

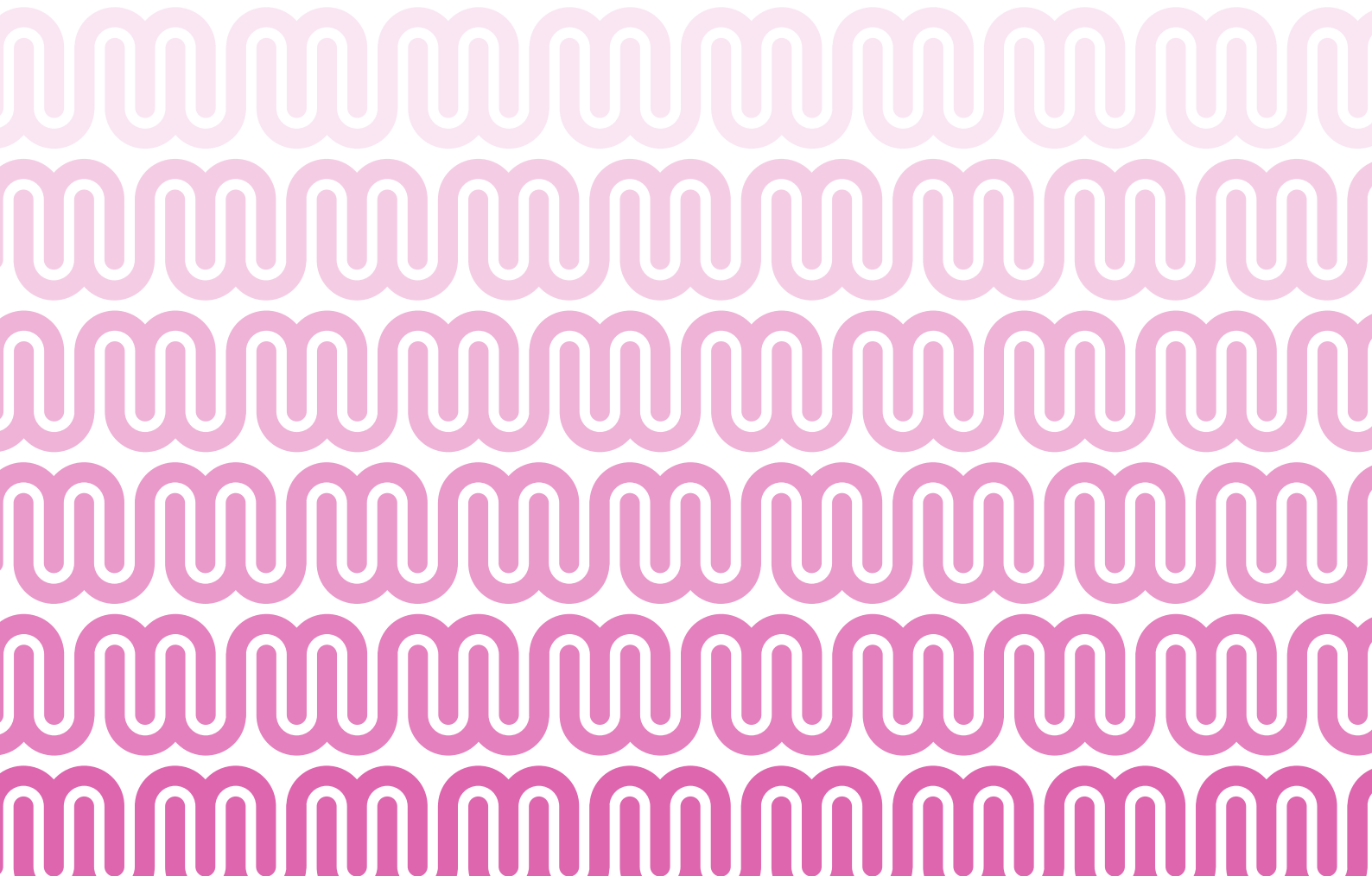


mental welfare
commission for scotland

Appeals against detention in conditions of excessive security

Good practice guide

December 2021



Our mission and purpose

Our Mission

To be a leading and independent voice in promoting a society where people with mental illness, learning disabilities, dementia and related conditions are treated fairly, have their rights respected, and have appropriate support to live the life of their choice.

Our Purpose

We protect and promote the human rights of people with mental illness, learning disabilities, dementia and related conditions.

Our Priorities

To achieve our mission and purpose over the next three years we have identified four strategic priorities.

