

MENTAL HEALTH TRIBUNAL for SCOTLAND
GUIDANCE to TRIBUNAL MEMBERS No. 3/2023
Guidance on sections 68 and 69

Introduction

1. This Guidance Note deals with the interaction of sections 68 and 69 of the Act, and the question of whether a tribunal at the first hearing of an application for a compulsory treatment order may adjourn the case without making any order.

Relevant statutory provisions

2. The majority of CTO applications are made when the patient is in hospital and subject to a short term detention certificate. In such circumstances, an additional five days' detention is authorised, under section 68. Since the majority of CTO applications arrive on day 27 or 28 of the short term detention period, this section is often relied on. It provides as follows:

68 Extension of short-term detention pending determination of application

(1) Where—

(a) the detention of a patient in hospital is authorised by—

(i) a short-term detention certificate;

...and

(b) before the expiry of the period of detention so authorised, an application is made under section 63 of this Act,

the measures mentioned in subsection (2) below are authorised.

(2) Those measures are—

(a) the detention in hospital of the patient for the period of 5 days beginning with the expiry of the period for which the certificate authorises the detention of the patient in hospital; and

(b) the giving to the patient, in accordance with Part 16 of this Act, of medical treatment.

3. The correlative obligation to that entitlement to detain is that the Tribunal must consider the case within those five days. That is as a consequence of section 69, which provides as follows:

69 Time limit for determining application etc. where section 68 applies

Where section 68 of this Act applies, the Tribunal shall, before the expiry of the period of 5 days referred to in section 68(2)(a) of this Act–

(a) determine whether an interim compulsory treatment order should be made; and

(b) if it determines that an interim compulsory treatment order should not be made, determine the application.

4. Also relevant is rule 8 of the Tribunal's Practice and Procedure Rules 2005 (SSI 2005 no. 519), which mandates that such consideration takes place at a hearing. The relevant part of rule 8 is as follows:

Determination of application for compulsory treatment order where section 68 of the Act applies: special case

(1) This rule applies where an application is made under section 63 of the Act and section 68 of the Act applies.

(2) Before the expiry of the period of 5 days referred to in section 68(2)(a) of the Act, the Tribunal shall hold a hearing ("a first hearing") in order to determine whether an interim compulsory order should be made and, if it determines it should not be made, to determine the application.

Different factual scenarios

5. Commonly, the application is for a hospital-based order, the patient is still in hospital and, if the application cannot be determined at this stage, the tribunal will make an interim hospital-based CTO. If the application is for a community-based CTO, for a patient who has not been subject to a short term detention certificate, there is no difficulty in adjourning without an order. But the situation may be a hybrid, involving a patient who was detained on a short term detention certificate but has been allowed to go home, with only community measures now sought. Alternatively, the patient may still be in hospital, but the care team may have decided to pursue a community based CTO without having an application ready. Questions arise as to how the Tribunal should proceed in this factual scenario. In particular, can the Tribunal adjourn this 'first hearing' without making any order?

Adjournment of the first hearing

6. The first question is whether section 68 'applies' when the application was lodged before the expiry of the short-term detention certificate, at a point when the patient was still detained, but the patient is now at home. Section 69 does not specify that it is necessary for the patient still to be detained as a matter of fact before section 68

can be said to apply. A straightforward reading of section 69 would encompass all situations where the patient was on an STDC, the CTO application was lodged and the additional five days' detention was thus triggered, even if by the time of the hearing the patient is at home. That interpretation is fortified by considering the position regarding measure b), the giving of medical treatment. The premise of the application is that compulsory treatment is necessary. It makes sense for the legislation to provide not only for continued detention, but also for continuing treatment.

7. If the legislation is interpreted in this way, then the tribunal dealing with the first hearing would appear to have only two options: to make an interim CTO or to determine the application. Any tribunal adjourning without making an order would therefore have to explain how it had interpreted and applied section 69.

8. If a community based order is now sought, it will be necessary to notify the people listed in section 64(3) of this revised proposal and offer them the chance to make representations and provide evidence (section 64(7)). In relation to those not present at the hearing, and whose views cannot be obtained during a short continuation of the hearing the same day, a further adjournment will be required. Rather than adjourning without making any order, however, the better course in such a situation is to make an interim CTO which includes measure b) and any other community based measures considered necessary in the interim (or even simply measure b)). That will comply with section 69, ensure the continuation of treatment and also avoid any difficulties with section 64(7).

9. If the tribunal does not consider it necessary even to make an interim order with only measure b), that suggests that there is no requirement for compulsory treatment at all. In such circumstances, the patient may be entitled to have the application refused at the first hearing (a determination which undoubtedly complies with section 69).