SHERIFFDOM OF GRAMPIAN HIGHLAND AND ISLANDS AT ABERDEEN
B585/10

JUDGEMENT

of

SHERIFF PRINCIPAL SIR STEPHEN S T YOUNG Bt QC

in the cause

BRIAN BLACK

Appellant

against

MENTAL HEALTH TRIBUNAL FOR SCOTLAND

Respondent

Act: Mr John Halley, advocate, instructed by Black & Markie, Cowdenbeath
Alt: Mr R G Hunter, solicitor, Mental Health Tribunal for Scotland

Aberdeen: 21st **February 2011**

The sheriff principal, having resumed consideration of the cause, on the motion of the appellant remits the appeal to the Court of Session in terms of section 320(4) of the Mental Health (Care and Treatment) (Scotland) Act 2003; finds no expenses due to or by either of the parties in respect of the appeal to the date hereof.

Note

[1] In this case a mental health officer made an application to the Mental Health Tribunal for Scotland for a compulsory treatment order to be made in respect of the patient M in terms of section 64(4) of the Mental Health (Care and Treatment)

(Scotland) Act 2003. The application was received by the Tribunal on 5 July, 2010 and by an order dated 8 July, 2010 the Tribunal, being satisfied on the basis of the application and two medical reports that M "does not have the capacity to instruct a solicitor to represent her interests in these proceedings before the Tribunal" appointed a curator *ad litem* from the list of curators held and maintained by the Tribunal. The appellant, who is a solicitor, was evidently selected from this list and he duly received notice of his appointment on 9 July, 2010.

[2] The hearing of the application took place before the Tribunal on 13 July, 2010. The appellant was present, but not M (and indeed the papers in the case were not served on her either upon the basis that to do so would be harmful to her). Others present included M's daughters D and E who had previously been appointed as her joint welfare attorneys. D also attended as M's named person, and in that capacity she was represented by another solicitor, Mr McClelland. The appellant requested the Tribunal to make an interim compulsory treatment order in respect of M for a period of up to 28 days under section 65(2) of the Act to allow for the preparation of an independent report by a consultant psychiatrist. The Tribunal refused this request and proceeded to make a compulsory treatment order in terms of section 64(4) of the Act. The Tribunal's full findings and reasons for making the order were subsequently recorded in writing by the convener.

[3] The appellant has now appealed to me against the order made by the Tribunal, and the first question that arises is whether the appeal is competent in light of the relevant provisions of the 2003 Act. The Tribunal's solicitor submitted in short that the appellant had no title to pursue the appeal, his appointment as curator *ad litem* having come to an end when the proceedings before the Tribunal came to an end with the making of an order under section 64(4) of the Act, and that in any event he was not one of those listed in section 320(5) of the Act as a relevant party having a right of appeal to the sheriff principal. It followed, said the Tribunal's solicitor, that the appeal was incompetent and should be dismissed.

[4] Section 320(1) provides that the section applies to a variety of decisions of the Tribunal including (b) a decision under section 64(4)(a) or (b) of the Act making or

refusing to make a compulsory treatment order. Section 320(2) provides that a relevant party to proceedings before the Tribunal may appeal to the sheriff principal against a decision to which the section applies. Section 320(5) provides that a relevant party in this context means (a) the person to whom the decision relates; (b) that person's named person; (c) any guardian of the person; (d) any welfare attorney of the person; (e) the mental health officer; and (f) that person's responsible medical officer. This list should be compared with the list of persons who, before determining an application for a compulsory treatment order, the Tribunal is required to afford the opportunity (a) of making representations (whether orally or in writing), and (b) of leading or producing evidence – see section 64(2). The list of persons is set out in section 64(3), and they are (a) the patient; (b) the patient's named person; (c) any guardian of the patient; (d) any welfare attorney of the patient; (e) the mental health officer; (f) the medical practitioners who submitted the mental health reports which accompany the application; (g) if the patient has a responsible medical officer, that officer; (h) the patient's primary carer; (i) any curator *ad litem* appointed in respect of the patient by the Tribunal; and (j) any other person appearing to the Tribunal to have an interest in the application. It will be observed that there are ten persons on this list, but only six of them feature in the list set out in section 320(5), and the curator *ad litem* is not one of these six. Leaving aside for the moment the question whether the provisions of the European Convention on Human Rights are of any significance in this context, I consider that the inescapable conclusion to be drawn from a comparison of these two lists is that the legislature intended that a curator *ad litem* should not be entitled to appeal against the making by the Tribunal of a compulsory treatment order. The same conclusion was reached by Sheriff Principal Bowen in *Henderson v Mental Health Tribunal for Scotland* (Edinburgh Sheriff Court, 23 July 2010), and I respectfully agree with him.

