

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF M.H. v. THE UNITED KINGDOM

(Application no. 11577/06)

JUDGMENT

STRASBOURG

22 October 2013

FINAL

22/01/2014

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.



In the case of M.H. v. the United Kingdom,

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Ineta Ziemele, *President,*
David Thór Björgvinsson,
Päivi Hirvelä,
George Nicolaou,
Paul Mahoney,
Krzysztof Wojtyczek,
Faris Vehabović, *judges,*

and Fatoş Aracı, *Deputy Section Registrar*,

Having deliberated in private on 1 October 2013,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 11577/06) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a British national, Ms M.H. ("the applicant"), on 13 March 2006. The President of the Section acceded to the applicant's request not to have her name disclosed (Rule 47 § 3 of the Rules of Court).

2. The applicant, who had been granted legal aid, was represented by Mr M. Bridgman, a lawyer practising in Telford with Elliott Bridgman, Solicitors. The United Kingdom Government ("the Government") were represented by their Agent, Mr D. Walton of the Foreign and Commonwealth Office.

3. On 12 February 2008 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1970 and lives in Shropshire.

5. The applicant is severely disabled as a result of Down's Syndrome. Prior to the events in question, she had lived at home with her mother, her nearest relative. However, her mother was struggling to cope with her often

difficult behaviour and towards the end of 2002 social workers had become extremely concerned about the impact on the physical and mental health of both parties.

6. On 31 January 2003 a social worker employed by Telford and Wrekin Borough Council ("the Council") executed a warrant from the Magistrates' Court to enter the applicant's mother's premises and to take the applicant to a place of safety.

7. The applicant was taken to a hospital where she was admitted and detained under section 2 of the Mental Health Act 1983 ("the 1983 Act"). Section 2 authorised her detention for twenty-eight days for assessment.

8. The applicant's mother, as her "nearest relative", had a special status under the 1983 Act (see paragraph 39 below). She exercised her right to make an order to discharge the applicant under section 23 of the 1983 Act. The applicant's responsible medical officer ("RMO") issued a report under section 25(1) of the 1983 Act (a so-called "barring order") which certified that the applicant, if discharged, would be likely to act in a manner dangerous to other persons or to herself. As a consequence, the applicant's mother's order that her daughter be discharged had no effect and she was prevented from making any further order for a period of six months from the date of the report.

9. On 18 February 2003 the hospital managers convened to review the decision to issue the barring order and decided not to discharge the applicant.

10. The twenty-eight day period of detention provided for in section 2 of the 1983 Act was due to expire on 28 February 2003. On 21 February 2003 a social worker employed by the Council visited the applicant's mother to seek her consent to the making of a guardianship order in respect of the applicant. The applicant's mother refused to consent and on 27 February 2003 the same social worker lodged an application with Telford County Court to displace the applicant's mother as the applicant's nearest relative. This application had the effect of automatically extending the applicant's detention under section 29(4) of the 1983 Act.

11. Pursuant to section 66(1)(a) of the 1983 Act, while the applicant was being detained under section 2 of that Act, she could have applied for discharge to the Mental Health Review Tribunal ("the Tribunal") within fourteen days. She did not do so because she lacked legal capacity to instruct solicitors. After the fourteen-day period had expired, she had no further right to apply to the Tribunal.

12. Moreover, once the section 29 application had been instituted, there were no means by which the applicant could apply to the Tribunal. Therefore, on 6 March 2003 solicitors acting on her behalf requested the Secretary of State to use his powers under section 67 of the 1983 Act to make a reference to the Tribunal. A reference was duly made and the Tribunal convened on 26 March 2003. It refused to discharge the applicant.

13. On 27 March 2003 the County Court gave directions for the hearing to consider the Council's application to displace the applicant's mother as the nearest relative.

14. On 20 May 2003 the applicant's mother (acting on the applicant's behalf as her "litigation friend") issued judicial review proceedings against the Secretary of State for Health, the Tribunal and the Council seeking, *inter alia*, an interim injunction requiring the Council to provide the applicant with suitable accommodation to enable her to be released from detention.

15. The Council eventually found suitable residential accommodation and the applicant was moved there on 21 July 2003.

16. The applicant subsequently applied to have the County Court added as a fourth defendant in the judicial review proceedings, alleging that it had failed to determine the Council's application to displace the applicant's mother as nearest relative expeditiously and in a manner which was compatible with the applicant's rights under Article 5 §§ 1 and 4 of the Convention.

17. On 22 July 2003 the High Court ordered that the County Court be joined as the fourth defendant in the judicial review proceedings and also that the applicant's mother be replaced as a litigation friend by the Official Solicitor.

18. On 1 August 2003 an interim displacement order was made by the County Court and on 7 August 2003 the applicant was admitted into guardianship.

19. When the judicial review proceedings next came before the High Court, the applicant, through the Official Solicitor, accepted: first, that the reason for her detention until 21 July 2003 was that no suitable accommodation was available for her; secondly, that the Council did not delay unreasonably in finding that accommodation; and thirdly, that the County Court had not acted incompatibly with her rights. In consequence, the claims against the Council and County Court were no longer pursued.

20. The applicant nevertheless continued with her claim against the Secretary of State for Health and the Tribunal seeking, *inter alia*, three declarations of incompatibility under section 4 of the Human Rights Act 1998. First, she sought a declaration that section 66(1) of the 1983 Act, the provision relating to applications for discharge to the Tribunal, was incompatible with Article 5 § 4 of the Convention insofar as it placed the onus for making the application on the detained patient. Secondly, she sought a declaration that section 66(1) of the 1983 Act was incompatible with Article 5 § 4 as neither the detained patient nor her nearest relative had any right to make an application to the Tribunal when a barring order had been issued under section 25 of the Act. Finally, she sought a declaration that section 29(4) of the 1983 Act was incompatible with Article 5 § 1 of the Convention as it authorised the indefinite detention of a patient admitted

under section 2 of the Act where an application had been made to displace the patient's nearest relative under section 29(1) for the purposes of making a guardianship application.

21. In its judgment of 22 January 2004 the High Court declined to make any of the three declarations. On the first declaration sought, the trial judge found that the right "to take proceedings" in Article 5 § 4 had to be contrasted with the right to be "brought" before a judicial authority under Article 5 § 3. He concluded:

> "[A] right 'to take proceedings' does not mean a right of automatic review or right to be brought before a judicial authority, irrespective of whether an application is made.
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> 27. The claimant [the applicant] has been unable to point to any cases to support the view that article 5(4) called for an automatic review. Indeed, in *X v. United Kingdom* (1981) 4 EHRR 188, it was decided by the Strasbourg Court that where a patient does not have a right of *automatic* [re]view, article 5(4) then only requires the State to ensure that the detained person is entitled 'to take proceedings at reasonable intervals before a court to put in issue the "lawfulness" [within the meaning of the Convention] of his detention whether that detention was ordered by a civil or criminal court or by some other authority' [at paragraph 52]. This passage indicates that a State need not provide automatic periodic reviews so long as the detained person is entitled himself to take proceedings to review the lawfulness of his detention at reasonable intervals. This reinforces my view that article 5(4) does not require there to be an automatic review of the lawfulness of a patient's detention but it will be satisfied if the detainee can institute proceedings to challenge the lawfulness of his detention.
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> 28. More recently, it was explained by the Strasbourg Court that the court's case law on Article 5 (4) establishes that this right that:-
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> 'a person of unsound mind who is compulsorily confined for an indefinite or a lengthy period is in principle entitled, at any rate where there is no automatic periodic review of a judicial character, to take proceedings "at reasonable intervals" before a court to put in issue the "lawfulness"- within the meaning of the Convention - of his detention' (*Megyeri v. Germany* (1992) 15 EHRR 584, 592 [22(a)].
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> 29. This shows that there are two answers to the claimant's complaint apart from the fact that the claimant has no right to an automatic reference to a Tribunal. First, the deprivation of liberty in this case was neither 'indefinite or lengthy' as it arose under section 2 of the 1983 Act, which meant that it was for the relatively short period of 28 days so as to enable an assessment to be made. Significantly, unless by the end of that period, the patient had become liable to be detained under some other provision of the 1983 Act, section 2(4) of the 1983 Act requires that he must be discharged. Second, in any event, within that period, as I have explained, the patient is entitled to apply for a discharge to the Mental Health Review Tribunal and this would constitute a right 'to take proceedings'. Thus, the claimant is not entitled to her first declaration."

22. In respect of the second declaration sought, the trial judge first considered whether Article 5 § 4 required automatic review of the lawfulness of a patient's detention where the patient lacked capacity to make her own application for a review of the lawfulness of her detention.

