SHERIFFDOM OF NORTH STRATHCLYDE AT KILMARNOCK

KIL-B148-18

JUDGMENT

By

SHERIFF PRINCIPAL DUNCAN L MURRAY

In Appeal by

MB

Appellant

Against

TOMMY GILMOUR, MHO

First Respondent

THE MENTAL HEALTH TRIBUNAL FOR SCOTLAND

Second Respondent

Appellant: Blair, Advocate
Second Respondent: Hunter, Solicitor

KILMARNOCK, 5 July 2018

The sheriff principal having resumed consideration of the cause, Refuses the appeal.

Background

[1] The appellant appeals against the decision of a Mental Health Tribunal for Scotland (the Tribunal) on 2 March 2018 to make an interim hospital based care and treatment order (CTO). The first respondent was present at the hearing of the appeal, but did not enter the process; the second respondent contested the appeal.

[2] The appellant was compulsorily detained on 29 January 2018 in terms of a short term detention certificate (STDC). The STDC authorised the patient's detention for 28 days. On 23 February, the first respondent presented an application to the second respondent under section 63 of the Mental Health (Care and Treatment) (Scotland) Act 2003 ("the Act") for a CTO, which, in terms of section 68 , had the effect of extending the STDC by a further five working days to midnight on 2 March. The purported hearing which is the subject of the appeal was held, on 2 March 2018 prior to the expiry of the STDC, at Woodlands View, Ayrshire Central Hospital, Kilwinning Road, Irvine.

[3] Scotland had been subjected to adverse weather conditions in the days prior to and including 2 March 2018 as a result of which the convenor was unable to attend at the hearing. At the start of the hearing the solicitor for the appellant raised a preliminary issue of competency, arguing that the convenor not being personally present at Woodlands View resulted in the Tribunal being improperly constituted in contravention of rule 64 of the Mental Health Tribunal for Scotland (Practice and Procedure) (No.2) Rules 2005 ("the Rules"). The convenor decided the hearing could proceed and after hearing evidence the Tribunal granted the interim CTO which is the subject of the appeal.

[4] A further interim CTO was made on 26 March and a substantive order made on 20 April as a result of which the appellant continues to receive treatment at Woodlands View.

Submissions for appellant

[5] The appellant invited me to allow the appeal and to quash the decision of the Tribunal to grant the interim CTO on 2 March. The appellant maintains that the Tribunal did not have jurisdiction to decide the CTO application. The appeal is not purely academic but will decide the validity of the interim CTO granted on 2 March, and in the event of the appeal being allowed, the appellant may wish to consider a claim for compensation for unlawful detention for the period between 2 March and 26 March, when a further interim CTO was made. The appellant would also be entitled to have her hospital records corrected to show she was not held under an interim CTO for that period. There is no challenge to the order made on 26 March, or to the order made on 20 April in terms of which the appellant is currently receiving treatment.

[6] The appellant argues that Article 5(4) of the European Convention of Human Rights (ECHR) governs the deprivation of liberty of a person said to be of unsound mind and requires a hearing in person, or representation at such hearing, although the hearing need not be in public given the privacy interests of a person said to be mentally ill. Article 5(4) also incorporates the Article 6(1) ECHR principle that proceedings for the determination of whether an individual ought to be deprived of their liberty by reason of unsound mind are adversarial *Keus* v *The Netherlands* A/185-C190 at paragraph 28, and that there must be a hearing.

[7] The organisation and administration of the Mental Health Tribunal for Scotland (MHTS) is established in primary legislation in Part 2 of Schedule 2 of the Act and paragraph 7/1 and 3 thereof;

> "(3) Subject to sub-paragraph (4) below, and to any rules made under paragraph 10(1) below, a tribunal constituted under sub-paragraph (1) above shall consist of–
> (a) a convener who shall be–
> (i) the President; or
> (ii) a member selected by the President from the panel mentioned in paragraph 1(1)(a) above; and
> (b) a member selected by the President from each of the panels mentioned in paragraph 1(1)(b) and (c) above."

Procedure is governed by the Rules which gives rise to an inference that Parliament saw the organisation of the MHTS as a matter for primary legislation. Rule 64 provides:

> **"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."

