

## Mental Health Review Tribunals – Just how ‘Speedily’?

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R (on the application of KB and others) v (1) Mental Health Review Tribunal (2) Secretary of State for Health [2002] EWHC 639 (Admin)

Administrative Court (23rd April 2002) Stanley Burnton J.

### Introduction

Numerous legal commentators have noted the tension between current mental health legislation and the Human Rights Act 1998, contending that a modest review across the provisions of the Mental Health Act 1983 (‘the Act’) suggests the potential for numerous challenges<sup>1</sup>. In the light of recent decisions, which have exposed the susceptibility of mental health legislation, it is hard to disagree. This Administrative Court decision exemplifies the positive approach that domestic courts have adopted in this area of law, and closely follows the jurisprudence of the European Court of Human Rights (‘European Court’) in its assertion that the vulnerability of patients compulsorily detained calls for “increased vigilance in reviewing whether the Convention has been complied with”.<sup>2</sup>

In *R (On the Application of KB and Others) v Mental Health Review Tribunal*<sup>3</sup> Stanley Burnton J ruled that the State has breached the fundamental rights of such patients in failing to take effective steps to provide *speedy* reviews as to the lawfulness of their detention. This case note will examine the content of the judgment and the future implications of this decision, having regard to the fact that such delays are commonplace and of concern, are increasing through an established shortage of medical tribunal members<sup>4</sup>.

### Facts

Seven claimants detained under the provisions of the Act made applications to the Mental Health Review Tribunal (‘the tribunal/MHRTs’) for a review of their detention. Four of the applicants were subject to detention under section 3, one detained under section 2, a further subject to detention under section 37 and the final applicant subject to detention under section 37 and to a restriction order under section 41 of the Act. Each claimant had been subject to delays in their hearings due to repeated adjournments. The claimants issued proceedings for judicial review,

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1 For a discussion of the provisions of the MHA 1983 and practices potentially susceptible to future challenge, see Davidson, L. ‘The Impact of the Human Rights Act 1998 on Mental Health Law: Part II’ in Garwood-Gowers, A., Tingle, J. and Lewis, T. (Eds.) (2001) *Healthcare Law: The Impact of the Human Rights Act 1998*, London: Cavendish, 181–200.

2 *Herczegfalvy v Austria* (1992) 15 EHRR 437

3 [2002] EWHC 639 (Admin)

4 This commentary will not consider the individual circumstances of each application in that each was subject to delays in the hearing of their application for very similar reasons.

contending that their rights under Article 5(4) of the European Convention on Human Rights ('ECHR') to a speedy determination of the lawfulness of their detentions were infringed, by virtue of the delays between their application to the tribunal and the date of an effective hearing. They claimed that these delays potentially resulted in the unjustified detention of patients, who, had their cases been considered earlier, would have been discharged. Furthermore, they claimed that these delays were not isolated, but were typical and unjustified, representing the overall systemic inadequacies in the administration of the tribunal. The respondents stated that they were taking all reasonable steps to remedy the situation.

### Decision

Allowing the applications, Stanley Burnton J stated that the fact that a patient's case was unmeritorious would not deprive him or her of the right to a speedy hearing. Second, although questions relating to financial policy would normally fall within the remit of the executive rather than the courts, when such issues were raised in relation to Articles 5 or 6 ECHR, the Court may then be required to assess the adequacy of resources and effectiveness of administration. The correct approach is to consider whether such delays are inconsistent with the requirement of a speedy hearing. If so, then the onus is upon the State to excuse such delay, for example that the delay had been caused by a sudden and unpredictable increase in the workload of the tribunal, and that it has taken effective and sufficient measures to remedy the problem.

If the State fails to satisfy that onus, the claimant will have established a breach of his right under Article 5(4). In the present cases the Secretary of State could not have been taken by surprise by these delays, and measures taken by the government had predictably added to the workload of the tribunals, such as moves to smaller hospitals and to care in the community. The extent to which failures to provide speedy hearings were due to shortages in medical members of the tribunal and the shortage and lack of training of staff, or the pressure of the work upon them, the responsibility for the delays experienced by patients was that of central government.

The seven claimants will now be lodging their claims for damages.