[5] In any event, and again leaving aside the possible impact of the European Convention on Human Rights, I agree with the submission of the Tribunal's solicitor that the appellant has no title to pursue this appeal. Paragraph 10 of schedule 2 to the Act authorises the Scottish Ministers to make rules as to the practice and procedure of the Tribunal, and paragraph 10(2) provides that such rules may include provision for or in connection with "(s) the circumstances in which a curator *ad litem* may be appointed". The current rules are those contained in the Mental Health Tribunal for

Scotland (Practice and Procedure) (No 2) Rules 2005 (2005 SSI 519). Rule 55 deals with the appointment of a curator *ad litem*, and it provides:

> **55.**—(1) Where the circumstances in paragraph (2) apply, a curator *ad litem* may be appointed by the Tribunal or a Convener.
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> (2) Those circumstances are–
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> (a) that the patient does not have the capacity to instruct a solicitor to represent the patient's interests in proceedings before the Tribunal;
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> (b) that where the Tribunal or a Convener has made a decision not to disclose a document or report or part of it to the patient under rule 47, and the patient does not have a representative to represent their interests (sic); or
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> (c) that the patient has been excluded from any hearing or part of it under rule 68 or 69 and the patient does not have a representative to represent their interests.
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> (3) The Tribunal or the Convener, as the case may be, may appoint a person having appropriate skills or experience to–
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> (a) assess whether the circumstances in paragraph (2)(a) may apply; and
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> (b) provide a report on the matter.
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> (4) The Tribunal shall pay to an expert appointed under paragraph (3) such an amount in respect of necessary expenses incurred in preparing and producing any report, as the President shall direct.
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> (5) The Tribunal shall provide all necessary information to a curator *ad litem* appointed to enable the curator *ad litem* to represent the patient's interests in proceedings before the Tribunal.

These provisions fall to be read in light of rules 3 and 4 which set out the scope and overriding objective of the 2005 Rules, and also rule 41 which sets out the scope of Part VII of the Rules which includes rule 55. Rules 3, 4 and 41 provide:

> **3.** These Rules apply to the following proceedings:–
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> (a) applications to the Tribunal;
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> (b) references to the Tribunal;
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> (c) appeals to the Tribunal;

(d) reviews by the Tribunal; and

(e) cases remitted to the Tribunal under section 324(5)(b)(ii) of the Act.

4. The overriding objective of these Rules is to secure that proceedings before the Tribunal are handled as fairly, expeditiously and efficiently as possible.

41.—(1) This Part applies generally to cases before the Tribunal.

(2) The cases referred to in paragraph (1) include an application, reference, appeal or review before the Tribunal, and to any case referred to in Part VI, as the Tribunal may determine.

[6] In my opinion it is perfectly clear from a consideration of these rules that the scope of the appellant's appointment as curator *ad litem* was restricted to representing M's interests in the proceedings before the Tribunal. Those proceedings came to an end on 13 July, 2010 when the Tribunal made a compulsory treatment order in respect of M. At that point the appellant was *functus officio*. He had carried out the duty which he had been appointed to perform in terms of the Tribunal's order dated 8 July, 2010, and there was nothing more he could or should have done thereafter in pursuance of the rules under which his appointment had been made.

[7] Counsel for the appellant however submitted that M's rights under articles 5(4) and 6(1) of the European Convention on Human Rights were clearly engaged in the circumstances of the present case, that I was obliged in terms of section 3(1) of the Human Rights Act 1998 to read and give effect to section 320(5)(a) of the 2003 Act in a way that was compatible with M's rights under these particular articles and that in order to do so I should read section 320(5)(a) as if it read: "the person to whom the decision relates or, in appropriate circumstances, any curator *ad litem* appointed by the Tribunal in respect of that person". He referred here in particular to *Reid v United Kingdom* (2003) 37 EHHR 9 at paragraphs 63 to 65 and 77 and *Principal Reporter v K and others* [2010] UKSC 56 at paragraphs 32 and 60/1. The Tribunal's solicitor on the other hand submitted that there was no incompatibility between section 320(5)(a) and M's rights under articles 5(4) and 6(1) so that there was no need to read into section 320(5)(a) the additional words proposed by counsel for the appellant. He referred here in particular to *Winterwerp v The Netherlands* (1979-80) 2 EHHR 387