[8] Hearing is defined in the interpretation section of the Rules:

> "means a sitting of the Tribunal for the purpose of enabling the Tribunal to take a decision on any matter relating to the case before it"

As a matter of ordinary English usage and a proper construction of the Rules "present" means being in the room with the other parties. Rule 64(3) makes clear that if the if the absent member is (a) not the convenor and (b) the parties consent to it, the hearing can continue, as the Tribunal shall be deemed to be properly constituted. This is an example of

"except as otherwise provided for in the Rules" as provided for in section 64(1). But the proper interpretation of Rule 64 is that for a Tribunal to be lawfully constituted, the convenor can never be absent. Non-compliance with the rule requiring the convenor to be present prevents any decision being validly taken. Furthermore if a party does not wish to proceed without three members, a two-member hearing is not properly constituted.

[9] Rule 43(2) which addresses interim or preliminary matters, permits a convenor alone, or as directed by the MHTS with other members, to decide a mental health preliminary matter, either on the MHTS's own initiative or on the convenor's own initiative, or if a relevant party made a request. The reference in Rule 43 to "the Tribunal" means the MHTS. Reliance could not be placed on Rule 43 which envisages a process in advance of a substantive hearing to deal with preliminary matters, but does not apply to issues of jurisdiction. It is not apt to permit the convenor to adjudicate on matters which are not incidental or preliminary but which go to the heart of the jurisdiction of the Tribunal.

[10] Rule 58 permits a determination without a hearing. This is another example of an exception as envisaged in rule 64(3). It makes provision for disposal on the papers, but only where the specific conditions contained in rule 58 are met. However in terms of rule 58(2) the Tribunal must give effect to an application for an oral hearing made by the patient.

[11] Rule 66 provides that a hearing must be in private unless that provision is waived, it was submitted that the appellant had no idea of where the convenor was, or who might have been present with him and was not afforded the objectively verifiable assurance that the hearing is conducted in private, which would have been demonstrated if he could see all who were present. The participation of the convener by telephone also deprived him of the opportunity to see witnesses give their evidence.

[12] The issue of the composition of the Tribunal had been raised before the hearing started. What should have happed was for the convenor to refer the matter to the President to arrange for another convenor who could be present to preside. As seen from the affidavit produced another convenor was available for the hearing. It was also suggested that if a video-link hearing could have been arranged with the patient being able to see and hear proceedings that would have offered an alternative and preferable way forward. A further alternative could have been for the RMO, following the expiry of the STDC, to consider making a further STDC.

[13] In relation to rule 52, its application pre-supposes there are proceedings and rule 52(2)(c) can only be utilised if all members are present at a hearing in terms of rule 64 to determine any question which arises under rule 52. It was also submitted that rule 52 is not a matter for the convenor alone, it is a case management power for the Tribunal. In support of this argument, reference was made to *Kiara* v *Vindaloss* 2017 UKSC 42 at paragraph 67 which was said to give support to the requirement of the personal presence of the "judge." Reference was also made to *Anisminic* v *Foreign Compensation Commission* 1969 2AC 147 and the speech of Lord Pearce at 195B:

> "Lack of jurisdiction may arise in various ways. There may be an absence of those formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an inquiry. Or the tribunal may at the end make an order that it has no jurisdiction to make. Or in the intervening stage, while engaged on a proper inquiry, the tribunal may depart from the rules of natural justice; or it may ask itself the wrong questions; or it may take into account matters which it was not directed to take into account. Thereby it would step outside its jurisdiction"

[14] Rule 64(1) places an obligation on the Tribunal that it shall not decide any question unless "all members are present." Neither present nor absent are defined in the rules and

the meaning which the convenor sought to give to them was not valid. The convenor had failed to properly address the question of whether he was absent as opposed to present and the meaning he sought to apply to absent went beyond the ordinary meaning and was not supported in the rules themselves.

[15] In relation to expenses, the appellant is legally aided and the appellant sought expenses against the second respondent in opposing the appeal, and sanction for junior counsel.

