B240/11

JUDGMENT
OF
SHERIFF PRINCIPAL
C A L SCOTT
in the cause
JG

APPELLANT

against

Mental Health Tribunal for Scotland

RESPONDENTS

GLASGOW, 17 June 2011.

The sheriff principal, having resumed consideration of the cause, Refuses the appeal; Finds the appellant, as an assisted person, liable to the respondents in the expenses of the appeal procedure as these might be taxed; Allows an account thereof to be given in and Remits same, when lodged, to the auditor of court to tax and to report thereon.

NOTE:-

[1] In this appeal, it was argued that a decision of the respondents taken at Stobhill Hospital, Glasgow on 20 December 2010 should be set aside. That decision resulted in the granting of an application, by the appellant's responsible medical officer, Dr Douglas Patience, to vary an existing compulsory treatment order from a community-based order to a hospital-based order.

[2] For the appellant, Mr McLaughlin indicated that he was founding upon procedural impropriety in the conduct of the hearing *et separatim* unreasonable exercise of the Tribunal's discretion. Both of these grounds of appeal are reflected within the pleas•in•law tabled on behalf of the appellant.

[3] The argument regarding procedural impropriety arose due to the circumstances in which the Tribunal hearing was conducted. The evidence of Dr Patience had been elicited, in effect, by conference call, over the telephone. Mr McLaughlin accepted that that was a competent way in which to proceed. However, he drew the court's attention to certain paragraphs within the Tribunal's findings which, in his submission, gave rise to the proposition that the conduct of the Tribunal hearing had been unfair. For example, paragraph 24 in the findings provides a flavour of concern which arose whilst Dr Patience was giving evidence to the Tribunal.

[4] The concern was that another person was present in the background and that concern seemed to have grown in the face of apparent denials by Dr Patience who stated that "he was alone".

[5] The Mental Health Tribunal for Scotland (Practice and Procedure) (No 2) Rules 2005/519 SSI relating to the conduct of Tribunal hearings dictate that such hearings must take place in private. (Rule 66(1) refers). Mr McLaughlin submitted that there had been a breach of these rules; that the severity of that breach made it all the more significant; and that the Tribunal's recognition of the breach coupled with its failure to act upon it constituted procedural impropriety.

[6] Mr McLaughlin referred to the case of *Elizabeth Byrne v Mental Health Tribunal for Scotland* (unreported), 13 February 2006 in which Sheriff Principal Taylor had relied upon the observations of Lord President Clyde in the case of *Barrs v British Wool Marketing Board* 1957 SC 72. At page 82, the Lord President stated:-

> "It is not a question of whether the tribunal has arrived at a fair result; for in most cases that would involve an examination into the merits of the case, upon which the tribunal is final. The question is whether the tribunal has dealt fairly and equally with the parties before it in arriving at the result. The test is not "Has an unjust result been reached?" but "Was there an opportunity afforded for injustice

to be done?". If there was such an opportunity, the decision cannot stand. Hence, if one party is allowed to give evidence, and this is denied to another, the decision would be reduced, not because the evidence led had convinced the tribunal, for this could hardly ever be established, but because the standards of fair play which underlie all such proceedings had not been satisfied."

[7] It was submitted on behalf of the appellant that the procedural impropriety attaching to the conduct of the hearing fell squarely within the test set out by Lord President Clyde. It was argued that, quite clearly, there had been an opportunity for injustice to be done. In addition to founding upon the apparent presence of an individual in the background, as I understood his submission, Mr McLaughlin also based his line of argument upon certain technical difficulties experienced during the conduct of the hearing. The quality of the telephone line had caused certain difficulties and it was suggested that the appellant's agent had been deprived of a proper opportunity to cross•examine Dr Patience.

[8] Mr McLaughlin contended that the appellant had not been afforded a meaningful opportunity to challenge the medical evidence against her and that, in that context, by persisting with the "conference call approach" the Tribunal had failed to give effect to the best evidence rule.

