SHERIFFDOM OF TAYSIDE, CENTRAL AND FIFE AT PERTH

[2023] SC PER 11

NOTE

BY SHERIFF PAUL REID, ADVOCATE

in respect of the Summary Complaint

brought by

THE PROCURATOR FISCAL OF PERTH

against

ZA

PERTH, 14 February 2023

Introduction

[1] ZA ("the accused") has a number of summary complaints pending before the Court. In respect of one of them she has been held on remand since 28 December 2022. Since 22 December 2022, however, the Court has been sufficiently concerned about her mental health, and her ability to give instructions and participate in criminal proceedings, that it has been looking to make an assessment order (in terms of s.52D of the Criminal Procedure (Scotland) Act 1995 (all statutory references are to this Act, unless otherwise specified)). Such an order was finally made on 14 February 2023. It was delayed due to a lack of a suitable bed in which to accommodate the accused for the purposes of assessment. This is not an isolated issue but is illustrative of a wider problem caused by current demands upon the forensic psychiatric estate, in particular in respect of females, in Scotland. It has, however, highlighted concerns about how a person in the position of the accused, who requires hospital based assessment and cannot safely be left in the community, is to be

managed. In particular, a real concern arises about how such a person can be managed in a way which is compatible with the State's obligations under Article 5 of the European Convention on Human Rights ("the Convention").

[2] Given the experience in this case is understood not to be an isolated problem, it was agreed that it may be helpful if this Note was produced so as to draw together, and share, what has been learned from the management of this accused.

Background

[3] On the complaint in respect of which the issue arose, the accused faces two charges which date from August 2021. One is a racially aggravated assault and the other is a breach of s.50A(1)(b) and (5) of the Criminal Law (Consolidation)(Scotland) Act 1995. She first appeared in respect of these matters on 30 August 2021. The case has called numerous times and several trial diets have been lost, for a variety of reasons. Until 28 December 2022, the accused was on bail. Concerns about the accused's mental health appear to have arisen in December 2022. On 22 December 2022, at an Intermediate Diet, the court on its own motion adjourned the diet until the following day to ascertain whether the accused's mental health could be assessed. On 23 December 2022, the Intermediate Diet was, on the court's own motion, adjourned until 28 December 2022 to allow further time for a report to be obtained with a view to making an assessment order. The accused's bail was continued. When the case called on 28 December 2022, a further intermediate diet was fixed for 20 January 2023 and a trial diet fixed for 30 January 2023. At this point, the accused was remanded in custody. It is unclear from the court minute why bail was revoked. She has been in custody since. On 20 January 2023, the intermediate diet was continued to 27 January 2023. On that day, the case was continued to a notional trial diet on 3 February 2023 to find out if a bed

was available for the accused. The previously assigned trial diet on 30 January 2023 was discharged.

[4] Throughout January and February 2023, soul and conscience letters were submitted attesting to the fact that the accused was unfit to attend court by reason of mental disorder. She was said to have been highly agitated, disturbed and unwell. On 13 January 2023, the accused was examined in prison by a Specialist Registrar in Forensic Psychiatry. At the time of that interview, the clinician formed the view that the accused lacked capacity to engage in any discussion about legal matters and that it was in her best interests that her mental health be assessed in a psychiatric hospital. The clinician also confirmed that the accused was unable to instruct her solicitor or effectively participate in court proceedings. However, the clinician advised that having had discussions with all of the relevant units throughout Scotland, "there is no prospect of a bed becoming available in the near future." Enquiries were made about possible availability in England but that does not appear to be an option. As at 14 February 2023, it was confirmed that the accused continued to meet the conditions for making an assessment order and that it was in her best interests for such an order to be made.