and *Lithgow v United Kingdom* (1986) 8 EHHR 329. He pointed out too that an appointment by the Tribunal of a curator *ad litem* under sub-paragraph (b) or (c) of rule 55(2) did not necessarily imply (as sub-paragraph (a) did) that the patient did not have the capacity to instruct a solicitor. He suggested that, if the additional words proposed by counsel were to be read into section 320(5)(a), a curator *ad litem* appointed in pursuance of sub-paragraph (b) or (c) might be entitled to appeal under section 320(2) notwithstanding that the patient had the capacity to instruct a solicitor to pursue an appeal and had chosen not to do so. Understandably, he suggested that such an extraordinary outcome could not be right.

[8] The first question here is whether either article 5(4) or article 6(1) has any application at all in the circumstances of this case. For, if they do not, there is no need even to consider whether section 320(5)(a) can be read and given effect in a way which is compatible with them, which is what section 3(1) of the 1998 Act requires me to do if they do apply. The answer I think is that article 5(4) clearly does apply here, but I am by no means sure that article 6(1) does.

[9] Article 5(1) provides that everyone has the right to liberty and security of person and that no one shall be deprived of his liberty save in certain specified cases and in accordance with a procedure prescribed by law. The specified cases include, in sub-paragraph (e), the lawful detention of persons of unsound mind. Article 5(4) then provides: "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 that detention is not lawful". In this case the effect of the order made by the Tribunal on 13 July, 2010 was that M was to be compulsorily detained in hospital, and it follows that she was (and is) entitled to the rights conferred by article 5(1) and (4).

[10] Article 6(1) provides that in the determination of his civil rights and obligations or of any criminal charge against him everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. The question here is whether the decision of the Tribunal to make a compulsory treatment order in respect of M which resulted in her detention in hospital constituted a determination of her civil rights and obligations. As a matter of first impression it seems to me that the right to liberty and security of person which is

enshrined in article 5 is likely to be a right of a different character from the civil rights to which article 6(1) applies. A similar question arose in *Winterwerp v The Netherlands*. In that case the applicant, who had been compulsorily detained under the relevant Netherlands legislation dealing with mentally ill persons, complained that articles 5 and 6 had been violated. He had been detained by court orders renewed periodically, but had not been notified that the proceedings were in progress or allowed to appear or be represented. The detention in the Netherlands of persons of unsound mind was governed by an Act of 27 April, 1884, section 32 of which provided that any person of full age who was actually confined in a psychiatric hospital automatically lost the capacity to administer his property and that, as a consequence, all contracts entered into by that person after his confinement were void and he could not legally transfer property or operate his bank accounts. At paragraphs 73 to 76 of the judgment of the European Court of Human Rights it was said *inter alia*:

> 73. The Government doubt whether Article 6 para. 1 (art. 6-1) is applicable to the facts of the case. They incline to the view that what is in issue is a question of status rather than of civil rights and obligations as such.
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> The Court does not share this opinion. The capacity to deal personally with one's property involves the exercise of private rights and hence affects "civil rights and obligations" within the meaning of Article 6 para. 1 (art. 6-1). Divesting Mr. Winterwerp of that capacity amounted to a "determination" of such rights and obligations.
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> 74. The applicant lost the capacity to administer his property on his confinement in a psychiatric hospital (see paragraph 32 above).
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> .....
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> 75. By way of general argument, the Government contend that there was no breach of Article 6 para. 1 (art. 6-1) since the provisions of the Mentally Ill Persons Act safeguard the civil rights of the detained person of unsound mind who, by the very reason of his proven mental condition, needs to be protected against his own inability to manage his affairs.

> The Court does not agree with this line of reasoning. Whatever the justification for depriving a person of unsound mind of the capacity to administer his property, the guarantees laid down in Article 6 para. 1 (art. 6-1) must nevertheless be respected. While, as has been indicated above in connection with Article 5 para. 4 (art. 5-4) (see paragraphs 60 and 63), mental illness may render legitimate certain limitations upon the exercise of the "right to a court", it cannot warrant the total absence of that right as embodied in Article 6 para. 1 (art. 6-1).
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> 76. There has accordingly been a breach of Article 6 para. 1 (art. 6-1).

