

## *MHRT Target Hearing Times and the ECHR*

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**The Queen (on the application of C) v London South and South West Region Mental Health Review Tribunal (Judgment given 21st December 2000 - unreported)**

*High Court (Queen's Bench Division). Scott Baker J.*

### **Introduction**

C challenged the current practice of the Mental Health Review Tribunal ('MHRT') to list applications for discharge in s. 3 cases to be heard within 8 weeks after the making of the application. It was submitted on his behalf that a period of 8 weeks in such cases did not meet the requirement in Article 5 (4) of the European Convention on Human Rights for a speedy review of detention. Scott Baker J dismissed C's application for judicial review holding that neither the current practice nor the facts of C's case gave rise to a breach of Article 5 (4).

### **Facts**

C was diagnosed as suffering from schizophrenia. Over a number of years he had been admitted and detained in hospital on several occasions. On 15th October 2000, having first been taken into custody by the police following a disturbance caused by him at the offices of Lambeth Council and interviewed by a doctor and social worker, C was admitted to South Western Hospital under s. 4 Mental Health Act 1983 ('MHA'). His wife and nearest relative objected to his admission under s. 3. On 16th October a district judge sitting in the County Court displaced C's wife as nearest relative by way of an interim order. The same day C was admitted for treatment pursuant to s.3 MHA. He applied immediately to the MHRT for his discharge from hospital. On 17th October C's wife learned of the order displacing her and sought leave to apply for judicial review of the order on the grounds that it should not have been granted by a district judge. Upon the County Court arranging for an inter partes hearing, leave was refused on 20th October. The interim displacement order was confirmed by a circuit judge at a hearing on 23rd October. On 26th October the solicitors representing C requested without success a hearing of C's application for discharge to the MHRT to be heard in advance of the expiry of the 8 weeks within which the hearing would be listed according to the current practice. Thereafter C was transferred from South Western Hospital to Cane Hill Hospital on 10th November. The tribunal application was listed to be heard on 1st December 2000 to accommodate C's new RMO. On 21st November the interim order displacing C's wife as the nearest relative was discontinued by a circuit judge. On 24th November C's wife successfully applied to the hospital managers for his discharge.

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## Law

### Domestic Position: Pre-Admission

There is a stringent procedure which must be adhered to before a person can lawfully be admitted to hospital for treatment pursuant to s. 3 MHA. Where a patient is detained pursuant to s. 3 following a failure to comply with the procedure then the admission may be challenged by way of judicial review and/or habeas corpus.<sup>2</sup>

First, an application for admission must be made to the hospital managers by either the nearest relative or by an approved social worker<sup>3</sup>. Where the application is made by an approved social worker that social worker is obliged to interview the patient and satisfy himself that detention in hospital is in all the circumstances the most appropriate way of providing the care and medical treatment of which the patient stands in need<sup>4</sup>. The application may not be made unless the social worker making the application has personally seen the patient within the period of 14 days ending with the date of the application<sup>5</sup>. The application must be supported by written recommendations of two registered medical practitioners<sup>6</sup>. One of the two medical practitioners must be approved by the Secretary of State as having special experience in the diagnosis and treatment of mental disorder and one of the two, if practicable, must have previous acquaintance with the patient<sup>7</sup>. Both medical practitioners must personally examine the patient and, if they do so separately, not more than five days must elapse between the days upon which the separate examinations take place<sup>8</sup>. The medical recommendations must include in each case a statement that in the opinion of the practitioner the conditions precedent for admission contained in s. 3 (2) are satisfied<sup>9</sup>.

Secondly, if the application for admission is made by an approved social worker, that social worker is required to first consult with the nearest relative (unless it appears to the social worker that such consultation is not reasonably practicable or would involve unreasonable delay) and, if the nearest relative objects to the admission, the application may not be made<sup>10</sup> unless an order is obtained from the county court displacing the nearest relative and appointing either the local social services authority or another person to act in the role<sup>11</sup>.

2 [see Lord Woolf in *R v Barking Havering and Brentwood Community Health Care NHS Trusts* [1999] 1 FLR 106 at 114 to 117 *re. the appropriate procedure and remedy in cases of continuing unlawful detention*].

