SHERIFFDOM OF TAYSIDE, CENTRAL AND FIFE

DUN-B197-19

JUDGMENT OF SHERIFF PRINCIPAL M LEWIS

in appeal by

[redacted]

Appellant

against

MENTAL HEALTH TRIBUNAL FOR SCOTLAND

Respondent

Appellant: Mr Leighton, Advocate; Mike Ferrie Solicitor
Respondent: Mr Pirie, Advocate; The Mental Health Tribunal for Scotland
Lord Advocate: Ms Irvine, Advocate; Litigation Division, Scottish Government

Perth, 04 June 2020

Background

[1] At the centre of this appeal is an issue about whether a person who enters the mental health system as a consequence of the imposition of a compulsion order is treated differently to a patient who enters the system through the imposition of a compulsory treatment order.

[2] The appellant has a mental disorder within the meaning of section 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003 ("the 2003 Act"). He has been involved with mental health services since 2001. He has a diagnosis of schizophrenia and his

condition is characterised by auditory hallucinations, aggression and hostility. He has a severe and enduring mental illness which is exacerbated by illegal substance misuse. His treatment is oral and depot antipsychotic medication and specialist nursing care and supervision.

[3] On 30 December 2013 the appellant appeared in Dundee Sheriff Court. He had been charged with a breach of section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 ("the 2010 Act") as a result of behaving in a threatening manner towards neighbours. He was convicted of that offence. After obtaining reports, the sheriff decided that it would be more appropriate for the appellant to be dealt with under the mental health system and so on 30 December 2013 he made a compulsion order ("the Order") under section 57A of the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act"). The appellant was initially detained in a secure care unit at the Murray Royal Hospital, Perth.

[4] On 16 July 2014 the Order was first reviewed under section 139 of the 2003 Act and on 11 December 2015 was subsequently extended and varied to a community based order. On 14 March 2018 the Order was varied back to a hospital based order, following which the appellant was detained at the Carseview Centre in Dundee. The responsible medical officer ("RMO") examined the appellant on 20 November 2018. With the consent of the mental health officer ("MHO") a further extension of the hospital based compulsion order was granted on 23 November 2018. The appellant applied for revocation of the Order. A tribunal was convened on 15 March 2019.

The decision of the tribunal

[5] The appellant did not attend the hearing. He was represented by his solicitor and an advocacy worker. The tribunal heard evidence from the RMO and the MHO as well as hearing submissions from the advocacy worker and the solicitor.

[6] The tribunal accepted the medical evidence that the appellant has responded well to medication and treatment and that if he is not provided with medication and treatment in hospital he would be at significant risk of his mental health deteriorating "and therefore at significant risk to his health, safety and welfare and to the safety of others." It is clear from the various productions which were before the tribunal and the evidence of the RMO and MHO that the medical professionals responsible for the appellant's care and treatment have made strenuous efforts at rehabilitation, facilitating, encouraging and then latterly providing supported care in the community with a view to avoiding readmission to hospital.

[7] The submissions made on behalf of the appellant were that (1) he (the appellant) considers that he no longer fulfills the criteria for a compulsion order, (2) the Order ought to be revoked or replaced with a less intrusive order such as a compulsory treatment order along with recorded mattters, and (3) to keep him on the Order is not only discriminatory, its continuance does not comply with the principles in the 2003 Act.

[8] Having reflected on the evidence and the principles in the 2003 Act, the tribunal refused the application on the basis that the statutory criteria for the Order continued to be satisfied.

Grounds of appeal

[9] The appellant decided to challenge that decision and has appealed to this court under section 320(2) of the 2003 Act. An appeal to the Sheriff Principal may be made only on one or more of the grounds set out in section 324(2). The grounds are:

(a) the tribunal's decision was based on an error of law;

(b) there has been a procedural impropriety in the conduct of any hearing by the tribunal on the application;

(c) the tribunal has acted unreasonably in the exercise of its discretion;

(d) the tribunal's decision was not supported by the facts found to be established by the tribunal.

The note of appeal as originally framed did not identify any error on the part of the tribunal.

Amended grounds of appeal

[10] After securing the grant of legal aid and sanction for the employment of junior counsel, the appellant lodged a motion seeking to amend the grounds of appeal and a Devolution Minute. I granted the motion. The amended grounds of appeal specify errors of law and procedural irregularity (sections 324(2)(a) and (b)). The errors are the tribunal (i) failed to apply the principles in the 2003 Act, (ii) failed to apply a necessity test and in that regard failed to consider the issue of significantly impaired decision making ability, (iii) failed to consider making a "recorded matter", and (iv) failed to apply a necessity test and in that regard failed to consider the possibility of revoking the order and replacing it with a compulsory treatment order or other less restrictive order. The procedural irregularity is a failure on the part of the tribunal to provide adequate reasons for its decision.

