

Number 75

## Conditional Discharge

Earlier this year the House of Lords considered the issue of conditional discharge and the obligation on the responsible after care bodies to fulfil those conditions<sup>1</sup>.

Many would have expected that to signal the end of litigation on that subject following the guidance provided by the House of Lords. However, the court has recently had to consider again the use of conditional discharge, the obligations of those with the duty to fulfil the conditions proposed and whether this process constitutes a breach of Article 5 of The Human Rights Act<sup>2</sup>.

### The Facts

In a recent case<sup>3</sup> the patient was detained subject to a Restriction Order. His case was considered by an MHRT in July 2001. The Tribunal were satisfied that it was not necessary for his health or for the protection of others for him to receive medical treatment but was not satisfied that he should not remain liable to be recalled to hospital for further treatment.

The Tribunal made an order for deferred conditional discharge pursuant to Section 73(7) imposing conditions as to the receipt of psychiatric and social supervision and residence at an appropriate approved location.

The patient's after care services were the responsibility of the Local Authority for the area in which he had lived before he had been detained. The Local Authority expressed serious reservations about the suitability of the accommodation proposed for the patient, in particular, because they did not consider that the care available at the home and in the community was sufficient to address the risks that this patient created.

Accordingly, as the conditions could not be satisfied the patient remained in hospital.

The patient's case was considered again by the MHRT in March 2002. At this time the Tribunal made an Order for conditional discharge specifying a specific residence. The patient was discharged to that residence and then issued proceedings against the Local Authority in relation to his detention between July 2001 and March 2002. He contended that the Local Authority had failed in its duties under Section 117 Mental Health Act and claimed damages for false imprisonment together with damages under the Human Rights Act on the basis that the failure by the Local Authority to take such action so as to ensure his discharge within a reasonable time constituted a breach of Article 5.

### Court Decision

The Court of Appeal dismissed the patient's claim. The Court held that there was nothing in Article 5 of the European Convention on Human Rights to prevent use of the mechanism of conditional discharge in principle nor to suggest that orders for conditional discharge should be viewed with disfavour. The court reiterated (following the decision in IH) that the obligation of the responsible after care bodies under Section 117 was to use their best endeavours to fulfil any conditions. In the particular case, as the

<sup>1</sup> R (on the application of IH) v SOS for the Home Department [2004] 1 All ER 412

<sup>2</sup> The right to liberty

<sup>3</sup> W v Doncaster MBC [2004] All ER (D) 49 (May)

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patient could only appropriately and safely be discharged if the conditions could be fulfilled, and as there were genuine difficulties in doing this, it was impossible to say that the Local Authority had not used its best endeavours to implement the conditions. Accordingly there was no breach of Section 117 and the court rejected the suggestion that the Human Rights Act imposed a greater obligation on the after care authority over and above that set out in Section 117.

## Comment

Taken with the House of Lords' authority in IH, the use of conditional discharge and the duties of the responsible after care bodies should now be clear. In particular, it is clear that conditional discharge is an appropriate exercise of the power of the Tribunal (and, it can be assumed, the hospital managers). Where such an order is made, the after care authority is obliged to use its best endeavours to seek to fulfil the conditions. However, if there are difficulties in putting an appropriate after care package in place (often because of difficulties providing the appropriate supervision or accommodation), an inability to comply with the conditions will not of itself render the after care authority in breach of either the Mental Health Act or the Human Rights Act.

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