SHERIFFDOM OF GRAMPIAN HIGHLAND AND ISLANDS AT ABERDEEN

B354/08

JUDGEMENT

of

SHERIFF PRINCIPAL SIR STEPHEN S T YOUNG Bt QC

in the cause

AB

Appellant

against

MENTAL HEALTH TRIBUNAL FOR SCOTLAND

First Respondent

and

GERARD McCABE

Second Respondent

Act: Mr Ian Woodward-Nutt, solicitor, Woodward Lawson, Aberdeen
Alt: Mrs Valerie Mays, solicitor, Mental Health Tribunal for Scotland
Mr A J Foster, solicitor, Aberdeen City Council

Aberdeen, 23rd October 2008

The sheriff principal, having resumed consideration of the cause, sustains the pleas in law for the first and second respondents, repels the pleas in law for the appellant and refuses the appeal; on the opposed motion of the first and second respondents finds no expenses due to or by any of the parties in respect of the appeal.

Note

[1] In this case the appellant has appealed against a compulsory treatment order made in respect of him on 1st May 2008 by the Mental Health Tribunal for Scotland ("the Tribunal") which is the first respondent in this appeal. The second respondent is the mental health officer who made the original application for the order in terms of sections 57 and 63 of the Mental Health (Care and Treatment) (Scotland) Act 2003 ("the Act"). Before making such an order the Tribunal has to be satisfied that all the conditions specified in section 64(5) of the Act are met. These conditions are as follows:

> (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;
>
> (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; and
>
> (f) where the Tribunal does not consider it necessary for the patient to be detained in hospital, such other conditions as may be specified in regulations.

[2] Where an application is made under section 63 the Tribunal may in terms of section 65(2) make an interim compulsory treatment order if satisfied as to the matters mentioned in section 65(6). An interim compulsory treatment order is an order

authorising for such period not exceeding 28 days as may be specified in the order such of the measures as may be made on the making of a compulsory treatment order as may be specified. Section 65(6) provides that the matters referred to in section 65 (2) are:

> (a) that the conditions mentioned in paragraphs (a) to (d) of section 64(5) of this Act are met in respect of the patient; and
>
> (b) that it is necessary to make an interim compulsory treatment order.

[3] Section 320(2) provides in the context of this case that the person to whom the decision relates, in other words the appellant, may appeal to the sheriff principal against the making of a compulsory treatment order. Section 324(1) provides that such an appeal may be made only on one or more of the grounds mentioned in section 324(2). These grounds are:

> (a) that the Tribunal's decision was based on an error of law;
> (b) that there has been a procedural impropriety in the conduct of any hearing by the Tribunal on the application;
> (c) that the Tribunal has acted unreasonably in the exercise of its discretion;
> (d) that the Tribunal's decision was not supported by the facts found to be established by the Tribunal.

Section 320(3) provides that, as in this case, the Tribunal may be a party to an appeal under section 320(2).

[4] The original application for a compulsory treatment order in respect of the appellant was dated 12th March 2008. It was accompanied by mental health reports by the appellant's responsible medical officer, Dr Elizabeth Willox, and his general practitioner, Dr Matthew Jack. Both reports indicated that the appellant suffered from all three forms of mental disorder specified in section 328(1) of the Act, namely mental illness, personality disorder and learning disability. An initial hearing before the Tribunal took place on 19th March 2008. The appellant was not present or legally represented at this hearing, though it appears that at one point during the proceedings

the members of the Tribunal did go and speak to him in the hospital ward in which he was then being cared for. The outcome of this hearing was that the Tribunal made an interim compulsory treatment order and fixed a further hearing to take place on 15th April 2008.

[5] At this second hearing the appellant was present along with his solicitor. Also present were the second respondent, the appellant's independent advocate (see section 259 of the Act) and Dr Willox. I shall refer to the events of this hearing in a little more detail shortly. The outcome was that the Tribunal made a further interim compulsory treatment order and fixed a third hearing to take place on 1st May 2008.

[6] At this third hearing the three members of the Tribunal were not the same persons as those who had constituted the membership of the Tribunal at the hearing on 15th April 2008. The appellant, his solicitor, his independent advocate, the second respondent and Dr Willox were again present along with the appellant's sister who appeared as his named person (see section 250 of the Act). The outcome of the hearing was that the Tribunal made the compulsory treatment order which is the subject of this appeal.

[7] The appeal itself was lodged with the sheriff clerk on 14th May 2008 and by interlocutor dated 16th May 2008 I granted warrant to cite the respondents and fixed an initial procedural hearing to take place on 11th June 2008. At that hearing the appellant's solicitor indicated that he wished to rely at the hearing of the appeal on transcripts of the proceedings before the Tribunal on 15th April and 1st May 2008. These were in due course lodged and I heard parties' solicitors on the appeal on 27th August 2008.