The Devolution Minute

[11] The Minute is linked with the amended grounds of appeal. The issues raised within the Minute are that the 2003 Act as it is ordinarily interpreted is incompatible with his convention rights, in particular articles 8 and 14 of the European Convention on Human Rights and Fundamental Freedoms ("the ECHR"); a patient who enters the mental health system through the criminal justice route is treated differently to a patient who enters the mental health system through the civil route: there is no SIDMA test, no "recorded matters" and no prospect of moving from one type of order to another under the criminal route. These omissions are a disproportionate interference with his article 8 rights and constitute discriminatory treatment as between him and other classes of patients in terms of article 14.

[12] After further procedure, a hearing took place at which I heard from counsel for the appellant, for the Mental Health Tribunal for Scotland and for the Lord Advocate on (a) the devolution issues and (b) the substantive matters raised in the appeal.

Submissions

[13] Each party to the appeal had lodged in advance written submissions and I am grateful to them. As these documents form part of process I have summarised their respective submissions below.

The appellant

[14] Counsel contended that there are three main deficiencies in the legislative regime: the absense of a SIDMA test for those subject to a compulsion order; the lack of provision

for recorded matters for those subject to a compulsion order; and the lack of a mechanism for transferring a patient from a compulsion order to a compulsory treatment order.

[15] A tribunal may make a compulsory treatment order under section 64(4) of the 2003 Act if it is satisfied that all of the conditions in subsection (5) are met. One of the conditions in subsection (5) is that "because of the mental disorder the patient's ability to make decisions about the provision of such medical treatment is significantly impaired"(the SIDMA test). There is no comparable provision in section 57A(3) of the 1995 Act. That omission constitutes a disproportionate interference with the appellant's right under article 8 of the ECHR to respect for private life which embraces personal autonomy (*Glass* v *UK* 2004 ECHR 103). The test for proportionality is found in *Christian Institute* v *Scottish Ministers* 2017 SC (UKSC) 29 in which four questions require to be answered:

1. Whether the objective is sufficiently important to justify the limitation of a protected right?
2. Whether the measure is rationally connected to the objective?
3. Whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective?
4. Whether, in a balancing exercise, the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure?

[16] Having regard to the test, counsel acknowledged that the absence of the SIDMA test is likely to be connected to a legitimate objective in relative to public safety and security but he suggested that the tribunal could have applied the SIDMA test without unacceptably compromising that objective and that in the balancing exercise the passage of time since the

imposition of the Order as well as the principle of non-discrimination in section 1(3)(g) of the 2003 Act mitigated against its continuance.

[17] Counsel also contended that the regime is a breach of the appellant's rights in terms of article 14. With reference to *R (Steinfeld)* v *Secretary of State for International Development* 2018 3 WLR 415 he submitted that the necessary stages for establishing an article 14 complaint have been met. Firstly, the facts of the case fall within the ambit of articles 5, 6 and 8 – counsel spent much time dealing with article 8 and said little about articles 5 and 6 after objection, recognising that there was nothing in the Minute to support such an attack. Secondly there is a difference of treatment - he contrasted the provisions of section 64(4) of the 2003 Act with section 57A(3) of the 1995 Act. Thirdly the difference is as between persons who are relevantly similarly situated or in an analogous situation – counsel argued that the appellant is in an analagous position to a person who is subject to a comulsory treatment order (*AL (Serbia)* v *Home Secretary 2008* 1WLR 1445). Fourthly the difference of treatment is on a protected ground, and in that regard counsel pointed to article 14 and to *Clift* v *United Kingdom* 2010 EHCR 1106 at paragraphs 59 and 60. Finally the difference in treatment cannot be justified –counsel submitted that there is no legitmate aim, and that it is the difference **of** treatment that requires to be justifed rather than the treatment itself (*Steinfeld* at paras 41-42).

[18] As an alternative, counsel proffered a less formulaic approach relying upon Lady Hale in the *AL (Serbia)* case at paragraphs 24-28. The difference of treatment of which the appellant complains cannot withstand scrutiny. There are no very obvious relevant differences between him and other civil patients. No real reasons for the difference of treatment have been provided and on this basis the court ought to conclude that the appellant's rights have been infringed.

[19] Recorded matters, which relate to the treatment that an individual patient will receive or be subject to, are an element of article 8. Any interference with the appellant's convention rights has to pursue a legitimate aim, be lawful and proportionate. In short counsel contended that the objective has to be related to public safety, that the absence of the ability to make recorded matters is not rationally connected to any conceivable legitimate objective, that the availability of recorded matters would not unacceptably compromise the achievement of possible legitimate objectives, and the balancing exercise favours the appellant. Overall the non-availability of recorded matters is a disproportionate step. He also contended that the regime is a breach of article 14 and in that regard he replied upon his submissions in relation to the SIDMA test.

[20] The primary remedy for any breach of the convention is to read down the legislation - in other words to interpret the 2003 Act so that it no longer breaches the convention (*Ghaidan* v *Godin-Mendoza* 2004 2AC 557 at paragraphs 121-123). The legislation can and should be read down to permit consideration of the SIDMA criteria and to permit the making of recorded matters.

