EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

Lord Reed
Lord Mackay of Drumadoon
Lord Marnoch

[2011] CSIH 83
XA23/11

OPINION OF THE COURT

delivered by LORD REED

in appeal

by

BRIAN BLACK, as curator *ad litem* to the patient M

Appellant;

against

THE MENTAL HEALTH TRIBUNAL FOR SCOTLAND

First Respondent:

and

THE SCOTTISH MINISTERS

Second Respondent:

_____

For the appellant: O'Brien QC, Halley; Drummond Miller LLP
For the first respondent: K J Campbell QC; Legal Secretary, Mental Health Tribunal for Scotland
For the second respondent: Mure QC, Barne; Scottish Governement Legal Directorate

8 December 2011

What remedy, if any, is available to a curator *ad litem* appointed to represent the interests of a patient in proceedings before the Mental Health Tribunal for Scotland, in the event that the Tribunal acts unlawfully or unfairly or exercises its discretion in an unreasonable manner? That is the question which lies at the heart of the present appeal, which was remitted to this court by the Sheriff Principal of Grampian, Highlands and Islands.

The facts of the case can be stated shortly. On 10 June 2010 the patient M, an elderly woman suffering from senile dementia, was admitted to hospital as an emergency. A short−term detention certificate was granted by an approved medical practitioner under section 44 of the Mental Health (Care and Treatment) (Scotland) Act 2003, authorising the detention of the patient for a period of up to 28 days. On 5 July 2010 a mental health officer appointed under section 32 of the 2003 Act applied to the Tribunal under section 63 of the Act for a compulsory treatment order to be made in respect of the patient. On 8 July 2010 the Tribunal appointed the appellant as curator *ad litem* to the patient, under rule 55 of the Mental Health Tribunal for Scotland (Practice and Procedure) (No 2) Rules 2005, SSI 2005/519. It did so on the basis that it was satisfied that the patient did not have the capacity to instruct a solicitor to represent her interests in the proceedings before it.

The hearing of the application took place before the Tribunal on 13 July 2010. The appellant was present, but the patient was not: she had not been notified of the application, or of the hearing, on the basis that the giving of such notice would be likely to cause her significant harm. It was also the view of all involved that she had no understanding of the process in any event. Others present at the hearing included the patient's mental health officer, her responsible medical officer (appointed under section 230 of the 2003 Act), and her two daughters, D and E, who had been appointed as her joint welfare attorneys under section 16 of the Adults with Incapacity (Scotland) Act 2000. D also attended as the patient's named person (by virtue of section 251 of the 2003 Act), and in that capacity was represented by a solicitor.

At the hearing, the appellant requested the Tribunal to adjourn its consideration of the application for a compulsory treatment order, and in the meantime to make an *interim* compulsory treatment order under section 65 (2) of the 2003 Act. Such an order authorises detention of the patient for a period of up to 28 days, whereas a compulsory treatment order authorises detention for a period of six months. The appellant sought an adjournment in order to obtain a medical report on the patient. The Tribunal however refused to adjourn the hearing, and proceeded to make a compulsory treatment order. In the reasons which they gave for their decision, they explained that the medical evidence before them (which came from the responsible medical officer and from the patient's GP) was clear and unchallenged, and that there was no material advanced from which they could reasonably reach the conclusion that a further report was necessary. We note that the Tribunal included a medically qualified member.

The appellant then purported to appeal to the Sheriff Principal against the order made by the Tribunal, under section 320 of the 2003 Act, on the ground that the Tribunal's refusal of an adjournment had been unreasonable and had resulted in procedural unfairness. The Sheriff Principal noted that section 320(5) lists the categories of person who are entitled to appeal, and that the curator *ad litem* of a patient is not included in that list. The appeal was therefore *prima facie* incompetent. Furthermore, the Sheriff Principal considered that the scope of the appellant's appointment as curator *ad litem* was restricted to representing the patient's interests in the proceedings before the Tribunal. Since those proceedings had come to an end when the Tribunal made the compulsory treatment order, it followed that the curator was *functus officio* : he had carried out the duty which he had been appointed to perform. The Sheriff Principal considered however that, since the Tribunal had authorised the patient's detention, it followed that the patient was entitled under article 5(4) of the European Convention for the Protection of Human Rights and Fundamental Freedoms "to take proceedings by which the lawfulness of [her] detention shall be decided speedily by a court". Section 320 made provision for such proceedings to be