He considered this Court's decision in *Megyeri v. Germany*, judgment of 12 May 1992, Series A no. 237-A, § 22, in particular the need for special procedural safeguards to protect the interests of persons who, on account of their mental disabilities, are not fully capable of acting for themselves and accepted that section 67 of the 1983 Act (providing for the Secretary of State to refer cases to the Mental Health Review Tribunal) did not itself provide adequate safeguards. First, the Secretary of State could only exercise his power after a request had been made to him to exercise such a power. Where a patient lacked capacity and had nobody to make the request for him or her, the power would not be exercised. Second, relying on *Benjamin and Wilson v. the United Kingdom*, no. 28212/95, §§ 33 and 36, 26 September 2002, he found the right of a patient under Article 5 § 4 could not be dependent upon the exercise of another power by a member of the Executive which might or might not be exercised in the patient's favour. However, the trial judge was satisfied that there were adequate procedural safeguards in place for the protection of patients detained under section 2 of the 1983 Act. He ruled that it was:

> "[O]f critical importance that in this case the claimant was subject to section 2 detention, which for two reasons by its nature is of an inherently short duration. First, as I have explained, the patient could apply to the Tribunal within the first 14 days of his or her detention pursuant to section 66(1) (a) and (2) (a) of the 1983 Act. Second, it is more important that section 2(4) of the 1983 Act requires that the patient be released at the end of the 28 day period, regardless of whether any application has been made to the Tribunal in the meantime unless a different legal basis for the patient's continuing detention has since emerged.
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> 36. I therefore agree with [counsel for the Secretary of State] that this complaint is flawed by the procedural safeguard of automatic release at the end of the period, which is a better safeguard for a patient subject to a section 2 detention than 'an automatic review'. Therefore, I am unable to accept [Counsel for the applicant's] complaint that Article 5(4) requires that there should be an automatic review for a patient, who lacks the capacity to make his own application."

23. The trial judge also considered whether Article 5 § 4 required that a patient should have a right for the lawfulness of her detention to be reviewed where she was admitted to hospital under section 2 of the 1983 Act; her nearest relative had exercised her power of discharge under section 23 of the 1983 Act; a barring order had been issued under section 25 of the Act; and Social Services had applied to displace the relative under section 29 with a view to making a guardianship order. The judge found that the issue was whether section 29(4) – which authorises the indefinite detention of a patient admitted and detained under section 2 of the Act while the County Court considered an application to displace a nearest relative – infringed Article 5 § 4 of the Convention. The trial judge found as follows:

> "Section 29(1) of the 1983 Act is the procedure by which the nearest relative is displaced but it is important to stress that it requires an application to the County Court. The duty of the County Court, in common with any other public body involved

> in a section 29 application, is to ensure that the application respects the article 5 rights of the patient. Section 3(1) of the HRA states that 'so far as it is possible to do so, primary legislation must be read and given effect in a way which is compatible with Convention rights'. The rights in article 5 are Convention rights and so the County Court is obliged to deal with section 29 applications speedily. Indeed, section 6 of the HRA specifically states that it is unlawful for a public authority to act in a way which is incompatible with the Convention. It therefore follows that the County Court is obliged to control the proceedings so as to ensure that a patient is not detained for a period which is indefinite or lengthy... If delay does occur in the County Court proceedings so that a patient's article 5(4) rights were infringed, this would be a result of a breach by the County Court in its duties under sections 6(1) and 3(1) of the 1998 Act and not because of any incompatibility between the 1983 Act and the Convention."

24. In respect of the third declaration sought – that section 29(4) of the 1983 Act was incompatible with Article 5 § 1 of the Convention, insofar as it authorised the indefinite detention of a patient admitted under section 2 of the Act where an application had been made to displace the patient's nearest relative under section 29(1) for the purposes of making a guardianship application – the trial judge found the essence of the applicant's complaint was that the indefinite detention of an individual for the purpose of making a guardianship application was not consonant with the purpose of Article 5 § 1(e), namely "the lawful detention...of persons of unsound mind." He went on to find that detention in such circumstances would only arise after a responsible medical officer had made a "barring order" under section 25 of the Act preventing discharge and such an order would only be made when, in the terms of section 25, a patient was "likely to act in a manner dangerous to other persons or to himself." Thus the second criteria for detention laid down in *Winterwerp v. the Netherlands*, judgment of 24 October 1979, Series A no. 33, § 73 (that "the mental disorder must be of a kind or degree warranting compulsory confinement") was fulfilled. The trial judge further relied on the Court's observations in *Johnson v. the United Kingdom*, (judgment of 24 October 1997, *Reports of Judgments and Decisions* 1997-VII, § 61) in support of the proposition that the responsible authorities were entitled to exercise their judgment to determine in particular cases and on the basis of all relevant circumstances when the interests of the patient and the community into which he was to be released would in fact be served by immediate and unconditional release. He concluded:

> "57. I agree with [Counsel for the Secretary of State] that any application under section 29 of the 1983 Act which is made in order to pave the way for a guardianship application must by its nature involve an exercise of judgment by the social services authority that it would not be in the best interests of the patient and the community that the patient be immediately and unconditionally released. Indeed it follows that a patient's continuing detention pending a section 29 application with a view to guardianship is consistent with the principle enunciated in *Johnson* so long as the patient's discharge does not become unduly delayed. As I have explained, the County Court has a specific duty to dispose of the section 29 applications expeditiously.

58. Furthermore, once a section 29 application has been finally disposed of, the section 2 detention can only thereafter continue for a maximum of a further seven days: section 29(4)(b). In addition, if the patient is admitted for treatment, an appeal to the Mental Health Review Tribunal becomes available under section 66(1) (b) of the 1983 Act with automatic reviews provided for under section 68(1) of the 1983 Act. Furthermore, if the patient is placed into guardianship, there is a further right of appeal under section 66(1)(c) which provides that 'where (c) a patient is received into guardianship in pursuance of a guardianship application....an application may be made to a Mental Health Review Tribunal within the relevant period (i) by the patient'. The relevant period for such an application is 'six months beginning with the day on which the application is accepted' (section 66(2)(c) of the 1983 Act).

59. Thus, where a section 29 application is made with a view to a guardianship application rather than for the purpose of an admission for treatment, the existence of the duty of the County Court to exercise its powers under section 29 of the 1983 Act in accordance with its duties as a public body under section 6 of the HRA is of critical importance. Those duties, which require the County Court not 'to act in a way which is incompatible with a Convention right', would and should prevent the section 29(4) procedure from becoming so protracted so as to require a new and fresh right to another article 5(4) review. This answers the claimant's complaints about the lack of sufficiency of the grounds of appeal to the Tribunal under section 66 of the 1983 Act or as a consequence of the section 29(4) procedure. Thus, this claim also fails."

25. The applicant appealed and on 3 December 2004 the Court of Appeal allowed her appeal and made two declarations of incompatibility under section 4 of the Human Rights Act 1998.

26. In respect of section 2 of the 1983 Act Lord Justice Buxton, with whom Lord Justice Wall and Mr Justice Lindsay concurred, first addressed the fact that it provided for automatic release after twenty-eight days in the absence of an application under section 29. He stated:

"8. The [High Court] judge, at his paragraph 36, accepted the argument of the Secretary of State that automatic discharge at the end of the 28 day period (absent, of course, a section 29 application) was a better safeguard for the patient than an 'automatic review'. The latter expression reverts to the jurisprudence of article 5, and I shall have to come back to it. The problem about the argument at this stage is, however, that it does not address the imbalance between the competent patient, who can apply to the [Mental Health Review Tribunal] under section 66 within 14 days of his detention, and the incompetent patient who, because he is not mentally able to make or promote such an application, has no recourse to an outside body: except through the agency of the nearest relative, who can be, and in this case was, barred under section 25. If the 28 day limit is a sufficient safeguard in the case of incompetent patient, why is it not so in the case of the competent? Why in his case is recourse to the MHRT given at all? And, further, even a 28 day period of detention without review by a judicial body at least raises questions under the ECHR. Whilst I would agree that no rule of thumb can be laid down either in respect of detention generally or in respect of particular categories of detention, nevertheless it is impossible to say that the ECHR organs neither could have nor should have any concern about a 28 day detention without judicial review."

