

## *Detention of a recently-discharged psychiatric patient*

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**R v East London & the City Mental Health NHS Trust and David Stuart Snazell,  
Approved Social Worker, ex parte Count Franz Von Brandenburg**

*Court of Appeal, 21 February 2001, The Master of the Rolls, Buxton LJ and Sedley LJ  
[2001] 3 WLR 588*

*Although it was unnecessary to show a change in circumstances following discharge by a MHRT, it would be difficult for an ASW to be satisfied that a fresh application for detention, made within days of detention, ought to be made*

### **Introduction**

This case was heard on the same day, and by the same judges, as *R v Camden & Islington Health Authority, ex parte K*.<sup>1</sup> It was an appeal against a decision of Burton J refusing judicial review of an application by the Second Respondent, an Approved Social Worker ('ASW'), for the Appellant to be detained in hospital under section 3 of the Mental Health Act 1983 ('MHA 1983'), and of a decision by the First Respondent, 'the managers' for the purposes of MHA 1983 section 145 of the hospital in which the Appellant consequently came to be detained, to accept that application. In *Ex parte K*, the Master of the Rolls explained why the Court had decided to hear the two cases consecutively. He said:

"In each case the Applicant was a patient compulsorily detained under the Mental Health Act 1983. In each case a Mental Health Review Tribunal ... had ordered the discharge of the Applicant. In each case the Applicant sought judicial review on the same basis that the Tribunal's order had unlawfully been prevented from being implemented by, in the first case, omissions and, in the second case, acts of the relevant professionals. Each appeal turns on a different narrow, though important, point of statutory construction. Each appeal raises wider issues of general importance. Each appeal involves areas of law and practice in relation to mental health of some complexity."<sup>2</sup>

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1 [2001] 3 WLR 553; see Dr Kristina Stern, *Clinical Disagreement with a Deferred Conditional Discharge*, *Journal of Mental Health Law*, June 2001, edition no 5, pp 86-92

2 *Ibid*, para 1

## **Facts**

On 15 March 2000, the Appellant was admitted to hospital under section 4 of the Mental Health Act 1983 ('MHA 1983'), and later that day detained under MHA 1983, section 2. On 31 March 2000, a Mental Health Review Tribunal ('MHRT') granted his application for discharge, which it deferred under MHA 1983, section 72(3) until 7 April 2000. It said as follows:

"The Tribunal are satisfied that [there] may be evidence of mental illness, but do not believe that it is of a degree which justifies detention. Moreover, having heard [the patient's] own account of the episodes of alleged aggression, we do not consider that his own health or safety requires detention, nor do others need to be protected from him. In the light of our concern, however, that [the patient] may continue to suffer from a mental illness, it is appropriate for accommodation in the community to be found for him and a care plan be made including possible medication. The discharge has therefore been delayed to enable this to happen."

However, on 6 April 2000, the day before the deferred discharge would be realised, the Appellant was detained again, under MHA 1983, section 3. The application for detention was made by an ASW who had appeared before the MHRT on 31 March and opposed the Appellant's discharge; and one of the medical recommendations was provided by his Responsible Medical Officer, who had done the same. Neither of the medical recommendations referred to the MHRT decision or indicated that there had been any change in circumstances since it was made.

## **The Law**

In *R v Secretary of State for the Home Department, ex parte K*,<sup>3</sup> McCullough J considered the circumstances in which the Home Secretary might recall to hospital a restricted patient to whom a MHRT had recently granted a conditional discharge. He concluded that such would not be lawful,

"... unless meanwhile something has happened which justified the belief that a different view might now be taken about one of the factors on which his release had depended."

