R v (1) The Mental Health Review Tribunal (2) Torfaen County Borough Council (3) Gwent Health Authority ex p Russell Hall

Court and Reference: Administrative Court; CO/2874/98

Judge: Scott Baker J

Date: 23 April 1999

Appearances: R Gordon QC and F Morris (instructed by Irvings) for H; R Singh (instructed by the Treasury Solicitor) for the Tribunal; M Reed (instructed by Sharpe Pritchard) for the Council; P Engelman and J Laddie (instructed by Welsh Health Legal Services) for the Health Authority.

Judgment:

1. The Applicant is presently detained in Ashworth Special Hospital, notwithstanding his conditional discharge was ordered by a Mental Health Review Tribunal first on 4 February 1997 and secondly on 30 April 1998. He seeks judicial review, claiming that all or each of the Mental Health Review Tribunal (the Tribunal), the Torfaen County Borough Council (Torfaen) and the Gwent Health Authority (Gwent) have acted unlawfully in failing to secure his discharge. The case raises difficult questions concerning the release into the community of patients detained under the Mental Health Act 1983.

The Facts

2. On 20 September 1991 the Applicant was found not guilty of manslaughter by reason of insanity and an order was made under s5(1) of the Criminal Procedure (Insanity) Act 1964 that he be detained in a hospital. He thereby became a restricted patient detained without limit of time under ss37 and 41 of the Mental Health Act 1983.

3. His case came for consideration before a Mental Health Review Tribunal on 4 February 1997. The Tribunal decided (I summarise) that the Applicant was still suffering from mental illness but that it was not necessary for his health or safety or the protection of others that he should be detained in a hospital for treatment. However, he should be liable to recall. It felt that the stress of living in the community might cause a relapse and imposed conditions on his discharge, deferring his discharge until, as they put it, the appropriate package had been prepared.

4. The conditions were:

(i) that he reside at a place to be agreed by his psychiatric and social supervisors;

(ii) that he receive medical supervision by a nominated forensic psychiatric supervisor;

(iii) that he comply with the directions of his responsible medical officer (RMO) (ie the person in (ii) above);

(iv) that he comply with the directions of his social supervisor as nominated by his RMO.

5. The Applicant clearly presented a difficult case for the Tribunal. There was conflicting medical evidence and indeed the Tribunal reached its decision he continued to suffer from mental illness notwithstanding he had no overt symptoms, was not on medication and had exhibited no symptoms since arriving at Ashworth. The divided medical opinion went right back to the date of the trial when Dr Chris Hunter, a much respected forensic psychiatrist and director of the Caswell Clinic at Brigend, formed the clear opinion that he was not mentally ill, but rather seeking to fake to be so. This, I think, at least in part explains the difficulty in finding any forensic psychiatrist to supervise the Applicant in the community. Both Dr Hunter and his colleague at the Caswell Clinic, Dr Tegwyn Williams think he is manifestly untreatable and unsupervisable.

6. By July 1997 matters had not progressed very far. Dr Stephen Hunter, consultant in psychological medicine to Gwent, was prepared to be the Applicant's RMO but he is not an approved forensic psychiatrist. He offered to try and find the Applicant accommodation in the Gwent area and to organise community support, but he did not think it would be easy to arrange. On 3 September 1997 Mr Tim Miles, the Applicant's senior social supervisor at Ashworth Hospital, wrote to the Tribunal seeking assistance. In response the Tribunal wrote back on 23 September 1997 varying the conditions so that the nominated psychiatric supervisor need not be a forensic psychiatrist and the social supervision could be undertaken by a community psychiatric nurse as nominated by the RMO. The reasons were (1) to enable Dr Stephen Hunter to be the psychiatric supervisor and (2) that the Applicant did not require formal social care.

7. On 27 October 1997 Dr Stephen Hunter wrote saying that he would be the nominated consultant and Mr Bob Morris would be the nominated social supervisor but that there was an ongoing problem over accommodation. He added that, because the Applicant was not felt to be in need of social care, social services were not in a position to assist him beyond basic advice and support. On 13 December 1997 the Applicant's solicitors wrote to Torfaen holding them responsible under s117 of the Mental Health Act 1983 and pointing out that the only matter preventing the Applicant's discharge was the lack of appropriate accommodation. The response on 19 November was that because of the nature of the index offence it was not possible for the Applicant to return to Torfaen and that Monmouth had accepted s117 responsibility as he would be resident in their Borough. Torfaen were not, the author said, involved in the Applicant's aftercare arrangements. Monmouthshire took a different view, as is apparent from their letter of 10 December. They regarded Torfaen as the responsible authority and were not, on the facts then known to them, prepared to offer accommodation. They were concerned about the proximity of the victim's relatives place of residence and required more information from Torfaen and an assessment of the risks involved. On 2 March 1998 Torfaen wrote saying that if the Applicant moved to Monmouthshire and lived in private rented accommodation he would become the responsibility of their social services department but they agreed, because of the Applicant's exceptional circumstances, to accept initial financial responsibility for him should he make such a move.

8. On 6 March 1998 Mr Miles wrote asserting that responsibility for the Applicant's aftercare rested with Torfaen and Gwent who should liaise with each other and Monmouthshire to resolve the outstanding issues of where the Applicant should live and where the money was to come from. He continued:

> "The conditions of discharge are of course that Russell must reside where his prospective supervisors decide and Torfaen would need to decide whether to provide such accommodation and whether to agree a care plan under s117 involving a placement in Torfaen in a location (if any) acceptable to Russell's supervisors."

9. This was a helpful letter copied to all concerned. It did not, however, achieve the desired result. A fresh application was made to a Mental Health Review Tribunal by the Applicant's solicitors. This was determined on 30 April 1998. The statutory consequence of this new application was that the Applicant's conditional discharge lapsed and his case had to be considered afresh by the new Tribunal.

10. This time the Tribunal decided that the Applicant was not suffering from a mental illness or condition that required him to be detained, but that he ought to remain liable to recall to hospital for further treatment. It imposed the following conditions:

(i) He should reside at a place to be agreed by his psychiatric supervisors which should be a considerable distance from the scene of the index offence;

(ii) he should receive medical supervision by a nominated <u>forensic</u> psychiatric supervisor (my emphasis);

(iii) he should comply with the directions of his social supervisor who should be an <u>approved</u>

> social worker specialising in forensic psychiatry (again my emphasis).

11. Between the 2 Tribunal hearings the Applicant's RMO had changed from Dr AO Williams to Dr Croy. The Tribunal accepted that at the time of the index offence the Applicant was suffering from an acute mental illness but that for 6 years he had not shown any evidence of mental illness despite, during that time, having been in receipt no medication.

