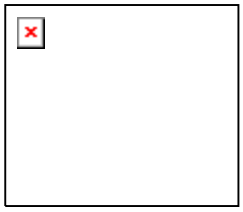

EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

Lord Eassie
Lord Clarke
Lord Mackay of Drumadoon

[2012] CSIH 18

OPINION OF THE COURT

delivered by LORD EASSIE

in

APPEAL

by

SCOTTISH MINISTERS
Appellants;

against

THE MENTAL HEALTH TRIBUNAL
Respondent:

and

J M M
Interested Party

_____

Appellants: Poole; Scottish Government Legal Directorate
Respondent: MacGregor: R Hunter, Esq, Solicitor to the Mental Health Tribunal
Interested Party: Byrne; Murray Beith & Murray (for Frank Irvine, Solicitors, Glasgow)

28 February 2012

Introductory

[1] This is an appeal by Scottish Ministers under section 322 of the Mental Health (Care and Treatment) (Scotland) Act 2003 – "the 2003 Act" – against a decision of the Mental Health Tribunal – "the Tribunal"- communicated to Scottish Ministers on 1 April 2011 whereby, pursuant to section 193(5) of the 2003 Act, the Tribunal

revoked a restriction order. The appeal is opposed by the Tribunal and by the patient in question, "JMM".

[2] On 13 May 1991 in the High Court of Justiciary sitting at Glasgow the patient, JMM, was acquitted by reason of insanity at the time of the offence of a charge of the attempted murder of his father. The patient was diagnosed as suffering from paranoid schizophrenia. The court made a hospital order, with a further order that the detention be without limit of time, in terms of sections 174 and 175(4) of the Criminal Procedure (Scotland) Act 1975. The patient was thereupon detained for treatment in the State Hospital at Carstairs. By virtue of various statutory and regulatory provisions which it is unnecessary to rehearse[1], on the entry into force of the regime established by the 2003 Act the patient fell to be treated by the Tribunal as a person who was a "1995 Act patient" and who was subject to both a "compulsion order" under section 57A(2) of the Criminal Procedure (Scotland) Act 1995, as amended, - "the 1995 Act" – and a "Restriction Order" under section 59 of that Act.

[3] So far as touching on this appeal those provisions of the 1995 Act are in these terms:

> "*57A Compulsion order*
>
> (1) This section applies where a person (in this section and in sections 57B to 57D of this Act, referred to as the 'offender')–
>
> (a) is convicted in the High Court or the sheriff court of an offence punishable by imprisonment (other than an offence the sentence for which is fixed by law); or
>
> (b) is remitted to the High Court by the sheriff under any enactment for sentence for such an offence.
>
> (2) If the court is satisfied–
>
> (a) on the written or oral evidence of two medical practitioners, that the conditions mentioned in subsection (3) below are met in respect of the offender; and
>
> (b) that, having regard to the matters mentioned in subsection (4) below, it is appropriate,

[1] The provisions are helpfully set out in a schedule to the written Note of Argument for the Tribunal.

it may, subject to subsection (5) below, make an order (in this Act referred to as a 'compulsion order') authorising, subject to subsection (7) below, for the period of 6 months beginning with the day on which the order is made such of the measures mentioned in subsection (8) below as may be specified in the order.

(3) The conditions referred to in subsection (2)(a) above are–

(a) that the offender 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 offender;

(c) that if the offender were not provided with such medical treatment there would be a significant risk–

(i) to the health, safety or welfare of the offender; or

(ii) to the safety of any other person; and

(d) that the making of a compulsion order in respect of the offender is necessary.

(4) The matters referred to in subsection (2)(b) above are–

(a) the mental health officer's report, prepared in accordance with section 57C of this Act, in respect of the offender;

(b) all the circumstances, including–

(i) the nature of the offence of which the offender was convicted; and

(ii) the antecedents of the offender; and

(c) any alternative means of dealing with the offender.

(5) The court may, subject to subsection (6) below, make a compulsion order authorising the detention of the offender in a hospital by virtue of subsection (8)(a) below only if satisfied, on the written or oral evidence of the two medical practitioners mentioned in subsection (2)(a) above, that–

(a) the medical treatment mentioned in subsection (3)(b) above can be provided only if the offender is detained in hospital;

(b) the offender could be admitted to the hospital to be specified in the order before the expiry of the period of 7 days beginning with the day on which the order is made; and

(c) the hospital to be so specified is suitable for the purpose of giving the medical treatment to the offender.