[9] Whilst acknowledging the case of *G v G (Minors: Custody Appeal)* [1985] 1 WLR 647 and, in particular, Lord Fraser of Tullybelton's remarks therein, Mr McLaughlin also argued that the Tribunal had failed to carry out a proper balancing exercise in arriving at its decision. He referred to passages within Macphail on Sheriff Court Practice (Third Edition) at pages 671 to 673 relating to the exercise of judicial discretion. Looking to matters in the round, Mr McLaughlin maintained that insufficient weight had been attributed to the breach of procedure referred to above, the unsatisfactory quality of the evidence and to the overriding principle of fairness which required to inform the Tribunal's approach. It was submitted that the Tribunal simply could not have placed sufficient weight upon these matters. Reference was made to the decision section of the Tribunal's findings at page 7 of 8 and, in particular, paragraph 29. Mr McLaughlin submitted that too much weight appeared to have been attributed to the "social circumstances reports". Far too little weight had been attached to, as he put it, standards of fair play. The Tribunal had, effectively, "rubber-stamped" the responsible medical officer's application. The court was invited,

for all of the foregoing reasons, to set the Tribunal's decision aside and to remit it to a Tribunal, of new, for it to consider the application afresh.

[10] Mr Hunter, for the respondents, invited the court to repel the appellant's pleas•in•law, to sustain the respondent's pleas-in-law and to refuse the appeal. He explained that the appellant had been subject to a compulsory treatment order since 19 July 2006. He briefly summarised the statutory provisions relating to such an order. In November 2010, the appellant's mental health had, apparently, deteriorated and she required to be detained in hospital. She had been made the subject of a short-term detention certificate. Mr Hunter made reference to paragraphs 9 to 13 in the Tribunal findings.

[11] Paragraph 4 of the Tribunal's findings reflected the fact that when it came to section 64(5) of the Mental Health (Care & Treatment) (Scotland) Act 2003, sub•paragraphs (a), (b) and (d) were not in dispute. As the Tribunal findings recorded, at paragraph 6, the main grounds of challenge related to issues of significant risk and to necessity. (Section 64(5)(c) and (e) refer). Mr Hunter pointed out that the making of a compulsory treatment order as a whole was being challenged and not simply the proposed variation from a community-based order to a hospital-based order.

[12] Mr Hunter then completed his review of the Tribunal's findings. In doing so, he referred to paragraphs 5, 11, 14, 21, 23, 28 and 29 to 31. In his submission, the findings disclosed an adequacy of material upon which to base the Tribunal's decision. That, he submitted, could be confirmed by a reading of the transcript of the hearing which had been obtained. Mr Hunter referred to various passages within the transcript, firstly, reflecting the evidence of Peter Nagel, the appellant's mental health officer and, thereafter, the evidence of Dr Patience himself. Mr Hunter was at pains to point out that, when it came to any inaudibility, only 17 seconds out of a hearing lasting 1 hour had been affected. Reference was also made to Dr Patience's evidence in response to questioning by Dr McCue at page 19 onwards.

[13] When it came to the discreet arguments being advanced in support of the appeal, Mr Hunter dealt, firstly, with the issue of procedural impropriety. With regard to the presence or otherwise of another individual along with Dr Patience, Mr Hunter referred to the transcript of proceedings at pages 24 to 26. He submitted that there was no evidence to suggest that the privacy of the

proceedings had been breached in any way. He accepted that what took place had been regrettable. However, all that could be taken from the transcript was that Dr Patience had briefly been engaged in passing a note to a patient. There was no suggestion that that amounted to a breach of privacy and, in Mr Hunter's submission, in any event, it had no bearing upon the outcome of the hearing. There had been no unfairness as far as the appellant was concerned. He contended that such an incident could not serve to undermine the making of an order in relation to a person who was clearly unwell. Additionally, with regard to any perceived inability of the part of the appellant's agent to procure qualitative evidence from Dr Patience, Mr Hunter referred to pages 26 and 27 within the transcript and to the dialogue between the convenor and the agent which, ultimately, concluded with the agent indicating that he was content to proceed. That contrasted with the final sentence in article 3 of the summary application lodged on behalf of the appellant.