[21] The absence of the SIDMA test and recorded matters would be capable of resolution if the 2003 Act was interpreted so that there could be a transfer from a compulsion order to a compulsory treatment order. In order to remedy the difficulties, the necessity test within the compulsion order criteria could be applied flexibly. Failing to adopt a more fluid interpretative and practical approach is contrary to section 1(3)(e) and (f) of the 2003 Act.

[22] With reference to the transcript, counsel refuted the contention that the section 1 principles, the SIDMA test, recorded matters and transfers between orders were not explored before the tribunal. The MHT is a specialist tribunal. It has a quasi-inquisitorial function (rules 4 and 49 of The Mental Health Tribunal for Scotland (Practice and Procedure)

(No. 2) Rules 2005 ("the 2005 Rules")). In the exercise of that function the tribunal erred in that it did not explore the convention issues – he subsequently accepted that the convention issues were not raised on behalf of the appellant during the hearing. He invited me to apply the appellate rules in an imaginative and expansive fashion by taking on that role.

[23] He did not accept that the appeal was academic or that he was presenting an *ab ante* challenge because the focus of the appeal is the appellant's treatment and breaches of his convention rights and not the rights of others.

[24] In the event that his devolution arguments fail, this being a statutory appeal, he invited me to refuse the appeal for the reasons set out in the note of appeal and in his written submissions (most of which replicate the matters mentioned above).

The respondent

[25] Mr Pirie directed himself primarily to the grounds of appeal. He supported and adopted the written submissions lodged on behalf of the Lord Advocate in relation to the devolution issues.

[26] His starting point was quite simply that the tribunal had not erred in law. Many of the points raised in the Minute and in the grounds of appeal had not been argued before the tribunal. The tribunal cannot be said to have erred if it did not take account of issues which had not been advanced (*HH* v *Secretary of State for the Home Department* 2015 SC 613, *R* v *Secretary of State for the Home Department ex Parte Robinson* [1998] QB 929, and rule 13(1)(f) of the 2005 Rules.

[27] The court does not have jurisdiction to hear matters which were not explored before the tribunal (*GS (India)* v *Secretary of State for the Home Department* [2015] 1 WLR 3312) and it would be wrong to take an expansive approach to the 2005 Rules and the 2003 Act to permit

an appellant to go beyond the statutory scope of the appeal. He did accept that the court nonetheless have the power to consider a point not argued before the tribunal (*Advocate General for Scotland* v *Murray Group Holdings Ltd* 2016 SC 201) but only if justice requires that to be done, no unfairness will result and no additional findings in fact are required.

[28] Justice does not require it because the appellant was represented at the hearing before the tribunal by a solicitor and an advocacy worker both of whom addressed the tribunal and neither made mention of the ECHR issues now being argued and his present submissions contradict what was put forward on his behalf before the tribunal. Unfairness would result because had the issues now being aired been before the tribunal, it would have had the opportunity of hearing further more appropriate evidence and submissions (*RJG* v *Secretary of State for the Home Department* [2016] EWCA Civ 1042). Additional findings in fact would be required to deal with (a) the extent of the impairment of the appellant's decision making, (b) the treatment required were a different type of order to be imposed and (c) the recorded matters.

[29] The transcript reveals the extent of the discussion. The decision of the tribunal reflects that discussion. The tribunal did not take into account irrelevant factors and it did not ignore relevant material. Its decision is clear and well considered.

The Lord Advocate

[30] Counsel invited me to refuse the appeal for two principal reasons: (i) the issues are academic and (ii) the remedy of reading down is not required.

[31] In relation to the first matter she referred to the written chronology which had been tendered at the advance of the appeal and the transcript of the hearing before the tribunal.

The appellant was offered the opportunity of alternative accommodation (pages 3 and 9 of the transcript), an offer which he declined. On 28 May 2019 the appellant was transferred from Carseview Centre, Dundee to the Amulree Ward, Murray Royal Hospital, Perth for the purpose of rehabilitation. The circumstances of the appellant have changed.

[32] In addition even although the SIDMA test is not relevant to a compulsion order, the appellant did meet that criterion (pages 4 and 9 of the transcript.)

[33] Accordingly the appeal is simply of academic interest and on that basis alone it ought to be refused.

[34] Counsel accepted in general terms that medical intervention without consent where a patient has capacity gives rise to an interference with the right to respect for private life which requires to be justified (article 8). However the interference in this Order is amply justified and proportionate based on the facts and circumstances.

[35] The imposition of such an order is subject to significant procedural safeguards (sections 139-143, 159, 162, 164, 250 and 275 of the 2003 Act). Patient decision making ability and the administering of specific medical treatment are preserved by part 16 of the 2003 Act for a forensic patient such as the appellant in the same way as it is for a non-forensic patient subject to a compulsory treatment order.

