SHERIFFDOM OF SOUTH STRATHCLYDE DUMFRIES AND GALLOWAY

B890/06

JUDGMENT OF SHERIFF PRINCIPAL B A LOCKHART

in the cause

KEITH ROBBINS

Appellant

against

CAROLINE MITCHELL,
RESPONSIBLE MEDICAL OFFICER

First Respondent

MENTAL HEALTH TRIBUNAL FOR SCOTLAND

Second Respondent

Act: Quinn, of Messrs Freelands
Alt: Miss M Jack, Advocate, instructed by Caroline Mitchell
Miss J Cherry, Advocate, instructed by Mental Health Tribunal for Scotland

AIRDRIE: 14 May 2007

The Sheriff Principal, having resumed consideration of the cause refuses the appeal and adheres to the decision of the Mental Health Tribunal for Scotland dated 6 October 2006; finds no expenses due to or by either party in respect of the appeal.

NOTE:

Background to the appeal

1. On 6 October 2006 a Mental Health Tribunal considered an application by the appellant in terms of section 99 of the Mental Health (Care and Treatment) (Scotland) Act 2003 against a determination by the Responsible Medical Officer (RMO) received 10 August 2002 in terms of section 86 of the 2003 Act to extend a deemed Compulsory Treatment Order. The Compulsory Treatment Order was first made on 15 August 2005 and was extended for six months at the first mandatory review. At a further

mandatory review of the Compulsory Treatment Order the RMO made a determination to extend the CTO for a further period of 12 months without variation. The new expiry date of the CTO as extended was 14 August 2007.

2. It was the unanimous decision of the Mental Health Tribunal to refuse the application of the patient made under section 99 of the 2003 Act. Accordingly, the determination of the RMO extending said CTO for a period of 12 months until 14 August 2007 was confirmed.

3. The appellant has a right to appeal the decision of the Mental Health Tribunal in terms of section 320(1)(f) of the 2003 Act. His grounds of appeal, in terms of section 324(2)(a) and (d) of the 2003 Act are:

> "(a) that the Tribunal's decision was based on an error of law ...
> (d) the Tribunal's decision was not supported by the facts found to be established by the Tribunal."

4. His detailed grounds of appeal are:

> "(1) The Tribunal having erred in law in respect that it failed to give adequate reasons for its decision, the decision of the Tribunal should be set aside.
> (2) The findings of the Tribunal not justifying its decision in law, the decision of the Tribunal should be set aside.
> (3) The Tribunal having erred in law in respect that it made a decision unsupported by the evidence, the decision of the Tribunal should be set aside."

Submissions for appellant

5. Solicitor for the appellant stated that prior to the Tribunal hearing he instructed an independent social circumstances report by Mr Tom Keenan, an independent social worker. That report, dated 27 September 2006 was before the Tribunal (no 18 of process). The author had interviewed the appellant and the health staff involved in looking after him. His conclusion was that the appellant did not require compulsory measures of care and that he would be able to look after himself in the community. He would need assistance of health staff in the community and medication which he knew about. It was always accepted that there was no risk involved to anyone else. The only risk was that perceived by the RMO that the appellant was a risk to himself. Mr Keenan had been unable to attend the Tribunal hearing but his report was before the Tribunal. Oral evidence was given by the RMO, the Mental Health Officer, the appellant's father who was the named person and Dr Focone, a Clinical Physiologist. The appellant had also addressed the Tribunal.

6. The onus was on the RMO to establish the criteria for the continuation of the CTO set out in section 64(5)(a) to (e) had been met. These criteria were:

> "(a) that the patient 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 to the patient
> > (c) that if the patient were not provided with such medical treatment there would be a significant risk-
> > (i) to the health, safety or welfare of the patient; or
> > (ii) to the safety of any other person.
> > (d) that because of the mental disorder the patient's ability to make decisions about the provision of such medical treatment is significantly impaired;
> > (e) that the making of a compulsory treatment order in respect of the patient is necessary."

7. It was accepted that the appellant had a mental disorder which required treatment. It was accepted that the Tribunal had before it a section 86 determination (form CTO 3a) completed by the RMO dated 1 August 2006 (5/1 of process), a Care and Treatment Plan dated 2 August 2006 (5/2 of process) and a report by the Mental Health Officer, Peter Di Mascio dated 1 August 2006 (5/3 of process).

