A Consideration of the Approach the Mental Health Review Tribunal Should Adopt When Considering the Discharge of the Asymptomatic Patient

David Mylan[[1]](#footnote-1)\*

**Regina v London South and South West Region Mental Health Review Tribunal ex parte**

**Stephen Moyle**

**High Court (Queen’s Bench Division)**

**Latham J**

**Judgment Given 21st December 1999**

**TLR 10th February 2000**

**The Facts**

The Applicant Stephen Moyle was a Patient detained under section 37/41 of the Mental Health

Act 1983 (“the Act”) having pleaded guilty on the 21st November 1990 to an offence of unlawful

wounding. His legal categorisation[[2]](#footnote-2) had originally been one of mental illness, which had been

amended to mental illness and psychopathic disorder for a time and had reverted to mental illness

in 1995.

He applied for a Mental Health Review Tribunal (“MHRT”) on 23rd June 1998 and was at that date

and throughout the time up to his MHRT asymptomatic as a consequence of medication.

The medical evidence before the MHRT was that:-

“his condition was such as would not make it appropriate for him to be liable to be detained were

he in the community[[3]](#footnote-3). However .........were he to stop taking the medication , he would quickly

relapse, and that after any relapse, it would be more difficult to produce satisfactory control of his

symptoms with drugs.”[[4]](#footnote-4)

The Psychiatrists giving evidence were all agreed that:

“were he to relapse he would pose a danger to himself and others”.

It was submitted to the Tribunal on behalf of the applicant that the admission and discharge criteria

should mirror each other so that if it was not appropriate for him to be admitted to detention from

the community in his present condition, then he must be discharged. The applicant himself gave an

assurance to the MHRT that were he to be discharged he would continue with the medication.

The MHRT rejected the legal submission and did not accept the patient’s assurance, as:-

“they could not be satisfied that his mental illness was not of a nature which made it appropriate

for him to be liable to be detained in a hospital for medical treatment, nor that he would not be a

danger to himself or others were he to be discharged”.

The applicant sought judicial review of the MHRT’s decision on the basis that it was unlawful

because the MHRT had misdirected itself as to the law to be applied to an application for

discharge, and irrational, in that the medical evidence was only capable of supporting the

conclusion that he should be discharged.

**The Law**

When a MHRT considers an application from a patient or a reference of a patient detained under

either an order for admission for treatment[[5]](#footnote-5) or a hospital order[[6]](#footnote-6) with or without a restriction

order[[7]](#footnote-7) it must order the discharge of the patient if satisfied that either:-

“he is not then suffering from mental illness, psychopathic disorder, severe mental impairment or

from any of those forms of disorder of a nature or degree which makes it appropriate for him to

be liable to be detained in a hospital for medical treatment”[[8]](#footnote-8)

or

“”that it is not necessary for the health or safety of the patient or for the protection of other

persons that he should receive such treatment”.[[9]](#footnote-9)

The MHRT also has a general discretion (other than in the case of restricted patients) to discharge

the patient when it considers it appropriate and the statutory criteria are not met.

There are separate discharge criteria[[10]](#footnote-10) in respect of patients detained under an order for admission

for assessment[[11]](#footnote-11); subject to Guardianship[[12]](#footnote-12) [[13]](#footnote-13) or subject to Aftercare under Supervision.[[14]](#footnote-14) [[15]](#footnote-15)

The words “nature or degree” must be construed disjunctively.[[16]](#footnote-16)The double negative requires a

patient seeking to obtain discharge on the first statutory ground to satisfy the MHRT that his

mental disorder is not of a nature warranting detention and is not of a degree warranting

detention.

The wording of sections 3 and 37 of the Act relating to the criteria for admission to hospital under

a treatment order or hospital order respectively are unambiguous as is the wording of section 72

in relation to the criteria to be applied when considering discharge of detention. The criteria for

both detention and discharge include tests that have been termed “appropriateness” and

“necessity” (or “safety”) tests, and the wording of the “tests” approximate to each other.

