IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
CROWN OFFICE LIST

CO/291/98

Royal Courts of Justice
Strand
London WC2

Wednesday, 8th April 1998

B e f o r e:

MR JUSTICE LIGHTMAN

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REGINA

-v-

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

EX PARTE JAMES HARRY

- - - - - -

(Handed down judgment of
Smith Bernal Reporting Limited, 180 Fleet Street,
London EC4A 2HD
Tel: 0171 831 3183
Official Shorthand Writers to the Court)

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MR R GORDON QC and MR P BOWEN (Instructed by Alexander & Partners, London NW10 4NE) appeared on behalf of the Applicant

MR D PANNICK QC and MR P SAINI (Instructed by The Treasury Solicitors) appeared on behalf of the Respondent.

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J U D G M E N T
(As Approved)

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Wednesday, 8th April 1998

MR JUSTICE LIGHTMAN:

I. INTRODUCTION

This application raises important questions as to the procedures to be followed by the Secretary of State ("the Respondent") in the exercise of his statutory jurisdiction under the Mental Health Act 1983 ("the Act"). An order (which I shall refer to as a Restriction Order) may be made in respect of a mentally disordered patient convicted of a serious offence which places special restrictions upon him because this is necessary to protect the public from serious harm. I shall refer to a patient subject to a Restriction Order as a Restricted Patient. So long as the protection of the public requires the Restriction Order to remain in force, the consent of the Respondent is required before two steps can be taken towards the discharge of the Restriction Order and the return of the Restricted Patient to the community, two steps which can be taken without his consent in case of patients not subject to a Restriction Order ("Unrestricted Patients"). These steps are (pursuant to Section 17 of the Act) the grant of leave to be absent from the hospital and (pursuant to Section 19 of the Act) transfer to a less secure hospital. What is at issue on this application is whether in exercising the power to give or withhold consent to either of these steps being taken the Respondent is free to disregard a recommendation made to him by a Mental Health Review Tribunal ("a Tribunal"); whether after having received a recommendation from a Tribunal, he is free to seek further advice elsewhere, and in particular from the Advisory Board on Restricted Patients ("the Board") and to act on such advice; and if he is free to seek, obtain and act on such advice from the Board, whether the Board and the Respondent are obliged to allow the Restricted Patient to make informed representations to them before they respectively give and act on such advice.

Mr James Harry ("the Applicant") is subject to a Restriction Order and is detained in conditions of maximum security at Broadmoor Special Hospital ("Broadmoor"). A Tribunal in this case after a full hearing made a recommendation to the Respondent that there should be a transfer from Broadmoor to conditions of less security at Shaftesbury Regional Secure Unit ("RSU"). The Respondent thereafter referred the Applicant's case to the Board which carried out certain limited inquiries and, without

disclosing the result of those inquiries to the Applicant, gave the Respondent advice to the opposite effect. The Respondent (without disclosing this advice or giving the Applicant any opportunity to make any representations) thereafter acted on the advice of the Board and by letter dated the 7th November 1996 refused his consent.

The Applicant on this application for judicial review (pursuant to leave granted by Kay J. on the 29th January 1998) challenges:

(1) the Respondent's decision made to refer the Applicant's case to the Board for advice notwithstanding the recommendation for transfer already made by the Tribunal;

(2) the Respondent's decision made upon advice from the Board to refuse to consent to the Applicant's trial leave or transfer on the grounds that: (a) the decision was irrational in that, absent irrationality on the part of the Tribunal or any material change in circumstances since its recommendation, the Respondent was bound to follow the Tribunal's recommendation; and (b) principles of fairness were not complied with in that the Applicant was denied the opportunity to make informed representations to the Board or the Respondent; and

(3) the Respondent's ongoing policy of referring to the Board for advice as to whether to consent to trial leave or transfer in respect of Restricted Patients in circumstances where a recommendation has already been made by the Tribunal.

This case raises three questions:

(1) whether, in the absence of irrationality or a material change in circumstances since the Tribunal's recommendation, the Respondent is bound to follow the Tribunal's recommendation for transfer or leave;

(2) (if the answer to (1) is no), whether it is unfair and irrational for the Respondent to refer a case to the Board where a recommendation for transfer or leave has been made by a Tribunal;

(3) (if the answer to (1) and (2) is no), whether the Respondent is obliged to introduce a greater degree of openness and procedural safeguards into the decision-making process in a case where the Board is consulted.

