Mental Health Tribunal for Scotland

CASE DIGEST

Volume 2

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Mental Health Tribunal for Scotland

FOREWORD

Almost ten years after the publication of the first volume of the MHTS Case Digest, a second volume is now complete. As with its older companion, this Digest summarises and comments on tribunal decisions which have been appealed to the courts and which have been the subject of a written judgment. A small amount of case law from other relevant areas has also been included.

The update is intended to serve as a collection of material useful to all who practise in this area of law. I hope it will also be of interest to the large number of people who seek to stay abreast of the work of the Tribunal. As a further development, we now also feature on our website selected decisions of individual tribunals. We try to include those which consider less common sections of the 2003 Act, but also to regularly publish decisions which are representative of the day to day work of the Tribunal.

I am sure that this second volume of the Case Digest will form a useful resource for all who are interested in this area of law. I am hugely grateful to Jennifer Whyte, the Legal Secretary to the Tribunal, for undertaking the research for and preparation of Volume 2, and to Yvonne Bastian, who has once again provided copy editing and desktop publishing support for the production of the finalised work. I would also like to extend my thanks to Scott Blair, Advocate and Tribunal Convener, for his invaluable support in the production of this volume.

Laura J Dunlop QC
President

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Necessity criterion – least restrictive option

Facts

At the conclusion of a hearing, the tribunal granted the application by the mental health officer (MHO) for a compulsory treatment order (CTO) in respect of AB. The CTO authorised detention of the appellant in hospital and the giving to him of medical treatment in accordance with Part 16 of the Mental Health (Care and Treatment) (Scotland) Act 2003 asp 13 (the 2003 Act).

By way of background, the appellant's responsible medical officer (RMO) had, as is almost always the case when a CTO application has been made, granted a short term detention certificate (STDC). This, allowing for the extension permitted by section 68 of the 2003 Act when the CTO application was made, would have expired 13 days after the date on which the CTO application was heard. The appellant's solicitor argued that the tribunal should refuse the application or adjourn the hearing for a period of approximately 10 days so that the tribunal would be in a better position to see whether the appellant actually needed a CTO towards the end of the period during which the appellant could be lawfully detained without such an order, by virtue of that STDC. The appellant's solicitor noted that the appellant had a history of responding quickly to medical treatment and it may be that he would be well enough within a further ten days not to require a CTO. In short, it was premature to grant a CTO on the date of the hearing. The tribunal rejected that argument on the basis that necessity related to the need to treat the patient other than informally and that, in granting an order in terms of section 64, the STDC would cease to have effect.

On appeal to the Sheriff Principal, it was said for the appellant that the tribunal had erred in law in its interpretation of the word "necessary" where it appeared in section 64(5)(e) of the Act and that the making of a compulsory treatment order in respect of the appellant had not been necessary since the short term detention certificate, (and thereafter the extension of time authorised by section 68), allowed the appellant to be detained in hospital and treated in accordance with Part 16 of the Act for a further period of 13 days after the date of the tribunal hearing. It was submitted that by the time that period had expired he might have been treated successfully, meaning that it was not necessary to grant the compulsory treatment order on 8 July 2011. Finally, it was argued for the appellant that the tribunal ought to have considered whether the appellant's need for treatment at that time could be met by other less restrictive means, such as a continuation of the hearing with the appellant continuing to be detained under the short term detention certificate and thereafter the extension authorised by section 68.

Held

The appeal was refused.

It is important to note from the outset that the Sheriff Principal found it was perfectly competent for the tribunal to grant a CTO prior to the expiry of a STDC. This decision does not in any way limit the timing of such an application, or of the hearing fixed to consider it. However, the Sheriff Principal noted that, before making a CTO, the tribunal had to be satisfied (1) that it was necessary, as required by section 64(5)(e), and (2) that it would involve the minimum restriction on the freedom of the appellant that was necessary in the circumstances – see section 1(4) of the 2003 Act.

It was held that in order to demonstrate that the test of necessity is met, it has to be shown not only that the patient must be treated under compulsory measures but also that their treatment will require compulsory measures for longer than the period permitted by the STDC and any extension authorised under section 68. Alternatively, the patient may require treatment or measures authorised in pursuance of a CTO, but not in pursuance of a STDC (or indeed on the basis of both these factors).

The question that the tribunal was required to ask was whether it was necessary that the appellant should be detained in hospital and given medical treatment in accordance with Part 16 of the Act after the end of the STDC. The Sheriff Principal was not confident, from reading the tribunal's reasons, that the tribunal had asked this question and then answered it in the affirmative. In the absence of any explicit statement in the written decision in response to the appellant's solicitor's submissions on that point, the Sheriff Principal took the view that it was likely that the tribunal did not do so. The Sheriff Principal therefore felt that there was some force in the appellant's argument, but observed that the proceedings under the 2003 Act are as much for the benefit of the patient as for any other person, and that this was an important consideration which justified the taking of a more informal and pragmatic approach to the resolution of the uncertainty. The Sheriff Principal therefore took the unusual step of adjourning the appeal hearing asking the convener to clarify the reasons in the written decision before determining the appeal. The tribunal's convener was asked to prepare a report for the Court stating (1) whether or not, before the making of the compulsory treatment order in respect of the appellant on 8 July 2011, the tribunal considered the question whether it was necessary that the appellant should be detained in hospital and given medical treatment in accordance with Part 16 of the 2003 Act after 21 July 2011 and, if so, (2) what answer it gave to this question. The report confirmed that the tribunal had in fact addressed the relevant question and, taking into account the evidence before the tribunal on the severity of the appellant's mental disorder, the tribunal was in no doubt that the appellant would require to be detained and treated for a period longer than the STDC would authorise.

The Sheriff Principal agreed that in order to satisfy the test of necessity in sections 1(4) and 64(5)(e) of the Act, it has to be shown that it is necessary that a patient should be treated and that compulsory measures are required to achieve this. However, the compulsory element is present in both a short term detention certificate and a compulsory treatment order. In order to demonstrate that the making of a compulsory treatment order is necessary, it has to be shown not merely that the patient needs to be treated by compulsory measures, but also that they need to be subject to compulsion either (a) for a period longer than that allowed by a short term detention certificate and any extension authorised under section 68 or (b) subject to measures which can be authorised in pursuance of a compulsory treatment order but not in pursuance of a short term detention certificate.

It followed that it was not enough that the Tribunal should have been satisfied that it was necessary to treat the appellant "other than informally". Compulsory treatment was already assured until midnight on 21 July 2011 by the existing short term detention certificate and the extension authorised by section 68. It was not suggested that any measures were necessary over and above those which could be authorised under the short term detention certificate; in other words detention in hospital and the giving of medical treatment in accordance with Part 16 of the Act was all that was required.

The only advantage of making a CTO in this case was that the appellant could be compelled to submit to these measures after 21 July 2011. The tribunal had to ask itself whether it was necessary for compulsory treatment to be authorised after 21 July 2011.

The Sheriff Principal was not satisfied that the tribunal did ask this question. It was implicit in the submission made by the appellant's solicitor to the tribunal on 8 July 2011 that the appellant might so far recover by midnight on 21 July 2011 as not to meet the criteria for a compulsory treatment order after that date. If that were to have been the case, then the making of a CTO would not have involved the minimum restriction on the freedom of the appellant that was necessary in the circumstances, since such an order would have authorised compulsory treatment for a period of up to 6 months when all that was required was compulsory treatment until, at the latest, 21 July 2011 (which would have been secured by the short term detention certificate and the extension authorised by section 68).

An answer to this submission would have been that the tribunal was satisfied, not merely that it was necessary that the appellant should receive compulsory treatment, but that it was necessary also that he should receive such treatment for a period of time after 21 July 2011. The tribunal was evidently satisfied on the first of these matters. But the omission of any explicit statement in the written decision, in response to the appellant's solicitor's submission, that it was satisfied on the second suggested that the tribunal did not in fact address this point. Had it done so, it would surely have said so in order to explain why the submission of the appellant's solicitor had been rejected.

Comment

This case resulted in detailed consideration around the necessity criterion specified in section 64(5) of the 2003 Act. In his written opinion, the Sheriff Principal set out that before making the compulsory treatment order, the tribunal had to be satisfied that it was necessary and that it placed the minimum restriction on the freedom of the appellant. The tribunal had rejected the appellant's submission that it should either adjourn the hearing and continue consideration of the application for up to 10 days or else refuse it, giving two reasons for this. These were (i) that "necessity related to the need to treat the patient other than informally", and (ii) that "in granting an order in terms of section 63, the section 44 certificate would cease to have effect". The Court had some difficulty with the second reason. Making a compulsory treatment order in respect of a patient who is then in hospital under the authority of a short term detention certificate has the effect of revoking that certificate, by virtue of section 70. But the Sheriff Principal could not extrapolate that to support either the contention that the compulsory treatment order was necessary or that the submissions made on behalf of the patient on that point should be rejected.

The opportunity to clarify or expand on a written decision when it comes under challenge is one which is rarely extended by the Court. Although appeals against Tribunal decisions are brought in terms of part 22 of the 2003 Act, the appeal when lodged must take the form of a summary application. So, notwithstanding the provisions for disposal of such an appeal in the 2003 Act, rule 2.31 of the Summary Applications and Appeals etc. Rules 1999 allowed the Court to make such order as it thought fit for the progress of a summary application, in so far as this is not inconsistent with section 50 of the Sheriff Courts (Scotland) Act 1907.

Usually, when a tribunal's decision is challenged, it will stand or fall on the reasons contained in the written decision. The Sheriff Principal's decision to seek supplementary reasons was unusual, and represented a pragmatic approach to balancing the purpose of the relevant provisions in the 2003 Act with the overarching principle of applying the least restrictive option. This permitted the Court to recognise that one of the grounds of appeal was to all intents and purposes made out, amounting to an error in the tribunal's decision, but still ensured continuing care and treatment for the appellant in line with the purpose of the 2003 Act.

For the Tribunal, this shows that in any case where there is still a substantial period of time before the expiry of a STDC, in considering a CTO application the Tribunal must make it expressly clear that detention and treatment will be required for a period in excess of or a purpose beyond that which the STDC would authorise. The Tribunal will require evidence as to why this is the case. The Tribunal should thereafter be able to record this evidence and to explain, with reference to that evidence, why the CTO is necessary despite the fact that, if the CTO was not made, the STDC would still have a substantial period to run.

The patient subsequently appealed to the Court of Session on the basis that there was a procedural impropriety in the conduct of the appeal hearing, as the Sheriff Principal allowed the tribunal to provide supplementary reasons. That appeal was not upheld.

DC, Petitioner

2012 SLT 521; 2011 GWD 39–805

Opinion of Lord Stewart, 22 November 2011

Effect in law of patient being on suspension of detention for more than 9 months when on CTO, does CTO lapse? – effect of patient absconding for more than 3 months, does CTO lapse?

Facts

It should be noted that some of the ratio of this case has been superseded by an amendment to the 2003 Act, introduced by the Mental Health (Scotland) Act 2015 (the 2015 Act).

This case raised questions about the interpretation of section 127 and section 304 of the 2003 Act. By section 127 (as then enacted) a responsible medical officer (RMO) could not grant a certificate suspending a patient's detention in hospital if the effect of that certificate were to be that the patient's detention would have been suspended for more than 9 months in a 12 month period. By section 304, where a patient subject to a CTO has been on unauthorised absence (defined as being liable to be taken into custody under section 301) for more than three months, the CTO ceases to have effect.

Here, the issue was whether, when an RMO purported to extend leave of absence beyond 9 months in a 12 month period, the underlying order lapsed and a patient who had been later recalled to hospital was entitled to seek damages?

Held

The patient had been unlawfully detained. The Court did not accept the argument that the CTO had lapsed because the patient's detention was suspended for a period in excess of nine months. In addressing the failure to comply with a statutory provision, Lord Stewart observed:

> *"54. In saying this, I do not exclude the possibility that there are situations in which a rule, ruling or order otherwise valid can be invalidated or terminated by an ultra vires derogation, condition or qualification: but I am confident that this is not one of them. Counsel for the Third Respondents was correct to say that no party really supported the MHTS reasoning of 30 July 2009 leading to the conclusion that the CTO had lapsed. Counsel for the Petitioner presented his own, different case for the lapsing of the CTO."*

In his view, while detention and suspension of detention may complement one another in the treatment plan, suspension is not integral to detention in such a way that a flawed allowance of suspension must, in the absence of clear direction in the statute, vitiate the CTO authorising detention. He was not persuaded that this was the intention of the legislature.

He did not find the consequentialist test articulated in *Soneji*[1] and applied in *Paterson*[2] and *JG*[3] helpful. In his view, the relevant issue in those cases was whether non-compliance with the statutory timescale for one step in, and integral to, a judicial or *quasi* judicial process might be excused or whether non-compliance invalidated the whole process.

The common feature in all those cases was that the statutory timescales were held to have been inserted for the purpose of securing a fair or efficient process. Trivial non-compliance was properly excused on the basis of lack of prejudice.

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[1] *R v Soneji* [2006] 1 AC 340; [2005] 3 WLR 303; [2005] 4 All ER 321

[2] *Paterson v Kent* 2007 SLT (Sh Ct) 8; [2007] MHLR 20; 2006 GWD 24-541

[3] *JG v Mental Health Tribunal for Scotland* 2010 GWD 40-817

The issue in this case was not about process but about substance. The legislature apparently accepted, against the background of the Millan Report, that over-long allowances of leave are potentially abusive and could occur for ulterior, resource-driven motives, risking prejudice to the patient and to public safety considerations. Ultimately, a straightforward reading of section 127 (as it was then enacted) is that the RMO simply has no power to grant a Suspension Certificate that results in more that the permitted duration of suspension of detention. The words are "if the sum of … *past leave periods together with the period of leave proposed to be certified* … would exceed 9 months in the period of 12 months ending with the expiry of the period [*of leave proposed to be certified*] the responsible medical officer may not grant a certificate." The certificate itself therefore may not have been valid, but the Court did not find that it followed that the underlying CTO had also become invalid.

In considering the point, Lord Stewart gave some consideration to the meaning of "absconding" in this context. He held that:

> *"[73] On this understanding I take "absconding" to mean simply being absent from the location or situation where the individual is required to be at the time when, under the authority of the Act or any authority derived from it, he or she is required to be there. For the foregoing reasons, negative and positive, I am satisfied that the legislature intended section 127 leave-overstayers to be classed as absconders within the meaning of section 301(1)(a)(ii) and to be liable to be taken into custody and dealt with in accordance with section 303 of the Act. I am satisfied too that the guidance given in the Code of Practice to this effect is sound. Clearly, if my interpretation of section 301(2) is correct, namely that patients may be taken into custody and re-detained for failing to comply with leave conditions, this reinforces the argument for understanding section 301(1) to mean that patients may also be taken into custody and re-detained if they stay away after their period of leave has expired."*

Lord Stewart then went on to address what he considered to be the key point, contained in section 304(3).

> *"[77] On the foregoing interpretation, which in my opinion is the correct one, by 16 August 2009 the Petitioner had been on unauthorised absence for three months and, in terms of section 304(3), the CTO had ceased to have effect. The CTO having ceased to have effect, there was no warrant for the Petitioner's re-detention, so that the detentions of or commencing on 16 September and 8 December 2009 respectively were unlawful. It follows too that the MHTS was not empowered to entertain applications in relation to the CTO, which had ceased to have effect, and that its determinations of 4 November 2009 and 13 April 2010, among others, were ultra vires."*

Accordingly he held that there had been an unlawful detention because, in terms of section 304(3), the CTO had ceased to have effect as, by the middle of August 2009, the patient had been an "absconder" for 3 months. The plain words of section 304(3) meant that the CTO came to an end on that alternative footing. It followed that subsequent re-detention and purported decisions by the Tribunal in relation to a CTO which had in fact lapsed had been unlawful.

On the alternative argument advanced by the Respondents, Lord Stewart had this to say:

> *"[78] I have to consider an alternative scenario, namely that the over-limit part of the Suspension Certificate is severable and that the Petitioner did not commence on unauthorised absence until the intra vires part had run its course. The first difficulty is that the Respondents, who contend for this scenario, are not in a position to tell me the date when intra vires absence became ultra vires, as it were. This could be*

fatal to their contention, above all in a context to which Article 5 ECHR applies: it would involve an assertion that the Petitioner was liable to be detained without specification of the date when he became liable.

[79] If the leave overshoot started after 16 June 2009, then the unauthorised absence might possibly have been interrupted by the re-detention on 16 September 2009. There would then not have been the continuous period of three months unauthorised absence in terms of section 304(3) before the Petitioner was again re-detained on 8 December 2009. I take the view that there is a fatal lack of clarity in the position of the First Respondents et al on this point. The Petitioner has, I think rightly, called on the First Respondent et al "to specify what power was used to return him to hospital on 16 September 2009 and on 9 December 2009". The call has not be answered [Article 15, page 21D; Answer 15 for the First Respondent et al]. The stated position of the First Respondent et al is that the Petitioner was not an absconder: if so, I cannot see that there was warrant for taking the Petitioner into custody and re-detaining him on 16 September. In the absence of a satisfactory explanation, what happened on 16 September has to be disregarded. Thus I would conclude that any ultra vires absence which commenced three months or more before the Petitioner's eventual re-detention on 8 December 2009 constituted the continuous period for the purpose of section 304(3) with the same legal consequence as regards the re-detention on 8 December 2009."

Comment

As well as addressing the effect of what amounts to unauthorised absence beyond that permitted by statute, the Court gave some clarity on what being an absconder means in the context of the 2003 Act. In particular, it discounted the need for intention, which seems appropriate given that the context is around people with mental disorder. The Court has also made it clear that the effect of a patient being on unauthorised leave from a CTO for three months is to bring the underlying order to an end.

However, one point the Court did not have to resolve is that of a precise calculation of the permitted period over which detention may be suspended. If a patient detained under a hospital-based compulsory treatment order [CTO] is given leave of absence during a number of discontinuous periods here and there, how should the Tribunal calculate the cumulative period of "9 months in the period of 12 months" (as was then relevant) ending with the expiry of the latest leave period, which is the maximum total amount of leave allowable in terms of section 127(2) of the Act?

His Lordship had this to say:

"[2] The answer is that you cannot calculate it, or that you cannot calculate it with certainty, which may come to the same thing. At least none of the Counsel who appeared in this case could explain how to do it. This is because, I was told, the Interpretation Act, "calendar month" definition cannot apply in the context of section 127 (2); because the 2003 Act itself does not provide an alternative definition; and because, without other definition, "month" is a variable period, 28 days to 31 days in length, depending on the month in question, so that the cumulative period of "9 months" can mean 252 days or 279 days or anything in between.

[3] Consequential questions arise, the first of which is: does section 127(2) meet the standard of legal certainty for Convention Rights-compliance, particularly for compliance with Article 5 ECHR (right to liberty and security); and, if it does not meet the standard, what are the implications?"

In fact, as the patient had been managed in such a way that he had exceeded the nine months, that did not arise as a practical question which needed to be resolved.

In mental health matters there should be guarantees that are not inferior to those existing in criminal proceedings – see *De Wilde, Ooms and Versyp* v *Belgium (No 1)* (1979-80) 1 EHRR 373 at paragraphs 76 and 79. A deprivation of liberty must be "in accordance with law". This means that it must meet national law, but also that the national law has the quality of certainty. The law must be sufficiently accessible, precise and foreseeable.

What became clear from this case was that calculating the cumulative period of 9 months in the period of 12 months, the maximum total amount of leave allowable in terms of section 127(2), could not be done with any certainty. This is partly due to the fact that "month" means calendar month and, of course, months have different periods depending on the month in question. Lord Stewart noted that with luck the legislature would resolve that problem by expressing the matter in days or weeks before a more pointed challenge arises. Ultimately, that was exactly what happened.

The 2015 Act amended section 127 of the 2003 Act to clarify the permitted time periods over which detention may be suspended. Section 127 (1A) of the 2003 Act provides as follows:

> *(1A) a certificate under subsection (1) above may specify –*
> *(a) a single period not exceeding 200 days, or*
> *(b) a series of more than one individual period falling within a particular six month period.*
>
> *(2) the total period that an order does not, by reason of certification under subsection (1) above, authorise the measure mentioned in section 66(1)(a) of this Act must not exceed 200 days within any period of 12 months (whenever counted from).*
> *(2A) for the purpose of subsection (2) above–*
> *(a) a day does not count towards the total period if the measure is (by reason of such certification) not authorised for a period of 8 hours or less in that day,*
> *(b) a single period (specified in such certification) of more than 8 hours and less than 24 hours, whether in one day or spanning two days, is to count as a whole day towards the total period.*

So, this gives some measure of clarity to the calculation of the total permissible period over which detention may be suspended. Whilst there is always some risk associated with attempting to paraphrase statutory provisions, it can be summarised as a maximum of 200 days in a rolling 12 month period. Within that period, detention may either be suspended continuously or be individual days of suspension not running consecutively, over six months. The provisions in (2A) set out what is considered to be a day; anything of eight hours or more is a day and must be subtracted from the 200 day total. If that was an overnight stay away from the ward, even though the calendar dates would suggest that be counted as two days, if the patient's detention is suspended for less than 24 hours, only one day is subtracted from the 200 day total. So, for example if the patient left the ward at 7pm on the first day of the month and returned at 6pm on the second of the month, that would count as a single day for this purpose. If they left at 7pm and returned at 8am? That may be less clear, but the following subsection states that anything less than 8 hours is not considered to be suspension of detention for this purpose and does not result in a day being subtracted from the 200 day total.

What does remain relevant from Lord Stewart's decision is the clear finding that the underlying order does not fall until the statute says that it does, namely three months beyond the permitted period of suspension of detention. So, now, that is calculated simply by identifying day 200 and adding three months to that date.

Although perhaps still slightly complex, the new subsections added by the 2015 Act do appear to ensure that the arrangements for calculating suspension of detention meet the tests of certainty, accessibility, precision and foreseeability.

