

Re-detention after a tribunal discharge – the last word?

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R v East London and the City Mental Health NHS Trust and another, ex parte von Brandenburg (aka Hanley) [2003] UKHL 58¹

House of Lords (13 November 2003). Lord Bingham; Lord Steyn; Lord Hobhouse of Woodborough; Lord Scott of Foscote; Lord Rodger of Earlsferry

A psychiatric patient who has been recently discharged from detention may be lawfully re-detained where the relevant ASW forms the reasonable and bona fide opinion that he or she has information not known to the tribunal that puts a significantly different complexion on the case.

INTRODUCTION

It is possible that the House of Lords has cleared up one of the most contentious questions in mental health law: in what circumstances may a patient who has been discharged by a Mental Health Review Tribunal ('MHRT') be re-detained under the 1983 Mental Health Act? If they have reached a definitive decision, Their Lordships also may have revived, at least in part, a ten-year old piece of reasoning.²

THE FACTS

This case concerned a male patient who was admitted to St Clement's Hospital in London on 15 March 2000. The Respondent NHS trust ('the Trust') was "the managers" of that hospital for the purposes of the Mental Health Act 1983 ('MHA 1983').³ Initially, the patient was held under MHA 1983, section 4, but later that day he was detained under section 2. The Approved Social Worker ('ASW') who applied for his admission under section was the Second Respondent to these proceedings.

The patient's detention under MHA 1983, section 2 was to expire at midnight on 11 April 2000.⁴ As was his right, the patient made a MHRT application on 22 March 2000, and the hearing took place on 31 March 2000.

Despite opposition from his Responsible Medical Officer ('RMO'), who gave both written and oral evidence, from a staff grade psychiatrist, and from the ASW, the MHRT decided to discharge

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the Home Department [see below for citations]

1 (2003) 3 WLR 1265. See also: David Hewitt, A 'significantly different complexion' to re-detention, *New Law Journal*, vol 153, no 7109, 19 December 2003, pp 1914-1915

2 *R v Managers of South Western Hospital, ex parte M* [1993] QB 683, per Laws J

3 MHA 1983, s 145

4 *Ibid.*, s 2(4)

the patient. However, in order that accommodation could be found for him in the community and a care plan be drawn up, the MHRT deferred discharge until 7 April 2000.⁵

In fact, the patient did not leave hospital. On 6 April 2000, the day before his deferred discharge was to become effective, he was detained under MHA 1983, section 3 on the basis of an application by his ASW supported by recommendations from his RMO and a second doctor (who had also provided a recommendation for his detention under section 2).

Because of the form these proceedings took, the court never investigated the Trust's primary case, which was that there had in fact been a change of circumstances between the time of the MHRT hearing, on 31 March 2000, and the patient's re-detention under section 3 on 6 April 2000. The Trust argued that, according to the evidence of the RMO and ASW, and of the clinical notes, the patient's condition had deteriorated over the relevant period. However, neither of the doctors who completed recommendations for his admission under MHA 1983, section 3 had specifically referred to the earlier MHRT decision or this deterioration in their medical recommendations, and the ASW had made no such reference in his application for admission under section 3.

THE PROCEEDINGS

The patient sought judicial review of the decision by the ASW to apply for his admission under MHA 1983, section 3 and of the Trust's decision to accept that application. As Lord Bingham was to state in the House of Lords,⁶ the "broad thrust" of the patient's claim was that the application and admission of 6 April 2000 were unlawful because there had been no relevant change of circumstances since the MHRT granted him a deferred discharge. The patient argued that, as a matter of law, it was incumbent upon those responsible for admission to establish that such a change of circumstances had taken place. The Respondents argued that a change of circumstances was not necessary in order for a patient to be re-detained, but that there had, in any event, been such a change on the facts of this case. (As set out above, the latter point was not considered by the Administrative Court or the Court of Appeal.)

