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# Is There a Burden of Proof in Mental Health Cases?

*Jeremy Cooper*<sup>1</sup> and *Howard Davis*<sup>2</sup>

## Background Positions

This article examines the concept of the burden of proof in the context of the First-tier Tribunal (Mental Health). Whereas it is well established that in an adversarial system the burden of proof in a case will always rest with the party bringing the action, the position in an inquisitorial system is far less clear. At least 4 positions have been competing for supremacy on this issue for over 30 years as follows:

1. There is no burden of proof in any jurisdiction that adopts an essentially inquisitorial approach to the conduct of its cases. This position was first articulated by Lord Denning MR in 1974 in the case of *R v National Insurance Commissioner ex parte Viscusi*<sup>3</sup>, stating:

*“The proceedings are not to be regarded as if they were a law suit between opposing parties. The injured person is not a plaintiff under a burden of proof.”*<sup>4</sup>

2. Following French legal principles there is only one rule of evidence, that of ‘weight’.<sup>5</sup> Under this approach the tribunal simply attaches to every piece of evidence such weight as it thinks fit and does not consider itself bound by the strict rules of evidence that apply for example in the criminal courts. This approach is classically expressed in the procedural rule governing the conduct of mental health tribunals which permits the tribunal:

*‘To admit evidence whether or not the evidence would be admissible in a civil trial in England and Wales’.*<sup>6</sup>

Under this interpretation, the parties are expected to work together with the tribunal panel to reach an adjudication characterised by Baroness Hale as “a cooperative process of investigation in which both the claimant and the [state as respondent] play their part.”<sup>7</sup> According to Baroness Hale:

*“If that sensible approach is taken, it will rarely be necessary to resort to concepts taken from adversarial litigation such as burden of proof.”*<sup>8</sup>

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1. *Professor Jeremy Cooper, Judge of the Upper Tribunal.*

2. *Dr Howard Davis, Reader in Law, Bournemouth University.*

3. [1974] 1 WLR 646.

4. *Ibid* at 651.

5. *It is interesting to note that evidence is not a discrete topic*

*of jurisprudence in French legal education.*

6. *Tribunal Procedure (First-tier Tribunal) (Health Education and Social Care Chamber) Rules 2008 Rule 15 (2).*

7. *Kerr (AP) v Department for Social Development (Northern Ireland)* [2004] UKHL 27.

8. *Ibid* at para. 63

The 'overriding objective' of all proceedings in the First-tier Tribunal (which includes mental health) and set down in all the post-2007 First-tier Tribunal Rules of Procedure is for the tribunal to deal with cases 'fairly and justly'. Prescriptively, the parties must 'help the tribunal to further the overriding objective'.<sup>9</sup> In the case of the mental health jurisdiction, this is to be achieved by the parties inter alia 'agreeing to co-operate with the Tribunal generally', 'avoiding delay', 'avoiding any unnecessary formality' and 'seeking flexibility in the proceedings'. A strict burden of proof could potentially conflict directly with such facilitation.

3. A third and slightly different position concerning the burden of proof in an inquisitorial tribunal has been adopted in the First-tier Chamber (Immigration and Asylum). On a formal level the Chamber adopts the general principle, based in international law, that the burden of proof in an asylum seeker application rests with the person seeking asylum. But as the very nature of asylum often means that the person seeking asylum has no documentation or proof of other status, no proof of age, and no proof of the reasons they left their own country that might enable them to discharge this burden of proof, this may prove to be an unattainable chimera. Recognising this to be a fundamental problem in its jurisdiction, and one that would arise specifically as a consequence of adopting the standard burden of proof, the Chamber has ingeniously evolved its own test. An applicant must show a 'reasonable degree of likelihood' that he or she has a well-founded fear of being persecuted if obliged to return to their country of origin. In this context the Chamber accepts that the duty to ascertain the relevant facts to establish the answer to this question is shared between the applicant and the tribunal.
4. In all matters it is for the applicant to prove his or her case and the respondent to rebut it, with the tribunal's case management role limited to the exercise of its powers to 'fill the evidential gaps' left by the parties. This position has been significantly nuanced by the Court of Appeal in the recent case of *R (on the application of AN) V Mental Health Review Tribunal*<sup>10</sup> when the Court queried the value of the formal language of 'burdens' and 'standards' in circumstances where, as in most mental health hearings, risk is being evaluated:<sup>11</sup>