Scottish Ministers v MHTS

2012 SC 225; 2011 GWD 40-834 (MHTS not participating)

Restriction order – revocation – motion for interim order to continue the restriction order pending appeal against revocation – competency [Criminal Procedure (Scotland) Act 1995 (c.46), s.57A(2) and s.59 – the 2003 Act, s.193, s.196, s.323 and s.323(1) – Mental Health (Care and Treatment) (Scotland) Act 2003 (Transitional and Savings Provisions) Order 2005 (SSI 2005/452), art.20]

Facts

It should be noted that the Mental Health (Scotland) Act 2015 amended some of the relevant provisions in the 2003 Act, in particular giving a 21 day period in which an appeal may be made against the revocation of a restriction order prior to the tribunal's decision to revoke this taking effect.

This motion was heard in the course of an appeal by Scottish Ministers against a decision of the Tribunal revoking a restriction order and varying a compulsion order affecting a patient (JMM) (see *Scottish Ministers v MHTS and JMM*).

JMM was suffering from paranoid schizophrenia and living in the community. Scottish Ministers moved the Court to make an interim order in terms of section 323 of the 2003 Act continuing JMM's compulsion order and restriction order.

By way of background, JMM had been acquitted by reason of insanity of the attempted murder of his father, and a hospital order with a restriction order was imposed on him by the Court. By virtue of the Mental Health (Care and Treatment) (Scotland) Act 2003 (Transitional and Savings Provisions) Order 2005 art. 20, JMM then became subject to a compulsion order under section 57A(2) of the Criminal Procedure (Scotland) Act 1995 and to a restriction order under section 59 of that Act. JMM continued to demonstrate violent psychosis and suffered further from paranoid ideation, hallucinations and delusions. However, some years after the index offence, a tribunal concluded that the restriction order was no longer necessary and that the compulsion order ought to be varied to permit him to reside in the community. Scottish Ministers considered that JMM's mental disorder and his history were such that he would commit offences if set at large, and that it was necessary to have a restriction order in place for the protection of the public from serious harm in terms of section 59 of the 1995 Act. A motion was enrolled seeking an interim order for the continuation of the compulsion and restriction orders whilst the appeal took place.

JMM opposed the motion arguing that it was incompetent on the basis that the wording of section 323 and section 196, which also addressed the interim position, did not empower the Court to make an order when JMM was not currently physically detained in hospital, and that JMM's progress had been such as to make an interim order unnecessary.

Held

The motion was granted. (1) The word "detention" in section 323 could not be confined to the narrow construction of being currently physically detained within a hospital. Properly construed, the concept of detention had to be flexible enough to extend *inter alia* to a patient who had been detained in a place of safety pending admission to a specified hospital of the 1995 Act; to an acquitted person who had been detained in a place of safety pending a medical examination; to a patient who should be in hospital in terms of a compulsion order, but who had absconded; to a patient who had been conditionally discharged into the community but who was liable to recall to hospital in the event of non-compliance with a

condition; and to a patient who was subject to detention in hospital in terms of a compulsion order but had been granted leave of some nature such that he was currently in the community.

Comment

Sections 196 and 323 of the 2003 Act applied ex facie to all appeals against orders in terms of s.193, and accordingly covered appeals where detention was not one of the authorised measures. The Court's power in terms of section 323(1), properly construed, entitled it to continue not only detention but also any other order to which the appeal related; such a flexible disjunctive construction of "and" where it linked section 323(1)(a) and (b) was consistent with the use of the term elsewhere in the 2003 Act.

If sections 196 and 323 of the 2003 Act applied only to cases where the patient was currently actually detained in a hospital, there was no statutory provision to cover the interim situation in the present case. That being so, there was nothing in the statute or elsewhere to override or disapply the normal common law rule that an appeal had the effect of suspending the operation of the decision appealed against. In all the circumstances, the motion of the Scottish Ministers was competent.

Having regard to the gravity of JMM's original offence, the risk of violence if JMM's illness was unsatisfactorily controlled, his potential to fail to appreciate his need for medication when under the influence of illicit drugs or alcohol, the element of public protection by preserving *ad interim* Scottish Ministers' powers of monitoring and supervision, including their power to recall JMM, and the fact that the interim continuation of the restriction order would have a minimal effect on JMM's present life, the motion was granted. This of course meets the test for the grant of interim orders, where those seeking the order must have a prima facie case, but must also be able to satisfy the Court that the balance of convenience favours the granting of that order.

The substantive decision in the appeal by JMM is considered in detail next.

Black (curator a*d litem* to M) v Mental Health Tribunal for Scotland

2012 SC 251; 2012 GWD 2–31

Opinion of Lord Reed 8 December 2011

Article 5 – does a curator ad litem have a right of appeal against a decision of the Tribunal?

Facts

M was an elderly patient with a diagnosis of dementia. She was admitted to hospital on an emergency basis, and a short term detention certificate was granted under section 44 of the 2003 Act authorising the detention of the patient for a period of up to 28 days.

Her mental health officer applied to the Tribunal under section 63 of the Act for a compulsory treatment order (CTO). For the purpose of this application, the Tribunal appointed the appellant as curator *ad litem* to the patient under rule 55 of the Tribunal's Rules[4]. The Tribunal 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 appellant was present at the hearing on the CTO but the patient was not. Others present at the hearing included the patient's mental health officer, her responsible medical officer 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 moved the tribunal to adjourn its consideration of the application in order to obtain a medical report on the patient. The tribunal refused the motion to adjourn 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.

The appellant attempted to appeal to the Sheriff Principal against the order under section 320 of the 2003 Act on the grounds that the tribunal's refusal of an adjournment had been unreasonable and unfair.

Held

The case was remitted to the Court of Session in terms of section 320(4) of the 2003 Act. In reaching that decision, 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 on Human Rights (the ECHR) "to take proceedings by which the lawfulness of [her] detention shall be decided speedily by a court".

Section 320 makes provision for such proceedings to be taken by the patient, but that is of little or no value if the patient lacks capacity to exercise that right. In those circumstances, the Sheriff Principal concluded that section 320(5) might be incompatible with Article 5(4).

[4] The Mental Health Tribunal for Scotland (Practice and Procedure) (No. 2) Rules 2005 (SSI 2005/519)

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 the Inner House of the Court of Session.

The Inner House made reference to the European Court of Human Rights decision in *Winterwerp v The Netherlands* (1979-80) 2 EHRR 387, paragraph 39, noting that 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 fluctuation in the effect of some mental disorders, *Winterwerp* confirms (at paragraph 55) that 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. 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 on the authority of a 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).

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 were made out.

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 (and, indeed, any other application) the Tribunal can appoint a curator *ad litem* to act in the interests 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 ensure that detention is ended as quickly as possible for a person who should not in fact have been detained or who should not be detained any longer, as required by Article 5(4) of the Convention.

Clearly, the Tribunal is a "court" within the meaning of that provision, having the power to take a judicial decision on the need for detention in accordance with law. As the Court observed in *Reid* v *United Kingdom* (2003) 37 EHRR 9 at paragraph 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."*

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 under a compulsory treatment order made by the Tribunal under section 64 of the 2003 Act. That section 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, appears to comply fully with Article 5(1)(e) of the Convention. Furthermore, because a compulsory treatment order is made by a "court", within the meaning of Article 5(4), the judicial supervision of detention required by that provision is incorporated in the Tribunal's decision, as the European Court of Human Rights set out in *De Wilde, Ooms and Versyp* v *Belgium (No 1)* (1979-80) 1 EHRR 373, paragraph 76. The right to regular reviews is also satisfied. The 2003 Act contains a number of provisions for such review, either automatically in the event of an extension of the order beyond a certain time (e.g. under section 101), or on the application of the patient, another party or a relevant person.

The Court took the view that the Sheriff Principal was therefore mistaken 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). 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.

In providing a right of appeal against the Tribunal's decision, the 2003 Act meets 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, paragraph 84.

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 the Court of Session 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 give rise to any incompatibility with the Convention. The requirements of Articles 5(1)(e) and (4) are met by the procedure before the Tribunal itself, without the need for any further appeal to another court.

The appeal was refused.

Comment

The Sheriff Principal came to the view that section 320(5), which lists the category of persons who are entitled to appeal and which does *not* include a curator *ad litem*, might be incompatible with article 5(4) of the European Convention on Human Rights. As a result, he remitted the case to the Court of Session. The Court noted that the fundamental concern of the Sheriff Principal was that a right – and in particular a right of appeal (which is, of course, open to the patient under section 320 of the 2003 Act) – is of no practical benefit if the person is unable to exercise it. The Court noted that this is a difficulty which is inherent in mental illness and that sort of concern does not lead to the conclusion 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. The Court noted that that objective is reflected in the terms of the 2003 Act. In particular, the provisions in relation to the appointment of a named person, whose role is to protect the interests of the patient and who has a right of appeal under section 320, were referred to. Section 257A, which was inserted into the 2003 Act by virtue of the Mental Health (Scotland) Act 2015, subsequently added a further person with a right of appeal: the listed initiator. That section applies to allow one of a list of individuals to appeal where the patient would have that right and where the patient does not have a named person. This was added partly because the 2003 Act as originally enacted provided for a 'default' named person (at section 255(1)) for a patient who lacked capacity to nominate a named person of their choosing. The listed initiator concept is intended to ensure that the right of appeal can be exercised for such a patient now that that section has been repealed.

So what remedy, if any, is available to a curator *ad litem* appointed to represent the interests of a patient in proceedings before the Tribunal in the event that the Tribunal acts unlawfully or exercises its discretion in an unreasonable manner? The conclusion that a curator *ad litem* has no statutory right of appeal against a decision of the Tribunal does not mean 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 the Court of Session. Although the 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 the application to the Court would proceed on the basis that the proceedings before the Tribunal had not been validly completed), and they would have a sufficient interest in the matter complained of.

The Court also noted 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. Ultimately, this case clarified that a curator *ad litem* does not have a right of appeal against a Tribunal decision, and the fact that the curator does not have that right is not incompatible with the European Convention of Human Rights.

JB (Named Person for CB) v Mental Health Tribunal for Scotland

2012 SLT (Sh Ct) 71; 2012 GWD 7-130

Judgment of Temporary Sheriff Principal C N Stoddart, 10 January 2012

Composition of the Tribunal and role of named person– removal of a named person

Facts

It should be noted that the relevant sections of the 2003 Act have subsequently been amended by the Mental Health (Scotland) Act 2015. The provisions creating a default named person for a patient over the age of 16 years have been repealed by virtue of the 2015 Act.

The patient (CB) was made the subject of a short term detention certificate, and on the same day his mother (JB) was granted the status of named person by default by virtue of section 251(1) of the 2003 Act. However, the mental health officer (MHO) for CB applied to the Tribunal under section 255(6) of the 2003 Act for an order under section 257 to declare that JB was no longer to be the named person, on the basis that it was inappropriate for her to continue as such. A tribunal granted that application. JB appealed against that decision to the Sheriff Principal under section 320(1)(u) of the 2003 Act. During the appeal a fundamental point of competency emerged, namely that the decision of the tribunal had been made by a single member, namely a convener, rather than a tribunal composed of more than one member.

Held

Appeal allowed and decision remitted to a differently-constituted tribunal to reconsider.

The Sheriff Principal held that the tribunal was not properly constituted when it took the decision to remove the named person under section 257 of the 2003 Act. When the MHO applied for an order to remove the appellant as the named person for the patient, the tribunal was faced with an important substantive decision. That such a decision was in fact taken is clear from the Full Findings and Reasons. This shows that the convener, sitting alone, heard oral evidence from the Appellant and considered a range of written material before making a number of Findings-in-fact.

The Sheriff Principal noted that the decision affected the rights and duties of the appellant herself, but also affected the position of the patient. Under the statutory provisions in place at the time of this decision, a patient in his position always had a named person, either by nomination or by default. Indeed if the patient did not have a named person then the mental health officer was, under the relevant section as it was then enacted, under a duty to take steps to ensure that a named person was appointed. Although that has been superseded by subsequent amendments to the 2003 Act, the role of the named person remains unchanged, so this case is still a relevant part of the jurisprudence. The named person acts independently of the patient and has defined rights as a party. In particular, the named person has the right to raise proceedings in respect of the patient and is entitled to receive intimation of any proceedings raised by anyone else. The named person has an important substantive role and any application to remove a named person from that role is therefore a substantive decision.

The task of the tribunal here was to decide on whether it was inappropriate for the named person to continue in that role. If the tribunal was so satisfied, then that named person would have no further part to play. That is a significant step and in the view of the Sheriff Principal, one which could not be taken by a tribunal consisting of a single member.

Comment

The fundamental point of competency arose because the decision of the tribunal was made by a convener sitting alone, rather than a tribunal composed of three members. Under reference to the Tribunal's Rules, it was argued that the decision under appeal was of such an interim or preliminary nature as could legitimately be made by a single member under rule 43. This point was contested by parties. It was conceded that, when the decision was made, there were no other live proceedings pending before the Tribunal and it could not therefore be said that the decision to remove the named person was an interim or preliminary matter in the context of other proceedings, as required by rule 43.

It was submitted for the Tribunal that it was for the President of the Tribunal to delegate the decision making functions to tribunals either consisting of three members or not; and that, in consequence, the President could competently allocate the making of a particular decision to a tribunal consisting of a Convener sitting alone. This arises from the wording of paragraph 7(1) of Schedule 2, where the position of the statutory body (the Tribunal) was contrasted with the body which carried out its function (a tribunal). Here, the drafting implies (albeit does not explicitly state) that a tribunal might be validly constituted by one member.

At this time, it was the Tribunal's policy for applications under section 255 to be heard by a convener sitting alone, mainly on the basis that these proceedings were seen as "interim" or "preliminary" in nature, as they were related to a particular case and could therefore be dealt with under rule 43 of the Tribunal's Rules. The important point, however, in this case was that, at the time the decision was made in relation to the named person, there were in fact no other live proceedings pending before the Tribunal, so it could not really be said that the decision to remove JB was an interim or preliminary matter in the context of other proceedings, as required by rule 43.The Sheriff Principal came to the view that the tribunal was not properly constituted when it took the decision under section 255 of the 2003 Act.

Although this is not a decision which should be taken by a convener sitting alone, it does not mean that no decisions can be taken by a convener only. The 2003 Act, together with the Tribunal's Rules, clearly envisages some decisions being taken this way, for example in an emergency situation or where an interim or preliminary decision requires to be made in the context of other proceedings, essentially for case management purposes. Here, there was no emergency or urgent need for a decision. Even if there had been other proceedings extant at the time the decision had been taken, it could not be said that the decision on the named person was of an "interim" or "preliminary" nature, given the significance of the application and the consequences of it being granted.

As a result of this decision, the Tribunal ceased to hear applications for removal of a named person before a legal convener sitting alone. All such cases are now heard by a three member tribunal panel. The case is interesting for the emphasis the Sheriff Principal puts on the important role of the named person and the fact that he makes it clear that proceedings in relation to removal of a named person are freestanding proceedings and cannot be seen as interim or preliminary proceedings relating to a case such as a CTO application before the Tribunal.

Scottish Ministers v Mental Health Tribunal for Scotland and JMM

2012 SC 471; 2012 SLT 560; 2012 SCLR 375; 2012 GWD 9-176

Opinion of Lord Eassie, Lord Clarke, Lord Mackay of Drumadoon, 28 February 2012

Requirement to consider variation of a compulsion order on removal of restriction order – requirement to give consideration to all aspects of relevant tests – requirement to give reasons for decisions.

Facts

This was an appeal by Scottish Ministers under section 322 of the 2003 Act against a decision of the Tribunal to revoke a restriction order in terms of section 193(5) of the 2003 Act.

On 13 May 1991 in the High Court of Justiciary sitting at Glasgow, the patient (JMM) was acquitted by reason of insanity at the time of the offence of the charge of the attempted murder of his father. The patient was diagnosed as suffering from paranoid schizophrenia. The Court made a hospital order, with a further order of detention without limit of time, in terms of sections 174 and 175(4) of the Criminal Procedure (Scotland) Act 1975. The patient was thereafter detained for treatment in the State Hospital at Carstairs. By virtue of various statutory and regulatory provisions, on entry into force of the regime established by the 2003 Act, the patient fell to be treated by the Tribunal as a person who was a "1995 Act patient" and who was subject to both a compulsion order under section 57A(2) of the Criminal Procedure (Scotland) Act 1995, as amended, and a restriction order under section 59 of that Act. The effect of the restriction order was to make the compulsion order apply without limit of time (subject to regular reviews) and also to bring the patient within the restricted patients regime; that is to say, making Scottish Ministers responsible for having an overview of his care, treatment and management while the restriction order was in place.

The patient was conditionally discharged into the community on three occasions, but each time he was recalled to hospital. In 2008 he was again conditionally discharged. Following a recommendation by the patient's responsible medical officer (RMO) in terms of section 183 of the 2003 Act that the patient's restriction order should be revoked, the Scottish Ministers made a reference to the Tribunal under section 185 of the 2003 Act. The Tribunal began hearing evidence on 31 August 2010. When the Tribunal held its final evidential hearing on 9 March 2011, the evidence of the RMO, the psychiatrist instructed by the Scottish Ministers, and the psychiatrist instructed on behalf of the patient was that the restriction order was no longer necessary. The tribunal made an order under section 193(5) of the 2003 Act revoking the restriction order. The tribunal's written decision was communicated to the parties on 1 April 2011. The Scottish Ministers appealed against that decision. The decision notwithstanding, as JMM was a restricted patient, the appeal route lay to the Inner House of the Court of Session, rather than to the Sheriff Principal.

The tribunal had before it the opinion of expert medical witnesses, including the RMO and the independent expert instructed by the Scottish Ministers, that the restriction order was no longer justified. There was no contradictory evidence. The patient's mental health officer was also of the view that the patient no longer met the relevant test for the maintenance of a restriction order. The patient's community psychiatric nurse gave evidence favourable to the revocation of the restriction order.

In the Full Findings and Reasons, the tribunal, having summarised the evidence of witnesses and the submissions of the parties, set out the facts found as the basis of its decision. It set out the relevant statutory provisions, including the terms of section 193 of the 2003 Act.

It also considered and sought to follow the guidance given by this Court in *Scottish Ministers* v *Mental Health Tribunal* 2009 SC 398 – *"JK"* – and in *Scottish Ministers* v *Mental Health Tribunal* 2010 SC 56 – "*MM".*

The tribunal then identified the questions which it had to consider as follows:

> "(a) Does the Patient have a mental disorder?
>
> (b) As a result of the Patient's mental disorder, is it necessary, in order to protect any other person from serious harm, for the Patient to be detained in hospital whether or not for medical treatment?
>
> (c) Do the conditions mentioned in section 182(4)(a), (b) and (c) [of the 2003 Act], continue to apply to the Patient?
>
> (d) Is it necessary for the Patient to be subject to the Compulsion Order?
>
> (e) Does it continue to be necessary for the Patient to be subject to the Restriction Order?"

To the first and third of those questions the tribunal gave a positive answer. To the second it gave a negative answer. None of those answers gave rise to dispute in the proceedings before the tribunal. As to the fourth question – whether the compulsion order was necessary – the tribunal gave a positive answer, in the following terms:

> *"The Tribunal makes reference to section 193(4)(b)(ii)(B). The Tribunal were satisfied that it continues to be necessary for the patient to be subject to the Compulsion Order, especially as this provided the necessary structure for the Patient to receive the treatment which alleviated his condition and allowed him to be maintained within the community through a robust and extensive care package. From the evidence the Tribunal was satisfied that the Patient would be at risk of non-compliance if the order was not in place. The Compulsion Order therefore continues to be necessary."*

It was the final question identified by the tribunal – whether there was any proper need for continuing the restriction order – which was the principal matter put in issue by the Scottish Ministers.

In approaching that issue, and in light of what of what had been said by Lord Carloway at paragraph 44 in the Opinion which he gave in *MM*, the tribunal then refers to and sets out section 59(1) of the 1995 Act. Further reference is then made to paragraph 37 of Lord Carloway's Opinion in *MM* and to what was said in paragraph 39 in the Opinion of the Court delivered by Lord Wheatley in *JK*.

The Scottish Ministers essentially had two grounds of appeal. The first ground criticised the decision of the tribunal to revoke the restriction order in terms of section 193(5). The second ground was that, having resolved under section 193(5) to revoke the restriction order, the tribunal erred in not proceeding to consider in terms of section 193(6) whether the compulsion order fell to be varied.

On appeal, a number of criticisms were made of the tribunal's approach in support of the grounds of appeal. The first criticism was that, whilst the tribunal had set out the guidance given at paragraph 39 of the opinion of the Court in *JK* (namely that the tribunal should consider the nature of the offence, the antecedents of the patient and the risk of his committing further offences if at large), the tribunal, it was submitted, had not properly addressed those criteria.

It was submitted that the decision made no reference to the patient's offending prior to the imposition of the hospital order in 1991. Further, the tribunal did not properly address the patient's history after 1991 but prior to 2008, consisting as it did of a number of grants of

conditional discharge followed by recall, the patient having resumed substance use. In particular the tribunal had not made detailed reference to the threats or incidents of violence which, among other things, had led to recall.

It was also submitted that the tribunal did not address the fact that the patient had a physical health condition which may mean that he would likely be unable to continue with the medication prescribed for his mental disorder in future. Further, the tribunal had not properly addressed the effects of the restriction order on the patient. In the absence of a restriction order, the patient would not be covered by arrangements under sections 10 and 11 of the Management of Offenders etc. (Scotland) Act 2005, which enabled co-ordination and co-operation among various public agencies in the provision of care and services. Accordingly, the tribunal had not properly addressed the continuing necessity test in section 193(5)(b)(ii).

The appellant argued that, having concluded under section 193(5) of the 2003 Act that the restriction order should be revoked, the tribunal ought to have gone on to consider whether, under section 193(6), the compulsion order – which it had concluded should be kept in place – should be varied. In the Opinion of the Court delivered in *JK*, the Court had referred to the terms of section 193 of the 2003 Act as setting up a "sequential" list of tests to be applied.

The tribunal was therefore bound to proceed from its decision under section 193(5), whereby it revoked the restriction order, to consider in light of that revocation and in terms of section 193(6) whether the compulsion order should be varied. Further, whether that decision be for or against variation, reasons ought to be given for it.