taken by the patient, but that was of little or no value if the patient lacked capacity and was unaware of the proceedings before the Tribunal. In those circumstances, the Sheriff Principal concluded that section 320(5) might be incompatible with article 5(4). Since he had no jurisdiction to make a declaration of incompatibility under section 4 of the Human Rights Act 1998, and on the mistaken view that that provision is applicable to Acts of the Scottish Parliament (whereas such Acts are not "primary legislation" within the meaning of section 4: see section 21(1)), he remitted the appeal to this court under section 320(4) of the 2003 Act.

A preliminary point

The order appealed against had expired by the time the appeal was heard by this court. In those circumstances, it was argued on behalf of the respondents that the issue raised was of purely academic interest and that the court should refuse the appeal on that basis, without hearing any argument on the merits. Having considered the parties' written arguments on this point, however, the court came to the provisional conclusion that the appeal should nevertheless be heard. The issues identified by the Sheriff Principal were of general significance, and it appeared to us that there was a public interest in their being clarified. We were also mindful that, given the time which it takes for an appeal to be heard first by a Sheriff Principal and secondly, following a remit, by this court, and given also the changeability of mental disorders, it might prove difficult for this court to provide guidance to lower courts and tribunals in cases of this kind if it were to decline to hear appeals whenever the order in question had expired. That provisional view having been intimated to the parties, the respondents did not press their preliminary objection.

Rights of appeal and compatibility with Convention rights

Article 5 of the Convention provides:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

> ...
> (e) the lawful detention...of persons of unsound mind...
>
> 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

As the European Court of Human Rights held in *Winterwerp* v *The Netherlands* (1979) 2 EHRR 387, para 39, article 5 (1) requires three things:

> "In the court's opinion, except in emergency cases, the individual concerned should not be deprived of his liberty unless he has been reliably shown to be of 'unsound mind'. The very nature of what has to be established before the competent national authority − that is, a true mental disorder − calls for objective medical expertise. Further, the mental disorder must be of a kind or degree warranting compulsory confinement. What is more, the validity of continued confinement depends upon the persistence of such a disorder."

Given the inherent changeability of mental disorders, article 5(4) requires not only an initial right of access to a court or tribunal to discover whether the criteria for detention have been met, but also "a review of lawfulness to be available at reasonable intervals" thereafter: see *Winterwerp* , para 55. That review need not always be attended by the same guarantees as are required under article 6, but:

> "it is essential that the person concerned should have access to a court and the opportunity to be heard either in person or, where necessary, through some form of representation...Mental illness may entail restricting or modifying the manner of the exercise of such a right, but it cannot justify impairing the very essence of the right. Indeed, special procedural safeguards may prove called for in order to protect the interests of persons who, on account of their mental disabilities, are not fully capable of acting for themselves" (*Winterwerp* , para 60).

In the present case, the patient was initially detained by virtue of the short−term detention certificate granted by an approved medical practitioner under section 44 of the 2003 Act. That section reflects the requirements discussed in the *Winterwerp* judgment, since the certificate can only be granted by a medical practitioner with appropriate expertise (see section 22 of the 2003 Act) who has examined the patient and who considers it likely that she has a mental disorder and that it is necessary to detain her in hospital (see section 44 (1) and (3)). An admission to hospital which

complies with the procedural requirements of section 44, where the substantive grounds for admission do in fact exist, would appear therefore to comply fully with article 5(1)(e) of the Convention. In the present case, there is no dispute that the procedure prescribed by section 44 was followed and that the substantive grounds for the granting of a short−term detention certificate did in fact exist.

