SHERIFFDOM OF SOUTH STRATHCYLDE, DUMFRIES AND GALLOWAY AT HAMILTON

[2025] SC HAM 72

HAM-B277-25

JUDGMENT OF SHERIFF PRINCIPAL CATHERINE DOWDALLS KC

in the cause

DR

Pursuer and Appellant

against

MENTAL HEALTH TRIBUNAL FOR SCOTLAND

Defender and Respondent

Pursuer and Appellant: Frank Irvine, solicitors
Defender and Respondent: Mental Health Tribunal for Scotland

24 September 2025

Introduction

[1] This is an appeal in terms of section 320(1)(d) and (2) of the Mental Health (Care and Treatment) (Scotland) Act 2003 ("the Act") against the decision of the Mental Health Tribunal for Scotland ("the tribunal") on 27 February 2025 confirming the determination made by the responsible medical officer ("RMO") on 11 December 2024 to extend a compulsory treatment order ("CTO") in relation to the appellant, under section 102(1)(c) of the Act.

[2] The appeal proceeds on the basis that the tribunal's decision was based upon an error in law, in terms of section 324(2)(a) of the Act. The error in law identified by the appellant is the alleged failure by the tribunal on 27 February 2025 to properly consider the

consequences of its earlier failure to review a determination in January 2024 by the RMO to extend the CTO to which the appellant was subject, such a review being required in terms of section 101(2)(b) of the 2003 Act.

[3] I heard oral submissions on behalf of the appellant and the respondent on 30 May 2025. In addition, both solicitors provided me with notes of their submissions. I am grateful to them for their helpful written and oral submissions.

Preliminary issues

[4] The respondent has two preliminary pleas, which were dealt with at the outset of the appeal hearing. The second of those preliminary pleas, as to relevancy and specification was not insisted upon and was therefore repelled.

[5] The first preliminary plea was that all parties had not been called. I heard arguments from both parties. The respondent submitted that, as the RMO and the appellant's named person (in terms of section 250 of the 2003 Act) had both been present when the determination was confirmed by the tribunal on 27 February 2025, they each have an interest in the outcome of this appeal and therefore should be called as parties. The RMO's responsibility extended beyond care and treatment; he was obliged to comply with the legislation. The appellant argued that neither the RMO nor the named person had a locus in this appeal, which was focused on a narrow point of law. If the appeal was successful, there would be no CTO in place. It was not for this court to look beyond that outcome. The decision would be communicated to the RMO and named person. The appellant's care team would remain in place, whether there was a CTO in place or not; it would be for the RMO to decide what action, if any, to take in those circumstances.

[6] I agree that neither the RMO nor the named person has a locus in this appeal, which is focused only on the narrow point of law set out in para [2] above. No issue arises in this appeal as to the need for compulsory treatment. The question for me to determine relates solely to the interpretation and application of statutory provision. I therefore repelled the respondent's first preliminary plea.

Factual background

[7] The appellant is subject to a Compulsory Treatment Order (CTO) in terms of section 64(4) of the 2003 Act, granted on 11 January 2022. He was initially detained in Hairmyres Hospital and then from 26 September 2023 in Coathill Hospital, where he remains. The CTO to which the appellant is subject authorises measures (a) and (b) as set out in section 88(1) of the 2003 Act. Those measures are his detention in Coathill Hospital and the giving to him of medical treatment, in accordance with Part 16 of the Act.

[8] The CTO was initially granted for up to 6 months. In July 2022 it was extended for up to 6 months. In January 2023 it was extended for up to 12 months and on 10 January 2024 it was extended for up to 12 months. On 11 December 2024 it was extended for up to 12 months. Each extension was determined by the appellant's Responsible Medical Officer (RMO), in terms of section 86 of the Act, and approved by the respondents.

[9] By letter dated 13 December 2024, the respondent wrote to the appellant in the following terms:

> "Dear Mr R…
>
> It has come to our attention that there has been an omission to schedule a two year review of your compulsory treatment order after the last extension. I would like to apologise on behalf of the tribunal for this mistake.

