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

*David Mylan**

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

High Court (Queen's Bench Division)

Latham J

Judgment Given 21st December 1999

TLR 10th February 2000

The Facts

The Applicant Stephen Moyle was a Patient detained under section 37/41 of the Mental Health Act 1983 ("the Act") having pleaded guilty on the 21st November 1990 to an offence of unlawful wounding. His legal categorisation[1] had originally been one of mental illness, which had been amended to mental illness and psychopathic disorder for a time and had reverted to mental illness in 1995.

He applied for a Mental Health Review Tribunal ("MHRT") on 23rd June 1998 and was at that date and throughout the time up to his MHRT asymptomatic as a consequence of medication.

The medical evidence before the MHRT was that:-

"his condition was such as would not make it appropriate for him to be liable to be detained were he in the community[2]. However .....were he to stop taking the medication , he would quickly relapse, and that after any relapse, it would be more difficult to produce satisfactory control of his symptoms with drugs."[3]

The Psychiatrists giving evidence were all agreed that:

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

It was submitted to the Tribunal on behalf of the applicant that the admission and discharge criteria should mirror each other so that if it was not appropriate for him to be admitted to detention from the community in his present condition, then he must be discharged. The applicant himself gave an

* *Solicitor, Saxmundham, Suffolk. Mental Health Review Tribunal Legal Member*

1 *Section 1(2) Mental Health Act 1983.*

2 *The question of whether a "condition" is such as to warrant detention is a legal question that should be answered following receipt of medical evidence. Had the Psychiatrists who gave the evidence had the benefit of the Moyle Judgment when making their assessment, the assessment of detainability might have been different.*

3 *Paragraph 2 of the Judgment.*

assurance to the MHRT that were he to be discharged he would continue with the medication. The MHRT rejected the legal submission and did not accept the patient's assurance, as:-

"they could not be satisfied that his mental illness was not of a nature which made it appropriate for him to be liable to be detained in a hospital for medical treatment, nor that he would not be a danger to himself or others were he to be discharged".

The applicant sought judicial review of the MHRT's decision on the basis that it was unlawful because the MHRT had misdirected itself as to the law to be applied to an application for discharge, and irrational, in that the medical evidence was only capable of supporting the conclusion that he should be discharged.

The Law

When a MHRT considers an application from a patient or a reference of a patient detained under either an order for admission for treatment[4] or a hospital order[5] with or without a restriction order[6] it **must** order the discharge of the patient if satisfied that either:-

"he is not then suffering from mental illness, psychopathic disorder, severe mental impairment or from any of those forms of disorder of a nature or degree which makes it appropriate for him to be liable to be detained in a hospital for medical treatment"[7]

or

""that it is not necessary for the health or safety of the patient or for the protection of other persons that he should receive such treatment".[8]

The MHRT also has a general discretion (other than in the case of restricted patients) to discharge the patient when it considers it appropriate and the statutory criteria are not met.

There are separate discharge criteria[9] in respect of patients detained under an order for admission for assessment[10]; subject to Guardianship[11] [12] or subject to Aftercare under Supervision.[13] [14]

The words "nature or degree" must be construed disjunctively.[15] The double negative requires a patient seeking to obtain discharge on the first statutory ground to satisfy the MHRT that his mental disorder is not of a nature warranting detention **and** is not of a degree warranting detention.

The wording of sections 3 and 37 of the Act relating to the criteria for admission to hospital under a treatment order or hospital order respectively are unambiguous as is the wording of section 72 in relation to the criteria to be applied when considering discharge of detention. The criteria for both detention and discharge include tests that have been termed "appropriateness" and "necessity" (or "safety") tests, and the wording of the "tests" approximate to each other.

4 *Section 3*
5 *Section 37*
6 *Section 41*
7 *Section 72(1)(b)(i)*
8 *Section 72(1)(b)(ii)*
9 *Section 72 (1)(a)(i)&(ii)*
10 *Section 2*
11 *Section 7*
12 *The discharge criteria are in Section 72(4)(a)&(b)*
13 *Section 25A*
14 *The discharge criteria are in section 72[(4A)(a)&(b)]*
15 *Regina v Mental Health Review Tribunal for South Thames Region ex parte Smith [TLR 9th. December 1998]*

There is however a third test that must be satisfied before a treatment order or hospital order can be made in respect of a person suffering from either psychopathic disorder or mental impairment namely that "such treatment is likely to alleviate or prevent a deterioration in his treatment".[16] This has become known as the "treatability" test and is not expressly mirrored in the Section 72 discharge criteria.