(a) The Administrative Court

In the Administrative Court, Burton J. found that a change of circumstances was not a necessary requirement for the lawful re-detention of a patient who had been recently discharged by a MHRT.⁷ The Judge followed *Ex parte M*, in which Laws J. said:

"[T]here is no sense in which those concerned in a section 3 application are at any stage bound by an earlier tribunal decision. The doctors, social worker, and managers must, under the statute, exercise their independent judgment, whether or not there is an extant tribunal decision relating to the patient."⁸

However, Burton J. found that there was a range of public and private law constraints that operated in these circumstances, and that would provide protection for a patient in the position of Count von Brandenburg.

5 *Ibid.*, s 72 (1) and (3)

6 [2003] UKHL 58, para 4

7 *QBD, Burton J*, 23 May 2000; (2000) 3 CCL Rep

189; *The Independent*, October 2, 2000

8 *R v Managers of South Western Hospital, ex parte M* [1993] QB 683, at p 696

(b) The Court of Appeal

The Court of Appeal also found for the Respondents – the Trust and the ASW – but its reasoning was more specific than that of Burton J. in relation to how the public law constraints would operate⁹.

Although the decision of the Court of Appeal was unanimous, the judgments of Lord Phillips MR and Buxton LJ on the one hand and Sedley LJ on the other were quite distinct. It is necessary to consider them in some detail, for they were also at the heart of the decision in the House of Lords.

(i) *The speeches of Lord Phillips MR and Buxton LJ*

In a speech with which Buxton LJ. concurred, the Master of the Rolls rejected any formal requirement for a change of circumstances.¹⁰ However, he found that the professionals concerned were not free simply to ignore or over-rule a MHRT discharge.

The Master of the Rolls drew a distinction between two types of case. Where “a sensible period” had elapsed following discharge, he found that it was neither sensible nor necessary to require a change of circumstances. This was because the application for re-admission was likely to have been triggered by the patient’s behaviour in the community, a matter that would almost certainly constitute a change of circumstances. Therefore, he held that:

“[t]o require the professionals involved to investigate and attempt a comparison between the two sets of circumstances in order to decide whether or not there has been a relevant change of circumstances would not be helpful or even meaningful.”¹¹

However, according to the Master of the Rolls, a “very different position” would obtain where the re-admission application was made “within days” of the MHRT discharge. This would be especially so if, because the patient had remained in hospital, his “environmental circumstances” had not changed:

“In such a situation there is likely to have been [...] a difference of view between the patient’s [RMO] and the tribunal as to whether or not the criteria justifying detention were established. [...] [W]here such a conflict exists, it is the opinion of the tribunal that is to prevail.”¹²

In such a case, the Master of the Rolls found the ASW who made a fresh admission application could not be properly satisfied (as MHA 1983, section 13 required him/her to be satisfied) that “an application ought to be made”, unless he or she was aware of circumstances not known to the MHRT which invalidated its decision. Absent such circumstances, the Master of the Rolls said, the ASW’s admission application would be vulnerable to challenge.

Therefore, it will be seen that, when deciding how best to test the lawfulness of re-detention following a MHRT discharge, the Master of the Rolls (and Buxton LJ.) relied heavily upon a temporal distinction. However, it was not clear whether the Master of the Rolls sought to constrain the scope for doctors to recommend admission, or whether he wished to confine his comments to the position of the ASW applying for admission. Moreover, there was no clear indication of how the Master of the Rolls anticipated his temporal distinction to apply in practice – for example, would the critical point be reached after a day, a week, or a month?

9 [2001] EWCA Civ 239; [2001] 3 WLR 588. See also: David Hewitt, *Detention of a recently-discharged psychiatric patient*, JMHL, February 2002, edition no 6, pp 50–58