12. The Tribunal had before it the evidence of Dr Tegwyn Williams, who had prepared a report on the Applicant at the request of his solicitors, and who gave oral evidence. He could find no evidence to suggest the Applicant had been mentally ill since before the time of his trial and concluded that he had recovered from "whatever episode of mental illness that had effected him". He did not feel that medical or social supervision would reduce the risk of any further offending and recommended an absolute discharge. He concluded by observing, with the benefit of hindsight, that should the Court have accepted the Applicant was mentally ill at the time of the index offence there would have been grounds for considering diminished responsibility under the Homicide Act 1957 rather than insanity and that, as he was not mentally ill at the time of the trial, a hospital order would have been unavailable. In his view the underlying difficulty was trying to manage within the hospital system a case that should not have been there in the first place.

13. The Tribunal preferred the view of Dr Croy the RMO to Dr Tegwyn Williams and ordered a conditional discharge. They said:

> "Although we have decided that the patient is not suffering from mental illness or psychopathic disorder we feel, having considered the past history, that there is a risk of a spontaneous recurrence of mental illness, or a recurrence arising from stress associated with independent living, the difficulties of inter-personal relationships, the accumulation of debt and in particular the fear of loss of accommodation, the consumption of prohibited drugs or excessive amounts of alcohol."

14. Then they added:

> "We feel that it is essential that these conditions are in place because of the risk of recurrence of mental illness and the need to protect the community."

15. An obvious and immediate difficulty was caused by the first of the Tribunal's conditions that required the Applicant to live "a considerable distance" from the index offence. Mr Miles wrote on 13 May 1998 asking for clarification because all the areas covered by Gwent are within 20 miles of Cwmbran where the index offence occurred. Mr Miles asked whether the Tribunal required or at least preferred resettlement outside the Gwent Health Authority area or whether somewhere relatively distant albeit within the Gwent Health Authority area would suffice. Alternatively, were they thinking of somewhere outside South Wales altogether? The Tribunal responded on 8 June 1998 that the Applicant should be resettled outside the Gwent area and preferably outside South Wales.

16. It is unfortunate that lack of clarity on one of the conditions imposed by the Tribunal added further difficulty to an already troublesome case. Conditions imposed by a Tribunal should be expressed in clear terms so that those who have to implement them are aware of what is required. The Applicant too is entitled to know precisely where he stands.

17. On 29 May 1998 the Applicant's solicitors wrote to Torfaen and Gwent pointing out the delay in the Applicant's discharge from Ashworth Hospital and that this was due to their failure to secure appropriate accommodation and services for him and requiring the necessary steps to be taken within the next 10 days. On 1 June 1998 Torfaen replied saying that until it was known what area the Applicant would be moving to and who would be his psychiatric and social supervisors it would not be possible to make any practical arrangements for his accommodation on discharge. They added that the general aftercare responsibility under s117 of the Mental Health Act 1983 might well fall jointly on the health and social services authorities in the area in which the Applicant would become ordinarily resident rather than the place of ordinary residence from which he was admitted to hospital.

18. On 25 June 1998, following clarification by the Tribunal about where the Applicant was to live, Gwent wrote saying that, now the Tribunal had said the Applicant should be placed outside South Wales if possible, there were no local connections of which they could take advantage to promote a fast resettlement. Mr Miles should approach the voluntary sector to provide accommodation and, once it had been found, Torfaen would be asked to provide any necessary funding to secure it. The letter concluded "all reasonable steps are now being taken to locate available accommodation and there is nothing more that the health authority can be doing at this stage". What, however, seems clear is that the only real initiative was coming from Mr Miles. Torfaen and Gwent were doing little if anything. Certainly there was no multi-disciplinary assessment or any joint plan to solve the problem.

19. Torfaen's attitude was, as appears from the Affidavit of Mr Harris sworn on 4 November 1998, that they were not the relevant social services authority for the purposes of s117 of the Mental Health Act 1983 because, pursuant to the condition imposed by the Tribunal, the Applicant would be

residing outside their area. Gwent's position was (see Dr Sarah Aitkin's Affidavit of 4 November 1998) that once the availability of accommodation had been established a formal request would be made to the relevant health authority for provision of supervision by a forensic psychiatrist for which Gwent would pay for a defined period. Dr Aitkin says she maintained contact with Mr Miles and learned that efforts were being made to accommodate the Applicant in Bradford. She said that if Bradford Health Authority refused to accept a supervisory role she intended that Gwent should refer back to the Tribunal requesting a further variation of conditions to enable the Applicant to be rehoused in South Wales eg Swansea with supervision being provided by the Caswell Clinic with whom the health authority had a contractual arrangement for the provision of outpatient services. The Caswell Clinic was not, however, agreeable because both Dr Chris Hunter and Dr Tegwyn Williams were of the view that the Applicant was not mentally ill but suffering from an anti-social personality disorder that was not amenable to treatment. Dr Aitkin appears to have been content to take very much a back seat and let Mr Miles make the running.

20. What was required, but appears never to have taken place, was a meeting between Dr Miles, the senior social worker at Ashworth looking after the Applicant's case and representatives of Torfaen and Gwent to plan the way ahead. This was asked for by Mr Miles by letter of 13 May 1998 and again on 7 September 1998 but there is no evidence that any such meeting every materialised. On 18 September 1998 Dr Aitkin wrote saying:

> "While we are responsible under the Mental Health Act for Mr Hall, the normal arrangements with our providers of mental health services is that the discharge arrangements are made by those caring for the patient. The role of the health authority is to approve funding of any care required to enable the discharge to take place."

21. Eventually and unsurprisingly the Applicant's solicitors lost patience with the lack of progress and commenced proceedings for judicial review on 29 July 1998. Even that did not bring about a solution. Events meandered onwards until eventually, on 18 February 1999, Bradford decided they would not support a discharge into their community. The Bradford forensic service was not willing to provide psychiatric supervision of the Applicant and indeed described the manner in which they had been approached as bizarre.

22. So the position is that nearly a year after the second tribunal ordered the Applicant's discharge he remains detained in Ashworth Hospital with no prospect the conditions for his discharge will be met. How is the impasse to be broken? Each of the 3 Respondents contends that it has acted lawfully and appropriately. The Tribunal says the conditions it imposed were both lawful and essential. It acted rationally and within its powers. Torfaen says that once the Applicant is to be accommodated outside its area and preferably outside South Wales it is not up to it to make arrangements for his accommodation; it is not the responsible authority. Gwent says it only comes into the picture once a firm decision has been taken where the Applicant is to live; then it will provide limited funding to cover psychiatric supervision. If all 3 Respondents are right the Applicant may never be released and yet he is not suffering from any condition that warrants his detention in hospital; nor has he been for a number of years.