27. He then addressed the question of review by the County Court and found that in determining a section 29(4) application it was not performing

a function under Article 5 of the Convention. The speed with which it was required to determine such an application was not a relevant consideration:

> "Not only is the County Court not reviewing the lawfulness of the patient's detention, but also questions must arise about its promptitude in performing the task that it does undertake... [The trial judge] suggested that any undue delay by the County Court would involve a breach of its obligations under article 6 of the ECHR. But that is of no help to the patient. The standard of promptitude in such an application will be that appropriate to the condition of the nearest relative, not that appropriate to the condition of the patient. Moreover, the patient is not party to the proceedings: as Hale LJ pointed out in paragraph 24 of her judgment in the *City of Plymouth* case, he is the one person whom the County Court rules do not permit to be joined. Thus, the proceedings are not and cannot be concerned with the determination of his civil rights and obligations, so it is difficult to see how he can complain under article 6 of delay in pursuing them."

28. In turning to Article 5 § 4 of the Convention, Lord Justice Buxton stated as follows:

> "18. As we have seen, there are undoubted, and as the judge thought conclusive, difficulties in applying article 5.4 to oblige the state to act on the incompetent patient's behalf. We also have to remember that the ECHR provides the court with a set of guiding principles, and not with a palm tree. Nevertheless, I cannot think that the scheme of protection for persons detained in cases of suspected unsound mind can have been intended to exclude, simply because of their mental inability, persons who find themselves in the position of MH. The matter may perhaps be tested by asking what reply the authors of the ECHR would have given had they been asked whether the particular language that they adopted in article 5.4 was intended to exclude from the protection of article 5 a person who, solely because of lack of capacity to do so, was unable to take proceedings. At least if they were English lawyers I suspect that they would have replied with a testy 'of course not' worthy of the hypothetical parties in *Shirlaw v. Southern Foundaries* [1939] 2 KB 206 at p227.
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> 19. We have not been shown any ECHR authority that impedes that approach. [Counsel for the Secretary of State] took us to the judgment of the [European Court of Human Rights] in *TW v. Malta* (1999) 29 EHRR 185[43], where the court pointed to the difference of wording between article 5.3 and article 5.4, already observed. But that was a case of detention on a criminal charge, where the court was at pains to stress that recourse in an article 5.1.c case cannot be dependent on any initiative by the prisoner. That is far from concluding that in the converse case, where relief is in the first instance in the hands of the subject, but the subject is unable to obtain that relief, the court would hold that assistance to the subject in asserting the right was excluded.
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> 20. I am therefore of opinion that the state is obliged by the general principles of protection that inform article 5 to place the incompetent patient in the same position as the competent patient, as nearly as it is possible to do so, with regard to access to the MHRT."

29. On the prolongation of detention by section 29(4) of the Act, Lord Justice Buxton concluded:

> "21. This case is more straightforward. The patient detained under section 2, whether competent or incompetent, is detained beyond the 28 day limit without

adequate judicial supervision. When that occurs, the justification for his original detention, whether or not it has been approved by the MHRT, has expired, and he is detained just because of the existence of proceedings in respect of which he is a spectator. That will be so even if the County Court judge finds in favour of the nearest relative if the approved social worker appeals...I have no doubt that in those circumstances he should have the right to return to the MHRT to obtain a judicial decision on his continued detention."

30. Lord Justice Wall and Mr Justice Lindsay in their concurring judgments both added that, in contrast to the trial judge, they could not regard the twenty-eight day period of detention provided for by section 2 as being of an "inherently short duration". On the distinction between Article 5 § 3 and Article 5 § 4 of the Convention, Mr Justice Lindsay added:

"That distinction led [Counsel for the Secretary of State] to argue that under Article 5.4 it was only he or she who was deprived of his or her liberty that was to be entitled, him – or herself, to take proceedings by which the lawfulness of the detention was to be decided. Were a rigorously literal approach to be appropriate some force could be attributed to such an argument but it has to be remembered that the Convention of which 5.4 forms part is intended to cope with the whole range of those deprived of their liberty by arrest or detention throughout the numerous jurisdictions which have subscribed to the Convention, many deploying a more purposive approach than was traditionally used here. Within those jurisdictions there will doubtless be many different circumstances in which one person is entitled or required to bring proceedings in the name of or on behalf of another. If one restricts Article 5.4 so that only the very person detained or deprived of liberty can "take proceedings" to determine the lawfulness of the detention then one would have arrived at a construction as if the Convention had read 'Everyone who has capacity himself to bring such proceedings ... shall be entitled to take proceedings'. That is not what 5.4 says and, in its context, the word 'Everyone' is plainly shorthand intended to enable not only the very person who is deprived of liberty to take proceedings but, where some other is, by the relevant domestic law, authorised or required to proceed in that person's name or on that person's behalf, to ensure that he, too, should be entitled to take the proceedings. The Crown's construction would or might preclude Article 5.4 applications in all sorts of cases, including the detention of persons under 18, well beyond those with mental disorder. I cannot think that that was intended either by those subscribing to the Convention or by Parliament in its enacting of the Human Rights Act 1998."

31. The Court of Appeal therefore made the following two declarations of incompatibility:

"(i) section 2 of the Mental Health Act 1983 is incompatible with article 5.4 of the European Convention on Human Rights in that it is not attended by adequate provision for the reference to a court of the case of a patient detained pursuant to section 2 in circumstances where a patient has a right to make application to a Mental Health Review Tribunal but the patient is incapable of exercising that right on his own initiative;

(ii) section 29(4) of the Mental Health Act 1983 is incompatible with article 5.4 of the European Convention on Human Rights in that it is not attended by provision for the reference to a court of the case of a patient detained pursuant to section 2 of that Act whose period of detention is extended by the operation of the said section 29(4)."

32. The Secretary of State appealed to the House of Lords, which, on 20 October 2005, unanimously allowed the appeal. Baroness Hale of Richmond (with whom the other four law lords concurred) first considered the compatibility of section 2 of the 1983 Act with Article 5 § 4. She found as follows:

> "22. The short answer to this question is that article 5(4) does not require that every case be considered by a court. It requires that the person detained should have the right to 'take proceedings'. The wording is different from article 5(3), which deals with the rights of a person who has been arrested on suspicion of having committed a criminal offence or to prevent his committing an offence or fleeing after having done so...The difference between a right to 'take proceedings' and a right to 'be brought promptly before a [court]' must be deliberate. It stops short of requiring judicial authorisation in every case. It leaves to the person detained the choice of whether or not to put the matter before a court. Understandably, therefore, the respondent abandoned the argument that article 5(4) required that all section 2 admissions should be referred to a tribunal and concentrated only on those patients who lack the capacity to exercise their article 5(4) rights. Logically, of course, this argument would also apply to a patient detained under section 3, for the automatic reference after six months under section 68(1) would not be regarded as 'speedy'.
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> 23. For [the applicant], the argument is that a right 'to take proceedings' is ineffective if the patient lacks the ability to do so. Given that the Convention is there to secure rights that are 'practical and effective' rather than 'theoretical and illusory' this is a powerful argument. But it does not lead to the conclusion that section 2 is in itself incompatible with the Convention or that the solution is to require a reference in every case. Rather, it leads to the conclusion that every sensible effort should be made to enable the patient to exercise that right if there is reason to think that she would wish to do so.
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> 24. There is no Strasbourg case which implies into article 5(4) the requirement of a judicial review in every case where the patient is unable to make her own application, nor is this suggested in authoritative texts such as Karen Reid, A Practitioner's Guide to the European Convention on Human Rights (2nd ed 2004). Indeed, in *Rakevich v. Russia* (Application No 58973/00), 28 October 2003, it was held that even the judicial review of every admission on the initiative of the detaining authorities is not enough if the patient does not herself have the direct right to apply for her release. In the recent case of *Storck v. Germany* (Application No 61603/00), 16 June 2005, there was in principle a procedure available to protect the patient's interests, but the applicant had been unable to secure outside help during her confinement in a private clinic to enable her to institute such proceedings, so it was 'questionable whether there had been sufficient safeguards to guarantee the applicant's effective access to court': see para 118. This was not because of lack of capacity but because of the lack of practical machinery for contacting the court. This illustrates only too well how there may be many other obstacles than lack of capacity to the effective exercise of the right to take proceedings. Singling out lack of capacity for special treatment would raise a host of problems of definition and assessment for which there is no warrant either in the Convention or in the Act.
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> 25. That is why our system tries hard to give patients and their relatives easy access to the tribunal which is itself designed to meet their needs. The managers of the hospital have a statutory duty, under section 132 of the Act, to take such steps as are

practicable to ensure that the patient understands the effect of the provisions under which she is detained and the rights of applying to a mental health review tribunal which are available to her. This has to be done as soon as practicable after the patient is detained. Unless the patient wishes otherwise, this information is also to be given to the patient's nearest relative. Under the Code of Practice (published March 1999 pursuant to section 118 of the Act by the Department of Health and Welsh Office), section 14, information should be given to the patient 'in a suitable manner and at a suitable time' by a person who 'has received sufficient training and guidance'. Patients and nearest relatives have to be told how to apply to a tribunal, how to contact a suitably qualified solicitor, that free legal aid may be available, and how to contact any other organisation which may be able to help them make an application. In other words, the hospital managers have to do the best they can to make the patient's rights practical and effective.

