

The Sheriff Principal, having resumed consideration of the cause and in respect of the death of the patient on 25 May 2006 makes no order in relation to expenses or otherwise.

(signed) **EFBowen**

Sheriff Principal of Lothian and Borders

NOTE:

1. This is an appeal brought under the provisions of section 320 of the Mental Health (Care and Treatment) (Scotland) Act 2003 by the curator *ad litem* to PH against the decision of the Mental Health Tribunal of 20 March 2006 when the patient was made the subject of a Compulsory Treatment Order in terms of section 63 of the Act.
2. The appellant who is a solicitor in private practice was appointed curator *ad litem* on 20 February 2006 following a report to the Tribunal on the condition of the patient by a man of skill. The appellant, in his capacity as curator, attended a tribunal hearing on 21 February when the patient was made the subject of a second interim CTO. Thereafter, according to his averments in the summary application, the appellant began to make enquiries as to funding for the performance of the duties which he considered required to be carried out in furtherance of his appointment. In this connection I refer to the Note appended to my interlocutor dated 26 April 2006. Following the revocation of Rule 55 of the Mental Health Tribunal for Scotland (Practice and Procedure) Rules 2005 the Mental Health Tribunal for Scotland ("MHTS") adopted the position that it did not have power to pay fees or expenses of anyone acting in the capacity of curator *ad litem*. That position was adopted notwithstanding an indication in the Executive Note appended to the MHTS (Practice and Procedure) (No 2) Rules 2005 that Rule 55(6) of the original rules had been unnecessary because power to pay a curator was to be found in paragraph 16 of Schedule 2 of the 2003 Act.

3. According to the appellant's averments he was referred to the Scottish Legal Aid Board. He avers "Upon further enquiries with the Scottish Legal Aid Board the curator *ad litem* ascertained that there is only restricted funding available. This funding relates to the ability of the curator *ad litem* to instruct a solicitor of his own who can provide and be paid for legal services provided to the curator *ad litem*. This does not however remunerate the curator *ad litem* for the work required to be carried out by him in order to discharge his obligations to his ward. In particular such funding does not cover the fees and outlays attributable in respect to the curator *ad litem* attending at the substantive hearing before the Tribunal, hearing and assessing the evidence before the Tribunal, forming a view and making any relevant submissions to the Tribunal. The Scottish Legal Aid Boards position in respect of this funding was initially unclear. This delayed the curator *ad litem* in respect of carrying out any work or indeed instructing a solicitor to represent his interests".

4. Article 4 of the summary application is in the following terms: "On Thursday 16 March 2006 the curator *ad litem* received intimation of the hearing to be convened on 20 March 2006. On 17 March 2006 the curator *ad litem* appointed a solicitor within his own firm to provide him with legal advice and carry out legal services for him in terms of the advice and assistance ABWOR Scheme administered by the Scottish Legal Aid Board. The solicitor appointed by the curator *ad litem* attended the Tribunal on 20 March 2006. The curator *ad litem* did not attend the Tribunal convened on 20 March 2006. He had already appeared *pro bono* at the earlier said hearing which took one half day of professional time. It would be unreasonable to expect the curator *ad litem* to continue to act on a *pro bono* basis".

5. Although there is some dispute as to what was actually said at the Tribunal hearing on 20 March 2006 there is no doubt as to the substance of the proceedings. The solicitor for the appellant made a preliminary submission that the patient could not have a fair hearing as required by Article 6 of the European Convention of Human Rights because, in the absence of funding, his curator *ad litem* was unable to carry out any work or be present at the hearing. The Tribunal rejected this contention following which the solicitor for the appellant intimated that he required to withdraw from acting. The Tribunal thereafter

heard evidence and proceeded to make a Compulsory Treatment Order. According to the observations by the Tribunal in its Statement of Reasons the patient was able to understand the proceedings and participated fully with the assistance of an advocacy worker.

6. It is not clear from the Statement of Reasons whether a specific submission was made to the Tribunal that there was power at its own hand to authorise funding of the curator's fee. According to counsel for the appellant such a submission was made and it is the case that the Tribunal records that it "did not consider that there was authority to authorise the funding of the curator's fee". I dealt with the proposition that the Tribunal (as distinct from the MHTS) had power under paragraph 16 of Schedule 2 of the 2003 Act to authorise such funding in the note to my previous interlocutor. In that situation it is unnecessary to resolve the issue of whether the Tribunal was asked to make some form of order for funding the curator *ad litem*. No such power was available on any view.

7. Having resolved that issue, at the continued hearing of the appeal counsel for the appellant confined his submission to a contention that there was an absence of effective representation such as to render the proceedings incompatible with the patient's Convention rights. There was, he contended, a subsidiary error on the part of the Tribunal in proceeding on the basis that the patient had some degree of capacity, it having been established earlier that his lack of capacity was such as to justify the appointment of a curator.

8. In developing his principal argument counsel for the appellant adopted the position that it was not the legislative scheme in which the Tribunal operated that was incompatible with the patient's right to a fair hearing, it was the interpretation placed on the rules by the MHTS. Power to pay the curator existed in terms of Schedule 2 paragraph 16 of the 2003 Act, as indicated in the Executive Note. The MHTS had however adopted the position that the only form of payment available was through the Legal Aid Board by means of assistance by way of representation. Whilst that covered payment of the curator's legal representative, and indeed might be extended to cover the expense of obtaining a medical report, it did not cover the curator's expenses in "reading his way in", considering the

views of the patient, issuing instructions to his legal representative, and being present personally at the hearing. The absence of that meant there was no "effective representation".

