[2018] AACR 24

(Djaba v West London Mental Health Trust & Secretary of State for Justice [2017] EWCA Civ 436)

CA (Arden, McCombe and Sales LJJ) **HM/405/2016**
28 June 2017

Mental Health – Administration of Justice - Patient subject to hospital and restriction orders - Tribunal declining to discharge patient - Whether tribunal required to consider conditions of detention — Mental Health Act 1983 - Whether statutory tests require proportionality assessment

The appellant was a "restricted patient" for the purposes of the Mental Health Act 1983 (MHA). He had been detained in a super seclusion suite at a secure hospital following his convictions for unlawful wounding and assault occasioning actual bodily harm. He did not exercise his right of appeal, but a review of his detention was triggered by the secretary of state under section 71(2). The First-tier Tribunal (F-tT) found that neither a conditional discharge nor a transfer to a different hospital was appropriate, and that the significant restrictions placed upon him were necessary and proportionate to deal with his levels of violence. The appellant appealed to the Upper Tribunal (UT) on the ground that there had been no express reference to ECHR Article 5. The UT dismissed the appeal.

The issue on the instant appeal was whether the statutory tests within section 72, section 73 and section 145 of the MHA required a "proportionality assessment" to be conducted, pursuant to Article 5, taking into account the conditions of the appellant's detention.

The appellant submitted that (1) the decision in *PJ (A Patient) v Local Health Board* [2017] EWCA Civ 194 was narrowly confined to the power of the tribunal to impose conditions under a community treatment order; (2) a special interpretation should be given to sections 72(1)(b)(i) and (iia) in respect of the phrases "appropriate for him to be detained in a hospital for medical treatment" and "appropriate medical treatment is available for him", so that what was to be regarded as 'appropriate" should include the conditions of detention, with the result that the tribunal had jurisdiction to rule upon all aspects of the Convention rights of a restricted patient.

Held, dismissing the appeal, that:

1. the F-tT did not have the jurisdiction to carry out an assessment beyond that set out in sections 72 to 73 of the MHA. The decision in *PJ* is directly applicable to the issue in this case (even if not formally binding). Thus, it was right for the appeal to the UT to be dismissed.

2. the matters identified in section 72(1)(b)(i), (ii) and (iia) requiring to be considered by the tribunal pursuant to section 73(1) do not include the conditions of detention of a restricted patient or things such as the availability of visiting rights for members of a patient's family. These are aspects of the care of a restricted patient which are within the control of the hospital authorities, who will have to take account of a range of matters in organising his detention in their facility, including the resources available, the Convention rights of the patient and others and the safety of staff and visitors.

3. in the case of an application to the tribunal by a restricted patient, the tribunal's powers are strictly defined by statute. By virtue of section 72(7) of the MHA, the tribunal does not have the general power to direct that the patient be discharged which is conferred by the opening words of section 72(1) in relation to other patients, but only has a power and a duty to direct the absolute discharge of the patient if it is not satisfied of the matters mentioned in section 72(1)(b)(i), (ii) or (iia) and it is satisfied that it is not appropriate for the patient to remain liable to be recalled to hospital: see section 73(1).

The Supreme Court has confirmed that the F-tT has no power to direct any alteration to the conditions of detention including seclusion.

DECISION OF THE COURT OF APPEAL

Kerry Bretherton QC and Fiona Paterson (instructed by Abbotstone Law) for the Appellant

Vikram Sachdeva QC (instructed by Bevan Brittan) for the First Respondent

The Second Respondent did not appear and was not represented

Judgment

Lord Justice Mccombe:

1. This is an appeal by Mr Jasmin Djaba from a decision of 19 July 2016 of the Upper Tribunal (Administrative Appeals Chamber) (Upper Tribunal Judge Jacobs) ("UT"), refusing to set aside a decision of 23 November 2015 of the First-tier Tribunal ("F-tT") (Health, Education and Social Care Chamber) (Tribunal Judge Rickman, Dr M. Al-Yassiri and Mrs. R Sekhawat) that the appellant should not be discharged from liability to be detained for medical treatment. The appellant appeals with permission given by Moore-Bick LJ by order of 10 November 2016 on the basis that this second appeal raises a point of principle and that it had sufficient prospect of success to warrant the grant of permission.

2. By my direction this case appeared in the court's lists with the appellant's name anonymised. However, at the hearing, we revoked that direction for the future, since we were informed by Ms Bretherton QC (for the appellant) that Mr Djaba, with the full concurrence of his litigation friend, wished his case to have normal publicity. Accordingly, the appellant's full name appears in this judgment and will so appear in court documents, absent any further order to the contrary.

3. As appears in paragraph 3 of the Grounds of Appeal, the appeal is concerned with the narrow issue whether the statutory tests within sections 72, 73 and 145 of the Mental Health Act 1983 ("MHA") require a "proportionality assessment" to be conducted, pursuant to Articles 5 and/or 8 of the European Convention of Human Rights and Fundamental Freedoms ("ECHR") and the Human Rights Act 1998 (HRA), taking into account the conditions of the appellant's detention. Some limited summary of the background facts and procedural history of the case are necessary as follows.

4. The appellant was born in 1980 to a family of West African origin. It is said in the written decision of the F-tT (paragraph 1.1) that he was born in the United Kingdom but moved to Ghana with his mother at the age of 8. He returned to the UK when aged 21. He became unwell while living in Ghana and, it appears, he was admitted to psychiatric hospitals on more than one occasion while living there. He was first admitted to hospital in this country in 2002 and there followed a number of other admissions arising from his non-compliance with medication regimes. His current admission began in 2007. In 2008 he was transferred to medium security conditions because of his aggressive behaviour and he was detained in various hospitals until his transfer to Broadmoor Hospital in 2009.