26. Mental health review tribunals were also designed with that object in mind. Before they were created, in the Mental Health Act 1959, compulsory detentions were authorised by a judicial officer, who was widely regarded as a 'rubber stamp' of little practical value in challenging the decision to detain. Tribunals are composed of a legally qualified presider, a medical member with expertise in the diagnosis and treatment of mental disorder, and a third member with other suitable experience, for example in the social services. Although the procedures have become more formal since the advent of legal assistance for patients, they are designed to be user-friendly and to enable the patient and her relative to communicate directly with the tribunal. A reference to the tribunal must be considered in the same way as if there had been an application by the patient: see r 29. Hence although the initiative is taken by someone else, the patient's rights are the same. Although an application has to be made in writing, it can be signed by any person authorised by the patient to do so on her behalf: see r 3(1). This could be any relative, a social worker, an advocate, or a nurse, provided of course that the patient has sufficient capacity to authorise that person to act for her. The common law presumes that every person has capacity until the contrary is shown and the threshold for capacity is not a demanding one. These principles have recently been confirmed by Parliament in the Mental Capacity Act 2005.

27. Even if the patient's nearest relative has no independent right of application, there is much that she, or other concerned members of the family, friends or professionals, can do to help put the patient's case before a judicial authority. The history of this case is a good illustration. The [applicant's] mother was able to challenge every important decision affecting her daughter. Most helpfully, she stimulated the Secretary of State's reference to the tribunal very quickly after it became clear that her daughter was to be kept in hospital longer than 28 days. Had MH been discharged once the 28 days were up there would, in my view, have been no violation of her rights under article 5(4). It follows that section 2 of the Act is not incompatible with article 5(4)."

33. Baroness Hale then considered the compatibility of section 29(4) with Article 5 § 4 of the Convention:

"28. Section 29(4) raises a very different question, which applies to all patients affected by it, irrespective of their mental capacity. The system is obviously capable of being operated compatibly. The patient is entitled to make an application during the initial 14 days of the section 2 admission, thus complying with her right, should she choose to exercise it, to a speedy initial judicial determination of the lawfulness of her

detention. The county court proceedings may produce a swift displacement order, whether interim or final, after which the patient is admitted under section 3. The patient then has a fresh right to apply to a tribunal, which will arise at a 'reasonable interval' after the first. Alternatively, a displacement order may be refused, in which case the patient can no longer be detained unless the relative has been persuaded to withdraw her objection to the section 3 admission. But in that event a fresh right to apply to a tribunal will also arise.

29. The problem arises when the county court proceedings drag on and the patient is detained indefinitely without recourse to a tribunal. Indeed, it may be difficult for the county court to proceed too quickly, without endangering the rights of the parties under article 6 and the rights of both the patient and her relative under article 8. Hence there may well come a time when her article 5(4) rights will be violated unless some means of taking proceedings is available to her. That time may come earlier if she has not made an initial application, so that the lawfulness of her detention has never been subject to judicial determination, than it would do if there had been an early tribunal hearing. But here again the means are available, within the existing law, of securing that she does have that right.

30. The preferable means is what happened in this case: that the Secretary of State uses her power under section 67(1) to refer the case to a tribunal. This is preferable because mental health review tribunals are much better suited to determining the merits of a patient's detention and doing so in a way which is convenient to the patient, readily accessible, and comparatively speedy. As already seen, a reference is treated as if the patient had made an application, so that the patient has the same rights within it as she would if she herself had initiated the proceedings. It can, of course, be objected that this solution depends upon the Secretary of State being willing to exercise her discretion to refer. But the Secretary of State is under a duty to act compatibly with the patient's Convention rights and would be well advised to make such a reference as soon as the position is drawn to her attention. In this case this happened at the request of the patient's own lawyers. Should the Secretary of State decline to exercise this power, judicial review would be swiftly available to oblige her to do so. It would also be possible for the hospital managers or the local social services authority to notify the Secretary of State whenever an application is made under section 29 so that she can consider the position."

34. Her Ladyship finally considered the availability of judicial review or habeas corpus to challenge the lawfulness of a patient's detention. In finding that they were available she added:

"Any person with sufficient standing could invoke them. Before the Human Rights Act 1998, the European Court of Human Rights held that these were not a sufficiently rigorous review of the merits, as opposed to the formal legality, of the patient's detention to comply with article 5(4): see *X v. United Kingdom* (1981) 4 EHRR 188. It may well be that, as the Administrative Court responsible for hearing judicial review and *habeas corpus* petition must now itself act compatibly with the patient's rights, it would be obliged to conduct a sufficient review of the merits to satisfy itself that the requirements of article 5(1)(e) were indeed made out. But it is not well equipped to do so. 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 article 5(4) requires.

32. Hence, while judicial review and/or habeas corpus may be one way of securing compliance with the patient's article 5(4) rights, this would be much more satisfactorily achieved either by a speedy determination of the county court proceedings or by a Secretary of State's reference under section 67. Either way, however, the means exist of operating section 29(4) in a way which is compatible with the patient's rights. It follows that the section itself cannot be incompatible, although the action or inaction of the authorities under it may be so."

35. She therefore declined to hold that either section 2 or section 29(4) of the 1983 Act was incompatible with Article 5(4) of the Convention in the respects identified by the Court of Appeal. The House of Lords thus allowed the appeal and set aside the declarations made by the Court of Appeal.

II. RELEVANT DOMESTIC LAW

1. Primary legislation

a. The Mental Health Act 1983

36. Section 2 of the 1983 Act provides for the admission and detention for assessment of a person on the ground that he is suffering from mental disorder of a nature warranting such detention, and that he needs to be detained in the interests of the health or safety of himself or others. By section 2(4), such detention can only last for twenty-eight days.

37. Section 3 provides for the compulsory detention of a person for treatment, for an initial period of up to six months. Under section 68, managers of hospitals are under a duty to refer the case of a patient to the Mental Health Review Tribunal where the patient has not exercised his right of application after six months. No such corresponding duty exists in respect of detention under section 2.

38. Section 7 provides for the making of a guardianship order in respect of a person suffering from a mental disorder.

39. Where the patient is detained under section 2 or 3, section 66 permits him or her to make an application for the discharge of the order to a Mental Health Review Tribunal within fourteen days of the start of the period of detention. Furthermore, section 23 permits either the hospital authorities or the patient's nearest relative to make an order for his or her discharge from a section 2 or 3 detention. However, where the nearest relative has made an order under section 23, section 25 provides that the patient's responsible medical officer ("RMO") may make a "barring order" preventing a

discharge by the nearest relative if he or she thinks that the patient if discharged would be liable to be a danger to himself or to others. The nearest relative is then prevented from making any further such application for a period of six months (section 25 (1)(b)). If the patient was detained under section 3, section 66(1)(g), 66(h)(ii) and 66(2)(d) provides that the nearest relative may bring an application to the Mental Health Review Tribunal within twenty-eight days of the date the applicant receives the barring order. However, there is no equivalent right for the nearest relative to apply to the Mental Health Review Tribunal where the barring order is made in respect of a patient detained under section 2.

40. Under section 29 an authorised social worker may apply to the County Court for the removal of the nearest relative from the performance of his functions under the Act, if, *inter alia*, he or she considers that the nearest relative is unreasonably failing to agree to a guardianship order. When such an application is made, the twenty-eight day period under section 2(4) is, by section 29(4), extended automatically until the proceedings have been finally disposed of. Once they have, the section 2 detention can only continue for a further period of seven days (section 29 (4)(b)).

41. When a patient is admitted into guardianship, section 66(2)(c) provides that he or she may bring an application to the Mental Health Review Tribunal within six months of the date that the guardianship application is accepted.

42. Section 67 provides that the Secretary of State may, if he thinks fit, at any time refer to a Mental Health Review Tribunal the case of any patient who is liable to be detained or subject to guardianship.

43. Pursuant to section 68, where a patient's case has not already been brought before the Mental Health Tribunal the hospital manager is under a duty to refer the case to the Tribunal upon the expiry of a six-month period beginning with the patient's admission to hospital. Moreover, if more than three years elapse from the date a patient's case was last considered by the Tribunal, the hospital manager is under a duty to make a further referral to the Tribunal.

