SHERIFFDOM OF TAYSIDE, CENTRAL AND FIFE

JUDGMENT OF SHERIFF PRINCIPAL M LEWIS

in appeal by

[redacted]

Appellant

against

MENTAL HEALTH TRIBUNAL FOR SCOTLAND

Respondent

Appellant: [redacted] Solicitor
Respondent: [redacted] Counsel; Mental Health Tribunal For Scotland

Perth, 08 September 2021

Introduction

[1] At the centre of this appeal is an issue regarding the effect of a failure on the part of a Mental Health Officer to comply with his duties under section 147 of the Mental Health (Care and Treatment) (Scotland) Act 2003 ("the 2003 Act") in the context of an application for an extension of a Compulsion Order.

Background

[2] The appellant has a mental disorder within the meaning of section 328 of the 2003 Act. He has a diagnosis of schizophrenia and his condition is characterised by paranoid and persecutory delusional beliefs, hostility and suspicion. His mental illness is exacerbated by

[redacted]

illegal substance misuse. His treatment involves medication and specialist nursing care. He is currently prescribed oral anti-psychotic medication and specialist nursing care and supervision including psychological input.

[3] On 31 July 2020 the appellant appeared in [redacted] Sheriff Court. He had come to the attention of the police due to his behaviour towards some of his neighbours. The sheriff decided that it would be more appropriate for the appellant to be dealt with under the mental health system and made a Compulsion Order ("CO") under section 57A of the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act").

[4] The appellant was treated in the [redacted] The CO was due to expire on 30 January 2021. An application was made by the Registered Medical Officer ("RMO") to extend the CO. A tribunal was convened on 26 January 2021 to consider the application.

The hearing on 26 January 2021

[5] The hearing took place by way of telephone conference call due to the ongoing pandemic. The appellant attended the hearing and was represented by his solicitor, [redacted], and an advocacy worker, [redacted].

[6] A number of preliminary matters were raised by the tribunal including discrepancies in the timeline of events leading to the application and in the content of some of the supporting material. By way of clarification the RMO advised that she examined the appellant on 16 December and was satisfied on that day that application for an extension ought to be made. She asked her colleague, [redacted] to conduct a formal examination and understood that took place on 22 December. She also understood that [redacted] had given notice to the Mental Health Officer ("MHO") on 21 December. She undertook to check the paperwork and to supply any missing pages.

[redacted]

[7] The tribunal then heard evidence from the RMO and the appellant as well as hearing submissions from [redacted] and representations from [redacted]

[8] The tribunal decided that although the statutory criteria for the CO continued to be satisfied, in view of the outstanding preliminary matters and to enable the appellant's solicitor to make further inquiries, the most apt solution would be to grant an interim CO, to issue directions in relation to the preliminary matters and to assign a further hearing.

The directions

[9] In short, the tribunal directed the MHO or his depute, to attend the hearing on 18 February 2021, and [redacted] to use her best endeavours to attend the hearing. The tribunal further directed the MHO to prepare a written report and lodge this with the tribunal administration no later than 9 February 2021 detailing his involvement with the RMO and [redacted], and the steps he took in terms of sections 139 and 147.

The hearing on 18 February 2021

[10] The appellant attended the hearing. He was represented by his solicitor, [redacted] and the advocacy worker. [redacted] and the MHO were present. In advance of the hearing the MHO submitted a written report in the form of a letter dated 08 February 2021.

[11] The tribunal heard evidence from the MHO which focussed on the interaction between the MHO and the appellant, and the timeline of events leading to the application. The MHO had known the appellant since May 2020. He met with the appellant in October 2020 and his views on the mental state of the appellant and his need for treatment remained consistent. He had received notification of the application from [redacted] on 21 December 2020. Later that day he and [redacted] had a lengthy discussion regarding the appellant's progress, treatment and possible future rehabilitation in the community, and during that discussion he agreed that the application should be made. He had intended to meet with the

[redacted]

appellant on the ward but that was not possible due to the restrictions in place as a consequence of the pandemic. He considered that a face to face meeting would be preferable as the appellant had previously found telephone and video calls distressing. He spoke with the appellant by telephone on 08 February 2021 and maintained his agreement that the appellant continues to meet the criteria in section 139(4).

[12] [redacted] submitted to the tribunal that based on the evidence, the MHO had not complied with his duties in section 147 and that failure was fatal to the application.

