SHERIFFDOM OF GRAMPIAN, HIGHLAND and ISLANDS AT INVERNESS

B169/14

JUDGMENT

by

SHERIFF PRINCIPAL DEREK C W PYLE

in the Appeal by

AK, currently residing at [illegible] Ward, New Craigs Hospital, Inverness

<u>Appellant</u>

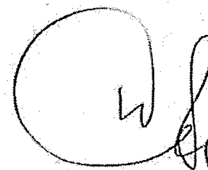
against a decision of

THE MENTAL HEALTH TRIBUNAL FOR SCOTLAND

<u>Respondents</u>

Inverness, 29 January 2015

The Sheriff Principal, having resumed consideration of the cause, Refuses the appeal; Adheres to the order of the Tribunal; finds no expenses due to or by either party.



Introduction

[1] This is an appeal against a decision of the Mental Health Tribunal for Scotland ("the Tribunal") under Section 320 of the Mental Health (Care and Treatment) (Scotland) Act 2003.

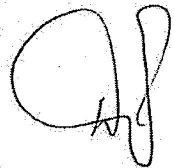
[2] The appellant was detained on 24 April 2014 within New Craigs Hospital, Inverness, under a compulsory treatment order in terms of Section 66(1)(a) and (b) of the Act. On 20 May 2014 a warrant for her removal to GGZ Hospital Friesland, Franeker, Netherlands, was authorised by the Scottish Ministers in terms of Section 290(1)(b) of the Act and Regulation 10 of the Mental Health (Cross border transfer: patients subject to detention requirement or otherwise in hospital) (Scotland) Regulations 2005 (SI 467: 2005), the effective date of renewal being the date of authorisation.

[3] The appellant appealed to the Tribunal against that decision on the grounds that, first, the treatment she receives in Scotland will be less restrictive than the equivalent treatment in the Netherlands, and, secondly, she wishes to reside in Scotland, she having no family connections in the Netherlands.

[4] The first hearing of the Tribunal took place on 13 June 2014 but was adjourned to allow attendance by the appellant's responsible medical officer ("RMO") and for him to provide a report regarding the care arrangements for the appellant in the event of her transfer to the Netherlands. A further hearing of the Tribunal took place on 10 July 2014.

Decision of the Tribunal

[5] In the event no such report was produced. The Tribunal decided that the issue of the appellant's detailed care and treatment was only one element of the regulatory requirements to be taken into account and that it might be impossible to obtain such information in the Dutch hospital because of its lack of co-operation. After hearing evidence and considering the written information before it, the Tribunal decided that the appellant's treating consultant in the Dutch hospital was prepared to accept her as a patient and that the medical treatment was corresponding or similar to that which she was receiving in Inverness. The Tribunal noted the appellant's concern that the care and treatment in the Netherlands would be more restrictive but concluded that the particular matters she raised would not be treated differently in Inverness. The Tribunal took into account the appellant's preference that she remain in the UK, but considered that it was clearly in her best interests that she be transferred to the Netherlands where she could have a period of stability and planning for future rehabilitation which, largely for financial reasons, cannot take place in the UK. Accommodation and financial support would be available to her on discharge from the Dutch hospital. There was no satisfactory evidence that she would be at risk if she were to go there, but there was clear evidence of significant risk to her safety were she to remain in the UK and be untreated as was her wish. The appeal was therefore refused.

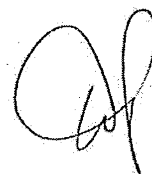


Grounds of Appeal

[6] I deal with each ground of appeal in turn.

[7] The first ground was that the Tribunal erred in law by failing to apply the correct test in order to satisfy itself of the existence in the Dutch hospital of arrangements which would secure for the appellant measures, treatment, care and services corresponding or similar to those to which the appellant is subject or is receiving in terms of the Act, all in terms of Regulation 8(2)(b)(i) of the 2005 Regulations. At the hearing on 13 June the Tribunal made an order that the RMO or Clinical Director of New Craigs Hospital was to provide a written report detailing the proposed care arrangements for the transfer. By the time of the second hearing the appellant's RMO had changed. She submitted a report which addressed only the physical arrangements for undertaking the transfer and not the care regime which it was proposed she would receive in the Dutch hospital. The Tribunal also had before it a social circumstances report, a letter from the Dutch hospital, a number of web pages from the hospital's web site and the application for the warrant by Dr Thomson. The Tribunal went on to find in fact that the appellant "has been accepted by her psychiatrist Dr Noort for treatment in GGZ Friesland. She will be admitted as an in-patient and will receive care and treatment corresponding or similar to that which she is currently receiving".