[5] Matters became more acute, from a legal perspective, on 3 February 2023. On that day, the case called for a notional trial diet. The accused remained in prison and no bed was available (the position remained that one would not be available for the foreseeable future). She had, however, been in custody for 40 days (the statutory maximum in summary proceedings before the trial must start; see below). That left the Court with three options: (a) start the trial; (b) extend the 40 day limit for detention; or (c) refuse to extend the time limit, with the consequence the accused would be released. Starting the trial was not an option given the accused was not present and had been assessed as unfit to participate in

proceedings. Refusing to extend the time limit was not attractive because it would have resulted in the accused being released and none of the parties were in a position to explain what, if any, support would be available to the accused if liberated (it having been reported that she would be a risk to both herself and the community). That left extending the period of detention, which appeared to be the least bad option. But given the time the accused had already been in custody, and the fact no hospital bed was likely to become available in the near future, how long to sanction her detention became an issue. And that was a real problem for the court because it could not lawfully permit her continued detention if it became arbitrary within the meaning of Art.5 of the Convention (see below). In the event, the accused's continued detention was authorised for seven days and the court required the Crown to intimate the proceedings upon the Law Officers and the Scottish Ministers given the real possibility that a compatibility issue would arise should a further extension be sought. An earlier draft of this Note was made available to the parties so as to explain the court's concerns. The Law Officers and the Scottish Ministers were invited to make any observations, if they wished to do so.

[6] On 10 February 2023, the case called again and still no bed was available. It was hoped one might become available the week beginning 20 February 2023, but when the case called nobody then appearing was particularly confident that it would materialise. It also became apparent that the accused was being held in the segregation unit and was refusing to take her medication. She was reported to be unable to form coherent speech. How long the accused had been held in segregation was not clear but I was led to believe she was being held there under "Rule 95", which I presume to be Rule 95 of the Prisons and Young Offenders Institutions (Scotland) Rules 2011. Read short, a person can be held in segregation for 72 hours by order of the Governor and that period may be extended, for no more than a

month at a time, by the Scottish Ministers. I was given no details of any extensions having been granted by the Ministers but the impressions was the accused had been there for more than 72 hours.

[7] Whilst the Scottish Ministers did not appear when the case called, a helpful letter was provided by a solicitor in the litigation division which explained what had been done to clarify responsibility for managing the care of the accused. It went on to explain that:

> "As regards the wider issues, Scottish Government Mental Health Directorate are leading on work around forensic capacity following the Independent Forensic Mental Health Review and the Scottish Mental Health Law Review. I understand that a meeting of stakeholders … is being urgently arranged to try to identify the extent of the problem and potential solutions."

The reviews mentioned reported in February 2021 and September 2022, respectively. At the hearing, limited information was available as to what would happen if the accused's detention was not again extended (the Crown sought a further 7 day extension). In light of that, a further extension, to 14 February 2023, was granted so that the case could call and a fuller explanation offered as to the range of options available for managing the accused in the event her detention ended.

[8] Later that day, the court was informed that a bed would be available in an appropriate facility within seven days of 14 February 2023 if the court were to make an assessment order when the case next called. That was done, with the time bar extended so as to facilitate the assessment. The accused's detention in a "place of safety", namely HMP Cornton Vale, was authorised for up to seven days until her transfer to hospital. When the case called, the Scottish Ministers were this time represented. On their behalf, a fuller explanation was tendered about the practical issues that the accused's case has revealed (not least the number of Health Boards involved) and it was fairly acknowledged that this case appeared to be a practical illustration of concerns raised in recent reviews of

mental health provision in Scotland. I was told that whilst the local Health Board had responsibility for the care of the accused, the Ministers were coordinating efforts at a national level to address what appeared to be a structural issue. I was also told that the Ministers shared the concerns previously expressed about the compatibility of further detention with Art.5 of the Convention. In that regard, they drew my attention to further helpful authority from the Strasbourg Court. From a practical point of view, it was suggested that, going forward, where the court was faced with not being able to make an assessment order both the local Health Board (that is, the Health Board for where the accused person normally lives) and the Scottish Ministers be informed of that. It was also suggested that an updated version of the draft Note previously prepared would assist in sharing the experience of this case given the issue raised is not understood to be particular to this Sheriff Court District.

[9] Before explaining how those concerns were addressed in the context of the present case, it may be helpful to set out the relevant legal framework.

