OUTER HOUSE, COURT OF SESSION

[2022] CSOH 78

P673/21

OPINION OF LORD HARROWER

In the petition of

X

Petitioner

for Judicial Review of a decision by the Mental Health Tribunal for Scotland

Petitioner: Leighton; Drummond Miller LLP
Respondents: Macpherson; Scottish Government Legal Directorate

19 October 2022

The issues

[1] The Mental Health (Care and Treatment) (Scotland) Act 2003 ("the 2003 Act") distinguishes between mentally disordered patients requiring compulsory treatment according to whether or not that treatment is authorised in criminal or civil proceedings. Where patients have been convicted in the High Court or the sheriff court of an offence punishable by imprisonment, or where they have been acquitted of such an offence because they were unable by reason of their mental disorder to appreciate the nature or wrongfulness of their conduct ("forensic patients"), the court may authorise treatment as part of a compulsion order. Where, by contrast, treatment is authorised because the patients' decision-making in respect of that treatment is significantly impaired ("civil

patients"), the Mental Health Tribunal for Scotland ("the Tribunal") may impose a compulsory treatment order. In many respects, the two types of order, and their consequences, are similar. However, only in the case of the compulsory treatment order may the relevant decision-making body (in this case, the Tribunal), make an order specifying such treatment, care or services as it considers appropriate ("recorded matters", as they are referred to in the 2003 Act). The principal issue in this case is whether the absence of any corresponding provision allowing the Tribunal to specify recorded matters in respect of forensic patients amounts to unlawful discrimination contrary to Article 14 of the European Convention of Human Rights ("the Convention"). The petitioner, who is one such forensic patient, says that it does. He also argues that his Convention rights to liberty and to respect for his private and family life have been infringed.

Background

[2] The petitioner is 36 years old, and has a long-standing diagnosis of paranoid schizophrenia. In early 2018 he was detained in a "low-secure" specialist hospital ward in terms of a compulsory treatment order. Since 8 November 2019, however, his continued detention and treatment in hospital have been authorised by virtue of a compulsion order, granted by Stirling Sheriff Court in terms of Section 51A and Section 57A of the Criminal Procedure (Scotland) Act 1995. That order was made following his acquittal in relation to an offence of wilful fire-raising, the court having accepted that he was unable by reason of his mental disorder to appreciate the nature or wrongfulness of his conduct.

[3] In March 2021 he applied to the Tribunal to have his compulsion order varied in such a way that he would be allowed to receive care and treatment in the community. A hearing took place on 3 June 2021, and the Tribunal reached its decision on the same date

("the decision"). According to the evidence of the professional witnesses, which the Tribunal accepted, the petitioner's paranoid schizophrenia was characterised by auditory hallucinations, delusional beliefs, thought disorder, and increased agitation and aggression. He had benefitted from antipsychotic medication, together with care and support. He had also been assessed as suffering from impaired cognition. He had a history of self-harm at times of distress and was at risk of self-neglect. His criminal record included convictions for assault and weapons-related offences. Whilst in the Intensive Psychiatric Care Unit, he had engaged in sexual relations with a vulnerable female patient and displayed no insight into the impact this had on her. He did not believe that he suffered from mental illness, that he needed treatment, or that he required his current dose of medication. He wished to reduce or stop his medication altogether and would do so unilaterally if he were not subject to the order. He disagreed with his treatment plan, believed he could manage independently, and generally lacked insight into the support which he needed in the community.

[4] In the light of that evidence there was no dispute that the statutory conditions requiring the petitioner to be made subject to a compulsion order continued to be met. However, notwithstanding his various difficulties, it was also accepted that the petitioner's detention in a low-secure unit was no longer necessary. Rather, he had been assessed as requiring the type of support that could be provided by a so-called "core and cluster" facility. An estimated 25-30 establishments had been approached, all of which had assessed the petitioner as unsuitable, having regard to his care needs and the risks that he posed to himself and others.

