Casenotes

Executive Action and Convention Compliance? A Risk Unrecognised by the House

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R (MH) v (1) Secretary of State for Health (2) Mental Health Review Tribunal
House of Lords, 20 October 2005
[2005] UKHL 60, [2005] Mental Health Law Reports 302

The House of Lords' interest in the impact of the Human Rights Act 1998 on mental health matters, evidenced by the number of cases it has heard[2], has continued with the case of *MH*. The two central issues arising were:

1. Whether automatic reviews of the lawfulness of detention by a court (in practice the Mental Health Review Tribunal) are required in relation to s2 detentions where the patient lacks capacity to apply for a Tribunal.

2. Whether a review is required pending the outcome of an application to displace a nearest relative (which extends the period of the s2 detention).

The House, in a judgment given by Baroness Hale, held that the statutory scheme was compatible with the requirements of the Convention, and in so doing overturned two declarations of incompatibility granted by the Court of Appeal, and restored the first instance decision of Silber J.

Facts

MH, an adult with severe learning disabilities, had lived with her mother, who, it was said, refused assistance from the authorities which might have been to MH's benefit. On 31 January 2003, following concerns about MH's behaviour, which was said to be escalating, and her mother's

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2 *R (B) v Ashworth Hospital Authority [2005] Mental Health Law Reports 47; R (IH) v Nottinghamshire Healthcare NHS Trust [2004] Mental Health Law Reports 51; R (Munjaz) v Mersey Care NHS Trust [2005] Mental Health Law Reports 276; R v (1) Tower Hamlets Health Care NHS Trust and (2) Snazell ex p Von Brandenburg [2004] Mental Health Law Reports 44; Ward v Commissioner of Police of the Metropolis and another [2005] Mental Health Law Reports 128;* see also *Anderson, Doherty and Reid v The Scottish Ministers and the Advocate-General for Scotland [2001] Mental Health Law Report 192* (Privy Council – considering the Mental Health (Public Safety and Appeals) (Scotland) Act 1999), and cases relating to criminal matters, *R v Antoine [2000] Mental Health Law Reports 28, R v Drew [2003] Mental Health Law Reports 282,* and *R v H [2003] Mental Health Law Reports 209.*

ill-health and ability to cope, police and a social worker employed by Telford and Wrekin BC executed a warrant granted by the Magistrates Court under s135(1) *Mental Health Act 1983* after the mother refused to allow a mental health assessment to be carried out. MH was admitted to hospital for assessment under s2 of the 1983 Act, and a plan was formulated to place her under guardianship under s7 of the Act and admit her to a suitable residential setting. Guardianship can proceed only if the nearest relative does not object[3]: as MH's mother did object, an application was made to the County Court on 27 February 2003 pursuant to s29 of the Act for her displacement as nearest relative on the ground that her stance was unreasonable. The effect of the making of the application was that MH's detention under s2 was extended until the displacement proceedings, including any appeal, were completed[4].

A patient detained under s2 may apply to a Mental Health Review Tribunal[5], which may order release; however, the application has to be made within 14 days of the section being put in place[6]. Rule 3(1) of the Mental Health Review Tribunal Rules 1983 states that "An application shall be made to the tribunal in writing, signed by the applicant or any person authorised by him to do so on his behalf." MH made no application: it seems to have been felt that she did not have the capacity to make an application or to instruct solicitors. However, solicitors acting on her behalf subsequently did ask that the Secretary of State for Health use her powers under s67 of the 1983 Act to refer the case to the Tribunal, which was done. On 26 March 2003, a Tribunal upheld MH's detention. There had also been an attempt by MH's mother to use her powers of discharge under s23 of the Act, but this was barred by the Responsible Medical Officer under s25 of the Act, who certified that MH would be likely to act in a manner dangerous to herself or others if discharged, reflecting the statutory test which prevents a discharge by the nearest relative taking effect.

In the displacement proceedings, an interim displacement order was made on 1 August 2003, following which MH was admitted into guardianship; she had already been placed in accommodation on 21 July 2003, as a matter of leave under s17 of the Act. The final displacement order was made in July 2004, but an appeal from that was not completed until May 2005[7]: had no interim displacement been made, the s2 detention could have remained in place until that time.

