention Rights as Grounds for Judicial Review

Documents: [Section 4. - The Human Rights Act 1998](#)

Encyclopedia of Local Government Law

Chapter: Human Rights Act 1998

Documents: [3-999.1314 Declaration of incompatibility](#)

Encyclopedia of Social Services and Child Care Law

Chapter: Part II—Compulsory Admission to Hospital And Guardianship

Documents: [E1-057 Admission for treatment](#)

Encyclopedia of Social Services and Child Care Law

Chapter: Part II—Compulsory Admission to Hospital And Guardianship

Documents: [E1-109 Effect of guardianship application, etc.](#)

Encyclopedia of Social Services and Child Care Law

Chapter: Part V—Mental Health Review Tribunals

Documents: [E1-854 Powers of tribunals](#)

Encyclopedia of Social Services and Child Care Law

Chapter: Part V—Mental Health Review Tribunals

Documents: [E1-877 Power to discharge restricted patients](#)

Encyclopedia of Social Services and Child Care Law

Chapter: - The Deprivation of Liberty Safeguards

Documents: [EA2-035](#)

Encyclopedia of Social Services and Child Care Law

Chapter: Part 5 Human Rights Act 1998

Documents: [G3-016 Prohibition of Slavery and Forced Labour](#)

Phipson on Evidence 18th Ed.

Chapter: Chapter 1 - Introduction

Documents: [Sub-section \(ii\) - Article 5: right to liberty and security of person](#)

Renton and Brown Criminal Procedure Legislation from W Green & Son Ltd

Chapter: Division A - Legislation, Part II

Documents: [Human Rights Act 1998: A130-01 to A130-83.1](#)

White Book 2013

Chapter: Section 3 - Other Proceedings

Documents: [Section 3-Interpretation of legislation](#)

Insight

[Human rights](#)

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No. C/2000/3539, Neutral Citation Number: [2001] EWCA Civ 415

IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
Mr Justice Crane

Royal Courts of Justice
Strand, London, WC2A 2LL

Wednesday 28th March, 2001

B e f o r e:

MASTER OF THE ROLLS
LORD JUSTICE KENNEDY
AND
LORD JUSTICE DYSON

THE QUEEN ON THE APPLICATION OF H

Appellant

– v –

MENTAL HEALTH REVIEW TRIBUNAL, NORTH & EAST LONDON REGION

Respondent

–AND–

SECRETARY OF STATE FOR HEALTH

Intervenor

(Transcript of the Handed Down Judgment of
Smith Bernal Reporting Limited, 190 Fleet Street
London EC4A 2AG
Tel No: 020 7421 4040, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

Mr Richard Gordon QC and Paul Bowen (instructed by Scott–Moncrieff, Harbour & Sinclair for
the Appellant)

Ms Jenni Richards (instructed by Treasury Solicitor for the Respondent)
Mr Rabinder Singh (instructed by the Secretary of State for Health as Intervenor)

J U D G M E N T
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LORD PHILLIPS MR :

Introduction

This is the judgment of the Court.

1. On 15 September 1988, the appellant, whom we shall call 'H', was convicted of manslaughter. He was ordered to be detained in a hospital and to be subject to special restrictions pursuant to sections 37 and 41 of the Mental Health Act 1983 ("the Act"). He was admitted to Broadmoor Hospital. On 22 December 1999, he applied to the Mental Health Tribunal ("the tribunal") for a discharge pursuant to section 73 of the Act. On 29 March 2000, the tribunal decided that he should not be discharged from liability to be detained. H applied for judicial review of the decision of the tribunal. On 15 September 2000, Crane J. dismissed his application. Moreover, he refused to grant declaratory relief as to the compatibility of section 73 of the Act with Article 5(1) and (4) of the European Convention on Human Rights ("the Convention"). On 20 December 2000 the appellant obtained permission to appeal against these decisions from Laws L.J., who commented: "the appellant should be allowed to argue his Human Rights Act 1998 points". In the event the only issue that has been pursued before us has been the question of whether section 73 of the Act can be given an interpretation which is compatible with the Convention. That is a matter in which H has an interest. He is about to make a further application to the Mental Health Review Tribunal to be discharged from hospital. The true interpretation of section 73 may impact on the result of that application. The Secretary of State was given the requisite notice of an application by H for a declaration that section 73 is incompatible with H's rights under Article 5 of the Convention. He has appeared at this appeal, through his Counsel, Mr Rabinder Singh. Mr Singh has informed us that the Secretary of State wishes this court to make a declaration of incompatibility if it concludes that section 73 is not compatible with the Convention. The point is one of general importance and, in the circumstances, we have thought it right to entertain it.