[5] Against that background, the primary issue before the Tribunal was whether the petitioner's detention in hospital continued to represent the least restrictive option available for the provision of appropriate care and treatment. In that regard, the petitioner had

expressed a wish that he be allowed to return to the family home, even if only on a provisional basis. However, the Tribunal noted that all previous attempts to manage his care and treatment at home had failed, and that problems had arisen in relation to the petitioner's further drug use, and the petitioner's father's inability to control him. The father had been unable to attend the Tribunal hearing due to his being in hospital, and the Tribunal noted that it had received no information regarding the reason for his hospitalisation, the nature of his illness, its prognosis, or the impact of any of these matters on his ability to care for the petitioner. Nor had it received any evidence from the petitioner's mother to confirm her willingness or ability to care for the petitioner. In view of that state of the evidence, the Tribunal concluded that the current hospital-based compulsion order represented the least restrictive option available for the provision of appropriate care and treatment for the petitioner (paragraph 29 of the decision).

[6] No issue is taken in the present proceedings with that aspect of the Tribunal's decision. However, the petitioner's solicitor had also requested that the Tribunal specify a recorded matter. Her submission had been that, "given that no attempts to transition into the care of his father had been made" (somewhat contrary to the evidence accepted by the Tribunal), a recorded matter would "facilitate time out of the ward in the care of his father" (paragraph 13 of the decision). The Tribunal refused to grant that application, ostensibly because it considered it had no power to specify recorded matters under the 2003 Act (paragraph 28 of the decision). It is only in respect of that refusal to specify recorded matters that the petitioner now seeks judicial review, on the grounds that it amounted to an unjustified interference with Articles 5, 8 and 14 of his Convention rights.

The law

[7] In a joint bundle of authorities, parties lodged copies of Sections 57-129 and Sections 137-274 of the 2003 Act. When it came to the substantive hearing itself, however, they were far more sparing in their references, addressing no more than one or two of the Act's provisions. I have highlighted the key similarities and differences between compulsory treatment orders and compulsion orders, insofar as these emerged during the course of the discussion.

Conditions

[8] The Scottish Parliament clearly intended that, in certain respects at least, there should be similarities in the provisions made in respect of both compulsion orders and compulsory treatment orders. For example, in each case the court or tribunal making the order must be satisfied that certain conditions are met: that the offender or patient has a mental disorder; that medical treatment is available for him which would be likely to prevent the disorder worsening, or alleviate any of its symptoms or effects; that if he were not provided with such treatment, there would be a significant risk to his health, safety or welfare, or to the safety of any other person; and that the order is necessary. Significantly, however, the Tribunal making a compulsory treatment order must also be satisfied of the additional condition that, because of the mental disorder, the patient's ability to make decisions about the "provision of such medical treatment is significantly impaired" (Section 64(5)(d) of the 2003 Act: the so-called "SIDMA" test).

Appropriateness

[9] The 2003 Act provides that a Tribunal, once it is satisfied that the relevant conditions are met, "may" make a compulsory treatment order (Section 64(4)), whereas the court making a compulsion order, must also be satisfied that the order is appropriate, having regard to certain matters (Section 57A(4) of the 1995 Act, introduced by Section 133 of the 2003 Act): these are the mental health officer's report in respect of the offender, prepared in accordance with the Act; all the circumstances, including "the nature of the offence" of which the offender was convicted, and his antecedents; and any alternative means of dealing with him. Importantly, in terms of Section 57 of the 1995 Act, Section 57A also applies to any person who has been acquitted under Section 51A, with references to the "offender" being treated as references to such a person, and the reference in Section 57A(4) to "the nature of the offence" being treated as a reference to the offence with which such a person has been charged.

Care plans

[10] Before an application for a compulsory treatment order may be made, the mental health officer must prepare a care plan, specifying the patient's needs, as these have been assessed by the medical practitioners preparing reports relating to the patient, and (reading short) the treatment, care or services it is proposed to provide to the patient (Sections 62 and 63 of the 2003 Act). However, no proposed care plan is required before the court makes a compulsion order. Part 9 of the 2003 Act envisages that the making of a care plan will be one of the first acts carried out following the making of such an order and the appointment of the responsible medical officer.