The decision of Silber J – 22 January 2004, [2004] Mental Health Law Reports 155

The first instance decision was given whilst the displacement proceedings were still at a relatively early stage. The judge split the case into a number of distinct issues, each of which he answered against the arguments for MH.

Firstly, was s66(1) of the 1983 Act incompatible with Art 5(4) of the European Convention on Human Rights in relation to a s2 patient? This was a general challenge, which rested on the fact that the statutory right was limited, as it was a right given to the patient only (and so not exercisable by the nearest relative) and was limited to a right to make an application within 14 days. It was argued that this could not comply with Art 5(4), which gives a general right of application to a court. The solution for this defect, it was suggested, would be an automatic reference so that there would

3 *s11(4) of the 1983 Act.*

4 *s29(4).*

5 *s66(1).*

6 *s66(2).*

7 *see Lewis v Gibson [2005] Mental Health Law Reports 309.*

always be a review of the lawfulness of detention by a competent court. Silber J dismissed this argument, resting on the fact that the right in Art 5(4) is in terms a right to "take proceedings" to determine the lawfulness of detention, which does not encompass the need for an automatic review; this point was, he felt, fortified by the contrast with the language of Art 5(3), which requires that those arrested in criminal proceedings have a right to be "brought promptly before" a judicial official, which does not rest on an application being made. The judge also relied on the fact that the s2 detention was usually of relatively short duration.

The second argument for MH was specific to her status as a patient felt to be without capacity to instruct lawyers or take proceedings: it was that those without capacity must be provided with an automatic review. Reliance was placed on *Megyeri v Germany* (1992) 15 EHRR 584. In this case, a patient detained on grounds of mental disorder had not been represented by a lawyer in proceedings to review the lawfulness of his detention, in essence because he had not appointed one: the European Court of Human Rights found that there had been a breach of Art 5(4) because M had not been able to present his case, which had compromised the fairness of the proceedings, an essential component of judicial proceedings. The Court emphasised that special procedural safeguards may be called for to protect those not fully capable of acting for themselves on account of their mental disorder, and on the facts that meant that M should not have been required to take the initiative in obtaining legal representation. Applying that principle, the argument for MH was that the special procedural safeguard required was an automatic review.

Silber J did not accept this: his first reason was a repetition of the conclusion that Art 5(4) did not use the language of review, but provided a right to take proceedings; his second reason was that any need for special procedural safeguards had to depend on the context, which was a short period of detention and so not one requiring an automatic review.

The next argument for MH related to the fact that there had been an extension of the s2 detention by virtue of the application to displace the nearest relative: in such a case, there is no statutory provision allowing the patient to make an application to a Tribunal to consider whether detention remains justified. However, Silber J felt that the answer to this problem was that the County Court involved in the displacement proceedings was bound to exercise its role in accordance with Art 5 and so not allow any excessive delay. As such, there was no defect in the statutory scheme of the 1983 Act.

The fourth argument developed from the third by noting that the aim of the displacement proceedings on the facts was not to secure MH's further detention under s3 of the Act (detention for treatment) but to allow her to be transferred into guardianship: in this context, it was argued that the criteria for detention could not be made out and so any detention breached Art 5 of the Convention. Silber J rejected this argument on the basis that the criteria for detention were indeed made out (in light of the fact that a barring order had been issued to prevent MH's release) and the use of guardianship was akin to setting up a regime for release into the community which was permissible under Art 5 as long as it was not unreasonably delayed. The mechanism to ensure that there was no unreasonable delay was the duty of the County Court to act expeditiously, thereby ensuring either that the guardianship was put in place or the patient released.

All these arguments were revisited on appeal. There was one other challenge which was not pursued on appeal, which related to the Tribunal's refusal to consider the s25 dangerousness criteria on an application in relation to a s2 patient. Silber J held that an analysis of s72 of the Act,

which governs the powers of the Tribunal, indicated that it was not bound to consider those criteria in relation to a s2 patient, although it could do so in its discretion.

The decision of the Court of Appeal – 3 December 2004, [2004] Mental Health Law Reports 345

The Court of Appeal reached a radically different conclusion to Silber J in relation to the arguments as to compatibility, and granted two declarations of incompatibility under s4 of the Human Rights Act. By that time, the displacement order had been granted, although the appeal from that was pending.

