THE SCOTTISH MINISTERS v. AGAINST THE DECISION OF THE MENTAL HEALTH TRIBUNAL FOR SCOTLAND IN THE CASE OF JK, 11 February 2009, Lord Wheatley+Lady Cosgrove+Lord Clarke

EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

Lord Wheatley
Lord Clarke
Lady Cosgrove

[2009] CSIH 9
XA132/07

OPINION OF THE COURT

delivered by LORD WHEATLEY

in

COURT OF SESSION APPEAL UNDER SECTION 322 OF THE MENTAL HEALTH (SCOTLAND) ACT 2003

by

THE SCOTTISH MINISTERS

Appellant;

against the decision of

THE MENTAL HEALTH TRIBUNAL FOR SCOTLAND

Respondents;

in the case of

J K

Interested Party;

For the Appellants: Johnstone QC, Poole; Scottish Government Legal Directorate
Respondents: Dunlop QC, K Campbell, Solicitor to the Mental Health Tribunal
Interested Party: O'Carroll: Balfour + Manson LLP

11 February 2009

[1] This in an appeal under section 322 (1)(b) of the Mental Health (Care and Treatment) (Scotland) Act 2003 ("the 2003 Act") from a decision of the Mental Health Tribunal for Scotland dated 13 August 2007, revoking a restriction order which had earlier been placed on J K ("the patient"), who is the interested party in this appeal.

[2] The present restriction order was initially imposed on 16 November 1970 in Greenock Sheriff Court, following the patient's conviction for a breach of the peace on a summary complaint. Because the patient was suffering from a mental disorder, and also on account of his dangerous, violent or criminal propensities, the court determined that he required treatment under conditions of special security and ordered him to be detained in the State Hospital in terms of section 55 of the Mental Health (Scotland) Act 1960 ("the 1960 Act"). In addition, the court made an order restricting the patient's discharge, without limitation of time. The patient had originally appeared on petition, but the case was thereafter reduced to a summary prosecution and no indictment was ever served.

[3] The restriction order imposed on the patient was in terms of section 60 of the 1960 Act, although the section itself is not referred to in the court's decision. Section 60 provides:-

> "(1) Where a hospital order is made in respect of a person, and it appears to the court, having regard to the nature of the offence with which he is charged, the antecedents of the person and the risk that as a result of his mental disorder he would commit offences if set at large, that it is necessary for the protection of the public so to do, the court may, subject to the provisions of this section, further order that the person shall be subject to the special restrictions set out in this section, either without limit of time or during such period as

may be specified in the order."

[4] The current position in respect of the detention of persons suffering from a mental disorder is that the court has powers under the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act") to impose a compulsion order authorising the detention of a person in hospital (in terms of section 57 (2)(a)), and further to impose restriction orders regulating the treatment of such patients in appropriate cases (in terms of sections 57(2)(b) and 59). By virtue of paragraph 20 of the Mental Health (Care and Treatment) (Scotland) Act 2003 (Transitional and Savings Provisions Order 2005 (SSI 452):-

> "A restricted patient shall be treated as if a compulsion order under section 57A(2) of the 1995 Act and a restriction order under section 59 of the 1995 Act had been made in respect of that patient."

In the interpretation paragraph of the Order (2(1)) a restricted patient

> "means a 1995 Act patient who immediately before 5 October 2005 was subject to the special restrictions set out in section 62(1) of the 1984 Act."

[5] Schedule 5 of the 1984 Act repealed the 1960 Act, but paragraphs 1 and 2 of Schedule 4 made the necessary transitional and savings provisions in respect of restricted patients under the earlier statute. The net effect of these various statutory enactments is that by virtue of the original court order of 16 November 1970, the patient in this appeal is for all present purposes to be treated as being under both a compulsion order and a restriction order under the relevant sections of the 1995 Act.

[6] One of the principal consequences of these legislative developments is to change the way in which restriction orders are supervised and administered. Formerly, only the Scottish ministers had the power to revoke a restriction order, by virtue of section 61 of the 1960 Act, followed by section 8 of the Mental Health (Scotland) Act 1984. This was changed by Parts 9 and 10 of the

2003 Act, which altered the way in which compulsion orders and restriction orders are managed. In terms of Part 9 of the Act, which deals with compulsion orders, the oversight of such orders is supervised by the patient's responsible medical officer. In the case of restriction orders under Part 10, restricted patients are supervised not only by the responsible medical officer but also by the Scottish Ministers and the Mental Health Tribunal, and for the first time, the right to remove the restriction order is given to the Tribunal. At this point it should be noted that restriction orders do not themselves authorise detention in hospital; that is achieved by the imposition of compulsion orders. The purpose of restriction orders is to provide additional safeguards in the decision making process concerned with the management and possible release of a restricted patient. The safeguards in respect of restricted patients are *inter alia* that while compulsion orders last only for six months (section 57A(2) of the 1995 Act), a restriction order continues the compulsion order without limit of time (section 57A(7)). A restriction order therefore prevents the patient from being released from a compulsion order (either within a hospital or a community setting), unless there has first been a decision of the Mental Health Tribunal following a hearing at which the Scottish ministers have the right to make representations (section 193(8) and (9) of the 2003 Act). In addition, decisions about the transfer of the patient (for example to a lower security hospital) are subject to scrutiny and approval by the Scottish ministers (sections 218 and 224 of the 2003 Act); and restriction orders require the Scottish minister to monitor the patient on a continuing basis (on reports from the relevant health officials) and must refer each case to the Tribunal at appropriate intervals (section 188 of the 2003 Act). Patients who are liable to come into increased contact with the community are subject therefore to regular statutory supervision by the Scottish Ministers, and the Tribunal, to ensure that considerations of public safety are given appropriate weight in the decision making process about the treatment and release of the patient.

[7] The legislative provisions concerned with the revocation of restriction orders are found in

section 193 of the 2003 Act. The relevant parts of section 193 are as follows:-

"(1) This section applies where -

(a) an application is made under sections 191 or 192(2) of this Act;

(b) a reference is made under section 185(1), 187(2) or 189(2) of this Act.

(2) If the Tribunal is satisfied -

(a) that the patient has a mental disorder; and

(b) that as a result of the patient's mental disorder, it is necessary,

in order to protect any other person from serious harm, for the patient to be detained in hospital, whether or not for medical treatment, it shall make no order under this section.