Measures and recorded matters

[11] There is a menu of "measures" that may be authorised by a Tribunal making a compulsory treatment order (Section 64(4) and Section 66(1) of the 2003 Act). These measures are almost identical to those that may be authorised by a court making a compulsion order (Section 57A(2) and (8) of the 1995 Act). They include detention of the patient or offender in hospital, giving him medical treatment, and the imposition of a requirement on the patient or offender to attend at specified or directed times and places with a view to receiving treatment, care or services. (The exception is the imposition of a requirement to reside at a specified place. While such a requirement may be authorised in either type of order, in the case of a compulsion order, if the place is used for the purpose of providing a care home service, the court must be satisfied that the person providing that service is willing to receive the offender: Section 57A(9) of the 1995 Act.)

[12] In addition, the Tribunal making a compulsory treatment order may specify "such medical treatment, community care services, relevant services, other treatment, care or service" as the Tribunal considers appropriate (Section 64(4)(a)(ii) of the 2003 Act, and referred to in the 2003 Act as "recorded matters"). There is no provision authorising the court making a compulsion order to specify recorded matters.

Modifications

[13] I shall not attempt to summarise the myriad provisions relating to review, extension, revocation and variation of compulsory treatment orders or compulsion orders. The important point for present purposes is that applications to vary orders of either type must be made to the Tribunal. However, while the Tribunal varying a compulsory treatment order may modify the measures or the recorded matters specified in it (Sections 102, 103 and

104 of the 2003 Act), its powers when varying a compulsion order are necessarily limited to modifying the specified measures (Sections 166 and 167 of the 2003 Act).

Articles 5 and 8

[14] Mr Leighton's argument took these two Convention rights together. The compulsion order authorised the petitioner's detention and medical treatment in hospital against his will. That constituted an interference with Articles 5 and 8 of the Convention (*Glass* v *United Kingdom* [2004] ECHR 103, at paragraph 70). The only question was whether that interference was proportionate. He referred to the standard approach to questions of proportionality as set out in numerous decisions of the Supreme Court: "(i) whether the objective is sufficiently important to justify the limitation of a protected right; (ii) whether the measure is rationally connected to the objective; (iii) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective; and (iv) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter (ie whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure)" (*Christian Institute* v *Lord Advocate* 2017 SC (UKSC) 29, at paragraph 90). Addressing heads (iii) and (iv) of the proportionality test only, Mr Leighton argued that the availability of a power in the Tribunal to specify recorded matters when varying a compulsion order would make the interference with the petitioner's Article 5 and 8 Convention rights "less intrusive" and would "strike an appropriate balance". Mr Macpherson, appearing for the Lord Advocate, the second respondent, accepted that the petitioner's compulsory detention and treatment constituted an interference with his Convention rights (departing to some

extent from his Note of Argument), but argued that the absence of a power to record matters did not of itself interfere with any right.

[15] Assuming for the purposes of this decision that the compulsion order represents *prima facie* an interference with the petitioner's Article 5 and 8 Convention rights, I am not persuaded that any such interference can be said to be disproportionate. The Supreme Court has warned against treating the proportionality test as an invitation to the court to "come up with something a little less drastic or a little less restrictive" (per Lord Reed in *Bank Mellat* v *HM Treasury (No 2)* 2014 AC 700, at paragraph 75). That can be done in almost any situation and risks usurping the function of the legislature. The question is whether the limitation of the protected right is one that is reasonable for the legislature to impose (*ibid*). Mr Leighton did not seek to argue specifically that the balance struck by the legislature was unreasonable, and it is difficult to see how he could, given the various checks and balances that are inherent in the whole legislative scheme of the 2003 Act. I therefore reject this part of his submissions.

Article 14

[16] Article 14 of the Convention, entitled "Prohibition of discrimination", provides:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, or other status."

