

# Casenotes

## *The Home Secretary's Tribunal Referral Powers Following IH*

*David Mylan*

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

[2002] EWCA Civ 647

Court of Appeal (15th May 2002) Lord Phillips MR, Dyson LJ, and Jonathan Parker LJ

### **The Facts**

C, a patient detained in Broadmoor High Security Hospital pursuant to an order made under section 37/41 of the Mental Health Act 1983 (MHA) applied to the Mental Health Review Tribunal ("the tribunal") for a discharge from hospital. The tribunal met on the 10th February 2000 and adjourned the application for a possible care plan to be formulated and for a further report from the patient's Responsible Medical Officer ("RMO").

The hearing resumed on the 11th and 12th October 2000, when it had the benefit of further reports from the RMO, the hospital social worker and the local authority social worker. There was a difference of views expressed both as to the suitability of discharge, and in the event that a conditional discharge<sup>1</sup> was considered appropriate the conditions that should be imposed.

Crucially part of the written evidence that the local authority social worker had prepared for the tribunal, consisting of her assessment of the needs of the patient should he be discharged, was not submitted as part of the written evidence. She was not present at the hearing to give oral evidence.

The tribunal after hearing all the evidence decided that the patient should be conditionally discharged, and that the discharge should be deferred<sup>2</sup> until the resources necessary to meet the conditions were assembled. In reaching this decision it appears that the tribunal had preferred the evidence of the hospital social worker to that of the RMO. The tribunal imposed a condition that:-

"The patient has access to such psychiatric treatment as he may need from time to time."

They imposed this condition rather than the more usual condition that a psychiatrist in the community should supervise the patient.

The reasons given by the tribunal to support the decision were most probably defective. As Mr. Justice Collins stated in the Administrative Court: -

"With great respect to the Tribunal, those are no reasons at all. It may well be that that deficiency could, had the Secretary of State so wished have justified an application for judicial review. I have no doubt whatever that those reasons were entirely defective."<sup>3</sup>

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1 Section 73(2) MHA.

2 Section 73(7) MHA.

3 Paragraph 26 of the judgment in the Administrative Court [2001] EWHC Admin 501.

The community-based local authority social worker learnt that the statement of needs she had prepared in May 2000, had not been before the tribunal, and on the 30th October wrote enclosing a copy of the statement, and highlighting the differences between her view and that of the hospital social worker.

The Secretary of State (S of S) who had opposed C's discharge then exercised his power to refer<sup>4</sup> his case to a new tribunal on the basis that:-

“Apparent confusion over the documentation was very important because of the extreme rarity of a restricted patient being discharged without a condition of psychiatric supervision and the problems that this presents.”<sup>5</sup>

The effect of such a referral back to the tribunal is to deprive the patient of the deferred conditional discharge that he had obtained<sup>6</sup>.

The Patient sought Judicial Review of the reference by the S of S and on the 19th June 2001 in the Administrative Court, Mr. Justice Collins gave judgment in favour of “C” and quashed the decision of the S of S to refer “C's” detention to the tribunal.

The consequence of this decision was to introduce a fetter on the power under Section 71(1) of the MHA, and as Counsel for the S of S put it when making her application for leave to appeal:-

“ ..... Your Lordship is well aware that there are no previous authorities on the extent of the section 71 power, only authorities that give examples of that power. This case does therefore break new ground .....”.

Leave to appeal was granted and the case came before the Court of Appeal on the 10th December 2001. After hearing argument but before judgment was delivered, the appeal in the case of *IH*<sup>7</sup> was lodged, and the Court of Appeal of its own motion decided that: -

“Having reserved judgment, we learned that Bell J's decision in *IH* was to be the subject of appeal. Because of the obvious impact that this appeal might have on the present case, we arranged for the appeal of *IH* to come before us and directed that this appeal should be restored for further argument at the same time.”<sup>8</sup>

## **The Law**

The power of the tribunal to discharge a restricted patient is contained within S 73 MHA, which imports the tests set out in S 72(1)(b)(i) & (ii) MHA. If either of these tests is satisfied and “it is not appropriate for the patient to remain liable to recall to hospital for further treatment”<sup>9</sup> then the patient must be absolutely discharged.<sup>10</sup> If the tribunal considers that it is appropriate that the patient remains liable to be recalled then the patient must be conditionally discharged.<sup>11</sup>

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4 Section 71(1) MHA.