Submissions for the second respondent

[16] The primary position adopted by the second respondent was that the appeal should be refused; the plea-in-law for the appellant refused and the second respondents' first and second pleas-in-law sustained. The second respondent's secondary position was that if the decision should be set aside, it should be remitted back to the Tribunal in terms of section 324 of the Act.

[17] Following the decision in *Smith* v *Mental Health Tribunal for Scotland (MHTS)* 2006 SLT 347 the MHTS had been punctilious in arranging timeous hearings and had never again missed a date for a tribunal hearing. The date for the hearing had been intimated on 28 February. It was explained by the solicitor for the MHTS that he personally had been actively involved in seeking to make arrangements for the conduct of various tribunal hearings over the period of adverse weather. Over the preceding days many Tribunals had proved problematic to assemble and considerable work had been undertaken to rearrange Tribunals where there was time and flexibility to allow that to happen, or to rearrange the composition of the Tribunal to facilitate the attendance of members. The hearing

accordingly took place on 2 March in the knowledge that the STDC was to expire at midnight as at Friday 2/Saturday 3 March. The second respondent repudiated the suggestion by the appellant that little by way of new enquiry and reporting would have been required before a further short term detention certificate could be properly issued. Section 44 of the Act expressly prohibits the grant of a short term detention certificate if immediately before the undertaking a medical examination the patient is already under a STDC. Sequential orders under the previous legislation had been considered in *R* v *Lothian Health Board No* 2 1993 SLT 1021 and it was understood that there had to be a material gap between successive certificates. For obvious reasons, sequential STDCs are undesirable. In addition there would have been a gap in the compulsory care of the appellant, which rendered such an approach unsatisfactory as well as giving rise to the concern that it avoided the intended scrutiny by the MHTS.

[18] With the imminent expiry of the STDC, the statutory obligation on the Tribunal and the inability to adjourn the hearing or to find another convenor, the hearing went ahead with the convenor participating by conference call and the Tribunal relied on the powers it believed it had to do so. This was not a unique situation, following a recent judicial review where a hearing had to be held the following day to comply with a time limit; a hearing was conducted by use of a telephone link. As in the instant case this had resulted in a perfectly serviceable decision, in which all three members of the tribunal had participated, which had not been subject to challenge.

[19] A three-person panel had been convened to conduct this hearing, and it was expected that three members would be present in order to do so; however the weather

conditions had made that unfeasible. Rule 64 anticipated that there could be a variance from the requirement that all members are present. The appellant's characterisation of rule 64 was misconceived. Reading that rule along with the power of the Tribunal in terms of rule 52(2)(c) 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 it would be fair in all the circumstances."

empowered the Tribunal to conduct the hearing with the convenor participating by telephone. It was common practice for the RMO to give evidence in tribunal hearings by telephone as had happened in this case. Considering rule 52(c) alongside the overriding objective as set out in rule 4 "to secure that proceedings before the Tribunal are handled as fairly, expeditiously and efficiently as possible" the Tribunal was entitled to proceed as it had done here.

[20] It was accepted that there may be some difficulty in not having the ability to see the witness, and in particular, a witness such as the appellant who was a party to the proceedings, give evidence. Nonetheless generally in cases involving a mentally-disadvantaged individuals, matters of credibility and reliability, have less impact and what was generally of more importance was medical evidence from the RMO and other expert witnesses. In this case the patient had not given evidence, but evidence had been given by her advocacy worker. No specific complaints had been made about any prejudice caused by the convenor's participation by telephone. The question raised about the hearing being conducted in private was posed hypothetically and no actual complaint was made that any infringement had taken place.

[21] In terms of rule 42(3) a preliminary matter can be considered by the convenor alone, or with such other members as the MHTS may direct. Given the circumstances, the convenor had properly taken a pragmatic view which was in compliance with the rules and accorded with the overriding objective.

