FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2019] CSIH 14
XA65/18

Lord President
Lord Justice Clerk
Lord Malcolm

OPINION OF 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

in the cause

MH

Appellant

against

THE MENTAL HEALTH TRIBUNAL FOR SCOTLAND

Respondents

Appellant: Blair; Balfour & Manson
Respondents: Pirie; Legal Secretary to the Mental Health Tribunal

15 March 2019

Introduction

[1] This is an appeal from an interlocutor of the Sheriff Principal refusing an appeal from a decision of the Mental Health Tribunal. It raises an important issue of practice in relation to the anonymisation of the names of parties in civil court proceedings.

Background

[2] On 29 January 2018, the appellant was compulsorily detained for 28 days in terms of a short term detention certificate under section 44 of the Mental Health (Care and Treatment) (Scotland) Act 2003. An application to the respondents for a compulsory treatment order under section 63 of the 2003 Act extended that period by 5 days (s 68) during which the respondents were bound to reach a decision (s 69). A hearing was arranged for 2 March 2018 in premises at Irvine. On that date, the respondents purported to make an interim, hospital based, care and treatment order.

[3] The unusual feature of the hearing was that the legal convenor was not there. Although the medical and general members were present, the legal convenor was not in the building. The convener had been unable to reach the premises because of unusually inclement weather. He was in communication with the hearing by telephone. The appellant's solicitor submitted that the hearing was not properly constituted in terms of rule 64 of the Mental Health Tribunal for Scotland (Practice and Procedure) (No. 2) Rules 2005. This provides that the respondents cannot decide any question "unless all members are present". The convenor determined that the hearing could competently proceed. On 5 July 2018 the Sheriff Principal refused an appeal against that determination. The appeal to this court challenges his interlocutor.

[4] The appellant has enrolled a motion:

> "to anonymise her details to the initials 'MH' and to design her care of [her solicitors] in order to protect her privacy. The appellant is a vulnerable individual and the matter is concerned with the conduct of the [respondents]".

The proceedings before the respondents required to be held in private, unless the patient sought a public hearing (2005 Rules rule 66(1)).

Submissions

Appellant

[5] The appellant accepted that justice was administered by the courts in public (*A* v *Secretary of State for the Home Department* 2014 SC (UKSC) 151 at para 23). This principle was not unqualified and there were exceptions both at common law and under statute. The application of the principle was different in private litigation, where stress had always been put on the need for a proper disclosure of names (*Joel* v *Gill* (1859) 22 D 6) and addresses (*Murdoch* v *Young* (1909) 2 SLT 450). These factors carried less weight in public law cases, where it was likely that the parties would be known to each other. Even in private law litigation, the need for confidentiality in relation to medical information had long been recognised (*AB* v *CD* (1851) 14 D 177).

[6] Those with a mental disability were entitled to equal access to the courts. Openness of justice was not an end in itself. The purpose of the principle in a particular case had to be examined (*A* (*supra*) at para 41; *Khuja* v *Times Newspapers* [2017] 3 WLR 351). Those with mental disorders were likely to be vulnerable. The stigma attached to mental illness had not been eliminated. It was incumbent upon a legal system to afford appropriate protection to those with mental illnesses, who sought equal access to the courts, alongside those who do not suffer from such illnesses. This included the making of procedural accommodations for such parties in order to ensure their effective participation in the process (European Convention, Articles 6 and 14; United Nations Convention on the Rights of Persons with Disabilities, Articles 3, 5, 12 and 13). Where a person with a mental illness was the subject of action taken by the state, his or her name ought not to be disclosed unless there were pressing circumstances to the contrary.

[7] Rule 66 of the 2005 Rules provided that hearings of the respondents required to be held in private unless the patient applied otherwise. Rule 67 provided that, even when public proceedings had been ordered, the respondents could make an order that any publicity should be limited, having regard to the need to safeguard the welfare of the patient, or to protect his or her life. Rule 73 provided that any decision of the Tribunal required to be published in a manner which protected the patient's anonymity.

[8] The appellant was not seeking a reporting restriction under section 11 of the Contempt of Court Act 1981. The distinction between a section 11 order and the need for anonymity was recognised in the Practice Note (No.1 of 2015): *Reporting Restrictions etc.* (paras 8 and 9). Chapter 102 of the Rules of Court established a process in relation to reporting restrictions. The court had an inherent common law jurisdiction to restrict the reporting of matters disclosed in open court, including the names of parties and witnesses (*Khuja* (*supra*), para 14). The statutory powers were an adjunct to this. The fact that there was a public interest in reporting proceedings did not mean that it should extend to identifying the individual involved (*A* (*supra*) at para 39). It was inherent in the very nature of a mental health case that the name of the patient was not something that it was in the public interest to know. The *parens patriae* nature of the jurisdiction pointed to this (*Law Hospital NHS Trust* v *Lord Advocate* 1996 SC 301) since it suggested that the court should protect the person.

[9] The appellant had contested an order restricting her liberty in the knowledge that her opposition would be dealt with by the respondents in private. Access to justice for persons with mental disorders was more likely to be secured against that background. Deterrence in accessing justice was a pertinent consideration (*H* v *Ministry of Defence* [1991] 2 WLR 1192 at 106-107). All appeals to the Court of Session from the respondents had been

dealt with by referring to the patient by way of an initial or initials (eg *G* v *Mental Health Tribunal for Scotland* [2015] CSIH 18; cf *Black* v *Mental Health Tribunal for Scotland* 2012 SC 251; see the pre-act *B* v *Forsey* 1987 SLT 681, 1988 SC (HL) 28). The lunacy jurisdiction of the English courts attracted anonymity (*Khuja* (*supra*) at para 14). The practice of the sheriffs principal was to anonymise appeals, notwithstanding the lack of an express provision enabling them to do so. The Practice Note had ended the automatic grant of anonymity in asylum cases. The Guidance Note (No.2 of 2011) on Anonymity Directions in the First Tier Tribunal (IAC) set out situations in which anonymity directions would often be made.