[36] The appellant has overlooked the margin of discretion which the courts properly afford to the legislature in determining what measure is appropriate. The question is not what else could or should have been used, but whether "the limitation on the fundamental right is one which it was reasonable for the legislature to impose" *(Bank Mellat* v *Treasury (No 2)* [2014] AC 700 at paragraph 75). Where a compulsion order is imposed in lieu of imprisonment, an individual's decision making ability is irrelevant. In circumstances where any continuation of a compulsion order is linked to mental disorder, it was reasonable for

the Scottish Parliament in enacting the 2003 Act to limit the fundamental right to respect for private life as regards the imposition of a compulsion order by choosing not to apply the same SIDMA criteria as is applied as regards the imposition of a compulsory treatment order and absent criminality.

[37] The passage of time argument overlooks the significant procedural safeguards (see paragraph [35] above). In any event the appellant failed to articulate why, in light of the part 16 requirements of the 2003 Act in respect of which no complaint is made, the absence of SIDMA actually gives rise to the disproportionate interference in his case. Accordingly there is no incompatibility.

[38] Counsel accepted that the appellant correctly identified the necessary stages for establishing an article 14 ECHR complaint. Stages 1, 2 and 4 are met but stages 3 and 5 are not - the orders were imposed in different contexts, the appellant is not in an analogous position to a non-forensic patient subject to a CTO imposed absent any criminality and, as had already been said, his decision making ability is not relevant.

[39] In the context of this case, unlike in *Clift v United Kingdom* [2010] ECHR 1106, there is no suggestion that the detention was unlawful.

[40] With reference to section 274 of the 2003 Act counsel explained that that the Mental Health (Care and Treatment) (Scotland) Act 2003: Code of Practice is mandatory for anyone carrying out duties under the 2003 Act or under the relevant part of the 1995 Act. The Code provides that "whilst there is no provision in the act for a compulsion order to specify recorded matters, best practice would suggest that where any treatment, care or services is regarded as being essential for the care package of a patient subject to a compulsion order this should be described as such in the patients' part 9 care plan." She contrasted that with section 64(4) in the 2003 Act in relation to those subject to a compulsory treatment order and

concluded that in both cases (for forensic and non-forensic patients) where matters of treatment are considered to be required by the relevant medical personnel they will have been imposed in accordance with section 1 principles.

[41] Counsel did not accept that article 8 is engaged because there is no right to a recorded matter under article 8; the appellant did not put forward facts to support the proposition that the absence of a specific recorded matter engages the right to respect for private life which article 8 protects; and there is no interference by virtue of the absence of recorded matters.

[42] Any delay in the appellant being moved to a rehabilitation facility was not due to the absence of a recorded matter. He was offered supported accommodation as an alternative to a move to a rehabilitation unit but declined that offer. The true nature of his ECHR complaint is an *ab ante* challenge which must fail - the 2003 Act is capable of being operated in a manner which is compatible with Convention rights not least because of the availability of an alternative "recorded matters" mechanism. Further his submissions as to proportionality are misdirected. The Order with its own version of "recorded matters" is rationally connected to a legitimate objective (prevention of crime and disorder).

[43] In relation to article 14, counsel observed that the appellant has failed to articulate why the facts of the case fall within the ambit of articles 5, 6 and 8. Although she accepted that any difference of treatment would be on a protected ground (namely other status) she did not accept that the appellant is in an analogous situation to a non-forensic patient subject to a compulsory treatment order. Any discrimination is able to be justified.

[44] On the matter of transfer between orders counsel observed that the appellant had singularly failed to articulate any convention breach.

[45] She concluded her submission by contending that the 2003 Act is within legislative competence and that the appeal insofar as raising a devolution issue should be refused.

Decision

The Devolution Minute

[46] The purpose of the Human Rights Act 1998 is to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights and Fundamental Freedoms. The Scotland Act 1998 ("the 1998 Act") requires that all legislation of the Scottish Parliament must be compatible with ECHR rights. A devolution issue arises within the meaning of Schedule 6 to the 1998 Act if, among other things, there is "a question whether an Act of the Scottish Parliament or any provision of an Act of the Scottish Parliament is within the legislative competence of the Parliament". It is not a matter of agreement that a devolution issue arises in these proceedings. The Lord Advocate and the Mental Health Tribunal for Scotland maintain that the matters raised are largely academic and that the 2003 Act is within legislative competence.

The ECHR

[47] The ECHR rights applicable to mental health care and treatment include: article 2 (right to life); article 3 (freedom from torture and inhuman or degrading treatment or punishment); article 5 (right to liberty); article 6 (right to a fair trial); article 8 (right to respect for private and family life) and article 14 (non-discrimination in the realisation of rights). The appellant argues that the 2003 Act is incompatible with his ECHR rights (articles 8 and 14) and seeks either that parts of the 2003 Act should be read down or interpreted in such a way as to be consistent with his rights (*Ghaidan* v *Godin-Mendoza*). If the provisions cannot

be read down then the 2003 Act is outwith the legislative competence of the Scottish Parliament.

The legislation

[48] As the arguments focused on the interpretation and the application of (1) section 57A and section 59 (as amended) of the 1995 Act, (2) the 2003 Act, and (3) the interaction between the 1995 Act and 2003 Act, it is necessary to consider the relevant statutory provisions.