8. It was submitted that the decision by the Tribunal (5/5 of process) did not record in any great detail the content of the evidence of the parties who spoke at the Tribunal. It was submitted that there was only a brief statement of how the appellant's condition fell within the statutory provisions. In the statement of reasons on page 4 of the paragraph entitled "Evidence and Reasons", the Tribunal stated:

> "We considered carefully the independent social circumstances report of Mr Keenan and while noting his views were of the opinion that his report was outweighed by the evidence of the RMO and the care team as their evidence is based on substantial knowledge of the patient and on an ongoing basis while the report of Mr Keenan is based on interview with the patient."

It was submitted that Mr Keenan had not only interviewed the patient but his report indicates that he consulted Mr Oliver Robins, the appellant's father and named person, Dr Caroline Mitchell, the Responsible Medical Officer, Janice Hayton, staff nurse, Brenda Ellis, unit manager rehabilitation unit, Peter Di Mascio, Mental Health Officer and Martin McGavin, social worker South Lanarkshire Council. It was further submitted that the Tribunal's decision did not give adequate weight to the professionalism of Mr Keenan. From what was said any social circumstances report would be disregarded by a Tribunal if faced with medical evidence. It was submitted there was no narration in the decision of the Tribunal as to how the Tribunal had weighed up the evidence.

9. In dealing with his grounds of appeal solicitor for the appellant submitted:

(a) The Tribunal failed to give adequate reasons for its decision. I was referred to *Chief Constable, Lothian & Borders Police v Lothian & Borders Police Board* 2005 SLT 315 at 336K where Lord Reed said:

"This is however a case where the statement of reasons form part of the record of the decision. There is a statutory duty to include the reasons in the record of the decision and to give those reasons as part of the notification of the decision. It is clear from the authorities that, where a provision expressly requires a decision to be communicated together with reasons for it, then if adequate reasons are not included in the record of the decision and notified as required, then the decision itself will normally be held to be invalid."

I was also referred to the well known dicta of Lord President Emslie in *Wordie Property Co Ltd v Secretary of State for Scotland* at 1984 SLT 345 at 348:

"... all that requires to be said is that in order to comply with the statutory duty imposed upon him the Secretary of State must give proper and adequate reasons for his decision which deals with the substantial questions in issue in an intelligible way. The decision must, in short, leave the informed reader and the court in no real and substantial doubt as to what the reasons for it were and what were the material considerations which were taken into account in reaching it."

It was submitted that the present decision failed that test as it was not possible to discern the content of the evidence on which the Tribunal focussed. It was submitted it was particularly true in respect of requirements (c) and (d) set out in para 4 of this note. There was no specification as to the reasons why there would be a significant risk to the health, safety or welfare of the patient or why, because of the mental disorder, the patient's ability to make decisions about the provision of such medical treatment was significantly impaired.

It was submitted that the failure to give proper reasons was an error in law.

(b) The Findings regarding risk to the patient lacked any content which could indicate a significant risk to the health, welfare or safety of the patient. There required not just to be risk - there required to be significant risk. I was referred to the opinion of the court in the case of *Regina v Lang* (2006) 1 WLR 2509 at para 17:

"In our judgment, the following factors should be borne in mind when a sentencer is assessing "significant risk":

(i) The risk identified must be significant. That is a higher threshold than mere possibility of occurrence and in our view can be taken to mean (as in the Oxford Dictionary) "noteworthy, of considerable amount or importance".

It was submitted that was the test in this context. The risk to health, safety or welfare of the appellant must be significant in the sense of important or noteworthy to justify removing from him his right to his liability.

Solicitor for the appellant had five specific criticisms of the decision in respect of the question of significant risk:

i. It was impossible to tell on what evidence the Tribunal had relied in coming to its conclusion about risk.

ii. While an extensive list of risks was identified in para 9 of the decision letter, it was not clear on what basis the Tribunal had concluded that these risks arose for this particular patient. It was not clear why these matters should be seen as a significant risk to health, welfare and safety of this patient.

iii. It was not clear where the evidence of speedy relapse had come from. There did not appear to be evidence to that effect in the documents before the Tribunal. The reference to his medication was, it was suggested, a question of "cutting and pasting" from another determination.

iv. The nature and extent of the self neglect and social isolation was unclear. It could not be decerned from the Tribunal's determination why they should be regarded as significant risks to his health, safety and welfare.

v. It was not clear that the Tribunal had adequately taken into account the report by the independent social worker Mr Tom Keenan. Although the Tribunal in the last page said that they had considered carefully the independent social circumstances report, they did not give adequate reasons for rejecting it. Mr Keenan was a professional social worker. He had recent contact with the appellant and everyone connected with the case. It was suggested that the reason given by the Tribunal for rejecting this report was inadequate. The Tribunal had said that the evidence of the RMO and the Care Team was based on substantial knowledge of the patient on an ongoing basis. If it was the case that a social worker, meeting with a patient on one occasion, could not produce an adequate report, very few social work reports produced to the courts would be of any value.