II. SCHEME OF THE ACT

The Act superimposes on the statutory scheme applicable in cases of Unrestricted Patients specific additional provisions in respect of Restricted Patients. The regime so created is one in which the Respondent has a special and continuing responsibility for Restricted Patients so long as the Restriction Order remains in force. Until the passing of the Act, the Respondent had the sole responsibility and jurisdiction periodically to consider and determine whether the protection of the public from serious harm afforded by each existing Restriction Order was no longer required, and (if he so decided) to direct that the Restriction Order should cease to have effect. But in 1981 in the case of *X v. UK* (1981) 4 ECHR 181 the European Court of Human Rights held in that Article 5(4) of the European Convention on Human Rights ("Article 5(4)") required that a court should be empowered to review at periodic intervals the lawfulness of the detention of patients and order their discharge. To give effect to this decision, whilst Section 42(1) of the Act retained the responsibility and jurisdiction of the

Respondent in respect of the discharge of Restriction Orders, Section 73 of the Act gave a parallel jurisdiction to the Tribunal to direct the discharge of Restriction Orders if (and only if) the statutory criteria there specified are satisfied. These criteria (in short) are that the Tribunal is satisfied that the Restricted Patient is no longer suffering from a mental disorder making it appropriate for him to be liable to be detained in a hospital for medical treatment or that it is not necessary for the health or safety of the Restricted Patient or for the protection of other persons that he should receive such treatment, and (in any event) that it is not appropriate that the Restricted Patient should remain liable to be recalled to hospital for further treatment. Likewise to give effect to the decision of the European Court of Human Rights, the Act and the Mental Health Review Tribunal Regulations 1983 ("the Regulations") made thereunder contain the necessary provisions to ensure that the procedures and proceedings before the Tribunal have the character of proceedings before a court of law. In particular the patient is afforded an oral hearing, disclosure of all material considered by the Tribunal, the opportunity to call and cross-examine witnesses and representation (paid for by legal aid) by a qualified lawyer. Further Regulation 11 specifically requires a medical examination of the Restricted Patient by a medically qualified member of the Tribunal in order to form an opinion of the Restricted Patient's mental condition before the hearing. This is in marked contrast with the absence of any regulation of the procedures of the Board, which has to date had all the hallmarks of a private and informal fact-gathering and advisory consultative body available to the Respondent, and with the absence of any provision for such an examination of the Restricted Patient.

Neither the Act nor its predecessor made any express provision regulating the advice which the Respondent might seek or rely on. In practice the Respondent avails himself of two sources: (a) since 1973 it has been the Respondent's policy in difficult cases to refer questions of discharge, transfer and grant of leave to the Board for the purpose of obtaining their recommendations. The Board consists of

eight members; two lawyers (one, a judge, is chairman), two experienced forensic psychiatrists, two senior social work representatives and two members with special experience of the criminal justice system. Reference to the Board is made only in a comparatively small number of cases. In 1997 only 13 of 2,550 recommendations for discharge , transfer or leave were referred to the Board; and (b) since 1987 advice may be obtained in respect of transfer or grant of leave from the Tribunal. Whilst the Act made provision in Section 72(3) for the Tribunal to make recommendations as to the transfer and grant of leave in case of Unrestricted Patients, no provision was made for such recommendations in case of Restricted Patients. On the 28th October 1987, the Respondent announced that, if in the course of its decision on an application to discharge a Restriction Order the Tribunal made a recommendation as to a transfer or a grant of leave, and the Restricted Patient's responsible medical officer ("RMO") made a proposal based on that recommendation, the Respondent would take full account of the Tribunal's views (see *Hansard* Vol 11, Cols 261-262).

III. FACTS

The Applicant was born on the 3rd April 1951 and he is married. On the 11th December 1980 at Maidstone Crown Court he was charged with the murder of two persons and on both counts was found guilty on grounds of diminished responsibility of manslaughter ("the Index Offences"). He admitted two earlier killings in Scotland in respect of which charges remain on the file. The Crown Court pursuant to what is now Section 37 of the Act by order authorised his admission to and detention in hospital and pursuant to what is now Section 41 of the Act made a Restriction Order without limit of time. He was re-admitted to Broadmoor from Park Lane Special Hospital on the 19th August 1987.

