PART V

DISCHARGE AND REMOVAL

Chapter 17

DISCHARGE FROM HOSPITAL AND GUARDIANSHIP

A. PATIENTS SUBJECT TO PART II OF THE ACT

17.01 Introduction

This chapter will discuss methods of discharge from hospital other than by a Mental Health Review Tribunal (as to tribunals, see Chapter 18).

Section 23 provides for the discharge of patients liable to be detained or subject to guardianship under Part II of the Act. Generally speaking, a discharge order can be made by the responsible medical officer, the nearest relative or the hospital managers or, in the case of a guardianship patient, the local social services authority. There are no specific criteria governing the exercise of the power to discharge; and the power can be exercised at any time during the time the person continues to be liable to detention or guardianship. Those exercising a discharge order are expected to assess the need for continued detention; the lawfulness of the initial admission is not at issue. If there is reason to believe that the **initial admission** was unlawful (*e.g.* if the necessary application and recommendations were not completed properly and not subject to rectification—see para. **6.05** *ante*), the patient may have recourse to judicial remedies such as a writ of *habeas corpus* (see para.

17.07 below). The forms of discharge described in section 23, strictly speaking, apply only to patients subject to Part II of the Act and, by reference, to unrestricted patients under Part III—see paras. **17.02** and **17.05** below). However, it is almost certain that either the RMO or the managers could discharge a patient admitted to hospital by a police officer under section 136 or in pursuance of a magistrate's warrant under section 135(1). In any case, the authority for detention in these sections ceases after the necessary interviews and examinations have been completed (see paras. **12.02.5** *ante* and **21.16** *post*). It should also be borne in mind that every power given under the Act (except a hospital order with restrictions on discharge) is subject to a time limit. Unless the liability to detention or guardianship is properly renewed the patient ceases to be so liable or subject after the expiry of the relevant period.

17.02 Admission for Assessment or Treatment

17.02.1 *Discharge by the RMO or Hospital Managers*

A patient detained for assessment (s. 2 or 4) or for treatment (s. 3) may be discharged by the responsible medical officer (RMO) or hospital managers (s. 23(2)(*a*)). In practice, it is the RMO, and not the managers, who usually makes the decision to exercise a discharge order. The decision is normally made on a combination of clinical and behavioural factors relating to the patient's health, the safety of others, and on the availability of appropriate after-care facilities (as to after-care, see further paras. **4.07–4.08** *ante*).

It is exceedingly rare for the managers to exercise a discharge order independent of the RMO. However, it is clear that discharge by the managers is contemplated in the Act. In particular, it is implied in section 20(3) or section 20(6) that the managers should consider exercising their powers of discharge on receiving a report from the RMO for renewal of the patient's detention or guardianship. The managers should also be prepared to see patients and their relatives to discuss the possibility of discharge if the latter are still dissatisfied after discussion with the RMO; such **managers' interviews** should be arranged with a minimum of delay (see para. **6.06** *ante*). The power of the managers to discharge a patient may be exercised by three or more members of a committee or sub-committee appointed by them (s. 23(4)).

17.02.2 *Patients detained in a Mental Nursing Home*

If a patient is detained for assessment or treatment in a mental nursing home (see para. **5.02** *ante*) he may (in addition to the RMO or the managers) be discharged also by the Secretary of State for Social Services. If such a patient is maintained under a contract with a regional, district or special health authority, he can also be discharged

by that authority (s. 23(3)). (As to visiting and examination of patients for the purposes of exercising a discharge order under section 23(3) see s. 24(3), (4) discussed at para. **17.04** below).

17.02.3 *Discharge by the Nearest Relative*

The nearest relative (for definition see para. **8.02** *ante*) of a patient detained under section 2 or 3 of the Act may order the patient's discharge (s. 23(2)(*a*)). To do so the nearest relative must give at least 72 hours written notice to the hospital managers of his intention to discharge the patient (as to delivery of notice see para. **6.13** *ante*). The RMO may, within the 72 hour period, issue a report to the managers certifying that in his opinion the patient, if discharged, would be likely to act in a manner dangerous to himself or other persons. (This is a very high standard, for the RMO must believe that dangerous behaviour would be a **probability** if the patient were to be discharged). The effect of such a report furnished by the RMO is to bar the order for discharge by the nearest relative (s. 25(1)(*a*)). Once such a report has been issued the nearest relative may not order the patient's discharge for a further six months from the date of the report (s. 25(1)(*b*)); this is so even if the patient is subsequently discharged and re-admitted under a fresh application.

