



**OUTER HOUSE, COURT OF SESSION**

**[2008] CSOH 123**

P1019/08

**OPINION OF LORD CARLOWAY**

in the petition of

**RM**

Petitioner;

against

**THE SCOTTISH MINISTERS**

Respondents:

-----  
\_\_\_\_\_

**Act: J J Mitchell, Q.C., D O'Carroll; Balfour + Manson LLP  
Alt: Mure, Scottish Government Legal Directorate**

27 August 2008

**Facts**

[1] The petitioner suffers from a mental disorder. He is detained in Leverndale Hospital, Glasgow, in terms of a compulsion order under the Criminal Procedure (Scotland) Act 1995

(c 46). This petition challenges the effectiveness of the provisions of section 268 of the Mental Health (Care and Treatment) (Scotland) Act 2003 (asp 13). That section is in Chapter 3 of Part 17 of the Act. It is concerned with the remedy available when it is alleged that a patient in a hospital, other than a state hospital (i.e. the State Hospital, Carstairs), is being detained in conditions of excessive security. The security level of the petitioner's unit is rated as "low". "High" and "medium" levels are appropriate respectively to patients posing a grave and immediate danger to others if at large or at least a serious, if less immediate, danger. "Low" security essentially means that the measures taken "impede rather than completely prevent absconsions (*sic*), with greater reliance on staffing arrangements and less reliance on physical security measures" (Definition of security levels etc. para 2.8.1, no 7/5 of process). It will involve the patient being kept, at times, in a locked ward.

[2] The 2003 Act established the Mental Health Tribunal (section 21). Section 164 provides that a person, who is subject to a compulsion order, may apply to the Tribunal for an order revoking the compulsion order or modifying the measures specified in it. Such measures may have included requirements that the person: be detained in a specified hospital; receive medical treatment; attend a particular place in order to do so; and reside in a certain place. The petitioner made an application to revoke his compulsion order on the basis that he did not need any medical treatment. The Tribunal (Determination, 6/6) observed that the petitioner did not consider that he required to be kept in conditions of security or, indeed, that he needed any form of supervision in the community. The Tribunal rejected these contentions and concluded that the petitioner required highly skilled nursing care (medical treatment), which could not be provided in a community setting.

[3] The petitioner now contends only that the level of security applied to him is excessive. He avers that he wishes to reside in an "open ward", thus improving the quality of his life and

advancing the prospects of his ultimate liberation. His complaint is the lack of any formal mechanism to enable him to challenge his conditions of security. In that regard he seeks a declarator that the respondents have failed in their statutory duty to lay before Parliament regulations in terms of sub-sections 268 (11) and (12) of the 2003 Act; the existence of such regulations being essential, the petitioner argues, for the practical operation of the section as a whole.

### **Background to the Legislation**

[4] Chapter 3 of Part 17 of the Act is headed "Detention in conditions of excessive security". The chapter divides its attention between patients detained in a state hospital and persons placed in other hospitals. Its provisions stem, at least in part, from the concerns expressed about persons being "entrapped" in mental health hospitals in the Report on the Review of the Mental Health (Scotland) Act 1984. This report (7/4), which was produced by the (Bruce) Millan Committee, was laid before Parliament in January 2001. It noted that a patient transferred to the State Hospital from another hospital could appeal the decision to transfer him to a Sheriff. A person sent to the State Hospital by a court could challenge that order by an appeal against sentence. The criteria for admission was that the person required special security and could not be suitably cared for in another hospital "on account of his dangerous, violent or criminal propensities" (Millan Report, paras 67 and 79). The Report continued:

"81. ...It is likely that patients admitted to the State Hospital will meet the admission criteria at the time of transfer. The Hospital faces considerable pressure on resources, and is unlikely to admit patients needlessly. However, the aim of the Hospital is to provide effective treatment, so that patients may move on to conditions of lower security in due course. The problem is that the patient, should his or her condition improve, has no legal right to move to lower security. The current rights of appeal would only be relevant in the relatively unusual situation that the patient is able successfully to argue for absolute or conditional discharge.

82. We have received evidence from the State Hospital and the Mental Welfare Commission that there are significant numbers of "entrapped patients". These are patients who no longer require the level of security afforded by the State Hospital but for whom appropriate local services are not available..."

