19 February 2008

FOURTH SECTION

Application no. 11577/06 by M.H. against the United Kingdom

lodged on 13 March 2006

STATEMENT OF FACTS

THE FACTS

The applicant, Ms M.H., is a British national who was born in 1970 and lives in Shropshire. She is represented before the Court by Mr M. Bridgman, a lawyer practising in Telford with Elliott Bridgman, Solicitors.

A. The circumstances of the case

The facts of the case, as submitted by the applicant, may be summarised as follows.

The applicant is severely disabled as a result of Down's Syndrome. Prior to the events in question, she had lived at home with her mother, her nearest relative.

On 31 January 2003, a social worker employed by Telford and Wrekin Borough Council ("the Council") executed a warrant from the Magistrates' Court to enter the premises of the applicant's mother and to take the applicant to a place of safety.

The applicant was taken to a hospital where she was admitted and detained under section 2 of the Mental Health Act 1983 ("the 1983 Act") under which her detention was authorised for twenty-eight days.

The applicant's mother sought to discharge the applicant. The applicant's responsible medical officer ("RMO") issued a so-called "barring order" under section 25 of the 1983 Act preventing the discharge on the grounds that if discharged, the applicant would be likely to act in a manner dangerous to other persons or to herself.

On 18 February 2003, the hospital managers convened to review the decision to issue the barring order and decided not to discharge the applicant.

The twenty-eight day period of detention provided for in section 2 of the 1983 Act was due to expire on 28 February 2003. On 21 February 2003, a social worker employed by the Council visited the applicant's mother to seek her consent to the making of a Guardianship order in respect of the applicant. The applicant's mother refused to consent and on 27 February 2003, the same social worker lodged an application with

Telford County Court to displace the applicant's mother as the applicant's nearest relative. This application had the effect of automatically extending the applicant's detention under section 29(4) of the 1983 Act.

While the applicant was being detained under section 2 of the 1983 Act, the applicant could have applied for discharge to the Mental Health Review Tribunal ("the Tribunal") within fourteen days, though she did not do so because she lacked the capacity to instruct solicitors. Furthermore, by operation of section 66(1)(g) and section 66(1)(i) of the same Act, she was prevented from making such an application once the barring order had been made. In addition, after the Council's application to the County Court, despite this being made after the fourteen day period, the applicant had no further right to apply to the Tribunal.

For the period of the applicant's detention under section 2, under section 66(ii) the applicant's mother had no right to make an application to the Tribunal unless she was displaced as the nearest relative.

Once the section 29 application had been instituted, there was no means by which the applicant or her mother could apply to the Tribunal. Therefore on 6 March 2003, the applicant's solicitors requested the Secretary of State to use his powers under the 1983 Act to make a reference to the Tribunal. A reference was duly made and the Tribunal convened on 26 March 2003. It refused to discharge the applicant.

On 27 March 2003, the County Court gave directions for the hearing to consider the Council's application to displace the applicant's mother as the nearest relative.

On 20 May 2003, the applicant's mother (acting on the applicant's behalf as her 'litigation friend') issued judicial review proceedings against the Secretary of State for Health, the Tribunal and the Council seeking, *inter alia*, an interim injunction requiring the Council to provide the applicant with suitable accommodation to enable her to be released from detention.

The Council eventually found suitable residential accommodation and the applicant was moved there on 21 July 2003.

The applicant subsequently applied to have the County Court added as a fourth defendant in the judicial proceedings, alleging that it had failed to determine expeditiously the Council's application to displace the applicant's mother as nearest relative and in a manner which was compatible with the applicant's rights under Article 5 §§ 1 and 4 of the Convention.

On 22 July 2003, the High Court ordered that the County Court be joined as the fourth defendant in the proceedings and also that the applicant's mother be replaced as a litigation friend by the Official Solicitor.

On 1 August 2003, an interim displacement order was made by the County Court and on 7 August 2003, the applicant was admitted into Guardianship.

When the matter next came before the High Court, the applicant, through the Official Solicitor, accepted: first, that the reason for her detention until 21 July 2003 was that no suitable accommodation was available for her; second, that the Council did not delay unreasonably in

finding that accommodation; and third, that the County Court had not acted incompatibly with her rights. In consequence, the claims against the Council and County Court were no longer pursued.

The applicant nevertheless continued with her claim against the Secretary of State for Health and the Mental Health Review Tribunal seeking, *inter alia*, three declarations of incompatibility under section 4 of the Human Rights Act 1998. First she sought a declaration that the relevant provisions of the 1983 Act relating to applications for discharge to the Tribunal was incompatible with Article 5 § 4 of the Convention insofar as it placed the onus for making the application on the detained patient. The second declaration sought was that, concerning her detention under section 2 of the 1983 Act, section 66 (1) of that Act was incompatible with Article 5 § 4 insofar as neither she nor her nearest relative had the right to make an application to the Tribunal when a barring order had been issued under section 25 of the Act. Finally, she sought a declaration that section 29 (4) of the 1983 Act was incompatible with Article 5 §1 insofar as it authorised the indefinite detention of a patient admitted under section 2 of the Act where an application had been made to displace the patient's nearest relative under section 29 (1) for the purposes of making a guardianship application.