[8] Counsel for the appellant submitted that the Tribunal had erred. It was bound to take account of relevant and material considerations and not to take into account irrelevant ones. It also required to establish a proper basis in fact to support any factual conclusion it reached. (*Wordie Property Co Ltd v Secretary of State for Scotland* 1984 SLT 345, per Lord President Emslie at p 347; Clyde and Edwards, *Judicial Review*, para 14.08) The Tribunal erred in concluding that it had evidence before it to make the above finding in fact. It took into account irrelevant considerations. It wrongly took into account a letter from Dr Noort (dated 29 July 1999) setting out the medication which the appellant was then receiving. It

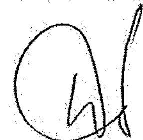


should not have attached weight to the letter of 28 March 2014 from Dr Noort as an explanation of any proposed treatment. It should not have attached any weight to the web pages which were only of a general nature. It erred in not taking into account a statement in the social circumstances report, based upon the Dutch Consulate web site, that the Netherlands would not accept the repatriation of patients with severe mental health problems against their will. It failed to take into account whether any consent would be required from the Dutch government for the repatriation of the appellant. While the Tribunal was not bound by the direction in the earlier tribunal's decision, it should not have proceeded without obtaining detailed information setting out the proposed care arrangements. In the absence of the information as sought by the previous tribunal, the Tribunal could not reasonably have made the finding in fact. (*Eumon v Dalzeil & Co* 1912 SC 966; Clyde and Edwards, op cit, para 22.32) It therefore followed that it could not reasonably conclude that the granting of the warrant was in the appellant's best interests. (Regulation 8(1)(2)(a))

[9] In response, the solicitor for the Tribunal invited me to reject these criticisms of the Tribunal's findings and reasoning. The letter dated 29 July 1999 was not from Dr Noort but was from a Dr Van der Werf. The Tribunal did not expressly refer to it in its decision. The letter was however evidence of the treatment which the appellant had previously received while in the Dutch hospital. Dr Noort's letter of 28 March 2014 provided evidence that the appellant would be accepted for further treatment. It made it clear that the appellant was known to Dr Noort and the hospital. The Tribunal was entitled to have regard to the hospital web site and to attach what weight it thought appropriate to its contents. It was also entitled to take into account the oral evidence of the RMO and the Mental Health Officer, as

well as the documentary evidence of the treatment and measures which would be available in the Dutch hospital. The possibility of the Dutch government not allowing the appellant to be repatriated was solely based upon a comment in the social circumstances report. That the Tribunal had not expressly referred to it in its decision does not mean that it did not take it into account. (*Moray Council v Scottish Ministers* [2006] CSIH 41) It was not argued before the Tribunal that it would be unlawful for it to repatriate the appellant. The Scottish Ministers in granting the warrant required to be satisfied that any consent required in the country or territory to which it was proposed that a patient be removed had been obtained. (Regulation 10(2)) Dr Noort in her letter of 28 March 2014 said that she would accept the appellant for treatment. The Tribunal did not require to look behind the grant of the warrant. The decision of the previous tribunal was not binding upon the Tribunal. As a specialist tribunal it was entitled to use its own expertise in assessing the evidence before it.

[10] In my opinion, this ground of appeal fails. The role of an appellate court in reviewing the decision of a tribunal or a court below is a restricted one. (*G V G (Minors: Custody Appeal)* [1985] 1 WLR 647; *Britton v Central Regional Council* 1986 SLT 207) That is particularly so for specialist tribunals of which the Tribunal is one. (*Scottish Ministers v Mental Health Tribunal for Scotland (JK)* 2009 SC 398; *AH (Sudan) v Secretary of State for the Home Department* [2008] 1AC 678.) There is, in my view, a proper evidential basis for the Tribunal's finding in fact and it has provided adequate reasons for its decision. (*Wordie Property Co Ltd v Secretary of State for Scotland; Meek v City of Birmingham District Council* 1987 WL 492248; *Uprichard v Scottish Ministers* 2012 SC 172; *JC (As Legal Guardian of AM) v A Decision of the Additional Support Needs Tribunals for Scotland* 2012 GWD 33-669; *G v Scottish Ministers* 2014 SC [UKSC] 84) Looking broadly at the evidence before the Tribunal, and bearing in mind its own