Buxton LJ gave the first judgment. He dealt with two broad issues, which were the position of a patient without capacity detained under s2 and the position of a patient (whether with or without capacity) detained by virtue of the extension of a s2 order on account of the commencement of displacement proceedings. In relation to the first issue, he noted that the conclusion reached by Silber J resulted in an imbalance between those who were able to apply for a tribunal hearing and those who were not. He then posed the question whether it could have been the intention of those who framed the language of the Convention to produce this imbalance: this he answered by concluding that clearly it could not have been their intention. When this was analysed in terms of the language of the Convention, on which Silber J had relied, the reference in Art 5(4) to the right to "take proceedings" could not be construed as being intended to exclude from the protection of Art 5 a person who was unable to take proceedings because of their lack of capacity. This was so even though, as Silber J had noted, Art 5(3) used the language of being brought before a judge: Buxton LJ made the point that just because a criminal detainee must have their case considered by a judge, that does not mean that the state is not required to assist a detainee under other heads who was unable to assert the right to take proceedings. He made the point that the language of the Convention is not to be construed in an overly legalistic fashion: it is designed to set out guiding principles only, which then have to be applied to the facts of the particular case.

Two points made by way of preamble supported the conclusion that there were problems in the statutory scheme. The first was that the short period of detention under s2 – which Silber J felt justified the lack of a review for a patient without capacity – could not be relied on because it proved too much: if it was acceptable in such a case, it would also be acceptable for a patient with capacity; but in Convention terms, a period of 28 days without a review raised obvious concerns about compliance with Art 5(4). Secondly, Silber J's reliance on the County Court was also misplaced because it was not reviewing the lawfulness of detention (and so was not sitting as a court carrying out an Art 5 task) and the patient had no standing in the proceedings (but could only be a witness)[8].

As to the solution to the problem identified with the statutory scheme, Buxton LJ noted that the unjustified differential treatment of s2 patients without capacity meant that a mechanism was required whereby those cases could be referred to a Tribunal. Such a power was missing from the Mental Health Act 1983; although there are wide powers of interpretation provided by s3 of the

8 *This was because CCR Ord 49, r12(3)(b) at the time provided that anyone other than the patient could be made a party to proceedings. This was amended by the Civil Procedure (Amendment) Rules 2005 (SI 2005/352): see Lewis v Gibson [2005] Mental Health Law Reports 309, the appeal from the displacement proceedings in the MH case, for guidance on the procedural steps which should be taken to ensure that the patient is able to be made a party.*

1998 Act – which allow the courts to bend over backwards to secure a meaning compliant with the Convention – these cannot be used to read into the statute a provision which is simply not there. Accordingly, it was necessary to grant a declaration of incompatibility under s4 of the 1998 Act, namely that the 1983 Act required an amendment to make it compatible with the Convention. The other members of the Court of Appeal delivered concurring opinions.

Having dealt with the first issue, Buxton LJ turned to the second question raised, namely the continued detention of a patient under s2 by virtue of ongoing displacement proceedings. This was felt to be more straight-forward: as there was no judicial supervision of the lawfulness of detention during this period, there was a breach of Art 5(4). The proceedings in the County Court, on which Silber J had relied, were inadequate as displacement did not deal with the lawfulness of detention and the patient was not a party[9]. It was also held that the use of judicial review or habeas corpus would also be inadequate because they were not suited to consider the merits of the case for detention in the way that a Mental Health Review Tribunal could: review by the High Court of a decision to continue to detain a patient is not the same as the power of a specialist court to take a decision on the merits. As this also reflected a gap in the statutory regime, the remedy was a further declaration of incompatibility. The other members of the Court concurred with this.

The use of s67[10] of the 1983 Act

There was one matter on which Silber J and the Court of Appeal agreed, which was that the intervention by the Secretary of State to refer the case to a Tribunal was not a matter which could provide compliance with the Convention. This is because the principle enumerated in Convention case law, and adopted in jurisprudence under the Human Rights Act 1998, is that access to a judicial body which is controlled by the Executive is not adequate for the purposes of Art 5[11].

The decision of the House of Lords – 20 October 2005, [2005] Mental Health Law Reports 302

Baroness Hale (described by Buxton LJ in his judgment in the Court of Appeal as "a judge of unparalleled authority in the field of mental health law"[12]) disagreed with the Court of Appeal's construction of the statutory scheme. She gave the only speech, the rest of their Lordships agreeing with her.

