Casenotes

Scottish 'public safety' test for discharge of restricted patients held ECHR compatible

*Hilary Patrick**

A v The Scottish Ministers [2001] SLT 133I

The Privy Council (15th October 2001) Lords Slynn, Hope, Clyde, Hutton and Scott

Introduction

While 'preventative detention' of people with serious personality disorders has not found favour in Scotland, new legislation recently imposed a public safety test for patients already detained in hospital. The Mental Health (Public Safety and Appeals) (Scotland) Act 1999 was the first Act of the new Scottish Parliament. It altered the Mental Health (Scotland) Act 1984 by providing that, if there were public safety concerns, patients with severe anti-social personality disorders could continue to be detained in hospital even though their condition was not treatable and even if they were not, in fact receiving treatment. The new legislation has recently survived an ECHR challenge to the Judicial Committee of the Privy Council.

Three restricted patients held in the State hospital at Carstairs challenged the new legislation on the grounds that it was outside (or in Scotland, 'outwith') the competence of the Scottish Parliament, being contrary to the European Convention on Human Rights. The court upheld the decision of the Inner House of the Court of Session and dismissed the appeals, saying that there was no requirement in the ECHR that detention in hospital had to be linked to treatment. The new legislation was a proportionate response to the risk.

Background and facts

In July 1999 Sheriff Douglas Allen granted Noel Ruddle, described as a person with a severe personality disorder and a danger to the public, an absolute discharge from detention in the State hospital at Carstairs.[1]

The sheriff's decision followed the ruling of the House of Lords in *Reid v Secretary of State for Scotland*.[2] In that case it was held that a proper reading of s64 of the Mental Health (Scotland) Act (the 1984 Act) had to 'read into' the discharge provisions the conditions which applied at a patient's initial detention, currently in s17(1) of the 1984 Act. Section 17(1) provides that a patient with anti-social personality disorder (the Scottish Act does not use the term 'psychopathy') can be admitted to hospital only if treatment will alleviate his or her condition or at least prevent it getting worse.

* *Solicitor, member of the Millan Committee, Honorary Fellow in the Faculty of Law, University of Edinburgh.*

1 *Ruddle v Secretary of State for Scotland, 1999 GWD 29-1395.*

2 *[1999] 1 All ER 481.*

In Ruddle's case the sheriff found that he was receiving very little treatment, other than containment, and that there was no evidence that medical treatment would improve his condition. He was, therefore, given an absolute discharge.

When the new Scottish Executive came to power it was advised that this apparent 'loophole' in the 1984 Act could lead to the discharge of around a further twelve patients currently detained in the State hospital. Two such patients, R and A, did, in fact, put in appeals in July 1999. There was considerable public dismay following Ruddle's discharge and the Scottish Executive was under pressure to allay public concerns.

The first Act of the new Scottish Parliament, was, therefore, an attempt to plug the Ruddle gap. The 1999 Act was passed in 13 September 1999, just twelve days after the Parliament first met for business. It inserted a new sub-clause into the appeal provisions. Where a sheriff found that there were compelling public safety concerns, a patient could not be discharged, even though his or her mental disorder was untreatable and even though no further treatment was proposed.

The Act was regarded as a temporary measure, pending the reports of the MacLean Committee into serious, violent and sexual offenders, including people with personality disorders, and the Millan Committee, which was reviewing the Mental Health (Scotland) Act.

All three appellants were long term patients in the State hospital. A and R had been sent to hospital under hospital orders with restrictions, while D had been transferred to hospital from prison in Northern Ireland via a restriction direction and later transferred to the State hospital from that hospital. (Northern Ireland has no high security hospital provision and all patients needing such provision come to the State hospital.)

All three patients had been diagnosed as suffering from anti-social personality disorders. The medical evidence was that such patients would not be sent to the State hospital today, as their conditions were regarded as untreatable.

A and D applied to the local sheriff for discharge in July 1999. D, being subject to a transfer direction, applied for discharge from hospital and to complete the remainder of his sentence in prison. The 1999 Act legislation was retrospective and thus covered D and A, even though they had put in appeals before it was passed. R, having failed to obtain his discharge from the House of Lords,[3] made a further application to the sheriff for discharge in March 2000.

The sheriff referred the cases to the Inner House of the Court of Session, which determined that the legislation was within the Parliament's powers. The patients appealed to the Judicial Committee of the Privy Council.

Legal provisions

Section 64 of the 1984 Act contains provisions relating to the discharge of restricted patients very similar to those contained in s73 Mental Health Act 1983.