[49] Section 1 of the 2003 Act creates "an overarching approach to the discharge of functions under the Act" (Lord Reed at paragraph 26 in *G (AP)* v *Scottish Ministers and another (Scotland)* [2013] UKSC 79) and sets out fundamental principles to be applied throughout the operation of the whole of the Act. Subsections (2) to (4) apply to the tribunal whenever it is discharging a function by virtue of the 2003 Act in relation to a patient who is over the age of 18 years. One of the functions discharged by the tribunal to which subsections (2) to (4) apply is that of taking decisions under section 167.

[50] Subsection (3) imposes a duty on the tribunal, in discharging any function under the 2003 Act, to have regard to a series of matters. The matters upon which the appellant relies are (e), (f), (g) and (h). Paragraphs (e) and (f) reflect the importance of identifying and considering a range of options for the patient and ensuring that functions exercised under the 2003 Act are discharged, not for reasons of convenience for others but to achieve the most benefit for the patient; paragraph (g) is concerned with non-discrimination in relation to persons with mental disorders, and paragraph (h) makes provision for respect for diversity.

[51] Section 1(4) provides that the function must be discharged in a manner that involves "the minimum restriction on the freedom of the patient that is necessary in the

circumstances." This subsection does not specify matters to which the tribunal must have regard. It applies after the tribunal has had regard to all the matters to which it is required to have regard.

[52] The appellant is subject to a compulsion order. The requirements for making a compulsion order, and its continuation, are contained at section 57A(3) of the 1995 Act which provide that:

> "(a) that the offender has a mental disorder;
>
> (b) that the medical treatment which would be likely to –
> (i) prevent the mental disorder worsening; or
> (ii) alleviate any of the symptoms, or effects, of the disorder,
> is available for the offender;
>
> (c) that if the offender were not provided with such medical treatment there would be a significant risk –
> (i) to the health, safety or welfare of the offender; or
> (ii) to the safety of any other person;
>
> (d) that the making of the compulsion order in respect of the offender is necessary."

[53] The requirements for granting a compulsory treatment order under the civil route are found at section 64 (5) of the 2003 Act which provides:

> "(a) that the patient has a mental disorder;
>
> (b) that medical treatment which would be likely to –
> (i) prevent the mental disorder worsening; or
> (ii) alleviate any of the symptoms, or effects of the disorder,
> is available for the patient;
>
> (c) that if the patient were not provided with such medical treatment there would be a significant risk –
> (i) to the health, safety or welfare of the patient; or
> (ii) to the safety of any other persons;
>
> (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 the compulsory treatment order in respect of the patient is necessary."

[54] The test "that because of the mental disorder the patient's ability to make decisions about the provision of such medical treatment is significantly impaired" features in relation to compulsary treatment orders but not compulsion orders.

[55] A compulsion order lasts for 6 months. Two months prior to expiry of the compulsion order the RMO must carry out a mandatory review (section 139). The order requires to be reviewed at regular intervals in a similar manner to a compulsory treatment order. If it is not extended, a compulsion order will expire after 6 months. Subsection (4) sets out the conditions which the responsible medical officer is to decide either do or do not continue to apply in respect of the patient. Those conditions mirror the conditions set out in section 57A(3) of the 1995 Act which must be satisfied before the court can make a compulsion order. Section 140 provides for further reviews of a compulsion order. If extended beyond 6 months from the date on which it was first made, the order will lapse unless it is extended again at the first anniversary and annually thereafter.

[56] Section 148 provides that the RMO must apply to the tribunal if he/she wishes to extend the order on the first occasion after it was made. Such an application was made and granted in respect of the appellant. No issue arises in regard to the legitimacy of the first review and extension. Following upon the first review, renewals do not require the authority of the court or the tribunal and the process is much the same as for compulsory treatment orders.

[57] Section 164 makes provision for a patient to apply to the tribunal for revocation or variation of a compulsion order. There are restrictions on the number and timing of such applications. The appellant made such an application in March 2019.

[58] The powers of a tribunal when determining such an application are set out in section 167(4). Before making a decision on such an application the tribunal shall afford the patient, the patient's named person, the patient's guardian or welfare attorney, the MHO, the RMO primary carer and any other person whom the tribunal considers appropriate the opportunity to make oral or written submissions and to lead or produce evidence. The tribunal heard evidence from the MHO and RMO and heard submissions from the appellant's solicitor and advocacy worker.

[59] The effects of a compulsion order without restrictions order are similar to those of a compulsory treatment order: there are similar rights of renewal and of appeal, and the RMO must keep the patient's condition under review at all times and must cancel the order if the grounds for an order no longer apply or if it is no longer necessary (sections 141 and 142); there are similar provisions for variation and extension of orders, and suspension of orders to allow rehabilitation (chapter 2); patients have the right to advocacy (section 259), to appoint a named person (section 250) and to have any advance statements taken into account.