*"Proof in the phrase 'standard of proof' and 'probabilities' in the phrase 'balance of probabilities' are words which go naturally with the concept of evidence relating to fact, but are less perfect with evaluative assessments. That is why the courts have started to speak of the 'burden of persuasion.'"*

The deliberate replacement of the adversarial word 'proof' with the more flexible and subtle concept of 'persuasion' may to some be no more than semantic sophistry. It nevertheless marks an attempt to use language to wrestle away a concept that sits increasingly uncomfortably in an inquisitorial context.

### **What is the Position of the First-tier Tribunal (Mental Health) concerning the Burden of Proof in Mental Health Cases?**

So which of these various approaches to the burden of proof is the most appropriate to the conduct of the First-tier Tribunal (Mental Health)?

Given the importance of the issue there is surprisingly scant authority or guidance in mental health case law on the burden of proof in mental health cases. Let us begin with the statute.

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9. *Supra* fn 6 at 2 (2).

10. [2006] MHLR 59

11. *Ibid* at para 100.

## Statute

The wording of s 72 of the *Mental Health Act 1983* is clear as to what the tribunal must do if it is not satisfied as to certain facts concerning the patient's current mental state, the availability and appropriateness of treatment for the patient in hospital, and any risks associated with their discharge. The tribunal, if not satisfied that the facts are established on the balance of probabilities<sup>12</sup>, *must discharge the patient*. The section is however silent as to where the burden of proof lies. Prior to 2002, the statute was taken to require the patient to be discharged only if the tribunal was satisfied that at least one of the criteria for detention was not made out – a position that (using the term only as a useful shorthand) imposed a “burden of proof” on the applicant that was then held to be incompatible with Article 5 (4) Schedule 1 *Human Rights Act 1998*<sup>13</sup> leading subsequently to the first Remedial Order in England, passed subsequent to the *Human Rights Act 1998* s. 10.<sup>14</sup>

## Case Law

Despite this statutory change, the idea that there remains a place for a burden of proof in mental health tribunal cases is still current. In *Re X's Application for Judicial Review*<sup>15</sup> for example (albeit a Northern Ireland case), it was said that one of the “salient principles” governing the court is that the “burden” or “onus” of proof (both terms are used) is on the “party seeking to justify detention”. This case was decided under *Mental Health (Northern Ireland) Order 2004* which, as with section 72 MHA 1983, had been amended to remove a burden of proof on the applicant. The most important English case concerning the burden of proof in mental health cases is that of *R (AN) v Mental Health Review Tribunal*.<sup>16</sup> Although this case was essentially concerned with the standard of proof in mental health cases, reference was also made in passing by Munby J (as he was) (at first instance), to the general burden of proof in mental health cases in the following terms:

“104. I recognise, ....that the Strasbourg Court held in *Reid v UK* [2003] *Mental Health Law Reports* 226, (2003) 37 EHRR 211 at para [73] that the burden – what the Court called the “onus” – lies on the detaining authority to establish all the relevant criteria, including in particular whether the patient is “amenable to treatment”. And the onus on the detaining authority is.. to establish those criteria ‘on the merits’: *HL v UK* [2004] *Mental Health Law Reports* 236 para [137].”