In its judgment of 22 January 2004, the High Court declined to make any of the three declarations. On the first declaration sought, the trial judge found that the right "to take proceedings" in Article 5 § 4 had to be contrasted with the right to be "brought" before a judicial authority under Article 5 § 3. He concluded:

> "[A] right 'to take proceedings' does not mean a right of automatic review or right to be brought before a judicial authority, irrespective of whether an application is made.
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> 27. The claimant [the applicant] has been unable to point to any cases to support the view that article 5(4) called for an automatic review. Indeed, in *X v. United Kingdom* (1981) 4 EHRR 188, it was decided by the Strasbourg Court that where a patient does not have a right of *automatic* [re]view, article 5(4) then only requires the State to ensure that the detained person is entitled 'to take proceedings at reasonable intervals before a court to put in issue the 'lawfulness' [within the meaning of the Convention] of his detention whether that detention was ordered by a civil or criminal court or by some other authority' [at paragraph 52]. This passage indicates that a State need not provide automatic periodic reviews so long as the detained person is entitled himself to take proceedings to review the lawfulness of his detention at reasonable intervals. This reinforces my view that article 5(4) does not require there to be an automatic review of the lawfulness of a patient's detention but it will be satisfied if the detainee can institute proceedings to challenge the lawfulness of his detention.
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> 28. More recently, it was explained by the Strasbourg Court that the court's case law on Article 5 (4) establishes that this right that:-
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> > 'a person of unsound mind who is compulsorily confined for an indefinite or a lengthy period is in principle entitled, at any rate where there is no automatic periodic review of a judicial character, to take proceedings "at reasonable intervals" before a court to put in issue the "lawfulness"- within the meaning of the Convention- of his detention' (*Megyeri v. Germany* (1992) 15 EHRR 584, 592 [22(a)].
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> 29. This shows that there are two answers to the claimant's complaint apart from the fact that the claimant has no right to an automatic reference to a Tribunal. First, the deprivation of liberty in this case was neither 'indefinite or lengthy' as it

arose under section 2 of the 1983 Act, which meant that it was for the relatively short period of 28 days so as to enable an assessment to be made. Significantly, unless by the end of that period, the patient had become liable to be detained under some other provision of the 1983 Act, section 2(4) of the 1983 Act requires that he must be discharged. Second, in any event, within that period, as I have explained, the patient is entitled to apply for a discharge to the Mental Health Review Tribunal and this would constitute a right 'to take proceedings'. Thus, the claimant is not entitled to her first declaration."

Also in respect of the first declaration sought, the trial judge considered whether Article 5 § 4 required automatic review of the lawfulness of a patient's detention where the patient lacked capacity to make her own application for a review of the lawfulness of her detention. He considered this Court's decision in *Megyeri v. Germany*, judgment of 12 May 1992, Series A no. 237‑A, § 22, in particular the need for special procedural safeguards to protect the interests of persons who, on account of their mental disabilities, are not fully capable of acting for themselves and accepted that section 67 of the 1983 Act (providing for the Secretary of State to refer cases to the Mental Health Review Tribunal) did not itself provide adequate safeguards. First, the Secretary of State could only exercise his power after a request had been made to him to exercise such a power. Where a patient lacked capacity and had nobody to make the request for him or her, the power would not be exercised. Second, relying on *Benjamin and Wilson v. the United Kingdom*, no. 28212/95, §§ 33 and 36, 26 September 2002, he found the right of a patient under Article 5(4) could not be dependent upon the exercise of another power by a member of the Executive which may or may not be exercised in the patient's favour. However, the trial judge was satisfied that there were adequate procedural safeguards in place for the protection of patients detained under section 2 of the 1983 Act. He ruled that it was:

"[O]f critical importance that in this case the claimant was subject to section 2 detention, which for two reasons by its nature is of an inherently short duration. First, as I have explained, the patient could apply to the Tribunal within the first 14 days of his or her detention pursuant to section 66(1) (a) and (2) (a) of the 1983 Act. Second, it is more important that section 2 (4) of the 1983 Act requires that the patient be released at the end of the 28 day period, regardless of whether any application has been made to the Tribunal in the meantime unless a different legal basis for the patient's continuing detention has since emerged.

36. I therefore agree with [counsel for the Secretary of State] that this complaint is flawed by the procedural safeguard of automatic release at the end of the period, which is a better safeguard for a patient subject to a section 2 detention than "an automatic review". Therefore, I am unable to accept [Counsel for the applicant's] complaint that Article 5(4) requires that there should be an automatic review for a patient, who lacks the capacity to make his own application."