expertise in matters of mental health and treatment, it is clear that the Dutch hospital was willing to take the appellant as a patient – see the letter of 28 March 2014 from Dr Noort. That remained the position as at 29 April 2014, per the RMO's request for transfer form (p 3). Indeed, both documents merely officially confirm the understanding of the appellant's family, specifically her nephew, as described in the Mental Health Officer's social circumstances report (at p 3) and to which she spoke in evidence before the Tribunal. It would obviously have been preferable that the full report as ordered by the earlier tribunal had been available, but it was clear from the evidence before the Tribunal that the Dutch hospital could offer the same care as the appellant was receiving in Inverness. This is confirmed by the social circumstances report in which is it stated that the drug which she was currently being prescribed in Inverness had also been prescribed to her in the Dutch hospital (at p 4). In the next paragraph there is a reference to the opinion of Dr Thomson, the Clinical Director at New Craigs, that he had spoken directly to Dr Noort who has "indicated that she would be willing to continue [the appellant's] treatment", from which one can reasonably surmise that it will, subject of course to continuing medical assessment, be the same treatment. The fact that she has in the past been a patient in the Dutch hospital was clearly a matter which the Tribunal was entitled to take into account. There is no suggestion that the psychiatrists in the Netherlands and Scotland disagree about her diagnosis. Counsel for the appellant sought to draw a distinction between the dosages of medication in 1999 and 2014, but nothing was made of that before the Tribunal and, even if it were an important clinical distinction, the tribunal was better placed than a court to determine its significance. Nor do I find any force in the objection about potential problems over repatriation. That was not a point raised before the Tribunal, was in any event a matter for the Scottish Ministers and, when one looks at the derivation of it, being contained in the social circumstances

report, it is clear that the Mental Health Officer was merely drawing attention to some very broad information she had discovered on a web site. If that was the significant issue which counsel now presents it as, I would have expected him to provide much more clarity of the current attitude of the Dutch government. He did not so do.

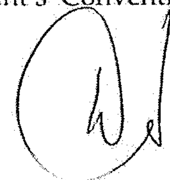
[11] The second ground of appeal was that under reference to Article 8 of the European Convention on Human Rights the decision of the Tribunal did not determine whether refusing to uphold the warrant was a proportionate act (*R (Daly) v Secretary of State for the Home Department* [2001] 2 WLR 1622, in the context of a person with a mental disorder who by definition has a particular vulnerability which requires protection under the Convention. (*Keenan v United Kingdom* [2011] 33 EHRR 38) The Tribunal had failed to address this issue in its decision. That failure required the court to apply a heightened level of scrutiny of the Tribunal's decision, which it was required to do anyway when considering an interference with an Article 8 right. (*R (Daly) v Secretary of State for the Home Department*, Lord Steyn at paras 24-28) That was particularly so when one took into account the allegations of abuse suffered by the appellant, the disputed state of her relations with her close family and the issue of whether the Netherlands would accept her repatriation. The appellant's "home" for the purposes of Article 8 was Inverness. She had no alternative, given the terms of the compulsory treatment order.

[12] The solicitor for the Tribunal readily accepted that the Tribunal did not directly address the Convention issue in their decision, but that is scarcely surprising given that it was not raised before them. That does not, however, mean that the Tribunal did not take it into account. It well knew that as a public authority it had to apply its mind to Convention rights

before reaching its decision. The warrant is, on the evidence, the least restrictive alternative. It is therefore necessary, justified and proportionate.

[13] In my opinion, this ground of appeal also must fail. It is one thing to remind the court of its duty to consider Convention rights; it is quite another to raise them in only the very general manner in which counsel did. The correct forum for facts to be proved is the Tribunal. It is not appropriate to do so before an appellate court. But counsel did not even go that far; he merely made general assertions about abuse (he did not say by whom) and the state of relations (presumably bad, but even that was unclear) with the appellant's family. If there was evidence to support these assertions it was open to the appellant to raise them before the Tribunal and, if it allowed, to lead evidence in support of them. I have already dealt with the complaint about repatriation. It is simply not good enough before an appellate court to raise an issue, be it noted for the first time, based upon a vague reference to something on a web site mentioned in a report. Tribunals and courts can function properly only on the basis of evidence which if disputed should be led and adjudicated upon; they cannot make decisions on the basis of mere assertion or innuendo. In any event, I do not agree that the court requires to adopt a heightened level of scrutiny, at least on the basis that the proposition is vouched by what Lord Steyn said. The test is one of proportionality and the level of scrutiny will depend upon the subject matter in hand. (*R (Daly) v Secretary of State for the Home Department*, Lord Steyn, para 28) I am in any event satisfied that the decision of the Tribunal was indeed a proportionate one.

[14] As this is the first decision of a Tribunal on the cross border regulations which has been appealed, I was invited to offer guidance on whether on this, or perhaps on other matters, mental health tribunals should give reasons on issues involving a patient's Convention



rights. I do not think it appropriate to do so, particularly in a case where the issue has been raised in such an unsatisfactory manner. All I would say is that tribunals will, I assume, be well aware of their obligation to interpret the Act and the Regulations in a manner which is consistent with the Convention and the jurisprudence arising from it. Indeed, I should anticipate that most decisions involve some restriction of a patient's rights under Article 8. To give reasons in every case may not be appropriate. It is a matter for each tribunal to decide when and in what circumstances it should make specific reference in its reasons for interfering with the Convention rights of a patient.

[15] The Tribunal is not seeking an award of expenses. I therefore find no expenses to be due to or by either party.