> The omission came to light when we began processing the most recent extension of your order. Our view is that this earlier failure to hold a hearing in terms of S.101(2) of the Mental Health (Care and Treatment) (Scotland) act does not invalidate your compulsory treatment order. The determination to extend the order was not confirmed but the legislation does not imply that this results in invalidity of the order itself. You may of course wish to take legal advice on this. In the meantime we will be scheduling a hearing to review your order and the most recent determination to extend within the next few weeks and you will receive an invite and paperwork shortly.
>
> We are sending a copy of this letter to your RMO and MHO for their information.
>
> Yours sincerely …"

[10] On 27 February 2025, a hearing took place to review the determination by the RMO dated 11 December 2024 to extend the CTO for a further period of 12 months. It is against the decision of the tribunal at that hearing that this appeal is taken.

The legislation

[11] Section 101 of the Act sets out the tribunal's duty to review a determination under section 86 of that Act as follows:

> "(1) This section applies where a patient's responsible medical officer makes a determination under section 86 of this Act.
>
> (2) If–
> (a) …
> (b) the conditions in subsection (3) are satisfied in relation to the compulsory treatment order to which the determination relates,
> the Tribunal shall review the determination.
>
> (3) The conditions mentioned in subsection (2)(b) above are
> (a) that the order was made 2 or more years before the renewal day;
> (b) that this section did not require the Tribunal to review the previous determination made under section 86 of this Act in relation to the order; and
> (c) that, in the period of 2 years ending with the day before the renewal day, no application has been determined by the Tribunal under section 92, 99, 95 or 100 in relation to the order.

(4) In subsection (3) above, the renewal day is the first day on which the order, had it not been extended by the determination, would not authorise the measures specified in it."

[12] Section 86 provides as follows:

"(1) If, having regard to—
(a) any views expressed by persons consulted under section 77(3)(c) of this Act for the purpose of the review being carried out; and
(b) any views expressed by the mental health officer under section 85(2)(d) of this Act for the purpose of that review, the responsible medical officer is satisfied as to the matters mentioned in section 84(2)(a) and (b) of this Act, the responsible medical officer shall make a determination extending the compulsory treatment order for the period mentioned in subsection (2) below.

(2) The period referred to in subsection (1) above is—
(a) where a determination is made in respect of the first review, the period of 6 months beginning with the day on which the compulsory treatment order will cease (unless extended) to authorise the measures specified in it;
(b) where a determination is made in respect of the first further review, the period of 12 months beginning with the expiry of the period mentioned in paragraph (a) above; (c) where a determination is made in respect of a subsequent further review, the period of 12 months beginning with the expiry of the period of 12 months for which the order is extended as a result of the immediately preceding further review."

Tribunal decision

[13] The purpose of the hearing on 27 February 2025 was to review the determination made by the RMO on 11 December 2024 to extend the CTO in relation to the appellant for a further period of 12 months. Review was required under section 101 of the Act.

[14] At the hearing, the solicitor for the appellant challenged the validity of the existing order as, "while the previous CTO had been lodged timeously with MHTS, the determination had not been reviewed". It was submitted that the intention of section 101 of the Act was that no patient was subject to detention without review by the tribunal. The appellant was prejudiced because his detention had not been reviewed for over 3 years

(since January 2022). The tribunal determined that no prejudice had been caused to the appellant by the respondent's failure to review the previous extension, which was due to administrative oversight. As the appellant continued to require care and treatment the previous order was valid "as the oversight had been in good faith". The tribunal confirmed the decision of the RMO under section 102 of the Act, including measures under section 66(1)(a) and (b) of the Act, such that the CTO authorises detention in Coathill Hospital and the giving of treatment under Part 16 of the Act.

Appellant's submissions

[15] The appellant sought to have the decision of the tribunal on 27 February 2025 set aside. She did not invite me to substitute my own decision and did not seek remit to the tribunal. The basis for the latter position was, as I understood it, that if the CTO "flies off" upon granting of the appeal, the involvement of the tribunal is at an end. Refusal of the appeal would in effect amount to substitution of this court's decision in terms of section 324 of the Act. Decisions on the need for care and treatment would then fall to the appellant's care team to determine. They may recommend further compulsory treatment, which would require the re-commencement of the process. In the short term an emergency or short-term detention might be considered.