The SIDMA test

[60] There is one striking difference which can be found by examining the grounds for making a compulsory treatment order under section 64(5) of the 2003 Act (the civil route). It contains (at subsection (5)(d)) what came to be termed a SIDMA test – there is no comparable provision in section 57A (see paragraphs [47]-[49] above). The matter for determination is whether that omission constitutes a disproportionate interference with the appellant's article 8 rights to respect for private life.

[61] The right to private life embraces personal autonomy, the right to make choices regarding one's own life without interference by the state, to develop one's own personality and to establish relationships with others and to communicate. Mental health is a crucial part of private life. An individual's right to refuse medical treatment falls within the scope of article 8. Mentally ill patients do have the right to refuse treatment including psychiatric medication. The appellant is not refusing medical treatment on this occasion – he is seeking an alternative outcome within the mental health regime. A medical intervention in defiance of the patient's wishes will give rise to an interference with respect to private life and the right to physical integrity. In *Glass* v *United Kingdom* the Court held that a doctor's decision to treat a severely disabled child contrary to a parent's express wishes, and without the opportunity for judicial review of the decision, violated article 8. Sometimes forced medication of a mentally ill patient may be justified, in order to protect the patient and for the protection of others. That is the situation in which the appellant finds himself.

[62] However, such decisions must be made against the background of clear legal guidelines and the provision of adequate safeguards to ensure that mentally ill patients are able to participate in the process and that the process is sufficiently individualised to meet specific needs.

[63] Any interference has to pursue a legitimate aim, be lawful and proportionate (*Christian Institute* v *Scottish Ministers)*. I am satisfied that there is a legitimate aim or objective in the absence of the SIDMA test relative to public safety and security and that the absence of such a test is rationally connected to such an objective. The reason for the omission and the distinction between the criminal justice route and the civil route can be found in the Policy Memorandum to the Mental Health (Scotland) Bill introduced in the Scottish Parliament in September 2002. Paragraph 152 is in the following terms –

> "It is intended that a compulsion order without restrictions shall have the same effects as a compulsory treatment order, subject to certain differences to reflect the different purpose of the order. The principle differences are:
>
> - the compulsion order is made and continues with reference to the forensic criteria (see paragraphs 190-4);
> - the compulsion order is made by the sentencing court and not the Tribunal;
> - The first renewal, at 6 months, requires to be authorised by the Mental Health Tribunal; and
> - It is not possible for the patient or named person to apply to the Tribunal to vary the compulsion order or to seek discharge during the first 6 months of the order."

[64] Paragraphs 190-194 consider the policy objectives behind the differences between the civil and the criminal criteria. The Millan Committee had recommended that the criteria ought to be the same - but the executive did not agree and its reasons appear in paragraph 191:

> "The civil criteria are designed to ensure that a patient is only placed under compulsion and deprived of their liberty when there are grounds for over-ruling the patient's autonomy. The forensic criteria are directed at ensuring that a court disposal and any continuing compulsion are appropriate, given all the circumstances of the offender's mental disorder and offence. We believe this difference is justified in the context of criminal disposals, where the alternative to a mental health order may be prison. The aim is to place emphasis on the patient's need for appropriate care and treatment rather than on a person's willingness to accept the care and treatment. The intention is also that the criteria should not preclude voluntary transfer of prisoners to hospital under the Bill, when that is the most appropriate course of action. "

[65] The sentencing court has a range of options open to it when a person with a mental disorder is convicted of a criminal offence. The court may decide that it is appropriate for the mental health system rather than the criminal justice system to deal with such a person – if the offence is punishable by imprisonment (and leaving aside the issues relative to short sentences) the court may make a compulsion order keeping person in a secure hospital if satisfied that this is the most appropriate way of dealing with the case. Whether or not the individual can make treatment decisions is not relevant to the court's decision. In short, the

reason for the distinction is that the compulsion order is an alternative to a prison sentence or other punishment. The person's ability to make decisions about treatment is not, in these circumstances, necessary.

[66] The tribunal did not have the necessary discretion to use the SIDMA test as a less instrusive measure without unacceptably compromising the achievement of any objective of public safety or security. I agree with counsel for the Lord Advocate that the question is not what else could or should have been used but whether "the limitation on the fundamental right is one which it was reasonable for the legislature to impose" (*Bank Mellat* v *Treasury)*. I have already set out the relevant provisions of the Policy Memorudum which provides explanation for the imposition of the limitation and in my view it was reasonable for the Scottish Parliament in enacting the 2003 Act to omit the SIDMA test for the reasons I have given above.

[67] There is a need to reach a fair balance between respect for the dignity and self-determination of the patient and to protect and safeguard the patient's interests and that can be achieved through there being effective safeguards. There are safeguards built in to the 2003 Act to ensure that the appellant's rights, will and preferences were taken into account. Part 16 of the 2003 Act contains detailed requirements for the administration of treatment to those who enter the mental health regime through the civil or through the criminal routes. The appellant has been involved at all stages of the proceedings, has previously been heard in person, has been able to express his wishes, and in March 2019, as I have already mentioned, he was represented by a solicitor and an advocacy worker. The fact that the tribunal reached a decision which did not accord with the appellant's wishes, in the interests of protecting his health, safety and welfare and the safety of others, is not in my view a breach of article 8.