In respect of the second declaration sought, the trial judge found that the issue was whether section 29 (4) – which authorises indefinite detention of a patient admitted and detained under section 2 of the Act while the County Court considered an application to displace a nearest relative – infringed Article 5 § 4 of the Convention. The applicant had argued that there was no possibility to apply for a discharge where she had been detained under section 2 and her nearest relative, her mother, had sought to discharge her under section 23, whereupon the RMO had

issued a barring order under section 25 and the local social services authority then sought to displace the nearest relative under section 29. The trial judge, in rejecting this argument, found as follows:

> "Section 29(1) of the 1983 Act is the procedure by which the nearest relative is displaced but it is important to stress that it requires an application to the County Court. The duty of the County Court, in common with any other public body involved in a section 29 application, is to ensure that the application respects the article 5 rights of the patient. Section 3(1) of the HRA states that 'so far as it is possible to do so, primary legislation must be read and given effect in a way which is compatible with Convention rights'. The rights in article 5 are Convention rights and so the County Court is obliged to deal with section 29 applications speedily. Indeed, section 6 of the HRA specifically states that it is unlawful for a public authority to act in a way, which is incompatible with the Convention. It therefore follows that the County Court is obliged to control the proceedings so as to ensure that a patient is not detained for a period which is indefinite or lengthy... delay does occur in the County Court proceedings so that a patient's article 5(4) rights were infringed, this would be a result of a breach by the County Court in its duties under sections 6 (1) and 3(1) of the 1998 Act and not because of any incompatibility between the 1983 Act and the Convention."

In respect of the third declaration sought – that section 29(4) of the 1983 Act was incompatible with Article 5(1) of the Convention, insofar as it authorised the indefinite detention of a patient admitted under section 2 of the Act where an application had been made to displace the patient's nearest relative under section 29(1) for the purposes of making a guardianship application – the trial judge found the essence of the applicant's complaint was that the indefinite detention of an individual for the purpose of making a guardianship application was not consonant with the purpose of Article 5 § 1 (e), namely "the lawful detention...of persons of unsound mind". He went on to find that detention in such circumstances would only arise after a responsible medical officer had made a "barring order" under section 25 of the Act preventing discharge and such an order would only be made when, in the terms of section 25, a patient was "likely to act in a manner dangerous to other persons or to himself". Thus the second criteria for detention laid down in *Winterwerp v. the Netherlands*, judgment of 24 October 1979, Series A no. 33, § 73 (that "the mental disorder must be of a kind or degree warranting compulsory confinement") was fulfilled. The trial judge further relied on the Court's observations in *Johnson v. the United Kingdom*, (judgment of 24 October 1997, *Reports of Judgments and Decisions*1997- VII, § 61) in support of the proposition that the responsible authorities were entitled to exercise their judgment to determine in particular cases and on the basis of all relevant circumstances when the interests of the patient and the community into which he is to be released would in fact be served by immediate and unconditional release. He concluded:

> "57. I agree with [Counsel for the Secretary of State] that any application under section 29 of the 1983 Act which is made in order to pave the way for a guardianship application must by its nature involve an exercise of judgment by the social services authority that it would not be in the best interests of the patient and the community that the patient be immediately and unconditionally released. Indeed it follows that a patient's continuing detention pending a section 29 application with a view to guardianship is consistent with the principle enunciated in *Johnson*so long as the patient's discharge does not become unduly delayed. As I have explained, the County Court has a specific duty to dispose of the section 29

applications expeditiously.

58. Furthermore, once a section 29 application has been finally disposed of, the section 2 detention can only thereafter continue for a maximum of a further seven days: section 29(4) (b). In addition, if the patient is admitted for treatment, an appeal to the Mental Health Review Tribunal becomes available under section 66(1) (b) of the 1983 Act with automatic reviews provided for under section 68(1) of the 1983 Act. Furthermore, if the patient is placed into guardianship, there is a further right of appeal under section 66(1)(c) which provides that "where (c) a patient is received into guardianship in pursuance of a guardianship application....an application may be made to a Mental Health Review Tribunal within the relevant period (i) by the patient". The relevant period for such an application is "six months beginning with the day on which the application is accepted" (section 66(2) (c) of the 1983 Act).

59. Thus, where a section 29 application is made with a view to a guardianship application rather than for the purpose of an admission for treatment, the existence of the duty of the County Court to exercise its powers under section 29 of the 1983 Act in accordance with its duties as a public body under section 6 of the HRA is of critical importance. Those duties, which require the County Court not "to act in a way which is incompatible with a Convention right", would and should prevent the section 29(4) procedure from becoming so protracted so as to require a new and fresh right to another article 5(4) review. This answers the claimant's complaints about the lack of sufficiency of the grounds of appeal to the Tribunal under section 66 of the 1983 Act or as a consequence of the section 29(4) procedure. Thus, this claim also fails.