The legal framework

[10] Provision (which was introduced by s.130 of the Mental Health (Care and Treatment)(Scotland) Act 2003) is made for the making of an assessment order in respect of a person who has been charged with an offence and where those proceedings have not been disposed of. It is for the Crown to apply for an assessment order where it appears to the prosecutor that the person has a mental disorder: s.52B. Where the person is remanded in custody, the Scottish Ministers may apply to the court for an assessment order: s.52C. Where the Crown make an application in respect of a person who has been remanded, they

must notify the Scottish Ministers: s.52B(3)(c). Such an order can be made in accordance with the provisions of s.52D which, so far as material for present purposes, provides:

> "**52D Assessment order**
>
> …
>
> (2) If the court is satisfied –
> (a) on the written or oral evidence of a medical practitioner, as to the matters mentioned in subsection (3) below; and
> (b) that, having regard to the matters mentioned in subsection (4) below, it is appropriate,
> it may, subject to subsection (5) below, make an assessment order authorising the measures mentioned in subsection (6) below and specifying any matters to be included in the report under section 52G(1) of this Act.
>
> (3) The matters referred to in subsection (2)(a) above are –
> (a) that there are reasonable grounds for believing –
> (i) that the person in respect of whom the application is made has a mental disorder;
> (ii) that it is necessary to detain the person in hospital to assess whether the conditions mentioned in subsection (7) below are met in respect of the person; and
> (iii) that if the assessment order were not made there would be a significant risk to the health, safety or welfare of the person or a significant risk to the safety of any other person;
> (b) that the hospital proposed by the medical practitioner is suitable for the purpose of assessing whether the conditions mentioned in subsection (7) below are met in respect of the person;
> (c) that, if an assessment order were made, the person could be admitted to such hospital before the expiry of the period of 7 days beginning with the day on which the order is made; and
> (d) that it would not be reasonably practicable to carry out the assessment mentioned in paragraph (b) above unless an order were made.
>
> (4) The matters referred to in subsection (2)(b) above are –
> (a) all the circumstances (including the nature of the offence with which the person in respect of whom the application is made is charged or, as the case may be, of which the person was convicted); and
> (b) any alternative means of dealing with the person.
>
> (5) The court may make an assessment order only if the person in respect of whom the application is made has not been sentenced.

(6) The measures are –

(a) in the case of a person who, when the assessment order is made, has not been admitted to the specified hospital, the removal, before the end of the day following the 7 days beginning with the day on which the order is made, of the person to specified hospital by - … [specified persons] …

(b) the detention, for the relevant period given by subsection (6A) below, of the person in the specified hospital; and

(c) during the relevant period given by subsection (6A) below, the giving to the person … of medical treatment.

(6A) For the purposes of subsection (6)(b) and (c) above, the relevant period is the period –

(a) beginning with the day on which the order is made,

(b) expiring at the end of the 28 days following that day.

(7) The conditions referred to in paragraphs (a)(ii) and (b) of subsection (3) above are –

(a) that the person in respect of whom the application is made has a mental disorder;

(b) that medical treatment which would be likely to –

(i) prevent the mental disorder worsening; or

(ii) alleviate any of the symptoms, or effects, of the disorder, is available for the person; and

(c) that if the person were not provided with such medical treatment there would be a significant risk –

(i) to the health, safety or welfare of the person; or

(ii) to the safety of any other person.

…

(9) An assessment order may include such directions as the court thinks fit for the removal of the person subject to the order to, and detention of the person in, a place of safety pending the person's admission to the specified hospital.

(10) The court shall, as soon as reasonably practicable after making an assessment order, give notice of the making of the order to –

…

(d) in a case where the person, immediately before the order was made, was remanded in custody, the Scottish Ministers

…"

The court may make an assessment order of its own volition in respect of a person where it would have made one under s.52D had an application been made: s.52E.