As its opening words make clear, Article 14 is not a free-standing prohibition of discrimination. It is enjoyment only of the rights and freedoms set out in the Convention which the article requires to be secured without discrimination on any of the identified grounds. This does not mean that the scope of the article is limited to cases where there has

been a breach of a Convention right. Clearly, that would have made article 14 redundant. Rather, where a contracting state goes further than the Convention requires in protecting any of the rights set forth in the Convention, it must do so in a manner compatible with Article 14.

[17] Under reference to *R (Steinfeld)* v *Secretary of State for International Development* [2020] AC 1 (in particular at paragraph 19), Mr Leighton identified four requirements that the petitioner had to satisfy in order to demonstrate a breach of Article 14: that compulsion orders and compulsory treatment orders fell within the ambit of one or more Convention rights; that they involved a difference in treatment between forensic and civil patients; that this difference in treatment was on a ground falling within Article 14; and that forensic and civil patients were in an analogous position. Once these matters had been established, the only basis on which the respondent could escape a finding that there had been an infringement of the petitioner's rights was by showing that the unequal treatment was justified.

[18] In the event, there was no dispute that compulsion orders and compulsory treatment orders fell within the ambit of, at least, Articles 5 and 8 of the Convention. Nor was there any dispute that, if the inability of the Tribunal varying a compulsion order to specify recorded matters genuinely amounted to a difference in treatment, it was a difference in treatment made on the ground of status as required by Article 14, namely, the petitioner's status as a forensic patient. However, Mr Macpherson did indeed take issue with whether the inability to specify recorded matters amounted to a genuine difference "in substance" (Note of argument, paragraph 8). He also disputed whether forensic patients and civil patients could be said to be in an analogous position (Note of Argument, paragraph 7). The question of whether or not any difference in treatment could be said to be justified was not

particularly developed in the Lord Advocate's Note of Argument or in the discussion before me. However, since it remained her position as set out in the Answers lodged on her behalf, I will deal with it briefly below.

Whether there is a difference in treatment

[19] Mr Macpherson made three arguments in support of the proposition that there was no substantial difference in treatment between forensic and civil patients when it came to the specification of recorded matters. Firstly, he suggested, albeit tentatively, that where no recorded matters were specified by the Tribunal when making the compulsory treatment order, there appeared to be no power in the Tribunal to specify recorded matters in any subsequent variation of the order. To that extent, the civil patient was in no different position to a forensic patient. Secondly, he suggested that, in any event, recorded matters were of little or at best uncertain practical utility, so much so that the forensic patient could not be said to be substantially prejudiced by the absence of any power to specify them as part of a compulsion order. Finally, and this was perhaps his principal argument, insofar as recorded matters were useful at all, their function was fulfilled, for forensic patients, by the Part 9 care plan, in which the patient's appropriate treatment, care and services would be set out.

[20] I deal firstly with the supposed absence of any power to vary a compulsory treatment order by specifying recorded matters, where none had been specified in the original order. This argument appeared to be based on an interpretation of Section 103(3) and (4) of the 2003 Act, which empower the Tribunal, on an application made by the patient, to vary a compulsory treatment order "by modifying … any recorded matter… specified in it". Where no recorded matter was specified in the original order, so the argument ran, the

Tribunal could have no jurisdiction to insert one. The civil patient, for whom no recorded matter was specified at the outset, was therefore in no different position to the forensic patient, for whom no recorded matter *could* be specified at the outset (or at any time). However, the short answer to this argument is that it ignores Section 111(d) of the 2003 Act, which provides that any reference in the 2003 Act to "modifying" recorded matters specified in a compulsory treatment order includes a reference to "specifying a recorded matter in an order which does not specify a recorded matter". Accordingly, this argument must be rejected.