Dealing first with the question of whether Art 5(4) required an automatic review, Baroness Hale adopted the reasoning of Silber J: "The short answer," she said at para 22, "is that Art 5(4) does not require that every case be considered by a court. It requires that the person detained should have the right to 'take proceedings'." She then supported this, as had done the judge, by contrasting this with the language of Art 5(3) and commenting that "The difference between a right to "take proceedings" and a right to "be brought promptly before a [court]" must be deliberate."

9 *At least not at that time: see preceding footnote.*

10 *'The Secretary of State may if he thinks fit, at any time refer to a Mental Health Review Tribunal the case of any patient who is liable to be detained or subject to guardianship (or to aftercare under supervision) under Part II of this Act.'*

11 *Addressed below.*

12 *At para 12; the context was Buxton LJ's reliance on comments from Hale LJ as she then was in the case of R (S) v City of Plymouth [2002] Mental Health Law Reports 118, [2002] 1 WLR 2582 [39] that "applications under s29 have to be dealt with quickly" to make the point that they had not been dealt with quickly on the facts of MH's case.*

Dealing with the obvious riposte that a right to "take proceedings" has to be practical and effective[13], Her Ladyship conceded that this was a "powerful argument" but felt that it lead to the conclusion not that a reference to a Tribunal was required but that "every sensible effort should be made to enable the patient to exercise that right if there is reason to think that she would wish to do so". And this is achieved by the statutory regime, since hospital managers are required to take such steps as are practicable to ensure the patient understands his or her right of access to a tribunal and how to apply, including giving advice on how to contact the Tribunal and solicitors[14], and the rules governing applications to tribunals are part of a user-friendly regime which allows an application to be made on behalf of the patient by anyone authorised to do so (relatives, social workers, nurses and advocates), subject only to the patient meeting the undemanding threshold of capacity to authorise that person to act. In addition, it was to be noted that although relatives (including the nearest relative) have no independent right of application to a tribunal, relatives and friends can ensure that the case is put before a judicial authority, including by stimulating a reference by the Secretary of State under s67 of the Act (as had happened on the facts). For these reasons, it was held that s2 of the Mental Health Act 1983 was not itself incompatible with Art 5(4) by not having an automatic review of those felt to be without capacity to apply.

The position of patients who continued to be detained as a result of the commencement of displacement proceedings was said to reveal a more unsatisfactory legal situation. This was because the commencement of displacement proceedings extends the s2 detention – which is meant to last for only 28 days at most before either lapsing or being replaced by a longer-term power of detention for which the admission criteria are more stringent and which brings fresh rights to apply to a tribunal (and referrals if no application is made). However, Baroness Hale held that it was not something which required a declaration of incompatibility because the regime can be operated compatibly with the Convention if the County Court makes a swift displacement order resulting in a s3 detention (or s7 guardianship), which gives a right to apply to a tribunal, or refuses to displace, thereby ending the detention; further, if the displacement proceedings drag on, Art 5(4) is not violated if the Secretary of State refers the case to a tribunal pursuant to her discretion, which must be exercised compatibly with the Convention and is subject to judicial review.

Effect of the Ruling and Need for Action by Others

In assessing which of the contrasting rulings is objectively better, it is worth noting, first, that Baroness Hale's final comment in relation to the s29(4) situation was that the while the section was not itself incompatible with Art 5(4) "the action or inaction of the authorities under it may be so"[15]. This comment is equally applicable to the case of the patient without capacity detained under s2: the section was held not incompatible because of the steps that could and should be taken, and so failures in this regard could breach the Convention.

