FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2019] CSIH 28
XA65/18

Lord President
Lord Brodie
Lord Drummond Young

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD PRESIDENT

in the Appeal under Section 321(1) of the Mental Health (Care and Treatment) (Scotland) Act 2003 from the Sheriff Principal of North Strathclyde by

MH

Appellant

against

THE MENTAL HEALTH TRIBUNAL FOR SCOTLAND

Respondents

Appellant: O'Neill QC; Balfour & Manson
Respondents: Dunlop QC; Legal Secretary to the Mental Health Tribunal

3 May 2019

Introduction

[1] This is an appeal from an interlocutor of the Sheriff Principal at Kilmarnock which refused an appeal from a decision of the Mental Health Tribunal for Scotland to grant an application for a hospital-based interim compulsory treatment order (Mental Health (Care and Treatment) (Scotland) Act 2003, ss 65 and 66(1)(a) and (b)).

[2] Notwithstanding the appellant's attempts to move the argument to one involving justice being seen to be done, the issue raised in the grounds of appeal is focused upon whether the Tribunal was properly constituted in terms of rule 64 of the Mental Health Tribunal for Scotland (Practice and Procedure) (No 2) Rules 2005. The convenor was not in the same building as the other members of the Tribunal because of extreme adverse weather conditions. He decided that the hearing could nevertheless proceed with his participation being by telephone conference facilities.

The Tribunal and its Rules

[3] The Mental Health (Care and Treatment) (Scotland) Act 2003 regulates, *inter alia*, the grounds upon which, and the manner whereby, a person may be subject to short term detention in hospital. Section 44 permits such detention when a person is suffering from a mental disorder which significantly impairs his or her ability to make decisions about medical treatment. Detention may be authorised initially by an "approved medical practitioner" on the ground that it is necessary to provide such treatment and failure to do so would present a significant risk to the health, safety or welfare of the patient. The maximum detention period is 28 days (s 44(5)(b)). The patient has a right to apply to the Mental Health Tribunal to revoke the detention certificate (s 50).

[4] Section 57 of the 2003 Act requires the patient's mental health officer to apply to the Tribunal for a compulsory treatment order where two medical practitioners are satisfied that the patient has a mental disorder, and requires medical treatment to prevent that disorder worsening or to alleviate symptoms or effects of the disorder, and the disorder significantly impairs the patient's ability to make decisions about treatment. A CTO may be made *ad interim* (s 65). This authorises detention for a maximum further period of 28 days; such

authorisation not being permitted to result in the patient being detained for more than 56 days (ie approximately 8 weeks) in total.

[5] The Mental Health Tribunal is established by the 2003 Act (s 21). Schedule 2 provides for the appointment of panels of legal, medical and general members from which the individual three person tribunals are constituted; one member from each category with the legal member acting as "convenor". Where a decision is to be made by more than one member, it can be by majority vote (Sch 2, para 13).

[6] The Mental Health Tribunal for Scotland (Practice and Procedure) (No. 2) Rules 2005 provide:

> "2.– *Interpretation*
>
> (1) ... 'hearing' 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;
>
> ...
>
> 'Tribunal' means the Mental Health Tribunal for Scotland and 'tribunal' means a tribunal constituted ... to discharge the functions of the Tribunal; ...
>
> 4.– *The overriding objective*
>
> The overriding objective of these Rules is to secure that proceedings before the Tribunal are handled as fairly, expeditiously and efficiently as possible.
>
> ...
>
> 43.– *Interim or preliminary matters*
>
> (1) The Tribunal may ... consider and determine any interim or preliminary matter in relation to the case including any matter for which specific provision is made ...
>
> (2) Any matter referred to in paragraph (1) may be considered by the Convenor alone ...
>
> 49.– *Directions*
>
> (1) Except as otherwise provide (*sic*) for in these Rules, the Tribunal may at any time ... give such directions as the Tribunal considers necessary or desirable to further the overriding objective in the conduct of a case ...
>
> 52.– *Other case management powers*
>
> (1) Subject to the provisions of the Act and these Rules, the Tribunal may regulate its own procedure.

(2) The Tribunal may in any proceedings –

...

(c) 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 this would be fair in all the circumstances.

...

63.– *Procedure*

...