[10] In *A* v *Secretary of State for the Home Department* (*supra*), Lord Reed explained the general approach (at paras 47-50). There was no balancing exercise between Articles 3 and 10, as distinct from between 8 and 10. Interference with freedom of expression had to remain possible in order to comply with Article 3. This appeal was governed by Rule of Court 41.39, which allowed the court to hear all or some of the appeal in private. A private hearing, followed by a published opinion, could undermine the concerns underlying the need for such a hearing. Anonymity was preferable to the more drastic measure of sitting in private (*Khuja* (*supra*) at para 14). Plainly anonymity might be necessary if a person's mental health would be at risk, if his identity became publicly known or the disclosure of personal information would be humiliating and there was no public interest in it being published. The appellant's circumstances raised matters of delicacy and there was no public interest in disclosing her name.

[11] In most mental health cases Article 8 would be relevant. There required to be a balance struck with Article 10, since both articles were qualified. The question was whether, in a democratic society, it was necessary for there to be disclosure (*Khuja* (*supra*) at paras 22-23; see, in England and Wales, *R (C)* v *The Secretary of State for Justice* [2016] 1 WLR 444; Civil

Procedure Rule 39.2(4)). Even if there was no presumption that an order should be made in every mental health case (eg *Fuller* v *R* [2016] EWCA Crim 1867), it was a weighty consideration that the patient had an expectation that his or her name would not be disclosed in mental health proceedings involving compulsory measures.

[12] Identification of the appellant would carry a clear risk that sensitive matters would come into the public domain. In Article 8 terms, it was not clear why the public interest would make that necessary. There was a degree of prurience on the part of some sections of the public about persons who might suffer from mental health problems. The appeal contained a number of matters relating to the appellant's life and condition, which might be disclosed.

Respondents

[13] The respondents did not oppose the appellant's motion. They accepted the general principle that justice was administered by the courts in public (*A* v *Secretary of State for the Home Department* (*supra*) at para 23; *R (C)* v *Secretary of State for Justice* (*supra*) at paras 1 and 16). The purpose of the principle was to reassure the public and the parties that the courts were doing justice according to the law. One aspect of this was that the names of people, whose cases were being decided, should be public knowledge. There were exceptions to that, both at common law and under statute (*A* (*supra*) at para 27). One statutory exception was in relation to the respondents' hearings. When the respondents had been established under section 21 of the 2003 Act, one of the recommendations of the Millan Report (*New Directions – Report on the Review of the Mental Health (Scotland) Act 1984*, Chapter 9, paras 90 and 97 and Recommendation 9.6) had been that the hearings should be held in private

unless the patient objected. Schedule 2 of the 2003 Act had given the Scottish Ministers power to make rules about this. This had been done (Rules 66 and 73).

[14] There were two grounds on which the court could depart from the general principle. First, at common law it could do so as part of its inherent power to control its own procedure in the interests of justice (*A* (*supra*) at paras 27 and 33-34, 38). Necessity was the touchstone (*Khuja* (*supra*) at para 14). Anonymity might be necessary if the person's mental health would be at risk in the event of his or her identity becoming known, or where personal information would be humiliating and there was no public interest in its being revealed (*A* (*supra*) at paras 39 and 41). Secondly, the disclosure of information about a patient's health, criminal offending, sexual activities or other personal matters was an interference with his or her right to respect for private life (*Christian Institute* v *Lord Advocate* 2017 SC (UKSC) 29 at paras 75-77; *Z* v *Finland* (1998) 25 EHRR 371 at paras 70-71). A failure to disclose that information interfered with other rights to receive and impart information under Article 10 (*A* (*supra*) at para 47). Since Articles 8 and 10 were qualified, the court had to carry out a case-specific balancing exercise (*Khuja* (*supra*) at paras 22-23) in order to decide whether anonymity or disclosure was necessary in a democratic society.

[15] In the High Court and the Court of Appeal in England and Wales, CPR 39.2(4) stated that the court could order that the identity of any party should not be disclosed, if that was necessary to protect the interests of that party. In *R (C)* (*supra*) it was decided that CPR 39.2(4) required a balancing of Article 8 and 10 rights. There was no presumption that an order should be made in every case. There could be cases in which the court would refuse to anonymise (eg *Fuller* v *R* (*supra*)). The view of the Court of Appeal in *R (C)* (*supra*) should apply by analogy to the Court of Session. The respondents had no interest in anonymity being denied in the appeal. The appeal was likely to involve sensitive medical

and other personal information. Disclosure might have a worse effect on the patient than on someone who was not the subject of measures under the 2003 Act. The respondents would be against making such information public if it deterred patients from appealing in matters concerning their liberty (*H* v *Ministry of Defence* (*supra*)).