(6) A compulsion order may authorise detention in a state hospital only if, on the written or oral evidence of the two medical practitioners mentioned in subsection (2)(a) above, it appears to the court–

(a) that the offender requires to be detained in hospital under conditions of special security; and

(b) that such conditions of special security can be provided only

in a state hospital.

(7) Where the court–

(a) makes a compulsion order in respect of an offender; and

(b) also makes a Restriction Order in respect of the offender,

the compulsion order shall authorise the measures specified in it without limitation of time.

(8) The measures mentioned in subsection (2) above are–

(a) the detention of the offender in the specified hospital;

(b) the giving to the offender, in accordance with Part 16 of the Mental Health (Care and Treatment) (Scotland) Act 2003 (asp 13), of medical treatment;

(c) the imposition of a requirement on the offender to attend–

(i) on specified or directed dates; or

(ii) at specified or directed intervals,

specified or directed places with a view to receiving medical treatment;

(d) the imposition of a requirement on the offender to attend–

(i) on specified or directed dates; or

(ii) at specified or directed intervals,

specified or directed places with a view to receiving community care services, relevant services or any treatment, care or service;

(e) subject to subsection (9) below, the imposition of a requirement on the offender to reside at a specified place;

(f) the imposition of a requirement on the offender to allow–

(i) the mental health officer;

(ii) the offender's responsible medical officer; or

(iii) any person responsible for providing medical treatment, community care services, relevant services or any treatment, care or service to the offender who is authorised for the purposes of this paragraph by the offender's responsible medical officer,

to visit the offender in the place where the offender resides;

(g) the imposition of a requirement on the offender to obtain the approval of the mental health officer to any change of address; and

(h) the imposition of a requirement on the offender to inform the mental health officer of any change of address before the change takes effect.

(9) The court may make a compulsion order imposing, by virtue of subsection (8)(e) above, a requirement on an offender to reside at a specified place which is a place used for the purpose of providing a care home service only if the court is satisfied that the person providing the care home service is willing to receive the offender.

(16) In this section–

> ‘care home service’ has the meaning given by [paragraph 2 of schedule 12 to the Public Services Reform (Scotland) Act 2010] [4];
>
> ‘community care services’ has the meaning given by section 5A(4) of the Social Work (Scotland) Act 1968 (c.49);
>
> ‘medical treatment’ has the same meaning as in section 52D of this Act;
>
> ‘relevant services’ has the meaning given by section 19(2) of the Children (Scotland) Act 1995 (c.36);
>
> ‘responsible medical officer’, in relation to an offender, means the responsible medical officer appointed in respect of the offender under section 230 of the Mental Health (Care and Treatment) (Scotland) Act 2003 (asp 13);
>
> ‘Restriction Order’ means an order under section 59 of this Act;
>
> ‘sentence of imprisonment’ includes any sentence or order for detention; and
>
> ‘specified’ means specified in the compulsion order.
>
> *59.— Hospital orders: restrictions on discharge.*
>
> (1) Where a[compulsion order authorising the detention of a person in a hospital by virtue of paragraph (a) of section 57A(8) of this Act is made in respect of a person, and it appears to the court—
>
> (a) having regard to the nature of the offence with which he is charged;
>
> (b) the antecedents of the person; and
>
> (c) the risk that as a result of his mental disorder he would commit offences if set at large.
>
> that it is necessary for the protection of the public from serious harm so to do, the court may, subject to the provisions of this section, further order that the person shall be subject to the special restrictions set out in Part 10 of the Mental Health (Care and Treatment) (Scotland) Act 2003 (asp 13), without limit of time.
>
> (2) An order under this section (in this Act referred to as “a restriction order”) shall not be made in the case of any person unless the approved medical practitioner, whose evidence is taken into account by the court under section 57A(2)(a) of this Act, has given evidence orally before the court.

[4] The proceedings before the Tribunal with which this appeal is concerned arise from a recommendation, made in terms of section 183 on the 2003 Act by the patient’s “responsible medical officer” – the “RMO” – as part of her duties of annual

review, that the restriction order resulting from the various transitional statutory and regulatory provision should be revoked. Consequent upon that recommendation, which was made on 26 April 2010, the case was referred by Scottish Ministers under section 185(1) of the 2003 Act to the Tribunal.