13 *A long established principle of Convention jurisprudence – see as a good example Airey v Ireland (1979) 2 EHRR 305, in which it was determined that the right to a fair trial in civil proceedings might well require the provision of legal aid in order to be effective, even though the Convention makes express reference to legal aid only in the context of criminal proceedings.*

14 *Section 132 of the Act, which imposes a statutory duty to give advice, as supplemented by the Code of Practice issued under s118 of the Act, which includes guidance that hospitals should ensure that advice is given by people with appropriate training and that information provided includes material on how to apply to the Mental Health Review Tribunal, the availability of legal aid and information on solicitors.*

15 *Para 32.*

However, this final comment also demonstrates an obvious problem in the reasoning process Her Ladyship had adopted in reaching her conclusion. The starting point was, as it had been with Silber J, that the language of Art 5(4) involves a deliberate choice of a right to "take proceedings" and so automatic referrals could not be required: but the solution adopted in the s29 situation does not involve the patient taking proceedings whereby the lawfulness of their detention is tested. Rather, it involves the County Court being swift in determining whether to displace the nearest relative, or it involves the Secretary of State for Health making a reference under s67. Equally, in the case of s2 and the patient without capacity, Her Ladyship relies on the s67 power or on the power of others to sign an application form to a Tribunal on behalf of a patient who has not actually made an application to a Tribunal but may wish to do so. So these instances of why the statutory scheme is compatible with the Art 5(4) right to "take proceedings" all involve situations where the patient does not in fact commence proceedings but where a Tribunal is spurred into action by others to review detention or the County Court takes action in proceedings which the patient cannot commence.

The analysis of the problem in the Court of Appeal was more compelling, particularly in light of the established principle that there is no compliance with Art 5(4) if Executive action is required. This principle, as noted above, was accepted by both Silber J and the Court of Appeal, but it is not mentioned by the House of Lords. It is a principle which has been accepted by the domestic courts, and so it was behind a declaration of incompatibility that was not appealed by the government: in *R (D) v Home Secretary* [2003] Mental Health Law Reports 193, [2003] 1 WLR 1315, a declaration was granted that "the absence of any power in s74 of the Mental Health Act 1983 or any other provision enabling a "court", for the purposes of Art 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms, to order the release of a prisoner: (a) who is sentenced to a discretionary life sentence; and (b) who is transferred to hospital under s47 of the 1983 Act and made subject to a restriction direction under s49 of the 1983 Act; and (c) who is subsequently the subject of a recommendation under s74(1)(b) of the 1983 Act; and (d) who is discharged from hospital but where the recommendation is accepted by the Secretary of State and he therefore remains in hospital, is incompatible with Art 5(4) of the Convention". The problem in this case was that the release of a life sentence prisoner from his or her sentence of imprisonment has to be a matter for a court (in practice the Parole Board[16]) to meet the requirements of Art.5(4). However a life sentence prisoner transferred to hospital, in relation to whom a Tribunal could only recommend release[17], had a statutory right to access the Parole Board only through a decision of the Home Secretary to allow such access. The Home Secretary had in fact announced in a Parliamentary answer[18] that such prisoners would be allowed access to the Parole Board via his power of referral just as if they had a right to apply under statute. But this declaration of policy, together with the availability of court action by way of judicial review, was held to be insufficient to comply with Art 5(4). Although permission to appeal was granted by the High Court, it appears that the result was accepted, and the law was then changed in the Criminal Justice Act 2003[19].

The principle in *D* that control by the Executive of access to a court breaches Art. 5(4) is a development of the principle that Executive action before release (ie after a court decision) is *not* sufficient for Art 5(4).

16 *Normally under s28 of the Crime (Sentences) Act 1997, though on the facts of the case, due to the date on which D had been sentenced, his access to the Parole Board was by virtue of s34 of the Criminal Justice Act 1991, even though it had been repealed.*

17 *Section 74 of the Mental Health Act 1983*

18 *Hansard HC Debates 20 June 1994, col 9*

19 *Section 295 added s74(5A) to the 1983 Act to provide that a transferred prisoner in hospital subject to a restriction direction could apply to the Parole Board and if the Board directed his release the restriction direction would cease to have effect on his release.*

An example of this from the European Court of Human Rights which also involved s74 of the 1983 Act is *Benjamin and Wilson v UK* [2003] Mental Health Law Reports 124, (2003) 36 EHRR 1. The Court found a breach of Art 5(4) in relation to transferred life-sentence prisoners who had been granted the status equivalent to those detained under a hospital order[20], since the consideration of their case by the Tribunal involved only the making of a recommendation for release under s74. It noted that the requirement of the Convention is that there be a court-like body which has the power to determine lawfulness of detention and order release[21].