Counsel for the appellant went on to point out that, notwithstanding the general principle in section 1(4) of the 2003 Act, the tribunal had left in place a compulsion order which required the patient to be detained in hospital. It had not considered any variation of the compulsion order to reflect the fact that the patient was living in the community and had been living there for some time.

Whilst a compulsion order could provide for the subject of the order to be resident in the community, the terms of section 57(8) of the 1995 Act did not permit complete replication of the conditions to which JMM's current discharge from hospital was subject. It was therefore appropriate that the tribunal should have gone on to consider the terms of the compulsion order and whether or not the compulsion order should be varied. There was nothing in the tribunal's decision suggesting that the tribunal had considered section 193(6) of the 2003 Act; nor, if the tribunal had in fact considered that provision, what matters it had taken into account, or what reasons it had found for resolving not to alter the terms of the compulsion order.

Held

Appeal allowed and the matter remitted back to the Tribunal.

With regard to the first ground of appeal, while the Court appreciated the Scottish Ministers' concern that the safety of the public should not be endangered by the removal of the restriction order, which provides for the Scottish Ministers having a role in the management of the patient, the Court nevertheless came to the view that this ground of appeal was not well founded. In this respect, the Court noted that while it was correct that the tribunal did not make reference to the criminal convictions of the patient incurred prior to the making of the hospital order in 1991, it took the view that this was wholly understandable, as those previous convictions were very minor in nature and thus essentially irrelevant to a consideration of matters at the time the tribunal made its decision. The Court noted that the tribunal was wholly informed of the serious nature of the index offence which led to the making of the original hospital order and of the patient's history after the making of the

hospital order. Further, the Court noted that while, of course, the Tribunal is not bound by the expert evidence and must reach its own view, in reaching a view contrary to that unanimously held by the expert evidence before it a tribunal must have a proper evidential basis for doing so and that, in this appeal, the Scottish Ministers had been unable to identify any such basis upon which the tribunal could properly reach such a contrary conclusion.

As indicated, the second ground of appeal was that, the tribunal having concluded under section 193(5) of the 2003 Act that the restriction order should be revoked, the tribunal ought to have gone on to consider whether, under section 193(6), the compulsion order – which it had concluded should be kept in place – should be varied. The Court noted that the opinion of the Court delivered in the case of *JK* referred to the terms of section 193 of the 2003 Act as setting up a "sequential" list of tests to be applied and so the tribunal was bound to proceed from its decision under section 193(5) – whereby it revoked the restriction order – to consider, in light of that revocation and the terms of section 193(6), whether the compulsion order should be varied; further, whether that decision be for or against variation, the reasons for it.

Comment

The Tribunal accepted that the written decision made no reference to any consideration having been given to section 193(6) of the 2003 Act. The Tribunal noted however, that no submissions had been made to the Tribunal by Scottish Ministers, or any other party, that if the restriction order was revoked, it would be necessary or appropriate for the Tribunal to consider variation of the compulsion order. In acting as they did, the Tribunal took the view that the practical situation was that, having failed to vary the compulsion order, the patient was left subject to a compulsion order requiring the patient's detention in hospital and that, by virtue of section 179 of the 2003 Act applying section 127 of the 2003 Act to the compulsion order, the RMO had power to suspend the patient's detention. Further, section 127(6)(b) gave the RMO wide powers to attach conditions to suspension of detention. In the Inner House, the Tribunal noted that any condition which might be imposed in a compulsion order providing for the patient being in the community could be imposed by the RMO as a condition of suspension of detention under section 127 (as applied by section 179) of the 2003 Act.

The Tribunal accepted also, in response to questions from the Bench, that having reached the conclusion under section 193(5) to revoke the restriction order, the tribunal was required – by the opinion of the Court in the case of *JK* – to proceed to section 193(6) and to consider whether the terms of the compulsion order should be varied. The Tribunal further accepted that, having proceeded to that question, there was an obligation on the tribunal to say how the question (as to whether and how the compulsion order should be varied) was considered and answered and to give reasons for the view which the tribunal had reached. Since the tribunal did not proceed to do either of those things in reaching its final decision, the Court concluded that the decision was flawed in those respects. Whilst the Court considered that Scottish Ministers' argument in respect of the tribunal's decision to revoke the restriction order under section 193(5) was unsound, it did consider there to be merit in the Scottish Ministers' argument in respect of the tribunal's omission to proceed to address the issues raised in section 193(6).

Looking in more detail at the criticisms made of the tribunal's approach, on the first criticisms around the patient's offending history the Court did not agree that it had substance. It was correct that the tribunal did not make reference to the criminal convictions of the patient incurred prior to the making of the 1991 hospital order. However those previous convictions were minor in nature and thus essentially irrelevant to a consideration of matters some three decades later. It is clear that the tribunal was wholly informed of the serious nature of the index offence which led to the making of the original hospital order.

The tribunal was aware of the history of the patient after the making of the hospital order in 1991. It was fully detailed in the various reports before it and it was acknowledged in the reasons for their decision.

The patient's physical health condition was put before the tribunal and witnesses, but was not seen by those witnesses as a problem of significance. Nor did any of the witnesses consider the continuing application of the Management of Offenders etc. (Scotland) Act 2005 to the patient to be necessary. The Court was of the view that no legal error arose. The criticisms really related to the weight to be given to those matters by the tribunal in its consideration of all the evidence and materials before it and, secondly, whether the tribunal has given adequate reasons for its view of that evidence and those materials.

The expert evidence before the tribunal was to the unanimous effect that continuing the restriction order was not necessary. There was no suggestion in the submission advanced on behalf of the Scottish Ministers that those experts were in any way ignorant of any of the matters to which that submission refers. Whilst ultimately the Tribunal is not bound by the expert evidence and must reach its own view, in reaching a view contrary to that unanimously set out in expert evidence a tribunal must have a proper evidential basis for doing so.

As noted above, it was on the second part of the appellant's argument that the Court considered the tribunal had fallen into error. Counsel for the Tribunal accepted that having reached a conclusion under section 193(5) to revoke the restriction order, the tribunal was required to proceed to section 193(6) and consider whether the terms of the compulsion order should be varied. Counsel for the Tribunal accepted that having proceeded to that question there was an obligation to say how it was considered and answered and to give reasons for the view which the tribunal reached. Since the tribunal did not proceed to do either of those things in reaching its final decision, the Court ultimately concluded that the decision was flawed and remitted the matter back to be considered by a differently constituted tribunal.

The lesson for the Tribunal was that when a panel revokes a patient's restriction order under section 193(5) of the 2003 Act, it must proceed to section 193(6) to consider whether the terms of the compulsion order should be varied; reach a decision; and give reasons for the view which the tribunal has reached. Significantly, it must do all of this irrespective of whether any party appearing before it has raised the issue of variation of the compulsion order under section 193(6).

AB v Bernarda Rodriguez (Mental Health Officer), Dr Debbie Monaghan (Responsible Medical Officer) and Mental Health Tribunal for Scotland

2012 GWD 34-702

Judgment of Sheriff Principal B A Lockhart, 29 September 2012

Compulsory treatment order – community-based measures – requirement to reside in locked care facility – least restrictive option.

Facts

The patient (B), suffering from a mental disorder and resident in a care home, appealed against the refusal by the MHTS of her application under section 100 of the 2003 Act for revocation or variation of the compulsory treatment order (CTO) to which she was subject. The appellant's community based compulsory treatment order required the appellant to reside at a particular address, which was the care home. The appellant made an application seeking revocation or variation of the CTO.

The appellant's solicitor at the Tribunal hearing submitted that this was a locked facility where residents could only leave or return using a keypad. The appellant did not know the code to operate the keypad, and the solicitor for the appellant submitted that she was detained in the care home. The solicitor suggested that the tribunal did not have power to make, or continue, a community based compulsory treatment order which included as a measure that the appellant reside in the specified care home. The appellant's solicitor suggested that the tribunal should therefore vary the CTO to a hospital based CTO, or alternatively revoke the CTO.

The tribunal found that it could not revoke the order on the basis of a submission by the patient questioning the lawfulness of her placement in the locked facility as not being the least restrictive in all the circumstances. The tribunal took the view that such a submission fell outwith their powers in section 103(3) and (4) of the 2003 Act, particularly by reference to sections 64(5) and 66(1). The tribunal further found that it was not necessary for her to be detained in hospital.

On appeal, the appellant sought to have the decision set aside and the case remitted back to the Tribunal for reconsideration. She submitted that her continued detention in a locked facility while under a community based order went beyond the statutory intervention to which she was subject. She argued that it was not competent for such an order to require her to reside in a locked facility, and that the tribunal had acted unreasonably in the exercise of its discretion. The appellant accepted that the tribunal was entitled, on the evidence before it, to be satisfied that the conditions for making a community based compulsory treatment order set out in section 64(5) of the 2003 Act were satisfied. Her solicitor submitted, however, that the tribunal had not properly considered the section 1 principles, in particular section 1(3)(g), namely the need to ensure that, unless it can be shown that it is justified in the circumstances, the patient is not treated in a way that is less favourable than the way in which a person who is not a patient might be treated in a comparable situation.

He submitted that a proper consideration of the section 1 principles would have shown the difficulty of continuing the CTO due to the unacceptable restriction to her liberty in the care home. He submitted that the failure to give proper weight to the section 1 principles had resulted in an error in law.

A second ground in the appeal was that the tribunal had failed to make a recorded matter suggested by the appellant's solicitor that welfare guardianship in respect of the patient should be applied for. The appellant's solicitor submitted that the tribunal had taken a narrow and restricted interpretation of a recorded matter and this has also been an error of law.

It was conceded by the tribunal that the issue before it had been the lawfulness of the patient being required to reside in a locked facility. The issue, however, was not whether the facility was locked, but whether the person could be said in law to be being detained. It was submitted that there was no evidence from the appellant or the named person at the tribunal that the appellant was in fact being detained. While she would only be taken out when she requested if a member of staff was available, there was no evidence before the tribunal that that was a major obstacle. It was submitted that the tribunal had specified the least restrictive alternative in the circumstances. They imposed the minimum restrictions on the appellant required for her own safety. In addition, it was submitted by the Tribunal that if there was at any time evidence available of the patient being detained against her will, the remedy lay elsewhere and against others. Counsel for the RMO made similar submissions, seeking to draw distinction between detention and restrictions of liberty.

Held

The appeal was refused on both grounds.

At the hearing before the tribunal, the appellant had sought to have the CTO varied, in order that it might become hospital based rather than the existing community based CTO. The Sheriff Principal accepted the submissions made on behalf of the Tribunal that the evidence from all the witnesses before the tribunal (other than the patient) was that a community based CTO was necessary. There was no evidence in support of revoking the CTO and no evidence that any alternative was appropriate. The Sheriff Principal preferred the submissions made by the Tribunal and the other parties as to the nature of the restriction placed on the appellant. He considered the arrangements in place at the specified care home and noted that there were strong reasons for the keypad locking system. It was necessary to monitor movement in and out of the home; the appellant required to be prevented from leaving unexpectedly; visits were arranged to her family; and if she wanted to leave for a walk, she could request this but would require to be supervised, for reasons of safety. There was no evidence that this did not work well in practice. In all of the circumstances, it was the opinion of Sheriff Principal Lockhart that it is not appropriate to consider such an arrangement as amounting to legal detention. The tribunal was entitled to take the view that the care home provided the best arrangements possible for B's appropriate care and treatment, and there was no evidence before it of any other facility which could better cater to her needs.

As set out above, the tribunal had refused to make a recorded matter that consideration should be given to making an application for welfare guardianship in respect of the appellant. The Sheriff Principal was quite clear that the tribunal had dealt with that matter adequately and had not erred in law in finding that it was not open to it to require that this should be considered or applied for. Put simply, this did not fall within the meaning of "recorded matter" as defined in the 2003 Act. The tribunal was entitled to find that guardianship could not be such medical treatment, community care services, relevant services, other treatment, care or service as a recorded matter was defined in terms of section 64(4)(a)(ii) of the 2003 Act, and was entitled to find that it was not open to it to require that that should be considered or applied for.

The Sheriff Principal said:

> *"[25] This appeal falls to be refused. In my opinion the submissions on behalf of the Mental Health Tribunal for Scotland and the responsible medical officer, which I have set out in full, are well founded. In my opinion the overriding purpose of the Mental Health (Care and Treatment) (Scotland) Act 2003 is to provide appropriate care and treatment for persons having a mental disorder. In this case the medical evidence before the Tribunal was to the effect that a hospital based order was not necessary. On the other hand there were strong reasons for the keypad locking*

system at Z Care Home. There was a need to monitor movement in and out of it. The appellant required to be prevented from leaving unexpectedly. She was a risk to road users and to herself if she left Z Care Home unaccompanied. She required to be prevented from leaving unexpectedly and alone. There was a history of leaving Stobhill Hospital and her own home and she had placed herself at significant risk. There was also a requirement to monitor visitors at Z Care Home. The patient was known to be liable to exploitation. It was the minimum required for her safety. Visits to her family were arranged fortnightly. Visits to the local area under supervision in a safe manner were facilitated. If she wanted to leave for a walk, she would request this but would require to be supervised for reasons of safety. There was no evidence that this did not work well in practice. She had free access to the Z Care Home gardens in the summertime. There was no evidence before the Tribunal of any concern about her requiring to wait for a supervised walk because staff members were not available. In any event, such matters must be considered proportionately.

[26] In my opinion it is not appropriate to consider such an arrangement as amounting to legal detention. The Tribunal were entitled to take the view, which they did, that these arrangements at Z Care Home provided the best arrangements possible for appropriate care and treatment for the appellant. There was no evidence before the Tribunal of any other facility which could cater better for the appellant's needs. In these circumstances the first ground of appeal fails.

[27] The other ground of appeal is that the Tribunal erred in not making a Recorded Matter that consideration should have been given to the making of a welfare guardianship order in respect of the appellant. In my opinion the Tribunal dealt with this submission on behalf of the appellant very adequately. I have set out their findings in para [10] hereof. In my opinion the Tribunal were entitled to state: "We do not find that Guardianship, which is applied for in terms of the Adults with Incapacity (Scotland) Act 2000, could be 'such medical treatment, community care services, relevant services, other treatment, care or service' as a Recorded Matter is defined in terms of section 64(4)(a)(ii) of the 2003 Act." The Tribunal was correct to find that it was not open to them to require this should be considered or applied for. This ground of appeal also fails."

Comment

The only cases mentioned in the decision were G*uzzardi v Italy* (1981) 3 EHRR 333 and *Cheshire West and Chester Council* v *P* 2001 EWCA Civ 1257. In the latter case, the Court of Appeal said:

> *"23. ..."merely being required to live at a particular address ... does not, without more, amount to a deprivation of liberty". Similarly, restraint must be distinguished from deprivation of liberty. In extreme cases, no doubt, restraint may be so pervasive as to constitute a deprivation of liberty, but restraint by itself is not deprivation of liberty."*

The Sheriff Principal appears to have endorsed this approach in accepting the submissions for the Tribunal relying on it. In essence, it suggests that not all forms of restraint or restriction will in fact amount to detention for the purpose of Article 5. This should now be treated with considerable caution as, at the time when this appeal was heard, *Cheshire West*[5] had not been considered by the UK Supreme Court. A different outcome might be expected if this matter was appealed again today.

[5] *Cheshire West and Cheshire Council v P* [2014] AC 896; [2014] 2 WLR 642

Compared with Scotland, England and Wales has seen a considerable amount of litigation on what amounts to a deprivation of liberty under Article 5. As noted, the case may now be of limited value if someone is required to live in a locked facility as part of a community based compulsory treatment order. It was decided before *Cheshire West* in the Supreme Court, and indeed applied the decision of the Court of Appeal in *Cheshire West* which was overruled by the Supreme Court.

It is perhaps worth noting that a few applications have been made to the Tribunal by individuals subject to this type of restriction, under section 291 (asking the Tribunal to declare that they are being unlawfully detained). To date, although extensive written submissions have been lodged in a number of such cases, none has actually proceeded to a hearing before a tribunal, so the point has not been considered by a tribunal and therefore no decision has been scrutinised by another court on appeal. This is an evolving aspect of mental health law in Scotland.

Greater Glasgow Health Board v Mental Health Tribunal for Scotland

Judgment of Sheriff Principal B Kerr QC, 27 February 2013 (unreported)

Validity of short term detention certificate following amendment – vires to grant a second short term detention certificate immediately after the first has fallen or expired

Facts

The patient was admitted to hospital on an informal or voluntary basis, with no short term detention certificate (STDC) or compulsory treatment order (CTO). The patient subsequently claimed that she was being unlawfully detained and made an application to the Tribunal under section 291 (application to the Tribunal in relation to unlawful detention) seeking an order from the Tribunal "requiring the managers of the hospital to cease to detain the patient".

At the hearing, a tribunal decided that the patient was indeed being unlawfully detained and granted the application and made an order requiring the managers of the hospital to cease to detain the patient. The patient was immediately medically examined and made subject to a STDC.

The patient made a fresh section 291 application to the Tribunal. She argued that the STDC was invalid, as it bore to have been granted at 1500 hours on the day of examination, but stated that the time of the medical examination was also at 1500 hours on that day. Fifteen days later, the approved medical practitioner (AMP) who made the STDC submitted to the Tribunal an amended page of the STDC stating that the medical examination had in fact taken place at 1400 hours, one hour ahead of the time when the STDC was granted.

The tribunal issued a written decision explaining that there was no statutory provision which allowed the terms of a STDC to be altered and that the failure to state the correct time of the medical examination in the STDC was a fundamental error which made the STDC invalid. The tribunal granted the section 291 application and once again made an order requiring the managers of the hospital to cease to detain the patient.

The war of attrition continued as the patient was medically examined once more and made subject to a fresh STDC. The patient in turn made a fresh section 291 application to the Tribunal, arguing that section 44(2) of the 2003 Act prevented the making of a STDC in respect of a patient who, immediately before the medical examination under section 44(1)(a) is carried out, was already subject to a STDC.

The tribunal held that the first STDC granted (notwithstanding that it had been found to have been invalidly granted) was still a STDC for the purpose of the prohibition in section 44(2). The tribunal reached the view that the second STDC was granted in contravention of section 44, and in turn granted the section 291 application, making another order requiring the managers of the hospital to cease to detain the patient. This decision was appealed to the Sheriff Principal by Greater Glasgow Health Board.

In defence of the decision, it was argued for the Tribunal that section 44(2) prohibited the making of a STDC in respect of a patient who, immediately before the medical examination under section 44(1)(a) is carried out, was already subject to a STDC. The issue which the Sheriff Principal had to decide was whether a patient can be considered to be subject to a STDC when the STDC has been declared by a tribunal to have been invalidated by a fundamental error. Thereafter, the question was whether a further STDC could be granted in respect of the same patient.

Held

The Court allowed the appeal and set aside the tribunal's decision.

The Sheriff Principal held that the manifest intention of section 44 was to prevent a patient being detained under a series of STDCs without any attempt being made, by those charged with his/her care, to regularise the detention for the longer term by obtaining a CTO. The Sheriff Principal held that the 2003 Act is not looking at the situation where the initial STDC is for some reason invalid. He took the view that the process should begin again if it was discovered that the prima facie authorisation of the patient's detention on a STDC has for some reason been invalid (in this case, due to the invalidity of the certificate itself).

He held that:

> *"The mischief which section 44(2) is intended to prevent is the granting of one valid STDC followed immediately by the granting of another and another and so on. The subsection is not concerned with invalid STDCs or for that matter with unlawful detentions but with attempts to repeat lawful detentions by the mechanism of the STDC, which it disallows. When therefore the statute speaks in section 44(2) of a patient being "subject to a STDC", that means in my opinion a valid STDC and not one which is for some reason invalid".*

Comment

There is no doubt that section 44 (as amended) prohibits the making of a STDC if, immediately before the medical examination mentioned in section 44(1)(a) is carried out, "the patient is subject to" a STDC (or a section 47 extension certificate, section 68 or a certificate granted under section 114(2) of the 2003 Act). The question before the Sheriff Principal was whether a patient can be considered to be "subject to" a STDC when the STDC has been declared to have been invalid on account of a fundamental and material error, such that the essential statutory process required for the granting of the STDC has not been complied with. In considering this, the Sheriff Principal found that the relevant provision in the 2003 Act is not aimed at a situation where the initial STDC is for some reason invalid. He was of the view that, in such circumstances, it seemed proper for the process to be started again if it was discovered at some point during the first 28 days (or 31 days, if there is an extension certificate under section 47) that the first attempt to validly detain a patient by means of a STDC has for some reason been a failure.

It is also worth noting from this judgement that the Sheriff Principal doubted the correctness of the approach taken by the tribunal when it had expressed the view that the STDC containing the error "could not have been valid". The Sheriff Principal noted in *obiter* remarks that, if the amendment which was sought to be made to the recording of the timing of the medical examination was the correction merely of a clerical error, then it seemed to the Sheriff Principal doubtful whether such a clerical error invalidated the STDC.

D v Mental Health Tribunal for Scotland

BD v MHTS, 2014 SLT (Sh Ct) 39; 2014 GWD 13-246 (reported as D v MHTS)

Compulsory medical treatment – extensions of time – responsible medical officers – Scotland – statutory duties – treatment orders – validity

Facts

A patient (D) appealed against a decision of a tribunal, repelling his preliminary objection to the validity of a determination by his responsible medical officer (RMO) to extend his compulsory treatment order (CTO) by virtue of section 86 of the 2003 Act.

A failure to comply with section 84 and section 85 of the 2003 Act had not invalidated the responsible medical officer's power to extend a compulsory treatment order where that could not have been Parliament's intention, the tribunal had applied the correct test, and no prejudice had been caused to the patient as a result of the failure.

Following the extension of the CTO, D applied under section 100 of the 2003 Act for its revocation. The tribunal accepted that the duties imposed on the RMO and D's mental health officer (MHO) in terms of sections 84 to 86 of the 2003 Act had not been complied with. In particular the RMO had failed to notify the MHO in writing of her intention to extend the order, and the MHO had failed to interview D. The tribunal concluded that the failures by the MHO and RMO did not render the RMO's determination invalid, and refused D's application.

