OUTER HOUSE, COURT OF SESSION

[2024] CSOH 107

P224/24

OPINION OF LORD LAKE

In the Petition of

MC (FE/LA)

Petitioner

for

Judicial Review

Petitioner: Leighton; Drummond Miller LLP
First Respondent: McGuire; Mental Health Tribunal Scotland
Second Respondent: MacPherson; Scottish Government Legal Directorate

4 December 2024

[1] The petitioner is the subject of a Compulsory Treatment Order ("CTO") made under the Mental Health (Care and Treatment) (Scotland) Act 2003. In terms of that order, she is detained at the Royal Edinburgh Hospital in "low secure" conditions. The petitioner has made applications for discharge of the CTO in terms of section 100 of the 2003 Act that have been refused. The most recent was determined on 27 March 2024. In the petition, she claims that the most appropriate place for her to be treated is outwith hospital, that she requires care consistent with being in the community and that she does not require to be in hospital. The first respondent is the Mental Health Tribunal for Scotland and the second respondent is the Lord Advocate.

Remedies sought

[2] Two remedies are sought in the petition; (1) an order requiring the first respondent to read the relevant parts of the Act such that the petitioner is able to make an application for an order under Chapter 3 of Part 17 of the Act declaring that she is being detained in "inappropriate conditions" and specifying a period during which a community placement should be identified, or (2) declarator that the relevant parts of the Act are in breach of her rights in terms of the ECHR, Article 14. In the course of the hearing, it was accepted by counsel for the petitioner that there was no way in which the Act could be read to produce the desired result that would "go with the grain" [*Ghaidan* v *Godin-Mendoza,* [2004] 2 AC 557]. It was common ground that it is not appropriate for the court to attempt to re-write legislation. The result was that the issue was really whether the legislation infringes Article 14 and the petitioner should be granted the declarator she seeks.

Petitioner's submissions

[3] The petitioner contends that the 2003 Act discriminates against her. She points to the fact that patients wishing to move from high to medium security or from medium to low security can apply to the Tribunal under Chapter 3 of Part 17 of the Act for a declaration that they are detained in conditions of excessive security. If the Tribunal declare that the patient is being detained in conditions of excessive security, it may specify a period of not more than 3 months in which the Health Board must identify a hospital in which the patient could be accommodated and which is, "a hospital in which the patient could be detained in conditions that would not involve the patient being subject to a level of security that is excessive in the patient's case." As the petitioner is already detained in "low secure"

conditions it was common ground that she was therefore not able to make such an application.

[4] In the petition, it is averred that the petitioner has been a "delayed discharge patient" since January 2003. During the hearing, it was clarified that this was intended to mean a patient who is fit to be discharged but is not in fact discharged because there is no place suitable for them to go. It was recognised by counsel for the petitioner that she is not fit to be returned home but it is claimed that she is presently fit to be discharged. She has previously made an application for accommodation to the local authority and sought judicial review of the decision to refuse this but did not insist in her action as changes in her condition meant that she ceased to be fit to be discharged.

[5] It was submitted that the circumstances satisfied the five tests relevant for an inquiry as to whether there has been a breach of Article 14 which were approved by Lady Hale in *Ghaidan*, paragraphs 133 and 134. It was submitted that the petitioner's situation fell within the ambit of the convention as she seeks to be released from detention in hospital and into the community. By reference to *Clift* v *United Kingdom* which was approved in *Stott* v *United Kingdom* (2024) 78 EHRR, it was said that the conditions for a move from being detained to not being detained would fall within the ambit of Article 5 which prevents arbitrary detention. In addition, in that the Health Board would be required to identify accommodation which was suitable for her, it was said that it fell within the ambit of Article 8. In that regard, reference was made to *Marzari* v *Italy,* (1999) 28 EHRR CD 179-180, in which the court had said that a refusal to provide assistance for housing to an individual suffering from severe disease was capable of raising an issue under that Article.

[6] The requirement that there had been differential treatment was said to be met in that other patients were able to get an order requiring that they are provided with a place in

suitable accommodation whereas she was not. In relation to status, it was noted by reference to *Clift* that the status need not be something that exists independently of the treatment which has led to the complaint. It was submitted that she had the necessary status by reason of being a delayed discharge patient, ie was fit to be discharged but could not because of the absence of suitable accommodation for her. In relation to the requirement that the comparators be in an analogous situation, it was accepted that she was seeking to bring an end to her detention whereas persons seeking an order under Part 17 could only change the conditions of detention. It was submitted that this was not a sufficiently big difference to mean that the two situations were not analogous and that the application of Article 14 was not precluded. It was submitted that she is analogous to a person who is not a delayed discharge patient and who is seeking orders under Part 17.