Where an appeal to the sheriff is made by a restricted patient who is subject to a restriction order, the sheriff must direct the absolute discharge of the patient if s/ he is satisfied that the patient is not suffering from mental disorder of a nature or degree which makes it appropriate for him/her to be liable to be detained in a hospital for medical treatment; or that it is not necessary for the

3 *See [2] above. The Lords had held that it was not appropriate for him to be discharged, as R was receiving treatment at the State hospital, in the form of anger management training, which was preventing his condition from getting worse.*

health or safety of the patient or for the protection of other persons that s/he should receive such treatment; and (in either case) that it is not appropriate for the patient to remain liable to be recalled to hospital for further treatment.

Section 1 of the 1999 Act inserts a new subclause into s64. If an appeal to the sheriff is made by a restricted patient subject to a restriction order, the sheriff must refuse the appeal if s/he is satisfied that the patient is, at the time of the hearing of the appeal, suffering from a mental disorder the effect of which is such that it is necessary, in order to protect the public from serious harm, that the patient continue to be detained in a hospital, whether for medical treatment or not. The burden of proof of the matters as to which the sheriff is to be satisfied for the purposes of this provision is on the Scottish Ministers.

The 1999 Act was challenged on the basis that s1 was contrary to Articles 5.1(e) and 5.4 of the ECHR and thus outwith the legislative competence of the Scottish Parliament.

Article 5.1(e)'s terms are as follows:

> 'Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:…*(e)* the lawful detention of ……persons of unsound mind …….'

Article 5.4 states:

> 'Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.'

Section 29(2) of the Scotland Act 1998 provides that a provision of an Act of the Scottish Parliament is outwith its legislative competence if, among other things, 'it is incompatible with any of the Convention rights …'. Convention rights are the rights detailed in section 1 of the Human Rights Act 19984 and include Article 5 of the ECHR. Section 29(1) of the Scotland Act states that 'An Act of the Scottish Parliament is not law so far as any provision of the Act is outside the legislative competence of the Parliament'. The court is given power to strike such provisions out of offending legislation.

Questions for the court

Three major questions were considered.

Firstly, and crucially, was the public safety test in s1 of the Mental Health (Public Safety and Appeals) (Scotland) Act 1999 in breach of the ECHR and therefore beyond the competence of the Scottish Parliament under s29(2)(d) of the Scotland Act 1998?

Secondly, should the case of D be distinguished from those of A and R? D applied to be returned to prison to serve the remainder of his sentence of imprisonment and did not seek to be discharged into the community. The public at large would not be affected by D's discharge from the State hospital. Could the 'public safety' provisions in the 1999 Act be relevant to D?

Thirdly, was the retrospective application of section 1 to pending proceedings incompatible with Article 5(4) of the EHCR?

4 *Scotland Act 1998, s126(1).*

Judgement

Was the public safety test in breach of the ECHR?

The judges did not agree that the public safety provisions were in breach of Article 5(1)(e). There was no reference in that Article to detention being for the purposes of treatment and the court could find no reference in the case law to suggestions that it should be.

The case law did not make treatment a requirement of detention. The court quoted the conditions as set out in *Winterwerp v The Netherlands*.[5] These were objective proof of 'unsound mind', mental disorder of a kind or degree warranting compulsory confinement and the validity of continued confinement depending upon the persistence of such a disorder. All such requirements were met in the case of the appellants. *Winterwerp* did not impose a requirement that treatment be offered or likely to improve the patient's condition.

Counsel for the appellants argued that in terms of the second *Winterwerp* test, confinement could be 'appropriate' only if treatment were to be offered. However the court dismissed this argument. Public safety concerns could justify confinement whether or not the patient's condition could be improved by treatment. In *Luberti*[6] the European Court held that confinement was appropriate and did not suggest that the second requirement involved consideration of treatment. It was sufficient that the patient posed a 'real danger' at the time of the confinement.

In *Ashingdane*[7] the court stated that article 5(1)(e) was not in principle concerned with whether the treatment offered to a patient or the conditions under which s/he was detained were suitable.

In *Guzzardi v Italy*[8] the court said that article 5(1)(e):

> 'refers to persons of unsound mind, alcoholics and drug addicts. The reason why the Convention allows the latter individuals …… to be deprived of their liberty is not only that they have to be considered as occasionally dangerous for public safety but also that their own interests may necessitate their detention.'

In *Litwa v Poland*[9] the court said that all the categories of people noted in article 5(1)(e) could be deprived of their liberty 'either in order to be given medical treatment or ……on both medical and social grounds'.