- To challenge and to promote change
- Focus on the most vulnerable
- Increase our impact (in the work that we do)
- Improve our efficiency and effectiveness

Our Activity

- Influencing and empowering
- Visiting individuals
- Monitoring the law
- Investigations and casework
- Information and advice

Contents

Introduction	4
History.....	4
Who can appeal, and when?.....	4
Putting an appeal together.....	5
The tribunal’s discretion – Stage 1.....	7
The health board responsibilities following a tribunal ruling – Stage 1	8
Transferring the patient.....	9
The responsibilities of other public bodies	9
Appeals	10
Recall of order	10
Tribunal Stage 2.....	12
Effect of a tribunal ruling – Stage 2.....	12
Challenging a failure by the health board – options	13
The Commission’s power to take legal action.....	13
Issues to be considered in legal action.....	14
ECHR and human rights considerations	15
Summary – what should Health Boards do?	16

Introduction

This guidance explains the provisions in the Mental Health (Scotland) Act 2003 regarding appeals against excessive security, and gives the Commission's advice on the rights of patients and responsibilities of public bodies concerning such appeals.

It is issued under the Commission's powers under s5, 7 and 10 of the Act, to promote best practice in respect of the Principles of the Act, to bring matters of concerns to the attention of public bodies, and to publish information or guidance about any matter relevant to its functions.

This note does not constitute legal advice. It reflects the law as at 1 August 2021.

The relevant legislation is section 264-273 of the 2003 Act, as amended by the Mental Health (Scotland) Act 2015, and associated regulations¹. Guidance has been issued by the Scottish Government – see [Mental Health legislation - appeals against conditions of excessive security: guidance - gov.scot \(www.gov.scot\)](http://www.gov.scot/Topics/mentalhealth/legislation-appeals-conditions-excessive-security-guidance)

History

In 2001, the Millan committee recommended that there should be a right of appeal to be transferred from the State Hospital or a medium secure hospital to conditions of lower security. This reflected evidence that there were significant numbers of 'entrapped' patients at the State Hospital who no longer required detention in conditions of high security.

This right was introduced in the 2003 Act. It was initially brought in only for State Hospital patients, from 1 May 2006. The Act made provision for the right to be applied to other specified hospitals by regulations. The intention was that this should be done once services were further developed.

In 2012, the UK Supreme Court ruled that the failure of the Scottish Government to introduce regulations to bring the appeal right into effect for non-State Hospital patients was unlawful.²

Following this ruling, the Government made amendments to the appeal right in the Mental Health (Scotland) Act 2015, and extended the right to patients in the three currently existing medium secure units.³ This change came into effect on 16 November 2015.

Who can appeal, and when?

Any patient who is detained in the State Hospital or a named medium secure unit under a compulsory treatment order or one of the three main forensic mental health disposals (a compulsion order, a hospital direction or a transfer for treatment direction) can apply to the

¹ [The Mental Health \(Detention in Conditions of Excessive Security\) \(Scotland\) Regulations 2015 \(legislation.gov.uk\)](http://www.legislation.gov.uk/ukdsi/2015/0000/201500364) SSI 2015 Number 364

² [RM \(AP\) \(Appellant\) v The Scottish Ministers \(Respondent\) \(Scotland\) \(supremecourt.uk\)](http://www.supremecourt.uk/cases/2012/UKSC58) [2012] UKSC 58

³ The Orchard Clinic in Edinburgh, the Rowanbank Clinic in Glasgow, and the Rohallion Clinic in Perth

tribunal.⁴ Their named person, guardian or welfare attorney, if they have one, can also appeal⁵, as can the Mental Welfare Commission⁶.

The Commission considers each case on its merits, but it would not normally decide that it is appropriate for it to initiate an appeal if the patient or the patient's named person, guardian or attorney is able to do so. It may consider doing so if, for example, it had concerns that the patient was entrapped, was too unwell to instruct legal representation, and there was no named person, guardian or attorney in place.

The appeal cannot be made during the first six months of the order or direction. Only one application can be made during the first 12 months of the order or direction, and each 12 month period thereafter.

Legal aid is available under the 'ABWOR' scheme, without a financial contribution.⁷

Putting an appeal together

An appeal is separate from any application for discharge or variation of the relevant order or direction. It is only concerned with the level of security to which the patient is subject.

There are two separate stages at which the appeal is considered by the Mental Health Tribunal.

The first stage is initiated under s264 (State Hospital patient) or s268 (patient in medium security). Sections 265 and 269, discussed at [Tribunal Stage 2](#) below, set out what happens should the case reach the second stage.

There is a non-statutory form (form EXS1⁸) available on the Scottish Government website⁹ which can be used to initiate an appeal.

