SHERIFFDOM OF SOUTH STRATHCLYDE DUMFRIES AND GALLOWAY

B187/11

JUDGMENT OF SHERIFF PRINCIPAL B A LOCKHART

Appeal under Section 320 of the Mental Health (Care and Treatment) (Scotland) Act 2003

in the cause

L.B.N.

Appellant

against

MRS FIONA BORLAND, Mental Health Officer, North Ayrshire Council

First Respodent

MENTAL HEALTH TRIBUNAL FOR SCOTLAND

Second Respondents

Alt: Mr Shaw, of A C White
Act: Mr Green, for Mental Health Officer, North Ayrshire Council, Kilwinning
Ms Mays, of the Mental Health Tribunal for Scotland, Hamilton

AYR: 9 May 2011

The Sheriff Principal, having resumed consideration of the cause refuses the appeal and upholds the decision of the second respondents dated 18 March 2011; finds no expenses due to or by any party in respect of the appeal.

NOTE:

Background to the appeal

1. This is an appeal against a decision by the second respondents at a hearing held at Ailsa Hospital by Ayr on 18 March 2011 to make a compulsory treatment order in respect of the appellant in terms of the Mental Health (Care and Treatment) (Scotland) Act 2003. The decision is capable of appeal to myself in terms of section 320(10(c) of the 2003 Act at the instance of the appellant.

2. An application was made to the second respondents by the first respondent as Mental Health Officer for a compulsory treatment order. The application was dated 8 March 2011 and was lodged with, and received by the second respondents on 9 March 2011.

3. In terms of section 63(2)(b) the application requires to be accompanied by the documents mentioned in subsection (3) which are:

> "(a) the mental health reports
>
> (b) the report prepared under section 61 of this Act
>
> (c) the proposed care plan relating to the patient"

4. When the application was lodged with the second respondents, it was not accompanied by the mental health reports prepared by Doctors Ewen Douglas and Krzysztof Tyczynski following a joint examination of the patient on 25 February 2011. The mental health reports were dated 25 February 2011. The mental health reports were lodged with, and received by, the second respondents by fax from the first respondent at 3.04 pm on 11 March 2011. The first respondent, the Mental Health Officer had been advised by telephone by the second respondents on 9 April 2011 that the mental health reports had not been received with the application. The first respondent posted the copy reports by first class post on 9 April 2011. The first respondent was absent on holiday on 10 April 2011, but enquired from the second respondents on 11 April 2011 to discover that the reports had still not arrived. She then faxed the reports to the second respondents.

5. In terms of section 57(7) of the 2003 Act:

> "Where a mental health officer is required by subsection (1) above to make an application for a compulsory treatment order, the mental health officer shall make the application before the expiry of the period of 14 days beginning with:
>
> (a) in the case where each of the mental health reports specifies the same date (or dates), for the purposes of subsection (4)(f) above, that date (or the later, or latest, of those dates) ..."

The period of 14 days accordingly commenced on the date of the joint examination for the two mental health reports and expired on 10 March 2011.

6. The application was lodged by the first respondent (the Mental Health Officer) with the second respondents (the Mental Health Tribunal for Scotland) in terms of section 57(7) within 14 days of the date of the two mental health reports. Two mental health reports, in the circumstances outlined in paragraph 4 hereof were not received by the second respondents until 11 March 2011.

7. Accordingly an application in terms of section 63 of the 2003 Act was made within the 14 day period. However section 63(2)(b) of the 2003 Act provides that the application for the compulsory treatment order should be accompanied by the documents that are mentioned in subsection (3). These include "(a) the mental health reports". In these circumstances, it was the appellant's position before the Tribunal that the application was misconceived as it was invalid. It was submitted that the lodging of the application *et separatim* the subsequent lodging of the two mental health reports by the first respondent with, and its receipt by, the second respondents was not in conformity with the requirements of the 2003 Act.

