SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2025]CSIH 18
XA21/25

Lord Justice Clerk
Lord Malcolm
Lord Armstrong

OPINION OF THE COURT

delivered by LORD MALCOLM

in the appeal

by

DR AGNES LOUISE JOHNSTON

Appellant

against

GA AND ANOTHER

Respondents

Appellant: Pugh KC and Black; NHS Scotland Central Legal Office
First Respondent: Paterson KC; Ormistions Law Practice Limited
Second Respondent: McBrearty KC; Starling Lawyers

11 June 2025

Introduction

[1] This appeal raises the question of whether, and if so to what extent, a mental health tribunal is bound by an earlier tribunal decision in respect of the same patient. The circumstances can be summarised as follows. GA is subject to a compulsory treatment order and is currently in a specialist unit for those with an eating disorder. In May 2024, and at the instance of the responsible medical officer (RMO), the Scottish Ministers granted a warrant under cross border regulations for her transfer to a hospital in England. In June the

warrant was successfully appealed to the tribunal by GA and her father (the named person). Three weeks after that decision the RMO sought another warrant for the same purpose, which was granted in September. It was appealed to a differently constituted tribunal. In December 2024 it held a preliminary hearing to decide whether, given the earlier decision, there should be another evidential hearing on essentially the same question. Under reference to the doctrine of *res judicata* (the matter has been decided), the appeal was granted. Thus the cross-border transfer has not taken place. This court is now asked to set aside the December determination as a legally erroneous decision, essentially on the basis that *res judicata* should not have been applied in proceedings where circumstances can change and the primary concern is the best interests of the patient.

The June tribunal decision

[2] The June tribunal set out the evidence presented for and against the proposed transfer, the parties' submissions, and its findings in fact. Given GA's severe mental disorder, compulsory treatment remained necessary to ensure nutrition and survival. The improvement in her mental health had reached a plateau and the desire of the clinicians was to pass on the care to a suitable specialist unit more capable of addressing GA's complex needs. None had been found in Scotland but one had been identified near London.
The tribunal considered it a very difficult case. It concluded that a transfer so far away from family and friends was not the least restrictive option. There had been insufficient investigation into the staff resources and skills available at the London unit to keep the patient safe. None of GA's clinical team had visited it. Reliance had been based on anecdotal comments rather than research into patient outcomes. There had been no rebuttal of inspectors' criticisms. There was no recovery plan should there be a traumatic response

to the transfer. The tribunal was not convinced that local solutions had been fully investigated, nor that the benefits of a transfer would outweigh the serious risks for GA. There was no clear evidence that the transfer would provide the patient with the maximum benefit or be in her best interests. A cross border transfer order was refused.

The December tribunal decision

[3] After hearing submissions on the issue, the December tribunal commented that in principle the rationale underpinning *res judicata* is as desirable in disputes about mental health care as in any other type of case, though they may not apply with their full rigour. The essence of the dispute was whether the anticipated benefits of in-patient care at the London hospital outweighed the practical disadvantages and the identified risks of the move. Material additional to that before the June tribunal had been presented, but it was insufficient to overcome the application of *res judicata* in respect of the prior refusal of the transfer. Some of the new information was administrative in nature; some did not bear directly on the issues highlighted by the earlier tribunal. Other material pre-dated the June decision. Recent documents vouching regulatory inspections were general in nature. The opinions of the RMO and other doctors were useful background but could have been presented in June. In any event, they did not rebut six of the nine identified particular concerns expressed by the June tribunal.

[4] The December tribunal referred to passages in the judgment of Andrews LJ in *R(Abidoye)* v *Secretary of State for the Home Department* [2020] EWCA Civ 1425 to the effect that (a) an earlier decision will be final and binding on the parties to it unless there is a legal justification for departing from it, and (b) absent a change in circumstances, material which could and should have been presented to the original tribunal cannot be relied upon. Fresh

evidence meeting the test in *Ladd v Marshall* [1954] 1 WLR 1489 would be needed. The difficulty for the RMO was that none of the additional material satisfied both of the first and second limbs of that test; those limbs in summary being (i) could not have been used at the earlier tribunal, and (ii) if given to the tribunal, would have had an important influence on the outcome. While the tribunal was sympathetic to the comment that the RMO did not have advance notice of the June tribunal's concerns, the problem was that they had not been met by the material she now relied upon. Thus the decision was that "the current proceedings are caught by the doctrine of *res judicata*, as that doctrine has come to be applied in a public law context", see paragraph 29.