[13] Having reflected on the evidence, submissions, the statutory regime and the principles in the 2003 Act the tribunal accepted that the MHO had not complied with the duties set out in section 147. The tribunal was not satisfied that the requirements for exception under section 147(3) had been met, concluding that despite the restrictions it was practicable for the MHO to have spoken with the appellant by telephone prior to 08 February. The tribunal noted that [redacted] had informed the patient of his section 147(2) rights, the appellant had instructed a solicitor and an advocacy support worker in respect of the application, and had attended both the original hearing and the continued hearing at which he was fully represented. The tribunal concluded that he had not been prejudiced by the MHO's failure to interview him as soon as practicable after 21 December 2020 and consequently the application to extend was valid. Based on all of the material before it, written and oral, and applying the section 1 principles, the tribunal concluded that the statutory criteria for extending the CO had been met.

Grounds of appeal

[14] The appellant challenges that decision and appeals to this court on the grounds that:

- the tribunal's decision was based on an error of law (s324(2)a)); and
- the tribunal acted unreasonably in the exercise of its discretion (s234(2)(c)).

Submissions

[15] Each party to the appeal had lodged notes of argument, which they supplemented orally during the hearing. I am grateful to them for their clear, concise, focussed and well-structured arguments. I have summarised their respective submissions below.

The appellant

[16] [redacted] contended that having accepted that the MHO had not complied with his section 147 duties, the tribunal erred in law in concluding that the non-compliance had no effect on the application. The duties are mandatory. The MHO must interview the appellant unless it is impracticable to do so; inform the appellant that the RMO is proposing to make an application to the tribunal to extend the order, explain the appellant's rights in relation to this and of the availability of independent advocacy services; take steps to ensure that the appellant has the opportunity to use these services, and inform the RMO whether he agrees or disagrees with the RMO's proposed application and to provide reasons where there is disagreement. The failure of the MHO to comply with the mandatory requirements in section 147(2) and (3) invalidated the application.

[17] With reference to *R v Soneji* [2005] UKHL 49 and *R v Clarke* [2008] UKHL 8 Ms Guidi argued that when considering the consequence of failing to comply with mandatory statutory provisions, the court should concentrate on (i) the intention of Parliament and whether it was intended that a procedural failure should render the proceedings invalid and (ii) the interests of justice and whether the procedural failure caused any prejudice to any of the parties.

[18] The tribunal erred in focusing solely on the prejudice to the appellant, and in concluding that as he had representation, no prejudice had arisen. The prejudice is obvious. The omissions by the MHO amount to a blatant disregard for primary legislation. Section 3

[redacted]

of the Human Rights Act 1998 ("the 1998 Act") requires primary legislation to be read and given effect in a way which is compatible with convention rights. The tribunal, as a public authority, must act in accordance with section 6 of the 1998 Act. It did not do so. The undisputed evidence reveals that the MHO failed to carry out a positive obligation to interview the appellant prior to providing an opinion to the RMO and ensuring that the appellant was supplied with information regarding the provision of advocacy services and legal representation. The MHO could not possibly express an opinion to the RMO without having considered the appellant's views. Where a person's liberty is being restricted, particularly within a level of security, the statutory provisions must be adhered to. The failures breached a fundamental safeguard in article 6 of the ECHR and were inconsistent with the guiding principles contained in section 1 of the 2003 Act.

[19] The Mental Health (Care and Treatment) (Scotland) Act 2003: Code of Practice at chapter 5 of Volume 2 is concerned with the renewal of a Compulsory Treatment Order ("CTO"). As the renewal process for a CTO mirrors that of a CO, the chapter is of relevance as it reinforces the important statutory role of the MHO. [redacted] founded on various passages in support of her contention that the decision of the tribunal completely undermines the significance of the duties of the MHO, the importance of compliance, and the consequence of non-compliance (s87(2)(a)(iii) of the 2003 Act). The duties on the MHO under the civil scheme are markedly similar to those imposed on the MHO under the criminal scheme. To apply a different standard is prejudicial and unfair.

[20] In the note of appeal the appellant suggested that the tribunal had failed to give adequate reasons for its decision which amounted to an error of law and an unreasonable exercise of tis discretion. This matter was not pressed during the appeal hearing.

[redacted]

[21] [redacted] contended that the tribunal acted unreasonably in the exercise of its discretion. The decision is not consistent with its own prior decisions in relation to non-compliance with a statutory duty (case of *DN* ref 05787/20 of 29 October 2020 and case of *EC* ref 03435/20 of 20 July 2020).

[22] She invited the court to set aside the decision. She explained the CO has been suspended and the appellant is now living in the community.