The consequence appears to be that the untreatable psychopath (or person suffering from mental impairment) cannot be detained under the Act but if detained cannot thereafter secure their discharge through a MHRT under the mandatory criteria for discharge by showing that their condition is not treatable.

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

R v Canons Park Mental Health Review Tribunal ex parte A[17]

In a majority decision in the Court of Appeal Kennedy LJ with whom Nourse LJ agreed considered that Parliament had deliberately omitted the "treatability" test, so that section 72 was not to be read as if it provided criteria for discharge which in some way referred back to or mirrored the criteria for admission.

Roch LJ gave a dissenting judgment and the case did not receive consideration in the House of Lords as it had become academic as a consequence of "A" being re-classified as mentally ill.

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

Reid v Secretary of State for Scotland[18]

This case was considered by the House of Lords on the construction of the Scottish statute which was accepted to be to all intents and purposes identical to the English legislation.

Although *Reid* does not expressly overrule *Canons Park* such a conclusion is inevitable and in *Moyle* Latham J states:-

"Although, at page 42H [of the judgment in *Reid*] Lord Hope expressly stated that he would not wish to go so far as to say *Canons Park* had been wrongly decided, it is in my judgment inevitable that in agreeing with Roch LJ on the issue of statutory construction, he was disagreeing with Kennedy LJ and Nourse L J."

The ratio of *Reid* is:-

"By referring to a mental disorder of a nature or degree which made it "appropriate for him to be liable to be detained", section 64 of the 1984 Act referred back to section 17 with the result that the issues which the Sheriff or Tribunal were required to address when considering an application for discharge under section 64 of a patient who was subject to a restriction order without limit of time were the same as those which had to be considered when an application was made under section 17(1) for admission to hospital."[19]

Applied to the English legislation the ratio of the House of Lords judgment is that the section 72 criteria to be applied when considering discharge should be the same as those that had to be considered for detention when making an application under section 3 (or imposing a hospital order under section 37).

16 *Section 3(2)(b) and 37(2)(a)(i)*

17 *[1994] 2All ER 659; [1995] QB 60*

18 *[1999] 2 WLR 28; [1999] 1 All ER 481*

19 *At page 482 paragraphs a - b [1999] 1 All ER*

The Decision

The court in *Moyle* applied the *Reid* principle to the case of a patient with a mental illness, who as a result of taking medication was asymptomatic. The MHRT's decision was quashed, and Stephen Moyle's case was remitted to the MHRT for reconsideration. The application for judicial review was successful as the MHRT had failed to ask themselves the correct question when considering the appropriateness of detention.

"By expressly disavowing the relevance of the admission criteria, I consider that they were wrong in law."[20]

The Tribunal concluded that Stephen Moyle's illness could not be considered to be of a degree making detention appropriate. The key issue was whether the nature of the illness made it appropriate to detain or discharge.

Mr Justice Latham stated:-

"The correct analysis, in my judgment, is that the nature of the illness of a patient such as the applicant is that it is an illness which will relapse in the absence of medication. The question that then has to be asked is whether the nature of that illness is such as to make it appropriate for him to be liable to be detained in hospital for medical treatment. Whether it is appropriate or not will depend upon an assessment of the probability that he will relapse in the near future if he were free in the community".[21]

Comment

The Test for Discharge

The case has caused some consternation amongst practitioners partly because they may have had difficulty in appreciating its significance, as they have always regarded the non-sectionable patient as a dischargeable patient and partly because the headnotes of the law reports fail to highlight the way in which the case analyses the meaning of "nature" within section 72 and in consequence re-enforces the judgment in *Smith*.[22]

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

"On an application for discharge by a restricted patient, section 72 of the Mental Health Act 1983 was to be construed by reference to the statutory criteria for hospital detention set out in section 3 of that Act."[23]

The headnote in Lawtel states:-

"The same criteria had to be applied by a mental health review tribunal in relation to admission and discharge of a patient subject to a hospital order with restrictions unlimited in time, but the burden of proof was reversed for the purposes of consideration of discharge. Whether it was appropriate or not for the patient to be detained in hospital for medical treatment depended upon an assessment of the probability that the applicant would relapse in the near future if he was free in the community, and that value judgment had to be exercised in the context of the reverse burden of proof."[24]

20 *At page 22 of the Moyle judgment.*

21 *At pages 19 -20 of the Moyle judgment.*

22 *Supra*

23 *TLR 10/02/2000*

24 *LTL 14/01/2000 Document No: C7800683*

The case should not however be confined to restricted patients and must have a general applicability to any person[25] subject to the Act who has the right to make an application or be the subject of a reference to a MHRT.