A summary of the parties' submissions

The RMO

[5] It was accepted that *res judicata* could apply in a public law context, though not as strictly as in respect of a finally determined private court action. Scrutiny of the relevant statutory framework supported the RMO's appeal. Nothing in the rules governing the tribunal refers to dismissal because of an earlier decision. There is an inquisitorial aspect to the procedure. The primary concern is to bring maximum benefit to the patient. Technical rules, including restrictions on the scope of admissible evidence, should not thwart the patient's welfare and best interests; they should be assessed on the information available at the time of the decision. For similar reasons, the children's hearings system is not subject to *res judicata*. The RMO is not seeking to nullify or frustrate the June decision. In any event, this was an appeal against a subsequent warrant granted by the Scottish Ministers on the basis of different information. The June tribunal could not and did not determine the question of a transfer for all time. There was genuinely new information available to the

second tribunal which should have allowed evidence to be led in support of the second warrant.

GA and her father

[6] The earlier decision should be respected unless there is a good reason for re-visiting the issue. The RMO had the chance to put forward her best case in June. Nothing had been presented in support of the second warrant which placed a different complexion on the case. The principles of *res judicata* "resonate" in permanence proceedings, see *RG* v *Glasgow City Council* 2020 SC 1 at paragraph 30. Plainly decisions of the present kind could not be binding for all time, but there had to be fresh evidence or a material change in circumstances. Another dispute on the same issue militates against the wellbeing of GA. It wastes money, resources, and the time of the tribunal. There was no procedural requirement for the second tribunal to hear oral evidence. As a specialist tribunal it was entitled to consider the material relied upon and conclude that it did not justify another evidential hearing into the proposed transfer to the London hospital.

The case law

[7] The following general propositions can be derived from the authorities cited by the parties, many of which concerned administrative or public law disputes. The doctrine of *res judicata* is not confined to private law adjudications. Unless the relevant statutory framework indicates otherwise, the principles underlying the plea can apply to any decision which finally and absolutely establishes the existence of a legal right; *Thrasyvoulou* v *Secretary of State for the Environment* [1990] 2 AC 273, Lord Bridge of Harwich at 289. Finality of litigation applies unless it would operate contrary to the wider interests of justice; *R(Ex*

parte Momin Ali) v *Secretary of State for the Home Department* [1984] 1 WLR 663. Absent a good reason, such as fresh evidence or a change of circumstances, a tribunal decision cannot be circumvented by a subsequent administrative decision; *Secretary of State for the Home Department* v *TB(Jamaica*) [2008] EWCA Civ 977. No one can be allowed to act in a way which nullifies or sets at nought a tribunal's decision. Mere disagreement is not enough for a second application. The applicant must reasonably and in good faith consider that they have information, not known to the tribunal, which puts a significantly different complexion on the case; *R(Von Brandenburg)* v *East London and The City Mental Health Trust and another* [2004] 2 AC 280.

[8] The plea of *res judicata* is based on considerations of public policy, equity and common sense which will not tolerate the same issue being litigated repeatedly between the same parties on substantially the same basis; *Grahame* v *Secretary of State for Scotland* 1951 SC 368 at 387. The plea can act in a positive manner by allowing facts determined earlier in another forum to be founded upon; *RG* v *Glasgow City Council* 2020 SC 1. Thus when considering an application for a permanence order, it was open to a sheriff to proceed on the basis of facts found by a different sheriff at earlier ground of referral proceedings, and to refuse to hear substantially the same evidence as that before the first court.

Analysis

[9] The well-established rules of *res judicata* as they apply to adversarial private law claims cannot simply be transferred to cases of the present nature, nor indeed to many public law claims. The plea is designed to provide certainty when a matter has been finally determined, for example that X can exercise a right of access, or Y has breached a contract. (That said, there are public law examples of this in operation, for instance in respect of a

decision that the mental health tribunal had no jurisdiction in the matter, see *C, Petitioner* 2012 SLT 521.) The result is that the parties cannot re-litigate the same issue. However, with regard to a tribunal required to make decisions which are best for the patient as matters stand at the time, there can be no such finality. And that was not the effect of the June decision; the tribunal could not and did not say that the transfer could never happen. Amongst other things, it commented on evidence which was missing and which might have made a difference. If come December those deficiencies had been remedied, how could one stop the issue being reconsidered by the tribunal?

