

Andrew Muir Letter of 1 February 2014

Public Petitions Committee, PE01494 1st February 2014 – Andrew Muir

As a consequence of what happened to my wife I have had personal experience of short-term detention and tribunals. As secretary of the recently formed group, Psychiatric Rights Scotland, I have also obtained information from others about those matters. A study of individual cases demonstrates that it is far too easy for a person to be detained and then subjected to involuntary treatment which will invariably be unpleasant and which sometimes has fatal consequences. I provide some relevant information about my own experiences but begin by contrasting what happens when someone is deprived of their liberty under criminal law with what happens when someone is deprived of their liberty under mental health law. Under criminal law great care is taken to ensure that no one is wrongly deprived of their liberty. As is made clear below, the same is not true under mental health law. The Scottish Parliament will be failing to take human rights seriously if it does not remedy this situation by adopting the recommendations in petition PE01494.

Short-term detention

The process relating to short-term detention as set out in the 2003 Mental Health Act is clearly unsatisfactory, as is obvious when it is compared with what must be done when someone is liable to be detained on the grounds that he or she is suspected of having committed a criminal offence:

1. Persons suspected of having committed a crime will not be remanded in custody pending trial (and not all are) unless the police officers have collected sufficient evidence to provide a reasonable chance of a conviction. That requires the police to make careful enquiries before the suspect is charged. A solicitor will be informed if a suspect is detained for questioning and any police interview at the police station will be recorded. Suspects are informed that they have the right to remain silent. Because suspects are not drugged while awaiting trial they are able to give evidence with a clear head. They will also normally have good legal representation. The burden of proof is high as the crime must be shown to have been committed by the suspect beyond reasonable doubt and the court is required to assume that the suspect is innocent until he or she is proved guilty. Further, the grounds for appeal are wide. For example, a successful appeal could be based on the grounds that proper procedures were not followed prior to detention or that material that could have been used by the defence was not disclosed. Finally, if the court finds that the accused is not guilty then he or she will not have been stigmatised as a consequence of having appeared in court.
2. By contrast, persons suspected of having a detainable mental disorder can be detained and treated for 28 days under a short-term detention certificate on the basis of a single interview behind closed doors with a psychiatrist. No solicitor is informed in advance of the possibility that the interview might result in the person being interviewed being detained in hospital and the person is not informed of his or her right to remain silent. The interview is not recorded which means that the psychiatrist can later give a false account of what the person said. The 2003 Mental Health Act Act does not require careful enquires to be made prior to the grant of the certificate although certain procedures must be followed if it is practicable

to do so; if they are not followed then the detention is not lawful. However, there is no great incentive for those responsible for a person's detention to follow the procedures specified in the Act since the tribunal is not required to confirm that proper procedures were followed. Also, there is no provision within the Act for an appeal on the grounds that these procedures were not followed. Similarly, there is no provision for an appeal on the grounds that information had been withheld that could have been of value to the person when appealing against detention. (See s324 of the Act.) In addition, there is no great incentive to make careful enquiries prior to granting the certificate since the tribunal is only required to consider whether the conditions that would warrant detention "continue to be met".

Another important difference between the detention of a person awaiting a criminal trial and the detention of a person awaiting a hearing of a mental health tribunal is that the former is not given mind-altering drugs whereas the latter almost invariably is. Further, tribunal decisions are based on balance of probability even although a person's liberty is at stake and even although the European Court of Human Rights has ruled that it must be reliably shown that a person is of unsound mind before he or she can lawfully be deprived of his or her liberty on those grounds. Finally, although a person found to be not guilty at a criminal trial is not stigmatised as a consequence of having been charged with having committed a criminal offence, a patient whose appeal against detention is successful remains with the stigma of having been sectioned because a mental health tribunal is not required to determine whether the psychiatrist who considered it likely that a person had a detainable disorder might have been mistaken.

Tribunals

Tribunals are unfair for the following reasons:

1. A patient appearing before a mental health tribunal is likely to have been heavily sedated and therefore unable to fully participate in tribunal proceedings.
2. The NHS controls all the documentation. Thus they have more time to prepare and have been known to withhold information that would have been invaluable to those opposing the compulsory treatment of the patient. Also, it is not customary for the patient or those supporting the patient to be given a copy of the short-term detention certificate which makes it nigh impossible to successfully rebut the allegation that the patient had a detainable mental disorder when the certificate was granted. This is an important consideration because the Act requires the tribunal to determine whether the criteria for detention "continue to be met". Just as a criminal court must not assume that a suspect is guilty merely because the police have evidence that might be the case, there should be no assumption on the part of a mental health tribunal that the criteria which would justify the detention of a patient were met merely because a psychiatrist thought it likely that was the case. Any tribunal that believes that the patient had a detainable mental disorder two or three weeks previously is unlikely to be truly impartial especially if the mind-altering drugs given to the patient give the impression that he or she has a mental disorder: the side-effects of some of those drugs make this a possibility. A major defect of the 2003 Act is that it is based on the premise a psychiatrist, having obtained the consent of a mental health officer, never makes a mistake when granting a short-term detention certificate. Not only is this premise obviously false on theoretical grounds, but there is empirical evidence that it is false. This part of the Act must be changed.