Although McCullough J's decision was upheld on appeal, the Court of Appeal did not comment upon this particular passage of his judgment.<sup>4</sup>

However, a contrary view was expressed in *R v Managers of South Western Hospital, ex parte M*.<sup>5</sup> On the day that a patient's deferred discharge was due to take effect, she was detained again, under MHA 1983, section 3. In upholding this subsequent detention, Laws J held that it was not necessary that there had been a change of circumstances since the MHRT heard her case, and he accepted as correct the following submission:

"[MHA 1983,] section 13 imposes a duty on an approved social worker to make a section 3 application in the circumstances which that section specified; the duty is not abrogated, or qualified, in a case where there has been a recent tribunal decision directing discharge; if it were to be abrogated or qualified, section 13 would say so. That being the case, the hospital managers must be obliged to consider on its merits an application made by the approved social worker in pursuance of his or her duty, and the existence of a recent tribunal decision can no more fetter this obligation than it can the social worker's own express duty under section 13."<sup>6</sup>

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3 [1990] 1 All ER 703

4 [1990] 3 All ER 562

5 [1993] QB 683

6 *Ibid.*, p 694

The learned judge found against the requirement for a ‘change of circumstances’. He said:

“Honest and responsible doctors and other experts will differ upon such questions as the significance of any apparent change in a patient’s condition – even when there has been a change; to make the legality of a detention dependent upon issues of that sort would be to abandon any claim in this area to a reasonable degree of legal certainty and would, likely as not, put the experts involved in individual cases in an invidious if not impossible position.”<sup>7</sup>

Finally, Laws J distinguished the decision of McCullough J in *Ex parte K*. He spoke of a “plain nexus” between the MHRT’s power under MHA 1983, section 73(2) conditionally to discharge a restricted patient, and the Secretary of State’s MHA 1983, section 42(3) power to recall such a patient to hospital, and he suggested that the legality of such recall may depend “upon the Secretary of State’s having had regard to the basis of the earlier tribunal decision so as to avoid any frank inconsistency with it.”<sup>8</sup> However, Laws J could find no such connection between the MHA 1983, section 3 regime and the functions of the MHRT under MHA 1983, sections 66 and 72(1). He therefore concluded:

“I can see no basis for construing [MHA 1983] so as to produce the result that the duty and discretion of the approved social worker to make the section 3 application, and the function of the managers in considering it, are to any extent impliedly limited or abrogated by the existence of an earlier tribunal decision to discharge under section 72.”<sup>9</sup>

### Argument – the Appellant

The Appellant’s principal contention was that, once a MHRT has ordered that a patient be discharged from detention, the MHA 1983 makes it unlawful for an ASW to apply to re-detain him, or for the ‘managers’ to accede to such an application, unless they can show that there has been a relevant change of circumstances. It was argued that this interpretation was necessary both to give effect to the scheme of the MHA 1983 and to fulfil the obligation to interpret it compatibly with the European Convention on Human Rights (‘ECHR’).<sup>10</sup> The Appellant argued that if the relevant professionals could procure the readmission of a discharged patient without a change in circumstances, this would rob the MHRT of its status as a ‘court’ and reduce it to a mere advisory body – a status, it was clear, that would offend against ECHR, Article 5(4).<sup>11</sup> Thus, the Appellant argued, the analysis by Laws J in *R v Managers of South Western Hospital, ex parte M* was incorrect: a ‘change of circumstances’ test would not introduce criteria that were either subjective or elastic, and in any case, such a test had been already approved, both in mental health<sup>12</sup> and in other fields of law.<sup>13</sup>

However, the Appellant conceded that it would not be necessary for those re-detaining a recently discharged patient to demonstrate a relevant change in circumstances where such would be impracticable or would involve excessive delay.

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7 *Ibid.*, pp 694-695

8 *Ibid.*, p 696

9 *Ibid.*

10 Human Rights Act 1998, s 3(1)

11 *X v United Kingdom* (1981) 4 EHRR 188

12 *R v Home Secretary, ex parte Harry* [1998] 1 WLR 1737, per Lightman J at p 1745

13 *R v Secretary of State for the Home Department, ex parte Danaie* [1988] 1 All ER 84 at p 92

## **Argument – the Respondents**

The Respondents contended that there had, in fact, been a relevant change in the Appellant's circumstances following his discharge by the MHRT. However, they also argued that the power to detain him again was not, in fact, contingent upon such a change.