Significantly however, Munby J went on to add the following gloss to this statement:

“106. I accept....that the burden lies on the detaining authority to establish the relevant criteria. I do not enter into jurisprudential debate, and the point is, if you like, semantic but, in common with Lord Bingham, Keene LJ, Kennedy LJ and Sullivan J, I prefer in this context not to use the expression ‘burden of proof’. The more accurate and appropriate expressions are either ‘onus’ – the word which, as I have said, was used by the Strasbourg court in *Reid v UK* at para [73] – or ‘persuasive burden’.”

As stated above, the Court of Appeal in this case added a further layer of subtlety concerning the difficulties establishing a burden of proof in mental health cases. First the Court of Appeal stressed that the tribunal is not only considering if the case for detention is made out, it is also discharging a further

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12. *R (AN) v MHRT* [2006] MHLR 59

13. *R (H) v Mental Health Review Tribunal for North and East London Region* [2002] QB 1, 9.

14. *Mental Health Act 1983 (Remedial) Order 2001* (SI 2001/3712).

15. [2008] NIQB 22,

16. [2005] MHLR 56

and important public protection function, which might well conflict with the patient's wish for discharge and the regaining of his or her freedom:

"73. ... the mental health context is very different from other situations where individual liberty is at stake. The unwarranted detention of an individual on grounds of mental disorder is a very serious matter, but the unwarranted release from detention of an individual who is suffering from mental disorder is also a very serious matter. ...."

74. .... One who is suffering from a debilitating mental illness and in need of treatment is neither wholly at liberty nor free of stigma ... It cannot be said, therefore, that it is much better for a mentally ill person to 'go free' than for a mentally normal person to be committed. Furthermore the consequences that may flow from the release of a person suffering from mental disorder include not only a risk to the individual's own health and safety (e.g. self-harm, even suicide), but also a risk of harm to other members of the public."<sup>17</sup>

The implication of Lord Justice Richards' comments, as cited above, is that it is ultimately disingenuous to use concepts such as 'burden of proof' in mental health cases when the issues engage a set of competing rights that ultimately need to be balanced one against the other. The point had already been recognised by Stanley Burnton, J. who described the procedure of a Mental Health Review Tribunal as being "to a significant extent inquisitorial".<sup>18</sup>

## What does the Intervention of the European Court of Human Rights contribute to the Debate?

This concern with the burden of proof derives from the impact of Article 5 (4) and Article 6, scheduled Convention rights in the *Human Rights Act 1998*. The declaration of incompatibility in *R (H) v Mental Health Review Tribunal for North and East London Region*<sup>19</sup> led to statutory amendment which by requiring a tribunal to be satisfied that the detention conditions were satisfied, might be thought to have created sufficient change so that further requirements relating to the burden of proof would no longer be significant; but *R (AN) v MHRT* (discussed above) suggests that this is not the case.

Despite case law acknowledgment that tribunals pursue an inquisitorial approach,<sup>20</sup> burden of proof concepts continue to play a role in English law in mental health cases. The need for compatibility with Article 5 (4), as interpreted by the European Court of Human Rights in *Reid v United Kingdom*<sup>21</sup>, is the explanation for this continued reference to the burden of proof which is said to fall on the detaining authority. The case concerned Mr Reid, a Scottish man who claimed that the requirement that he had the burden of proof to establish that his psychopathic disorder was not treatable was a breach of his Article 5 rights under the Convention.<sup>22</sup> The Strasbourg Court ultimately found in Mr Reid's favour.

"Whilst there is no Convention case law ruling on the onus of proof in Art 5(4) proceedings, it is implicit in the case law that it is for the authorities to prove that an individual satisfies the conditions for compulsory detention."

17. *Supra* f/n 12 per Richards LJ.

18. *R (Ashworth Hospital) v MHRT* [2001] EWHC Admin. 901, paragraph 16.

19. *Supra* f/n 13; see text to f/n 13, *supra*.

20. See remarks of Burnton J at *supra* f/n 18.

21. (2003) 37 EHRR 9.