The State Hospitals Board had commented to the Committee that there was little incentive upon local authorities to provide such services and had suggested the imposition of a statutory duty upon them to do so. The Committee thought that such a recommendation was outwith their remit but reported that:

"83. ...it would be more appropriate for us to propose another means of addressing this problem, which is more directed at the rights of individual patients. This is that patients should have a continuing right to appeal against the level of security to which they are subject..."

84. It seems to us that to detain a patient unnecessarily in conditions of high security is inconsistent with respect for the patient's rights, and our general principle of *Least restrictive alternative*. Furthermore, the proposed development of medium secure units would seem to make it more likely that such an appeal right would be practicable".

The Committee's focus was primarily on patients in the State Hospital. The Report recommended the introduction of a staged appeal process whereby, should a state hospital patient appeal successfully against the level of his security, the Tribunal could set a time limit for the local health authority to comply with directions instructing a lower level (para 90). Further measures could be considered if there were no compliance within the period set.

[5] The Report dealt very briefly with non state hospital patients as follows:

"91. Although the current concern relates to patients entrapped in the State Hospital, it is possible that the same difficulties could arise in future in respect of patients in medium secure services, who are not able to move to low security settings. We have addressed this in our recommendations..."

#### Recommendation 27.19

Patients should have a right of appeal to be transferred from the State Hospital, or a medium secure facility, to conditions of lower security".

There was no discussion about appeals from a low security setting.

[6] The issue of appeals against detention in conditions of excessive security came before the Health and Community Care Committee of the Parliament on 5 February 2003 when Stage 2 of what was then the Mental Health (Scotland) Bill was debated (Official Report, 7/1). The Bill, which had been introduced on 16 September 2002, had not contained any provisions dealing with such appeals (see Policy Memorandum, paras 187-9). Shona Robison (Scottish National Party), who was not then, of course, in government, proposed Amendments 804 (state hospital patients) and 805 (non state hospital patients). Ultimately, only Amendment 804 was moved. Ms Robison said (Col 3804) that the amendments were:

"directed largely at addressing the situation of patients who become entrapped at the state hospital. Some patients no longer meet the criteria for admission to the state hospital but cannot be transferred as a result of the inadequate provision of medium-secure and other psychiatric facilities and services in Scotland...

I accept that patients and others can apply to the tribunal to have a compulsory treatment order varied, but the relevant provisions lack a clear indication of the tribunal's powers if it is established that a patient is contained in conditions of excessive security. In addition, the importance of the issue from a human rights perspective would be better expressed in a direct right of appeal".

[7] Mary Scanlon (Conservative) supported the main amendment (804) but commented (Col 3807) that:

"...the right of appeal against conditions of excessive security will be of no benefit unless medium-secure units are in place.

The latest figures that I have received from Carstairs show that 29 people are, in effect, bed-blocking. Their discharge has been delayed because of a lack of medium-secure units. We found the same problem when we visited the Orchard Clinic, where people were held in conditions of excessive security because of a lack of provision in the community".

[8] As a result of the debate, the Deputy Minister for Health and Community Care (Mrs Mary Mulligan) announced that the Scottish Executive (as it then was) were unable to

accept the amendments as they stood because of a number of practical and legal difficulties. She explained (Col 3809-10) that:

"We also wish to consider whether an appeal right should apply only to patients at the state hospital, or more widely. The main focus of concern is on patients at the state hospital and there would be a number of difficulties in broadening that right to a wider group".

She stated that it was the Executive's intention to introduce a suitable amendment at a later stage in the progress of the Bill, once certain legal and practical issues had been "worked through". She confirmed that it was the Executive's intention:

"to put into the bill a provision that will give patients in the state hospital the right to appeal against the level of security at which they are held. If the tribunal establishes that a patient is being held in conditions of excessive security, there will be a legal obligation for a specified health board to arrange for the patient to be accommodated at an appropriate level of security.

However, I must be frank with the committee and say that, as Mary Scanlon mentioned, we are not sure that such an appeal right will be workable until local forensic services are better developed. It might be, therefore, that such a right could not be brought into effect until later than the other provisions in the bill, but we are committed to the development of those services and to the introduction of the right as soon as is feasible".