The Applicant's transfer to conditions of lesser security is a vital stage of his treatment and

rehabilitation and affects his future prospects of discharge. Discharge directly from a special hospital like Broadmoor is extremely rare; a staged discharge is more usual, beginning with authorised day visits from Broadmoor, followed by a period of trial leave to a RSU, then a formal transfer to a RSU with further transfers to local hospitals and then to hostels, culminating in a conditional discharge. Although that process will not be followed exactly in every case, the importance of a period of trial leave or transfer to a RSU has as great impact upon a patient's eventual prospects of discharge as a prisoner's categorisation as Category A or B.

In 1996 the Applicant applied under Section 73(1) of the Act to the Tribunal for the discharge of the Restriction Order. On the 19th March 1996 a Tribunal was convened to decide whether the Restriction Order should be discharged. The Tribunal decided that it should not be discharged, but nonetheless recommended a transfer to a RSU. The entirety of the reasons for the Tribunal's decision and recommendation was as follows:

> *"(1) The index offence was very serious and we agree with the RMO that this patient is not `out of the wood'. Indeed there are many problems which still have to be tackled. (2) That said, we sincerely congratulate him and the team on his recent improvement and would certainly recommend a transfer to Shaftesbury RSU once all the plans have been dovetailed. They are already in hand but it could well take a further year. (3) We were pleased to meet Mrs Harry she was both pleasant and cooperative, but will clearly need some professional support in the future. Her's is no easy task"*

The Tribunal's recommendation formed the basis of a subsequent proposal ("the Proposal") to the Respondent by Dr Tim Exworthy, the Applicant's RMO, for a period of trial leave under Section 17 of the Act rather than a formal transfer under Section 19. This is a common management device, leaving a number of options open when, after six months, the period of trial leave is reviewed. The patient is then either remitted back to high security conditions, is given a further six months trial leave or is formally transferred to the RSU under Section 19. On receipt of the Proposal the Respondent submitted it to the

Board together with a dossier ("the Dossier") for its recommendations.

In August 1996 a non-medical member of the Board visited Broadmoor where she interviewed Dr Exworthy, a staff nurse and the Applicant. She prepared for the Board a three and a half page report setting out the information which she had gathered ("the Report"). Neither it nor its gist was disclosed to the Applicant. The Board then convened on the 2nd September 1996. A note of the members' deliberations and recommendation ("the Note") reveals the considered views of the individual members of the Board and the unanimous conclusion which they reached that the Applicant was as dangerous and manipulative as ever and that the Board could not support the Proposal. The Note was passed to the Respondent. The Respondent did not disclose the Note or the gist of its contents to the Applicant. The Respondent followed the advice of the Board and by letter dated the 7th November 1996 to Dr Exworthy communicated his refusal to consent to the Proposal. This letter reads as follows:

"I am writing with reference to your recommendation that Mr Harry be allowed a period of trial leave at the Shaftesbury Clinic under the care of Dr Oyebode.

The case was considered by the Advisory Board on Restricted Patients on 2 September 1996. After careful consideration of their views, the Home Secretary has concluded that Mr Harry remains dangerous and manipulative, completely lacking any insight into his offending behaviour. He is concerned that there is little, if any, evidence of genuine progress, and that Mr Harry appears to have co-operated with staff in recent years only in order to achieve a move from Broadmoor and an eventual discharge.

The Home Secretary is strongly of the view that much further work needs to be carried out at Broadmoor before a move to lesser security can be considered. In particular, the motivation behind the index offences, Mr Harry's tendency to intimidate other, his self-centredness, lack of remorse for his offending, and the possible future risk to his wife (in the event of discharge) are all areas requiring further investigation.

The Home Secretary has concluded, therefore, that there would be no benefit in moving Mr Harry to a medium secure unit at this stage and is therefore unable to agree your proposal."

Thereafter the Applicant sought from the Respondent disclosure of the Dossier and the Report and his agreement to accept written representations on matters related to the reference and the Board's recommendations. The Respondent replied by letter dated the 29th September 1997:

"The Home Secretary is responsible for the management of mentally disordered offenders who are made the subject of a restriction order under the Mental Health Act 1983. He is responsible for protecting the public from unjustifiable risk. The purpose of the Advisory Board is to provide the Home Secretary with confidential advice in which to assist with decisions about the discharge or transfer between hospitals of those patients and to advise on the management of cases which require special care and assessment because the risk of serious re-offending is particularly difficult to predict.