Decision

[16] The starting point in relation to the withholding of any information concerning civil cases pending before the courts is to recognise that it is an interference with the principle of open justice and the requirement that the courts should operate in a way which is transparent to the public. For this court, that principle is enshrined in the Court of Session Act 1693, which states:

> "... That in all tyme comeing all Bills Reports Debates Probations and others relating to processes shall be considered reasoned advised and voted by the Lords of Session with open doors where parties procurators and all others are hereby allowed to be present as they used to be formerly in time of Debates but with this restriction that in some speciall cases the saids Lords shall be allowed to cause remove all persons except the parties and their procurators ...".

The reason for the principle is a fundamental one; public scrutiny of the courts facilitates public confidence in the system. It helps to ensure that the courts are carrying out their function properly.

[17] In *A* v *Secretary of State for the Home Department* 2014 SC (UKSC) 151, which concerned the identification of a person to be deported as a convicted sex offender, Lord Reed, prior to referring to the 1693 Act and its sister act of the same date for the High Court of Justiciary (Act anent advising criminal processes with open doors), said (at para [23]) that:

> "[I]n a democracy, where the exercise of public authority depends on the consent of the people governed, the answer [to the question '*sed quis custodiet ipsos custodes*'] must lie in the openness of the courts to public scrutiny".

The two Acts, as Lord Reed emphasised (at para [24], citing *Scott* v *Scott* [1913] AC 417, Lord Shaw at 475):

> "formed part of the Revolution Settlement, and bore testimony to a determination to secure civil liberties against judges as well as against the Crown".

The Settlement had placed William of Orange and Mary on the throne instead of James VII in 1688 and established Parliamentary sovereignty, rather than the Divine Right of Kings, as the governing principle.

[18] *Scott* v *Scott* (*supra*) had determined that, in England, the courts could not hear a matrimonial cause *in camera*, even in the interests of public decency. In Scotland, the Lord President (Inglis) had already said, in the defamation context of *Richardson* v *Wilson* (1879) 7 R 237 (at 241, also cited by Lord Reed in *A* (*supra*) at para [25]), that:

> "... as Courts of Justice are open to the public, anything that takes place before a Judge or Judges is thereby necessarily and legitimately made public, and, being once made legitimately public property, may be republished without inferring any responsibility".

Open justice has two key elements. The first is that proceedings are heard and determined in public. The second is that the public has access to judicial determinations, including any reasons for them and the identity of the parties.

[19] In the modern era, members of the public rarely attend the courts to see the justice system in action. They rely on the press to provide them with accurate information on judicial proceedings; thus allowing the process of scrutiny to continue. In this jurisdiction at least, the court reporter is an endangered species. The press now largely depend on the courts themselves to supply relevant information on proceedings through the issue, in civil cases, of opinions. Freedom of expression, now enshrined in Article 10 of the European Convention, is effectively protected by the openness of the courts and their publication of

information on their proceedings in terms of the common law duty and now also the public hearing element in Article 6.

[20] All of this points to a continuing requirement for the courts to continue to publish information on the cases coming before them. A lawyer might still query the need for a party's name to be published. In so far as the development of the law is concerned, the identity of a party may be seen as irrelevant. However, the need to identify the parties was comprehensively explained by Lord Rodger in *In re Guardian News and Media* [2010] 2 AC 697 (at para 63) when he answered his own question "What's in a name?" by saying "A lot". The press required to name names in order to attract readers and hence promote continued scrutiny of the civil justice system.

[21] Before considering what derogations or exceptions from the general principle of open justice are available, it is important to distinguish between two procedures. The first is the court's power, under the 1693 Act and at common law (*A* v *Secretary of State for the Home Department* 2013 SC 533, LP (Gill) at para 38, citing *Scottish Lion Insurance Co* v *Goodrich Corp* 2011 SC 534 and, for the High Court, *A* v *Procurator Fiscal, Dundee* 2018 SLT 72, Lord Turnbull at para 17 citing Erskine: *Institutes* i.II.8) not only to exclude the public (and sometimes, but only in the rarest of circumstances, the press) from a court hearing, but also to withhold information, including the names of parties, from materials, notably opinions, which they publish either in hard copy or on the internet. Courts may, for example, elect to "anonymise" an opinion. The fact that a court decides to do this does not restrict the press, or others, from publishing what they have heard at a court hearing or from disclosing the name of a litigant, of which they have become aware either as a result of being present at the hearing, by asking at the court offices or finding out by other means. The court's ability to regulate what it discloses in or about of its own proceedings cannot operate as a means of

press censorship on a report of these proceedings from someone present at the relevant hearing.

[22] The second procedure is the making of an order under section 11 of the Contempt of Court Act 1981. It states:

> "In any case where a court (having power to do so) allows a name or other matter to be withheld from the public in proceedings before the court, the court may give such directions prohibiting the publication of that name or matter in connection with the proceedings as appear to the court to be necessary for the purpose for which it was so withheld."

A preliminary requirement of this process is the withholding of a name or other matter (ie the first procedure (*supra*)). The court can then make a reporting restriction in terms of the section. It is only the latter which can affect third parties, notably the press (*A* v *Secretary of State for the Home Department* (*supra*), Lord Reed at para [55] *sub nom* "orders *contra mundum*"). If a reporting restriction is made, then, in this court, the persons affected (ie the press) can make appropriate representations in terms of RCS 102.3 and 102.5; no doubt based at least in part on Article 10 and common law. If the order stands, it will be fenced with the powers of the court relative to the punishment of contempt.