The Mental Health (Patients in the Community) Act 1995 ("the 1995 Act") introduced the "Supervision Application" and required three "grounds"[26] to be satisfied before such an application can be made and three "conditions"[27] to be satisfied before a renewal can take place. The 1995 Act also amended section 72 of the 1983 Act by introducing section72 (4A) which sets out the criteria to be applied by a MHRT when considering an application by a patient subject to after-care under supervision.

Parliament appears to have shown prescience in anticipating the *Reid/Moyle* issue by drafting the 1995 Act in such a way that the admission and discharge criteria co-incide exactly whether the patient has or has not left hospital at the time of the hearing. It does this by referring the MHRT back to the admission/renewal criteria (which in any event only differ to reflect the fact that on admission to section 25A the patient has not yet started to receive section 117 services whereas on renewal he is receiving them).

Rather than re-iterating the admission "grounds" 72(4A) states that the MHRT shall direct that the patient shall cease to be subject to s25A if satisfied that the "conditions set out in section 25A(4) [in the case of a patient still in hospital] [section 25G(4) in any other case] are not complied with."

Section 72(4) sets out the criteria for the discharge of a Guardianship Order and mirrors the admission criteria set out in section 7(2) [and section 37(2)(a)(ii)] of the Act.

The Burden of Proof

Richard Gordon QC counsel for Stephen Moyle (who was also counsel for "A" in the *Canons Park* case) submitted "that by its very nature, the Tribunal was a reviewing body". This was emphatically rejected by Mr. Justice Latham in the following terms:-

"In my judgment, for the reasons that I have already indicated, this submission is based on a misunderstanding of the nature of the Tribunal's jurisdiction in relation to restricted patients. They have an original jurisdiction, in which they have to exercise their own judgment, based on the evidence before them."

There is no authority for suggesting that the jurisdiction of the MHRT should differ in respect of restricted and non-restricted patients although the power in relation to discharge differs. It therefore appears that *Moyle* is authority for the proposition that a MHRT is a judicial body with original jurisdiction and not an appellate or reviewing body.

In the *Canons Park* case Kennedy LJ stated[28]:-

"The first thing to be noted about section 72(1)(b) is that the tribunal is only required to direct discharge if it is satisfied of a negative - first, that the patient is not then suffering from [a specific form of mental disorder].If he may be, the obligation does not arise".

This supports the generally held view that the burden of proof is placed on the patient and this view is reinforced in the judgment of Mr Justice Latham.[29]

25 *That is subject to Section 2, Section 3, Section 7, Section 37 or Section 25A.*

26 *Section 25A(4) (a) (b) and(c).*

27 *Section 25G(4) (a) (b) and(c).*

28 *[1994] 2 All ER at 683*

29 *Page 20 of the judgment.*

That value judgment [referring to the probability of relapse as a factor in determining the nature of a mental illness] has to be exercised in the context of the reverse burden of proof".

Moyle was however dealing with an application by the patient and it may be that in the case of a reference to the MHRT[30] a distinction can be drawn and that in such cases the burden of proof rests with the party seeking to detain. This submission is made because a requirement for the patient to prove he does not possess a mental disorder before the judicial body with original jurisdiction to determine the question would appear to be contrary to the decision of the European Court of Human Rights (ECHR) in:-

X v United Kingdom[31]

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

Winterwerp v The Nederlands[32]

Paragraph 40 states:-

"In its *Winterwerp* judgment of 24 October 1979, the Court stated three minimum conditions which have to be satisfied in order for there to be "the lawful detention of a person of unsound mind" within the meaning of Article 5 par. 1 (e) [of the European Convention of Human Rights ("the Convention")]: except in emergency cases, the individual concerned must be reliably shown to be of unsound mind, that is to say, a true mental disorder must be established before a competent authority on the basis of objective medical expertise; the mental disorder must be of a kind or degree warranting compulsory confinement; and the validity of continued confinement depends upon the persistence of such disorder".