The application must be accompanied by a report prepared by an approved medical practitioner¹⁰ which states (for a State Hospital patient)

*'that in the practitioner's opinion the patient does not require to be detained under conditions of special security that can be provided only in a state hospital'*¹¹

Or (for a patient in a medium secure unit)

⁴ The appeal right does not apply to patients subject to emergency or short-term detention, assessment orders, treatment orders or interim compulsion orders. 'Restricted patients', meaning patients subject to extra oversight by Scottish Ministers under Part 10 of the 2003 Act, can apply if they are subject to a compulsion order, hospital direction or transfer for treatment direction.

⁵ The 2003 Act does not say so explicitly, but under s16 of the Adults with Incapacity (Scotland) Act 2000 the welfare attorney would only be able to appeal where it has been established that the patient lacks capacity and the attorney's powers have been 'triggered'.

⁶ The EXS1 form which the Scottish Government recommends using for appeals states that 'If the patient is incapable of making a decision whether to apply, their primary carer (if any) or nearest relative can do so.' The basis for this is unclear, as this is not stated in the legislation or the Government guidance.

⁷ [Financial eligibility tests for ABWOR: case type exemptions - Scottish Legal Aid Board \(slab.org.uk\)](#) This exemption from a financial contribution applies generally to proceedings before the Mental Health Tribunal

⁸ [EXS 1 v7 0.pdf \(www.gov.scot\)](#)

⁹ The full set of Mental Health Act forms is at [Mental Health law: forms - gov.scot \(www.gov.scot\)](#)

¹⁰ Meaning a medical practitioner approved by a health board under s22 of the Act as having special experience in the diagnosis and treatment of mental disorder – normally a consultant psychiatrist. Updated lists are regularly published by the Scottish Government on [SHOW - SGHSC - Scottish Government Health and Social Care Directorates](#)

¹¹ Section 264(7A)

'that detention of the patient in the hospital in which the patient is being detained involves the patient being subject to a level of security that is excessive in the patient's case'.¹²

For medium secure patients, the regulations further specify that the level of security is excessive in the patient's case only 'when the security at the hospital is greater than is necessary to safely manage the risk that the patient may pose to (a) the patient's own safety; and (b) the safety of any other person.'¹³

In both situations the practitioner must give their reasons for being of that opinion.

This report can be from the patient's responsible medical officer (RMO), but it is not essential that it is the responsible medical officer.

The Scottish Government guidance gives more detail on how to apply the statutory tests¹⁴. Although this guidance is not binding on the Mental Health Tribunal, it provides important pointers as to what excessive security means in this context. The guidance should be considered in its entirety, but some key points from it include:

- The approved medical practitioner does not have to identify a suitable alternative hospital or unit.
- The focus is not on the appropriateness of individual measures that may or may not be applied to the patient at any given time, but only measures which are inherent in or are unavoidably applied by virtue of being detained in this particular hospital.

In Scotland there is no formal definition of what is meant by high secure or medium secure care. A report by the NHS Scotland Forensic Network on patient referral¹⁵ gives some information on the basis for a placement in either setting, although it does not carry any particular legal force. There are also some English documents, which do not have legal effect in Scotland, but give some general indication of the nature of the different settings.¹⁶

¹² [The Mental Health \(Detention in Conditions of Excessive Security\) \(Scotland\) Regulations 2015 \(legislation.gov.uk\)](#) SSI 364/2015, regulation 5

¹³ Ibid regulation 6

¹⁴ Paragraphs 17-33

¹⁵ Guidance on patient referral to or within Scottish high and medium secure services (August 2019) [Guidance-on-Patient-Referral-to-High-Medium-Security-FINAL.pdf \(scot.nhs.uk\)](#). This document also refers to a 2004 Forensic Network Report - Definition of security levels in psychiatric inpatient facilities in Scotland - [D R A F T \(scot.nhs.uk\)](#)

¹⁶ [adult-medium-secure-service-specification-dec-20.pdf \(england.nhs.uk\)](#) and [Environmental Design Guide Adult Medium Secure Services \(publishing.service.gov.uk\)](#)

The tribunal's discretion – Stage 1

The tribunal must allow the patient, the RMO and other key people and organisations the opportunity to make representations and give evidence.¹⁷ This includes the Commission, although it would be unusual for the Commission to do so, unless they had initiated the appeal, or had some particular involvement in the case.

The tribunal essentially has to decide to make, or not to make, an order declaring the patient is being kept in excessive security. In doing so, it should apply a two-stage test.