[23] Before making any order, the court should be aware of the general restrictions on reporting which are already imposed by statute. There is no need to anonymise, where the criminal law already prohibits publication. In criminal cases, where the 1693 Act has become section 92(3) of the Criminal Procedure (Scotland) Act 1995, the press are not excluded from cases involving allegations of "rape or the like" on the understanding that they do not reveal the identity of the complainer (see also the Sexual Offences (Amendment) Act 1992, s 1). Section 47 of the 1995 Act prohibits the identification of children. In civil cases, the exceptions are far more limited. The Judicial Proceedings (Regulation of Reports) Act 1926 restricts what may be published in divorce proceedings. It excludes any indecent

or, in essence, medical details; but the names of the parties and the opinion of the court may still be published. There are few other express prohibitions, although there is specific statutory authority which allows the court to prohibit the press reporting the identities of children (Children and Young Persons (Scotland) Act 1937, s 46). Unlike criminal proceedings, a court order is required. Adoption proceedings are determined in private (Adoption and Children (Scotland) Act 2007, s 109). Publication of proceedings at a Children's Hearing is prohibited (Children (Scotland) Act 1995, s 44). Given all of these specific statutory incursions into what is a constitutional principle of open justice, the court must be slow to create further exceptions other than in "the most compelling circumstances" (*In Re S (a child) (Identification: Restrictions on Publication)* [2005] 1 AC 593, Lord Steyn at para 20).

[24] Such circumstances do exist. There are situations in which the court can, and sometimes must, withhold information, and in addition make a reporting restriction, but these must be set against the background of the general principle. They should be rare events and depend not upon categories of case but individual circumstances.

[25] The court should seldom anonymise its own processes and should never do so without having a written record, perhaps to be kept under secure conditions, of the identity of the anonymised litigant (see *Scottish Ministers* v *Stirton* 2014 SC 218, LJC (Carloway) at para [102]). There would require to be quite exceptional circumstances before the court would permit a litigation to proceed with an instance containing initials or a pseudonym. Given the court's other powers of anonymisation and reporting restrictions, the need for such a protection could only arise in the most extreme cases.

[26] In cases in which disclosure of a person's identity would threaten his or her life, or put him or her at risk of torture or inhumane and degrading treatment, the court would

require to withhold that person's identity from a court opinion to be published on the internet. A section 11 order may also be merited if there were, despite anonymisation, a risk of publication of the identity by the press (ie the situation in *A (supra)*). The threat or risk would have to be a real or substantial one. An action of this type should not be taken as a matter of routine or applied to a wide category of cases. Each case requires to be considered on its merits.

[27] In non life/torture threatening situations, it is for the court to balance the competing rights; eg respect for privacy or property (eg trade secrets; see *Bank Mellat* v *HM Treasury* [2014] AC 700, Lord Neuberger at para 2) on the one hand with open justice/transparency and freedom of expression on the other. This may be a finely balanced exercise, but the starting point, or presumption, remains open justice. It is not enough for an order to be convenient or even desirable. It must be "a matter of necessity in order to avoid the subordination of the ends of justice to the means" (*A* (*supra*), Lord Reed at para [30] quoting from *Re K (Infants) sub nom Official Solicitor* v *K* [1965] AC 201, Lord Devlin at 239; *Al Rawi* v *Security Service* [2012] 1 AC 531, Lord Neuberger MR at para 21, following *Scott* v *Scott* [1913] AC 417, Lord Haldane LC at 437-8). In approaching the issue in a particular situation, the court should choose the least restrictive option; the most restrictive being closed doors (including the advising) and the least being anonymity of names in the opinion published by the court, but no section 11 order.

[28] In this particular case, the fact that the appellant was in some way involved with the mental health regime is an important consideration. Under the previous mental health regime (Mental Health (Scotland) Act 1984, s 21(4)) there was specific provision requiring the sheriff to conduct any proceedings in private if requested to do so. This may have stemmed from the idea that the sheriff's jurisdiction was administrative rather than judicial

(*F* v *Ravenscraig Hospital* 1989 SLT 49, Lord McDonald, delivering the opinion of the court, at 52). As the Millan report (*supra*) observed (at para 9.14), this meant that there was "virtually no published information regarding the operation of the sheriff courts in mental health hearings"). Nevertheless, when devising a new tribunal system, the report recommended (at para 9.97; recommendation 9.6) that hearings should be held in private unless the patient objected. This became the procedure (Mental Health Tribunal ... (Practice and Procedure) (No.2) Rules 2005, rule 66(1)). Mental Health Tribunal procedures will normally be held in private (see *R (C)* v *Secretary of State for Justice* [2016] 1 WLR 444, Lady Hale at para 26, cited in *PW* v *Chelsea and Westminster Hospital NHS Foundation Trust* [2018] EWCA Civ 1067, Sharp LJ at para 70). When matters reach an appellate or reviewing court, which is to determine a point of law, different considerations may come into play especially where, as in this case, the facts about the patient's condition are not in issue. The report recommended a right of appeal to the Court of Session on a point of law, but there was no provision requiring court proceedings to be heard *in camera*.

[29] Care may be needed to protect a mental health patient from having his or her privacy unnecessarily disrespected. Where an appeal is on a point of law, it will seldom be necessary to divulge details of a patient's illness in a court opinion or during the course of an appeal hearing. The press or public would not normally have access to those details. It is quite another matter to anonymise, or to prohibit publication of, the name of an appellant simply because by doing so would reveal that he or she is in some way involved in mental health proceedings. That fact, as a matter of public record, should hardly be kept secret, even if during the appeal hearing it seemed to be suggested by both parties that it would not be divulged, even to close relatives who may be concerned about what had happened to the patient. In most cases, the fact that a patient is subject to mental health proceedings will be

known to those in the patient's immediate circle of friends, family and quite possibly wider community. It is not to be, and should not be, kept secret when doing so would conflict with the general need for open justice.