[11] It is to be observed that it does not appear to have been suggested in the *Winterwerp* case that the patient's detention of itself constituted a determination of his civil rights. Rather, it was the fact that, as a consequence of his detention, he was deprived of the capacity to administer his own property that meant that there had been a determination of his civil rights. In the present case counsel for the appellant did not point to any similar provision in the legislation applicable here in Scotland, and in these circumstances it appears to me that, contrary to counsel's submission, article 6(1) is not engaged in the determination in this appeal of the question whether the detention of M in pursuance of a compulsory treatment order made under section 64(4) of the 2003 Act was lawful.

[12] The next question is whether section 320(5)(a) can be read and given effect in a way that is compatible with article 5(1) and (4). If, as I think must be the case, the procedure set out in Chapter 1 of Part 7 of the 2003 Act (which is the part that provides for applications for, and the making of, compulsory treatment orders and thus includes section 64) is to be regarded, at least in principle, as satisfying the requirement in article 5(1) for a procedure prescribed by law, then what article 5(4) demands is that the patient should be entitled to take proceedings by which the lawfulness of his or her detention in pursuance of a compulsory treatment order made by the Tribunal shall be decided by a court. This of course is what section 320(1)(b), (2) and (5)(a) provide for. So far so good. But the patient's entitlement as a relevant party in terms of section 320(5)(a) to appeal to the sheriff principal may be of little, or more probably, no worth if he or she does not have the capacity to instruct a solicitor

and/or the Tribunal or a convener has made a decision not to disclose a document or report or part of it to the patient under rule 47 of the 2005 Rules and/or the patient has been excluded from any hearing or part of it under rule 68 or 69. Here the observations of the court at paragraphs 59 and 60 of the judgment in the *Winterwerp* case are apposite:

> 59. According to the Government, Article 5 para. 4 (art. 5-4) does not compel a court to hear in person an individual whose mental condition is established on the basis of objective medical advice to be such that he is incapable of presenting statements of any relevance for the proceedings. The objective medical evidence lodged over the years with the Netherlands courts shows, so they argue, that this was the case with Mr. Winterwerp.
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> In their submission, the system under the Mentally Ill Persons Act offers adequate guarantees. The review is carried out by an independent court which has full discretionary powers to investigate the merits of each individual case. Furthermore, the process of review is continuous: at least once a year a court decides on the necessity of maintaining the detention. The public prosecutor, who has a statutory duty to ensure that no one is unlawfully confined in a psychiatric hospital, plays an important rôle of supervision. Finally, the medical declarations and reports required at the various stages are subject to specific rules designed to provide safeguards for the patient.
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> 60. The Court does not share the Government's view.
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> The judicial proceedings referred to in Article 5 para. 4 (art. 5-4) need not, it is true, always be attended by the same guarantees as those required under Article 6 para. 1 (art. 6-1) for civil or criminal litigation. Nonetheless, it is essential that the person concerned should have access to a court and the opportunity to be heard either in person or, *where necessary, through some form of representation*, failing which he will not have been afforded "the fundamental guarantees of procedure applied in matters of deprivation of liberty". Mental illness may entail restricting or modifying the manner of exercise of such a right, but it cannot justify impairing the very essence of the

right. Indeed, *special procedural safeguards* may prove called for in order to protect the interests of persons who, on account of their mental disabilities, are not fully capable of acting for themselves.

[13] The emphasis here is mine. Of course it may be said that the requirement for "some form of representation" or "special procedural safeguards" is met by the fact that section 320(5) provides for appeals not only by the patient but also his or her named person, guardian or welfare attorney. But the patient may not have a guardian or welfare attorney and, while one would like to think that a named person would look to the patient's best interests, this cannot be taken for granted. It is not difficult to think of situations where the interests of the patient and of the named person would not necessarily coincide, and there would always be the temptation for the named person to put his or her interests ahead of the patient's interests. It follows in my opinion that in its present form section 320(5)(a) cannot be read and given effect in a way which is compatible with M's rights under article 5(4).

[14] The simple solution to this difficulty, at least if a curator *ad litem* has been appointed to represent the patient's interests in the proceedings before the Tribunal, would be to read into section 320(5)(a) words which would allow the curator *ad litem* to appeal if the patient is unable to do so for any reason. As already indicated, counsel for the appellant suggested that the words to be read in should provide for a curator *ad litem* to be permitted to appeal "in appropriate circumstances". The difficulty with this expression is that it begs the question what circumstances would be considered appropriate. Would it, for example, be appropriate to allow a curator *ad litem* to appeal where the patient had the capacity to instruct a solicitor but for one reason or another had elected not to appeal despite having, at least in the opinion of the curator *ad litem*, good grounds for an appeal?