The Relevant Statutory Provisions

23. A Mental Health Review Tribunal's powers of discharge in respect of restricted patients are contained in Sections 72 and 73 of the Mental Health Act 1983. Section 72, so far as is material, provides:

> "(1) Where application is made to a Mental Health Review Tribunal by or in respect of a patient who is liable to be detained under this Act, the Tribunal may in any case direct that the patient be discharged, and …
> (b) the Tribunal shall direct the discharge of a patient liable to be detained otherwise than under s2 above if they are satisfied
> (i) that he not then suffering from mental illness, psychopathic disorder, severe mental impairment or from any of those forms of disorder of a nature or degree which makes it appropriate for him to be liable to be detained in a hospital for medical treatment; or
> (ii) that it is not necessary for the health or safety of the patient or for the protection of other persons that he should receive much treatment…"

24. And s73:

> "(1) Where an application is made to a Mental Health Review Tribunal by a restricted patient who is subject to a restriction order, or where the case of such a patient is referred to such a Tribunal, the Tribunal shall direct the absolute discharge of the patient if satisfied:-
> (a) as to the matters mentioned in para (b)(i) or (ii) of s72(1) above; and
> (b) that it is not appropriate for the patient to remain liable to be recalled to hospital for further treatment.
>
> (2) Where ... the Tribunal are satisfied as to the matters referred to in para (a) ... but not as to the matters referred to in para (b) ... the Tribunal shall direct the conditional discharge of the patient.
> …
> (4) Where a patient is conditionally discharged under this section:-

> (a) he may be recalled by the Secretary of State under subs(3) of s42 ... and
> (b) the patient shall comply with such conditions (if any) as may be imposed at the time of discharge by the Tribunal or at any subsequent time by the Secretary of State.
> …
> (7) A Tribunal may defer a direction for the conditional discharge of a patient until such arrangements as appear to the Tribunal to be necessary for that purpose have been made to their satisfaction; and where by virtue of any such deferment no direction has been given on an application or reference before the time when the patient's case comes before the Tribunal on a subsequent application or reference, the previous application or reference shall be treated as one on which no direction under this section can be given."

25. The way ss72 and 73 operate is this. A Tribunal is bound to direct the discharge (whether absolute or conditional) of a restricted patient if they are satisfied he is no longer suffering from a sectionable mental disorder or, if he is, that it is not necessary for his health or safety or for the protection of others that he should receive treatment in hospital. Whether the discharge is absolute or conditional is determined by whether the Tribunal is satisfied it is not appropriate for the patient to remain liable to recall for further treatment. If it is so satisfied the discharge must be absolute. Otherwise it must be conditional.

26. What happened here was that the s72 criteria were met so there had to be a discharge, but because the Tribunal felt the Applicant ought to be liable to recall for further treatment the discharge had to be conditional. The patient is required by s73(4)(b) to comply with the conditions. By s73(7) the Tribunal may defer a direction for the conditional discharge of a patient until the necessary arrangements have been made. If a fresh application comes before the Tribunal before the deferred direction has been given, the patient loses the benefit of the original conditional discharge and his case has to be considered afresh. That was what happened when the Applicant's case was heard by the second Tribunal on 30 April 1998. On this occasion too the Tribunal made a deferred direction.

27. Because the Tribunal was not satisfied that the Applicant should no longer be liable to be recalled to hospital, it was bound not to order absolute discharge. A conditional discharge was the only option. Mr Rabinder Singh, for the Tribunal, points out that the wording of the Act appears to confer a broad discretion upon the Tribunal to decide what conditions are appropriate (see s73(4)(b)). Furthermore, the Tribunal was not bound to take the same view as its predecessor. It had a duty to reach its own judgment on the facts and evidence before it. Indeed it answered question A of the 3 questions concerning the statutory criteria differently from its predecessor. It was satisfied the Applicant was not any longer suffering from mental illness whereas the first Tribunal thought otherwise.

28. Mr Singh says that the Tribunal had a rational basis for the conditions that it imposed. It felt the Applicant's place of residence should be away from the scene of the index offence and that if those supervising the Applicant were forensically trained they would be more likely to recognise the first signs of any return of his mental illness. Naturally the Tribunal was very concerned about the gravity of the index offence and the risk to the public. In short, they were perfectly reasonably conditions to impose and the fact that they subsequently proved difficult to implement in practice is a matter for others, or for another Tribunal if one is convened on a fresh application or reference. Once a Tribunal has ordered deferral under s73(7) it has no power to reconvene to change its order: R v Mental Health Review Tribunal ex p Secretary of State for the Home Department [1988] AC 120. The reasonableness of the Tribunal's decision as to conditions and deferral has to be considered as at the time of the decision and not in the light of subsequent events. As Lord Bridge observed at p129E it is impossible for a Tribunal in making a deferred direction for conditional discharge to predict how long it would take to make the necessary arrangements.

29. Mr Richard Gordon QC, for the Applicant, argues that whilst the Tribunal has, under s73(4)(b), an apparently wide discretion as to the conditions that it imposes, the discretion has to be exercised in the context of what had occurred since the first Tribunal's decision on 4 February 1997. The fact is that pending implementation of any conditions the Applicant's discharge is deferred under s73(7). During the deferred period he will remain in hospital notwithstanding he is not suffering from any condition that warrants his continuing detention. Parliament cannot in such circumstances have envisaged other than a short period of deferment, or looking at it slightly differently there is no power to impose conditions that are likely to be impossible to meet or lead to indefinite deferral of discharge. He reminds me of Art 5 of the European Convention on Human Rights which provides:

> "Everyone has the right to liberty and security of person. No person shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law ... (e) the lawful detention of ... persons of unsound mind."

30. The Applicant's lengthy deferred conditional discharge appears to be in direct conflict with Art 5. I shall return to this aspect of the case a little later.

31. The other statutory provision of direct relevance is s117 of the Mental Health Act 1983 which deals with aftercare. The material parts of the section provide:

> "(1) This section applies to persons who are detained under s3 above or admitted to a hospital in pursuance of a hospital order made under s37 above or transferred to a hospital in pursuance of a transfer direction made under ss47 or 48 above and then cease to be detained and (whether or not immediately after so ceasing) leave hospital.
>
> (2) It shall be the duty of the health authority and of the local social services authority to provide, in co-operation with relevant voluntary agents, aftercare services for any person to whom this section applies until such time as the health authority and the local social services authority are satisfied the person concerned is no longer in need of such services; but they shall not be so satisfied in the case of a patient who is subject to aftercare under supervision at any time while he remains so subject."
>
> (I omit subsections (2A) and (2B)).
>
> "(3) In this section "the health authority" means the health authority and "the local social services authority" means the local social services authority, for the area in which the person concerned is resident or to which he is sent on discharge by the hospital in which he was detained."

32. This case raises issues upon the true construction of s117 that it is necessary to resolve. The questions, as I see it, are who owes the duty, when is it owed and the extent of it. The purpose of the section is to provide support in the form of aftercare services for those who have been detained in a mental hospital and are released into the community. The providers are the health authority and the social services authority. There is one reported case in which s117 has been considered, namely R v Ealing District Health Authority ex p Fox [1993] 1 WLR 373, [1993] 3 All ER 170. Otton J decided that a district health authority was under a mandatory duty under s117 to provide aftercare services for any person to whom the section applied and was therefore under a duty to make practical arrangements for aftercare prior to a patient's discharge from hospital where such arrangements were required by a Mental Health Review Tribunal in order to enable the patient to be conditionally discharged from hospital. The relevant facts were that a Mental Health Review Tribunal directed a conditional discharge to be deferred until it was satisfied that the conditions could be met including, inter alia, supervision by a responsible medical officer. The authority declined to appoint a responsible medical officer because both the head of their regional secure unit and their consultant psychiatrist considered the patient's condition had deteriorated since the Tribunal hearing and were pessimistic about his progress outside hospital.