3 s. 11 (1) and (2) MHA

4 s. 13 (2) MHA

5 s. 11 (5) MHA

6 s. 3 (3) MHA

7 s. 12 (2) MHA

8 s. 12 (1) MHA

9 s. 3 (3) [The conditions precedent for admission set out in s. 3 (2) are that the patient (a) is suffering from a mental disorder of a nature or degree which makes it appropriate for him to receive medical treatment in hospital and that (b) in the case of psychopathic disorder or mental impairment, such treatment is likely to alleviate or prevent a deterioration of his condition and that (c) it is necessary for the health or safety of the

patient or for the protection of others that he should receive such treatment and it cannot be provided unless he is detained under s. 3. The statement required by s. 3 (3) must contain particulars of the grounds for the opinion that the conditions in s. 3 (2) (a) and (b) are satisfied and reasons for the opinion that the condition in s. 3 (2) (c) is also satisfied, stating why other methods of dealing with the patient are inappropriate].

10 s. 11 (4) MHA

11 The County Court has power to make an Order displacing the nearest relative under s. 29 MHA. [Before doing so s. 29 (3) provides that the Court must be satisfied that (a) the patient has no nearest relative or it is not practicable to find him or (b) the nearest relative of the patient is incapable of acting as such by reason of a mental disorder or other illness or (c) the nearest relative unreasonably objects to the application for admission or (d) the nearest relative has, in the past, discharged the patient from hospital without due regard for his welfare or the interests of the public].

### Domestic Position: Post-Admission

Once admitted, a patient may be detained against his will in hospital for treatment pursuant to s. 3 MHA for a period not exceeding 6 months<sup>12</sup> unless it is renewed. However, there are statutory safeguards (aside from the right to apply to the MHRT seeking discharge) which are intended to ensure that his continued detention during that period is not unjustified. In particular the RMO remains under a continuing duty to consider whether the conditions remain satisfied and may discharge him if he is not so satisfied, as may the hospital managers and the nearest relative.<sup>13</sup>

The patient (or the nearest relative whose direction to discharge has been ‘barred’ by the RMO) may at any time during that six month period apply to the MHRT for his discharge<sup>14</sup>. Following consultation with the Council on Tribunals the MHRT Secretariat has set time limits for listing the hearings of applications for discharge from detention authorised under different sections of the MHA. In s. 3 cases the hearing of the application should take place within 8 weeks from the making of the application<sup>15</sup>. The relevant MHRT Rules are as follows. The responsible authority must provide a statement to the MHRT containing prescribed information as soon as possible and in any event within three weeks upon receipt of the Notice of application. This includes an up to date medical report containing a medical history and a full report on the patient’s mental condition and, so long as it is reasonably practicable to provide it, an up to date social circumstances report<sup>16</sup>. At any time before the hearing of the application the medical member must examine the patient and may examine his medical records<sup>17</sup>. The MHRT must give at least fourteen days notice of the time, date and place fixed for the hearing<sup>18</sup> and it has power to give directions as it thinks fit to ensure the speedy and just determination of the application<sup>19</sup>. There is a power to adjourn the hearing of the application and, before doing so, to give such directions as it thinks fit for ensuring the prompt consideration of the application at the adjourned hearing<sup>20</sup>.

### Article 5 (4) ECHR

Article 5 ECHR enshrines the right to liberty and security of the person but permits detention in limited circumstances including the ‘lawful detention ... of persons of unsound mind’ (Article 5 (1) (e)) where it is justified either in the interests of the person detained and/or in the public interest<sup>21</sup>. Whether a person is lawfully detained under Article 5 (1) (e) must be determined on the basis of reliable evidence from an objective medical expert, the mental disorder must be of a kind or degree warranting compulsory detention and, importantly, must persist during the period of detention.<sup>22</sup> Further, the procedural requirements in domestic law must be adhered to and the law itself must be accessible, clear and not arbitrary<sup>23</sup>.

12 s. 20 (1) MHA

13 s. 23 (2) (a) MHA [the power of the nearest relative to discharge is of no effect where, once the nearest relative has given Notice of the intention to discharge, the RMO furnishes the hospital managers with a report stating his opinion that if discharged the patient would be likely to act in a manner dangerous to himself or others (s. 25(1) MHA)].

