

**SHERIFFDOM OF SOUTH STRATHCLYDE DUMFRIES AND GALLOWAY**

**B448/11**

**JUDGMENT OF SHERIFF PRINCIPAL B A LOCKHART**

**in the cause**

**L A**

**Appellant**

**against**

**MENTAL HEALTH TRIBUNAL FOR SCOTLAND**

**Respondents**

**DR ANN JOHNSTON, RESPONSIBLE MEDICAL  
OFFICER**

**Minuter**

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Act: Miss N Guidi, of Frank Irvine, Solicitors, Glasgow  
Alt: Mr R Hunter, of Mental Health Tribunal for Scotland,  
Miss K Ritchie, NHS, Scotland

HAMILTON: 20 July 2011

The Sheriff Principal, having resumed consideration of the cause, refuses the appeal and adheres to the decision of the respondents made on 20 April 2011 at the Jim Foley Centre, 65 John Street, Wishaw ML2 7TJ; finds no expenses due to or by either party in respect of the appeal.

NOTE:

**Background to the appeal**

1. This is an appeal against a decision made by the respondents on 20 April 2011 in terms of section 324(5)(a) of the Mental Health (Care and Treatment) (Scotland) Act 2003 ("the 2003 Act").
2. The appellant was detained under a short term detention certificate under section 44 of the 2003 Act dated 4 April 2011. The appellant raised an application for revocation of the short term detention certificate in terms of section 50 of the Act. The respondents convened a hearing to

determine the application which was heard on 20 April 2011. The lawful process for detaining a patient on a short term detention certificate is governed by section 44 of the Act. Under section 44(1) of the Act, an approved medical practitioner may grant a short term detention certificate following a medical examination of a patient. A short term detention certificate may be granted when the criteria set out in section 44(4) of the Act have been met. Section 44(9) states that the short term detention certificate will set out the reasons why the approved medical practitioner believes the conditions mentioned in section 44(4) are met. These conditions are as follows:

- (a) That the patient has a mental disorder;
- (b) That, because of the mental disorder, the patient's ability to make decisions about the provision of medical treatment is significantly impaired;
- (c) That it is necessary to detain the patient in hospital for the purpose of-
  - (i) determining what medical treatment should be given to the patient; or
  - (ii) giving medical treatment to the patient.
- (d) That if the patient were not detained in hospital there would be a significant risk-
  - (i) to the health, safety or welfare of the patient; or
  - (ii) to the safety of any other person; and
- (e) That the granting of a short term detention certificate is necessary.

A proforma DET2, issued by the Scottish Executive, is the form used by most detaining authorities. There is no legal provision that requires this form to be used. There are eight pages in the DET2 form. The DET2 form sets out the five conditions in section 44(4) of the Act and provides space for the medical practitioner to supply reasons as stipulated by section 44(9) of the Act.

3. A copy of the short term detention certificate was given to the solicitor acting for the appellant on the morning of the hearing. This consisted of the DET2 form without page 2. The respondents adjourned the hearing to allow the minuter to locate page 2 of the DET2 form. After adjournment the minuter advised the respondents that page 2 could not be found and she could not be sure that it was ever completed. At the hearing the respondents accepted that they could not proceed to hear evidence if they did not have before them a valid short term detention certificate. Solicitor for the appellant challenged the lawfulness of the appellant's detention. The respondents had the opportunity to deem the appellant's detention unlawful.

4. At the hearing before the respondents, it was submitted by solicitor for the appellant that the reasons, why the conditions set out in section 44(4) of the 2003 Act had been met, had not been properly recorded in the certificate. The onus was on the detaining authority to complete the

detention in accordance with the 2003 Act and this had not been done. The certificate addressed the condition contained in section 44(4)(a) of the Act, namely that the patient had a mental disorder. However, it was said that the certificate did not address the conditions in section 44(4)(b), (c), (d) and (e) of the Act. The certificate did not sufficiently explain the reasons why Dr Johnston believed that the conditions in section 44(b)-(e) were met.