[5] Where such a reference is made the powers of the Tribunal are laid down in section 193 of the 2003 Act. The decision of the Tribunal proceeded under subsection (5). We set out the somewhat lengthy terms of that section with added emphasis on the subsections of particular pertinence to this appeal:

> "*193 - Powers of Tribunal on reference under section 185(1), 187(2) or 189(2) or application under section 191 or 192(2)*
>
> (1) This section applies where–
>
> (a) an application is made under section 191 or 192(2) of this Act; or
>
> (b) a reference is made under section 185(1), 187(2) or 189(2) of this Act.
>
> (2) If the Tribunal is satisfied–
>
> (a) that the patient has a mental disorder; and
>
> (b) that, as a result of the patient's mental disorder, it is necessary, in order to protect any other person from serious harm, for the patient to be detained in hospital, whether or not for medical treatment,
>
> it shall make no order under this section.
>
> (3) If the Tribunal is not satisfied that the patient has a mental disorder, the Tribunal shall make an order revoking the compulsion order.
>
> (4) If the Tribunal–
>
> (a) is satisfied that the patient has a mental disorder; but
>
> (b) is not satisfied–
>
> (i) that, as a result of the patient's mental disorder, it is necessary, in order to protect any other person from serious harm, for the patient to be detained in hospital, whether or not for medical treatment; and
>
> [(ii) either—
>
> (A) that the conditions mentioned in paragraphs (b) and (c) of section 182(4) of this Act continue to apply in respect of the patient; or
>
> (B) that it continues to be necessary for the patient to be subject to the compulsion order,] [1]

it shall make an order revoking the compulsion order.

(5) If the Tribunal–

(a) is satisfied–

(i) that the conditions mentioned in section 182(4) of this Act continue to apply in respect of the patient; and

(ii) that it continues to be necessary for the patient to be subject to the compulsion order; but

(b) is not satisfied–

(i) that, as a result of the patient's mental disorder, it is necessary, in order to protect any other person from serious harm, for the patient to be detained in hospital, whether or not for medical treatment; and

(ii) that it continues to be necessary for the patient to be subject to the Restriction Order,

it shall make an order revoking the Restriction Order.

(6) If the Tribunal–

(a) makes an order, under subsection (5) above, revoking the Restriction Order; and

(b) is satisfied that the compulsion order should be varied by modifying the measures specified in it,

it shall make an order varying the compulsion order in that way.

(7) If the Tribunal–

(a) is satisfied–

(i) that the conditions mentioned in section 182(4) of

this Act continue to apply in respect of the patient; and

(ii) that it continues to be necessary for the patient to be subject to the compulsion order and the Restriction Order; but

(b) is not satisfied–

(i) that, as a result of the patient's mental disorder, it is necessary, in order to protect any other person from serious harm, for the patient to be detained in hospital, whether or not for medical treatment; and

(ii) that it is necessary for the patient to be detained in hospital,

the Tribunal may make an order that the patient be conditionally discharged and impose such conditions on that discharge as it thinks fit.

(8) Before making a decision under this section the Tribunal shall–

(a) afford the persons mentioned in subsection (9) below the opportunity–

(i) of making representations (whether orally or in writing); and

(ii) of leading, or producing, evidence; and

(b) whether or not any such representations are made, hold a hearing.

(9) Those persons are–

(a) the patient;

(b) the patient's named person;

(c) the patient's primary carer;

(d) any guardian of the patient;

(e) any welfare attorney of the patient;

(f) any *curator ad litem* appointed by the Tribunal in respect of the patient;

(g) the Scottish Ministers;

(h) the patient's responsible medical officer;

(i) the mental health officer; and

(j) any other person appearing to the Tribunal to have an interest.

(10) Nothing in section 102 (state hospitals) of the National Health Service (Scotland) Act 1978 (c.29) prevents or restricts the detention of a patient in a state hospital as a result of a decision of the Tribunal not to make any order under this section."

The patient's history after 1991.

[6] At the time of his initial detention in the State Hospital in terms of the hospital order made on 13 May 1991 JMM was 20 years of age. On 19 April 1994 he was granted a conditional discharge into the community. However JMM abused alcohol and controlled drugs with the consequence that his mental health deteriorated and on 6 July 1995 he was recalled to Woodilee Hospital; and thereafter, having made threats respecting his wife, young son and the staff of the hospital, he was transferred to the State Hospital in August 1995. He was granted a second conditional discharge in June 1998, but again his mental health thereafter deteriorated in consequence of his consumption of controlled drugs; he was again recalled to hospital. On 23 November 2000 JMM was of new granted conditional discharge but this period in the community also came an end on 13 February 2001 when the patient was recalled following a breach of the peace committed when he was intoxicated. In September of

that year a further conditional discharge took place but again on 3 December 2004 the patient was recalled in light of his mental health having once more deteriorated following his resumption of the taking of controlled drugs and the abusive use of alcohol, and also of the making by his wife of complaints of threatening behaviour. While in the hospital to which he had been recalled, namely Stobhill Hospital, he assaulted two fellow patients and attempted to assault a nurse; the patient was, in consequence, again returned to the State Hospital.