[30] It was asserted that the revealing of a patient's identity in this limited manner might discourage them from appealing decisions taken by the respondents. There was no evidential basis for this proffered. It was also said that it would in some way have an adverse effect on the appellant's health. There was no evidence of this. If there were a real or substantial risk that identifying the appellant as someone involved in the mental health system would have a significant impact on the appellant's mental health, that is something which the court would be bound to take into account. There is no medical opinion to that effect. However, if it were to be, then the court hearing the merits of that appeal may reconsider matters in so far as their own opinion is concerned. As matters stand, there is insufficient material to justify anonymising the appellant's name in these proceedings. If the appellant wishes to design herself as care of a firm of agents, she may do so in the appeal documents and justify that by way of averment. That is a different issue. The motion as it stands should be refused.

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OPINION OF LADY DORRIAN, the LORD JUSTICE CLERK

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[31] I have had the opportunity of reading in draft the opinion of your lordship in the chair and I am in agreement with it.

[32] The first part of the argument for the appellant related to the motion to "anonymise her details to the initials "MH" and to design her care of [her solicitors] in order to protect her privacy". In the motion, the only explanation for seeking such an order was that the appellant was a vulnerable individual and the matter concerned the conduct of the MHTS.

In explaining the exact nature of the order he sought, counsel explained that he sought an order from the court that the appellant should, in the instance, be designated only by her initials, and that in such a way only should the case appear on the rolls of court. This, he submitted, was an order which it was within the common law powers of the court to grant.

[33] The second part of the submission related to the effect that making such an order would have. It was submitted that this would be equivalent to an order under s 11 of the Contempt of Court Act 1981: the publication or dissemination of any material revealing the identity of the appellant would constitute a breach of an order of the court, and so be punishable for contempt of court. A specific order under s 11 would not be needed.

[34] In advancing the first part of his submissions, and conscious of the decision in *R(C)* v *Secretary of State for Justice* [2016] 1 WLR 444, counsel claimed to disavow any argument that there should be a presumption of "anonymization" in appeals from the MHTS. However, he repeatedly asserted that there should be "if not a presumption, at least an assumption" of "anonymity" in these cases. His argument was clearly predicated on the generality of cases, because he did not advance arguments which were in any way specific to the circumstances of this particular appellant. The whole tenor of this argument was that mental health appeals were not cases where the principle of open justice applied "in an unvarnished way". Patients in appeals from the MHTS were entitled to expect that their identity would not be revealed. The reality, therefore, was that counsel, despite his disavowal of the point, was arguing for a rebuttable presumption that appellants in appeals from the MHTS should not be identified, and that their identity should not appear in the instance of the appeal, nor be published in the rolls of court.

[35] I am unable to accept such a submission. There are statutory exceptions to the principle of open justice in relation to proceedings before the MHTS, but these do not apply

to appeals. The primary focus of the MHTS will be the welfare of the patient and the medical or therapeutic interventions which may be required, all of which naturally requires considerable focus on the nature, degree and effect of the illness from which the patient is suffering. By contrast, these issues are not likely to feature to a great extent in appeals, the scope of appeals is limited in terms of section 324(2) of the Mental Health (Care and Treatment) (Scotland) Act 2003. The focus of the appeal will be on the legal formalities and proprieties of the process and the decision making. The present case, being one concerned only with the question of jurisdiction, is a case in point. The factors which led to the statutory exceptions in relation to proceedings before the Tribunal do not apply with equal force to appeal proceedings, and the principles of open justice remain in full vigour. That is not to say that the court will not take steps to prevent disclosure of an individual's name, or other personal and intimate details, where the interests of justice demand it, but the court must be satisfied that the balance lies in favour of concealment, not the other way round. The argument for the appellant inverts this, by submitting that the material should be withheld unless the public interest requires disclosure.

[36] It is abundantly clear that the court would have power to order that the identity of an appellant should be withheld from the public should the circumstances indicate that it was necessary to do so in the interests of justice. For the ways in which this might be done, see para 61 of *A* v *Secretary of State for the Home Department*, 2014 SC 151. However, in addressing that question, the principle of open justice, which is a paramount consideration, requires to be balanced with the interests of the individual litigant, the reasons the order is sought, the possible effect which might follow were the identity revealed, the consequences for the administration of justice, and so on. It is not a matter of presumption or assumption. I do not consider there is any basis for considering an application in a case such as this as

standing in any different position from any other case, such as an asylum case, or one where sensitive commercial information is at stake. As is clearly identified in *A* v *Secretary of State for the Home Department* (*supra*) the rule of open justice is a constitutional principle departure from which requires a compelling justification, and should extend only to the degree that the public interest of necessity dictates.

