

Perth 2 December 2020

Sheriff Principal Lewis

Act: H

Alt: █

The Sheriff Principal, having heard from the appellant and from the respondent's representative, refuses the appeal.

Sheriff Principal M W Lewis

This document has been electronically authenticated and requires no wet signature.

Note of Sheriff Principal Lewis

Background

1. At the centre of this appeal is an issue about whether a decision of a Tribunal to revoke a short term detention certificate may be challenged.
2. On █ the appellant was admitted, on a voluntary basis, to █. She was placed in the █ ward as no beds were available in the █ ward. She found this to be an acutely challenging environment, and she explained the reasons for her discomfiture during the hearing this morning.
3. On 26 September a short term detention certificate ("STDC") was made under Section 44 of the Mental Health (Care and Treatment) (Scotland) Act 2003 ("the 2003 Act") and authorised the detention of the appellant in hospital for a period of 28 days for the purpose of examination, investigation and appropriate treatment. That same day she was transferred to the █ at █
4. █ the appellant applied under Section 50 of the 2003 Act to the Mental Health Tribunal for Scotland ("MHTS") for revocation of the STDC because she did not accept that the criteria under section 44(4) of the 2003 Act had been met. The application was lodged on her behalf by █, solicitor.

The decision of the Tribunal

5. The MHTS convened a hearing which took place on █. Due to the current pandemic, the hearing took place by telephone conference call. The appellant attended the hearing and she was accompanied by █. The Tribunal heard evidence from █, the Responsible Medical Officer ("RMO"), from █, the Mental Health Officer ("MHO"), and from the appellant. █ was afforded the opportunity to cross-examine the witnesses. Based on the evidence the Tribunal concluded that the appellant was suffering from psychosis and had undoubtedly suffered trauma. The RMO was unable to classify the specific nature of the illness due to the lack of available information from the patient. Accordingly the Tribunal found that the appellant has a mental disorder. It was not satisfied on the evidence that the other conditions were met and accordingly concluded that it was no longer necessary for the appellant to be kept detained in hospital. The application was granted and the STDC was revoked.

Grounds of appeal

6. The appellant has appealed to this court under section 320(2) of the 2003 Act. An appeal to the Sheriff Principal may be made only on one or more of the grounds set out in section 324(2). The grounds are:
 - a. the tribunal's decision was based on an error of law;
 - b. there has been a procedural impropriety in the conduct of any hearing by the tribunal on the application;
 - c. the tribunal has acted unreasonably in the exercise of its discretion;
 - d. the tribunal's decision was not supported by the facts found to be established by the tribunal.
7. The appellant relies upon grounds (a) and (c). More unusually the appellant has decided to challenge not the decision but the reasoning of the Tribunal members in relation to the finding that she has a mental disorder. She does not seek to overturn the decision; rather she invites me to find that she does not have a mental illness.

Competency hearing

8. I scheduled a procedural hearing to take place to permit parties to address me on the matter of competency. I was somewhat concerned that the appeal as formulated did not accord with the provisions of Section 320(1)(a) of the Act. That section provides that an appeal lies to the Sheriff Principal against a decision of the Tribunal "under section 50(4) of this Act refusing an application for revocation of a Short Term Detention Certificate". Quite simply the Tribunal did not refuse to grant the application – it granted the application.

Submission - appellant

9. The appellant submitted that the Tribunal had failed to have regard to the principles in section 1 (a), (c), (g) and (h) and section 3 of the 2003 Act. In particular it had failed to take into account her wishes and feelings; failed to give her an opportunity to fully and effectively participate in the hearing; failed to treat her fairly; failed to recognise and respect diversity, equality and non-discrimination; and failed to have regard to the principle of equal opportunities. The Tribunal had attached too much weight to the views of the RMO, which were ill-founded; had exercised its discretion unreasonably and in that regard had failed to apply a test of necessity.
10. In her grounds of appeal the appellant argues that the foregoing factors led the Tribunal into making a finding that the appellant suffered from a mental disorder. This finding is prejudicial and in breach of articles 8 and 14 of the ECHR.
11. Her motion appeared to be an invitation to me to recall the finding of the Tribunal that she had a mental disorder and to replace that with a finding that she does not have a mental disorder and that consequently none of the criteria in section 44 (4) have been met.

Submission – the MHTS

12. The MHTS submitted that the note of appeal does not disclose a right of appeal. The appellant's application was made under section 50(1). At a hearing on 23 October the Tribunal considered the appellant's application. It revoked the STDC under section 50(4). The only appeal available against the determination of a Tribunal on an application under section 50(1) is a right to appeal against **the refusal** to revoke (section 320(1)(a)).
13. The section 1 principles set out the framework for the application of the legislation. The principles set out legal duties upon certain individuals in the discharge of their functions under the 2003 Act but they do not override the specific legislative provisions. Insofar as relevant, the appellant fully participated in the hearing; she was legally represented in

that process; she had the opportunity to present her case and to cross-examine witnesses. Her views and feelings were taken into account. The hearing was conducted fairly, objectively, with due regard to equality and diversity. The test of necessity was taken into account by the Tribunal resulting in the revocation of the STDC. The issue of unreasonable exercise of discretion is a substantive matter and nothing to do with competency. In allowing an appeal, the court may set aside the decision of the Tribunal and can substitute its own decision or remit to the Tribunal for reconsideration. What the court cannot do is rewrite in part the findings to suit the appellant, leaving the decision extant.