5. On 26 July 2012, in the Crown Court at Reading, he was found to be unfit to plead to an indictment charging him with three offences, involving unlawful wounding and assault occasioning actual bodily harm, contrary to sections 20 and 47 (respectively) of the Offences against the Person Act 1861. Two of the offences were said to have occurred in July 2009. The first happened when he lost his temper when his mobile telephone ran out of credit and

he repeatedly punched the victim, causing him severe bruising to the face and head, bleeding and whiplash. The second incident related to an occasion when he attacked members of the care team attempting to administer medication. The third offence alleged was in January 2011 when he attacked his victim while under escort from a shower room at the hospital; he punched the victim six times, causing injuries, including a fractured eye socket. He was found to have committed the acts underlying the offences charged and the court imposed a hospital order and a restriction order under sections 37 and 41 of the MHA. He is, therefore, a "restricted patient" for the purposes of the MHA. He had no history of violence prior to his detention and all the recorded violence has been in hospital surroundings.

6. The appellant has been kept in secluded conditions since admission to Broadmoor and, since 2014, he has been accommodated in what is called "a super seclusion suite" built entirely for the purposes of his confinement. This suite consists of a small room divided into two parts, with a secure partition between the two sections. Save for reviews to assess his health, no one is permitted to enter the room without the partition being in place. Treating staff have to enter the room wearing personal protective equipment (including shields, helmets and visors), as the appellant is highly resistant to receiving his depot medication, which has to be administered forcibly. Limited interventions are made to enable visits by the appellant to communal areas of the hospital, but always with the use of mechanical restraints and accompaniment by several staff members. Until the intervention of his present solicitors, the appellant had not had face-to-face contact with his mother, other members of his family or with friends for a number of years.

7. The F-tT decision records further incidents of varying seriousness and other occasions when the appellant himself has suffered injury, including a shoulder dislocation twice. At the hearing of the appeal, we were also taken to parts of the fuller medical evidence that was before the F-tT dealing with the numerous incidents of extreme behaviour by the appellant that have led to the decisions as to his treatment and management in the secluded conditions described above. It is not for us on this appeal to review that material or the decisions of the clinicians that have been made on the basis of it. The appeal is concerned solely with the issue of principle which I have already outlined.

8. The appellant did not exercise his right of appeal to the F-tT (under section 70 of the MHA) in the first three years of detention, although it is accepted that he would have been reminded of his right to do so in accordance with normal statutory procedures. As a result, the Secretary of State, pursuant to his duty under section 71(2) of the MHA, referred the case to the F-tT, thus triggering a review of the detention.

9. The relevant sections of the MHA were sections 73 (power to discharge restricted patients) (applying by reference criteria set out in section 72) and 145 (interpretation) which provide as follows:

> "**72 Powers of tribunals**
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> (1) Where application is made to the appropriate tribunal by or in respect of a patient who is liable to be detained under this Act or is a community patient, the tribunal may in any case direct that the patient be discharged, and –
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> (b) the tribunal shall direct the discharge of a patient liable to be detained otherwise than under section 2 above if it is not satisfied –

(i) that he is then suffering from mental disorder or from mental 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 necessary for the health of safety of the patient or for the protection of other persons that he should receive such treatment; or

(iia) that appropriate medical treatment is available for him; ...

73 Power to discharge restricted patients

(1) Where an application to the appropriate tribunal is made by a restricted patient who is subject to a restriction order, or where the case of such a patient is referred to the appropriate tribunal, the tribunal shall direct the absolute discharge of the patient if –

(a) the tribunal is not satisfied as to the matters mentioned in paragraph (b) (i), (ii) or (iia) of section 72(1) above; and

(b) the tribunal is satisfied that it is not appropriate for the patient to remain liable to be recalled to hospital for further treatment.

(2) Where in the case of any such patient as is mentioned in subsection (1) above –

(a) paragraph (a) of that subsection applies; but

(b) paragraph (b) of that subsection does not apply,

the tribunal shall direct the conditional discharge of the patient.

145 Interpretation

(1) In this Act, unless the context otherwise requires –

…

'medical treatment' includes nursing, psychological intervention and specialist mental health habilitation, rehabilitation and care (but see also subsection (4) below);

…

(4) Any reference in this Act to medical treatment, in relation to mental disorder, shall be construed as a reference to medical treatment the purpose of which is to alleviate, or prevent a worsening or, the disorder or one or more of its symptoms or manifestations."

10. The hearing before the F-tT was opened at the hospital on 14 November 2015 when directions were given; the case was heard substantively (again at the hospital) on 20 and 21 November 2015. The appellant was represented (as now) by Ms Bretherton QC and his solicitor, Ms Luscombe. He was then seeking either a conditional discharge or an extra-statutory recommendation by the F-tT for his transfer to a different hospital.

11. The F-tT decision records that the appellant attended the hearing wearing mechanical restraints throughout. It is stated that he interrupted proceedings frequently and

was warned that he might be excluded. However, it appears from the record that he gave oral evidence.