[8] In support of the appeal two pleas in law were tabled on behalf of the appellant. In their final form these read as follows:

> 1. The Tribunal's refusal to allow the appellant's solicitor to cross-examine the responsible medical officer being a procedural irregularity in the conduct of the Tribunal hearing on 15th April 2008 *et separatim* being an unreasonable exercise of discretion *et separatim* being an error of law the compulsory treatment order made on 1st May 2008 should be set aside.

2. The Tribunal having erred in law in making the compulsory treatment order on 1st May 2008, the said order should be set aside.

On the strength of these two pleas the appellant's solicitor developed two grounds of appeal to which I shall refer shortly.

[9] Before turning to these, I think that it may be helpful to examine in more detail certain aspects of the proceedings during the hearing on 15th April 2008 as disclosed by the transcript of these proceedings. After various introductions the second respondent spoke in support of the application and was cross-examined by the appellant's solicitor. At page 15 of the transcript the convener turned to Dr Willox and invited her to take the hearing through her mental health report and explain why she thought that the statutory grounds for a compulsory treatment order had been made out. This she proceeded to do, and the transcript of this part of her evidence runs to page 36. It is to be noted in particular that at page 23D/F, referring evidently to section 64(5)(d) of the Act, Dr Willox said:

> In terms of Mr (AB), looking at the third .... his ability to make decisions about the provision of such medical treatment is significantly impaired. I believe it continues to be, and I think this is due to his learning disability in combination with his personality disorder, and now also by his mental illness, and really at this stage is incapable of making decisions about his mental disorder.

After a short interlude the appellant's solicitor began to cross-examine Dr Willox at page 37, and the transcript of this chapter of her evidence runs to page 58 at which point the appellant's solicitor was asking the witness whether the appellant could not be satisfactorily treated in terms of a compulsory treatment order which allowed him to live in the community rather than requiring him to remain in hospital.

[10] At age 58 the convener adjourned the hearing briefly, chiefly it appears to allow the appellant to assimilate what had been said so far and to speak to his independent advocate and his solicitor. The proceedings resumed at page 59 when the appellant's solicitor indicated that he wished to continue his cross-examination of Dr

Willox. He was permitted to do so, and he continued to question her about the prospects of a community-based compulsory treatment order for the appellant. Then at pages 62 to 64 the following exchanges took place (Dr Johnston was the medical member of the Tribunal and Mr Woodward-Nutt the appellant's solicitor):

> DR WILLOX: But I don't think, I don't think there's support for a community CTO. Just because you need to ... just because you are able to do that doesn't mean that it's applicable to the person that you are talking about.
>
> MR WOODWARD-NUTT: So why is it not applicable?
>
> THE CONVENER: Could we maybe move on to hear about what could be offered in the community because it seems to me that you are suggesting that the community would be ... it would be possible to deliver the services that he needs within the community setting and I believe there has been some work done towards looking at the future and what could be offered in the community. So I think that it might be helpful if we moved on to the care manager who has been looking at the community care needs of this man.
>
> DR JOHNSTON: Could I also add something? Did you not say that the risk factors would outweigh community care just now?
>
> DR WILLOX: Well I am saying that. I think, you know, significant risk is there but also it's about compliance as well as needs.
>
> DR JOHNSTON: Okay.
>
> THE CONVENER: Certainly we have heard what you have said about ...
>
> MR WOODWARD-NUTT: This isn't a question about me giving evidence, this is a question of me being afforded an opportunity to cross-examine a witness who has already given evidence before the Tribunal.
>
> THE CONVENER: Yes, and I feel you've had ample opportunity.
>
> MR WOODWARD-NUTT: Well, if that's the Tribunal's decision.
>
> THE CONVENER: Yes, I feel that we are just going over the same ground.
>
> MR WOODWARD-NUTT: I will be grateful if that would be recorded, if I'm being denied an opportunity to cross-examine, further cross-examine a witness, I would be grateful if the Tribunal would record that.
>
> THE CONVENER: Right, well we are recording. I mean, I'm not sure what other ...

> MR WOODWARD-NUTT: Well if a decision has been taken by the Tribunal that I am not to be afforded an opportunity to continue to cross-examine I'm certainly not going to argue with the decision of the Tribunal.
>
> THE CONVENER: Right, well I feel that you have been given an ample opportunity to ask ...
>
> MR WOODWARD-NUTT: Very well.
>
> THE CONVENER: ... and I feel that you are just going over the same ground that you have already covered, okay. So there was some mention of what might be available in the community and now I wonder in which way we should go first, whether we should address that or give you an opportunity to speak, because you have recently spoken to Mr (AB).

The person addressed as "you" in this last sentence was evidently the appellant's independent advocate, and she and the appellant himself proceeded to address the Tribunal. There was no further cross-examination of Dr Willox by the appellant's solicitor, though he did briefly cross-examine the appellant's care manager who gave evidence towards the end of the hearing.