Standing the assurances given, the Amendment moved was withdrawn. The focus had remained very much on the State Hospital patients and the practical concern centred on the absence of medium security units to which such patients could be transferred. However, the prospect of a right of appeal for those in medium security non state hospitals was at least in contemplation.

[9] The Bill came before the Parliament for its Stage 3 debate on 20 March 2003 (Official Report, 7/2). The Deputy Minister introduced Amendments 681 and 685-8 which, in broad terms, were to become respectively sections 264 and 268 of the 2003 Act. She said (Col 19741-4) that:

"We have faced many difficult issues during the bill's passage, but one of the most difficult concerns patients who are detained at an excessive level of security, in particular those in the state hospital who are ready to move on but have not been found places in

local services. That issue is, rightly, of great concern.

...We have always recognised that it was wholly wrong that some patients should spend prolonged periods at the state hospital after their condition had improved to the extent that they could be safely treated in a less secure and more local environment. However, when we first considered the Millan recommendations, it seemed to us that the real problem was the lack of appropriate local services. An appeal right is of little use if there is genuinely no bed available that can meet the patient's needs.

We now accept that an appeal provision is not only an important protection for the individual patient, but should act as a spur for the development of the local forensic services, which are a key component in our strategy for mentally disturbed offenders.

We recognise that if the amendments are to achieve their objective, they have to be backed up by the Executive intensifying the pressure on boards and local authorities to agree and implement plans that will address any remaining shortcomings against the assessed need. We need to build on the progress made with the development of the Orchard Clinic here in Edinburgh and with the new facility at Stobhill in Glasgow by ensuring that the west, north and north-east of Scotland produce proposals that will secure local services for those areas.

...Amendment 681 sets out the right of patients who are detained in the state hospital to apply to the tribunal for an order declaring that the patient is held in conditions of excessive security...

...At the moment, the problem of entrapped patients particularly concerns the state hospital, but it is possible that similar problems might arise in other secure facilities in future. Amendments 685 to 688 allow for regulations to grant similar rights in future to patients detained in hospitals other than the state hospital...

...We are happy to accept amendments 740 and 741...That will provide that the new rights will be brought into force no later than May 2006".

Once more, the focus was on the entrapment of patients in the State Hospital and the need for the provision of a broader range of facilities for those no longer requiring the type of security available at Carstairs. What was being said was that there was the possibility of "similar problems" arising in other secure facilities "in future". It was because of the different levels of problem perceived that the Chapter, in its final form, distinguishes between state hospital and non state hospital patients.

## The Legislation and its aftermath

[10] In relation to state hospital patients, section 264 provides that:

"(2) On the application of any of the persons mentioned in subsection (6) below, the Tribunal may, if satisfied that the patient does not require to be detained under conditions of special security that can be provided only in a state hospital, make an order -

(a) declaring that the patient is being detained in conditions of excessive security, and

(b) specifying a period...during which the duties under subsections (3) to (5) below shall be performed".

Subsections (3) to (5) relate to the identification of a non state hospital in which the patient can be detained in "appropriate conditions". Subsection (6) includes "the patient" as one of the "persons" referred to in subsection (2). Thus, section 264 gives a patient at a state hospital a remedy if he considers that the conditions of his security are excessive.

[11] The provisions relative to patients in non state hospitals are very different. They are contained primarily in section 268, which applies "(1) ...where a qualifying patient's detention in a qualifying hospital is authorised by" a compulsion (or other similar) order. A "qualifying patient", amongst others, can apply to the Tribunal, in a manner similar to a state hospital patient, complaining of excessive security and seeking a reduction in the level of that security. The critical feature of this section, and that which differentiates it from section 264, is the requirement for both the patient and the hospital to be "qualifying". It continues:

"(11) A patient is a 'qualifying patient'...if the patient is of a description specified in regulations.

(12) A hospital is a 'qualifying hospital'...if -

(a) it is not a state hospital; and

(b) it is specified, or of a description specified, in regulations.

(13) Regulations under subsection (11) or (12) above may in particular have the effect -

(a) that "qualifying patient" means a patient;

(b) that "qualifying hospital" means -

(i) a hospital other than a state hospital; or

(ii) part of a hospital".

For the section to be operative therefore, there have to be regulations specifying who qualifies as a patient and what qualifies as a hospital.