12. The decision was announced at the end of the hearing and the reasons were given in the written decision of 23 November 2015. The formal grounds of the decision were:

> "1. The tribunal is satisfied that the patient is suffering from mental disorder of a nature and degree which makes it appropriate for the patient to be liable to be detained in a hospital for medical treatment.
>
> 2. The tribunal is satisfied that it is necessary for the health and safety of the patient and for the protection of other persons that the patient should receive such treatment.
>
> 3. The tribunal is satisfied that appropriate medical treatment is available for the patient."

13. It was found that the appellant was suffering from paranoid schizophrenia; a finding that had not been challenged by his legal team, although the appellant himself did not accept that diagnosis. The F-tT found that he was delusional, thought disordered, with paranoid beliefs, irritable, prone to aggressive behaviour and totally lacking in insight. It was found that medication made the appellant calmer and less preoccupied with his beliefs and that there had been subtle improvements in his mental state as a result. It was not accepted by the F-tT that he was only violent because of his restrictive setting; on the contrary, it was found that the violence was driven by his beliefs and that he constituted a danger to others. It was also found that appropriate treatment was available.

14. Neither conditional discharge, nor the extra-statutory recommendation sought on the appellant's behalf, were considered appropriate. The significant restrictions on the appellant were acknowledged, but it was found expressly that these were necessary and proportionate to deal with the appellant's violence. However, there was no express reference to Article 5 of the ECHR, although it had been submitted to the F-tT by Ms Bretherton that the F-tT was required to have regard to that Article.

15. We have seen Miss Bretherton's skeleton argument for that stage of the proceedings, dated 5 November 2015. It appears from that document that Ms Bretherton's argument engaged with issues both relating to the statutory criteria under the MHA (standing alone) and to the ECHR. While the latter took up a smaller element of the written document, Ms Bretherton told us that the argument was much expanded in submissions after the oral evidence had been given.

16. Permission to appeal to the UT was sought and was granted by the F-tT, in the person of Tribunal Judge Fryall, on 7 January 2016, in particular in reliance upon the decision of Charles J in *PJ v A Local Health Board & ors.* [2015] COPLR 756; [2015] UKUT 480 (AAC) ("*PJ*") to which (together with this court's judgment on appeal in that case) I return below.

17. In the UT, Ms Bretherton argued that the F-tT had failed entirely to deal with her Article 5 arguments. It was submitted that the Article was clearly engaged and the F-tT was obliged by it to apply the "least restrictive option" approach to the appellant's detention. Accordingly, the F-tT should have expressly considered the length and the severity of the detention. Any improvement by treatment, it was submitted, was so minimal as to be

unworthy of regard. It should have found accordingly that treatment no longer had the necessary purpose set out in section 145(4) of the MHA, i.e. treatment in the Act

> "…shall be construed as a reference to medical treatment the purpose of which is to alleviate, or prevent a worsening of, the disorder or one or more of its symptoms or manifestations."

Ms Bretherton argued that treatment no longer had this purpose and that detention was not proportionate in a way that was compliant with Article 5.

18. It was also argued for the appellant that similar issues arose under Article 8 concerning the limited contact that the appellant had been allowed with his mother.

19. So far as protection was concerned, it was submitted, there were no adequate grounds for finding that detention was needed for the protection of others outside the hospital setting.

20. For the respondent it was argued that the F-tT's review had satisfied the Article 5 requirements by its application of the statutory criteria. The treatment given was working and the F-tT had rejected the argument (as it was entitled to do on the evidence) that the violence by the appellant was simply referable to his treatment and/or to his detention.

21. The UT judge reviewed Articles 5 and 8 and some of the case law on the subject. He noted the decision of Charles J in *PJ*, that Article 5 governed the MHA provisions dealing with Community Treatment Orders ("CTOs") (i.e. MHA sections 17A and following) and he referred to his own previous decisions (differing from Charles J) that ECHR issues did not arise in the limited mental health jurisdiction of the F-tT. Ms Bretherton had submitted to the judge that it was important for a decision to be made as to whether the approach of Charles J was to be applied to decisions made under sections 72 and 73 of the MHA.

22. The judge referred to section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 which provides that if the UT finds that the F-tT has made an error of law it "may (but need not) set aside the decision". To cut shortly to the point, without (I hope) doing disservice to the judge's fuller reasons, he decided that the ground covered by the statutory analysis conducted by the F-tT under the MHA covered the same ground as required on any application of the ECHR principles. He said at paragraph 32 of the decision:

> "…the outcome of this case would be the same whether I dealt with it under Ms Bretherton's human rights analysis or under the normal interpretation of the Mental Health Act 1983".

23. At paragraph 29 of the decision he stated that he had put to Ms Bretherton that her argument could have been put just as well without reference to Article 5 or the human rights case law and that she had accepted that it could have been. The judge then reviewed the case under the headings of "Disorder", "Treatment" and "Protection" and held that the tribunal had been correct in its application of the evidence to the statutory criteria and thus the result

> "…would have been the same had I applied the human rights approach presented by Ms Bretherton. Essentially, the argument failed because it was founded on an approach to the tribunal's findings of fact that was not supported by the evidence".

24. Ms Bretherton does not accept that she made any concession before the judge of the kind mentioned above and she referred us in that regard to her written application to the UT

for permission to appeal to this court, in which she made that point. All I need to say, I think, is that it appears that Ms Bretherton and the judge appear to have been at cross-purposes about this aspect of the argument which had been presented.