10 See discussion in Richard Jones, *Mental Health Act*

Manual, Sweet & Maxwell, eighth edition, 2003, para 1-048

11 [2001] EWCA Civ 239, para 30

12 *Ibid.*, para 31

(ii) *The speech of Sedley LJ*

For Sedley LJ, the case had taken “a peculiar and in some ways unsatisfactory shape”.¹³ The patient had succeeded in part, in that the Court of Appeal had not followed the broad statement of principle set out by Laws J. in *Ex parte M*;¹⁴ ultimately, however, he had failed in his challenge because the Court had declined to adopt the ‘change of circumstances’ test for which he had contended. Instead, “in the space between the two”,¹⁵ the Court of Appeal had interposed the set of private law and public law controls¹⁶ laid out by Burton J. and endorsed by the Master of the Rolls.¹⁷ Lord Justice Sedley endorsed this approach, but he went on to consider the precise requirements for a lawful readmission decision following a MHRT discharge:

- (aa) Where readmission came “hard on the heels of” a MHRT discharge, Sedley LJ. implied that, *de facto*, it would be necessary to show a change of circumstances. Any such necessity would be imposed by the twin public law requirements that decisions be made in good faith and that they have proper regard to the relevant facts.¹⁸
- (bb) Not only a recent MHRT decision, but also, often, one that was “not so recent” would have to be taken into account as a relevant fact.¹⁹
- (cc) The failure by those involved in the process of admission – by implication, both the doctors and the ASW – to take a recent or “not-so-recent” MHRT decision into account would “vitiating a subsequent decision to seek admission”,²⁰ even where they were unaware of that earlier decision.
- (dd) It would be unlawful for either an ASW or a recommending doctor to take steps towards a patient’s admission under MHA 1983, “if [s/he] believes that a mental health review tribunal will thereupon order the patient’s discharge”.²¹

Sedley LJ concluded by articulating the relevant principle as follows:

“[A] recent [MHRT] decision to discharge a patient, if the circumstances have not appreciably changed, must be accorded very great weight if the second decision is not to be perceived as an illicit over-ruling of the first. Put another way, there will have to be a convincing reason, in such a case, for re-admission. ... [Those concerned in a section 3 application] must have due regard to [the MHRT decision] for what it is: the ruling of a body with duties and powers analogous to those of a court, taken at an ascertainable date on ascertainable evidence.”²²

He said this was “particularly so” if the United Kingdom was to respect its obligations under the European Convention on Human Rights (‘ECHR’) (although he didn’t articulate precisely why this was so), but he found that “neither the Act nor the Convention inhibits the detention by a proper decision-making process of those who, although recently discharged, have deteriorated or whose mental well-being otherwise requires admission. The second decision must be approached with an open mind, but it is not necessarily going to be written on a clean slate.”²³

13 *Ibid.*, para 38

14 *See note 10*

15 [2001] EWCA Civ 239, para 38

16 Which might perhaps be called the ‘within days’ test

17 [2001] EWCA Civ 239, paras 31 and 32

18 *Ibid.*, para 39

19 *Ibid.*, para 41

20 *Ibid.*

21 *Ibid.*, para 40

22 *Ibid.*, paras 40 and 42

23 *Ibid.*, para 41

THEIR LORDSHIPS' JUDGMENT

In the House of Lords, the only substantive speech was delivered by Lord Bingham. He said that, though it was “narrow”, the question at issue in this case was one of “practical importance”.²⁴

First, Lord Bingham set out four over-riding principles.

(a) Over-riding principles

Lord Bingham noted that:

*“The common law respects and protects the personal freedom of the individual, which may not be curtailed save for a reason and in circumstances sanctioned by the law of the land.”*²⁵

This principle, he said, is “reflected in, but does not depend on” Article 5(1) of the ECHR. In fact, it may also be found in the Magna Carta of 1215, which states, in part:

*“No freeman shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land.”*²⁶

However, in his second overriding principle, Lord Bingham noted that in some circumstances the right to personal freedom might lawfully be limited on the basis of the health or safety of the patient or for the protection of others.²⁷ This was recognised by Article 5(1)(e) of the ECHR, which states:

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

[...]

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants.”

This, His Lordship said, was the underpinning for, *inter alia*, MHA 1983, sections 2, 3 and 4.

Third, a detained person had the right to take proceedings to test the lawfulness of his detention, as set out in Article 5(4) of the ECHR and provided for in the MHA 1983 by section 72(1)(which gave the MHRT a carefully conscribed power of discharge).