In *Johnson v United Kingdom*,[10] the court recognised that that the release of a person previously found to present a danger to society 'is a matter that concerns, as well as that individual, the community in which he will live if released'. Such discharge should not take place immediately but the authorities should be able to give consideration to 'whether the interests of the patient and the community into which he is to be released would in fact be best served by [the patient's] discharge.'

The appellants claimed that there must be a relationship between the purpose of the confinement and the place of confinement. Confinement in hospital must be to serve the purpose of treatment and if the condition is not susceptible to treatment then the person should not be confined in a hospital. In *Aerts v Belgium*[11] the court stated that:

5 *(1979) 2 EHRR 387, 403.*
6 *6 EHRR 440, 449, para 28.*
7 *7 EHRR 528, 543, para 44.*
8 *(1980) 3 EHRR 333, 366, para 98.*
9 *App No 26629/95, 4 April 2000, at paragraph 60.*
10 *27 EHRR 296, 322, para 62.*
11 *(1998) 29 EHRR 30, 85, para 46.*

> 'there must be some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention. In principle, the 'detention' of a person as a mental health patient will only be 'lawful' for the purposes of sub-paragraph (e) of paragraph 1 if effected in a hospital, clinic or other appropriate institution.'

However the Judicial Committee said that the final four words showed that what mattered was that the place of detention was appropriate. This could be a hospital or some other institution. It did not follow that detention in the State hospital was inappropriate for the appellants, even although the purpose was for public safety rather than treatment.

The court also cited with approval *R (on the application of H) v Mental Health Review Tribunal, North and East London Region*.[12] In that case Lord Phillips MR expressed the view that once it was established that a person was of unsound mind the Convention did not link detention in hospital to treatability.

The court concluded that it was a matter for domestic law to determine whether deprivation of liberty in circumstances meeting the *Winterwerp* criteria should be possible only if the patient was treatable. Domestic law could also decide the place of detention, so long as this was a place which was suitable for the detention of persons of unsound mind. The fact that a patient's mental disorder was not susceptible to treatment did not mean, in Convention terms, that his or her continued detention in hospital was arbitrary or disproportionate.

Was the new legislation flawed because of its retrospective nature?

The appellants argued that the new legislation was flawed because it was applied to cases which were part of the existing legal process. However the court held that, although the Convention did 'not readily admit' retrospective legislation, there was no absolute prohibition. Such legislation must be treated 'with the greatest possible degree of circumspection'[13] and could be justified only if there were 'compelling grounds of general interest'.[14]

The court held that in this case there were such compelling grounds. The risk the Scottish Parliament faced, of the possibility of successful appeals by up to twelve patients with similar diagnoses, was real and imminent. The response was proportionate. The test imposed by the new legislation was a strict one. The sheriff had to be 'satisfied' that the conditions of public risk were met. There must be a risk to the public of 'serious' harm. The burden of proof was put on the Scottish Ministers.

The court said that, while there was a delicate balance to be drawn between the rights and liberties of people with mental disorders and the rights of the public to be free from the fear of assault or injury, it could not be right that public peace and safety should be subordinated to the rights of people whose disorders rendered them a threat to society. There was nothing in the Convention to suggest otherwise.

12 *[2001] EWCA Civ 415 (Court of Appeal) 28 March 2001. See commentary in Journal of Mental Health Law June 2001, p75.*

13 *See The National & Provincial Building Society v United Kingdom (1997) 25 EHRR 127, 181, at para 112.*

14 *Zielinski v France (2001) 31 EHRR 19, at para 57.*

Was the case of D different, in that if his appeal were successful he would be returned to prison?

D argued that it was inadequate drafting of the 1999 legislation which had applied s1 to patients subject to restriction directions as well as to those subject to restriction orders. He argued that the second *Winterwerp* test did not apply in his case, and thus the legislation breached his Convention rights. If he was right, the section should fall, as it would be outwith the legislative competence of the Parliament.

However the court held that the safety of the 'public' could apply either to the public at large or to a section of the public. If D were discharged to prison, he might put the safety of prison officers or other inmates at risk. The sheriff was, therefore, entitled to find that he posed a risk to the public. However it followed that if D's mental condition was not treatable and the Scottish Ministers were not satisfied it was necessary for him to be detained in hospital to protect a section of the public from serious harm, D should be transferred back to prison.

Commentary

The court was influenced in its decision by the decision of the European Court in *Koniarska v United Kingdom*.[15] The facts were similar. K suffered from a psychopathic disorder which could not be treated. The court said that her detention was needed, as there was a danger of her injuring herself or other persons. It held that there could be said to be both medical and social reasons for her detention and that this was not in breach of Article 5(1)(e).

