AIRDRIE SHERIFF COURT

Sheriff Principal B A Lockhart B158/12

JUDGMENT OF SHERIFF PRINCIPAL
B A LOCKHART

in causa

AB

Appellant

Against

BERNARDA ROSRIGUEZ (Mental Health Officer)
First Respondent
Dr DEBBIE MONAGHAN (Responsible Medical Officer)
Second Respondent
MENTAL HEALTH TRIBUNAL FOR SCOTLAND
Third Respondents

Solicitor for the Appellant: F Irvine, Solicitor, Glasgow

Solicitor for the First Respondent: Miss Burns, Solicitor, Motherwell

Solicitor for the Second Respondent: Mr McGregor, Advocate

Solicitor for the Third Respondent: - Mr R.H. Hunter, Solicitor, Hamilton

AIRDRIE: 26 September 2012

The Sheriff Principal, having resumed consideration of the cause, refuses the appeal and adheres to the decision of the third respondents dated 2 February 2012; finds no expenses due to or by either party in respect of the appeal.

NOTE:

Background to the appeal

[1] The appellant was subject to a compulsory treatment order in terms of the Mental Health (Care and Treatment) (Scotland) Act 2003 ("The 2003 Act"). By virtue of the compulsory treatment order the appellant was required to reside at Z care home. The appellant made an application to the third respondents (hereinafter referred to as "The Tribunal") under section 100 of the 2003 Act for revocation or variation of the compulsory treatment order (the application). The third respondents convened a hearing to determine the application. Hearings took place on 22 December 2011, 12 January 2012 and 2 February 2012. A final decision was made on 2 February 2012.

[2] In their Full Findings and Reasons, the Tribunal found:-

> "1. The patient is suffering from a mental disorder, namely amnesic syndrome secondary to alcohol misuse, causing a loss of cognitive function characterised by poor short term memory and risky decision making, together with a bipolar affective disorder which is currently stable under medication.
> 2. There is medical treatment available for the patient which would be likely either to prevent the mental disorder worsening or to alleviate any of its symptoms or effects, namely an atypical anti-psychotic, Quetiepine, and a mood stabiliser, Carbarmazepine for her bipolar affective disorder together with twenty four hour nursing supervision and occupational therapy for her amnesic syndrome.
> 3. If the patient were not provided with such medical treatment there would be a significant risk to the health, safety or welfare of the patient as she is at risk of

further deterioration of her mental health if she resumes taking alcohol; is vulnerable to exploitation by others; is unable to find her way about without supervision; is unable to cross roads safely on her own and is unable to recognise common risks from electrical appliances or from lit cigarettes which places herself at risk and other persons at indirect risk of harm.
4. Due to the mental disorder, the patient's ability to make decisions about the provision of such medical treatment is significantly impaired as she does not recognise that, due to the loss of cognitive function, she is unwell or that there is a need for ongoing treatment.
5. A Compulsory Treatment Order in respect of the patient remains necessary as, due to her cognitive impairment, she cannot understand the extent of her illness or that supervised care is necessary and therefore it is not appropriate to revoke the Order.
6. It is appropriate to vary the measures attached to the Compulsory Treatment Order in respect of the patient to be the least restrictive in all the circumstances. The measures should in the circumstances be that she receive medical treatment in terms of Part 16 of the Act be required to attend as directed by her RMO with a view to receiving medical treatment; be required to reside at Z Care Home; be required to allow her MHO, RMO or any person authorised by the RMO responsible for providing medial treatment, community care, care services, relevant services or any treatment to visit the place where she resides. She should not be required to attend as directed by her RMO with a view to receiving community care services, relevant services or any treatment, care or service which she does not in fact receive away from Z Care Home and it is not necessary that she seek the approval of the MHO for or advise the MHO of a change of address.
7. No recorded Matters should be made.
8. No Report should be made to the Mental Welfare Commission as this is unnecessary, the patient being subject to a Compulsory Treatment Order but not detained in hospital and so falling within the ambit of Section 11(2)(c) of the Act."