[12] Section 333, dealing with the commencement of the Act, states:

"(2) Chapter 3 of Part 17 of this Act shall come into force on 1 May 2006 or such earlier day as the Scottish Ministers may by order appoint".

The provisions relating to both state and non state hospital patients were therefore programmed to commence by the same date. Section 333(3) provided that the remaining provisions of the Act, other than sections 325, 326, 330 and 332, were to come into force on such day as the respondents might appoint. Section 326 deals with the mode of making orders and regulations under the Act. The Mental Health (Care and Treatment) (Scotland) Act 2003 (Commencement No 4) Order 2005 (SSI No 161) provided that almost all of the provisions of the Act, other than Chapter 3 of Part 17, were to come into force on 5 October 2005. Sections permitting the making of regulations were generally brought into force on 21 March 2005. In terms of paragraph 4, section 268 was brought into force on 6 January 2006, but only for the purpose of making regulations. Thus, the power to make regulations specifying who were to be qualifying patients and what were to be the qualifying hospitals existed for some four months before the general commencement date for section 268.

[13] A guidance note issued in April 2006 by the Directorate of Health Care Policy and Strategy,

a limb of the Scottish Executive's Health Department, stated that the main provisions of the Act "came into effect" on 5 October 2005, but that those in Chapter 3 of Part 17 in relation to excessive security were required by the Act to "come into effect" by 1 May 2006. The note continues:

"2. The provisions in Part 17 will therefore come into effect on 1 May 2006. These provisions relate to appeals by patients in the State Hospital. No regulations have been made under s268 to specify qualifying patients or hospitals to which the provisions in s268 to 270 apply. In effect these sections will not come into force on 1 May 2006. Further consideration is being given to whether and if so how these provisions might be extended to other hospitals and patients".

[14] The provisions of the Act relative to state hospital patients are in force and operating. The respondents' position relative to their failure to render operative the non state hospital provisions is essentially that they are keeping matters under review having regard, amongst other things, to: the workload of the Tribunal; the building and staffing of mental health units; the extension and development of local and national forensic mental health services; evidence of entrapment in particular hospitals; clinical care issues; and the availability of other remedies under the Act (see the averments in answer to the thirteenth statement of fact). A paper from the Executive's Health Department Directorate for Service Policy and Planning dated 28 July 2006 (7/6) sets out in broad terms the work being done by the Forensic Mental Health Managed Care Network established to advise on policy and service development. A paper called "Configuration of Forensic Mental Health Services" (7/7) describes the progress made over the years 1999 to 2005 and highlights the need to create medium and low security facilities.

[15] A consultation document on forensic mental services from the Directorate of Health Care Policy and Planning, Mental Health Division, dated July 2007 (7/8) describes the progress made relative to the dispersal of state hospital patients, where the numbers have been reduced from 240 to 185. It analyses the need for places of high, medium and low security. The impact of the

establishment of non state hospital units at the Orchard Clinic and (only since 2007) the Rowanbank Clinic (Stobhill) was assessed along with that of a proposed unit for the North of Scotland. Views on the appropriateness of the existing and projected facilities were sought by September 2007. A letter from Shona Robison, then and now the Minister for Public Health, dated 25 June 2007 (6/1), to the petitioner's law agents does make it clear that the respondents' view then was that:

"There is currently no evidence to show that patients in medium secure or low secure units are entrapped. Moreover these patients do have other rights of appeal to the Tribunal in the event they are unhappy with their care and treatment. Nevertheless we will continue to monitor the position and will review this decision in spring 2008".

There was little information produced by the respondents on what has occurred since then, but it seems reasonable to conclude that there remains at least an apparent lack of enthusiasm for bringing the provisions of section 268 into effective operation.

## **Submissions**

### **(a) PETITIONER**

[16] The petitioner maintained that the respondents were under a duty to draft and lay before Parliament, in advance of 1 May 2006, regulations which would make section 268 operative. The guidance note had correctly identified Parliament's intention that the provisions of Chapter 3 of Part 17 were to "come into effect" on 1 May; meaning that they were to "come into force" on that day. In failing to ensure that this had occurred, the respondents had misused their powers. They did not have a discretion to exercise. Parliament's intention had been that those detained in conditions of excessive security would be able, by 1 May at the latest, to challenge these conditions before the Tribunal. In order to give effect to that intention, the respondents were bound to draft and present relevant regulations in advance of that date.

