B779/10

JUDGMENT
OF
SHERIFF PRINCIPAL
JAMES A TAYLOR
in the cause
L M

APPELLANT

against

Mental Health Tribunal for Scotland

RESPONDENTS

and

Dr Julie Gibbons

FIRST INTERESTED PARTY

GLASGOW, 31 August 2010.

The Sheriff Principal, having resumed consideration of the cause, Refuses the appeal; Finds the appellant liable to the respondents and first interested party in the expenses of the appeal procedure as these might be taxed; Allows an account thereof to be given in and remits same, when lodged, to the auditor of court to tax and to report; Certifies the appeal as suitable for the employment of junior counsel.

NOTE:-

[1] This is an appeal under Section 320(1)(a) of the Mental Health (Care and Treatment) (Scotland) Act 2003 (hereinafter "the Act"), against the Mental Health Tribunal's decision of 5 March 2010 refusing the appellant's application to revoke a short-term detention certificate dated 25 February 2010. The appellant moved me to set aside the decision of the Tribunal using my powers under Section 324(5) of the Act and to revoke the short-term detention certificate.

[2] The appellant is 14 years old and has been diagnosed with anorexia nervosa. A short-term detention certificate was granted on 26 January 2010 and the appellant was thereafter detained in hospital. That certificate was due to expire on 18 February 2010. The Mental Health Officer ("MHO") intended to lodge an application for a Compulsory Treatment Order ("CTO") on 18 February 2010 but due to problems with a computer system was unable to do so. On 18 February 2010, an extension certificate was purportedly granted by Dr Julie Gibbons, an approved medical practitioner and the first interested party, in respect of the appellant, in terms of Section 47 of the 2003 Act, which would expire on 21 February 2010. On 19 February 2010 the MHO made an application under Section 63 of the 2003 Act for a CTO. A hearing was fixed for 26 February 2010 to determine this application. By virtue of Section 68 of the 2003 Act, the making of the application for a CTO during the period of the extension certificate authorised the detention of the appellant for five working days. On 25 February 2010 the MHO withdrew the application for a CTO. It was common ground that the appellant was informed of this withdrawal on the late afternoon of 25 February 2010. She was not told that she was thereafter an informal patient and was free to leave the hospital if she so chose. On 25 February 2010, shortly after the appellant had been informed that the application for a CTO had been withdrawn, the first interested party granted a second short-term detention certificate. The appellant instructed her solicitors to appeal the second certificate and an application to the Tribunal was made under Section 50 of the 2003 Act with a request that the Tribunal revoke the second short-term detention certificate. On 5 March 2010 a Tribunal refused the application. It was that decision which was under appeal. The parties to the appeal were the patient, who is the appellant, the Mental Health Tribunal, who are the respondents, and Dr Julie Gibbons, the first interested party.

[3] It was agreed that parties would each lodge notes of argument. I am grateful to counsel and solicitors for the care taken in the preparation of these notes which made the hearing of the appeal that much more efficient. The notes are in process and numbered 7, 10 and 11 thereof. It was common ground at the appeal that a hospital authority did not have any power at common law to detain a patient. The authority for this proposition is *B v Forsey* 1988 SLT 572. Short-term detention certificates are authorised by Section 44 of the 2003 Act. In order for there to be a short•term detention in hospital in terms of Section 44 it is necessary that the patient does not fall within the category of patients described in Section 44(2) of the Act. Section 44(2) is in the following terms:-

> "The patient falls within this sub-section if, immediately before the medical examination mentioned in sub-section (1)(a) above is carried out, the patient is subject to
>
> (a) a short-term detention certificate:
>
> (b) an extension certificate:
>
> (c) section 68 of this Act: or
>
> (d) a certificate granted under section 114(2) or 115(2) of this Act."

Parties were agreed that the purpose of this statutory provision is to prevent a patient being detained on a succession of short-term detention certificates. Therefore it can be seen from the narrative in paragraph 2 *supra* that if the extension certificate granted on 18 February 2010 was valid it followed that the second short-term detention certificate granted on 25 February 2010 was unlawfully granted. It was further agreed that if during the subsistence of a short-term detention certificate an extension certificate was granted and the short-term detention certificate was subsequently revoked, the extension certificate fell. For that proposition parties referred me to Section 50(5). It was common ground that there was no power under Section 47 to grant the extension certificate dated 18 February 2010. It was also common ground that the appellant was unlawfully detained in hospital from 18 February to 25 February 2010. The Mental Health Tribunal acknowledged that the first interested party was seeking to secure the welfare of the patient when she granted the second short•term detention certificate on 25 February 2010.