Fourth, the rule of law required that the decisions of legally constituted courts and tribunals should be respected. As the domestic courts had already held that the MHRT was a ‘court’ to which the law of contempt would apply,²⁸ it necessarily followed that “no one may knowingly act in a way which has the object of nullifying or setting at nought the decision of such a tribunal”.²⁹ Thus, those making applications for admission must give proper effect to tribunal decisions for what they decide. An application for admission could not be based upon mere disagreement.³⁰

Having completed his statement of over-riding principles, Lord Bingham turned to several important considerations.

24 [2003] UKHL 58, para 6

25 *Ibid.*

26 17 John, ch 39

27 [2003] UKHL 58, para 6

28 *Pickering v Liverpool Daily Post & Echo Newspapers plc* [1991] 2 AC 370 [1991] 2 WLR 513

29 [2003] UKHL 58

30 *Ibid.*

(b) Important considerations

Lord Bingham said that the exercise of clinical judgment – whether as to diagnosis or treatment (or, implicit in this, as to risk) – is rarely capable of scientific verification, so that “[t]here will often be room for a *bona fide* difference of professional opinion”.³¹ He noted the following words of the European Court of Human Rights in *Johnson v United Kingdom*:

*“It must also be observed that in the field of mental illness the assessment as to whether the disappearance of the symptoms of the illness is confirmation of complete recovery is not an exact science.”*³²

Further, Lord Bingham noted that where someone is suffering from mental disorder his/her condition might not be static. Thus:

*“It does not follow that a tribunal decision, however sound when made, will remain so. Other things being equal, the longer the period since the decision was made, the greater the chance that the patient’s mental condition may have altered, whether for better or worse.”*³³

Moreover, by reason of the statutory language at MHA 1983, section 72(1) – namely, that its focus must be on the mental disorder or mental illness (if any) from which the patient is “then” suffering – the MHRT must consider the patient’s condition at the time of the hearing (and cannot consider the validity of the initial decision to detain).³⁴ When determining this issue, and in considering matters such as health, safety and public protection, the MHRT “cannot ignore the foreseeable future consequences of discharge”. However, it:

*“[...] is not called upon to make an assessment which will remain accurate indefinitely or for any given period of time.”*³⁵

Lord Bingham said that, *ex hypothesi*, the cases that the MHRT was required to consider would be those of patients whom their doctors believed should continue to be detained. If it were otherwise, the doctors would themselves have ordered discharge (assuming that, like Count Von Brandenburg, the patients were not subject to restrictions). Therefore, a MHRT decision to discharge a patient from detention would probably imply that the opinion of the patient’s RMO had not been accepted. This might give a conscientious doctor room for pause, and s/he might wish to consider whether to revise his/her opinion. However, s/he “cannot be obliged to suppress or alter it”. This was because:

*“His [sic] professional duty to his patient, and his wider duty to the public, require him to form, and if called upon express, the best professional judgment he can, whether or not that coincides with the judgment of the tribunal.”*³⁶

This finding is, of course, central to the issue determined in the appeal. Lord Bingham found that a conscientious doctor, properly directing her/himself, is entitled to maintain his/her clinical opinion in the face of disagreement from the MHRT, and is entitled to complete a medical recommendation for admission based upon that opinion. This maintains the principle of clinical freedom, and relies upon a fundamental acceptance that doctors expressing clinical opinions

31 *Ibid.*, para 9

32 (1997) 27 EHRR 296, para 61

33 [2003] UKHL 58, para 9

34 MHA 1983, s 72(1)(a)(i) and (b)(i); *In re Waldron* [1986] QB 824, at p 846

35 [2003] UKHL 58, para 9

36 *Ibid.*

cannot be constrained from uttering those opinions, even where a Court has reached a different conclusion on the facts of the particular case.

The practical significance of this finding is that, in any consideration of the lawfulness of a readmission following an MHRT decision to discharge, then, absent bad faith or some other error of law, it shifts focus away from the doctors and towards the ASW.