Held

Appeal refused.

It was held that the legislature intended that statutory rules should be followed to the letter, and that had not happened in D's case. Thereafter, it was for the tribunal to assess the legal consequences of that non-compliance, and in particular whether Parliament could fairly be taken to have intended total invalidity of the purported act or order in the event of failure to follow the legislation.

The Sheriff Principal found that the nature and effect of the action or omission was of significant importance, as was the background or context against which it occurred, *London & Clydeside Estates Ltd v Aberdeen DC* [1980] 1 W.L.R. 182 considered. In the decision of the Sheriff Principal, it was noted that the tribunal had not considered the matter lightly. It had, at a preliminary hearing, described the sequence of events as so unsatisfactory as to oblige it to allow the RMO and MHO the opportunity of being represented at a further hearing. At the subsequent hearing, the tribunal had correctly determined that the test to apply was whether, in the particular circumstances, a failure to comply with sections 84 and 85 would have been intended to invalidate the RMO's power to extend the CTO.

Comment

The tribunal had considered that D had been legally represented before the tribunal and his agent could point to no prejudice as a result of the failure to comply with the statutory duty, had correctly identified that the RMO and MHO had had contact with each other and with D as part of his ongoing care plan and had had discussions with D in connection with a previous application for revocation of his CTO, and the RMO was aware that the MHO would support her proposed determination to extend it. The tribunal therefore concluded that the purpose or objects of sections 84 and 85 had been achieved by these means and its decision disclosed no error of law.

Section 84 was clearly directed towards the participation principle in terms of section 1 of the 2003 Act and that had clearly been at the forefront of the tribunal's mind in considering the consequences of the default, the considerable engagement between the MHO and D was clear, and the tribunal had made its decision based upon that factual matrix.

Observed, that the purpose of the 2003 Act was the care and treatment of those with mental disorders and it was inconceivable that Parliament would have intended that the consequence of failure to follow the statutory requirements to the minutest detail would invalidate treatment orders necessary not only for the benefit of the patient but also the safety of others.

G v Scottish Ministers and the Mental Health Tribunal for Scotland

2014 SC (UKSC) 84; 2014 SLT 247; 2014 SCLR 415; [2014] MHLR 348

Judgment of Lady Hale, Lord Wilson, Lord Sumption, Lord Reed and Lord Hodge, 18 December 2014

Discretion – compulsion order – excessive security – restricted patients – Scotland – transfer – section 1 principles

On an application under section 264(2) of the 2003 Act, the Tribunal could decline to exercise its discretion to make an order, despite finding that the patient did not need to be detained under conditions of special security that could only be provided at the State Hospital. It did not have to find that the circumstances were exceptional before it could decline to make an order.

Facts

The appellant (G) appealed against a decision of the Court of Session (Inner House)[6] upholding the Tribunal's refusal to recommend his transfer to a medium secure hospital.

G had been detained in Scotland's high security State Hospital under compulsion and restriction orders following High Court proceedings. Ten years later he applied to the Tribunal for an order under section 264(2) of the 2003 Act arranging for his transfer to a medium secure hospital. The task before the tribunal was to decide whether G needed to be detained under conditions of special security that could only be provided at the State Hospital and thereafter, depending on the outcome of that consideration, whether to exercise its discretion to make an order. Although the tribunal found in G's favour when considering the first part of that test, it declined to make an order. Referring to the maximum benefit and least restrictive option principles in sections 1(3)(f) and 1(4) of the Act respectively, it found that G posed a risk of sexual violence towards women and needed to complete a course of psychological treatment. The tribunal found that the State Hospital was best placed to deliver that treatment. In reaching that view, they considered that there would be female patients in a medium secure hospital, which meant that there would have to be greater restrictions on G's freedom, with adverse consequences for his mental health. The tribunal thus found that it was of maximum benefit to G that he remain at the State Hospital.

G appealed to the Court of Session and his appeal was dismissed by the Court. G then appealed to the Supreme Court on the following grounds:

(1) The Tribunal had failed to exercise its discretion in accordance with the purpose of section 264;

(2) The Tribunal had been influenced at stage two of the decision making process by the risk posed by G to women. Risk was an irrelevant consideration at stage two;

(3) The Tribunal had placed weight on a finding that the State Hospital offered better resources for the treatment of G than were available in medium secure facilities. The unavailability of suitable resources in medium secure facilities was not a relevant factor;

(4) The Tribunal had failed to have regard to the wishes and feelings of G and to the need to avoid discrimination against patients in accordance with section 1(3)(g);

(5) The Tribunal had erred in elevating the importance of providing maximum benefit to the patient (section 1(3)(f)) above the least restrictive alternative principle (section 1(4)).

[6] *G v Mental Health Tribunal for Scotland* 2012 SC 138, 2011 SCLR 770; [2011] MHLR 387

Held

Appeal dismissed by the Supreme Court.

The Court clarified the nature of the decision making under section 264 and the factors relevant to the proper application of section 264 and of other provisions of the 2003 Act – namely section 1.

Sections 1(2) to 1(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 18. That includes functions relating to the taking of decisions under section 264(2) and the related provisions. Section 1(5) (which makes provision in relation to the duty of the Tribunal, when discharging a function, to have regard to the needs and circumstances of any carer and the importance of providing information to carers) also applies to decisions under section 264(2) and related provisions, as this is not a decision about medical treatment. Section 1(6), which makes provision for a person discharging functions in relation to a person who has been subject to certain specified certificates or orders to have regard to the importance of the provision of appropriate services to the person who is, or has been, the subject of the certificate or order concerned, can also apply when the Tribunal is taking a decision under section 264.

Turning to section 1(4), the Court clarifies that section 1(4) is of a different nature from subsections (3), (5) and (6). Section 1(4) applies after the person – in this case the Tribunal – has had regard to all the matters to which it is required to have regard, including those under paragraph (c) of subsection (4), i.e. such other matters as are relevant in the circumstances. It requires the person – in this case the Tribunal – to discharge the function in a particular manner, namely the manner which appears to the person to involve the minimum restriction on the freedom of the patient that is necessary in the circumstances. The Court confirms that this provision broadly, but not precisely, reflects the Millan Committee's general principle of the "least restrictive alternative".

The Court confirmed that the concept of "restriction on freedom" is not defined and requires to be considered broadly. The Court held that section 1(4) does not prioritise the freedom of the patient over other considerations (including the importance of providing the maximum benefit to the patient, the protection of the public or the safety of other patients).

The Court makes clear that section 1 sets out an overarching approach to the discharge of functions under the 2003 Act and there is a sequential approach required to decisions which involve section 1. The Tribunal must have regard to the matters specified in section 1(3) so far as relevant; to the matters specified in section 1(5) and (6) where applicable; and to such other matters as may be relevant in the particular circumstances (section 1(4)(c)). The Tribunal must then discharge the function, i.e. make its decision, in the manner that appears to the Tribunal to involve the minimum restriction on the freedom of the patient that is necessary in those circumstances.

Turning to the Court's consideration of section 264(2), the Court confirmed that the function of the Tribunal under this section involves two distinct stages in the decision making process. First, the Tribunal must decide whether it is satisfied that the patient does not require to be detained under conditions of special security that can be provided only in a state hospital. Second, if the Tribunal is so satisfied, the Tribunal must decide whether to exercise its discretion to make an order.

The exercise of the second stage of the decision making process, i.e. exercising the Tribunal's discretion, involves consideration of the provisions of section 1 as discussed above. The Court states, however, that when considering section 1(4), conditions of security are not synonymous with restrictions on freedom. The Court highlights that an analysis of the implications of an order under section 264(2) will be required. It is possible, on the facts

of a particular case, that refusal of the order will result in the minimum restriction necessary in the circumstances.

The Tribunal should, however, exercise its discretion in such a way as to promote the policy and objects of the 2003 Act, and of section 264 in particular. As a result, where the pre-condition is met, the Tribunal should make an order, unless in the particular circumstances of the case there is some good reason to refuse to do so. The Tribunal is entitled to take into account a wide range of matters and is not subject to any express restriction, giving the Tribunal a wide discretion. Its discretion must nevertheless be exercised in a manner which is consistent with the intention of Parliament.

Consideration of the question of risk is relevant at both stages of the decision making process under section 264. The tribunal was entitled to have regard to the increased risk to women which might result from the transfer of G to a medium secure hospital, where there would be female patients: that was a matter falling within section 1(4)(c). The tribunal's finding that the risk to women posed by G in the setting of a medium secure hospital before he had completed an appropriate treatment course would necessitate him being subject to restrictions greater than those to which he was subject in the State Hospital was relevant to its assessment under section 1(4). The tribunal was also entitled to have regard to its finding that the consequent restrictions on G's movements would pose a risk to his mental health: that was a matter falling within section 1(3)(f).

The Court held that, under section 1 of the 2003 Act, the quality of the treatment available elsewhere may be a relevant consideration in the Tribunal's exercise of its discretion. The Court further held that section 1(3)(g) is relevant to the decision making process of the Tribunal under section 264. The suggestion to the contrary in the Inner House Opinion in this case was disapproved. Whilst the tribunal did not expressly mention section 1(3)(a) and did not refer in terms to G's wishes or feelings in its reasons, it was clear that it had had regard to G's wishes. The tribunal had provided adequate reasons for its decision. The Court was clear that Parliament did not intend that the unavailability of medium secure accommodation should preclude the making of an order. Unavailability of accommodation in medium secure hospitals where the patient could be detained in conditions appropriate to his particular needs, including appropriate facilities for treatment, may in some circumstances be relevant to the Tribunal's decision making and the requirement of the Tribunal to have regard to the importance of providing the maximum benefit to the patient, in accordance with section 1(3)(f) and the provision of appropriate services (section 1(6)).

The Court held that the view expressed in *Lothian Health Board v BM* 2007 SCLR 478 – that the availability of accommodation in a medium secure hospital where the patient could be detained in appropriate conditions, including appropriate facilities for treatment, can never be relevant to the question of whether an order should be made under section 264, and can only be raised by way of an application for recall of the order under section 267 – went too far.

The Court held that if the Tribunal reached a conclusion favourable to the patient on the first part of the test, it had to decide whether to exercise its discretion to make an order. That decision fell within the scope of section 1, and the Tribunal had to have regard to the matters set out in section 1(3) so far as they were relevant, those in sections 1(5) and 1(6) where applicable, and any other relevant matters. If the patient did not need to be detained under conditions of special security available only in the State Hospital, his application was to be granted absent some good reason to refuse it. The Tribunal could take into account a wide range of matters and its discretion was not subject to any express restriction. Though it had to exercise its discretion in a manner consistent with Parliament's intention, it would be wrong to say that it could decline to make an order only in exceptional circumstances.

The risk posed by the patient to others was held to be relevant to the tribunal's assessment of both aspects of the decision. The conditions of security under which G needed to be detained were clearly dependent on the nature and extent of any risk he posed, and the issue of risk was connected to the restrictions on his freedom that would be necessary outside the State Hospital, which in turn was bound up with the potential consequences for his mental health. The tribunal had thus been right to consider risk at both stages of the decision making process.

The unavailability of accommodation at another hospital where the patient could be detained in appropriate conditions did not preclude the making of an order. However, that did not mean that the comparable quality of the treatment available elsewhere was irrelevant to the exercise of discretion. There was nothing in section 264 to prevent the tribunal from taking such a clinical comparison into account. Under section 1(3)(f) and section 1(6), the quality of the treatment available elsewhere could be a relevant consideration. Moreover, the quality of the treatment available in a medium secure hospital might affect the risk posed by the patient, and any increase in risk was something to which the tribunal was entitled to have regard under section 1(4)(c).

Although the tribunal did not expressly refer to section 1(3)(a) or to G's wishes or feelings, the Court found that it was clear that it had regard to them. The non-discrimination principle set out in section 1(3)(g) was undoubtedly relevant and, although the tribunal had not expressly referred to it, it was enough that it had dealt with the critical issues sufficiently to enable the parties and the Court to understand its decision. A formulaic rehearsal of every matter referred to in section 1 was not required.

The Court noted that it was not readily apparent that the tribunal had understood the structure of section 1 and the potential significance of section 1(4), but that any misunderstanding had not affected the substance of the decision. It was likely that it had not reached a clear conclusion as to the "least restrictive option", and it had therefore been entitled to exercise its discretion having regard to all relevant matters and in accordance with the objects of the Act. The way it had done so could not be considered unreasonable.

Comment

This case provides a useful analysis by the Court on the application of the section 1 principles in the 2003 Act to decisions made by the Tribunal (in this case a decision under section 264 of the 2003 Act).

The Court was of the view that it was not readily apparent from the tribunal's decision that it understood the structure of section 1 and the potential significance of section 1(4) in particular. However, on the facts of the particular case, it did not appear that any misunderstanding affected the substance of the tribunal's decision. Essentially, the Court emphasised the importance of the statutory principles in section 1(3) and (4) of the 2003 Act. They were regarded as being relevant considerations in the exercise of discretion in performing functions under the Act. The Court sets out the approach which should be taken to section 1 and the discharge of functions under the 2003 Act. The Tribunal must have regard to the matters specified in section 1(3), so far as relevant; to the matters specified in section 1(5) and (6) where applicable; and to such other matters as may be relevant in the particular circumstances of the case (which is clearly a wide ranging category and will depend on the facts and circumstances of any particular case the Tribunal is considering) (section 1(4)(c)). The Tribunal then requires to discharge the function in the manner that appears to it to involve the minimum restriction on the freedom of the patient that is necessary in those circumstances.

The Court confirms that even if the precondition in section 264 is made out, the Tribunal has discretion as to whether or not to make the order. In considering whether or not to exercise its discretion to make the order, the Tribunal is entitled to take into account a wide range of matters.

In relation to the ground of appeal which referred to the tribunal's failure to refer to section 1(3)(a) and (g), the Court refers to the general guidance relevant to the duty of tribunals to give reasons for their decisions and notes that the guidance given by Lord Clyde in *City of Edinburgh Council v Secretary of State for Scotland* 1998 SC (HL) 33, at paragraphs 49-50, applies in the present context. Tribunal decisions do not require a formulaic rehearsal of every matter referred to in section 1 of the 2003 Act, regardless of its importance in the particular case. The Court also referred to the general guidance given to courts scrutinising the reasons of expert tribunals, such as the Mental Health Tribunal for Scotland, in *AH (Sudan) v Secretary of State for the Home Department* [2008] 1 AC 678 and noted that, although the tribunal might have given a fuller explanation of its factual findings in relation to the matters it considered relating to the quality of the resources available in medium secure hospitals, the reasons given by the tribunal dealt with the critical issues sufficiently to enable the parties and the Court to understand why the application had been refused, and that was sufficient.

Finally, it is of interest to note that, in a short concurring judgment, Lady Hale agreed that the appeal should be dismissed, albeit with a degree of reluctance. She agreed with Lord Reed that it would be unreasonable to make an order under section 264, or indeed section 268, if there was no possibility of an appropriate bed being found elsewhere. She emphasised, however, that this is a conclusion which a tribunal should be slow to reach. While this is of course possible, it should be noted that any move to a hospital outwith Scotland would engage the cross-border transfer provisions in the 2003 Act. Lady Hale also highlighted the fact that a tribunal considering an application for an order that a patient is being detained in conditions of excessive security should be aware of the "Catch 22" situation where the patient does not need the conditions of special security only available in the State Hospital, but facilities elsewhere are not suitable because of a lack of appropriate work having been done with the patient at the State Hospital.

At present, and as a consequence of the Covid 19 Pandemic, movement of patients between hospitals and security levels has been restricted. This has prompted a number of petitions for judicial review. The premise here is that, once a tribunal has made an order declaring that a patient is being held in conditions of excessive security (which may be in the State Hospital or in a medium secure facility), the relevant health board has an obligation to transfer the patient within the time period specified by the tribunal. To date, none of these petitions has progressed to a substantive hearing. The relevant health board in each case has managed to find alternative accommodation to meet the patient's needs prior to a hearing, and the petitions were withdrawn in consequence. However, this is another area where the landscape is changing. In a limited number of cases, relevant health boards have sought to have the order recalled under the provisions in section 267 or 271 of the 2003 Act. These relate to orders made in respect of patients detained in the State Hospital and in medium secure facilities, respectively. In both sections, the order may be recalled if the level of security is no longer excessive, but also for "any other reason". In some recent applications to the Tribunal, relevant health boards have cited the restrictions relating to the pandemic and their effect on resources as being reasons to recall such an order. To date, none of these applications has been heard by a tribunal, and consequently none has been appealed further to receive scrutiny by a higher court.

K v Mental Health Tribunal for Scotland

2015 SLT (Sh Ct) 197; 2015 GWD 9–171

Judgment of Sheriff Principal D C W Pyle, 30 January 2015

In-patients – Netherlands – removal – repatriation – treatment orders

In this case, a patient (K) appealed to the Tribunal against the granting of a warrant for her removal from Scotland to her country of residence. Her appeal was refused, and it was held that she would receive comparable care and treatment in her country of residence. The decision was found to be proportionate in terms of Article 8 of the ECHR.

K was subject to a compulsory treatment order in terms of section 66(1)(a) and (b) of the 2003 Act. She appealed against the Tribunal's decision to refuse her appeal against the authorisation by the Scottish Ministers of a warrant for her removal to the Netherlands in terms of section 290(1)(b) of the 2003 Act and the Mental Health (Cross border transfer: patients subject to detention requirement or otherwise in hospital) (Scotland) Regulations 2005 reg.10.

The evidence before the tribunal had included a social circumstances report which stated *inter alia* that the Netherlands would not accept the repatriation of patients with severe mental health problems against their will. The tribunal found that there was in fact a hospital in the Netherlands which was prepared to accept K as a patient and that her treatment there would be comparable to her treatment in Scotland. The tribunal further considered that the transfer was in K's best interests, having regard to future rehabilitation.

K submitted *inter alia* that the tribunal had failed to take into account whether her repatriation would require consent from the Dutch government and founded upon the tribunal's failure to consider whether refusing to uphold the warrant would be proportionate in terms of Article 8 of the ECHR, which she averred required a heightened level of scrutiny to be applied to its decision.

The appeal was refused by the Sheriff Principal.

He found that there was an evidential basis for the tribunal's finding in fact and it had provided adequate reasons for its decision. A suitable hospital in the Netherlands was willing to accept K as a patient. The evidence supported the tribunal's view that comparable care and treatment could be provided there. From the information given in the social circumstances report, the tribunal was entitled to take into account K's previous treatment in that hospital and there was no suggestion that the psychiatrists in the Netherlands and Scotland disagreed about K's diagnosis. Further, the Sheriff Principal found that there was no force in K's objection relating to potential problems over repatriation. This was something which had not been raised before the tribunal, and it was in any event a matter for Scottish Ministers. In respect of the appropriate level of scrutiny, the Sheriff Principal found that a heightened level of scrutiny was not necessary as the test was one of proportionality; the tribunal's decision was proportionate, following *R (on the application of Daly) v Secretary of State for the Home Department* [2001] 2 AC 532.

Comment

This appeal serves to highlight some of the tensions in having the Tribunal as a contradictor in litigation where their own decision is under challenge. It arises from a rather unusual situation, although not unheard of in terms of mental health law. Occasionally, people from outwith Scotland are found to require care and treatment on a compulsory basis while they are visiting or residing on a temporary basis in Scotland. The patient's remedy against Scottish Ministers' decision to remove her from the UK was, in the first instance, an appeal to the Tribunal.

When the matter was appealed on to the Sheriff Principal, it was the decision of the tribunal to refuse that appeal, rather than the decision of Scottish Ministers, which was challenged. An alternative approach to defending the appeal may have been for Scottish Ministers to consider entering appearance in the appeal to the Sheriff Principal, with the Tribunal taking a neutral approach to the scrutiny of their decision. As the Tribunal is entitled to appear in appeals against its own decisions, this was not criticised by the Court. However, it is a matter for the Tribunal to consider in future litigation. From the Sheriff Principal's decision, what is clear is that the tribunal demonstrated appropriate awareness of the obligation to interpret the 2003 Act in a manner consistent with the Convention, and that it is for each tribunal to decide when, and in what circumstances, it should make specific reference in its reasons for the interference with the Convention rights of a patient.

BG v Mental Health Tribunal for Scotland and Mark McIlwraith, Mental Health Officer

2015 GWD 9–170

Judgment of Lord Eassie, Lady Smith and Lord Brodie, 4 March 2015

Safeguarding vulnerable adults

Facts

This was an appeal against a decision of the Sheriff Principal, who found that in refusing to revoke a compulsory treatment order (CTO), a tribunal had reached a conclusion which was plainly open to it in all the circumstances.

The adult son and primary carer (G) of an incapacitated adult (X) appealed to the Sheriff Principal against a decision of the Tribunal. The Sheriff Principal's decision was in turn appealed to the Court of Session. X suffered from severe dementia. She was also frail due to physical health conditions. G was formerly X's primary carer and, in April 2014, he had removed her from hospital contrary to medical advice. In April 2014, the patient was detained under a short term detention certificate (STDC). G applied to the Tribunal under section 50 of the 2003 Act to have the STDC revoked. The Tribunal declined to revoke the STDC. An application was made by the patient's mental health officer (MHO) for a compulsory treatment order (CTO). A tribunal granted an interim CTO and indicated that G's behaviour was of sufficient concern that the Mental Welfare Commission and the Office of the Public Guardian were to be advised of its decision. At the subsequent hearing to determine whether a full CTO ought to be granted, evidence was given by *inter alia* G, X's responsible medical officer (RMO), and X's MHO. The tribunal found *inter alia* that, in the absence of a CTO, G would be likely to try to take X home, and concluded that X's care needs could only be met in a hospital.

BG appealed each of the Tribunal's decisions – the decision to refuse to revoke the STDC, the decision to make an interim CTO and the decision to make a full CTO – to the Sheriff Principal. All three appeals called before the Sheriff Principal on the same day. In respect of the decisions to refuse to revoke the STDC and to make an interim CTO, the Tribunal submitted that as at the date of the appeal hearing before the Sheriff Principal the STDC and the interim CTO had long expired and there was no live issue for the Court to determine. Having heard argument, the Sheriff Principal decided that there was no significant or important point of principle or requirement to clarify the law raised in either of those appeals. The Sheriff Principal declined to hear the appeals in respect of the refusal to revoke the STDC and the decision to make an interim CTO. The Sheriff Principal proceeded to hear the appeal against the decision to make a full CTO. This appeal was refused by the Sheriff Principal.