5 Paragraph 11 of the judgment quoting from the witness statement of the Home Office Civil Servant explaining why the reference was made.

6 Section 73(7) MHA.

7 *R (IH) v Nottinghamshire Healthcare Trust & Ors* [2001] EWHC Admin 1037. *R on the Application of IH v Secretary of State for the Home Department & Ors* [2002] EWCA Civ 646. For a discussion of this highly

significant case, see ‘Deferred Conditional Discharges’ by David Mylan, *Journal of Mental Health Law* July 2002 pp 208 – 218.

8 Paragraph 27 of the judgment.

9 Section 73(1)(b) MHA as amended.

10 Section 73 (1) MHA.

11 Section 73 (2) MHA.

Should the patient be conditionally discharged then “the patient shall comply with such conditions (if any) as may be imposed at the time of discharge by the tribunal or at any subsequent time by the Secretary of State.”<sup>12</sup>

If on the day of the hearing it is not possible to fulfil any conditions that the tribunal considers it appropriate to impose: –

“A tribunal may defer a direction for the conditional discharge of a patient until such arrangements as appear to the tribunal to be necessary for the purpose have been made to their satisfaction.”<sup>13</sup>

The S of S may at any time refer the case of a restricted patient to a Mental Health Review Tribunal.<sup>14</sup>

Should the S of S exercise this power in respect of a restricted patient whose conditional discharge has been deferred, the effect is to place the patient in the same position he was before his case was considered by the tribunal. The relevant statutory provision states as follows:

“ ..... where by virtue of any of any such deferment no direction has been given on an application or reference before the time when the patient’s case comes before the tribunal on a subsequent application or reference, the previous application or reference shall be treated as one on which no direction under this section can be given.”<sup>15</sup>

Where difficulties arise in respect of meeting the conditions, the decision of the House of Lords in the case of *Campbell*<sup>16</sup> precluded any reconsideration by the tribunal of its decision.

In the event that subsequent events indicate that the discharge should not take place or new information suggests the proposed conditions may be inappropriate, the only function that remained to the tribunal was to direct the conditional discharge as and when the necessary arrangements had been made.

The objections made by C to the exercise of the power of referral to a new tribunal by the S of S is concisely set out in the judgment of the Court of Appeal:

“Under the Act the role of a Tribunal is to decide the lawfulness of a patient’s detention in accordance with Article 5(4) of the Convention. The Tribunal had decided that C’s detention was unlawful and that C was entitled to be discharged, albeit subject to conditions. The Secretary of State was bound to observe that decision. It was not open to him to abrogate it by making a fresh reference without good reason. The fact that the Tribunal had reached its decision without knowledge of Ms. Roden’s views did not constitute a good reason.”<sup>17</sup>

## **The Judgment**

As noted above, C’s application to have the S of S’s referral to a new Tribunal quashed was upheld at first instance in the Administrative Court. The S of S appealed. The appeal failed and the referral remained quashed. Although the decision of both Courts was the same, the reasoning was totally different. In the Administrative Court the case went against the S of S because the Judge found that the S of S had misdirected himself as to the test that he should apply before making a Section 71(1)

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12 Section 73(4)(b) MHA.

13 Section 73(7) MHA.

14 Section 71(1) MHA.

15 Section 73(7) MHA.

16 *Campbell v Secretary of State for the Home Department* [1988] 1 AC 120.

17 Paragraph 19 of the judgment.

reference. It was held that the mere existence of new information or the fact that there had been an omission in respect of facts or opinions that should have been before the tribunal, was insufficient. The S of S: –

“..... must form the view that it is probable that the material in question would have affected the result in that it would have decided either that a more onerous condition be imposed or that a conditional discharge would not have been ordered.”<sup>18</sup>

The Court of Appeal, having indicated that it did not find it easy to follow the reasoning of the Administrative Court judgment, did not consider: –

“..... that it would be profitable to conduct a detailed analysis of the judgment below.”