33. Otton J pointed out that s117(2) is mandatory. He said at [1993] 1 WLR 385, [1993] 3 All ER 181:

> "Thus, the duty is not only a general duty but a specific duty owed to the Applicant to provide him with aftercare services until such time as the district health authority and the local social services authority are satisfied that he is no longer in need of such services. I reject the submission this duty only comes into existence when the applicant is discharged from Broadmoor. I consider a proper interpretation of this section to be that there is a continuing duty in respect of any patient who maybe discharged and falls within s117, although the duty to any particular patient is only triggered at the moment of discharge."

34. He continued (at 386, 182):

> "In my judgment, if the district health authority's doctors do not agree with the conditions imposed by the Mental Health Review Tribunal and are disinclined to make the necessary arrangements to supervise the applicant on his release, the district health authority cannot let the matter rest there. The district health authority is under a continuing obligation to make further endeavours to provide arrangements within its own resources or to obtain them from other health authorities who provide such services so as to put in place practical arrangements for enabling the applicant to comply with the conditions imposed by the Mental Health Review Tribunal or, at the very least, to make enquiry of other providers of such services. If the arrangement still cannot be made then the district health authority should not permit an impasse to continue but refer the matter to the Secretary of State to enable him to consider exercising his power to refer the case back to the Mental Health Review Tribunal under s71(1)".

35. It is of note that Otton J rejected the submission that the health authority's duty only arose on the patient's discharge from hospital. A similar submission was made to me in the present case by Mr Harris on behalf of Torfaen and likewise I reject it. If effective aftercare services are to be provided, it is necessary for them to be planned and arranged before the patient leaves hospital. The joint nature of the duty on the health authority and the social services authority emphasises that this is so. Effective aftercare, as this case illustrates, takes time to prepare and arrange. In Fox the terms of the duty were described in the declaration made by the Court as follows:

> "That a district health authority is under a duty under s117 of the Mental Health Act 1983 to provide aftercare services when a patient leaves hospital, and acts unlawfully in failing to seek to

make practical arrangements for aftercare prior to that patient's discharge from hospital where such arrangements are required by a Mental Health Review Tribunal in order to enable the patient to be conditionally discharged from hospital".

36. It was argued by Mr Harris that even if Fox was correct the primary duty to provide aftercare still only comes into effect upon discharge. Fox, he says, is authority for the proposition that there also exists some more limited duty prior to discharge to seek to make practical arrangements for such aftercare as is required to enable the patient to be conditionally discharged in accordance with the conditions of discharge. I do not think it is right to split up the duty in this way. Nothing in either s117 or Fox suggests that there is a distinction of this kind. In my judgment the s117 duty is not divisible in this way; it is one duty. This is a matter of some importance when one comes to consider the particular authority to which s117 is directed.

37. In my judgment Fox supports the following propositions which I accept to be the law:

(i) An authority's duty to provide aftercare services includes a duty to set up the arrangements that will be required on discharge. It is not a duty that arises for the first time at the moment of discharge.

(ii) An authority with a duty to provide aftercare arrangements acts unlawfully by failing to seek to make arrangements for the fulfilment of conditions imposed by a Mental Health Review Tribunal under s73(1).

(iii) If such an authority is unable to make the necessary arrangements it must try to obtain them from another authority.

(iv) If arrangements still cannot be made an impasse should not be allowed to continue, the case must be referred back to a Mental Health Review Tribunal through the Secretary of State.

38. By which authority is the s117 duty owed? Are Torfaen and Gwent the relevant authorities in the present case?

39. Section 117(3) defines the Health Authority and the Social Services Authority as those for the area in which the Applicant is resident or to which he is sent on discharge by the hospital. The definition must, of course, be read in the context of the Act as a whole and in particular s117(1) and (2). What Parliament in my judgment had in mind was a workable and effective system to provide aftercare in the community for patients released from hospital.

40. The word "or" in subs(3) clearly envisages an alternative so that there is always some authority that will be responsible when a patient is discharged; if not that of his residence that of the place to which he is sent. One or the other authority is responsible but not both; otherwise there would be a recipe for disaster with the prospect of endless disagreements and failures to make arrangements. Section 117 does not provide for multi-social services department or health authority responsibility. The words "or to whom he is sent on discharge by the Tribunal" are included simply to cater for the situation where a patient does not have a current place of residence. The subsection does not mean that a placing authority where the patient resides suddenly ceases to be "the local social services authority" if on discharge the Applicant is sent to a different authority.

41. It has not been suggested in the present case that the Applicant is not resident in Torfaen. That is where he was resident prior to admission to hospital and a person does not cease to be resident in the area of an authority by reason only of his admission to hospital. See eg Fox v Stirk [1970] 2 QB 463. A patient such as the Applicant has a residence notwithstanding he is compulsorily detained in hospital. It is this that fixes Torfaen with responsibility notwithstanding he may never return to their area.

42. The contrary argument, advanced by Mr Harris on behalf of Torfaen runs thus. He agrees that "or" expressly provides for the subsection to bite on one of 2 alternatives, "is resident" and "is sent", and also that the aftercare duty is directed to a single authority and not to a multiplicity of authorities. If, however, on discharge a patient is sent to an area different to that in which he is resident then the authority for that area is the appropriate authority on discharge. "Is resident" and "is sent" both refer to the present tense and are both looking at the situation after the patient has left hospital which is when, says Mr Harris, the duty arises. A person who has left hospital will actually be resident somewhere. It is this physical residence which triggers the duty under the Act. The conditions imposed in the present case mean that on the Applicant's discharge Torfaen cannot be the relevant social services authority for the provision of aftercare because the Applicant will not be living in Torfaen.

43. In support of his contention Mr Harris points out that the draughtsman has specifically not chosen the expression "ordinarily resident" which would have been the appropriate concept were the Applicant's construction to be correct. Suppose, says Mr Harris, on leaving hospital with no residential condition a patient chooses to live in Manchester. A Manchester authority would be the appropriate authority for aftercare. This would be consistent with the purpose of the section which is to provide appropriate aftercare locally by local bodies best suited to local circumstances, and not to fix financial liability on any specific authority. The duty accrues where actual

residence is. This is not only fairer but more practicable from a provider's point of view than fixing responsibility according to previous or ordinary residence.

44. Mr Harris argues that the Applicant's construction produces impracticable results. Suppose a patient who is resident in South Wales chooses on release to live in the north of England. He would remain the responsibility of the South Wales authority until either his need for aftercare was complete or his ordinary residence changed. Furthermore there is no power to require the north of England authority to undertake arrangements on its behalf. However, it seems to me there is no real difficulty in one authority being the purchaser and another the provider of the necessary services. Indeed Local Authority Circular LAC (93)7 provides for precisely such an eventuality.