8. When giving their decision to make a compulsory treatment order on 18 March 2011, the Tribunal observed:

> "The MHO by way of explanation advised the Tribunal that the CTO application was received by the Tribunal on 9 March 2011 and she was contacted by them to advise that the CTO 2 reports were not enclosed. She posted them that day but unfortunately they did not arrive the next day and when she was contacted to say that they had not been received she faxed them. Unfortunately that was after the STDC had expired. No prejudice to the patient was established by this irregularity and in any event the Tribunal considered that in terms of Rule 45(3) there was authority to accept the late lodging of this part of the application. It was further considered by the Tribunal that as the section 63 application had been triggered by the CTO 2 reports they were incorporated in the application."

9. It is against that decision that the appellant now appeals.

Submissions for the appellant

10. Solicitor for the appellant set out the following chronology on which his submissions were based:

(i) A short term detention certificate was granted in respect of the appellant on 11 February 2011.

(ii) On 25 February 2011 Doctors Ewen Douglas and Krzysztof Tyczynski jointly examined the appellant with his consent. They prepared their reports on that date.

(iii) The compulsory treatment order application was signed by the first respondent (the Mental Health Officer) on 8 March 2011. This was received by the Tribunal on 9 March 2011. It was received without the mental health reports.

(iv) On 10 March 2011 the short term detention certificate and the 14 days period in terms of section 57(7) of the 2003 both expired at midnight.

(v) On 11 March at 3.04 pm the mental health reports were received by the second respondents.

(vi) On 14 March 2011 the Tribunal administration assigned a hearing on the application for 18 March 2011 in Ailsa Hospital. The necessary documentation, including the application and the mental health reports, were forwarded to the appellant.

(vii) The Tribunal on 18 March 2011 granted the application and issued Full Findings and Reasons.

11. Section 57 of the 2003 (the mental health officer's duty to apply for compulsory treatment order) provides:

> "(1) where subsection (2) to (5) below apply in relation to a patient, a mental health officer shall apply to the Tribunal under section 63 of this Act for a compulsory treatment order in respect of that patient.
>
> (2) This subsection applies where two medical practitioners carry out medical examinations of the patient in accordance with the requirements of section 58 of this Act ...
>
> (7) Where a mental health officer is required by subsection (1) above to make an application for a compulsory treatment order, the mental health officer shall make the application before the expiry of the period of 14 days beginning with-
>
> > (a) in the case where each of the mental health reports specifies the same date (or dates) for the purposes of subsection (4)(f) above, that date, or the later, or latest, of those dates ..."

Section 63 of the 2003 Act (application for a compulsory treatment order) provides that:

> "(1) An application to the Tribunal for a compulsory treatment order may be made by, and only by, a mental health officer.
>
> (2) An application-
>
> > (a) shall specify ...
> >
> > (b) shall be accompanied by the documents that are mentioned in subsection (3) below.
>
> (3) These documents are:
>
> > (a) the mental health reports ...
>
> relating to the patient."

12. It was submitted that against that factual background and applying the provisions of section 57(7) and section 63(2)(b) and (3) the mental health reports had not been lodged within the 14 day period and accordingly the application, which required to be accompanied by the mental health reports, was lodged out of time. It was submitted this was a fundamental breach of the legislation which was not capable of being cured. I was in particular referred to the terms of section 63(2)(b) which provided that the application "shall" be accompanied by the two reports. It was submitted that the reports were separate from the application and were not incorporated into it, as was suggested by the Tribunal in their Full Findings and Reasons.

13. I was referred to the case of *Regina v Soneji & Another* 2005 3WLR 303 which dealt with the approach to time limits. The case considered the use of the word "shall" in respect of time limits and discussed the issue of whether time limits should be considered "mandatory" of "directory". In particular I was referred to the speech of Lord Carswell at paragraphs 61 to 68. He said *inter alia*:

> "61. The distinction between mandatory and directory provisions, which was much discussed in judicial decisions over many years, has gone out of fashion and has been replaced, as Lord Steyne has said, by a different analysis, directed to ascertaining what the legislature intended should happen if the provision in question was not fully observed. I do not seek to question the correctness of the altered approach to this, but I do feel that the principles inherent in the rejected dichotomy may in some cases offer assistance in the task of statutory construction.
>
> 62. It has long been appreciated that the essence of the search is the ascertainment of the intention of the legislature about the consequences of failure to observe the requirement contained in the provision in question. ...
>
> 63. The traditional dichotomy between mandatory and directory provisions has been used as a convenient shorthand for a very long time, and, as in the case of many shorthand labels for concepts, those concerned with statutory interpretation may have tended to forget the object summarised by the useful labels. ... There is, however, some value still in the principles enshrined in the dichotomy, particularly that which relates to substantial performance.
>
> 64. I agree with your Lordships that Parliament did not intend confiscation proceedings to fail in all cases where the timetable contained in section 72(a) of the Criminal Justice Act 1988 was not observed ...
>
> 65. The traditional consequence of finding the provisions was merely directory was that substantial performance would constitute a sufficient compliance with the statutory requirement ... Minor and insubstantial deviation from the requirements will not make the resulting proceedings invalid. ...
>
> 67. The other avenue is by means of holding that if the time limit is not strictly observed the confiscation is nevertheless not invalidated. It is here that the doctrum of substantial performance may offer some assistance. I would not regard it as justified to extend the time limit indefinitely, for I do not think that Parliament would have so intended. Nor would it be sufficient to ask merely if it would be fair and reasonable to accept the validity of an action out of time. I would suggest that one should ask if there had been substantial observance of the time limit. What will constitute substantial performance would depend on the facts of each case, and it will always be necessary to consider whether any prejudice has been caused or injustice done by regarding the act done out of time as valid.
>
> 68. If one approaches the present case by the second avenue, I think that the answer will be the same. There was a small departure from the prescribed time and no prejudice was created or injustice done by regarding the confiscation order as valid. I am satisfied that this approach is not only consistent with the intention of Parliament but is a proper way to ensure that its intention is carried out."

14. It was suggested that I require to look at the whole circumstances of this case to find out exactly what Parliament was intending by applying the time limit and then determining what the consequences of failure of observing that time limit were.

15. Solicitor for the appellant then referred to the various provisions contained in volume 2 of the Code of Practice issued by the Scottish Executive on the 2003 Act. He conceded that this document was not helpful in determining how the statutory provisions regarding the time limit for lodging the application for a compulsory treatment order and the relevant mental health reports should be interpreted.

16. Solicitor for the appellant then referred to the Mental Health Tribunal for Scotland (Practice and Procedure) (No 2) Rules 2005 as amended in 2006 and 2008. He referred to Rule 6 which provided *inter alia*:

> "(2) The Clerk shall send a copy of the application and any accompanying documents mentioned in section 63(3) of the Act to the patient and the patient's named person.
>
> (3) The Clerk shall send a notice of the application to the following persons:
>
> (a) the patient ...
>
> (4) Notice under paragraph (3) shall inform the persons- ...
>
> (d) of the date, time and place of the hearing ..."

It was conceded that this was done by the clerk of the second respondents on 14 March 2001 when, *inter alia,* a copy of the application, the mental health reports, and the date, time and place of the hearing were sent to the appellant.

17. This appeal was presented against that factual and legal background. It was submitted that the Tribunal in its Full Findings and Reasons did not address the issue of the late lodging of the mental health reports with the Tribunal administration. It did not comment as to whether that issue was fundamental. The Tribunal stated:

> "No prejudice to the patient was established by this irregularity"

There was no amplification of this statement. The Tribunal continued:

> "In any event the Tribunal considered that in terms of Rule 45(3) there was authority to accept the late lodging of this part of the application."

It was submitted this was not the case. Rule 45(3) applied to evidence which was sought to be adduced at the hearing. It did not apply to the provisions of section 63. The Tribunal continued:

> "It was further considered by the Tribunal as the section 63 application had been triggered by the CTO No 2 Reports they were incorporated in the application."

It was conceded that there was certain material from the reports contained in the application, but this was irrelevant. The statutory provisions required the two mental health reports to be lodged with the application.

