

[2011] CSIH 76

XA44/11

OPINION OF THE COURT

delivered by LADY PATON

in the appeal by

by

THE SCOTTISH MINISTERS

Appellants;

against a decision of the Mental Health Tribunal relating to JM
communicated on 1 April 2011

Lady Paton

Lord Hardie

Lord Emslie

Act: Poole; Scottish Government Legal Directorate

Non-participating party: the Mental Health Tribunal

Interested party (the patient JM): Komorowski; Murray Beith Murray

2 December 2011

Introduction

[1] In this appeal, the Scottish Ministers challenge the revocation by a Mental Health Tribunal of a Restriction Order (RO) affecting a patient suffering from paranoid schizophrenia and living in the community. The hearing date is yet to be fixed. The present motion concerns the *interim* position. The Ministers seek to preserve the *status quo* pending the appeal in terms of section 323 of the Mental Health (Care and Treatment) (Scotland) Act 2003. They consider that the patient's mental disorder and his history (which includes the attempted murder of his father) are such that he "would commit offences if set at large, [and] that it is necessary [to have an RO in place] for the protection of the public from serious harm" in terms of section 59 of the Criminal Procedure (Scotland) Act 1995. The patient, JM, opposes their motion on two grounds: first, the motion is said to be incompetent on the basis that the wording of section 323 does not empower the court to make an order when the patient is not currently actually physically detained in hospital; and secondly, the patient's progress has been such as to make an *interim* order unnecessary. The Mental Health Tribunal do not wish to be represented at this stage.

The patient's history

[2] On 13 May 1991 at Glasgow High Court, the patient (then aged 20) was acquitted by reason of insanity of the attempted murder of his father. He had assaulted his father in an unprovoked attack, repeatedly striking him on the head with a hammer to the danger of his life. The patient claimed to have heard voices instructing him to attack his father. He was diagnosed as suffering from paranoid schizophrenia. Lord Morison imposed a hospital order with an RO in terms of sections 174 and 175(4) of the Criminal Procedure (Scotland) Act 1975. The patient was then detained in Carstairs State Hospital. By virtue of paragraph 20 of the Mental

Health (Care and Treatment) (Scotland) Act 2003 (Transitional and Savings Provisions) Order 2005, the patient became subject to a Compulsion Order (CO) under section 57A(2) of the Criminal Procedure (Scotland) Act 1995 as amended, and to an RO under section 59 of that Act.

[3] Over the years since 1991, the patient has demonstrated a cyclical pattern of behaviour, with periods of paranoid and violent psychosis alternating with periods of more normal, settled behaviour. The psychotic symptoms suffered by the patient were often triggered by the abuse of alcohol or drugs, and included the hearing of voices, paranoid ideation, delusions and hallucinations. While psychotic, he exhibited violent or bizarre behaviour including absconding from hospital, threatening to kill his wife and baby, making threatening telephone calls to his mother, accusing people of communicating by telepathy around him so that he could not follow what they were saying, attacking and fighting fellow-patients and nurses, and being generally disruptive by, for example, deliberately setting off smoke alarms. Nevertheless when given the appropriate treatment, including antipsychotic medicine, monitoring and supervision, he could improve to such a level that he could live in the community with support and supervision in terms of a conditional discharge (the CO and RO remaining in force).

[4] This cyclical pattern of behaviour is well illustrated by a sequence of five conditional discharges into the community, followed by four recalls (and on one occasion a voluntary re-admission) to hospital as a result of deteriorating health and behaviour. Staff noted that when the patient's symptoms worsened, he lost insight into the nature of his illness and his need for medication. He would also tend to minimise the seriousness of his violence towards others. In a letter dated 19 October 2007, his then RMO (responsible medical officer), a consultant psychiatrist Dr Culshaw, noted that:

"... [his] risk of violence to others [was] significantly increased whenever he had a relapse of his illness".

She noted his significant history of failure in the community, primarily as a result of substance misuse precipitating a relapse of his psychotic symptoms. In her view, the RO remained necessary for the protection of the public because the index offence was "inextricably linked to his mental illness".