14 s. 66 (1) (b) and (2) (c) MHA

15 The same time limit applies to s. 37 cases. In restricted cases (s. 41) the hearing should be listed within 20 weeks of the making of the application. The hearing of applications in s. 2 cases is required by the MHRT rules

(Rule 31) to take place in 7 days.

16 Rule 6 (1) MHRT Rules and Schedule 1 Part B

17 Rule 11 MHRT Rules

18 Rule 20 MHRT Rules

19 Rule 13 MHRT Rules

20 Rule 16 (1) and (2) MHRT Rules

21 *Guzzardi v Italy* (1980) 3 EHRR 333 at para 98 ECtHR

22 *Winterwerp v Netherlands* (1979) 2 EHRR 387 at para 39 ECtHR

23 *Winterwerp v Netherlands* at para 45; *Van de Leer v Netherlands* (1990) 12 EHRR 567 at para 22 ECtHR

Where detention is justified under Article 5 (1) (e) a periodic review of detention is required by Article 5 (4) which states

“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.”

The purpose of the Article 5 (4) requirement is to provide those who are detained with judicial supervision of the lawfulness of their detention<sup>24</sup>. In *Megyeri v Germany*<sup>25</sup> the EctHR made it clear that in mental health cases the review must be periodic because his detention will be lawful only for as long as his condition persists.

The review required by Article 5 (4) must be a speedy one. This is particularly so in the case of initial reviews. However, whether a review is sufficiently speedy is determined in the context of the whole of the relevant scheme as apparent shortcomings in one procedure may be remedied in safeguards available in other procedures<sup>26</sup>. Further, an examination of the judgments and decisions of the Strasbourg Court and the Commission demonstrates that whether there has been a breach of the speedy review requirement in Article 5 (4) will depend upon not only the whole of the relevant scheme but also, as is always the case, upon the facts of each case. For example, in *Wassink v Netherlands*<sup>27</sup> the applicant was made the subject of an emergency confinement on 15th November 1985. On 19th November a request was made by the relevant authorities to the court to extend the period of emergency confinement. That request was accompanied by the medical file relating to the applicant. On 20th November the President of the District Court interviewed the applicant, his wife and two doctors over the telephone. On 25th November the President ordered the continuation of the emergency confinement. Under domestic law that Order was valid for a further three weeks. The Court held that a period of three weeks detention without review did not breach Article 5 (4) since, taking the whole of the relevant procedure into account, the review of the position by the President before granting the extension of the confinement amounted to a sufficient review of the lawfulness of the detention in respect of the subsequent three weeks. However, in other circumstances the Court has held that the speedy review requirement has not been met, particularly where there has been no good reason for a delay. This is likely to be the case where there has been administrative delay. For example, in *Koendjibiharie v Netherlands*<sup>28</sup> the Court held that there was a breach of 5 (4) in a case in which 4 months had elapsed between the making of an application to the Court of Appeal for release from extended confinement in a psychiatric clinic and the giving of judgement. The Court found the four month period to be unreasonable as it included a month long adjournment without good reason. Similarly in *E v Norway*<sup>29</sup> 8 weeks was too long when the delay was due, in part, to the judge's absence on vacation. The Court took account of the lack of rules pointing to a speedy conclusion of proceedings, delays in arranging hearings and in giving judgement.

Equally, where the delay is due to requests for an adjournment, there will be no breach of Article 5 (4). For example, in *Cottenham v UK*<sup>30</sup> the MHRT could not be criticised for a delay of 10 months where the patient's solicitor requested an adjournment to obtain independent reports. However, in *Musial v Poland*<sup>31</sup> the EctHR held that a lapse of eighteen months in proceedings to determine the

24 *De Wilde, Ooms and Versyp v Belgium* (1971) 1 EHRR 373 at para 76 ECtHR

25 (1992) 15 EHRR 584 ECtHR

26 *X v UK*, 05/11/85, App No. 7215/75 ECtHR at para 60; *Winterwerp v Netherlands* at para 62.