(2) The Tribunal may, in accordance with the overriding objective, conduct the hearing –

(a) as informally as the circumstances of the case permits; and

(b) in the manner the Tribunal considers –

(i) to be just; and

(ii) most suitable to the clarification and determination of the matters before the Tribunal.

...

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.

...

66.– *Hearings in public or private*

(1) ... hearings shall be held in private."

Facts

[7] On 29 January 2018 the appellant was compulsorily detained for 28 days under a short term detention certificate in terms of section 44 of the 2003 Act. The appellant's mental health officer applied to the Tribunal for an interim CTO under section 65, which would last

for a further 28 days. That application extended the remaining period of the original 28 days by a further 5 days (s 68) during which the Tribunal were bound to reach a decision (s 69). A hearing was fixed for 2 March 2018 at the Ayrshire Central Hospital, Irvine.

[8] Immediately prior to the hearing, there had been an unprecedented snowfall. Red weather warnings had been issued for the west of Scotland encouraging people not to travel. Public transport was at a standstill. As a result, the convenor was unable to reach the Hospital, where the medical and general members had attended along with the appellant and her law agent. The convenor was able to, and did, communicate with those at the Hospital by conference telephone call; that is he could hear and be heard. He was able to respond to matters arising accordingly. The appellant's law agent raised the matter of the convenor's participation as a preliminary issue. He argued that the hearing had not been properly constituted in terms of rule 64 and should not proceed. There were alternative procedures available.

[9] After an adjournment to consider the matter in terms of rule 43(2), the convener determined that the Tribunal would be properly constituted. He reasoned that he could undertake all aspects of his role, including: participation in pre-hearing discussions with the other members; introducing matters at the start of the hearing; determining procedural matters; hearing all the evidence; upholding the overriding objective; questioning witnesses; and considering the evidence along with the other members before reaching a decision. No prejudice would be caused to the appellant by the convenor not being in the same room as the other members (*R* v *Soneji* [2006] 1 AC 340) and none was suggested. There was a pressing need to consider the application; that is, prior to the expiry of the STDC at midnight. It was specifically recorded that no substitute convenor could be found upon enquiry with the Tribunal's headquarters. In any event, the convenor had already carried

out all the necessary preparatory work. The written evidence suggested that potentially catastrophic consequences could occur to the patient should the matter not be determined.

[10] The Tribunal had concurring written and oral evidence from the appellant's MHO and the responsible health officer (who also contributed by telephone). This included the views of the original approved medical practitioner. The appellant suffered from anorexia nervosa and a learning disability. Upon admission to hospital, she had been severely underweight and malnourished. Without treatment, there was a significant risk to her health, safety and welfare. She was not capable of making informed decisions about her treatment. She did not see any need to gain weight; viewing 6 stone as the ideal. There was a six month prediction of death in the absence of treatment. Before reaching a decision, the views of the appellant and her understanding were conveyed orally to the Tribunal members by her law agent and in writing by her advocacy worker. These were that the appellant did not have any mental health issues or an eating disorder. Although accepting that her views were genuinely held, the Tribunal preferred the evidence of the three psychiatrists. An interim CTO was made.

[11] The appellant appealed to the Sheriff Principal (2003 Act, s 320(1)(c)) on the basis that the absence of the convener meant that the Tribunal was not properly constituted in terms of rule 64. The sheriff principal's attention was drawn to Article 5 of the European Convention on Human Rights and the need to avoid arbitrary detention (*Winterwerp* v *Netherlands* (1979) 2 EHRR 387). The sheriff principal did not accept a submission, which was made under reference to *R (Byndloss)* v *Secretary of State for the Home Department* [2017] 1 WLR 2380, that a live oral hearing was necessary in all detention cases. The convenor had been entitled to determine the matter as a preliminary issue. There was provision in the rules to enable hearings to take place without all members being in the same room. The wide and flexible

case management powers entitled the Tribunal to proceed as it did. There had been no suggestion of any unfairness. The appeal was refused on 5 July 2018.

[12] A further ICTO had been made on 26 March 2018 by a Tribunal at which all members were in attendance. A CTO was imposed by a Tribunal, also involving all members being in attendance, on 20 April 2018. These orders were not challenged.

