

## Section 75(1) of the Mental Health Act 1983 is compliant with Article 5(4) of the European Convention on Human Rights...just.

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R (Daniel Rayner) v Secretary of State for Justice [2008] EWCA Civ 176

### Introduction

This case addresses for the first time the compatibility of section 75(1) of the *Mental Health Act 1983* with Article 5(4) of the European Convention on Human Rights. The decision of the Court of Appeal was that the statutory duty of the Secretary of State to act quickly in referring a recalled patient's case to the Mental Health Review Tribunal, combined with the patient's right to challenge the lawfulness of his detention by way of judicial review, was sufficient to satisfy the requirements of Article 5(4).

### The Facts

Daniel Rayner was convicted in 2002 of assault and possession of an offensive weapon. He was diagnosed as suffering from schizophrenia and made the subject of hospital and restriction orders under sections 37 and 41 of the *Mental Health Act 1983* ['MHA']. In 2004 a Mental Health Review Tribunal directed his conditional discharge under section 73 MHA. In 2005 he was readmitted as a voluntary patient, and on 14 June 2005 the Secretary of State for the Home Department issued a warrant under section 42(3) MHA formally recalling him to hospital.

In response to a letter from Mr Rayner's solicitors, the Home Office wrote on 8 August 2005 that, due to an oversight, a referral to the tribunal was not made following the recall to hospital in June. The referral was made that same day.

The tribunal arranged for the hearing of the reference to take place on 27 September 2005, but that date had to be vacated because of problems in providing the necessary reports in time. The hearing eventually took place on 28 October 2005, when the tribunal directed the deferred conditional discharge of Mr Rayner; because one of the conditions was only fulfilled on 12 January 2006, it was only on that date that he was discharged.

### The Law

Where a conditionally discharged patient has been recalled, section 75(1) MHA requires the Secretary of State to refer his case to the tribunal within one month of the day on which he returns to hospital. Once the reference has been made, rule 29(cc) of the Mental Health Review Tribunal Rules 1983 requires a hearing to be fixed in the period between five and eight weeks after the date of the reference.

In this case, therefore, the Secretary of State was required to refer Mr Rayner's case to the tribunal before, at the latest, 14 July 2005.

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Article 5(4) of the European Convention on Human Rights provides: “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.”

In the Administrative Court, the case came before Holman J. He concluded that the legislative scheme was compatible with the European Convention on Human Rights. He held however that Mr Rayner’s case should have been the subject of an “immediate” referral by the Secretary of State and that the Secretary of State’s delay in referring the case was unlawful. Both the Secretary of State and Mr Rayner appealed.

At the appeal stage, it was conceded on behalf of Mr Rayner that the timescale for a reference in section 75(1) is not incompatible with a patient’s rights under Article 5(4) of the Convention; it does not prevent a prompt reference and a speedy decision by the tribunal, and the stipulation that the Secretary of State must act within a maximum of one month does not prevent him from acting with such promptness within that month as is required by Article 5(4).

However, it was argued that the absence of any statutory means by which a patient can make his own application to the tribunal after he has been recalled is incompatible with his Article 5(4) right to take proceedings by which the lawfulness of his detention shall be decided. Mr Rayner’s cross-appeal therefore focused on the legislative requirement for dependence upon the Secretary of State to provide him with access to a court.

The Secretary of State conceded that on the facts of this case, he was in breach of Article 5(4) and of the duty under section 75(1), in that the reference was not made by him until 8 August 2005, which was almost two months after Mr Rayner’s return to hospital with the status of a compulsory detainee. That delay meant that a speedy determination of the lawfulness of his detention was not achieved.

However, the Secretary of State challenged the way in which Holman J at first instance described the duty of referral under section 75(1). The judge spoke in terms of Article 5(4) requiring an “immediate reference” to the tribunal and stated that a case should be referred “at once” unless the circumstances of the applicant or his case positively required otherwise. The judge noted the evidence given on behalf of the Secretary of State that his normal practice was to refer within 72 hours of recall, in the light of which he found that in this case “the very last day upon which the Secretary of State could lawfully have referred the case was Monday 20 June”.

## **The Decision**

### *(i) The Secretary of State’s duty of referral*

The period of one month within which the Secretary of State must refer a recalled patient’s case to the tribunal (section 75(1)(a)) runs from the return of the patient to hospital, not the date of the recall. The need to comply with the obligation to refer cannot have come as a surprise to the Secretary of State, because it is he who issues the warrant of recall.