In the case of Mr Harry, the information before the Advisory Board for their decision on the recommendation for trial leave in medium secure unit comprised of reports from the clinical team during the period of his detention. In addition, reports from the case conference and reports presented to the Mental Health Review Tribunal hearings, together with correspondence between ourselves and his legal advisers and between ourselves and his responsible medical officer. The decision on whether or not to consent to Mr Harry being transferred to another hospital rests entirely with the Home Secretary and is taken by him in the light of all the advice he receives, including that of the Advisory Board.

As you are aware the Home Secretary put forward his views opposing Mr Harry's transfer to Dr Exworthy in his letter of 7 November 1996. On the general issue of disclosure, as outlined above the advice given by the Advisory Board to the Home Secretary on restricted cases is in confidence. The Home Secretary is not, therefore, prepared to disclose the contents of the dossier and advice of the Advisory Board."

The Applicant's solicitors wrote again on the 17th November 1997 repeating their request for disclosure of the Dossier, reconsideration of the application by the Respondent and an opportunity to make informed representations both to the Board and thereafter to the Respondent. In the absence of undertakings to this effect, judicial review proceedings were threatened.

By letter dated the 19th January 1998 the Respondent disclosed the Report, but withheld the Dossier. No undertaking was given to reconsider the application; nor were any undertakings given as to

the procedure that had been requested in relation to any future applications. This application was issued on the 23rd January 1998. In the affidavit sworn on behalf of the Respondent on the 9th March 1998, the Respondent stated that in the exceptional circumstances of this case he was prepared to disclose the Dossier, but this should not set any precedent for the future. The Report was only disclosed in the course of the hearing (at least in part) at my instance.

IV. IRRATIONALITY

The thrust of challenge to the decisions of the Respondent to refer the Proposal to the Board and to act upon the recommendation of the Board is that it was irrational for the Respondent to seek further advice when he already had the recommendation after a full hearing of the Tribunal which had all the trappings of a court of law.

(a) Decision of Fact

There is authority to the effect that, where a statutory or extra statutory body vested with jurisdiction to determine an issue of fact has determined that issue, it may be irrational for a decision-maker to disagree with that conclusion. An example is afforded by the case of *R v. Secretary of State for the Home Department ex. p Danaei* an unreported decision of the Court of Appeal dated the 12th November 1997. In the course of his dismissal of an asylum appeal, a special adjudicator having heard full evidence found that the applicant had committed adultery in Tehran. The Court of Appeal held that on a separate but related application for leave to enter or remain in the United Kingdom outside the Immigration Rules (a jurisdiction where the Secretary of State had a very wide discretion) it was irrational for the Secretary of State to set aside or ignore that finding. Simon Brown LJ said:

"Mr Blake submits that the Secretary of State can only reach a different factual conclusion from the adjudicator if he has good reason to do

so. In considering whether good reason exists, two particular matters must be borne in mind. First, that the adjudicator has what is generally regarded as the unique advantage of seeing and hearing the witnesses as they give their evidence orally in the course of an adversarial process. Second, that the adjudicator is an independent appellate authority, deciding issues of fact impartially as between the rival parties, here the Secretary of State and the respondent. The adjudicator's independent role in the scheme of the legislation is exemplified not merely by his power to review the Secretary of State's decisions on questions of fact and to allow appeals, but also by his power to make recommendations (both under s.19(3) and extra-statutorily) and, if asked, to report to the Secretary of State under s.21. True, such recommendations and reports are not binding upon the Secretary of State; but they must be recognised as coming from an independent tribunal.

These two considerations taken together seem to me of great importance in this case."

...

"In the present case ... the primary fact in question is ... whether or not the respondent was an adulterer. On an issue such as this it does not seem to me reasonable for the Secretary of State to disagree with the independent adjudicator who has heard all the evidence unless only:

1. the adjudicator's factual conclusion was itself demonstrably flawed, as irrational or for failing to have regard to material considerations or for having regard to immaterial ones - none of which is suggested here;

2. fresh material has since become available to the Secretary of State such as could have realistically have affected the adjudicator's finding - ...;

3. arguably, if the adjudicator has decided the appeal purely on the documents, or if, despite having heard oral evidence, his findings of fact owe nothing whatever to any assessment of the witnesses."