(3) If the Tribunal is not satisfied that the patient has a mental disorder, the Tribunal shall make an order revoking the compulsion order.

(4) If the Tribunal -

(a) is satisfied that the pursuer has a mental disorder; but

(b) is not satisfied -

(i) that, as a result of the patient's mental disorder, it is necessary, in order to protect any other person from serious harm, for the patient to be detained in hospital, whether or not for medical treatment; and

(ii) either -

(A) that the condition mentioned in paragraph (b) and (c) of section 182(4) of this Act continues to apply in respect of the patient; or

(B) that it continues to be necessary for the patient to be subject to a compulsion order,

it shall make an order revoking the compulsion order.

(5) If the Tribunal -

(a) is satisfied -

(i) that the conditions mentioned in section 182(4) of this Act continue to apply in respect of the patient; and

(ii) that it continues to be necessary for the patient to be the subject of the compulsion order, but

(b) is not satisfied -

(i) that, as a result of the patient's mental disorder, it is necessary, in order to protect any other person from serious harm, for the patient to be detained in hospital, whether or not for medical treatment; and

(ii) that it continues to be necessary for the patient to be subject to the restriction order,

it shall make an order revoking the restriction order.

....

(7) If the Tribunal -

(a) is satisfied -

(i) that the conditions mentioned in section 182(4) of this Act continue to apply in respect of the patient; and

(ii) that it continues to be necessary for the patient to be subject to the compulsion order and the restriction order; but

(b) is not satisfied -

(i) that, as a result of the patient's mental disorder, it is necessary, in order to protect any other person from serious harm, for the patient to be detained in hospital, whether or not for medical treatment; and

(ii) that it is necessary for the patient to be detained in hospital,

> the Tribunal may make an order that the patient be conditionally discharged and impose such conditions on that discharge as it thinks fit."

[8] Section 193 (8) and (9) allow for representations to be made before the decision is reached by *inter alia* the patient and the Scottish Ministers.

[9] It is against that background that the Tribunal examined the circumstances of the patient in the present appeal. The Tribunal hearing took place on 24 July 2007 and its decision was issued on 22 August 2007. The first part of the Tribunal's decision comprises a form CORO 2, which contains a number of standard compartments which require to be completed by the Tribunal. Part 4 is designed to note the details of who appeared at the hearing, including those who gave evidence. In the present case it is recorded that the patient, a representative of the Scottish Ministers, the patient's responsible medical officer and the patient's advocacy worker were present at the hearing. Dr Dewar, the patient's responsible medical officer, was the only person who gave evidence. The Tribunal also considered a report by Dr Clark, a consultant forensic psychiatrist, instructed by and on behalf of the patient. In addition, the patient's full medical records appear to have been available to the Tribunal. In the part of the form recording their decision, (at p14D) the Tribunal noted that it was satisfied:-

> "(i) that the conditions mentioned in section 182(4) of the Act continue to apply in respect of the patient; and
>
> (ii) that it continues to be necessary for the patient to be subject to the compulsion order;"
>
> but that it was not satisfied:-
>
> "(i) that as a result of the patient's mental disorder, it is necessary, in order to protect any other persons from serious harm, for the patient to be detained in hospital, whether or not for medical treatment; and
>
> (ii) that it continues to be necessary for the patient to be subject to the restriction order."

The findings of the Tribunal are thus designed to reflect the terms of section 193(5)(a)(i) and (ii) and (b)(i) and (ii). The Tribunal therefore revoked the restriction order. For convenience the tests described in section 193(5)(b)(i) and (ii) are hereinafter referred to as "the serious harm test" and "the continued necessity test" respectively.

[10] The Tribunal made *inter alia* the following findings in fact.

"(1) The patient is 56 years old.

....

> (4) There have been four attempts to rehabilitate the patient from the State Hospital, all of which have been unsuccessful as a result of his disturbed behaviour.................
>
> ....
>
> (9) In 1986 he was referred to a neurologist following a prolonged deterioration in his behaviour and because of poor seizure control.
>
> (10) He was found to be suffering from a slow growing frontal lobe lesion which was considered to be inoperable.
>
> (11) He is currently suffering from an organic psychosis as a result of this tumour.
>
> (12) For approximately half to two thirds of the time the patient can be calm, pleasant and co-operative with staff. When calm he has a number of interests which he enjoys such as reading, listening to music and building model boats.
>
> (13) As a result of his mental disorder the patient can become distressed, frustrated and angry.
>
> (14) His behaviour then becomes very disturbed and he has to be confined to a side room. He is verbally abusive to those around him and can on occasion be violent. He has a propensity to self harm and accordingly he is not allowed to listen to his music or build model boats lest he uses his earphones as a ligature or fashions a weapon from the glue kit

used in model boat building.

(16) The patient has a history of making weapons and in March 2006 stabbed a nurse in the leg using a pen.

(17) The patient is currently on level three observation as a result of his disturbed behaviour. This is the highest level of observation at the State Hospital and involves a member of staff having responsibility for the patient only and the member of staff must be within touching distance of the patient at all times.

....

(19) The patient has a history of poor compliance with his medication and this exacerbates the volatility of his mood. He also has little interest in food. He often refuses to eat and is accordingly frail. Following a fall in which he fractured his femur, he is restricted to a wheelchair and will continue to be so restricted.

(20) Without the medical treatment provided there would (be) a significant risk to the patient's health welfare and safety and to that of others as is evidenced by the episodes of disturbed behaviour described in paragraphs 13-16 above."

[11] The Tribunal also made the following finding in law (which reflects and reiterates their decision as recorded in the form).:-

"The Tribunal is satisfied that the conditions mentioned in section 182(4) of (the) Act continue to apply in respect of the patient and that it continues to be necessary for the patient to be subject of a compulsion order; but it is not satisfied that as a result of his mental disorder, it is necessary in order to protect any other person from serious harm, for the patient to be detained in hospital whether or not for medical treatment and that it continues to be necessary for the patient to be subject to a restriction order."

[12] Section 182 is concerned with the regular review of compulsion orders and restriction

orders. Section 182(4) provides details of the conditions of such orders which have to be reviewed;

> "(4) Those conditions are -
>
> (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 for the patient; and
>
> (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."