[11] Two features of the legislative scheme appear to be worthy of comment. First, the power to make an assessment order is discretionary. Where satisfied of the matters set out in subsections (2)(a) and (b), the court "may" make an assessment order. Accordingly, the legislation recognises that there may be people who meet the criteria for making an assessment order but it is nonetheless appropriate that no such order be made. For a person who was not otherwise on bail or ordained to appear, they would continue to be detained in prison. The point I take from that is the statutory scheme recognises, and accepts, that a person who meets the criteria for an assessment order can still be held in prison. Put another way, meeting the criteria for an assessment order does not require that person be admitted to hospital. Secondly, it is recognised that a place in hospital may not be available immediately. Specific provision is made to hold a person in a "place of safety" for seven days before admission to hospital. That, as noted below, is consistent with the Convention jurisprudence. It is notable that the period is short (a quarter of the period within which an assessment order must be completed). But it is further recognition that a person who meets the criteria for an assessment order, and even where the court has decided an assessment order should be made, can be held elsewhere than a hospital. Having regard to the processes which are in place to assess prisoners and support those who are identified as having mental health challenges, as well as the State's positive duty in respect of the care of a prisoner, a prison ought ordinarily be meet the requirement of being a place of safety. It is clear, however, that the legislature intended such place of safety to be a short-term and temporary measure and as effectively a bridge to an identified place in hospital. And whatever measures are in place within a prison, it is not a hospital and it is not suitable for the medium or long-term detention of a person in need of formal mental health assessment. That is expressly recognised by s.52C.

[12] Given how long the accused has been held on remand, the time period prescribed in s.147 was relevant. That section provides:

> "**Prevention of delay in trials**
>
> **147-**(1) Subject to subsections (2) and (3) below, a person charged with an offence in summary proceedings shall not be detained in that respect for a total of more than 40 days after the bringing of the complaint in court unless his trial is commenced within that period, failing which he shall be liberated forthwith and thereafter he shall be for ever free from all question or process for that offence.
>
> (2) On an application made for the purpose, the sheriff may, on cause shown –
> (a) extend the period mentioned in subsection (1) above; and
> (b) order the accused to be detained awaiting trial,
> for such period as the sheriff thinks fit.
>
> (2A) Before determining an application under subsection (2) above, the sheriff shall give the parties an opportunity to be heard.
>
> …
>
> (3) The grant or refusal of any application to extend the period mentioned in subsection (1) above may be appealed against by note of appeal presented to the Sheriff Appeal Court; and that Court may affirm, reverse or amend the determination made on such application."

Applications were made, and granted, under s.147(2) to extend the period (as set out above) so that this matter could be resolved. The need for such applications is significant in circumstances such as these. Where continued detention needs specific authorisation, if the line of arbitrariness is crossed the court cannot further extend detention. That is a consequence of the Human Rights Act 1998 ("HRA").

[13] Certain articles of the European Convention on Human Rights which are listed in schedule 1 of the HRA are, for the purposes of domestic law, "Convention rights" (s.1 HRA). Those rights include the right to liberty and security (Art.5). Domestic legislation must, so far as it is possible to do so, be read and given effect to in a way which is compatible with Convention rights (s.3(1) HRA). It is unlawful for a public authority to act in a way which

is incompatible with a Convention right (s.6(1) HRA). An act includes a failure to act (s.6(6) HRA) and the court is for these purposes a public authority (s.6(3)(a) HRA). If a public authority has, by virtue of primary legislation, no choice but to act in a way which is incompatible with a Convention right, it is lawful for it to so act (s.6(2) HRA).

[14] So far as relevant for present purposes, Art.5 provides:

> "1 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:
>
> …
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
>
> …
>
> (e) the lawful detention of persons … of unsound mind
>
> …
>
> 3 Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
>
> 4 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.
>
> …"

