PER-B266-23

OPINION OF THE COURT

Delivered by SHERIFF PRINCIPAL GILLIAN A WADE KC

in the appeal by way of Summary Application Under Section 320(2) of the Mental Health (Care and Treatment) (Scotland) Act 2003

by

[redacted]

APPELLANT

against

A decision of the Mental Health Tribunal for Scotland made on 03 October 2023 and communicated to the Appellant by email dated 04 October 2023

RESPONDENTS

Appellant: [redacted]

Respondent: [redacted] Mental Health Tribunal for Scotland

14 December 2023

[1] The appellant is subject to a Compulsory Treatment Order which was last extended by his Responsible Medical Officer ("RMO") on 19 June 2023. The appellant thereafter appealed to the Mental Health Tribunal for Scotland in terms of Section 99 of the Mental Health (Care and

Treatment) (Scotland) Act 2003 ("the 2003 Act") against the RMO's decision to extend the order. A Tribunal was convened to consider his appeal on 03 October 2023. The Tribunal decided to confirm the determination of the RMO and extended the existing order unvaried. The determination included a number of measures which were to be authorised in terms of the Compulsory Treatment Order. Those measures are to be found on page 5 of the Tribunal's pro forma determination and include measures which are given the following alphabetical references:-

(b) giving the patient medical treatment in accordance with Part 16 of the Act;

(c) requiring the patient to attend on: specified or directed dates; or at specified or directed intervals, specified or directed places with a view to receiving medical treatment (including associated travel where appropriate);

(d) requiring the patient to attend: on specified or directed dates; or at specified or directed intervals, specified or directed places with a view to receiving community care services, relevant services or any treatment care or service (including associated travel where appropriate);

(e) requiring the patient to reside at a specified place, as detailed below;

Thereafter the Tribunal specified [redacted],

(f) requiring the patient to allow any of the following parties to visit the patient in the place where the patient resides. Those parties are:

- The patient's Mental Health Officer ("MHO");
- The patient's RMO;

- Any person responsible for providing medical treatment, community care services, relevant services or any treatment, care or services to the patient who is authorised for this purpose by the patient's RMO.

[2] This appeal related only to the imposition of measure (e) which required the patient to reside at a specified place. During the course of the hearing before the Tribunal and at the hearing before me it was made clear that the RMO and the MHO both gave evidence to the Tribunal that measure (e) was not necessary and that the order did not require to be extended with that measure in place. The summary application states that neither the appellant nor the named person wished that measure to be continued. While it is fair to say that the appellant indicated that he did not wish such a restriction the named person does not appear to have specifically commented on whether the measure remained necessary or not. However it was clear that she fully supported the continuation of the Compulsory Treatment Order in all other material respects.

[3] Before me the appellant argued that having regard to the "Principles for discharging certain functions" contained in Section 1 of the 2003 Act and in particular having regard to Section 1 Subsection 4(c) the Tribunal in discharging its function must do so in a manner which involves the minimum restriction on the freedom of the patient that is necessary in the circumstances.

[4] The appellant argued that the Tribunal had acted unreasonably in the exercise of its discretion when considering which measures were required in respect of the order. It was submitted that the decision which the Tribunal had reached appeared to be based on what may or may not happen in the future in relation to the status of the appointment of a Welfare Guardian and did not address whether the measure represented the least restrictive option or was necessary in all of the circumstances.

[5] In answer to the appeal the solicitor acting for the Mental Health Tribunal for Scotland argued that the decision which the respondents had reached was well within their discretion and was based on the evidence which they had heard at the hearing. The respondents argued that the reasons given by the Tribunal demonstrated that the Tribunal had recognised the need to balance the least restrictive option with the requirement to provide the maximum benefit for the patient. It was submitted that it was necessary for the appellant to live at his current place of residence in order to receive the care he required on a 24 hour basis. The respondents relied on the fact that the powers afforded to the current welfare guardians in terms of the Guardianship Order would expire within the lifetime of the current Compulsory Treatment Order unless a renewal application was lodged timeously and granted by the Court in identical terms to that currently in force. The appellant postulated circumstances in which the welfare guardians for some reason failed to either make such an application timeously or did not seek or otherwise obtain a measure in similar terms. It was submitted that should the appellant abscond from his current place of residence the continuation of power (e) in the Compulsory Treatment Order would allow the appellant to be returned to his current residence using the process outlined in Part 20 of the 2003 Act without the need for the Welfare Guardian to obtain a warrant from the Sheriff Court. It was further submitted that the decision reached by the respondents was a reasonable one within their discretion.

Applicable law

[6] There was no dispute between parties in relation to the procedure which had been adopted in order to review the decision of the Tribunal. Under and in terms of the Mental Health (Care and Treatment) (Scotland) Act 2003 Section 320 the patient, his named person or any Welfare Guardian may appeal against the granting of an order or the refusal of an order but this right of appeal is somewhat restricted by the provisions of Section 324(2). Accordingly in

order to succeed the appellant must establish that the Tribunal has made a legal mistake, that there were irregularities in the hearing, that the Tribunal acted unreasonably in the exercise of its discretion or that the decision could not be justified on the facts established at the Tribunal. The current appeal proceeds on the basis of an unreasonable exercise of discretion and although not articulated as such this necessarily includes a requirement to review the evidence which was before the Tribunal. It was also suggested that the Tribunal erred in law insofar as they failed to take account of the overarching principle requiring the least restrictive measure to be imposed.

