SHERIFFDOM OF SOUTH STRATHCLYDE DUMFRIES AND GALLOWAY

AT AIRDRIE

B567/10

JUDGEMENT

by

TEMPORARY SHERIFF PRINCIPAL
CHARLES NORMAN STODDART

in appeal in the cause

M. P. (born 30 December 1946)

APPELLANT

against

J. L.

FIRST RESPONDENT

DR T.H.

SECOND RESPONDENT

MENTAL HEALTH TRIBUNAL FOR SCOTLAND,
Bothwell House, First Floor, Hamilton Business Park,
Caird Park, Hamilton ML3 0QA

THIRD RESPONDENTS

Act: Mr A. L McLaughlin, Solicitor

Alt: (1) Ms K Briggs, Solicitor

(2) Mr A MacSporran, Advocate, instructed by Central Legal Office, National Services Scotland, Edinburgh

(3) Mr R Hunter, Solicitor, Mental Health Tribunal for Scotland, Hamilton

AIRDRIE: 7 April 2011.

The Sheriff Principal, having resumed consideration, ADHERES to the decision of the Mental Health Tribunal for Scotland dated 25 October 2010; REFUSES the appeal; FINDS the Appellant liable as an assisted person to each Respondent in the expenses of the appeal; MODIFIES to nil her personal liability for said expenses, all in terms of section 18(2) of the Legal Aid (Scotland) Act 1986.

Charles Stoddart

NOTE:

Introduction

[1] Since 2006 the Appellant M. P. has been the subject of a Compulsory Treatment Order ("CTO") under the provisions of the Mental Health (Care and Treatment) (Scotland) Act 2003 ("the 2003 Act") and is currently detained in hospital. On 29 September 2010 she applied to Mental Health Tribunal for Scotland ("the Tribunal") to vary the order under section 100 of the 2003 Act so that it would thereafter be one which was community-based. But instead at the hearing of her application, her solicitor moved the Tribunal to revoke the order completely, or alternatively to include in the CTO a recorded matter in terms of section 100(2) (b) (ii) of the 2003 Act.

[2] The definition of a recorded matter is to be found in section 64(4) of the 2003 Act which provides (in part):

> "(4) The Tribunal may
>
> (a) if satisfied that all of 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 Tribunal considers appropriate....."

Subsection (5) sets out a series of conditions for making a recorded matter, but no issue turned on any of them. Suffice it to say at this point that (i) at the time the application under section 100 was made by the Appellant, no recorded matter had been specified in the CTO and (ii) at the hearing before the Tribunal all that was requested (in the event that the Tribunal refused to revoke the CTO) was a recorded matter requiring:

> "up-to-date reports from occupational therapy, social work, housing and the Responsible Medical Officer as to what progress had been achieved in advancing the patient's care pathway towards a community placement".

Accordingly, the Appellant was not seeking an order for any kind of treatment or other intervention, but merely an order for the preparation of a series of progress reports.

[3] In the event, the Tribunal decided on 25 October 2010 neither to revoke the CTO, nor to make any recorded matter. The Appellant now seeks (i) to have that decision set aside and (ii) an order remitting her case to the Tribunal for consideration afresh, all in terms of section 324(5) of the 2003 Act. A Summary Application was lodged on her behalf; Answers were lodged by the Mental Health Officer ("MHO"), the Responsible Medical Officer ("RMO") and the Tribunal itself; and the whole matter came before me on 24 February 2011. At the hearing of the appeal, the submissions of the parties were restricted to the Tribunal's decision not to make a recorded matter. Only two issues were argued: whether the Tribunal had erred in law and whether its decision represented a misuse of discretion.

[4] At the commencement of the hearing I allowed the Summary Application to be adjusted by the deletion of the first sentence in the original Article 6 of Condescendence, which did not make grammatical sense; but I refused to allow the addition of a plea-in-law directed to an allegation of procedural impropriety on the part of the Tribunal, on the basis that there was no averments in the application to support such a plea. Finally, I allowed the Appellant to lodge at the Bar an additional production, being a Report by the Recorded Matters Working Group of the Tribunal, dated September 2009 and which was publicly available on the website of the Royal College of Psychiatrists (" the Working Group Report").

