



OUTER HOUSE, COURT OF SESSION

[2006] CSOH 44

P274/06

OPINION OF LADY SMITH

in the Petition

of

JOHN SMITH,
Mental Health Officer for Fife Council

Petitioner;

for

Judicial Review

Petitioner: Brown, Advocate, Innes, Advocate; HBJ Gateley Wareing, LLP
First Respondent: Campbell, Advocate; Ian Kennedy, W.S.

17 March 2006

Introduction

[1] This petition for judicial review was presented by the petitioner in his capacity as a mental health officer appointed by Fife Council under and in terms of s.32 of the Mental Health (Care and Treatment) (Scotland) Act 2003 ("the 2003 Act"). The first respondent was the Mental Health Tribunal for Scotland, a body created by s.21 of the 2003 Act. His application concerned the welfare of a patient ("P") at Stratheden Hospital.

Factual Background

[2] P had been compulsorily detained at Stratheden Hospital on 10 January 2006 in terms of a short term detention certificate ("STDC") granted by medical practitioners there under and in terms of s.44 of the 2003 Act. He suffers from Korsikoff's psychosis and was considered to be a danger to himself and to others.

[3] The STDC authorised the detention of P under s.44(5) of the 2003 Act for a period of 28 days.

[4] On 7 February 2006, the petitioner, in fulfilment of the duties incumbent on him under s.57 of the 2003 Act, presented an application to the first respondent for a compulsory treatment order in respect of P, it being the view of the doctors responsible for his care at Stratheden Hospital, that such an order was required. The application was properly and timeously presented under s.63 of the 2003 Act.

Presentation of the application had the effect of extending the STDC by a further five working days to midnight on 14 February 2006 (see: s.68 of the 2003 Act). Such applications require to be considered at a hearing fixed by the first respondent.

[5] By letter dated 10 February 2006, the first respondent's Chief Executive responded to Fife Council's enquiry regarding the fixing of a tribunal hearing in terms which included the following:

"Your understanding of the Act is correct. Your understanding of the reasons for the failure in this instance to meet the requirements of Section 69 is not. The reason no hearing has been arranged is not related to the availability of panel members, this is not an issue. Mr John Smith was advised by 2 members of my staff that a hearing was not possible due to the lack of a venue within the timescales and the compromised ability of the Administration to give other participants notice of the hearing.

Both the President and the Tribunal Administration were already aware of their responsibilities under the Act in this regard. Unfortunately, the number of CTO applications being received late in the Short Term Detention Period has increased hugely since the inception of the Tribunal. In October 17% of applications were received in the last 3 days of the 28 day period. By January this had risen to nearly 70%.

The Administration continues to make all possible efforts to meet our obligations in respect of hearing dates under the Act but we also have obligations to patients and others in terms of the notice they are given of hearing so that they can obtain representation, prepare for and properly participate in hearings. Where applications are received late but we are able to quickly identify a suitable venue etc we will do so, even where the notice is only 48 hours. We continue to meet our obligations under the Act in all but a handful of instances, but where we also have limited availability of venues there will be occasions when we are simply not able to do so.

Mr Smith advised me that the decision to proceed with a CTO application was made on day 14. If the medical records had been completed shortly thereafter no issue would have arisen. Or if Stratheden Hospital had greater availability of a hearing venue, even with an application received on day 28, we may have been able to secure a hearing. Neither of those is within my control."

[6] Fife Council wrote to Mrs Davie, the President of the First Respondents by letter dated 10 February 2006 in the following terms:

"Dear Ms Davie

Re: DT
CHI Number: 0103520457
Compulsory Treatment Order

I am writing to make you aware of a situation that has arisen concerning a Compulsory Treatment Order application for Mr T. He is currently on a Short Term Detention Certificate that expired on 07/02/06. A Compulsory Treatment Order application has been made and lodged with the Tribunal on 07/02/06 within the 28 day period. The application's by the MHT was confirmed in a telephone discussion on 07/02/06.

As I am sure you are aware the detention of Mr T can be extended for the period of 5 days under Section 68 (2) (a) of the Act pending determination of application.

John Smith, MHO, was advised yesterday afternoon (09/02/06) that it would not be possible for the Tribunal to be held within 5 days, i.e. before or on 14/02/06.

I believe that you need to be aware i.e. this inability by the Tribunal to hear this application within the terms of the duties laid out in the Act.

We will be advising our legal section also and liaising with the relevant parties to make them aware of this situation.

I look forward to receiving your response.

Yours sincerely".