[4] The appellant's position was that notwithstanding that the Section 47 extension certificate was unlawfully granted, the appellant was *de facto* detained under the terms of a certificate which was *ex facie* valid. She was detained first under the extension certificate and thereafter by virtue of Section 68 of the Act.

[5] Unfortunately the appellant's counsel, when preparing her written submission, had not been aware that Section 44 of the 2003 Act had been amended by the Mental Health (Care and Treatment) (Scotland) Act 2003 (Modification of Enactments) Order 2005/465 (Scottish SI) Schedule 1, paragraph 32(4). As originally enacted Section 44(2) was in the following terms:-

> "The patient falls within this section if, immediately before the medical examination mentioned in sub-section (1)(a) above is carried out, the patient is detained in hospital under authority of
>
> (a) a short-term detention certificate:
>
> (b) an extension certificate:
>
> (c) section 68 of this Act: or
>
> (d) section 114(2) or 115(2) of this Act."

Recognising that the appellant was not *de jure* detained under an extension certificate, I was invited to import into the original terms of Section 44 the words "or purported authority" after "under authority". The court had power to take this course by virtue of Section 3 of the 1998 Human Rights Act. Section 3 requires legislation to be read and given effect in a way compatible with Convention rights. The Convention right which it was said would be breached if the statute was not so interpreted was Article 5, which provides that everyone has the right to liberty and security and that detention must take place "in accordance with a procedure prescribed by law" and be "lawful". In paragraphs 31 and 32 of the submission by the appellant the following was said:-

> "31. In the present case the appellant was purportedly detained under an extension certificate and thereafter purportedly by virtue of section 68 of the Act. She was *de facto* detained from 18th February-25th February, albeit that the detention was unlawful. She was kept under constant observation and was not told she was free

to go. Her detention was arbitrary and not in accordance with law. The appellant's detention under the second certificate went beyond the limits of section 44 and beyond the protection within the 2003 Act. It did not follow the designated procedures. Her continued detention under the second certificate breached Article 5 of her Convention Rights.

32. If, contrary to these submissions, section 44 is construed only to prohibit detention where the appellant is immediately before the medical examination detained **lawfully** under section 68 of the 2003 Act, it is suggested that such an interpretation is not Convention compliant and would result in a breach of Article 5. It would allow patients to be unlawfully detained for successive periods without prohibition on a further successive period of short-term detention. Such detention would be arbitrary and contrary to law. If that is the natural meaning of section 44, it is submitted that the words should be read down in a Convention compliant way under section 3 of the 1998 Act. It is possible to read section 44 so that references to detention under section 68 include a reference to purported detention under section 68. That is the meaning which should be given effect. That would produce a result which would be compatible with the human rights of the appellant."

[6] I have come to the view that the appellant's submissions are misconceived. It is my opinion that the Tribunal did not have power to determine the validity of the second short-term detention certificate. Section 50(1) and (4) of the 2003 Act is in the following terms:-

"50 - (1) Where a patient is in hospital under authority of a short-term detention certificate or an extension certificate -

(a) the patient; or

(b) the patient's named person,

may apply to the Tribunal for revocation of the certificate.

(4) On an application under subsection (1) above, the Tribunal shall, if not satisfied -

(a) that the conditions mentioned in paragraphs (a), (b) and (d) of section

44(4) of this act continue to be met in respect of the patient;

or

(b) that it continues to be necessary for the detention in hospital of the patient to be authorised by the certificate,

revoke the certificate."

Being a creature of statute the Tribunal's powers are circumscribed by the terms of that statute. I agree with counsel for the first named party that on a plain reading of the section the Tribunal had neither the power nor the duty to consider the validity of the second short-term detention certificate. In order for a Tribunal to exercise its powers under Section 50(4) to revoke a certificate it must be not satisfied on certain matters specified in Section 50(4)(a) and (b). It was not suggested that the Tribunal was in a position not to be satisfied on such matters. Therefore the Tribunal did not, in the circumstances of this case, have the power to revoke the short-term detention certificate granted on 25 February 2010. The terms of Section 50(4) could not be met. I accept that Article 5(4) of the Convention requires that the state provides persons deprived of their liberty with a means by which they can challenge the lawfulness of their detention. In my opinion such provision exists. Section 291(1) of the 2003 Act could have been invoked by the appellant. It is in the following terms:-

"291 - (1) This section applies where, otherwise than by virtue of this Act or the 1995 Act, a person ("the patient") -

(a) has been admitted to a hospital; and

(b) is being given treatment there primarily for mental disorder.