27 (1990) A/185-A EctHR

28 (1990) 13 EHRR 820 ECtHR

29 (1990) 17 EHRR 30 at para 66 ECtHR

30 [1999] EHRLR 530 ECtHR

31 Unreported, 25th March 1999 ECtHR

lawfulness of the applicant's detention in a psychiatric hospital did breach Article 5 (4). A request by the applicant that he be examined by doctors from outside the hospital where he was detained did not amount to a waiver of his Article 5 (4) rights and the responsibility for the delays in securing the provision of expert opinion rested ultimately with the state which could have, for example, imposed fines on the experts failing to provide reports in time. The Court also stated that the complexity of the patient's medical dossier could not absolve the authorities from its obligations under 5 (4).

## **Judgment**

There was a preliminary issue as to jurisdiction for the Court to decide since C had been discharged from hospital. Both parties urged the Court to decide the application because (i) the point was one of importance affecting many cases, it being routine practice for the MHRT to list the hearing of applications for discharge in s. 3 cases eight weeks after the application and (ii) C was likely to be detained again in the future and, to that extent, he had an interest in the decision. The Court decided to hear the application, its' attention having been drawn to the decision in *R v Secretary of State for the Home Department ex parte Salem*<sup>32</sup>.

On the substantive issue in the case the Court held that the current practice of listing s. 3 cases to be heard 8 weeks after the making of the application did not breach Article 5 (4). Nor was there a breach on the facts of the case. In giving judgment Scott Baker J recognised that Article 5 (4) gives the patient a positive right to have the lawfulness of his detention decided speedily and that one of the purposes of the review of detention required by 5 (4) is to remove arbitrariness. He further stated that it is obviously desirable that the MHRT should review the detention sooner rather than later both in order to comply with Article 5 (4) and as a matter of commonsense and that there was a greater need for the detention to be susceptible to review speedily when a detained person is first challenging the propriety of his detention than at a second or subsequent challenge some time into his detention. He accepted the submission made on C's behalf that the question of administrative convenience was irrelevant to the question before the court and that administrative failings on the part of the state may result in a breach of 5 (4).

However, Scott Baker J rejected the primary submission made on behalf of C that s. 3 cases should be dealt with as are s. 2 cases i.e. the hearing of an application for discharge should be required to take place within 7 days<sup>33</sup>. In doing so he distinguished admission under s. 2 in that it permits short term detention for the purpose of assessment only in order to diagnose and/or determine what, if any, longer term treatment is appropriate (relying on the judgment of Tucker J in *R v Wilson ex parte Williamson*<sup>34</sup>). Accordingly s. 2 cases can proceed on a shorter time scale because (i) the permitted detention period is short (28 days) (ii) the nearest relative has no right to prevent admission under s. 2 (iii) the patient is unlikely to be known to other mental health services or to have undergone a

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32 [1999] 1 A.C. 450 [On an appeal on an issue of public law involving a public authority the House of Lords had a discretion to hear the appeal even if by the time it was due to begin there was no longer an issue to be determined directly affecting the parties' rights and obligations inter se: but the discretion is to be used with caution, and academic appeals should not be heard unless there was good reason in the public interest for

doing so. See also *R v Secretary of State for the Home Department ex parte Abdi* [1996] 1 W.L.R. 298 at 301 and referred to in the speech of Lord Slynn in *Ex parte Salem* at 456G].

33 Rule 31 MHRT rules.

34 [1996] C.O.D. 42

recent assessment and (iv) the doctors do not have to go through the process of having to consider whether the conditions precedent to admission required by s. 3 are satisfied. For any right of appeal in a s. 2 case to be effective it has to be heard quickly because otherwise the 28 day period will have expired and the appeal will be pointless - hence the need for hearings to be listed within 7 days. The position is different in s. 3 cases. Treatment under s. 3 involves the ongoing management of the patient. Time may be needed to assess whether treatment has been effective. The patient is likely to be well known to the mental health services and to have had a recent assessment and/or be the subject of an informal assessment before being admitted or to have been previously detained under s. 2 and moved to detention under s. 3.