The First Respondent, the detaining 'managers', accepted that there might be circumstances in which a patient's detention in hospital would be unlawful where a MHRT had already ordered his discharge. However, it contended that the existence of such an order was merely one factor that would have to be taken into account, and that the MHA 1983 required the professionals involved to consider the criteria contained in section 3(2)(a) and (c) in the light of the circumstances that then obtained. In support of this contention, the First Respondent cited the case of *St George's Healthcare NHS Trust v S*,<sup>14</sup> in which Judge LJ held that the provisions in MHA 1983, section 13:

“... make clear that the [approved] social worker must exercise her own independent judgment on the basis of all the available material, including her interview and assessment of the 'patient', and personally make the appropriate decision.”<sup>15</sup>

For the Second Respondent, the ASW, it was argued that the right to apply for the patient's further detention had not been abrogated by the MHRT discharge. In fact, it was suggested that MHA 1983, section 13 compelled such an application if the ASW was satisfied that it “ought to be made” and that it was “necessary and proper” in the circumstances then existing. Furthermore, when an ASW was contemplating making an application for a patient's further detention, it was unrealistic to require him to obtain and scrutinise all the material available to any MHRT that had recently discharged him. However, the Second Respondent conceded that, because an ASW was obliged to act rationally and in good faith, he would be obliged to have regard to an earlier MHRT decision of which he was aware. Where a patient had recently been discharged by a MHRT, a further detention application would only be valid if the ASW considered that the facts relevant to the admission criteria had changed. In the absence of such a change, it was likely that a decision to apply for detention would be irrational, although it might be justified by matters other than a change of circumstances, such as the discovery of information that had not been available to the MHRT.

## **Decision**

The lead judgment was delivered by the Master of the Rolls, Lord Phillips. He accepted the contention on behalf of the Appellant that Laws J had erred, and that there was, in fact, a “cross-reference” between the MHA 1983, section 3 regime and the functions of the MHRT under MHA 1983, sections 66 and 72(1).<sup>16</sup> He noted the decision in *Reid v Secretary of State for Scotland*,<sup>17</sup> whose import, he stated, was that:

“A finding by a Tribunal pursuant to section 72 that a patient must be discharged amounts, in terms, to a finding that one or more of the criteria necessary to found admission under section 2 or section 3 are not present”.<sup>18</sup>

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14 [1998] 3 All ER 673

15 *Ibid.*, at p 694

16 *R v East London & the City Mental Health NHS Trust and David Stuart Snazell, Approved Social Worker, ex*

*parte Count Franz Von Brandenburg* [2001] 3 WLR 588, para 17

17 [1999] 2 WLR 28

18 Para 18

The Master of the Rolls held that in most cases, a “sensible period” would elapse between the patient’s discharge by a MHRT and an application for his re-admission under the MHA 1983, and that the statutory requirement for a ‘change of circumstances’, for which the Appellant contended, would therefore be “neither necessary nor sensible”.<sup>19</sup> Any new application would probably be prompted by behaviour that was a reaction to the patient’s return to the community, which might constitute a relevant change of circumstances. In those circumstances:

“To require the professionals involved to investigate and attempt a comparison between the two sets of circumstances in order to decide whether or not there has been a relevant change of circumstances would not be helpful or even meaningful.”<sup>20</sup>

However, the position was very different “where an application for re-admission is made within days of a Tribunal’s decision to discharge”. Such a decision would imply a finding by the MHRT that the statutory criteria for the patient’s detention were no longer met. In such circumstances, it would be the view of the MHRT that must prevail, particularly if the patient had not subsequently left hospital and been exposed to different environmental influences.<sup>21</sup> In such circumstances, the Master of the Rolls indicated:

“... I do not see how an Approved Social Worker can properly be satisfied, as required by [MHA, 1983,] 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.”<sup>22</sup>

The Master of the Rolls held that, in the absence of such circumstances, an application by an ASW for the patient’s further detention would probably be “irrational”, and be struck down upon judicial review. Whether such a result was appropriate in this case would depend upon factual evidence, which had not been rehearsed at first instance and upon which, therefore, it would not be appropriate for the Court of Appeal to express a view.<sup>23</sup> However, the Appellant had failed to establish that, as a matter of statutory interpretation, the MHA 1983 requires a change of circumstances before a patient who has been discharged by a MHRT may be re-detained under section 2 or section 3.<sup>24</sup> Therefore, his appeal would have to be dismissed.