[21] So far as the supposed limited effectiveness of recorded matters was concerned, Mr Macpherson referred to two reports published by the Mental Welfare Commission for Scotland ("MWCS"). The first report was produced following a survey into recorded matters made between January 2011 and October 2013 (MWCS, "Visit and Monitoring Report, Updated survey of recorded matters", 2014). It found that there had been a lack of adequate information and training among service users in relation to recorded matters. The second report was produced following a survey of people with learning disabilities in hospitals (MWCS, "No through road", 2016). It found that there had been a high number (46) of patients whose discharge from hospital had been delayed. The MWCS found this was due to a number of factors, including an absence of funding, accommodation and appropriate care providers. In a small number of cases (3), the length of the delay and lack of progress led to the Tribunal specifying as a recorded matter that the local authority should identify supported accommodation in order to facilitate the patient's discharge. The MWCS noted that it had been "hard to judge" how effective this was. For his part, Mr Leighton relied on an affidavit from an experienced specialist solicitor in support of his submission that the ability to specify recorded matters was an effective tool in the hands of

the Tribunal, but he himself appeared to acknowledge that recorded matters lacked "any coercive power", and carried only "a degree of moral weight" (Note of Argument, paragraph 6).

[22] In my opinion, both parties tended to underestimate the legal consequences that might follow from the fact that a Tribunal had specified one or more recorded matters. In the first place, the compulsory treatment order as a whole, including any recorded matters, must be reviewed by the responsible medical officer. Secondly, if it appears to him that the recorded matters are not being provided, Section 96(2) of the 2003 Act imposes an obligation on him, as soon as practicable, to consult the mental health officer, and such other persons as he considers appropriate. If, having regard to their views, the responsible medical officer is satisfied that the recorded matters are not being provided, Section 96(3), (4) and (5) impose upon him a further obligation, as soon as practicable, to make a reference to the Tribunal. (These duties do not arise where the responsible medical officer is required to revoke the order, or where he is making an application to the Tribunal to have the order varied.)

[23] In any event, whatever limitations there may be to the Tribunal's power to specify treatment, care and services for the patient, I am not prepared to hold that the power is so ineffective that it would be of no advantage to the forensic patient were it available to the Tribunal. The 2014 report carried out by the MWCS, though now rather out of date, found that recorded matters "frequently made a real difference to service users". They "focussed the minds" of managers of services on resource issues (p12).

[24] So far as the argument based on the functional equivalence of the Part 9 care plan with recorded matters was concerned, Mr Macpherson referred to Volume 3 of the Code of Practice for the 2003 Act, issued under powers conferred by Section 274 of that Act, and in which it is suggested that the power to specify recorded matters permits the Tribunal to

"mark out [any form of treatment care of service] as being essential" to the care package of a civil patient (at p202). Although there was no similar provision applicable to forensic patients, it noted that "best practice" suggested that any treatment, care or service regarded as "essential" should be described in the patient's Part 9 care plan. A similar argument appears to have been accepted by Sheriff Principal Lewis in the case of *S* v *Mental Health Tribunal for Scotland* (DUN-B197-19, Perth Sheriff Court, 4 June 2020). She stated that the absence of any provision for a compulsion order to specify recorded matters did not mean that "treatments, care or services essential to the person's care are ignored. The Code of Practice envisages that the care team should have assessed the person's needs" (paragraph 73).

[25] However, at least in this case, the petitioner does not complain that his treatment, care or services have been ignored. Nor does he complain that there has been a failure on the part of the care team to assess his needs. Rather, he complains about the absence of any power in the Tribunal to specify treatment, care or services that *they* might have regarded as appropriate to his needs. So far as care plans are concerned, these are required for both the forensic and the civil patient, albeit at different stages of the process. So it must have always been envisaged by the draftsman that something additional was required when providing the Tribunal with the power to specify recorded matters.

[26] I agree. The power to specify recorded matters provides a focal point for a more intensive scrutiny by the Tribunal, both procedurally and substantively, of the care team's assessment of needs and their formulation of a care plan. As part of that process, the Tribunal can hear evidence and submissions, thereby ensuring the participation of the patient, his named person, and any relatives or carers. Depending on what the Tribunal concludes is appropriate for the patient, it may specify treatment, care of services which are

additional or alternative to those proposed in the care plan. As the MWCS noted in the 2014 Report to which I have already referred, the power to specify recorded matters "*improved* [civil patients'] therapeutic care plan or social care package" (emphasis supplied).