[8] Following that recall to hospital on 3 December 2004, the medication prescribed for JMM was altered in the course of 2005 to include the drug clozapine. It appears that after JMM began to take that drug in early 2006 his condition settled, though yet dependent on his diligent taking of that medication and abstinence from both controlled drugs and the consumption of alcohol to excess. His condition having thus settled, on 3 April 2008 JMM was again granted conditional discharge. In granting that discharge, which was not opposed, the Tribunal laid down the following conditions:

> "(a) residence at a particular address
>
> (b) psychiatric supervision by his RMO, with regular attendance at appointments
>
> (c) social work supervision
>
> (d) supervision by his community psychiatric nurse (CPN)
>
> (e) access to his accommodation by his clinical team
>
> (f) good behaviour and no criminal offences
>
> (g) compliance with such treatment as his RMO may direct
>
> (h) compliance with directions about the structure of his week by his RMO and MHO

(i) no illegal drugs, and compliance with random testing

(j) a maximum of two units of alcohol on special occasions, and compliance with the care team's alcohol monitoring."

[9] Putting matters shortly, it appears that in the period following the patient's conditional discharge on 3 April 2008 and the Tribunal's decision to revoke the restriction order the patient adhered to all of those requirements. The settled nature of his mental state continued; he found voluntary employment at a charity shop; the relationship with his wife came to an end; and he maintained satisfactory relationships with other members of his family.

The Tribunal Proceedings

[10] The Tribunal began hearing evidence in the reference by the Scottish Ministers on 31 August 2010. On that date the Tribunal heard evidence from Dr Isabel Campbell, an experienced psychiatrist instructed by the Scottish Ministers. Dr Campbell had prepared an extensive report, including a detailed review of the patient's history of cyclical discharge and recall to which we have just adverted. As the Tribunal notes in its summary of Dr Campbell's evidence on 31 August 2010, that report was adopted into her evidence. In a passage set out in bold in its decision which the Tribunal found significant and which Dr Campbell confirmed orally in her evidence, Dr Campbell wrote:

> "In my professional opinion it continues to be necessary for [JMM] to be subject to the Restriction Order and I would suggest more vigorous drug screening as described above, further serum Clozapine levels and seeking confirmation from the family that all is well. Assuming that laboratory tested drug screening is negative with no indication that samples are so dilute that

there is a likelihood of these being false negatives and that there are no indications of non-compliance with clozapine or concerns raised by the family regarding his mental health it would be appropriate to consider lifting the Restriction Order in a further six months".

[11] The Tribunal heard further evidence on 29 October 2010 from the RMO and a further expert psychiatrist, instructed on behalf of the patient, Dr Ian Matson. Put very shortly, both were of the view that the restriction order was no longer necessary. But, meantime, in light of Dr Campbell's concerns, a programme of random testing and analysis in accordance with her recommendation had been put in place. The results of that programme of testing (which revealed nothing adverse to the patient) were available when Dr Campbell gave further evidence to the Tribunal on 9 March 2011. In keeping with the views which she had expressed earlier about giving consideration to the lifting of the restriction order subject to the carrying out of the testing, which had been favourable to the patient, and the other enquiries similarly favourable to the patient, Dr Campbell also then gave as her professional opinion that there was no longer any need to maintain in place the restriction order.

[12] Accordingly, when it came to take its the decision the Tribunal had before it unanimity of opinion among the expert psychiatric witnesses that the continuance of the restriction order was no longer justified. There was nothing in the other evidence before the Tribunal to any contrary effect. The patient's mental heath officer was similarly of the view that the patient no longer met the serious harm test for the maintenance of a restriction order. The community psychiatric nurse gave evidence favourable to the patient and the revocation of the restriction order.