Buxton LJ agreed with this conclusion, and with the analysis that had prompted it.

For Sedley LJ, the significance of this case was that, although the Appellant had succeeded in his challenge to the decision of Laws J in *Ex parte M*,<sup>25</sup> and had established as false the proposition that “there is no sense in which those concerned in a section 3 application are at any stage bound by an earlier tribunal decision”, he had failed to re-introduce the ‘change of circumstances’ test in its place. The void was now to be filled with the test set out by the Master of the Rolls,<sup>26</sup> and an ASW would be bound to have regard to “a recent – and often a not so recent – order of a tribunal for discharge”.<sup>27</sup> Such an order,

“... if the circumstances have not appreciably changed, must be accorded very great weight if the second decision is not to be perceived as an illicit over-ruling of the first”.<sup>28</sup>

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19 Para 30

20 *Ibid.*

21 *Ibid.*, para 31

22 *Ibid.*, para 32

23 *Ibid.*, para 34

24 *Ibid.*, para 33

25 see note 6, above

26 *R v East London & the City Mental Health NHS Trust and David Stuart Snazell, Approved Social Worker, ex parte Count Franz Von Brandenburg* [2001] 3 WLR 588, para 38

27 *Ibid.*, para 41

28 *Ibid.*

Thus, although those involved in a subsequent application for detention would not be bound by a recent MHRT discharge, they may not lawfully ignore it, and

“... must have due regard to such a decision for what it is: the ruling of a body with duties and powers analogous to those of a court, taken at an ascertainable date on ascertainable evidence. The second decision must be approached with an open mind, but it is not necessarily going to be written on a clean slate.”<sup>29</sup>

All of which, Sedley LJ concluded, represented “a significant movement in the law as it has thus far been understood”.<sup>30</sup>

### **Commentary**

It is, perhaps, regrettable that the Master of the Rolls, and Sedley and Buxton LJ did not address the central issue of this case in more detail and, in the case of the first two of them, that they did not agree a common definition of their terms.

It is clear that the considerable latitude afforded to practitioners by the judgment of Laws J in *R v Managers of South Western Hospital, ex parte M*<sup>31</sup> has been reduced, but it is doubtful whether the ‘change of circumstances’ test set out by McCullough J in *R v Secretary of State for the Home Department, ex parte K*<sup>32</sup> has been rejected quite so thoroughly as the Court seems to have supposed.

Certainly, it is unnecessary to demonstrate a change in circumstances where “a sensible period [has elapsed] between discharge and readmission”,<sup>33</sup> but few difficulties were ever encountered in that regard. In any case, this judgment offers no guidance as to the course that is to be adopted where a patient has remained in hospital for such a “sensible period” following his discharge by a MHRT, and has not therefore been exposed to the sort of stressors that might be expected to bring about a change in his circumstances.

Difficulties have, of course, been encountered, in the words of the Master of the Rolls, “where an application for readmission is made within days of a Tribunal’s decision to discharge”.<sup>34</sup> However, it is unlikely that this judgment will do very much to alleviate them. As we have seen, Laws J believed that the ‘change of circumstances’ test would import “criteria which were subjective and elastic”.<sup>35</sup> However, the test that the Master of the Rolls has sought to put in its place is no more objective and no more firm. He seeks to clarify the position “where an application is made *within days* of a Tribunal’s decision to discharge”,<sup>36</sup> but for precisely how many days after discharge will his stipulations apply? Sedley LJ simply compounds this uncertainty, because he speaks of the inhibiting effect of “a recent – and often a *not so recent* – order of a tribunal for discharge”.<sup>37</sup> How much time will have to elapse before a “not so recent” discharge is no longer “recent” at all?

