

# Re-admission under the Mental Health Act following discharge by a Mental Health Review Tribunal

*Kristina Stern\* and David Hewitt\*\**

## Introduction

There is continuing confusion over the precise effect and force of Mental Health Review Tribunal ('MHRT') decisions and the extent to which they may be lawfully overborne. That confusion has not been alleviated by the Court of Appeal judgment in the *Von Brandenburg* case,<sup>1</sup> and it may even have been exacerbated by the case of *H v Ashworth Hospital*.<sup>2</sup> Now that the latter decision has been considered by the Court of Appeal, and before the former decision comes before the House of Lords, this may be an opportune moment to place both cases in their true context and to attempt to distil some definitive guidance on this troublesome point.

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\* *Kristina Stern is a barrister practising from chambers at 39 Essex Street, London, WC2R 3AT. She appeared both at first instance and in the Court of Appeal in Von Brandenburg, and at first instance in H v Ashworth, both of which cases are considered here. This paper is based upon a lecture delivered by Dr Stern at the Hempsons Mental Health Law Seminars in Manchester on 26 June 2002 and London on 2 July 2002*

\*\* *David Hewitt is a partner with Hempsons, Solicitors, a member of the Mental Health Act Commission and Associate Lecturer in the Faculty of Health at the University of Central Lancashire*

1 *R v East London & the City Mental Health NHS Trust and David Stuart Snazell, Approved Social Worker ex parte Count Franz Von Brandenburg (aka Nicholas Hanley) [2001] EWCA Civ 239; see: David Hewitt, Detention of a recently discharged psychiatric patient, Journal of Mental Health Law, February 2002, pp50–58*

2 *R v Mental Health Review Tribunal for West Midlands & North West Region, ex parte Ashworth Hospital Authority and (1) H (a patient) (2) Hammersmith & Fulham London Borough Council (3) Ealing, Hammersmith & Hounslow Health Authority (Interested Parties) : R v (1) Ashworth Hospital Authority (2) Lorraine Berry (3) Edward Silva (4) Melanie Frances Croy, ex parte H (a patient) and Ealing, Hammersmith & Hounslow Health Authority (Interested Parties) [2001] EWHC Admin 901; See: David Hewitt, Challenging MHRT decisions, Solicitors Journal, vol 146, no 14, 12 April 2002, pp 338–339; R v Ashworth Health Authority and others, ex parte H : R v (1) Mental Health Review Tribunal for West Midlands and North West Region (2) London Borough of Hammersmith and Fulham (3) Ealing Hounslow and Hammersmith Health Authority, ex parte Ashworth Hospital Authority [2002] EWCA Civ 923*

## A cruel mirage?

The Mental Health Act 1983 ('MHA 1983') provides a scheme by which those who require medical treatment for mental disorder may be admitted to hospital against their will. Because that scheme is founded primarily upon the clinical judgment of doctors and social workers, it may occasionally come into conflict with the Mental Health Review Tribunal ('MHRT') process. The MHRT is, of course, the court-like body to which statute<sup>3</sup> has entrusted the responsibility of ensuring that detained psychiatric patients receive the protections contained in Article 5(4) of the European Convention on Human Rights ('ECHR'). Those protections provide that:

"Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

However, there may be a divergence of opinion between psychiatrists and social workers on the one hand and the MHRT on the other. For example, although a MHRT may direct that a patient be discharged, the clinical team may take the view that s/he should in fact be detained in hospital under MHA 1983, section 3<sup>4</sup>. This may be so either where the patient's discharge is to be immediate or where it has been deferred to enable satisfactory arrangements to be made for his/her aftercare. In such circumstances there is an apparent conflict between the statutory schemes for admission *to*, and for discharge *from* hospital. The first relies solely upon clinical judgment. Although the second may do the same – for example, where discharge is granted<sup>5</sup> by the patient's Responsible Medical Officer ('RMO') or the managers of the hospital in which s/he is detained – it may also be contingent upon the judgment of the MHRT. That more complex judgment will be reached only after the patient has been examined by the MHRT (through its medical member), and after the Tribunal has heard all of the evidence and considered any legal submissions.