### Relevant Legal Provisions

#### *MHRTs*

MHRTs are established under section 65 of the Act, forming one of the statutory safeguards for those compulsorily detained in psychiatric institutions. There is one Tribunal for each region of England and one Tribunal for Wales. In England there are four regions: North London; Trent and Northern and Yorkshire; South London; and West Midlands and Northwest. The Lord Chancellor appoints tribunal members including the five Regional Chairmen. Each panel consists of a legally qualified member, a medical member<sup>5</sup> and a third member (usually referred to as the 'lay member') appointed from persons having experience in administration, knowledge of social services or other qualifications that are considered suitable by the Lord Chancellor. Remuneration and conditions of service of Tribunal members are determined by the Department of Health, upon whom responsibility falls for the funding of their payment and for the provision of the staff and accommodation of the Tribunal.

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5 *In practice medical members are consultant psychiatrists.*

The MHRT Rules 1983 (‘the Rules’) made under section 78 of the Act apply to all applications and references to tribunals and to the proceedings of those tribunals. The Rules set out a sequence of actions following the receipt of an application/reference, which will obviously affect the timing of a tribunal hearing. These include the requirement that the tribunal sends notice of the application/reference to the managers’ of the hospital<sup>6</sup>, that the responsible authority sends a statement<sup>7</sup> to the tribunal containing prescribed information, either within three weeks of the application or, in the case of assessment (i.e. section 2) applications, “as can reasonably be provided in the time available”. Where the case involves a restricted patient, the Secretary of State must be sent the prescribed information, and he/she must then send to the Tribunal his/her statement within the next three weeks<sup>8</sup>. In addition, the medical member of the tribunal must examine the patient some time prior to the hearing<sup>9</sup>. The tribunal has a limited power of postponement if it is in the interests of the patient<sup>10</sup> and holds the power to give directions to ensure the speedy and just determination of the application<sup>11</sup>. There is a general power for the tribunal to adjourn and before adjourning it may give directions as it thinks fit to ensure the prompt consideration of an application at an adjourned hearing<sup>12</sup>. In all cases other than assessment applications, at least fourteen days’ notice is required of the time, date and place fixed for the hearing<sup>13</sup>.

### *The Right to Apply for a Review of Detention*

All patients that are admitted to hospital compulsorily under sections 2 and 3 of the Act have the right to apply for an MHRT hearing for a review of their detention<sup>14</sup>. A patient liable to detention under section 3 has a right to apply to the tribunal when admitted to hospital under section 3 (at any time during the first six-month period of detention). If the liability to detention is renewed for a further six months after the initial period, the patient then has a further right to apply during the second six-month period. If liability to detention is further renewed under section 3, the patient has the right to make an application in each period of twelve-month renewal.

Patients detained under section 37 do not have the right to make an application to the tribunal in their first six-month period of detention following the imposition of the order by a court. They do have the right to apply in the second six-month period of their detention and at annual intervals thereafter. By section 70 of the Act, a patient subject to a restriction order may apply to the tribunal in the period between the expiration of six months and the expiration of twelve months beginning with the date of the relevant hospital order. The Home Secretary may refer the case of any restricted patient to the tribunal at any time<sup>15</sup>. The Home Secretary is required to refer: (a) the

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6 Rules 4 and 31(c) MHRT Rules

7 This is required to contain: an up-to-date medical report, including the relevant medical history and a full report of the patient’s condition (Rules 6 and 32(1) MHRT Rules).

8 Rules 6 and 32(1) MHRT Rules. Note that in all cases other than assessment applications other background reports are required and the production of these is required within three weeks, subject to it being reasonably practicable to produce them (Rule 6 MHRT Rules).

9 Rule 11 MHRT Rules

10 Rule 9 MHRT Rules

11 Rule 13 MHRT Rules

12 Rule 16 MHRT Rules

13 Or such shorter time as all the parties may consent to (Rule 20 MHRT Rules).

14 Section 66(1) MHA

15 Section 71(1) MHA

case of any patient whose case has not been considered by a tribunal for three years<sup>16</sup> and (b) the case of any patient treated as subject to a hospital order and restriction order<sup>17</sup> who has not applied to a tribunal in the six months beginning with the date of the order<sup>18</sup>.