The patient and the named person were thereafter entitled to apply to the Tribunal for the revocation of the certificate, under section 50 of the 2003 Act. That section requires the Tribunal to revoke the certificate if not satisfied that the conditions laid down in section 44 continue to be met, or that it continues to be necessary for the patient's detention in hospital to be authorised by the certificate: section 50(4). Before determining such an application; the Tribunal can appoint a curator *ad litem* to act on behalf of the person detained, and must afford specified persons, including the patient, the patient's named person, any guardian of the patient, any welfare attorney of the patient, and any curator *ad litem* , the opportunity to make representations and to lead or produce evidence: sections 50(2) and (3). This procedure is designed to secure the speedy release of a person who should not in fact have been detained in the first place or should not be detained any longer, as required by article 5(4) of the Convention. In that regard, it is important to understand that the Tribunal is a "court" within the meaning of that provision. As the European Court of Human Rights observed in *Reid* v *United Kingdom* (2003) 37 EHRR 211 at para 63:

> "The 'court' referred to in this provision does not necessarily have to be a court of law of the classic kind integrated within the standard judicial machinery of the country. The term denotes bodies which exhibit not only common fundamental features, of which the most important is independence of the executive and the parties to the case...; but also the guarantees − 'appropriate to the kind of deprivation of liberty in question' − 'of [a] judicial procedure', the forms of which may vary but which must include the competence to 'decide' the lawfulness of the detention and to order release if the detention is not lawful."

Following that approach, the equivalent English tribunal was treated in *Kolanis* v *United Kingdom* (2005) 42 EHRR 206 as a "court" within the meaning of article 5(4).

In the present case, no application was made to the Tribunal under section 50, and the patient continued to be detained under the short−term detention certificate until it expired. She was subsequently detained by virtue of the compulsory treatment order made by the Tribunal under section 64 of the 2003 Act. That section again reflects the *Winterwerp* requirements, since the application for the order must be accompanied by two reports by medical practitioners stating *inter alia* that they are satisfied that the person has a medical disorder and that the making of a compulsory treatment order is necessary (sections 57(4) and 63(3)); and the Tribunal can make the order only if satisfied *inter alia* that the patient has a mental disorder and that the making of the order is necessary (section 64(5)). In addition, before determining the application, the Tribunal can appoint a curator *ad litem* , and is required to afford specified persons, including the patient, the patient's named person, any welfare attorney of the patient and any curator *ad litem* , the opportunity to make representations and to lead or produce evidence: section 64(2) and (3). Detention in accordance with the procedural requirements of section 64, where the substantive grounds for making the order do in fact exist, would appear therefore to comply fully with article 5(1)(e) of the Convention. Indeed, it appears from the case law of the European Court of Human Rights that even an order which is open to a successful challenge on *Wednesbury* grounds may nevertheless be regarded as having been made in accordance with a procedure prescribed by law: *Benham* v *United Kingdom* (1996) 22 EHRR 293, paras 42−46: *Perks* v *United Kingdom* (1999) 30 EHRR 33, paras 64−68.

Furthermore, because a compulsory treatment order is made by a "court", within the meaning of article 5(4), the judicial supervision of detention which is required by that provision is incorporated in the Tribunal's decision, as the European Court of Human Rights explained in *De Wilde, Ooms and Versyp* v *Belgium (No 1)* (1970) 1 EHRR 373, para 76. There must in addition be provision for subsequent review of continued detention at reasonable intervals, as was explained in *Winterwerp* at para 55. In that regard, the 2003 Act contains a number of provisions for such review, either

automatically in the event of an extension of the order (e.g. under section 101), or on the application of the patient or his named person (e.g. under sections 99 and 102).

