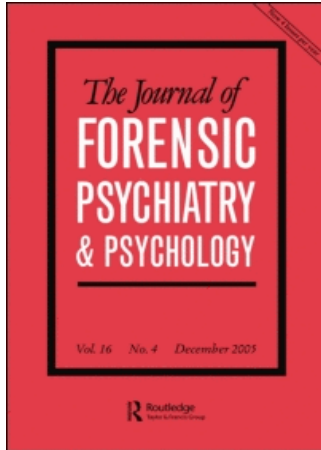


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Access Details: [subscription number 782812164]
Publisher: Routledge
Informa Ltd Registered in England and Wales Registered Number: 1072954
Registered office: Mortimer House, 37-41 Mortimer Street, London W1T 3JH, UK



Journal of Forensic Psychiatry & Psychology

Publication details, including instructions for authors and subscription information:
<http://www.informaworld.com/smpp/title~content=t714592861>

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Ikechukwu Obialo Azuonye

Online Publication Date: 01 December 2007

To cite this Article: Azuonye, Ikechukwu Obialo (2007) 'Medical evidence for the purposes of recall to hospital under Section 42(3) of the Mental Health Act 1983', *Journal of Forensic Psychiatry & Psychology*, 18:4, 443 - 451

To link to this article: DOI: 10.1080/14789940701535127

URL: <http://dx.doi.org/10.1080/14789940701535127>

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Medical evidence for the purposes of recall to hospital under Section 42(3) of the Mental Health Act 1983

IKECHUKWU OBIALO AZUONYE

Harley Street, London, UK

Abstract

In emergency situations, a telephone call to the Mental Health Unit of the Home Office would be acceptable for the recall of a conditionally discharged restricted patient to hospital, but the caller should and the recipient of the telephone call must make a contemporaneous written record of the information provided. In all other circumstances, a written report to the Home Office is an absolute requirement, without which the recall would be a breach of the patient's rights under Article 5(1) of the European Convention on Human Rights. In all circumstances, the medical evidence must be up to date and objective, demonstrate that the patient is suffering from a true mental disorder, and show that the criteria for detention are met. As required by Article 5(2) of the Convention, the patient must be informed immediately, in writing, why he or she has been recalled to hospital, by supplying copies of the written records of the telephone message or the written report to the Home Office.

Keywords: *Mentally disordered offenders, hospital order, restriction order, absolute discharge, conditional discharge*

Background

Part III of the Mental Health Act 1983 (MHA) makes provision for the treatment of patients concerned in criminal proceedings or under sentence. A restriction order under s.41 may be made following a hospital order (s.37) where the court considers, in view of specific factors, that "it is necessary for the protection of the public from serious harm so to do".

A patient admitted to, and detained in, hospital under Sections 37/41 may be granted an absolute or conditional discharge by the Secretary of State under s.42(2) or s.74(1). A patient who has been conditionally

Correspondence: Ikechukwu Obialo Azuonye, 10 Harley Street, London, W1G 9PF, UK.
E-mail: drioazuonye@aol.com

discharged by the Secretary of State may be recalled to hospital, as provided under s.42(3):

The Secretary of State may at any time during the continuance in force of a restriction order in respect of a patient who has been conditionally discharged under subsection 42(2) by warrant recall that patient to such hospital as may be specified in the warrant.

A patient may also be absolutely or conditionally discharged by a mental health review tribunal (MHRT) under s.73(1) or s.73(2) respectively. A patient conditionally discharged by the tribunal may be recalled to hospital under s.42(3) as if he or she had been conditionally discharged by the Secretary of State under s.42(2).

The European Court of Human Rights (ECtHR) decision in *Kay v United Kingdom* (1994) established that, for the purposes of recall under s.42(3) of the MHA 1983, it would be necessary for the Mental Health Unit of the Home Office to be provided with up to date, objective medical evidence showing that the patient concerned was suffering from a true mental disorder. Not covered by that decision was the required character of this medical evidence: specifically, whether a telephone call to the Home Office would suffice or whether the medical evidence must be in writing.

The author recently provided medical evidence to a MHRT on behalf of a conditionally discharged restricted patient who had been recalled to hospital on the basis of a telephone call to the Mental Health Unit of the Home Office. One of the issues at the hearing was the character of the medical evidence required for the lawful recall of the patient: specifically, whether the recall had been lawful given that there had been no emergency or any written report to the Home Office requesting recall.