[27] Nor do I accept that the power to specify recorded matters is limited, as the Code of Practice appears to suggest, to specifying "essential" treatment, care and services. The legislation is perfectly clear: it extends to any treatment, care of service the Tribunal considers "appropriate". Finally, while there may well be legal consequences following upon a failure to implement a care plan, as I have already noted, the 2003 Act provides a distinct, additional remedy, in the case of a failure to provide the specified recorded matters.

[28] In summary, I am persuaded that the absence of any power in the 2003 Act for the Tribunal to specify recorded matters, when considering an application to vary a compulsion order, represents a substantive difference in treatment of forensic patients compared to civil patients.

Whether civil and forensic patients are in an analogous position

[29] In *Clift* v *United Kingdom* [2010] ECHR 1106, the European Court of Human Rights explained that the requirement to demonstrate that the comparator groups were in an "analogous position" did not require their position to be identical. That there may be differences between the various groups did not preclude the application of Article 14. Rather, what was important was that, "having regard to the particular nature of his complaint", the applicant was in a "relevantly similar situation" to others treated differently.

[30] Mr Macpherson accepted that in the Answers lodged on behalf of the Lord Advocate (Answer 12), as well as in his Note of Argument (paragraphs 3 and 7), the petitioner was erroneously referred to as having been convicted. However, he maintained the position, at

the substantive hearing, that the forensic patient was not in an analogous position to the civil patient. In other words, whether or not the compulsion order was imposed following conviction for an offence punishable by imprisonment, the mere fact that it had been imposed in criminal proceedings, where different considerations applied, meant that the petitioner was not in an analogous position to the civil patient.

[31] I have already set out the principal differences in the provisions of the 2003 Act regarding compulsory treatment orders and compulsion orders. One preliminary matter to notice is the absence of any requirement, similar to that imposed on the mental health officer seeking a compulsory treatment order, for a proposed care plan to be placed before the court when it is considering whether or not to make a compulsion order. In the course of the substantive hearing, Mr Leighton accepted that, in the absence of such a plan, the court would not be in a position, at the time the compulsion order was imposed, to specify recorded matters relating to the patient's appropriate treatment, care or services. However, since the Part 9 care plan would be required to be prepared as soon as practicable after the forensic patient's responsible medical officer is appointed (Section 137 of the 2003 Act), the absence of a care plan at the time the order was originally imposed was not a sufficient reason for depriving the Tribunal of the power to specify recorded matters, if and when it came to consider the compulsion order.

[32] I agree. I would add that I can see no fundamental, procedural or competency-based objection to making legislative provision for the Tribunal varying a compulsion order to do something which the court first imposing that order had no power to do. In particular, it should be possible to introduce an interpretative provision akin to that made in Section 111(c) and (d) of the 2003 Act for compulsory treatment orders, such that any reference to "modifying measures" in a compulsion order would include a reference to

adding to the order any recorded matter, or to specifying a recorded matter in an order which does not specify a recorded matter.

[33] Of course, as already noted, there are other, more significant, differences between the forensic and civil patient. The SIDMA test represents an additional condition which must be satisfied before a compulsory treatment order may be imposed; and for the forensic patient, there is a criterion of "appropriateness", in terms of which the court must take into account all the circumstances of the patient's mental disorder, including the offence of which he was convicted or, where he has been acquitted under Section 51A of the 1995 Act, the offence with which he was charged. The reason for these differences was explained in the following terms by the Scottish Executive in its Policy Memorandum (at paragraph 191), when introducing the Mental Health (Scotland) Bill to the Scottish Parliament in 2002:

> "The civil criteria are designed to ensure that a patient is only placed under compulsion and deprived of their liberty when there are grounds for over-ruling the patient's autonomy. The forensic criteria are directed at ensuring that a court disposal and any continuing compulsion are appropriate, given all the circumstances of the offender's mental disorder and offence. We believe this difference is justified in the context of criminal disposals, where the alternative to a mental health order may be prison. The aim is to place emphasis on the patient's need for appropriate care and treatment rather than on a person's willingness to accept the care and treatment. …"