45. As to the words "is sent on discharge", Mr Harris points out that these are again ordinary words that should be given their ordinary meaning. The expression recognises that on discharge some patients may not be free to choose their residence. A patient may be sent somewhere by reason of a condition. So, he says, if a patient is sent to Manchester, but in breach of condition goes to live in Leeds that residence in breach of condition will not fix Leeds with the duty under the Act.

46. The aim of s117 in the submission of Mr Harris is to avoid residences which are in breach of condition founding a statutory duty which frustrates the condition of the discharge. The section says responsibility lies where the patient is sent not where he is to be sent. The section only applies to patients who have already left hospital and are therefore already resident somewhere or have already been sent somewhere.

47. The main difficulty, it seems to me, with Torfaen's submission as to the construction of the section is that there is no duty on anyone prior to the Applicant's release. It seems to me that the whole purpose of s117 is that there should be a working together to ensure that when a patient is released he is given the kind of support that gives him the best prospect of settling in the community. Furthermore, Fox establishes there is some obligation on a local authority prior to discharge.

48. Torfaen's position at the hearing was that if there exists, in the circumstances of this case a Fox duty to make practical arrangements they accept that such a duty, in the absence of any other authority, lies with them. But they say that such a duty, if it exists, is a limited one and that in any event on the evidence they have discharged it. The reasons they accept the duty are:

(i) That prior to his release the Applicant was resident in Torfaen.

(ii) The Mental Health Review Tribunal chose not to identify any other local authority.

(iii) As a matter of fact Torfaen chose to seek to make practical arrangements on the Applicant's behalf.

49. Their duty, it is contended was to do no more than to make practical arrangements for achieving the conditions of discharge which, in this case, contemplate ultimate responsibility for aftercare being borne by another authority. That, argues Mr Harris, is where Fox leads on the facts of the present case. All that was required of Torfaen was the location of an appropriate place for the Applicant to reside in or to be sent to.

50. Gwent's position is that for the purposes of the present hearing it accepts it has responsibility for the Applicant but reserves it position on the true construction of s117 and the correctness of the decision in Fox for argument elsewhere. It contends it has complied with its obligations as explained in Fox in that:

(i) It has sought to make arrangements for fulfilment of the conditions imposed by the second Tribunal.

(ii) In so far as it has not been able to provide such arrangements itself it has approached other authorities.

(iii) It is prepared to refer the matter back to the Tribunal.

51. Gwent does not accept any duty beyond that described in Fox and to that extent adopts the position of Torfaen. Mr Engelman points out that there is no duty on Gwent to provide accommodation nor is there any general joint liability under s117(2) other than a duty to co-operate in relation to the aftercare plan, which was in fact done. The health authority, having no housing or financial obligations can only really help once the place where the Applicant is going to live has been identified. This was never established after the second Tribunal's decision. Gwent has cooperated by looking at the Applicant's needs, assisting in preparing an aftercare plan and risk assessment and agreeing to provide psychiatric supervision.

52. Gwent's case is that its duty extends no further than to provide aftercare services and that the scope of the duty depends on the facts of the individual case. It has no legal duty beyond "provision" of such services. In this case it was required to arrange or facilitate medical supervision, an aftercare plan and a risk assessment, all of which have been done.

53. I cannot accept that the duty of either Torfaen or Gwent is as limited as they submitted in argument. The duty applies to "persons who are detained ... and then cease to be detained ..." It is widely expressed to cover aftercare services and the duty continues until

the relevant authority is satisfied that the person concerned is no longer in need of such services. In my judgment such a duty cannot be met adequately without proper preparation. This will require careful investigation and research by the bodies charged with the duty so that they can present to the Tribunal that will consider discharge an up to date care plan with a proposal or options as to how it can be implemented. In this case the Tribunal should have been presented by Torfaen and Gwent with a clear proposal or options as to where (a) it was proposed the Applicant should live and (b) the psychiatric supervision available. In the absence of such material it is easy to see how an impasse can be reached with the Tribunal imposing conditions that cannot be met and Torfaen and Gwent each looking to the other to provide the key to unlock the problem. Furthermore, absence of planned arrangements before a Tribunal hearing are likely to lead to unacceptably long deferrals under s73(7). I accept Mr Gordon's submission that the duty on Torfaen and Gwent extends to making a full multi-disciplinary assessment prior to the Tribunal hearing. Only in that way can suitable aftercare arrangements be implemented in the event of the patient being discharged. There are several documents that support my view that this is the correct approach. These include the revised Code of Practice prepared in accordance with s118 of the Mental Health Act 1983. This code did not come into force until 1 April 1999. However it does not conflict with the principles on which the previous code was based. Rather, it expands clarifies and updates its guidance. Paragraph 27 is the provision dealing with aftercare. Paragraph 27.1 mentions that while the Act defines aftercare requirements in very broad terms it is clear that the central purpose of all treatment and care is to equip patients to cope with life outside hospital and function there successfully without danger to themselves or other people. The planning of this needs to start when the patient is admitted to hospital.

54. Paragraph 27.7 provides, following the decision in Fox:

> "The Courts have ruled that in order to fulfil their obligations under s117 health authorities and local authority social services authorities must take reasonable steps to identify appropriate aftercare facilities for a patient before his or her actual discharge from hospital. In view of this, some discussion of aftercare needs including social services and other relevant professionals and agencies should take place before a patient has a Mental Health Review Tribunal or manager's hearing, so that suitable aftercare arrangements can be implemented in the event of his or her being discharged (see para 22.12)".

55. Paragraph 27.4 specifically refers to the relationship between the care programme approach (CPA), s117 aftercare and local authority arrangements for care management, and notes that this is more fully explained in "Building Bridges - A Guide to Arrangements for Inter Agency Working for the Care and Protection of Severely Mentally Ill People" (Department of Health 1995). Paragraph 1.4.9. of Building Bridges provides that to fulfil the duty under s117 authorities will need to ensure that the CPA principles are applied so far as they are relevant to the aftercare of detained patients. The essential elements of the CPA (see para 3.1.1 of Building Bridges and para 27.2 of the revised Code) are:

> "(i) Systematic arrangements for assessing a patient's health and social care needs;
> (ii) formulation of an agreed care plan;
> (iii) allocation of a key worker;
> (iv) regular review of a patient's progress".

56. A similar picture emerges from LAC 93(7) paras 22 and 23, which emphasises that the CPA operationalises good professional practice. These provisions are, in my judgment not only good sense but accurately reflect the duty on health authorities and local authority social services authorities and the manner in which it may be discharged. Compliance requires close co-operation in the present case between Torfaen and Gwent before the Applicant's future is considered by the Mental Health Review Tribunal.