The respondent

[23] Counsel adopted her written submission. Her starting point was that the tribunal had not erred in law and had not acted unreasonably in the exercise of its discretion. The CO was necessary and there was no alternative to hospital care to manage the risks to the appellant himself and to others.

[24] The tribunal concluded that the MHO had made no effort to contact the appellant by telephone following intimation of the application. It was practicable for him to have made contact and accordingly he had failed in his section 147 duties. That does not mean that the application is automatically fatally flawed. In accepting that the statutory requirement should be complied with, counsel submitted that the real question is what are the legal consequences of non-compliance with the statutory provision? Section 147 does not specify the consequence of non-compliance. The question of law which flows from that is whether parliament can fairly be taken to have intended total invalidity in the event of such non-compliance (*Paterson v Kent* 2006 SLT (Sh Ct) 8 and *R v Soneji* 2005 UKHL 49). Regard has to be had to the language of the relevant provision and the scope and object of the statute (*Paterson v Kent*). The nature and effect of the actual act or omission is of significant importance as is the background of context against which it occurs (*D v MHTS* 2014 SLT (Sh

Ct) 39)) and whether any prejudice has been caused or injustice done by that of omission (*N v MHO North Ayrshire Council* 2011 SLT (Sh Ct) 135).

[25] The overriding purpose of the 2003 Act is ensuring that appropriate care and treatment is provided to a patient with a mental disorder. The purpose of section 147 is to ensure effective participation of the patient in the hearing. The appellant participated in the two hearings fully and effectively.

[26] The requirement to interview is not absolute. The interview did occur albeit not as soon as reasonably practicable. If failure to interview as soon as reasonably practicable is fatal to an application the consequence would be that a CO would fall and there would be no care and treatment available to the patient. The CO in these proceedings would have expired in January 2021. It could not be the intention of Parliament to thwart the overriding purpose of the 2003 Act and it cannot have been the intention of Parliament that a failure to comply with section 147 would render the application fatally flawed.

[27] The facts indicate that the effect of delay in interviewing the appellant had limited consequence. The appellant had been made aware of his rights by [redacted] The MHO considered he had sufficient information as to the appellant's views which had not changed and it was clear that the appellant did not consider the Order to be necessary.

[28] The section 1 principles are guiding principles for the respondent in taking decisions. The tribunal took the section 1 principles into account. It had regard to the engagement of the appellant in the hearings. The appellant had instructed a solicitor and an advocacy worker. They attended both hearings. The solicitor indicated to the tribunal she was ready to proceed. No additional time was sought by those representing the appellant to prepare for the hearing. The approach of the tribunal throughout was consistent with the overriding

[redacted]

objective in rule 4 of the Mental Health Tribunal for Scotland (Practice and Procedure) (No 2) Rules 2005 to secure that proceedings are handled as fairly as possible.

[29] She concluded her submission by inviting me to refuse the appeal. If the appeal is allowed, no purpose would be served in remitting the case back to the respondent as there would be no statutory basis on which they could reconsider the application. If the application is fatally flawed then the CO ceased to have effect on 31 January.

Decision

[30] The primary issue for determination as set out in ground of appeal one is whether the failure by an MHO to comply with the requirements in section 147 of the 2003 Act is fatal to an application to extend a CO. The 2003 Act does not specify the consequence of non-compliance.

[31] In *London and Clydeside Estates Limited v Aberdeen District Council* 1980 SC(HL) 1 Lord Halisham observed "When parliament lays down a statutory requirement for the exercise of legal authority it expects its authority to be obeyed down to the minutest detail." [redacted] and counsel for the respondent agreed that the correct approach to statutory construction in these circumstances is to ask whether parliament can fairly be taken to have intended total invalidity in the event of such non-compliance (*R v Soneji* 2005 UKHL 49, *R v Clarke* [2008] UKHL 8, and *Paterson v Kent* 2006 SLT (Sh Ct) 8). The approach adopted by Sheriff Principal Dunlop in *Paterson v* Kent was to consider the language of the relevant provision (here it is section 147) and the scope and object of the 2003 Act. In *D v The Mental Health Tribunal for Scotland* Sheriff Principal Stephen considered that "The nature and effect of the action or omission is of significant importance as is the background or context against which it occurs." I align myself with their respective views.

[redacted]

[32] The overriding purpose of this legislation is to provide a patient having a mental disorder with appropriate care and treatment. Entry to the mental health system may arise through the criminal sentencing process (the forensic route). It may also arise through an application at the instance of a Mental Health Officer to the tribunal for a CTO (the civil route).