The scheme provided by the 1983 Act gives no clue as to when – or, indeed, if – a previous MHRT discharge will restrict the power to admit a patient to hospital under MHA 1983, section 3 in future. However, if there is no such restriction, and if a discharge from detention in fact counts for nothing once it has taken effect, it is at least arguable that the ECHR, Article 5(4) protection that the MHRT is required to provide is nothing more than a cruel mirage. Of course, few people would suggest that a MHRT direction for discharge counts for *nothing*, and the real question is one of degree: when a new admission is proposed under MHA 1983, section 3, what weight should – or may – be given to an earlier discharge from detention? In cases such as these, the courts must also grapple with a question of degree: to what extent do public law principles in general – and the Human Rights Act 1998 in particular – provide a solution to the problem?

## The statutory scheme

### (a) Admission

The extent to which the scheme for detaining patients depends upon the professional judgement of various clinicians is evident from a consideration of MHA 1983. Section 3(3) of the Act provides that:

"An application for admission for treatment shall be *founded* on the written recommendations in the prescribed form of two registered medical practitioners, including in each case a

3 MHA 1983, ss 65–79

detentions effected under MHA 1983, ss 2 or 5

4 Although, for convenience, this paper refers only to MHA 1983, s 3, its analysis may be applied equally to

5 Under MHA 1983, s 23

statement that in the opinion of the practitioner the conditions set out in subsection (2) above<sup>6</sup> are complied with.”<sup>7</sup>

The clinical recommendations, which are provided in statutory Form 11,<sup>8</sup> are focused upon the condition of the patient and the necessity for compulsion, and the medical practitioners who provide them must set out their own clinical opinions. However, they are not required to state whether it is appropriate for a patient to be detained under MHA 1983, nor to consider any prior decision of a MHRT. Indeed, it would appear that their obligation is simply to deal with the here-and-now – in other words, to consider whether the statutory criteria for detention are satisfied at that point in time, in the patient who appears before them. This point is illustrated by MHA 1983, section 3(2), which states that an admission application may be made in respect of a patient on the grounds that:

“(a) he is suffering from mental illness, severe mental impairment, psychopathic disorder or mental impairment and his mental disorder is of a nature or degree which makes it appropriate for him to receive medical treatment in hospital;

(b) in the case of psychopathic disorder or mental impairment, such treatment is likely to alleviate or prevent a deterioration of his condition; and

(c) it is necessary for the health or safety of the patient or for the protection of other persons that he should receive such treatment and it cannot be provided unless he is detained under this section.”

It is difficult to see how a recent MHRT direction for discharge can directly impinge upon the doctor’s clinical opinion as to the fulfilment of each of these three criteria.

Whilst it must be *founded* upon the opinions of medical practitioners, an application for admission to hospital may be made only by an Approved Social Worker (‘ASW’) or the patient’s nearest relative.<sup>9</sup> The Act would appear to offer an unconstrained power in this regard, for it provides that:

“Each of the applications<sup>10</sup> shall be sufficient if the recommendations on which it is founded are given either as separate recommendations, each signed by a registered medical practitioner, or as a joint recommendation signed by two practitioners.”<sup>11</sup>

Furthermore, an ASW will be under a *duty* to make an application for admission:

“... in any case where he is satisfied that such an application ought to be made and is of the opinion, having regard to any wishes expressed by relatives of the patient or any other relevant circumstances, that it is necessary or proper for the application to be made by him.”<sup>12</sup>

At first blush, this provision appears to constrain the power of an ASW, for it requires him/her to consider both whether an application “ought to be made” and whether it is “necessary or proper”. However, the possibility that this might require – or permit – an ASW to take into account such matters as an earlier MHRT discharge would appear to be removed by MHA 1983, section 13(5), which states that:

“Nothing in this section shall be construed as ... restricting the power of an approved social worker to make any application under this Act.”