5. In their Statement of Full Findings and Reasons dated 20 April 2011 the Tribunal recorded that the commonly used DET2 form comprised seven pages. The form had been used in this case, but there was no second page. That page, it was recorded, usually related the medical disorder relevant to the patient and why the doctor granting the certificate is of the view that decision making ability is significantly impaired. The Full Findings and Reasons of the Tribunal then continue:

"Miss Guidi accepted that the use of the usual forms is not mandatory but she submitted that the papers before the Tribunal were not sufficient to be regarded as a valid section 44 certificate in that the statutory conditions for the grant of such a certificate were not made out. She asked us to rule that in these circumstances there is no valid order in place.

We had regard in detail to what was in the papers. A diagnosis is given of a mental disorder. Some examples of behaviour are related that may be taken as inferring substantial risk. It is stated that the Patient is insightful and unable to make appropriate decisions for her own safety. This, we concluded, covers sufficiently the absence of decision making ability as well as providing further evidence of risk. The papers go on to relate the need for special nursing observations and the frequently expressed wish of the patient to go home. The comments of the RMO in the papers, we conclude, address sufficiently the necessity of detention to determine treatment or the giving of treatment. In summary, therefore, although what is clearly a clerical error is unfortunate, it does not render the papers before us fatally flawed. It is our view that what has been signed by the RMO is a section 44 order and we can therefore proceed to hear this application under section 50. The submission made by Miss Guidi was properly made in the circumstances but for the reasons set out above was not accepted by the Tribunal."

6. The Tribunal proceeded to hear evidence from the minuter who was the Responsible Medical Officer, Alexandra Sheridan, nurse at Wishaw Hospital and B A, the named person and the patient's husband. The Tribunal held that they were satisfied that the conditions set out in paragraph (a), (b) and (d) of section 44(4) of the Act continued to be met in respect of the patient and that the detention authorised by the certificate remained necessary. The evidence of Dr Johnston, Miss Sheridan and Mr B. A. was unequivocal and unanimous in support of the certificate. It concluded it had been necessary to grant the certificate and that it was necessary that it remain in place.

7. It is against that decision to refuse the appellant's application to revoke the certificate that this appeal is taken.

## Submissions for appellant

8. The principal submission on behalf of the appellant was that, before granting the short term detention certificate on 4 April 2011, the minuter did not have before her material to allow her to be satisfied that the provisions of section 44(4)(a) to (e) have been obtempered. It was conceded that there was no statutory form for the certificate, but the Scottish Government had issued a form, number DET2, which was available for use by responsible medical officers and set out a form in which all the information which was required could be included. The provisions of section 44(4) are set out in paragraph 2 hereof.

9. I was also referred to the Scottish Government's Code of Practice Volume 2, Chapter 2 (Part 6). I was referred to this document as follows:

(i) "Which criteria must be met before the short term detention certificate can be granted?"

22. The approved medical practitioner must consider it likely that the criteria which are listed at section 44(4) of the Act had been met before a short term detention certificate can be granted. The criteria are that:

- The patient has a mental disorder
- Because of the mental disorder, the patient's ability to make decision about the provision of medical treatment is significantly impaired
- It is necessary to detain the patient in hospital for the purpose of determining what medical treatment should be given to the patient or giving medical treatment to the patient
- If the patient were not detained in hospital there would be a significant risk to the health, safety or welfare of the patient or to the safety of any other person; and
- The granting of a short term detention certificate is necessary.

23. It should be noted that these condition are cumulative; that is that all five conditions must be met before the short term detention certificate can be granted.

(ii) 56. Section 44(9) states that the certificate must state the reasons for believing that the criteria for granting the certificate to be met. The medical practitioner should give specific reasons on the detention certificate for why he/she believes each of the conditions are met. One "Blanket" reason should not be given to given all the criteria. The medical practitioner must sign the certificate.

(iii) Note 7. There is no form prescribed when granting a short term detention certificate but it is strongly recommended you use proforma, DET2. This proforma may be found on the Scottish Executive website. ... Where proforma DET2 is not used, for the certificate to be valid, it must state the practitioner's reasons for believing that the grounds for detention are met and must be signed by the practitioner."