[7] In relation to the question of justification, by reference to *R (Steinfeld)* v *Secretary of State for International Development* [2020] AC 1 it was noted that it must be the difference in treatment that is reasonable not the scheme under which the difference arises. It was submitted that the onus to justify the difference in treatment lay on the respondents and that they had not suggested any justification for the different treatment of the petitioner. It was submitted by reference to *Clift* that the fundamental importance of the guarantees in Article 5 to be free from arbitrary detention was such that there was the need for careful scrutiny of differences of treatment.

[8] It was also submitted that the United Nations Convention on the Rights of Persons with Disability was relevant to the question of interpretation. It was submitted that the law in relation to that convention was the same as it had been in relation to the convention on human rights prior to its incorporation in the Human Rights Act. This meant that while the convention did not have direct force, Acts of Parliament were to be read as far as possible so

as to be in conformity with it. However, as noted above, the petitioners had come to accept that the Act could not be read to achieve the result they sought and the convention was therefore not of relevance to the decision.

Respondents' submission

[9] Counsel for the Tribunal referred me to a definition of 'delayed discharge patient' contained in a publication entitled "Delayed Discharges in NHS Scotland", an annual summary of patient data prepared by Public Health Scotland and published in 2023. Counsel noted that the term "delayed discharge patient" was not one used in the Act. By reference to the petitioner's most recent application to discharge the CTO that had been rejected, it was noted that not only had the Tribunal not revoked the order, they had not agreed to a submission that they should note a recorded matter putting a timeline for finding alternative accommodation as a pathway to discharge. It was submitted that this decision indicates that the petitioner is not in fact fit to be discharged and that this fundamentally undermined the basis of the petition in that she was not a delayed discharge patient. It was noted that the petitioner had failed to exhaust remedies available to her. She had not sought to appeal the refusal of her application for revocation of the CTO or the refusal to note a recorded matter. In so far as provision of accommodation was concerned, it was submitted that she could have brought proceedings against the local authority for performance of their duties and she had failed to use this remedy.

[10] In relation to the substance of the challenge, it was submitted that neither Article 5 nor Article 8 were engaged. Article 5 seeks to prevent arbitrary detention and does not address the conditions on which detention takes place. In the present case the detention is authorised by a CTO and is clearly lawful in terms of Article 5(1)(e). On the face of the

petition, the petitioner's concern is not with detention as such but with the conditions of detention. Article 8 is not engaged as there is no complaint about the hospital in which she is detained or the treatment she gets there.

[11] In relation to status for the purposes of Article 14, it was submitted that being a delayed discharge patient would not be sufficient as it is too vague a concept. In relation to the comparators, it was submitted that there are fundamental differences between the petitioner and persons detained under conditions of high or medium security and also between the petitioner's concern and the application which might be made by the identified comparators with the result that there was no similarity between them. It is suggested that the type of application made by comparators was very different in that it addresses only the conditions under which they are detained and not the issue of whether or not they should be detained. A successful outcome for persons making an application under Part 17 is that they will remain in hospital albeit under different conditions. It was said that insofar as the issue of justification arises, the justification for any differential treatment comes from the legislation and its structure. The legislation deals with the concerns that arise from patients with different security levels in a proportionate manner. Those patients at the higher levels can seek to have a determination that they should be detained at a lower level. If patients are at a lower level, they can seek revocation of the order under section 100 or the recording of a matter to delineate their pathway.

[12] Counsel for the second respondent aligned himself with the submissions made for the first respondent. He too suggested that the petitioner could not be seen as a delayed discharge patient. In particular, he said that the petitioner's averment that she was "trapped" was not correct. It was submitted that there is a material difference between making changes to the levels of security within which a person is detained and a decision to

release them. The difference was such that the comparators identified by the petitioners are not properly analogous. It was submitted that she was in a different position and therefore no issue of differential treatment arose. By reference to *Clift*, it was noted that the requirement was that the comparators be "relevantly analogous" and it was maintained that the comparator identified by the petitioner does not meet this requirement. The statutory provisions in Part 17 deal with changes to the condition in detention. The petitioner complains that she is unable to rely on that but she is seeking something quite different from the remedy provided by those provisions. She is not seeking to review her conditions; she is seeking to bring an end to detention altogether. It was noted also that the petitioner relied on her alleged status as a delayed discharge prisoner. It was submitted that if she is wrong about that status, no other status has been identified which would be relevant for Article 14.

Whether the petitioner had sought remedy

[13] There was some dispute between the parties as to whether the petitioner had sought to make an application to the Tribunal under Part 17. However, as the challenge is not to any decision of the Tribunal but to the legislation itself, this is not material. The respondents accept that there is no mechanism in the Act by which the petitioner can apply for the order she seeks and the petitioner claims it is this that amounts to an infringement of her rights. The issue of whether there was application made is not determinative of the petition.