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6 Namely *mental illness/disorder/impairment, treatability, appropriateness of receiving medical treatment in hospital and necessity for health or safety of patient or others that treatment be provided in hospital under compulsion [see later]*

7 *Emphasis added*

8 *Mental Health (Hospital, Guardianship and Consent*

*to Treatment) Regulations 1983, regulation 4(1)(f)(ii)*

9 *MHA 1983, s 11(1)*

10 *That is, by the nearest relative or an ASW*

11 *MHA 1983, s 11(7)*

12 *MHA 1983, s 13(1)*

The admission process should culminate in a formal application by an ASW. MHA 1983, section 6 provides that the application will be sufficient authority for the patient to be conveyed to hospital within 14 days, and for the managers of the hospital to detain him/her there. Moreover, MHA 1983, section 6(3) provides that:

“Any application for the admission of a patient ... which appears to be duly made and to be founded on the necessary medical recommendations may be acted upon without further proof of the signature or qualification of the person by whom the application or any such medical recommendation is made or given or of any matter of fact or opinion stated in it.”

The consequence of this provision is that the managers will be entitled to detain a patient upon the authority of an application that appears to be duly made. However, if the application was not in fact duly made, the patient will have been detained unlawfully and will be entitled to seek his/her release by means of an application for a writ of *habeas corpus*.<sup>13</sup> Therefore, a patient may be lawfully detained provided the ASW or nearest relative presents a valid application and supports it with medical recommendations that focus upon his/her current condition.

In summary, therefore: within this statutory scheme:

- there is nothing that expressly requires the doctors to consider the appropriateness of making an application for admission, or to focus in any way upon a recent MHRT decision;
- the ASW or nearest relative is not in way constrained as to the circumstances in which s/he may make an application for admission; and
- the role of the statutory managers is unclear, save that they must ensure that an application is – or at least, that it *appears to be* – duly completed.

### *(b) Discharge*

The statutory criteria for discharge of un-restricted patients are set out in MHA 1983, section 72. However, with effect from 26 November 2001, they were amended by the Mental Health Act 1983 (Remedial) Order,<sup>14</sup> which placed the burden of justifying a patient's continued detention upon the authority – usually, a NHS Trust – that sought to continue detaining him/her.

In *Reid v Secretary of State for Scotland*,<sup>15</sup> the House of Lords held that the criteria for discharge mirror those for admission. Therefore, in order to justify a patient's continued detention the detaining authority will have to satisfy a MHRT that the admission criteria are satisfied as at the date of the hearing. It is, of course, the case that a MHRT may direct a patient's discharge even if it is satisfied that the admission criteria still obtain.<sup>16</sup> That rarely invoked discretion apart, a MHRT direction for discharge is in fact a decision that, as at the date of the hearing, the MHA 1983 admission criteria are no longer satisfied. This creates real confusion as to the question of when, if at all, an earlier MHRT decision should be taken into consideration as part of the decision-making process that precedes a subsequent admission under MHA 1983, section 3.

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13 *Re S-C (Mental Patient: Habeas Corpus)* [1996] 1 All ER 532 (CA)

15 [1999] 2 AC 512

14 SI 2001 No 3712

16 MHA 1983, s 72(1)

### Difficult situations

There are many situations in which doubt may arise as to whether it is appropriate to apply for a patient to be detained in hospital under MHA 1983, section 3. For example:

- although the MHRT rejected their view that discharge was inappropriate, members of the clinical team may still believe that the patient should be detained;
- a patient's psychiatric condition may have deteriorated since the MHRT decision was made;
- it may not be known how the patient presented at the hearing or why the MHRT decided to direct discharge (the RMO may not have been present for the whole of the hearing and the MHRT's reasoning may be brief);
- the clinicians now considering the possibility of admission may simply have no knowledge of what went on before the MHRT (the patient may have moved to a different geographical area since s/he was discharged);
- it may be believed that the MHRT erred in its decision, which is – or may be – susceptible to judicial review;
- a further psychiatric opinion may be received, which provides information or raises issues that were not before the MHRT;
- information may become available – for example, from family members – which was not considered by the MHRT;
- a patient may break a promise to comply with medication. In such circumstances, it may not be clear whether, in reaching its decision, the earlier MHRT accepted the patient's assurance, or whether, in fact, it concluded that even if s/he did not comply, the patient did not need to be detained.