The applicant appealed and, on 3 December 2004, the Court of Appeal allowed her appeal and made two declarations of incompatibility under section 4 of the Human Rights Act 1998.

In respect of section 2 of the 1983 Act, Lord Justice Buxton (with whom Lord Justice Wall and Mr Justice Lindsay concurred) first addressed the fact that it provided for automatic release after twenty-eight days in the absence of an application under section 29. He stated:

"8. The [High Court] judge, at his paragraph 36, accepted the argument of the Secretary of State that automatic discharge at the end of the 28 day period (absent, of course, a section 29 application) was a better safeguard for the patient than an "automatic review". The latter expression reverts to the jurisprudence of article 5, and I shall have to come back to it. The problem about the argument at this stage is, however, that it does not address the imbalance between the competent patient, who can apply to the [Mental Health Review Tribunal] under section 66 within 14 days of his detention, and the incompetent patient who, because he is not mentally able to make or promote such an application, has no recourse to an outside body: except through the agency of the nearest relative, who can be, and in this case was, barred under section 25. If the 28 day limit is a sufficient safeguard in the case of incompetent patient, why is it not so in the case of the competent? Why in his case is recourse to the MHRT given at all? And, further, even a 28 day period of detention without review by a judicial body at least raises questions under the ECHR. Whilst I would agree that no rule of thumb can be laid down either in respect of detention generally or in respect of particular categories of detention, nevertheless it is impossible to say that the ECHR organs neither could have nor should have any concern about a 28 day detention without judicial review."

He then addressed the question of review by the County Court and found that in determining a section 29(4) application it was not performing a function under Article 5 of the Convention. The speed with which it was required to determine such an application was not a relevant consideration:

"Not only is the County Court not reviewing the lawfulness of the patient's

> detention, but also questions must arise about its promptitude in performing the task that it does undertake... [The trial judge] suggested that any undue delay by the County Court would involve a breach of its obligations under article 6 of the ECHR. But that is of no help to the patient. The standard of promptitude in such an application will be that appropriate to the condition of the nearest relative, not that appropriate to the condition of the patient. Moreover, the patient is not party to the proceedings: as Hale LJ pointed out in paragraph 24 of her judgment in the *City of Plymouth*case, he is the one person whom the County Court rules do not permit to be joined. Thus, the proceedings are not and cannot be concerned with the determination of his civil rights and obligations, so it is difficult to see how he can complain under article 6 of delay in pursuing them.

In turning to Article 5 § 4 of the Convention, Lord Justice Buxton stated as follows:

> 18. As we have seen, there are undoubted, and as the judge thought conclusive, difficulties in applying article 5.4 to oblige the state to act on the incompetent patient's behalf. We also have to remember that the ECHR provides the court with a set of guiding principles, and not with a palm tree. Nevertheless, I cannot think that the scheme of protection for persons detained in cases of suspected unsound mind can have been intended to exclude, simply because of their mental inability, persons who find themselves in the position of MH. The matter may perhaps be tested by asking what reply the authors of the ECHR would have given had they been asked whether the particular language that they adopted in article 5.4 was intended to exclude from the protection of article 5 a person who, solely because of lack of capacity to do so, was unable to take proceedings. At least if they were English lawyers I suspect that they would have replied with a testy "of course not" worthy of the hypothetical parties in *Shirlaw v Southern Foundaries*[1939] 2 KB 206 at p227.
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> 19. We have not been shown any ECHR authority that impedes that approach. [Counsel for the Secretary of State] took us to the judgment of the [European Court of Human Rights] in *TW v Malta*(1999) 29 EHRR 185[43], where the court pointed to the difference of wording between article 5.3 and article 5.4, already observed. But that was a case of detention on a criminal charge, where the court was at pains to stress that recourse in an article 5.1.c case cannot be dependent on any initiative by the prisoner. That is far from concluding that in the converse case, where relief is in the first instance in the hands of the subject, but the subject is unable to obtain that relief, the court would hold that assistance to the subject in asserting the right was excluded.
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> 20. I am therefore of opinion that the state is obliged by the general principles of protection that inform article 5 to place the incompetent patient in the same position as the competent patient, as nearly as it is possible to do so, with regard to access to the MHRT."

On the prolongation of detention by section 29 (4) of the Act, Lord Justice Buxton concluded:

> "21. This case is more straightforward. The patient detained under section 2, whether competent or incompetent, is detained beyond the 28 day limit without adequate judicial supervision. When that occurs, the justification for his original detention, whether or not it has been approved by the MHRT, has expired, and he is detained just because of the existence of proceedings in respect of which he is a spectator. That will be so even if the County Court judge finds in favour of the nearest relative if the approved social worker appeals...I have no doubt that in those circumstances he should have the right to return to the MHRT to obtain a judicial decision on his continued detention."