9. Counsel accepted that for the purposes of Article 6 free legal representation did not require to be made available to anyone who did not have resources sufficient to pay for representation themselves. But where a person was liable to be deprived of their liberty and where that individual could not be expected to effectively conduct his or her own case it was an unanswerable contention that proper financed legal representation must be made available: see *S v Miller* 2001 SC 977 (in particular the opinion of the Lord President at pages 995C and 996G). Counsel further accepted that the issue in *Miller* (a case in which a child was not represented in proceedings of Children's Hearings) was whether the whole legislative scheme was not convention compliant. The issue in this case was a distinct one of whether the manner in which the legislative scheme was operated rendered the proceedings incompatible. Counsel moved that the order of the Tribunal should be quashed and the matter remitted to the Tribunal for reconsideration; in the meantime steps would be taken to resolve the issue of remuneration of the curator.

10. In response senior counsel for the Mental Health Tribunal contended that the central question was what, if any, effect did the difficulty over payment of the curator have on the decision reached by the Tribunal. The situation was clearly distinguishable from that in *Miller* because in that case there was a "system failure" which led the Court to consider a declarator of incompatibility. The present case was not in that territory. Representation was available for the patient by means of ABWOR. The curator simply served as the bridge between the patient and the solicitor acting under that scheme. Two courses were open to a person appointed to the office of curator. One was to investigate the position regarding the remuneration and if thought appropriate decline appointment. Having accepted appointment the only course open was to act and instruct a solicitor who would be paid by ABWOR. It was not open to the curator to hold on to his appointment but take no action in relation to safeguarding the position of the patient. In these circumstances it was fallacious to maintain that adequate representation was not available.

11. In any event on the central issue it was clear that the Tribunal could not have acted differently. Counsel drew attention to the distinction in the provisions of Article 6 and 5 of the Convention. Whilst Article 6 made a general provision regarding right to a fair trial and consequential questions of representation there was special provision in Article 5 relating to the lawful detention of persons of unsound mind. Article 5 involved a different kind of court control. In the jurisprudence of the European Court of Human Rights it had been made clear that whilst legal assistance in relation to such proceedings was generally necessary there were exceptions in special circumstances (see for example *Megyeri v Germany* 1952 15EHRR 584 at paragraph 23). As the matter presented itself to the Tribunal in the present case there were special circumstances in that (1) legal representation was provided; (2) the Tribunal was not aware of the fundamental difficulty in relation to payment of the curator; (3) the Tribunal had before it a proper application which had to be determined that day if continued detention was to occur; (4) there was no suggestion that the patient was not seriously ill; (5) he was represented by an advocate albeit that individual was not legally qualified; (6) the patient himself made a contribution to the hearing and (7) the only alternative was to determine the application by refusing it which would not have been in the interests of anyone. In these circumstances the decision of the Tribunal was not vitiated.

12. Counsel for the Mental Health Officer broadly supported the position adopted by the Tribunal. He further submitted that this was an appeal brought under the provisions of Section 320(2) of the 2003 Act in which the ground founded upon in terms of Section 324(2)(a) was that the Tribunal's decision was based on an error of law. If there was any error of law that was one on the part of the Mental Health Tribunal for Scotland in refusing to fund the curator. There was no error of law on the part of the Tribunal itself.

13. I have set out the submissions made by Counsel only in outline because, having taken the matter to avizandum on 18 May 2006 I was informed on 23 May that the patient had died on 25 May 2006. In that situation I am of the view that, as in any civil litigation, the death of a party suspends further proceedings pending the intervention of a representative of the deceased. In the present case no-one would have any interest to be sisted to the present proceedings; I cannot make the order sought by Counsel for the curator; there can

be no question of appeal and in consequence any views which I express are entirely obiter.

14. With some hesitation, having been invited by parties to do so, I accordingly express only a brief view on the issues raised. In general terms I would not have been disposed to grant this appeal, largely for the reasons advanced by senior counsel for the Tribunal. In my judgment the circumstances of this case do not, on a proper understanding, raise an issue as to inadequacy of legal representation by reason of lack of funding. I agree with the submission by senior counsel that having accepted office as curator the appellant ought to have proceeded with the duties of his appointment which would have involved instructing representation on behalf of the patient. Funding of such representation was available. The issue of funding of the curator was not one to be explored before the Tribunal.

15. That said, I am not without sympathy for the position in which the curator found himself and indeed certain of the criticism directed against him by the Tribunal in its statement of reasons went, in my view, a little too far. The situation as revealed is at best manifestly unsatisfactory and at worst absurd. There are plainly certain tasks which a curator requires to undertake on appointment before proceeding to instruct legal representation. In the current state of affairs it is hard to see why anyone who is not in salaried employment should undertake the office of curator to a patient in proceedings under the 2003 Act. The most satisfactory situation in the majority of cases will be for one legally qualified person to be appointed to that role who can represent the patient at a hearing without the need to instruct legal representation. Encouraging representation by way of ABWOR simply means that two individuals will become involved when one would do. It is not for me to express any view in this process on the applicability of paragraph 16 of Schedule 2 of the 2003 Act but if that does not cover the expenses of a *curator ad litem* there ought to be an alternative provision that does.

(signed) **EFBowen**