The history of the proceedings

2. There were reports from two psychiatrists before the tribunal. Dr Basson was H's responsible medical officer ("RMO"). In his report dated 25 January 2000, Dr Basson referred to the diagnosis of schizophrenia, and said that since the commencement of antipsychotic medication in 1990, there had been an improvement in his mental state, and a marked decrease in the negative symptoms of his illness. He said that since the appellant was moved to the Windsor Ward, Broadmoor Hospital, in December 1996, there had been no positive symptoms of mental illness. He did, however, continue to show 'negative' symptoms of illness, and he still found it difficult to be motivated in relation to the future move to a regional secure unit. The negative symptoms were his lack of insight into (a) his illness, (b) his need for treatment and (c) the nature of his index offence. He concluded:

"Given [H's] recent improvement I think he may be able to be managed in a specialised hostel or hostel ward. I do not see him as being a danger to the general public. Those living in close proximity, if we take the index offence, are at risk if the living circumstances are inappropriate and/or the medication is inadequate."

3. In an addendum dated 29 February 2000, Dr Basson reported that his earlier report had been seen by staff from the North London Forensic Service who unanimously recommended long term medium security. He said that this was also the option favoured by the majority of the

clinical team on Windsor Ward. In the addendum report, Dr Basson expressed his conclusion as follows:

"Given the above, the North London Forensic Service and Rehabilitation team at Broadmoor, advise that hostel accommodation providing the care this patient needs on initially leaving Broadmoor is not a realistic option and we should pursue the line of long term medium security. We have contacted the local authority to confirm the above view and they will do the appropriate assessment."

4. The second psychiatrist was Dr Somekh. In his report of 3 March 2000, he said that he was satisfied that H continued to suffer from a chronic paranoid schizophrenia which was currently well stabilised by his medication. It was noted that H was 'compliant with his medication even though he himself expresses doubts as to his need for it'. Dr Somekh raised the issue as to whether he needed continuing treatment in the hospital. He believed that the forensic psychiatry team were taking an unreasonably cautious approach in proposing a placement in long term medium security.
5. Both doctors gave evidence at the tribunal hearing. Both of them said that in their opinion H did not satisfy the conditions necessary for detention under the Act. Dr Basson said that he thought that if H went to a suitable hostel and continued to take his medication he would remain as well as he was at the present time.
6. Despite this evidence the tribunal concluded that H should not be discharged from hospital. In their written reasons the tribunal explained:

"The tribunal is of the opinion that this patient is (a) still exhibiting symptoms of his illness, namely the hearing of voices, (b) would not continue to take his medication× The tribunal are clear that this patient needs to be detained in hospital for treatment for his own health and safety."

7. The tribunal completed the standard Decision Form S73 by giving a negative answer to each of the following questions:

"A. Is the Tribunal satisfied that the patient is not now 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 the patient to be liable to be detained in a hospital for medical treatment?

B Is the Tribunal satisfied that it is not necessary for the health or safety of the patient or for the protection of other persons that the patient should receive such treatment."

8. Those questions reflect the provisions of section 73 of the Act. Before Crane J., junior Counsel Mr Bowen, on behalf of H, argued that the jurisprudence of the Strasbourg Court demonstrated that those questions were not appropriate and that section 73 was not compatible with the Convention. Before us Mr Gordon, Q.C., who did not appear below, suggested that it might be possible to interpret section 73 in a way that was compatible with the Convention and that was satisfactory to his client, but that should we not feel able to achieve this, we should make a declaration of incompatibility. Mr Gordon had obtained

permission to advance a number of other grounds of appeal, but on instructions from H he did not pursue these.

9. Mr Gordon's submissions were founded on

- i) the interrelationship of section 3 and section 72 and 73 of the Act.
- ii) Article 5(1) and (4) of the Convention and the Strasbourg jurisprudence in relation to it.