In a subsequent appeal to the Court of Session, G submitted that the Sheriff Principal had erred on three points. Firstly, in finding that the conditions for granting a CTO had been met. Secondly, in deciding that the tribunal had given adequate reasons for preferring the evidence of X's responsible medical officer. Thirdly, in finding that the tribunal had conducted a proper balancing exercise. In support of this last point, it was submitted that undue weight had been given by the tribunal to the views of healthcare professionals.

Held

The appeal was refused. The Court found that medical treatment was defined in section 329 of the 2003 Act as treatment for mental disorder including nursing and care, and such treatment fell within section 64(5) of the 2003 Act if its purpose was to alleviate the symptoms or effects of the disorder. X's proposed care plan qualified on both counts, and

it was clear from the information provided to the tribunal that X would receive specialist nursing care directed towards alleviating the symptoms and effects of her dementia. Neither the tribunal nor the Sheriff Principal had regarded G's views as irrelevant, nor was there any indication of them failing to appreciate that he had detailed experience of X's care needs. However, neither the tribunal nor the Sheriff Principal was required to prefer his views. The decision on whether or not to grant a CTO was for the tribunal; it had reached its own conclusions on the facts. No relevant matter which it had failed to explore could be identified, the tribunal had agreed with the unanimous medical view, and the tribunal was entitled, on the facts found, to conclude as it did. G had failed to put forward any basis on which it could be inferred that the motives of X's responsible medical officer and mental health officer were other than to perform their statutory duties and, in any event, the decision of whether or not to grant a CTO was for the tribunal. The Court observed that it was not for the Sheriff Principal to carry out an assessment of the evidence that was before the tribunal, or to decide what weight ought to be given to evidence. Although a specialist tribunal might misunderstand the relevant law or fail to apply it correctly, it was more likely than not that they had not done so, and G's appeal could not succeed if the tribunal had not misdirected itself in law (following *AH (Sudan) v Secretary of State for the Home Department [2007] UKHL 49* [2008] 1 AC 678). The Court therefore determined that the tribunal had taken account of all relevant views and had regard to the statutory principles and that the conclusion it reached was one which was plainly open to it in all the circumstances.

Petition By N for Judicial Review of a decision of the Mental Health Tribunal for Scotland

Named person provisions – removal of default named person provision for those over 16 years

Sections 22, 23 and 24 of the Mental Health (Scotland) Act 2015 (the 2015 Act) came into force on 30 June 2017. One of the effects of this was to change the provisions relating to the named person, as set out in the 2003 Act.

Prior to the 2015 Act, the 2003 Act had provided that when there was no named person nominated or willing to act in that capacity, a 'default' named person was created. The nearest relative of the patient was permitted to act as the patient's named person. The 2015 Act removed this provision, so that a named person must be nominated and consent to act. It should be noted that the 2015 Act did not change the situation for children, and default named persons for people under the age of 16 years are still provided for.

One of the rights afforded by named person status is that of being a party to proceedings before the Tribunal in respect of the person for whom they are acting as named person. That includes the right to all papers, the right to appeal and the right to be represented and seek legal aid for proceedings.

A number of individuals who had previously been default named persons by virtue of section 251 of the 2003 Act found their position before the Tribunal significantly changed by the commencement of the 2015 Act, as they were no longer default named persons and so were not a party to the proceedings. These individuals were previously default named persons for people who lacked capacity (and who were likely to always lack capacity) to make the necessary nomination under the new regime. Many of them were parents of adult children with mental disorders including learning disabilities. As the patient to whom they were related was incapable of doing so, they could not be nominated named persons. One such person petitioned the Court of Session for a judicial review of the new legislative provisions which left them unable to be a party to Tribunal proceedings or to appeal against decisions taken by the Tribunal.

On 20 December 2017, the Tribunal received an application for a compulsory treatment order (CTO) in respect of the patient (P). P was a teenager but was over the age of 16 and had been involved in proceedings before the Tribunal over a number of years. The Tribunal appointed a curator *ad litem* to P, and an interim hospital based CTO was made in respect of P to allow the curator to obtain an independent medical report. P's mother (N) attended the hearing in her capacity as welfare guardian. In previous proceedings before the Tribunal concerning P, N had been P's default named person by virtue of section 251 of the 2003 Act. N made representations to the Tribunal and indicated that she wished to seek legal advice about applying to be made a party in the proceedings. The hearing was adjourned until 31 January 2018.

N's solicitor made an application to the Tribunal in terms of rule 43 of the Tribunal's Rules, seeking (1) a copy of the paperwork to be provided to N in advance of the hearing on 31 January 2018; (2) to afford N the status of party for the purpose of the proceedings; and (3) to fix a procedural hearing on the application.

A procedural hearing took place to determine this application. N's solicitor advised that N, as welfare guardian, wished to instruct an independent psychiatric report on the necessity of the CTO and on whether any recorded matter might be appropriate. N's solicitor indicated that N wished access to the paperwork before the Tribunal to provide to the independent psychiatrist. N's solicitor requested that the Tribunal direct that N be treated as a party to the proceedings. Rule 48(5) of the Tribunal's Rules provides that "the Tribunal … if satisfied that the person has an interest in the case, and that it is reasonable to do so, may grant the

request and direct that the person shall be treated as a party…". The focus of N's solicitor's submission was directed to how N was being treated as a consequence of the legislative changes in respect of default named persons.

A tribunal considered the incidental application. It noted the legislative changes made to the named person regime under the 2003 Act and considered that the incidental application sought to circumvent the legislative changes made to the named person regime. The tribunal disagreed with N that, in failing to provide that a person in the position of N should be named person under the 2015 Act, the Scottish Parliament had made an error. In their written decision, the tribunal noted that the policy intention had been to ensure that a service user should have a named person only if the service user wished to have a named person. The tribunal also noted that the order appointing N as welfare guardian to P did not include any powers entitling the guardian to enter or participate in legal proceedings or to receive medical records; and refused the application.

N sought judicial review of the Tribunal's decision to refuse her incidental application. The hearing of N's petition was expedited, so as to be determined before the CTO application itself was heard by the Tribunal. Otherwise, there would have been no proceedings before the Tribunal and so the issue as to whether or not N should have party status would be academic rather than a practical live issue.

N's petition sought reduction of the tribunal's decision of 29 January 2018 refusing her incidental application and an order ordaining the Tribunal to make an order in terms of rule 48 of the Tribunal's Rules treating the petitioner as a party. The petition also sought five declarators that the Tribunal's Rules and the 2003 Act breached the rights of N and P in terms of Articles 5, 6, 8 and 14 of the ECHR and that the 2003 Act (as amended by the 2015 Act) is *ultra vires* (i.e. beyond the power of the Scottish Parliament to make) in so far as it does not deem that individuals in the position of N are to be named persons.

The Lord Ordinary allowed argument at the hearing on 27 February to proceed in respect of only the first two orders sought (i.e. reduction of the Tribunal's decision of 29 January 2018 and an order ordaining the Tribunal to treat N as a party to the proceedings before it concerning P). That decision was made on the basis that the rights of N and P were adequately protected by the right for a person in the position of N to apply to the Tribunal under rule 48 of the Tribunal's Rules for a decision of the Tribunal to direct that the person be treated as a party. In short, the issue was restricted to whether the decision of the Tribunal in this specific case was correct and did not go to whether the 2003 Act or the Tribunal's Rules were deficient and so unlawful.

Held

The Lord Ordinary was of the view that there was no clear problem with regard to the policy or its implementation in respect of repealing section 251 of the 2003 Act and that there was therefore no difficulty in bringing an end to the existence of default named persons. Section 251 had provided a mechanism by which a certain category of people automatically became parties to proceedings before the Tribunal and rule 48 of the Tribunal's Rules provides a discretionary power for the Tribunal to direct that a person be treated as a party to proceedings. Accordingly, the issue was whether that rule had been properly applied in the circumstances of this case.

While the Lord Ordinary accepted that both N and her solicitor had raised before the tribunal the change in the Petitioner's treatment arising from the legislative changes to the named person regime, his view was that the tribunal attached undue weight to the legislative change to the named person regime and, in doing so, lost sight of the rule 48 test. The rule 48 test requires assessment of whether the person requesting leave to enter the proceedings before the Tribunal "has an interest in the case" and, if so, whether "it is reasonable" to grant the request for that person to enter the proceedings before the Tribunal. For that reason, the Lord Ordinary reduced the tribunal's decision. The Lord Ordinary declined to order that the Tribunal exercise its judicial discretion under rule 48 to treat N as a party and, instead, remitted the incidental application to the Tribunal for consideration anew by a differently constituted tribunal. No written decision was given by the Lord Ordinary.

Comment

The incidental application was subsequently considered by a fresh tribunal, which directed that N be treated as a party to the proceedings. The Tribunal welcomed the judicial review, as it allowed the opportunity for the Court of Session to provide guidance. Now, in considering an application under rule 48 for a person to be treated as a party to proceedings before the Tribunal, the Tribunal will not consider how a person's position has been altered by legislative changes to the named person regime but will instead focus on the test set out in rule 48(5), namely whether it is satisfied "…that the person has an interest in the case" and, if so, whether "… it is reasonable to … grant the request and direct that the person shall be treated as a party".

MH V Mental Health Tribunal for Scotland

2019 SC 432; 2019 SLT 411; 2020 SCLR 240; 2019 GWD 12-162

Opinion of Lord President, Lord Justice Clerk and Lord Malcolm, 15 March 2019

Administration of justice – MHTS appeal – patient moving for anonymity order – whether sufficient to justify interfering with principle of open justice

Facts

This is an appeal from an interlocutor of the Sheriff Principal refusing an appeal from a decision of the Tribunal. It raises an important issue of practice in relation to the anonymisation of the names of parties in civil court proceedings. In the course of *MH v MHTS* (below), the appellant's counsel made a motion for her anonymity to be preserved in the written opinion of the Court. The motion was heard as a procedural hearing by a bench of three judges in the Inner House. Although it was not opposed by the Respondents, it was refused on the grounds that the appellant would have to show some significant reason for anonymity beyond the nature of the case or the disclosure in court of personal and medical information. There is a presumption in favour of justice being open and public, and special cause would require to be shown to achieve a different outcome.

Held

The motion was refused. Lord Carloway, the Lord President, observed that those acting for the appellant asserted that revealing the patient's identity might discourage them and others from appealing decisions taken by the Tribunal. However, he felt that there was no evidential basis for this, nor was there evidence of any adverse effect on the appellant's health. He went on to say that "if there were a real or substantial risk that identifying the appellant as someone involved in the mental health system would have a significant impact on the appellant's mental health, that is something which the Court would be bound to take into account. There is no medical opinion to that effect. However, if it were to be, then the Court hearing the merits of that appeal may reconsider matters in so far as their own opinion is concerned. As matters stand, there is insufficient material to justify anonymising the appellant's name in these proceedings".

Lady Dorrian, the Lord Justice Clerk, and Lord Malcolm concurred with Lord Carloway.

Comment

This is an interlocutory judgment, given in the course of the next case. It is included because it is the first time the Court of Session has explicitly considered the issues around anonymity of patients who appeal from decisions of the Tribunal to higher courts. In the Tribunal, decisions are, to the extent that they are made public, anonymised by redaction and deletion of any information which could lead to the identification of a patient. The current practice of the Sheriffs Principal is to anonymise anything written on appeals from Tribunal decisions. There is no particular rule or formal requirement for this, however.

Here, the Inner House of the Court of Session was dealing only with a motion for anonymity for the appellant, in an appeal against the decision of the Sheriff Principal. The substantive matter of the appeal was yet to be heard and determined at the point when this decision was given.

In summary, the Court took the view that anonymisation of a decision at appellate level would require a significant reason, and would not be a presumption based on the category or subject matter of the case. The appellant would have to be able to show that, due to exceptional circumstances, anonymity was necessary to prevent a real or substantial threat or risk.

Each of the three judges who heard the motion chose to write on it, with Lord Malcolm's *obiter* remarks in particular describing the private nature of Tribunal hearings as being afforded "more or less automatic secrecy" giving some indication of the Court's concerns about Tribunal hearings taking place in private, as set out in the Tribunal's Rules.

Whilst this motion was refused at the procedural hearing, when the appeal called for a substantive hearing in the Inner House those acting for the appellant made a fresh motion for anonymity, this time providing further evidence, including a medical report, that was held to amount to the "significant reasons" that the Court set as a threshold at this hearing. The appeal decision was therefore eventually published with the appellant's name given only as initials.

MH v Mental Health Tribunal for Scotland

2019 SC 527; 2019 SLT 615; 2019 SCLR 930; 2019 GWD 15-226

Opinion of Lord President, Lord Brodie and Lord Drummond Young, 3 May 2019

Telephone hearings – severe weather – meaning of 'present'

A hearing was scheduled in respect of the appellant, MH and took place during a short period of particularly severe weather, with significant snowfall resulting in a MET Office red weather warning being issued, which advised against all travel. The medical and general members were able to attend the hearing, but the legal convener could not make it to the venue for the hearing, due to the weather conditions and convened the hearing by telephone. The RMO also gave evidence by telephone. The patient's solicitor raised a preliminary matter: that, unless the convener was present, the tribunal was not properly constituted, under reference to rule 64 of the Tribunal's Rules.

The convener took the decision to proceed with the hearing, relying on the overriding objective in rule 4. He was also of the view that there was no prejudice to the patient, with reference to the case of *R v Soneji* (2006) 1 AC 340. He noted that the appellant's solicitor rested his submission in terms of rule 64 although he did in fact go further than that, suggesting that the hearing be adjourned or another tribunal found.

Rule 64 of the Tribunal's Rules provides as follows:

Part VII GENERAL RULES
The hearing

64.— Absence of a member of the Tribunal

(1) Except as provided for otherwise in these Rules, a tribunal shall not decide any question unless all members are present and, if any member is absent, the case shall be adjourned or referred to another tribunal.

(2) If a member of a tribunal ceases to be a member of the Tribunal or is otherwise unable to act before that tribunal has commenced hearing the case, the President may allocate the hearing of that case to a differently constituted tribunal.

(3) If, after the commencement of any hearing, a member other than the Convener is absent, the case may, with the consent of the parties, be heard by the other two members and, in that event, the tribunal shall be deemed to be properly constituted.

Neither "present" nor "absent" are defined in the interpretation section of the Rules and the convener considered himself to be present in the sense that he was able to conduct the hearing by telephone, albeit not physically present and that, absent any other definition in the Rules, he was entitled so to do.

Under the interpretation provisions a "Hearing" means a sitting of the Tribunal for the purposes of enabling a tribunal to take a decision on any matter relating to the case before it.

In this case, the tribunal determined, after hearing evidence and considering a medical report said to be confidential lodged by the patient, that it was appropriate than an interim order be granted.

The patient appealed to the Sheriff Principal against the decision to grant an interim order. It was argued for the appellant that Article 5(4) of the ECHR requires a person in her position to have, and to be able to attend, a hearing to determine whether they should be deprived of their liberty for reasons of unsound mind.

That appeal was refused, with the Sheriff Principal finding that such a hearing did in fact take place and that the tribunal was properly constituted in terms of the Tribunal's Rules.

An appeal against the Sheriff Principal's decision was lodged with the Court of Session. The grounds of appeal set out some fifteen alleged errors in the Sheriff Principal's decision, which the Inner House noted all related to a failure to find that rule 64 required the physical presence of the convener in the room when the matter was being heard. The appellant argued that, in the absence of the convener, the Tribunal President was required to re-allocate the hearing (i.e. to find an alternative convener or panel). An alternative convener had been available and the Sheriff Principal had been made aware of this. Rule 52(2)(c) could not apply as it required a decision of all three members (this rule gives a tribunal fairly extensive case management powers and specifically permits a tribunal to "hold a hearing and receive evidence by telephone, through video link or by using any other method of communication if the Tribunal is satisfied that this would be fair in all the circumstances"). It was said for the appellant that it represented a breach of natural justice for the convener to determine a matter related to his own absence. The convener's participation by phone from a different location had compromised the privacy of the hearing (rule 66) and this breached Article 8 of the Convention (right to respect for private life). The appellant did not need to demonstrate actual unfairness. The proper purpose of rule 64(1) is to secure the right to a hearing and effective participation by the patient in that hearing. This includes seeing and considering the conduct of the convener, to be satisfied that he was acting appropriately in a judicial manner. It was said that, in the absence of this, the appellant's "common law right" for the convener to be in her presence had been breached and that this was also a right under both Articles 5 and 6 of the Convention. Finally, it was said for the appellant that the Sheriff Principal had erred in having regard to the risks to the appellant if the tribunal hearing had not proceeded.

Against that, it was submitted for the Tribunal that the overall objective of the Rules was to ensure that proceedings before the Tribunal were handled as fairly, expeditiously and efficiently as possible. The tribunal had to balance the appellant's right to personal autonomy and the need, in terms of the purpose of the 2003 Act, to protect her wellbeing. The word "present" in rule 64 could apply to a member participating by telephone, and a member participating in the hearing by telephone, in accordance with rule 52, was in fact present in terms of rule 64. Rule 52(2)(c) allowed the Tribunal to hold a hearing remotely, subject to an overarching test of fairness. All three members had to take the substantive decision for it to be valid, but that need not be the case for incidental decisions on case management or procedural points. Further, it was said for the Tribunal that even if there was a procedural irregularity, that did not go to the Tribunal's jurisdiction. The appellant had been given an opportunity to make representations, and Article 6 of the Convention did not guarantee the right to personal presence before a civil court but rather a general right to present one's case effectively to the court and to enjoy equality of arms. In that context, it was also noted that the tribunal made only an interim decision, which was capable of being appealed, and that no final decision was taken on that day; further procedure and further consideration of the appellant's case was guaranteed to take place.

Held

The appeal was refused by the Inner House.

In giving the Opinion, Lord Carloway said (of rule 64):

> "*The purpose is to ensure that the proceedings are conducted before all the members of the Tribunal and that each member participates in the decision-making process. This does not require that all the members be in one room, along with the parties, even if that may, in most cases, be the most convenient way of proceeding. The rules specifically provide (rule 52(2)(c)) that hearings can involve communication by telephone, by video link, or by using any other method that is fair in all the circumstances. [23] In the modern era, where technology permits, hearings are*

regularly conducted remotely; whether by the decision-maker being at a remote location or the party or witness being remotely linked. This can be advantageous to everyone involved in terms of cost and time in certain circumstances. It may be a necessity in others, and that seems to have been the situation here."

In considering the question of fairness to the appellant, Lord Carloway went on to say:

"*There remained an overarching requirement of fairness in rule 52(2)(c). That would have existed in any event and would have necessitated ensuring that the appellant, and the Tribunal, were able to consider all the evidence and arguments, both oral and written. It would require providing the appellant with an opportunity to be heard. All of this was done in the appellant's case. There was no discernible unfairness.*

It was also noted in the Opinion that there was no hint in any of the papers in respect of this appeal, or of that to the Sheriff Principal, that there was any lack of attention on the part of the convener, and that no unfairness arose by that means.

Comment

The Court considered that the situation did not give rise to any breach of the Tribunal's Rules and, in turn, that the circumstances did not result in any procedural unfairness, or indeed perception of unfairness. The suggestion that the Sheriff Principal had erred in considering the consequences of the hearing not taking place was not entertained; indeed, Lord Carloway makes reference in his Opinion to the weight of medical evidence which was before the tribunal, and the relatively short-lived effect of the interim compulsory treatment order which was made.

The Covid 19 pandemic has resulted in much of the Tribunal's business being conducted remotely, by telephone conference hearings, video hearings and, in some cases, hybrid hearings, with parties and witnesses joining by different methods. The decision in MH has given reassurance to the Tribunal administration and to individual members of the Tribunal that the jurisdiction of the Tribunal is not called into question solely because of the physical location of a convener or other member. That has enabled the Tribunal to provide an uninterrupted service throughout a public health emergency unprecedented in modern times. The decision has also given some useful and detailed consideration of the interpretation of the Tribunal's Rules and the significance of both fairness and the appearance of fairness in this type of judicial process.

The appellant sought permission to appeal to the UK Supreme Court. This was refused by the Inner House. A direct application for permission to appeal was also refused by the Supreme Court.

CS v MHTS

Decision of Sheriff Principal M W Lewis, June 2020 (unreported)

Differences between compulsory treatment orders and compulsion orders – legislative competence – discrimination – recorded matters – significantly impaired decision making

The central issue in this case was whether someone who receives care and treatment for a mental disorder via an order imposed in the first instance by a criminal court is treated differently than someone who receives care and treatment via a civil order. The appellant was made subject to a compulsion order in 2013 by the Sheriff Court, following charges of a relatively minor nature, for a breach of the peace. This order was appropriate because the Court was satisfied that the appellant had a mental disorder and met the criteria for a compulsion order, which was therefore the appropriate way to proceed. That order was varied and extended over the next few years until the appellant sought revocation of the order in 2019. A tribunal heard extensive evidence from those responsible for the appellant's care and treatment, including medical evidence and evidence of significant rehabilitation efforts made by his care team. The appellant argued that he did not meet the criteria for a compulsion order and that the order ought to be revoked or replaced with a less intrusive order such as a compulsory treatment order. His final submission was that to keep him on the compulsion order was not only discriminatory, its continuance did not comply with the principles in the 2003 Act. The tribunal refused the application for revocation, on the basis that they were satisfied that the statutory criteria for a compulsion order continued to be met. C appealed against that decision to the Sheriff Principal.

The note of appeal as originally lodged did not actually identify any error by the tribunal, rather it focused on the unfairness of the position that the appellant found himself in, being subject to the restrictions of a compulsion order long after any criminal sentence would have ended.