[37] Nor am I able to accept the submission that the making of an order at common law that the identity of an individual litigant be withheld would be an order having equivalent effect to the making of an order under section 11 of the Act. In my view counsel for the appellant was mistaken in his understanding of the nature of the order that the court would make at common law, where it found that there were reasons making it necessary for the identity of the individual to be withheld from the public. In the Inner House in *A* v *Secretary of State for the Home Department* [2013] CSIH 43, the Lord President (Gill) stated [at para 38] that the inherent power of the court was to "withhold the identity of a party where, regardless of the outcome of the case, the disclosure … would constitute an injustice". The nature of the inherent jurisdiction, as one allowing material to be withheld from the public, appears also from Lord Reed's discussion of the matter in *A* v *Secretary of State for the Home Department* (*supra*) at paras 37-38. It seems to me that an order of the court allowing an individual's identity not to be disclosed in open court, or otherwise to be withheld from the public, is simply that: an order permitting information to be withheld. It is effectively permissive, in allowing material to be withheld from public gaze, rather than a prohibitory order against third parties, preventing the reporting of the information, or the disclosure otherwise of the identity of the individual. It is part of the court's inherent ability to regulate its own procedure. In *Khuja* v *Times Newspapers* [2017] 3 WLR 351, Lord Sumption, in a judgment with which Lord Reed agreed, observed (para 18) that

> "The inherent power of the court at common law to sit in private or anonymise material deployed in open court has never extended to imposing reporting restrictions on what happens in open court. Any power to do that must be found in legislation"

Although relating to a different jurisdiction, that observation appears to me to be equally relevant to the inherent jurisdiction of the Court of Session. The Court of Session Act 1693 recognised that the court had power to derogate from the principle of open justice by causing the removal of the public from the courts, but it has ever been the practice that when this has been done, the press have been allowed to remain.

[38] Had the nature of an order allowing an individual's identity, or other information, to be withheld from the public been as counsel for the appellant suggested, it would hardly have been necessary for section 11 to be enacted: the court's order would have been sufficient, and breach of it could automatically have been punished as contempt. In *A* v *Secretary of State for the Home Department* (*supra*), Lord Reed (para 69) noted that, but for the section 11 order, the BBC would have been able to report the identity of the appellant, despite the other steps taken by the Lord Ordinary to have the appellant's name withheld from the public. In the *Scottish Lion Insurance Company* v *Goodrich Corporation* 2011 SC 534, referred to at para 35 in *A* v *Secretary of State for the Home Department* (*supra*), the order allowing names to be withheld was backed up by a section 11 order, and this was clearly seen as being necessary to make the common law order effective.

[39] Section 11 of the Act applies only where the court, having power to do so, has allowed a name or other matter to be withheld from the public. In these circumstances the section gives the court the added power to give directions prohibiting the publication of the relevant information, but only so far as necessary for the purpose for which the information was withheld. That is why the power in section 11 is referred to as "ancillary" to the court's

common law powers. This was noted in para 59 of *A* v *Secretary of State for the Home Department* (*supra*):

> "As Lord Rodger explained in *Re Guardian News and Media Ltd* (para 31), sec 11 does not itself confer any power upon courts to allow 'a name or other matter to be withheld from the public in proceedings before the court', but it applies in circumstances where such a power has been exercised. The purpose of sec 11 is to support the exercise of such a power by giving the court a statutory power to give ancillary directions prohibiting the publication, in connection with the proceedings, of the name or matter which has been withheld from the public in the proceedings themselves. Section 11 thus resolves the doubt which had arisen following the Socialist Worker case as to the power of the court to make such ancillary orders at common law. The directions which the court is permitted to give are such as appear to it to be necessary for the purpose for which the name or matter was withheld."

In *A* v *Secretary of State for the Home Department* (*supra*), *(para 74)* Lord Reed noted that the Tribunal had determined that should the appellant's identity become known it would put him at risk. He added that:

> "In those circumstances, the court's failure to make a sec 11 order would, as the Lord President observed, have had the grave consequence that the deportation might create all the risks that the tribunal's directions as to anonymity had been intended to prevent."

In other words, the section 11 order enabled the court's decision, at common law, to withhold information to be made effective.

> "Put shortly, the order had to be made if the court was to do its job, notwithstanding the resulting restriction upon the BBC's capacity to do its job." (para 76).

I agree with the way the matter was expressed by Lord Sumption in *Khuja* v *Times Newspapers* (*supra*), at para 14:

> "Where a court directs that proceedings before it are to be conducted in such a way as to withhold any matter, section 11 of the Contempt of Court Act 1981 allows it to make ancillary orders preventing their disclosure out of court."

[40] For these reasons, and those given more fully by your lordship, I agree that the motion should be refused.

FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2019] CSIH 14
XA65/18

Lord President
Lord Justice Clerk
Lord Malcolm

OPINION OF LORD MALCOLM

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

in the cause

MH

Appellant

against

THE MENTAL HEALTH TRIBUNAL FOR SCOTLAND

Respondents

Appellant: Blair; Balfour & Manson
Respondents: Pirie; Legal Secretary to the Mental Health Tribunal

15 March 2019

[41] At first sight the appellant's application may seem straightforward and uncontroversial. The appeal raises a pure question of law as to whether the tribunal was able to make a lawful order. The case can be decided and the answer publicised to the world at large without any need to identify the appellant or mention the nature of her mental disorder. The doors of the court can be open throughout the hearing so long as no one says anything or distributes any document which reveals the appellant's name. It might

be said that there is no obvious public interest in the identity of the person challenging the tribunal's decision. A satisfactory compromise of the competing interests can be achieved, with which no one could reasonably object.