[33] A 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 CO keeping a person in a secure hospital if satisfied that this is the most appropriate way of dealing with the case. The court requires reports from two doctors, confirming that the requirements or the grounds for making a CO are met. The requirements for making a CO are contained in section 57A(3) of the 1995 Act (see para 39 below). The purpose of a CO is to ensure that the offender receives medical treatment in respect of a mental disorder by compulsory measures either in the community or by means of detention in hospital. It is not disputed that such an Order in respect of the appellant was appropriate at the time of imposition.

[34] Under the civil route, the role of the MHO is of considerable importance. The only person who can apply to the tribunal for a CTO is an MHO. The MHO must make application where the requirements of section 57(1)-(5) of the 2003 Act are met. Before making application, medical examination of the patient must be carried out by two medical practitioners and they each must be satisfied that the conditions for making such an order are met. These conditions are set out in section 57(3) of the 2003 Act. Section 60 imposes a duty on the MHO to notify the patient, the named person and the condition that an

application for a CTO is to be made. The MHO is also under a duty to prepare a report into the personal circumstances of the person, and in compiling his report the MHO must interview the patient unless it is impracticable to do so. The MHO must also inform the person of their rights in relation to the application and of the availability of independent advocacy services and ensure the person has the opportunity to use those services.

[35] The effects of a CO without restrictions largely mirror those of a CTO. In relation to both types of orders there are similar but not identical provisions for variation and extension, suspension and revocation. However the grounds for continuing or extending the CO are different to those of a CTO as are the grounds for making the original orders. The reason for the differences should be apparent – the civil route is designed to ensure that a patient is placed under compulsion and deprived of their liberty only where there are grounds for overruling patient autonomy. On the other hand a CO is an alternative to a prison sentence or other punishment. The differences are neither unfair nor prejudicial.

[36] The relevant provision (s147) is contained within Part 9, Chapter 2. It seems to me that section 147 requires to be understood not only in the factual matrix (which is undisputed) but also in the context of Chapter 2 which is concerned with mandatory reviews of Compulsion Orders by the RMO.

[37] A CO lasts for 6 months. Two months prior to expiry of the CO the RMO must carry out a mandatory review (s139). If it is not extended, the CO will expire after 6 months.

[38] The role of the RMO is crucial. Section 145 imposes duties on the RMO in carrying out the review. When carrying out the review the RMO must examine the appellant, consider whether the conditions set out in subsection (4) continue to apply to the appellant, consider whether an order continues to be necessary, and take into account views expressed by those who require to be consulted (section 139(3)). There is no suggestion that the RMO

has failed in these duties. If the RMO is satisfied that the conditions in section 139(4) continue to be met and that the order continues to be necessary the RMO must then consider whether the order needs to be extended – otherwise the order would come to an end.

[39] The subsection 4 conditions are:-

(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 the effects of the disorder;

is available for the patient; and

(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 person.

These conditions mirror the conditions set out in section 57A(3) of the 1995 Act which must be satisfied before the court can make a CO. The conditions focus not only on the interests of the patient but also the interests of the public. That much is clear from the terms of subsection(4)(c) which specifically mentions the existence of a significant risk to the health, safety or welfare of the patient.

[40] Where the RMO considers that the order should be extended but not varied notice must be given to the MHO that the RMO intends to make an application to the tribunal under section 149 to extend the order. This is set out in more detail in section 146.

[41] Section 147 (the relevant provision) provides:-

"(1) The mental health officer shall, as soon as practicable after receiving notice under section 146(2) of this Act, comply with the requirements in subsection (2) below.

(2) Those requirements are—

(a) subject to subsection (3) below, to interview the appellant;

(b) to inform the appellant—

(i) that the appellant's responsible medical officer is proposing to make an application under section 149 of this Act for an order under section 167 of this Act;

(ii) of the appellant's rights in relation to such an application; and

(iii) of the availability of independent advocacy services under section 259 of this Act;

(c) to take appropriate steps to ensure that the appellant has the opportunity of making use of those services; and

(d) to inform the appellant's responsible medical officer—

(i) as to whether the mental health officer agrees, or disagrees, that the proposed application should be made;

(ii) if the mental health officer disagrees, of the reason why that is the case; and

(iii) of any other matters that the mental health officer considers relevant."

(3) If it is impracticable for the mental health officer to comply with the requirement in subsection (2)(a) above, the mental health officer need not do so."