### *Time Limits*

There are only two instances where the Rules prescribe times limits within which the case must be heard:

1. In the case of a section 2 patient (who may be detained for no longer than twenty-eight days under that section), the tribunal is required to fix a hearing to take place within seven days of receipt of an application<sup>19</sup>.
2. In the case of the restricted patient who has been conditionally discharged and who is then subsequently recalled, his or her case must be referred to the tribunal by the Secretary of State within a month of his or her return to hospital under section 75(1) of the Act. Rule 29 (cc) of the Rules provides that the tribunal must fix a date for the hearing of the reference, neither later than eight weeks, nor earlier than five weeks, from the date of the receipt of the reference.

Neither the Act nor the Rules lay down a specific time period within which the hearing of any other application or reference must be heard. However, a policy has been in force in recent years whereby cases involving unrestricted patients are heard within eight weeks and those involving restricted patients are heard within twenty weeks<sup>20</sup>.

### **The European Convention on Human Rights**

The incorporation of the ECHR through the enactment of the Human Rights Act 1998 ('HRA') means for those alleging a breach of their Convention Rights, they may seek a remedy in domestic courts. In interpreting whether rights have been violated or not, courts shall have regard, where appropriate, to previous Convention jurisprudence<sup>21</sup>. In the context of the instant case, Convention rights are of central importance, as neither the Act nor the Rules provide a mechanism to challenge delays, although it is certainly open to a patient to seek judicial review on the grounds of unreasonableness. The most effective option is to challenge the legality of their detention by reference to Article 5(4) ECHR, which gives the detained patient the right to have the lawfulness of his or her detention decided *speedily* by a court<sup>22</sup>.

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16 Section 71(2) MHA

17 Under section 5(1) of the Criminal Procedure (Insanity) Act 1964

18 Section 71(5) MHA

19 Rule 31 MHRT Rules

20 These target time-limits were agreed between the Council on Tribunals and the Department of Health.

21 Section 2 of the Human Rights Act 1998

22 Article 5 permits detention on the grounds of unsoundness of mind, provided that it is carried out in accordance with a procedure prescribed by law and that the detained patient has access to a court where the lawfulness of his detention can be periodically reviewed. The criteria for lawful detention are laid out in *Winterwerp v Netherlands* (1979) 2 EHRR 387.

The purpose of this paragraph has been stated to “assure to persons who are arrested or detained the right to judicial supervision of the lawfulness of the measure to which they are thereby subject”<sup>23</sup> and to ensure that no one is “arbitrarily dispossessed of his liberty.”<sup>24</sup> Therefore the rights granted under Article 5(4) not only entail that such individuals are entitled to take proceedings at reasonable intervals before a court to put in issue the lawfulness of their detention<sup>25</sup> but that the authorities must make a patient’s right to a speedy review “practical and effective”<sup>26</sup>.

### Comment

In the present case, none of the applicants had an effective hearing within the time limits required by Statute or those set by the MHRT service itself. One applicant had waited twenty-six weeks for a hearing that had been cancelled three times, and the application concerning the section 2 patient did not come before the MHRT for 3 weeks when it should have been heard within seven days. While the judge found that in all instances there had been a breach of Convention rights, if similar delays should occur in other cases, will it not become abundantly clear that the rights of a patient have been breached under Article 5(4)?

### *Just how ‘Speedily’?*

Setting out to achieve a ‘speedy’ decision does not mean that a decision should be made with undue haste. As the judge noted, the issues before the MHRTs were probably the most important issues decided by any tribunals, in that they involve decisions as to the liberty of the individual. A wrong decision could lead to the unnecessary detention of a patient, and at the other extreme to the release of a patient who may pose a danger to himself and/or the public. Other than in cases involving section 2 patients, the decision of the tribunal may determine the patient’s fate for several months ahead. Therefore the concern for the MHRT is to provide a speedy, fair and effective means by which detained patients may challenge the need for restrictions upon their liberty. Indeed, the circumstances of some cases may necessitate a longer period in order to prepare for a hearing<sup>27</sup>.