The last of Lord Bingham's important considerations arose out of MHA 1983, section 13(1) and (2), which he said must be taken into account. They state:

“(1) It shall be the duty of an approved social worker to make an application for admission to hospital or a guardianship application in respect of a patient within the area of the local social services authority by which that officer is appointed in any case where he is satisfied that such an application ought to be made and is of the opinion, having regard to any wishes expressed by relatives of the patient or any other relevant circumstances, that it is necessary or proper for the application to be made by him.

“(2) Before making an application for the admission of a patient to hospital an approved social worker shall interview the patient in a suitable manner and satisfy himself that detention in a hospital is in all the circumstances of the case the most appropriate way of providing the care and medical treatment of which the patient stands in need.”

This led Lord Bingham to conclude:

“It is plainly of importance that the ASW is subject to a statutory duty to apply for the admission of a patient where he is satisfied that such an application ought to be made and is of the opinion specified.”³⁷

(c) Lord Bingham's conclusion

Although he put it differently himself, Lord Bingham's conclusion was that the appeal should fail. He reached this conclusion without relying in any way upon the ECHR.³⁸

In resolving the central question in the appeal, Lord Bingham set out the following test:

“[A]n ASW may not lawfully apply for the admission of a patient whose discharge has been ordered by the decision of a mental health review tribunal of which the ASW is aware unless the ASW has formed the reasonable and bona fide opinion that he has information not known to the tribunal which puts a significantly different complexion on the case as compared with that which was before the tribunal.”³⁹

In his judgment there was no broad obligation upon the ASW to make enquiries as to the existence of an earlier MHRT decision. Unless there were exceptional circumstances or the facts were already well known to him/her, an ASW would simply be obliged to enquire into the patient's background and medical history, and to consult those doctors who had pertinent information to give. This obligation was implicit in MHA 1983, section 13. If, by these means, the ASW learned of an earlier MHRT decision, s/he would no doubt wish to know the reasons for it. However, if s/he did not become so aware, s/he could not be subject to a more wide-reaching duty of enquiry. Thus, Lord Bingham rejected Sedley LJ's conclusion that an admission decision could be invalid even where those responsible were not aware of the earlier MHRT decision.⁴⁰

³⁷ *Ibid.*

³⁸ *Ibid.*, para 10

³⁹ *Ibid.*

⁴⁰ *Ibid.*, para 11

Lord Bingham set out three hypothetical examples in which the ASW – or the nearest relative – might lawfully apply for a patient’s re-admission under MHA 1983:⁴¹

- (a) The issue before the MHRT was whether the patient would harm himself if he were discharged. According to the evidence it heard, the MHRT discounted that possibility and discharged the patient. However, after the hearing, the ASW learns that the patient had previously made a determined attempt on his own life. This information was not known to the ASW or the doctors, or, therefore, to the MHRT.
- (b) The MHRT was persuaded by the patient’s assurance that he would continue to take his prescribed medication, and decided to discharge him where it would not have done so if that assurance had not been given. The patient subsequently refuses to take his medication (or indicates that he will refuse in future).
- (c) After a MHRT hearing, the patient’s mental condition “significantly deteriorates, so as to present a degree of risk or require treatment or supervision not evident at the hearing”. (This was essentially the position encountered by the professionals in *R (H) v Oxfordshire Mental Healthcare NHS Trust*,⁴² in which, having applied the Court of Appeal’s test in *Von Brandenburg*, Sullivan J held the patient’s re-detention to be lawful.⁴³)

On the issue of the reasons that must be given to a patient, Lord Bingham felt it was necessary to distinguish between the obligations of the relevant professionals. First, he dealt with the doctors:

*“Whilst it will doubtless be helpful if a medical recommendation identifies any new information on which it is based, a recommending doctor is not in my opinion required to do more than express his or best professional opinion.”*⁴⁴

However, because the decision of a MHRT should be respected, the duty imposed upon the ASW would be more onerous, if only slightly so:

*“[A] patient should be informed why an earlier tribunal decision is not thought to govern his case if an application for admission is made by an ASW inconsistent in effect with the earlier decision.”*⁴⁵