[14] In responding to the appellant's submissions concerning the exercise of the Tribunal's discretion, Mr Hunter referred to Macphail at paragraph 18.110 and to Lord Fraser in the *G v G* case at pages 651 and 652. In his submission, the Tribunal's decision had not exceeded the generous ambit within which a reasonable disagreement was possible. In summary, Mr Hunter argued that when one considered the Tribunal findings, read along with the relatively extensive transcript of the material adduced in the course of the hearing, there was ample foundation for the decision arrived at.

[15] In my opinion, the arguments put forward in support of the appeal are without proper foundation. Firstly, I do not consider that the argument regarding procedural impropriety has been established. Receipt of evidence by telephone is specifically authorised by rule 52(2)(c) of the 2005 Rules *supra*. There may have been certain technical difficulties in the course of the hearing but, in my estimation, and this is borne out by the transcript of proceedings, such difficulties were *de minimis* and did not materially impact upon the proper conduct of proceedings. Equally, even if the procedural requirement for privacy were to equate to the requirement that only those participating in the hearing should be privy to the detail of what is being discussed, there can be no realistic suggestion in the present case that privacy had been breached beyond the momentary appearance of a disinterested and uninformed individual charged solely with receiving a note passed by Dr Patience. It is only too apparent from the

Tribunal's findings and the transcript of proceedings that that occurrence, unsatisfactory though it may be, was of little or no consequence and most certainly did not constitute a breach of privacy.

[16] In any event, I am inclined to the view that the rule regarding hearings being held in private derives greater significance from the converse approach, viz. a public hearing, which requires a written application from the patient. (Rule 66(2)). Rule 66 provides that a hearing held in private will be "the default position", absent a written application to the contrary. As such, it is more concerned with the circumstances in which a *public* hearing should or shouldn't take place, rather than attaching absolute confidentiality to the proceedings.

[17] Having dealt with the privacy argument, I would simply record that any suggestion that the Tribunal or, indeed, the appellant's agent was, in some way, prevented from procuring qualitative evidence from Dr Patience has not been made out. The transcript and the Tribunal's findings more than adequately dispose of that line of argument.

[18] Turning to the exercise of the Tribunal's discretion, I have to agree with the submission advanced on behalf of the respondents. There was an abundance of material which served to inform the Tribunal's decision. Notwithstanding its reservations and criticisms as to Dr Patience's perceived attitude, the Tribunal was, of course, entitled to look to the material before it in its entirety. It was entitled on the one hand to criticise certain aspects of Dr Patience's contribution but, on the other, to accept separate, substantive aspects of it along, indeed, with the other adminicles and information which Mr Hunter highlighted in the course of his submission.

[19] It has not been established that the Tribunal exercised its discretion upon a wrong principle or that its decision was plainly wrong. (See Lord Scarman in *B v W (Wardship*: *Appeal)* [1979] 1 WLR 1041 at 1055). Whilst it might be argued that a differently constituted Tribunal, on a different occasion may have reached a different conclusion such an argument is nothing to the point. It has not been shown that the decision of this Tribunal was so plainly wrong as to merit it being set aside.

[20] Accordingly, I have refused the appeal. It was agreed that expenses should follow success but that in the event of my finding against the appellant the award of expenses should be *qua*

assisted person. I have given effect to that agreement.

[21] By way of general comment, it is my opinion that the conduct of Tribunal proceedings must be a matter for the Tribunal itself to regulate. Beyond that, it is inappropriate for this court to pronounce further, particularly given the variety of circumstances which might arise on a case by case basis. The Tribunal will always require to be alert to the constraints of procedural propriety and fairness. However, where possible, the format of the proceedings should be afforded the degree of flexibility and tolerance which the procedural rules clearly envisage.