Despite expressly declining to provide a definition of ‘speedily’, the European Court has stated that its meaning should be determined in the light of the circumstances of individual cases<sup>28</sup>. In this respect, observance of Strasbourg jurisprudence provides an indication as to what may *not* constitute ‘speedily’. In *E v Norway*<sup>29</sup>, a newly detained patient had to wait fifty-five days from the date of application to a decision on the legality of his detention, owing partly to the unavailability of the judge who was on holiday. This was held to constitute a breach of Article 5(4). Similarly, in the case of *Van der Leer v The Netherlands*<sup>30</sup> the Court held that a delay of five months in obtaining a hearing was unacceptable<sup>31</sup>, in particular focusing on the fact that there had been a one-month

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23 *De Wilde, Ooms and Verp v Belgium* (1971) 1 EHRR 373 at para 76

24 *Shiesser v Switzerland* [1979] 2 EHRR 417 at 425

25 *Megyeri v Germany* (1993) 15 EHRR 584 at para 22

26 *Luberti v Italy* (1982) app. no. 9019/80 at para 69

27 *R (On the Application of C) v MHRT, London South and South West Region* [2001] EWCA Civ 1110

28 *Sanchez-Reisse v Switzerland* (1987) 9 EHRR 71, at para 55

29 (1990) 17 EHRR 30

30 (1990) EHRR 567

31 See also *Koendjiharie v Netherlands* (1990) 13 EHRR 820 EctHR.

period of adjournment without good reason. However, as illustrated by the case of *Cottingham v UK*<sup>32</sup>, where delay is caused through requests for an adjournment, this will not constitute a breach of Article 5(4).

Although not concerned with delay, the routine practice of listing *all* section 3 hearings eight weeks after the date of application was successfully challenged as constituting an infringement of the right to a 'speedy' hearing under Article 5(4). The Court of Appeal in *R (On the Application of C) v MHRT London South and South West Region*<sup>33</sup> held that this practice was unlawful, was bred of administrative convenience and failed to conform with the requirement that individual applications are heard as soon as is reasonably practicable. Their Lordships confirmed that whether there has been a breach of Article 5(4) is to be determined with regard to the particular circumstances of the individual case, although it should be practicable, in the ordinary case, for such hearings to take place *within* eight weeks of the application<sup>34</sup>.

It is abundantly clear that Article 5(4) will not be breached by *isolated* cases in which reviews are heard after the date upon which they could in practice have been accommodated. This point was emphasised by Burnton J, who stated that in any sensibly managed judicial system there are bound to be adjournments and cancelled hearings for a number of reasons, for example, the illness of a judge, witness unavailability or earlier hearings over-running. Also, the need to accommodate urgent hearings of section 2 applications in preference to section 3 applications/references, listing difficulties caused by withdrawn applications and the fact that hearings are held at the patient's place of detention (rather than in a central location), provide relevant considerations as to why hearings need to be delayed or cancelled.

But as the present case demonstrates, by no means are these delays isolated, but sadly are typical of the situation of MHRTs. As the judge found, the cancellation of section 3 hearings in order to accommodate section 2 hearings is commonplace, principally because of a lack of sufficient tribunals, rendering a lack of flexibility in the system to accommodate urgent cases without disrupting the hearings of less urgent cases. Nevertheless, despite being given priority, nor has it always been possible to hear section 2 cases within the statutory limit.

Therefore, the question of whether the incidence of delay might constitute a breach of Article 5(4) pivots on several issues. As Trowler notes, the tendency of the European Court has been to find that there has been a breach of Convention rights where there is no good reason for a delay, particularly when owing to administrative failings<sup>35</sup>. Furthermore, from the jurisprudence of the European Court, it appears that had the backlog of cases been both recent and exceptional, combined with prompt remedial action by the State, this would possibly have been sufficient in the circumstances to avoid a breach of Article 5(4)<sup>36</sup>.

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32 [1999] EHRLR 530 EctHR

33 See note 27 above.

34 See further, Trowler, R. (2001) 'MHRT Target Hearing Times and the ECHR' *Journal of Mental Health Law*, pp. 93–100.

35 *Ibid*, pp. 96 and 100 (Rebecca Trowler's casenote provides a detailed consideration of the case law relating to this area).

36 In the context of an Article 5(4) case, see note 31 above.

But delay (and under-funding) has long been a feature of the operation of the MHRT as evident from the following passage:

“There is a clear and urgent need for substantially increased resources to be put into the operation of the tribunal system if the issue of delay is to be tackled effectively and the general quality of the service to patients is not to be significantly compromised. This is not a novel observation, having been made by the MHAC as long ago as its Report for 1985–87.”<sup>37</sup>

### Scrutinising Causes of Delay

At the heart of the problem lies a history of under-funding, large workloads and recruitment difficulties. But questions relating to the level of public expenditure have traditionally been approached as being a matter of political opinion<sup>38</sup>, reserved for policy makers rather than judges<sup>39</sup>. Therefore, the central question is, to what extent is the court able to scrutinise the way the government organises the MHRT system?