Accordingly, intervention by authorities of the state is not sufficient for compliance with Art 5(4). This calls into question Baroness Hale's reliance on the availability of the s67 reference. In the s29(4) situation, the other matter on which she relied was the duty of the County Court to act speedily, but that does not deal with the point that the proceedings in the County Court do not answer the question of the lawfulness of detention. It may be that this is a matter which is answered implicitly (the more so now that the patient can be a party to the proceedings): but, again, there is authority from the European Court of Human Rights that what is required is a court which answers the question directly. To give a recent example to illustrate this point, in *Mathew v Netherlands* [2006] 1 Prison Law Reports ..., the issue was whether the conditions of detention in a prison in Aruba breached Art 3 of the Convention; the Dutch government pointed out that the criminal appeal court had taken account of the conditions of detention and had reduced the sentence accordingly, and so they argued that Mr Mathew was no longer a victim of a breach of the Convention, having had a remedy in the criminal proceedings. The Court held that Mr Mathew remained a victim, notwithstanding the action of the domestic court, because it had not been the function of that court to make findings as to whether there was a breach of Art 3. So by analogy, the County Court does not perform the function of the Mental Health Review Tribunal and so does not meet the requirements of Art 5(4).

In the case of the patient without capacity detained under s2, the principle that intervention by the Executive is not sufficient – which disallows reliance on s67 – must apply equally to the reliance placed by Baroness Hale on the duties of hospital managers to make sure that patients know of their rights of application. The managers, after all, have custody of the patient[22] and are clearly acting on behalf of the state in that regard. The whole point of the guarantees set out in the Convention, it must be remembered, is the view that the best way to ensure that fundamental liberty rights are protected is via the separation of powers doctrine. Pursuant to this, issues of liberty are for the courts and access to the courts must be direct. This is because of the risk that Executive action will be less than ideal because of problems ranging from politically-inspired deliberate policies to prevent people enjoying their fundamental rights through to lack of resources despite the best will, with problems of indifference somewhere in the middle.

This is why the analysis of Buxton LJ is better. His starting point is the obvious one that the Convention aims to set out guiding principles only: the expansive reading adopted by the European Court[23] makes this plain. That in turn means that not much can be read into the specific language "take proceedings": the question to be asked is what principle is guaranteed, to which the

20 *The now-abolished "technical lifer" status described in R (IR) v (1) Dr G Shetty (2) Home Secretary (No 2) [2004] Mental Health Law Reports 130*

21 *The Court cited long-established case law in relation to life sentence prisoners, Weeks v UK (1987) 10 EHRR 293 and Singh v UK (1996) 22 EHRR 1, and also DN v Switzerland [2001] Mental Health Law Reports 117,*

22 *Section 6 of the 1983 Act.*

23 *Including the need for steps to be taken to make rights practical and effective, referred to above.*

answer is access to a court to assess the lawfulness of detention. As did Buxton LJ, the rhetorical question to be posed is whether this guarantee should not apply in the case of someone who cannot actually "take proceedings", in part because their mental disorder (the very basis for their detention) means that they cannot actually do so.

It is true that Buxton LJ does not in terms deal with the difference in the language of Art 5(3) and Art 5(4), beyond saying that the fact that a criminal detainee must have their case considered by a judge does not mean that the state is not required to assist a detainee under other heads who was unable to assert the right to take proceedings. There are at least two further points which could have been made. First, there is the difference in context: the right to liberty combined with the presumption of innocence means that depriving someone of their liberty on the basis of arrest on suspicion of having committed an offence requires court intervention to assess the need for detention. This indeed is reflected in the language of Art 5(1)(c), which provides for arrest on reasonable suspicion "for the purpose of bringing him before the competent legal authority": there is no similar requirement in the other grounds of detention in Art 5(1), making plain that criminal arrest simply has a different context. It may also be that the question of bail is more susceptible of a summary determination, making it appropriate to have the language of s5(3).

Secondly, the existence of the Art 5(3) right in relation to a criminal arrestee does not exclude the Art 5(4) right of the same detainee, and so using the language of Art 5(3) in the Art 5(4) context amounts to using apples in a debate about the quality of oranges.