The principle stated by Simon Brown LJ applies equally to a decision whether a "thing" (such as an access road) (see *Powergen,* an unreported decision of the Court of Appeal quoted by Simon Brown LJ) and to a decision whether a person is dangerous.

There is force in the Applicant's contention that the Respondent was obliged to recognise the decision of fact by the Tribunal that the Applicant had improved as coming from an independent tribunal and as one that could only rationally be departed from if one of the three conditions postulated by Simon Brown LJ were satisfied. On that question of fact, the Respondent obtained further material, namely the Report and the Note, and that material as it seems to me could realistically have affected the Tribunal's decision that the Applicant had improved. The critical issue raised by the Applicant is whether the Respondent was entitled to seek fresh material and in reliance upon it to reach a conclusion contrary to that reached by the Tribunal. The Applicant concedes that in principle the Respondent could take into account fresh material that had become available to him since the Tribunal's decision, but challenges that this is so if (as in the present case) such information is generated by the Respondent himself by making the reference to the Board.

This distinction appears to me totally artificial and unsustainable in principle or common-sense. The critical issue must be whether in the particular situation in question the decision-maker is free to rely on fresh information or is precluded from doing so. Circumstances may exist where to allow the issue which has been decided to be reopened would defeat the whole purpose for which the original inquiry took place. There may be a public interest in finality. But I can see no justification for such a constraint on the Respondent in the performance of the duties imposed by the Act in question on this application. Parliament has not by the Act conferred upon the Tribunal any role (even as advisers) on the issue before him: the Tribunal would not have even entered into the picture but for the Respondent adopting the practice of entertaining the Tribunal's recommendations. It is the Respondent (and not the Tribunal) who is by statute entrusted with the task of deciding whether to give consent and he cannot have deprived himself of access to further information if he considers this to be required (compare *R v. Home Secretary ex p. Doody* [1994] 1 AC 531 at 549 per Lord Mustill). If the finding by the Tribunal of the Applicant's improvement did not fully satisfy him, the Respondent was not only free, but bound, to seek further advice

and further information. In this situation the obvious source of information and advice was the Board. The Respondent in weighing up the views of the Tribunal and of the Board on the mental condition of the Applicant had to have full regard to the advantages enjoyed by the Tribunal in the court hearing before it and the fact that the information obtained for the Board was in course of a single visit to Broadmoor by a single (non medically qualified) member. But the Respondent could also have regard to the fact that the Tribunal's decision was totally unspecific as to the degree of improvement and accordingly was not particularly illuminating; the additional information contained in the Report; the relative expertise of the members of the Board and Tribunal; and the relative cogency of the reasoning of the advice of the Board and the recommendation of the Tribunal.

(b) Discretion

Even if I thought that the Respondent was bound to accept the decision of the Tribunal as to the Applicant's improvement, though the existence of such an improvement is highly material to the decision whether to grant consent, it would not be decisive. The continuance in force of the Restriction Order signifies that there continues to be some risk of serious harm to the patient or others requiring its continuance in force, and the Respondent must bear this risk in the forefront of his mind when considering an application for consent. As I have already said, the Respondent is entrusted by Parliament with the task of deciding whether to give consent and he cannot abdicate this responsibility or transfer the responsibility to the Tribunal. It is open to him to decide (with or without the benefit of the advice of the Board) that the improvement is not such as justifies the creation of the risk to the public which the grant of leave or transfer to a less secure hospital may occasion.

(c) Summary

In short, as it seems to me, the scheme of the Act places on the Respondent the responsibility in the case of Restricted Patients to balance the patient's claim to liberty against the interests of everyone else to be safeguarded against the risks to which such liberty may give rise. For his performance of these duties the Respondent is politically accountable to Parliament. His obligation is fully to satisfy himself as to the propriety of any decision before he makes it because of the serious impact of such decision, and if the finding or recommendation of the Tribunal leaves him in doubt, he is not only entitled but bound to look further afield for guidance: the finding and recommendation of the Tribunal may assist him to fulfil this obligation, but cannot dilute it or impede its fulfilment or obviate the need for the exercise by him of an informed judgment whether consent should be forthcoming.

Accordingly I hold that, far from the decisions in this case taken by the Respondent being irrational, they were entirely rational and proper. The only limitation upon the freedom of the Respondent to consult and act on the recommendation of the Board was his obligation to act in a procedurally fair manner, and the only question is whether the Respondent did so.