There is no firm guidance available on the matter from the Mental Health Act Commission or the Home Office, and therefore this paper sets out the author's understanding of the current legal position. It represents the first time, to the best of the author's knowledge, that the relevant European and UK legislation has been brought together into a unified statement of law for the benefit of clinical forensic psychiatric practice in the matter at issue.

Legislation

Article 5 of the European Convention on Human Rights (ECHR) states that:

1. Everyone has the right of liberty and security of person. No one 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.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and the charge against him
4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

Winterwerp v the Netherlands (1979), the so-called ‘grandfather of mental disability cases’, established the application of the provisions of the ECHR to mental health cases, with particular reference to Article 5. The facts of the case were as follows: in 1968 the local mayor, following an emergency procedure, ordered Mr. Winterwerp, a resident of the Netherlands, to be admitted to a psychiatric hospital. Six weeks after this committal, Mr. Winterwerp, on his wife’s application, was detained at the same hospital under an order made by the local district court. The order to detain him in hospital was renewed thereafter from year to year (at the request of the public prosecutor and on his wife’s further applications) by the regional court on the basis of medical reports from the doctor treating him. In addition to his complaints about the decisions regarding his many requests for discharge from hospital, Mr. Winterwerp complained about the procedure followed in his compulsory admissions to hospital. His particular objection was that he ‘was never heard by the various courts or notified of the orders, that he did not receive any legal assistance and that he had no opportunity of challenging the medical reports’.

The ECtHR considered the procedure set out under the Netherlands’ Mentally Ill Persons Act (most recently revised, at that time, in 1970) *vis-à-vis* the provisions of the ECHR, and decided, unanimously, *inter alia*, that there had been no breach of Article 5(1), but that there had been breach of Article 5(4) and Article 6(1). This ruling thus established that member states’ procedures for the care of mentally ill persons must be compliant with the ECHR. Regarding the breach of Article 5(4), the ECtHR’s reasoning was as follows:

To sum up, the various decisions ordering or authorising Mr. Winterwerp’s detention issued from bodies which either did not possess the characteristics of a ‘court’ or, alternatively, failed to furnish the guarantees of judicial procedure required by Art. 5(4); neither did the applicant have access to a ‘court’ or the benefit of such guarantees when his requests for discharge were examined, save in regard to his first request which was rejected by the Regional Court in February 1969. Mr. Winterwerp was accordingly the victim of a breach of Art. 5(4). (para. 67)

In the case of *Wassink v the Netherlands* (1990), on November 15, 1985, the local mayor ordered Mr. Wassink, a Netherlands citizen, to be admitted to a psychiatric hospital under the provisions of s.35(b) of the Mentally Ill Persons Act 1884. The decision was based on a medical report that the mayor had received that day from a psychiatrist. This report indicated that Mr. Wassink was a danger to himself and others in that he had reportedly assaulted a neighbour and threatened members of his family. Four days after the compulsory admission of Mr. Wassink, the Crown Prosecutor requested an extension of the patient's detention in hospital. The next day (November 20, 1985) the District Court President interviewed Mr. Wassink and a psychiatrist in the presence of the patient's 'confidential counsellor'. The District Court President later interviewed two doctors and Mrs Wassink by telephone, making notes of what they said to him, and subsequently telephoned the confidential counsellor with a summary of the information he had obtained from the doctors and the patient's wife. On November 25, 1985, the President ordered the continuation of Mr. Wassink's detention in hospital on the basis of a medical report and the information given to him on the telephone. On January 24, 1986, after he had left hospital, Mr. Wassink filed an appeal on points of law with the Supreme Court against the order made on November 25, 1985. He complained that: (1) the President had not specified the nature of the danger which his mental illness represented for himself and others; (2) the President had held a hearing without a registrar being present to record the proceedings; and (3) before making the order, the President had failed to communicate to him the content of the statements of the persons he had telephoned, thereby depriving him of any opportunity to comment upon these statements.

The ECtHR decided that there had been a violation of Art. 5(1) insofar as there had not been a registrar present, and therefore there had been a failure to comply with a procedure prescribed by law. However, the Court did not accept that there had been a violation of Art. 5(4), arguing that notwithstanding the risks inherent in questioning by telephone, the procedure had taken place in emergency circumstances, and on the initiative and under the responsibility of an individual judicial officer. However, Judge Ryssdal dissented from this, stating as follows:

With regret I find that I am unable to agree with the majority as regards the violation of Art. 5(4). There can be no doubt whatsoever that the President of the District Court constituted a 'court' from the organisational point of view; as such he was qualified to carry out the review, required by Art. 5(4), of the decision of the Burgomaster [mayor] of Emmen. However, in the course of the proceedings conducted before him a breach of Art. 5(1) occurred. The notion of 'lawfulness' under Art. 5(1) has the same meaning as in Art. 5(4) . . . and the review provided for

in the latter provision must be sufficiently broad to cover each of the conditions which are indispensable for the lawfulness of the detention of an individual under Art. 5(1)... Accordingly, it should have been possible to appeal against the decision of the President of the District Court in order to have the violation established and redressed... notwithstanding the non-essential nature of that violation. As there is no evidence that such a possibility existed, I conclude that, in addition to the violation of Art. 5(1), there has also been a violation of Art. 5(4).