3. The composition of the tribunal (a lawyer, psychiatrist and usually an NHS employee) is such that the diagnosis of the treating psychiatrist is less likely to be challenged than if tribunal members were drawn from the public. (In fact, it is possible that hearings should be held before a sheriff rather than before a tribunal.)
4. The hearings of mental health tribunals are not open to public scrutiny, one of the guarantees of a fair hearing. They should be open to the public if the patient requests this.
5. Witnesses are not on oath and are thus more likely to make misleading statements. Further, it is policy for tribunal proceedings to be of an informal nature. This militates against evidence being properly tested. For example, in my experience it is not normal to test the evidence that the patient has significantly impaired decision making capacity, one of the necessary criteria for detention under the 2003 Act.
6. The 2009 Limited Review of the 2003 Mental Health Act described the quality of legal representation at tribunals as poor. Psychiatric Rights Scotland can vouch for that.
7. It should be noted that at 5.57 in the 2009 research report entitled “An Exploration of the Early Operation of the Mental Health Tribunal for Scotland” it was suggested that solicitors might milk the process to increase their revenue from legal aid. Perhaps that accounts to some extent for the poor standard of legal representation.

Personal experiences

My personal experiences are relevant not only because they demonstrate that the 2003 Act is not being implemented as Parliament intended but also because **they expose the weakness of one part of the argument of those who maintain that the 2003 Act is compatible with Convention rights, namely that there is no case law which establishes that it is not.**

On 11 September 2006 a psychiatrist granted a short-term detention certificate with respect to my wife, Claire Muir. He did so without consulting me even though it would not have been impracticable for him to have done so. That meant that my wife’s detention was unlawful by virtue of s44(10) of the Act. Had I been consulted I could have informed him that Claire, to whom I had been married for six years, did not have a mental disorder.

When Claire was admitted to hospital she was given an admission assessment. The report stated that Claire had no mental disorder and *was not obviously depressed*. In spite of that report and my objections, Claire was administered drugs against her will. Even although she had been assessed as being not obviously depressed, these included an antidepressant. She reacted badly to that antidepressant.

As can be verified from the transcript, the tribunal of 3 October 2006 was made aware that I was unhappy that the antidepressant had been administered to Claire and that I wished the tribunal to examine that issue. The convener refused to do so stating that “*It’s a matter for another forum somewhere else, Mr. Muir*”. The convener was correct since the Act contains no provision for a tribunal to determine whether treatment provided

to a patient was inappropriate. It was pointless complaining to the Mental Welfare Commission since it had previously informed the psychiatrist responsible for my wife's care that I could be banned from the hospital if I continued to advise her against taking the antidepressant. The fact is that the Act contains no provision for an appeal against a treatment decision.

Claire appeared before five tribunals. Each accepted the assurance from the psychiatrist responsible for her care that it was necessary for her to remain on a compulsory treatment order. However, when she was put in the care of a different psychiatrist he could find no identifiable psychiatric disorder and he revoked that compulsory treatment order. She was formally discharged from the Mental Health Services on 14 December 2007.

In 2008 Claire and I made complaints to the Mental Welfare Commission, the relevant Health Board and various other bodies about what had happened to her. When the making of complaints proved fruitless, Claire, with my full support, raised several court actions. She was able to obtain legal advice but, in spite of our best efforts, we were unable to obtain a solicitor to represent her in court. Nevertheless she pressed ahead and represented herself.

One of the bodies against which Claire raised an action was the Health Board which employed those responsible for her care. She alleged that in a number of respects the way in which she had been treated breached her human rights. In particular, she claimed that it was a breach of her right not to be subjected to inhuman or degrading treatment by being forced to take the antidepressant to which she reacted badly since it could not be convincingly shown to be medically necessary and in her best interests as required by a judgment of the Court of Appeal in the 2002 case of R (on the application of N) v Dr. M and others.

The sheriff dismissed Claire's action. In his judgment he stated "*The pursuer cannot found on a breach of a Convention right unless she demonstrates that she has been deprived of a meaningful remedy. There are such remedies available to her within the Mental Health (Care and Treatment)(Scotland) Act 2003. Accordingly it is incumbent upon the pursuer to avail herself of such remedies in pursuit of her complaint but it appears that she has not done so. That being so a case based on a breach of a Convention right does not arise.*"

The sheriff was mistaken in supposing that there were remedies available to Claire within the Act. She did, therefore, have solid grounds for an appeal. However, since she had no solicitor and was not in receipt of legal aid, persevering with the action was out of the question. We did not have sufficient funds for that to have been an option.

If Claire had been able to find a competent solicitor to represent her then it is likely that by now there would be case law which would have established that an Act which permits psychiatrists to treat patients against their will before the facts have been established is not compatible with Convention rights. As it is, Claire has acted as a trailblazer. The Scottish Parliament should not assume that no other patient will follow Claire's example. If some patient on legal aid and with a solicitor does follow her example then it would be highly likely that the court action would succeed. Parliament should not delay until that happens before suitably amending the Act.