V. PROCEDURAL FAIRNESS

In my judgment, the current procedures followed by the Respondent in making the reference to the Board and acting on its advice did not comply with the requirements of procedural fairness: (a) the Applicant was not furnished with the Report or informed of the gist of it (and most particularly of the new information contained in it) or invited to make representations on this material to the Board; and (b) the Applicant was not furnished with the Note or invited to make representations to the Respondent before he acted upon it. In the course of the hearing, correctly anticipating my decision to this effect, the Respondent announced a fundamental change in practice which in future is to be as follows:

"Where, after an extra-statutory recommendation by the Mental Health Review Tribunal, the Secretary of State seeks advice from the Advisory Board on whether to give his consent to the transfer of a patient, or grant leave of absence, pursuant to his powers under section 41(3)(c) of the Mental Health Act 1983, the Secretary of State accepts that the patient is entitled by reason of procedural fairness (subject to public interest immunity or some other substantial reason for departing from these principles which will normally be communicated to the patient's advisers):

1. To be told the gist of any new information before the Advisory Board on a relevant point and, in particular, to be told the gist of the report to the Advisory Board by its member who has visited the hospital.

2. To make written representations to the Advisory Board in response to such material before the Advisory board reaches a conclusion on its advice to the Secretary of State.

3. To be given a copy of the advice from the Advisory Board to the Secretary of State, and to be given an opportunity to make written representations on the matter to the Secretary of State before the Secretary of State reaches his conclusions.

4. To be given reasons for the decision of the Secretary of State.

5. To make thereafter, any further written representations to the Secretary of State, which will be considered, it being a continuing process of review by the Secretary of State of the need for, and application of, restrictions."

I endorse the adoption of this policy. The policy fully satisfied the Applicant in all respects save one. This exception relates to the Report which (in view of its importance) should clearly be in writing. The Applicant contends that the Restricted Patient should be entitled to see the whole of the Report to the Board. The Applicant has seen the whole of the Report in this case. The question can only be live between the parties before me if a further reference to the Board is made at a later stage. I should however indicate my view that in accordance with established principles of law, though the reference to the Board is part of a decision-making process which has a direct impact on the liberty of the patient, the Restricted Patient's entitlement is limited to the gist of the Report (see *R v. Secretary of State for the Home*

Department ex p. Duggan [1994] 3 All ER 277 at 288 per Rose LJ). But it is to be remembered that what is sufficient to constitute the gist for one purpose may not be sufficient for another. When a fundamental right is in issue, a more expansive and informative summary may be called for. The detail required must depend on what (having regard to the importance of the issue at stake and of the contents of the document in question on that issue) fairness requires to enable the making of meaningful and focused representations. The Respondent must consider in each case whether a full and fair understanding of the gist of the Report can be conveyed without production of the Report itself and whether good administrative practice may also call for its production. Good administrative practice may call for production of a document where this is necessary to avoid the risk of a legitimate sense of concern or grievance and there is no countervailing consideration of any weight and no legitimate reason for wishing to withhold it.

VI. CONCLUSION

I accordingly reject the contention of the Applicant that the Respondent was bound to follow the recommendations of the Tribunal and that any other course (and in particular the course followed) was irrational. But I uphold the contentions of the Applicant that the Respondent in this case has failed to comply with the principles of procedural fairness.

The Respondent has now fully recognised his failure in the latter regard and adopted a new practice which fully complies with those principles. The Respondent fully accepts that the Board should reconsider his reference to it of the Proposal and for this purpose should take into account any written representations by the Applicant; that a copy of the Board's advice to the Respondent should be provided to the Applicant; and that the Applicant should be entitled to make written representations on the advice before the Respondent makes his decision. He offers the assurance that this course will be followed. In

the light the change of practice and this assurance I do not see the need for the grant of any substantive relief on this application.

I shall make no substantive order.

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MR GORDON: My Lord, my client is legally aided. In the circumstances, my learned friend and I have agreed there should be no order as to costs save for legal aid taxation of the Applicant's costs.

MR JUSTICE LIGHTMAN: I will make that order.

MR GORDON: The second matter is we would seek your Lordship's leave to appeal on the recommendation point. My Lord, my learned friend Mr Pannick seeks to make no point to the court on that. I do not need to remind your Lordship of the importance of the case, because your Lordship referred to it, that is my application.

MR JUSTICE LIGHTMAN: I shall leave it to the Court of Appeal, I shall not grant leave.

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