[11] Finally at page 83 the convener invited the second respondent to summarise his position and, when he had finished doing so at page 85, she invited the appellant's solicitor to sum up. This he proceeded to do to page 90 with a number of brief interjections from the convener and others present (which are not of significance in the context of this appeal), and at page 91 the Tribunal adjourned to consider its decision. On resuming, the convener explained to those present that the Tribunal had decided to make an interim compulsory treatment order which required the appellant to remain in hospital for the time being. Although it is not apparent from the written decision of the Tribunal which was subsequently issued, it is clear from what the convener is recorded as saying in the transcript (at pages 91/2) and what is noted in the order itself that the reason why the Tribunal did not proceed at once to make a final order was that it wished to afford an opportunity for the appellant's sister as his named person to be appointed to appear or be represented before the Tribunal if so minded. In the event, as indicated, she did appear at the hearing on 1st May 2008.

[12] For present purposes I do not think that it is necessary to set out in full the appellant's solicitor's closing submissions. But it may be helpful to summarise here what he said. He began by reminding the Tribunal that it required to be satisfied that the criteria set out in section 64 of the Act were met and that in considering this the Tribunal was bound by the principle of minimum intervention set out in section 1 of the Act. Thereafter he proceeded to address the Tribunal on the various risk factors that might or might not apply in the event that the appellant was to be made the subject of an order which allowed him to reside in the community rather than remaining as a patient in hospital. At pages 87E to 88C he then said:

> Accordingly I would urge the Tribunal to take the view that this could be a case where taking ... following the principle of minimal intervention, it could be a case where a community-based order is appropriate. However, I fully accept that the Tribunal is not placed today to make a final decision in that regard in the absence of a risk assessment and accordingly if the Tribunal is with me today my submission is that the way ahead is a further interim order being granted and an order being put in place requiring a risk assessment relative to a community-based placement to be placed before the next Tribunal to decide, and to finally decide this issue.

There was then a brief discussion whether a risk assessment in respect of the appellant was already available, and at pages 89F to 90B the appellant's solicitor stated:

> What my submission is is that this is a case where a community-based order should be considered, however it's accepted that the Tribunal may consider further information is required before the final decision is made. One issue that may be required to be clarified by the Tribunal, and it's a matter in which I am entirely in the panel's hands, is issues of ... is a risk assessment directed at a community-based resolution here.

This concluded his submissions apart from a brief comment that he would need to consult further with the appellant on the question whether he might later take objection to the introduction of a risk assessment that apparently already existed.

[13] It will be apparent from what I have just said that in his closing submissions the appellant's solicitor, after referring at the outset to the statutory criteria in section 64, made no further reference to these. In particular, he did not refer in terms to the condition set out in section 64(5)(d), nor did he suggest even obliquely that this condition was not met in the case of the appellant. Nor did he make any reference to the curtailment of his cross-examination of Dr Willox, let alone submit that this had given rise to any procedural impropriety which might vitiate the outcome of the hearing that day.

[14] At the hearing of the appeal the appellant's solicitor advanced two grounds of appeal. In the first place he submitted that the convener's refusal (as he described it) to allow him to cross-examine Dr Willox at the hearing on 15th April 2008 had been objectionable on four counts, namely (a) it had been procedurally unfair and irregular, (b) it had been contrary to natural justice and the common law requirement for fairness, (c) it had been incompatible with the appellant's rights under article 5(4) of the European Convention on Human Rights (which provides that everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful), and (d) it had constituted a failure by the Tribunal to exercise its discretion properly. On this last point the appellant's solicitor accepted that the Tribunal had had a discretion to stop questioning that was merely repetitive. But, said that the appellant's solicitor, this did not entitle the Tribunal to stop cross-examination altogether which was what had happened in this case. Reference was made here to the decision of the First Division in *Errington -v- Wilson* 1995 SC 550 where it was held, in short, that the justice in that case had been under a duty to have regard to the principles of natural justice which required her to allow cross-examination if the proceedings were to be fair and whether or not to allow such cross-examination was not a matter for her discretion.

[15] The appellant's solicitor referred also to *Malloch -v- Aberdeen Corporation* 1971 SC (HL) 85 in which the principal question debated was whether the appellant, a certificated teacher, ought to have been given the opportunity of being heard by the education authority before a resolution confirming his dismissal became effective. The House of Lords by a majority held that he had been entitled to such a hearing.

The appellant's solicitor drew attention in particular to a passage in the judgment of Lord Wilberforce at page 118 where he said:

> The appellant has first to show that his position was such that he had, in principle, a right to make representations before a decision against him was taken. But to show this is not necessarily enough, unless he can also show that, if admitted to state his case, he had a case of substance to make. A breach of procedure, whether called a failure of natural justice or an essential administrative fault, cannot give him a remedy in the courts unless behind it there is something of substance which has been lost by the failure.