The MHO did not interview the appellant until shortly before the adjourned hearing. He did not comply with subsection (2)(a)-(c). He did comply with subsection (2)(d).

[42] In essence section 147 requires the MHO to interview the appellant as soon as reasonably practicable. The reason for conducting such an interview is to advise the patient of the fact that an application for an extension to the CO is to be made and to provide the patient information on where he may seek advice and support as to his rights. The object of this section is directed to engagement with the patient – the participation principle in section 1. I deal with the section 1 principles in paragraphs 46-49 below. I agree with counsel for the respondent that the requirement to interview is not absolute and further it is not a pre-requisite to the requirement to inform the RMO of their opinion as to whether the application should be made to the tribunal.

[43] It is patently obvious that Parliament intended that an MHO should comply with the provisions of section 147. It is, as the tribunal recognised, highly unsatisfactory for the MHO not to comply with the duties imposed upon him by section 147. If [redacted] is correct and that non-compliance is fatal to the application, the consequence is that the Compulsion Order would fall. A CO is imposed by the court as part of the sentencing process. There is no mechanism within the 2003 Act for the RMO or the MHO to apply for a CO, although the RMO must apply to the tribunal if he/she wishes to extend the order on the first occasion

after it was made (s148). It was suggested in *Paterson v Kent* that the overriding purpose of the 2003 Act would not be frustrated because a fresh application for a CTO could be made and the whole procedure start of new. There is no such mechanism in relation to a Compulsion Order. In my view it is inconceivable that it was the intention of Parliament in the event of a failure on the part of the MHO to comply with section 147 that an application to extend a CO would fall. Such an outcome would thwart the overriding purpose of the Act and the purpose of a CO.

[44] 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 appellant, the appellant's named person, the appellant'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. Over the course of the two hearings the tribunal heard evidence from the RMO, the MHO, [redacted] and the appellant and heard submissions from the appellant's solicitor and advocacy worker.

[45] I am satisfied that the tribunal understood the issue which it was being asked to determine – whether the failure on the part of the MHO resulted in the application being fundamentally flawed. The tribunal considered the background facts and circumstances leading to the application; it had regards to the evidence of the RMO and the MHO in relation to (a) their interaction, (b) the interaction between the appellant and the RMO, and (c) the prior engagement between the MHO and the appellant. The tribunal assessed that evidence against the provisions of section 147. It then dealt with the issue of prejudice noting the engagement of the appellant throughout the hearings with the support of advocacy services and a solicitor.

[redacted]

[46] The prevailing statutory regime actively encourages patient participation. This is stated in section 1 of the 2003 Act and is reinforced in the many safeguards built into that Act to ensure the appellant's rights, will and preferences are taken into account. Although there was repeated reference to the section 1 principles in the submissions, neither party addressed the court on the specific duties which the principles impose and in what respect the tribunal had failed to apply them. Section 1 creates "an overarching approach to the discharge of functions under the Act" 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. The appellant 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, as here.

[47] Subsection (3) imposes a duty on those discharging any function under the Act (including the tribunal, the MHO and the RMO), to have regard to a series of matters. The matters of relevance here it seems to me are (a), (c) and (d). Paragraph (a) is concerned with ascertaining the past and present wishes and feelings of the appellant so far as they can be ascertained by any means of communication. Paragraph (b) emphasises the importance of the appellant participating as fully as possible in the decision making process and the procedures under the 2003 Act. Paragraph (d) focusses on the importance of providing information and support to the appellant which is necessary to enable the appellant to participate as fully in the decision making processes and procedures under the Act.

[48] I agree with the observations of Sheriff Principal Stephen in *D v The Mental Health Tribunal for Scotland* that the section 1 principles "are separate and distinct from the purpose

of the Act and are guiding principles which should be taken into account of when decisions are being made under the Act."

[49] Although the tribunal was not addressed on the section 1 principles, it did properly take into account the effect of the MHO's default on the participation of the appellant in the proceedings. The tribunal concluded that the appellant had suffered no prejudice because he had been involved at all stages of the present proceedings. He has been heard in person at both hearings; he had been able to express his wishes in the lead up to the application; and he was represented by a solicitor and an advocacy worker at both hearings. The tribunal was in my view entitled to rely on the absence of any prejudice to the appellant in reaching its conclusion, without excusing the omissions on the part of the MHO.