[7] The powers open to the Court are contained in Section 324(5) and include the power to set aside the decision and substitute its own decision or to remit the matter back to a differently constituted Tribunal for reconsideration.

Decision

[8] This appeal involves consideration of the complex relationship between the Adults with Incapacity (Scotland) Act 2000 ("the 2000 Act") and the Mental Health (Care and Treatment) (Scotland) Act 2003. The thresholds imposed by the two Acts are not exclusive. A person can be subject to the provisions of one or both pieces of legislation at the same time but it is important to understand that just because someone is subject to compulsory measures under the 2003 Act it does not mean he or she is automatically incapable of taking other decisions and vice versa. The 2003 Act is designed to provide protection where a person has impaired ability to make decisions about their mental health treatment. The person who is the subject of discussion is designed as "the patient". The 2000 Act on the other hand recognises that there may be situations in which a person with or without a mental disorder for the purposes of the 2003 Act may , for various reasons lack capacity to deal with their affairs to a limited or greater extent. Inevitably the same people may well be subject to both processes. In this case the patient's

mother is both the named person in terms of the 2003 Act and the Welfare Guardian (or one of them) in terms of 2000 Act. Although the same person is involved it is important that they recognise their role and a demarcation is made between the various statutory positions held by the party for the purposes of the different legislation. For example while a Welfare Guardian can and often does take part in proceedings before the Mental Health Tribunal the Welfare Guardian does not have any role in approving medical treatment given under Part 16 of the 2003 Act. Where, as here an adult is unable to take a decision or is unable to protect or promote his or her interests procedures under the 2000 Act are usually appropriate. Where the guardianship order authorises treatment for a mental disorder and the person does not resist or object to the care or treatment then further measures under the Mental Health (Care and Treatment) Act 2003 are not necessary. It should be noted that an order is not "necessary" if the Adults with Incapacity Act 2000 can provide a less restrictive alternative.

[9] In this case there is no doubt that the adult or patient does not agree to the treatment which is being suggested for him. He does not consider that he requires to be subject to a Compulsory Treatment Order or that his decision making is impaired. Accordingly the majority of the measures sought in terms of the Compulsory Treatment Order are clearly required in order to protect him. It is clear that each case will turn on its own facts and circumstances and a decision will require to be taken as to whether to invoke the powers of the 2003 Act or not.

[10] In this particular case the Tribunal heard evidence from the RMO, the MHO and the named person as well as the patient himself. As has been alluded to the patient does not dispute that he has a mental disorder which requires treatment but he does not consider that his decision making ability is significantly impaired or that any order is necessary. He made clear in evidence that if he was not subject to an order he would move from his current address although he appreciated that he would need support to do so and would cooperate with that.

[11] The evidence of the RMO and MHO is recorded at paragraphs 12 and 13 of the Tribunals' decision. While both officers agreed that the Compulsory Treatment Order was necessary and acknowledged that it was also necessary for the patient to reside at his current address they considered that measure (e) was no necessary in the context of the Compulsory Treatment Order because the welfare guardians could specify the appellant's place of residence and that would represent a less restrictive option.

[12] The Tribunal then heard evidence from the named person. In relation to this particular issue she confirmed that she considered the Compulsory Treatment Order to be necessary. She pointed out that it had taken her six years to secure a place at the patient's current residence and this had been of great benefit to him. She made clear that the Welfare Guardianship Order would be renewed in due course. It was due to expire in May 2024. She made clear that not only would a renewal be sought but there would also be a variation of the powers included to restrict and monitor the adult's online and information technology activities in order to ensure his safety. The named person, who is of course one of the welfare guardians, confirmed that she had already instructed her solicitor to proceed with the renewal and variation of the Welfare Guardianship Order. That in my opinion was important evidence which was not challenged.

[13] On specific questioning the parties agreed that while the named person had not specifically addressed the requirement for measure (e) both the MHO and the RMO, who arguably had a fuller understanding of the legislative framework, had indicated that the measure was unnecessary. The only discussion and available evidence in relation to the renewal of the welfare guardianship powers confirmed that the requirement to regulate the adult's residence would be renewed in due course. There was therefore no evidence before the Tribunal to the effect that a duplication of the existing measure was necessary or indeed desirable.