Lord Justice Wall and Mr Justice Lindsay in their concurring judgments both added that, in contrast to the trial judge, they could not regard the twenty-eight day period of detention provided for by section 2

as being of an "inherently short duration". On the distinction between Article 5 § 3 and Article 5 § 4 of the Convention, Mr Justice Lindsay added:

> "That distinction led [Counsel for the Secretary of State] to argue that under Article 5.4 it was only he or she who was deprived of his or her liberty that was to be entitled, him – or herself, to take proceedings by which the lawfulness of the detention was to be decided. Were a rigorously literal approach to be appropriate some force could be attributed to such an argument but it has to be remembered that the Convention of which 5.4 forms part is intended to cope with the whole range of those deprived of their liberty by arrest or detention throughout the numerous jurisdictions which have subscribed to the Convention, many deploying a more purposive approach than was traditionally used here. Within those jurisdictions there will doubtless be many different circumstances in which one person is entitled or required to bring proceedings in the name of or on behalf of another. If one restricts Article 5.4 so that only the very person detained or deprived of liberty can "take proceedings" to determine the lawfulness of the detention then one would have arrived at a construction as if the Convention had read "Everyone who has capacity himself to bring such proceedings ... shall be entitled to take proceedings". That is not what 5.4 says and, in its context, the word "Everyone" is plainly shorthand intended to enable not only the very person who is deprived of liberty to take proceedings but, where some other is, by the relevant domestic law, authorised or required to proceed in that person's name or on that person's behalf, to ensure that he, too, should be entitled to take the proceedings. The Crown's construction would or might preclude Article 5.4 applications in all sorts of cases, including the detention of persons under 18, well beyond those with mental disorder. I cannot think that that was intended either by those subscribing to the Convention or by Parliament in its enacting of the Human Rights Act 1998.

The Court of Appeal therefore made the following two declarations of incompatibility:

> "(i) section 2 of the Mental Health Act 1983 is incompatible with article 5.4 of the European Convention on Human Rights in that it is not attended by adequate provision for the reference to a court of the case of a patient detained pursuant to section 2 in circumstances where a patient has a right to make application to a Mental Health Review Tribunal but the patient is incapable of exercising that right on his own initiative;
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> (ii) section 29(4) of the Mental Health Act 1983 is incompatible with article 5.4 of the European Convention on Human Rights in that it is not attended by provision for the reference to a court of the case of a patient detained pursuant to section 2 of that Act whose period of detention is extended by the operation of the said section 29(4)."

The Secretary of State appealed to the House of Lords, which, on 20 October 2005, unanimously allowed the appeal. Baroness Hale of Richmond (with whom the other four law lords concurred) first considered the compatibility of section 2 of the 1983 Act with Article 5 § 4. She found as follows:

> "22. The short answer to this question is that article 5(4) does not require that every case be considered by a court. It requires that the person detained should have the right to "take proceedings". The wording is different from article 5(3), which deals with the rights of a person who has been arrested on suspicion of having committed a criminal offence or to prevent his committing an offence or fleeing after having done so...The difference between a right to 'take proceedings' and a right to 'be brought promptly before a [court]' must be deliberate. It stops short of requiring judicial authorisation in every case. It leaves to the person

detained the choice of whether or not to put the matter before a court. Understandably, therefore, the respondent abandoned the argument that article 5(4) required that all section 2 admissions should be referred to a tribunal and concentrated only on those patients who lack the capacity to exercise their article 5(4) rights. Logically, of course, this argument would also apply to a patient detained under section 3, for the automatic reference after six months under section 68(1) would not be regarded as 'speedy'.

23. For [the applicant], the argument is that a right 'to take proceedings' is ineffective if the patient lacks the ability to do so. Given that the Convention is there to secure rights that are 'practical and effective' rather than 'theoretical and illusory' this is a powerful argument. But it does not lead to the conclusion that section 2 is in itself incompatible with the Convention or that the solution is to require a reference in every case. Rather, it leads to the conclusion that every sensible effort should be made to enable the patient to exercise that right if there is reason to think that she would wish to do so.

24. There is no Strasbourg case which implies into article 5(4) the requirement of a judicial review in every case where the patient is unable to make her own application, nor is this suggested in authoritative texts such as Karen Reid, A Practitioner's Guide to the European Convention on Human Rights (2nd ed 2004). Indeed, in *Rakevich v Russia*(Application No 58973/00), 28 October 2003, it was held that even the judicial review of every admission on the initiative of the detaining authorities is not enough if the patient does not herself have the direct right to apply for her release. In the recent case of *Storck v Germany(*Application No 61603/00), 16 June 2005, there was in principle a procedure available to protect the patient's interests, but the applicant had been unable to secure outside help during her confinement in a private clinic to enable her to institute such proceedings, so it was 'questionable whether there had been sufficient safeguards to guarantee the applicant's effective access to court': see para 118. This was not because of lack of capacity but because of the lack of practical machinery for contacting the court. This illustrates only too well how there may be many other obstacles than lack of capacity to the effective exercise of the right to take proceedings. Singling out lack of capacity for special treatment would raise a host of problems of definition and assessment for which there is no warrant either in the Convention or in the Act.

