SECOND DIVISION, INNER HOUSE, COURT OF SESSION

Lord Justice Clerk
Lord Brodie
Lord Marnoch

[2010] CSIH 74
XA197/08

OPINION OF THE LORD JUSTICE CLERK

in Appeal by

W S

Appellant;

against

THE MENTAL HEALTH TRIBUNAL FOR SCOTLAND;
THE SCOTTISH MINISTERS;
AYRSHIRE AND ARRAN HEALTH BOARD;
and OTHERS

Respondents:

_____

Act: Bovey Q.C., Leighton; Drummond Miller LLP (for the appellant)
Alt: K Campbell; Russell Hunter Esq (for the Tribunal)
Alt: Springham; Scottish Government Legal Directorate (for the Scottish Ministers)
Alt: Creally; NHS Central Legal Office (for the Health Board)

20 August 2010

Introduction

[1] This is an appeal against a decision of the Mental Health Tribunal for Scotland (the Tribunal) dated 11 August 2008 to refuse to make an order under section 220(5) of the Mental Health (Care and Treatment) (Scotland) Act 2003 (the 2003 Act) returning the appellant from the State Hospital, Carstairs to Linden House, Yorkshire where he was formerly detained. The appellant is subject to a Compulsion Order and a Restriction Order under sections 57A and 59 of the Criminal Procedure (Scotland) Act 1995. Before I narrate the history of events, I shall set out the relevant legislation.

The legislation

The Scottish legislation – the 2003 Act

Detention in conditions of excessive security

[2] Section 264 provides a remedy for a patient in compulsory detention who considers that he is being held in conditions of excessive security. It provides *inter alia* as follows:

> " … (2) … the Tribunal may, if satisfied that the patient does not require to be detained under conditions of special security that can be provided only in a state hospital, make an order—
>
> (a) declaring that the patient is being detained in conditions of excessive security; and
>
> (b) specifying a period, not exceeding 3 months and beginning with the making of the order, during which the duties under subsections (3) to (5) below shall be performed.
>
> (3) Where the Tribunal makes an order under subsection (2) above in respect of a relevant patient, the relevant Health Board shall identify a hospital—
>
> (a) which is not a state hospital;
>
> (b) which the Board and the Scottish Ministers, and its managers if they are not the Board, agree is a hospital in which the patient could be detained in appropriate conditions; and
>
> (c) in which accommodation is available for the patient …
>
> (5) Where the Tribunal makes an order under subsection (2) above in respect of a patient, the relevant Health Board shall, as soon as practicable after identifying a hospital under subsection (3) or, as the case may be, (4) above, give notice to the managers of the state hospital of the name of the hospital so identified …"

Transfer of patients between hospitals

[3] Section 218 provides *inter alia* that the managers of the hospital in which the patient is detained may, if certain conditions are satisfied, transfer the patient to another hospital. The section deals with transfers between hospitals in Scotland. Section 220 applies where the transfer is made to the State Hospital. It provides *inter alia* as follows:

> "(1) This section applies where—

> (a) a patient —
>
> (i) receives notice under subsection (4), (6)(a) or (10)(b) of section 218 of this Act that it is proposed to transfer the patient; or
>
> (ii) is transferred under subsection (2) of that section,
>
> to a state hospital …
>
> (2) The patient, or the patient's named person, may … appeal to the Tribunal against the proposed transfer or, as the case may be, the transfer …
>
> (5) On an appeal under subsection (2) above, the Tribunal may, if not satisfied as to the matter mentioned in subsection (6) below, make an order that the proposed transfer not take place or, as the case may be, that the patient be returned to the hospital from which the patient was transferred.
>
> (6) That matter is—
>
> (a) that the patient requires to be detained in hospital under conditions of special security; and
>
> (b) that those conditions of special security can be provided only in a state hospital."

An appeal lies to this Court under section 322(1)(h) against a decision of the Tribunal to make, or to refuse to make, an order under section 220(5). This appeal has been presented under that provision.

The English legislation – the Mental Health Act 1983 (the 1983 Act)

[4] Section 80 of the 1983 Act provides for the transfer of patients from England to Scotland. If it appears to the Secretary of State for Justice that it is in the interests of a patient to remove him to Scotland and that arrangements have been made for admitting him to a hospital there, the Secretary of State may authorise his removal to Scotland. There is no statutory right of appeal against the Secretary of State's decision; but it is not disputed that such a decision would be open to challenge in an application for judicial review.

The history

[5] The appellant was admitted to the State Hospital in 1996. In May 2007, on the application of the appellant, the Tribunal made an order under section 264 of the 2003

Act declaring that he was being held in conditions of excessive security. His psychiatric condition was such that no suitable alternative accommodation could be found for him in Scotland (s 264(3), *supra*). He was then transferred to Linden House, a medium-secure facility in Yorkshire.

[6] On 17 and 18 July 2008 he was involved in a disturbance at Linden House in which staff were threatened and property was damaged. A consultant psychiatrist there described it as "an extremely serious incident." The Secretary of State for Justice made an order under section 80 of the 1983 Act for the return of the appellant to the State Hospital.

[7] The appellant was returned to the State Hospital on 20th July 2008. He appealed to the Tribunal against the decision to return him there. He did so purportedly under section 220 of the 2003 Act.