(c) There was no adequate finding that the appellant's ability to make decisions about the provision of medical treatment was impaired because of mental disorder. There was a finding that he had limited insight and that his understanding of his difficulties was impaired. The Tribunal was silent about the cause of this impairment. There was no finding, in terms of section 64(5)(d), to the effect that, because of mental disorder, the patient's ability to make decisions about the provision of such medical treatment was significantly impaired.

10. I was asked to find the grounds of appeal established and set aside the decision of the Tribunal. I was asked to remit the case to a differently constituted Tribunal in terms of section 324(6) of the 2003 Act.

Submissions for first respondent

11. Counsel for the first respondent submitted that all three grounds of appeal, namely that the Tribunal failed to give adequate reasons for its decision, its decision was not justified by its findings, or that its decision was unsupported by the evidence were ill founded. It was submitted that the decision of the Tribunal had to be looked at as a whole. From such a consideration of the document it was possible to determine the evidence on which the Tribunal relied.

12. It was accepted that the Tribunal had to be satisfied on all five tests set out in section 64(5)(a) to (e) had been met. It was submitted this had been done:

(a) "The patient has a mental disorder"

This was accepted on behalf of the appellant.

(b) "That medical treatment would be likely to-

(i) prevent the mental disorder worsening or the symptoms or the effects or

(ii) alleviate any of the symptoms, or effect of the disorder,

is available for the patient."

Page 1 para 3 in the "Full Findings and Reasons" provided:

"There is medical treatment available to the patient which would be likely to prevent his mental disorder worsening of alleviate any of the symptoms or the effects of the disorder and this is detailed in the Care and Treatment Plan dated 2 August 2006."

(c) "That if the patient were not provided with such medical treatment there would be a significant risk -

(i) to the health, safety or welfare of the patient ..."

Para 4 of page 1 of the "Full Findings and Reasons" provided:

"The main risk in the patient's case is that of relapse when unwell. He is prone to self neglect and social isolation. If the patient were not provided with such medical treatment there would be a significant risk to his health, safety and welfare. There is no significant risk to the safety of any other person."

(d) "That because of the mental disorder the patient's ability to make decisions about provision of such medical treatment is significantly impaired."

In para 5 of the "Full Findings and Reasons" it is recorded:

"The patient has very limited insight and his understanding of his difficulties is impaired. His ability to make decisions about the provision of such medical treatment is significantly impaired."

(e) "That the making of a compulsory treatment order in respect of the patient is necessary."

Para 6 on page 1 under "Full Findings and Reasons" records

"The patient requires to be subject to compulsory measures without which it is believed he would disengage from services and would cease his medication."

Accordingly it was submitted that on page 1 each of the five tests set out in section 64(5)(a) to (e) had been considered and commented upon. Importantly, para 7 on page 1 provides:

> "The RMO has given notice of her determination to the Mental Health Officer (MHO) and he agrees with same."

In his report 5/3 of process this was confirmed by the HMO.

13. On page 2 of the decision letter at para 9 there are set out the factors which the Tribunal had taken into account in reaching its decision. It is in the following terms:

> "The patient's clear view is that he has been subject to CTO for long enough and feels he can manage in the community. He feels stigmatised being subject to said CTO. The patient's named person attended and gave a clear view that he saw an improvement in the patient's commencing treatment but felt that there was still some distance to go until the patient could live more independently. He was in favour of the CTO continuing in its present form as hospital based. This was also the view of Mrs Robins. The patient had declined an independent advocate. The patient's solicitor, Mr Quinn has submitted an independent social circumstances report prepared by Mr Tom Keenan, independent social worker and is dated 27 September 2006 and this was fully considered. The patient's parents who have a long standing knowledge of his mental health confirmed that over the last year they have seen an improvement in that he is engaging with them albeit to a minimal extent. There is a risk that the patient if becoming informal would lose the positive and progressive benefits that have been won for him. There is a risk of disengagement from the process of rehabilitation. There is risk of non-compliance with medication. For example the patient indicated side effect of medication but at the same time does not recognise the need for medication and this suggests a significant risk of non-compliance. The outcome of non-compliance is relapse. It the patient were to become informal now he may relapse quickly and this could result in short term detention reducing the likelihood of voluntary engagement with the mental health system. These are all in our opinion having heard and evaluated the evidence significant risks."