[16] By reference to the decision of Sheriff Principal Taylor in *LM* v *MHTS*, unreported 31 August 2010, it was submitted that the detention of any patient must be competent and that if there is any doubt that it is competent any confusion about the patient's detention status should be rectified. That case concerned the short-term detention of a patient in terms of section 44 of the Act, the purpose of which statutory provision was to prevent a patient being detained on a succession of short-term detention certificates.

[17] The decision of the House of Lords in the case of *R* v *Soneji and Another* [2005] UKHL 49 sets out the proper approach to questions of the consequences of failure to comply with statute. The courts should concentrate on, firstly the intention of Parliament and, secondly the interests of justice and whether in particular a procedural failure caused prejudice to any parties such that it would make it unjust to proceed further. As the appellant's liberty was the issue that the court was dealing with in this appeal, that was a matter of the upmost importance. Reference was made to the speech of Lord Carswell at paragraph 65 for the proposition that a minor or insubstantial deviation from the statute will not render resulting proceedings invalid. In the present case, the deviation is neither minor nor insubstantial. In particular, reference was made to section 101(2) of the Act where the word "shall" is used. It was submitted that the use of that language confirms that there is no discretion under the statute.

[18] It was submitted that the authorities differ as to whether a procedural impropriety might be regarded as rendering a decision invalid. The appellant relied upon the unreported decision of Sheriff Principal BA Lockhart in *N* v *Borland,* unreported 9 May 2011, in which there was a delay in lodging the MHO report within the specified period for a CTO application. The report was submitted 15 hours late. The appeal was refused, having regard to the dicta in *R* v *Soneji,* on the basis that a 15 hour delay was not a sufficiently substantial time such that the procedural failing ought to have rendered the CTO invalid or cause prejudice to a party. This case was referred to by way of contrast with the present appeal in which it was submitted that the appellant was prejudiced by the failure to review the detention in a timely and efficient manner.

[19] The RMO is under a duty to keep the CTO under review and the respondent has a statutory duty to review the detention. The overriding purpose of the Act is to ensure that

care and treatment is provided. Parliament's clear intention was to safeguard the rights of detained individuals and that fact was particularly pertinent where detained individuals have not exercised their right to appeal and their detention is subject to review in terms of section 101. The Act safeguards against uncertainty as to the reasons for failure to appeal by requiring review under section 101(2)(b). The onus is on the respondent's to schedule the review. Reference was made to *X* v *United Kingdom* (1981) 4 EHRR in which it was concluded that there was a violation of Article 5(4) ECHR as reviews were conducted administratively and not judicially in relation to the right to a hearing and independent review in cases where there is detention by reason on mental health.

[20] The solicitor for the appellant noted that the authorities differ as to whether a procedural impropriety would be regarded as rendering a decision invalid. There is no period of time, for example, which would be regarded as sufficient to render any decision invalid. There is a need to look at the purpose of the legislation as a whole. The breach of section 101 in the appellant's case cannot now be cured. By the time the administrative error was recognised, the order had already expired and therefore it was not possible to review the order, which was no longer in existence.

[21] In response to the respondent's submission that it was open to the appellant to initiate review of the order under section 99 or section 100 of the Act, it was submitted that the absence of an appeal by the appellant should not be read as acquiescence. The appellant had sought legal advice as soon as he became aware of the requirement for the 2 year review. It could be inferred that the appellant was unaware of his right to appeal prior to the scheduling of the 2 year review, though the basis upon which that inference could be drawn was not explained. It was accepted that there is no obligation to have a hearing. A review could have been done either by way of a hearing or as a paper exercise. In relation

to the circumstances in which the error occurred as explained in the submissions for the respondent, the reason for the error is irrelevant. It is not reasonable not to comply with primary legislation.

[22] The motion for the appellant was that the decision of 27 February 2025 be set aside and this court's decision substituted therefor. Such an approach would be competent because the previous order had not been reviewed and came to an end at midnight on 10 January 2025; the subsequent determination could not be renewed as the order had lapsed. In other words the order made in January 2022, not having been reviewed, came to an end in January 2025. The tribunal's decision of 27 February 2025 amounted to a decision reviewing an order that had already come to an end.

Respondent's submissions

[23] The respondent invited the court to refuse the appeal. It was submitted that this case was about a mistake in applying a statutory scheme. Section 101 should have triggered a review but it was not agreed that failure to carry out that review had had consequences. It was appropriate to consider the statutory scheme as a whole, including the role of the provision under examination and the nature of the mistake.