There are likely to be many more situations in which clinicians are faced with real difficulty in reconciling a clinical opinion that the statutory criteria for detention are satisfied with an earlier MHRT direction for discharge.

### **The issue as considered by the Court of Appeal in *R (Von Brandenburg) v East London and The City Mental Health NHS Trust and another***

Last year, in the *Von Brandenburg* case,<sup>17</sup> the Court of Appeal was told that if the statutory admission criteria were to be reconciled with an earlier MHRT discharge, a subsequent detention would usually have to have been precipitated by a change of circumstances.

The issue arose in this case because, although the clinical team had argued for Count Von Brandenburg's continued detention, a MHRT had discharged him, holding that he was not suffering from mental illness of a nature or degree which justified detention, and that his detention was not necessary in the interests of his own safety or for the protection of others. His discharge was deferred for several days to enable accommodation to be arranged and a care plan to be drawn up. In the interim, and before he had in fact left hospital, the Count was detained again under MHA 1983, section 3. He argued that this subsequent detention was unlawful, because:

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<sup>17</sup> [2001] EWCA Civ 239. The issue had been previously considered directly by Laws J in *R v. Managers of South Western Hospital ex parte M* [1993] QB 683, and in

passing by David Pannick, QC in *In re Whitbread* (Unreported, 5 January 1999)

- (a) there had not been a change in his circumstances, as there would need to have been in order to justify re-detention; and
- (b) neither the medical recommendations nor the application that was based upon them addressed the question of a change of circumstances.

The NHS Trust, which was the Defendant in the claim, contended that:

- (a) on the facts, there had in fact been a change of circumstances between the patient's discharge and his subsequent re-detention; and
- (b) in any event, a change of circumstances was not necessary (although it conceded that public law principles would apply to the second admission, such that it must be *bona fide* and rational).

It is important to understand the scope of the issue that arose in *Von Brandenburg*. In particular, the Claimant did not argue that his second admission was irrational or that it fell foul of accepted public law principles. Rather, he said that it would only be lawful if there had been a demonstrable change of circumstances since the MHRT granted his discharge. Alternatively, and in a refinement of the test proposed at first instance, the Claimant argued that it was impracticable for the MHRT decision to be followed. The Court of Appeal found that no requirement for a change of circumstances was contained in MHA 1983, whether as a matter of domestic law or by virtue of the special duty of construction imposed by the Human Rights Act 1998. However, applying traditional public law principles, the Court held that the earlier discharge was a relevant factor in the later decision, and that the subsequent admission would only be lawful if those who precipitated it had given proper regard to the MHRT's decision.

The Court of Appeal did not, however, resolve all the issues. For example, it was not clear from the judgments to what extent each of the various agencies involved in the subsequent admission – the doctors, the ASW and the statutory hospital managers – must (a) be aware of, and (b) reason by reference to, the earlier MHRT decision. Furthermore, whilst it is clear that the Court of Appeal was simply applying traditional public law principles, its decision at times appears to imply a “test” for determining how those principles should apply to this situation. For these reasons, the judgments of the Master of the Rolls (with whom Buxton LJ agreed) and Sedley LJ merit close examination.

The Master of the Rolls found that “normally a sensible period is likely to elapse between discharge and readmission.”<sup>18</sup> In those circumstances, he felt that a change of circumstances test would be neither necessary nor sensible. Readmission was likely to be prompted by consideration of how the patient had behaved in the community and, he said, that of itself would almost certainly constitute a change of circumstances. Moreover, to require such a change to be investigated by the professionals involved would be neither helpful nor meaningful.