(2) A person mentioned in subsection (4) below may apply to the Tribunal for an order requiring the managers of the hospital to cease to detain the patient.

(3) On an application under subsection (2) above the Tribunal shall -

(a) if satisfied that the patient is being unlawfully detained in the hospital, make the order mentioned in subsection (2) above; or

(b) if not satisfied about the matter mentioned in paragraph (a) above, refuse the application.

(4) The persons referred to in subsection (2) above are -

(a) the patient;

(b) the patient's named person;
(c) if the patient is a child, any person who has parental responsibilities in relation to the patient;
(d) a mental health officer
(e) the Commission;
(f) any guardian of the patient;
(g) any welfare attorney of the patient; and
(h) any other person having an interest in the welfare of the patient."

It is accepted by all parties that the appellant was being unlawfully detained between 18 and 25 February. Thus she came within the terms of Section 291(3)(a). It follows that the appellant could have applied to a Tribunal for an order under Section 291(2) requiring the managers of the hospital to cease to detain her. Accordingly, the provisions of Article 5 are satisfied by the statute. That being so it is unnecessary for me to import words to Section 47, which Parliament chose not to include, in order that the terms of Article 5 are satisfied. The statute provides a mechanism to enable a patient detained in circumstances such as the appellant to have that detention tested by an independent Tribunal thus satisfying the requirements of Article 5.

[7] I am fortified in this view by counsel for the first interested party's submission that in order for the appeal against unlawful detention to be effective the respondent in the appeal would require to be the entity which was detaining the patient. In an application under Section 50 the respondent is the Mental Health Tribunal for Scotland and the Mental Health Officer. In an application under Section 291 the hospital managers are given the opportunity of making representations at the hearing and leading evidence. Under Section 291 the order is one which hospital managers must obtemper. I was referred to the Mental Health Tribunal for Scotland Practice & Procedure (Number 2) Rules 2005 and, in particular, Rule 18. I agree with counsel for the first interested party that it is the managers of the hospital who effectively detain patients such as the appellant. Thus it is appropriate that they should be heard in an appeal in circumstances such as those in which the appellant found herself. Any order made in terms of Section 291 is then properly directed against the party detaining the patient.

[8] In any event, given that Section 44 has been amended from its original terms, it would not

have been possible to give effect to the submissions of the appellant's counsel. The amending Scottish Statutory Instrument (2005/465) deleted from Section 44, the words "detained in hospital under authority of" and substituted therefor "subject to". The appellant's submission was that I should read into the section after "authority" the words "or purported authority". By extension the appellant's submission would require me to add after "subject to" the words "or purportedly subject to". I am not prepared to hold that the section should be so read nor that it requires to be so read in order to give the appellant a mechanism to challenge an unlawful detention. Such a mechanism exists by virtue of Section 291.

[9] Counsel for the first interested party accepted that the Section 47 extension certificate granted on 18 February 2010 could not be a complete nullity albeit that she accepted it was unlawful and invalid. For it to be a nullity it would require to be reduced. She and counsel for the appellant referred to Lord Hailsham's speech in *London & Clydeside Estates Ltd v Aberdeen District Council* 1980 SC (HL) 1. However, counsel for the first interested party submitted that notwithstanding its continued existence it could not be said that the appellant was *subject* to the certificate. I did not understand counsel for the appellant to argue otherwise. The appellant's position was that she had been *purportedly subject* to the Section 47 extension certificate on 25 February 2010 immediately before the second short-term detention certificate was applied for. Thus she could bring herself within the terms of Section 44(2) if I imported words into Section 44 which, as explained, I am not prepared to do. If at the time the second short-term detention certificate was granted on 25 February 2010 the appellant was not able to bring herself within the categories of persons set out in Section 44(2), it follows that the certificate granted on 25 February was valid and the appellant was not unlawfully detained from that date. In any event, I have doubt if one can be "purportedly" subject to a certificate. One is either subject to a certificate or not.

[10] I should record that there was no counter argument to the appellant's submission that although there was a short time gap between the appellant's detention purportedly under Section 68, coming to an end and the medical examination which preceded the granting of the second short-term detention certificate being applied for, the appellant was nonetheless able to say that, had the Section 68 detention been valid she would have been detained under Section 68 immediately before the said medical examination.

[11] It was not in dispute that the appellant is now competently detained under another order. That notwithstanding, it was important that the appellant had the opportunity to vindicate her rights under Article 5 in relation to the second certificate. Thus it was important, from the perspective of the appellant, that the issue of whether the Tribunal erred in law when it refused to invoke the second certificate was tested. It was agreed that expenses should follow success.