[24] The following propositions were advanced:

1. That what was omitted was a review by the tribunal in 2024 of the RMOs decision to extend the CTO;
2. That the holding of a hearing for the purpose of such a review is not an express requirement of the legislation;

3. That though review should have occurred in 2024, it was not essential to the continuing validity of the CTO;
4. That the omission to schedule a review in 2024 does not create invalidity of the CTO as a matter of law and the tribunal were in correct so to conclude;
5. That so far as concerns the discretion of section 102 to confirm or revoke the CTO the omission in 2024 was taken into account by the tribunal which reached a reasonable conclusion in weighing all factors relevant to their decision regarding the extension of the CTO.

[25] The group of provisions which allow for challenge of continuing detention are to be found at sections 99, 100 and 101 of the Act. The mischief that section 101 was designed to address is as set out in the Report on the Review of the Mental Health (Scotland) Act 1984 ("the Millan report") in section 2, chapter 8 at paragraphs 46 to 49. Those sections highlighted the absence of any automatic review of detentions by the sheriff, the effect of which for some patients was that they may be continuously detained for long periods without any formal review of their detention. Patients who did not wish or were unable to appeal against compulsory measures and were held under compulsion for lengthy periods were a vulnerable group. The Millan report concluded that those patients were not adequately protected by the law and that there should be an automatic review of compulsory measures by the tribunal.

[26] While section 101 as enacted did not implement the recommendations of the Millan report in their entirety, they did require that a review takes place. It was submitted that the practice of the MHTS is to arrange a review if subsection (3) of section 101 is satisfied. The section does not direct or require them to hold a hearing. That is in contrast with provisions elsewhere in the Act, such as sections 193(8), 265(2) and 269(2) and rule 8(2) of the Mental

Health Tribunal for Scotland (Practice and Procedure) (No.2) Rules, SSI 2005/519, which requires that a hearing be held where section 68 of the Act applies. The procedural rule governing review of a determination under section 101(2) is set out in rule 35. Rule 58 confers a power upon MHTS to decide a case without a hearing. There is no express statutory provision requiring that a hearing be fixed when applying section 101. The holding of a hearing is not therefore expressly mandated by the legislation though that does routinely happen in practice. But for the error or oversight in this case, a hearing would have been fixed.

[27] The mistake or error that resulted in no hearing being fixed was an administrative one. The CTO was granted on 11 January 2022. It was extended without variation and an administrative process thereafter took place; each step of that process is ordinarily checked by a casework team leader. In this case, the CTO 3a document was prepared by the doctor. When it was received, it should have been noted that the renewal date was 11 January 2024. That should have raised a "red flag" signifying the need for a 2 year review. Enquiries have been carried out to identify how the error occurred. The best that can be said is that there appears to have been confusion.

[28] The solicitor attempted to identify what was lost as a result of the error. Firstly, as a matter of practice the hearing was lost but that could have been dealt with on the papers alone had the error been identified. Secondly, there was loss of the review whether on paper or at a hearing.

[29] Although the review should have occurred in 2024 it was not essential to the continuing validity of the CTO. There is nothing in the Act that prescribes when a review should take place. In practice most reviews take place after the extension of the order has taken effect. For example, if an order is due to expire at midnight on 1 May the extension

would take effect on 2 May but the review may not take place until after that date, by which time the extended period will already have commenced. Nothing in the legislation prevents continuing treatment or implementation of the order that has been extended. In other words, the treatment of the patient continues and is authorised. It was noted that the tribunal has no role in the decision to extend a CTO. That is the decision of a doctor. The tribunal's role in terms of section 102 of the Act is that it can revoke the determination to extend, revoke both the determination and the compulsory treatment order, confirm the determination or confirm the determination and vary the compulsory treatment order.

[30] The process of confirmation of a determination merely maintains the status quo and does not amount to the grant of an extension nor does it amount to approval of the extension. Therefore, should this court determine that by not confirming the order, the validity of the order is affected such that there would be no order to extend, that would amount to the court innovating on the legislation.