Where such a report is issued in the case of a patient admitted for **assessment** (s. 2), the nearest relative is entitled to ask the hospital managers to consider the patient's case with a view to discharging him (see para. **17.02.1** above); the nearest relative cannot apply to a Mental Health Review Tribunal himself but the patient may do so within the first fourteen days of admission (see para. **18.04** *post*). In the case of a patient admitted for **treatment** (s. 3) the hospital managers have a duty to ensure that the nearest relative is informed that a barring report has been issued (s. 25(2)). This is so the nearest relative can consider whether to apply to a Mental Health Review Tribunal within 28 days after receiving notice of the report (s. 66(1)(*g*), (2)(*d*)). When a nearest relative applies to a tribunal after first having sought to exercise a discharge order, the tribunal has an additional criterion upon which it must decide upon the discharge of the patient—*i.e.* it must discharge him if it finds that the patient, if released, would not be likely to act in a manner dangerous to himself or to other persons (s. 72(1)(*b*)(*iii*)). (See further para. **18.08.2** *post*).

If a nearest relative has exercised (or is likely to exercise) his power of discharge "without due regard to the welfare of the patient or the interests of the public", the county court, upon application, may appoint someone to act as nearest relative in his place (s.29(3)(d)). The displaced relative cannot then exercise the powers of the nearest relative under the Act (*e.g.* to order the patient's discharge a second time or block a subsequent application for the patient's admission for treatment). A displaced relative may, however, apply to a tribunal during

specified periods (s. 66(1)(*h*), (2)(*g*); see paras. **8.05–8.09** *ante* and **18.04** *post.*).

17.03 Guardianship Applications

A patient subject to guardianship under Part II may be discharged by his RMO, by the responsible social services authority (see definition s. 34(3), and para. **11.08** *ante*) or by the nearest relative (s. 23(2)(*b*)). The power of the social services authority to discharge the patient may be exercised by three or more members appointed by it (s. 23(4)). In contrast to patients admitted for treatment (see para. **17.02.3** above), there are no restrictions on the nearest relative's power to discharge the patient and there is no requirement to give notice. However, the county court can appoint an acting nearest relative if the nearest relative exercises, or is likely to exercise, his power of discharge without regard to the patient's welfare or the protection of the public (s. 29(3); see paras. **8.05–8.09** *ante*).

17.04 Visiting and Examination of Patients

For the purposes of advising the nearest relative as to his power of discharge, any registered doctor authorised by the relative may, at any reasonable time, visit the patient and examine him in private (s. 24(1)). Any such doctor can require the hospital authorities to produce any records relating to the detention or treatment of the patient in any hospital (s. 24(2)). This does not appear to include records kept, for example, by the local social services authority, which relates to care in the community. However, it does include records kept about the care of the patient in other hospitals in the past.

There are special powers relating to visiting and examination of patients detained in a private mental nursing home where the Secretary of State for Social Services, regional, district or special health authority are considering whether to exercise their power to discharge the patient under section 23(3) (see para. **17.02.2** above). Any registered doctor authorised by the Secretary of State or the relevant health authority and any other person (whether or not a doctor) authorised under the Registered Homes Act 1984 to inspect the home (see para. **5.07** *ante*) may, at any reasonable time, visit the patient and interview him in private (s. 24(3)). Any person authorised under section 24(3) to visit the patient may require the production of and inspect any documents relating to the detention of the patient under Part II; and any such person who is a registered doctor may examine him in private and may inspect any other records relating to the patient's treatment in the home.[1]

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[1] Section 24(3) and (4) apply also to patients under a hospital order (with or without restrictions) or a guardianship order under Part III of the Act (Sch. 1, Pt. I, para. 1, Pt. II, para. 2).

Any person who without reasonable cause refuses to allow visiting, interviewing or examination of a patient by a person authorised under section 24 or who refuses to produce any relevant document for inspection is guilty of an offence (s. 129) (see further para. **25.05** *post*).

B. PATIENTS SUBJECT TO PART III OF THE ACT

17.05 Hospital Orders without Restrictions and Guardianship Orders

Discharge of patients under section 23(2) who are subject to a hospital order without restrictions or a guardianship order (s. 37) is the same as in the case of patients detained for treatment or subject to guardianship applications (see paras. **17.02–17.03** above). Thus, a hospital order patient can be discharged at any time by the RMO or the hospital managers; and a guardianship order patient can be discharged by the RMO or the local social services authority. The only difference is that, in the case of a patient subject to a hospital or guardianship order under Part III, the nearest relative **cannot** order the patient's discharge (s. 40(4), Sch. 1, Pt. II, paras. 2, 9; see further paras. **15.10** and **15.22.4** *ante*).