It follows from the foregoing that the Sheriff Principal was mistaken, in the present case, in considering that a right of appeal against the decision of the Tribunal was necessary in order for the lawfulness of the patient's detention to be decided by a court, as required by article 5(4). As we have explained, the Tribunal is itself a "court", and the judicial supervision required by article 5(4) was incorporated in its decision to make the compulsory treatment order. Article 5(4) does not therefore require a right of appeal in such circumstances. As the Strasbourg Court stated in *Jecius* v *Lithuania* (2000) 35 EHRR 400, para 100:

> "Article 5(4) guarantees no right, as such, to an appeal against decisions ordering or extending detention, as the provision speaks of 'proceedings' and not of appeals. In principle, the intervention of one organ satisfies article 5(4), on condition that the procedure followed has a judicial character and gives to the individual concerned guarantees appropriate to the kind of deprivation of liberty in question."

In providing a right to appeal against the Tribunal's decision, the 2003 Act therefore goes beyond the requirements of the Convention. Nevertheless, where a right of appeal is provided, the Convention requires that the procedures on any appeal must in principle accord to the detainee the same safeguards as the procedures at first instance: see e.g. *Toth* v *Austria* (1991) 14 EHRR 551, para 84. It appears to us that that requirement is met in relation to the appeal procedures under the 2003 Act. In particular, so far as concerns the appointment of a curator *ad litem* to protect the interests of a patient who is not fully capable of acting for herself, both the Sheriff Principal and this court have the power to appoint a curator *ad litem* to the patient when necessary.

Against this background, the absence of any provisions in the 2003 Act enabling a curator *ad litem* who represented a patient before the Tribunal to appeal against the Tribunal's decision to make a compulsory treatment order does not in our view give rise to any incompatibility with the Convention. As we have explained, the procedural requirements of article 5(1)(e) and (4) are met by the procedure before the

Tribunal itself. The Convention does not require a right of appeal against its decisions.

All that said, the fundamental concern of the Sheriff Principal, as we understand it, is that a right, and in particular a right of appeal, is of no practical benefit to a person who is unable to exercise it. This sort of problem is, however, inherent in mental illness, and its solution is not to be found within the Convention. As Baroness Hale of Richmond observed in *R (H)* v *Secretary of State for Health* [2006] 1 AC 441 at para 23, in relation to the Mental Health Act 1983, the sort of concern expressed by the Sheriff Principal leads to the conclusion, not that the legislation is incompatible with the Convention, but that every sensible effort should be made to enable patients to exercise their rights if there is reason to think that they would wish to do so. That objective is reflected in the 2003 Act. Sections 250 and 251, in particular, provide for the appointment of a named person whose role, as explained in the Code of Practice issued under section 274, is to protect the interests of the patient, and who has a right of appeal under section 320 against the making of a compulsory treatment order. It is also relevant in this connection to note that the managers of the hospital where the patient is detained have a statutory duty, under section 260, to take all reasonable steps to ensure that the patient understands the effect of the provisions under which she is detained, the rights of applying to the Tribunal which are available to her, and the availability of the independent advocacy services which must be provided under section 259. Put shortly, the legislation seeks to ensure that patients' rights are practical and effective, notwithstanding the difficulties which may arise as a consequence of mental disorder.

Judicial review

Our conclusion that a curator *ad litem* has no statutory right of appeal against a decision of the Tribunal does not entail that the curator is necessarily without any legal remedy if, for example, the Tribunal acts unfairly or wholly unreasonably. The Tribunal falls within the scope of the supervisory jurisdiction of this court. Although

this court is likely to decline to exercise that jurisdiction in circumstances where a statutory right of appeal exists, it can be invoked, in appropriate circumstances, where there is no such right of appeal. In the present case, counsel for the Tribunal and counsel for the Scottish Ministers both accepted that it would in principle be open to the curator *ad litem* to bring a decision of the Tribunal under judicial review, on the basis that the curator would not be *functus officio* (since his application to the court would proceed on the basis that the proceedings before the Tribunal had not been validly completed), and he would have a sufficient interest in the matter complained of. As presently advised, we see no reason to question that approach.

Finally, we also observe that the Mental Welfare Commission for Scotland has important supervisory functions under the 2003 Act, and that it would be open to a curator *ad litem* who had concerns about the operation of the Tribunal or the detention of a patient to draw those concerns to its attention.

Conclusion

For the foregoing reasons we shall refuse the appeal on the ground that it is incompetent.