[31] Omission to schedule a review does not create invalidity of the CTO. That compares with other parts of the legislation including section 304, which deals with the effect of unauthorised absence. That section is an example of the Act providing expressly for action or inaction leading to the lapse of an order.

[32] Reference was made to the decision of Sheriff Principal Dunlop in *Patterson* v *Kent* 2007 SLT (SHCT) 8 for the proposition that the core purpose of the Act is to provide care and treatment, where needed, on a compulsory basis. That decision was followed by Sheriff Principal Stephen in *D* v *MHTS* 2014 SLT (Sh Ct) 39. In the latter case, the Sheriff Principal identified the correct question to be posed where there have been failures in statutory duty. The question is whether it was the intention of the legislature that such failures would invalidate the act of an RMO in extending a CTO. Although neither of those

authorities was concerned with the operation of section 101, or the consequences of failure to comply with the requirements of the section, the circumstances were analogous to those in the present case. Parliament had not intended that these failures should automatically lead to invalidity of the order.

[33] ECHR Article 5 jurisprudence requires that deprivation of liberty has to comply with domestic law. The provisions of the Act take account of Article 5(4) and are compliant therewith. The tribunal's position is that when the effect of the mistake is analysed, including by reference to case law and in particular *Patterson* v *Kemp*, applying *Soneji*, it is clear that the tribunal is not obliged to revoke the order and did not err in the exercise of its powers under section 102. In this case, there was a delay or gap in holding a review. A review should have been held in early 2024 and that would have happened had the form CTO 3a been looked at properly. The CTO was made on 11 January 2022. The next hearing took place on 27 February 2025. Although 12 months later than under normal practice, the non-compliance with the underlying rationale for the decision is less than it might at first seem. This case is analogous with the other authorities and in particular the decisions of Sheriffs Principal which have been referred to during the course of this appeal. Parliament did not intend that failure in this respect should automatically lead to invalidity.

[34] As it is within the discretion of the tribunal to confirm or revoke the order, that was for the tribunal to decide in the exercise of its discretion on 27 February 2025. The determination of the tribunal on that date indicates that the tribunal did consider the correct question, which was whether the failure by the tribunal in December 2023 to identify that a review was required was fatal to extension of the order in 2024. The tribunal had considered the overriding purpose of the Act and took into account the absence of prejudice to the patient. That absence of prejudice should be seen in the context of the RMO's continuing

duty to review the need for compulsion. The RMO's duty to keep the need for compulsion under review is required in terms of sections 79 and 80 of the Act. There is therefore continuing review of whether the patient meets the criteria for compulsory treatment.

[35] By reference to the authorities cited in argument by the solicitor for the appellant, it was submitted that *R* v *Soneji* dealt with a very different English process and should be distinguished on that basis and that *LM* v *MHTS* and *RM* v *Scottish Ministers* do not assist the court.

Discussion and decision

[36] The core purpose of the Act is to provide care and treatment to individuals who require it, if necessary on a compulsory basis. That purpose was identified by Sheriff Principal Dunlop in *Patterson* v *Kent*, referred to above. That case dealt with failure to observe the time limit set down in section 69 of the Act in relation to the determination of applications under section 68, for interim CTOs. *D* v *MHTS* was an appeal against the decision of the tribunal refusing to revoke a CTO in circumstances where the requirements of sections 84 to 86 of the Act had not been complied with. There, Sheriff Principal Stephen identified the issue for the tribunal, and for the appeal court, as being the assessment of the legal consequences of non-compliance with the relevant legislative provision. In both cases, the question for the appellate court was whether the tribunal was correct in concluding that such failures in compliance with statutory provision were not sufficient to render the determination invalid. Both appeals against the decisions of the tribunal failed, the Sheriffs Principal concluding that it was unlikely that the legislators had intended that failure to comply with the statutory provision, in *Paterson* v *Kent* a statutory time limit and in *D* v

MHTS the failure of the RMO and MHO to comply with their statutory duties in relation to the extension of a CTO, would be apt to invalidate the purported act.