There is however a third test that must be satisfied before a treatment order or hospital order can

be made in respect of a person suffering from either psychopathic disorder or mental impairment

namely that “such treatment is likely to alleviate or prevent a deterioration in his treatment”.[[17]](#footnote-17) This

has become known as the “treatability” test and is not expressly mirrored in the Section 72

discharge criteria.

The consequence appears to be that the untreatable psychopath (or person suffering from mental

impairment) cannot be detained under the Act but if detained cannot thereafter secure their

discharge through a MHRT under the mandatory criteria for discharge by showing that their

condition is not treatable.

Whether this is a correct statement of the law received judicial consideration in the case of:-

*R v Canons Park Mental Health Review Tribunal ex parte A*[[18]](#footnote-18)

In a majority decision in the Court of Appeal Kennedy LJ with whom Nourse LJ agreed considered

that Parliament had deliberately omitted the “treatability” test, so that section 72 was not to be

read as if it provided criteria for discharge which in some way referred back to or mirrored the

criteria for admission.

Roch LJ gave a dissenting judgment and the case did not receive consideration in the House of

Lords as it had become academic as a consequence of “A” being re-classified as mentally ill.

The same issue arose in Scotland some five years later in the case of:-

*Reid v Secretary of State for Scotland[[19]](#footnote-19)*

This case was considered by the House of Lords on the construction of the Scottish statute which

was accepted to be to all intents and purposes identical to the English legislation.

Although *Reid* does not expressly overrule Canons Park such a conclusion is inevitable and in Moyle

Latham J states:-

“Although, at page 42H [of the judgment in Reid] Lord Hope expressly stated that he would not

wish to go so far as to say Canons Park had been wrongly decided, it is in my judgment inevitable

that in agreeing with Roch LJ on the issue of statutory construction, he was disagreeing with

Kennedy LJ and Nourse L J.”

The ratio of *Reid* is:-

“By referring to a mental disorder of a nature or degree which made it “appropriate for him to be

liable to be detained”, section 64 of the 1984 Act referred back to section 17 with the result that

the issues which the Sheriff or Tribunal were required to address when considering an application

for discharge under section 64 of a patient who was subject to a restriction order without limit of

time were the same as those which had to be considered when an application was made under

section 17(1) for admission to hospital.”[[20]](#footnote-20)

Applied to the English legislation the ratio of the House of Lords judgment is that the section 72

criteria to be applied when considering discharge should be the same as those that had to be

considered for detention when making an application under section 3 (or imposing a hospital order

under section 37).

**The Decision**

The court in Moyle applied the Reid principle to the case of a patient with a mental illness, who as

a result of taking medication was asymptomatic. The MHRT’s decision was quashed, and Stephen

Moyle’s case was remitted to the MHRT for reconsideration. The application for judicial review

was successful as the MHRT had failed to ask themselves the correct question when considering

the appropriateness of detention.

“By expressly disavowing the relevance of the admission criteria, I consider that they were wrong

in law.”[[21]](#footnote-21)

The Tribunal concluded that Stephen Moyle’s illness could not be considered to be of a degree

making detention appropriate. The key issue was whether the nature of the illness made it

appropriate to detain or discharge.

Mr Justice Latham stated:-

“The correct analysis, in my judgment, is that the nature of the illness of a patient such as the

applicant is that it is an illness which will relapse in the absence of medication. The question that

then has to be asked is whether the nature of that illness is such as to make it appropriate for him

to be liable to be detained in hospital for medical treatment. Whether it is appropriate or not will

depend upon an assessment of the probability that he will relapse in the near future if he were free

in the community”.[[22]](#footnote-22)

**Comment**

*The Test for Discharge*

The case has caused some consternation amongst practitioners partly because they may have had

difficulty in appreciating its significance, as they have always regarded the non-sectionable patient

as a dischargeable patient and partly because the headnotes of the law reports fail to highlight the

way in which the case analyses the meaning of “nature” within section 72 and in consequence

reinforces the judgment in *Smith*.[[23]](#footnote-23)

The headnote in The Times Law Report of *Moyle* states:-

“On an application for discharge by a restricted patient, section 72 of the Mental Health Act 1983

was to be construed by reference to the statutory criteria for hospital detention set out in section