For these reasons, the Buxton position, as agreed to by the other members of the Court of Appeal, seems to have the benefit of principle. Baroness Hale's position, particularly in relation to patients without capacity, comes close to this in any event, since she allows applications to be made on behalf of the patient: this is not the patient taking proceedings, this is proceedings being taken on behalf of the patient. But since her argument rests on a view that it is the taking of proceedings by the patient which is the right guaranteed – even though the compatibility she sees in the existing scheme comes from proceedings not commenced by the patient – it would be far better to conclude that the Convention in fact requires that automatic references be provided, for reasons which reflect the principle underlying the Court of Appeal's position, namely that the important right guaranteed is a court decision, not access to a court to those who choose to participate in proceedings.

The Practical Application of the Ruling in Relation to Patients Without Capacity

It may be thought that the practical problem with the Court of Appeal's position, and the strength of the House of Lords' ruling, is that a declaration of incompatibility does not change the law, but rather amounts to a recognition of the unsatisfactory nature of the situation which is then left to political will to solve[24]. In other words, rather than wringing hands, Baroness Hale has set out a position which allows practical steps to be taken to ensure that there are Tribunal proceedings

24 *Just as, for example, the inability of patients to change their nearest relative has been recognised and accepted for several years (see FC v UK [1999] Mental Health Law Reports 174, 7 September 1999, in which the Court referred to correspondence from the government indicating that the matter would be resolved as part of a review of mental health legislation). See also JT v UK [2000] Mental Health Law Reports 254, 30 March 2000.*

which will examine the position of all patients caught in either of the two situations described.

It is true that the practical effect of the House of Lords' ruling is that there should be an increase in the number of cases put in front of Tribunals by s67 references and by applications made on behalf of patients: but there is nothing in the granting of a declaration of incompatibility which prevents those exercising public powers from doing what they can to ensure that Convention rights are met so far as possible pending a change in the legislation.

In relation to incapacitated s2 patients, s132 of the 1983 Act provides that hospital managers must ensure that patients know "what rights of applying to a Mental Health Review Tribunal are available to him": the same information must be provided to the nearest relative (except where the patient request otherwise) (s132(4)). Since Baroness Hale relied on the s67 power and the right of patients to authorise others to make applications for them, the information provided under s132 must presumably include these methods as well. Given that the use of formal powers over a patient is a good indication that the patient is not there voluntarily, could not this be taken as an indication that the patient authorises the making of an application to a Tribunal on their behalf, satisfying the low threshold of capacity to provide such authority, since it is an indication that the patient does not wish to be in hospital and would presumably want to question their detention by the available mechanism, namely the Tribunal? Further, since the s67 power is seen as a method of ensuring that there is compliance with Art 5(4), and the hospital managers have a power to alert the Secretary of State to the possible need to make a reference, and there is a general administrative law principle that those who have a power must consider whether to use it, it must fall to them to consider whether or not in every case of a patient under s2 who has not made or had made an application to the Tribunal, there should be a request to the Secretary of State to use the s67 power.

The net effect of this ought to be that every s2 patient should have their case placed before a Tribunal. As for the situation where a s2 detention is extended by s29 proceedings, either the s29 proceedings must be dealt with speedily or the Secretary of State must make a referral to the Tribunal, and a mechanism must be in place to allow s67 references to be made wherever displacement proceedings drag on for any reason.

Since the mechanisms identified by the House of Lords were ones within the requirements of Art 5(4), they would have applied in any event, given the duty of public bodies to act compatibly with the Convention, even if the ultimate conclusion was that a declaration of incompatibility was required because of the structural problem that reliance on Executive action is not sufficient to ensure that there is compliance with Art 5(4). But the fact is that practical problems exist: County Courts do not always deal with displacement proceedings speedily, and it is unlikely that the mechanisms identified by Baroness Hale are being used in all cases when they should be used. The likely corollary of the conclusion of the House of Lords is that further judicial review litigation will be needed to establish the natural consequences of their decision. This reinforces the practical need for an amendment of the legislation to ensure that there are automatic references, which is what the declarations of incompatibility should have accomplished (at least eventually). This in turn demonstrates that the Court of Appeal's approach was preferable: reliance on action by the Executive is not a safe way to ensure that Art 5(4) is met because of the practical problems which this may encounter. It is much better to have a legal requirement to make a reference than rely on hospital managers and the Secretary of State putting into place, as a matter of their discretion, mechanisms which cause references to be made.