



**PUBLIC PETITION NO.**

**PE01494**

### Name of petitioner

W. Hunter Watson

### Petition title

Mental Health Legislation

### Petition summary

Calling on the Scottish Parliament to urge the Scottish Government to amend the Mental Health (Care and Treatment) (Scotland) Act 2003 to ensure that it is compatible with the European Convention on Human Rights.

### Action taken to resolve issues of concern before submitting the petition

In a series of papers I have drawn to the attention of the Scottish Government evidence that the 2003 Act is not compatible with Convention rights. In my papers I have made reference to judgments of the European Court of Human Rights (ECtHR) and also to recommendations made in 2004 by the Council of Europe. (The Council of Europe was set up after the end of World War 2 in order to safeguard human rights and was responsible for the establishment of the ECHR and also the ECtHR.) The Scottish Government, however, has refused to accept that the Scottish Parliament might have exceeded its legislative competence by passing an Act which was not compatible with Convention rights. Basically, in spite of the evidence to the contrary, the Scottish Government has maintained that the 2003 Act contains sufficient safeguards and provisions for appeals. It has claimed that no fundamental changes to the Act are necessary and has avoided entering into a meaningful debate with me.

### Petition background information

#### Short-term detention certificate

I developed an interest in the 2003 Act after a man alleged that his wife had been detained under the provisions of that Act and hence stigmatised even though she had no mental illness. He further alleged that she had been given against her will drugs with serious side-effects before she had an opportunity to appeal.

The woman in question had been detained after a short-term detention certificate had been granted by an approved medical practitioner who considered it likely that she had a detainable mental disorder. (About 3000 of those certificates are granted each year.) A study of the 2003 Act made it clear to me that the part relating to short-term detention is not ECHR compatible. I consider it significant that for the most part the Scottish Government has made no attempt to refute my criticisms and that where it did attempt to do so these attempts did not stand up to close scrutiny.

One obvious way in which the provisions for short-term detention are not ECHR compatible is that they permit individuals to be treated against their will before they have had an opportunity to appeal. This constitutes a breach of Article 6 ECHR which states that in the determination of his civil rights everyone is entitled to a fair hearing. The right to refuse treatment is such a civil right. Before an individual is deprived of this right it should be established at a fair hearing that the individual lacks the capacity to make a decision about the treatment and also that this treatment is in the individual's best interests.

In 2004 the ECtHR ruled that it is unlawful to deprive an individual of his liberty on the basis of unsoundness of mind unless, at a minimum, he has been reliably shown to be of unsound mind and the mental disorder is of a kind or degree warranting compulsory confinement. (H.L. v UK; paras 98,114.) Now the short-term detention certificate authorises the detention of an individual for up to 28 days and it is common for the individual to have to wait for three weeks for an opportunity to appeal against his or her detention. Given the ruling of the ECtHR it would appear to be unlawful to detain the individual in hospital before the facts are properly established unless there are special circumstances. If the detention is unlawful then there is clearly a breach of Article 5 ECHR, the right to liberty.

### Absence of fair hearings

When an individual does appeal against his or her short-term detention the nature of the 2003 Act is such that he or she is denied a fair hearing in breach of Article 6 ECHR. There are several reasons for this state of affairs:

1. Under Article 6 ECHR "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law." That being the case, it would seem reasonable to demand that a mental health tribunal should not assume that the approved medical practitioner was not mistaken when he or she considered it likely that an individual had a detainable mental disorder. Yet that is exactly what the tribunal is liable to assume since the 2003 Act only requires it to determine whether the conditions which would justify detention "continue to be met". A tribunal which makes an assumption that an individual appearing before it recently had a detainable mental disorder is clearly not impartial. In order for a hearing to be fair the tribunal must, of course, be impartial.

(Note: An individual who is detained under a short-term detention certificate is thereby stigmatised. The 2003 Act contains no provision for an appeal on the grounds that a mistake was made by the approved medical practitioner who granted the short-term detention certificate. Hence, although it is inevitable that some individuals will have been wrongly stigmatised there is, in reality, nothing that they can do about it. )

2. The ECtHR in the 2012 case of Ibrahim Gurkan v Turkey (para 14) ruled that a tribunal must be "impartial from an objective viewpoint in that it must offer sufficient guarantees to exclude any legitimate doubt in that respect." Mental health tribunals cannot be regarded as impartial since one of their three members is a psychiatrist to whose supposed expertise the other members are liable to defer. However, that psychiatrist is liable to be reluctant to challenge the professional judgment of the fellow psychiatrist who considers it necessary for a patient to be placed on a compulsory treatment order. Further, it is unlikely that the psychiatrist on the tribunal would doubt the veracity of any of the mental health professionals opposing a patient's appeal even though there is good evidence that even people in highly respected positions are not always completely truthful.

3. Yet another of the reasons for individuals not receiving a fair hearing at mental health tribunals is that tribunal hearings are informal and witnesses are not required to give evidence on oath. Hence the evidence is not always properly tested. This means that some individuals will not reliably be shown to have a mental disorder and hence their continued detention will be unlawful.

### Council of Europe recommendations

The adoption of the following Council of Europe recommendations and the elimination of the provisions relating to the short-term detention certificate would go a long way

towards making Scottish mental health legislation ECHR compatible provided steps were taken to ensure that mental health patients received fair hearings:

1. Exceptionally a person may be subject to involuntary placement for the minimum period necessary in order to determine whether he or she has a mental disorder that represents a significant risk of serious harm to his or her health or to others.
2. The decision to subject a person to involuntary placement should be taken by a court or another competent body.
3. The decision to subject a person to involuntary treatment should be taken by a court or another competent body.

#### Further necessary changes

Several other changes must be made to the 2003 Act to ensure that it is ECHR compatible, in particular, changes relating to electro-convulsive therapy (ECT). The 2003 Act authorises the giving of ECT to a patient “who resists or objects” However, in 2005 the World Health Organisation recommended that “If ECT is used, it should only be administered after obtained after obtaining informed consent”. In fact, ECT seems to fall within the definition of inhuman or degrading treatment, something prohibited in all circumstances. Basically the Scottish Parliament should urge the Scottish Government to make all necessary changes to the 2003 Act to ensure that it is ECHR compatible.

#### **Unique web address**

<http://www.scottish.parliament.uk/GettingInvolved/Petitions/mentalhealthlegislation>

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