The first stage is to decide whether the patient is being detained in excessive security. The tribunal has to consider the same statutory test as the approved medical practitioner (see above). It can only declare the patient is being held in excessive security if that test is met.

The second stage is to decide whether to make a declaration. The tribunal has a discretion *not* to make a declaration, even if it is satisfied that the patient is being held in conditions of excessive security. The guidance makes clear that it can consider other factors, although it must apply the principles in sections 1 and 2 of the 2003 Act¹⁸, which include the need to discharge their function 'in a manner that involves the minimum restriction on the freedom of the patient that is necessary in the circumstances.'

The guidance does not explain what other factors would justify a tribunal in not making an order, if they are satisfied that the patient is being held in excessive security. In light of the principles, they would need to be substantial.

This was discussed by the UK Supreme Court in the case of *G v Scottish Ministers* [2013] UKSC 79.¹⁹ Lord Reed said:²⁰

'Parliament can be taken to have envisaged that if the tribunal were to conclude at stage one that the patient no longer required to be detained under conditions of special security that could be provided only in a state hospital, it would then make an order under section 264(2) unless it considered that there was some good reason not to do so.'

He went on to discuss what might be a good reason not to make an order. In a carefully balanced judgement, he makes clear that the absence of suitable accommodation at the appropriate level of security:

*'cannot have been intended to preclude the making of an order under section 264(2): otherwise, Parliament's intention in enacting section 264 could be frustrated by mere inertia on the part of health boards, and the arrangements made ... allowing health boards substantial periods of time where necessary to make appropriate arrangements, would be supererogatory. Those provisions take account of the potential practical difficulties identified by the Millan Committee, while also guarding against the connection between "entrapment" and the absence of incentives for health boards to address the problem.'*²¹

¹⁷ The full list is at s264(10) and s268(10)

¹⁸ Paragraph 39

¹⁹ [G \(AP\) \(Appellant\) v Scottish Ministers and another \(Respondents\) \(Scotland\) - The Supreme Court](#)

²⁰ Para 41

²¹ Para 42. The judgement refers to the provisions before they were amended in the Mental Health (Scotland) Act 2015, but the relevant parts are essentially unchanged

At the same time, Lord Reed acknowledges that the unavailability of accommodation in the appropriate setting may be relevant in some cases²². The lack of suitable accommodation elsewhere may be relevant to the duty to provide the maximum benefit to the patient, as may the availability of clinically superior conditions at the State Hospital.

Lady Hale agreed, saying 'it would be unreasonable to make an order under section 264, or indeed section 268, if there were no conceivable possibility of an appropriate bed being found elsewhere. But that is a conclusion which a tribunal should be slow to reach.'²³

In the particular case, the Supreme Court decided that a tribunal was justified not to make an order where it found that, because of a risk the patient posed to women, he would be likely to be subject to greater restriction in a medium secure unit than the State Hospital (which had no female patients), and the State Hospital would be better placed to offer the treatment which he needed.

Each case needs to be considered on an individual basis, but it is reasonable to conclude that a simple statement by a health board that there are no beds available at the right level of security may not be enough to persuade a tribunal not to make an order. There would need to be evidence that, applying the principles of the Act, it would be wrong to make an order in that particular case. Furthermore, the Act provides for a substantial time period to allow the health board to make arrangements to find a bed, even if one is unavailable on the day of making the order.

The Supreme Court judgement suggests that a tribunal may be more inclined to accept that it should not make an order where the patient has particular needs which cannot easily be met in the less secure setting. Conversely, they may be more inclined to make an order requiring a placement at lower security where the problem is a general shortage of beds, which has been known about for some time, and which the health board have failed to address²⁴.

The health board responsibilities following a tribunal ruling – Stage 1

If the tribunal makes an order declaring the patient is being detained in excessive security, they will specify a period of no more than 3 months for the patient's health board to identify a hospital at an appropriate level of security which has a bed available for the patient.²⁵ For restricted patients, Scottish Ministers need to agree the placement with the health board.

The health board is under a clear legal duty at this stage to find a suitable bed. If they cannot accommodate the patient within their own estate, they should look for a bed elsewhere. This could be from another NHS Board, a private provider, or a bed elsewhere in the UK. They should look in good faith, applying the principles of the Act. For example, a decision to offer a bed hundreds of miles away, to avoid pressure on local services, would not be appropriate, if it would not provide maximum benefit to the patient or respect their wishes.