44. The power of a Mental Health Review Tribunal to discharge patients is provided for by section 72(1) of the 1983 Act under which it shall direct the discharge of a patient liable to be detained under section 2 if it is satisfied either that he is not suffering from mental disorder or from mental disorder of nature or degree which warrants his detention (section 72(1)(i)); or that his detention is not justified in the interests of his own health or safety or with a view to the protection of other persons (section 72(1)(ii)).

45. Section 118 of the 1983 Act directs the Secretary of State to prepare a Code of Practice for, *inter alia*, the guidance of registered medical practitioners, managers and staff of hospitals and mental nursing homes and approved social workers in relation to the admission of patients to hospitals

and mental nursing homes under the Act and to guardianship. Section 132 places managers of hospitals under a duty to take such steps as are practicable to ensure the patient understands under which of the provisions of the 1983 Act he is being detained under and his right to apply to a Mental Health Review Tribunal (subsections (1)(a) and (b)). The same information is to be provided to a nearest relative (subsection (4)).

(b) The Human Rights Act 1998

46. Section 4 of the Act provides (so far as relevant):

"(1) Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right.

(2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility. ...

(6) A declaration under this section ... -

(a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it was given; and

(b) is not binding on the parties to the proceedings in which it is made."

47. Section 6 provides:

"(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

(2) Subsection (1) does not apply to an act if -

(a) as a result of one or more provisions of primary legislation, the authority could not have acted any differently; or

(b) in the case of one or more provisions of ... primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions. ..."

2. The Code of Practice

48. Chapter 14 of the Code of Practice, promulgated in March 1999 by the Secretary of State in accordance with section 118 of the 1983 Act (see above), is entitled "Information for detained patients, those subject to guardianship and nearest relatives" and, so far as relevant, provides:

"The Hospital Managers' information policy

14.4 In order to fulfil their statutory duties Hospital Managers should implement a system which is consistent with the principles set out in Chapter 1 and ensures that:

a. the correct information is given to the patient;

b. the information is given in a suitable manner and at a suitable time and in accordance with the requirements of the law;

c. the member of staff who is to give the information has received sufficient training and guidance and is identified in relation to each detained patient;

d. a record is kept of the information given, including how, when, where and by whom it was given; e. a regular check is made that information has been properly given to each detained patient, and understood by them.

Specific information

14.5

a- Information on consent to treatment

The patient must be informed;

• of the nature, purpose and likely effects of the treatment which is planned;

• of their rights to withdraw their consent to treatment at any time and of the need for consent to be given to any further treatment;

• how and when treatment can be given without their consent, including by the second opinion

process and when treatment has begun if stopping it would cause serious suffering to the patient.

b- Information on detention, renewal and discharge

The patient should be informed;

• of the provisions of the Act under which they are detained, and the reasons for their detention;

• that they will not automatically be discharged when the current period of detention ends;

• that their detention will not automatically be renewed when the current period of detention ends;

• of their right to have their views about their continued detention or discharge considered before any decision is made.

c- Information on applications to Mental Health Review Tribunals:

Patients and nearest relatives must be informed;

• of their rights to apply to Mental Health Review Tribunals;

• about the role of the Tribunal;

• how to apply to a Tribunal; how to contact a suitably qualified solicitor;

• that free Legal Aid - Advice by way of representation (ABWOR) may be available;

• how to contact any other organisation which may be able to help them make an application to a Tribunal."

III. RELEVANT INTERNATIONAL MATERIALS

1. United Nations Convention on the Rights of Persons with Disabilities

49. The United Nations Convention provides as follows:

"Article 5 - Equality and non-discrimination

1. States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.

2. States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.

3. In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.

4. Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention.

... ...

Article 12 - Equal recognition before the law

1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.

2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.

3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that

measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.

5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

Article 13 - Access to justice

1. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.

2. In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff."

2. Recommendation Rec(2004)10 of the Committee of Ministers

50. Recommendation Rec(2004)10 of the Committee of Ministers to Member States concerning the protection of the human rights and dignity of persons with a mental disorder provides as follows:

"Article 25 – Reviews and appeals concerning the lawfulness of involuntary placement and/or involuntary treatment

1. Member states should ensure that persons subject to involuntary placement or involuntary treatment can effectively exercise the right:

i. to appeal against a decision;

ii. to have the lawfulness of the measure, or its continuing application, reviewed by a court at reasonable intervals;

iii. to be heard in person or through a personal advocate or representative at such reviews or appeals.

2. If the person, or that person's personal advocate or representative, if any, does not request such review, the responsible authority should inform the court and ensure that the continuing lawfulness of the measure is reviewed at reasonable and regular intervals.

...

Article 26 – Placement of persons not able to consent in the absence of objection

Member states should ensure that appropriate provisions exist to protect a person with mental disorder who does not have the capacity to consent and who is considered in need of placement and does not object to the placement.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 § 4 OF THE CONVENTION

51. The applicant complained that her right to "take proceedings by which the lawfulness of [her] detention shall be decided speedily by a court and [her] release ordered if the detention is not lawful" under Article 5 § 4 of the Convention was violated by the United Kingdom in two important respects: first, that the 1983 Act made no provision for the automatic referral to an Article 5 § 4 compliant court of patients such as her who lacked capacity to institute proceedings for themselves; and, secondly, that domestic legislation made no provision for a patient, whether incapacitated or not, to take proceedings before an Article 5 § 4 compliant court in circumstances where his or her detention was authorised under section 29 (4) of the 1983 Act.

52. Article 5 § 4 of the Convention reads as follows:

"4. 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."

53. The Government contested the applicant's arguments.

1. Admissibility

54. The Court notes that the applicant's complaints are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

2. Merits

a. The applicant's submissions

55. The applicant argued that Article 5 § 4 was to be read as creating a right of access to a court. Where a patient lacked capacity to take proceedings herself, the safeguard provided by Article 5 § 4 would be deprived of any substance, and the right to take proceedings would become

theoretical and illusory, unless there was some provision by which such a patient's case was automatically referred to an Article 5 § 4 court. Consequently, the applicant submitted that Article 5 § 4 should be construed as requiring an automatic reference to the Mental Health Review Tribunal, which she accepted was an Article 5 § 4 compliant body.

56. The applicant relied on *Storck v. Germany*, no. 61603/00, § 116, ECHR 2005-V as authority for the proposition that special procedural safeguards might be necessary to protect the interests of persons who were not capable of acting for themselves on account of their mental disabilities.

57. The applicant also submitted that the difference in wording in Article 5 § 3 did not compel a different interpretation of Article 5 § 4. While the particular circumstances of a person arrested and held under Article 5 § 1(c) were such that a right of automatic review under Article 5 § 3 was necessary for all detainees, that was not the case for those detained under Article 5 § 1(e), many of whom were capable of taking proceedings unaided.

58. Although the applicant accepted that mechanisms were available for bringing her case to court, they depended upon the initiative of third parties, namely her mother (who brought the judicial review proceedings) and the Secretary of State (who referred her case to the Tribunal following a request from her mother's lawyers). It was clear from the Court's case law that the right of access to a court under Article 5 § 4 of the Convention should not depend upon the goodwill or initiative of a third party, and that "important safeguards against arbitrary detention" did not eliminate the need for an automatic referral in cases where the patient lacked capacity to apply to a court of her own motion (*Gorshkov v. Ukraine*, no. 67531/01, § 44, 8 November 2005).

59. In any case, the applicant averred that the availability of the Secretary of State's reference procedure was dependent upon a third party asking him to make such a reference and was therefore of no utility to a person who lacked capacity and was un-befriended. It would therefore not comply with Article 5 § 4 of the Convention even if the Secretary of State were under a duty to make a reference when requested to do so.

60. In respect of the applicant's complaint under section 29(4) of the 1983 Act, she submitted that the question whether the lack of access to a Mental Health Review Tribunal for a patient detained under that section amounted to a violation of Article 5 § 4 depended upon two issues: first, whether such a right of access arose; and secondly, if so, whether the right to apply to the High Court for a writ of *habeas corpus* and/or judicial review satisfied the requirement.

61. With regard to the first issue, the applicant submitted that Article 5 § 4 could only be complied with by creating a right of access to the Mental Health Review Tribunal at the same time that detention was extended under

section 29(4). It was no answer that there might not be a violation of Article 5 § 4 if the domestic authorities exercised their functions speedily.