However, the case of *Clift* made it clear that, in assessing whether the petitioner was in a "relevantly similar situation" to others treated differently, the court must have regard to "the particular nature of his complaint". In this petition, the petitioner's complaint is directed not at the *conditions* for his continuing compulsion under the order, but rather at its *consequences*. So far as the his ongoing need for appropriate treatment, care and services is concerned, he is in a relevantly similar, if not identical, situation as a patient subject to a compulsory treatment order (such as he was himself prior to the imposition of the

compulsion order). Therefore it is difficult to see why he should be in any different position so far as the ability of the Tribunal to specify recorded matters is concerned.

[34] The Policy Memorandum distinguished the forensic patient from the civil patient by reference to the possibility of imprisonment as an alternative to a compulsion order. However, it may be doubted whether this constitutes a relevant difference when it comes to the specification of recorded matters. In this connection, parties referred to a consultation paper published in March 2022 by the Scottish Mental Health and Incapacity Law Review ("the SMHLR"), set up by the Scottish Ministers, and chaired by Lord Scott. At p113, the SMHLR underlined the importance of the power to specify recorded matters as supporting the principle of "reciprocity". That principle was explained in the following terms by the Millan Committee in its Report on the Review of the Mental Health (Scotland) Act 1984,

> "Where society imposes an obligation on an individual to comply with a programme of treatment and care, it should impose a parallel obligation on the health and social care authorities to provide safe and appropriate services, including ongoing care following discharge from compulsion" (p19).

Accepting of course that the Millan Committee's recommendations were not fully implemented in the 2003 Act, it is nevertheless worthy of note that there would appear to be nothing in this statement of principle to suggest that the forensic patient is in any different position, so far as reciprocity is concerned, from the civil patient. In any event, imprisonment is not available as an alternative to an acquittal in terms of Section 51A of the 1995 Act. It is not therefore a relevant basis for distinguishing the present petitioner from patients detained in terms of a compulsory treatment order.

[35] Before turning to the question of justification, I should note that in September 2022, while this case was at *avizandum*, the SMHLR produced its final report, in which it recommended extending the power to specify recorded matters to forensic patients. The

SMHLR's conclusions are based on broader considerations than are relevant to a discussion based exclusively on Article 14 of the Convention, and I have not relied on them in the preparation of this opinion.

Justification

[36] In Answer 14, the Lord Advocate avers that any difference in treatment between the provisions relating to compulsory treatment orders compared with compulsion orders "is justified by the different means by which a patient becomes subject to either order." In the same answer, she continues, "A compulsion order may be made where the alternative to the order may be imprisonment". And in Answer 16, it is averred that "any difference in treatment that exists on account of the absence of provision for recorded matters can … be justified from the provisions relating to the treatment, care and services required by a person subject to a compulsion order". The provisions being referred to in this last averment would appear to be those relating to the Part 9 care plan. I hope that I do no injustice to Mr Macpherson's submissions under this heading when I say that they are really no more than a restatement of arguments that I have already considered and rejected.

[37] I would conclude that, at least in the case of the forensic patient who has been acquitted on Section 51A grounds, the absence of any power in the 2003 Act for the Tribunal to specify recorded matters, where such a power is available for the benefit of civil patients, amounts to unjustified discrimination contrary to Article 14 of the Convention, and is therefore unlawful.

Materiality

[38] The petitioner is rather coy in his pleadings regarding what was actually sought at the hearing. In paragraph 12 he avers that, had the petitioner been subject to a compulsory treatment order, then, being a "delayed discharge" patient, he might "reasonably have expected the Tribunal to make a recorded matter in an effort to obtain appropriate accommodation". He immediately adds, "The petitioner's agents sought a recorded matter in the present case but were refused it as the legislation does not make provision for recorded matters".

[39] It is clear from the Tribunal's reasons that the petitioner's legal representative's submissions were directed not so much at the provision of "appropriate accommodation", but at facilitating "time out of the ward in the care of his father". There was simply no evidential basis that would have permitted the Tribunal to specify such a recorded matter, and indeed a strong evidential basis for not doing so. It appears therefore that the only recorded matter that was actually sought would never have been specified by the Tribunal even if it had the power to do so.