Even if these temporal confusions were to be resolved, there would still be doubt as to the factors that will permit an ASW to act, and those that will prohibit him from acting. The Master of the

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29 *Ibid.*, para 42

30 *Ibid.*, para 43

31 see note 6, above

32 see note 4, above

33 Lord Phillips, MR, at para 30

34 at para 31

35 Lord Phillips, MR, at para 15

36 at para 31; *emphasis added*

37 at para 41; *emphasis added*

Rolls has stated that an application for further detention will not be irrational where the ASW who makes it is “aware of circumstances not known to the Tribunal which invalidate the decision of the Tribunal”.<sup>38</sup> This is not so, he makes clear, because the law is to be interpreted as requiring a change of circumstances. Such was the conclusion of McCullough J in *R v Secretary of State for the Home Department, ex parte K*,<sup>39</sup> and it was erroneous. The requirement for knowledge of additional circumstances before a subsequent detention application may be made is to be inferred from MHA 1983, section 13. Without it, that application would have to be over-ruled because the ASW’s belief that it “ought to be made” would be improper. Of course, by so finding, the Master of the Rolls explicitly joins issue with – and over-rules – Laws J in *R v Managers of South Western Hospital, ex parte M*.<sup>40</sup> However, he also alters the context in which the ASW’s conduct is to be viewed. It will now fall to be judged, not according to principles of strict legal construction, but, because the new benchmark is the ASW’s MHA 1983, section 13 duty, according to its more general ‘necessity’ or ‘propriety’. As we shall see, this may make it more difficult for an ASW to secure the detention of a patient under MHA 1983, section 3 in the face of objections from the nearest relative.

It is also necessary to attempt to identify the sorts of circumstances knowledge of which will justify re-detention. The formulation put forward by the Master of the Rolls – “circumstances not known to the Tribunal which invalidate the decision of the Tribunal” – suggests that they are confined to matters of which the MHRT was unaware, even though they were in existence at the time of the initial hearing. However, logic dictates that the power to re-detain cannot be contingent only upon those circumstances, and that it will also be justified by *post*-hearing changes that are genuine and empirically-observed. If so, it is surely inaccurate to state, as Sedley LJ states, that the “change of circumstances criterion for readmission” has not been re-introduced.<sup>41</sup> The truth, surely, is that the ‘change of circumstances’ test has been re-asserted, albeit – because of the judgment of the Master of the Rolls – in a slightly enlarged form.

It is, perhaps, curious that Sedley LJ never seems to acknowledge this re-formulation; never seems to concede that after-acquired knowledge of pre-existing facts might in itself justify re-detention. His words are imprecise, and the concepts they convey vague. He speaks of the need to respect an existing MHRT discharge “if the circumstances have not appreciably changed”,<sup>42</sup> and confirms this analysis by suggesting that “where readmission comes hard on the heels of discharge by the tribunal, there may ... be little practical difference between what [the Appellant] has sought and what he has achieved”.<sup>43</sup> These words do not seem significantly different to those of McCullough J, who, it will be remembered, in a judgment that has come to be seen as the highwater-mark of the ‘change of circumstances’ test, argued that it would be unlawful for the Home Secretary to recall a conditionally discharged restricted patient to hospital:

“... unless meanwhile something has happened which justified the belief that a different view might now be taken about one of the factors on which his release had depended.”<sup>44</sup>

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38 at para 32

39 see note 4, above

40 see note 6, above. The importance of this judgment is being gradually eroded – see, for example: *Re S-C (Mental Patient: Habeas Corpus)* [1996] 1 All ER 532, CA

41 at para 38

42 at para 41

43 at para 39

44 see note 4, above

Thus, Sedley LJ's suggestion that the *Von Brandenburg* decision represents "a significant movement in the law as it has thus far been understood" may be sustainable only if one ignores his own contribution to it. It seems clear that in his view the current understanding of that law had been based upon the judgment of McCullough J.