Decision

13. As the arguments focused on the application of the section 1 and 3 principles as well as the criteria in section 44(4), the right to appeal under section 320, and the grounds of appeal under section 324, it is necessary to consider the relevant statutory provisions.
15. Section 1 of the 2003 Act creates "an overarching approach to the discharge of functions under the Act" (Lord Reed at paragraph 26 in *G (AP) v Scottish Ministers and another (Scotland)* [2013] UKSC 79) and sets out fundamental principles to be applied throughout the operation of the whole of the Act. Subsections (2) to (4) apply to the Tribunal whenever it is discharging a function by virtue of the 2003 Act in relation to a patient who is over the age of 18 years. One of the functions discharged by the Tribunal to which subsections (2) to (4) apply, is that of taking decisions under section 50.
16. Subsection (3) imposes a duty on the Tribunal, in discharging any function under the 2003 Act, to have regard to a series of matters. The matters upon which the appellant relies are (a), (c), (g) and (h). Paragraphs (a) and (c) reflect the importance of ascertaining the wishes and feelings, past and present, of the patient and ensuring that the patient is afforded the opportunity to participate as fully as possible in the process; paragraph (g) is concerned with non-discrimination in relation to persons with mental disorders, and paragraph (h) makes provision for respect for diversity.
17. Section 1(4) provides that the function must be discharged in a manner that involves "the minimum restriction on the freedom of the patient that is necessary in the circumstances." This subsection does not specify matters to which the tribunal must have regard. It applies after the tribunal has had regard to all the matters to which it is required to have regard. Section 3 introduces the broad principle of equal opportunities.
18. The requirements for making the STDC are contained at section 44(4) of the 2003 Act which provide that:
 - (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.
19. The STDC lasts for 28 days (section 46(2)). Section 47 makes provision for an extension to the STDC pending an application for a compulsory treatment order. No such application was made here.

20. Section 50 makes provision for a patient to apply to the tribunal for revocation of the STDC. The appellant made such an application in October 2020. The powers of a tribunal when determining such an application are set out in section 50(2). Before making a decision on such an application the tribunal shall afford the patient, the patient's named person, the patient's guardian or welfare attorney, the approved medical practitioner who granted the STDC, the MHO, the RMO, any curator ad litem and any other person whom the tribunal considers appropriate the opportunity to make oral or written representations and to lead or produce evidence. The Tribunal heard evidence from the MHO and RMO and heard submissions from the appellant's solicitor. The appellant says that she did most of the speaking rather than her solicitor.
21. Section 320(1) lists the decisions against which a right of appeal lies. It includes "(a) a decision under section 50(4) of this Act refusing an application for revocation of a short-term detention certificate;". There is no right of appeal against the grant of an application for revocation. There is no general catch all right of appeal.
22. Section 324 sets out the grounds of appeal and I have already considered that in paragraphs 6-7 above.
23. I have taken some time to set out the relevant statutory provisions lest there be any doubt about the wording of them. The appellant seeks an extraordinary outcome and one which is not envisaged in the 2003 Act. She does not have a remedy available to her under this legislation. On that basis alone her appeal must fail as incompetent.
24. To put it bluntly, the Tribunal was not satisfied that all the criteria in section 44(4) continued to be met. It concluded that the appellant has a mental disorder (section 44(4)(a)). However, and by majority, the Tribunal concluded that her ability to make decisions about the provision of medical treatment for that mental disorder is not significantly impaired; it is not necessary to detain the appellant in hospital for the purposes of determining what medical treatment should be given to her or the giving of medical treatment to her; and there was no significant risk to the health, safety and welfare of the appellant or to the safety of any other patient (section 44(4)(b)-(d)). For those reasons the Tribunal revoked the STDC. Had the Tribunal determined that the appellant did not have a mental disorder, it would still have revoked the STDC.
25. I have given careful thought to the additional points made by the appellant in relation to the principles and to her fear about the use to which the finding of her having "a mental disorder" might be put by others including her estranged husband. Those factors do not take her within the ambit of section 320. In the context of appeals, I am asked to disturb the conclusion of another decision maker for a raft of reasons including for example a failure on the part of the decision maker to take into account relevant material or that the decision is inconsistent with other acceptable evidence or that the decision is inconsistent with itself. Here, even if the finding that the appellant has a mental disorder is inconsistent with the grant of the revocation (which I do not accept given the other findings), the appellant does not seek disturbance of the outcome.
26. For the foregoing reasons, the appeal is refused.