[37] In the present appeal, the tribunal acknowledged that there had been no review of the extension granted on 10 January 2024, as required by section 101(3)(a) of the Act, describing that omission as "an administrative oversight" which "had not caused any prejudice" to the appellant, as he continued to require care and treatment. Some emphasis was placed on the oversight having been "in good faith" and the tribunal noted that it was not Parliament's intention that treatment necessary for a patient would be interfered with. The overriding purpose of the Act being to ensure that care and treatment can be provided to patients, that purpose is relevant to questions of interpretation where the statute is silent as to the particular state of affairs. Reference was made to *Soneji.* The tribunal concluded that, as the appellant continued to require care and treatment and that the oversight by the respondents to carry out a review had been in good faith, the previous CTO remained valid and went on to review the determination made on 11 December 2024 to extend the CTO.

[38] It is not disputed that as at February 2025, the appellant was and remains, in need of compulsory care and treatment. The history of the appellant's detention by reason of CTOs is set out at para [8] above. At no time has a CTO been allowed to lapse or come to an end without a further CTO being made; there is no period since his initial detention in 2023 when he has been subject to compulsory treatment in the absence of a CTO. The consequences of the respondent's failure to carry out a timeous review of the January 2024 CTO in terms of section 101 of the Act must be viewed in that context. There can be no doubt that the appellant's liberty is a matter of considerable importance. The consequence for him of the respondent's failure and thus deviation from the statutory provision is not

a minor matter. Nonetheless, the consequences must be seen in the context of the overall purpose of the legislation and the appellant's need for compulsory treatment.

[39] The terms of section 101 are clear. The respondent was compelled to review the 10 January 2024 determination because the condition in section 101(3)(a) was met. That did not occur. That failure is said to be by reason of an administrative error. That is at best unfortunate and at worst to be deprecated. But what are the consequences of such failure?

[40] The 2003 Act is detailed and comprehensive. Where there is a requirement that a hearing be held, as in sections 193(8), 265(2) and 269(2), provision is made expressly for the holding of such a hearing. Rule 35 of the Practice and Procedure Rules, evidences the expectation that a hearing will take place for the review of a determination where required in terms of section 101(2)(b). The primary legislation, however, contains no provisions relating to a hearing.

[41] Nowhere in the Act are the consequences of failure to review a determination under section 101 prescribed. Critically, there is no timeframe within which a review under section 101 must be commenced or completed. A hearing to review the order was scheduled and took place on 27 February 2025, some months after the end of the 2 year period during which review ought to have occurred. At that hearing it was not a gap or delay in holding a review that was challenged by the appellant but rather the validity of the order then subject to review.

[42] The tribunal concluded that the absence of review of the earlier extension due to administrative oversight had not caused any prejudice to the appellant, who continued to require care and treatment, as evidenced by the determination in December 2024. On that basis, the tribunal concluded that the previous order remained valid, the oversight having occurred in good faith. The tribunal noted that 'the overriding purpose of the Act is to

ensure that care and treatment can be provided to patients and "this is relevant to questions of interpretation where the statute is silent as to the particular state of affairs." There can be no doubt as to the overriding purpose of the legislation. There can be no doubt that the conditions in section 101(3) were met in the present case. As was recognised by both parties, the statute is silent as to the consequences of failure to review in terms of section 101.

[43] I share the view of Sheriff Principal Stephen in *D* v *MHTS* that it is inconceivable that the legislators intended that the consequence of failure to follow the statutory requirements to the minutest degree would invalidate treatment orders necessary for the benefit of patients. I am reinforced in that view in relation to the failure to comply with the requirement for review under section 101, wherein there is no timeframe set for the carrying out of any such review nor any provision setting out the consequences attendant upon failure to carry out such a review. The tribunal did not err in reaching the conclusion that the January 2024 CTO was valid, faced as it was with the contention on behalf of the appellant that the absence of review under section 101 rendered it invalid. In the absence of express statutory provisions to that effect, it must be presumed that Parliament did not intend such a consequence to follow an error or failure to comply with the terms of the section.

[44] It therefore follows that no error in law has been identified in the approach of the tribunal. This appeal therefore fails.

Disposal

[45] I shall refuse this appeal. There is no need to remit to the tribunal for further consideration, as the CTO was reviewed and continued at the hearing on 27 February 2025 and remains in place. I therefore make no order in that respect. If parties are unable to

reach agreement on the matter of expenses within 2 weeks of the date of this decision, a hearing shall be fixed to determine the matter.