62. With regard to the second issue, the applicant argued that the availability of judicial review and/or *habeas corpus* could not meet the difficulty raised by patients who lacked capacity to institute legal proceedings themselves. Moreover, both procedures could not, in practice, satisfy Article 5 § 4 because they were unsuitable for the resolution of complex factual issues and the relevant courts lacked specialist medical expertise and were not, therefore, well-adapted to determining the lawfulness of the detention of persons of unsound mind. There was also no guarantee that a nearest relative, if there was one, would be eligible for public funding and the cost of privately instructing a solicitor could be a very real barrier to accessing the legal advice necessary to make such an application.

b. The Government's submissions

63. The Government submitted that Article 5 § 4 of the Convention provided for the right of a detained person to take proceedings and not for an obligation on the part of Contracting States to bring such persons before a court. In this regard they noted that there was an important distinction between the wording of Article 5 § 4 and Article 5 § 3 and submitted that the Court had consistently drawn a firm distinction between the automatic judicial control required under Article 5 § 3 and the right to institute proceedings conferred by Article 5 § 4. According to the Court's case-law, what was required was that a review be available at reasonable intervals, and not that a review take place in every case (see, for example, *Winterwerp*, cited above, § 55, *X v. the United Kingdom*, Appl. no. 7215/75, 24 October 1981).

64. Moreover, while the Court had held that a State might choose to institute a system of automatic periodic reviews, the Government submitted that it was not obliged by Article 5 § 4 to do so, even where the applicant was himself incapable of pursuing proceedings (*Megyeri*, cited above, *Musial v. Poland* [GC], no. 24557/94, § 43, ECHR 1999-II and *Tám v. Slovakia*, no. 50213/99, §§ 65 – 66, 22 June 2004). In fact, the Court has held that it would be a contravention of Article 5 § 4 for the State to substitute a system of automatic appeals for one which the applicant could himself initiate (*Rakevich v. Russia*, no. 58973/00, § 39, 28 October 2003 and *Gorshkov v. Ukraine*, cited above, § 39).

65. The Government further submitted that a system of automatic review would cause very great practical difficulties. If the detaining authorities were required to form a view about which patients were incapacitated and thus entitled to automatic review, and those who were not, the problem would merely be removed to a different stage of the analysis. This was because the truly incapacitated patient would be no more able to challenge a

misdiagnosis or misjudgement by the relevant authorities about whether or not he was incapacitated than he would be able to challenge the lawfulness of his detention outright.

66. Moreover, the Government submitted that any ruling that court scrutiny was required automatically in all cases covered by section 2 of the 1983 Act would inevitably create considerable pressure on the Mental Health Review Tribunal system, which in turn could jeopardise the State's ability to comply with the express speediness requirement in Article 5 § 4 and would divert the time and energy of doctors from the provision of front-line care.

67. Consequently, the Government argued that Article 5 § 4 did not require automatic review of the detention of persons of unsound mind and, as such, the applicant's right to bring her case before the Tribunal within fourteen days of admission under section 2 of the 1983 Act constituted compliance with the Article.

68. Moreover, the Government highlighted the power of the Secretary of State under section 67(1) of the 1983 Act to apply to the Tribunal during the initial twenty-eight day period of detention under section 2 of the Act, as well as during any extended period, or indeed after a patient had been admitted for treatment under section 3. In addition, they indicated that judicial review or an application for a remedy in the form of a writ of *habeas corpus* was also available to patients during the initial twenty-eight day period of detention under section 2 of the 1983 Act. The Government submitted that judicial review was an adequate remedy as the House of Lords had accepted in the present case that the Administrative Court had to act compatibly with a patient's rights and would therefore be obliged to conduct a sufficient review of the merits to satisfy itself that the requirements of Article 5 § 1(e) were made out. Even though the applicant lacked capacity, her mother had been able to bring proceedings on her behalf and could also have done so in her own name.

69. The Government also emphasised that that right to apply to the Tribunal for discharge had to be read together with safeguards seeking to facilitate access to the Tribunal, including the statutory duty of hospital managers to take such steps as are practicable to ensure that the patient and her nearest relative understood the provisions under which she was detained, her right to apply to a Tribunal, and how to obtain legal assistance; the requirement that information be given to the patient in a suitable manner, at a suitable time, by a person who had received sufficient training and guidance; the creation of a "user-friendly" procedure before the Tribunal to enable the patient and her nearest relative to communicate directly with it; the fact that the patient's application to the Tribunal might be signed by a relative, social worker, advocate or nurse, provided that the applicant had capacity to authorise that person to act for her; the fact that the Secretary of State or a hospital manager might refer a case to the Tribunal

and the patient would be entitled to participate in any subsequent proceedings; and finally, even where the patient's nearest relative had no independent right of application to a Tribunal, he or she could still help put the patient's case before a judicial authority.

70. In the alternative, the Government submitted that detention under section 2 did not require a full merits-based review because of its urgent and short-lived character. On the contrary, in a case of an emergency Article 5 § 4 could be satisfied by the availability of a traditional, highly limited *habeas corpus* review provided that the detention was for a short period of time (see, for example, *X v. the United Kingdom*, cited above, §§56 – 58 and *Winterwerp*, cited above, § 42).

71. In the further alternative, the Government sought to rely on the fact that detention under section 2 of the 1983 Act, absent the exceptional circumstance of extension as a result of an application under section 29(4) of the 1983 Act, could only last for twenty-eight days. At the end of that period the patient had to either be released or admitted for treatment under section 3 and, if the latter occurred, the patient would have an immediate right of application to the Tribunal under section 66(1)(b) of the 1983 Act. The Government therefore submitted that the shortness of the period justified the conclusion that Article 5 § 4 of the Convention would not be breached even if there were no means at all of challenging the detention during the initial period of assessment. In this regard, the Government submitted that a period of twenty-eight days was neither "indefinite nor lengthy" (*Winterwerp*, cited above, §42; *X v. the United Kingdom*, cited above, §§ 57 – 58; and *Herczegfalvy v. Austria*, 24 September 1992, Series A no. 244).

72. In respect of the section 29(4) complaint, the Government submitted that the County Court had an obligation under section 6(1) of the Human Rights Act 1998 to avoid any breach of Article 5 § 4 of the Convention, including by proceeding to a decision as expeditiously as possible. As Baroness Hale said in her judgment (paragraph 33 above), section 29(4) is plainly capable of being operated so as to produce a result compatible with Article 5 § 4 of the Convention and the Government maintained that the domestic courts and other state authorities were both obliged and ordinarily capable of ensuring this was done. Moreover, the Government noted that in the present case, in the course of the domestic proceedings, the applicant had accepted that the County Court had determined her application to remove her mother as nearest relative expeditiously and within a reasonable time.

73. The Government further relied on the finding of the House of Lords that, even in those exceptional cases where the County Court procedure did not operate speedily, other remedies were available to a patient and those acting on her behalf to ensure compliance with Article 5 § 4: first, the Secretary of State could be invited to make a reference to the Tribunal under

section 67(1) of the 1983 Act and a refusal would be open to judicial review proceedings; and secondly, the applicant or a close relative could access the remedies of judicial review and habeas corpus in their own name or in that of the patient. Both of these remedies were in fact invoked in the present case and, as a consequence, the Government maintained that there had been no breach of Article 5 § 4 of the Convention.

c. The Court's assessment

α. General Principles

74. The Court reiterates that Article 5 § 4 entitles detained persons to institute proceedings for a review of compliance with the procedural and substantive conditions which are essential for the "lawfulness", in Convention terms, of their deprivation of liberty. The notion of "lawfulness" under paragraph 4 of Article 5 has the same meaning as in paragraph 1, so that a detained person is entitled to a review of the "lawfulness" of his detention in the light not only of the requirements of domestic law but also of the Convention, the general principles embodied therein and the aim of the restrictions permitted by Article 5 § 1. Article 5 § 4 does not guarantee a right to judicial review of such a scope as to empower the court, on all aspects of the case including questions of pure expediency, to substitute its own discretion for that of the decision-making authority. The review should, however, be wide enough to bear on those conditions which are essential for the "lawful" detention of a person according to Article 5 § 1 (see *Winterwerp*, cited above, § 55; for more recent authorities, see also *X v. Finland*, no. 34806/04, §§ 148 – 149, ECHR 2012 (extracts) and *E. v. Norway*, 29 August 1990, § 50, Series A no. 181-A). The reviewing "court" must not have merely advisory functions but must have the competence to "decide" the "lawfulness" of the detention and to order release if the detention is unlawful (see *Ireland v. the United Kingdom*, 18 January 1978, § 200, Series A no. 25; *Weeks v. the United Kingdom*, 2 March 1987, § 61, Series A no. 114; *Chahal v. the United Kingdom*, 15 November 1996, § 130, Reports of Judgments and Decisions 1996-V; and *A. and Others v. the United Kingdom* [GC], no. 3455/05, § 202, 19 February 2009).