After securing legal aid and sanction for the employment of junior counsel, the appellant lodged a motion seeking to amend the grounds of appeal and to lodge a Devolution Minute (written notice averring that an aspect of legislation goes beyond the competence of the Scottish Parliament). This was granted by the Sheriff Principal. The amended grounds of appeal did disclose alleged errors of law and procedural irregularity in terms of sections 324(2)(a) and (b) of the 2003 Act. It was argued for the appellant that the tribunal failed to apply the principles at section 1 of the 2003 Act, that it failed to apply a necessity test and failed to consider the issue of the appellant's significantly impaired decision making. It was also said for the appellant that the tribunal failed to consider making a recorded matter and failed to consider revoking the order and replacing it with a compulsory treatment order or "other less restrictive order." Finally, a procedural impropriety was said to have occurred, in that the tribunal failed to provide adequate reasons for its decision.

The Devolution Minute addressed what the appellant viewed as the fundamental incompatibility of the 2003 Act with his Convention rights, in particular his rights in terms of Articles 8 and 14 of the ECHR. The ordinary interpretation of the 2003 Act allegedly breaches these rights, as a patient who enters the mental health system through the criminal justice route is treated differently than a patient who enters the system through the civil route. There is no consideration of significantly impaired decision making (the SIDMA test), no option for the tribunal to make a recorded matter and no prospect of moving from one type of order to another. The appellant argued that these failures amount to a disproportionate interference with his Article 8 rights and constitute discriminatory treatment between him and other classes of patients in terms of article 14.

Counsel for the appellant submitted that the test for proportionality is found in *Christian Institute* v *Scottish Ministers* 2017 SC (UKSC) 29, which sets out four questions:

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?

Counsel for the appellant did acknowledge that the absence of the SIDMA test relates to a legitimate objective in respect of public safety and security, but he suggested that the tribunal could have applied the SIDMA test in the appellant's case without compromising that objective and that, in a proper 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 militated against the order being permitted to continue.

Counsel for the appellant then contended that the regime was a breach of the appellant's rights in terms of Article 14. With reference to *R (Steinfeld)* v *Secretary of State for International Development* [2020] AC 1, at paragraph 3, he submitted that the test for establishing an article 14 complaint had been met as follows:

- The facts of the case fell within the ambit of Articles 5, 6 and 8 of the ECHR
- There was a difference of treatment – the contrast between the provisions of section 64(4) of the 2003 Act (civil orders) and section 57A(3) of the 1995 Act (compulsion orders)
- The difference was between persons who are in an analogous situation, with the appellant being said to be in an analogous position to a person who is subject to a compulsory treatment order *(AL (Serbia)* v *Home Secretary* [2008] 1 WLR 1434)
- The difference of treatment was on a protected ground, and in that regard counsel pointed to article 14 and to *Clift* v *United Kingdom* [2010] ECHR 1106 at paragraphs 59 and 60
- The difference in treatment could not be justified – here it was said for the appellant that there was no legitimate aim, and that it was the different treatment which had to be justified rather than the treatment itself *(Steinfeld* at 41-42).

Counsel submitted in similar terms that there was no justification to exclude recorded matters from hearings where the underlying order is a compulsion order, rather than a compulsory treatment order. In conclusion, it was said that the 2003 Act can and should be read down, to permit recorded matters to be made in respect of patients subject to a compulsion order and to permit the SIDMA test to be considered in respect of such patients. The absence of the SIDMA test and recorded matters would be capable of resolution if the 2003 Act was read as permitting conversion of an order from a compulsion order to a compulsory treatment order.

For the respondent, the starting point of submissions 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) of the Tribunal's Rules).

Counsel for the respondent submitted that the Court did 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 Tribunal's Rules and the 2003 Act to permit the appellant to go beyond the statutory scope of an appeal. Justice did not require it, as the appellant was legally represented before the tribunal. In support of this position, counsel quoted *Advocate General for Scotland* v *Murray Group Holdings Ltd* 2016 SC 201):

> *[17] For the Lord Advocate, who entered appearance due to the Devolution Minute, it was argued that the issue was academic, due to a change in the appellant's circumstances and that the 2003 Act did not require to be read down as suggested by the appellant. Counsel for the Lord Advocate accepted that the appellant correctly identified the necessary stages for establishing an Article 14 ECHR complaint, but noted that 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 that his decision making ability is not relevant. In the context of this case, unlike in Clift v United Kingdom [2010] ECHR 1106 relied on by the appellant, there is no suggestion that the detention was unlawful. Counsel for the Lord Advocate did not accept that Article 8 is engaged, there being no right to a recorded matter under that Article, and further, 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. Finally, before concluding that the 2003 Act lies within legislative competence, counsel for the Lord Advocate noted that the appellant failed to articulate any Convention breach in respect of his inability to transfer between orders.*

Held

The appeal was refused.

The Sheriff Principal found that the decision of the tribunal was not based on an error of law. In summary, she held that the 2003 Act does not require to be read down so as to permit recorded matters to be made in respect of compulsion orders, nor to incorporate the SIDMA test.

In dealing with the Article 8 submissions, the Sheriff Principal said that

> *"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."*

In addressing the lack of consideration of significantly impaired decision making in the appellant's case, the Sheriff Principal said that

> *"The tribunal did not have the necessary discretion to use the SIDMA test as a less intrusive measure without unacceptably compromising the achievement of any objective of public safety or security…. 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)."*

In saying this, the Sheriff Principal referred to the provisions of the Policy Memorandum which provides explanations for the omission of the SIDMA test in respect of compulsion orders, and held that it was reasonable for the Scottish Parliament in enacting the 2003 Act to omit the SIDMA test.

The Sheriff Principal went on to say that

> *"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."*

In addressing the duration of the compulsion order, the Sheriff Principal said that

> *"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)."*

The Sheriff Principal was not satisfied that all of the necessary stages for establishing an Article 14 complaint were met. She found that the appellant "was not in an analogous position to a person who is subject to a compulsory 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."

In terms of the lack of availability of recorded matters, the Sheriff Principal did not find any inherent unfairness or discrimination here. She noted that, unlike in CTO applications, "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."

Finally, in dealing with the lack of opportunity to convert a compulsion order into a compulsory treatment order, the Sheriff Principal held that

> *"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. The approach adopted on behalf of the appellant fails to recognise that the statutory scheme has various safeguards enabling the patient to challenge decisions."*

Comment

This appeal and the detailed written decision by Sheriff Principal Lewis have provided clarity around issues of inherent fairness in the treatment of those who are subject to compulsion orders. This decision clarifies that while there are differences between the civil and criminal statutory provisions, there is objective justification for these differences, within a system which provides appropriate safeguards and opportunities for review of detention and treatment. As such, the 2003 Act does not require to be interpreted or read down so as to allow the SIDMA test to be considered by a tribunal dealing with a compulsion order hearing, nor to allow recorded matters to be made in respect of a patient subject to a compulsion order.

IL v MHTS

Decision of Sheriff Principal M W Lewis, 31 August 2020 (unreported)

Telephone hearings – disruption to hearing – fairness to parties – representation

Facts

The appellant (IL) had a diagnosis of a chronic psychotic illness characterised by persecutory delusions and passivity. A short term detention certificate ("STDC") was granted by an approved medical practitioner in terms of section 44 of the 2003 Act. The STDC authorised detention of IL in hospital for a period of 28 days to determine what medical treatment should be given to her and to give such treatment in accordance with Part 16 of the 2003 Act.

IL applied under section 50 of the 2003 Act to the Tribunal for revocation of the STDC because she did not accept that the statutory criteria required for the continuance of the STDC were met. The application was lodged on behalf of IL by her solicitor. The application was refused. IL challenged that decision and appealed to the Sheriff Principal under section 320(2) of the 2003 Act, averring that all available grounds of appeal in that section were relevant. Prior to the hearing, the Sheriff Principal limited the appeal to only one of these grounds, that of procedural impropriety, and sought written submissions from both parties.

IL represented herself during the appeal. Her submissions set out technical and practical difficulties which she experienced (interruptions from incoming phone calls, patient call alarms being activated and the voices of patients from elsewhere in the building) and which prevented her from participating effectively in the hearing:

- Deterioration in the quality of the mobile phone facility (the speaker facility and the volume control caused difficulty).
- Lack of clarity about the process to be followed.
- Being denied the opportunity to participate fully and effectively in the hearing and in particular to ask for portions of the inaudible evidence to be repeated.

It was submitted for the Tribunal that the overriding objective of the Tribunal's Rules is to secure that proceedings before the Tribunal are handled as fairly, expeditiously and as efficiently as possible. Rule 52(2)(c) provides that the Tribunal may hold a hearing and receive evidence by telephone, video link or by using any other method of communication if the Tribunal is satisfied that this would be fair in all the circumstances. In addition, the appellant was informed from the outset that due to the Covid-19 Pandemic the hearing would take place by way of telephone conferencing facilities, and she did not object.

Held

The appeal was refused. A transcript of the hearing demonstrated that there had been no unfairness or impropriety in the conduct of the hearing. It showed that the tribunal convener intervened appropriately to deal with background noise and managed the situation by clear and careful instruction to all participants. The Sheriff Principal observed that IL was represented by a solicitor and an advocacy worker at the hearing. She was fully able to participate in the hearing directly through the giving of evidence and through the services of her solicitor (*MH v Mental Health Tribunal for Scotland* 2019 SC 527).

The Sheriff Principal observed that the interruptions to the hearing caused by background noise were undoubtedly irritating for all of the participants. The issue here is fairness and, in considering this, she took the following issues into account:

- All of the Tribunal members had considered the written material including the medical reports and the written statement provided by IL in advance of the hearing.

- Although the parties were not physically in the same room, they all had the opportunity to participate. The convener dealt with the interruptions swiftly, ensuring that the appellant could hear and be heard and was not denied the opportunity of effectively participating.
- IL was legally represented at the hearing and her solicitor had the full opportunity which he took to present her case orally as had her advocacy worker in writing.
- The decision made was one with relatively short term effect – this was an appeal against a short term detention certificate.
- Whilst there may have been technical difficulties in the course of the hearing in relation to operating the loudspeaker and the volume control and there were the interruptions mentioned above, the difficulties and interruptions were *de minimis* and did not in the Sheriff Principal's view materially impact on the proper conduct of the proceedings.

Comment

The hearing which resulted in this appeal took place early on in the Covid-19 Pandemic, and associated arrangements at that point were being made for telephone hearings to replace face to face hearings. It clarifies that there is no difficulty in principle with remote hearings, or any inherent unfairness to these. However, this appeal turned on the nature and significance of the interruptions to the hearing and the extent to which they hampered the appellant's meaningful participation. This is not to say that every phone hearing with technical difficulties or disruption will be acceptable as a means of determining an application to the Tribunal.

X v MHTS

Decision of Sheriff Principal M W Lewis, December 2020 (unreported)

Challenge to the contents of an FFR without seeking to challenge the decision of the Tribunal.

Facts

This was an unusual appeal, in that it did not seek to challenge a decision by the Tribunal, but rather sought to challenge only aspects of the decision as recorded in the Full Findings and Reasons document (FFR). The patient (X) was made subject to a short term detention certificate ("STDC") under section 44 of the 2003 Act. This authorised the detention of X in hospital for a period of 28 days for the purpose of examination, investigation and appropriate treatment. X applied under section 50 of the 2003 Act to the Tribunal for revocation of the STDC because she did not accept that the criteria under section 44(4) of the 2003 Act had been met. The application was heard by a tribunal, who found that the criteria were not met and that the patient should no longer be detained. Although the tribunal granted the application, X appealed against their decision, not to have the decision set aside, but to challenge some of the findings in fact, in particular that the patient had a mental disorder. In her grounds of appeal, X argued that the tribunal erred in making a finding that the appellant suffered from a mental disorder. This finding was prejudicial and in breach of Articles 8 and 14 of the ECHR. X invited the Sheriff Principal to recall the finding of the tribunal that she had a mental disorder and to replace that with a finding that she does not have a mental disorder and that consequently none of the criteria in section 44 (4) have been met.

It was submitted for the Tribunal that no such right of appeal exists. The appellant's application was made under section 50(1). At a hearing on 23 October the Tribunal considered the appellant's application. It revoked the STDC under section 50(4). The only appeal available in terms of the 2003 Act is an appeal against the tribunal's decision not to revoke the STDC. As the STDC was in fact revoked, an appeal was not competent.

Held

The Sheriff Principal dismissed the appeal after a procedural hearing on competency. In her words:

> "*The appellant seeks an extraordinary outcome and one which is not envisaged in the 2003 Act. She does not have a remedy available to her under this legislation. On that basis alone her appeal must fail as incompetent. To put it bluntly, the Tribunal was not satisfied that all the criteria in section 44(4) continued to be met. It concluded that the appellant has a mental disorder (section 44(4)(a)). However , and by majority, the Tribunal concluded that her ability to make decisions about the provision of medical treatment for that mental disorder is not significantly impaired; it is not necessary to detain the appellant in hospital for the purposes of determining what medical treatment should be given to her or the giving of medical treatment to her; and there was no significant risk to the health, safety and welfare of the appellant or to the safety of any other person (section 44(4)(b)-(d)). For those reasons the Tribunal revoked the STDC. Had the Tribunal determined that the appellant did not have a mental disorder, it would still have revoked the STDC. I have given careful thought to the additional points made by the appellant in relation to the principles [in section 1 of the 2003 Act] and to her fear about the use to which the finding of her having "a mental disorder" might be put by others including her estranged husband. Those factors do not take her within the ambit of section 320. In the context of appeals, I am asked to disturb the conclusion of another decision maker for a raft of reasons including for example a failure on the part of the decision*

maker to take into account relevant material or that the decision is inconsistent with other acceptable evidence or that the decision is inconsistent with itself. Here, even if the finding that the appellant has a mental disorder is inconsistent with the grant of the revocation (which I do not accept given the other findings), the appellant does not seek disturbance of the outcome."

Comment

As noted, this was an unusual appeal, in that the patient did not wish to challenge the tribunal's decision to revoke her short term detention certificate, but attempted only to challenge their findings in fact as to whether the criteria for granting the certificate were met. The Sheriff Principal's decision clarifies that the contents of a decision as set out in Full Findings and Reasons are not susceptible to appeal. It is only the decision itself (and here, the decision not to revoke a STDC) which can be either set aside and remitted back to a differently constituted tribunal or substituted by the Court.

RE v MHTS

Decision of Sheriff Principal M W Lewis, 27 July 2021 (unreported)

Sufficiency of evidence – error of law – method of recording evidence heard by a tribunal

Facts

This compulsory treatment order (CTO), of several years' duration, had been extended for a period of 12 months under section 86 of the 2003 Act, a determination by the responsible medical officer (RMO) having been made on 27 November 2020. The patient made an application under section 99(1) for revocation of that determination. At a hearing on 17 February 2021, the determination was confirmed by a tribunal. That decision was subsequently the subject of an appeal to the Sheriff Principal under section 320(2).

There were three grounds of appeal. Two were refused and one upheld, with the Sheriff Principal setting aside the tribunal's decision and remitting the application back to a differently constituted tribunal to be heard again.

When the section 99(1) application first called for a hearing on 3 February, the RMO did not attend. It transpired that he had left his post and that no replacement RMO had been identified for the patient. The mental health officer (MHO) was unavailable, although a substitute MHO did attend. The only medical assessment available was dated 27 November 2020. The tribunal adjourned that hearing, issuing a direction under rule 49 requiring the relevant clinical director to notify the Tribunal of the name of the patient's new RMO and to ensure that the RMO or their substitute was available to participate at the next hearing. This was commended by the Sheriff Principal as a prompt and practical approach to enable effective participation without further delay.

At the subsequent hearing on 17 February, the patient's new RMO attended and gave evidence to say that he had not assessed the patient but had had access to his medical notes. The patient's MHO attended. Based on the oral and written evidence, the tribunal confirmed the former RMO's determination to extend the CTO, in terms of section 103(2)(c). In doing so, they considered the criteria in section 64(5) of the 2003 Act. (Although that is not specifically required by statute, this approach is again treated with approval by the Court; here, the Sheriff Principal states that the tribunal must be satisfied that these conditions are met).

Held

The Sheriff Principal found that there was an error of law, there being insufficient evidence before the tribunal to enable it to find that the criteria for a CTO continued to be met. The decision of the tribunal was set aside and the matter remitted back to a differently constituted tribunal.

Comment

In her decision, Sheriff Principal Lewis makes a number of observations to guide those responsible for drafting Full Findings and Reasons. The first observation does not go to the substance of the decision, but does highlight the importance of careful drafting of findings in fact: the Sheriff Principal expressed some surprise at the inclusion of evidence in one of the findings in fact.

It is the Sheriff Principal's treatment of the recording of oral evidence, and of the reasoning of the tribunal, that is of real significance. The decision sets out that it should be possible to identify the nature and extent of oral evidence; a list of witnesses is insufficient. It is of course acknowledged that the tribunal need not set out everything said by a witness.

In the view of the Sheriff Principal, however–

> *"What would be helpful … is a summary of the evidence of each witness, written with clarity and precision as this will assist the tribunal in determining whether there was any evidence to justify the findings."*

In practice, this approach may have been practical and useful in this particular case, given that the evidence was limited and the question of sufficiency was finely balanced.

In line with well-established case law, the Court here is not seeking to reach its own view on the evidence and makes clear that appellate courts will continue to respect the Tribunal's status as an expert panel. Rather, what is sought is clarity as to why a panel has made its findings and decided to accept or reject evidence. In applying the test in *Wordie Property Company Limited v Secretary of State for Scotland* 1984 SLT 345, the Sheriff Principal commented that it could not be ascertained here what oral evidence was given by the MHO, the RMO and any other party. She states that greater clarity of expression and a more bespoke approach could have been utilised in relation to the recording and evaluation of evidence.

Ultimately, the appeal was allowed on the grounds that the tribunal's decision was based on an error of law: there was insufficient evidence before the tribunal to enable it to find as a matter of fact that the criteria for a CTO continued to be met. The appeal decision makes it clear that this does not mean that the tribunal came to the wrong result on account of any omission in the recording of the evidence (or indeed that they reached a correct decision despite the omission). The issue is that there was a flaw on the part of the tribunal in failing to set out the evidence on which their decision was based.

SL v MHTS

Decision by Sheriff Principal M W Lewis, September 2021 (unreported)

Failure to comply with statutory requirement – consequences of failure

This appeal was about the effect of a failure on the part of a mental health officer (MHO) to comply with his duties under section 147 of the 2003 Act in the context of an application for an extension of a compulsion order. In short, these are duties about interviewing the patient and providing information.

A telephone hearing took place on 21 January 2021, when the patient was represented by a solicitor and supported by an advocacy worker. Preliminary matters considered by the tribunal included discrepancies in the timeline leading to the application and in some supporting documents. The responsible medical officer (RMO) clarified in evidence that she had examined the patient on 16 December 2020. A second approved medical practitioner carried out an examination on 22 December. Both were satisfied that the compulsion order should be extended. Notification was given to the MHO on 21 December. At the hearing, an interim order was made to permit the patient's solicitor to make further inquiries. The MHO or his substitute was directed to attend a further hearing on 21 February, and the RMO was directed to make 'best endeavours' to attend. The MHO was also directed to submit a written report to the Tribunal, setting out his contact with the patient's RMO and the steps he had taken under sections 139 and 147 of the 2003 Act. This disclosed that a face to face meeting between the MHO and patient had not been possible due to the pandemic restrictions in place at the time. The MHO had thereafter not interviewed the patient as soon as was practicably possible, as required by section 147 of the 2003 Act. The patient's solicitor submitted that the MHO had therefore not complied with the duties in section 147. Indeed, the tribunal was not satisfied that the exceptions in section 147 (setting out when a face to face assessment of the patient can be waived as a requirement) were relevant and accepted that the MHO had not complied with the statutory requirements in section 147. In essence, these provisions are about ensuring that the patient has an explanation of what is being done and of their legal rights in consequence. The patient was legally represented and had input from an independent advocacy service. On balance, the tribunal concluded that the patient had not been prejudiced by the MHO's failure to interview him as soon as reasonably practicable after 21 December 2021, and that the application was therefore valid. The tribunal went on to find that the relevant statutory criteria were met in respect of the application, and an order was made accordingly.

That decision was appealed to the Sheriff Principal.

At the appeal hearing, it was argued for the patient that the application was not competent and should not have been determined by the tribunal. The duties placed on the MHO by section 147(2) and (3) are mandatory and the tribunal erred in finding that non-compliance did not have the effect of invalidating the application. The tribunal was wrong to focus on whether or not the non-compliance caused prejudice to the patient and also erred in concluding that no prejudice arose as the patient was represented. The MHO failed to carry out a positive obligation to interview the patient and ensure the gathering and provision of specified information; the MHO could not have given an opinion to the RMO on the appropriateness of the application without having taken account of the patient's views. It was also argued that the different treatment of aspects of a compulsion order and a compulsory treatment order are prejudicial and unfair.

For the Tribunal, it was said that the application was not fatally flawed by the MHO's failure to adhere to the statutory requirements. It was submitted that it is necessary to look at the consequences of failure. Section 147 of the 2003 Act does not provide any statutory consequences, so it cannot fairly be concluded that Parliament intended the consequence to

be total invalidity of the applications. The requirement for the MHO to interview is not absolute and, taking into consideration the overriding purpose of the Act itself, the intention cannot have been for the compulsion order to fail, leaving the patient without care and treatment. The facts show the failure to be of limited consequences: the patient was aware of the application and had legal representation. His views could be represented to the tribunal, and the tribunal took the section 1 principles of the 2003 Act into account in determining that the application could be heard. Their approach was consistent with the objective set out in rule 4 of the Tribunal's Rules.

Held

The appeal was refused. In refusing the appeal, the Sheriff Principal made some useful comments around the nature of a compulsion order, when compared with a compulsory treatment order. She noted that the former is an alternative to a prison or other sentence of the court and there are therefore legitimate differences between the processes to extend the different types of order which are neither prejudicial nor unfair. Section 147 requirements are to be considered in the context of the factual matrix, but also in the context of Chapter 2 of Part 9 of the 2003 Act dealing with mandatory reviews of compulsion orders by the RMO.