[3] At page 10 of their written decision the Tribunal stated:

> "We found that, on the basis of the clinical Consultant's evidence, which was not in fact challenged on the actual criteria in cross-examination by the patient's solicitor, and which was supported by both the MHO and Mr Barrett, the criteria as set out in Section 64(5) of the Act for the Order continuing were established.
> Although the clinical Consultant had not been in post for long, he had qualifications and experience in mental health issues in England and had clearly reviewed the patient's case for the Tribunal. He gave clear evidence as to the criteria. The MHO has known the patient for several years and was clear in her support of the views of the clinical Consultant. Mr Barrett, who has had over thirty years' experience in mental health, in both nursing and

social work, had reviewed the patient's circumstances for this Hearing at the request of her solicitor and his evidence was that an Order remained necessary.
We accepted such evidence and where it differed from that of the patient, who considered that she was capable, we preferred it to that of the patient who appeared not to demonstrate an understanding of the extent of her illness or of the need for supervision and treatment.
Having established that the criteria as set out in Section 64(5)(a)-(e) of the Act for the Order continuing were made out, we then required to consider whether it is necessary for the patient to be detained in hospital, in terms of Section 64(5)(f). We concluded that it was not, accepting again the evidence of the clinical Consultant, supported by both the MHO and Mr Barrett.
In so doing, we had regard to the patient's solicitor's further submission, that the question of the lawfulness of the patient being placed in a locked facility in Z care home which was not the least restrictive in all the circumstances could entitle us to revoke the Order or to vary the measures contained in the Order from being community to hospital-based. We concluded that we could not.

It is plain to us, notwithstanding the evidence to the contrary on this point from both the clinical Consultant and the nurse today, that the patient is indeed accommodated in a locked facility. It cannot logically be anything other than a locked facility given that there is a keypad entry which residents of Z care home, like the patient, (and for that matter, the clinical Consultant) do not have the code for and that the staff facilitate any persons entering or leaving Z Care Home.
However, in our view, that circumstance does not allow us to revoke the Order or to vary measures contained in the Order. Such a submission falls outwith the ambit of our powers as detailed n Section 103(3) and (4), particularly by reference to Sections 64(5) and 66(1) [above].
There are limited mechanisms within the Act which allow for certain challenges to be made to a patient's "detention". Section 291 of the Act allows for a patient who has been admitted to hospital in certain circumstances to apply for a finding that he or she is being illegally detained there. Matters of excessive security can be pursued before the Tribunal by patients in the State Hospital (but currently not otherwise) in terms of Section 264 of the Act. None of the available mechanisms within the Act can apply in this particular case, as was accepted by the patient's solicitor."

[4] In the Note of Appeal the appellant states:-

DM

> "A main issue at the hearing was the requirement to reside at Z Care Home. It was stated that the tribunal acknowledged that the appellant was accommodated in a locked facility. She was required to reside there. Z Care Home has a keypad entry/exit system on the main door to which the appellant does not have the code. The appellant was not able to leave the premises unaccompanied. The tribunal confirmed the continuation of the applicant's detention in a locked facility by virtue of a community based Compulsory Treatment Order. They did not consider they had the power to revoke or vary the measures in the order following such a finding. It was submitted that the tribunal had erred in law in making a finding that the appellant be kept in a locked facility. She was essentially detained in a locked facility while under a community based Compulsory Treatment Order. It was submitted that her continued detention went beyond the statutory intervention to which the appellant was subject. It was submitted it was not competent for a community based Compulsory Treatment Order to require the appellant to reside in a locked facility. The appellant could not leave the facility. The tribunal had the power to revoke or vary the Compulsory Treatment Order and they failed to do so. It was said that the tribunal had erred in law, they had acted unreasonably in exercise of the discretion. This was inconsistent with the guiding principle of minimalist intervention."