Decision

[14] The most recent application by the petitioner to have her Compulsory Treatment Order revoked was determined by the first respondent on the 27 March this year. In the findings of fact, it was recorded that the order was necessary and that there was no

alternative to detention in hospital. In this situation, it does not appear that the petitioner meets the definition of "delayed discharge patient" from "Delayed Discharges in NHS Scotland" referred to by counsel. The definition given there is:

> A delayed discharge is a hospital inpatient, aged 18 and over, *who has been judged clinically ready for discharge by the responsible clinician in consultation with all agencies involved in planning that person's discharge*, and who continues to occupy a bed beyond the ready for discharge date. (emphasis added)

The consequences of the petitioner not satisfying this condition are considered below.

[15] The petitioner wishes to be in a position to take advantage of the provisions in Chapter 3 of Part 17 of the 2003 Act to obtain a declarator that she is being detained in inappropriate conditions. As was clear from the submissions, however, the petitioner does not seek to challenge those conditions. She has not made any complaint about the conditions in which she is detained. Her complaint is that she should not be detained at all. In this situation, it appears that the petition seeks a remedy which does not address the claimed problem. That the petitioner's objective does not accord with the purpose of Part 17 also undermines the attempt to identify a comparator analogous to her situation. Patients who are detained under high or medium security conditions who make an application under Part 17 are in a situation which is different in a material way in that they are not seeking to be released from detention. Parties in the petitioner's position who wish to be released from detention, can seek an order under section 100 of the Act for revocation of the CTO. The petitioner has pursued this route and her application was rejected. Her remedy for that would have been to appeal the refusal of a revocation and/or the refusal to record a matter. She did neither of these things. If the petitioner had pursued the remedy that would lead directly to the result she wants of ending detention, it would be clear that there had been a failure to exhaust the remedies open to her after her application for revocation of the

CTO was refused. I have not, however, decided the application on that basis. Counsel for the petitioner explained that part of the rationale for seeking to put the petitioner in a position whereby she could make an application under section 264 of the Act was the broad scope of the remedy it affords. If a patient was found to be detained in conditions of excessive security, the relevant Health Board must within a period of not more than 3 months identify alternative accommodation. If there is no space already available, the obligation to find suitable alternative accommodation can extend to creating additional bed spaces for accommodation in the community. If the petitioner could be brought within this section and there was a finding in her favour, it was contended that it would not matter that there was no accommodation suitable for her - some would have to be created.

[16] Turning to the substance of the Article 14 challenge, the petitioner has not established that she is in the same position as her comparators and had therefore not established than any difference in the remedies available to her is discrimination which is prohibited by that Article. Patients detained under high or medium security and who make an application for variation of the conditions to one of lesser security are not in a similar situation to the petitioner. A review of the conditions of detention against the background that the applicant will remain subject to detention, raises different issues of narrower scope than bringing that detention to an end. In this situation, the requirement for justification does not arise. If however, the identified alternatives were comparators, the differences in the intended outcome in the two situations would be sufficient to justify the differences in treatment of the two classes. Of course, there must be means to challenge the continuance of the detention to ensure compliance with Article 5, but provision is made for that in the Act.

[17] In relation to the other issues that arise in relation to the Article 14 claim, on the basis of the decision in *Clift*, I consider that the petitioner was able to establish the requirement of

having "other status". I accept the respondent's submission that the fact that the petitioner is detained on the basis of an order granted in terms of the 2003 Act which is subject to review and therefore the detention is therefore not arbitrary. However, although there is no infringement of the substantive rights in Article 5, I accept that the nature of the challenge which seeks a route by which detention may be brought to an end is sufficient for it to fall within the ambit of Article 5. In relation to Article 8, I agree with the submission for the respondents that as no issue is raised in relation to the conditions of detention as such and the only issue taken is with the principle of detention, the application does not fall within its ambit. The decision in *Marzari* v *Italy* ((1999) 28 EHRR CD 179-180) to which I was referred by the petitioner is not in point. The court there determined that a failure to provide assistance with accommodation to a person suffering from severe disease might infringe Article 8. However, the petition does not to any extent seek to challenge a decision as to accommodation and instead is concerned with the detention.

Conclusion

[18] I do not consider that the petitioner has established that, in failing to provide for her to obtain a declarator that she is being detained in conditions of excessive security, the 2003 Act is in breach of her rights in terms of the ECHR, Article 14. I therefore sustain the third and fourth pleas for the first respondent and fifth plea for the second respondent and refuse the remedies sought by the petitioner.