However, according to the Master of the Rolls:

“The position is very different where an application for readmission is made within days of a tribunal's decision to discharge, which carries the necessary implication that the criteria for admission are not present – the more so if the patient has remained under the hospital regime because discharge has been deferred, so that there has been no change in the patient's environmental circumstances. In such a situation there is likely to have been ... a difference of

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<sup>18</sup> At paragraph 30

view between the patient's RMO and the Tribunal as to whether or not the criteria justifying detention were established. Under the statutory scheme, where such a conflict exists, it is the opinion of the tribunal that is to prevail.

"In such circumstances I do not see how an Approved Social Worker can properly be satisfied, as required by section 13, that 'an application ought to be made' unless aware of circumstances not known to the tribunal which invalidate the decision of the Tribunal. In the absence of such circumstances an application by the Approved Social Worker should, on an application for judicial review, be held unlawful on the ground of irrationality".<sup>19</sup>

The Master of the Rolls concluded by finding that:

"[...] I do not consider that the statutory scheme leaves it open to professionals effectively to overrule a decision to discharge taken by a Tribunal."<sup>20</sup>

Thus, although in the body of his judgment the Master of the Rolls appeared to place the obligation to consider the earlier MHRT decision firmly upon the ASW, his conclusion referred more generally to the professionals involved.

In essence, Sedley LJ held that that the lawfulness of admission following a MHRT decision to discharge would be determined according to a set of private and public law controls. Where admission comes hard on the heels of discharge:

"Any decision made in the exercise of statutory powers and affecting a person's liberty must not only be made in good faith but must, among other things, have proper regard to any relevant facts".<sup>21</sup>

More specifically, a recent MHRT decision:

"... must be accorded very great weight if the second decision is not to be perceived as an illicit overruling of the first. Put another way, there will have to be a convincing reason, in such a case, for readmission".<sup>22</sup>

Counsel for the ASW had conceded that his client's subsequent admission application would be unlawful if he believed that a MHRT would respond by ordering the patient's discharge. Sedley LJ pronounced this view "correct" and, perhaps more significantly, he ruled that the same stricture would apply to the recommending doctors. In other words, a medical recommendation certifying that the statutory criteria were satisfied would not be lawful if the recommending doctor believed when he gave it that a MHRT would order the patient's discharge.<sup>23</sup>

Of equal significance was Sedley LJ's ruling that a recent – and often, a not-so-recent – MHRT discharge will always be a relevant factor, so that a failure by a subsequent decision-maker to take it into account – *albeit through ignorance* – will vitiate a decision to seek admission.<sup>24</sup>

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19 At paragraphs 31–32

20 At paragraph 35

21 At paragraphs 38–39

22 At paragraph 41

23 At paragraph 40

24 At paragraph 41

### *H v Ashworth* at first instance

The issues that had exercised the Court in *Von Brandenburg* arose again in the case of *H v Ashworth* – albeit, from a somewhat different perspective. In that case, the patient, Mr H, had been detained at Ashworth Hospital for approximately six-and-a-half years. However, on 22 March 2001, a MHRT ordered his immediate discharge. It had heard that no aftercare arrangements had been made for Mr H, and regarded this as significant because the failure of previous arrangements had led to him becoming violent and, ultimately, to his re-admission to hospital. Although H agreed to remain in hospital voluntarily, there was doubt as to whether he would do so. Therefore, on 26 March 2001, he was detained under MHA 1983, section 5(2), and on 29 March 2001, under MHA 1983, section 3.

Upon hearing the MHRT's decision, the hospital immediately took legal advice and subsequently sought judicial review of Mr H's discharge. Its claim was issued on 29 March 2001, when Stanley Burnton J granted interim relief in the form of an order staying the decision and an injunction prohibiting H's release from hospital.