[13] The Tribunal then gave its reasons for its decision. For the purposes of the present opinion it is necessary to provide a summary of the Tribunal's report on the evidence. The Tribunal had considered the form CORO 1, which is the document which has to be completed on a regular basis by the patient's responsible medical officer (Dr Dewar), the evidence of Dr Dewar himself, the patient's medical records and a report from a consultant psychiatrist, Dr Clark, who had been instructed by the patient. Paragraph 5 of the CORO 1 form requires the responsible medical officer to agree or disagree with the following statement:

> "I am satisfied that as a result of the patient's mental disorder it is necessary, in order to protect any other person from serious harm, for the patient to be detained in hospital whether or not for medical treatment."

In his response to this part of the form, Dr Dewar expressed his disagreement with that statement. Dr Dewar, nevertheless, also considered that the restriction order should remain in place. The

reason for this apparent contradiction was spoken to by Dr Dewar in his evidence. As will be seen, it reflected the professional and ethical views of a body of psychiatrists with regard to the appropriateness of detaining "non-treatable" patients in a hospital setting . The Tribunal also considered the terms of Dr Clark's report, with which Dr Dewar agreed in its entirety, except for paragraph 6 of the conclusions of the report, where Dr Clark, said that he felt that, given that the patient was increasingly frail and confined to a wheelchair, and particularly given that the patient was to remain in a secure setting, no longer presented any undue risk that the restriction order would help to prevent.

[14] Crucially the Tribunal then turned to consider the evidence given by Dr Dewar before the Tribunal. The starting point of his testimony was that he had disagreed with the statement at paragraph 5 of the CORO 1 form, as described in the previous paragraph. This initially appeared to suggest that both Dr Dewar and Dr Clark were of the view that an examination of the various tests described in section 193(5)(a) and (b) of the 2003 Act meant that the restriction order should be revoked.

[15] However, Dr Dewar had subsequently given a more recent report dated 17 July 2007 which was also before the Tribunal, in which he had stated that:-

> "If (the patient) were not detained in this environment I think it would not be possible to manage the risks he presents to himself and to other persons."

The Tribunal then considered the reasons for this apparent anomaly in Dr Dewar's position by a detailed review of his evidence.

[16] The Tribunal noted that Dr Dewar had said that from a clinician's perspective the serious harm test described in section 193(5)(b)(i) presented ethical difficulties, because certain psychiatrists do not feel comfortable retaining patients when they are not susceptible to treatment. He considered that the serious harm test did not apply when the patient was receiving treatment,

and would only apply where there was an immediate and grave threat were the patient to be released. Dr Dewar was satisfied therefore that not only was the patient's compulsion order necessary, but that the restriction order should also remain in place; however he continued to have difficulty with the idea that the patient should be detained in hospital purely on the grounds of public safety. It is therefore clear that Dr Dewar in fact considered that the serious harm test described in section 193(5)(b)(i) had been met in the present case, but he was not prepared to support the view that the patient should be detained in hospital "whether or not for medical treatment"; in other words, he continued to disagree with the approach apparently supported by the legislative provision that a patient might be detained in hospital when he could not be effectively given medical treatment..

[17] Dr Dewar then spoke to the pursuer's general health and emphasised that his condition required him to be in the secure conditions of the State Hospital. Without the restriction order there was a significant risk that the patient would swiftly become worse. At present he was generally well, but had unpredictable bouts of distress, agitation and anger. He then soiled himself and damaged the contents of his room. He was not yet ready for the removal of his restriction order. The serious harm he presented to others was found in his verbal and physical aggression to staff when he was distressed and unwell; and he found it difficult in those circumstances to take advice, and had a tendency to assault staff, on occasion with objects. In March 2006 he stabbed a nurse with a pen, and he had to be managed very carefully to see that he could not get hold of anything that could be used as a weapon. It should be added that with the papers presented to the Tribunal, in addition to Dr Dewar's evidence, there was a log which detailed numerous incidents of aggressive threats and assaults by the patient on members of staff, which had continued on a regular basis up until the Tribunal hearing. These dangers as described by Dr Dewar persisted even although the patient was in fragile health and confined to a

wheelchair. He had a long history of aggressive behaviour, and while Dr Dewar, as the responsible medical officer, was primarily concerned for the safety of his patient, he accepted that the pursuer did on occasion present a risk of serious harm to others while in hospital, and previous attempts to rehabilitate him had failed because of his aggressive conduct. Ultimately, Dr Dewar conceded that it was in the interests of the patient and the public that his management be subject to public scrutiny and that the restriction order was necessary. He therefore counselled against its revocation.

[18] After hearing submissions on behalf of the patient and the Scottish ministers, the Tribunal then came to its decision. Firstly, the Tribunal was satisfied on the basis of Dr Dewar's evidence and Dr Clark's report that the conditions referred to in section 184(2) were met and that it continued to be necessary for the patient to be subject to the compulsion order in terms of section 193(5)(a)(ii). That this was the case was specifically conceded by the patient's representative at the hearing.

[19] The Tribunal then proceeded to examine the application of section 193(5)(b) to the patient's case. It noted that the restriction order had to be revoked if the serious harm test in terms of section 193(5)(b)(i) was not met, notwithstanding the fact that the pursuer may still be detained in hospital under the compulsion order. The Tribunal considered the opinion of Dr Clark that the serious harm test had not been satisfied in respect of the patient, and believed that he had applied the correct test to the patient's circumstances. However, as Dr Clark did not give evidence and was not therefore able to speak directly to his report at the hearing, the Tribunal did not feel it could reach a concluded view on that evidence alone.

[20] The Tribunal did not accept Dr Dewar's view that the question of whether the serious harm test was met depended upon whether or not the patient was treatable. However, it appears that because of his explanation that he did not consider that it was appropriate for a patient who was

not treatable to be detained at all, the Tribunal concluded that the evidence tendered by Dr Dewar, to the effect that the patient in the present case did present a risk of serious harm, should be ignored. The Tribunal also concluded that because Dr Dewar related the serious harm test only to those occasions when the patient was distressed, frustrated or angry as a result of his epilepsy or his psychosis or both, and because further they considered that there was no evidence of any other physical violence towards nursing staff, all that was left was verbal aggression and damage to property, and the risk of self harm. In these circumstances the Tribunal believed that the relevant serious harm test was not met in the patient's case, and accordingly revoked the restriction order.