[5] In 2008, the patient was again conditionally discharged into the community. The current conditions of his discharge are as follows:

- (a) residence at a particular address
- (b) psychiatric supervision by his RMO, with regular attendance at appointments
- (c) social work supervision
- (d) supervision by his community psychiatric nurse (CPN)
- (e) access to his accommodation by his clinical team
- (f) good behaviour and no criminal offences
- (g) compliance with such treatment as his RMO may direct
- (h) compliance with directions about the structure of his week by his RMO and MHO
- (i) no illegal drugs, and compliance with random testing
- (j) a maximum of two units of alcohol on special occasions, and compliance with the care team's alcohol monitoring.

[6] On 9 March 2011 a Mental Health Tribunal, having heard evidence and considered authorities, decided that the RO was no longer necessary. They revoked the RO and varied the CO. As already noted, that is the

decision which is challenged by the Scottish Ministers.

[7] In a recent report by the patient's RMO Dr Sankey dated 9 May 2011, the patient's mental state was described as remaining stable. He continued to attend his voluntary job at a Salvation Army shop and to visit his family at weekends. He attended monthly appointments with Dr Sankey. He showed no evidence of returning to illicit drug use. He continued to confine his alcohol intake to one or two pints of lager once a week or fortnight. He complied with random drug tests. Dr Sankey noted that the Mental Health Tribunal had revoked the patient's RO on 9 March 2011, and had varied his CO. She further noted:

"JM himself was very clear with me ... that he anticipated very little changing with his follow-up arrangements despite his potential derestriction ... He himself was of the view that 'very little is going to change' with derestriction or otherwise."

[8] In the section headed "Opinion", Dr Sankey summarised the positive aspects of the patient's current position, but added in paragraph 4:

"... I am still concerned about his potential to return to illicit drug use particularly at times of high stress. "

In all the circumstances, however, she concluded that while the CO should remain in place, it was her submission that the RO was no longer necessary.

The statutory scheme

[9] A judge sentencing an offender with a mental disorder may, by means of a CO under section 57A of the Criminal Procedure (Scotland) Act 1995, make orders for compulsory treatment including detention in hospital, residence at a specific place, compulsory medical treatment, and compulsory attendances for such treatment and/or community care services. Where the court also makes an RO under section 59 of the 1995 Act, imposing special restrictions for the protection of the public as set out in Part 10 of the 2003 Act, then the CO is without limit of time; but in the absence of an RO, the CO lasts for six months only. The provisions in Part 10 give the Scottish Ministers significant monitoring and supervision powers, including the power to recall a patient to hospital and the power to oppose an absolute discharge.

[10] In terms of the Mental Health (Care and Treatment) (Scotland) Act 2003, Mental Health Tribunals hear applications and references relating to patients with mental disorders, and have the power to change their regimes. For example, where a patient is subject to both a CO and an RO and is currently detained in hospital, a Mental Health Tribunal may, in terms of section 193(7) of the 1993 Act, if not satisfied that it is necessary to detain the patient in hospital, authorise his conditional discharge into the community. The patient remains subject to the CO and the RO, and is subject to the conditions imposed by the tribunal. In the event of a breach of any condition, the Scottish Ministers have the power under the RO to recall him to hospital (as occurred in JM's case on four previous occasions).

[11] The following sections of the 2003 Act are relevant to the present motion. Section 323:

"Suspension of decision of Tribunal pending determination of certain appeals

(1) Where the Scottish Ministers appeal under section 322(2) of this Act against any decision of the Tribunal under section 193 of this Act ... the Court of Session may, on the motion of the Scottish Ministers, order -

(a) that the patient in respect of whom the Tribunal's decision was made shall continue, subject to subsection (2) below, to be detained; and

(b) that both the compulsion order and restriction order or, as the case may be, the hospital direction or transfer for treatment direction to which the patient is subject shall continue to have effect accordingly.

