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[2004] I AC 1) and R (Smith) v Parole Board (The Times September 2, 2003; [2003] TLR 504; [2004] I WLR 421) in support of his argument that his conduct was not within the ambit of article 5 because the initial sentence by a court justified what happened thereafter.

However, in his Lordship's judgment, those authorities could still, arguably, be distinguished if the claimant's other arguments were right. There could then be, so it was argued, a process governing the claimant's release that was

arbitrary and discriminatory.

That situation would not have been in the contemplation of the House of Lords in *Giles* and the Court of Appeal in *Smith*. It could be, as the claimant argued, that those authorities were not intending to exclude all reliance on article 5 because of the existence of a proper sentencing process.

However, if the difference in treatment was justified, that would defeat any invocation of article 5 and article 14.

2 Was there any material difference between the treatment of the claimant and his comparators?

The claimant contended that his comparators were those serving determinate sentences of less than 15 years, in relation to whom the Parole Board's decision would be final.

He did not suggest that those serving discretionary life sentences were comparators because of the different nature of such a sentence.

The Home Secretary submitted that there was no material difference of treatment between one category of long-term prisoner and the other. All long-term determinate sentence prisoners had access to discretionary conditional release after serving half their sentences.

The same reports were prepared, the same criteria were applied in deciding whether to grant release and the fact that the Home Secretary was a member of the executive and the Parole Board was a judicial body was of itself of no consequence.

The fact that two bodies were involved in considering release in the case of those serving the longest sentences was of no significance as they were both considering the same material.

His Lordship did not accept that argument. The fact that there were two bodies, both of whom legitimately could come to a different decision, demonstrated that there could be, and was in the case of the claimant, a difference in treatment

For release to be subject to the decision of two decision makers rather than one constituted a material difference in treatment.

3 Were the chosen comparators in an analogous situation?

The circumstances of the two categories of comparators were so similar as to call, in the mind of the rational and fair-minded person, for a positive justification for the less favourable treatment.

Once it was established that there was a difference in treatment, then there should be some rational explanation for that difference in treatment. The more discriminatory the treatment, the greater the need for justification.

4 Was there objective and reasonable justification for the difference in treatment?

In the case of sentences for 15 years and longer, it was self-evident that the Home Secretary's involvement existed because of the gravity of the crimes committed by those who were sentenced for such a long period of time.

The history of the legislation made clear the reason for a distinction between the treatment of those sentenced for a lesser period and those sentenced for 15 years or over. It was not difficult to argue that any cut-off point could, in the case of individual prisoners, create results which were difficult to justify so far as the relevant circumstances of each was concerned.

However, dividing lines had to be drawn and it was perfectly reasonable for the Home Secretary to draw a line and say that in relation to those prisoners who would, in the case of those sentenced to a determinate sentence, generally have committed the most serious crimes or have the worse record, or both, he should remain democratically accountable as Home Secretary and so have a residual discretion over their release.

It followed that while there was a difference in treatment, that difference in treatment was justifiable and, therefore, there could be no contravention of article 5 read with article 14.

Lord Justice Rix and Lord Justice Carnwath agreed. Solicitors: Pattersons, Halifax; Treasury Solicitor

Mental health — conditional discharge of restricted patient — lawfulness of patient's continued detention

COURT OF APPEAL

Published May 13, 2004

Regina (W) v Doncaster Metropolitan Borough Council

Before Lord Justice Judge, Lord Justice Mance and Lord Justice Scott Baker

Judgment May 6, 2004

When the discharge of a restricted mental patient was ordered, the duty of a health authority was not absolute, but to use its best endeavours to ensure that conditions required by a mental health review tribunal were satisfied.

The Court of Appeal so held, dismissing an appeal from the refusal by Mr Justice Stanley Burnton (*The Times* March 12, 2003; [2003] TLR 145) of the application of a mental patient, W, for judicial review of alleged failure by the respondent, Doncaster Metropolitan Borough Council, to take steps required by a mental health review tribunal's decision of July 9, 2001 directing his conditional discharge from hospital.

The claimant sought damages under the Human Rights Act 1998 alleging that Doncaster had unlawfully failed to take steps required by the tribunal's decision directing his discharge, which would have secured his release from detention under the Mental Health Act 1983.

Mr Richard Gordon, QC and Mr Kris Gledhill for W; Mr Robert Jay, QC and Mr Robert Weir for Doncaster.

LORD JUSTICE SCOTT BAKER said that W claimed that for seven months or more he was detained in hospital when he should have been living in the community under a conditional discharge ordered by a mental health tribunal. He claimed that Doncaster was responsible for that state of affairs and sought damages for false imprisonment.

The claimant, aged 30 was detained with a restriction order under sections 37 and 41 of the 1983 Act. In 2001 his case was referred to a mental health review tribunal and heard on July 9, 2001.

The tribunal was not satisfied that the applicant was suffering from a mental condition specified in section 72(1)(b) of the 1983 Act.