10. I was informed that, when the appellant was detained, she was told of her rights and given access to a solicitor. The appellant had instructed the solicitor appearing before me to appeal the

granting of the certificate. A hearing was convened for 20 April 2011 in terms of section 50 of the 2003 Act in respect of the appellant's right to apply to have the certificate revoked.

11. At the appeal hearing it was apparent that page 2 of the form DET2 was missing. There was an adjournment to allow it to be traced but it could not be located. The minuter, who later gave evidence and who had granted the certificate stated to the Tribunal that she could not recall whether or not she completed page 2. It was accepted that there was no need to use the form DET2, but section 44(4) governed what required to be in the certificate.

12. It was submitted what was completed, namely the form DET2 without page 2, was not a valid certificate. It was conceded that the terms of section 44(4)(a) had been complied in that the document recorded that the patient had a mental disorder. It was conceded that section 44(4)(d) had been complied with as it confirmed that if the patient were not detained in hospital there may be a significant risk to the health, safety or welfare of the patient or to the safety of any other person. It was further conceded that section 44(4)(e) was complied with as it recorded that the granting of a short term detention certificate was necessary.

13. It was however submitted that the provisions of section 44(4)(b) and (c) had not been complied with. It was argued as follows:

(1) section 44(4)(b) "That, because of the mental disorder, the patient's ability to make decisions about the provision of medical treatment is significantly impaired."

I was referred to page 3 of the form DET2 where at paragraph (d) it stated:

"She is insightful and dilated, and unable to make appropriate decisions for her own safety."

In Part (e) it stated:

"L is having to receive special nursing observations because of her manic state. She has no insight and frequently insists on going home."

It was submitted that section 44(4)(b) had not been complied with as adequate reasons had not been given why the medical practitioner felt that this subsection had been complied with.

(2) section 44(4)(c) "That it is necessary to detain the patient in hospital for the purpose of:

- (i) determining what medical treatment should be given to the patient or
- (ii) giving medical treatment to the patient."

I was referred to paragraph (c) at page 3 of form DET2:

"L is in manic phase of bipolar disorder. She is loud, mildly disinhibited, demanding with pressure of speech, flight of ideas and voicing various ever changing delusional ideas."

It was submitted that no reasons were given why the minuter believed that condition (c) had

been met.

14. It was submitted that the Tribunal had regard to what they had in front of them. It was accepted that form DET2 was incomplete. The Tribunal had to make inferences from the information before them that all the conditions were met. This was not appropriate.

15. I was referred to paragraph 4 of the Full Findings and Reasons by the Tribunal which said as follows:

"Miss Guidi accepted that the use of the usual forms is not mandatory but she submitted that the papers before the Tribunal were not sufficient to be regarded as a valid section 44 certificate in that the statutory conditions for the grant of such a certificate were not made out. She asked us to rule that in these circumstances there is no valid order in place.

We had regard in detail to what was in the papers. A diagnosis is given of a mental disorder. Some examples of behaviour are related that may be taken as inferring substantial risk. It is stated that the Patient is insightful and unable to make appropriate decisions for her own safety. This, we concluded, covers sufficiently the absence of decision making ability as well as providing further evidence of risk. The papers go on to relate the need for special nursing observations and the frequently expressed wish of the patient to go home. The comments of the RMO in the papers, we conclude, address sufficiently the necessity of detention to determine treatment or the giving of treatment. In summary, therefore, although what is clearly a clerical error is unfortunate, it does not render the papers before us fatally flawed. It is our view that what has been signed by the RMO is a section 44 order and we can therefore proceed to hear this application under section 50. The submission made by Miss Guidi was properly made in the circumstances but for the reasons set out above was not accepted by the Tribunal."

16. It was submitted that this was not enough to comply with the provisions of section 44(4)(b) and (c). As the short term detention certificate was flawed, the Tribunal should not have proceeded to a hearing as to whether it should be revoked. They erred in law.

17. It was further argued there had been a procedural impropriety. As I understood the argument by solicitor for the appellant, the Tribunal had proceeded to hear evidence after concluding that:

"in our view what has been signed by the RMO is a s 44 order and we can therefore proceed to hear this application under section 50."