10. It is convenient at the outset to set out the relevant provisions.

The 1983 Act

11. H was admitted to hospital as a restricted patient pursuant to the provisions of sections 37 and 41 of the Act. For present purposes, however, it suffices to set out the following very similar provisions of the Act dealing with compulsory admission of an unrestricted patient for treatment in hospital under section 3(2). Section 3(2) reads:

"An application for admission for treatment may be made in respect of a patient on the grounds that—

(a) he is suffering from mental illness, severe mental impairment, psychopathic disorder or mental impairment, and his mental disorder is of a nature or degree which makes it appropriate for him to receive medical treatment in a hospital; and

(b) in the case of psychopathic disorder or mental impairment, such treatment is likely to alleviate or prevent a deterioration of his condition; and

(c) it is necessary for the health or safety of the patient or for the protection of other persons that he should receive such treatment and it cannot be provided unless he is detained under this section."

12. The relevant provisions for discharge of an unrestricted patient are set out in section 72(1)(b):

"The tribunal shall direct the discharge of a patient liable to be detained otherwise than under section 2 above if they are satisfied—

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

(ii) that it is not necessary for the health or safety of the patient or for the protection of other persons that he should receive such treatment×."

13. These apply to a restricted patient by virtue of section 73(1), which provides:

"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 should direct the absolute discharge of the patient if satisfied—

(a) as to the matters mentioned in paragraph (b)(i) or (ii) of section 72(1) above; and

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

The Convention

14. Article 5 provides:

"Right to liberty and security

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

×(e) the lawful detention of× persons of unsound mind×

×4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

The appellant's submissions

15. Mr Gordon's submission on behalf of H can be summarised as follows:

- i) The function of a Mental Health Review Tribunal in a case such as the present is to enable a patient who has been compulsorily admitted to a hospital to challenge the legality of his detention.
- ii) In performing that function, the tribunal acts as 'a court' in enabling the patient to exercise the right conferred on him by Article 5(4) of the Convention.
- iii) The criteria that the tribunal has to consider on an application under section 73 are the same criteria that have to be satisfied before a patient can be admitted under section 3.
- iv) On a natural reading of section 73 a tribunal is not required to discharge a patient unless *satisfied* that at least one of these criteria *does not* exist. This has the effect of placing the burden of proof on the patient. The patient has to prove that the criteria for admission are not satisfied, whereas he should be entitled to be discharged if it cannot be demonstrated that the criteria are satisfied.
- v) This reversal of the burden of proof is incompatible with his rights under Article 5(1) and (4).

16. The position of the Secretary of State, as set out in the skeleton arguments submitted by Mr Singh, can be summarised as follows:

(i) To place the burden on a patient of proving that the conditions for detention are no longer met would be incompatible with Article 5(1) of the Convention, but

(ii) It is possible to read the words of section 72 of the Act in such a way that it does not impose the burden of proof on the patient, albeit that to do so involves straining the natural meaning of the section.

17. It was this submission that led Mr Gordon to suggest that it might be possible to interpret section 73, which incorporates section 72, in a manner compatible with the Convention. He confessed in argument, however, that he was not able to see how this could be done.

18. We shall have to give more detailed consideration to the position of the Secretary of State in due course. We propose now to turn to consider each head of Mr Gordon's argument.

The function of a Mental Health Review Tribunal on an application under section 73

19. Under the Mental Health Act 1959 a patient under a restriction order had no right to apply to a tribunal for his discharge. He could require that his case be referred to a tribunal in order that it should *advise* the Secretary of State whether he should be discharged, but the Secretary of State was not required to follow the advice of the tribunal. In *X v. United Kingdom* (1981 4 E.H.R.R. the European Court of Human Rights held that this was not in conformity with Article 5(4) of the Convention. Article 5(4) required the court reviewing the lawfulness of the detention of a patient to have the power to order the discharge of the patient where that detention was unlawful. Sections 72 and 73 of the 1983 Act were enacted in response to the decision in *X*. Thus the first two heads of Mr Gordon's argument are made out.

The criteria to be considered

20. The third head of Mr Gordon's argument was founded on the decision of the House of Lords in *Reid v. Secretary of State for Scotland* [1999] 2 A.C. 513. That case concerned provisions of the Mental Health (Scotland) Act 1984 which mirror those of sections 3 and 73 of the 1983 Act. Under the Scottish Act the application for discharge is made to the sheriff. The House of Lords held that, when considering whether a patient was entitled to discharge, the sheriff had to consider all three of the criteria which had to be established on an application for admission under the section equivalent to section 3. If the sheriff found that any one of those criteria was not satisfied, the patient was entitled to be discharged. It follows that the third head of Mr Gordon's argument is made out.