75. The forms of judicial review satisfying the requirements of Article 5 § 4 may vary from one domain to another, and will depend on the type of deprivation of liberty in issue. It is not the Court's task to inquire into what would be the most appropriate system in the sphere under examination (see *Shtukaturov v. Russia*, no. 44009/05, § 123, ECHR 2008).

76. Nevertheless, Article 5 § 4 guarantees a remedy that must be accessible to the person concerned and must afford the possibility of reviewing compliance with the conditions to be satisfied if the detention of a person of unsound mind is to be regarded as "lawful" for the purposes of

Article 5 § 1 (e) (see *Ashingdane v. the United Kingdom*, 28 May 1985, § 52, Series A no. 93). The Convention requirement for an act of deprivation of liberty to be amenable to independent judicial scrutiny is of fundamental importance in the context of the underlying purpose of Article 5 of the Convention to provide safeguards against arbitrariness. What is at stake is both the protection of the physical liberty of individuals and their personal security (see *Varbanov v. Bulgaria*, no. 31365/96, § 58, ECHR 2000-X).

77. Among the principles which can be found in the Court's case-law under Article 5 § 4 concerning "persons of unsound mind" are the following:

(a) an initial period of detention may be authorised by an administrative authority as an emergency measure provided that it is of short duration and the individual is able to bring judicial proceedings "speedily" to challenge the lawfulness of any such detention including, where appropriate, its lawful justification as an emergency measure (*Winterwerp*, cited above, §§ 57 – 61 and *X v. the United Kingdom*, cited above, § 58);

(b) following the expiry of any such initial period of emergency detention, a person thereafter detained for an indefinite or lengthy period is in principle entitled, at any rate where there is no automatic periodic review of a judicial character, to take proceedings "at reasonable intervals" before a court to put in issue the "lawfulness" – within the meaning of the Convention – of his detention (*Winterwerp*, cited above, § 55 and *Stanev v. Bulgaria* [GC], no. 36760/06, § 171, ECHR 2012);

(c) Article 5 § 4 requires the procedure followed to have a judicial character and to afford the individual concerned guarantees appropriate to the kind of deprivation of liberty in question; in order to determine whether proceedings provide adequate guarantees, regard must be had to the particular nature of the circumstances in which they take place (*Stanev*, cited above, § 171);

(d) the judicial proceedings referred to in Article 5 § 4 need not always be attended by the same guarantees as those required under Article 6 § 1 for civil or criminal litigation. Nonetheless, it is essential that the person concerned should have access to a court and the opportunity to be heard either in person or, where necessary, through some form of representation (see *Megyeri*, cited above, § 22);

(e) special procedural safeguards may be called for in order to protect the interests of persons who, on account of their mental disabilities, are not fully capable of acting for themselves (see, among other authorities, *Winterwerp*, cited above, § 60).

b. Application of these principles to the present case

78. Although in her complaint the applicant divided her detention into two periods – that authorised under s 2 of the 1983 Act and that authorised under s 29(4) – the Court prefers to break the detention down into the following three discrete stages:

i. The first twenty-seven days of the administrative detention ordered to carry out an in-hospital expert assessment (bearing in mind that the legal basis for the applicant's compulsory confinement in fact changed on 27 February 2003, before the expiry of the twenty-eight day period, when an application was made by social services to the County Court for a "displacement order").

ii. The period beginning on 27 February 2003, when the application for a displacement order was made by social services to the Country Court and ending on 26 March 2003, when the Tribunal gave its ruling following the referral of the applicant's case to it by the Secretary of State at the request of the solicitors acting on the applicant's behalf.

iii. The period from 26 March 2003 until 21 July 2003, when the applicant was moved by the local council into appropriate residential accommodation.

The first twenty-seven days of administrative detention

79. During the first fourteen days of this period of detention, a remedy allowing access to the Tribunal was available to a competent patient. After the first fourteen days, no such remedy was available for the remainder of the period.

80. The Court accepts that in the case of a person with legal capacity, the right to apply to the Tribunal for discharge during the first fourteen days of detention under section 2 of the 1983 Act would satisfy the requirements of Article 5 § 4 of the Convention as it provides an opportunity to challenge the lawfulness of detention "speedily." The difficulty in the present case, however, is that this remedy was not available in practice to the applicant because she lacked legal capacity.

81. In the case of *Winterwerp,* cited above, § 60, the Court held that it was essential for the patient to have access to a court and the opportunity to be heard either in person or, where necessary, through some form of representation; that mental illness could entail restricting or modifying the manner of exercising that right, but could not justify impairing its very essence; and that special procedural safeguards might be called for in order to protect the interests of persons who, on account of their mental disabilities, were not fully capable of acting for themselves.

82. As the right set forth in Article 5 § 4 of the Convention is guaranteed to everyone, it is clear that special safeguards are called for in the case of detained mental patients who lack legal capacity to institute proceedings

before judicial bodies. However, it is not for this Court to dictate what form those special safeguards should take, provided that they make the right guaranteed by Article 5 § 4 as nearly as possible as practical and effective for this particular category of detainees as it is for other detainees. While automatic judicial review might be one means of providing the requisite safeguard, it is not necessarily the only means. As Burton LJ expressed it in the Court of Appeal,

> "the State is obliged by the general principles of protection that inform Article 5 to place the incompetent patient in the same position as the competent patient, as nearly as it is possible to do so, with regard to access to the [Tribunal]."

83. That being said, a special feature of this first period of the applicant's detention is that it can be characterised as one ordered on the basis of the urgency of the situation. This Court has already ruled that in relation to such emergency detentions, the remedy of *habeas corpus* under English law, although limited in scope with regard to the kind of review of "lawfulness" it can offer, is capable of constituting the "proceedings" guaranteed to detained persons by Article 5 § 4 of the Convention (*X v. the United Kingdom*, cited above, § 58). This opinion was echoed by Lady Hale, who in the present case considered that "judicial review and *habeas corpus* may be one way of securing compliance with the patient's Article 5 § 4 rights." Indeed, she even speculated that

> "it may well be that, as the Administrative Court responsible for hearing judicial review and *habeas corpus* petitions must now itself act compatibly with the patient's rights, it would be obliged to conduct a sufficient review of the merits to satisfy itself that the requirements of Article 5 § 1(e) were indeed made out" (see paragraph 34 above).

84. Be that as it may, the Court does not consider it necessary to explore the theoretical protection, for the purposes of Article 5 § 4, that the petition of *habeas corpus* might offer in the context of patients detained by virtue of section 2 of the 1983 Act. In the specific circumstances of the present case, it would be wholly unreasonable to expect the applicant, or indeed her mother acting on her behalf as her litigation friend, to have attempted during the first twenty-seven days of detention to have brought a *habeas corpus* petition. The scheme established by the 1983 Act makes an application to the Tribunal for discharge the natural and obvious way of taking Article 5 § 4-type proceedings in order to contest the justification – and "lawfulness" – of the compulsory confinement of a mental patient ordered under section 2 of the 1983 Act. An incompetent patient such as the applicant could not make a section 66(2)(a) application to the Tribunal for discharge because she lacked legal capacity, but her nearest relative could make an order for her discharge from the assessment detention under section 2 of the 1983 Act. The applicant's mother attempted to do this, but she was met with a "barring order" under section 25(1) of the 1983 Act, as a consequence of which her order for discharge had no effect and she was prevented from

making any further discharge order for a period of six months (see paragraphs 8 and 39 above).

85. Likewise, having been met by a "barring order" against her nearest relative, the applicant could not, at this stage, have been reasonably expected to immediately get her mother or the solicitors acting on her behalf to address a request to the Secretary of State for referral of her case to the Tribunal.

86. The Convention does not oblige applicants, after unsuccessfully attempting the obvious remedy at their disposal, to attempt all other conceivable remedies provided for under national law (see, *mutatis mutandis*, *Karakó v. Hungary*, no. 39311/05, § 14, 28 April 2009). Neither the applicant nor her mother acting as her nearest relative was able in practice to avail themselves of the normal remedy granted by the 1983 Act to patients detained under section 2 for assessment. That being so, in relation to the initial measure taken by social services depriving her of her liberty, the applicant did not, at the relevant time, before the elucidation of the legal framework by the House of Lords in her case, have the benefit of effective access to a mechanism enabling her to "take proceedings" of the kind guaranteed to her by Article 5 § 4 of the Convention. The special safeguards required under Article 5 § 4 for incompetent mental patients in a position such as hers were lacking in relation to the means available to her to challenge the lawfulness of her "assessment detention" in hospital for a period of up to twenty-eight days.