[21] Against that decision the Scottish Ministers tabled three grounds of appeal, all in terms of section 324(2) of the 2003 Act. Put briefly, and in very general terms, the first of these grounds of appeal was that the Tribunal exercised its discretion unreasonably, by failing properly to deal with the evidence before it; secondly, that the Tribunal's decision was vitiated by errors of law, and thirdly that the Tribunal's decision was unsupported by the evidence. As is often the case, in submissions there was a degree of overlap of the material connected to these three grounds. All parties to the appeal dealt first with the question of supposed errors in law in terms of the second ground of appeal (for convenience now referred to as the first ground of appeal), and then with the evidence based appeals contained in the first and third grounds (now referred to as the second and third grounds).

[22] The appellant's first ground of appeal therefore was that the Tribunal had erred in law in that it had failed properly to apply the statutory tests for revocation of a restriction order contained in section 193 of the 2003 Act, cited earlier in this opinion.

[23] In this ground of appeal, counsel for the appellants submitted that in reaching its decision, the Tribunal had erred in law in that it had failed properly to apply the statutory tests for

revocation of a restriction order on four grounds. Firstly, before considering revocation of a restriction order, the Tribunal was obliged to consider the test contained in section 193(2) of the Act. It had failed to do so. Secondly, the Tribunal only considered that it had to look at the first test contained in section 193(5)(b)(i) ("the serious harm test"), prior to revoking the restriction order, and had overlooked and failed to consider the second test contained in section 193(5)(b)(ii) ("the continued necessity test"). Thirdly, the Tribunal had misinterpreted the nature of the serious harm test described in section 193(5)(b)(i). Fourthly, the Tribunal had failed to apply the continued necessity test in terms of section 193(5)(b)(ii).

[24] In terms of his first submission, therefore, counsel for the appellant argued that, in light of the sequential nature of the tests provided, the Tribunal first had to give its attention to section 193 (2). In terms of that sub-section, if the Tribunal is satisfied that the patient has a mental disorder and that as a result it is necessary, in order to protect any other person from serious harm, for the patient to be detained in hospital, whether or not for medical treatment, it shall make no order. Counsel pointed out that the terms of section 193(2) were peremptory. It was clear that the patient had a mental disorder and there was substantial evidence before the Tribunal that it could be considered necessary to protect any other person from serious harm for the patient to be detained in hospital, whether or not for medical treatment. If those conclusions had been reached, the Tribunal would be obliged to make no order, and in particular would make no order for revocation of the restriction order. This was clearly a prerequisite of any further consideration of the tests subsequently laid out in the section. However, it is clear from an examination of that decision that the Tribunal had not addressed its mind to this, and had made no specific findings which would allow confirmation that it had either accepted or rejected this preliminary test.

[25] For the respondents it was submitted that the Tribunal had considered the matters described in section 193(2); it had made a finding that the patient had a mental disorder and further it had

held that it was not necessary for the patient to be detained in hospital on the grounds that he posed a risk of serious harm to any other person. Although the Tribunal had not expressly recorded its decision in terms of section 193(2), that was unnecessary. For the interested party, who broadly endorsed the respondents' submissions, it was argued that there was no requirement that the Tribunal had to start with section 193(2) before considering any other part of the legislation.

[26] In respect of his second submission in this first ground of appeal, that the Tribunal wrongly considered that it only required to look at the serious harm test under section 193(5)(b)(i) prior to revoking a restriction order, and thereby overlooked the continued necessity test in section 193(5)(b)(ii), counsel for the appellants argued that it was clear that there are two tests contained in section 193(5)(b), both of which required to be met in any case before a restriction order could be revoked. It was agreed that the conditions contained in section 193(5)(a) were satisfied. In respect of the provisions of section 193(5)(b), counsel argued that the use of the word "and" at the end of section 193(5)(b)(i) was clearly disjunctive, and indicated that a second and separate test was to follow. Other provisions of the Act indicated the continued necessity of a restriction order as a separate test. The two tests in section 193(5)(b) were directed at different matters, section 193(5)(b)(i) being concerned with the necessity for hospital detention, and section 193(5)(b)(ii) with the question of whether the public interest needs to be considered in relation to the patient, whether or not he is in hospital.

[27] Counsel for the respondents submitted that section 193 makes no reference to the factors which the Tribunal must consider when assessing whether a restriction order continues to be necessary. The terms of the section should be construed narrowly. The question of whether an order continues to be necessary cannot sensibly be answered without identifying the purpose which is sought to be achieved. The use of the word "continues" in section 193(5)(b)(ii) suggests

the persistence of a state of affairs. Accordingly, the Tribunal was correct to have regard to the criteria governing the imposition of a restriction order. When the restriction order is imposed the court is directed to have regard to three particular factors, in deciding whether the patient presents a risk of serious harm, namely the nature of the offence with which he was charged, his antecedents and the risk he poses to the public if released, as a result of his mental disorder. These factors need not be relevant at the time when revocation is considered. There is no record of what weight, if any, was given to the three matters specified in section 60 of the 1960 Act when the present order was originally imposed. The question of a continued necessity test was therefore not essentially a separate issue in terms of section 193(5)(b). In any event, the Tribunal did consider the question of whether there was a continued necessity for the revocation order to remain in place, and had made findings on the matter.

[28] For the interested party, counsel submitted that there was no free standing test for the continuation of a compulsion order based on necessity, and the same therefore applied to the question of a restriction order. Accordingly, if the first part of the test in section 193(5)(b)(i) was met, then the order should be revoked. If that was not accepted, it was nonetheless clear that the Tribunal did appreciate that section 193(5) had two elements, both of which had to be considered; reference was made to the finding in law and to paragraphs 2 and 22 of their decision. The Tribunal heard evidence on both limbs of section 193(5)(b) and recorded that evidence in paragraphs 3 to 14 of their Findings in Fact. While most of that evidence was concerned with the serious harm test, there was nothing to suggest that the restriction order continued to be necessary. The Tribunal was an expert Tribunal and could be presumed to have known whether it was necessary or not to have the order continued. If the serious harm test under section 193(5)(b)(i) is not met, it should usually follow that it was not necessary for the restriction order to remain in place, as the order was designed to deal with those who offer a risk of serious harm to the

public.