It was said there was no adjournment to consider the submission. I was referred to the dicta of the Lord President Clyde in *Barrs v British Wool Marketing Board* 1957 SC 72 at 82:

"It is not a question of whether the Tribunal has arrived at a fair result; for in most cases that would involve an examination into the merits of the case upon which the decision is final. The question is whether the Tribunal has dealt fairly and equally with the parties before it in arriving at the result. The test is not "has an unjust result been reached?" but "was there an opportunity afforded for injustice to be done. If there was such an opportunity the

decision cannot stand."

As I understood the submission the Tribunal did not deal fairly and equally with the parties as it did not adjourn to consider the submissions fully.

18. It was further said that the Tribunal had unreasonably exercised their discretion. Again, as I understood the argument, the basis of this submission was the Tribunal did not give appropriate consideration to the submissions which had been made by solicitor for the appellant in the preliminary point at the Tribunal hearing.

19. I was asked to set aside the decision made by the respondents on 20 April 2011 in terms of section 324(5)(a) of the Mental Health (Care and Treatment) (Scotland) Act 2003 and, in terms of section 324(5)(b), substitute my own decision therefor.

### **Submissions for the respondent**

20. I was asked to refuse the appeal and adhere to the decision of the Tribunal of 20 April 2011. It was submitted that there was a valid short term detention certificate before the Tribunal on that date. The short term detention certificate placed before them, on the form DET2 with page 2 missing, conformed with the requirements of section 44(4)(a) to (e) of the 2003 Act. In terms of section 44(9) the Tribunal's reasons for believing the terms of section 44(4) to be met had been given. It had been conceded that the use of form DET2 was not mandatory. It had been produced for the convenience of medical practitioners by the Scottish Government.

21. It was the respondents' position that the evidence of compliance with section 44(4) could be found in the document which was before the Tribunal. It was now conceded that the provisions of section 44(4)(a), (d) and (e) had been obtempered. However, it was said this was not the case with the provisions of section 44(4)(b) and (c). Solicitor for the respondents submitted as follows:

(1) Section 44(4)(b) "Because of the mental disorder, the patient's ability to make decisions about the provision of medical treatment is significantly impaired."

I was referred to:

(i) Box c at page 3

"L is in manic phase or bipolar disorder. She is loud, mildly disinhibited, demanding with pressure of speech, flight of ideas and voicing various ever changing delusional ideas."

(ii) Box d at page 3

"She is insightful and belated and unable to make appropriate decisions for her own safety."

(iii) Box e at page 3

"L is having to receive special nursing observations because of her manic state. She has no insight and frequently insists on going home."

It was accepted that in terms of paragraph 56 of the Code of Practice:

"One "blanket" reason should not be given to given all the criteria."

This, however, was not the case here. A consideration of the above entries on page 3 of form DET2 entitled the Tribunal to take the view that, because of the mental disorder, the patient's ability to make decisions about the provisions of medical treatment was significantly impaired. What was being discouraged in the Code of Practice was a medical practitioner merely stating "the patient is mentally disordered" with no details given. Here there was a very substantial evidence base on which the respondents could reach that conclusion.

(2) Section 44(4)(c) "It is necessary to detain the patient in hospital for the purpose of determining what treatment should be given to the patient or giving medical treatment to the patient."

In paragraph c of page 3 of form DET2 there is a star to the effect that "I consider it is likely, for the reasons stated below, that it is necessary to detain the patient in hospital for the purposes of giving medical treatment to the patient. The reason for this is that:

"L is in manic phase of bipolar disorder. She is loud, mildly disinhibited, demanding with pressure of speech, flight of ideas, and voice and various ever changing delusional ideas.""

It was submitted these were adequate reasons for the minuter and the Tribunal reaching the conclusion that medical treatment was necessary.

22. It was submitted that whether there was a valid short term detention certificate complying with the terms of sections 44(4) and (9) of the 2003 Act was a question of law. It was submitted that there had been no error of law by the Tribunal. They had been entitled to take the view, as they set out in the paragraph 4 of their Full findings and Reasons:

"In our view what was signed by the RMO was a section 44 order and we can therefore proceed to hear this application under section 50."