25. As I hope is already apparent, Ms Bretherton's primary argument on this appeal is that the tribunals below have failed to have proper regard to, and to apply, the provisions of Articles 5 and/or 8 of the ECHR. She invites us to allow the appeal and to remit the case to a differently constituted F-tT to rehear the case and, in the process, for the new tribunal to review the lawfulness of the appellant's detention, in the context of the conditions of that detention, under the relevant provisions of the ECHR.

26. Mr Sachdeva QC for the first respondent invites us to dismiss the appeal, to hold that the tribunals below were correct in their approach and to find that the appellant's other remedies (if any) under the ECHR have to be pursued in the civil courts. He submitted that the F-tT was correct not to engage in the wider issues under the ECHR, as it had no jurisdiction to do so, and the UT had been correct in dismissing the appeal on the grounds that it did.

27. Before dealing, so far as is necessary, with the refinements of the arguments presented to us, I find it convenient to deal with the important decision in *Secretary of State for Justice and Welsh Ministers v MM and PJ* [2017] EWCA Civ 194, on appeal from the Upper Tribunal (Administrative Appeal Chamber) (Charles J) (reference given above). I shall continue to refer to the case in this court as *"PJ"* since it seems to me that it is the case of the respondent PJ that is more material to our present problem than that of MM; the case of MM was joined with that of PJ to deal with wider issues affecting both patients.

28. PJ was a middle-aged man who was the subject of a CTO under section 17A of the MHA. He had been discharged to a specialist care home and he was required to reside there and to abide by rules requiring him to be subject to 15 minute observations. His community access was required to be predominantly escorted. His capacity to consent to the conditions was not in issue. He sought discharge of the CTO on the basis that the conditions of the order's implementation amounted to an unlawful deprivation of his liberty in breach of Article 5 of the ECHR.

29. The Mental Health Review Tribunal for Wales ("MHRTW") decided that PJ was not deprived of his liberty and that the CTO was a framework to enable monitoring and review of the risks posed to the public and that had to take precedence over issues of human rights under the ECHR.

30. On appeal to the UT, Charles J decided that, whether or not the arrangements under the CTO constituted a lawful deprivation of liberty or a deprivation of liberty that could not be authorised, PJ was not free to leave the care home. The tribunal could not ignore possible breaches of the ECHR or permit an unlawful state of affairs to continue. When construing the test set by section 72(1)(c) of the MHA (relating to the discharge of community patients), and in exercising any discretion to adjourn proceedings under section 72(1), the tribunal had to take into account whether the implementation of the conditions of a CTO would or might create a breach of Article 5 or any other Convention right and, where such a breach was established it had to exercise its powers to bring it to an end. Only where problems relating to the ECHR could not be resolved (e.g. by altering conditions) would a patient have to be discharged.

31. In reaching his conclusion as to the role of the tribunal with regard to rights under the ECHR, Charles J cited extensively from the speech of Baroness Hale of Richmond in *R (on the application of H) v Secretary of State for Health* [2005] UKHL 60; [2006] 1 AC 441; [2005] 3 WLR 867 ("*H*")

32. The *H* case concerned a challenge to the compatibility of the regime for challenge to a patient's detention under the MHA. The patient's mother had given notice of her intention to discharge her under section 23 of the MHA. Thereupon, an approved social worker applied to the County Court under section 29 for an order that the functions of the "nearest relative" be transferred from the mother to that social worker. As a result, the period of lawfulness of the patient's detention was extended, by operation of the statute, until the application was disposed of, giving rise to potential delay in resolving any issue as to the lawfulness of the detention. At the mother's request, the Secretary of State referred the case to a tribunal under section 67. The tribunal heard the reference and refused to order discharge. The patient sought (by judicial review) a declaration that the scheme under the MHA was incompatible with the right to take proceedings for the speedy decision of the lawfulness of detention under Article 5(4) of the ECHR. Silber J dismissed the claim; this court allowed an appeal, making a declaration that sections 2 and 29(4) were incompatible with Article 5(4). The House of Lords allowed the Secretary of State's appeal and reversed this court's decision.

33. Having said (at [29]) that a time might come when a patient's right under Article 5(4) will be violated unless some means of taking proceedings are available, Baroness Hale said this at [30] to [32]:

> "30. The preferable means is what happened in this case: that the Secretary of State uses her power under section 67(1) to refer the case to a tribunal. This is preferable because mental health review tribunals are much better suited to determining the merits of a patient's detention and doing so in a way which is convenient to the patient, readily accessible, and comparatively speedy. As already seen, a reference is treated as if the patient had made an application, so that the patient has the same rights within it as she would if she herself had initiated the proceedings. It can, of course, be objected that this solution depends upon the Secretary of State being willing to exercise her discretion to refer. But the Secretary of State is under a duty to act compatibly with the patient's Convention rights and would be well advised to make such a reference as soon as the position is drawn to her attention. In this case this happened at the request of the patient's own lawyers. Should the Secretary of State decline to exercise this power, judicial review would be swiftly available to oblige her to do so. It would also be possible for the hospital managers or the local social services authority to notify the Secretary of State whenever an application is made under section 29 so that she can consider the position. These applications are not common: they no longer feature in the annual published *Judicial Statistics*, but when they did feature they tended just to make double figures every year. So the burden on the authorities, the Secretary of State and the tribunals would not be high.
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> 31. Judicial review and/or habeas corpus would, of course, also be available to challenge the lawfulness of the patient's detention. Any person with sufficient standing could invoke them. Before the HRA, the ECHR held that these were not a sufficiently rigorous review of the merits, as opposed to the formal legality, of the patient's detention to comply with Article 5(4): see *X v United Kingdom* (1981) 4 EHRR 188. It may well be that, as the Administrative Court must now itself act compatibly with the patient's rights, it would be obliged to conduct a sufficient