18. In this case there had been a failure to observe the time limit. It was submitted that the issue was whether or not the statutory time limit had been obtempered. If it had not been obtempered, the application was fundamentally flawed. This was an application to remove the appellant's liberty. There was a requirement on the first respondent to lodge the application, her report, her proposed care plan, and the two mental health reports within 14 days of the date of these reports. This had not been done.

19. While it was conceded that on one view, there had been substantial compliance with the time limit in that three of the four necessary documents had been lodged within the time limit, the question was posed "What was the purpose of the time limit?". It was submitted that it was not inappropriate for the court to come to the conclusion that the purpose of the time limit was to ensure that there was up to date medical information accompanying the application. As far as prejudice was concerned, it was submitted it was self evident that the effect of granting the application was that (a) the appellant would be detained in Ailsa Hospital and (b) there was a requirement that he undertake treatment. It was submitted that there accordingly had been stark prejudice to the appellant as a result of a fundamentally incompetent application. He had been deprived of his liberty and forced to undertake treatment. I should accordingly find that the application was misconceived in terms of Rule 44 of the 2005 Rules. The breach of the statutory provisions was so fundamental that it could not be remedied. I was asked to sustain the appeal and recall the decision of the Tribunal to make a compulsory treatment order on 18 March 2011.

Submissions for the first respondent

20. Solicitor for the first respondent referred to the dicta of Lord Carswell in *Regina v Soneji & Another, supra* which I have set out in paragraph 13. His position was that there had been substantial compliance with the requirements of sections 57 and 63 of the 2003 Act when the application, the Mental Health Officer's report and the proposed care plan were lodged with the Tribunal on 9 March 2011. The time limit expired on midnight on 10 March 2011. There was total compliance at 3.04 pm on 11 March when the two mental health reports, which had been delayed in the post, were delivered by fax to the Tribunal. In particular I was referred to the dicta of Lord Carswell in *Regina v Soneji & Another* as follows:

> "... 65. A minor and insubstantial deviation from the requirements will not make the resulting proceedings invalid ...

> 67. What will constitute substantial performance will depend on the facts of each case, and it will always be necessary to consider whether any prejudice has been caused or any injustice done by regarding the act done out of time as valid."

21. It was submitted that there had been very little if any prejudice to the appellant. Although the two mental health reports had been lodged with the Tribunal some 15 hours late, there was no criticism of the delivery by the clerk to the Tribunal to the appellant in terms of Rule 6 of the 2006 Rules of all the documents which required to be sent to him, including the application and the mental health reports. The appellant was given adequate time to consider these documents before the Tribunal sat. Solicitor for the appellant had argued that the 14 day Rule allowed up to date information to be before the Tribunal. It was explained that both signatories to the medical reports gave evidence at the Tribunal, Dr Tyczynski in person and Dr Douglas by mobile phone link. No objection was taken to this form of evidence. The information before the Tribunal as to the medical condition of the appellant was accordingly as up to date as was possible.

22. It was accepted that the manner in which the Tribunal dealt with the objection to the competency of the application in its Full findings and Reasons was flawed. However, in light of the case law canvassed at this appeal hearing it was clear there had been substantial compliance with the statutory provisions and no prejudice. The appeal should be refused.

Submissions for the second respondents

23. Solicitor for the second respondents submitted that the nub of the issue for decision at this appeal was the effect of the failure to comply with the statutory provision. The second respondents accepted the factual narrative set out by solicitor for the appellant. In particular the mental health reports were received 15 hours late. However the Tribunal administration processed the application within the appropriate timescales and all the documentation was delivered timeously prior to the hearing on 18 March 2011 to the appellant.

24. If the criteria set out in section 57(2) to (5) are met, a mental health officer has no discretion - he or she must make an application for a compulsory treatment order to the Tribunal. While the statutory provisions provided that the application should be made and the mental health reports lodged within 14 days of the date of the reports, legislation did not specify the consequences of failure to comply with the statutory time limits. The question for decision was what were the

consequences of the failure to lodge the mental health reports within 14 days of the date on which they were made.