57. Some suggestion was made that the CPA does not apply to Wales (see para 2 of McMillan's Affidavit of 17 February 1999 and para 4 of Mr Engelman's skeleton argument). I reject this. The CPA and the Welsh Guidance make essentially the same provision, see paras 1.2 and 27.2 of the new Code of Practice and paras 10, 11 and 14 of Welsh Health Circular WHC 95(40).

58. It is I think helpful to look with a little care at how the second Tribunal approached its decision on 30 April 1998. It recognised that its conditions were more stringent than those imposed by its predecessor but concluded they were necessary in order to minimise the risk of recurrence of mental illness and to protect the community. They made no reference to the difficulty there had been in implementing the previous Tribunal's conditions or that the previous Tribunal had been prepared to change its mind about the need for a forensic psychiatrist because of the difficulty of finding one prepared to help. An immediate consequence of the re-imposition of a forensically trained psychiatrist was that Dr Stephen Hunter could not be the supervising psychiatrist and it was going to be virtually impossible to place the Applicant in South Wales. Even elsewhere the field of potential supervisors would be significantly narrowed.

59. I have already criticised the vagueness of the condition that the Applicant should live a

considerable distance away from the index offence. It was however clarified and the clarification suggests that the Tribunal may, all along, have had in mind that the Applicant would probably not be living in South Wales. Whilst there was on the face of it a good reason for the residence condition, namely threats from the victim's family and consequent precipitation of a return of mental illness, there is no indication the Tribunal considered the difficulty the new condition would create in implementing discharge within a reasonable time. The Tribunal simply said:

> "For reasons which do not affect our decision the first Tribunal's conditions were not put into action".

60. But the reasons did in my view affect their decision at least to the extent that if less onerous conditions could not be implemented the reasons might throw light on the prospect of implementing more onerous conditions. The likelihood of being unable to implement the conditions they imposed on 30 April 1998 was something the Tribunal should have had in mind for it bore on the continuing detention of a person no longer suffering from a condition justifying detention in hospital.

61. It also seems to me to be questionable whether a forensically qualified rather than any other psychiatrist would be better able to recognise the first signs of return of mental illness. However, I do not think anything turns on this.

62. What all this adds up to is that the Tribunal did not discharge its obligation to consider all relevant factors in the light of the policy and objectives of the Act. In particular it made no proper enquiry whether the conditions it imposed could be implemented when it knew or ought to have known that its conditions would be extremely difficult, if not impossible, to meet. The most important matter was that if the conditions were not implemented the Applicant was going to have to remain in hospital when he was not mentally ill. Was this acceptable? I think not.

The Failures of Torfaen

63. Torfaen's position, as expressed by Mr Harris in his Affidavit of 4 November 1998, was that in the light of the Tribunal's condition that the Applicant should be resettled outside the Gwent area and preferably outside South Wales altogether Torfaen could not be the local social services authority responsible for him. In the course of argument Torfaen accepted a limited duty to seek to make practical arrangements pursuant to Fox, but with the funding of such arrangements falling upon the authority to which he was sent on discharge. In my judgment they did not fully appreciate the extent of their obligation as to which LAC 93(7) and in particular the summary and para 7 provides assistance. Had Torfaen properly understood its duty under s117 it should have accepted responsibility and advanced with the assistance of Gwent a concrete aftercare plan for the consideration of the Tribunal. Mr Gordon suggests, for example, that Torfaen might have funded long term private accommodation in Monmouthshire. Torfaen never took on the burden of agreeing to fund accommodation. This, as Mr Gordon pointed out, inevitably doomed any approach to a local social services authority in a different area to failure as is demonstrated by the efforts to house the Applicant in Monmouthshire.

64. Mr Harris submits that Torfaen did make efforts to comply with their duty, albeit in my judgment they saw their duty as much more limited than in truth it was. First, he says, the residence condition imposed by the Tribunal on 30 April 1998 was vague, and so it was. Secondly, even before clarification was received the Applicant was threatening judicial review and demanding appropriate accommodation and other arrangements within the next 7-10 days. But at that stage Torfaen were unable to make any practical arrangements for his discharge. Mr Harris says they were doing their level best but it seems to me that most of the running was being made by Mr Miles from the Ashworth Hospital. Nor do I think it is realistic to look at events simply post 30 April 1998. The real error was that no constructive plan had been advanced to the Tribunal by Torfaen and Gwent prior to the hearing. Given that a year or more after the first Tribunal there was still no clear idea where the Applicant would go and given the vague condition as to locality imposed by the second Tribunal there was most unlikely to be a speedy, if any, implementation of the discharge. The re-imposition of the condition of supervision by a forensic psychiatrist added to the difficulties. What should have happened was the presentation to the Tribunal of an up to date aftercare plan, possibly with options, that reflected means of surmounting the difficulties that had arisen since the first Tribunal, eg proximity of the victim's family and finding suitable psychiatric supervision.

65. Torfaen should have appreciated that the Applicant was resident in Torfaen before his admission to hospital and that as their resident he was prima facie their responsibility. Even if there was uncertainty as to responsibility, which in my view there should not have been, Torfaen were the "authority of the moment" and should have retained responsibility unless and until another authority had specifically accepted responsibility (see LAC (93)7, opening summary).

The Failures of Gwent

66. They too were in my judgment under an obligation to carry out with Torfaen a multi-disciplinary assessment of the Applicant under s117 of the Mental Health Act 1983 and prepare an up to

date care plan so that proposed practical arrangements could be put before the Tribunal. Mr Engelman relies on the preparation of 2 care plans, but at the time of the second Tribunal there was no up to date care plan identifying agreed aftercare arrangements to be put in place by the respective s117 authorities.

67. The first care plan is dated 21 November 1997. It proposed that the Applicant should reside in a group home in Abergavenny run by Monmouthshire Social Services. This, however, came to nothing because of Monmouthshire's reservations about the Applicant's suitability for the group home and the risk presented by the victims' relatives.

68. The second care plan was dated 10 February 1998. It spoke of private rented accommodation in Monmouthshire, the accommodation to be agreed by the Applicant's respective supervisors, but again this came to nought by the date of the second Tribunal Hearing (see Mr Miles' report for the Tribunal dated 17 April 1988). While Torfaen could provide accommodation quite quickly in the northern areas of Torfaen this was not acceptable to Gwent. Page 3 of Mr Miles' report sets out the unhappy impasse achieved by the 2 authorities who should have been co-operating to offer the Tribunal a solution.

69. There was therefore no plan on which the Tribunal could act, nowhere for the Applicant to go and live and no psychiatric or social worker to keep an eye on him.

70. Gwent did precious little after the second Tribunal hearing either. They appear to have thought they were powerless, or not required, to do anything until accommodation was found. They should in my view have tried to arrange a multi-disciplinary assessment with Torfaen or, if they disclaimed responsibility, have endeavoured to identify an alternative social services authority. In the last resort they should have taken steps to ensure the Applicant's case was referred back to the Tribunal as was suggested in Fox.