The patient does not have a right to veto a place, if the health board determine that it is suitable, and it is available. In line with the principles, the health board should take account of the patient's wishes, and the reasons they may have for not wishing to be accommodated in

²² Para 43

²³ Para 73

²⁴ The 2021 independent review of forensic mental health services led by Derek Barron provides useful historical context on the development (or lack of development) of these services: [Forensic mental health services: independent review - gov.scot \(www.gov.scot\)](https://www.gov.scot/publications/forensic-mental-health-services-independent-review/pages/10_to_14.aspx)

²⁵ s264(3) and (4) for State patients, and s268(3) and (4) for patients in a medium secure unit

a particular setting. If, for example, it is important to the patient to be near to their family, that is a reasonable consideration, particularly if it might assist with further rehabilitation.

At this stage, there is no higher court action available to the patient, should the health board fail to secure a bed.²⁶ Instead at the end of the time period set by the Tribunal, the case will be remitted back to the Tribunal - see Stage 2 below.

Transferring the patient

Normally, when a transfer is proposed for a detained patient, the 2003 Act sets out a process to be followed.²⁷ It is not clear whether this process has to be followed where the move follows an excessive security appeal. This could be important where the patient does want to move to lower security, but not to the particular hospital identified.

If the normal transfer provisions apply, they include a right for the patient to appeal to the Tribunal against the transfer. If the appeal succeeded, it would mean the patient stays at the original hospital. The health board might in these circumstances seek a recall of the excessive security order on the basis that they have done what is required of them under the order – i.e. identify a hospital. In either event, it would be the Tribunal that would have the final say.

However, it may be that the normal transfer provisions are not intended to apply, and the transfer is deemed to be authorised under a separate procedure altogether.²⁸ In that case, the patient would not have the right to appeal against the transfer.

Should this situation arise, legal advice is likely to be necessary.

The responsibilities of other public bodies

The 2003 Act places the legal responsibility to find a place on the relevant health board, meaning the Board in which the patient was ordinarily resident prior to their detention.²⁹

Under the arrangements for the integration of health and social care³⁰, some health board responsibilities are delegated to integrated joint boards and delivered by health and social care partnerships (HSCPs). It may be that the health board depends on the local authority or HSCP to develop community provision in order to free up beds for those held in excessive security.

In the Commission's view, this does not affect the ultimate responsibility of the health board to make sure they fulfil the requirements of the tribunal. We would also expect other public bodies to co-operate in providing support to the health board where necessary, in line with the basic principles of integration.

Similarly, health boards have a duty to co-operate with each other.³¹ Many forensic services, including medium secure units, are operated on a regional basis. The health board which is

²⁶ *Boyle v Greater Glasgow and Clyde Health Board* [2019 SC GLA 89] [2019scgla89.pdf \(scotcourts.gov.uk\)](#)

²⁷ See sections 124-126, for patients subject to a compulsory treatment order. Section 178 applies these provisions to patients subject to compulsion orders. For restricted patients, the procedure is at sections 218-220.

²⁸ There is a separate form for notifying the Tribunal of a transfer following an excessive security appeal - [Compliance+with+Order+made+under+Section+264,+265,+268+or+269+-+EXS4+v7.0+27 Jun 2017.pdf](#)

²⁹ [The Mental Health \(Relevant Health Board for Patients Detained in Conditions of Excessive Security\) \(Scotland\) Regulations 2006 \(legislation.gov.uk\)](#) SSI 2006/172

³⁰ The Public Bodies (Joint Working) (Scotland) Act 2014

³¹ Section 12A National Health Service (Scotland) Act 1978

responsible for implementing the order of the Tribunal is entitled to expect other health boards to assist where they can – although this does not absolve them of their legal duty.

Health boards are ultimately accountable to Scottish Ministers, in a more direct relationship than other public bodies. We would expect Scottish Ministers to wish to be satisfied that health boards are meeting their legal obligations, and if necessary to take action in the event of any persistent failure to do so.

Scottish Ministers also have some responsibilities in relation to restricted patients³². Ministers would be expected to check that the security arrangements at any prospective hospital were appropriate for the particular needs of the restricted patient. This may add a degree of complexity to finding a suitable place at appropriate security for a restricted patient, but Ministers would, like the health board, be expected to do all they can to ensure an appropriate placement is found. They are also expected to accept the Tribunal's judgement that a lower level of security is justified. Should they disagree with this, they would need either to appeal or seek recall (see below).

Appeals

There is an appeal to the sheriff principal against a Tribunal decision to make, or to refuse to make, an order declaring that the patient is detained in conditions of excessive security.³³ For restricted patients, the appeal is to the Court of Session.³⁴ It is intended that these appeals will be transferred to the Upper Tribunal, but no date has been set for this as at August 2021.