In the context of the present case the appellant's solicitor submitted that the convener's refusal to allow him to cross-examine Dr Willox (who had been the critical witness in the case) in relation to the conditions set out in sub-sections 64(5)(b) and, more importantly, (d) had been objectionable and unfair. He submitted too that something had indeed been lost as a result of this refusal, namely that he had been denied the opportunity to test the evidence of Dr Willox in relation to these two conditions, both of which had to be met before a compulsory treatment order could be made. This was of particular significance in relation to the second of these conditions since it had a direct bearing on the second ground of appeal to which he was about to refer. Moreover, said the appellant's solicitor, this procedural unfairness had been such as to vitiate everything that had followed on thereafter. He pointed out here that the ground of appeal specified in section 324(2)(b) of the Act was that there had been a procedural impropriety in the conduct of any hearing by the Tribunal on the application. He submitted that the procedural unfairness that had occurred at the hearing on 15th April 2008 had rendered the order made by the Tribunal that day unsound and that, had this order not been made, no further proceedings could have taken place before the Tribunal without a fresh application having been made by the second respondent.

[16] Before rehearsing the submissions in support of the appellant's second ground of appeal, I should refer briefly to the events of the hearing on 1st May 2008 as disclosed by the transcript of the proceedings that day. It will be recalled that the three members of the Tribunal present that day were not the same as the three members

who had been present at the hearing on 15th April 2008. After various opening remarks the convener invited Dr Willox to address the hearing as follows (see pages 9B to 10D):

> THE CONVENER: Right Dr Willox, over to you, we would like to know what the situation is regarding Mr (AB)'s current mental state and response to treatment.
>
> DR WILLOX: Absolutely. So, in the application I stated that it is my opinion that Mr (AB) suffers from mental illness and with our assessments and investigations that have been done I think it's now fair that we can state fairly conclusively that Mr (AB) suffers from schizophrenia, late onset. He also suffers from personality disorder, that's in the form of an emotionally unstable personality disorder, and a dissocial personality disorder and he suffers from a learning disability, and the learning disability diagnosis comes from formal psychological testing of his intelligence quotient, last done by Mrs Maria Dawson, consultant clinical psychologist, on the 15th of June 2007. At that time the finding is what we call Full Scale IQ to be 61, so learning disability being anything below 69, the normal being 100. So in the mild learning disability range but nevertheless that is a significant impairment. In terms of - would you like me just to update from the last tribunal date, is that what you would like, or ....?
>
> THE CONVENER: Yes I think so, we've got, certainly we've got quite detailed notes of the interim order, if you just give us an update, and if we need you to flesh it out you will do.
>
> DR WILLOX: Okay. I have seen Mr (AB) on two occasions since the last Tribunal ....

[17] Dr Willox proceeded to expand in considerable detail upon the appellant's condition and treatment (past, present and future) in response to questions from the convener and the medical and general members of the Tribunal. This continued to page 32 of the transcript. In contrast to what she had said at the hearing on 15th April 2008, Dr Willox did not specifically allude to section 64(5)(d) of the Act. She was then very briefly cross-examined by the appellant's solicitor principally on the question whether the appellant had derived any benefit from the medication he was

receiving in hospital and she confirmed that there had been an improvement in relation to the symptoms of his mental illness since the application for a compulsory treatment order had originally been made in respect that he had had no recurrence of auditory hallucinations in the previous six weeks or so. There was no cross-examination by the appellant's solicitor specifically in relation to the question whether any of the conditions specified in section 64(5) of the Act were met.

[18] This cross-examination concluded at page 34E and on the ensuing eight pages or so to page 42E the Tribunal heard from the appellant himself, his sister and his independent advocate. At page 42C/D the following brief exchange took place (Ms Cornish was the appellant's independent advocate):

> MR (AB): And then I go and get my depo at my doctor's surgery at two weeks, and I did take my medication.
> THE CONVENER: Okay, we've got all that down here in your notes from the last time. Okay, anything else, Ms Cornish?
> MS CORNISH: I don't think so.

[19] At page 43 the second respondent presented his closing submission to the effect that the appellant required to be in hospital under a compulsory treatment order. Finally the appellant's solicitor addressed the Tribunal. He reminded the Tribunal that an order could only be made if the conditions set out in section 64(5) of the Act were met, and specifically the condition set out in section 64(5)(d). He submitted in short that the Tribunal had not heard any evidence, and had no up-to-date written evidence before it, to entitle it to conclude that this condition was met with the result that a compulsory treatment order could not be made in the case.