Submissions

Appellant

[13] The enumerated grounds of appeal identify 15 separate errors on the part of the sheriff principal; four of which (5, 7, 8 and 11) have respectively 3, 2, 4 and 4 sub-grounds. In essence, however, they all complain of a failure to find that rule 64 required the physical presence of the convenor in the hearing room. In the absence of the convenor, the President of the Tribunal required to re-allocate the hearing. Rule 43 did not apply. It was a breach of natural justice for the convenor to determine a matter related to his own absence. An alternative convenor had been available and the sheriff principal had been made aware of this. Rule 52(2)(c) could not apply as it required a decision of all three members. The convenor's remote participation had compromised the privacy of the hearing (rule 66) and this breached Article 8 of the Convention (right to respect for private life). The appellant did not need to demonstrate actual unfairness. The proper purpose of rule 64(1) involved a right to a hearing and effective participation in it. This included seeing and considering the conduct of the convenor to confirm that he was acting in a judicial manner. The appellant's "common law right" for the convenor to be in her presence had been breached. This was also a right under both Articles 5 and 6 of the Convention. The proceedings were

adversarial. The sheriff principal had erred in having regard to the risks to the appellant if the hearing had not proceeded.

[14] A written Note of Argument followed in due course, as did a response to that. At a relatively late stage in the appeal, the appellant was permitted to lodge a "substitute" Note of Argument. It did not initially appear to involve any significant departure from the expansive grounds of appeal. Once more, the focus was on the proper construction of rule 64 and whether it required the physical presence of the convenor in the hearing room. However, within its terms and in oral submissions, stress was placed on the principle that justice must be seen to be done "in a quite literal sense"; a matter not referred to at all in the grounds of appeal. Emphasis on the vulnerability of the appellant became a focus. A hearing required to be conducted on the basis that each party, and his or her law agent, "sees and hears" all the evidence and argument. This was an aspect of the cardinal requirement that a trial process be seen to be fair. There was a right to see the judge (*Shtukaturov* v *Russia* (2012) 54 EHRR 27 at para 73; *AN* v *Lithuania* (2017) 65 EHRR 23) "to witness his or her reactions to evidence and legal submissions". The appellant could not be assured that the convenor was listening and paying full attention (see *Elys* v *Marks and Spencer* [2014] ICR 1091 at paras 16-17). The test of the well informed observer could not be used because the convenor had been shielded from view. In terms of the Convention jurisprudence, there had to be sufficient protection from arbitrary deprivation of liberty (*Winterwerp* v *Netherlands* (*supra*)). The appellant had been prejudiced in that an ICTO was made.

Respondents

[15] The respondents countered that the overall objective of the Rules was to secure that

proceedings before the Tribunal were handled as fairly, expeditiously and efficiently as possible. There had to be a balance between the appellant's right to personal autonomy and the need, in terms of the purpose of the 2003 Act, to protect her health and life (see *R* v *Soneji* (*supra*); *M* v *Murray*, unreported, Sheriff Principal Lockhart, 17 April 2009). "Present" in rule 64 could apply to a member participating by telephone (cf *M Harris* 1956 SC 207). All three members had to take the substantive decision for it to be valid. A member participating in the hearing by telephone, in accordance with rule 52, was present in terms of rule 64. Rule 52(2)(c) allowed the Tribunal to hold a hearing remotely, subject to an overarching test of fairness.

[16] In any event, any irregularity did not destroy the Tribunal's jurisdiction. Rule 64 came into play after the appellant had been given an opportunity to make representations. Article 6 of the Convention did not guarantee the right to personal presence before a civil court but a more general right to present one's case effectively to the court and to enjoy equality of arms (*Insanov* v *Azerbaijan*, unreported, European Court of Human Rights, App no. 16133/08, 14 March 2013). It was of note that what was under consideration was not a final determination but an interim decision (cf *Storck* v *Germany* (2006) 43 EHRR 6; *VK* v *Russia* [2018] MHLR 75) which was in any event appealable.