Nevertheless, even this duty would be a limited one, and the ASW could not be required to make a disclosure that would be harmful to the patient or others. (This might be so, for example, where the decision to re-detain was based on information obtained from a relative of the patient or from a doctor with whom s/he has “a continuing and trusting relationship”.⁴⁶) Therefore, “it may be necessary for the ASW to give reasons in very general terms”.⁴⁷ In setting out the limits of the obligations imposed, respectively, upon doctors and upon social workers, Their Lordships’ judgment remedies one of the uncertainties arising from the Court of Appeal judgment that was identified by Stern and Hewitt.⁴⁸

Lord Bingham said that the Court of Appeal might have allowed the patient’s appeal. Although he hadn’t managed to establish the ‘change of circumstances’ test, he had modified the “somewhat

41 *Ibid.*, para 10

42 [2002] EWHC Admin 465

43 See discussion in Richard Jones, *op cit.*, para 1-049

44 [2003] UKHL 58, para 12. This view finds an echo in Kristina Stern and David Hewitt, *Re-admission under the Mental Health Act following discharge by a*

Mental Health Review Tribunal, JMHL, July 2002, edition no 7, pp 169–178

45 [2003] UKHL 58, para 12

46 *Ibid.*

47 *Ibid.*

48 Kristina Stern and David Hewitt, *op cit.*, p 174

inflexible rule that had been applied” at first instance (which had been borrowed from Laws J in *Ex parte M*⁴⁹). However, Lord Bingham added that the patient “has gained little by his appeal to the House”.⁵⁰

Finally, Lord Bingham noted that neither the Administrative Court nor the Court of Appeal had been able to consider the facts of this case, and to resolve certain disputes between the parties. However, Their Lordships had seen certain untested witness statements, which, according to Lord Bingham, suggested that the decision to re-detain this patient would have fallen within the test set out here, and *would* therefore have been lawful.

DISCUSSION

(1) Practical lessons

The decision of the House of Lords in *Von Brandenburg* certainly gives practitioners more clarity. It is probably now true to say that where a patient has been discharged by a MHRT, his/her subsequent re-detention is lawful where:

- (a) the ASW has information not known to the MHRT which puts a significantly different complexion on the case as compared with that which was before the MHRT; and
the ASW informs the patient in broad terms of this conclusion (subject of course to the overriding duty on the ASW not to make any potentially harmful disclosure);

or

- (b) having fulfilled the MHA 1983, section 13(2) duty, the ASW is unaware of the tribunal discharge.

There is no requirement that either the recommending doctors’ or the hospital managers’ decisions be scrutinised to identify any similar analysis.

It follows that it is now more important than ever that ASWs and RMOs attend MHRT hearings, and that they stay for the decision and reasons, so that they know what information was – and, perhaps more importantly, what information can be said not to have been – known to the tribunal. It is equally important that tribunals do not delay in providing full written reasons for their decisions. Ideally, although this is not required by the relevant rules,⁵¹ they should provide such information before any discharge takes effect. In this way, everyone concerned in a MHRT decision may be helped to understand the factors that have, and have not, been taken into account.

(2) Changing tests

In holding as they did, Their Lordships considerably refined the tests set out by the Master of the Rolls and Sedley LJ. in the Court of Appeal.

In future, what will matter is whether the information that is thought to militate in favour of re-detention was known to the tribunal; and if it wasn’t known, whether it puts a significantly different complexion on the case.

⁴⁹ See note 8

⁵⁰ [2003] UKHL 58, para 13

⁵¹ MHRT Rules 1983, rr 24(1) and 33(d)

Information that puts a significantly different complexion on the case may relate to events that occurred *before*, or to a state of affairs in being *at the time of*, the MHRT hearing. If it is to justify re-detention, and if that re-detention is to be lawful, the sole requirements are that the information was not known to the tribunal and that it justifies admission. This is a necessarily practical test, which is likely to be resolved by recourse to clinical opinion. However, ultimately, it will be for the ASW, and not the recommending doctors, to be satisfied that the test is made out.