The Position of the Tribunal

71. Mr Singh's contentions are:

(i). The Tribunal had clear statutory power to defer a conditional discharge and attach such conditions to the discharge as it thought fit. As it had to exercise its own judgment, it was not bound to attach the same conditions as the previous Tribunal. The conditions it did attach were founded on a rational basis. A decision that was reasonable at the time it was made does not become unreasonable because of what happened later. The question the Tribunal had to decide was what conditions did it think were appropriate, without which the Applicant should not be discharged into the community. The fact that it turned out that the conditions could not be implemented in practice does not affect their validity as conditions. Furthermore, the Tribunal cannot be criticised for the failure of someone else to perform its statutory duty.

(ii). The Tribunal was not bound to exercise its statutory functions in a way that is informed by the principles of the European Convention on Human Rights (ECHR) as was submitted by the Applicant.

(iii). In any event the Tribunal's decision does not conflict with any principle in Johnson v UK (1997) 27 EHRR 296.

72. Mr Singh pointed out that although the Human Rights Act 1998 has now been enacted, its main provisions have yet to be brought into force. It had not even been enacted at the time of the Tribunal's decision. He cited Lord Oliver in JH Rayne Ltd v Department of Trade [1990] 2 AC 418 at 500C-D:

> "Treaties, as is sometimes expressed, are not self executing. Quite simply a treaty is not part of English law unless and until it has been incorporated into the law by legislation. So far as individuals are concerned, it is res inter alios acta from which they cannot derive rights and by which they cannot be deprived of rights or subjected to obligations; and it is outside the purview of the court not only because it is made in the course of foreign relations, which are a prerogative of the Crown, but also because, as a source of rights and obligations, it is irrelevant".

73. Accordingly, he submitted, the Tribunal was not under any legal obligation to exercise its powers in a way which is compatible with the ECHR, see eg Lord Ackner in R v Secretary of State for the Home Department ex p Brind [1991] 1 AC 696 at 761G.

74. What is the relevance of Art 5 of the ECHR in the present case? Simon Brown LJ said in R v Ministry of Defence ex p Smith [1996] QB 517 at 537H:

> "When the most fundamental human rights are threatened, the Court will not, for example, be inclined to overlook some perhaps minor flaw in the decision making process, or adopt a particularly benevolent view of the Minister's evidence or exercise discretion to withhold relief".

75. He continued:

> "As indeed Lord Ackner put it in ex p Brind [1991] 1 AC 696 at 757: 'In a field which concerns a fundamental human right ... close scrutiny must be given to the reasons provided for interference with that right'. But that did not stop him concluding at p763: 'unless and until Parliament incorporates the convention into domestic law ... there appears to me at present no basis upon which the proportionality doctrine

applied by the European Court can be followed by the Courts of this country'."

76. In my judgment the present state of the law was helpfully summarised by Sedley J in R v Secretary of State for the Home Department ex p McQuillan [1995] 4 All ER 400 at 422H:

> "Once it is accepted that the standards articulated in the Convention are standards which both march with those of the common law and inform the jurisprudence of the European Union it becomes unreal and potentially unjust to continue to develop English law without reference to them. Accordingly, and without in any way departing from the ratio decidendi in Brind, the legal standards by which the decisions of public bodies are supervised can and should differentiate between those rights which are recognised as fundamental and those which, though known to the law do not enjoy such a pre-eminent status. Once this point is reached, the standard of justification of infringement of rights and freedom by executive decision must vary in proportion to the significance of the right which is in issue".

77. Mr Singh's third submission is that the Tribunal's decision does not conflict with any principle in Johnson v UK, decided by the European Court of Human Rights on 24 October 1997. In that case it was held that Johnson's continued confinement could not be justified on the basis of Art 5 of the Convention. It was a breach of Art 5 where a conditional discharge had been ordered and the condition imposed thereunder could not be fulfilled. Likewise, says Mr Gordon, if a condition cannot be fulfilled within a reasonable time. However, the fact that he was no longer suffering from mental illness which had resulted in his confinement did not require the authorities to order his immediate and unconditional discharge; the review tribunal needed to have flexibility to assess in the light of all the relevant circumstances whether this course of action served the interests of both the Applicant and the community. But his continued detention was, in the circumstances, a violation of Art 5 albeit lawful under domestic law.

78. Mr Singh points out that Johnson was concerned with the responsibility at international level (the UK viewed as a single entity) for its entire legal and administrative system, including the acts or omissions of Parliament. The Court held he says that, taken as a whole, that framework failed to protect the Applicant's rights under Art 5. It does not follow that a Tribunal, when exercising the particular statutory function assigned to it by Parliament, can be held liable for that failure of the state as a whole. The Tribunal's duty is to apply the statute as it currently is.

79. I can see the force of this argument but the Tribunal could not in the circumstances of this case be blind to Art 5 or to the fact that the Court in Johnson had found there to be a breach where conditions imposed on a conditional discharge were not fulfilled. Alarm bells should have rung that, in exercising a discretion to impose conditions and defer release until satisfied the arrangements were in place, there was a human rights consideration to be weighed in the balance.

80. Whilst, as Mr Gordon says, the Applicant's continued detention over 2 years after his initial conditional discharge is an affront to Art 5 of the ECHR, that does not of itself entitle him to a remedy in this Court. However, when the Tribunal imposed the conditions that it did on 30 April 1998 and deferred the Applicant's discharge under s73(7) until they were met, it was exercising a discretion. In my judgment Art 5 comes into play in the sense that it should be in the mind and under the consideration of the decision maker, ie the Tribunal, when that discretion is exercised.

81. Mr Gordon and Mr Singh are at one in accepting that there is nothing inconsistent between the ECHR and the Mental Health Act 1983. Nor does Mr Singh dispute that the discretion must be exercised to promote the policy and objects of the Act. But securing the Applicant's discharge is not the only purpose of the Act. It has several potentially conflicting purposes including the protection of the patient and the safety of others. In my judgment, the Tribunal should have weighed in the scales (i) the time that had passed since the order for the first conditional discharge and that the Applicant was still detained despite the fact that he was not mentally ill, (ii) the difficulty there had been in complying with the first Tribunal's conditions, (iii) the difficulty there was likely to be in complying with even more onerous conditions, (iv) that there was no up to date plan for his aftercare and, (v) that the consequence of the combination of these factors was the Applicant had been and was likely to continue to be detained in hospital when he ought to be free. Whether one looks at it through Art 5 of the ECHR or otherwise, one of the Applicants fundamental human rights was at the very least in jeopardy, if not more. Having scrutinised carefully the Tribunal's reasons and the chairman's affidavit I am unpersuaded that this was weighed in the discretion.

82. Faced with no concluded care plan, what should the Tribunal have done? There were, it seems to me, 2 possibilities. Either it could have adjourned for a proper care plan to be drawn up or it could have attempted to resolve outstanding matters so as to make sure that any conditions it imposed could be implemented.