The Tribunal's Decision

[13] In the written decision which it delivered the Tribunal sets out its findings in fact. These embrace, among other things, the history which we have already summarised. In findings 6 to 10 the Tribunal then finds, in summary, that the patient was in good health; was aware that matters had improved since his illness was medicated with the clozapine; had a good history of compliance with that medication and with appointments with his medical care team; was very settled and engaged in a charity shop five days per week; and had insight into his condition. Having summarised the evidence of the various witnesses and the submissions of the parties, the Tribunal then gives an exposition of the basis of its decision. It sets out the relevant statutory provisions, including the terms of section 193 of the 2003 Act. It also considered and sought to follow the guidance given by this court in *Scottish Ministers* v *Mental Tribunal* 2009 SC398 – *"JK"* – and in *Scottish Ministers* v *Mental Tribunal* 2010 SC56 – *"MM"*. The Tribunal then identified the questions which it had to consider as follows:

> "(a) Does the Patient have a mental disorder?
>
> (b) As a result of the Patient's mental disorder, is it necessary, in order to protect any other person from serious harm, for the Patient to be detained in hospital whether or not for medical treatment?
>
> (c) Do the conditions mentioned in section 182(4)(a), (b) and (c) [of the 2003 Act], continue to apply to the Patient?
>
> (d) Is it necessary for the Patient to be subject to the Compulsion Order?
>
> (e) Does it continue to be necessary for the Patient to be subject to the Restriction Order?"

[14] To the first and third of those questions the Tribunal gave a positive answer. To the second it gave a negative answer. None of those answers gave rise to any

element of dispute in the proceedings before the Tribunal. As to the fourth question – whether the compulsion order was necessary – the Tribunal gave this answer:

> "The Tribunal makes reference to section 193(4)(b)(ii)(B). The Tribunal were satisfied that it continues to be necessary for the patient to be subject to the Compulsion Order, especially as this provided the necessary structure for the Patient to receive the treatment which alleviated his condition and allowed him to be maintained within the community through a robust and extensive care package. From the evidence the Tribunal was satisfied that the Patient would be at risk of non-compliance if the order was not in place. The Compulsion Order therefore continues to be necessary."

The final question identified by the Tribunal – namely whether there was any proper need for continuing the restriction order - was the principal matter put in issue by the Scottish Ministers in their reference and that issue thereafter receives detailed consideration.

[15] In approaching that issue, and in light of what of what had been said by Lord Carloway at paragraph 44 in the Opinion which he gave in *MM*, the Tribunal then refers to, and sets out, section 59(1) of the 1995 Act. Further reference is then made to what Lord Carloway said at paragraph 37 of his Opinion in *MM* and to what was said in paragraph 39 in the Opinion of the Court, delivered by Lord Wheatley, in *JK*. We do not think it necessary to set out the terms of those passages since none of the parties appeared to question their soundness.

[16] Having thus set out the statutory framework and that judicial guidance the Tribunal then addresses the substance of the issue which was seen as being the real matter in controversy and we think it appropriate to set out fully what the Tribunal says:

> "The Tribunal had regard to the submissions made by Ms Meikle on behalf of the Scottish Ministers. It is accepted that the index offence is serious, and it is

accepted that on a number of previous occasions the patient has been discharged into the community only to be recalled at a later date. Further, the Tribunal accepts that given that a Restriction Order was originally imposed it would be necessarily have been on the basis of a risk assessment which concluded that because of behaviours associated with the mental disorder the patient posed a risk of serious harm to others.

However, the Tribunal also considered the significant progress the Patient had made, the extensive and robust medical and care plans which are not [*sic* – now] in place and the views of all three consultant psychiatrists who gave evidence that it is no longer necessary for the patient to be subject to the Restriction Order.

The Tribunal attached importance to the RMO's evidence. Her conclusions are supported by the other Medical Practitioners. The Tribunal finds that it does not continue to be necessary for the Patient to be subject to the Restriction Order.

When applying the test under Section 193(5)(b)(ii) of the 2003 Act as to whether the Restriction Order continues to be necessary the Tribunal considered what risk the Patient would present of causing serious harm to the public. The Tribunal recognises that the Court, in having decision [*sic*] to impose a Restriction Order, has expressly given the Scottish Minsters statutory responsibility under the 2003 Act on [*sic*] monitoring the management of the Patient and of scrutinising the pace of their [*sic*] rehabilitation from the view point of the protection of the public. The Tribunal also requires to consider the fact that when imposing a Restriction Order this caused the Compulsion Order to be without a time limit. It is recognised that the purpose of the Restriction Order is broadly to ensure that the public are adequately protected from those on whom a Restriction Order has been imposed, as a result of the statutory obligations and powers which the Scottish Ministers have bestowed upon them. Without the Restriction Order there is no oversight and scrutiny upon the Patient's RMO.

The Tribunal has considered the nature of the index offence, the Patient's antecedents, the risk that the Patient would commit further offences and the purpose and effect of a Restriction Order.

It is recognised that the index offence is serious. However it occurred in circumstances which appear unlikely to recur and in the context of an acrimonious relationship between the Patient and his father. These circumstances are not currently duplicated elsewhere.