3 of that Act.”[[24]](#footnote-24)

The headnote in Lawtel states:-

“The same criteria had to be applied by a mental health review tribunal in relation to admission and

discharge of a patient subject to a hospital order with restrictions unlimited in time, but the burden

of proof was reversed for the purposes of consideration of discharge. Whether it was appropriate or

not for the patient to be detained in hospital for medical treatment depended upon an assessment

of the probability that the applicant would relapse in the near future if he was free in the

community, and that value judgment had to be exercised in the context of the reverse burden of

proof.”[[25]](#footnote-25)

The case should not however be confined to restricted patients and must have a general

applicability to any person[[26]](#footnote-26) subject to the Act who has the right to make an application or be the

subject of a reference to a MHRT.

The Mental Health (Patients in the Community) Act 1995 (“the 1995 Act”) introduced the

“Supervision Application” and required three “grounds”[[27]](#footnote-27) to be satisfied before such an

application can be made and three “conditions”[[28]](#footnote-28) to be satisfied before a renewal can take place.

The 1995 Act also amended section 72 of the 1983 Act by introducing section72 (4A) which sets

out the criteria to be applied by a MHRT when considering an application by a patient subject to

after-care under supervision.

Parliament appears to have shown prescience in anticipating the *Reid/Moyle* issue by drafting the

1995 Act in such a way that the admission and discharge criteria co-incide exactly whether the

patient has or has not left hospital at the time of the hearing. It does this by referring the MHRT

back to the admission/renewal criteria (which in any event only differ to reflect the fact that on

admission to section 25A the patient has not yet started to receive section 117 services whereas on

renewal he is receiving them).

Rather than re-iterating the admission “grounds” 72(4A) states that the MHRT shall direct that the

patient shall cease to be subject to s25A if satisfied that the “conditions set out in section 25A (4)

[in the case of a patient still in hospital] [section 25G(4) in any other case] are not complied with.”

Section 72(4) sets out the criteria for the discharge of a Guardianship Order and mirrors the

admission criteria set out in section 7(2) [and section 37(2) (a) (ii)] of the Act.

**The Burden of Proof**

Richard Gordon QC counsel for Stephen Moyle (who was also counsel for “A” in the *Canons Park*

case) submitted “that by its very nature, the Tribunal was a reviewing body”. This was emphatically

rejected by Mr. Justice Latham in the following terms:-

“In my judgment, for the reasons that I have already indicated, this submission is based on a

misunderstanding of the nature of the Tribunal’s jurisdiction in relation to restricted patients.

They have an original jurisdiction, in which they have to exercise their own judgment, based on the

evidence before them.”

There is no authority for suggesting that the jurisdiction of the MHRT should differ in respect of

restricted and non-restricted patients although the power in relation to discharge differs. It

therefore appears that Moyle is authority for the proposition that a MHRT is a judicial body with

original jurisdiction and not an appellate or reviewing body.

In the *Canons Park* case Kennedy L J stated[[29]](#footnote-29):-

“The first thing to be noted about section 72(1) (b) is that the tribunal is only required to direct

discharge if it is satisfied of a negative - first, that the patient is not then suffering from [a specific

form of mental disorder].If he may be, the obligation does not arise”.

This supports the generally held view that the burden of proof is placed on the patient and this

view is reinforced in the judgment of Mr Justice Latham.[[30]](#footnote-30)

That value judgment [referring to the probability of relapse as a factor in determining the nature

of a mental illness] has to be exercised in the context of the reverse burden of proof”.