[22] The second respondent did not accept the appellant's position that these were adversarial proceedings under reference to the decision of Sheriff Principal Lockhart in *M* v *Murray and Others* 17 April 2009 where he determined that an application for a compulsory treatment order was not a litigation and effectively concluded such applications were *sui generis* proceedings. The Rules permitted the convenor to participate by telephone. On 2 March the appellant had taken a preliminary point which was considered and rejected. The narrow point in the appeal focussed on the construction of rule 64 to challenge competency of the Tribunal proceedings when the convenor was not personally present. No challenge was taken to the substance of the decision, to the evidence before the Tribunal, nor to the Tribunal's application of the evidence to reach its conclusion. It was also of note that both the convenor and the RMO were geographically separated but there was no suggestion of any criticism that the RMO's attendance by telephone link, which is fairly common practice in Tribunal hearings, was fatal to the proceedings.

[23] The application required to be considered on 2 March as the STDC was going to expire at midnight on 2 March, in terms of section 69 of the Act. The interests of justice required the Tribunal to make a determination; the effect of doing nothing would have been to leave an apparently seriously unwell woman who had a learning disability and anorexia

nervosa, without the benefit of medical services that she required. As explained in the decision, the convenor was unable to make it to the venue.

[24] In this case, given the time-critical nature and the statutory obligation, the decision was taken by the Tribunal, relying on the powers it believed it had, to conduct the hearing with the convenor participating by telephone link. Rule 64(1) could be read alongside rule 52(c) which gave a flexibility to allow proceedings to be undertaken in a manner that reflected the overriding objective of rule 4 that proceedings before the MHTS should secure a fair disposal as expeditiously and efficiently as possible. This was not a case where any specific point was taken over difficulties in assessment of the evidence as a result of the convenor's participation by telephone. It was not a matter of jurisdiction where the arrangements which were in place, allowed the three-man member panel to convene a hearing, to participate in the hearing and reach a valid decision. It was commonplace for the RMO, who can often be in a location separate from where the Tribunal was being conducted, to provide evidence by telephone. Indeed, that happened in the instant case, but the manner of the RMO giving evidence was not the subject of any criticism by the appellant. In terms of rule 43, what was considered here was a preliminary matter which was properly considered by a constituted Tribunal which was empowered to deal with a preliminary determination that the Tribunal hearing could be constituted with the convenor participating by telephone. This follows directly from sub-section 2 which is self-evidently appropriate to enable preliminary matters to be dealt with.

[25] The respondents made no submissions in relation to expenses.

Decision

[26] The MHTS was established by the 2003 Act to act as an independent judicial body which was empowered, amongst other functions, to authorise compulsory treatment orders The Rules were introduced by Scottish Ministers to regulate the operation of the MHTS. The overriding objective of the Rules as set out in rule 4 is to secure proceedings before the Tribunal are handled as fairly, expeditiously and efficiently as possible.

[27] The Tribunal's function is in this case was consider the application to make an interim compulsory treatment order in terms of section 63. The relevant parts of Article 5(1) of the Convention read as follows:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
> (a) the lawful detention of a person after conviction by a competent court; ...
> (e) the lawful detention ... of persons of unsound mind ..."

The European jurisprudence makes clear that that the object and purpose of Article 5 (1), is to ensure that no one should be dispossessed of his liberty in an arbitrary fashion. *Winterwerp* v *The Netherlands* (1979-80) 2 EHRR 387 paragraph 37. It is also clear that the "procedure prescribed by law" relates to national law. The reference in *Kreus* to "adversarial" is in the context of the statement at par 16 that according to the Dutch Supreme Court's decisions, the adversarial principle is one of the basic principles of Dutch procedural law. I find no substance to the appellant's argument in that regard. I merely note my agreement that with Sheriff Principal Lockhart that proceedings before the MHTS are *sui generis*.

[28] Neither do I find support for the appellant's position in *Kiara* v *Vindaloss*. As is made clear in the speech of Lord Wilson JSC at page 2402 J the area of concern for the Supreme Court was in respect of the prejudice which may be caused by the appellant being unable to give live evidence to the Tribunal. The appellant in the instant case did not give evidence. I am unable to accept the submission of the appellant that *Kiara* v *Vindaloss* is authority for the proposition that a live oral hearing is an end in itself.

[29] The legislative aim of the Act is to provide a fair process for the making of such orders and to ensure the protection of the patient. I accept that "present" as used in rule 64 gives an expectation that the members of the Tribunal shall be in the same room, indeed that position was not challenged by the second respondent.