22. *Ibid*

This statement is clearly inconsistent with the inquisitorial approach and the co-operative procedure and principles which mental health tribunals, under statutory rules, are bound to adopt. We do not believe that *Reid* can continue to carry the weight of being the principal authority justifying the imposition of a burden of proof on the procedures of Mental Health Review Tribunals for four reasons.

- 1) In *Reid* the Court of Human Rights was dealing with a statutory provision which, as in *R (H) v Mental Health Review Tribunal for North and East London Region*<sup>23</sup>, required the court (in the form of the Sheriff) to discharge a patient only when satisfied that the detention criteria were not made out. Consequently the case need not be taken to be controlling authority for tribunals which, under the reformed law, are now required to satisfy themselves that the detention criteria are made out.
- 2) It is true that (in the words quoted above) the Court refers to an onus of proof resting on the authorities. However, the reason for the finding of a violation in this case was that the law, as it then was, placed a burden of proof on the applicant which, in respect of the domestic law requirement that the patient's condition be treatable, seemed, on the facts, to determine the outcome of the case. The requirement that there must not be a burden of proof placed on the applicant that could determine the outcome of a case to his or her detriment does not imply that there must be a burden placed on the authorities. It is equally consistent with the argument of this article that the concept of a burden of proof, wherever placed, is at odds with the proper approach to its procedure by a First Tier Tribunal (Mental Health).

*Reid* appears to turn primarily on the undesirability of imposing a burden of proof on a patient, rather than a lack of any burden on the detaining authority. And in our view the circumstances of a mental health case are just too complex and the consequences of a wrong decision too grave, for so simple a formula to apply. It is no co-incidence that when mental health review tribunals were introduced in England and Wales in 1983 to adjudicate mental health detentions in compliance with the Article 5 requirements, an inquisitorial as compared to an adversarial setting was selected as the chosen model. Indeed it is not difficult to provide an example of circumstances where a strict requirement that the burden be on the detaining authority *as applied to discharge*, would give rise to an unacceptable and/or dangerous outcome. Take for example the case of the patient who presents at the tribunal as floridly psychotic, and furthermore appears to be likely to a danger both to himself and potentially to the public, if discharged. If the hospital fails for whatever reason to provide any evidence in support of his detention other than the fact that he is detained, and his lawyer argues for his immediate discharge on the grounds that the detaining authority has failed to discharge the burden of proof, is this an outcome the Strasbourg Court had in mind when it made its ruling in the *Reid* case? This seems somewhat unlikely.

At paragraph 72 the Court said:

*“It is true in this case that there was considerable medical evidence before the Sheriff concerning the applicant’s condition and that the Sheriff made clear and unequivocal findings as to the existence of a serious mental disorder and the risk of the applicant re-offending. These conclusions were reached on an assessment of the evidence as a whole and the burden of proof does not appear to have played any role.”*

It seems clear from this paragraph therefore that the Strasbourg Court was prepared to accept that

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23. *Supra* f/n 13.

crucial aspects of a mental health case did not require any specific burden to be discharged, and that its concerns regarding burden were limited to the issue of treatability.

- 3) Reid is principally a case about treatment and diagnosis rather than the issue of risk. The need for a burden of proof was said to be “implied” from the requirement, in *Winterwerp v The Netherlands*<sup>24</sup> and *Johnson v United Kingdom*<sup>25</sup>, that the criteria for detention, enunciated in the former case, have “reliably to be shown”.<sup>26</sup> In *Winterwerp*, however, it is only the first of three criteria, the diagnostic requirement that the applicant must be of “unsound mind”, that must be reliably shown.<sup>27</sup> The point has a principled justification which is to ensure that there is “objective medical expertise” before the tribunal. In neither *Winterwerp* nor *Johnson* does the “reliably...shown” requirement, expressly apply to the risk judgment that the mental disorder must be of a kind or degree “warranting” compulsory confinement. The elision in Reid of the diagnostic and the risk criteria in respect of what must be “reliably shown” goes further, it is submitted, than is required or justified by the Strasbourg authorities it purports to follow.

