

2001 No. 3712

MENTAL HEALTH, ENGLAND AND WALES

The Mental Health Act 1983 (Remedial) Order 2001

Made - - - - - *18th November 2001*

Laid before Parliament *19th November 2001*

Coming into force - - *26th November 2001*

Whereas:

- (a) sections 72(1) and 73(1) of the Mental Health Act 1983(a) have been declared(b) under section 4 of the Human Rights Act 1998(c) to be incompatible with a Convention right(d);
- (b) the time for bringing an appeal has expired and no appeal has been brought within that time;
- (c) the Secretary of State considers that there are compelling reasons for proceeding by way of a remedial order(e) to make such amendments to the Mental Health Act 1983 as he considers necessary to remove the incompatibility; and
- (d) it appears to the Secretary of State that, because of the urgency of the matter, it is necessary to make the order without a draft being approved by resolution of each House of Parliament;

Now, therefore, the Secretary of State in exercise of the powers conferred upon him by section 10(2) of, and paragraph 1(1)(a) of Schedule 2 to, the Human Rights Act 1998 hereby makes the following Order:

Citation

1. This Order may be cited as the Mental Health Act 1983 (Remedial) Order 2001.

Commencement, application, extent and interpretation

- 2.—(1) This Order shall come into force on 26th November 2001.
- (2) This Order shall apply in relation to any determination made by a Mental Health Review Tribunal on or after the date on which this Order comes into force (including any determination in respect of an application or referral made to the Tribunal before that date).
- (3) This Order shall extend to England and Wales only.
- (4) In this Order “the Act” means the Mental Health Act 1983.

(a) 1983 c. 20.
(b) By the Court of Appeal in the case of *The Queen on the application of H v Mental Health Review Tribunal North & East London Region (Secretary of State for Health Intervening)* 2001 EWCA Civ 415.
(c) 1998 c. 42.
(d) See section 1(1) of the Human Rights Act 1998 for the definition of “Convention right” and section 21(1) of that Act for the definition of “Convention”.
(e) See section 21(1) of the Human Rights Act 1998 for the definition of a “remedial order”.

Amendment of section 72(1) of the Act

3. In section 72 of the Act (powers of tribunals) for subsection (1) there shall be substituted—

“(1) Where application is made to a Mental Health Review Tribunal by or in respect of a patient who is liable to be detained under this Act, the tribunal may in any case direct that the patient be discharged, and—

- (a) the tribunal shall direct the discharge of a patient liable to be detained under section 2 above if they are not satisfied—
 - (i) that he is then suffering from mental disorder or from mental disorder of a nature or degree which warrants his detention in a hospital for assessment (or for assessment followed by medical treatment) for at least a limited period; or
 - (ii) that his detention as aforesaid is justified in the interests of his own health or safety or with a view to the protection of other persons;
- (b) the tribunal shall direct the discharge of a patient liable to be detained otherwise than under section 2 above if they are not satisfied—
 - (i) that he is then suffering from mental illness, psychopathic disorder, severe mental impairment or mental impairment or from any of those forms of disorder of a nature or degree which makes it appropriate for him to be liable to be detained in a hospital for medical treatment; or
 - (ii) that it is necessary for the health or safety of the patient or for the protection of other persons that he should receive such treatment; or
 - (iii) in the case of an application by virtue of paragraph (g) of section 66(1) above, that the patient, if released, would be likely to act in a manner dangerous to other persons or to himself.”.

Amendment of section 73 of the Act

4. In section 73 of the Act (power to discharge restricted patients) for subsections (1) and (2) there shall be substituted—

“(1) Where an application to a Mental Health Review 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 such a tribunal, the tribunal shall direct the absolute discharge of the patient if—

- (a) the tribunal are not satisfied as to the matters mentioned in paragraph (b)(i) or (ii) of section 72(1) above; and
- (b) the tribunal are 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.”.

18th November 2001

Alan Milburn
One of Her Majesty's Principal Secretaries of State,
Department of Health

EXPLANATORY NOTE

(This note is not part of the Order)

This Order makes changes to sections 72(1) and 73(1) of the Mental Health Act 1983 (“the 1983 Act”) to remove the incompatibility of those provisions with a Convention right.

In the case of *The Queen on the application of H v Mental Health Review Tribunal North & East London Region (Secretary of State for Health Intervening)* (4 April 2001) the Court made a declaration under section 4 of the Human Rights Act 1998 that—

“Sections 72(1) and 73(1) of the Mental Health Act 1983 are incompatible with Articles 5(1) and 5(4) of the European Convention of Human Rights in that, for the Mental Health Review Tribunal to be obliged to order a patient’s discharge, the burden is placed upon the patient to prove that the criteria justifying his detention in hospital for treatment no longer exist; and that Articles 5(1) and 5(4) require the Tribunal to be positively satisfied that all the criteria justifying the patient’s detention in hospital for treatment continue to exist before refusing a patient’s discharge.”.

In order to remove the incompatibility, the Order amends sections 72(1) and 73(1) of the 1983 Act to provide that a Mental Health Review Tribunal shall direct the discharge of a patient if they are not satisfied that the criteria justifying his detention in hospital for treatment continue to exist. The Order also makes a consequential amendment to subsection (2) of section 73 of the 1983 Act.

The Order will come into force on 26th November 2001 pursuant to the “urgent” procedure prescribed in paragraph 4 of Schedule 2 to the Human Rights Act 1998. The Order will cease to have effect if, at the end of the period of 120 days beginning with the day on which the Order was made, a resolution has not been passed by each House of Parliament approving the Order.

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The Mental Health Act 1983 (Remedial) Order 2001

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