The requirement in Article 5(4) is that a court decision is obtained speedily, rather than that proceedings are started speedily; that is, the obligation relates to the period within which the proceedings are determined, and not the speed with which they are initiated. In theory, laxity at the referral stage could be vitiated by alacrity by the tribunal upon receipt of the reference.

The Secretary of State is not generally entitled to take the statutory maximum of one month before

making a reference: a more energetic approach is required where the liberty of the subject is at stake, and, since a recalled patient has no direct right to apply to the tribunal himself, it is all the more important that the Secretary of State should act with despatch. It was the Secretary of State's practice to make a reference as soon as possible and normally within 72 hours; there would normally be no reason for him to take longer. Moreover, it is his duty to obtain without delay the necessary information as to the patient's return to hospital.

However, Holman J's use of the word 'immediate' to describe the reference required by Article 5(4) was incorrect: that interpretation of the word 'speedily' was not supported by the decisions of the Strasbourg Court, which has dealt with Article 5(4) issues on a case-by-case basis. The domestic courts should adopt the same approach, and should not prescribe quantified periods of time within which determination should be achieved; many factors, including delays by the patient and his representatives, could affect the timing of the hearing.

The test for the Secretary of State's duty to refer under section 75(1) was whether there was a failure to proceed with reasonable despatch, having regard to all the material circumstances. The test was as appropriate to the section 75(1) duty (i.e. to make the referral) as it was in respect of the timescale for determination.

On the facts, Holman J's conclusion that the reference should have been made by 20 June 2005, almost a week after the issue of the warrant, was correct. It was in any event conceded by the Secretary of state that he was in breach of Article 5(4) and section 75(1).

#### (ii) *The right to take proceedings*

Keene LJ identified a recent shift of emphasis in the Strasbourg jurisprudence, towards a greater emphasis on the Article 5(4) requirement that a detained person should be able to take the initiative to start proceedings to challenge the lawfulness of the detention. For example, in *Rakevich v Russia* [2004] MHLR 37, despite there being a duty on the detaining hospital to make an application to a court for approval of the patient's detention, Article 5(4) was violated because the patient did not herself have the direct right to apply for her release (that is, to *take* proceedings as opposed to have them initiated on her behalf).

However, because in English domestic law there is a statutory mechanism requiring the state authorities to act quickly in getting the issue of the lawfulness of a detention before the courts (which duty may be enforced by the patient by way of judicial review), and because a detained patient, including a recalled patient, has the right to use judicial review or habeas corpus to mount a direct challenge to the lawfulness of his detention, Article 5(4) was not violated. Keene LJ added that the Administrative Court, on an application for judicial review or habeas corpus by a detained patient, could order the Secretary of State to discharge the patient on a conditional basis if it was appropriate.<sup>2</sup>

## Comment

The Secretary of State's position, that he could wait up to a month before making a reference, was unlikely to be accepted by the court. In *R (C) v Mental Health Review Tribunal* [2002] 1 WLR 176, a successful challenge to an administrative practice whereby the Mental Health Review Tribunal would list every case after eight weeks, Lord Phillips MR stated it was not lawful to make no effort to see that the individual application is considered as soon as possible. It was therefore unsurprising that Keene LJ in

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<sup>2</sup> *A petition to the House of Lords is intended to be made.*

*Rayner* at paragraph 21 observed that the Secretary of State could not generally be entitled to wait for a month before making the referral and that where the liberty of the subject is at stake, speediness requires a more rapid and energetic approach. On the other hand, the Court of Appeal did not accept the patient's submission (accepted by Holman J in the court below) that an immediate referral was required, and observed the distinction between "speedily" (in Article 5 (4)) and "promptly" (in Article 5 (3)), the latter importing a more exacting requirement of expedition. However, Holman J's finding that a referral should have been made within a week was upheld.

This case is reminiscent of *R (SC) v (1) MHRT (2) The Secretary of State For Health & Secretary of State For The Home Department* [2005] MHLR 31 - in both cases, flaws in the terms of section 75 MHA were decided nevertheless to be compatible with detained patients' Article 5 rights because the Administrative Court is available as a form of panacea. However, whilst in SC the court's role was as a subsequent corrective to an unlawful tribunal decision, *Rayner* goes further.