25. That is why our system tries hard to give patients and their relatives easy access to the tribunal which is itself designed to meet their needs. The managers of the hospital have a statutory duty, under section 132 of the Act, to take such steps as are practicable to ensure that the patient understands the effect of the provisions under which she is detained and the rights of applying to a mental health review tribunal which are available to her. This has to be done as soon as practicable after the patient is detained. Unless the patient wishes otherwise, this information is also to be given to the patient's nearest relative. Under the Code of Practice (published March 1999 pursuant to section 118 of the Act by the Department of Health and Welsh Office), section 14, information should be given to the patient 'in a suitable manner and at a suitable time" by a person who "has received sufficient training and guidance'. Patients and nearest relatives have to be told how to apply to a tribunal, how to contact a suitably qualified solicitor, that free legal aid may be available, and how to contact any other organisation which may be able to help them make an application. In other words, the hospital managers have to do the best they can to make the patient's rights practical and effective.

26. Mental health review tribunals were also designed with that object in mind. Before they were created, in the Mental Health Act 1959, compulsory detentions were authorised by a judicial officer, who was widely regarded as a 'rubber stamp' of little practical value in challenging the decision to detain. Tribunals are composed of a legally qualified presider, a medical member with expertise in the diagnosis and treatment of mental disorder, and a third member with other suitable experience, for example in the social services. Although the procedures

have become more formal since the advent of legal assistance for patients, they are designed to be user-friendly and to enable the patient and her relative to communicate directly with the tribunal. A reference to the tribunal must be considered in the same way as if there had been an application by the patient: see r 29. Hence although the initiative is taken by someone else, the patient's rights are the same. Although an application has to be made in writing, it can be signed by any person authorised by the patient to do so on her behalf: see r 3(1). This could be any relative, a social worker, an advocate, or a nurse, provided of course that the patient has sufficient capacity to authorise that person to act for her. The common law presumes that every person has capacity until the contrary is shown and the threshold for capacity is not a demanding one. These principles have recently been confirmed by Parliament in the Mental Capacity Act 2005.

27. Even if the patient's nearest relative has no independent right of application, there is much that she, or other concerned members of the family, friends or professionals, can do to help put the patient's case before a judicial authority. The history of this case is a good illustration. The [applicant's] mother was able to challenge every important decision affecting her daughter. Most helpfully, she stimulated the Secretary of State's reference to the tribunal very quickly after it became clear that her daughter was to be kept in hospital longer than 28 days. Had MH been discharged once the 28 days were up there would, in my view, have been no violation of her rights under article 5(4). It follows that section 2 of the Act is not incompatible with article 5(4).”

Baroness Hale then considered the compatibility of section 29 (4) with Article 5 § 4 of the Convention:

“28. Section 29(4) raises a very different question, which applies to all patients affected by it, irrespective of their mental capacity. The system is obviously capable of being operated compatibly. The patient is entitled to make an application during the initial 14 days of the section 2 admission, thus complying with her right, should she choose to exercise it, to a speedy initial judicial determination of the lawfulness of her detention. The county court proceedings may produce a swift displacement order, whether interim or final, after which the patient is admitted under section 3. The patient then has a fresh right to apply to a tribunal, which will arise at a "reasonable interval" after the first. Alternatively, a displacement order may be refused, in which case the patient can no longer be detained unless the relative has been persuaded to withdraw her objection to the section 3 admission. But in that event a fresh right to apply to a tribunal will also arise.

29. The problem arises when the county court proceedings drag on and the patient is detained indefinitely without recourse to a tribunal. Indeed, it may be difficult for the county court to proceed too quickly, without endangering the rights of the parties under article 6 and the rights of both the patient and her relative under article 8. Hence there may well come a time when her article 5(4) rights will be violated unless some means of taking proceedings is available to her. That time may come earlier if she has not made an initial application, so that the lawfulness of her detention has never been subject to judicial determination, than it would do if there had been an early tribunal hearing. But here again the means are available, within the existing law, of securing that she does have that right.

30. The preferable means is what happened in this case: that the Secretary of State uses her power under section 67(1) to refer the case to a tribunal. This is preferable because mental health review tribunals are much better suited to determining the merits of a patient's detention and doing so in a way which is convenient to the patient, readily accessible, and comparatively speedy. As already seen, a reference is treated as if the patient had made an application, so that the patient has the same rights within it as she would if she herself had initiated the proceedings. It can, of course, be objected that this solution depends upon the Secretary of State being willing to exercise her discretion to refer. But

the Secretary of State is under a duty to act compatibly with the patient's Convention rights and would be well advised to make such a reference as soon as the position is drawn to her attention. In this case this happened at the request of the patient's own lawyers. Should the Secretary of State decline to exercise this power, judicial review would be swiftly available to oblige her to do so. It would also be possible for the hospital managers or the local social services authority to notify the Secretary of State whenever an application is made under section 29 so that she can consider the position."