Scott Baker J also rejected the applicant's submission in the alternative that a s. 3 patient should be in no different a position to that of a restricted patient conditionally discharged but recalled. The reference to the MHRT which must be made by the Secretary of State within one month of the patient's return to hospital following recall<sup>35</sup>, must be listed for hearing within 5 to 8 weeks of the reference being received at the tribunal offices.<sup>36</sup>

Having rejected the analogy with the position of those detained under s. 2 or conditionally discharged patients recalled to hospital, Scott Baker J considered the scheme for the preparation for and listing of hearings in s. 3 cases which he stated 'gives the impression of importing some urgency into the whole process.' He accepted that it would be wrong to first consider the rules and from the time limits within them conclude that 8 weeks is necessary and appropriate to fit in with them and that accordingly 5 (4) is satisfied. However the Rules demonstrate what is involved in getting all the relevant material before the MHRT. He observed that the provision of evidence as required by rule 6 can often be a substantial task. Further, representatives have to be booked, reports circulated and absorbed and, if necessary, responded to, and disclosure may be necessary. Crucially, a speedy hearing must also be a just one. Article 5 (4) does not require undue haste and it is critical that the MHRT has the relevant information and people before it so that it can give a considered judgement. The point was illustrated by the present case in that the patient may not remain in the same hospital and there may be a change of the RMO making it more difficult to prepare a case for the Tribunal. The MHRT is normally concerned with the substantive justification for a continuing detention rather than its procedural validity. This involves consideration of the medical issues and detailed investigation of sometimes conflicting evidence. Without the result of such investigations the MHRT might well make a decision on a wrong basis possibly with unjust and disastrous results. Balance therefore had to be achieved between putting the best information before the MHRT and having the hearing take place speedily.

Scott Baker J did not explore in detail the various judgments to which the Court was referred stating that to do so was not necessary as all were concerned with different situations from that of the present case. However he set out three points of principle that can be gleaned from the case law: (1) The Strasbourg Court recognises the need for detailed investigations and time for preparation of reports; (2) the word 'speedily' in 5 (4) must be construed against a background of the type of case under consideration; (3) mental health detention presents its own special difficulties. He also observed that in no case has a "not more than eight weeks" time limit for hearing appeals of mental health detentions for the purpose of providing treatment been held to breach 5 (4). He distinguished *E v Norway*<sup>37</sup> noting that in that case the patient was not psychotic at

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35 s. 75(1)(a) MHA

37 [1994] 17 EHRR 30

36 Rule 29(cc)(i) MHRT Rules

the relevant time, he was not being detained in hospital for treatment as a mental patient but in prison under preventative measures, and his detention was imposed in response to a criminal offence and not for his own protection or safety under the mental health legislation.

Leave to appeal was requested on the grounds that this was an issue of law which requires clarification in the public interest. Leave was refused because a clear judgement had been given.

### **Commentary**

Little justified criticism can be made of the general approach taken by Scott Baker J to determining the issue before the Court. Taking account of the Strasbourg jurisprudence, as he was bound to do<sup>38</sup>, he was right to consider whether the current practice in s.3 cases is in breach of Article 5 (4) in the context of the whole of the relevant scheme including the extent to which a person admitted under s. 3 is known to the psychiatric services and whether he has recently been assessed, the ability of the nearest relative to object to the admission, the purpose of detention under s. 3 and the time that is required to allow for the proper preparation of the hearing. In this regard the distinctions drawn by Scott Baker J between admissions under s. 3 and s. 2 are realistic and indeed reflect the guidance given in chapter 5 of the Mental Health Act Code of Practice. Importantly, it must be right that the patient detained under s. 3, having not only the benefit of a recent assessment (or of being known to the mental health services) and of the right of the nearest relative to object, but also the continuing duty of the RMO to consider whether the conditions for detention persist, does not require a review as speedily as a person detained under s. 2 without the equivalent safeguards.

Although it would have been useful, if, in giving judgment, Scott Baker J had referred to (and distinguished) the decisions of the European Court and Commission of Human Rights to which he had been referred by counsel for the applicant, he cannot otherwise be criticised for failing to do so. It is undoubtedly correct that in every case coming before the Court/Commission which has been concerned with detention under Article 5 (1) (e) and the speediness of review under Article 5 (4) the outcome has been determined according to the particular facts of the case and the relevant domestic scheme regulating the making of applications and which may or may not have provided other safeguards ensuring the continued lawfulness of the detention. None are on all fours with the instant case and, for the reasons given in the judgment, *E v Norway* is readily distinguished notwithstanding that the time period under consideration was also, as it happened it that case, 8 weeks. The most significant factor distinguishing *E v Norway* from the instant case is of course the fact that that *E* was not detained in a psychiatric institution for the purpose of treatment. The implications that follow from detention for the purpose for treatment did not arise.