[68] The passage of time from the date of imposition of the Order to the date of the hearing on the application is far in excess of any period of incarceration in prison for a breach of section 38 of the 2010 Act. Counsel submitted that such a lengthy period is disproportionate. Looked at in such simple terms, he is correct. However that fails to recognise that the court makes a compulsion order for a "relevant period" which is 6 months (section 57A(2A) of the 1995 Act) which is followed by numerous procedural safeguards which appear in sections 139-143, 159, 162, 164, 250, 259, and 275 and part 16 of the 2003 Act. I am therefore not persuaded that the provisions of the 2003 Act are incapable of being operated in a proportionate way and that the 2003 Act is inherently unjustified in cases such as this (*R (Bibi)* v *Secretary of State for the Home Department (Liberty intervening)* [2015] 1 WLR 5055 at para 69 and *Christian Institute* v *Scottish Ministers*).

[69] I am not satisfied that all of the necessary stages for establishing an article 14 complaint have been met (*R (Steinfeld)* v *Secretary of State for International Development*). I accept that in the present case stages 1, 2 and 4 have been met in that the facts fall within the ambit of article 8, the appellant would be able to establish a difference in treatment as between persons who are relevantly similarly situated or in an analogous situation, and that such treatment is on a protected ground. However the appellant is not in an analagous position to a person who is subject to a comulsory treatment order (*AL (Serbia)* v *Home Secretary*): the Order was imposed in a different context to the imposition of a compulsory treatment order; the decision making ability of the appellant was irrelevant in regard to the imposition of the Order; and the difference in treatment is justified on the basis of the different contexts both of which have built in safeguards.

[70] For completeness, the Tribunal was not invited on behalf of the appellant to exercise such discretion. The tribunal does not have any such discretion under the 2003 Act. In any

event the solicitor for the appellant in drawing the attention of the tribunal to the differences between section 64(4) of the 2003 Act and section 57A(3) of the 1995 Act stated that the "issue of his improving insight is not something that requires to be considered in terms of the compulsion order … ".

Recorded matters

[71] There is, in my view, a simple explanation for the absence of recorded matters in a compulsion order which can be found by comparing and contrasting the civil and the criminal mechanisms. Section 63 of the 2003 Act governs applications for compulsory treatment orders. The application may be made by, **and only by**, a mental health officer. It shall specify (i) the measures that are sought in relation to the patient in respect of whom the application is made; (ii) any medical treatment, community care services, relevant services or other treatment, care or service specified in the proposed care plan by virtue of section 62(5)(j) of the 2003 Act; and (iii) where it is proposed that the order should authorise measures other than the detention of the patient in hospital, the name of the hospital the managers of which should have responsibility for appointing the patient's responsible medical officer. The following documents must be lodged with the application - (a) the mental health reports; (b) the report prepared under section 61; and (c) the proposed care plan.

[72] In addition to authorising various measures, the compulsory treatment order may also specify certain recorded matters (section 64(4)(a)) – these are " ... such medical treatment, community care services, relevant services, other treatment, care or service as the tribunal 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")". These recorded matters will generally be specified in the proposed care plan prepared by the MHO.

[73] There is no requirement under the criminal procedure for the preparation of a care plan for the court. There is no provision in the 2003 Act or the 1995 Act for a compulsion order to specify recorded matters. That does not mean that treatments, care or services essential to the person's care are ignored. The Code of Practice envisages that the care team should have assessed the person's needs. It is clear from the papers that the care needs of the appellant have been repeatedly assessed.

Transfer of order

[74] There is no provision in the legislation for a change from a compulsion order to a compulsory treatment order. There are however alternative remedies available to the appellant, for example if he considers that he no longer meets the criteria for a compulsion order he may apply to the tribunal for revocation. The criteria for the making of a compulsory treatment order are set out in section 63. The application is solely at the instance of the MHO. No such application was before the tribunal. I agree with counsel for the Respondent and for the Lord Advocate that the appellant did not identify any interpretative principle that requires the court to depart from the ordinary wording of sections 63 and 64 of the 2003 Act. No breach of ECHR was properly articulated.

[75] The approach adopted on behalf of the appellant fails to recognise that the statutory scheme has various safeguards enabling the patient to challenge decisions. I have already set out those safeguards. It is for the appellant to demonstrate to this court that, in the circumstances of his appeal, the application of the 2003 Act resulted in a breach or breaches of the ECHR. The appellant has not done so. In all the circumstances therefore I am not persuaded that the operation of the statutory scheme in the appellant's case resulted in a

breach of his Convention rights, or that the legislation has been demonstrated to have failed to comply with the ECHR.

The grounds of appeal

[76] The grounds of appeal as re-framed overlap somewhat with the terms of the devolution minute. I do not propose to repeat my views on the ECHR issues.