review of the merits to satisfy itself that the requirements of Article 5(1)(e) were indeed made out. But it is not well equipped to do so. First, it is not used to hearing oral evidence and cross examination. It will therefore take some persuading that this is necessary: cf *R (Wilkinson) v Broadmoor Special Hospital Authority* [2002] 1 WLR 419 and *R (N) v M* [2003] 1 WLR 562. Second, it is not readily accessible to the patient, who is the one person whose participation in the proceedings must be assured. It sits in London, whereas tribunals sit in the hospital. How would the patient's transport to London be arranged? Third, it is not itself an expert tribunal and will therefore need more argument and evidence than a mental health review tribunal will need to decide exactly the same case. All of this takes time, thus increasing the risk that the determination will not be as speedy as Article 5(4) requires.

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

34. It was the passages from Baroness Hale's speech upon which Charles J primarily relied in reaching his decision in *PJ*. After citing that passage. He said at [57] – [58] this:

"[57] So, as mentioned earlier, the First-tier Tribunal and thus the MHRT provide a tribunal in which patients are entitled to speedily challenge the lawfulness of their detention and obtain an order for release if it is not lawful. For example as to this in *AMA v Greater Manchester West Mental Health NHS Foundation trust and Others* [2015] UKUT 36 (AAC) I said in the different context of an application to withdrawal of an application:

'The role of the F-tT

38. The F-tT is a tribunal that has the function of reviewing detentions under the MHA. It therefore plays an important role in fulfilling the substantive and procedural requirements of Article 5(4) ECHR, and the underlying purposes of the MHA and the procedural fairness required by the common law. As appears from *YA*:

(i) The main purpose of Article 5 is to provide that no one should be deprived of their liberty in an arbitrary manner.

(ii) The reviewing body, and so the F-tT, must consider whether the reasons that initially justified detention continue and review the substantive and procedural conditions that are essential for the deprivation of liberty to be lawful.

(iii) Article 5(4) applies to those reviews and is directed to ensuring that there is a fair procedure for reviewing the lawfulness of a detention.

(iv) To my mind the most important principles to take into account in the decision making process of the F-tT are: (a) the underlying purpose and importance of the review and so the need to fairly and thoroughly assess the reasons for the detention, (b) the vulnerability of the person who is its subject and what is at stake for that person (ie a

continuation of a detention for an indentified purpose), (c) the need for flexibility and appropriate speed, (d) whether, without representation (but with all other available assistance and the prospect of further reviews), the patient will practically and effectively be able to conduct their case, and if not whether nonetheless (e) the tribunal is likely to be properly and sufficiently informed of the competing factors relating to the case before it and so able to carry out an effective review. (As to this the tribunal should when deciding the case review this prediction).

(v) The presumption of capacity and the requirement for it to be assessed by reference to the relevant decision, issue or activity must be remembered but care needs to be taken not to embark on unnecessary assessments and to maintain flexibility to achieve the underlying purpose, namely a practical and effective review of a deprivation of liberty in an appropriate timescale.'

[58] In my view, it would therefore be surprising if those tribunals either (a) could not as a matter of jurisdiction take into account a breach of European Convention rights, or (b) in the exercise of their discretion should leave to other courts, and so effectively ignore, a breach of European Convention rights."

35. At [96]- [98], the learned judge, referring to the language of the MHA, said:

"… [T]hat language and the following, namely:

(i) the role and function of the MHRT (and so the First-tier Tribunal) (see paragraphs [56]-[58] hereof), and so the points made by Baroness Hale on their role and the problems relating to and thus the adequacy of an available challenge in other courts,

(ii) sections 3, 6 and 7 of the HRA (the relevant terms and effects of which are set out a paragraphs [59]-[65] hereof),

(iii) the positive obligations under Art 5 (see paragraph [55] hereof),

(iv) the point that Parliament is most unlikely to have intended that any of the tests set by the MHA should or could be construed and applied in a way that created an unlawful result, and

(v) the point that Parliament is also most unlikely to have intended that a tribunal set up to determining challenges to and to review decisions made under the MHA could or should not address any such unlawful result and if it found one had been created do nothing about it. [sic] found the conclusion that the MHRT (and so the First-tier Tribunal) in applying their statutory jurisdiction can and should take into account whether the decision that is the subject of the proceedings before them creates an unlawful result.

[97] It follows that in my view a First-tier Tribunal (and so the MHRT) cannot ignore and so effectively sanction a continuation of, or a possible continuation of, a deprivation of liberty in breach of Article 5 created by the implementation of the conditions of a CTO and so an unlawful, or possibly unlawful, state of affairs.

[98] If these conclusions are wrong issues of incompatibility would arise."

36. Having played no part in the proceedings before Charles J, the Secretary of State and the Welsh Ministers (who had been the second and third respondents to the proceedings throughout) decided to appeal to this court. The grounds of appeal were that (i) the judge had erred in law in determining that the UT had jurisdiction to revise conditions under a CTO and/or to adjourn proceedings for such conditions to be revised and/or to take into account Article 5 when exercising its powers of discharge under section 72 of the MHA; and (ii) he had also erred in law in holding that the tribunal had erred in its approach to the deprivation of liberty question. It is only the first ground which is material to the present case.