[20] After a short adjournment the Tribunal reconvened and the convener announced that the compulsory treatment order sought would be made requiring the appellant to remain in hospital for the time being. The Tribunal's written findings and reasons for this decision were subsequently issued. Dealing specifically with the condition set out in section 64(5)(d) the Tribunal found in fact as follows:

> The patient lacks insight and is unable to make decisions about his treatment because of his learning disability, personality disorder and now mental illness.

In explaining the reasons for the decision, the Tribunal stated, *inter alia*:

> The Tribunal had no hesitation in finding that the criteria for a CTO continue to be satisfied. In reaching this decision they had regard to the evidence contained in the CTO application and accompanying mental health reports and to the oral evidence at the hearing. Both the MHO and the RMO supported the need for a CTO in their evidence at the hearing. The patient's named person Ms (AB) also thought that he should be in hospital until he was better. The Tribunal accepted the evidence of the RMO as being based on her professional expertise and knowledge of the patient's mental disorders. There was no medical evidence produced by Mr Woodward-Nutt to challenge this.
>
> .....
>
> The RMO's evidence was that the patient lacks insight into his mental disorder, and has been assessed as such in the risk assessment. The patient does not accept that he needs to be in hospital. This was confirmed by the patient himself who said that he would like to get back to his own house. He had indicated this also in his statement dated 15th April. Mr Woodward-Nutt submitted that the patient's symptoms of mental illness had improved and no evidence had been led to establish that the patient was unable to make decisions about his medical treatment because of his mental disorder.
>
> The Tribunal rejected this assertion and found that there was compelling evidence from the RMO and the patient himself, both directly and through his advocate Ms Cornish that his ability to make decisions about his treatment is significantly impaired because of his mental disorders. It was clear that his personality disorder, mild learning disability together with his mental illness (sic)

> There was evidence that a hospital-based order is necessary as the patient will not stay in hospital voluntarily. He said that he would take his medication there was evidence from the RMO that even in the ward he was not attending for his medication (sic).

[21] Turning to his second ground of appeal, the appellant's solicitor submitted that at the hearing on 1st May 2008 the Tribunal had been required to determine for itself whether the statutory conditions set out in section 64(5) were met on the basis of the evidence then before it. This, said the appellant's solicitor, the Tribunal had not done but had instead based its decision on the findings made by the differently constituted tribunal on 15th April 2008. As a result it had erred in law. The appellant's solicitor pointed out that an individual's mental health might fluctuate, and he submitted that not only was it wrong in law for one Tribunal to rely on evidence led on another occasion before a differently constituted Tribunal, but also in this case the wrong had been compounded on account of the circumstances which have given rise to the first ground of appeal, namely that the Tribunal on 15th April 2008 had based its decision on evidence which had not been challenged that day in cross-examination on account of the procedural unfairness that had occurred. The appellant's solicitor referred to the passage at page 10C/D of the transcript for 1st May 2008 where the convener had said to Dr Willox that the Tribunal had "got quite detailed notes of the interim order, if you just give us an update ....." (see paragraph [16] above). He submitted that this was clear evidence that the Tribunal on 1st May 2008 was relying on the findings made by the previous Tribunal on 15th April 2008, and further that this conclusion was also supported by the passage at page 42D of the transcript where the convener had said to the appellant: "Okay, we've got all that down here in your notes from the last time" (see paragraph [18] above). He drew attention to the fact that, while she had clearly given evidence on 15th April 2008 in support of the conditions specified in section 64(5)(d), Dr Willox had not done so on 1st May 2008 and this again supported the foregoing conclusion. Moreover she had confirmed in cross-examination on 1st May 2008 that there had been some improvement in relation to the symptoms of the appellant's mental illness since the application had originally been made, and he submitted here that the Tribunal on 1st May 2008 had not been entitled to consider the terms of Dr Willox's original mental health report since she had not formally adopted it in her evidence that day and since she had confirmed that there had been some

improvement in his health since. The appellant's solicitor drew attention to the penultimate paragraph of the Tribunal's decision which I have quoted in paragraph [20] above and submitted that it was plainly wrong to say that there had been compelling evidence from Dr Willox to the effect that the condition in section 64(5)(d) was met. In all these circumstances the appeal should be allowed, the decision of the Tribunal on 1st May 2008 to grant a compulsory treatment order set aside and the application for this order refused. Alternatively the case should be remitted to the Tribunal for consideration anew coupled with a direction that it should be differently constituted from when it had made the decisions on 15th April and 1st May 2008.