Keene LJ concluded at paragraph 46 that section 75, if it stood alone, might not now be sufficient to accord with the requirements of Article 5(4). But, taken with the Administrative Court's post *Human Rights Act 1998* ['HRA'] power to step into the role of an Article 6 court and reach substantive decisions on the merits, it was saved.

This is a procedure which the Administrative Court is likely to approach with considerable distaste. Keene LJ relied heavily on *R (Wilkinson) v Broadmoor Special Hospital Authority* [2002] 1 WLR 419, in which the Court of Appeal decided that Article 6 of the Convention required a patient's judicial review of a decision to treat him compulsorily under section 58 MHA to be a full merits hearing with, if necessary, the cross-examination of witnesses. However, in *R (N) v M* [2003] 1 WLR 562, when the Court of Appeal considered the same point, following the first substantive claim of this nature, it said at paragraph 39: "although in some cases the nature of the challenge may be such that the court cannot decide the ultimate question without determining for itself the disputed facts, *it should not be overlooked that the court's role is essentially one of review*" (emphasis added).

As a very strong indication of the continuing difficulty of this question, the judgment of Baroness Hale of Richmond in *R (H) v Secretary of State for Health* [2005] 4 All E.R. 1311 is instructive: at paragraph 31 she describes the post HRA possibility that the Administrative Court will be obliged to conduct a merits review of a patient's detention where a patient is detained under section 2 MHA for longer than is usually allowed, because there are parallel proceedings relating to their nearest relative. She said the Court is not well equipped to conduct such a review, and may take some persuading that it is necessary:

*"First, it is not used to hearing oral evidence and cross examination. It will therefore take some persuading that this is necessary: cf R (Wilkinson) v Broadmoor Special Hospital Authority [2002] 1 WLR 419 and R (N) v M [2003] 1 WLR 562. Second, it is not readily accessible to the patient, who is the one person whose participation in the proceedings must be assured. It sits in London, whereas tribunals sit in the hospital. How would the patient's transport to London be arranged? Third, it is not itself an expert tribunal and will therefore need more argument and evidence than a Mental Health Review Tribunal will need to decide exactly the same case. All of this takes time, thus increasing the risk that the determination will not be as speedy as Art 5(4) requires."*

Despite these misgivings, Baroness Hale, who gave the only reasoned speech in *H*, decided in relation to a similar issue as was before the Court of Appeal in *Rayner* that speedy action by the Secretary of State

and the lower courts combined with, if necessary, a full merits hearing in the Administrative Court, was sufficient to render section 29(4) MHA compliant with Article 5(4)<sup>3</sup>.

Similarly, as a matter of judicial theory if not of actual practice, the Court of Appeal's decision in *Rayner*, and hence the compatibility of section 75(1) MHA with the Convention, relies squarely on the Administrative Court's availability to act as a kind of ersatz Mental Health Review Tribunal. Keene LJ added a caveat at the close of his judgment, to the effect that a patient would normally find it quicker and more effective to apply for an order enforcing the Secretary of State's statutory duty rather than to embark on a direct challenge in the courts to the lawfulness of the detention.

But how would a direct challenge in the Administrative Court work, particularly in relation to conditional discharge? Would the deferred conditional discharge procedure established by the Court of Appeal in *R (IH) v Secretary of State for the Home Department* [2002] 3 WLR 967 (approved by the House of Lords [2005] 3 WLR 867) be followed? If not, would there not be a risk of the patient falling into the Article 5(4) violating limbo which the new regime established in *IH* was designed to cure? Would the often drawn out provisional discharge procedure require an Administrative Court judge to order the Secretary of State to direct discharge *if* the proposed conditions can be implemented, requiring the indefinite deferral of a mandatory order? And what if in the meantime the patient has his statutory hearing before the Mental Health Review Tribunal, the decision of which is at odds with that of the judge?

It would perhaps be overly cynical to suggest that these are questions which will never be answered because the Court of Appeal's judgment in this case relied on a theoretically available direct right of access to the courts which, while convenient as an Article 5(4) compliant veneer, is never likely to be of practical use. After all, it is a first principle of the Convention that the protection it affords is practical and effective.

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3 The European Court of Human Rights has recently referred the case of *MH v United Kingdom* (the appellant in *H*) to the Government for its observations both on admissibility and merits. A review of *R (H) v Secretary of State for Health* [2005] 4 All E.R. 1311 was published in the May 2006 issue of the *JMHL* @ pp66–75 – see 'Executive Action and Convention Compliance? A Risk Unrecognised by the House' by Kris Gledhill.