Since conditional discharge the Patient has been subject to a number of controls. He is now taking Clozapine appropriately. Random drug screening is taking place regularly. There is a frequency of contact with the care team. The care team are in contact with the family. There are regular meetings with the RMO, the MHO, the CPN and the members of the care team. There is a care programme approach which is in place which is helpful for the severe and enduring mental illness and for those with complex needs and a history of violence. The fact that the Patient has been on Clozapine for a lengthy period means that it is less likely that he will not comply. He is subject to anticonvulsant medication which does not interfere with the Clozapine.

The Tribunal accepts that in the absence of a Restriction Order the Compulsion Order lasts only for six months. There is no guarantee that it will be renewed. The Restriction Order provides an obligation to review the Patient at specific intervals. Without a Restriction Order the frequency of contact is at the sole discretion of the RMO. With the Restriction Order the Scottish Ministers can recall the Patient where there is a relapse, including circumstances in which there is an increased risk to others. In the absence of the Supervision [*sic*] Order monitoring and supervision would not take place by the Scottish Ministers.

The test which the Tribunal requires to consider is the continuing necessity test. The onus of proof is on the Scottish Ministers to prove the test is met. For the Tribunal to find in favour of the Scottish Ministers it would be making findings which were contrary to the medical views expressed by the three

consultant psychiatrists. Dr Matson expressed a view that the only way to completely obviate risk is to ensure that everybody is in hospital. While a patient is within the community there must be some risk. All three medical practitioners did not describe the risk as being significant. All properly accepted that there would be some risk but the risk appears to be being well managed with the Patient in community. The Patient has been subject to Clozapine therapy since January 2006. The reservations which had been expressed by Dr Campbell in relation to relapses in mental heath as a result of unpredictable stressors, illicit substances and failure to comply with medication due to stressors or illicit drugs have been purified during the currency of the Tribunal hearing to her satisfaction, such that she feels the Restriction Order is no longer necessary. It should be noted that the adjournment of the Tribunal on 29 October 2010 was done specifically to allow the various measures which Dr Campbell had suggested in paragraph 6 of her report to be implemented. The RMO in her evidence accepted the recommendations of Dr Campbell as per her report (Production 20) in relation to the more robust drug testing and other measures. It would appear that no illicit substances had been used. When the Tribunal reconvened on 9 March 2011 these matters had been addressed.

In so far as Ms Meikle's argument in relation to the monitoring of compliance of Clozapine treatment and the monitoring of drug and alcohol testing is concerned the Tribunal is of the view that the current care plan is sufficient to allow such monitoring and testing as is necessary, albeit on a voluntary basis.

While it is accepted that the Restriction Order provides an obligation to review [JMM] at specific intervals and without the Restriction Order the frequency of contact is at the sole discretion of the RMO the view of the Tribunal is that there comes a point at which the medical and care teams require to be trusted. The Patient has made good progress. It needs to be recognised that he has made good progress. The Tribunal has considered the index offence and the antecedents. By antecedent what is understood is 'an event or circumstance that happens before another'. Antecedent is not defined within the interpretation section of the Criminal Procedure (Scotland) Act 1995. The

> Tribunal has taken into account the previous discharges from hospital, all of which have resulted in recall. However, in the view of the independent expert Dr Matson **'things are different now'**. The Patient has been on Clozapine for some time. The longer he is on Clozapine the less likely he is to relapse (Dr Campbell). The family and the care team are providing significant and robust support against that background. The Tribunal holds that it is not necessary for the Patient to be subject to the Restriction Order and makes an order revoking the Restriction Order. The Tribunal has not taken this decision lightly. Despite the uniformity of the medical view that the Restriction Order should be revoked the Tribunal has been careful to satisfy itself in terms of the statutory tests. Ms Meikle referred the Tribunal to the case of RH v South London and Maudsley NHS Foundation Trist (2010 v 32 (aac) Appeal No: M695/2009. Since this case was predicted upon a separate statutory framework the Tribunal distinguished this case from the current one. This is an English case. The legislation which applies does not apply to the present case." [emphasis in the original]

The Scottish Ministers' Contentions

[17] The argument impugning the decision of the Tribunal which was advanced by counsel for the Scottish Minsters involved two relatively distinct chapters. One chapter involved a criticism of the decision to revoke the restriction order in terms of section 193(5). The other chapter was to the effect that, having resolved under subsection (5) of section 193 to revoke the restriction order, the Tribunal erred in not proceeding to consider in terms of subsection (6) of section 193 whether the terms of the compulsion order fell to be varied. Counsel for the respondent and the interested party were in agreement that the argument for Scottish Ministers involved those two chapters. We accordingly find it convenient to take the two chapters of argument – or grounds of appeal – in sequence.

