

EDINBURGH, 2nd March 2006 Sheriff Principal Bowen QC

Act: O'Carroll, Advocate

Alt: Mr Wilson, Solicitor for the Mental Health Office

Alt: Mr K Campbell, Advocate, for the Mental Health Tribunal

The Sheriff Principal, having heard counsel for the appellant and counsel for the Mental Health Tribunal (second respondents), allows the appeal and sets aside the decision of the Tribunal dated 18 November 2005; remits the case to the Tribunal for consideration anew and directs that the Tribunal be differently constituted from that on 18 November 2005; finds the second respondents liable to the appellant in the expenses of the appeal as taxed; allows an account thereof to be given in and remits same, when lodged, to the Auditor of Court to tax and to report; certifies the cause as suitable for the employment of junior counsel.

Sheriff Principal of Lothian and Borders

NOTE:

1. This is an appeal against the 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) of the Act.
2. The appeal was initially directed against the Mental Health Officer ("the first respondent") who made the application. The Mental Health Tribunal ("the second respondents") were subsequently sisted as a party to the appeal. At the hearing of the

appeal the solicitor for the first respondent intimated at the outset that he did not oppose it. After I had been addressed by counsel for the appellant counsel for the second respondents indicated that he also had instructions not to oppose the appeal. In these circumstances the appeal has been allowed, technically on an unopposed basis, and it is strictly speaking unnecessary for me to express any opinion on the arguments addressed to me. Counsel for the second respondents went so far as to suggest that it would be inappropriate for me to express any such opinion, but the situation is one in which the error on the part of the Tribunal, if not obvious, ought to be highlighted.

3. The applicant in this case was the subject of a short-term detention certificate granted under the provisions of section 44 of the Act. Authority to detain her was due to expire on 14 November 2005. By virtue of the application made under section 33 her detention for a further period of five days was authorised in terms of section 68 of the Act. In that situation when the matter came before the Tribunal on 18 November 2005 the matter was governed by the provisions of Rule 8 of the Mental Health Tribunal for Scotland (Practice and Procedure) (No 2) Rules 2005. Paragraph 8(2) provides: "Before the expiry of the period of five days referred to in section 68(2)(a) of the Act, the Tribunal shall hold a hearing ("a first hearing") in order to determine whether an interim Compulsory Order should be made and, if it determines it should not be made, to determine the application". It is thus clear that in the situation with which it was presented the first question which the Tribunal ought to have considered was whether an interim Compulsory Order should have been made.

4. It is clear from the terms of the findings and reasons in support of the Tribunal's decision that consideration was not given to making an interim CTO. If it had been it would have avoided the difficulty which has arisen, and which has necessitated this appeal, namely that the applicant had had insufficient time to consult her legal advisors and if necessary instruct and obtain an independent report before the making of a full CTO was contemplated. An opportunity to make those enquiries and obtain that separate opinion was one which should have been provided in accordance with the principles contained in section 1 of the Act which I need not cover in detail.

5. In these circumstances I do not consider that counsel for the second respondents had any alternative but to abandon opposition to the appeal. Whilst questions may arise as to whether this position should not have been adopted earlier, I was satisfied that the Tribunal had acted in good faith and was not prepared to accede to a motion to find them liable in expenses on a solicitor and client paying basis. I would however, reiterate the comments made in my note at an earlier stage of the proceedings in this case, namely that appearance on behalf of a Tribunal whose decision is the subject of an appeal is anomalous and is a step which should only be taken in exceptional cases.