87. Therefore, in the particular circumstances of the present case there was a violation of Article 5 § 4 of the Convention in relation to the applicant's initial detention by administrative order for the purposes of medical assessment in hospital.

The period beginning on 27 February 2003 and ending on 26 March 2003

88. The applicant contends that Article 5 § 4 could only be complied with by creating a right of access to the Tribunal at the same time that detention was extended under section 29(4). It was no answer that there might not be a violation of Article 5 § 4 if the domestic authorities exercised their functions speedily. She further contends that the availability of judicial review and/or *habeas corpus* could not meet the difficulty raised by patients who lacked capacity to institute legal proceedings themselves. Neither procedure could, in practice, satisfy Article 5 § 4 because they were unsuitable for the resolution of complex factual issues and the relevant courts lacked specialist medical expertise and were not, therefore, well-adapted to determining the lawfulness of the detention of persons of unsound mind. There was also no guarantee that a nearest relative, if there was one, would be eligible for public funding and the cost of privately

instructing a solicitor could be a very real barrier to accessing the legal advice necessary to make such an application.

89. The Court of Appeal found a defect, in terms of compliance with Article 5 § 4, in relation to the functioning of the scheme provided for under the 1983 Act as a result of the operation of section 29(4) (see paragraphs 27, 29 and 31 above). In particular, it noted that the patient could not be joined as a party to the proceedings before the County Court. As a consequence, the patient could not complain under Article 6 of the Convention about any delay in pursuing them. Moreover, the standard of promptitude in such proceedings would be that appropriate to the condition of the nearest relative, and not that of the patient.

90. The House of Lords, on the other hand, took the view that the means existed for operating section 29(4) in a way which was compatible with the patient's rights (see paragraphs 33 – 34 above).

91. The Court notes that in the present case the applicant's case was referred to the Tribunal and a hearing took place on 26 March 2003, approximately one month after her detention was automatically extended by law. This cannot be regarded as an unreasonably long period to have been without judicial control on the legal basis of a fresh authorisation of detention in hospital following as an automatic consequence of the application of the law.

92. In its case-law under Article 5 § 4 in respect of persons "of unsound mind" the Court has not looked favourably upon procedures which depend upon the exercise of discretion by a third party. In *Shtukaturov* and *Stanev* (both cited above, at § 124 and § 174 respectively) the Court found that an entitlement of a close relative to initiate proceedings was not a remedy "directly accessible to the applicant." Likewise, in *Rakevich*, where the initiative to apply to a court lay solely with the medical staff, the Court held that "the detainee's access to the judge should not depend on the good will of the detaining authority" (cited above, § 44; see also *Gorshkov*, cited above, § 44 and *X v. Finland*, cited above, § 170).

93. That being said, the Court has accepted that with regard to persons who, on account of their mental disabilities, are not fully capable of acting for themselves, there is no doubt that special procedural safeguards may be called for (see, among other authorities, *Winterwerp*, cited above, § 60; see also the United Nations Convention on the Rights of Persons with Disabilities, cited at paragraphs 49 – 50 above). When a mental patient is not fully capable of acting for herself on account of her mental disabilities, by definition the compensatory safeguards to which the State might have recourse in order to remove the legal or practical obstacles barring such a person from being able to benefit from the procedural guarantee afforded by Article 5 § 4 may well include empowering or even requiring some other person or authority to act on the patient's behalf in that regard.

94. As concerns the legislative scheme at issue in the present case, the House of Lords pointed out that the Secretary of State was required under the Human Rights Act to exercise any power compatibly with the rights enjoyed by individuals under the Convention. This means that once a request is made for a referral, rather than enjoying a discretionary power to refer the case to the Tribunal, he is under a duty to do so if not to do so would involve an infringement of the patient's rights under Article 5 § 4 of the Convention to obtain speedy judicial review of the detention. In such circumstances, the referral to a judicial body cannot be said to be dependent on the goodwill or initiative of the Secretary of State, but rather is a legal consequence flowing from his statutory obligation to act compatibly with the patient's rights under Article 5 § 4 of the Convention. In this regard the present case can be distinguished from those of *Stanev* and *Rakevich* (cited above), where the third parties were not under any duty to intervene on the applicants' behalf.

95. The question might be asked whether such a hearing could have taken place had the applicant not had a relative willing and able, through solicitors, to bring her situation to the attention of the Secretary of State. However, the Court may only consider the case before it, and the facts of the present case clearly illustrate that in circumstances such as the applicant's, where the incompetent patient is "befriended", the means do exist for operating section 29(4) of the 1983 Act compatibly with the requirements of Article 5 § 4 of the Convention. For that reason, no failure to comply with those requirements can be found in the applicant's case as regards the period of her detention in issue under the present head.

96. In any event, the fact remains that the applicant's case was referred to a Tribunal. As a consequence, she was not deprived of the kind of "speedy" judicial review provided for under Article 5 § 4 of the Convention. To that extent, she was personally not a victim of the alleged shortcoming in the British mental health system that she is denouncing in her application. Consequently, even if the Court were to take her arguments at their strongest, her complaint would have to be rejected on the ground that she could not claim to be a victim within the meaning of Article 34 of the Convention.

The period beginning on 26 March and ending on 21 July

97. From 26 March onward the legal basis of the applicant's detention ceased to be the automatic authorisation flowing from the filing by the social services of the application for a "displacement order" and became the refusal of the Tribunal, a judicial body, to discharge the applicant from hospital.

98. The judicial control of lawfulness as required by Article 5 § 4 is incorporated into the judicial decision taken by the Tribunal, at least as far

as concerns a first, reasonable period of detention (*Winterwerp*, cited above, § 55). Article 5 § 4 does not guarantee a mental patient, or any other detainee for that matter, a right to take proceedings against an order of detention issued by a judicial body applying an appropriate judicial procedure. It is of course true that incorporation of the Article 5 § 4 proceedings into a judicial decision authorising detention as a mental patient does not endure eternally, and that a mental patient detained for an indefinite or lengthy period is subsequently entitled by Article 5 § 4 to take proceedings at reasonable intervals to challenge the justification for her continuing detention. However, the lapse of time between 26 March and 21 July cannot be regarded as having been long enough to bring into play this aspect of the guarantee afforded to mental patients by Article 5 § 4 of the Convention.

99. Accordingly, the Court finds no violation of Article 5 § 4 of the Convention in respect of this final period of detention.

V. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION READ TOGETHER WITH ARTICLE 5 § 4

100. The applicant also complains that there was a breach of Article 14 when taken with Article 5 § 4 because incapacitated patients were treated differently from competent patients and this difference in treatment was not justified under Article 14.

101. Article 14 of the Convention reads as follows:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

102. The Court has examined this complaint but finds, in the light of all the material in its possession and in so far as the matters complained of are within its competence, that it does not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. In any event, the matter raised by the applicant has been adequately addressed in the Court's response to her Article 5 § 4 complaint.

103. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

VI. APPLICATION OF ARTICLE 41 OF THE CONVENTION

104. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

105. The applicant did not submit a claim for just satisfaction. Accordingly, the Court considers that there is no call to award her any sum on that account.

106. However, she claimed GBP 5825.06 for the costs and expenses incurred before the Court.

107. The Government queried the solicitor's hourly rate of GBP 175 and submitted that GBP 4,500 would be a more reasonable figure for the applicant's legal costs.

108. The Court notes that the applicant has received legal aid for the costs and expenses incurred in the context of the proceedings before it. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession, the above criteria, and to the fact that the applicant was not successful in relation to the totality of the claims she made against the respondent Government, the Court considers it reasonable to award the sum of EUR 5,250.00 covering costs under all heads for the proceedings before the Court less EUR 850.00 already paid under the Court's legal-aid scheme.

C. Default interest

109. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* unanimously, the Article 5 § 4 complaints admissible and the remainder of the application inadmissible;

2. *Holds* unanimously, that there has been a violation of Article 5 § 4 of the Convention in respect of the first twenty-seven days of the applicant's detention but not in respect of the remainder of the detention;

3. *Holds*, unanimously,

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 4,400 (four thousand four hundred euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses, to be converted into the currency of the respondent State at the rate applicable at the date of settlement; and

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

Done in English, and notified in writing on 22 October 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı	Ineta Ziemele
Deputy Registrar	President