(2) An order under subsection (1) above has the effect of continuing the patient's detention -

- (a) in a case where no appeal is made to the [Supreme Court] against the decision of the Court of Session under section 322(2) of this Act, until the expiry of the time allowed to so appeal to the [Supreme Court]; or
- (b) in a case where such an appeal is made, until it is abandoned or finally determined."

[12] The *interim* position pending an appeal is also addressed to some extent in section 196 of the 2003 Act, which provides that the tribunal's order revoking an RO -

"... shall not have effect until the occurrence of the first to occur of the events mentioned in subsection (2) below.

Those events are -

- (a) the expiry of the appeal period, no appeal having been lodged within that period; and
- (b) where an appeal has been lodged within the appeal period -
- (i) the receipt by both the Court of Session and the managers of the [relevant] hospital ... of notice from the Scottish Ministers that they do not intend to move the Court of Session to make an order under section 323 of this Act;
- (ii) the refusal of the Court of Session to make such an order; and
- iii) the recall of any such order or the expiry of its effect."

Submissions for the Scottish Ministers

[13] Counsel for the Ministers moved the court to make an *interim* order in terms of section 323 of the 2003 Act continuing the patient's CO and RO.

[14] *The competency of the motion*: Counsel submitted that section 323 gave the court the necessary power, which failing, the court had power at common law. Section 323 should be construed to give effect to the intention of Parliament: Bennion, *Statutory Interpretation* (5th ed) Part VIII pages 469-72 and 585-88; Craies, *Legislation* (9th ed) pages 672-73; and the Mental Health (Scotland) Act 1984 section 66A(3)-(4). Parliament intended, by section 196 of the 2003 Act, to enable the court to regulate the *interim* position for all orders. There was no intention to confine section 323 to patients actually currently detained in hospital.

[15] Several approaches to the construction of section 323 confirmed that proposition:

[16] First, "detention" was to be construed broadly, and not to be confined to current actual physical detention in hospital: cf the many meanings of detention in *Words and Phrases Legally Defined* (4th ed); the explanatory notes to the Mental Health (Public Safety and Appeals) (Scotland) Act 1999 paragraphs 15, 21 and 26, and the explanatory notes to the 2003 Act; the approach of the Court of Appeal in *B v Barking Havering & Brentwood Community Healthcare NHS Trust* [1999] 1 FLR 106; the fact that sections 196 and 323(1) applied to *all* appeals under section 193; and the express use of the words detention "in hospital" where that was intended (as in sections 184, 193(2)(b), 193(4)(b)(i), and 202(2), of the 2003 Act; and sections 57A(5) and 57A(14)(b) of the 1995 Act). *R v Gardner* [1986] 1 QB 1090 did not assist, as that case concerned another statutory provision expressly concerned with detention in hospital.

[17] Secondly, subparagraphs (a) and (b) of section 323(1) should be construed disjunctively. The court could select what order should continue. The word "accordingly" at the end of subparagraph (b) could be read as qualifying the reference to the Scottish Ministers taking an appeal under section 322, or alternatively as referring back to the conditions in the RO.

[18] Thirdly, "detention" should be construed as meaning "liable to detention", as Parliament intended the relevant provisions to extend to, for example, a patient who had absconded.

[19] *Esto* section 323 did not give the court the necessary power, the common law applied. The general principle was that an appeal suspended the decision pending the appeal hearing: cf *McLeay v McDonald* 1928 SC 776 at page 782; *Kennedy v M* 1995 SC 121 at page 126; *Secretary of State for Social Security v Nicol* 1996 SC 510 at page 512H.