The admittedly brief intervention of Buxton LJ is both curious and ambiguous. He states that he agrees with the Master of the Rolls "for the reason [sic] that he gives",<sup>45</sup> and must therefore be taken to concur in the purported rejection of the 'change of circumstances' test. It is surprising, then, to discover that he had recently concurred in a decision in which that test was specifically affirmed.

In *Smirek v Williams*,<sup>46</sup> a patient had been granted a delayed discharge by a MHRT upon his assurance that he would comply with his medication regime. When he failed so to comply, consideration was given to detaining him in hospital once again. Although his statutory 'nearest relative' objected to such a course, he was held to have done so unreasonably, and was therefore displaced by a county court judge.<sup>47</sup> The Court of Appeal upheld this displacement, notwithstanding the recent deferred discharge. However, Hale LJ held that:

"... it cannot possibly be outside that band of reasonable decisions for the [nearest relative] to agree with, and rely upon, a recent decision of a Mental Health Review tribunal unless there has *since* been a change in the circumstances leading to that decision".<sup>48</sup>

Buxton LJ agreed with this view, stating:

"The Tribunals' decision is to be respected unless there has been ... some change in the circumstances of a significant kind which would enable the Tribunal to take a different view if the matter was referred to them again".<sup>49</sup>

If the test adumbrated by Buxton LJ (and Hale LJ) in *Smirek* is different to that of Phillips MR (and Sedley LJ) in *Von Brandenburg* – with which test, of course, Buxton LJ concurred – he has contradicted himself. If it is the same test, then Sedley LJ is wrong, *Von Brandenburg* does not represent a "significant movement in the law as it has thus far been understood", and the much-maligned 'change of circumstances' test still obtains.

Of course, following *Smirek v Williams*, if the circumstances obtaining at the time of the MHRT hearing had not changed subsequently, Hale LJ's test would permit the nearest relative's objection to be 'reasonable' – and would therefore render the nearest relative incapable of being displaced and a subsequent detention unsustainable – even where information had come to light suggesting that the circumstances upon which the discharge decision was based had been misunderstood. Yet, according to the judgment of Lord Phillips MR in *Von Brandenburg*, such after-acquired information may now be capable of justifying the patient's re-detention. Thus, where the proposed detention is under MHA 1983, section 3 – and therefore relies upon the absence of objection from the nearest relative – an ASW might find himself unable to secure the nearest relative's displacement where, following *Von Brandenburg*, an application for the patient's detention would be perfectly proper. This is the undesirable result of shifting the basis of analysis from strict principles of legal construction to the more general questions implied by MHA 1983, section 13: although an ASW may support an application for detention under MHA 1983, section 3 according

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45 *at para 37*

48 *Ibid.*, *at para 17; emphasis added*

46 *Unreported, Court of Appeal, 7 April 2000*

49 *Ibid.*, *at para 21*

47 *Following an application under MHA 1983, s 29(1)*



to circumstances obtaining at the time of, but not mentioned at, a MHRT hearing, the reasonableness of a nearest relative's objection to such an application is only to be judged against subsequent events.

### **Conclusion**

The decision of the Court of Appeal in *R v East London & the City Mental Health NHS Trust and David Stuart Snazell, Approved Social Worker, ex parte Count Franz Von Brandenburg* will do little to assist practitioners faced with a MHRT decision that they find disappointing, and the more recently that decision was made, the greater will be their difficulty. If, despite the protestations of the Master of the Rolls, the 'change of circumstances' test still obtains, it is likely that it will be capable of being satisfied, not only by subsequent events, but also by those which, although they occurred before the hearing, were unknown to the MHRT and would have affected its decision to discharge. In that sense, this decision represents a development of the existing law. However, those requiring firm guidance as to precisely when, or in precisely what circumstances, a new application might be made to detain a patient recently discharged by a MHRT will search for it in vain. By impliedly creating different standards by which to judge the propriety of an ASW's application for a patient's detention and the 'reasonableness' of his nearest relative's refusal to consent to it, this judgment simply serves to compound the considerable confusion that is already experienced by many practitioners.