This dissent was important, as subsequent ECtHR judgments demonstrated.

In *Kay v United Kingdom* (1994) the applicant, in January 1971, was made subject to a hospital order with restrictions under ss.60 and 65 of the Mental Health Act 1959 following his manslaughter of a 12-year-old girl. Conditionally discharged in March 1985, Mr. Kay left hospital a month later. In November of that year he assaulted two young women and was sentenced to three years' imprisonment on each count. He appealed against his hospital order with restrictions while in prison. His appeal was heard in December 1986, and although the tribunal found that he was not suffering from a mental disorder he was not discharged, as the tribunal determined that he should remain liable to be recalled to hospital. A judicial review of this decision was unsuccessful and he remained in prison. A month before his due date of release, the Home Secretary issued a warrant of recall, and he was conveyed to Broadmoor Hospital in October 1989. A month after Mr. Kay had been transferred to Broadmoor Hospital, the Home Secretary received a medical report which stated that Mr. Kay was suffering from psychopathic disorder. Mr. Kay's judicial review of the Home Secretary's recall warrant failed, and he took the case to the ECtHR, citing a violation of Article 5(1) on the basis that he had been recalled without the Home Secretary having first received up-to-date medical evidence that he was still suffering from a mental disorder.

The ECtHR held that there had been a breach of Article 5(1) because:

when the Secretary of State decided to recall the applicant to Broadmoor, certain minimum conditions of lawfulness were not respected. In particular, there was no up-to-date objective medical expertise showing that the applicant suffered from a true mental disorder, or that his previous psychopathic disorder persisted. This was only confirmed a month after the applicant's recall.

Two Judges, Trechsel and Schermers, dissenting, stated that there had also been a breach of Article 5(4) 'because proceedings before the Tribunal were not conducted speedily'.

In *Nikolova v Bulgaria* (1999), the applicant was suspected of having misappropriated funds while working as a cashier/accountant at a government enterprise. According to the ECtHR's judgment:

In October 1995 she was arrested and brought before an investigator who decided, with a prosecutor's approval, to detain her on remand. In November 1995 the applicant appealed against her detention to the competent court. She advanced arguments which in her view demonstrated that there was no danger of her absconding, committing crimes or obstructing justice, and also requested to be released on medical grounds. The court examined the case *in camera*, after having received the prosecutor's comments. The court dismissed the appeal noting that the applicant was charged with a serious wilful crime and that the medical evidence was out of date. The applicant complained that following her arrest she had not been brought before 'a judge or other officer authorised by law to exercise judicial power' within the meaning of Art. 5(3) of the Convention. She further complained under Art. 5(4) of the Convention that the judicial proceedings concerning her appeal against detention were not adversarial and that the scope of the judicial review of lawfulness was limited

The Court noted that the Plovdiv Regional Court when examining the applicant's appeal against her detention had only verified whether the applicant had been charged with a 'serious wilful crime' within the meaning of the Penal Code and whether her medical condition required release, thus without having examined concrete facts concerning the soundness of the charges against the applicant and the issue whether there existed a danger of absconding. The Court found unanimously that this approach, which was based on section 152 (1) and (2) of the Code of Criminal Procedure and the Supreme Court's practice, was contrary to the requirement of Art. 5(4) of the Convention that the judicial review of detention should encompass all the conditions essential for its lawfulness, in the Convention sense.

The Court further found, unanimously, that the proceedings before the Plovdiv Regional Court did not ensure equality of arms as they were held *in camera*, because the prosecutor submitted comments which were not communicated to the applicant, and also due to the fact that the applicant was not allowed to consult the case-file.