[42] If the discussion was confined to a competition between ECHR article 8 privacy rights and press freedom of expression under article 10, there would be force in the above analysis. However, long before article 8 and the relatively recent development of a privacy law, our courts insisted upon a general principle to which great weight must always be attached, namely that judicial proceedings are held in public and the parties are named in court and in judgments. This can be traced as far back as the Court of Session Act 1693. It was affirmed in *Scott* v *Scott* [1913] AC 417. Since then statutory exceptions have been created, for example for reasons of public decency or for the protection of children; but the importance of the default position has never been doubted. Any qualification must be justified as clearly necessary in the interests of justice. When the parties consent to secrecy, judges must be "most vigilant" (*R* v *Westminster City Council ex p P* (1998) 31 HLR 154, Sir Christopher Staughton at 163). Where a derogation is justified, it should be the least required to satisfy the circumstances of the case. In short, the general principle must be upheld unless to do so would thwart the essential purpose of the courts, namely to administer justice fairly and in a manner which fosters the trust and confidence of the public in our laws and the judicial system.

[43] Lord Diplock has explained the position as follows:

> "If the way that courts behave cannot be hidden from the public ear and eye this provides a safeguard against judicial arbitrariness or idiosyncrasy and maintains the public confidence in the administration of justice. The application of this principle of open justice has two aspects: as respects proceedings in the court itself it requires that they should be held in open court to which the press and public are admitted and that, in criminal cases at any rate, all evidence communicated to the court is communicated publicly. As respects the publication to a wider public of fair and

> accurate reports of proceedings that have taken place in court the principle requires that nothing should be done to discourage this." (*Attorney General* v *Leveller Magazine Ltd and Others* [1979] AC 440 at 450 A-B)

In *R (C)* v *Justice Secretary* [2016] 1 WLR 444, at paragraph 1, Lady Hale, when handing down the judgment of the court, began as follows:

> "The principle of open justice is one of the most precious in our law. It is there to reassure the public and the parties that our courts are indeed doing justice according to law. In fact, there are two aspects to this principle. The first is that justice should be done in open court, so that the people interested in the case, the wider public and the media can know what is going on. ... The second is that the names of the people whose cases are being decided, and others involved in the hearing, should be public knowledge."

[44] Similar reasoning applies in the context of article 6 of ECHR. In *Re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593, Lord Steyn drew attention to the observations of the European Court of Human Rights in *Diennet* v *France* (1995) 21 EHRR 554:

> "The court reiterates that the holding of court hearings in public constitutes a fundamental principle enshrined in article 6. This public character protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. By rendering the administration of justice transparent, publicity contributes to the achievement of the aim of article 6(1), namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society ... ". (paragraph 33)

His Lordship noted that there are numerous automatic statutory reporting restrictions, for example in favour of victims of sexual offences, and also statutory provisions providing for discretionary reporting restrictions, such as in respect of official secrets. However:

> "Given the number of statutory exceptions, it needs to be said clearly and unambiguously that the court has no power to create by a process of analogy, except in the most compelling circumstances, further exceptions to the general principle of open justice." (paragraph 20)

[45] The case law, for example the *Leveller* case, reveals that there have been doubts as to the ability of the court under its inherent common law power to pronounce orders binding upon the public at large, for example by way of a restriction on press reporting, the breach of which automatically amounts to a contempt of court. (Section 11 of the Contempt of Court Act 1981 was passed in response to the observations made by the judges in that case.) However, it has always been clear that the court can regulate its own procedure, for example by deciding that the proceedings, or a part of the proceedings, be held in private, or that a witness should give evidence on an anonymous basis. If the court has made such an order and someone publicises details as to the proceedings or names the witness, this can amount to a contempt, but only if the circumstances demonstrate a calculated and wilful interference with the administration of justice.

> "For that to arise (the publication amounting to a contempt of court) something more than disobedience of the court's direction needs to be established. That something more is that the publication must be of such a nature as to threaten the administration of justice either in the particular case in relation to which the prohibition was pronounced or in relation to cases which may be brought in the future. So the liability to be committed for contempt in relation to publication of the kind with which this house is presently concerned must depend upon all the circumstances in which the publication complained of took place." (*Leveller*, Lord Diplock at page 465)

[46] In *Independent Publishing Co Ltd* v *Attorney General of Trinidad and Tobago and Another* [2005] 1 AC 190, when delivering the judgment of their Lordships, Lord Brown of Eaton-under-Heywood said at paragraph 67:

> "Their Lordships likewise conclude that if the court is to have the power to make orders against the public at large it must be conferred by legislation; it cannot be found in the common law. It is not for the Board to say whether or not such legislation is desirable. Sometimes, no doubt, an actual order rather than merely a warning may be judged necessary (as perhaps in this very case). There may, however, be fears lest the power be too readily invoked – always a concern with regard to prior restraint orders. If, moreover, legislation is to be enacted, it should include a right of appeal by those aggrieved (such as was added in the United Kingdom by section 159 of the Criminal Justice Act 1988). "

Again it was recognised that, regardless of the legality of an order, the publication of matters likely to prejudice the fair administration of justice, particularly if a warning has been given by the court, could still give rise to a contempt of court. In the UK, the necessary power is provided by section 11 of the Contempt of Court Act 1981; however, counsel for the appellant disavowed any request to the court to exercise its powers under that provision.

[47] From the above it can be concluded that if the court restricts the disclosure of information, in the absence of an ancillary section 11 order (which is subject to important procedural safeguards to preserve article 10 rights: see chapter 102 of the rules of court) disclosure of that information by a third party is not necessarily a punishable contempt of court. It may be a contempt, but only if the circumstances so demonstrate.