[29] The third submission for the appellants in this first ground of appeal was that the Tribunal had misinterpreted the serious harm test in terms of section 193(5)(b)(i). Counsel maintained that it was important to note that the serious harm test was introduced in order to protect any other person from serious harm. The Tribunal's reasoning appeared to suggest that it had understood the test to mean that it had been introduced in order to protect any other person from a serious risk of harm (see paragraph 20 of their decision). The two tests were different; see *R* v *Birch 1989* (11Cr App R (S)) 202, per Mustill LJ at 213; *R* v *Golding* [2006] 1 MHLR 272 at para 25. Counsel for the appellants maintained that the risk in question need not be serious or significant, and that the word "serious" qualifies the word "harm". The test is different from that contained in section 182(4)(c) which refers to "significant risk". Accordingly what the Tribunal require to consider was not whether there was a significant or serious or even high risk of harm, but whether there was a risk of serious harm, even if that risk may be small. Serious harm may include harm other than physical violence.

[30] For the respondents, counsel maintained that the Tribunal had not confused the question of significant risk to the safety of any other person (section 182(4)(c)) and the necessity to protect any other person from serious harm (section 193(5)(b)). The Tribunal repeatedly referred to "serious harm" in its decision. The necessity to protect any other person from serious harm involves the possibility that the patient will inflict harm and the further possibility that if he does it will be serious. The Tribunal recognised that both these ideas were involved in their assessment. The Tribunal was entitled to a presumption that it understood the need to focus on the seriousness of the harm rather than the seriousness of the risk. Counsel for the interested party agreed with these submissions.

[31] Finally, under the first ground of appeal, counsel for the appellant submitted that the

Tribunal had failed to consider properly whether or not the restriction order continued to be necessary in terms of section 193(5)(b)(ii). The use of the word "continues" in the sub section suggested a link with the reasons for the imposition of the order, and the appropriate conditions as set out under section 60(1) of the 1995 Act. Such an order is made where it appears to the court, in terms of that sub-section, that having regard to the nature of the offence with which he is charged, the antecedents of the person, and the risk that as a result of his mental disorder he would commit offences if set at large.

Accordingly the Tribunal, in determining whether the continued necessity test was satisfied, required to have regard to these matters. In particular, in relation to the third of those factors the Tribunal should be looking at what might happen if the patient is in the community, having been released without restriction. In the present case they had not done so. In addition to the circumstances relevant to the imposition of a restriction order, the Tribunal in considering whether it continues to be necessary has to have regard to the nature and effect of the order, which is to provide additional safeguards in decision making, in particular so that the issue of public safety, through representations by Scottish Ministers, is given appropriate weight in decisions about treatment and release. The Tribunal does not appear to have addressed these concerns in the present case. In reply, both counsel for the respondents and the interested party relied in effect on what they had said in response to the appellants' second submission in this ground of appeal.

[32] We have come to the conclusion that the Tribunal has erred in its consideration of the correct legal principles which should properly be applied to the patient's case. In our view the purpose of section 193 is to provide a sequential list of tests to be applied to patients detained under the relevant legislation in order to allow for an ordered consideration and review of their circumstances. Firstly, in terms of section 193(2), if the Tribunal is satisfied that a patient has a

mental disorder, and that in order to protect any other person from serious harm it is necessary that the patient be detained in hospital, then the Tribunal should make no order. This is a clear and peremptory requirement, which in our view the Tribunal must first consider in every case. If, on the other hand, the Tribunal is not satisfied that the patient has a mental disorder, it must revoke the compulsion order (section 193(3)). Section 193(4) allows the Tribunal to revoke a compulsion order where the patient does have a mental disorder, but the Tribunal is not satisfied that detention is necessary to protect the public from serious harm, and is also not satisfied that either the conditions in paragraphs (b) and (c) of section 182(4) (which are concerned with the availability of necessary medical treatment) continue to apply, or that it continues to be necessary for the patient to be subject to a compulsion order. Section 193(3) and (4) therefore deal with the revocation of compulsion orders for patients who respectively do not, and do, have mental disorders. Finally, section 193(5), with which the present appeal is concerned, allows for the revocation of a restriction order, in somewhat similar terms to those referable to the removal of a compulsion order in terms of section 193(4).

[33] In this apparently logical process it does appear to us that the Tribunal must therefore in all cases first give its attention to the terms of section 193(2). In our view, this sub-section imposes what is in effect a threshold requirement on the Tribunal, which must be dealt with before it can turn its attention to any other part of the section. By virtue of the terms of section 193(2), the Tribunal must, in all relevant references and applications, address the two questions raised thereby, namely whether the patient has a mental disorder, and whether, as a result of that mental disorder, it is necessary, in order to protect any other person from serious harm, for the patient to be detained in hospital, whether or not for medical treatment. If, having addressed these two questions, the Tribunal is satisfied that they both fall to be answered in the affirmative, then it may make no order. That means, in particular, that the Tribunal may not in that situation then

exercise any of the powers available to it under section 192(3), (4) and (5). The Tribunal may only proceed legitimately to exercise their jurisdiction in terms of section 193(5) if it has not been satisfied that, as a result of the patient's mental disorder, it is necessary in order to protect any other person from serious harm, for the patient to be detained in hospital, whether or not for medical treatment. Accordingly, when the Tribunal comes to exercise the power to revoke a restriction order in terms of section 193(5), it must have already determined the question posed in section 193(5)(b)(i), by virtue of having earlier considered the same question in section 193(2). What is left for them to determine in that situation are the questions posed by section 193(5)(a), and the question posed by section 193(5)(b)(ii).

[34] In these circumstances, we are of the opinion that the Tribunal should have reached a clear and reasoned view on section 193(2). We are equally satisfied that it did not do so. It is accepted that the patient has a mental disorder; it is also accepted that the compulsion order should remain in place. In respect of this latter conclusion, it must be assumed that the Tribunal was satisfied that, as a result of the patient's mental disorder, it was necessary in order to protect any other person from serious harm for the patient to be detained in hospital, by reference to section 193(4). As both tests in section 193(2) were thus, on the face of things, clearly satisfied, it would seem that the Tribunal's obligation was to make no order under section 193. Their failure to do so was in our view a fundamental error. They failed properly to assess the evidence and make and explain their decision in this respect. Further, as the serious harm test was clearly met in terms of section 193(2), it is difficult to understand how the Tribunal came to the opposite view in considering the identical test in terms of section 193(5)(b)(i). In these circumstances, we conclude that the Tribunal erred in law in revoking the restriction order in terms of section 193 (5). What the Tribunal should have done in the circumstances it was considering was to make no order, in terms of section 193(2).