25. I was referred to the following cases:

(i) *London and Clydesdale Estate Ltd v Aberdeen District Council & Another* 1980 WLR 182. I was referred to the speech of Lord Hailsham on St Marylebone at 189F where he said:

> "When Parliament lays down a statutory requirement for the exercise of legal authority it expects its authority to be obeyed down to the minutest detail. But what the courts have to decide in a particular case is the legal consequence of non compliance on the rights of the subject viewed in the light of a concrete state of facts and a continuing state of events. ... At one end of the spectrum there may be cases in which a fundamental obligation may have been so outrageously and flagrantly ignored or defied that the subject may safely ignore what has been done and treat it as having no legal consequences upon himself ... At the other end of the spectrum the defect in procedure may be so nugatory or trivial that the authority can safely proceed without remedial action, confident that, if the subject is so misguided as to rely on the fault, the courts will decline to listen to his complaint.

And at page 190C:

> "The jurisdiction is inherently discretionary and the court is frequently in the presence of differences of degree which merged almost imperceptibly into differences of kind."

It was submitted that in this case the failure to comply was at the very lowest end of the scale. There had been a trivial failure to comply. It could not have been the intention of Parliament that a failure to lodge the accompanying reports by 15 hours would invalidate the application.

(ii) *Wang v Commission of Inland Revenue* 1994 WLR 1286. Giving the judgment of the court in the House of Lords, Lord Slynn of Hadley said at 1296D:

> "Having reviewed the authorities cited by the taxpayer in this appeal, not all of which are referred to in this opinion, their Lordships consider that when a question like the present one arises - an alleged failure to comply with a time provision, it is simpler and better to avoid these two words "mandatory" and "directory" and to ask two questions. The first is whether the legislature intended the person making the determination to comply with the time provision, whether a fixed time or a reasonable time. Secondly, if so, did the legislature intend that a failure to comply with such a provision would deprive the decision maker of jurisdiction and render any decision which he purported to make null and void."

(iii) *Regina v Soneji & Another supra.* Lord Steyn at paragraph 21 referred to the decision of the court in *Project Blue Sky inc v Australian Broadcasting Authority* [1998] 194 CLR 355.

> "A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid. This has been the preferred approach of courts in this country in recent years, particularly in New South Wales. In determining the question of purpose, regard must be had to "the language of the relevant provision and the scope and object of the whole statute."

And at paragraph 23 he concluded:

> "Having reviewed the issue in some detail I am in respectful agreement with the Australian High Court that the rigid mandatory and directory distinction, and its many artificial refinements, have outlived their usefulness. Instead ... the emphasis ought to be on the consequences of non compliance, and posing the question whether Parliament can fairly be taken to have intended total invalidity. That is how I would approach what is ultimately a question of statutory construction."

(iv) *Paterson v Kent* 2007 SLT (Sh Ct) 8. Sheriff Principal Dunlop opined:

> "[30] The provisions of s 57 have in mind not only the interest of the patient but also, in certain cases, the interests of the public. This appears from the terms of s 57(3)(c), which speaks of the existence of a significant risk to the health, safety or welfare of the patient or to the safety of any other person. Those having an interest in the application are entitled to expect that it will be determined and it seems to be unlikely that Parliament intended a failure by the Tribunal to comply with the time limit of s 69 would lead to a frustration of the overriding purpose to which I have referred."

Sheriff Principal Dunlop had stated that he had considered the overriding purpose of the legislation was to provide appropriate care and treatment for persons having a mental disorder.

26. Solicitor for the second respondents accepted that, as far as the purpose of the 14 day time limit was concerned, it would not be inappropriate for me to conclude, as suggested by solicitor for the appellant, that the purpose was to ensure that the medical information in the medical reports which accompanied the application and are part of the documentary evidence to be considered by the Tribunal should be up to date. It was submitted that applying that test to the facts and circumstances of this case, Parliament could not have intended that failure to comply with the 14 days time limit would invalidate the application in a situation where the reports were lodged some 15 hours late. They remained up to date.