In considering Art.5, the Strasbourg Court has observed the following. First, the key purpose of Art.5 is to prevent arbitrary or unjustified deprivations of liberty (*McKay* v *United Kingdom* (2006) 44 EHRR 41 at para.30). The list of reasons given in Art.5(1) which may justify a restriction upon this right is exhaustive (*Brand* v *The Netherlands* (2004) 17 BHRC 398 at para.58). An aspect of arbitrariness requires that there must be some relationship between the ground of permitted deprivation of liberty relied upon and the place and conditions of

detention (*Ashingdane* v *United Kingdom* (1985) 7 EHRR 528 at para.44). Where an interim custody measure is adopted pending transfer to the more appropriate place of detention, such an interim measure must be "speedily followed by actual application of such a regime in a setting … designed with sufficient resources for that purpose" (*Bouamar* v *Belgium* (1988) 11 EHRR 1 at para.50). With particular reference to detention on the basis of mental health, three conditions must be met: (a) objective medical evidence must reliably establish that there is a true mental disorder; (b) the person's mental condition must justify detention; and (c) continuing detention must be supported and justified by the continuing need for such based on the current mental condition of the person (*Winterwerp* v *Netherlands* (1979) 2 EHRR 387).

[15] A certain flexibility has been recognised, in that the end of a mental illness does not demand immediate and unconditional release; transitional arrangements, and even some delays in putting transitional arrangements in place, are tolerable (*Johnston* v *United Kingdom* (1997) 27 EHRR 296). In such circumstances, it is "of paramount importance" that appropriate safeguards are in place to ensure the transition is not unreasonably delayed (*Johnston*, above, at para.63). Similarly, the Court's observations in *Brand* v *The Netherlands*, above, at paras-64-65 are instructive:

> "…it would be unrealistic and too rigid an approach to expect the authorities to ensure that a place is immediately available in the selected custodial clinic. … a certain friction between available and required capacity in custodial clinics is inevitable and must be regarded as acceptable.
>
> Consequently, a reasonable balance must be struck between the completing interests involved. … in striking this balance particular weight should be given to the applicant's right to liberty."

The Court then notes that a significant delay in admission to a clinic will obviously impact the prospects of successful treatment. It held, recognising that the Netherlands had

identified a structural lack of capacity almost ten years earlier, that a delay of six months was not reasonable (and thus incompatible with the Convention). See also: *Mocarska* v *Poland* [2008] MHLR 228 (eight months not reasonable).

[16] Before parting with the Convention authorities, the observations of the Grand Chamber in *Saadi* v *United Kingdom* (2008) 47 EHRR 17 at para.70 are worth noticing:

> "The notion of arbitrariness in the contexts of sub-paras (b), (d) and (e) also includes an assessment whether detention was necessary to achieve the stated aim. The detention of an individual is such a serious measure that it is justified only as a last resort where other, less severe measures have been considered and found to be insufficient to safeguard the individual or public interest which might require that the person be detained."

From that, I take it is important to remember that an assessment order is one particular form of state intervention where a person is believed to have a mental illness. There are other, non-criminal, interventions. The availability, and suitability, of those other interventions should, on my reading of that passage, form part of the discussion whether detention pending an ability to make an assessment order is appropriate.

[17] In the domestic context, the Judicial Committee of the Privy Council observed in *A* v *Scottish Ministers* 2002 SC (PC) 63 that the place of detention of a person for mental health reasons falls within the margin of appreciation afforded to the State "so long as it is a place which is suitable for the detention of persons of unsound mind." (at para.29, Lord Hope of Craighead). Lord Reed made the same point in *Brown* v *Parole Board for Scotland* 2018 SC (UKSC) 49 at para.3: "detention of a person as a mental health patient will, however, only be 'lawful' for the purposes of article 5(1)(e) if effected in a hospital, clinic or other appropriate institution" (that language is identical to that used by the Strasbourg court: *Hutchison Reid* v *United Kingdom* [2003] ECHR 94 at para.48 but should be read subject to the qualification stated in *Brand*, above, at para.62).