Reference was made to the cases of *Buchholz v Federal Republic of Germany*<sup>40</sup> and *Zimmermann and Steiner v Switzerland*<sup>41</sup>, both involving the allocation of resources to a court system. Undoubtedly this is an area in which a judge would be regarded as competent to hold a view as to appropriate allocation. Although MHRTs are distinctive from the ordinary court system, in that not only are legal experts involved but also medical personnel, Burnton J noted that when issues are raised under either Articles 5 or 6 (guarantee of a speedy hearing or a hearing within a reasonable time) the Court may be required to assess both the adequacy of resources, as well as the effectiveness of administration. Nevertheless, the judge noted that within the confines of a two-day hearing, the court was “ill-equipped” to determine general questions concerning the efficiency of administration, the sufficiency of staff levels and the adequacy of resources. He therefore adopted the approach taken by the European Court, ostensibly, that where such delays are, on the face of it, inconsistent with the requirement of a speedy hearing, the onus is on the State to excuse the delay. A failure to excuse the delay will establish a breach of article 5(4).<sup>42</sup>

The judge was quite clear that the principal cause of cancellation and delay was the shortage of tribunal members, in particular, medical members, accounting for 76 per cent of all MHRT cancellations. Where consultant psychiatrists are in short supply and therefore difficult to recruit, combined with unattractive pay for MHRT duties and a reduction of the retirement age from 70 to 65<sup>43</sup>, the judge considered that the State had not taken appropriate action to ensure that tribunals were adequately staffed. In addition, the judge identified that delays owing to the staff shortages

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37 Barlett, P. and Sandland, R. (2000) *Mental Health Law Policy and Practice*, London: Blackstone Press, p. 271

38 *R v Secretary of State for the Environment, ex parte Hammersmith & Fulham London Borough Council & Ors* [1991] 1 AC 521

39 See for example, *R v Cambridge Health Authority, ex parte B* [1995] 1 WLR 898; *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633

40 (1980) 3 EHRR 597 – The European Court found that the delays in hearings did not exceed a reasonable time under Article 6(1) as the backlog of cases was found to be both recent and exceptional and the Government had

demonstrated that it was fully conscious of their responsibilities.

41 (1983) 6 EHRR 17 – by contrast to the above case, the European Court viewed the measures adopted by the Swiss Government as insufficient, thereby constituting a breach of Article 6(1). Of particular interest, the Swiss Government had relied upon the fact that the applicants’ cases had to be delayed to give priority to more urgent cases.

42 See note 31 above; *Musial v Poland* (2001) 31 EHRR 29

43 However, it should be noted that in June 2001 the Lord Chancellor reverted to 70 years as the age of retirement.

and lack of training, were exacerbated by the pressure of large workloads and lack of IT provision. He stated that these shortages were the responsibility of the Secretary of State for Health and that the State must “establish such tribunals or courts, and provide such resources, as will provide speedy hearings.”<sup>44</sup>

The judge considered that the proportion of ineffective applications was very high, due to discharge by the RMO prior to the hearing date, a change of mind by the patient, a deterioration in the condition of the patient, a realisation that the application is hopeless, or indeed the making of a fresh application that may hold greater prospect of success. He suggested that while the tribunal system must cope with considerable uncertainty and a large increase in applications, the significant increase has been experienced year on year for some time. The judge was, however, quick to separate responsibility from those in the Tribunal Service, whom he stated, were working under considerable pressure and “doing all they can with the resources available to them”<sup>45</sup>. In this respect, the State was responsible and should have taken the likelihood of continuing increases in applications into account, in deciding on the allocation of resources to Tribunals.

