

SHERIFFDOM OF NORTH STRATHCLYDE

B236/12

JUDGEMENT

of

SHERIFF PRINCIPAL BA KERR, QC

in the cause

GREATER GLASGOW HEALTH BOARD
Appellants

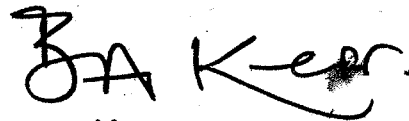
against

MENTAL HEALTH TRIBUNAL FOR
SCOTLAND
Respondents

Act: Mr Campbell QC
Alt: Mr Hunter

Paisley, 27 February 2013

The Sheriff Principal having resumed consideration of the cause Allows the appeal and in terms of section 324(5) of the Mental Health (Care & Treatment) (Scotland) Act 2003 Sets aside the decision of the respondents dated 30 January 2012 and Substitutes therefore a finding that on 6 January 2012 at 1215 hours the patient was not subject to any short-term detention certificate in terms of section 44(2) of the said Act and so was not unlawfully detained under the short-term detention certificate granted at 1630 hours on that date; Finds no expenses to be due to or by either party in respect of the appeal.


A handwritten signature in black ink, appearing to read 'BA Kerr', is written over a horizontal line. The signature is stylized and cursive.

NOTE:

[1] In this appeal a question arises as to whether it is possible, in terms of section 44(2) of the Mental Health (Care & Treatment) (Scotland) Act 2003, for a patient to be "subject to a short-term detention certificate" when the certificate under which the patient has been purportedly detained 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 it had not been complied with. This question was answered in the affirmative by a tribunal on 30 January 2012 and the present appeal is taken against that decision by the Greater Glasgow Health Board (also known as

"NHS Greater Glasgow & Clyde") who are the managers of *inter alia* the Inverclyde Royal Hospital.

[2] The circumstances giving rise to this question appear to have been that the patient was detained from some date around 2 December 2011 on a basis which is not entirely clear. On 15 December 2011 a tribunal declared that detention to have been unlawful. On that same date an approved medical practitioner granted a short-term detention certificate authorising the detention of the patient for up to 28 days. Unfortunately the medical examination of the patient required by section 44(1)(a) and the grant of the certificate bore to have happened, on the face of the certificate, simultaneously. An attempt was later made to rectify this manifest impossibility by amending the terms of the certificate. On 6 January 2012 another tribunal declared that detention to have been unlawful on the ground that the STDC under which it proceeded could not have been valid. On that same date another approved medical practitioner examined the patient and granted a new STDC which bore to record an interval of four hours and fifteen minutes between the examination and the grant of the certificate. On 30 January 2012 another tribunal decided, as narrated above, that immediately before this latest examination on 6 January 2012 the patient had been subject to the invalid STDC purportedly granted on 15 December 2011 in terms of section 44(2) and that accordingly this new detention proceeding under the STDC of 6 January 2012 was unlawful.

[3] In reaching their decision on 30 January 2012, which is the subject of the present appeal, the tribunal proceeded on the view that whether valid or not, ie even if invalid, the STDC purportedly granted on 15 December 2011 had the effect of detaining the patient until 6 January 2012 and that the finding that she had been unlawfully detained during that period "did not mitigate the fact of her detention". Having so stated in paragraph 27 of their decision they then proceeded directly in paragraph 29 to the conclusion that "accordingly we grant the application under section 291 ... and find that the patient was unlawfully detained in terms of the STDC of 6 January 2012". In so doing the tribunal focussed on the practical effects of there having existed from 15 December 2011 until 6 January 2012 an apparent STDC which was then declared to have been invalid. However commendable it may be in reaching many judicial decisions to take account of or be guided by the practicalities of what in fact has occurred, that approach cannot in circumstances such as the present be correct when regard is had to the nature and purpose of the statutory provision governing the granting of STDCs.

[4] The manifest intention of section 44(2), as was accepted on all hands before both the tribunal and this court, is to prevent a patient being detained under a series of STDCs without any attempt being made by those charged with his or her care to

regularise the detention for the longer term by obtaining a compulsory treatment order. In so providing the statute has in contemplation the granting by an approved medical practitioner of a valid STDC followed on its expiry, with or without a three-day extension, by an immediate further medical examination with a view to the granting of a further STDC. The statute is not looking to the situation where the initial STDC is for some reason invalid and it seems to me quite proper for the process to be started again if it is discovered at some point during the first twenty-eight or thirty-one days that the first attempt has for some reason been a failure. 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.

[5] The tribunal on 30 January 2012 considered none of this and indeed failed really to focus on the wording of the statute and its true intent. That it seems to me is demonstrated by *inter alia* the manner in which they jumped from their observations in paragraph 27 of their decision directly to their conclusion in paragraph 29 that there had been an unlawful detention in terms of section 291 as from 6 January 2012. There was here a *lacuna* in their thinking with the consequence that they fell into error and their decision of 30 January 2012 falls to be set aside.

[6] I was referred in the course of argument to a decision by Sheriff Principal Taylor at Glasgow in *M v MHTS* 2010 SLT (Sh.Ct.) 235 and in particular to his remarks in paragraph 9 of his opinion at page 238. His approach seen in the final sentences of that paragraph is in my view supportive of my perception of the present case, albeit his observations there are strictly speaking *obiter dicta* since that appeal was concerned not directly with section 44 but with section 50 of the 2003 Act. I was referred also to *London & Clydeside Estates Ltd v City of Aberdeen District Council* 1980 SC (HL) 1 and the speech there of Lord Hailsham of St Marylebone but the issue there decided does not bear on the decision required in the present case.

[7] The arguments presented to me in this appeal proceeded upon an acceptance of the view that the tribunal which sat on 6 January 2012 had correctly viewed the STDC of 15 December 2011 as one which "could not have been valid" and all that is written above proceeds on the same basis. I have to say however that I am not convinced of the correctness of that proposition and take leave to doubt it. If the amendment of that STDC in respect of the timing of the examination was the correction merely of a clerical error then it seems to be doubtful whether it was

thereby invalidated. That however is entirely an *obiter dictum* on a matter which was not in the circumstances made the subject of any argument before me.

[8] In the result the present appeal will be allowed and the decision of the tribunal of 30 January 2012 set aside. It was agreed before me that a remit for consideration of new was no longer appropriate and that there should be no finding of liability in expenses whatever the outcome.

JAK