17.06 Restriction Orders and Restriction Directions

The purpose of the restriction order is to ensure that special precautions are taken in discharging the patient. Thus the nearest relative **cannot** discharge a restricted patient, and the RMO and hospital managers may do so only with the consent of the Home Secretary (ss. 41(3), 40(4), Sch. 1, Pt. II, paras. 2, 7). There are three ways by which a restricted patient may be discharged (see further paras. **15.15–15.20** *ante*):

(*a*) by the Home Secretary (s. 42(2));

(*b*) by the RMO or hospital managers, with the consent of the Home Secretary;

(*c*) in the case of patients subject to a restriction order, by a MHRT. In the case of patients subject to a restriction direction, the tribunal can discharge only with the Home Secretary's consent (ss. 73(1), (2), (3), 74(1), (2)); see paras. **18.12–18.18** *post*).

C. JUDICIAL REVIEW

17.07 Habeas Corpus and the other Prerogative Orders

The writ of *habeas corpus ad subjiciendum* commands the person to whom it is directed to produce the body of the person detained and to give the cause for his detention. It is used to examine the legality of confinement. In theory the scope of judicial review open to the courts on a writ of *habeas corpus* is extensive and may empower the court to inquire into the truth of the facts stated in the return of the writ.[1] Yet the caselaw suggests that the courts will restrict their examination to the lawfulness of the detention and not its substantive justification.

17.07.1 *Patients subject to Part II of the Act*

Compulsory admission under Part II of the Act requires an application founded upon one or two medical recommendations. The court should be prepared to review the facial validity of the admission forms to ensure that they are completed by persons qualified to complete them; that all of the necessary documents are completed accurately; and that all of the procedures, including the time limits required under the Act have been complied with. Note that an application and medical recommendations made under Part II, if incorrect, may be rectified within fourteen days of the date of admission (s. 15; see para. **6.05** *ante*). Thus, any application for a writ of *habeas corpus* on the grounds that the admission documents are incorrect or defective may need to be delayed until after the fourteen day period, if the defect is one that can be rectified under the Act. It would be unlikely, however, for the court to go behind the facial validity of the admission documents to see whether the detention was justified on the merits of the case. The court would not, for example, review the conclusions reached by those completing the forms unless the application or recommendations were made in a wholly arbitrary manner or in bad faith.

In *R. v. The Governor of Broadmoor, ex parte Clifford William Argles*[2] a writ of *habeas corpus* was sought in respect of a person compulsorily admitted for treatment under section 26 of the 1959 Act. The patient claimed that the Mental Welfare Officer did not consult his nearest relative as required by section 27(2) of that Act before completing the application. The application form stated "it is not practicable . . . to consult a Mr. Argles of Wendover, Bucks." The patient argued that the MWO could easily have contacted his nearest relative who would have objected to the application. Lord Justice Melford Stevenson said: "here is a section 26 order which on the face of it seems

[1] The Habeas Corpus Act 1816 empowers the courts to enquire into the truth of the facts stated except in limited circumstances. See also R.S.C. Ord. 54, r. 7.

[2] Judgment given June 28, 1974.

to have been regularly made in the sense that the necessary material is written out on the forms. It may be that there is a terrible hinterland which demonstrates that it should not have been done, but at the moment this detention seems to me to be effective under Section 26."

In *Re S-C (mental patient: habeas corpus)*,[1] a writ of habeas corpus was sought in respect of a patient admitted and detained under s. 3 of the Mental Health Act. The patient claimed that the approved social worker applied for her detention under s. 3 despite knowing that the patient's father, her nearest relative, objected to the application. The ASW suggested that the father was willing to delegate his role as nearest relative to the patient's mother, who did not object to the s. 3 application. However, this delegation was not made in writing. The patient argued that her detention under s. 3 was therefore inappropriate since the ASW did not adhere to the requirements of the Mental Health Act.

The court found that habeas corpus was the appropriate remedy in this case because the patient was not seeking to overturn an administrative decision as to whether her detention should be continued, but was instead seeking to show that there was an absence of jurisdiction to detain her.

Upon the court's finding that the application was not made in accordance with the requirements of s. 3 of the Mental Health Act, the community health trust released the patient.

17.07.2 *Patients subject to Part III of the Act*

The writ of *habeas corpus* would probably lie where the court making a hospital order did not have jurisdiction to do so or there was some other irregularity rendering the order unlawful—*e.g.*, if a magistrates' court made a hospital order in respect of a person convicted of a non-imprisonable offence. The writ should not be used, however, as an alternative to an appeal against conviction or sentence.