A further complication was that, following his detention under MHA 1983, section 3 on 29 March 2001, H himself instituted proceedings for judicial review. He claimed that his readmission was unlawful because the recommending doctors and the ASW had failed to take sufficient account of the MHRT discharge; and that it had been unnecessary in the light of the stay and the injunction ordered by Stanley Burnton J.

For the purposes of this paper, the case of *H* raised the following issues of relevance:

- (a) the extent to which a MHRT's obligation to give reasons for its decision had been heightened by the judgment in *Von Brandenburg*;
- (b) the proper course to be taken when it is felt that a MHRT decision is – or may be – improper or unlawful;
- (c) the proper interpretation of *Von Brandenburg*; and
- (d) the extent to which a prior MHRT decision should be taken into account where those involved are advised by lawyers that it may be flawed.

Stanley Burnton J held that the decision of the MHRT was unlawful because it did not include any consideration of the issue of after-care, which was essential to ensure H's safe reintegration into the community. Accordingly, he ruled that the decision to direct an immediate discharge was “*Wednesday* unreasonable”, and he quashed it. Moreover, he held that the Tribunal's reasoning was defective because it did not explain why it disagreed with the well-reasoned preponderance of medical opinion that opposed discharge. The judge also found that the existing precept that reasons “must sufficiently inform both the patient and the hospital as to the findings of the Tribunal” had been given added significance by the decision in *Von Brandenburg*. He said that the MHRT “must also bear in mind that its decision may have to be considered by those who were not present at or parties to the hearing”.<sup>25</sup>

As to the correct procedure in circumstances where a MHRT decision is thought to be unlawful, Stanley Burnton J held that his earlier order granting interim relief had been ineffective because:

- (a) a stay of proceedings may defer the legal consequences of a decision but it may not “turn back the clock”. Thus, as the MHRT ordered the patient's immediate discharge on 22 March, the stay of 29 March could have no legal effect;

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<sup>25</sup> at para 77(h)



- (b) whilst the Administrative Court clearly enjoyed the power to do so, the judge could think of no circumstances in which it would be appropriate for it to grant an injunction that prohibited a patient from leaving hospital and required him to submit to treatment.

Accordingly, Stanley Burnton J held that, other than in the most exceptional cases, the court would have no power to grant effective interim relief where judicial review was sought of a MHRT decision for immediate discharge. Therefore, he stated that the recommending doctors and the ASW would act lawfully if “they are advised on substantial grounds that the decision [of the MHRT] is unlawful and that proceedings for judicial review have been commenced or that such proceedings are imminent”.<sup>26</sup> In such a case, the professionals would not be required to afford the MHRT decision the authority that it might subsequently be held not to have; and they would be entitled to take into account the alleged unlawfulness of that decision.

The judgment of Stanley Burnton is also interesting for its more general application of *Von Brandenburg*. He held that even if the MHRT decision had been assumed to be lawful and valid, the professionals involved would have had sufficient reason to detain H again. This was because they believed that he would discharge himself from hospital without any after-care plan having been put in place. Accordingly, as the recommending doctor could not have thought that the MHRT had reasonably envisaged this situation, her MHA 1983, section 3 recommendation had been lawful, notwithstanding the earlier MHRT decision to discharge. This suggestion stretches by some way the judgments of the Court of Appeal in *Von Brandenburg*, and it seeks to justify a MHA 1983, section 3 detention where there may be circumstances that the MHRT did not have envisaged. In fact, the possibility cannot be ruled out that the Tribunal did envisage those circumstances and simply chose not to regard them as sufficient to prohibit discharge. On the facts of this case, even where the MHRT had in fact ordered an immediate discharge, Stanley Burnton J was prepared to assume that the latter explanation was the more likely.

The judge did not resolve any of the issues outstanding after *Von Brandenburg*. In particular, he did not clarify the extent to which the obligations on the ASW also apply to hospital managers and/or recommending doctors. However, his analysis suggests that it is incumbent upon each of them to consider the impact of a MHRT decision when taking steps to facilitate a further MHA 1983, section 3 admission. Furthermore, Stanley Burnton J held that once a situation arose which had not been considered by the MHRT, the recommending doctors and the ASW were under a duty to bring their professional judgement to bear once again.