[40] In these circumstances, it might be tempting to dismiss the petition on the basis that the power to specify recorded matters, had it been available to the Tribunal, would have made no material difference to the petitioner's application to vary the compulsion order. However, the test for dismissing a petition on this ground is a high one, sometimes expressed as whether, but for the alleged error of law, or in this case, the alleged infringement of Convention rights, the outcome would "inevitably" have been the same (*Simplex GE (Holdings) Limited* v *Secretary of State for the Environment*, decided in 1988, and reported in [2017] PTSR 1041). In this case, the petitioner had been assessed as requiring the type of support that could be provided by a "core and cluster" facility (paragraph 9 of the

decision). The possibility cannot be excluded, notwithstanding the lengths to which the mental health officer and others had gone to obtain alternative accommodation for the petitioner, that a Tribunal might have wished to specify, as a recorded matter, the particular type of care that had been assessed as appropriate in the petitioner's case. Indeed, it is precisely because such efforts had already been made, and proved unsuccessful, that a Tribunal might have wished to make recourse to the specification of recorded matters as a way of registering what amounts to an unmet need.

Remedies

[41] Mr Leighton contended that, if I were with him on the merits, then the legislation should be interpreted in such a way that it is compatible with the petitioner's Convention rights, and asked the court to pronounce decree of declarator that the Tribunal could specify recorded matters when considering a case relating to a compulsion order. In the alternative, he sought decree of declarator that the Tribunal's inability in such a case to specify recorded matters was a breach of the petitioner's Convention Rights.

[42] In support of his primary contention, Mr Leighton relied on Section 3 of the Human Rights Act 1998, requiring that legislation be read and given effect to, "so far as it is possible to do so", in a way that is compliant with the Convention. He also relied on *Ghaidan* v *Godin-Mendoza* [2004] 2 AC 557. However, *Ghaidan* acknowledged an important limitation to the power under Section 3, namely, that the modified meaning must remain consistent with the fundamental features of the legislative scheme. In my opinion, the distinctions between forensic patients and civil patients, and between compulsion orders and compulsory treatment orders are obviously fundamental features of the 2003 Act. To "read in" words that give the Tribunal a power, when varying a compulsion order, to specify recorded

matters would cross the boundary between interpretation and amendment. In any event, Mr Leighton did not specify exactly which words should be read in or where they would require to be inserted.

[43] The petition also sought reduction of the 2003 Act insofar as it "[did] not permit recorded matters in relation to compulsion orders". But Mr Leighton acknowledged that he faced an uphill task in persuading the court to grant such a remedy, referring to certain *dicta* in the case of *R (Bibi)* v *Home Secretary* [2015] 1 WLR 5055, which suggested that it may be inappropriate to strike down legislation where it may be capable of being operated in a Convention-compliant manner. The more fundamental difficulty for the petitioner, in my view, lies in specifying what it is precisely that should be reduced. Since I have refused to uphold the petitioner's submissions insofar as they were based solely on Article 5 or Article 8 of the Convention, it would be inappropriate simply to reduce wholesale the legislative provisions authorising compulsion orders to be made. But it would be just as inappropriate, in a case based on Article 14, to seek to undo the discrimination by reducing the provisions conferring additional powers on the Tribunal in the case of civil patients.

[44] In my view the appropriate remedy in this case is to grant decree of declarator that, in the case of the forensic patient who has been acquitted on Section 51A grounds, the absence of any power in the 2003 Act for the Tribunal to specify recorded matters, where such a power is available for the benefit of civil patients, amounts to unjustified discrimination contrary to Article 14 of the Convention, and is therefore unlawful.

Disposal

[45] I shall therefore sustain the second plea in law for the petitioner to the extent of granting the above-mentioned declarator. *Quoad ultra* I shall repel the pleas in law for both the petitioner and the second respondent. I shall reserve any question of expenses.