[5] The appeal hearing before me took place in Airdrie Sheriff Court on 4 September 2012

Submissions for the Appellant

[6] It was pointed out that the appellant, in terms of a Compulsory Treatment Order was required to reside at Z Care Home. This was a locked facility where residents could only leave or return using a keypad. The appellant did not know the code to operate the keypad. It was submitted that she was detained in the care home. Any power of detention, it was submitted, in a Compulsory Treatment Order in terms of the 2003 Act could only be in respect of detention in hospital. It was conceded that a reasonable person, looking at the circumstances of the appellant, would not take issue with the general thrust of her care package. She was clearly a vulnerable individual who

benefited from the nature and type of treatment which she received in Z Care Home. The only matter at issue was the legal basis for her continuing detention in this locked facility. It was accepted that everything was done by the care home in good faith. However there required to be a legal basis for her detention. He acknowledged that the Tribunal were fully satisfied on the evidence that it was appropriate to continue the Compulsory Treatment Order. However they failed to address the fact that the appellant was detained in a locked facility. It was suggested that the Tribunal did not have the power to make a community treatment order with the condition that she reside in Z Care Home. The Tribunal were aware of the restriction that would be placed on her liberty. Solicitor for the appellant stated that she consistently complained about this restriction (although it is proper to point out that the appellant did not answer a call to specify incidents where requests had been refused and there was evidence before the Tribunal that her requests were granted).

[7] It was accepted that the Tribunal was entitled on the evidence to be satisfied that the conditions for making an order set out in section 64(5) of the 2003 Act namely:

> "(a) that the patient has a mental disorder;
> (b) that medical treatment which would be likely to –
> (i). prevent the mental disorder worsening;
> (ii). alleviate any of the symptoms, or effects, of the disorder, is available to the patient.
> (c) that if the patient were not provided with such medical treatment there would be significant risk –
> (i) to the health, safety or welfare of the patient or
> (ii) to the safety of other person.
> (d) that because of the mental disorder the patient's ability to make decisions about the provision of such medical treatment is significantly impaired.
> (e) that the making of a Compulsory Treatment Order in respect of the patient is necessary

(f) where the Tribunal does not consider it necessary for the patient to be detained in hospital, such other conditions as may be specified in regulations."

[8] It was submitted that what was in issue was the Tribunal's consideration of the guiding principles set out in section 1 of the 2003 Act and in particular section 1(3)(g).

"The need to insure that, unless it can be shown that it is justified in the circumstances, the patient is not treated in a way that is less favourable than the way in which a person who is not a patient might be treated in a comparable situation."

[9] It was submitted that it was open to the Tribunal to hold that, notwithstanding that the tests set out in section 64(5) of the 2003 Act had been satisfied, a proper consideration of the guiding principles would have shown the difficulty of continuing this Compulsory Treatment Order. It was an unacceptable restriction to her liberty in the care home. It was incumbent on all public authorities to ensure that an individual's Convention rights were protected. He submitted that failure to give proper weight to the guiding principles, in particular that contained in section 1(3)(g), had resulted in an error in law.

[10] Secondly, it was submitted that the Tribunal had failed to make a recorded matter. I was referred to section 64(4) of the 2003 Act as follows:-

"The Tribunal may –

(a) If satisfied that all the conditions mentioned in subsection 5 below are met, make an order –

...

(ii) specifying such medical treatment, community care services, relevant services, other treatment, care or service as the treatment considers appropriate, any such medical treatment, community care services, relevant services, other treatment, care or service so specified being referred to in this Act as a 'recorded matter'"

I was referred to page 11 of the FFR (full findings and reasons) at page 11:

> "We also considered the patient's solicitor's submission that the more appropriate means of securing the patient's welfare was for us to make a Recorded Matter that Welfare Guardianship in respect of the patient should be applied for. We concluded that we should not.
>
> We did not find that guardianship, which is applied for in terms of the Adults with Incapacity (Scotland) Act 2000, could be 'such medical treatment, community care services, relevant services, other treatment, care or service' as a recorded matter is defined in terms of section 64(4)(a)(ii) of the 2003 Act. Therefore, we found that it was not open to us to require that it be applied for.
>
> Further, even if we had found that such a Recorded Matter was competent, there was no evidence before us in terms of section 58(1) of the 2000 Act of the patient's incapacity in relation to her welfare or of other means to safeguard or promote such welfare to allow such a recorded matter to be considered."