[22] In response the solicitor for the Tribunal accepted that, for the purposes of article 5(4) of the European Convention on Human Rights and in order to satisfy the common law requirements of fairness in the context of applications under the Act, there had to be effective access to a court (in other words, the Tribunal) in order to be heard in person or through a representative and to participate effectively in the proceedings. The hearing of the Tribunal which had taken place on 15th April 2008 had met these criteria, and the appellant and his solicitor had had available to them copies of all the documents that the Tribunal itself had had. The appellant had had the opportunity to test the evidence through his solicitor and to give evidence himself and participate effectively in the proceedings. The right to cross-examine a witness was not a right to do so *ad nauseam* and the Tribunal had a discretion to curtail cross-examination which was repetitive. It was important to bear in mind that these proceedings had not been adversarial as in the case of a criminal trial. The function of the Tribunal was more inquisitorial than that of an ordinary court and it was entitled to order reports for itself. Its task had been to decide whether the appellant required compulsory treatment for his mental disorder and what therefore was best for him. In the present case his solicitor had been given ample opportunity to cross-examine Dr Willox and when, after the short break, the convener had intervened in effect to say to the appellant's solicitor that the Tribunal had grasped the point that he was trying to make about the necessity for a hospital-based compulsory treatment order he (the appellant's solicitor) had not suggested that there were any further issues about which he wished to cross-examine Dr Willox, and in particular had not suggested that he wished to cross-examine her about the condition set out in section 64(5)(d) of the Act.

The circumstances in *Malloch -v- Aberdeen Corporation* and *Errington -v- Wilson* were distinguishable from those of the present case. The Tribunal on 15th April 2008 could not be criticised for curtailing a repetitious cross-examination and not allowing further cross-examination when the appellant's solicitor had not explained that there were other matters upon which he wished to cross-examine. There had therefore been no procedural impropriety, error of law or unreasonable exercise by the Tribunal of its discretion and the appellant's first plea in law should be repelled accordingly. Reference was made here to Macphail's Sheriff Court Practice (3rd Edn) at paragraph 18.110, *G -v- G* 1985 1WLR 647 and *Britton -v- Central Regional Council* 1986 SLT (N) 207.

[23] Turning to the events of 1st May 2008, the solicitor for the Tribunal explained that it had had before it that day copies of (a) the short term detention certificate which had been granted in respect of the appellant on 15th February 2008, (b) the compulsory treatment order pack (including the two mental health reports) dated 12th March 2008, (c) the decision of the Tribunal and the order made by it on 19th March 2008, (d) the statement of the appellant's views about the application and (e) the decision of the Tribunal and the order made by it on 15th April 2008. The Tribunal on 1st May 2008 had not had before it a transcript of the previous proceedings, nor had it had the handwritten notes made by the previous convener. The Tribunal that day had been differently constituted from the Tribunal on 15th April 2008 and it had considered the oral evidence of Dr Willox, the second respondent, and the appellant assisted by his independent advocate.

[24] The solicitor for the Tribunal accepted that it would have been an error of law on the part of the Tribunal to find on 1st May 2008 that the condition set out in section 64(5)(d) was met if there had been insufficient evidence to support such a finding. But she submitted that there had indeed been sufficient evidence of this, and here she referred to various passages in the transcript of the evidence of Dr Willox where she had referred to the appellant's lack of insight, and she pointed out that no medical evidence had been led on behalf of the appellant to contradict the evidence of Dr Willox. She pointed out too that in the original short term detention certificate granted on 15th February 2008 and again in her mental health report dated 10th March 2008 Dr Willox had stated that the condition set out in section 64(5)(d) was

met and had given reasons for this statement. The appellant's general practitioner in his mental health report dated 6th March 2008 had expressed the same opinion. There had been no need for Dr Willox formally to adopt her mental health report as part of her evidence on 1st May 2008.

[25] Turning to the question whether the Tribunal on 1st May 2008 had based its findings in fact on the decision of the Tribunal on 15th April 2008, the solicitor for the Tribunal accepted that it had been required to reach its decision on the basis of the oral and documentary evidence before it on 1st May 2008 and not upon the findings, and the reasons therefor, of the previous tribunal. She submitted that the passage at page 10B/C of the transcript of the proceedings on 1st May 2008 to which the appellant's solicitor had referred did not indicate that the Tribunal that day were relying on the decision of the previous tribunal, and she drew attention to the fact that the convener at that point had asked Dr Willox for an update, and on the previous page had asked her what the situation was regarding the appellant's current mental state and response to treatment. Dr Willox had proceeded to give detailed evidence to the effect that the conditions for the making of a compulsory treatment order in respect of the appellant continued to exist, and in its decision the Tribunal had made it clear that, in finding that this was so, it had had regard to the evidence contained in the compulsory treatment order application, the accompanying mental health reports and the oral evidence given at the hearing itself. There was no suggestion here that, in reaching this decision, the Tribunal had had any regard to the findings in fact which had been made by the differently constituted tribunal on 15th April 2008. In these circumstances the second plea in law for the appellant should also be repelled.