[35] Further, although this is not now necessary for our decision, our conclusion emphasises that what is described in section 193(5)(b)(i) and (ii) amounts to two separate tests and not to one conflated test, as was contended for by counsel for the respondents and the patient. That two tests are intended, and not one, is entirely clear from the terms of the subsection. The use of the word "and" at the end of section 193(5)(b)(i) is plainly disjunctive and is intended to convey that what comes next is a separate and distinct consideration. In our view it is impossible to read the two parts of the subsection as being conjunctive. In addition, as counsel for the respondents candidly admitted, standing the terms of section 193(2) (and indeed the other parts of section 193, particularly subparagraph (7)), it is difficult to argue that section 193(5)(b) does not contain two separate tests.

[36] It is, unfortunately, clear from reading the reasoning in the Tribunal's decision that no mention is made of the continued necessity test, (although a formal reference is made to it in the Finding in Law) and that the Tribunal appear to have considered only the serious harm test described in section 193(5)(b)(i). This in our view must constitute a further error in the Tribunal's determination.

[37] We now turn to comment on the submissions made concerning the nature of the two tests described in section 193(5)(b). In respect of the serious harm test in section 193(5)(b)(i), we agree that the proper issue which the Tribunal has to address is whether the restriction order is necessary to protect the public from a risk of serious harm, rather than from a serious risk of harm which, in the view of counsel for the appellants, was the test which the Tribunal appears to have imposed. The different between these two concepts is significant. We refer to what was said by Mustill LJ in *R* v *Birch* (at 213) in discussing the similar position in England:-

> "Quite plainly the addition of the words "from serious harm" has greatly curtailed the former jurisdiction to make a restriction order; most particularly because the word

> "serious" qualifies the word "harm" rather than "risk". Thus the court is required to assess not the seriousness of the risk that the defendant will re-offend, but the risk that if he does so the public will suffer serious harm. The harm in question need not, in our view, be limited to personal injury. Nor need it relate to the public in general, for it would in our judgement suffice if a category of persons, or even a single person, were adjudged to be at risk; although the category of person so protected would no doubt exclude the offender himself. Nevertheless, the potential harm must be serious, and a high possibility of a recurrence of minor offences will no longer be sufficient."

[38] With these views we respectfully agree. It is important that the Tribunal puts its mind to the proper test. In the present case, the appellant's counsel maintain that the Tribunal had not done so. On examining the Tribunal's reasoning, it is certainly true that the correct test is not accurately focussed and there is a lack of clarity in the Tribunal's approach. However, in the event we agree with counsel for the respondents, and for the patient, that this court is entitled to assume that a specialist Tribunal would have properly understood the statutory test it was charged to examine, and although we would have much preferred to have been given a greater understanding of the way in which the Tribunal in this case looked at the test in section 193(5)(b)(i), we would not, in all the circumstances, have been disposed to quash its decision on this ground alone. However, we wish to make it clear that in our view the proper test in this respect is to decide whether, standing the patient's mental disorder, it was necessary for him to be detained in order to protect any other person from the risk of serious harm; and that means that the protection had to be directed at the risk, whether serious or not, so long as it was real; that the harm that was put at risk had to be serious; and that the harm that needed to be protected against did not have to be confined to physical harm to a person.

[39] It is undoubtedly correct that the terms of the statute afford no guidance as to how the

continued necessity test, contained in section 193(5)(b)(ii), is to be assessed. We agree with the submission of counsel for the appellants that an appropriate starting point would normally be to look at the reasons why the order was imposed in the first place. That will mean, as we have indicated earlier in this opinion, that the Tribunal should consider the nature of the offence, the antecedents of the patient and the risk that the patient would commit further offences if at large. But having considered those matters, it would not always be inevitable that the Tribunal has to conclude that they are of significance to the revocation of the restriction order. In the present case, for example, it may not have been unreasonable for the Tribunal to conclude that the particular matters in contemplation at the time the original order was imposed were all now in the distant past, and had limited relevance to the patient's current situation. While that may be so, it is nonetheless necessary in our view that a Tribunal in looking at the continued necessity test, must examine the three matters described in section 60 of the 1960 Act, and reach rational and intelligible conclusions on them, even if only to reject them as being no longer relevant. Of more immediate concern is the nature and effect of the restriction order itself on the patient's present circumstances. The Tribunal should reach a considered view on the evidence as to whether the continuation of the order is necessary, as it must also do when dealing with the other provisions of the section. The test involved is a high one, but it is not arbitrary, as counsel for the patient contended. Rather it is a clear and separate test based on historical and policy considerations, which the Tribunal must consider in every case in the context of the factual and opinion evidence it finds established.

[40] In the present case, because no mention is made of the continued necessity test in the reasons for its decision, we are unable to be satisfied that the Tribunal has clearly focussed on the principles which should inform a decision as to the application of that test, nor are we prepared to assume that, as a specialist Tribunal, it understood the correct test to be applied. The absence of

any detailed reasoning in the Tribunal's decision to support the basic assertion in the Finding in Law, namely that it was not satisfied that it continued to be necessary for the patient to be subject to a restriction order, is in our view a fundamental omission.

[41] We therefore conclude, on this ground of appeal, that the Tribunal misdirected itself in law by failing properly to consider the separate tests contained in section 193(2) as they might apply to the present circumstances of the patient. Had it done so, the Tribunal should have decided that it should have made no order, and refrained in particular from revoking the restriction order. We also conclude that the Tribunal may have failed to appreciate that two separate tests required to be addressed in terms of section 193(5)(b)(i) and (ii), and further that the Tribunal failed to provide any reasons for its apparent conclusion that the test contained in section 193(5)(b)(ii) had been met.