If the writ of *habeas corpus* is issued against the Home Secretary in respect of a restricted patient, the case law suggests that the scope of the writ would effectively be governed by the terms of the Act which affords the discretion; where the terms of the Act provide a discretion, the review exercisable by the courts will bear principally upon the conformity of the exercise of that discretion with the empowering statute. Under section 41 of the Mental Health Act, the Home Secretary's power to order the patient's discharge is not fettered by any criteria; nor does he have any explicit procedures to follow. It is exceedingly difficult, therefore, to demonstrate to a court that the Home Secretary has exceeded his powers or has otherwise acted unlawfully.

The reach of *habeas corpus* in relation to detention on grounds of

[1] [1996] 1 All ER 532, 2 WLR 146, C.A.

mental disorder is not easily discoverable. Early cases where the courts appeared to examine the merits of a detention cannot be regarded as reliable indicators of the courts' contemporary attitude. In *R. v. Turlington*[1] a writ was issued on behalf of a woman detained in a private madhouse after a medical practitioner "saw no reason to suspect that she was or had been disordered of the mind." However, such cases date from a time when there was no specific statutory protection for patients admitted to private madhouses (see para. **1.05** *ante*).

In modern times the only cases in which *habeas corpus* has issued to free a mental patient is on grounds of want of jurisdiction on the part of the committing authority: either where the prescribed statutory procedures were not followed or the statute misconstrued.[2] Since the passage of the 1959 Act there have been no reported cases where the courts have been willing to examine the substantive justification of a detention or have ordered the patient's discharge.

The difficulty in reviewing the Home Secretary's discretion in cases involving a hospital order with restrictions is examined by Sharpe: "Since the matter of discharge is left to the exercise of executive discretion, it will be virtually impossible for a prisoner who alleges that he no longer suffers from mental defect to secure review in the courts."[3]

Since 1974 a series of cases involving restricted patients seeking their release from hospital have been decided by the courts.[4] The scope of judicial review suggested in these proceedings is that the decision of the executive must have been effected in accordance with the law, and not in an arbitrary manner or with the intention of exercising his powers for an unlawful purpose. Thus, the court will inquire whether the executive had a reason for the exercise of his discretion which was permissible within the context of the statute.

In *R. v. Secretary of State for the Home Department, ex parte Khawaja*[5], the House of Lords indicated that the scope of judicial review may extend to examination of whether an administrative officer had **sufficient** evidence to justify his decision; the court is not limited to

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[1] (1761) 2 Burr. 1115.

[2] See *R. v. Rampton Institution Board of Control, ex parte Barker* [1957] Crim. L. Rev. 403; *R. v. Board of Control, ex parte Rutty* [1956] 2 Q.B. 109.

[3] R. J. Sharpe (1976) *Law of Habeas Corpus*, p. 157. But see, in the Canadian context, *Re Brooks' Detention* 338 W.W.R. 51 (Alta.) where M. Irain, J. refused the application but said that habeas corpus would prevent the exercise of arbitrary decisions taken by the lieutenant-governor.

[4] See *R. v. Secretary of State for the Home Department, ex parte Hinchliffe* (unreported) Q.B.D., May 24 and June 21, 1974; *R. v. Secretary of State for the Home Department, ex parte Medway* (unreported), Q.B.D., June 3, 1977; *R. v. Secretary of State for the Home Department, ex parte Powell* (unreported) Q.B.D., Dec. 21, 1978; *Kynaston v. Secretary of State for Home Affairs* (1981) 73 Cr. App. R. 281, C.A. These cases are discussed in L. Gostin (1982) Human Rights, Judicial Review and the Mentally Disordered Offender, *Crim. L. Rev.* 779, at 778–90.

[5] [1983] 2 W.L.R. 321 (application for judicial review of an immigration officer's order detaining a person in the U.K. as an illegal entrant).

inquiring merely whether there was **any** evidence. This does not suggest that the court will substitute its decision for that of the executive by weighing conflicting evidence; the Secretary of State must show only that he was acting on the basis of some sufficient evidence.

The fact that the Mental Health Review Tribunal, under the 1983 Act, now exercises a power to discharge concurrent with the Home Secretary will, if anything, render the writ of habeas corpus more ineffective. The writ of *habeas corpus* is a writ of right but will not be granted as a matter of course, and may be refused where there is another effective remedy to question the restraint, for example, an appeal against sentence or conviction, or a pending application to a tribunal.[1]

In summary, the court will uphold the Secretary of State's exercise of discretion so long as it was based upon lawful considerations, was not made in an arbitrary manner or in bad faith, and there was some sufficient evidence which reasonably could have supported the decision. Further, the court would be less likely to consider the case if there was another effective remedy available to the patient such as a Mental Health Review Tribunal.

[1] *Re Wring* [1960] 1 W.L.R. 138.