Her Ladyship finally considered the availability of judicial review or habeas corpus to challenge the lawfulness of a patient's detention. In finding that they were available she added:

"Any person with sufficient standing could invoke them. Before the Human Rights Act 1998, the European Court of Human Rights held that these were not a sufficiently rigorous review of the merits, as opposed to the formal legality, of the patient's detention to comply with article 5(4): see *X v United Kingdom*(1981) 4 EHRR 188. It may well be that, as the Administrative Court responsible for hearing judicial review and habeas corpus petition] must now itself act compatibly with the patient's rights, it would be obliged to conduct a sufficient review of the merits to satisfy itself that the requirements of article 5(1)(e) were indeed made out. But it is not well equipped to do so. First, it is not used to hearing oral evidence and cross examination. It will therefore take some persuading that this is necessary: cf *R (Wilkinson) v Broadmoor Special Hospital Authority*[2002] 1 WLR 419 and *R (N) v M*[2003] 1 WLR 562. Second, it is not readily accessible to the patient, who is the one person whose participation in the proceedings must be assured. It sits in London, whereas tribunals sit in the hospital. How would the patient's transport to London be arranged? Third, it is not itself an expert tribunal and will therefore need more argument and evidence than a mental health review tribunal will need to decide exactly the same case. All of this takes time, thus increasing the risk that the determination will not be as speedy as article 5(4) requires.

32. Hence, while judicial review and/or habeas corpus may be one way of securing compliance with the patient's article 5(4) rights, this would be much more satisfactorily achieved either by a speedy determination of the county court proceedings or by a Secretary of State's reference under section 67. Either way, however, the means exist of operating section 29(4) in a way which is compatible with the patient's rights. It follows that the section itself cannot be incompatible, although the action or inaction of the authorities under it may be so."

She therefore declined to hold that either section 2 or section 29(4) of the 1983 Act was incompatible with Article 5(4) of the Convention in the respects identified by the Court of Appeal. The House of Lords thus allowed the appeal and set aside the declarations made by the Court of Appeal.

B. Relevant domestic law

1. Primary legislation

a. The Mental Health Act 1983

Section 2 of the 1983 Act provides for the admission and detention for assessment of a person on the ground that he is suffering from mental disorder of a nature warranting such detention, and that he needs to be detained in the interests of the health or safety of himself or others. By section 2(4), such detention can only last for 28 days.

Section 3 provides for the compulsory detention of a person for

treatment, for a period of initially up to six months. Under section 68, managers of hospitals are under a duty to refer the case of a patient to the Mental Health Review Tribunal where the patient has not exercised his right of application after six months. No such corresponding duty exists in respect of detention under section 2.

Section 7 provides for the making of a guardianship order in respect of a person suffering from mental disorder.

In all of the foregoing cases, section 66 permits the patient to make an application for the discharge of the order to a Mental Health Review Tribunal. Section 66 (2)(a) requires an application for discharge from detention under section 2, if made by the patient herself, to be made within fourteen days of the start of the detention. An order for discharge from a section 2 detention may be made either by the hospital authorities or by the patient's nearest relative (section 23). However, under section 25, the patient's responsible medical officer ("RMO") may make a "barring order" preventing a discharge by the nearest relative if he or she thinks that the patient if discharged would be liable to be a danger to himself or to others. The nearest relative is then prevented from making any further such application for a period of six months (section 25 (1)(b)). Additionally, when such an barring order is made, section 66 (1)(g) prevents the patient from making an application for discharge to the Mental Health Review Tribunal (see section 72 below).

Under section 29 an authorised social worker may apply to the County Court for the removal of the nearest relative from the performance of his functions under the Act, *inter alia* if he or she considers that the nearest relative is unreasonably failing to agree to a guardianship order. When such an application is made, the 28 day period under section 2(4) is, by section 29(4), extended automatically until the proceedings have been finally disposed of. Once they have, the section 2 detention can only continue for a further period of seven days (section 29(4)(b)).

Section 67 provides that the Secretary of State may, if he thinks fit, at any time refer to a Mental Health Review Tribunal the case of any patient who is liable to be detained or subject to guardianship.

The power of a Mental Health Review Tribunal to discharge patients is provided for by section 72 (1) of the Act under which it shall direct the discharge of a patient liable to be detained under section 2 if it is satisfied either: that he is not suffering from mental disorder or from mental disorder of nature or degree which warrants his detention (section 72 (1)(i)); or that his detention is not justified in the interests of his own health or safety or with a view to the protection of other persons (section 72 (1)(ii)).

Section 118 of the Act directs the Secretary of State to prepare a Code of Practice for, *inter alia*, the guidance of registered medical practitioners, managers and staff of hospitals and mental nursing homes and approved social workers in relation to the admission of patients to hospitals and mental nursing homes under the Act and to guardianship.