It is true that in later cases, such as *Varbanov v Bulgaria*<sup>28</sup>, although “reliably be shown” still relates only to the diagnostic element of the *Winterwerp* criteria, the Court went on to require that it must also “be shown” that the deprivation of liberty is “necessary” in the circumstances. There is nowhere in this drafting an express requirement that a burden of proof be placed on the authorities. The problem dealt with in *Varbanov* was the need for the tribunal to consider other options to detention. Other cases on the same point deal with the need for the tribunal to have access to expert evidence.<sup>29</sup>

The point is significant because the judgment of risk (from which the need for detention flows) is not susceptible to the same degree of expert guidance as the diagnostic issue. English courts accept that this is a matter that involves discretionary judgment and is not susceptible to objective proof.<sup>30</sup> The proper disposition of a judicial body determining a person’s liberty by reference to the risk to themselves or others seems to depend on context. Thus the need for the authorities to prove the need to detain a recalled prisoner, in the statutory context of an “extended sentence”<sup>31</sup>, can be contrasted with the imposition of an implicit burden of proof on the applicant in the statutory

24. (1979-1980) 2 E.H.R.R. 387

25. (1999) 27 EHRR 296.

26. *Reid v United Kingdom* (2003) 37 EHRR 9, paragraph 70.

27. *Supra* f/n 24, para 39. The Court, in *Reid*, attributes the quotation: “if it can reliably be shown that he or she suffers from a mental disorder sufficiently serious to warrant detention” to *Winterwerp* (paras 39-40) and *Johnson*, *supra* f/n 25, para 60. Both those latter cases, in fact, only predicate “reliably be shown” on the diagnostic fact of the patient being of unsound mind.

28. *Varbanov v Bulgaria* app 31365/96 judgment of 5 October 2000, para 46, citing *Litwa v Poland* (2001) 33 EHRR 53..

29. See *Putrus v Germany* app 1241/06 admissibility decision of 24 March 2009, page 8.

30. *R (Henry) v Parole Board* [2004] EWHC 784, para 12 (a non-mental health case): “in assessing risk the Board is making a judgment about an issue that is inherently incapable of proof”. The words were adopted by Mumby J in *R (AN) v MHRT* [2005], *supra* f/n 16. Of course this does not mean that the assessment should be arbitrary. The Court of Appeal, in *AN*, accepted that assessing risk, in a mental health context, involves “judgment, evaluation and assessment”; applying a standard of proof (a balance of probabilities) to this process has some, albeit limited, relevance in respect of ensuring the sufficiency of a tribunal’s reasoning – *R (AN) v MHRT*, *supra* f/n 12 paras 98 and 104.

31. *R (Sim) v Parole Board* [2003] EWCA Civ 1845..

context of a life sentence or sentence “at Her Majesty’s pleasure”.<sup>32</sup> As the passage by Richards LJ in *R (AN) v MHRT*<sup>33</sup>, quoted above, indicates, the seriousness of the consequences which can follow an unwarranted release put Mental Health Review Tribunals (as they then were) into a different position from courts or some other bodies dealing with the right to liberty. The focus on the issue of risk explains why the statutory context of a Mental Health Review Tribunal (now a First-tier Tribunal (Mental Health)) is inquisitorial, based upon a cooperative procedure rather than one in which there should be an implicit burden of proof on the hospital.<sup>34</sup>

In *Reid* the Court of Human Rights accepted there was ample evidence on the issue of risk for the Sheriff to make up his own mind without reference to the authorities discharging a burden of proof. The violation of Article 5 was established when the Sheriff, faced with a division of expert evidence on treatability, decided that issue by reference to an implied burden of proof placed on the applicant. In these particular circumstances the Court of Human Rights saw the burden of proof placed on the applicant, as being capable of “influencing the decision”.