The shortage of medical members is confirmed in the Department of Health’s *Mental Health Review Tribunal Report, April 1999 to March 2001*<sup>46</sup>, which highlights that the recent retirement, and impending retirement of doctors in the tribunal service presents a significant cause for concern. Limited medical membership, coupled with a national shortage of consultant psychiatrists has unquestionably generated “serious delays” in the Tribunal service<sup>47</sup>; but these ongoing difficulties, exacerbated by a continuing rise in applications, indicate that delay may remain a feature of the MHRT landscape for the foreseeable future. The Report states that these difficulties have led to the Lord Chancellor’s agreement to a “special” recruitment exercise which will require newly appointed Medical Members to sit for double the number of days permitted in a normal contract. Despite these measures and an increase in the pay rates for Medical Tribunal Members, the response to the advertised appointment is described in the Report as “poor”.<sup>48</sup>

### Who will this affect?

The overarching question to be addressed is who will be in a position to challenge delays in their hearings in the future? Of significance, it is now clear that a patient whose case is regarded as unmeritorious cannot be deprived of his right to a speedy review, and nor will it excuse an infringement of his right under Article 5(4).<sup>49</sup>

Some are critical of this apparent “privileging” noting that detained patients are free of any analogous restrictions to those under the Civil Procedure Rules 1998 and that the authorities can hardly be expected to run the system any faster without excluding “a huge number of applications at the outset.”<sup>50</sup> This is a relevant consideration, particularly where the MHRTs are under immense pressure and failing to provide the volume of hearings demanded of them. But, as demonstrated by the different wording of Article 5 (“shall be decided speedily”) and Article 6 (“within a reasonable time”) a clear distinction has been drawn between patients with mental health problems

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44 See above note 3, at para 112

45 See above note 3, at para 113

46 Department of Health (2002) *Mental Health Review Tribunal Report April 1999 to March 2001*, London: DoH

47 *Ibid*, at p. 5.

48 *Ibid*, at p. 13.

49 See above note 3, para 31.

50 English, R. (2002) *Lawtel Human Rights Bulletin*, (16) 30/04/02 – 3/5/02, p. 3

and other litigants, reflecting the need for increased vigilance (and additional safeguards) when dealing with individuals regarded as particularly vulnerable.

But will this lead to thousands of patients successfully claiming damages as a result of the delay in their hearings as the UK media has suggested?<sup>51</sup> The judge noted that almost 27,000 compulsory admissions were made in 2000/2001. Nevertheless, as Hewitt suggests, the actual number of patients who will be in a position to claim damages will be limited by a number of factors<sup>52</sup>. Firstly, the problems highlighted by this case are fairly concentrated in the London region. Secondly, only patients who have experienced delays in the past twelve months will have an automatic right to make a claim owing to the restrictive limitation period under the HRA 1998. Thirdly, as MHRTs discharge few patients in practice, most of the delayed hearings would not have actually deprived patients of their liberty, but of their opportunity to seek it and therefore the recovery of damages will probably be nominal in many cases.

## Conclusion

Undoubtedly, this judgment is to be welcomed, in continuing a process of strengthening the rights of those detained in psychiatric institutions. Considerable pressure has now been placed on the government to confront the issue of funding for MHRTs and in turn, it is hoped that this will lead to the improvement of the quality of service provided to patients. And significantly, in relation to the issue of allocation of resources, nor can the State hope to hide behind the veil of non-justiciability in cases involving either Articles 5 or 6<sup>53</sup> or excuse such administrative failures through an alleged constraint of resources<sup>54</sup>.

Some might seek to argue that any damages recovered by patients would be better spent on the Tribunal system in order to recruit more Medical Tribunal members and administrative staff. However, as Hewitt asserts, “this cannot hide the fact that many people have been deprived of rights that are held to be fundamental”.<sup>55</sup> And for the reviewer, herein lies the substance of this case – in the event that some are being unfairly detained, access to a speedy hearing is obviously necessary to protect their right not to be deprived of their liberty.

Nevertheless, not all patients in the circumstances of repeated cancellation of hearings will be found to have suffered a breach of their rights under Article 5(4) owing both to the fluid meaning of ‘speedily’ and the lack of reparation available to those who experience ‘isolated’ delays. However, as highlighted by Trowler, the merits of such a challenge will be “improved in cases where the delay is due to administrative failings”<sup>56</sup>. This point is certainly confirmed by the instant case, and unfortunately, continues to provide an accurate summary of the MHRT system.