The role of the RMO in determining the need for extension is crucial, and the RMO did not fail in any of the statutory duties. The object of the duties placed on the MHO are directed at engagement with the patient. Whilst Parliament clearly intended the MHO to comply with the requirements, it did not intend that this type of failure would result in the order coming to an end.

There is no mechanism for the RMO or Tribunal to make a new compulsion order if it was allowed to expire while care and treatment is still necessary, as such an outcome would thwart the intention of the legislature. The Sheriff Principal was content that the tribunal addressed the correct question and considered the facts and the evidence and the issue of prejudice in finding that the application was not invalid. Although not specifically addressed on the section 1 principles, the tribunal did correctly take account of the MHO's failure on the effect of the patient's participation (in line with the purpose of section 147). The tribunal acted fairly, expeditiously and efficiently in granting an interim order and then in continuing the hearing for preliminary matters to be clarified. The Sheriff Principal went on to say that the tribunal acted fairly and with integrity, ensuring the participation of the patient at the hearings. In summary, there being no error of law and no unreasonable exercise of discretion, the appeal was refused.

Comments

It should be noted that there was no practical purpose in setting aside the decision. If the application had been found to be *ultra vires*, the compulsion order would have ceased to have effect on the 31st January, that being the date on which it would expire, leaving a differently constituted tribunal with no legal basis on which to reconsider the application.

This decision does go some way to exploring what amounts (or does not amount) to a failure which is fatal to an application. Here, the Court looked at whether in fact there had been any prejudice to the patient as a consequence of the failure to follow the statutory requirements. The Court also took account of the intended purpose of the provision which was not fully complied with, and balanced that against other procedural safeguards, including the role of the RMO in this particular type of situation.

In considering these factors, the Sheriff Principal took the view that it cannot have been the intention of Parliament to leave a patient without care and treatment (and in the context of a compulsion order, to withdraw the public protection element of that order) because of a procedural error in making the determination to extend an order. None of the criteria was disputed by the appellant; it was the means by which the order was extended which gave rise to the appeal.

Other Cases of Interest

P (by his litigation friend the Official Solicitor) (Appellant) v Cheshire West and Chester Council and another (Respondents); P and Q (by their litigation friend, the Official Solicitor) (Appellants) v Surrey County Council (Respondent)

[2014] AC 896; [2014] 2 WLR 642
on appeal from [2011] EWCA Civ 1257; [2011] EWCA Civ 190

Definition of deprivation of liberty – whether the person is under continuous supervision and control and is not free to leave

This is an English case, decided by the UK Supreme Court in 2014, which considered explicitly whether care arrangements in places other than a hospital amount to the deprivation of liberty of an individual who is required to live there due to a mental disorder. One of the appellants lived in a locked care home, one in foster care, and the other in a supported group living house with other individuals who required full time care and support.

The decision was not unanimous, or consistent for all three appellants. This reflects to some extent the very different living arrangements of the individuals. However, it was held that all three appellants were subject to restrictions, in particular being under constant supervision and being unable to leave the places where they lived. This went beyond the realms of parental care of individuals with similar disabilities, notably because the restrictions were placed on them by the State, and not by parents or carers. The Court therefore held that this amounted to a deprivation of liberty and, as such, fell to be checked and monitored periodically via the statutory regime in place for this in England and Wales. It should be noted that, unlike in Scotland, part of that statutory provision includes a best interests test – the purpose of the periodic monitoring includes the expressly stated aim of ensuring that the arrangements are in the person's best interests. As there is no equivalent provision in Scotland, the practical consequences of a similar decision here would be different. In the present case, it brought the appellants within that statutory framework of assessment and monitoring; in Scotland, it is possible that the outcome would simply be a stark declaration of unlawful detention.

Clearly, there are Convention rights, together with principles established by the European Court of Human Rights which apply to any deprivation of liberty, and specifically of those with mental disorders. Although each of the appellants lacked capacity, it was established that they were apparently content with their living arrangements. The Court noted the importance of separating the question of the benevolent justification for those arrangements from that of deprivation of liberty. The latter includes particular features such as supervision and control, and no freedom to leave. The individual may acquiesce, or at least fail to object to the arrangements, but that, together with the nature of the setting or the purpose and intentions behind it, is not relevant to the objective question of whether or not that person is deprived of their liberty. As a legal principle, that will apply to people in Scotland as well as England and Wales, as it is not specific to the statutory regime or reliant on statutory interpretation. Rather, it applies the principles of Human Rights to the objective situation of the individual.

Kiarie and Byndloss

[2017] 1 WLR 2380; [2017] 4 All ER 811

Statutory appeal – proper provisions – appellant's ability to prepare and participate effectively

This is of interest to MHTS, particularly in the context of remote Tribunal hearings and the extent to which they address Convention rights in respect of a fair hearing. The case, heard by the UK Supreme Court, was about an appeal from a decision of the Immigration Tribunal and subsequently Upper Tribunal, but the ratio is of relevance to tribunals generally.

Kevin Kiarie and Courtney Byndloss are foreign nationals who were made subject to deportation orders by the Home Secretary, following criminal convictions in the UK. They made representations to the Home Secretary on their Article 8 rights and these were refused; the deportation orders were not revoked. Kiarie and Byndloss were therefore to be removed from the UK prior to their appeal against this decision and were able to give evidence only remotely, by video link. They were given only what is described as an out of country right of appeal (i.e. an appeal to the Immigration and Asylum Chamber, but no right to remain in the UK until after that appeal was heard). They lodged a petition for judicial review of that decision on several grounds, some of which were specific to the Immigration Rules. However, of wider significance are the grounds that they would be insufficiently able to prepare for, to seek representation at or effectively give evidence in person at those hearings from overseas.

Essentially, they were seeking to challenge the approach of the Home Secretary in upholding (or failing to uphold) the procedural guarantees protected in Convention rights (specifically in this case Article 8 rights, but the principles can be extrapolated to other Convention rights including deprivation of liberty).

In summary, the UKSC upheld the appeal and set aside the appellants' deportation certification. The relevant aspect of the judgment here is the assertion by the Court that the public interest in the removal of an appellant in advance of his appeal is outweighed by the public interest that a right of appeal should be effective. In saying this, the Court made it clear that it considered not the fact of the appellants' being required to give video evidence as being the reason for the out of country right of appeal to be insufficient in terms of Convention rights, but rather that the appellants faced insurmountable obstacles in attempting to do so. There was no Convention compliant means of instructing representation or giving evidence.

In consequence, the Home Office established a means by which such appeals can be facilitated overseas, using consular premises and secure video link facilities, supported by UK government. This has been found to render the out of country appeal right sufficient, demonstrating that the fact of the appellant being at a remote location or separated from the tribunal taking the decision is not to be treated as rendering the appeal right ineffective. The judgment clarifies this by noting that the Home Secretary is required to be satisfied that appropriate facilities are in place for an appeal hearing before certifying removal of appellants from the UK. Remote hearings are not in themselves problematic, so long as they can provide an effective and adequate appeal.

Rooman v Belgium

European Court of Human Rights, Grand Chamber, 31 January 2019
Application no. 18052/11, [2019] ECHR 105

Lawfulness of detention relates to therapeutic purpose – treatment must cure, alleviate or reduce danger

Facts

As the Grand Chamber judgment extends to 70 pages and gives an account of various procedural details including court proceedings prior to the 2019 hearing, this serves only as a very brief summary outline of the facts.

The applicant was initially convicted and sentenced in 1997 for significant criminal offences, including sexual offences. He committed further offences while imprisoned. Prior to the expiry of his sentence, under the relevant procedures applicable in Belgium, he was transferred to an institution, described as a 'social protection facility'. This is broadly similar to the Transfer for Treatment Direction procedures available under the 2003 Act in Scotland. A psychiatric report from 2005 detailed the need for secure detention, with the longer term possibility of treatment at lower levels of security and, ultimately, the potential of a placement in a non-secure unit.

Various appeals and applications were made by the applicant, including applications seeking conditional discharge. In summary, the applicant claimed that he was not receiving appropriate treatment for his mental disorder and had no ultimate hope of being discharged, in large part because he is a member of Belgium's German-speaking minority and did not receive treatment in his first language. In domestic courts, his detention and treatment was held not to be unlawful, with reference to the continuing extent of his mental disorder and the danger to the public in the event of his discharge.

In an application heard by the Second Section of the Court, the applicant's position was that his compulsory detention violated his rights under Articles 3 and 5 of the Convention, averring that there was a failure to provide psychiatric and psychological treatment in the facility where he was confined. In respect of the alleged violation of Article 3 of the Convention, the Court accepted the applicant's claim that his detention without treatment and the lack of prospects of improving his situation based on the absence of that treatment amounted to inhuman and degrading treatment. This was in relation only to the period of time when he did not have access to a German-speaking psychiatrist, a situation which was rectified during the time he was detained.

In respect of Article 5 of the Convention, the Court concluded that no violation had occurred. The Court cited established case law "to the effect that, as long as a person's detention as a mental health patient takes place in a hospital, clinic or other appropriate institution, the adequacy of the treatment or regime is not a matter for examination under Article 5 § 1(e) of the Convention…. In the present case there has at all times been a link between the reason for the applicant's detention and his mental illness. The failure to provide appropriate care, for reasons unconnected with the actual nature of the institution in which the applicant was held, did not break that link and did not render his detention unlawful…".

The applicant's request that the matter be referred to the Grand Chamber was granted in December 2017.

Held

The Grand Chamber agreed that there was a violation of the applicant's Article 3 rights based on the lack of adequate treatment during a specific portion of the time during which he was detained. There was a thirteen year period during which he did not receive adequate treatment.

However, the Grand Chamber also found that a portion of the time during which the applicant was deprived of his liberty represented a violation of his Article 5 rights. This was held to be to the extent that he was not, during that time, placed in an appropriate facility which could provide suitable treatment. This occurred during the thirteen year period referred to above.

In reaching this position, the Grand Chamber considered whether Article 5, in parallel to its role in public protection, requires a therapeutic aspect for the purpose of the detention to be fulfilled. In other words, "it must determine whether or not the authorities are under an obligation to provide psychiatric and psychological treatment to an individual in compulsory confinement, and, if so, to define the scope of the Court's review of the suitability of the treatment in question. Equally, the Grand Chamber is called upon to clarify the relationship between Articles 3 and 5 as regards its scrutiny of compliance with those provisions in the event that both complaints concern the absence of appropriate medical treatment…". In other words, the Grand Chamber was considering the interaction of Articles 3 and 5 in this particular individual's situation.

The Grand Chamber was clear that the case law, "particularly as developed over the past fifteen years, shows clearly that it should now be considered that there exists a close link between the "lawfulness" of the detention of persons suffering from mental disorders and the appropriateness of the treatment provided for their mental condition." Their judgment clarifies that this now goes further than earlier case law: the provision of appropriate or suitable treatment is now a requirement of such a deprivation of liberty. The Grand Chamber stated that "[a]ny detention of mentally ill persons must have a therapeutic purpose, aimed specifically, and in so far as possible, at curing or alleviating their mental-health condition, including, where appropriate, bringing about a reduction in or control over their dangerousness. The Court has stressed that, irrespective of the facility in which those persons are placed, they are entitled to be provided with a suitable medical environment accompanied by real therapeutic measures, with a view to preparing them for their eventual release".

The Grand Chamber also noted that assessing the appropriateness of a facility must involve consideration of the conditions of detention and the treatment provided therein. They gave examples to demonstrate that "…appropriate and individualised treatment is an essential part of the notion of "appropriate institution" ". They related this to a conclusion that Article 5 § 1(e) has what was described as a 'dual function': public protection and the therapeutic function for the individual. In stating this, the Grand Chamber said that "The need to ensure the first function should not, *a priori*, justify the measures aimed at discharging the second".

Comment

This Strasbourg judgment is of direct relevance to the Principles stated at section 1 of the 2003 Act. In Scotland, the principle of reciprocity lies at the heart of every decision taken by a mental health tribunal. It also goes directly to provisions for the various levels of secure detention facility in Scotland. The judgment does represent a formalisation of the development of case law in this area since *Winterwerp v Netherlands* and *Ashingdane v UK*.

Significantly, the appropriateness of the facility in which a person with a mental disorder may lawfully be detained has received careful scrutiny in this judgment. The Grand Chamber stated in the conclusion to their consideration of the Article 5 arguments that "…it considers it appropriate to emphasise that the authorities must ensure, having due regard to the applicant's vulnerability and his diminished ability to take decisions, notwithstanding the fact that under domestic law he is formally considered capable of reaching his own decisions, that all the necessary initiatives are taken, in the medium and long term, to secure effective care, including psychiatric and psychological treatment and welfare assistance … so as to provide him with the prospect of release".

This is directly relevant in terms of levels of security for those in detention here, as well as the wider definition of treatment as being inclusive of rehabilitation. Of course, that does not come close to making discharge, or even preparation for discharge, a Convention right for every forensic patient. The Grand Chamber's phrase "real therapeutic measures, with a view to preparing them for their eventual release" does not go any further, in our view, than the relevant provisions in our domestic law.

Finally, a comment made by the Grand Chamber is also of interest in relation to the split decision of the UK Supreme Court in *P v Cheshire West & Chester Council* [2014] AC 896 on what constitutes deprivation of liberty. In paragraph [142], the Chamber observed that "[m]easures depriving persons of their liberty inevitably involve an element of suffering and humiliation". This may suggest that the situation of at least one of the individuals in the *Cheshire West* case would not be seen by the Strasbourg Court as constituting deprivation of liberty for the purposes of Article 5.

New Lanark Trading Limited v Office of the Scottish Charity Regulator

[2019] UT 62 UTS/AP/19/0008

Decision of Lord Tyre, 27 November 2019

Adequacy of written decision – significance of findings in fact in a dispute dependent on the establishment of a fact – guidance for tribunals in producing written decisions

Facts

The appellant, New Lanark Trading Limited (Trading) is a body which operates to generate income for the UNESCO World Heritage Site at New Lanark. The income generated by Trading is donated by gift aid to the New Lanark Trust (NLT), which manages the site. Income is received from entry fees to a visitor attraction and from retail and catering premises on the site, as well as by the generation of hydro-electric power. The appellant operates from buildings on the site, which it rents from NLT and for which it makes an annual maintenance contribution. The appellant's application to the respondent, the Office of the Scottish Charity Regulator (OSCR), to be registered as a Scottish charity was refused.

Trading appealed this decision to the General Regulatory Chamber of the First-tier Tribunal for Scotland (the FTT). That appeal was refused, and Trading applied for permission to appeal to the Upper Tribunal for Scotland (the UT), on the ground that the FTT had failed to give adequate reasons for their decision. The FTT refused permission to appeal, and Trading applied directly to the UT for permission to appeal. That was granted, and the appeal was heard before the UT.

The issue in dispute was whether Trading met the two relevant aspects of the test for registration as a Scottish charity. Those are that the purposes consist only of one or more charitable purposes and that it provides or intends to provide public benefit in Scotland or elsewhere. The respondent argued that although Trading fulfilled the requirement of the charitable purpose of advancement of education, they did not provide the necessary public benefit and so did not meet the second aspect of the statutory test for registration. The respondent gave their decision in writing, stating that the company would carry out a significant level of activity not in furtherance of its charitable purposes. In so doing, OSCR drew a distinction between activities which directly advance charitable purposes and those undertaken to generate profits to be applied for charitable purposes.

In their appeal to the FTT, Trading averred that OSCR erred in its distinction between the two types of activities, citing the special nature of the site from which trading took place and the role of the second type of activity in enhancing the visitor experience.

In essence, this dispute centred on a question of fact: whether or not the appellant met the requirements for registration by the respondent.

Held

The UT was of the opinion that the FTT had not provided proper, adequate and intelligible reasons for its decisions. They did not directly address (and therefore did not resolve) the issue of law between the parties. As a disputed issue of fact lay at the centre of the case, a finding in respect of that fact was essential to determine the appeal. That no such finding was made in the written decision rendered the FTT's opinion inadequate and the decision was quashed.

Comment

The UT was critical of the FFT's written decision. In particular, it noted that findings of fact, reasons for decisions and observations were not set out clearly under these separate headings.

Lord Tyre commented that "it was necessary to read the whole decision in order to identify what findings in fact were made, and what the reasons for the decision were."

Although this was not a case involving MHTS, the President of Scottish Tribunals took the unusual step of asking that Lord Tyre's decision be brought to the attention of legal members of other tribunals and chambers within the Scottish Courts and Tribunals Service. MHTS members' attention was drawn particularly to comments made by Lord Tyre on the standards of reasoning.

Lord Tyre commented:

> *"I would reject any suggestion that a different or lesser standard of reasoning applies to the decision of a tribunal as opposed to the decision of a court. …the FTT was acting in a fully judicial capacity, and dealing with an issue that was of sufficient complexity to require more than a brief and summary decision. The adequacy of its reasons must be judged accordingly.*
>
> *…I am of the opinion that the FTT has not provided proper, adequate and intelligible reasons for its decision, because it has failed to address the point truly at issue between the parties."*

This is a powerful reminder to those involved in tribunal proceedings to ensure that judicial process is followed, that reasons for decisions are carefully articulated and, ultimately, that parties have received a demonstrably fair hearing in all the circumstances. Whilst a party to any judicial action may dislike or disagree with the outcome, they should still be able to place trust in the process which gave rise to the decision and to be able to understand how it was arrived at.

DB v Greater Glasgow and Clyde Health Board

[2021] SC GLW 62; 2021 GWD 40-531

Judgment of Sheriff S Reid, 4 June 2021

Detention in conditions of excessive security – breach of statutory duty – damages for loss, injury or damage caused – conduct of pursuer

Facts

DB had been found to be unfit to stand trial in criminal proceedings against him in 2009. He was made subject to a compulsion order and a restriction order (referred to as a "CORO") in terms of section 57(2)(a) & (b) of the Criminal Procedure (Scotland) Act 1995. He was detained for care and treatment in the State Hospital, Carstairs, which is a high secure unit (HSU). He was subsequently transferred to another hospital facility, designated as a medium secure unit (MSU). In 2016, DB was assessed as being suitable for transfer to a hospital designated as a low secure unit (LSU) and his name was placed by the defender on a waiting list for a bed in a suitable hospital LSU.

As was his entitlement in such circumstances, DB made an application to the Tribunal for an order under section 268 of the 2003 Act, declaring *inter alia* that he was being held in conditions of excessive security. This was granted, with the Tribunal making the order sought and directing the defender to perform statutory duties under section 268 of the 2003 Act within a period of three months. These duties are essentially to identify a hospital which can provide the necessary but not excessive levels of security and where accommodation is available for the patient, and to advise the managers of the hospital in which the patient is being detained.

As noted, the pursuer's name had already been placed on the waiting list for a bed in a LSU which had been identified as suitable. However, by the expiry of the three month time period specified in the order, the defender had not identified a suitable hospital in which accommodation was available for the pursuer, and therefore had not advised the managers of the hospital where he was currently detained of this; no transfer had taken place. This was in effect because no bed had become available in the LSU. The defender then made what is known as an out of area referral, asking that the patient be assessed for transfer to a LSU in a different health board area where a bed was available.

A further Tribunal hearing took place, when a second order was issued, declaring that DB continued to be held in conditions of excessive security and again specifying a period of three months in which the defender should comply with their statutory duties under section 269 of the 2003 Act. After that hearing, DB declined to participate in assessment for a transfer to the out of area LSU. He and his family were of the view that the out of area LSU was too far away and that family visits would not be possible. DB explained to his responsible medical officer (RMO) employed by the defender that he preferred to wait for a bed to become available in the LSU where his name had already been placed on the waiting list, in the defender's health board area. He made it clear to the RMO that he understood this would result in a longer delay but asserted that this was a risk he was willing to take. DB was supported by his family in taking this decision. But for DB's refusal to transfer to the out of area LSU, the defender would have been in a position to comply with their statutory duties within the prescribed timescale; they were, however, unable to do so.

Held

The court found that the defender was in breach of statutory duties placed on them by the first and second orders made by the Tribunal. However, the court also held that the pursuer had not suffered any loss, injury or damage as a result of the breach. Further, had any such loss etc arisen, it would be attributable to the pursuer's own conduct in refusing to transfer to the out of area LSU. No award of damages was made and the court assoilzied the defender.

Comment

The background to this case is not uncommon: patients who are considered to be clinically suitable to move from a high to medium or from medium to low levels of security are often in a position of waiting for a bed to become available in a suitable hospital.

This was an unusual case, however, as DB sought damages: financial compensation for loss, injury or damage suffered as a consequence of the defender's breach. It is more usual for those who have been found to be detained in conditions of excessive security to seek a remedy by way of judicial review of the relevant health board's failure to comply with the statutory duties placed on them, and to seek to have the Tribunal's orders implemented. Such actions, whilst infrequent, are raised in the Court of Session. This was a Sheriff Court action for damages.

In a note on the decision, Sheriff Reid observed that in general terms a move to a LSU will often result over time in a managed move to a community placement for a patient. DB's complaint included the fact that his ultimate discharge from hospital was delayed or thwarted. This was based on the reasoning that the outbreak of the Covid-19 pandemic suspended transfers to community forensic placements and, but for the defender's delay, he would have been discharged to such a placement prior to the outbreak of the virus. Clearly, such a move is dependent on an individual patient's progress and clinical need, and there is no fixed timescale or even any certainty that a particular patient's care could be managed in a community forensic placement. The court found that the pursuer failed to prove the necessary causal link between the defender's breach of statutory duty and the loss which he claimed to have suffered.

It is of some significance, given the nature of the action which the pursuer chose to bring, that Sheriff Reid noted that "the board's statutory duty under sections 268 & 269 is merely to *identify* available accommodation in a suitable hospital (or hospital unit) of a lesser level of security, and to *notify* the managers of the hospital in which the patient is detained of the name of that other hospital; the board's statutory duty under sections 268 & 269 does not extend to actually *transferring* the patient to that other hospital. Sections 268 & 269 are concerned primarily with the identification of an available physical resource. A failure to effect a transfer to that available resource, once a health board has performed its narrower duty to identify it (and give notification of it), might be the subject of separate judicial review proceedings at the instance of an aggrieved detainee, but the proceedings would not be founded upon a breach of the statutory duty under section 269, because that particular duty would already have been fulfilled."