Arguments for Appellant

(i) Error of law

[5] Mr McLaughlin for the Appellant submitted that the Tribunal had failed to understand the true nature of a recorded matter and had failed critically to examine the benefit to the patient in making one. Indeed, the concept of a recorded matter was generally misunderstood; there was scant guidance as to when such a matter should be prescribed and no case law on when doing so would be "appropriate" in terms of section 64(4) of the 2003 Act. This uncertainty was evident from pages 5 and 6 of the Working Group Report.

[6] The statutory definition of a "recorded matter" was (said Mr McLaughlin) very broad and more expansive than "medical treatment" or "services". He submitted that the making of a recorded matter was an opportunity for the Tribunal to add value to a CTO. It would include the addition of something to a care package which otherwise might be lacking or constitute an acknowledgement that there had been a failure in a care package. Specifying a recorded matter had the potential to improve a patient's care. At the Tribunal hearing an order for updated reports had been requested because no formal assessment of the patient's needs had been carried out: see para. 7 of the Tribunal's Full Findings and Reasons. Apparently, this was now being opposed because what was requested was not within the statutory definition of a "recorded matter". The qualities of recorded matters were set out on page 6 of the Working Group Report; there it was said that they should be directly concerned with the individual' patient's care and treatment; they should be defined in operational terms; they should be specific, measurable and achievable; and they should have a realistic time-scale attached to them. Accordingly, a Tribunal should not make an arbitrary order but instead one which was practical in every respect. In the present case, all the conditions set out in section 64(5) of the 2003 Act for making a recorded matter were met. According to the Working Group Report at page 2, recorded matters were to be made applying the principle of reciprocity which underpinned much of the 2003 Act; it was surprising that in their Answers, the Tribunal did not accept that recorded matters rested on this principle.

[7] I should record that at this point in his submissions Mr McLaughlin sought to introduce arguments about procedural impropriety based on the adequacy of the reasons given by the Tribunal

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for its decision. This was objected to by the other parties to the appeal on the basis that I had already refused to allow the addition of a plea-in-law for the Appellant raising this point, due to a lack of any supporting averments. I held that the objection was well-merited and refused to allow this line to be pursued.

[8] Reverting to the matter of error of law, Mr McLaughlin referred to the passage at paragraph 12 of the Tribunal's Full Findings and Reasons where the Tribunal recorded that as well as being satisfied that it was neither necessary nor appropriate to make a recorded matter, it was satisfied that the RMO had discharged his various ongoing statutory duties to consider whether the criteria for a CTO continued to exist or whether it should be revoked or varied.. But this (said Mr McLaughlin) was not the correct question. The Tribunal had equated the making of a recorded matter with criticism of a care team. This was legally incorrect; the power to make a recorded matter was entirely separate. The judgements by the RMO were (in effect) the subject-matter of this appeal. The passage quoted disclosed a surrender of the Tribunal's jurisdiction. The Tribunal was an independent judicial body that could not delegate its decision-making responsibility to others; there had to be a critical assessment of the position.

(ii) Misuse of discretion

[9] On this point Mr McLaughlin accepted under reference to *G v G* [1985] 1 WLR 647 that a high test applied and that he had to satisfy me that the decision of the Tribunal was so plainly wrong that the only legitimate conclusion was that the Tribunal had erred in the exercise of its discretion. Here, in assessing the arguments, the Tribunal had failed to comment on and weigh in the balance each proposition. It had noted that that there been no formal assessment of the Appellant's needs had been made and yet no account had been taken by the Tribunal of the benefit to the patient in having updated reports. The test in *G v G* had accordingly been met. No reasonable decision making body should have come to its decision without weighing up the arguments in favour of getting reports.

[10] Mr McLaughlin concluded by inviting me to sustain both pleas in law for the Appellant and to remit the case to a differently-constituted Tribunal for consideration of the matter afresh. In so doing, I could provide helpful clarity as to the general utility of recorded matters.

