

Case No: MHTS

**MENTAL HEALTH (CARE AND TREATMENT)
(SCOTLAND) ACT 2003**

Appeal by

AG

against

**A Decision of the Mental Health Tribunal dated 18 November
2005**

Act: Wilson

Alt: McGinty

Kennedy for the Mental Health Tribunal for Scotland

EDINBURGH, 11 January 2006

The Sheriff Principal, having heard parties' procurators, grants the unopposed motion by Mr Kennedy to allow the Mental Health Tribunal to be sisted as a party to the action; makes no order in respect of the appellant's motion to have the audio tapes from the Tribunal transcribed; appoints parties to be heard in respect of the appellant's note of appeal and assigns 2nd March 2006 at 10.30am within the Sheriff Principal's Appeal Court, Court 9, Sheriff Court House, 27 Chambers Street, Edinburgh as a diet therefor; grants the appellant leave to amend the grounds of

appeal; thereafter orders the appellant to lodge amended grounds of appeal not less than 14 days in advance of said appeal hearing.

Sheriff Principal of Lothian and Borders

NOTE:

(1) This is an appeal under section 320 of the Mental Health (Care and Treatment) (Scotland) Act 2003 against a decision of the Mental Health Tribunal dated 18 November 2005 in terms of which the appellant was made the subject of a compulsory treatment order under section 64(4)(a). Section 324(7) of the Act provides that regulations may specify the period within which an appeal under section 320(2) shall be made. Regrettably no such regulations appear to have been promulgated. The appeal was marked within 14 days of 18 November. In the absence of any statutory guidance the appellant's agents lodged a form of Note of Appeal in the style of Form A1 in the appendix to the Ordinary Cause Rules. The substance of the ground of appeal is that the Mental Health Tribunal acted unreasonably in the exercise of its discretion by failing to grant a request for an adjournment of the hearing in order that further information or evidence might be obtained.

(2) On receipt of the note of appeal, and in the absence of any rules of procedure, I pronounced an interlocutor appointing today as a procedural diet and directed intimation both to the original applicant being the Mental Health Officer, and the Mental Health Tribunal. On proper reflection, and having made enquiries as to the procedure which has been adopted in other sheriffdoms, I consider that this course was precipitate, because I am of the view that the correct form of procedure for an appeal of this nature should be by way of summary application by virtue of the provision of section 3(p) of the Sheriff Court (Scotland) Act 1907 (as amended). I shall expect that procedure to be followed in the future. For present purposes, no exception having been taken, I shall allow the present appeal to proceed in the form in which it has been taken.

(3) At today's hearing the appellant, the Mental Health Officer, and the Tribunal were all

represented. Section 324(3) of the 2003 Act provides that the Tribunal may be a party to an appeal, and a request was made that I should allow the Tribunal to appear in this case. I granted that request, although having taken time to consider the matter I am satisfied that the terms of section 324(3) give the Tribunal a right to be a party to an appeal without seeking the Court's authority. Having said that, I would not wish it to be thought that appearance on behalf of the Tribunal should be regarded as the norm. There is something of an anomaly in a situation where a Tribunal whose decision is the subject of an appeal is permitted to be a party to it. There may very well be advantages in encouraging representation on behalf of a Tribunal in situations where only one party to the original proceedings is likely to be represented at the appeal, for example, in Licensing Appeals where the original objectors do not subsequently appear. That situation is unlikely to arise in the present context since I would anticipate that in the majority of cases the Mental Health Officer making the original application would be called as a respondent. Standing the fact that Court has power in terms of section 324(4) to order the Tribunal to be represented where this appears to be appropriate, the purpose of section 324(3) is not entirely clear, but it will be for the Tribunal to give careful consideration as to whether it is necessary to be represented in any particular case.

(4) The principal matter which arose at the preliminary hearing was a request made on behalf of the appellant to order transcription of the tape recording of the proceedings before the Tribunal. This request was made because, according to the appellant's agent, the written Statement of Decision (which had been obtained only two days ago) contained material inaccuracies in relation to procedural matters before the Tribunal. For example it was said that the agent had made "full submissions" when she had not. The whole thrust of the appeal was that she had insufficient information to make full submissions or to cross-examine witnesses in full and this would be revealed by examination of a transcript. She stated, and this was accepted, that Tribunal Chairmen were told in training that proceedings were to be tape recorded "for the purpose of appeals" and indeed a statement to that effect was made to parties when the Tribunal was about to commence. In response the agent for the Tribunal said that there was no statutory authority for ordering transcription; that superior Courts were generally reluctant to look beyond the written statement of reasons given by Tribunals, and that this was an appeal against an exercise of

discretion which should not involve examination of the whole proceedings.

(5) There does not appear to be any authority in primary or subordinate legislation for the tape recording of proceedings before the Tribunal. I entertain distinct reservations as to my ability to make any order for transcription of a tape recording which appears to have been made on a "voluntary" basis. I raise, but make no determination, on the possibility that power to make such an order may be derived from the provisions of Rule 2.31 of the Act of Sederunt (Summary Applications Statutory Applications and Appeals etc) Rules 1991 S.I 1999 No 929. I accept that where there is a specific statutory direction that the 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" (paragraph 13.2 of schedule 2 of the 2003 Act) that it is undesirable in the interests of expedition and economy that an appellate court should seek to go behind the terms of that decision except in the most exceptional cases. In the present case I am far from satisfied, the issue raised being of the relatively restricted nature as indicated above, that the fairly major step of requiring or seeking transcription of the tape recording would be appropriate. I accordingly refused that request. In this context I have only to add that I consider that any statement to parties to proceedings before a Mental Health Tribunal which might lead them to believe that the transcript of a tape recording will necessarily be available for appeal purposes is one which is misleading.

(6) The present case should now proceed to a hearing. In view of the late receipt of the written statement of decision I have afforded the appellant an opportunity of amending the grounds of appeal in advance of that hearing.