The reason for this was because immediately before giving judgement, they had given judgment in *IH* and had overruled *Campbell* on the grounds that it could not stand with Article 5(4) of the Convention. In consequence the Court of Appeal was able to dismiss the appeal on the grounds that: –

“This departure from the decision in *Campbell* leaves no doubt as to what the S of S should have done on the facts of this case. He should have invited the Tribunal to reconsider its decision, taking into account the views of Ms. Roden, which should have been before it at the time of its original decision. There was no justification for his making a fresh referral and, thereby, removing the matter from the jurisdiction of the Tribunal altogether.”<sup>19</sup>

## Discussion

The significance of *C* is perhaps in the judgment at first instance rather than that of the Court of Appeal. Once *Campbell* had been reversed and the Court in *IH* set out the “New Regime” for the way in which tribunals should approach the implementation of the conditional discharge of a patient, in circumstances where the discharge cannot be immediately implemented and in consequence has to be deferred, the outcome of the appeal was a foregone conclusion. *IH* makes it clear that the decision of a tribunal to make a conditional discharge and then to defer, is a provisional decision<sup>20</sup> and not a final decision. The tribunal can then re-consider as many times as it considers appropriate. With this power, there is obviously no necessity for a Section 71(1) reference as the S of S can request the original tribunal panel, which has already acquired knowledge of the facts of the detention, to reconsider its decision.

Counsel for the S of S argued unsuccessfully before the Court of Appeal that the appeal should be allowed because at the time the S of S had no option but to proceed on the basis that *Campbell* was good law. The Court rejected this on the basis that: –

“What is in issue is not whether the S of S is to be criticised for the course that he took, but whether his decision was lawful. For the reasons that we have given, we have held that it was not”.

It was unfortunate that the Court of Appeal did not conduct a detailed analysis of the judgment below because the reasoning of Mr. Justice Collins in the Administrative Court quite clearly introduced a fetter to a power of the S of S. This is a power that is explicitly provided in primary legislation and which is not fettered by any provision within the MHA.

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18 Paragraph 60 of the judgment in the Administrative Court quoted at paragraph 22 of the judgment in the Court of Appeal.

19 Paragraph 29 of the judgment.

20 Rule 2 of the Mental Health Review Tribunal Rules 1983 (S.I. 1983 No.942)

The powers of the S of S in relation to restricted patients arise as a consequence of *Hadfield's Case*<sup>21</sup> which prompted the passing of two Statutes<sup>22</sup> to create a system for dealing with criminal lunatics. The system precluded discharge without the consent of the Crown and reserved to the Crown further powers in respect of the treatment of such patients.

The powers have remained substantially intact for over 200 years. The major modification arose as a consequence of the European case of *X v UK*<sup>23</sup> which led to the provision within the MHA of a new power for the Mental Health Review Tribunal to discharge restricted patients in place of the advisory function they previously had under the Mental Health Act 1959.

This has so far been the primary statutory modification to the powers of the S of S in 200 years, and is not so much a restriction on the power of the State because the S of S retains the power to discharge<sup>24</sup>, but rather a sharing of the power with a judicial body.

Various other powers are not shared. These include the power to restrict the grant of leave of absence under section 17 MHA<sup>25</sup>; the power to restrict the transfer of the patient to another hospital<sup>26</sup>; and the power to restrict the discharge of the patient by the RMO from detention.<sup>27</sup>

The S of S has the sole power to recall the conditionally discharged patient to hospital<sup>28</sup> although the case of the recalled patient must then be referred to a tribunal.<sup>29</sup>

The Administrative Court judgment introduced in certain specific circumstances a fetter on the S of S's power to refer a restricted patient to a tribunal. Because post-*IH*, the decision of the tribunal to order a conditional discharge deferred is now a provisional decision, it is now unlikely that the S of S would ever again seek to use the Section 71(1) power in such circumstances. The judgment can however be seen as introducing a further Human Rights Act-inspired chink into the power of the State in respect of restricted patients. It remains to be seen to what extent, if any, the judgment can be used in relation to any of the continuing powers.

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21 *Hadfield's Case* (1800) 27 Howell's St. Tr.

22 39 & 40 George III Chapter 93 "An Act for regulating Trials for High Treason and Misprision of High Treason, in certain Cases" and 39 & 40 George III Chapter 94 "An Act for the Safe Custody of Insane Persons charged with Offences".

23 *X v United Kingdom (Detention of a Mental Patient)* (1982) 4 E.H.R.R. 188

24 Section 42(2) MHA.

25 Section 41(3)(e)(i) MHA.

26 Section 41(3)(e)(ii) MHA.

27 Section 41(3)(e)(iii) MHA.

28 Section 42(3) MHA.

29 Section 75(1)(a) MHA.