It was suggested that this was a proper summary from the Tribunal's point of view and gave proper notice to the reader of why the decision had been reached.

The Care and Treatment Plan was before the Tribunal and was referred to in the decision (5/2 of process). It was submitted that it was not necessary for the Tribunal to narrate the whole contents of the care plan in its decision. It was sufficient to refer to it and this it had done. The patient and his solicitor had a copy of it. It was clear from the care plan that the tests set out in section 64(5)(a) to (e) were met.

14. Counsel for the first respondent then referred me to page 3 of the decision letter under the paragraph "Reasons for decision" the Tribunal concluded:

> "The onus is on the RMO to show that the CTO continues to be necessary and that extension is appropriate with the same compulsory measures continued. We considered the mental health report and the updated care plan both of which indicate that the criteria contained in section 64(5)(a) to (e) of the Act continued to apply. The onus has been discharged. Such extension without variation is appropriate."

15. The decision at page 3 continued to deal with the five statutory criteria as follows:

> > "(a) Mental illness - The patient suffers from mental illness order detailed above and his symptoms are well documented. We accept the medical evidence in this regard.
> >
> > (b) Medical treatment - There is medical treatment available, namely anti-psychotic medication which the patient

responds to. The in-patient nursing care is detailed in the care and treatment plan. This is likely to prevent his mental disorder worsening and alleviating symptoms.
(c) Risk - The main risk in the patient's case is that of acute relapse without anti-psychotic drug maintenance. He is prone to self neglect and social isolation. The risks are referred to in detail as above. There are very real and significant risks to the patient who quickly lapses when not taking his medication.
(d) Decision making impairment - the patient has very limited insight and does see the need for treatment. He does not link the progress he has made to medical intervention. He has a very rigid thinking pattern.
(e) The necessity of a compulsory treatment order - the patient has expressed a desire to have accommodation outwith the inpatient setting. He has expressed a wish to return to his parent's home but they are reluctant to agree this. He has agreed to remain in hospital but does not give his consent to continuing treatment. It is believed that the patient would disengage from services if allowed to go into the community and that his condition would rapidly relapse. Until the patient makes further progress there is no alternative to a hospital based order.

16. It was suggested that more than adequate reasons had been given for the decision reached in the material which I have already set out. It was suggested that, if there was any doubt at that stage of the reasons for the decision, such a doubt would be met by the terms of the section of the decision entitled "Evidence and Reasons" in page 4 of the decision. That paragraph stated:

"The medical report submitted by the RMO is accepted by the Tribunal as this has been prepared by a Consultant Psychiatrist who is specifically trained in mental health and has given an informed professional opinion based on direct knowledge of the patient on an ongoing basis. She also has prepared the report in consultation with the patient's multi-disciplinary team. There was clearly a conflict in evidence. The RMO gave evidence today in very great detail to confirm that all the conditions of section 64(5)(a)-(e) of the Act continue to be met. Evidence was also heard from the care team, namely Dr Focone, Mr Di Mascio and Mr Henderson all of who agreed with the RMO opinion of the continuation of the hospital based CTO. We carefully considered the independent social circumstances report of Mr Keenan and while noting his views were of the opinion that his report was outweighed by the evidence of the RMO and care team as their evidence is based on substantial knowledge of the patient and on an ongoing basis while the report of Mr Keenan is based on interview with the patient. On the one hand the patient feels that he should no longer be subject to compulsory measures and that the CTO is no longer required. On the other hand the medical evidence clearly suggests otherwise. For the reasons above we have preferred the medical evidence. The RMO has carried out a careful risk assessment which clearly considers in-patient hospital treatment is still the least restrictive alternative for all the reasons given in the Mental Health Report. We accept that there is still significant risk and decision making is still significantly impaired as opined by the RMO and we consider that these risks can only be addressed by compulsory measures contained in a hospital based CTO which is under all the facts and circumstances in the patient's case the lease restrictive measure."