- 4) *Reid* influences English law because section 2 *Human Rights Act 1998* requires United Kingdom courts to take the judgments of the Court of Human Rights “into account”. This has been taken to mean that normally (even if reluctantly) the general principles laid down by Strasbourg, as distinct from their decisions on the facts of particular cases, should be followed.<sup>35</sup> A recent decision of the Supreme Court, on the compatibility of criminal convictions based “solely or decisively” on hearsay evidence admitted on the basis of statutory conditions, reaffirms that even where there are clear, constant and reiterated principles, coming from Strasbourg, these need not be followed where it appears that particular aspects of national law have not been properly appreciated or understood and where the Strasbourg analysis is less than fully convincing.<sup>36</sup> There is some relevance in this formulation to the burden of proof issue.

Firstly, both hearsay and burden of proof involve the right to a fair hearing, relevant to both Article 6 and Article 5 (4). Here the Court of Human Rights has frequently said that it has only a reviewing role, concerned with the overall fairness of the process, rather than authority to lay down particular procedural requirements: these are left to national law.

Secondly, the disputed legal principle in both situations does not come from a careful and principled analysis by the Strasbourg Court. Regarding the burden of proof, it comes from an “implication” which is merely asserted and then adopted, without further argument, in later cases.

Finally, *Reid* is a Chamber decision and not a focused and deliberate decision of the Grand Chamber. It is therefore submitted that there is no compelling need to follow *Reid* on the need for

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32. *R v Lichniak* [2002] UKHL 47. In *Comerford v United Kingdom* app 29193/95 Commission decision 9 April 1997, the Commission accepted that releasing only if satisfied as to safety was not incompatible with Article 5. In *Henry v Parole Board*, *supra* f/n 30, it was accepted, provisionally, that an implicit burden on the applicant (serving a sentence at Her Majesty’s pleasure) to prove it was safe to release on licence was not incompatible with Article 5.

33. See text accompanying f/n 17.

34. In Scotland there is an express statutory requirement that

the risk issue, in respect of those detained in a secure hospital following a criminal prosecution, is determined on the basis of a burden of proof on the Scottish Ministers, *Anderson v Scottish Ministers* [2001] UKPC D5, see paragraph 56.

35. See, *R (Ullah) v Special Adjudicator* [2004] UKHL 26, paragraph 20; in *SSHD v JJ* [2007] UKHL 45, Lord Bingham, at paragraph 13, made the point that Strasbourg is “laying down principles and not mandating solutions to particular cases”.

36. *R v Homcastle* [2009] UKSC 14.

burden of proof in mental health tribunal cases. Following *R Horncastle*<sup>37</sup> it is suggested that here we have an arguable exception to the normal approach to section 2 of the Human Rights Act. This argument, of course, is an invitation for a more principled decision, properly sensitive to the legal context in the UK, by the Court of Human Rights in Strasbourg and ultimately by the Grand Chamber<sup>38</sup>.

### What is the Impact of Article 5 of the European Convention on Human Rights on Burden of Proof arguments in the First-tier (Mental Health) Jurisdiction?

The previous section suggests that *Reid* need not be taken as compelling authority for the view that, at least on the issue of risk, there is a burden of proof on the detaining authority. A tribunal should be able to form its own judgement, based on an inquisitorial and cooperative procedure, on whether the conditions for continued detention have been made out without recourse to any notion of a “burden”. The question then arises whether, independently of *Reid*, there is any requirement for a burden of proof based on Article 5 (4) or Article 6 of the Convention.<sup>39</sup>

Article 5 stipulates the grounds on which a person can be deprived of his or her liberty and also imposes a condition, under Article 5 (4), that effective review of the continuing grounds for deprivation should be available within a reasonable time. A patient’s initial detention must be for a purpose compatible with Article 5 (1) (e) and following a “procedure prescribed by law”.<sup>40</sup> This means not only that the procedure must meet the general Strasbourg conditions of “accessibility” and “foreseeability” but, also, that the initial deprivation must not be arbitrary. The procedure for original detention may depend on the circumstances. At the very least, it will require the opinion of a medical expert, although it will not necessarily require a hearing with a judicial character at the time of the initial detention.<sup>41</sup> These requirements should also apply to the reviewing procedures under Article 5 (4).