Moyle was however dealing with an application by the patient and it may be that in the case of a

reference to the MHRT[[31]](#footnote-31) a distinction can be drawn and that in such cases the burden of proof

rests with the party seeking to detain. This submission is made because a requirement for the

patient to prove he does not possess a mental disorder before the judicial body with original

jurisdiction to determine the question would appear to be contrary to the decision of the

European Court of Human Rights (ECHR) in:-

*X v United Kingdom*[[32]](#footnote-32)

Paragraph 40 of the judgment of the ECHR in X v UK quoted with approval the judgment of the

ECHR in:-

*Winterwerp v The Nederlands[[33]](#footnote-33)*

Paragraph 40 states:-

“In its *Winterwerp* judgment of 24 October 1979, the Court stated three minimum conditions

which have to be satisfied in order for there to be “the lawful detention of a person of unsound

mind” within the meaning of Article 5 par. 1 (e) [of the European Convention of Human Rights

(“the Convention”)]: except in emergency cases, the individual concerned must be reliably shown

to be of unsound mind, that is to say, a true mental disorder must be established before a

competent authority on the basis of objective medical expertise; the mental disorder must be of a

kind or degree warranting compulsory confinement; and the validity of continued confinement

depends upon the persistence of such disorder”.

A periodic reference to a judicial body is required in order to comply with the requirement that

the lawfulness of the detention be reviewed at reasonable intervals.

Paragraph 52 of the *X v UK* judgment states:-

“....it would be contrary to the object and purpose of Article 5 to interpret paragraph 4 as making

this category of confinement immune from subsequent review of lawfulness merely provided that

the initial decision issued from a court. The very nature of the deprivation of liberty under

consideration would appear to require a review of lawfulness to be available at reasonable

intervals.”

If it is a correct statement of the law that the balance of the burden of proof is on the patient then

it follows that there is no requirement for the detaining authority to adduce any evidence to

support the lawfulness of continuing the detention. In circumstances when the patient elects not

to participate in the proceedings either as a consequence of a mental disorder or for other reasons;

or in circumstances when the patient lacks capacity to give instructions, (notwithstanding the

incapacity may not satisfy the MHA detention criteria) the MHRT would in consequence be

required to uphold the lawfulness of the detention despite the absence of any evidence of the

persistence of the disorder. Such an approach appears to be contrary to the requirement of

the MHRT to make its decision on the basis of “objective medical expertise”, and would lead to

the judicial body with original jurisdiction to determine whether a person has a mental disorder of

a nature or degree such as to make detention appropriate, making a decision to detain in the

absence of any evidence.

It follows that there is an argument that those seeking to justify detention must adduce the

necessary evidence, that is the burden of proof should lie with them, in order to comply with

Article 5 of the Convention.

When a MHRT is seized with an application by a patient detained under a hospital order the

patient is in effect requesting the MHRT not to wait until the statutorily prescribed time for

reconsideration that would arise as a consequence of a reference, and to reconsider whether the

circumstances that pertained at the time of the imposition of the order by the Court still pertain.

In these circumstances there is a logic in placing the burden of proof on the applicant.

Where the application is made by a patient detained under Part II of the Act there is no original

judicial authority for the detention and the situation would appear to be closer to that of a

reference than to that of a hospital order.

**The Criteria for Discharge are Mirror Images of the Criteria for Admission**

At page 17 of the *Moyle* judgment Mr Justice Latham states:-

“I accept Mr Gordon’s submission that the decision in Reid requires the question of discharge to

be approached on the basis that the criteria for discharge are meant to be matching or mirror

images of the admission criteria.”

It is this part of the decision that has received prominence in the headnotes of the reports and has

attracted most interest from practitioners. It is a clear statement of the law but is as Mr Justice

Latham makes clear only a reiteration of the ratio of the House of Lords judgment in Reid. The

significance of the statement may prove to be not in respect of discharge but in respect of

admission.

If the criteria for discharge mirror the admission criteria then it is inescapable that the criteria for

admission mirror the discharge criteria.

When consideration is being given as to whether an asymptomatic person diagnosed as

schizophrenic or with a bi-polar affective disorder should be detained when the illness can not

considered to have any ascertainable “degree”, but the “nature” is well known as a consequence of

the history, it would appear appropriate to ask whether in the light of the person’s comments about

medication, they would on that day be successful in securing their discharge before a MHRT had

they been detained in hospital.