Arguments for Respondents

(i) Error of law

[11] The Respondents agreed that Mr Hunter on behalf of the Tribunal would present (in opposition to the appeal) the principal arguments for all of them, to which his two colleagues later added only brief comments. Mr Hunter began by rehearsing the statutory provisions and then, focusing on what the Appellant had sought before the Tribunal by way of recorded matters, submitted that on a proper analysis of section 64(4)(a)(ii) of the 2003 Act what had been sought could not competently have been granted. What the statutory definition encompassed was not a series of reports but an order for specific treatment or services. A report or combination of reports did not amount to a recorded matter. The Tribunal derived its powers only from the provisions of the 2003 Act, which said nothing about "adding value" to a patient's care plan.

[12] But, said Mr Hunter, even if what was requested before the Tribunal did constitute a recorded matter, the Tribunal had made no error of law. The Tribunal was bound by section 64(4)(a)(ii) of the 2003 Act to consider whether what was requested was "appropriate". It had explicitly recorded at paragraph 12 of its Full Findings and Reasons it had the power to make a recorded matter but it had declined to do so. What the Appellant had been doing was really a fishing exercise. She should herself have obtained such reports as were necessary, funded either by legal aid or personally and then, having considered those reports, sought revocation or modification of the CPO under section 100 of the 2003 Act, deploying those reports for those purposes. Instead she had made a section 100 application not supported by any such reports and had then sought revocation or modification.

[13] Mr Hunter then submitted that there was nothing in the Tribunal's reasoning to demonstrate any error of law. In Article 7 of Condescendence the Appellant averred that the Tribunal used as the basis for not making a recorded matter the duty of the RMO under section 80 of the 2003 Act to satisfy himself from time to time that the criteria for a CTO continued to exist, but this did not amount to an error of law and was not a fair and reasonable reading of paragraph 12 of the Tribunal's reasoning. What had happened was that having refused to make a recorded matter, the Tribunal had then observed that "in any event" this duty existed. The Tribunal had held that the patient required treatment in a highly structured setting; it was not in question that she would need very significant support; that she was not yet capable of living in the community; and that no formal assessment of

her needs had yet been carried out. In these circumstances no purpose would have been served by obtaining up-to-date reports in assessing what progress was being made. The threshold for moving the patient had not been reached.

[14] Further, there were no averments in the Summary Application about any submissions to the Tribunal by the Appellant having been made and disregarded. As for the suggestion that the Tribunal had failed to analyse the potential benefit to the patient of the reports requested, there was nothing in the submissions to the Tribunal to show that they had been asked to do so. If this was the Appellant's case, evidence should have been produced as a foundation for her submissions. A recorded matter was not a mechanism for obtaining a final decision on care or services; rather, it was a decision in its own right. If a recorded matter had been granted in the terms requested, then there would have been no clarity as to what would happen next, who would take what action and within what period of time. There had been no submission to the Tribunal as to why reports were requested or what benefit they might have; and to say, as the Appellant averred in Article 5 of Condescendence, that updated reports would "....document in full the current status of the Appellant's care pathway towards community care" was meaningless.

(ii) Misuse of discretion

[15] Here, the submission by Mr Hunter was that the Tribunal's decision was not "plainly wrong"; the test in *G v G*, above, was not met. It was difficult to see what more the Tribunal could have said, beyond saying that a recorded matter was not appropriate. No harm had been done in noting the duties of the RMO; it was clear that the patient was not yet capable of living in the community. As for the Working Group Report, this contained the views of the group and did not constitute guidance. What was important was interpretation of the statutory provisions.

(iii) Additional matters

[16] In brief additional submissions, Ms Briggs for the MHO observed that the Tribunal had expressly stated that they had listened to all the evidence and the submissions and were aware of the position of all parties. They had accepted the evidence of the RMO and the MHO. They had refused to revoke or vary the CTO. Mr MacSporran for the RMO noted that the Tribunal's finding that the patient was not yet capable of living in the community was not mentioned in the Appellant's

pleadings, nor had it been mentioned in argument. It was wholly wrong for the Appellant to elevate the fact that there had been no formal assessment of the patient's needs into the statement in Article 7 of Condescendence that the Tribunal had failed to discharge their functions to document acknowledged shortcomings in the Appellant's care pathway. The context for the decision to decline to make a recorded matter was fully set out in paragraph 12 of the Tribunal's reasoning, where the factual circumstances taken into account were set out There had been no evidence produced in support of the application for a recorded matter. It was significant that the RMO had not supported the patient's application, nor had he used his power under the 2003 Act to refer the CTO to the Tribunal for possible variation.