[26] In conclusion the solicitor for the Tribunal submitted that, even if there had been any procedural impropriety at the hearing on 15th April 2008, this would not have vitiated the proceedings on 1st May 2008 which had been completely freestanding. If there had been such a procedural impropriety, the appellant's primary remedy would have been to appeal against the interim compulsory treatment order which had been made on 15th April 2008. This he had not done. Moreover, it was not correct to say, as had been said on behalf of the appellant, that if an interim order had not been made on 15th April 2008 there would have been no hearing on 1st May 2008

since at the earlier hearing the Tribunal could simply have adjourned consideration of the application until 1st May 2008 without making an interim order.

[27] The solicitor for the second respondent adopted the submissions of the solicitor for the Tribunal. He emphasised that, when the convener on 15th April 2008 had intervened in the cross-examination of Dr Willox by the appellant's solicitor, the latter had not indicated at that point that there were further issues which he wished to cover in his cross-examination. It would have been a different matter if he had done so and it would clearly have been unfair if he had indicated that there were such issues and the convener had then refused to allow him to pursue them with Dr Willox. As for the events of 1st May 2008, the solicitor for the second respondent drew attention to a further passage in the evidence of Dr Willox where she had referred to the appellant having said that he would do something, such as getting up in the morning to take his medication, and then being unable to follow this through which he said supported the conclusion that the condition set out in section 64(5)(d) was met.

[28] In a brief reply the appellant's solicitor submitted that the real issue in relation to his first ground of appeal was not whether there had been a breach of articles 5(4) or 6 of the European Convention on Human Rights but whether there had been a breach of the common law requirement for fairness in proceedings such as those before the Tribunal. He suggested that on 15th April 2008 the convener had not merely stopped him pursuing a particular line of cross-examination but had turned to take evidence from a different witness. He explained that he had been "entirely flummoxed" by this, and he reminded me that he had been on his feet at the time. He acknowledged that he had not raised the matter in his closing submissions that day, but submitted that this should not affect the outcome of the present appeal. In relation to his second ground of appeal, he reiterated that the Tribunal on 1st May 2008 must have relied on the findings made by the Tribunal on 15th April 2008 since no evidence had been led on the later date to support the conclusion that the condition set out in section 64(5)(d) was met. He acknowledged that he had not cross-examined Dr Willox about this and explained that he had not done so since he had considered that at that point insufficient evidence had been led to support this conclusion and that cross-examination by him on the point might bring out evidence to support the conclusion after all.

[29] In my opinion the submissions for the respondents are to be preferred. Having had an opportunity to re-read that part of the transcript of the proceedings on 15th April 2008 where the convener interrupted the appellant's solicitor's cross-examination of Dr Willox, I am not persuaded that there was any procedural impropriety in the conduct of the hearing that day. It was accepted that the convener had a discretion to curtail repetitive cross-examination, and it seems to me that it was not unreasonable for her to have taken the view that the cross-examination of Dr Willox by the appellant's solicitor was becoming repetitive at that point and to have suggested that it would be helpful to hear what the care manager had to say about the prospect of meeting the appellant's care needs in the community. I appreciate that the appellant's solicitor was then on his feet and that he may have been taken aback by the convener's intervention. But even allowing for this I cannot help thinking that, if at that point there were other aspects of Dr Willox's evidence upon which he wish to cross-examine her, he could and should have made that clear to the convener. If she had then refused to allow him to continue, that would indeed have constituted a procedural impropriety. As it was, he said nothing to alert the convener to the fact that he wished to cross-examine Dr Willox on other matters and simply treated the convener's intervention as a final decision to stop any further cross-examination by him of Dr Willox. Ideally I think that the convener might have clarified with the appellant's solicitor whether there were other matters that he wished to pursue in his cross-examination, and indeed I think that this was what she was about to do at the foot of page 63 when she said: "I mean, I'm not sure what other ...." But she was interrupted by the appellant's solicitor before she could finish her sentence, and indeed he interrupted her again when she said at page 64B/C: "Right, well I feel that you have been given an ample opportunity to ask ....."

[30] Even if the convener's intervention here was a procedural impropriety, I do not consider that the appellant has demonstrated that, to paraphrase the language of Lord Wilberforce in *Malloch*, something of substance had been lost by the impropriety. Here it will be recalled that in his closing submissions the appellant's solicitor made no reference to the curtailment of his cross-examination of Dr Willox and proposed that the Tribunal should make an interim compulsory treatment order coupled with a requirement to obtain a risk assessment. This proposal necessarily implied an

acceptance by the appellant's solicitor that, *inter alia*, the condition set out in section 64(5)(d) was met at that stage since in terms of section 65(2) and (6) the Tribunal required to be satisfied of this before it could competently make an interim compulsory treatment order. And of course the outcome of that day's proceedings was that the Tribunal did make such an order. It is true that it did so, not in order to obtain a risk assessment, but in order to allow for the appointment of the appellant's sister as his named person. Nonetheless two inescapable facts remain. An interim order was made by the Tribunal, and this was what the appellant's solicitor had asked it to do. In these circumstances I do not consider that the appellant can be heard to say now that something of substance was lost by him as a result of the supposed procedural impropriety.

