

PE1494/N

SCOTTISH PARLIAMENT PUBLIC PETITION PE 1494

PETITIONER: W. HUNTER WATSON

PETITION TITLE: MENTAL HEALTH LEGISLATION

The Mental Health Tribunal for Scotland (“the Tribunal”) welcomes the opportunity to give its views on what the abovementioned Petition seeks and the discussions which took place at the meeting on 10 December 2013.

Mental Health Tribunal for Scotland

The Tribunal was established by section 21 of the Mental Health (Care and Treatment) (Scotland) Act 2003 (“the 2003 Act”) and became operational in October 2005. The Tribunal is responsible for making and reviewing decisions concerning the compulsory care and treatment, both in the community and in detention in hospital, of people in Scotland with mental disorder.

The Tribunal is headed by a President, who is an experienced lawyer¹. The President and the members of the Tribunal are the people who hear and decide the cases that come before the Tribunal. The members fall into three groups²: legal members, i.e. lawyers of at least 7 years’ standing³; medical members, i.e. doctors who are qualified psychiatrists⁴; and general members, who are people with experience of using mental health services or of caring for such a person, or with qualifications or expertise in social care.⁵ The Tribunal sits to hear cases in judicial panels of three comprising a general member and medical member and convened by a legal member. In the cases of restricted patients,⁶ the panel has the same composition, except that they must be convened by either the President of the Tribunal or a Sheriff.

Members are appointed by the Scottish Ministers in terms of paragraph 1 of schedule 2 to the 2003 Act and regulations made thereunder. In terms of paragraph 4(2) of schedule 2 to the 2003 Act, the appointment of a member lasts for 5 years. In terms of paragraph 4(5) of schedule 2 to the 2003 Act, members shall be reappointed for further terms of 5 years except in the circumstances set out in paragraph 4(6) of schedule 2 to the 2003 Act. These provisions ensure that members have the requisite security of tenure.

The Tribunal has a semi-inquisitorial role and can therefore be proactive, questioning witnesses and instructing expert reports should it deem this necessary. Each member of the Tribunal panel has an equal vote and decisions are made either unanimously or by majority. In each case, the panel will issue a written decision. The decisions of the Tribunal are subject to review by the superior courts either on appeal or by an action for judicial review.

¹ Paragraph 2 of schedule 2 to the 2003 Act

² Paragraph 1 of schedule 2 to the 2003 Act.

³ Mental Health Tribunal (Appointment of Legal Members) Regulations 2004 (SSI 2004/286)

⁴ Mental Health Tribunal (Appointment of Medical Members) Regulations 2004 (SSI 2004/374)

⁵ Mental Health Tribunal (Appointment of General Members) Regulations 2004 (SSI 2004/375)

⁶ A patient subject to a compulsion order and a restriction order, a hospital direction or a transfer for treatment direction

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The Petition appears to the Tribunal to concern itself with short-term detention certificates (STDCs) and their compliance with the European Convention on Human Rights (ECHR).

A STDC can be granted under section 44 of the 2003 Act for a period of 28 days by an approved medical practitioner (AMP), where the AMP has carried out a medical examination of the patient; the patient is not subject to any certificates or provisions of the 2003 Act specified in section 44(2); there is no conflict of interest in relation to the medical examination; the AMP considers that it is likely that the conditions mentioned in section 44(4) are met in respect of the patient; the AMP consults the mental health officer (MHO) and the MHO consents to the grant of the STDC. The conditions mentioned in section 44(4) are that the patient has a mental disorder; that because of the mental disorder the patient's ability to make decisions about the provision of medical treatment is significantly impaired; 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; 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 that the granting of a STDC is necessary.

Where a person is made subject to a STDC, the patient or the patient's named person may apply to the Tribunal under section 50 of the 2003 Act for revocation of the STDC. The Scottish Tribunals Service (STS), which provides administrative support to the Tribunal, has a key performance indicator (KPI) requiring it to schedule a hearing to consider a section 50 application within 5 days of receipt of the application. This KPI is sometimes not complied with because of requests by parties for a small adjustment to the date of the hearing. When considering a section 50 application, the Tribunal must revoke the STDC if it is not satisfied that any of the conditions at section 44(4)(a), (b) or (d) continue to be met or if not satisfied that it continues to be necessary for the patient to be detained in hospital under the STDC. In making its decision on the section 50 application, the Tribunal requires to have regard to the principles set out in section 1 of the 2003 Act, including the present and past wishes and feelings of the patient; the importance of the patient participating as fully as possible; and the importance of providing the maximum benefit to the patient. After having regard to all of the principles, the Tribunal must make its decision "in the manner that appears ... to be the manner that involves the minimum restriction on the freedom of the patient that is necessary in the circumstances".