Decision

[17] This appeal was lodged, as it had been to the sheriff principal, on the basis that the Tribunal had erred in its construction of the Mental Health Tribunal for Scotland (Practice and Procedure) (No. 2) Rules 2005, notably rule 64. It was not advanced, as was ultimately the main thrust of the oral submission, on the basis that justice had not been seen to be done simply because the appellant could not see the convenor. The reference to Articles 5 and 6

of the Convention to the appeal was one *en passant* as a tool to guide the construction of the 2005 Rules (see sub-grounds of appeal 11(iii) and (iv)). It was not contended in the grounds that the Rules themselves breached the Convention, even if there were hints at such a proposition, should the court determine the matter in the respondents' favour.

[18] It is nevertheless instructive to observe that the context of the case is the deprivation of the appellant's liberty; albeit for an interim period. This undoubtedly engages Article 5, notably 5.1(e) "the lawful detention ... of persons of unsound mind". Any deprivation of liberty has to be "in accordance with a procedure prescribed by law". This necessitates a "fair and proper procedure" whereby "any measure ... should issue from and be executed by an appropriate authority and should not be arbitrary" (*Winterwerp* v *Netherlands* (1979) 2 EHRR 387 at para 45). Particular care must be taken to protect the rights of what is a vulnerable group (*VK* v *Russia* [2018] MHLR 75 at para 30). In terms of Article 5.4, the appellant must have a means of taking "proceedings by which the lawfulness of [her] detention shall be decided speedily by a court and [her] release ordered if the detention is not lawful". Although these proceedings "need not ... always be attended by the same guarantees as those required under Article 6(1) for civil or criminal litigation" there must be "access to the court and the opportunity to be heard either in person or, where necessary, through some form of representation" (*ibid* para 60). The person affected must have a "clear, practical and effective opportunity to have access to court" (*AN* v *Lithuania* (2017) 65 EHRR 23 at para 105). In determining whether the particular procedure provides adequate guarantees, "regard must be had to the particular nature of the circumstances in which such proceedings take place" (*ibid* para 57).

[19] In certain cases (such as one involving a physical assessment by the court itself), it may be necessary for a judge "to have at least brief visual contact with [the patient], and

preferably question him to form a personal opinion about his mental capacity" (*AN* v *Lithuania (supra)* at para 96; *Shtukaturov* v *Russia* (2012) 54 EHRR 27 at para 72). That does not mean that such contact is either necessary or desirable in every case. It will depend upon the particular facts and circumstances.

[20] As was explained in *Insanov* v *Azerbaijan*, unreported, European Court of Human Rights, App no. 16133/08 (at para 142), in the criminal context, Article 6 does not expressly provide a right to be heard in person but this is implied in the general notion that a fair trial normally requires the presence of the accused. In the civil sphere, there is no right to personal presence but one to present the party's case effectively and to enjoy equality of arms. There is no issue of these rights, which are no doubt capable of being interpreted as being applicable procedural safeguards when protecting Article 5 or 8 rights, being breached in this case. It was not suggested that there was any failure to allow the appellant to be heard at the hearing. There was no need for the convenor to make a personal assessment of the appellant, who elected not to give evidence but whose case was presented orally by her law agent, and thus heard by the convenor, and in writing by her advocacy worker, and thus read by him. The medical and general members were able to view the appellant, but nothing turned on this. The case is thus in sharp contrast to *Winterwerp*, *AN* and *Shtukaturov*, in which the persons involved had no effective opportunity to present their cases (see also *Storck* v *Germany* (2006) 43 EHRR 6), the effect of the decisions taken had long term implications and the prospects of review were limited.

[21] The provisions of the Mental Health (Care and Treatment) (Scotland) Act 2003 were enacted in part to ensure continued compliance of the domestic law with Articles 5, and *quantum valeat*, 8, by putting in place a strict regime which not only entitles the person detained to challenge any detention rapidly before an independent Mental Health Tribunal,

but also requires those responsible for the care of the person to take active steps to ensure that the patient's case is reviewed quickly, and, if advised, repeatedly by the Tribunal. This detailed and complex regime, which covers many different aspects of a person's detention in hospital, is not challenged as *ultra vires*. It is designed to ensure that a person has an effective remedy should he or she have grounds upon which to challenge his or her detention.