Relevant Legislation

[7] The 2003 Act imposes strict time limits regarding the issuing of STDC's and compulsory treatment orders. It is important, for the purposes of this petition, to note the terms of s.69 which are:

"69 Time limit for determining application etc. where section 68 applies

Where section 68 of this Act applies, the Tribunal shall, before the expiry of the period of 5 days referred to in section 68(2) (a) of this Act -

(a) determine whether an interim compulsory treatment order should be made; and

(b) if it determines that an interim compulsory treatment order should not be made, determine the application."

[8] Section 68 applied. The first respondents were, accordingly, obliged to convene a hearing to determine whether or not an interim compulsory treatment order should be made prior to midnight on 14 February 2006 and also determine that issue prior to that point in time. They had no discretion as to whether or not to fix such a hearing. The statutory requirement is clearly a mandatory one.

Hearing on 15th February 2006

[9] The petition called before me late in the morning of 15 February 2006. It sought reduction of the first respondent's decision to refuse to convene a tribunal hearing to determine the petitioner's application for a compulsory treatment order in respect of P and an order under section 47(2) of the Court of Session Act 1988 ordaining the first respondents to convene such a tribunal.

[10] I was advised that doctors at Stratheden Hospital had, conscious of the fact that the STDC had expired at midnight on 14 February 2006, issued a fresh STDC although they were conscious of the fact that the validity of that fresh certificate might not withstand scrutiny, given the terms of s.44(1) and (2) of the 2003 Act. They did, though, have the support of P's wife and felt that there was, in the circumstances, no alternative but to proceed in that way, an approach with which I have considerable sympathy.

[11] The first respondent had not lodged a caveat but the petitioner's agents had, responsibly, intimated the petition to their office at 9 am on the day of the hearing. There had, however, been no response at all from the first respondent and there was no appearance on their behalf when the petition called in court. Such an approach on

the part of the first respondent was surprising in circumstances where it was plain from the petition that the petitioner was seeking to draw the court's attention to a failure on their part to perform an important statutory duty.

[12] In the circumstance, I granted an order for intimation and service of the petition on an *induciae* of 24 hours and fixed 2 pm on 16 February as the time and date for the First Hearing in the petition.

Hearing on 16th February 2006

[13] When the petition called before me on 16 February 2006, the first respondent was represented. No satisfactory explanation was tendered for the failure to take action in response to the petitioner's intimation of the petition the previous day. No explanation for the failure to fix a hearing prior to midnight on 14 February 2006 other than that stated in the first respondents' letter, was advanced. I was advised that a s.69 hearing had now been fixed, for Tuesday 21 February 2006.

Discussion :

[14] The first respondent clearly had an obligation to fix a s.69 hearing to take place prior to midnight on 14 February 2006. No adequate excuse for the failure to do so was put forward. The suggestion in the Chief Executive's letter that the failure was somehow justified because the petitioner had not made the application at an earlier date is quite wrong as is the theme of the letter that the first respondent could be excused because it was not reasonably practicable for it to do as it was obliged to do. The obligation is straightforward and clear and not qualified by reference to reasonable practicability. An STDC subsists for 28 days and it is clear from the statutory scheme that applications for compulsory treatment orders may not only

properly be made at a stage including the 28th day of an STDC but that a mental health officer has duty to make such an application under s.63 whenever the conditions set out in s.57 apply, even if that happens to be on day 28. The clear import of the statutory scheme is that the first respondent requires to be organised and administered so as to allow for arranging tribunal hearings in respect of compulsory treatment order applications at very short notice. The terms of the letter of 10 January are such as to give a worrying indication of there being a lack of the necessary fundamental understanding on the part of the first respondent. Further and greater cause for concern is given by the first respondent's failure to fix a hearing within the required timescale, as they were obliged to do irrespective of it being difficult. It should have been obvious to the first respondent that if they did not do so, there was a real possibility that, on the expiry of the STDC on 14 February, a mentally ill patient who was a danger to himself and to others and who, in the opinion of those responsible for his care, required compulsory measures of treatment, would be released. The fact that, in the event, he was not, is neither here nor there. The doctors at Stratheden Hospital should not have been put in the difficult position of having to decide whether to release P or whether to detain him further by issuing a certificate which was of doubtful validity.

Decision

[15] It was suggested by counsel on behalf of the first respondent that since a date had now been fixed for the hearing, there was no need for any order to be pronounced. The history was, however, not such as to inspire confidence and it seemed to me to be appropriate that there be a formal order. In the foregoing circumstances, I pronounced an order requiring the first respondent, by close of business on 21 February 2006, to

convene a tribunal to determine, in respect of the petitioner's s.63 application, the matters that required to be determined in terms of s.69 of the 2003 Act.