Section 1 principles

[77] I am not satisfied that the tribunal failed (i) to have regard to the section 1 principles, (ii) to apply a necessity test in relation to the issue of significantly impaired decision making ability, (iii) to consider making a "recorded matter", and (iv) to apply a necessity test in relation to the possibility of revoking the Order and replacing it with a compulsory treatment order or other less restrictive order.

[78] On page 2 of its decision the tribunal noted that the appellant "considers that remaining on a compulsion order is discriminatory and does not comply with the principles in the Act." In the final paragraph of its decision the tribunal states "The Tribunal carefully considered the evidence and took great pains to consider the principles contained in the Act". Although the tribunal does not make specific reference to section 1(3)(e)-(h) it is clear, for the following reasons, that it had regard to each principle.

[79] The transcript, which forms part of the bundle, reveals that there was evidence from the RMO and MHO regarding the context of the making of the order, the review process, and their respective views on the appellant's diagnosis, the availability of treatment and care to prevent the mental disorder worsening, the significant risk to the mental health of the patient were treatment to cease as well as presenting risks to his safety and welfare and to

the safety of others. They and the tribunal were aware of the need to consider the least restrictive option. The RMO and MHO spoke at some length about the possibility of rehabilitation, the refusal on the part of the appellant to consider 24 hour supported accommodation, the previous attempts made at care in the community, and the failure of the previous attempts due to the appellant's vulnerability, use of illicit drugs, and inability to follow a medication compliance scheme, resulting in re-admission to the ward. The importance of identifying and considering a range of options for the appellant was not lost on the MHO, the RMO and the tribunal and they did focus on ensuring that functions exercised under the 2003 Act were discharged, not for reasons of convenience for others but to achieve the most benefit for the appellant (section 1(3)(e) and (f) of the 2003 Act). Without doubt there were tensions between the appellant and some of his neighbours during his periods of living in the community – but that was not determinative of the outcome of the application for revocation.

[80] I do not agree with counsel for the MHT that the discriminatory aspects – the lack of a SIDMA test, the lack of recorded matters, the lack of provision for a transfer between order and the passage of time – were not raised during the hearing before the tribunal. They were - however the submissions and discussion on these topics appear to have been presented with quite different emphasis than is set out in the written submissions. The transcript reveals that the solicitor representing the appellant accepted that the "issue of his improving insight is not something that requires to be considered in terms of the compulsion order … ". The MHO and the RMO were sympathetic to the contention that provision for recorded matters would be of considerable assistance to a patient subject to a compulsion order, although neither, regrettably, were reminded of the terms of the Code of Practice. Although discussion on the issue of transfer between orders was limited and unfocused, it seems to

me that the tribunal was fully aware of the purported discrimination and diversity issues (section 1(3)(g) and (h)) and reflected upon those in reaching its decision.

[81] I agree with counsel for the appellant that the respondent is a specialist tribunal and that it has a quasi-inquisitorial function but that does not mean that it must read into the legislation a SIDMA test and recorded matters which were deliberately omitted to reflect the differences in the criteria for the various orders. Statutory interpretation begins with the ordinary meaning of the words that Parliament has chosen. The tribunal reached its decision based on the facts having regard to the prevailing statutory scheme. Adopting a flexible and imaginative approach has much to commend it but in the circumstances here, counsel for the appellant is attempting to stretch the elasticity of interpretation to breaking point.

[82] Counsel for the respondent and for the Lord Advocate suggested that the case was largely academic. The change in the appellant's circumstances came after the appeal had been lodged. The Order has changed from hospital based to community based and may well change again. The issues therefore are of direct importance to the appellant and I was not prepared to dismiss the appeal on that basis.

[83] The final ground of appeal is that the tribunal did not give adequate or proper reasons for its decision. It is not necessary for the tribunal to elaborate on every point made during the hearing. What is required is clarity of reasoning on the main issues which were in dispute and which were properly focused and examined during the hearing. It should be obvious to any reader of the decision that the tribunal assessed the evidence carefully. It did not misconstrue the evidence or take into account irrelevant material or ignore material factors or err in the balancing exercise. The findings made by the tribunal are brief but they are unequivocal and in my view are supported by the evidence which the tribunal regarded

as clear and persuasive. I am satisfied that the decision of the tribunal was supported by the findings in fact and is consistent with the applicable statutory regime.

Outcome

[84] For the reasons above, the 2003 Act does not require to be read down as permitting recorded matters to be made nor does it require to be read down to incorporate the SIDMA test. The decision of the tribunal is not based on an error of law.

[85] Accordingly I sustain plea in law 2 for the respondent, repel pleas in law 1, 3, 4 and 5 for the respondent, repel the appellant's pleas in law 1, 2 and 3. The appeal is refused.

[86] Other than counsel for the appellant seeking sanction for the employment of counsel, no other motion was made in relation to expenses. I will grant sanction. A hearing on the matter of expenses generally will be scheduled unless parties are able to reach agreement on the principle of expenses.