[22] Access to the Tribunal is thus provided in the 2003 Act and the 2005 Rules. Returning then to the real question in the appeal, and it is the one which formed the basis for the original challenge to the Tribunal and the appeal to the sheriff principal and this court: did what happened comply with the Rules and, if not, what might the consequences be? The purpose of rule 64 is not to oblige each member of the Tribunal to be "present" in the sense of them all sitting in the same room at the time of the hearing. Such a literal interpretation, if complied with, would achieve nothing in practical terms. The purpose is to ensure that the proceedings are conducted before all the members of the Tribunal and that each member participates in the decision-making process. This does not require that all the members be in one room, along with the parties, even if that may, in most cases, be the most convenient way of proceeding. The rules specifically provide (rule 52(2)(c)) that hearings can involve communication by telephone, by video link, or by using any other method that is fair in all the circumstances.

[23] In the modern era, where technology permits, hearings are regularly conducted remotely; whether by the decision-maker being at a remote location or the party or witness being remotely linked. This can be advantageous to everyone involved in terms of cost and time in certain circumstances. It may be a necessity in others, and that seems to have been the situation here.

[24] There remained an overarching requirement of fairness in rule 52(2)(c). That would have existed in any event and would have necessitated ensuring that the appellant, and the Tribunal, were able to consider all the evidence and arguments, both oral and written. It would require providing the appellant with an opportunity to be heard. All of this was done in the appellant's case. There was no discernible unfairness. None was advanced at the hearing.

[25] In terms of rule 43(1) and (2) the convenor was entitled to decide what had been raised by the appellant's law agent as a preliminary matter, by using the remote link of the conference call. Indeed, he was asked to do this. In deciding whether the hearing should proceed in the manner it did, the convenor was bound to have regard to the overriding objective (rule 4) of ensuring that proceedings were handled as fairly, expeditiously and efficiently as possible. In determining that matter, the convenor could have regard to the urgency and seriousness of the situation, the effects of the weather and the absence, as he understood it from Tribunal headquarters, of any alternative. He had considered the papers and would be able to participate with the other members in accordance with the spirit of rule 64 in the decision-making process. The challenge to the decision to proceed in this manner, on the central basis that it did not comply with the rules, accordingly fails.

[26] Although it will continue to be the norm for all persons actively involved in a hearing to be able to observe each other, that privilege, which does have certain advantages in seeing that the members of the Tribunal are alert and focused, may have to be modified where a compelling reason, such as inclement weather, dictates otherwise. The fact that the appellant was unable to see the convenor caused no unfairness. There was no hint in the proceedings, or in the written judgment subsequently issued by the convenor, that there was any lack of attention on the part of the convenor.

[27] As indicated above, the appellant's oral submission, which reflected the subtle change produced in the amended Note of Argument, attempted to raise a general question of whether justice was seen to be done. The test of whether justice has been seen to be done must be an objective one, thus judged by the perception of the fictitious yet ubiquitous fair minded and informed observer. In the appellant's case, the observer would have been aware of several important factors. First, it was important that, in terms of the statute and in the appellant's own interests, a decision on the ICTO be made on the day of the hearing. If a decision could not be made, there would be no ICTO and the appellant might suffer serious adverse consequences to her health should she be released from in-patient care. Secondly, all of the Tribunal members had considered the written material, notably the medical reports, in advance of the hearing. They would, by the time of the hearing, be aware of the issues involved. They would be in a position to question the medical witnesses, notably the MHO and the RMO, if necessary. Thirdly, although the convenor was not physically in the room, he was participating in the hearing as convenor. He could be heard and could hear. If there were any real, as distinct from speculative, concerns about his level of participation, these would become apparent from the nature of that participation, the ultimate decision and the written reasons for it. Fourthly, the other two members were present and they could be observed and had the opportunity to observe the appellant. Fifthly, nothing turned upon the convenor's visual inspection of the appellant or the appellant's viewing of the convenor. There was, in particular, no reason to suppose that any trust which the appellant may have placed in the convenor would have been undermined by her not being able to see him. Sixthly, the appellant had been seen by three psychiatrists, two of whom were available for questioning. Seventhly, the appellant was legally represented at the hearing and her law agent had a full opportunity, which he took, to present the appellant's case

orally as had her advocacy worker in writing. Eighthly, if any significant procedural or other defect in the decision making process had occurred, there was a right of appeal. Ninthly, the decision being made was one with relatively short term effects. Set against this background, there was no appearance of any unfairness to the appellant. Justice was done and could be seen to be done.

[28] The appeal is accordingly refused.