[20] *The merits of the motion*: JM's history showed that he presented a number of risks. His schizophrenia resulted in violence, unless it was controlled by medication. He had been recalled on four occasions because of deteriorating health and behaviour, mainly relating to drug-induced psychosis. He had the potential of returning to drugs at times of high stress. He had convictions for drugs, breach of the peace, assault, and attempted murder. There had been recent examples of bizarre and violent behaviour, for example in 2001, 2004 and 2005. In the light of the risks presented by the patient, a continuing RO was necessary to protect the public so long as he remained in the community. In particular it was necessary for the enforceability of the conditions in the conditional discharge; the Ministers' powers of recall; the *locus* on the part of the Ministers to oppose an absolute discharge; and the preservation of multi-agency involvement (MAPPA). Some considerable time might pass before the hearing of the appeal, and meantime the public required protection. The effect on the patient of a continuing RO would be minimal if he continued to lead his life as he was currently doing, all as detailed in Dr Sankey's report dated 14 May 2011.

Submissions for the patient

[21] *The competency of the motion*: After some initial debate, counsel's final position was that section 323 was clear: subparagraphs (a) and (b) were conjunctive, and the section applied only where the patient was currently actually physically detained in hospital. Section 196 fell to be construed in line with section 323. The court should be readier to imply a qualification into section 196 (namely that the section was restricted to cases involving actual detention) than to ignore the express qualification in section 323. The resultant construction of section 196 was not so absurd as to be unacceptable. The explanatory notes for the 1999 and 2003 legislation (i.e. the Mental Health (Public Safety and Appeals) (Scotland) Bill, and the Mental Health (Care and Treatment) (Scotland) Bill) tended to support these submissions. Parliament must have made a policy decision. The underlying reasoning might be that the more dangerous people were more likely to be in detention. It was noteworthy that each of the subsections (1) to (9) of section 193 of the 2003 Act was capable of invoking detention (although it was accepted that the subsections included orders which had nothing to do with detention).

[22] As for any alleged power available to the court at common law, counsel submitted that the 2003 Act provided a complete code. Section 323 applied only to appeals where the patient was currently actually detained. To attempt to elide that qualification by introducing common law powers would be to subvert the will of Parliament.

[23] *The merits of the motion*: Four main points should be noted. First, there had been unanimous evidence from witnesses, including the Scottish Ministers' psychiatrist, that the RO was no longer necessary. Secondly, the tribunal had applied the relevant legal test on the basis of all the evidence, including the evidence of the patient and his sister. Thirdly, the tribunal comprised members with considerable professional experience. Fourthly, the current RMO Dr Sankey in the most recent report dated 9 May 2011 had again expressed the view that the RO was no longer necessary.

Discussion

The competency of the Scottish Ministers' motion in terms of section 323

[24] We consider the Scottish Ministers' motion to be competent, for several reasons.

[25] First, the word "detention" where it appears in section 323 cannot, in our view, be confined to the narrow construction of being currently physically detained within a hospital. "Detention" is nowhere defined in the 2003 Act, but significantly the Act contains references to detention *in hospital* where that specific

meaning is intended: see, for example, sections 36(2) and (8); 38; 44; 46-47; 113(1) and (5); 184; 193(2)(b); 193(4)(b)(i); and 202(2) (an approach reflected in the Criminal Procedure (Scotland) Act 1995 section 57A(5) and 57A(14)(b)). Properly construed, the concept of detention in the 2003 Act has to be flexible enough to extend, for example, to a patient/offender who has been detained in a place of safety pending admission to a specified hospital (section 57A(14) of the 1995 Act, inserted by the 2003 Act); to an acquitted person who has been detained in a place of safety pending a medical examination (section 60C of the 1995 Act, inserted by the 2003 Act); to a patient who should be in hospital in terms of a CO, but who has absconded; to a patient who has been conditionally discharged into the community but who is liable to recall to hospital in the event of non-compliance with a condition or conditions; and to a patient who is subject to detention in hospital in terms of a CO but has been granted leave of some nature such that he is currently in the community: cf the approach of the appeal court in the context of the Mental Health Act 1983 in *B v Barking Havering & Brentwood Community Healthcare NHS Trust* [1999] 1 FLR 106. It is our view that it was Parliament's intention that section 323 should apply in all of these cases, and possibly in other relevant circumstances not mentioned above.