[10] It does not follow from the non-applicability of strict *res judicata* that it is open season for repeated requests to a mental health tribunal until the desired outcome is achieved. If the RMO had done no more than argue that the June decision was wrong, that would fall foul of the authorities mentioned earlier. But by the time of the December hearing additional evidence had been lodged. Plainly the intention was to persuade the tribunal that the perceived weaknesses had been addressed and that the case for the transfer was now sufficiently strong for an order to be granted. In contrast, GA's representative submitted that the new evidence was not sufficiently different from that before the earlier tribunal. If it had been applying a strict rule of *res judicata*, the December tribunal would not have assessed that material. In doing so, its purpose was to determine whether, in the light of the June decision, it justified further procedure.

[11] As we understand it, essentially the tribunal's reasoning was as follows. The issue of the proposed transfer to the London hospital was dealt with six months earlier. Having regard to the terms of that determination, there was nothing in the information now relied upon by the RMO which justified re-opening the matter. The tribunal is a specialist body well able, as part of its case management powers, to assess the material relied on by the

RMO and decide whether it justified exploration at an evidential hearing. Although not binding in the sense of *res judicata,* in the event the June decision was highly relevant to the outcome. To have granted an evidential hearing would, in effect, have allowed a repeat adjudication on substantially the same basis as that which occurred in June. It can be noted that in *RG* the court explained that in cases of this kind the decision-maker can examine whether proffered evidence does or does not merit the re-examination of findings made earlier in related but different proceedings, see paragraph 34.

[12] The reference to *res judicata* in the context of a case of this kind has the potential to cause confusion, and we can understand why it has been contested. The concept is redolent of a final judgment which settles a dispute between two parties once and for all. Either the plea is available or it is not. If it is, the second action does not get off the ground. However the December tribunal considered all of the material relied on by the RMO. By examining it and weighing up its importance, the tribunal avoided an overly technical approach and stayed true to its primary responsibility towards the patient.

[13] The terminology used appears to have been influenced by certain passages in Andrews LJ's judgment in *Adeboye,* in particular the notion that the principles of *res judicata* may apply, but not with their full rigour; and also the reference to evidence having to meet the *Ladd* v *Marshall* tests, the English equivalent of our *res noviter veniens ad notitiam* (things newly come to light) as considered in cases such as *Rankin* v *Jack* 2010 SC 642 and *RG* at paragraph 33. For reasons similar to those ruling out strict *res judicata*, we cannot endorse the notion that the December tribunal required to ignore any evidence which reasonably could have been put before the earlier hearing, and this however material it was to the correct outcome. Had it applied such a rule, there might well have been a difficulty. However we are satisfied that in this regard the key finding was that, for the reasons set out

in paragraph 21 of the judgment, "the significant concerns raised by the tribunal in its decision in June do not appear to have been met by the material on which reliance is now placed", see paragraph 28. That decision having been made, the interests of justice did not require that it be explored at an evidential hearing.

[14] It is worth noticing the different context of the *Adeboye* case, namely whether the Home Secretary could issue a lawful deportation order notwithstanding a successful appeal to the Upper Tribunal against an earlier order. Indeed Andrews LJ herself derives the reference to *Ladd* v *Marshall* from *TB(Jamaica),* a case where the court confirmed that a mere disagreement with an immigration appeal tribunal's decision to grant leave to remain did not justify its circumvention by way of a subsequent inconsistent executive decision. These cases were much closer to circumstances which would justify a *res judicata/res noviter* type approach. Rather than focus on those concepts, in the present context we see merit in the approach outlined by Lord Bingham of Cornhill in *Von Brandenburg* at paragraph 10, namely, does the material now relied upon put "a significantly different complexion on the case as compared with that which was before the [earlier] tribunal"? Plainly the December tribunal did not think so.

Decision

[15] While we might not have expressed matters in exactly the same way, we are satisfied that the December decision is not vitiated by a material error in law. It was a decision which the tribunal was entitled to make. It follows that the appeal is refused.