Sheriff Reid went on to observe that the specified duties in section 268 at subsections (3) to (5) do not include a duty to transfer the patient – something which would have been stated if Parliament had so intended.

RM and SB (as Joint Guardians of the adult PKM) v Greater Glasgow Health Board and KM, Court-appointed Safeguarder – X66/21

Statement of Reasons issued by Lady Dorrian, the Lord Justice Clerk, 16 December 2021

Adults with Incapacity (Scotland) Act 2000 – guardianship orders – safeguarder – principles of the Act guiding decision making on behalf of an adult with incapacity

Facts

PKM, who was receiving medical treatment for complex mental and physical conditions, was known to be at risk of death from sudden cardiac arrest. PKM had a note on his medical records to the effect that no resuscitation (CPR) was to be attempted on him (known as a Do Not Attempt Cardiopulmonary Resuscitation direction or DNACPR direction). PKM's two sisters held guardianship powers, arising from an order granted for a period of five years from 2021 in relation to his personal welfare. The wide terms of this order include the right to make decisions about PKM's healthcare, including the right to consent to healthcare that is in his best interests or refuse to consent to health care that is either not in his best interests or which does not accord with his known wishes and feelings.

An order was sought under section 70(2) of the Adults with Incapacity (Scotland) Act 2000 (the 2000 Act) requiring the DNACPR direction to be removed from all notes and records held in respect of their brother. A safeguarder was appointed to represent PKM's interests. The order sought was granted *ad interim* by a sheriff, who continued the matter for an evidential hearing. The relevant health board appealed this decision to the Sheriff Appeal Court, from where it was remitted to the Court of Session for consideration.

Held

The appeal against the Sheriff's *interim* decision was refused.

In a Statement of Reasons, the Lord Justice Clerk examined the statutory provisions of the 2000 Act, considering the five principles set out in the Act. These are:

- the principle of beneficence (that the intervention is of benefit and that benefit cannot reasonably be achieved without the intervention);
- the principle of minimal intervention, where that intervention shall be the least restrictive option;
- the principle of consideration of the wishes of the adult, taking into account present and past wishes so far as they can be ascertained by any means of communication;
- the principle of consultation with relevant others (including taking account of the views of nearest relatives, primary carer, any guardian or welfare attorney with powers relating to the proposed intervention and any other person appearing to have an interest in the adult or in the proposed intervention); and
- the principle of encouraging the adult to exercise residual capacity.

She went on to consider the functions and duties of the guardian and the provisions in section 70 of the 2000 Act regarding non-compliance with decisions of guardians with welfare powers.

The safeguarder and the health board argued that the form recording the direction indicated that PKM had capacity for the decision and did not wish CPR to be attempted. They also stated that the likely outcome of successful CPR would not be of overall benefit to him. Essentially, whilst PKM was assessed as having capacity to take such a decision, the Guardianship Order was irrelevant, with the guardians having no entitlement to give or withhold consent to treatment.

As Lady Dorrian put it,

> "*The nub of the argument was that the presence of a Guardianship Order with the relevant power in relation to medical treatment was insufficient to displace actual capacity as assessed in real time by the treating physicians.*"

Although that right to give or withhold consent to medical treatment is within the power of the Guardianship Order and PKM's guardians were entitled to ask for an order under section 70 of the 2000 act where their decisions were not complied with, Lady Dorrian noted that

> "*…the authority given to the guardians is not a wholesale power. Their power is restricted to (i) consenting to healthcare which is in the adult's "best interests" or (ii) refusing to consent to treatment that is not in his best interests, or does not accord with his known wishes and feelings.*"

She affirmed that both aspects of this test must be considered and that section 1(6) of the 2000 Act requires powers to be interpreted in the context of the five guiding principles of the Act. Guardians must exercise their powers in line with those principles, and this applies also to a decision by a sheriff on an application under section 70 of the 2000 Act.

Discussion

This case is included, not because of any direct involvement by the Tribunal or consideration of a particular aspect of the 2003 Act, but because it explores the relationship between powers of a guardian to make decisions on medical treatment and powers of those treating a patient subject to guardianship. The extent of the powers and rights of guardians in decisions of this nature are of course less directly relevant in the context of Tribunal decisions. Often, that may first arise in a case when someone with a power of guardianship wishes to become a party to a hearing. The Tribunal's role is to take a judicial decision on the application before it, and to reach that decision by an application of the relevant sections of the 2003 Act and regulations to the facts before it. Decisions of the nature dealt with in this case are likely to arise only after the Tribunal has granted an order.

It is however helpful to examine the Court's views on the extent of the legal role of a guardian in the context of medical treatment, in what is an evolving area of law. Lady Dorian found difficulty with an argument "framed in terms of whether, despite their clinical assessment, the doctors "must follow" the guardianship order and specifically the decisions of the guardians". She went on to say that "a guardian cannot force a doctor to resuscitate someone or provide treatment which he does not think it appropriate to give … whether to attempt resuscitation will be a clinical decision to be made at the time that such an assessment is called for". The Statement of Reasons also sets out other safeguards for those subject to guardianship. Section 73 of the 2000 Act makes provision for the adult or a person interested in his welfare to seek the replacement or removal of a guardian, or even to seek recall of the order itself. The relevant local authority supervises welfare guardianship and a welfare guardian must keep records of decision making in that capacity to allow the local authority to exercise their supervisory duties.

At a point in time where the existing laws around decision making on care, compulsion and incapacity are being scrutinised at a national level, this case provokes some thought as to the roles of agencies and individuals in decisions taken on behalf of others. It serves as a reminder to those involved in judicial decision making where capacity is a factor that this is rarely a static or simplistic position (beyond the fact of having legal capacity to instruct a solicitor). As we look to modernise relevant laws in Scotland, this is something that is, and should be, a significant consideration.

Applying the Mental Health (Care & Treatment) (Scotland) Act 2003 in Practice

Laura Dunlop QC and Jennifer Whyte* explore the consequences of non-compliance with statutory requirements.

In common with those made to most tribunals, applications to the Mental Health Tribunal for Scotland will require to comply with specific statutory provisions. The specific requirements will depend on the section of the Mental Health (Care and Treatment)(Scotland) Act 2003 under which an application is made. Generally, these provisions regulate when, how and by whom an application may be made; some provisions will also specify the format of the application and prescribe other steps to be taken. What are the consequences when an application fails to comply with such a provision? Do they vary according to the circumstances, the nature of the application, or the nature of the flaw itself? In considering these questions, this article draws on recent examples from the Tribunal's work and uses these to explore the consequences of errors made in the process of resorting to the provisions of the 2003 Act.

Applications for a CTO

The single most commonly received application is that made under section 63, seeking the imposition of a compulsory treatment order (CTO) on a person with a mental disorder. A CTO is a civil order which gives authority for a person to be treated for a mental disorder without their consent, either because consent is withheld and no voluntary or informal treatment is possible, or because the patient is unable to give consent to treatment on their own behalf. A CTO may authorise detention in hospital for treatment, or treatment in a community setting with associated restrictions on the freedom of the individual.

The task for the tribunal hearing the application is to determine whether the criteria for a CTO are met. The criteria are set out at section 64(5) of the Act, and the expert tribunal, comprising a medical member, a general member and a legally qualified convener, will hear evidence to determine that question on the balance of probabilities.

Before they get to that stage however, preliminary matters may be raised either by a party to a case or by the Tribunal itself. At times, such matters will go to the competence of the application; does the format and preparation comply with that which is required by the 2003 Act? If not, is the failure to comply fatal to the application, and if so, what are the consequences for the patient involved? The stakes may be very high. People with suicidal ideation and intent, those with acute psychosis and those with severe eating disorders may be at risk of death or serious injury in the absence of immediate treatment. On the other hand, fundamental issues of individual freedom are involved. Article 5 of the European Convention on Human Rights will usually be in play, as well as Articles 2, 3 and 8. So, a tribunal may have to determine, often in a very short period of time, whether an apparently flawed application is valid or not. Although this is a question of law, the tribunal will be acutely aware of the consequences of their decision for the patient at the centre of the process.

How does the tribunal resolve a question of irregularity? Whilst the section under which a CTO application is made sets out the requirements of a valid application, it does not explicitly state Parliament's intention in respect of any failure to comply with one or more of these. Section 1 of the 2003 Act sets out a series of overarching principles, reflecting the work of the Millan Committee, on whose report the Act was based.[1] The Tribunal's own Practice and Procedure Rules ("the rules")[2] give a relatively wide discretion to the individual tribunal to regulate its own practice and to apply the overriding objective of securing that proceedings before the tribunal are handled as fairly, expeditiously and efficiently as possible.[3] The tribunal must also look to case law for guidance on whether non-compliance with statute may be overlooked, or must be considered fatal to the validity of the application.

R v Soneji: applications and limitations

For some time now, Courts have manifested a departure from the traditional approach of considering whether procedural requirements in a statutory provision are mandatory or directory.[4] There is increasing focus on a consideration of whether Parliament intended that a failure to follow a statutory requirement would deprive the decision maker of jurisdiction to act.[5] *R v Soneji & Another* sets a standard for this type of analysis.[6] Judicial decision makers are expected to consider whether or not an act done in breach of a legislative provision is intended by Parliament to be invalid.[7] The test requires *"an objective appraisal of the intent which must be imputed to Parliament."*[8]

Soneji was first applied to a failure to comply with the 2003 Act in the case of *Paterson v Kent*.[9] There, in terms of section 44 of the Act, the appellant had been detained on a short-term detention certificate dated 22 December 2005. The 28-day period of detention under section 44 expired at midnight on 18 January 2006. On 16 January, an application was made under section 63 for a CTO in respect of the appellant. Under section 68, this application had the effect of extending the period of detention authorised under the Act by five working days (until midnight on 25 January 2006). Where such extension applies, however, section 69 of the Act, coupled with Rule 8, requires that a hearing take place within the five-day period. In this case, no hearing took place until 31 January 2006. What was the effect of this breach of the legislation?

In his consideration of the competing submissions, Sheriff Principal Dunlop QC noted that section 57 of the Act confers a statutory duty on the mental health officer to apply for a CTO if the provisions of subsections (2) to (5) apply. He characterised "ensuring that appropriate care and treatment is provided to a patient having a mental disorder" as an overriding purpose of the legislation. The duty on the Tribunal to determine the application continued even though the prescribed five-day period had elapsed without a hearing taking place:

> Parliament cannot fairly be taken to have intended that the tribunal's duty to determine that application should disappear on the mere expiry of the five-day period of 'grace' allowed by section 68.[10]

The role of a statutory provision in the process may, however, be fundamental to the validity of an application. In a recent hearing, *VC*, to consider an application under section 63 of the Act, a preliminary objection was taken on behalf of the patient on the basis that neither mental health report relied on as part of the application for a CTO appeared to have been prepared by an approved medical practitioner, as required by section 58(2)(a) of the Act.

The statutory definition of an approved medical practitioner is set out in section 22; it refers to medical practitioners who:

(a) have such qualifications and experience, and have undertaken such training, as may be specified in directions given by the Scottish Ministers; and

(b) are approved for the purposes of this paragraph by the Board concerned as having special experience in the diagnosis and treatment of mental disorder.[11]

section 22 also requires each Health Board to compile and maintain for its area a list of all those who meet these criteria.

In the case referred to, however, neither medical practitioner was named on the list maintained by the Health Board concerned. It is a matter of interpretation whether this state of affairs could be overcome by evidence that the medical practitioner concerned has in fact been approved by the Board concerned or whether, given the drafting of section 22(4), appearance on the list is also a necessary condition of being an approved medical practitioner. The latter may be a less likely interpretation, since the list is a list of those who are approved medical practitioners, and inclusion on the list cannot be botha criterion for being an approved medical practitioner and evidence of having been approved. More importantly, however, if it is advised that the name of a particular psychiatrist does not appear on the list, the tribunal is confronted with *prima facie* evidence of non-compliance with a statutory requirement.[12]If no other evidence is led, the tribunal may conclude, as occurred in the present case, that the report in question does not meet the statutory requirement of being written by a practitioner with particular specified qualifications.

Moreover, when the consequence of a procedural failure is spelled out by the legislation itself, that consequence cannot be avoided by relying upon such authorities as *R v Soneji*. In *Shahidv Scottish Ministers*[13] Lord Reed, in giving the judgement of theUK Supreme Court, rejected a purposive interpretation of the Prisons and Young Offenders Institutions (Scotland) Rules 1994 and 2006,[14] where the consequence of non-compliance was "ineluctably spelled out by the legislation itself".

> No amount of purposive interpretation can however entitle the court to disregard the plain and unambiguous terms of the legislation.[15]

To that extent, the Tribunal must determine that an application is outwith its jurisdiction to hear when the 2003 Act plainly stipulates that such a consequence is intended.

Express provision; positive and negative

Occasionally, the Tribunal is confronted with a situation of non-compliance for which express provision does appear to have been made by the statute. A recent case illustrates the application of such an express provision, in the context not of non-compliance with a requirement for a valid application but of non-compliance with the CTO itself.

In *MS*, a hearing was arranged to review a determination under section 86 of the 2003 Act to extend a CTO, which had been first made on 17 March 2017. On 13 February 2020, the RMO had made a determination to extend the order for a further 12 months from 17 March 2020. That determination was notified to the Tribunal under section 87 of the Act. The problem which came to light concerned the residence of the patient: MS was not living at the place specified in the CTO.

The CTO had originally authorised detention of the patient in hospital, but this had been varied in 2018 to authorise measures permitting treatment in the community. One of the conditions of the community-based CTO was a requirement under section 66(1)(e) to reside at a particular address. At the time of variation, it was anticipated that the patient would move from that address to his own tenancy. With the support of the care team, that move had taken place by the time the CTO was extended by the RMO under section 86 for a period of 12 months from 17 March 2019. No-one appeared to have realised the inconsistency in relation to the specified address.

Because there had been no consideration by the Tribunal since 6 March 2018, the determination of 13 February 2020 fell to be reviewed under section 101(2)(b) of the Act. A hearing for that purpose was arranged to take place on 27 March 2020, with continued diets on 23 April and 7 May. The position of the patient was that the CTO had ceased to have effect, because of the combined effect of section 301 and section 304 of the 2003 Act.

section 301(3) provides that a patient who is subject to a compulsory treatment order imposing a requirement that they reside at a specified place and who fails to comply with that requirement is liable to be taken into custody and dealt with in accordance with section 303 of this Act. Section 303 creates a power for a constable or certain specified officials to take the patient into custody and/or to return them to the place at which they failed to reside. Section 304(3) provides, however, that where the patient's unauthorised absence has continued for a period of 3 months, the order shall cease to have effect.

Thus, the 2003 Act prescribes a specific consequence for a failure to comply with a statutory requirement, in the first instance the possibility of the patient being taken into custody. Beyond that however, the further provision in section 304 sets out a consequence for those affected by the order where such a failure has persisted over a particular period of time, namely lapse of the order.

For this particular patient, there was no prospect of custody, because his care team had supported and indeed facilitated the failure to comply with the requirement imposed under section 66(1)(e). That failure persisted, through no fault of the patient and apparently unappreciated by those involved in his care team, for a period in excess of three months. The patient submitted that the applicable legislation was clear and there was no requirement to examine case law. There were three relevant facts: the requirement in the CTO to live at a particular place; that the patient had not been residing there and that that situation had continued beyond three months. The order had therefore ceased to exist, under section 304(3). Sections 301 and 303 drew no distinction among the various ways in which a patient could be non-compliant with an order. Each incurs the liability to be taken into custody. The reasons why non-compliance occurred, or the existence of errors, were not relevant.

Counsel for the RMO submitted an argument based on *R v Soneji*, stating that the tribunal should consider the question of whether Parliament intended that an unauthorised absence arising in the circumstances set out here would result in the CTO being regarded as ended. The mischief at which the provisions were directed was the situation of a patient falling outwith the supervision of the Tribunal and of the RMO. This had not happened here. This had been an administrative error

– for example, the care plan referred to both addresses. In short, this was not the kind of unauthorised absence which was intended to have the consequence of invalidity of the CTO.

Rejecting this approach, the Tribunal dismissed the case under Rule 44 of the Practice and Procedure rules as misconceived. In considering whether a case is misconceived and therefore outwith the jurisdiction of the Tribunal, the individual tribunal will have regard to wider provisions in the 2003 Act. The overriding purpose is to ensure that care and treatment can be provided to patients and this is relevant to questions of interpretation where the statute is silent as to the consequences of a particular state of affairs. However, here the consequence of the failure was explicitly stated, even if the nature of the failure was administrative rather than intentional action on the part of the patient. The Tribunal was not able to depart from those statutory consequences because of the circumstances in which the breach arose.[16]

Finally, rather than specifying steps which are to be taken, with or without further provision as to the consequences of non-compliance, the legislation may specify that certain steps are not to be taken. This was the situation in the recent decision *EC no. 1*. There, a patient was detained on a short-term detention certificate under section 44 and, during its currency, an application had been made for a CTO under section 63 of the Act. By mistake, the version of the CTO application lodged had been a draft, which omitted certain information from the report of the MHO required under section 61. This omission had been drawn to the attention of the MHO, who had submitted an amended application. Owing to administrative error, the draft rather than the amended application had been distributed to tribunal members. Objection was taken on behalf of EC, and the application was rejected as fatally flawed.[17]

After the dismissal of this case, EC was then detained again on a further short-term detention certificate under section 44. He made an application for revocation of the certificate, under section 50, and also lodged an application under section 291 of the Act, alleging unlawful detention.[18]

The tribunal which considered these (conjoined) applications was referred to section 44(1). Read with subsection (2), this provision makes clear that a short-term detention certificate cannot be granted if (among other possibilities) immediately before the time of medical examination, the patient is subject to section 68 of the Act.[19] In the present case, the second short-term detention certificate had been granted just over an hour after the hearing had dismissed the CTO application, at a point when the extension of detention under section 68 was in force. Thus, a grant of further short-term detention was precluded by the Act. By a majority, the tribunal concluded that the patient was being unlawfully detained and, under section 291, made an order that the detention should cease.

Conclusion

This article has highlighted examples of irregularities arising in various different contexts in the practical operation of the Mental Health (Care and Treatment) (Scotland) Act 2003. There can be action which is contrary to an express provision in the legislation; if this happens, the consequence is likely to be that the Tribunal will hold that action taken is unlawful.[20] There can also be an irregularity in compliance with an order under the Act; any statutory provision prescribing consequences for such an irregularity will be given effect.[21] Finally, there may have been a failure to follow a step prescribed as part of a process for obtaining a particular outcome under the Act, but the legislation may be silent as to the consequences of such a failure.[22] In such circumstances, the Tribunal will examine the part played in the legislative scheme by the step concerned, and will infer whether or not Parliament can be taken to have intended that invalidity would result from non-compliance. The cases concerned illustrate the approach taken by individual tribunals when such situations have come to light. It is likely that other examples of irregularity in process will occur, and that other factors bearing on their characterisation will be identified. In relation to non-compliance about which the Act is silent, there may be room for examination not just of the part played by the step of process concerned, but also of the extent of the non-compliance. Being a day late may matter less than being three months late. On any view, this is a dynamic area and further challenging cases are to be expected.

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1. *New Directions: Report on the Review of the Mental Health (Scotland) Act 1984* (Chaired by the Rt Hon Bruce Millan), published January 2001
2. The Mental Health Tribunal for Scotland (Practice and Procedure) (No.2) Rules 2005 (SSI 2005/519)
3. Rule 4
4. See comments in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at paragraph 93 about this distinction being the end of the inquiry rather than the beginning.
5. *London & Clydeside Estates Ltd v Aberdeen District Council* [1980] SC (HL) 1; *Project Blue Sky Inc v Australian Broadcasting Authority* above; *Attorney General's Reference (No.3 of 1999)* [2001] 2 AC 91; *Charles v Judicial and Legal Service Commission & Another* [2002] UKPC 34; *R v Clarke* [2008] 1 WLR 338.
6. *R v Soneji & Another* [2006] 1 AC 340
7. *R v Clarke*, per Lord Rodger of Earlsferry, §28, approving *Project Blue Sky Inc v Australian Broadcasting Authority*, paragraph 93.
8. [2005] UKHL 49; [2006] 1 AC 340 per Lord Steyn paragraphs 15 & 24.
9. *Paterson v Kent*, 2007 SLT (Sh Ct) 8. More recent applications of *Soneji* in the context of the 2003 Act are *G v MHTS*, Sheriff Principal Taylor, Glasgow 14 October 2010, unreported; *N v MHO, North Ayrshire Council*, 2011 SLT (Sh Ct) 135 and *D v MHTS*, 2014 SLT (Sh Ct) 39.
10. Paterson at paragraph [34]
11. section 22(1) of the Act
12. It is not clear whether the tribunal's attention was drawn to evidence to opposite effect - the box on page 2 of the CTO2 form, where the doctor self-certifies that they are approved under section 22 of the Act and provides the name of the Health Board which approved them.
13. [2015] UKSC 58; 2016 SC (UKSC) 1
14. SI 1994/1931; SSI 2006/94
15. *Shahid* at paragraph [20]. See also comments of Lord Stewart in *C, Petitioner*, 2012 SLT 521 at paragraphs [56] to [60].
16. Had there been consideration at an earlier stage of the possibility of taking MS into custody, it might have been more problematic for the circumstances surrounding his non-compliance to have been regarded as irrelevant. But see discussion of the scope of 'absconding' by Lord Stewart in *C, Petitioner* 2012 SLT 521 at paragraphs [72] and [73] and the conclusion that the term has a purely objective meaning.
17. No argument was presented to the tribunal that the omission to comply with certain aspects of section 61(4) did not amount to a fatal flaw. Cf *Paterson v Kent* and other cases identified in note 9 above.
18. EC no. 2
19. Discussed in relation to *Paterson v Kent*, note 9 above
20. As in EC no. 2, above
21. As in *MS*, above
22. *Paterson v Kent* 2007 SLT (Sh Ct) 8 and other cases referred to in note 9 above; *VC*; and *EC* no. 1

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