[48] Often the judicial discussion revolves around balancing article 8 and article 10 rights. If there is a legitimate public interest in the matter at issue the latter often prevails, and *vice versa*. However, in respect of a proposed restriction on the public's right to know what is happening in the courts and who is involved, the scales are skewed in favour of openness and transparency. That said, courts in England and Wales have recognised wardship and cases concerning the treatment of those with mental disorders as being in a special category standing apart from the public administration of justice. Reference can be made to the speech of the Earl of Halsbury in *Scott* v *Scott* at pages 441/2. Such proceedings are seen as involving purely private matters: *R (C)* paragraph 27. Though either or both can be relaxed, for example in respect of dangerous persons, the starting point in such proceedings is privacy and anonymity. No doubt similar thinking underpins the procedural rules applicable to the Mental Health Tribunal for Scotland. The view has been taken that if confidential personal or medical information can be publicised, there will be a "chilling

effect" on the willingness of patients to be open and frank with those responsible for their care and treatment, and inhibit proceedings designed to review compulsory treatment measures. The "therapeutic exercise" may be compromised. Disclosure can put the patient and perhaps others at risk, and have an impact on successful reintegration into the community (*R (C)* paragraphs 26/39).

[49] In England and Wales the practice now is that proceedings in the Court of Protection are public, but the court may impose anonymity restrictions in what is, interestingly, called a "transparency order". The judge requires to carry out an evaluative exercise, akin to a discretionary decision, balancing the competing considerations – see *PW* v *Chelsea and Westminster Hospital NHS Foundation Trust* [2018] EWCA Civ 1067 paragraph 74. The reforms in this regard south of the border, which have taken place even in respect of proceedings involving personal and medical information of a highly sensitive nature, have not, as yet, travelled north to the doors of the tribunals in Scotland. It can however be noted that in *PW* Peter Jackson LJ said: "In cases of this nature, the balance between articles 8 and 10 will normally be found to tip in favour of protecting the identity of the individual concerned." (paragraph 98)

[50] For a mental health tribunal the focus will be on the patient and his or her medical and personal circumstances. However, if an appeal is taken from a tribunal to the courts on a point of law, the starting point is openness and transparency. An exception must be justified as necessary for the proper administration of justice. If, absent anonymity, there would be a serious risk of interference with the appellant's private life such as would undermine or amount to an affront to her personal integrity, then that would weigh heavily in the balance. The court must act compatibly with the appellant's article 8 rights. In the present case, the most which can be predicted is the appellant's identification as someone

who is challenging an order that she requires compulsory treatment measures in respect of a mental disorder. Is that sufficient to override the public interest in the openness and transparency of these court proceedings, and the article 10 rights of the press and others in respect of an appeal hearing in Scotland's highest civil court?

[51] The relatively recent proliferation of the use of initials in court judgments suggests that it is tempting to err on the side of anonymity. A tendency to downgrade the importance of naming those involved was given an important corrective in the judgment of the UK Supreme Court delivered by Lord Rodger of Earlsferry in *Re Guardian News and Media Ltd and Others* [2010] 2 AC 697. It was in response to the observation that the court's term docket read "like alphabet soup". At paragraph 25 his Lordship drew attention to the existence of specific statutory restrictions on what may be reported in various kinds of cases, and to Lord Steyn's injunction in *Re S* as to the need for compelling circumstances to justify further exceptions to open justice. There are well-recognised examples of cases where the court has been prepared to exercise its inherent power, for example if the matter at hand concerns an alleged blackmailer, or the protection of confidential or secret information. However, in general, court litigation is inconsistent with a desire for privacy. And it is a vital part of open justice that the press should be free to report proceedings in court.
Lord Rodger explained the importance to the media of the ability to put a name to the participants – see paragraph 63. He quoted Lord Steyn's reference to reports of "disembodied" trials and an adverse impact on informed debate about criminal justice. It was noted that judges have warned against press censorship and any temptation to act as if they were newspaper editors: see *Attorney General's Reference (No 3 of 1999)* [2010] 1 AC 154 at paragraph 25.

[52] The appellant's application for an anonymity order is not supported by evidence as to any specific adverse impact on her health or welfare if an order is refused. The submission is that the order should be granted more or less automatically given the background to and context of the appeal to this court. In *R (C)* (paragraph 21) a distinction was drawn between civil proceedings which happen to involve a person with a mental disorder, and those concerning compulsory powers of detention, care and treatment under mental health legislation. The peculiarity of this case is that it straddles both; however, in my view, it is of significance that there will be no reason for the court to investigate or publicise medical or other personal information about the appellant. The appeal is on a pure question of law. The court will not be exercising a "parental" jurisdiction of the kind discussed by the judges in *Scott*, see for example Lord Atkinson at page 462 and Lord Shaw of Dunfermline at page 483.

[53] I have not identified the compelling circumstances necessary to justify any interference with the principle of open and transparent justice. Unless the court is vigilant and gives appropriate weight to this important pillar of our justice system, there is a real risk that exceptions will accrue incrementally, step by step, until the general rule is evidenced as as much in the breach as the observance: see the speech of Lord Steyn in *Re S* at paragraphs 29 and 33. Questions can at least be asked as to the more or less automatic secrecy afforded to proceedings in mental health tribunals in Scotland, extending, so the court was informed, even to the reasons for a decision, not least given recent reforms in England and Wales. Moreover, if the court was to grant this order, it could be seen as maintaining, or even fostering, outdated notions of shame and stigma attaching to mental illness.

[54] Having regard to all the relevant competing considerations, including those under articles 8 and 10, in my opinion the balance remains tilted in favour of unrestricted open justice. It follows that I would refuse the application for an anonymity order.