Reply by Appellant

[17] By way of reply, Mr McLaughlin sought to persuade me that the decision of the Tribunal was not as clear as had been suggested and to construe the definition of a recorded matter much more broadly. "Medical treatment" included "medical care" and the completion of reports was a "care service" to the patient. He submitted that recorded matters were an efficient means of dealing with issues of care; they avoided multiple hearings and adjournments. The patient's wishes had not been properly considered. The Tribunal had not been asked whether the RMO had been carrying out his duties but it appeared that the fact that he had done so contributed to its decision not to make a recorded matter.

Decision

[18] I have no doubt that this appeal must be refused. While nothing turned on the conditions set out in section 64(5) of the 2003 Act for making a recorded matter, what the Appellant sought before the Tribunal was not a recorded matter in terms of the statutory definition in section 64(4)(ii). 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. The Appellant did not ask the Tribunal to order any form of treatment or services within the statutory definition of a recorded matter and I decline to read that definition any more broadly that its plain terms permit. If the Tribunal had acceded to the request made by the Appellant, it would have erred in law. Accordingly and quite separately from questions of appropriateness and use of discretion, it would have been incompetent for the Tribunal to have acceded to the request in the terms made by the Appellant.

[19] But even if it had been competent for the Tribunal to make a recorded matter which consisted solely in the obtaining of a series of reports, I can detect nothing amounting to an error of law in the Tribunal's decision not to do so. For the reasons advanced by Mr Hunter and his colleagues for the Respondents, the Tribunal understood and applied the law correctly. On a fair reading of its decision, it clearly reached the view that the Appellant presently required treatment in a highly structured setting with significant support and that she was not yet capable of living in the community. In these circumstances I fail to see how the obtaining of a series of reports showing what progress had been achieved in advancing the patient's care pathway to a community placement would have assisted. The Tribunal was not being asked to vary the CTO to one which was community based; and in any event there appears to have been no suggestion to the Tribunal (nor was there to me) as to what anyone was to do with any reports that might be obtained, or what benefit to the patient the mere obtaining of reports would have brought.

[21] The Tribunal reached the view that the making of a recorded matter was not appropriate. Since no specific forms of treatment or services were sought by the Appellant, the Tribunal were simply not able to hold that it was appropriate to order any. It could only proceed in the context of an application by the patient to modify an existing CPO by inserting a recorded matter where none was previously specified; and where what was sought was not within the definition of a recorded matter, it was not just incompetent to make one in the terms suggested, it could never be appropriate to do so.

[22] Nor is there any basis for suggesting that the Tribunal ought to have documented "...acknowledged shortcomings in the Appellant's care pathway.". There are no averments about what those alleged shortcomings were, nor any indication of how or by whom they were acknowledged, nor was any of this made clear to me. Crucially, there was no evidential basis for the submission that a recorded matter was appropriate. In my view there is considerable force in Mr Hunter's submission that the Appellant was indulging in a "fishing exercise", rather than one soundly based in fact and in law.

[23] Finally on the allegation of misuse of discretion, I am quite satisfied that the well-known test to be applied by an appellate court and which is set out in *G v G* has not been met. The decision reached by the Tribunal was one which was within its discretion to reach; it was not "plainly wrong". No question of procedural irregularity arises, for the reasons I have explained; and I do not accept that

the Tribunal failed properly to address the issues put before them, nor to carry out the balancing exercise.

Disposal

[24] For these reasons, the appeal will be refused. It will be observed from the foregoing that I have declined to give any general guidance on when and in what circumstances a recorded matter might be made. I do not see this as my function, which is simply to decide the issues raised in the particular circumstances of any appeal brought before me.

Expenses

[25] It was agreed that in the event that the appeal came to be refused, the Appellant should be found liable to the Respondents in expenses and, in view of the fact that she is legally-aided, her personal liability for those expenses should be modified to nil. I have so ordered.