This judgment therefore lent powerful support to the principle of 'equality of arms' – that is, that both parties to a dispute must be equally informed. In the particular case concerned the ruling was stated thus: 'Counsel representing a detained person must not be denied access to documentation

upon which the detention was based.’ The Mental Disability Advocacy Center’s commentary (n.d.) on this case was this:

Although not a mental disability case . . . this is a crucial case for arguing that the legal representative of a person detained under mental disability legislation should be allowed access to the information held by the authorities (e.g. a hospital) on the client. A person is not likely to be able to challenge his detention if he does not know on what basis he is detained, and what evidence must be challenged, and what new evidence must be introduced.

Nikolova is particularly important because it supersedes the ruling, in *Wassink v the Netherlands*, that the judge had reviewed the lawfulness of the detention to an extent consistent with the requirements of Art. 5(4) notwithstanding non-disclosure to the patient of the information on which his detention was based.

Summary

It is therefore quite clear from European jurisprudence that for a conditionally discharged restricted patient to be recalled, lawfully, to hospital under s.42(3) of the MHA, the Home Office must receive up to date, objective medical evidence showing that the person is suffering from a true mental disorder (*Kay v United Kingdom*, 1994). The medical evidence must show that the criteria for detention are met: in *R (on the application of B) v the Mental Health Review Tribunal and the Secretary of State for the Home Department* (2002), the relevant part of the decision (at para. 31) is:

Since *Kay v United Kingdom* it has been necessary for the Secretary of State, in order to justify recall, to have up to date medical evidence showing that the criteria for detention are met. That was not the case previously. See *R v Secretary of State for the Home Department ex parte K* [1991] 1QB 270.

Curtailed procedures, such as telephone calls, are acceptable only in emergency situations (*Wassink v the Netherlands*, 1990), and it is an implication of *Nikolova v Bulgaria* (1999) that the content of the telephone call must be written down since the patient and his/her legal representatives must be given objective information regarding why he/she has been recalled. Otherwise, the medical evidence to the Home Office must be in writing: this is further supported by the principle of ‘equality of arms’ in due process (*Nikolova v Bulgaria*, 1999) in order to comply with Article 5 of the

European Convention on Human Rights (Winterwerp v the Netherlands, 1979).

Clinical forensic practice issues

For clinical practice to comply with the law, there are, fortunately, only a few requirements. The decided cases suggest that where a psychiatrist wishes to request that a conditionally discharged restricted patient be recalled to hospital under s.42(3) MHA the procedure should be as follows.

When the situation is an emergency

Telephone the Mental Health Unit of the Home Office and explain the basis for the opinion that: (1) the patient is suffering from a true mental disorder at the present time; (2) the criteria for detention are met; and (3) this is an emergency so a full written report is not possible or practicable. The person receiving the call at the Home Office must make a contemporaneous written record of the content of the telephone call, so that copies of the record can be sent to the hospital, the patient, and the patient's legal representatives to show the patient why he or she had been recalled. This disclosure to the patient is mandatory under Article 5(2) of the European Convention on Human Rights.

Further, although not a legal requirement, it is clearly in the interests of the patient and the doctor making the telephone call to the Home Office that the doctor also makes a record of what he or she said, especially if the content of the conversation is to be scrutinized at a later tribunal. Indeed, given the advisability of having accurate documentation of the content of the telephone call, it may be simpler for the referring doctor who does not have the time to produce a typed report to write out long-hand a summary of the salient information to be passed to the Home Office, read it to the recipient of the telephone call, and send those handwritten notes to the Home Office immediately by fax, with the Home Office reciprocating by sending the doctor a copy of its record of the telephone conversation.

When the situation is not an emergency

Send a comprehensive written report to the Mental Health Unit of the Home Office, giving the required up to date objective medical evidence of the patient's mental state. It is important that the information that you provide is up to date and objective, and shows that the criteria for detention are met. A copy of the report that requests recall must be given to the patient and/or his/her legal representatives so that, as in the emergency situation, the patient is immediately made aware of why he/she has been recalled to hospital.

Pursuant to Section 75(1) of the MHA 1983 and Article 5(4) of the ECHR, the case of a conditionally discharged restricted patient recalled to hospital must be referred to a mental health review tribunal 'within one month of the day on which the patient returns, or is returned, to hospital'.

Conclusion

In view of the practical importance of these legal requirements, and the lack of information available on this issue, it may be timely for the Department of Health, the Home Office, and/or the Mental Health Act Commission to issue guidance on the law discussed in this paper, to ensure that recall by the Home Office is always conducted in full compliance with the law.

Acknowledgements

I am very grateful to Mr. Richard M. Jones for his assistance with this paper, in particular his initial confirmation that a written report was an absolute requirement in non-emergency cases, and his subsequent direction of my attention to the High Court's decision in *R(B) v MHRT*.

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