It was satisfied that it was not necessary for his health or safety, or for the protection of others, for him to receive medical treatment, but it was not satisfied that it was not appropriate for him to remain liable to be recalled to hospital for further treatment.

The tribunal imposed conditions on the applicant's discharge: that he should receive psychiatric supervision, supervision from a social worker and should live at appropriate accommodation approved by his psychiatrist and his social worker.

By December 2001 suitable accommodation had not been found. The social worker referred the case back to the tribunal. The tribunal met on March 6, 2002 and again directed discharge subject to similar conditions.

The period of detention about which the appellant complained was that between the first tribunal hearing on July 9, 2001 and the hearing on March 6, 2002. His case focused on the respondent's failure to put in place the conditions directed by the tribunal.

When the tribunal made its order, the applicant was entitled to be discharged within a reasonable time thereafter. It was said that failure by the respondent to take action to ensure the applicant's discharge within a reasonable time was a breach of article 5.1(e) and 5.4 of the European Convention on Human Rights as well as amounting to a wrongful detention in domestic law.

The fundamental flaw in that argument was that the conditions imposed by the tribunal were inextricably linked with the applicant's release.

It was not a correct analysis of the situation that the tribunal decided the applicant should be released and, absent the implementation of the conditions within a reasonable period his continued detention necessarily became unlawful.

The core of the submissions for the respondent was that on the true construction of the tribunal's July 2001 decision was that the applicant could be safely discharged provided that the conditions were fulfilled.

It was important not to lose sight of the underlying essentials. There was a middle group between those restricted patients who could not safely be discharged from hospital and those who could be returned unconditionally to live in the community.

The middle group could safely live in the community provided the necessary support was in place. It was to that group that the conditional discharge was directed, with the additional weapon in the tribunal's armoury that the discharge might be deferred until the necessary conditions were implemented.

However one approached the categorisation of the applicant in the present case, the respondent's obligation was to use its best endeavours to implement the conditions envisaged by the tribunal, which was what the respondent did,

A patient no longer suffering from mental disorder did not necessarily have to be absolutely discharged, see section 73(1)(b) and Johnson v United Kingdom (Application No 22520/93) ([1997] TLR 623; (1997) 27 EHRR 296).

As Lord Bingham observed in R (H) v Secretary of State for the Home Department ([2003] TLR 623; [2003] 3 WLR 1278), nothing in article 5 nor in Convention jurisprudence suggested that the power to discharge unconditionally, properly used, should be viewed with disfavour.

That was a case where the underlying mental illness, schizophrenia, was in remission because it was controlled

by drugs, and the applicant was being properly looked after. The illness would only remain of a nature or degree not to warrant detention if he remained properly looked after and continued to take the appropriate drugs.

It was to that end that the conditions were imposed. They were an integral part of the decision to release him into the community. The decision in R (H) v Home Secretary was directly in point.

Section 117 of the 1983 Act

The respondent's involvement arose solely out of section 117 of the 1983 Act as the primary health care trust or health authority responsible for the applicant's after-care having been discharged.

The issue of the respondent's duty under the section did not arise because the applicant was not discharged during the period in question.

Human Rights Convention

Provided the respondent used its best endeavours to fulfil the conditions imposed by the tribunal it would meet its obligations both under section 117 and the Convention.

The respondent's involvement, arising solely because it was the section 117 authority responsible for after-care, was neither the detaining authority nor the body to whom the applicant could look for review of the lawfulness of his detention: the former was the hospital where he was detained and the latter was the tribunal.

The section 117 authority's obligation was no more than to use its best endeavours loyally to give effect to the tribunal's decision. The respondent was not in breach of its duty under section 117 of the 1983 Act.

It had used its best endeavours to implement the conditions imposed by the July 2001 tribunal. The applicant was not unlawfully detained and there was no breach of article 5 or any other provision of the Convention.

Lord Justice Mance delivered a concurring judgment and Lord Justice Judge agreed.

Solicitors: Howells, Sheffield; Halliwell Landau, Sheffield.

Company — winding up petition by Secretary of State — shareholder can oppose petition

CHANCERY DIVISION

Published May 13, 2004

In re Rodencroft Ltd

Before Mr Justice Evans-Lombe

Judgment April 23, 2004

When the Secretary of State for Trade and Industry presented a petition to wind up a company on the ground that it was expedient in the public interest to do so, a shareholder was entitled to oppose the petition, even in the absence of opposition from the company itself, providing that he could demonstrate that the company was solvent.

Mr Justice Evans-Lombe so held in the Chancery Division when allowing an appeal by Simon Allso from a decision of Mrs Registrar Derrett made on December 17, 2003 to wind up Rodencroft Ltd on a petition presented by the secretary of state. The appeal was dismissed in so far as it related to orders winding up two other companies, W. G. Birch Developments Ltd and H.-M. Birch Ltd.