In reaching the decision that he came to, Scott Baker J placed significant emphasis on the need to achieve balance between the right to a speedy review of detention and the importance of ensuring that the MHRT has the personnel, including representation, and all of the information it needs, including, if appropriate, independent reports, before it in order to make a just determination of the application. Although it might be, in certain cases, that the exercise of achieving a properly prepared Tribunal hearing is or could be completed in fewer than 8 weeks, it is difficult to criticise the decision and, taking all relevant factors in the round, in the opinion of this reviewer it is probably right. The emphasis on balance and the need to ensure that the MHRT does not make ill informed decisions on the wrong basis with potentially 'disastrous results' is in keeping with the

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38 s. 2 Human Rights Act 1998

need to find a fair balance between the protection of individual rights and the interests of the community at large which is inherent in Convention jurisprudence. It is difficult to see how it could be argued that the current practice in s. 3 cases, in seeking to strike the right balance, produces such a delay as to destroy the essence of the Article 5 (4) right to a speedy review.

Of course it is not the case that those detained pursuant to s. 3 may never challenge the speediness of the review of their detention under Article 5 (4). In any such case in which there is a failure to list the hearing within 8 weeks and the delay is not insignificant it will be open to the detained patient to bring such a challenge and, in cases where the patient is subsequently discharged from detention by the MHRT at the delayed hearing, to claim damages<sup>39</sup>. The merits of any such challenge will be improved in cases where the delay is due to administrative failings. As Scott Baker J made clear, administrative failings may lead to a breach of the patient's Article 5 (4) rights. To this extent the judgment in the instant case is likely to be helpful to those bringing cases in the future in such circumstances.

Similarly, the Courts have yet to consider the position of the restricted patient whose application should (on the basis of the target hearing times set by the MHRT Secretariat) be heard within not 8 but 20 weeks of its making. There is of course a significant difference between 2 and 5 months and, although different considerations apply, it is arguable that 20 weeks does destroy the essence of the right to a speedy review and is not necessary to achieve the requisite balance between the individual's Article 5 (4) rights and the interests of the community. In the opinion of the reviewer it is unlikely that the State would successfully meet such a challenge simply on the basis of either the shortage of suitably qualified presidents<sup>40</sup> or the time needed by the Home Office to prepare its statement<sup>41</sup>. Scott Baker J has made it absolutely clear, if it was not already, that administrative convenience in this context is an irrelevance.

### Postscript

Since this review went to print, the Applicant has successfully appealed to the Court of Appeal ([2001] EWCA Civ 1110). On the appeal it was submitted that the practice of listing all hearings 8 weeks from the date of the application was unlawful (rather than that a delay of eight weeks could not satisfy Article 5 (4)). The Court of Appeal accepted that there is a policy of listing hearings within eight weeks but that in practice hearings are listed 8 weeks from the date of the application and not before. The Court held that the current practice is bred of administrative convenience and, there being no effort to see that the individual case is heard as soon as reasonably practicable, is thereby unlawful. In giving judgment Lord Phillips MR said that he well understood why Scott Baker J rejected the submission made in the court below that the 'lead time' in s. 3 cases should be no longer than in a s.2 case.

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39 For example, an action for breach of the detained patient's Article 5 (4) rights post 2nd October 2000 may be brought under s. 7 HRA '98.

40 Rule 8 (3) MHRT Rules states that 'the persons qualified to serve as president of the tribunal for the consideration of an application or reference relating to a restricted patient shall be restricted to those legal members who have

been approved for that purpose by the Lord Chancellor'.

41 Rule 6 (2) MHRT Rules provides that the Secretary of State 'shall send to the tribunal, as soon as practicable, and in any case within 3 weeks of receipt by him of the authority's statement, a statement of such further information relevant to the application as may be available to him'.