Recall of order

As the Explanatory Notes to the 2003 Act set out, 'it is possible that circumstances might change, so that the patient continues to require to be detained in conditions of special security.'³⁵

At any time before the expiry of the period set by the Tribunal, the health board or the patient's responsible medical officer (for restricted patients, Scottish Ministers) may ask the tribunal to recall the order.³⁶ The Tribunal must hold a hearing. If satisfied that the patient now requires the level of security in the original hospital, they must recall the order. They also have a discretion to recall the order 'on any other grounds'.

The most likely justification for seeking a recall is that the patient's condition has deteriorated, so that they cannot now safely be moved to lower security. The judgement in the case of *G v Scottish Ministers* suggests that recall may also be sought where the search for suitable accommodation has proved fruitless.³⁷ However, this should only be granted where the Tribunal is satisfied that recall is justified, bearing in mind the principles of the Act.

A simple assertion that no suitable beds are available should not, in the Commission's view, be enough to justify a recall of the order, particularly if that is attributable to a lack of long-term planning to develop services for which there is an identified need.

³² Meaning forensic patients subject to the additional safeguards set out in Part 10 of the 2003 Act

³³ s320(1)(w)

³⁴ s322(1)(i)

³⁵ Para 531 [Mental Health \(Care and Treatment\) \(Scotland\) Act 2003 - Explanatory Notes \(legislation.gov.uk\)](https://www.legislation.gov.uk/ukpga/2003/17/section/531)

³⁶ s267 (State patients) and s271 (medium secure patients)

³⁷ Ibid. paras 43 and 76

Nor would it be appropriate to seek to re-run the original hearing by simply repeating arguments which had already been considered when the Tribunal made the order.

In the Commission's view, the fact that other patients are regarded as higher clinical priorities for an available bed would not justify the Board in saying that they cannot fulfil their obligations. The order of the Tribunal is a legal ruling which is of greater force than the health board's own decisions about clinical priorities.

Tribunal Stage 2

If at the end of the specified period the health board has failed to identify a suitable bed, there must be a hearing before the Tribunal.³⁸ This is an automatic process, which does not require a further application on behalf of the patient. The hearing will be arranged by the Tribunal administration.

The Tribunal carries out a similar exercise as at Stage 1 – considering whether the statutory test has been met that the patient is detained in excessive security and, if it has, deciding whether to make an order declaring that this is the case and specifying a period during which the health board must find a suitable and available hospital place for the patient at the appropriate level of security.³⁹

As at Stage 1, the Tribunal must take account of the Principles in deciding whether to make such an order, and take account of the guidance of the Supreme Court in *G v Scottish Ministers*.

At this second stage, the minimum period the Tribunal must provide for the health board to discharge its responsibilities is 28 days, but it can specify a longer period up to three months.

Effect of a tribunal ruling – Stage 2

The duties on the Board are the same as after a Stage 1 ruling – they need to find a suitable place within the timescale, whether in their own services, from another NHS Board, in a private hospital or even in another part of the UK.

As at Stage 1, the health board can seek to have the order recalled⁴⁰. The Tribunal would consider the same issues as at Stage 1, discussed above.

The Act does not specify whether recall can be sought after the expiry of the period set by the tribunal at Stage 2. In the Commission's view, this would not be appropriate. Although the health board are under a continuing obligation to implement the order, they have already breached its terms by not finding a place within the statutory time period, and the appropriate forum for any further consideration would be the Court of Session under an action for breach of the statutory duty – discussed below.

Also as at Stage 1, either side can appeal against a decision of the Tribunal to recall or not to recall its order. The appeal is to the Sheriff Principal, except for restricted patients, where it is to the Court of Session.⁴¹

The key difference at Stage 2 is what happens should the health board fail to fulfil the requirements of the order within the specified time. At Stage 1, it leads to a further review by the Tribunal. At Stage 2, once the time period set by the Tribunal has run out, their role is at an end. The failure of the health board to fulfil the order makes them liable to a range of civil court proceedings.

³⁸ s265(2) for State patients and s269(2) for patients in a medium secure unit

³⁹ Sections 265 and 269

⁴⁰ s267 (State patients) and s271 (medium secure patients)

⁴¹ Sections 320 and 322

Challenging a failure by the health board – options

The 2003 Act sets out that the duties imposed on a health board at Stage 2 ‘shall be enforceable by proceedings by the [Mental Welfare] Commission for specific performance of a statutory duty under section 45(b) of the [Court of Session] Act 1988’.⁴²

Under this provision, the Court may ‘order the specific performance of any statutory duty, under such conditions and penalties ... in the event of the order not being implemented, as to the Court seem proper’.