At the heart of Article 5 (4) is the applicant’s right to apply to an appropriate judicial body<sup>42</sup> and much of the case law relates to the effective availability of this right under national law. The body need not be a court in the narrow sense of the term but must follow judicial procedures. It has been said that these need not include the same guarantees as required under either the civil or the criminal aspect of Article 6. Nevertheless the tendency is to stress the similarity of the procedural requirements under both Articles.<sup>43</sup> The Court of Human Rights has made it clear on numerous occasions that it is for the States – the signatories to the Convention – to establish the procedure that satisfies Article 5 (4). Its role is as a reviewing court intended primarily to ensure that national procedures, considered overall, meet the appropriate standard of fairness. The position is the same with Article 6: the Court in Strasbourg is not

37. *Ibid.*

38. *It is unclear at the time of writing (April 2011) what position the Supreme Court will adopt if its invitation to the Grand Chamber, to accept that the statutory law on hearsay is Convention compatible, is rejected.*

39. *Mental health tribunals, by deciding on a person’s right to liberty, are determining their “civil rights”, thus engaging Article 6, Aerts v Belgium (2000) 29 EHRR 50, paragraph 69, confirmed in a mental health context in Reinprecht v Austria (2007) 44 EHRR 39, paragraphs 50 and 51. The general principle is that Convention Articles should be in harmony with each other.*

40. *See, for instance, Storck v Germany (2006) 43 EHRR 6..*

41. *Though such a hearing can be incorporated into the initial process, Varbanov v Bulgaria, supra f/n 28, paragraph 58.*

42. *The “cornerstone guarantee of Article 5(4)” – see Rakevich v Russia app 58973/00, judgment of 28 October 2003.*

43. *Shtukaturov v Russia App 44009/05, judgment of 27 March 2008, “the ‘procedural’ guarantees under Article 5 (1) and 5 (4) are broadly similar to those under Article 6 (1)”, paragraph 66.*



there to require a particular set of procedures necessary to guarantee a fair hearing.

Frequently the Court has stated that the procedures under Article 5 (4) must be “adversarial”<sup>44</sup>. In the context of Article 6, adversarial has been said to mean “the opportunity for the parties to have knowledge of and comment on the observations filed or the evidence adduced by the other party”<sup>45</sup>. Issues of significance are that the hearing need not be by a regular court, but must be conducted by a body which has a judicial character in the sense of being properly independent of the executive and the parties<sup>46</sup>. It must be capable of deciding the issues relevant to Article 5(1), such as, in mental health context, the *Winterwerp* criteria. The hearing must have a judicial character in the sense that there must be “equality of arms” between the parties (a “distinct procedural right that can be subsumed within the general principle of adversarial proceedings”<sup>47</sup>). The forms of procedure may vary, but what is important is that the body is able to order the applicant’s release.

In relation to determining civil rights there is, absent *Reid*, little if any evidence that an adversarial procedure requires there to be a burden of proof placed on the authorities (as distinct from it not being on the applicant). In mental health cases such as *Keus v Netherlands*<sup>48</sup>, for instance, the Court refers to the “fundamental adversarial principle” of an article 5 (4) hearing. The case turns, however, on the applicant’s access to a judicial authority for a review of his detention. Burden of proof is not an issue. The evidence was that a judge would have ordered release “if he had accepted [the applicant’s] arguments”<sup>49</sup>; it cannot be implied from that statement that a burden of proof must be on the authorities. *Shtukaturov v Russia*<sup>50</sup> deals with the procedure for determining legal capacity and the consequences of determinations of that issue for the applicant’s liberty. The case is dealt with under Article 6 but with reference to Article 5. The Court found a breach of the “principle of adversarial proceedings enshrined in Article 6(1)”. Again the trigger for the finding is the lack of an opportunity to be seen and heard<sup>51</sup>.