27. As far as prejudice to the appellant was concerned, it was submitted that there was no prejudice. At the Tribunal hearing, there was full consideration of the written medical evidence. There was in addition verbal evidence at the appeal hearing from Dr Tyczynski and evidence via mobile telephone from Dr Douglas. The appellant had the opportunity to put forward any other evidence which he considered relevant. The decision to make the order was based on the documentary and oral evidence given to the Tribunal. There was no prejudice. This issue was canvassed by Sheriff Principal Taylor in the case of *J G v Mental Health Tribunal for Scotland* 2010 WL 4737734 where he said:

> "In my opinion the appellant suffered no prejudice. It was submitted that he had been deprived of his liberty and thereby prejudiced. I cannot agree that he lost his liberty as a consequence of the premature notification. The compulsory treatment order was made because the evidence placed before the Tribunal persuaded the Tribunal that it was in the appellant's best interests that an order be made. It was not suggested that the appellant's case

> would have been conducted any differently or that further evidence would have been led if he had received further notification of the intention to apply to the Tribunal. ..."

28. In these circumstances I was asked to refuse the appeal.

Decision

29. I have no hesitation in coming to the conclusion that this appeal is without substance. Two doctors examined the appellant on 25 February 2011. As a result, the first respondent lodged an application for a compulsory treatment order, with her report and the care plan, with the second respondents on 9 March 2011. She was required also in terms of section 63(2)(b) and (3) of the 2003 Act to lodge the two mental health reports with the application. In error the reports did not accompany the application. This was brought to the attention of the first respondent who immediately posted them to the second respondents on 9 March. Had the postal service operated efficiently, the reports would have been received within 14 days of 25 February as required by section 57(7) of the 2003 Act. The time limit expired at midnight on 10 March. The situation was brought to the first respondent's attention on 11 March and the reports faxed to the second respondents at 3.04 pm on 11 March. They were accordingly some 15 hours late. All the necessary documentation was timeously sent by the clerk to the second respondents to the appellant on 14 March 2011 when the hearing was intimated for 18 March 2011. No exception was taken to this procedure.

30. The only issue for me to decide is whether the fact that two mental health reports were lodged 15 hours late vitiates the application. On two separate grounds I take the view that this delay in lodging of the mental health reports does not vitiate the application:

(i) There was substantial compliance with the requirements of the 2003 Act on 9 March when the application, the first respondent's report and the care plan were lodged with the second respondents. There was total compliance 15 hours after the time limit expired. I consider the two dicta of Lord Carswell in the case of *Regina v Soneji & Another, supra* on which solicitor for the first respondent relies are in point.

> "65. A minor and insubstantial deviation from the requirements will not make the resulting proceedings invalid.
> 67. What will constitute substantial performance will depend on the facts in each case, and it will always be necessary to consider whether any prejudice has been caused or injustice done by regarding the act done out of time as valid"

In this case I am quite clear that there has been no prejudice suffered by the appellant. The two medical reports were timeously available for the appeal hearing. The two doctors were available to give evidence and were indeed questioned by solicitor for the appellant. There was an opportunity for the appellant to lead any evidence he thought appropriate at the appeal hearing. On this ground the appeal falls to be rejected.

(ii) I was satisfied that Parliament did not intend that failure to comply with the terms of section 57(7) of the 2003 Act by some 15 hours would frustrate the overriding purpose of the legislation which is to provide appropriate care and treatment for persons having a mental disorder. The application for a compulsory treatment order, the first respondent's report, the care plan, the medical reports and the Tribunal's Full Findings and Reasons point conclusively to the fact that the appellant is in need of compulsory measures of care. Such a course is in both his and the public interest. It is inconceivable that the intention of Parliament was that such a course would be frustrated by the failure to observe a time limit by some 15 hours in a situation where there has clearly been no prejudice to the appellant.

31. For these reasons the appeal will be refused. Parties were agreed that, as the appellant was in receipt of a full legal aid certificate, if I took this course I should make no finding in respect of expenses. This I have done.