[42] We now turn to the remaining grounds of appeal. In support of his second ground of appeal, counsel for the appellants submitted that the Tribunal had acted unreasonably in the exercise of its discretion in terms of section 324(2)(c) of the 2003 Act, and had reached a decision that was plainly wrong. This was partly because it had proceeded upon the wrong legal principles as set out in his submissions in the previous ground of appeal, but in addition he claimed that the Tribunal had overlooked or inadequately treated relevant considerations in reaching its decision, and in particular had fallen into error in the way in which it carried out the necessary balancing exercise in considering the evidence before it. He said that the principles upon which an appellate court will intervene in a decision of a Tribunal the decisions are familiar and are set out *inter alia* in the decision of *G* v *G (Minors: Custody Appeal) [1985]* 1WLR 647, and also in the judgement of Sheriff Principal Kerr in *Laurie* v *Mental Health Tribunal in Scotland* and others (unreported) 30 August 2007, (at p4 of 18):-

> "....... fundamentally it is not for an appellate court to interfere with a discretionary

> decision of the court below merely because it takes a different view of the matter in hand; instead it is necessary for it to be shown that the court below has in exercising its discretion proceeded upon some wrong principle or has produced a decision which is plainly wrong, falling out with the parameters within which reasonable disagreement is possible or has overlooked or inadequately treated some relevant consideration or has fallen into error in its manner of carrying out the necessary balancing exercise".

In the present case, counsel argued that the Tribunal had not only proceeded on the wrong principle in considering the serious harm test, as he had submitted under his first ground of appeal, it had further failed to take into proper account considerations material to a proper assessment of that test, including evidence of the patients' recent history of physical violence and other harmful behaviour. The Tribunal had taken into account that the patient had a history of making weapons, and also the incident in March 2006 when the patient stabbed a nurse in the leg (in fact the nurse was stabbed in the arm) using a pen. But the Tribunal made no mention of, and appears not to have taken into account, numerous other assaults, attempted assaults and threatened assaults, and other harmful behaviour listed in the information before it. Nor did it take into account the patient's previous conviction for assault, which involved the use of a knife. By failing to take these matters into account, the Tribunal was unable to carry out its balancing exercise properly, and had erroneously concluded that, on the evidence before it, the serious harm test had not been met.

[43] Further, counsel for the appellant submitted that Dr Dewar's evidence, properly understood, was that the serious harm test had in fact been met. His ambivalence towards the serious harm test, as indicated in his response in the form CORO 2, was based on an ethical aversion to a process which detained untreatable as well as treatable patients. Dr Dewar reported that the patient's volatility was linked with epilepsy, and that the episodes of disturbance were frequent

and unpredictable; that the patient had a propensity for verbal and physical aggression towards staff over a number of years; that he had difficulty when unwell in taking advice and at such times had a tendency to assault staff, on occasion with objects, as in the incident in March 2006. When he was unwell he had to be managed very carefully to ensure that he could not get his hands on objects that could be used as a weapon. Were the patient to be in a less secure environment, the risks would be higher. Dr Dewar, in conclusion, was of the view that on occasions the patient presented a risk of serious harm to others while in hospital, and that was partly why he was detained. Accordingly, Counsel for the appellants submitted that the Tribunal acted unreasonably in failing to explain clearly why it had rejected this evidence.

[44] Further, counsel argued that the Tribunal acted unreasonably in its approach to the continued necessity for the restriction order. It began by proceeding upon the wrong principle, namely that it believed that the serious harm test was the prerequisite of a restriction order remaining in place, when the Tribunal also required separately to consider the continued necessity of such an order. It therefore overlooked or treated inadequately considerations relevant to the continued necessity of the restriction order, and in particular it did not consider the nature of the index offence, the patient's antecedents and the risk that he would commit further offences if released. It did not consider the purpose and effect of a restriction order, nor did it put its mind to why, in considering the present order, its monitoring and overseeing role in the public interest was no longer necessary. It overlooked or inadequately treated the specific evidence from Dr Dewar that the restriction order was necessary; his evidence that the revocation of a restriction order would only ever be considered when a patient had progressed out of secure conditions and into the community in circumstances where very little supervision was required; and that it would be very unusual to revoke a restriction order while the patient was detained in high security. In these circumstances the Tribunal had acted unreasonably in the exercise of its discretion and had

reached a decision which was plainly wrong, and fell outwith the parameters within which reasonable disagreement was possible For these reasons the Tribunal's decision should be quashed.

[45] In response, counsel for the respondents submitted that most of the points made by the appellants in respect of this part of the case related to alleged errors of law, which had already been dealt with under the first ground of appeal. Further, counsel argued that the assessment of the evidence of Dr Dewar, and the weight to be given to it, were matters for the Tribunal. The Tribunal had taken into account the patient's history of fashioning weapons, his previous aggressive behaviour and the risk of further offences. Other matters referred to by the appellants were not relevant to an assessment of whether the order was necessary. In addition to considering the appropriate test as to whether it continued to be necessary to have the restriction order in place, the Tribunal was also enjoined to respect the principle in section 1(4) of the Act, which was concerned to see that the patient was subjected to the minimum restriction on his freedom that was necessary. Having regard to all the evidence before it, counsel for the respondents maintained that the decision of the Tribunal was one which could have been reached by the reasonable exercise of its discretion.

[46] For the patient, counsel submitted that the primary issue before the Tribunal was whether the serious harm test was met. The test was a high one. The Tribunal heard evidence from the responsible medical officer, who was subject to extensive cross examination on the question of whether the patient posed a risk of serious harm. The Tribunal also had a variety of reports and reviews before it. The Tribunal concluded that it would not rely either on the responsible medical officer's conclusions on the question of serious harm or indeed on Dr Clark's conclusions, as he did not give oral evidence. It was a decision an expert Tribunal was entitled to reach and should not be disturbed. The appellants had simply failed to produce evidence before the Tribunal which

reached the necessary standard to satisfy the high test of the risk of serious harm.

[47] The appellant's third ground of appeal was based on related submissions and were to the effect that the Tribunal had been guilty of procedural impropriety in reaching a decision unsupported by the facts which had been found proved before it in terms of section 324(b)(d) of the 2003 Act. Counsel for the appellants pointed out that the way in which the Tribunal should approach its task had been clearly set out. Paragraph 13(3) of the Schedule 2 to the 2003 Act provides:-

"A decision of the Tribunal shall be recorded in a document which contains

> a full statement of the facts found by the Tribunal and the reasons for the decision".