### ***Von Brandenburg* re-visited: *H v Ashworth* in the Court of Appeal**

On 27th June 2002, the Court of Appeal gave judgment in *H v Ashworth*<sup>27</sup>. In his leading speech, Dyson LJ disagreed with many of the findings at first instance. In particular, he held that when professionals believe a MHRT decision to be flawed, they should not proceed on the basis of the *Von Brandenburg* principles. Were they to heed those principles, he said, the decision to “sideline” the effect of the MHRT decision would be taken away from the Courts altogether. He held that the only appropriate course open to the professionals would be to seek permission to apply for judicial

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<sup>26</sup> at paragraph 104

<sup>27</sup> *R v Ashworth Health Authority and others, ex parte H*  
: *R v (1) Mental Health Review Tribunal for West*

*Midlands and North West Region (2) London Borough  
of Hammersmith and Fulham (3) Ealing Hounslow  
and Hammersmith Health Authority, ex parte  
Ashworth Hospital Authority [2002] EWCA Civ 923*

review and at the same time to apply for a stay of the MHRT decision. In a sharp reversal of the decision at first instance, Dyson and Mummery LJ held that a stay would be effective to “turn back the clock”, even where the patient had already been discharged by the MHRT. Simon Brown LJ doubted this analysis only in its application to a patient who had left the hospital before the stay could be made. In those circumstances, he held, a stay could not authorise the patient’s forcible re-detention, and he suggested that attention should be focussed upon bringing a substantive hearing of the application for judicial review before the court as quickly as possible.

As to the circumstances in which it would be appropriate for the court to grant a stay, the Court of Appeal held that the criterion should not be mere ‘arguability’. Rather, strong grounds for interfering with the MHRT decision must be shown to exist. In such circumstances, a stay would be an appropriate means of holding the ring pending the outcome of the substantive judicial review application, which should in any event proceed with all possible expedition.

The Court of Appeal also gave useful guidance as to how its decision in *Von Brandenburg* should be interpreted. Dyson LJ held that:

“[...] when considering whether to resection a patient who has only recently been discharged by a tribunal, the question that the professionals must ask themselves is whether the sole or principal ground on which they rely is one which in substance has been rejected by the Tribunal. If it is, then in my view, they should not resection. In deciding whether the grounds on which they rely are ones which have been very recently rejected by the tribunal, they should not be too zealous in seeking to find new circumstances”.<sup>28</sup>

Thus, where the patient has not yet left the hospital, it may be difficult to justify an application for his/her re-detention solely on the basis of circumstances of which the MHRT was unaware.

Applying that test to the facts of *H v. Ashworth*, Dyson LJ held that, even though the professionals believed that the patient would leave hospital if no aftercare was in place, the decision to re-section him was made upon grounds that had been rejected by the MHRT. Accordingly, he disagreed with the finding at first instance that once there was a relevant change of circumstances the professionals must apply their professional judgment, even if the Tribunal had already rejected it

## Conclusion

The appeal in *Von Brandenburg* is likely to come before the House of Lords in early-2003. However, in its re-consideration of *H v Ashworth*, the Court of Appeal has provided a very helpful gloss to that earlier, troublesome decision. In particular, it has confirmed that in deciding whether to resection a patient who has been recently discharged by a MHRT, the professionals involved must consider whether the principal grounds upon which they rely have been already rejected by the Tribunal. In addition, the Court has indicated that any subsequent application for admission must be founded upon circumstances not known to the first MHRT. These rulings will be of considerable assistance to those who are entrusted with the vital, sensitive task of balancing individual liberty and public safety; and who must continue to exercise their professional judgment even though the Mental Health Review Tribunal has already rejected it.

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28 At paragraph 59