It was submitted that this was a narrow and restricted interpretation of Recorded Matters and was entirely inconsistent with the first principles of social welfare legislation which treatment should be flexible and responsive to an individual's circumstances. It was submitted that the Tribunal had erroneously adopted an over restrictive approach to this recorded matter and had erred in refusing to make a Recorded Matter. They ought to have made a Recorded Matter that a welfare guardianship order should be considered. Such an order could require a person to live in a place and a condition of that would be that the individual would be detained if they sought to leave. It was suggested that this would be a mechanism whereby what was said to be a lacuna in the legislation might be dealt with. It would have been open for the Tribunal to make specific enquiries of the MHO in respect of the advisability of a welfare guardianship order. It was submitted it was not appropriate for a tribunal to take a passive role in an area of law which is organic and dynamic.

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[11] In these circumstances I was asked to hold that there had been an error of law, quash the Tribunal's decision and remit the case to the Tribunal for reconsideration.

Submissions for the Mental Health Tribunal for Scotland

[12] It was pointed out that this was an application in terms of section 100(2) which provides:-

> "Either of the persons mentioned...may...make an application under this section to the Tribunal for an order under section 103 of this Act –
>
> (a) revoking the compulsory treatment order or
> (b) varying that order by modifying –
>
> (i) the measures or
> (ii) any recorded matter specified in it."

At the hearing before the Tribunal the appellant sought to have the order varied in order that it might become hospital based.

[13] I was referred to the evidence of (i) the clinical consultant, (ii) an independent expert, Mr Barrett for the appellant, and (iii) the MHO (the second respondent). They were unanimous in the view that a community based CTO was necessary. Residence in an acute hospital was not necessary. All three witnesses concurred that the existing CTO should continue. There was no evidence from the patient or the named person to contradict that at the Tribunal (as opposed to what was said on behalf of the appellant before me). There was no evidence in support of revoking the CTO and no evidence that any alternative accommodation was appropriate.

DM

[14] The Tribunal's powers were set out in section 103(3) and (4) of the 2003 Act, but the criteria to be considered as to whether the CTO should continue are those set out in section 64(5) which I have recorded in para [7] hereof. In particular on pages 8 and 9 of the FRR the Tribunal set out the basis on which they concluded that the terms of section 64(5) had been obtempered. It is recorded in the FFR that the solicitor for the appellant did not challenge any of that evidence.

[15] It was submitted that, in these circumstances, it was difficult to see on what basis the Tribunal could have revoked or varied the CTO. The evidence of the clinical consultant, the appellant's expert, and the MHO all supported continuation of the CTO. No evidence was led that the CTO should be varied to become hospital based.

[16] It was conceded by the Tribunal that the issue before it was the lawfulness of the patient being required to reside in a locked facility. It was submitted the issue was not whether the facility was locked, but whether the person could be said in law to be being detained.

[17] It was significant that the clinical consultant, in his evidence, initially conceded the patient was not allowed to leave if she wished but, after continuing his cross-examination overnight, the Tribunal record:

> "The clinical consultant was now of the view that Z Care Home was not a locked unit. He had consulted the Mental Welfare Commission to get general information and had spoken to the NHS Central Legal Office as well as the RMO. There were strong reasons for the keypad locking of Z Care Home. There was a need to monitor movement in and out of it. The patient required to be prevented leaving unexpectedly. She had previously left Stobhill Hospital or her own home and placed herself at significant risk. There was also a requirement to monitor visitors at Z Care Home. The patient was known to be liable to exploitation. It was the minimum required for her safety. Z Care Home had fire doors for

> emergencies. Visits to the local area in a safe manner could be facilitated for the patient and visits to her family were arranged fortnightly. If she wanted to leave for a walk, she could request this but she would require to be supervised for reasons of safety. She had free access to the Z Care Home gardens in the summertime...The patient was felt to be unsafe in an assessment carried out on 29 December 2011."

[18] It was submitted there was no evidence from the appellant or the named person that she was being detained. It was conceded that she would only be taken out if a member of staff was available. There was no evidence before the Tribunal that this was a major obstacle. It was submitted that what the Tribunal had done was specify the least restrictive alternative in the circumstances. They imposed the minimum restrictions required for her own safety. There was no evidence of her detention in respect that she would be taken out by a member of staff when she requested. There was no evidence that this did not work satisfactorily in practice. If there was at any time evidence available of her being detained against her will, it was submitted that her remedy lay elsewhere.