[17] Where a section of an Act is intended to create a right of appeal against a decision of a

public authority and regulations are needed to make that right operable, it followed that Parliament must have intended that the party, on whom the duty lay, would make the regulations. Otherwise the section could be seen as a trick on the citizen conferring a right of appeal which was practically inoperable (*Singh v Secretary of State for the Home Department* 1993 SC (HL) 1, Lord Jauncey of Tullichettle at 10; *R v Secretary of State for the Home Office, ex parte Fire Brigades Union* [1995] 2 AC 513, Lord Browne-Wilkinson at 549-550, Lord Nicholls of Birkenhead at 574-575, rejecting the argument of the Lord Advocate (Lord Rodger of Earlsferry QC at 541)). Where Parliament enacts a provision, which does not give an option to ministers to select a date for its commencement, it intends that provision to come into force, in the sense of it being in effect or in operation, on the date specified. The key to the interpretation of section 268 was the distinction Parliament had made between the terms of sub-sections 333 (2) and (3). It was legitimate to look at the terms of the debates in order to ascertain Parliamentary intention. In 2003, Parliament had, after lengthy debate, imposed, by specific amendment, a date upon which Chapter 3 of Part 17 was to come into force. That date did not apply only to the state hospital provisions.

[18] The date selected by Parliament at the time was some three years into the future. Now, two years after that date had passed, there was no indication from the respondents about what was to be done. There was nothing in the material produced by the respondents to suggest that anything was being done to bring the appeal provisions into operation. In these circumstances the Court should declare the failure of the respondents to draft and lay regulations before Parliament to be unlawful and should make an order requiring them to do so within twenty eight days. In that regard, the regulations would not be complex and, in any event, the respondents had had ample warning of the petitioner's position in correspondence since June 2007.

[19] There was no separate argument beyond the above concerning the reasonableness of the

respondents' actings or explanations, nor was there any submission upon construing the legislation having regard to article 5 of the European Convention on Human Rights and Fundamental Freedoms (cf the averments in the thirteenth statement of fact).

(b) RESPONDENTS

[20] The respondents contended that there was no duty on them to make regulations under section 268 at any particular time or with any particular content. The practical problem which had arisen was that the provisions presumed the existence of a network of hospital units having varying levels of security. There was no such network. It had to be developed. The respondents were monitoring and establishing the relevant estate. They had not refused to make regulations.

[21] A distinction existed between a situation where a person had a right vested in him by legislation and regulations were required to make that right effective (*Singh v Secretary of State for the Home Department (supra)*, Lord Jauncey at 10; *Greater London Council v Secretary of State for the Environment* 1984 JPL 424, Hodgson J at 426-7, *sub nom. R v Secretary of State for the Environment ex parte Greater London Council* (1983) Times LR 713; *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997, Lord Morris of Borth-y-Gest (dissenting) at 1039) and a situation where no such right existed, such as in the petitioner's case. Section 268 did not confer a right on any person. *R v Secretary of State for the Home Office, ex parte Fire Brigades Union (supra)* was concerned with whether there was a duty to bring legislation, in the form of a specific statutory scheme, into force at some point in the future (Lord Browne-Wilkinson at 551). That was not the position here, where there was a discretion conferred upon the respondents regarding the content of any regulations. There had been, in that case, a "duty to consider" when to bring the scheme into force (Lord Nicholls at 575). The respondents here had continued to carry out such consideration on when to introduce any regulations and what their content should be.

[22] Parliament had been aware of the provisions of section 268 when it enacted sub-section 333 (2). It was not forcing the respondents to make regulations in advance of the commencement date of 1 May. No such regulations could have been made until section 268 was in force to some extent. Section 268 contained no obligatory language about the making of regulations and the identification of both patients and hospitals was left to the respondents to determine. Parliament had been aware of the requirement to build the relevant mental health units and it was unlikely therefore that it had intended that the respondents should make regulations before any particular date. As had been commented upon in the debates, there was no point in having a right of appeal if there were no facilities to give a successful appeal some practical effect.

[23] If there were a duty on the respondents to make regulations then the case ought to be put out By-Order to determine a number of practical issues including timing.