If the person is ambivalent about continuing with medication and the history shows that their

health or safety or the safety of others is at risk when symptomatic, a MHRT applying the “nature”

test proposed by Mr Justice Latham (supra) would be likely to decide that they do not meet the

“appropriateness” test for discharge. If this is the case it follows as a consequence of the mirror

criteria that if the nature of the illness is such as to justify detention they could be admitted for

treatment under section 3. Such a conclusion appears to be a natural consequence of the Smith

decision referred to earlier.

**Conclusion**

Although Moyle is already being used by practitioners[[34]](#footnote-34) to support a submission before a MHRT

that as the health of the patient on the day of the hearing is such that he could not be “sectioned”

he should therefore be discharged, the use of the case in this way is both superficial and fails to

appreciate the true significance. The importance of the case rests on the lucid exposition of the

meaning of the word “nature” within the Act and the importance for the asymptomatic patient of

appreciating the role of medication in his treatment and the significance of demonstrating to the

Tribunal his commitment to continuing with it when not subject to the compulsion that follows

from detention.

1. \* Solicitor, Saxmundham, Suffolk. Mental Health Review Tribunal Legal Member [↑](#footnote-ref-1)
2. Section 1(2) Mental Health Act 1983. [↑](#footnote-ref-2)
3. The question of whether a “condition” is such as to warrant detention is a legal question that should be answered following receipt of medical evidence. Had the Psychiatrists who gave the evidence had the benefit of the Moyle Judgment when making their assessment,

the assessment of detainability might have been different. [↑](#footnote-ref-3)
4. Paragraph 2 of the Judgment. [↑](#footnote-ref-4)
5. Section 3 [↑](#footnote-ref-5)
6. Section 37 [↑](#footnote-ref-6)
7. Section 41 [↑](#footnote-ref-7)
8. Section 72(1)(b)(i) [↑](#footnote-ref-8)
9. Section 72(1)(b)(ii) [↑](#footnote-ref-9)
10. Section 72 (1)(a)(i)&(ii) [↑](#footnote-ref-10)
11. Section 2 [↑](#footnote-ref-11)
12. Section 7 [↑](#footnote-ref-12)
13. The discharge criteria are in Section 72(4)(a)&(b) [↑](#footnote-ref-13)
14. Section 25A [↑](#footnote-ref-14)
15. The discharge criteria are in section 72[(4A)(a)&(b)] [↑](#footnote-ref-15)
16. Regina v Mental Health Review Tribunal for South Thames Region ex parte Smith [TLR 9th. December 1998] [↑](#footnote-ref-16)
17. Section 3(2)(b) and 37(2)(a)(i) [↑](#footnote-ref-17)
18. [1994] 2All ER 659; [1995] QB 60 [↑](#footnote-ref-18)
19. [1999] 2 WLR 28; [1999] 1 All ER 481 [↑](#footnote-ref-19)
20. At page 482 paragraphs a - b [1999] 1 All ER [↑](#footnote-ref-20)
21. At page 22 of the Moyle judgment. [↑](#footnote-ref-21)
22. At pages 19 -20 of the Moyle judgment. [↑](#footnote-ref-22)
23. Supra [↑](#footnote-ref-23)
24. TLR 10/02/2000 [↑](#footnote-ref-24)
25. LTL 14/01/2000 Document No: C7800683 [↑](#footnote-ref-25)
26. That is subject to Section 2, Section 3, Section 7, Section 37 or Section 25A. [↑](#footnote-ref-26)
27. Section 25A (4) (a) (b) and(c). [↑](#footnote-ref-27)
28. Section 25G (4) (a) (b) and(c). [↑](#footnote-ref-28)
29. [1994] 2 All ER at 683 [↑](#footnote-ref-29)
30. Page 20 of the judgment. [↑](#footnote-ref-30)
31. Section 67(1), Section 68(1), Section 68(2), Section 71(1), Section 71(2), Section 71(5) and Section 75(1)(a). [↑](#footnote-ref-31)
32. (1981) 4 E.H.R.R. 181; 1 B.M.L.R. 98 [↑](#footnote-ref-32)
33. (1979) 4 E.H.R.R. 387 [↑](#footnote-ref-33)
34. Personal knowledge of the writer gained in his capacity as MHRT legal member. [↑](#footnote-ref-34)