[19] The solicitor for the Tribunal then considered the submission which had been made that the Tribunal had failed to make consideration of a welfare guardianship application a recorded matter. I have referred at para [11] to the contents of the FFR in respect of this matter. I was also referred again to the terms of section 64(4)(a)(ii) of the 2003 Act which I have set out at para [10] hereof. I was referred to definitions of "medical treatment" (2003 Act), "community care services" (section 5(a)(iv) of the Social Work (Scotland) Act 1968, "relevant services" (section 19(2) of the Children (Scotland) Act 1995). "Other treatment, care or services the Tribunal considers appropriate" could

not, it was submitted, on any view amount to authority for the proposition that giving consideration to a welfare guardianship application should be a recorded matter. It was submitted that the Tribunal were correct to take that view. Support for that proposition was to be found in the decision of Temporary Sheriff Principal Charles Stoddart in *MP* v *MHTS* dated 7 April 2011 at para 18 he said:

> "A recorded matter is an order specifying that certain treatment or services must be provided as part of a CTO. It is not a mechanism for obtaining reports..."

To that could readily be added that it is not a mechanism to make a recommendation of consideration of a separate application for a welfare guardianship order. It was submitted that the Tribunal was correct not to regard consideration of a welfare guardianship application as a recorded matter.

Submissions for Responsible Medical Officer (the second respondent)

[20] Counsel for the second respondent adopted the arguments put forward by the solicitor for the Tribunal and added some further observations. It was submitted the mere fact that there was a keypad entry system to which the appellant did not have the key did not automatically result in unlawful detention. Even if the appellant was being detained unlawfully, his remedy was in another forum against other respondents. In particular he adopted the submissions which had been made regarding a possible recorded matter. It was submitted that a finding that consideration of an application for a welfare guardianship order should be considered was not competent. In any event there was no evidence regarding it during the Tribunal hearing.

DM

[21] Counsel emphasised that section 1 of the 2003 Act set out the guiding principles to which the Tribunal should have regard. They were not overriding considerations. All that had happened in this case was that the Tribunal had considered the various statutory requirements, assessed the evidence before it and recorded logical and reasoned conclusions. It was submitted there was a distinction between "detention" and "restrictions". It was significant that the clinical consultant had highlighted poor short term memory, became lost if unsupervised, required supervised care on a 24 hour basis. In the clinical consultant's opinion, Z Care Home represented a minimum intervention to maintain the appellant's safety and wellbeing. The appellant's own expert, Mr Barrett, agreed that a community based CTO was appropriate. He eventually appeared to take no issue with Z Care Home, and there was no evidence that any other facility would be more appropriate to the appellant's needs. There had been a measured assessment made by the Tribunal and the conclusions had been reached on a sound basis. There was no error in law.

[22] I was referred to some case law on the distinction between detention on the one hand, and restriction of liberty on the other hand. I was first referred to *Guzzardi* v *Italy* 1981 3 EHRR 333. In particular I was referred to para 92 at page 362:

> "92. The Court recalls that in proclaiming the 'right to liberty', paragraph 1 of article 5 is contemplating the physical liberty of the person; its aim is to insure that no one should be dispossessed of his liberty in an arbitrary fashion. As was pointed out by those appearing before the court, the paragraph is not concerned with mere restrictions and liberty of movement; such restrictions are governed by article 2 of protocol 4 which has not been ratified by Italy. In order to determine whether someone has been "deprived of his liberty" within the meaning of article 5, the starting point must be his concrete situation and account must be

> taken of a range of criteria such as the type, duration, effects and manner of implementation of the measure in question."

I was also referred to para 93 as follows:

> "The difference between deprivation of and restriction upon liberty is nonetheless merely one of degree or intensity, and not one of nature or substance. Although the process of classification into one or other of these categories sometimes proves to be no easy task in that some borderline cases are a matter of pure opinion, the court cannot avoid making the selection upon which the applicability or inapplicability of article 5 depends."