[18] Finally, in respect of the legal framework relevant to Convention rights issues, it is necessary to notice s.288ZA, which defines a "compatibility issue":

> "(2) In this section 'compatibility issue' means a question, arising in criminal proceedings, as to –
> (a) whether a public authority has acted (or proposes to act) -
> (i) in a way which is made unlawful by section 6(1) of the Human Rights Act 1998
>
> …
>
> (3) In subsection (2) –
> (a) 'public authority' has the same meaning as in section 6 of the Human Rights Act 1998;
> (b) references to acting include failing to act;"

As already noted, the court is, for the purposes of s.6 HRA, a public authority. Where a compatibility issue arises, certain Law Officers have the right to participate in proceedings and, if they wish, require the referral of the matter to a higher court. The procedural rules concerning a compatibility issue are anchored around the point being raised by one of the parties (Criminal Procedure Rules 1996, ch.40). Given the court's obligation as a public authority under s.6 HRA, it must be open to the court notice and raise the possibility of a compatibility issue itself.

Application to the accused

[19] Everyone appears to be agreed that it is not in the accused's (or the wider public's) interests that she simply be liberated and let out, unsupported and unmonitored, into the community. Because the accused has a number of complaints before the court, and in respect of the others she remains on bail, at one point is was suggested I could admit her to bail on this complaint and then remand her to custody on another. I was not, however, satisfied that was a course lawfully open to me. The practical effect would be that an accused could be held in custody, awaiting a suitable place in hospital becoming available,

for a length of time that was dependent upon how many complaints they then had pending before the court. Had, for example, the accused had only the complaint in respect of which they have already been held for 40 days, further remanding them on another matter would not be an option. In my view, that does not become an option simply because she is facing multiple complaints (and so multiple 40 day periods can be set off to run consecutively). I am not satisfied that such a course would be compatible with the prohibition on arbitrary detention enshrined in Art.5. Indeed, it strikes me as the very definition of arbitrary (being entirely dependent upon the happenstance of another complaint being before the court). I did not consider this option to be one that was lawfully available.

[20] Nor was I satisfied that I can simply make an assessment order in the absence of information of an available place. The terms of s.52D appear to hard-wire in the need for an available bed. That makes sense as it prevents the court from making orders which are impossible to comply with. No suggestion was made that the requirements of s.52D(3) that a particular hospital be identified and a place be available could be "read down" in terms of s.3 HRA. Indeed, when the case called on 10 February 2023, the suggestion s.3 HRA could be used was expressly disavowed. Having not heard any argument on the point I express no concluded view. But my immediate impression is that the parties were correct not to pursue such a line.

[21] That left the possibility of extending the time limit under s.147(2). That was the course adopted although I had misgivings about for how long that could be done before any detention would cross the line of arbitrariness and, with it, lawfulness.

[22] Ultimately, I was satisfied that the line of arbitrariness had not yet been crossed. First, transfer to hospital where the conditions for making an assessment order were otherwise satisfied is not mandatory. Both making the order is discretionary and then

a period in a "place of safety" is permitted before transfer. Those measures are consistent with the Strasbourg Court's concern to ensure the requirements of Art.5 are not "unrealistic and too rigid". Secondly, the Strasbourg Court also affords a margin of appreciation to national authorities. In *Brand*, a decade had passed since the Netherlands had identified systemic issues with the provision which was available. Here, a much shorter time has passed since the relevant reports were published, the Scottish Ministers confirmed that a degree of urgency is being applied to finding solutions and the period here is significantly shorter than either period in *Brand* or *Mocarska* which were held to be too long. Finally, the accused's Art.5 right does not exist in isolation. Her safety, as well as the safety of the wider community, arose. In the particular circumstances of this case, I was satisfied that despite the significant passage of time, the accused's detention was not arbitrary and thus it was not unlawful for me to further extend it.

[23] I have, however, misgivings about that conclusion. First, a sense of urgency to address the accused's position only appears to have arisen when the 40-day limit arrived. No meaningful updates appear to have been provided to the court between her initial remand and the hearing on 3 February 2023. Rather, matters were continued in the hope a bed would materialise. Throughout that period, however, the accused's continuing detention in prison (let alone in segregation) was unsatisfactory. Whilst the absence of an available bed meant the seven day "place of safety" provision was not engaged, the spirit of that provision ought to have been respected. Secondly, whilst coincidences happen and gift horses should not be looked at in the mouth, that a bed became available within hours of the court making it clear that a further continuation of detention in prison could not be taken for granted a clear impression was created of a solution only having been found because the court had pushed the issue. Again, from the moment the accused was assessed