Proceedings before the Tribunal and the decision appealed against

[8] The Tribunal held a preliminary hearing to decide whether the appeal was competent. Counsel appeared for the appellant. He conceded that, on the face of it, the appeal was not competent. However, he suggested that section 220 might not be compatible with the appellant's Convention rights. There is nothing in the Tribunal's statement of reasons to indicate that counsel for the appellant gave the Tribunal any detailed submissions as to why that might be so, or specified the Convention rights that were supposedly in issue.

[9] Nonetheless, the Tribunal concluded:

> "In terms of section 322(1)(h) of the 2003 Act an appeal to the Court of Session can be made in respect of a decision in terms of section 220(5) of the 2003 Act where that decision is to make or to refuse to make an Order. In the circumstances and to allow facilitation of an appeal the Tribunal has decided to refuse to make an Order in terms of section 220 of the 2003 Act."

That is the decision appealed against.

Submissions for the appellant

[10] Counsel for the appellant submitted that on the face of it section 220 gave the patient a right of appeal against his transfer to the State Hospital from a Scottish hospital; but denied the patient that right in relation to a transfer to the State Hospital from an English hospital. For that reason the section fell within the scope of articles 5, 6 and 8 of the Convention and accordingly violated article 14. It should be read down to give the patient such a right. Otherwise, as he put it, it was not law. If the section were to be construed in that way, the Tribunal and this court would have jurisdiction in this case.

[11] Counsel for the appellant conceded that it had been open to the appellant at any time since his return to the State Hospital to seek a further order under section 264 declaring that he was being held in conditions of excessive security. He did not know why that had not been done. However, an order under section 264 imposed on the Health Board only an obligation to search for new accommodation; whereas an order under section 220 would result in the appellant's being returned to Linden House, which was the declared purpose of the appeal. Counsel submitted that the Tribunal and the Health Board did not accept that section 264 required a search to be made outwith Scotland. So far as he knew, there was no suitable medium-secure accommodation in Scotland.

[12] Counsel for the appellant also conceded that the appellant could have sought judicial review in England of the decision of the Secretary of State for Justice. He said that that option had not been followed up because of certain practical and legal difficulties.

Submissions for the respondents

[13] Counsel for the Tribunal took a neutral stance on the competency of the decision appealed against. He submitted that the practical solution was for the appellant to apply to the Tribunal under section 264 of the 2003 Act. There was no reason in principle why the Tribunal should not consider such an application, notwithstanding this appeal. Counsel for the appellant had been wrong in saying that the Tribunal thought that section 264 imposed no duty to look for accommodation outwith Scotland. The appellant had been transferred to England, as had other patients, under that section. The Tribunal could have considered the Convention aspects of section 220 if it had received proper submissions on the point and had been moved to do so.

[14] Counsel for the Scottish Ministers submitted that the decision appealed against was incompetent, as was this appeal, because the appellant had not been transferred to the State Hospital under section 218. The Tribunal should have dismissed the appeal (The Mental Health Tribunal for Scotland (Practice and Procedure) (No 2) Rules 2005 (SSI No 519, as amended), rule 44). The question of reading down had not been properly put before the Tribunal. It was being raised in this court for the first time. The appellant had no need to rely on the Convention. He could have made a section 264 application at any time during the last two years. If that had been granted, the Health Board would have searched for accommodation in Scotland and in England.

[15] Counsel for the Health Board adopted the submissions made for the Tribunal and for the Scottish Ministers.

Conclusions

[16] This appeal is entirely misconceived. It is obvious that the right to appeal to the Tribunal under section 220 of the 2003 Act, and consequently the right to appeal

to this court under section 322, arises only if a patient is transferred to the State Hospital under section 218. The appellant was not transferred under that section. He was transferred by the Secretary of State for Justice in the exercise of his powers under the English legislation. That, in my opinion, is the end of the matter.

[17] Since the appellant was not transferred to the State Hospital under section 218, the Tribunal had no jurisdiction under section 220. It was therefore not open to the Tribunal to make a decision under that section "to allow facilitation of an appeal" to this court. It should have dismissed the appeal as being incompetent. Since the appeal to the Tribunal was incompetent, the appeal to this court purportedly under section 322 is, in my view, incompetent too.

[18] The Tribunal's record of its decision indicates that the Convention point on which counsel for the appellant was anxious to base this appeal was given no more than a passing mention before it and was not the subject of a detailed legal submission. On that view, I consider that the point cannot properly be taken at this stage.

[19] However, if the point had arisen, I would have held that there was no reason for us to construe section 220 in the manner proposed. The Tribunal is a creature of Scottish legislation and has no jurisdiction outwith Scotland. I fail to see how section 220(5) could possibly be read down in such a way as to confer jurisdiction on the Tribunal to make an order that would in effect rule upon the merits of the decision of the English Minister and ordain the English authorities to re-admit the appellant to Linden House.

[20] In any event, I fail to see why a Convention argument should even arise in this case, since the appellant has not been deprived of any meaningful remedy in respect of his complaint. He has had two remedies, both of which he has failed to pursue.

The first was to challenge the decision of the Secretary of State for Justice by a timeous application for judicial review of it in the English courts. That application was not made and it is, I think, too late to make it now.

[21] The second remedy has been available to the appellant in Scotland for two years, namely to apply again to the Tribunal under section 264. If the Tribunal were to grant the application, the Health Board would again be required to search for suitable accommodation, and, if need be, to search for it in England. No such application has been made.

Decision

[22] I propose to your Lordships that, instead of sustaining the respondents' pleas to competency and relevancy, we should simply refuse the appeal.

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[23] I agree with your Lordship in the chair and have nothing further to add.

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[24] I agree with your Lordship in the chair and have nothing further to add.