Issue One – section 193(5) of the 2003 Act

[18] In advancing her submission that the Tribunal had erred in revoking the restriction order, counsel for Scottish Ministers made a number of criticisms of the Tribunal's decision. She variously sought to characterise these as a misdirection by the Tribunal in not addressing the appropriate legal test; or omission by the Tribunal to have regard to relevant factors; or failure by the Tribunal to provide adequate reasons. But it was not always clear as to which category the particular complaints or criticisms fell to be ascribed.

[19] The criticisms can, we think, be summarised thus. While the Tribunal had set out the guidance given at paragraph 39 of the opinion of the court in *JK* (namely that the Tribunal should consider the nature of the offence, the antecedents of the patient and the risk of his committing further offences if at large), the Tribunal, it was submitted, had not properly addressed those criteria. First, the decision made no reference to the patient's antecedents in the shape of his offending prior to the imposition of the hospital order in 1991. Secondly, the Tribunal did not properly address antecedents in the shape of the patient's history after 1991 but prior to 2008 of cyclical grant of conditional discharge followed by recall, the patient having resumed consumption of drugs or the abuse of alcohol. In particular the Tribunal had not made detailed reference to the threats or incidents of violence which, among other things, had led to recall. Thirdly, the Tribunal did not address the fact that the patient had a liver condition which might mean that at some point in the future he might not be able to continue with clozapine. Further, the Tribunal had not properly addressed the effects of the restriction order on the patient; in particular in the absence of a restriction order the patient would not be covered by arrangements under sections 10 and 11 of the Management of Offenders etc. (Scotland) Act 2005, which enabled

co-ordination and co-operation among various public agencies in the provision of care and services. Accordingly, so ran the submission, the Tribunal had not properly addressed the continuing necessity test in section 193(5)(b)(ii).

[20] While one appreciates the appellants' concern that the safety of the public should not be endangered by removal of the restriction order, which of course provides for the appellants' having a role in the management of the patient, we have nonetheless come to review that this branch of their appeal against the Tribunal's decision is not well founded.

[21] It is no doubt correct that the Tribunal did not make reference to the criminal convictions of the patient incurred prior to the making of the 1991 hospital order. In our view however, that is wholly understandable since those previous convictions were very minor in nature and thus essentially irrelevant to a consideration of matters some three decades later. It is clear that the Tribunal was wholly informed of the serious nature of the index offence which led to the making of the original hospital order. The Tribunal was aware of the history of the patient after the making of the hospital order in 1991. It is fully detailed in the various reports before it and in particular the report by Dr Campbell and it is acknowledged in the exposition of the reasons for their decision. However, as the Tribunal observes, since 2008 things had changed. The patient's liver condition was also put before the Tribunal and the experts but, in a matter peculiarly within the expertise of the profession witnesses, was not seen by those witnesses as a problem of significance. Nor did any of the witnesses consider the continuing application of the Management of Offenders etc. (Scotland) Act 2005 to the patient to be necessary.

[22] Despite the endeavours of counsel for the Scottish Ministers to present these criticisms as matters of legal error which would justify our interfering with the

Tribunal's decision under s. 193(5) of the 2003 Act, we are satisfied that counsel for the Tribunal and the patient are correct in their submissions, first, that the criticisms relate essentially to the weight to be given to those matters by the Tribunal in its ponderation of all the evidence and materials before it and, secondly, that the Tribunal has given adequate reasons for its view of that evidence and those materials.

[23] We would add the observation that, as already narrated, when the Tribunal came to reach its decision, the expert evidence before the Tribunal was to the unanimous effect that continuing the restriction order was not necessary. There is no suggestion in the submission advanced on behalf of the Scottish Ministers that those experts were in any way ignorant of any of the matters to which that submission refers. While, of course, ultimately the Tribunal is not bound by the expert evidence and must reach its own view (a matter which the Tribunal properly recognises), in reaching a view contrary to that unanimously held by the expert evidence a Tribunal must have a proper evidential basis for doing so. It appeared to us that in the present case counsel for the Scottish Ministers was unable to identify any such basis upon the Tribunal charged with the present case could properly reach such a contrary conclusion.