Alternatively, or in addition, the patient or the patient's named person may apply to the Tribunal under section 291 of the 2003 Act for an order requiring the managers of the hospital to cease to detain the patient. STS will seek to fix a hearing to consider a section 291 application within 5 days. Again, there may be a small adjustment to the date of the hearing as a result of requests by the parties. On an application under section 291, the Tribunal shall make an order requiring the managers of the hospital to cease to detain the patient if satisfied that the patient is being unlawfully detained in hospital, for example if there had been a procedural failure in the making of the STDC which was significant enough to render the STDC invalid⁷. In making its decision under section 291, the Tribunal will have regard to the section 1 principles and the minimum restriction requirement referred to above.

⁷ Judgement of Sheriff Principal Taylor in *M v Mental Health Tribunal for Scotland* 2010 SLT (Sh Ct) 235

ECHR

While the Petition appears to focus on Article 6 of the ECHR, it appears to the Tribunal that the starting point in terms of the ECHR for considering STDCs is Article 5, which provides that–

1. Everyone has the right to liberty and security of person.
No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
...
(e) the lawful detention ... of persons of unsound mind ...;
...
4. Everyone who is deprived of his liberty by ... detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
5. Everyone who has been the victim of ... detention in contravention of the provisions of this article shall have an enforceable right to compensation.

The European Court of Human Rights has held that the term “a person of unsound mind” does not lend itself to precise definition, as psychiatry is an evolving field. However, it cannot be taken to permit the detention of someone simply because his/her views or behaviour deviate from established norms. Accordingly, domestic authorities are afforded some discretion in the interpretation they adopt. It appears to the Tribunal that the definition of “mental disorder” used for the purposes of the 2003 Act, which is set out at section 328 of the 2003 Act, meets this requirement. The domestic procedure prescribed by law is set out in section 44 of the 2003 Act.

In light of what has been said above about applications to the Tribunal under sections 50 and 291 of the 2003 Act, it appears that a person deprived of his/her liberty under a STDC is entitled to take proceedings by which the lawfulness of his/her detention shall be decided speedily and his/her release ordered if the detention is not lawful, all in compliance with Article 5(4) of the ECHR. For the purposes of Article 5(4) of the ECHR, the Tribunal notes that the European Court has held that a “court” for these purposes is a judicial body independent of the executive with “court-like” attributes. For the reasons set out above, it appears to the Tribunal that the Mental Health Tribunal for Scotland meets these requirements.

Fair Hearing

The Petition asserts that when a person subject to a STDC takes proceedings before the Tribunal, that person is denied a fair hearing in breach of Article 6 of the ECHR. In particular, the Petition asserts that because in terms of section 50(4) of the 2003 Act where the Tribunal is considering whether the STDC should be revoked, it is considering whether the conditions at section 44(4)(a), (b) and (d) continue to be met or whether it continues to be necessary for the patient to be detained in hospital under the STDC, this means that the Tribunal panel is not impartial because the Tribunal is making “an assumption that the individual appearing before it recently had a detainable mental disorder”. Mental disorders are dynamic, i.e. certain mental disorders can fluctuate such that a person may be liable to detention under a STDC on one date, but on a later date would not meet the requirements for

detention. Accordingly, it appears to the Tribunal that the wording of section 50 simply recognises the dynamic nature of mental disorder and requires the Tribunal to consider the condition of the patient at the time of the hearing before it.

If a patient was to assert that s/he had not met the criteria for the making of a STDC set out in section 44(4) at the time of the making of the STDC, it would be open to the patient to make an application under section 291 of the 2003 Act.

The Petition asserts that mental health tribunals “cannot be regarded as impartial, since one of their three members is a psychiatrist to whose supposed expertise other members are liable to defer”. Each member of the three-member Tribunal panel brings their own experience and expertise to bear in making decisions. As explained above, each member of the Tribunal panel has an equal vote, and decisions are made either unanimously or by majority. Each member of a Tribunal panel is carrying out a judicial function and requires to test and weigh the evidence before the Tribunal and to make their decision on the basis of that evidence.

The Petition asserts that because “hearings are informal and witnesses are not required to give evidence on oath” therefore “the evidence is not always properly tested”. Rule 63 of the Mental Health Tribunal for Scotland (Practice and Procedure) (No. 2) Rules 2005 provides that the Tribunal may, in accordance with the overriding objective (to secure that proceedings are handled as fairly, expeditiously and independently as possible), conduct the hearing as informally as the circumstances of the case permit and in the manner the Tribunal considers to be just and most suitable to the clarification and determination of the matters before the Tribunal. Rule 63(6) empowers the Tribunal to require any witness to give evidence on oath or affirmation. It does not appear to the Tribunal to follow, because a witness is not put on oath or required to affirm, that the evidence is not properly tested.

Discussions which took place at the meeting on 10 December 2013

Much of the discussion on 10 December 2013 appears to revolve around the issue of ECT, which is a clinical issue and not one directly for the Tribunal. In respect of other issues raised on 10 December 2013, the Tribunal refers to its observations above.

If the Tribunal can provide any clarification or further information, it will be happy to do so.

Mental Health Tribunal for Scotland
24 January 2014