17. It was submitted that the Tribunal in this case had advised the informed reader of the evidence which they had considered. They had concluded that certain aspects of the evidence outweighed other aspects. They gave a reason why they preferred the evidence of the RMO and the Care Team to the

evidence of the appellant and Mr Tom Keenan, the independent social worker.

18. I was referred to the case of *Koca v S of S for the Home Department* 2005 SC 487 at 499 where Lord Carloway said:

> "The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal, important controversial issues" ... reasons need refer only to the main issues in the dispute, not every material consideration ... decision letters must be read in a straightforward manner, recognising they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the parties aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

In this case the information contained in the decision letter made it quite clear on what basis on which the decision was reached by the Tribunal. It suggested that the Tribunal had given adequate reasons; the decision was justified by its findings and the decision was supported by its findings.

Submissions for the second respondents

19. Counsel for the second respondent first noted that the third plea in law was to the effect that the decision was unsupported by the evidence. It was clear from a consideration of section 324(2)(d) of the 2003 Act that it was not open to the appellant to argue that the decision was not supported by the evidence. The subsection provided:

> "The Tribunal's decision was not supported by the facts found to be established by the Tribunal."

There was no reference to evidence. On that alone the third ground of appeal for the appellant failed.

20. Counsel for the second respondent adopted the arguments put forward by counsel for the first respondent and merely added a few additional comments. In particular it was submitted that a consideration of the decision letter as a whole made it clear that the Tribunal had made findings which met all five criteria. In particular, the Tribunal found that there was significant risk to the appellant's health, safety or welfare if he relapsed in the community as a result of not taking his medication. The Tribunal's findings made it clear that they based their decision on evidence which they heard from the RMO and the three other members of the Care Team. The Tribunal gave a reasoned decision for preferring their evidence to that of the independent social worker, Mr Tom Keenan. It was submitted there were adequate findings in fact to enable the Tribunal to reach the decision they did, and it was clear that they reached these findings in fact on the basis of considering all the evidence before them. The Tribunal was not required to repeat all the evidence they heard *ad longum* in their decision. They

required to make findings about the crucial matters at issue and that was what they have done.

21. I was again referred to the dicta of Lord President Emslie in *Wordie Property Co Ltd v Secretary of State for Scotland* 1984 SLT 346 at 348:

> "... all that requires to be said is that in order to comply with the statutory duty imposed upon him the Secretary of State must give proper and adequate reasons for his decision which deal with the substantial questions in issue in an intelligible way. The decision must, in short, leave the informed reader and the court in no real and substantial doubt as to what the reasons for it were and what were the material considerations which were taken into account in reaching it."

I was also referred to *Singh v Secretary of State for Home Department* 2000 SC 219, *City of Edinburgh Council v Secretary of State for Scotland* 1998 SC (HL) 33 and *South Bucks District Council v Porta (2)* 2004 1 WLR 1953. The reasons given did not require to be to an exact standard. They required to be intelligible to the informed reader and they did not require to deal with all the material before the Tribunal. There was no need for the Tribunal to rehearse the evidence and analyse every piece of evidence. It was submitted that in this case the reasons were more than adequate.

22. The Tribunal had accepted that the onus was on the RMO and held that this had been discharged. As far as significant risk was concerned it was submitted that the appellant required to demonstrate that the decision was based on a misapprehension of what was meant by significant risk. This had not been the case. The decision, taken as a whole, gave clear notice to the informed reader of why the Tribunal reached its conclusion.

Decision

23. I find no merit in this appeal. I am content to adopt in their entirety the submissions which were made by counsel for the first and second respondents in this case and which I have set out in full in this note. I accept that these submissions allow me to conclude that the five criteria in section 64(5)(a) to (e) of the 2003 Act have been met. There was more than ample material before the Tribunal to allow the Tribunal to reach the decision which they did. In my opinion the Tribunal gave proper and acceptable reasons for their decision and in particular for preferring the evidence of the RMO and the Care Team to that of the appellant and Mr Tom Keenan, the independent social worker.

24. The criteria of what is required in a statement of reasons set out in *Koca v S of S for the Home Department supra* and *Wordie Property Co Ltd v Secretary of State for Scotland supra,* in my opinion have been met. I do not criticise the decision letter. The Tribunal have not erred in law in failing to give

adequate reasons for their decision. The findings of the Tribunal justify the decision which they have made.

25. In these circumstances the appeal fails. Parties were agreed that, if I took this course, I should make no finding in respect of expenses. This I have done.