While the House of Lords in *Reid* made it clear that patients with severe personality disorders could be subject to continued detention in hospital only if there was some possibility of treatment alleviating their disorder or at least preventing its deterioration, this is now no longer a requirement in Scotland. Long term containment is now possible and has been held not to be in breach of ECHR. This may have unfortunate repercussions for the management of such patients' cases.

Effect on conditional discharge

In *Reid* Lord Clyde pointed out that conditional discharge, a very useful rehabilitation tool, could not be available for a patient for whom 'treatment' (as defined in the 1984 Act) was unlikely to provide benefits. Conditional discharge is a possibility only if the sheriff is satisfied that it may be appropriate to recall the patient to hospital 'for further treatment'.[16] If no treatment is proposed, other than containment, an attempt at rehabilitation which failed would not allow doctors to recall the patient to hospital. There is thus a perverse disincentive to attempt such rehabilitation.

It was pointed out in *Reid* that a wide definition of 'medical treatment' is necessary to give the best possible likelihood of the conditional discharge option being available. Medical treatment is defined in s125(1) of the 1984 Act as including nursing, and care and training under medical supervision. While the term clearly covers medication or other psychiatric treatment designed to alleviate or to prevent a deterioration of the mental disorder, it can also cover other things which are done for either of those two purposes under medical supervision. This can include treatment, such as anger management, which does not treat the disorder itself but alleviates or prevents a deterioration of the symptoms of the disorder.

---

15 App No 33670/96), 12 October 2000, (currently unreported).

16 Mental Health (Scotland) Act 1984, s64(1)(c).

Conditional discharge is regarded by forensic psychiatrists as a very useful rehabilitation tool. With the imposition of the 'public safety' test in Scotland, coupled with the implications of the *Reid* judgement, it may be less possible to use this for patients in Scotland with untreatable anti-social personality disorders. We will have to wait to see how this works out in practice.

Burden of proof

It is interesting to note that the 1999 Act specifically states that the burden of proof that a patient constitutes a serious danger to the public should rest with the Scottish Ministers. This pre-empted a possible ECHR challenge to the legislation, on the grounds that the patient was being required to prove his/her safety.[17]

However the remaining provisions of the section, which require the patient to satisfy the sheriff that s/he no longer requires treatment, could now be subject to challenge.

Legislative reform and the future of the provision

The 1999 Act was expressed to be a temporary measure, pending the reports of the Millan Committee's review of the Mental Health (Scotland) Act 1984 and the MacLean Committee's review of the sentencing and treatment of sexual and violent offenders, including offenders with personality disorder. Those Committees have now reported.

The Millan Committee, which had criticised the new legislation, recommended its repeal, in favour of new safeguards at the time of sentencing and the greater use of hospital directions,[18] which would ensure that convicted persons whose conditions later proved untreatable could be returned to prison to complete their sentences.

However neither Millan nor MacLean could make any recommendation to cover those patients who were subject to the existing legislation. They could not be transferred to prison (unless, like D, they were subject to a restriction direction), as they had not received a prison sentence at their trial.

MacLean recommended that crucial to the proper management of their case was a high standard of risk assessment to consider their suitability for transfer to less secure facilities. Millan, while recommending that the legislation be repealed for the future, accepted that there might be a need for some transitional provisions to retain the provisions of the 1999 Act for this very limited group of high-risk patients.

The Scottish Executive is thought unlikely to repeal the 1999 Act as part of its new Mental Health Bill, expected in the spring. In its policy statement *Renewing Mental Health Law* (October 2001), the Executive said that it could not make firm recommendations until the outcome of the Privy Council case was known.[19] However its inclination was to retain the public safety test if a patient continued to suffer from a mental disorder and to pose a serious risk to the public.

17 *See R (on the application of H) v Mental Health Review Tribunal, North and East London Region [2001] EWCA Civ 415 and commentary in Journal of Mental Health Law, June 2001, p75.*

18 *Under s.59 of the Criminal Procedure (Scotland) Act 1995, where a person is convicted on indictment in the High Court or the Sheriff Court of an offence punishable by imprisonment, the court may make a direction authorising his or her detention in hospital in addition to any sentence of imprisonment which it may impose. Equivalent provisions are found in s.45A of the Mental Health Act 1983. Millan conceded that hospital directions have not been widely used in Scotland, referring at paragraph 35 of chapter 26 of their report to a "handful". Hospital directions are considered by some to be particularly appropriate for offenders with personality disorders who may benefit from treatment in hospital. If treatment is found to be ineffective, the person can be returned to prison.*

19 *At para 64.*