"Burden of proof"

21. In *Reid* Lord Clyde observed at p.533:

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

22. In *Perkins v. Bath District Health Authority* [1989] 4 B.M.L.R.145 Counsel for the Tribunal conceded that they had wrongly ordered the discharge of a patient on the ground that they

were not satisfied that the patient was suffering from a mental disorder which warranted his detention. In approving that concession, Lord Donaldson MR said :

"If a tribunal is to make an order under s72(1)(a)(i), clearly they have to be satisfied, and should state that they are satisfied, that he is not then suffering from mental disorder. That is not the same thing as saying the tribunal is not satisfied that he is so suffering."

23. Reference to the "reversed burden of proof" has been made in other cases, including a recent decision of Latham J. in a case that raised very similar issues to the present one: *R v. London and South Western Mental Health Review Tribunal ex p. M* [2000] Lloyd's LR Med 143 at p. 150.
24. In the course of argument it was suggested that, in the context of review of a patient's detention, the phrase "burden of proof" was not appropriate. The phrase suggests an adversarial process, whereas proceedings of a Mental Health Review Tribunal are inquisitorial in nature. Furthermore, a reference under section 71 may not be made by the patient. There is some force in this. The essential question is the nature of the test to be applied when determining the entitlement of a patient to release. Does the tribunal have to order discharge of the patient if it is not satisfied that each of the criteria is made out, or is a patient only entitled to release if the tribunal is satisfied that at least one of the criteria is not made out. If the latter is the position, however, it is not inappropriate, where a patient makes an application under section 73, to say that the burden of proof is on the patient. To speak of reversing the burden of proof is a useful shorthand to describe the effect of the section.
25. Mr Gordon submitted that, having regard to the authorities to which we have referred, and to the natural meaning of the language, it was hard to accord to section 72 a meaning which did other than require the tribunal to be satisfied that one of the criteria was not made out before a patient was entitled to release - in other words the section placed the burden of proof on the patient.
26. The submission of the Secretary of State appears in the following passage of Mr Singh's skeleton argument:

"In the Secretary of State's submission, were it necessary to do so in order to secure compatibility with Convention rights, it would be possible to read and give effect to section 72 of the MHA as imposing the burden of proof on the hospital authorities and not on the patient. This is for the following reasons:

(1) The section does not in terms address the question of the burden of proof. It is silent on the point. It certainly does not in terms impose the burden of proof on the patient.

(2) The negative formulation used in section 72(1)(b) ("not then suffering×") can be read as simply reflecting the fact that the criteria for admission (in section 3 of the MHA) are no longer present. The negative formulation does not compel the conclusion that the burden of proof lies on the patient."

27. We are not persuaded by this submission. It is of course the duty of the court to strive to interpret statutes in a manner compatible with the convention and we are aware of instances

where this has involved straining the meaning of statutory language. We do not consider however that such an approach enables us to interpret a requirement that a tribunal must act if satisfied that a state of affairs does not exist as meaning that it must act if not satisfied that a state of affairs does exist. The two are patently not the same. If the requirements of the Convention can only be satisfied if the tribunal is required to order the discharge of a patient unless satisfied that the three criteria justifying admission are made out, sections 72 and 73 are incompatible with the Convention.

Are Sections 72 and 73 compatible with the Convention?

28. The written submission of the Secretary of State on this issue was as follows:

"Although the point about the burden of proof has not been directly decided by the European Court of Human Rights the Secretary of state accepts that to place the burden on a patient to prove that the conditions for detention are no longer met would be incompatible with Article 5(1) of the Convention. This is ultimately a matter for the Court but it appears to follow from cases such as *Winterwerp v The Netherlands* 2 EHRR 387, para. 39–40, and *Johnson v United Kingdom* (1999) 27 EHRR 296, para. 60. In those cases the European Court has held that both the initial deprivation of a mental patient's liberty and the continued detention of a patient can only be lawful under Article 5(1)(e) of the Convention if it can 'reliably be shown' that he or she suffers from a mental disorder sufficiently serious to warrant detention."