[31] I might add here that in my opinion, if the appellant was dissatisfied by the outcome of the hearing on 15th April 2008, then he ought to have appealed against this decision there and then. But he did not do so, and moreover his solicitor said nothing throughout the proceedings on 1st May 2008 to suggest that these proceedings were inept or that it was not open to the Tribunal that day to make a compulsory treatment order on account of what had happened at the previous hearing. I am conscious here that section 324(2)(b) refers to a procedural impropriety in the conduct of any hearing by the Tribunal. Nonetheless, while I express no concluded opinion on the point, it does seem to be that in the circumstances which I have just outlined there is much to be said for the view that an appeal against the order made on 1st May 2008, while technically competent, ought not to have been allowed to succeed on the basis of a supposed procedural impropriety at the hearing on 15th April 2008.

[32] Turning to the second ground of appeal argued by the appellant's solicitor, I recognise that Dr Willox at the hearing on 1st May 2008 did not refer to the condition set out in section 64(5)(d) in the same explicit terms as she had done at the hearing on 15th April 2008. But in my opinion, while it might have been helpful (if only to the appellant's solicitor) that she should have done so, there was no necessity that she should have repeated the words of section 64(5)(d) in her evidence. The first question here for the Tribunal on 1st May 2008 was whether there was sufficient evidence before it to entitle it to find that the condition set out in this sub-section was met in the

case of the appellant. In my opinion there was indeed sufficient evidence of this. For present purposes I do not think that it is necessary to analyse the evidence of Dr Willox in detail other than to observe that at page 34B she made it clear that the improvement in the appellant's condition of which she spoke in cross-examination was limited to the fact that in the previous six weeks or so he had had no recurrence of auditory hallucinations. Suffice it to say that I consider that her evidence read as a whole in conjunction with her earlier mental health report and that of the appellant's general practitioner spoke eloquently of a patient whose ability to make decisions about the provision of medical treatment of the kind set out in section 64(5)(b) was significantly impaired because of his mental disorder. Here it should be recalled that the expression "medical treatment" is widely defined in section 329(1) of the Act to include not only what might conventionally be considered to be medical treatment but also nursing, care, psychological intervention, habilitation (including education, and training in work, social and independent living skills) and rehabilitation.

[33] As for the question whether the Tribunal on 1st May 2008 had, in finding that the condition set out in section 64(5)(d) was met, relied on the previous finding to this effect by the Tribunal on 15th April 2008, it should be recalled that in the Tribunal's written decision it was said that in reaching this the Tribunal had had regard to the evidence contained in the CTO application and accompanying mental health reports and to the oral evidence at the hearing, and further down the same page that there was compelling evidence from the RMO and the patient himself, both directly and through his independent advocate Ms Cornish, that his ability to make decisions about his treatment was significantly impaired because of his mental disorders. There is no hint here that the Tribunal was influenced by the findings of the previous tribunal on 15th April 2008, and in this situation I think that I should be very slow on appeal to find that the Tribunal had based its decision on the findings made by the previous Tribunal unless there was some cogent reason for believing that this was in fact what had happened. In this context I certainly do not think that the comment of the convener at page 10C/D of the transcript of proceedings on 1st May 2008 comes anywhere near vouching the proposition that the Tribunal reached its decision on the basis of the findings of the previous Tribunal. Nor in my opinion does the comment at page 42D to which the appellant's solicitor also drew attention (and which I think was probably a reference to the appellant's statement of views about the application).

[34] I can deal briefly with the appellant's solicitor's point that Dr Willox had not formally adopted her mental health report as part of her evidence. In my opinion there was no need for her to have done this. Just as in the case of the general practitioner's mental health report, the Tribunal was in my view quite entitled to take into account Dr Willox's mental health report whether or not she formally adopted it as part of her oral evidence. In any event it is perfectly clear from what she said at page 9C, where she spoke of the original application for a compulsory treatment order, that the whole of her oral evidence on 1st May 2008 was being given against the background of what she had said in her original mental health report.

[35] On the whole matter I have not been persuaded that either of the grounds of appeal argued by the appellant's solicitor has been made out, and I have refused the appeal accordingly.

[36] The appellant's solicitor submitted that whatever the outcome of the appeal the expenses of it should be awarded to the appellant because of the conduct of the convener at the hearing on 15th April 2008. Not surprisingly both the solicitor for the Tribunal and the second respondent's solicitor opposed this. They indicated that they would not seek an award of expenses against the appellant in the event of the appeal being refused, and in these circumstances I have found no expenses due to or by any of the parties in respect of the appeal.