The Court also requires, in respect of Article 5 (4), that there must be safeguards for the applicant which are appropriate to the kinds of loss of liberty involved.<sup>52</sup> There is no reason to suppose that such safeguards require the judicial body to proceed on the basis of a burden of proof. The inquisitorial approach, based on a proper attention of the judicial authority to the applicant’s case but with a necessary awareness of the issues of risk with which it must deal, can provide such safeguards. Indeed a combination of the procedural flexibility,<sup>53</sup> the encouragement of the active role of the panel, and the power of the panel to admit any relevant evidence even though not admissible in a court<sup>54</sup>, provide a strongbox of powers available to a tribunal to ensure adherence to these safeguards.

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44. This was recently confirmed by the Grand Chamber in *A and others v UK* (2009) 49 EHRR 29. ‘Thus the proceedings must be adversarial and must always ensure “equality of arms” between the parties’ (paragraph 204). This was not a mental health case, but the same principle has been asserted in such cases, including *Reid*, *supra* f/n 21, para 67 (see cases in the next paragraph).

45. *Ruiz-Mateos v Spain* (1993) 16 EHRR 505, paragraph 63.

46. *De Wilde et al v Belgium (No 1)* (1979-80) 1 EHRR 373, paragraph 78; independence is an express provision of Article 6(1).

47. Harris, O’Boyle & Warbrick *Law of the European Convention on Human Rights* 2nd edition 2009 Oxford: OUP p 191.

48. (1991) 13 EHRR 700.

49. *Ibid*, paragraph 28.

50. [2008] MHLR 238.

51. *Ibid* para 73. There was also a violation of Article 5(4) based on the general lack of access to a court under Russian law (see paragraph 123).

52. *Winterwerp*, *supra* f/n 24, paragraph 57; *Lexa v Slovakia (no. 2)* judgment of 5 January 2010, paragraph 67.

53. See *Rules supra* f/n 6, Rule 5.

54. *Ibid*, Rule 15 (2).

## Conclusion

The First-tier Tribunal (Mental Health) is expected, under its formal Rules, to operate a procedure which is relatively informal, co-operative, flexible and is not subject to delay. Any requirement of the law that this procedure must also embody a burden of proof placed on the authorities is likely to create tensions with these Rules' objectives. It is accepted that it is for the authorities to prove the objective, diagnostic question of whether or not the claimant is of "unsound mind" and there must be convincing, professionally validated, evidence of this before the Tribunal. The key issue to be determined in most mental health tribunals, however, concerns an assessment of the risk that is attached to discharging a patient from section, and on that issue it is not at all clear that any burden of proof rests with the detaining authority.

In so far as a place for a burden of proof is still accepted by the English courts as a necessary part of the procedure in these cases, the legal authority for this continued acceptance is not particularly strong. Examination of the Strasbourg case law suggests that an insistence on a burden of proof is incorrect law. At its strongest the argument states that the applicant must not be under a burden of proving that the conditions for his or her continued detention no longer exist. But this proposition is consistent with the view that placing a burden of proof on the detaining authority, is also inappropriate for these procedures. And in any event it relates to a statutory formulation of the questions a tribunal must ask itself which no longer exists.

In conclusion, *Reid v United Kingdom* need not, in our view, be treated as a precedent binding on English courts on the question of burden of proof in establishing the lawfulness of a patient's detention. Likewise there is nothing in the case law on Article 5 (4) and Article 6 which, independently of *Reid*, requires a burden of proof to be an essential part of an adversarial procedure in this context.