Section 132 places managers of hospitals under a duty to take such steps as are practicable to ensure the patient understands under which of the provisions of the Act he is being detained and what rights of

applying to a Mental Health Review Tribunal are available (subsections (1)(a) and (b)). The same information is to be provided to a nearest relative (subsection (4)).

(b) The Human Rights Act 1998

Section 4 of the Act provides (so far as relevant):

"(1) Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right.

(2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility. ...

(6) A declaration under this section ... -

(a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it was given; and

(b) is not binding on the parties to the proceedings in which it is made."

Section 6 provides:

"(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

(2) Subsection (1) does not apply to an act if -

(a) as a result of one or more provisions of primary legislation, the authority could not have acted any differently; or

(b) in the case of one or more provisions of ... primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions. ..."

2. The Code of Practice

Chapter 14 of the Code of Practice, promulgated in March 1999 by the Secretary of State in accordance with section 118 of the Mental Health Act 1983 (see above), is entitled "Information for detained patients, those subject to guardianship and nearest relatives" and, so far as relevant, provides:

"The Hospital Managers' information policy

14.4 In order to fulfil their statutory duties Hospital Managers should implement a system which is consistent with the principles set out in Chapter 1 and ensures that:

a. the correct information is given to the patient;

b. the information is given in a suitable manner and at a suitable time and in accordance with the requirements of the law;

c. the member of staff who is to give the information has received sufficient training and guidance and is identified in relation to each detained patient;

d. a record is kept of the information given, including how, when, where and by whom it was given; e. a regular check is made that information has been properly given to each detained patient, and understood by them.

Specific information

14.5

a. Information on consent to treatment

The patient must be informed;

• of the nature, purpose and likely effects of the treatment which is planned;

• of their rights to withdraw their consent to treatment at any time and of the need for consent to be given to any further treatment;

• how and when treatment can be given without their consent, including by the second opinion

process and when treatment has begun if stopping it would cause serious suffering to the patient.

b- Information on detention, renewal and discharge

The patient should be informed;

• of the provisions of the Act under which they are detained, and the reasons for their detention;

• that they will not automatically be discharged when the current period of detention ends;

• that their detention will not automatically be renewed when the current period of detention ends;

• of their right to have their views about their continued detention or discharge considered before any decision is made.

c- Information on applications to Mental Health Review Tribunals:

Patients and nearest relatives must be informed;

• of their rights to apply to Mental Health Review Tribunals;

• about the role of the Tribunal;

• how to apply to a Tribunal; how to contact a suitably qualified solicitor;

• that free Legal Aid - Advice by way of representation (ABWOR) may be available;

• how to contact any other organisation which may be able to help them make an application to a Tribunal."

C. Other relevant international materials

Recommendation Rec2004 (10) of the Committee of Ministers to member states concerning the protection of the human rights and dignity of persons with mental disorder, where relevant provides as follows:

Article 25 – Reviews and appeals concerning the lawfulness of involuntary placement and/or involuntary treatment

1. Member states should ensure that persons subject to involuntary placement or involuntary treatment can effectively exercise the right:

i. to appeal against a decision;

ii. to have the lawfulness of the measure, or its continuing application, reviewed by a court at reasonable intervals;

iii. to be heard in person or through a personal advocate or representative at such reviews or appeals.

2. If the person, or that person's personal advocate or representative, if any, does not request such review, the responsible authority should inform the court and ensure that the continuing lawfulness of the measure is reviewed at reasonable and regular intervals.

...

Article 26 – Placement of persons not able to consent in the absence of objection

Member states should ensure that appropriate provisions exist to protect a person with mental disorder who does not have the capacity to consent and who is considered in need of placement and does not object to the placement.

COMPLAINTS

The applicant alleges that her right under Article 5 § 4 of the Convention to take proceedings by which the lawfulness of her detention could be decided speedily was violated in two aspects. First, the relevant domestic legislation, the 1983 Act, made no provision for the automatic referral of her case to a competent court for patients such as her who lacked the capacity to take proceedings themselves. Second, she alleges that after her detention was prolonged under section 29 (4) of the 1983 Act, she could not take proceedings by which the lawfulness of this detention could be decided speedily. The applicant also complains in the alternative that there was a breach of Article 14 when taken with Article 5 § 4. Even if the absence of an automatic right of review under Article 5 § 4 did not violate her rights under that Article, this nevertheless amounted to different treatment between incapacitated and competent patients which is not justified under Article 14.

QUESTION TO THE PARTIES

Do the facts of the case disclose a breach of Article 5 § 4 of the Convention: (a) in relation to the failure to provide an automatic referral to a court when a patient is detained under section 2 of the Mental Health Act 1983 and when that patient lacks the capacity to take proceedings; and (b) when that detention is prolonged under section 29(4) of the same Act?