[26] Secondly (and quite independently of the above), sections 196 and 323 apply *ex facie* to all appeals against orders in terms of section 193. Accordingly those sections necessarily cover appeals where detention was not one of the authorised measures. Thus the court's power in terms of section 323(1), properly construed, entitles the court to continue not only detention but also any other order to which the appeal relates. That flexible disjunctive construction of the word "and" where it links subparagraphs (a) and (b) of section 323(1) is consistent with the use of the word "and" elsewhere in the 2003 Act. For example, in section 196(2), the word "and" is used in a disjunctive sense when listing the various events which could occur during the appeal period. As for the word "accordingly" where it appears at the end of subparagraph (b) of section 323(1), that simply refers, in our view, to the continuation (if the court so orders) of whatever conditions are contained in the CO or RO or hospital direction or transfer for treatment direction which is to continue until the final determination of the appeal.

[27] Thirdly, if, contrary to both of the above, counsel for JM is correct in his contention that sections 196 and 323 apply only to cases where the patient is currently actually detained in a hospital, then it follows that there is no statutory provision to cover the *interim* situation in the present case and in any similar case. That being so, there is nothing in the statute, or elsewhere, to override or disapply the normal common law rule that an appeal has the effect of suspending the operation of the decision appealed against: cf *Kennedy v M* 1995 SC 121, Lord President Hope at page 126D-E.

[28] For all of the above reasons, we are satisfied that the Scottish Ministers' motion is competent.

The merits of the motion

[29] The Scottish Ministers maintain that the tribunal did not properly apply the relevant legal test, and that the revocation of the RO leaves the public at risk. They point to various consequences of that revocation, including the "flying-off" of the conditional discharge and the disappearance of some of the conditions directed to public protection; the loss of the Ministers' power of recall, exercisable *inter alia* for the public protection; the possible termination of the CO six months after the revocation of the RO (unless renewed on the sole initiative of the RMO); the absence of regular supervision by the Scottish Ministers seeking to ensure that considerations of public safety are given appropriate weight (cf paragraph [6] of *Scottish Ministers v MHT (JK)* 2009 SC 398); the loss of the Ministers' *locus* to oppose an absolute discharge having regard to the risk to the public; and finally, the absence of multi-agency public protection arrangements (MAPPA).

[30] In assessing the *interim* situation, we take into account several factors. First, the gravity of the original offence, namely the attempted murder of JM's father by repeatedly striking him on the head with a hammer. The voices said to have ordered JM to kill his father were subsequently attributed to his illness (paranoid schizophrenia). That illness continues, although it is generally satisfactorily controlled by the drug Clozapine. Secondly, when the illness is not properly controlled, JM's health and behaviour deteriorates, and violence

towards others becomes a significant risk. His history since 1991 has demonstrated periods of satisfactory conduct in the community followed by deteriorations, usually linked to the consumption of illegal drugs or alcohol, and resulting in bizarre and violent behaviour towards others followed by his recall to an institution. He has been recalled on four such occasions. Thirdly, any deterioration linked to drugs or alcohol has tended to result in JM losing insight into his condition, failing to appreciate his need for medication, and minimising the seriousness of any ensuing violence. He cannot therefore be relied upon to self-monitor and to seek help in a responsible manner when his health and behaviour deteriorate. Fourthly, the continuation of the RO pending the appeal would maintain the element of protection of the public by preserving *ad interim* the Scottish Ministers' powers of monitoring and supervision, including their power to recall JM if his health or behaviour deteriorated to such an extent that he presented a danger to the public. Fifthly, the *interim* continuation of the RO would have a minimal effect on JM's present life (as he himself acknowledges, see paragraph [7] above), whereas its continuation might prove essential for the protection of the public.

[31] In these circumstances we have little hesitation in reaching the conclusion that the Scottish Ministers' motion should be granted. We shall accordingly order, in terms of section 323 of the Mental Health (Care and Treatment) (Scotland) Act 2003, that both the CO (as unvaried) and the RO to which JM is subject shall continue to have effect until the final determination of this appeal.