37. This court allowed the appeal. In the judgment of the court (Munby P, Gloster LJ and Ryder LJ (The Senior President of Tribunals)) the following salient paragraphs appear:

> "54. The CTO scheme is provided for in a statutory framework that is a procedure prescribed by law. The criteria for the imposition of conditions that may deprive a patient of his liberty are specified in sections 17A (4) to (5) and 17B (2) MHA. They are limited to the purposes of the legislation, for example, for medical treatment. They are time limited by section 17C and they are subject to regular rights of review by sections 20A and 66 which are equivalent to the rights enjoyed by a patient detained in hospital so that there is no incoherence or lack of equivalence in the safeguards provided by the scheme. The conditions in a CTO have to be in writing: see, for example sections 17A (1) and 17B (4). The responsible clinician has the power of recall (sections 17E (1) and (2)) and the powers of suspension and variation (sections 17B (4) and (5)). Accordingly, in our judgment, the framework provides both practical and effective protection of a patient's Convention rights.
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> The powers of the tribunal:
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> 55. The tribunal has a distinct and separate power: that of discharge if the statutory criteria for detention are not met. The statutory framework does not provide for the intervention of a tribunal to regulate the conditions made by the responsible clinician. In particular, there is no power in the CTO scheme for a tribunal to consider the terms of a CTO or to change those terms. The power vested in the tribunal is to discharge the patient if the circumstances described in section 72 MHA permit or to leave the CTO in place subject to the conditions made by the responsible clinician. The power exercisable by the tribunal is to discharge the patient from detention not to 'discharge the CTO'. There is no power to revise the conditions or examine the legality of the CTO including the proportionality of the interference with the patient's Article 5 or other ECHR rights. Likewise, the tribunal does not have power to defer discharge on an application for discharge of a community patient. There is no analogous provision to that contained in section 73(7) which confers a power on the tribunal to defer a direction for the conditional discharge of a restricted patient "until such arrangements as appear to the tribunal to be necessary for that purpose have been made to its satisfaction".
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> 56. The remedy for any illegality, including any Convention illegality, is to challenge the CTO by judicial review. The absence of a power in the tribunal does not create a Convention incompatibility if the statutory scheme has effective and practical safeguards. Furthermore, a tribunal which exercises a jurisdiction which is itself Convention compatible ie possessing effective and practical safeguards for the patient is not as a public authority acting unlawfully in not assuming what would have to be an inherent jurisdiction to scrutinise the Convention compatibility of the CTO.

> 57. It is accordingly inappropriate for the tribunal to create an extra-statutory checklist which might lead to the discharge of a patient because of an alleged Convention incompatibility, in particular an objective deprivation of liberty. There is a statutory test for discharge in section 72(1) MHA the criteria for which mirror the criteria for making a CTO under section 17A (5). The criteria are part of the safeguards provided for in the statutory scheme. There is no mandate to alter them. To do so involves the assumption of a jurisdiction that the tribunal does not possess with the unintended consequence that tribunals engaged in a straightforward specialist task would become diverted into time consuming and procedurally irrelevant exercises.
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> 58. The MHRTW analysed the CTO scheme as taking precedence over human rights issues. It would have been better to reason that the statutory framework contains all the safeguards that are required and that the safeguards can be read compatibly with human rights jurisprudence. Individual decisions of responsible clinicians that breach those safeguards can be remedied in judicial review.
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> 59. Neither the Convention nor the HRA confer jurisdiction on a tribunal. There is nothing in the general role and function of a tribunal that permits it to exercise a function that it does not have by statute."

38. I should also direct attention to [62]- [63] as follows:

> "62. The power to discharge a patient in the circumstances provided for in section 72 MHA does not extend to a power exercisable by a tribunal to scrutinise the lawfulness of the conditions imposed by the responsible clinician. That challenge must go to the High Court in judicial review where the court can take steps to remedy an unlawful condition without risking discharge of a patient in respect of whom the criteria for discharge are not made out.
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> 63. The logical conclusion of the UT's analysis is that a patient may have to be discharged under section 72 MHA if a Convention non-compliance is made out despite the criteria for discharge not being satisfied i.e. at a time when the statutory criteria for the power of recall to be exercised still exist. That could be dangerous both for the patient and the public because if the need for treatment and/or protection has been identified (and it must be for the tribunal not to exercise its mandatory power to discharge) then the need also has to be provided for: any other circumstance is contradictory and in terms of the statutory purpose, perverse. The power of discretionary discharge in section 72 is limited to the defined statutory purposes. The UT's analysis involves an exercise in interpretation of the statutory framework that is inconsistent with a fundamental feature of the legislation which is impermissible."

39. It is to be noted that in its judgment in *PJ,* this court did not refer at all to the *H* case and Baroness Hale's speech which had figured so prominently in the decision of Charles J. Ms Bretherton argues that Charles J had been correct to focus upon the passages which he cited and to rely on them in reaching his conclusion in the case.

40. Ms Bretherton argues that the ratio of the court's decision in *PJ* is narrowly confined to the issue of the power of the F-tT to impose conditions under a CTO which objectively amount to a deprivation of liberty. The statutory provisions relating to such conditions, she points out, appear in a different part of the legislation from that with which we are concerned. She says the ratio was to be found paragraph [18] of the judgment where the court said:

"18. Accordingly, as a matter of statutory construction, having regard to domestic law principles, the Act does not provide a power in the F-tT / MHRTW to impose conditions on a conditional discharge that extend to the imposition of an objective deprivation of liberty. There is no other power in the F-tT / MHRTW to impose conditions on a conditional discharge than that set out in section 73 MHA. The analysis of Convention jurisprudence in *RB* is to the same effect. We are of the view that *RB* is correct and it is binding on us. It cannot be said to be *per incuriam* but in any event that submission was not pursued and the Respondent's Notice asserting that it was *per incuriam* and/or wrongly decided was withdrawn with our leave."