[14] The Tribunal found the RMO, the MHO and the named person to provide reliable and credible evidence of the patient's need to be subject to what they describe as a community CTO. It is important to note that the care provided is not provided in a hospital environment and is instead provided by a funded place in a local authority resource. The Tribunal quite properly assessed the requirement for a Compulsory Treatment Order against the criteria in the Act and assessed that the patient has a mental disorder which requires care and treatment. They concluded that the patient lacked insight into the extent of the care and treatment which he required and posed a significant risk to himself and others if he were not the subject of a Compulsory Treatment Order. The Tribunal also concluded that it was not satisfied that he would comply with the requirements of his RMO on a voluntary basis and considered it necessary to extend the Compulsory Treatment Order and confirm the RMO's determination. No issue is taken with that aspect of their decision. At paragraph 23 of their decision the Tribunal explained its reasons for reinstating measure (e). The Tribunal states that there was very strong evidence that the patient requires to live in his current residence or somewhere equally safe for him. That is undoubtedly the case. The Tribunal goes on to recognise that the RMO and the MHO gave evidence that this requirement could be assured by the Welfare Guardian's power to specify the patient's residence and that that would be a less restrictive option. However the Tribunal then appear to have extrapolated from that reasoning that as a) the Welfare Guardianship Order was out with its control and b) that order would fall in May 2024, there could arise a situation where the application to renew the Guardianship Order was not made timeously or might not be granted. Accordingly the Tribunal considered it necessary for measure (e) to be duplicated in the Compulsory Treatment Order in what may be described as a "belt and braces" approach. In my opinion they were wrong to do so. As a matter of law the Tribunal is required to adopt the least restrictive measure and there is no justification for a

duplication based on speculation as to what the Welfare Guardian may or may not do. The evidence before the Tribunal was clear. The Welfare Guardian who was also the named person had already taken steps to instruct a solicitor to apply for a renewal of the existing order with increased powers as and when it was appropriate to make that application on expiry of the existing order. There was no basis in the evidence upon which the Tribunal could draw an inference that the renewal application would not be lodged or indeed granted. Furthermore there was no evidence that the adult had ever attempted to abscond from the accommodation or that he would do so in the future. On the contrary he seemed more inclined to wish to please his mother by doing what she wanted. Absent any additional evidence which would support the requirement for duplication of the existing powers vested in the welfare guardians it appears to me that the power which the Mental Health Tribunal sought to impose is unnecessary in the circumstances of this case.

[15] I have given consideration to what I consider to be the respondent's best point that being the ability to invoke Part 20 of the 2003 Act should the appellant abscond obviating the requirement for the Welfare Guardian to obtain a warrant from the Sheriff Court. However there was no evidence before me to support any conclusion that the appellant would abscond. On the contrary the evidence provided for the purposes of this appeal by the MHO was to the opposite effect. In her additional statement she specifically addresses the reasons for her assessment that measure (e) remains unnecessary and is overly restrictive. In addition to pointing out that the welfare guardians have the appropriate power to decide where the appellant should live and to require him to reside in a particular place of residence she also points out that the current placement is funded by [redacted] Council who are responsible for reviewing this on a regular basis to ensure that the placement continues to meet the appellant's needs. In any event she observes that the appellant does not have the ability to independently

move on his own accord, without appropriate support from his welfare guardians and any future moves would require further assessment and funding by social work. The question of the appellant's residence is therefore predominantly a social work matter and decisions in that regard are taken by the welfare guardians on behalf of the adult who lacks capacity to do so. The MHO has confirmed that the mental health team received a request on 27 October 2023 to compile a report for the variation and renewal of the private guardianship in respect of the appellant. She is well aware that this is due to expire on 15 May 2024. She has further confirmed that a colleague has been appointed to progress this matter. Accordingly there is no basis in the evidence to suggest that the application will not be appropriately renewed as and when the time arises.

[16] There will always be areas of overlap where a patient with a mental disorder also lacks capacity to make day to day decisions regarding finance, residence and the like. In my view it is appropriate that the appellant's residence is governed by the powers contained in the guardianship order as the residence requirement is not restricted to the provision of medical care. The accommodation in which he resides is his home. It is appropriate for his needs at present given that it affords him 24 hour care. If however he were to require hospitalisation that would not be a matter with which the welfare guardians could deal without recourse to the 2003 Act and accordingly the RMO would require to apply for a variation of the existing order if the patient were to be treated in a hospital setting.

[17] I was reminded that it is the duty of the RMO to continually review the measures to ensure that they remain appropriate and are not unduly restrictive. In the event that the RMO were to form the view that residence in a particular place should be covered by the measures in the Compulsory Treatment Order he could make the appropriate application at that stage. That

is an additional safeguard which renders the duplication of the power to specify where the patient/adult resides unnecessary.

[18] In all the circumstances I am satisfied that in this case the Tribunal's decision was not a reasonable exercise of their discretion in that it flew in the face of the evidence to the effect that it was not necessary and was unduly restrictive. It is my view that the Tribunal erred in law in failing to adhere to the principles contained in Section 1 of the 2003 Act requiring that the least restrictive measure be adopted.

[19] Accordingly I shall allow the appeal and on the basis that I have sufficient evidence before me I shall simply set aside the decision of the Tribunal dated 03 October 2023 and substitute a decision of this Court reinstating the Compulsory Treatment Order on the same terms and conditions including measures (b), (c), (d) and (f) but excluding measure (e). In respect that the appellant is legally aided I shall find no expenses due to or by either party.

Sheriff Principal of Tayside, Central and Fife