83. Mr Singh questions whether the Tribunal had jurisdiction to adjourn. Rule 16 of the Mental Health Review Tribunal Rules 1983 provides:

> (1) The Tribunal may at any time adjourn a hearing for the purpose of obtaining further information or for such other purpose as it may think appropriate.
>
> (2) Before adjourning any hearing the Tribunal may give such direction as it thinks fit for ensuring the prompt consideration of the application at an adjourned hearing.
>
> (3) Where the Applicant or the patient (where he is not the Applicant) or the reasonable authority requests that a hearing adjourned in accordance with the rule be resumed, the hearing shall be resumed provided that the Tribunal is satisfied that resumption would be in the interests of the patient.

84. Paragraph (4) covers the giving of notices and is irrelevant for present purposes.

85. Rule 16 cannot be used to adjourn the proceedings so as to monitor the patient's progress in the hope that a projected course of treatment will eventually permit the Tribunal to discharge the patient. (see Jones, The Mental Health Act Manual, 5th ed, p477 and cases there cited). Nevertheless para (1) appears to give a wide discretion provided it is exercised in accordance with the objectives of ss72 and 73.

86. Mr Singh's argument is that there are just 2 stages envisaged by s73. The first is consideration of the statutory criteria for discharge and the second is deferral for the arrangements to be made. An Applicant would probably wish the Tribunal to make up its mind on whether the statutory criteria for discharge are met (including the issue of conditions) because if they are the Tribunal has a duty to discharge. An adjournment would add a new and impermissible stage between these 2. He points to the use of the present tense in s72(1)(b)(i) and the expression "then" suffering from etc and contends that the decision must be taken at the time of the hearing when the matters are before the Tribunal. He also points to s73(4)(b) which mentions that the conditions must be imposed "at the time of discharge". Furthermore, the reasoning of Lord Bridge in Campbell emphasises the 2 stage process.

87. If Rule 16 appears to be of wider scope than is lawful under the scheme of the Act, the rule must be interpreted to accord with the scheme. To adjourn in the present case would be similar to adjourning to monitor a patient's process, because the question of what conditions to impose inevitably colours the question whether the criteria for discharge are met at all. Therefore the Tribunal would in effect be adjourning to see whether the criteria were met. Imposing conditions does not, says Mr Singh frustrate the purpose of a conditional discharge it is an essential part of it.

88. In my judgment it is an artificial approach to say that the Tribunal should when or if considering an adjournment first decide whether the statutory criteria for discharge are met. At the hearing the Tribunal has to consider the whole picture. It needs to have the appropriate information not only so that it can decide what are the right conditions to impose, but also whether they are capable of implementation in practice. It cannot properly conduct the decision making process without the necessary material. The striking omission in this case was any plan for how he might best be released into the community.

89. I agree with Mr Gordon's analysis of how the Tribunal conducts the s72 and 73 exercise. First it must reach a judgment as to whether the Applicant meets the discharge criteria (s72). Then it decides whether the discharge should be absolute or conditional, which will be determined whether the Tribunal is satisfied it is not appropriate for the Applicant to be liable to recall for treatment, ie the recall criterion is the sine qua non of the condition making power. The third stage is the exercise of discretion, whether to impose conditions at all and if so what conditions to impose (see s73(4)(b)). It is important to keep in mind, as Mr Gordon pointed out, that it is not essential to impose any conditions at all when granting a conditional discharge since the essential feature of a conditional discharge is liability to recall.

90. In my judgment the Tribunal may only order conditions that are capable of implementations. That is not to say that the situation can be viewed with hindsight where for some reason unforeseeable at the time a condition becomes impossible to implement. This view is supported by s73(7) which refers to making arrangements "necessary for that purpose" (the conditional discharge) and also by the fact that the patient is required to comply with the conditions (s73(4)(b)). This implies that he must be afforded the opportunity of compliance and the arrangements are the mechanism by which the opportunity is to be afforded to him.

91. Viewed in the circumstances of this case and its history, it seems to me that there was an obligation on the Tribunal not just to order conditions that were capable of implementation but also only to order conditions that were capable of implementation within a reasonable time. In the absence of an adequate and up-to-date care plan it was impossible for it to do so.

Conclusion

92. The difficulties in this case arose initially because Torfaen and Gwent did not properly discharge their obligations under s117 of the Mental Health Act. This was in part at least due to a misunderstanding of what these obligations were. What they should have done was to carry out a multi-disciplinary assessment and prepare, no doubt with the help of Mr Miles, a care plan for the Tribunal. They acted unlawfully in failing to do so. What the Tribunal needed to know was where arrangements could be made for the Application to live and how and by whom any psychiatric supervision might be provided.

93. Before imposing conditions under s73(4)(b) or directing arrangements to be made under s73(7) the Tribunal should have satisfied itself that the conditions were appropriate and reasonably capable of implementation within a reasonable period of time. They could not have been so satisfied in the present case and thereby acted unlawfully.

94. Rather than impose the unsatisfactory conditions that they did, the Tribunal should have adjourned under r16 of the Mental Health Review Tribunal Rules 1983 to obtain up to date information by way of a care plan from Torfaen and Gwent. This should have produced practical arrangements for resettlement in the community with appropriate supervision.

95. For the purpose of s117 of the Mental Health Act 1983 the relevant health and social services authorities are those for which the patient is resident, ie ordinarily resident at the time that he is detained, ie in this case Torfaen and Gwent.

96. Accordingly each of the 3 Respondents has acted unlawfully and the combined effect of this is that the Applicant remains in Ashworth Hospital long after, on the presently available medical evidence, he should have been discharged.

97. It seems to me that as a matter of urgency the Applicant's case should go before a fresh Tribunal, Torfaen and Gwent having in the meantime produced an up-to-date care plan with proposals and/or options for his resettlement in the community. This I think necessitates quashing the order of the Tribunal of 30 April 1998 and making appropriate declarations.

98. I will hear argument on the precise form of relief that is appropriate in the light of this judgment.

[Notes. After discussion, the remedies granted were (i) the decision of the Tribunal was quashed by way of certiorari, (ii) declarations were granted that:

(1) The 2nd and 3rd Respondent erred in law in failing to discharge, and misunderstanding, their obligations under s117 of the Mental Health Act 1983 as set out in 2 below.

(2) Under s117 of the Mental Health Act:
(a) the relevant authorities are those authorities in which the patient is resident at the time of detention.
(b) those authorities must carry out a full multi-disciplinary assessment and produce an up-to-date care plan prior to the Mental Health Review Tribunal hearing.
(c) those authorities must seek to make after-care arrangements for the fulfilment of conditions imposed by a Mental Health Review Tribunal under s73(1) of the Mental Health Act.
(d) if such an authority is unable to make the necessary arrangements it must try to obtain them from another authority.
(e) if arrangements still cannot be made an impasse should not be allowed to continue; the case must be referred back to a Mental Health Review Tribunal through the Secretary of State.

Permission to appeal to the Court of Appeal was granted.]