[30] The convenor considered the matters as a preliminary issue in terms of rule 43, following a submission made at the outset of the hearing by the appellant's solicitor. I accept he was entitled so to do. That is patently clear from the terms of rule 43(2). The convenor approached the question from an analysis of whether he could be said to be absent. The convenor explains that he considered he: "was part of the tribunal process throughout the proceedings." Rule 64 however, specifically provides there may be situations where the rules permit a relaxation of the requirement for all Tribunal members to be present. The use of "except as provided for otherwise in these Rules" does not restrict the exceptions to those situations anticipated in 64(3) and 64(4). If that was the intention the reference would have been to "this rule." I am therefore in no doubt that rule 64 may be modified by other provisions in the rules. Indeed that the exceptions could be other than in rule 64 was accepted by the appellant in identifying that rule 58 also allowed, with the

consent of the patient, a Tribunal to make a decision on the papers. In these circumstances I find no force in the appellant's submission that there was an issue of the jurisdiction of the Tribunal where there is provision for a Tribunal to take place where all members are not present. While I reach that conclusion by a different route to that of the convenor I am satisfied that the Tribunal was validly constituted in terms of the Rules. I do not therefore require to have regard to the speech of Lord Steyn in *R* v *Soneji and another* [2005] 3 WLR 303 referred to by the convenor in the decision. However the thrust of Lord Steyn's analysis of the jurisprudence, is to consider whether an act done in breach of a legislative provision was invalid, requires a contextual and purposive interpretation of the language of the provision and the scope and object of the whole statute. Were it to be required such an approach in the instant case would support the conclusion that the Tribunal should have proceeded to determine the matter in the best interests of the patient.

[31] The matter to be determined is whether the Tribunal was entitled by the terms of Rule 52(2)(c) to proceed as it did. Rule 52(2)(c) anticipates a hearing may be held, and evidence received, by telephone, video link, or by using any other method of communication if the Tribunal be satisfied that this be fair in all the circumstances. There is no requirement for the patient to consent within Rule 52.

[32] It is self-evident that the convenor's participation by a telephone link does not offer him the opportunity to visually observe a witness. It is however of note that in this case the RMO gave his evidence over the telephone. I do not accept that the appellant's inability to see the convenor gave a substantive basis for the assertion that there was breach of privacy

issues. I consider such a submission has little weight absent specification of actual breach of privacy or prejudice.

[33] The application was for a CTO for a patient who was said to have a learning disability, anorexia nervosa and was losing significant weight when discharged from hospital care. She was said to lack insight into the serious risks associated with a lack of nutrition. Taking account of the overriding objective set out in the Rules and the reference in Rule 64 to exceptions to all Tribunal members being present, permits a Tribunal to proceed absent all members being personally present in the same room. In the particular circumstances of this case, these provisions read together with the wide and flexible provisions for case management under rule 52 entitled the Tribunal to proceed as it did. There was no suggestion in the appeal that there was unfairness to the appellant in the manner in which the Tribunal dealt with matters. I am satisfied with the particular time constraints which were at play here: the STDC expiring at midnight, combined with the adverse weather conditions which had given rise to a red weather warning meaning travel was discouraged and problematic and had caused significant disruption, the manner by which the Tribunal was conducted and in which all three members participated was competent. It was a reasonable method to secure scrutiny of the decision and to support the patient, and permitted by the rules. I was not given any information as to whether a video link was available but would suggest that in future if such a facility is available then that should be used in preference to a telephone link as it would further reduce the prospective concerns expressed on behalf of the appellant in this appeal. On the evidence available to the Tribunal there was clearly a risk to the patient if the interim order were not made. I observe that the decision of the Tribunal was to make an interim order lasting up to twenty

eight days. That the subsequent orders are not subject to challenge endorses the view that the decision made was reasonable. Accordingly, I find there to be no substance to the appeal and it falls to be refused. I shall therefore refuse the plea-in-law for the appellant and sustain the second respondent's first and second pleas-in-law. The second respondent made no application for expenses and accordingly I shall make no award.