41. For my part, I do not accept that that paragraph represents the ratio of the court's decision in *PJ*, appearing as it does in the section of the judgment dealing with the case of the other respondent, MM. I do accept that the decision in both respondents' cases was considering the position of both of these patients with regard to the statutory regime providing for, and regulating, CTOs. To that extent, it may be that Ms Bretherton is correct in saying that we are not strictly bound by the decision in all respects. However, it seems to me that the reasoning behind the paragraphs of the judgment in [54]- [59] and [62]- [63], which I have quoted above, is properly to be carried over directly into that part of the legislation applicable in this case.

42. If, as the court said in *PJ* at [55], the tribunal's power is a "distinct and separate" one, namely that of discharge, and does not provide for intervention to regulate the conditions under a CTO made by the responsible clinician, then the same must, I think, apply under sections 72 and 73 which also confer a power of discharge. It seems to me that, applying this court's decision, that power cannot also include power to regulate the conditions of detention. In the material part of the *PJ* judgment the court was considering directly the extent of the power under section 72.

43. It is perhaps unfortunate that the court did not address the passages from the speech of Baroness Hale in *H* and I confess that I had some difficulty in understanding why it had not done so. I can see force in Ms Bretherton's point that it might be thought that specialist tribunals, rather than courts, were better suited to assessing conditions of a patient's detention in a human rights context for the reasons expressed by Baroness Hale in her speech. It seems to me, however, that in the light of the court's decision on the jurisdiction issue in *PJ*, it did not need to do so. In *H*, the House of Lords was concerned with the issue of the need for speedy resort to a court for the purpose of determining the lawfulness of detention under Article 5(4). It was not concerned with the wider issues of conditions of detention which Ms Bretherton argues are within the F-tT's jurisdiction. No issue arose in *H* as to the conditions of detention. The only point in issue was as to the compatibility of the regime for assessing lawfulness of detention which, it was held, were met by the reference to the tribunal under section 67 and could have been met by other alternative remedies such as judicial review.

44. Ms Bretherton addressed to us a number of further submissions as to how the criteria for the discharge of a patient under sections 72 and 73 could be read so as to require the F-tT, in considering whether detention in a hospital was "appropriate", whether detention was "necessary for protection purposes and whether "appropriate" treatment was "available", could review whether discharge (absolute or conditional) was required in order to avoid breaches of a patient's Convention rights. She also presented submissions as to the extent of the court's ability to examine conditions of detention in the context of Articles 5 and 8 of the ECHR. However, having taken the view that I have of this court's decision in *PJ*, it seems to me to be unnecessary to deal with these points.

45. In my judgment, Mr Sachdeva QC is correct in his submission that the decision in *PJ* is directly applicable to the issue in this case (even if not formally binding upon us) and that we must hold that the F-tT did not have jurisdiction to conduct an assessment beyond that dictated by sections 72 and 73 of the MHA. It carried out that assessment and no issues arise on this appeal as to the findings that it made in that respect within the confines of the MHA. Any further issue of the lawfulness of the appellant's conditions of detention under the ECHR would have to be raised in proceedings in the civil courts. Thus, it was right for the appeal to the UT to be dismissed and, therefore, the appeal before us should also be dismissed.

Lord Justice Sales:

46. I agree that the appeal should be dismissed for the reasons given by McCombe LJ. In view of the rather diffuse submissions we heard from Ms Bretherton, I make some observations of my own.

47. In the case of an application to the tribunal by a restricted patient, the tribunal's powers are strictly defined by statute. By virtue of section 72(7) of the MHA, the tribunal does not have the general power to direct that the patient be discharged which is conferred by the opening words of section 72(1) in relation to other patients, but only has a power and a duty to direct the absolute discharge of the patient if it is not satisfied of the matters mentioned in section 72(1)(b)(i), (ii) or (iia) and it is satisfied that it is not appropriate for the patient to remain liable to be recalled to hospital: see section 73(1).

48. The F-tT and UT in this case were therefore correct to focus their analysis upon the matters mentioned in section 72(1)(b)(i) (whether the appellant is suffering from a mental disorder which makes it appropriate for him to be liable to be detained in hospital for medical treatment), (b)(ii) (whether it is necessary for the health or safety of the appellant or for the protection of other persons that he should receive such treatment) and (b)(iia) (whether appropriate medical treatment is available for him). The decisions of the F-tT and UT were clearly correct in relation to each of these matters. The appellant is suffering from a severe mental disorder which makes it appropriate for him to be detained in hospital for medical treatment; it is necessary for his health and safety and for the protection of others that he should receive such treatment; and appropriate medical treatment is available.