as requiring hospital based assessment (and very likely treatment) finding appropriate accommodation ought to have been a priority. Thirdly, having been remanded, it appeared the accused was effectively lost to community-based mental health provision. I was surprised to be told that the accused did not have a Responsible Medical Officer despite the terms of her assessment, the fact she was continuing to refuse any treatment and her ongoing detention in segregation must have caused concern about her health. An assessment order was not the only conceivable option. It was a concerning feature of each hearing before me that there was no information available about what options to assess and treat the accused would be available if she was not on remand (bearing in mind she had spent well over a year on bail in respect of these charges). That made it very difficult to be satisfied that detention was a last resort or to be satisfied that there were no less severe measures, which would be adequate, available (*Saadi*, above). Collectively, those concerns, in my view, took this case much closer to the line of arbitrariness that it would otherwise have been. Had a bed not become available, I would have been unlikely to have further extended the accused's detention.

[24] Going forward, and whilst the Scottish Ministers undertake their review of forensic psychiatric facilities, this problem is likely to continue to occur. Until the systemic issues can be resolved, and based on experience of, and the helpful submissions from all involved in, this case, the following observations may assist:

a. In principle, and subject to regular and informed oversight by the court, the continued detention of a person in custody whilst they await the making of an assessment order can be compatible with the Convention.

b. Where the sole reason for not making an assessment order is the lack of an appropriate bed, the Crown ought ordinarily to notify the relevant Health

Board(s) (namely, the Board responsible for healthcare in the prison and the Board where the accused would ordinarily reside if at liberty) and the Scottish Ministers.

c. Before granting, or when reviewing, the detention of an accused in custody where an assessment order cannot be made due to lack of an appropriate bed, the court should ordinarily expect to be satisfied as to the steps taken to find a bed, whether community-based alternatives to an assessment order could be appropriate and, if so, whether they are available, the timescale within which a bed is likely to become available and the accused's current condition.

d. Given an assessment order should be completed within 28 days, the court would not normally allow more than 28 days to pass at any one time without the case calling before the court (although as this case has shown, it was only shorter periods which were sought and granted).

e. Whilst input from the relevant Health Board(s), and potentially the Ministers, may be necessary, it should not be necessary for those parties to appear (and incur the associated time and cost commitment). The Crown ought to be able to liaise with those parties and present the necessary information to the court.

f. A compatibility issue should not be expected to arise before the normal period of detention has expired. Where that period has been reached, however, an application under s.147(2) may well raise a question as to whether how a public authority (namely, the court) proposes to act is unlawful under the HRA. Accordingly, before moving such an application, the Crown ought to consider the need to lodge a compatibility minute. Were an application under s.147(2) to be opposed, a compatibility minute would ordinarily be necessary.

[25] Whilst I accept that this may require a case to call more often than normal, it is important that the matter regularly comes before the court so as to ensure detention does not become arbitrary. A point will come where an accused can no longer be held in custody (either because their health has deteriorated or too much time has elapsed). Where that point is in any specific case will depend upon the particular circumstances. But when it is reached, the issue of whether the accused can continue to be lawfully detained will have to be confronted.

Conclusion

[26] Whilst beds in appropriate facilities cannot be produced on demand, and recognising that matching supply and demand can never be a precise science, the practical consequence for this accused is unsatisfactory. A person who appears to be significantly unwell and who is refusing treatment has been held for over 50 days in a prison. Whilst that could be a short-term "place of safety", it not a suitable place in which to hold such a person for the medium term. It can only have a negative impact upon their already compromised health. Whilst those responsible for the on-the-ground operation of the relevant facilities are clearly doing all that they can to help, and at a national level efforts are being made to identify and procure a solution, that does not help the individual. In this case, a bed was belatedly found. Hopefully a more strategic solution can be found before long. Meantime, the experience of this case is shared for what assistance it may offer when the issue arises elsewhere.