[50] There is one further matter under this ground of appeal and that relates to the application of the 1998 Act. The purpose of the 1998 Act is to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights and Fundamental Freedoms. Section 6(1) provides that it is unlawful for a public authority to act in a way which is incompatible with a convention right. A public authority includes a court or a tribunal (section 6(3)). 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 relies upon article 6.

[51] The submission on this issue was light. There is only fleeting reference to the 1998 Act in the note of appeal and no mention of the ECHR. Although the tribunal was not presented with an article 6 argument that does not preclude the court from considering the matter if justice requires that be done. However in *Paterson v Kent*, the court noted that it

[redacted]

was "as unnecessary to resolve the issue of whether article 6 is engaged as it was in the case of *R (on the application of West) v Parole Board"* due in no small part to the provisions of rule 4 of the 2005 Rules. I endorse that approach.

[52] Rule 4 provides that as an overriding objective proceedings before the tribunal should be handled as fairly, expeditiously and efficiently as possible. I consider that the tribunal did act fairly, expeditiously and efficiently in granting an interim Order, issuing directions and continuing the hearing to enable the appellant's solicitor to make further inquiries and for the reserved preliminary matters to be clarified. At the continued hearing the solicitor representing the appellant advised the tribunal that she was prepared and ready to proceed. In my view the continued hearing was conducted fairly, expeditiously, and efficiently. No breach of rule 4 arises.

[53] In conclusion, 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 inconsistent with rule 4. I am not satisfied that the tribunal failed to have regard to the section 1 principles when assessing the preliminary issues, the application, the paperwork, the evidence and when making its decision. In my view the tribunal acted with integrity and demonstrated fairness throughout its dealing with the appellant. It ensured his active participation in the hearings and ensured he had sufficient time to instruct his solicitor and that she in turn had the opportunity to conduct further investigation prior to the hearing concluding.

[54] Accordingly I conclude that the submissions in relation to ground of appeal one disclose no error of law and the tribunal was entitled to reach the decision it did on the basis of the information before it.

[55] The second ground of appeal is that the tribunal acted unreasonably in the exercise of its discretion. In that regard I was referred to two internal MHTS decisions – *MHTS Case of DM* Ref 05787/20 29 October 2020 and *MHTS Case of EC* Ref 03435/20 20 July 2020. These can be readily distinguished from the facts and circumstances in the present case.

[56] In *DM* the patient entered the system through the civil route – she was made subject to a CTO. Her RMO undertook a mandatory review of the CTO and made application to the tribunal under section 92 to extend and vary the CTO to authorise community based measures. After hearing evidence the tribunal refused the application concluding that the application did not meet the statutory requirement in section 77(3)(a) in that the RMO failed to carry out a medical examination of the patient. The tribunal recognised that considerable effort had been made by the RMO to examine the patient and that all professionals had encountered significant difficulty in engagement with her. Nonetheless the examination was a critical component of the process. The tribunal also noted that "there is a welfare guardianship order in place and it remains open for a fresh CTO application to be made if that is thought to be appropriate." In the present proceedings the appellant is subject to a CO. He entered the system through the forensic route. The RMO fulfilled his statutory obligations. As a CO is an alternative to a prison sentence or other punishment, there is quite simply no statutory route for a fresh CO application on the same facts to be made.

[57] In *EC* an application was made to the tribunal under section 63 by the MHO. The application was undated and the MHO had failed to complete the sections in the application for expressing his views on the medical reports on which his report was based. He failed to attend the hearing although he did arrange for a substitute to attend the tribunal in his place. In the present proceedings, the shortcomings in the paperwork was rectified, the

[redacted]

application was made by the RMO not the MHO, the RMO had fulfilled her statutory duties and the MHO attended the adjourned hearing to explain his actions.

[58] The final issue on which I feel obliged to comment relates to the suggestion that the tribunal did not give adequate or proper reasons for its decision. It is entirely without merit. It should be obvious to any reader of the decisions that the tribunal assessed the application and supporting material carefully, identified preliminary matters, sought explanation, issued directions, assessed the evidence meticulously, had regard to the views of the appellant and to the submissions made on his behalf. In making its findings, the tribunal did not misconstrue the evidence or take into account irrelevant material or ignore material factors or err in the balancing exercise. The findings are supported by the evidence which the tribunal regarded as clear and persuasive. The clarity of reasoning on the main issues which are in dispute is commendable.

Outcome

[59] Accordingly I sustain pleas in law 1 and 2 for the respondent and repel the appellant's pleas in law 1 and 2. The appeal is refused. A hearing on the matter of expenses generally will be scheduled unless parties are able to reach agreement thereon.