(3) A ghost at the feast

There was a ghost at this particular feast. It lurked unheralded over the proceedings, and has now disappeared without a trace – or *almost* without trace.

Readers may remember, if only for its dramatic facts or breathless title, the case of *H v Ashworth*,⁵² in which the High Court imposed and then removed a stay on a patient's discharge, which had been granted by an exasperated tribunal on five minutes' notice. Eventually, the Court of Appeal rejected the first instance finding that *von Brandenburg* would not apply – and a patient might be re-sectioned without more – if the relevant professionals believed on substantial grounds that the MHRT had erred in law. The Court also explained how its own test in *von Brandenburg* should be applied. Dyson LJ. said:

*“[...] when considering whether to re-section a patient who has only recently been discharged by a tribunal, the question that the professionals must ask themselves is whether the sole or principal ground on which they rely is one which in substance has been rejected by the tribunal. If it is, then, in my view, they should not re-section. In deciding whether the grounds on which they rely are ones which have been very recently rejected by the tribunal, they should not be too zealous in seeking to find new circumstances.”*⁵³

This test closely resembles the one established by Their Lordships in *von Brandenburg*, and both parties relied heavily upon it in their submissions in that case.

(4) Changed circumstances?

It is ironic, perhaps, that, some 10 years and two significant cases later, the test advanced by Laws J. in *Ex parte M*⁵⁴ has for practical purposes been revived insofar as it concerns the obligations of the recommending doctors (but not, of course, the ASW). Laws J. said:

“[MHA 1983,] section 13 imposes a duty on an approved social worker to make a section 3 application in the circumstances which that section specifies; the duty is not abrogated, or qualified, in a case where there has been a recent tribunal decision directing discharge; if it were to be abrogated or qualified, section 13 would say so. That being the case, the hospital managers must be obliged to consider on its merits an application made by the approved social worker in pursuance of his or her duty, and the existence of a recent tribunal decision can no more fetter this obligation than it can the social worker's own express duty under section 13.”

52 *R v Ashworth Health Authority and others, ex parte H : R v (1) Mental Health Review Tribunal for West Midlands and North West Region (2) London Borough of Hammersmith and Fulham (3) Ealing, Hounslow and Hammersmith Health Authority, ex parte Ashworth Hospital Authority* [2002] EWCA Civ 923.

See also: David Hewitt, *Challenging MHRT decisions*, *Solicitors Journal*, vol 146 no 14, 12 April 2002, pp 338-9

53 [2002] EWCA Civ 923, para 59

54 See note 8

CONCLUSION

The House of Lords gave judgment in *von Brandenburg* on the same day it gave judgment in the case of *R (on the application of IH) v Secretary of State for the Home Department*⁵⁵. There was a certain symmetry to that. When the Court of Appeal gave judgment in *von Brandenburg* it also gave judgment in *R (on the application of K) v Camden and Islington Health Authority*⁵⁶. In both *IH* and *K* the applicant had sought judicial review of a failure to satisfy the conditions of a deferred conditional discharge. In both cases this was because of refusals by community psychiatrists to provide supervision and/or treatment in the community.

In *IH* and *von Brandenburg* the House of Lords was faced with mirror images of the same question: to what extent should the professional judgment of psychiatrists be constrained by the conclusions of a MHRT? In answering that question, Their Lordships focused resolutely upon the true extent of the tribunal's jurisdiction: in each case, the question for a MHRT is whether, on the facts at the time of the hearing, a patient's continuing detention is justified. The tribunal may not determine what treatment should be provided in the community or when re-admission can properly take place, nor can it in any way constrain the clinical judgment of doctors who might recommend admission in future. To the extent that MHRT decisions may be seen effectively to constrain re-admission, their relevance is to the question of the *appropriateness* of an application.

In this way, Their Lordships may have reconciled the role of professionals with that of the MHRT, at least for the time being.

⁵⁵ [2003] UKHL 59

⁵⁶ [2001] EWCA Civ 240