49. The matters identified in section 72(1)(b)(i), (ii) and (iia) and requiring to be considered by the tribunal pursuant to section 73(1) do not include the conditions of detention of a restricted patient or things such as the availability of visiting rights for members of a patient's family. These are aspects of the care of a restricted patient which are within the control of the hospital authorities, who will have to take account of a range of matters in organising his detention in their facility, including the resources available, the Convention rights of the patient and others and the safety of staff and visitors. The governing NHS Trust for Broadmoor Hospital is a public authority and is amenable to judicial review in the High Court in relation to any legal challenge which a restricted patient might wish to bring in relation to these matters. If a restricted patient needs access to a litigation friend in order to mount such a legal challenge, arrangements can be made to facilitate that. That is an appropriate and effective avenue for legal protection for a restricted patient who wishes to challenge what the hospital authorities have done in relation to his conditions of detention.

50. It could be argued that it would be better to confer jurisdiction on the tribunal to deal with these matters as well. But Parliament has clearly decided in enacting the MHA to limit the jurisdiction of the tribunal to dealing with claims for the absolute discharge of a restricted

patient by reference to the matters identified in section 72(1)(b)(i), (ii) and (iia). The availability of recourse to the tribunal for this purpose focuses on the requirement in Article 5(4) of the ECHR for an individual who is detained to be able to have access to a court or tribunal to seek release if his detention is not lawful. Parliament clearly intends that the tribunal is not to be diverted into dealing with a wide range of matters apart from this, which might also jeopardise the speediness with which it would be able to act when challenges to detention are made. There is nothing in the ECHR which says that *all* matters arising in relation to a person's detention must be capable of being determined by the same court or tribunal. In fact, it is well established in the field of ordinary imprisonment of convicted criminals that legal remedies in respect of some issues in relation to their detention will be determined by the Parole Board while remedies in respect of other issues in relation to their detention will be determined by the High Court in judicial review proceedings: see, e.g., *R (on the application of Hassett and Price) v Secretary of State for Justice* [2017] EWCA Civ 331.

51. In reliance upon section 3(1) of the HRA Ms Bretherton submits that a special interpretation should be given to section 72(1)(i) and (iia), in respect of the phrases "appropriate for him to be detained in a hospital for medical treatment" and "appropriate medical treatment is available for him", respectively, so that what is to be regarded as "appropriate" should also include the conditions of detention and the like, with the result that the tribunal has jurisdiction to rule upon all aspects of the Convention rights of a restricted patient under Article 5 and Article 8. I cannot accept this submission.

52. Section 3(1) of the HRA provides that, "So far as it is possible to do so, primary legislation … must be read and given effect in a way which is compatible with the Convention rights". However, interpreting section 72(1)(b)(i) and (iia) in accordance with the natural meaning of the words used, as set out above, does not produce any incompatibility with Convention rights. That is because aspects of Convention rights which are not covered by those sub-paragraphs are nonetheless capable of protection via judicial review proceedings in the High Court when they fall outside the jurisdiction of the tribunal conferred by section 73(1) of the MHA. Section 3(1) of the HRA does not create a licence for a court to distort the ordinary meaning of primary legislation which is not incompatible with Convention rights, just because the court thinks that a better way to cater for protection of such rights might be to expand the jurisdiction conferred by statute on the tribunal.

53. In the present case, therefore, the F-tT and the UT were bound by section 73(1) of the MHA, read with section 72(1)(b)(i) -(iia), to focus on the question whether an absolute discharge of the appellant should be ordered and the particular matters set out in those sub-paragraphs of section 72(1)(b), and had no jurisdiction to rule upon the wider questions which Ms Bretherton wished to canvass before them. It was not incompatible with any Convention right of the appellant for the F-tT and the UT to proceed in that way, and they had no obligation pursuant to any of sections 72 and 73 of the MHA and sections 3(1) and 6(1) of the HRA to act any differently.

54. I would add that, even if this analysis were wrong and there was a good argument that the Convention rights of the appellant indicated that the tribunal ought to be empowered to consider the conditions of his detention, I do not consider that the interpretation of sections 72 and 73 of the MHA contended for by Ms Bretherton would be a "possible" interpretation of those provisions for the purposes of section 3(1) of the HRA. In my view, the meaning and effect of sections 72 and 73 of the MHA to limit the jurisdiction of the tribunal are clear, and the alternative interpretation urged by Ms Bretherton would represent an illegitimate distortion or amendment of those provisions clearly going against the grain of the legislative

scheme in the MHA: cf *Ghaidan v Godin Mendoza* [2004] UKHL 30; [2004] 2 AC 557, at [122] per Lord Rodger of Earlsferry.

Lady Justice Arden:

55. I agree with both judgments. The point which the appellant raises has important implications for the liberty of persons in his position but I have perhaps had less hesitation than my Lord, Lord Justice McCombe, as I gave the lead judgment in *The Secretary of State for Justice v RB & Anor [2011] EWCA Civ* [2012] I WLR 2043. This Court followed this case (referred to as *RB* above) in the recent case of *PJ* and indeed this Court in *PJ* held that it was bound by *RB*. The position established by these cases is that, where the question whether the detention complies with the European Convention on Human Rights ("the Convention") is not expressly within the powers of the tribunals but can be heard in other proceedings, section 3 of the HRA does not require the powers of the tribunals to be interpreted by reference to the Convention to give them the powers to consider Convention-compliance as well. The same principle applies here too. In this case, the appellant must apply for judicial review to the Administrative Court if he considers that the conditions of his detention are disproportionate and do not comply with the Convention. That Court is able to carry out a sufficient review on the merits to meet the requirements of the Convention.

56. I agree with what my Lord, Lord Justice Sales, has said about Ms Bretherton's alternative submission about the interpretation of the word "appropriate" treatment" in section 72(1)(i) and (iia) of the MHA.