A periodic reference to a judicial body is required in order to comply with the requirement that the lawfulness of the detention be reviewed at reasonable intervals.

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

"....it would be contrary to the object and purpose of Article 5 to interpret paragraph 4 as making this category of confinement immune from subsequent review of lawfulness merely provided that the initial decision issued from a court. The very nature of the deprivation of liberty under consideration would appear to require a review of lawfulness to be available at reasonable intervals."

If it is a correct statement of the law that the balance of the burden of proof is on the patient then it follows that there is no requirement for the detaining authority to adduce any evidence to support the lawfulness of continuing the detention. In circumstances when the patient elects not to participate in the proceedings either as a consequence of a mental disorder or for other reasons; or in circumstances when the patient lacks capacity to give instructions, (notwithstanding the incapacity may not satisfy the MHA detention criteria) the MHRT would in consequence be required to uphold the lawfulness of the detention despite the absence of any evidence of the persistence of the disorder. Such an approach appears to be contrary to the requirement of the MHRT to make its decision on the basis of "objective medical expertise", and would lead to the judicial body with original jurisdiction to determine whether a person has a mental disorder of a nature or degree such as to make detention appropriate, making a decision to detain in the absence of any evidence.

---

30 Section 67(1), Section 68(1), Section 68(2), Section 71(1), Section 71(2), Section 71(5) and Section 75(1)(a).

31 (1981) 4 E.H.R.R. 181; 1 B.M.L.R. 98

32 (1979) 4 E.H.R.R. 387

It follows that there is an argument that those seeking to justify detention must adduce the necessary evidence, that is the burden of proof should lie with them, in order to comply with Article 5 of the Convention.

When a MHRT is seized with an application by a patient detained under a hospital order the patient is in effect requesting the MHRT not to wait until the statutorily prescribed time for reconsideration that would arise as a consequence of a reference, and to reconsider whether the circumstances that pertained at the time of the imposition of the order by the Court still pertain. In these circumstances there is a logic in placing the burden of proof on the applicant.

Where the application is made by a patient detained under Part II of the Act there is no original judicial authority for the detention and the situation would appear to be closer to that of a reference than to that of a hospital order.

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

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

"I accept Mr Gordon's submission that the decision in Reid requires the question of discharge to be approached on the basis that the criteria for discharge are meant to be matching or mirror images of the admission criteria."

It is this part of the decision that has received prominence in the headnotes of the reports and has attracted most interest from practitioners. It is a clear statement of the law but is as Mr Justice Latham makes clear only a reiteration of the ratio of the House of Lords judgment in *Reid*. The significance of the statement may prove to be not in respect of discharge but in respect of admission.

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

When consideration is being given as to whether an asymptomatic person diagnosed as schizophrenic or with a bi-polar affective disorder should be detained when the illness can not considered to have any ascertainable "degree", but the "nature" is well known as a consequence of the history, it would appear appropriate to ask whether in the light of the person's comments about medication, they would on that day be successful in securing their discharge before a MHRT had they been detained in hospital.

If the person is ambivalent about continuing with medication and the history shows that their health or safety or the safety of others is at risk when symptomatic, a MHRT applying the "nature" test proposed by Mr Justice Latham (supra) would be likely to decide that they do not meet the "appropriateness" test for discharge. If this is the case it follows as a consequence of the mirror criteria that if the nature of the illness is such as to justify detention they could be admitted for treatment under section 3. Such a conclusion appears to be a natural consequence of the *Smith* decision referred to earlier.

Conclusion

Although Moyle is already being used by practitioners[33] to support a submission before a MHRT that as the health of the patient on the day of the hearing is such that he could not be "sectioned" he should therefore be discharged, the use of the case in this way is both superficial and fails to appreciate the true significance. The importance of the case rests on the lucid exposition of the meaning of the word "nature" within the Act and the importance for the asymptomatic patient of appreciating the role of medication in his treatment and the significance of demonstrating to the Tribunal his commitment to continuing with it when not subject to the compulsion that follows from detention.

33 *Personal knowledge of the writer gained in his capacity as MHRT legal member.*