[48] The Mental Health Tribunal for Scotland (Practice and Procedure) (No 2) Rules 2005 (Scottish SI 519) regulation 72(7) provides:-

> "The Tribunal shall record the decision in a document which contains a full statement of the facts found by the Tribunal and the reasons for the decision."

A failure by the Tribunal to comply with this obligation is a procedural impropriety in terms of section 324(2)(b) of the 2003 Act. Reference was made to *Scottish Ministers* v *SW [2007]* CSIH 57 per Lord President Hamilton at para [7]. In *Wordie Property Ltd* v *Secretary of State for Scotland* 1984 SLT 345, it was noted (per Lord President Emslie at p348) that the decision maker

> "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."

[49] Counsel for the appellants argued that this meant that where a Tribunal rejects expert evidence, particularly in cases where there is no alternative expert view, it must indicate its reasoning process. Counsel accepted as is plainly the case, the appeal is not a rehearing of the

evidence, and that it is normally undesirable for an appellate court to go behind the terms of a Tribunal's decision except in the most exceptional circumstances. However, standing the aforementioned statutory requirements, the Tribunal must nonetheless make sufficient express findings in fact to support its decision. In the present case, counsel for the appellant maintained that it had failed to provide such a full statement of facts. It had failed to make crucial findings of fact bearing on the legal issues it required to determine. It had failed to make findings as to the nature, frequency and targets of violent incidents while the patient was in hospital, and the nature and extent of the weapons fashioned by the patient, and the use to which he attempted to put them. These facts were before the Tribunal, and were clearly relevant to the issue of serious harm. It had also failed to make findings as to the nature of the index offence, the patient's antecedents, and the risk that the patient might commit further offences if at large; and it also failed to make findings on the nature and effect of a restriction order. All of these were matters bearing on the issue of the continued necessity of the restriction order. In the absence of these findings, it was not possible to support a conclusion that the patient presented no risk of serious harm, necessitating detention in hospital, or that a restriction order no longer continued to be necessary for the protection of the public from serious harm. Counsel also submitted that in addition to all of these failures to make findings, the Tribunal had throughout its decision also failed to provide adequate reasons for the findings it had made. For these reasons the decision could not be supported.

[50] In response counsel for the respondents maintained that the Tribunal complied with all of its obligations in the making of its decision. The purpose of giving reasons was to indicate what conclusions were reached on the principal important controversial issues. Any set of reasons, when subject to examination on appeal, will appear capable of improvement (*Piglowska* v *Piglowski*[1991] 1WLR 1360, *per* Lord Hoffman at p1372). In this case the important issues of

controversy before the Tribunal were the significance of the expert evidence regarding the risk posed by the patient; what was disclosed by the patient's behaviour as described to the Tribunal; and the patient's physical condition. The reasons provided by the Tribunal dealt with all these issues, and explained in particular why the Tribunal reached its conclusion on the question of risk posed by the patient. Further, there was very little emphasis placed by the Tribunal concerning the patient's circumstances in 1970 when the original order restricting discharge was made, and that was entirely understandable.

[51] For the patient it was submitted that the reasons given by the Tribunal were in the circumstances sufficient to leave the informed reader in no real or substantial doubt as to why it reached its decision and the nature of the material considerations taken into account in reaching it. The obligation of a Tribunal to find facts and state reasons is not unlimited, and in the present case had been sufficiently complied with. The Tribunal's decision advised the informed reader of the evidence which it had considered. The Tribunal concluded that certain aspects of the evidence outweighed others. It did not place undue weight on Dr Clark's report. It gave reasons why it did not accept the responsible medical officer's conclusions on the serious harm test. It gave reasons why it considered that the serious harm test was not met. Standing the Tribunal's conclusion that the serious harm test was not met, there was no further reasoning that the Tribunal required to make as regards section 193(5)(b)(ii) other than to record, as it did, that the serious harm test was a pre-requisite of the restriction order.

[52] We consider that the way the Tribunal treated the evidence, particularly that of Dr Dewar, was not satisfactory. It is, of course, a specialist Tribunal and regard has to be had to its expert knowledge. We accept that it is not always appropriate to indulge in an overly elaborate analysis of the decision made by such a Tribunal. Nevertheless, the Tribunal must reach a decision based on the evidence. It requires to provide clear reasons for making, or failing to make, findings that

are central to the questions in issue. There are unconditional statements by Dr Dewar in his reports as well as in his evidence that the restriction order was necessary and should not be revoked. This is repeated in his CORO 1 form. In these circumstances the Tribunal ought to have given clear and intelligible reasons for the rejection of that part of his evidence, particularly as the witness was the responsible medical officer for the patient and had many years experience of working with him. The role of the responsible medical officer in the statutory scheme is plainly of the highest importance (see for example sections 182, 183 and 184 of the 2003 Act). The Tribunal therefore required to pay close attention to all parts of the responsible medical officer's evidence. The Tribunal's decision is all the more problematic against the background of the reports and reviews in the case, all emphasising the unpredictable and aggressive behaviour of the patient over many years. It is therefore difficult to understand why the Tribunal concentrated only on the incident involving the stabbing of a nurse with a pen, in considering the question of the risk posed by the patient, when there were many more such incidents to which they could have referred. Accordingly, there were unquestionably substantial areas of significant and relevant evidence before the Tribunal, the absence of which in the tribunal's justification of its decision were simply not explained.

[53] A decision on the second and third grounds of appeal is not required for the purposes of this opinion, the principal concern of which is with the question of the proper statutory interpretation of the legislation, raised in the first ground of appeal. We therefore confine ourselves at this stage to recording our concern that there does appear to be a failure on the part of the Tribunal to deal at all with large parts of the evidence and, in particular, to address the unequivocal and significant evidence of Dr Dewar, the responsible medical officer, that the serious risk test was met in the case of this patient.

[54] In the circumstances, we sustain the first ground of appeal, and remit the matter back to be

re-heard by a fresh Tribunal. In doing so we should make it clear that this should not be an academic exercise. It will be necessary for the new Tribunal to consider not only the material that was before the original Tribunal, but all material relevant to the patient which has become available since then, and up to the date of the next hearing, and to consider those matters in the way in which we have indicated.