It was submitted that the fact that there was a keypad to which the appellant did not have access did not mean there was unlawful detention.

[23] I was also referred to the case of *Cheshire West and Chester Council* v *P* 2001 EWCA Civ 1257 as follows:-

> "23. Merely being required to live at a particular address…does not, without more, amount to a derivation of liberty. Similarly, restraint must be distinguished from deprivation of liberty. In extreme cases, no doubt, restraint may be so persuasive as to constitute a deprivation of liberty, but restraint by itself is not deprivation of liberty.
>
> 37. There is a further point I should make at this stage. Neither the presence nor the absence of a lock is determinative…
>
> 110. Baker J never compared *P's* situation in the Z house with the kind of life P would have been leading *as someone with his disabilities and difficulties* in what for such a person would be a normal family setting. He never grappled with the question whether the limitations and restrictions on P's life at Z house are anything more than the inevitable corollary of his various disabilities. The truth, surely, is that they are not. Because of his disabilities, P is inherently restricted in the kind of life he can lead. P's life, wherever he may be living, whether at home with his family or in the home of a friend or in somewhere like Z house is, to use Parker J's phrase, dictated by his disabilities and difficulties…"

DMM

It was submitted this was exactly the situation in this case. Just because the appellant, for his own good, was required to reside in a locked facility, this did not mean necessarily there was unlawful detention.

Submissions for the Mental Health Officer

[24] The solicitor for the first appellant adopted the submissions which had been made on behalf of the Mental Health Tribunal for Scotland and the responsible medical officer.

Decision

[25] This appeal falls to be refused. In my opinion the submissions on behalf of the Mental Health Tribunal for Scotland and the responsible medical officer, which I have set out in full, are well founded. In my opinion the overriding purpose of the Mental Health (Care and Treatment) (Scotland) Act 2003 is to provide appropriate care and treatment for persons having a mental disorder. In this case the medical evidence before the Tribunal was to the effect that a hospital based order was not necessary. On the other hand there were strong reasons for the keypad locking system at Z Care Home. There was a need to monitor movement in and out of it. The appellant required to be prevented from leaving unexpectedly. She was a risk to road users and to herself if she left Z Care Home unaccompanied. She required to be prevented from leaving unexpectedly and alone. There was a history of leaving Stobhill Hospital and her own home and she had placed herself at significant risk. There was also a requirement to monitor visitors at Z Care Home. The patient was known to be liable to exploitation. It

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was the minimum required for her safety. Visits to her family were arranged fortnightly. Visits to the local area under supervision in a safe manner were facilitated. If she wanted to leave for a walk, she would request this but would require to be supervised for reasons of safety. There was no evidence that this did not work well in practice. She had free access to the Z Care Home gardens in the summertime. There was no evidence before the Tribunal of any concern about her requiring to wait for a supervised walk because staff members were not available. In any event, such matters must be considered proportionately.

[26] In my opinion it is not appropriate to consider such an arrangement as amounting to legal detention. The Tribunal were entitled to take the view, which they did, that these arrangements at Z Care Home provided the best arrangements possible for appropriate care and treatment for the appellant. There was no evidence before the Tribunal of any other facility which could cater better for the appellant's needs. In these circumstances the first ground of appeal fails.

[27] The other ground of appeal is that the Tribunal erred in not making a Recorded Matter that consideration should have been given to the making of a welfare guardianship order in respect of the appellant. In my opinion the Tribunal dealt with this submission on behalf of the appellant very adequately. I have set out their findings in para [10] hereof. In my opinion the Tribunal were entitled to state: "We do not find that Guardianship, which is applied for in terms of the Adults with Incapacity (Scotland) Act 2000, could be *'such medical treatment, community care services, relevant services, other treatment, care or service'* as a Recorded Matter is defined in terms of section 64(4)(a)(ii) of

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the 2003 Act." The Tribunal was correct to find that it was not open to them to require this should be considered or applied for. This ground of appeal also fails.

[28] In the whole circumstances I have made no order in respect of expenses.