## **Decision**

[24] As a generality, if Parliament wishes to impose a duty on a person to do something, it can do so expressly. In particular, if it wishes to compel a Minister to make regulations, and to do so within a particular period, it has the power to make that clear in any legislation it passes (*R v Secretary of State for the Home Office, ex parte Fire Brigades Union (supra)*, Lord Browne-Wilkinson at 550). However, if legislation vests a person or class of persons with a right and that right can only be exercised if regulations governing that exercise are in force, it will be assumed (i.e. without express provision) that Parliament intended that the person, who is delegated with the relative power, make regulations so as to activate the right in practice (*Singh v Secretary of State for the Home Department (supra)* Lord Jauncey at 10). That is not the position here.

Section 268 does not confer any rights upon any person or class of persons. What it does do is permit the identification of such persons or class of person by regulation. The regulations are

those which might be made by the respondents (sub-section 329(1)) and approved by Parliament (sub-section 326(4)). It is only once such regulations are made and given legal effect that any right can arise. Parliament did require that section 268 came into force on 1 May, at the latest. It was brought into force earlier by the respondents' order only for the purpose of making regulations. But the fact that the section had partial and then total legal effect on the dates specified did not carry with it an obligation to make regulations under it either in advance or thereafter.

[25] If Chapter 3 of Part 17 is looked at as a whole and in conjunction with the commencement provision in section 333(2), the contrast between what Parliament intended as between state hospital and non state hospital patients is reasonably clear. The intention was for the state hospital patients' provisions to have effect in a practical sense once the Chapter came into force. No further legislative action was required. On the other hand, for non state hospital patients, further action was needed in the form of regulations which would define the extent of applicability of the appeal provisions for such patients. It was envisaged that there might be a blanket application to all patients at all non state hospitals (s 268(13)) or that only certain patients in certain hospitals might be afforded appeal rights. Parliament laid down no criteria in that regard and, most importantly, it laid down no time scale for the making of any regulations. Section 268, when contrasted with section 264, carries with it an implication that any regulations would be made as and when the respondents thought it appropriate to do so, having regard to such relevant considerations as may have occurred to them over time. Looking at the legislation on its own, therefore, there appears to be no legal obligation imposed upon the respondents other than to consider whether regulations are required and, if so, when.

[26] It was not disputed that it was legitimate to look at all of the background material in order to determine the intention of Parliament in enacting Chapter 3. When this is done, it is equally clear

that, whereas the intention was to introduce appeals for state hospital patients immediately upon the specified commencement date, it was only to permit the respondents a discretion on whether and when to introduce the similar provisions for non state hospital patients. That clarity arises from the focus apparent upon entrapped patients in the State Hospital identified in the Millan Report right through to the Stage 3 debate when the Deputy Minister stated that the amendments would permit "regulations to grant similar rights in future to patients detained in hospitals other than the state hospital". The background material demonstrates that Parliament was aware that there were immediate difficulties with patients at the State Hospital and it decided to force the pace on that matter by imposing a deadline by which time, or thereby, local health authorities would have to have gone some way towards providing mental health facilities for those whom the Tribunal did not consider should be detained in the State Hospital. It also shows that, in relation to non state hospital patients, Parliament was satisfied only that a problem might arise in that area in the future. There is no material indicating that what was perceived in the latter sector was a problem so acute that Parliament required to take the slightly unusual step of setting a deadline in primary legislation. Rather, it was apparent that practical considerations remained at the forefront of Parliamentary thinking. Whereas medium secure units were being developed at the Orchard and Rowanbank Clinics, which were designed to accommodate some of those no longer requiring state hospital detention, lesser forensic mental health services at a community level remained, and probably remain, in relative infancy. Against that background, it would have been surprising if Parliament had sought to impose a deadline for the making of regulations or indeed had decided to set a template for the qualifying criteria which the regulations would specify. But, of course, should Parliament wish to do so now, it has that power to impose both deadline and template. That power does not rest with the courts.

[27] In all these circumstances, the conclusion is that there is no duty of the type contended for by

the petitioner and no unlawfulness in the actings of the respondents. The respondents' second plea-in-law will be sustained, the petitioner's plea-in-law repelled and the prayer of the petition, which is contained in the third statement of fact, will be refused.