29. In oral argument Mr Singh suggested that this concession went no further than accepting that it was inappropriate to speak of the plaintiff having to discharge a 'burden of proof'. As indicated above, we do not find it possible to divorce the concept of 'burden of proof' from the question of the test that the tribunal has to apply when considering whether a patient is entitled to be discharged. We understand the Secretary of State to concede that the same approach has to be applied when considering whether to admit a patient as that which has to be applied when considering whether the continued detention of the patient is lawful. In either case the test is whether it can be "reliably shown" that the patient suffers from a mental disorder sufficiently serious to warrant detention.

30. Mr Gordon's submission mirrored the written submission of the Secretary of State. He submitted that the continued detention of a patient who had been compulsorily admitted was not lawful under Article 5(1) unless it could reliably be shown that the mental condition of the patient was such as to warrant detention. A test which allowed the continued detention of a patient simply because it could not be shown that his mental condition did not warrant detention violated Article 5(1). Mr Gordon also submitted that such a test violated Article 5(4), but invited us simply to record that he had taken this point rather than decide it.

31. We do not think it sensible to address the issue of compatibility without considering both the relevant paragraphs of Article 5. So far as 5(4) is concerned, it seems to us axiomatic that if the function of the tribunal is to consider whether the detention of the patient is lawful, it must apply the same test that the law required to be applied as a precondition to admission, unless it be the case that a patient once admitted can be lawfully detained provided that some other test is satisfied. We endorse the common submission of Mr Singh and Mr Gordon that it is contrary to the Convention compulsorily to detain a patient unless it can be shown that the patient is suffering from a mental disorder that warrants detention. Inasmuch as Sections 72 and 73 do not require the tribunal to discharge a patient if this

cannot be shown we have concluded that they are incompatible with both Article 5(1) and Article 5(4). We think that this follows from the following statement of principle in the seminal case of *Winterwerp v. Netherlands* [1979] 2 E.H.R.R. 387 at paragraph 39:

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

Risk and uncertainty

32. There are some further observations that we wish to make although we should record that they relate to matters to which Counsel for the Appellant did not address detailed argument. It does not follow from our conclusion that Article 5 requires that a patient be discharged whenever any one of the three criteria in section 3 cannot be demonstrated on balance of probability. Detention cannot be justified under Article 5(1)(e) unless the patient is "of unsound mind", but once that is established we do not consider that the Convention restricts the right to detain a patient in hospital, as does section 3, to circumstances where medical treatment is likely to alleviate or prevent a deterioration of the condition. Nor is it necessary under the Convention to demonstrate that such treatment cannot be provided unless the patient is detained in hospital (see section 3(2)(c)).
33. The circumstances of the present case, which are similar to those considered by Latham J. in *M*, are not uncommon. A patient is detained who is unquestionably suffering from schizophrenia. While in the controlled environment of the hospital he is taking medication, and as a result of the medication is in remission. So long as he continues to take the medication he will pose no danger to himself or to others. The nature of the illness is such, however, that if he ceases to take the medication he will relapse and pose a danger to himself or to others. The professionals may be uncertain whether, if he is discharged into the community, he will continue to take the medication. We do not believe that Article 5 requires that the patient must always be discharged in such circumstances. The appropriate response should depend upon the result of weighing the interests of the patient against those of the public having regard to the particular facts. Continued detention can be justified if, but only if, it is a proportionate response having regard to the risks that would be involved in discharge.
34. Having regard to these considerations, we believe that it is only rarely that the provisions of sections 72 and 73 constrain a Mental Health Review Tribunal to refuse an order of discharge where the continued detention of the patient infringes Article 5. Indeed, in our experience where a tribunal refuses an application for a discharge it usually gives reasons for doing so that involve a positive finding that the patient is suffering from a mental disorder that warrants his or her continued detention. These may well be matters that the Secretary of State will wish to bear in mind when considering whether to take remedial action under section 10 of the Human Rights Act 1998. We have in mind the White Paper recently published on reforming the Mental Health Act and note that it does not appear to be proposed that the new Mental Health Tribunal will, when reviewing detention of a patient, apply a reversed burden of proof (see Part 1, 3.42).

35. For the reasons that we have given we consider that H has made out his case for a declaration of incompatibility. We shall hear Counsel on the precise form of the declaration.

ORDER:

1. Appeal allowed with costs.
2. Form of wording of declaration to be adjourned for one week, to be listed on Wednesday 4th April 2001.
3. Leave to appeal to the House of Lords refused.

(Order does not form part of approved Judgment)