[15] But there is I think a more fundamental difficulty here, namely that to read into section 320(5)(a) words which would allow a curator *ad litem* to appeal in place of (or, it may be, in addition to) the patient would fly in the face of the clear implication which I think is to be drawn from the fact that a curator *ad litem* features among the persons listed in section 64(3) but not among those listed in section 320(5). Here I would refer to the comments of Lord Rodger of Earlsferry in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 at paragraph 121:

> For present purposes, it is sufficient to notice that cases such as *Pickstone v Freemans plc* [1989] AC 66 and *Litster v Forth Dry Dock & Engineering Co Ltd* [1990] 1 AC 546 suggest that, in terms of section 3(1) of the 1998 Act, it is possible for the courts to supply by implication words that are appropriate to ensure that legislation is read in a way which is compatible with Convention rights. When the court spells out the words that are to be implied, it may look as if it is "amending" the legislation, but that is not the case. If the court implies words that are consistent with the scheme of the legislation but necessary to make it compatible with Convention rights, it is simply performing the duty which Parliament has imposed on it and on others. It is reading the legislation in a way that draws out the full implications of its terms and of the Convention rights. And, by its very nature, an implication will go with the grain of the legislation. By contrast, using a Convention right to read in words that are inconsistent with the scheme of the legislation or with its essential principles as disclosed by its provisions does not involve any form of interpretation, by implication or otherwise. It falls on the wrong side of the boundary between interpretation and amendment of the statute.

In my opinion to read into section 320(5)(a) words which would allow the patient's curator *ad litem* to appeal would indeed go against the grain of the legislation and would fall on the wrong side of the boundary between interpretation and amendment of the statute. In other words, as presently advised, I do not think that section 320(5)(a) can be read and given effect in a way which is compatible with M's rights under article 5(4) by the simple expedient of reading into it the words proposed by counsel for the appellant.

[16] Counsel submitted that, if I were to reach this conclusion, I should remit the appeal to the Court of Session as I have power to do under section 320(4). In the circumstances this seems to me to be the appropriate course to take. The question whether section 320(5)(a) is indeed incompatible with the patient's rights under article 5(4) is I believe an important one and, if I am right in my understanding of the legal position, it may be that a declaration of incompatibility ought to be made. That is something which I cannot do, the power to do so in the present context being reserved to the Court of Session – see section 4(2) and (5)(d) of the 1998 Act. So this

is another reason why it would be appropriate to remit this appeal to the Court of Session.

[17] I might add here that I cannot help thinking that the difficulty with section 320(5)(a) goes beyond the fact that a curator *ad litem* is not among those entitled to appeal under section 320(2). As is clear from the opening part of rule 55(1) of the 2005 Rules, the Tribunal or a convener has a discretion whether or not to appoint a curator *ad litem*. There is no obligation to do so. If one is not appointed, and any or all of the circumstances set out in rule 55(2) (a), (b) and (c) apply, it is not easy to see how the patient's rights under article 5(4) can be said to be given effect by the provisions of section 320(2) and (5) as presently framed. But since this question was not addressed in the submissions before me, I had perhaps better say no more about it.

[18] I was addressed by both counsel for the appellant and the solicitor for the Tribunal on the merits of the appeal. Since I have decided to remit the appeal to the Court of Session I do not think that it would be appropriate that I should express an opinion on this aspect of the matter.

[19] It was agreed that, whatever the outcome of the appeal, no expenses should be found due to or by either of the parties. Plainly I cannot make an order in relation to the appeal proceedings in the Court of Session. I have been in some doubt whether it would be appropriate for me to make an order in relation to the expenses of the appeal proceedings so far. It will be seen that I have decided to do so to reflect the parties' agreement. If I am wrong here, this part of my interlocutor can always be recalled by the Court of Session.

[20] In addition to the authorities already mentioned, in relation to the competency of this appeal reference was also made to *R v Grant* 2000 SLT 372, *Bailey's Trustees v Bailey* 1955 SLT(N) 21, *Air 2000 Ltd v Secretary of State for Transport* 1990 SLT 335, *Hughes v Mental Health Tribunal for Scotland* (Edinburgh Sheriff Court, 19 June 2006), Starmer: European Human Rights Law at paragraph 13.8 and Auchie and Carmichael: The Scottish Mental Health Tribunal – Practice and Procedure at paragraphs 2.61, 64, 65 and 85.