However, this is not the only legal option which is available. The Act states that this power granted to the Commission is ‘without prejudice to the rights of any other person’. So the patient or their welfare guardian or attorney may also raise an action for specific performance.

An alternative to an action for statutory performance may be an action for judicial review.

In the case of *Boyle v Greater Glasgow and Clyde Health Board* [2019] SC GLA 89, Sheriff Reid made clear that the patient is also entitled to take the Board to Court. As well as seeking an order of specific performance, the patient is entitled to claim damages for every day beyond the expiry of the Stage 2 order until they are finally accommodated at the appropriate level of security.

Under a judicial review, the court may order a range of remedies, including

- A declarator (i.e. a formal legal statement of the duties of the public body, in this case the health board)
- Implement (i.e. a requirement for the public body to take a specific action, including in this context provide a suitable placement)
- Payment, including damages.

Legal aid is potentially available for such an action, subject to the normal ‘means and merits’ tests: that the patient financially qualifies for civil legal aid, and the Scottish Legal Aid Board is satisfied that the strength and importance of the case justifies legal aid⁴³.

The Commission’s power to take legal action

The Commission’s ability to take action for specific performance is an important safeguard. The Commission monitors cases where the time period after a Stage 2 order has expired, to see if the patient has been moved, as required by the Tribunal. It will always consider carefully whether it is justified in exercising its discretion to take action. However, this power is seen by it as a safety net, not the first option following a failure by the health board to secure a bed.

The patient also has the power to take action, and indeed has a wider range of actions available to them, including for damages. Where the patient is willing and able to take such action, this would normally be the preferable option.

There may be cases where the patient is too unwell or impaired to take action, and has no-one to act on their behalf. In such cases, the Commission would consider what it could do to help resolve the situation. Before initiating legal proceedings, it would be likely to consider other ways to resolve the situation, using its normal powers of investigation, advice and guidance.

⁴² s272

⁴³ [Civil legal aid: statutory tests for applications - Scottish Legal Aid Board \(slab.org.uk\)](https://www.slabb.org.uk/civil-legal-aid-statutory-tests-for-applications)

Ultimately, however, it will take legal action in cases where it is satisfied that this is justified to protect the rights and interests of the patient.

Issues to be considered in legal action

To date, so far as the Commission is aware, there has not been a final order of the Court of Session in relation to any excessive security case. However, several cases have been raised and, in a number of them, a place was found for the patient shortly before a substantive hearing.

In our view, the duty on the health board to find a suitable place by the end of the second period ordered by the Tribunal is a strong one, and failure to meet it would be hard to justify. The duty is expressly to identify a hospital with a place for the patient, and there is no qualifying term in the legislation such as to 'use best endeavours'.

To the extent that availability of beds is relevant, that is an issue for the tribunal to consider in determining whether to make an order at Stage 1 or Stage 2, or any application for recall. Once the Stage 2 order has been made, the issue has been judicially determined, and we believe it should not fall to be debated further in an action to enforce the Tribunal's order.

In this respect, the duty is quite different from other more general duties in health and social work legislation, where it is reasonable to balance competing priorities for resources.⁴⁴

By the time Stage 2 has ended, the health board will have had up to six months to find a place. The nature of forensic mental health care is that patients are intended to progress through the system, generally at a considered pace, so it is likely that the patient's need for less secure accommodation in future will have been identified some time before this. This should, in the view of the Commission, be more than enough time to make the necessary arrangements.

This is also consistent with the original purpose of the legislation, as set out in the Millan report.⁴⁵ This recognised that 'to detain a patient unnecessarily in conditions of high security is inconsistent with respect for the patient's rights'⁴⁶, and set out that the staged approach was recommended to recognise that practical difficulties may exist. Ultimately, 'such a right of appeal is meaningless, unless it is capable of being upheld.'⁴⁷

The history of the provisions is also relevant. The extension of the appeal right to medium secure places was anticipated in the original legislation in 2003, but not brought into effect by the Scottish Government for several years, presumably because of concerns about the lack of available resources to deliver the duty. This delay was criticised by the UK Supreme Court in *R v Scottish Ministers* [2013] SC 139, and the appeal right was ultimately extended to medium secure patients in the Mental Health (Scotland) Act 2015. As at 2021, health boards have had 18 years since the original legislation was passed, and six years since it was extended, to make the necessary arrangements for a relatively small, clearly identifiable, and largely stable patient population.