And, while for some, damages may be available it is worth considering the wider implications to such delay, which were well accepted by the judge. These might include causing distress and disappointment to the vulnerable patient, a risk of damage to his or her relationship with the psychiatrists and staff of the hospital, a loss of trust in the tribunal system and a waste of scarce resources. Compensation cannot rebuild a therapeutic relationship with clinicians or re-engage

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51 For example, *The Guardian ‘Human Rights for Psychiatric Patients’*, Tuesday, April 23, 2002

52 Hewitt, D. (2002) ‘Delays have dangerous ends: Henry IV, Pt 1 – Act III, scene ii, line 33’, 172/7031 N.L.J., 694

53 See earlier discussion.

54 *Bezicheri v Italy* (1989) 12 EHRR 210

55 See above note 52

56 See above note 34, p 100

trust in the mental health system. Therefore, these implications should be borne in mind not only in relation to the present operation of the MHRT, but also its future.

The Government has stated that compliance with the Human Rights Act 1998 is a central aim of its proposed reform of the Act<sup>57</sup>. The suggested reforms are outlined in the recently published Draft Mental Health Bill ('Draft Bill')<sup>58</sup>, which is intended to supersede the majority of the existing Act<sup>59</sup>. One of the key changes involves the establishment of a new tribunal, the Mental Health Tribunal ('MHT'), which would replace the existing MHRT<sup>60</sup>. The new MHT will possess a wider jurisdiction, holding the power to make care and treatment orders<sup>61</sup> and will be required to scrutinise *all* compulsory treatment beyond twenty-eight days<sup>62</sup>. In addition, patients will be able to apply to the tribunal<sup>63</sup> for a review of the continued application of compulsory powers at any time during the initial period of formal assessment<sup>64</sup>. Although clearly aimed at the requirement that the lawfulness of restrictions on a patient's liberty be decided 'speedily' by a judicial body<sup>65</sup>, this clause does not, by contrast to the White Paper, incorporate the notion of an expedited hearing<sup>66</sup>. Instead, the period in which Tribunals must determine such applications is to be specified in the rules made by the Lord Chancellor<sup>67</sup>. Other key changes include the introduction of a Mental Health Appeal Tribunal<sup>68</sup> to which a patient, if given leave<sup>69</sup>, may appeal on any point of law arising from a determination made by a MHT<sup>70</sup>.

The Draft Bill has attracted widespread concern and has been accused of being "harmful" and constituting a "breach of human rights"<sup>71</sup>, owing to the broad criteria for compulsion and the proposals for compulsory detentions and forced treatments. Nor will the Government's plans for the Tribunal service escape criticism. The proposals clearly envisage a greatly increased role for MHTs, which will require an enlarged workforce of psychiatrists, lawyers and other personnel, bearing in mind that the former continue to prove difficult to recruit. In view of the fact that MHRTs are clearly incapable of sustaining the current level of applications, the Draft Bill in its current form raises serious questions as to the future of the Tribunal service. Without a full review of these proposals, the capability of MHTs to provide a significantly increased level of effective hearings 'speedily' is to be doubted.

57 Department of Health/Home Office (2002) *Mental Health Bill Consultation Document*, Cm 5528-III, London: TSO at para. 2.2

58 Department of Health (2002) *Draft Mental Health Bill*, Cm 5538-I, London: TSO.

59 Part VII of the existing Act is to remain in force (Department of Health (2002) *Draft Mental Health Bill Explanatory Notes* Cm 5538-II, London: TSO at para 8).

60 Clause 3 of the Draft Bill

61 Clause 31 of the Draft Bill

62 Clause 30 of the Draft Bill (other than offenders where authorisation is required by the courts, Clause 70, subsections (1) and (2)).

63 Clause 28(1)(a) of the Draft Bill (or a nominated person acting on their behalf (Clause 28(1)(b))).

64 Clause 28 of the Draft Bill

65 DoH (2002) See note 59 above, para. 38.

66 The White Paper proposed a 'fast-track procedure' under which the Tribunal hearing would take place within seven days of receipt of the application (Department of Health/Home Office (2000) *Reforming the Mental Health Act, Part I: The New Legal Framework* Cm 5016, London: TSO, at para. 3.42).

67 Clause 29(2) of the Draft Bill

68 Clause 4 of the Draft Bill

69 Clause 160(6) of the Draft Mental Health Bill 2002

70 Clause 160(1) of the Draft Mental Health Bill 2002

71 'The Treatment of the Mentally Ill that Shames us All', *The Independent on Sunday*, 30 June 2002.