Issue Two - Section 193(6)

[24] As already indicated the second branch of the submission for the appellants was that, the Tribunal having concluded under section 193(5) of the 2003 Act that the restriction order should be revoked, the Tribunal ought to have gone on to consider whether, under section 193(6), the compulsion order – which it had concluded should be kept in place – should yet be varied. In the Opinion of the Court delivered in *JK* the court had referred to the terms of section 193 of the 2003 Act as setting up a

"sequential" list of tests to be applied. So the Tribunal was bound to proceed from its decision under subsection (5) of section 193, whereby it revoked the restriction order to consider, in light of that revocation and in terms of subsection(6), whether the compulsion order should be varied. Further, whether that decision be for or against variation, reasons ought to be given for it.

[25] Counsel for Scottish Ministers went on to point out that, notwithstanding the general principal enunciated in section 1(4) of the 2003 Act, the Tribunal had left in place a compulsion order which required the patient to be detained in hospital. It had not considered any variation of the compulsion order to reflect the fact that JMM was living in the community. While a compulsion order could provide for the subject of the order to be resident in the community, the terms of section 57(8) of the 1995 Act did not permit complete replication of the conditions to which JMM's current discharge from hospital was subject. It was therefore appropriate that the Tribunal should have gone on to consider the terms of the compulsion order and whether or not the compulsion order should be varied. There was however nothing in the Tribunal's decision suggesting that the Tribunal had considered section 193(6) of the 2003 Act; nor, if the Tribunal had considered that provision, what matters it had taken into account in such consideration or what reasons it had found for resolving not to alter the terms of the compulsion order.

[26] Counsel for the Tribunal accepted that the decision issued by the Tribunal made no reference to any consideration having been given to subsection (6) of section 193. However, no submissions had been made to the Tribunal by the Scottish Ministers, or any other party, that, if the restriction order were recalled, it would be necessary or appropriate for the Tribunal to consider variation of the compulsion order. Counsel further explained that the practical situation was that, by virtue of

section 179 of the 2003 Act, section 127 of that Act is applied to a compulsion order. That section enabled the RMO to suspend detention and section 127(6)(b) gave the RMO wide powers to attach conditions to suspension of detention. Any condition which might be imposed in a compulsion order providing for the patient being in the community could be imposed by the RMO as a condition of suspension of detention. Moreover, the conditions imposed by way of suspension of detention could go beyond those which might be contained in a compulsion order. That, said counsel, appeared to be what the Tribunal envisaged; and it was to be noted that the patient did not object to the continuance of the compulsion order in its current terms. In effect, continuing the compulsion order stipulating detention in hospital provided the ultimate *compulsitor* for securing the patient's adherence to the conditions placed by the RMO on suspension of that detention.

[27] While we note the explanation tendered by counsel for the Tribunal for both the absence of any mention in the decision of consideration having been given to the terms of the compulsion order and the Tribunal's possible thinking in maintaining in force the compulsion order, we have nonetheless come to conclusion that there is some force in this branch of the argument advanced by the appellants. Counsel for the Tribunal accepted in response to questions from the Bench that, having reached a conclusion under section 193(5) to revoke the restriction order, the Tribunal was enjoined to proceed to section 193(6) and consider whether the terms of the compulsion order should varied. Counsel for the Tribunal equally accepted that having proceeded to that question there would be an obligation on the Tribunal to say how that question was considered and answered and to give reasons for the view which the Tribunal had reached. Since the Tribunal did not proceed to do either of those things in reaching its final decision we conclude that the decision is flawed in

those respects. While something about this is said in the Tribunal's responses to this appeal, the consideration of the tests in section 193(6) nonetheless required to be made when the Tribunal was deliberating on the reference; and the outcome of that consideration and the reasons for that outcome required to be expressed within the decision. Counsel for the Tribunal, in our view rightly, did not submit that such a deficiency in the terms of the decision could be remedied by answers lodged in the appeal.

[28] In these circumstances, while we consider the argument for Scottish Ministers advanced in respect of the Tribunal's decision on section 193(5) to be unsound, we consider there to be merit in the Ministers argument respecting the Tribunal's omission to proceed to address the issues raised in section 193(6). We must therefore quash the decision on that basis. While there was discussion before us as to whether a direction should be made to the Tribunal to consider only section 193(6) we are not minded to make such a direction. While we are of the view that on the evidence and materials before it the Tribunal was well entitled to conclude in terms of section 193(5) that the restriction order was no longer necessary, we do not think it appropriate that in a matter such as this, involving consideration of the interests of the patient and the public, to limit the Tribunal in its reconsideration of the case.

[29] We shall therefore allow the appeal on the ground of the Tribunal's omission to proceed to give consideration to the questions posed to it by section 193(6); quash the decision; and remit for re-consideration by the Tribunal in the light of the views expressed in this Opinion.