

APPEAL TO THE COURT OF SESSION BY THE SCOTTISH MINISTERS UNDER SECTION 322 OF THE 2003 ACT AGAINST A DECISION OF THE MENTAL HEALTH TRIBUNAL FOR SCOTLAND IN THE CASE OF PETER MCMILLAN

Lord Nimmo Smith

Lord Kingarth

Lord Wheatley

Opinion of the Court

We have decided to give our decision now rather than to go to avizandum. It is in the interests of the patient that this matter is decided and the case does not appear to us to raise any general point which goes beyond the circumstances of the individual case.

It is quite clear from the 2003 Act that the conditions imposed on a conditional discharge are a matter for the exercise of the Tribunal's discretion but it should be emphasised that any conditions are conditions on the discharge of that patient. There is no question of the Scottish Ministers being able to require specific conditions or of the Tribunal being able to ignore the legitimate role of the Scottish Ministers.

There were some rather unfortunate exchanges at the end of the Hearing at which the Scottish Ministers did not advance the full arguments and the Convener made some remarks which may possibly be [construed] as a refusal to recognise the legitimate role of the Scottish Ministers.

It is understandable therefore why this Appeal has been brought especially as the original reasons did not give reasons with regard to [that point].

We have now been favoured with additional reasons. No comment has been made by Mr Heaney in relation to the competency of those additional reasons. We are of the view that there is no prohibition on the issuing of supplementary reasons. The Tribunal can do so for example in response to a request from a [relevant] party. There will be no contravention of Article 6 of the ECHR provided the supplementary reasons cover only matters and evidence considered at the Hearing. In the present case the supplementary reasons relate solely to evidence and submissions at the Hearing and we are prepared to accept their competence.

The supplementary reasons show that the Tribunal had considered the condition. We can understand in some cases where concerns are raised relating to victims that the Scottish Ministers should have the [last say on] appropriate conditions. No such considerations are present here. [At the first stage of the proceedings it is clear that the Scottish Ministers have an opportunity to comment in relation to where the patient can reside. As the second stage in the proceedings the Scottish Ministers are made aware of any change of address and can make their thoughts known on the change to the RMO].

We are not persuaded in this particular case that the imposition of the condition would make any real difference. It would not help the Scottish Ministers monitor Mr McMillan. In practice the RMO would monitor Mr McMillan and [any information] would be shared with the Scottish Ministers. The condition imposed here by the Tribunal constituted part of a package.

Having regard to the supplementary reasons we are quite unable to accept that the Tribunal's decision was unreasonable. We do not accept as suggested by Mr Heaney that the Tribunal failed to take account of material facts.

For those reasons we refuse the Appeal with the exception of the agreed alcohol/drug condition. Section 324(5) of the 2003 Act empowers the court to set aside the decision of the Tribunal and (i) substitute its own decision or (ii) remit the case to the Tribunal for consideration of the case anew. We consider that this power is applicable to part of a decision. We set aside condition 7 imposed by the Tribunal and in lieu thereof substitute the condition that "the patient is to refrain from abusing alcohol/illicit drugs and shall co-operate with necessary blood, urine and all other reasonable investigations for the purpose of monitoring drug/alcohol intake".

Opinion of the Court (2)

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**Lord Nimmo Smith
Lord Kingarth
Lord Wheatley**

Opinion of the Court

We are grateful to parties for their helpful submissions. We have decided to give our decision now rather than to go to avizandum for two reasons. Firstly the case does not appear to us to raise any general point which goes beyond the circumstances of the individual case and secondly it is in the interests of the patient that this matter is decided as soon as possible.

We are only now concerned with who should approve the patient's residence.

It is quite clear that the conditions imposed on conditional discharge are a matter for the exercise of the Tribunal's discretion. Section 193(7)(b) states that the Tribunal may make an order that the patient be conditionally discharged and impose such conditions on that discharge as it thinks fit and it should be emphasised that any conditions are conditions on the discharge of "that patient". There is no question of the Scottish Ministers being able to impose standard conditions or of the Tribunal failing to recognise their role of devising conditions within the requirements of the case.

There were some rather unfortunate exchanges towards the end of the Hearing at which the Scottish Ministers' representative did not advance the full arguments favoured today. On the other hand the Convener made some remarks that could have been construed as a refusal to recognise the legitimate role of the Scottish Ministers. It is understandable therefore why this Appeal has been sought, especially as the original reasons do not deal with the point [before us].

We have now been favoured with supplementary reasons. Mr Heaney did not take any point with the competency of those additional reasons. We are of the view that there is no prohibition on the issuing of supplementary reasons. We can see that it might be sensible in a particular case to respond to a request from an interested party. There is no infringement of Article 6 of the ECHR provided the supplementary reasons related to evidence and submissions at the original hearing. There would be a risk of contravening Article 6 if the reasons were to deal with any representations made by one party after the hearing. In the present case the supplementary reasons relate solely to evidence and submissions at the Hearing and we are prepared to accept their competence.

It is clear that the Tribunal have considered appropriate conditions in the circumstances of the case. We can understand in some cases, especially where there is a need to protect an individual from harm, that the Scottish Ministers should have some say and that should be reflected in the condition but there is no suggestion that such considerations arise here. It is clear in any event that in practice 1) the Scottish Ministers are made aware of the address when the patient is conditionally discharged and have the opportunity to make submissions

on that as happened in this case, and 2) the Scottish Ministers in terms of their Memorandum of Procedure are made aware of any change of address and can make their views known on the change to the RMO. We can understand that the Scottish Ministers wish to keep informed of any circumstances that might change but we are not satisfied that approval of the address would make any real difference. Knowing the address would not ensure that the other conditions were being met. We can see no reason that the RMO would not share information with the Scottish Ministers. The condition imposed here by the Tribunal constituted part of a package tailored to the patient.

Having regard to the supplementary reasons we are quite unable to regard the Tribunal's decision as unreasonable. We do not accept the submission by Mr Heaney that the Tribunal failed to take account of relevant and material facts and reached a decision that no reasonable Tribunal could have reached. We regard the Tribunal's decision as reasonable.

For those reasons we refuse the Appeal with one exception: that condition 7 requires to be varied. Section 324(5) of the 2003 Act provides that in allowing the appeal, the court shall set aside the decision of the Tribunal and substitute its own decision. We consider that power is applicable to part of a decision. We apply that to the present condition 7 imposed by the Tribunal. We set aside condition 7 and in lieu thereof substitute the condition that "the patient refrain from consumption of illicit substances and/or alcohol" and thereafter replace the original condition 7 that "The patient shall cooperate with necessary blood, urine and all other reasonable investigations for the purpose of monitoring drug/alcohol intake".

No written decision will be issued but arrangements have been made to tape record the decision. A full note could be given by the clerk if required.