23. As far as the submissions on behalf of the appellant to the effect that (a) the decision of the Tribunal was procedurally improper and (b) there had been an reasonable exercise of their discretion, was concerned, it was submitted that the written Full Findings and Reasons indicated that the Tribunal, although they had not adjourned to consider the matter, they had given close attention to the submissions which was made on behalf of the appellant. They clearly set out their reasons for rejecting them.



24. I was asked to refuse the appeal.

**Submissions for the minuter**

25. Solicitor for the minuter adopted the submissions made on behalf of the respondents. It was submitted that the material before the Tribunal revealed that the appellant was in a manic state of bipolar disorder, was delusional and insightless, elated and having to receive special nursing observation. It was clear that she was acutely unwell. The minuter had examined the appellant before the papers were prepared and concluded that detention was necessary to provide a maximum benefit for the patient.

26. It was submitted that, taking the information contained in the form DET2 minus page 2 in its totality, the statutory tests contained in sections 44(4) and 44(9) had been met. It was submitted that there was no merit in the submissions made regarding procedural irregularity or unreasonable exercise of discretion.

## Decision

27. I refuse this appeal. Solicitor for the appellant, as she was quite entitled to do, raised a preliminary point before the Tribunal on 20 April 2011. She submitted that the papers before the Tribunal were not sufficient to be regarded as a valid section 44 certificate in that the statutory conditions for the grant of such a certificate were not made out. She asked the Tribunal to rule that in these circumstances there was no valid short term detention certificate in place.

28. I have set out in detail, in recording the submissions of parties, the material which was contained in the papers before the Tribunal. I have no hesitation in accepting the submissions on behalf of the respondents, adopted on behalf of the minuter. Taking the material which I have set out as a whole, in my opinion the respondents were entitled to hold that the minuter had complied with the provisions of sections 44(4)(a) to (e) and 44(9) of the 2003 Act. They had before them a valid section 44 short term detention certificate which had been granted by the minuter. They were entitled to proceed to hear evidence as to whether that certificate should be provoked in terms of section 50 of the 2003 Act.

29. It has to be borne in mind that the completion of form DET2 or other document sufficient to satisfy the provisions of section 44(4) and (9) does not require to be done with the same precision as a conveyancing document. The correct approach for the respondents is to consider all the material before them and decide whether, taking that material as a whole, the provisions of section 44(4)(a) to (e) and (9) of the 2003 Act have been complied with

30. The Tribunal in their written Full Findings and Reasons state:

"We had regard in detail to what was in the papers. A diagnosis is given of a mental disorder. Some of examples of behaviour are related that may be taken as inferring substantial risk. It is stated that the patient is insightless and unable to make appropriate decisions for her own safety. This, we concluded, sufficiently the absence of decision making ability as well as providing further evidence of risk. The papers go on to relate the need for special nursing observations and they frequently express wish of the patient to go home. The comments of the RMO in the papers, we conclude, address sufficiently the necessity for special nursing observations and the frequently expressed wish of the patient to go home. The comments of the RMO in the papers, we conclude, address sufficiently the necessity of detention to determine treatment or the beginning of treatment. In summary therefore, what is clearly a clerical error is unfortunate, it does not render the papers before us fatally flawed. It is our view that what has been signed by the RMO is a section 44 order and we can therefore proceed to hear this application under

section 50."

In my opinion, having regard to the material before them which I have set out in detail in my recording of the submissions, they were entitled to take that course.

31. The only other issues which I require to deal with are the two subsidiary arguments advanced on behalf of the appellant, namely that there was procedural impropriety at the Tribunal hearing and that there was an unreasonable exercise of discretion. Both these arguments appear to rest on the fact that the Tribunal did not adjourn to give due consideration to what had been said on the preliminary issue by solicitor for the appellant. In my opinion there was no requirement for them so to do. If the Tribunal were satisfied, having heard the argument on behalf of the appellant, that there was no merit in what was said and they had before them a valid short term detention certificate, there were entitled to say so. There was no necessity for them to retire to consider the issue. Their written statement of reasons indicates clearly they had considered the matter and in my opinion reached an appropriate and correct decision. I attach no weight to the arguments under these heads.

32. In these circumstances the appeal fails. In view of the straightened financial circumstances of the appellant I have made no finding of expenses.