⁴⁴ See Lord Nicholls of Birkenhead in *R (on the application of G) v Barnet London Borough Council* [2004] 2AC 208 at para 13: 'As a general proposition, the more specific and precise the duty the more readily the statute may be interpreted as imposing an obligation of an absolute character.'

⁴⁵ New Directions Chapter 27 paras 79-91 [Millan final cover \(mhtscotland.gov.uk\)](https://www.mhtscotland.gov.uk)

⁴⁶ Para 84

⁴⁷ Para 86

ECHR and human rights considerations

In most cases, the European Convention on Human Rights (ECHR) may be less crucial to upholding the patient's rights than the clear provisions of the 2003 Act. However, ECHR may be relevant in clarifying how the Act should be interpreted and applied.

In the *Boyle* case, Sheriff Reid considered an argument that the failure of the health board to find a suitable place for the patient was a breach of Article 5 of the ECHR, which protects people against unlawful deprivation of liberty. He rejected that argument, on the grounds that Article 5 is concerned with the legality of the detention itself, not the conditions of treatment during detention.⁴⁸ This reflected a ruling of the European Court in *Ashingdane v UK* (1985) A 93, 7 EHRR 528, followed by the decision of the House of Lords in *R (on the application of Munjaz) v Mersey Care NHS Trust* [2006] 2 AC 148.

This ruling is an important one, but there may still be arguments in future cases that Article 5 is relevant. In an earlier case, *Sheritt v NHS Greater Glasgow and Clyde*,⁴⁹ Lord Stewart suggested that there may be an Article 5 issue where the health board had failed to act upon the ruling of a judicial body, i.e. the Tribunal. This suggestion took account of the ruling of the European Court of Human Rights in the case of *Aerts v Belgium*,⁵⁰ where a patient had remained in the psychiatric wing of a prison for several months, despite a ruling by a Mental Health Board that he should be transferred to a Social Protection Centre. This was held to be a breach of Article 5, since

*'The proper relationship between the aim of the detention and the conditions in which it took place was therefore deficient.'*⁵¹

A more recent case may also suggest that the conditions of detention could be relevant to an Article 5 claim. In *Rooman v Belgium*⁵² the Grand Chamber commented that:

*'the administration of suitable therapy has become a requirement in the context of the wider concept of the "lawfulness" of the deprivation of liberty.'*⁵³

Patients 'are entitled to be provided with a suitable medical environment accompanied by real therapeutic measures, with a view to preparing them for their eventual release...What is important is that the Court is able to verify whether an individualised programme has been put in place, taking account of the specific details of the detainee's mental health with a view to preparing him or her for possible future reintegration into society ...a specialised psychiatric institution which, by definition, ought to be appropriate may prove incapable of providing the necessary treatment.'⁵⁴

Article 8 of the ECHR, the right of respect to family and private life may also be relevant in some cases, particularly where a failure to accommodate the patient in a suitable setting may make it hard for the patient to maintain or rebuild personal and family connections.

⁴⁸ Ibid. paras 48-57

⁴⁹ [DAVID ROY SHERRIT v. NHS GREATER GLASGOW AND CLYDE HEALTH BOARD \(scotcourts.gov.uk\)](#) [2011] CSOH 37

⁵⁰ [AERTS v. BELGIUM \(coe.int\)](#)

⁵¹ Ibid. para 49

⁵² [\[2019\] ECHR 105](#)

⁵³ Para 208

⁵⁴ Extracts from paras 208-210

Summary – what should Health Boards do?

The key points which the Commission would regard as good practice by health boards include

- **Reduce the risk of appeals being necessary in the first place.** Parliament has made clear that patients have a right to be treated at a level of security which is appropriate for their needs, and which supports their reintegration into society. The right of appeal is an important protection for individual patients, but it is also intended to ensure that appropriate services are available.
- **Plan early for individual patients.** In general, the path to rehabilitation for forensic patients is more predictable and takes a longer time than other patients with acute mental illness, so it should be possible to identify what resources are needed, to plan ahead so that they can be available in good time, and if necessary to agree with other agencies if it is unlikely that the home health board can provide suitable support.
- **Work collaboratively.** We expect all health and social care bodies to work together to support health boards who have obligations to patients requiring care at lower security.
- **Apply the principles of the Act.** The principles require that care is the least restrictive alternative, that the benefit to the patient is maximised, and that their views and wishes are taken into account.
- **Fulfil your legal responsibilities.** Once a Tribunal has determined that an order should be made, health boards are under a clear and strong obligation to deliver this.



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