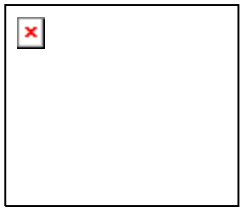


SECOND DIVISION, INNER HOUSE, COURT OF SESSION

Lord Justice Clerk
Lord Bonomy
Lord Brodie

[2011] CSIH 55
XA141/09

OPINION OF THE LORD JUSTICE CLERK

Appeal under section 322 of the Mental Health (Care and Treatment) (Scotland) Act 2003

by

G

Appellant;

against

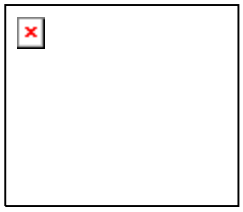
a decision of the Mental Health Tribunal for Scotland dated 1 September 2009 and intimated to the appellant on 9 September 2009

_____

Appellant: Leighton; Drummond Miller LLP
Respondents: (The Mental Health Tribunal for Scotland): K Campbell; Legal Secretary to Tribunal
Interested Party: (The Scottish Ministers): Poole; M Sinclair, Scottish Government Legal Directorate

23 August 2011

[1] For the reasons given by Lord Bonomy, I agree that the appeal should be refused.



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OPINION OF LORD BONOMY

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Appellant;

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23 August 2011

Background

[2] This appeal relates to the circumstances in which it may be appropriate, as a matter of law, for the Mental Health Tribunal for Scotland ("Tribunal") to pronounce no order for arrangements to be made for the transfer of a patient detained in the State Hospital to conditions of lesser security, following a finding that the patient is being detained in conditions of excessive security. The appellant challenges the decision of

the Tribunal of 1 September 2009 to decline to make an order in terms of section 264(2) of the Mental Health (Care and Treatment) (Scotland) Act 2003 ("2003 Act") to set in motion arrangements for his transfer. The Tribunal and the Scottish Ministers opposed the appeal.

[3] On 17 February 1998 at the High Court in Perth the appellant was acquitted by reason of insanity at the time, on an indictment comprising charges of rape, breach of the peace and four charges of assault. A compulsion order and restriction order were imposed and he was thereafter detained at the State Hospital.

[4] The appellant has a mental disorder, namely a mental illness diagnosed as bipolar disorder. In addition to his bipolar disorder he has been assessed as displaying traits of a personality disorder. As at the date of the hearing before the Tribunal he was subject to what might be regarded as the lowest level of security obtaining at the State Hospital. His room remained unlocked at night, and during day time he was subject to standard observations. His communications and visits were unsupervised, he had full grounds access and used that on a regular basis, and he had participated in escorted outings without any adverse report. He had responded to pharmacological treatment and his mental health was stable. He complied with all prescribed medication and there had been no significant fluctuations in his mood or any significant adverse incident for at least two years.

Relevant Statutory Provisions

[5] On 17 January 2008 the appellant submitted the application under section 264 of the 2003 Act which is the subject of this appeal. The patient is one of a number of persons, including certain representatives of the patient and the Mental Welfare Commission, who are entitled to apply under that section. The terms of subsections

(1), (2), (3) and (5) bear upon the arguments which were presented to us and are in the following terms:

"**264 Detention in conditions of excessive security; state hospitals**

(1) This section applies where a patient's detention in a state hospital is authorised by –

(a) a compulsory treatment order;

(b) a compulsion order;

(c) a hospital direction; or

(d) a transfer for treatment direction;

and whether or not a certificate under section 127(1) (either as enacted or as applied by section 179(1) of this Act) or 224(2) of this Act has effect in relation to the patient.

(2) On application of any of the persons mentioned in subsection (6) below, the Tribunal may, if satisfied that the patient does not require to be detained under conditions of special security that can be provided only in a state hospital, make an order-

(a) declaring that the patient is being detained in conditions of excessive security; and

(b) specifying a period, not exceeding 3 months and beginning with the making of the order, during which the duties under subsections (3) to (5) below shall be performed.

(3) Where the Tribunal makes an order under subsection (2) above in respect of a relevant patient, the relevant Health Board shall identify a hospital-

(a) which is not a state hospital;

(b) which the Board and the Scottish Ministers, and its managers if they are not the Board, agree is a hospital in which the patient could be detained in appropriate conditions; and

(c) in which accommodation is available for the patient.

…

(5) Where the Tribunal makes an order under subsection (2) above in respect of a patient, the relevant Health Board shall, as soon as practicable after identifying a hospital under subsection (3) … above, give notice to the managers of the state hospital of the name of the hospital so identified."

[6] The appellant is a relevant patient being subject to a compulsion order and restriction order (section 273). Other material provisions are to be found in section 1 as follows:

"1 Principles for discharging certain functions.

(1) Subsections (2) to (4) below apply whenever a person who does not fall within subsection (7) below is discharging a function by virtue of this Act in relation to a patient who has attained the age of 18 years.

(2) In discharging the function the person shall … have regard to the matters mentioned in subsection (3) below insofar as they are relevant to the function being discharged.

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

(a) the present and past wishes and feelings of the patient which are relevant to the discharge of the function;

(b) …

(c) the importance of the patient participating as fully as possible in the discharge of the function;

(d) …

(e) the range of options available in the patient's case;

(f) the importance of providing the maximum benefit to the patient;

(g) the need to ensure that, unless it can be shown that it is justified in the circumstances, the patient is not treated in a way that is less favourable than the way in which a person who is not a patient might be treated in a comparable situation;

(h) the patient's abilities, background and characteristics, including, without prejudice to that generality, the patient's age, sex, sexual orientation, religious persuasion, racial origin, cultural and linguistic background and membership of any ethnic group.

(4) After having regard to –

(a) the matters mentioned in subsection (3) above;

(b) …

(c) such other matters as are relevant in the circumstances.

the person shall discharge the function in the manner that appears to the person to be the manner that involves the minimum restriction on the freedom of the patient that is necessary in the circumstances.

(5) …

(6) …

(7) A person falls within this subsection if the person is discharging the function by virtue of being –

(a) the patient;

….

(8) In subsection (3)(a) above, the reference to wishes and feelings of the patient is a reference to those wishes and feelings in so far as they can be ascertained by any means of communication, whether human or by mechanical aid (whether of an interpretative nature or otherwise), appropriate to the patient.

…"

Parties were agreed that application of subsection (2) involves a two stage exercise in which the Tribunal must first decide whether it is satisfied that the patient does not require to be detained under conditions of special security that can be provided only in a State Hospital. It is only in the event that it is so satisfied that the second stage requires to be addressed, namely whether an order declaring, first of all, that the patient is being detained in conditions of excessive security and then specifying a period for performance of the duties under subsections (3) to (5) should be made.

Decision of the Tribunal

[7] Prior to the hearing of evidence in the application a number of consultant forensic psychiatrists met to identify areas of agreement and dispute. These were recorded in a minute which was presented to the Tribunal. The evidence led included evidence from a number of psychologists, a mental health officer, four of the psychiatrists who had earlier met and the appellant. The following paragraphs of the Tribunal decision are of particular relevance to this appeal:

"<u>Findings in fact</u>

13. Dr Lynda Todd Consultant Clinical Psychologist of the Forensic Clinical Psychological Services of the State Hospital has assessed him with regard to his risk of sexual and spousal violence. These assessments are

contained in her Report on Risk of Sexual Violence Protocol (RSVP) and Spousal Assault Risk Assessment (SARA) dated 25 February and 16 March 2009. The report is referred to for its terms. G continues to pose some risk of sexual and spousal violence, which can be exacerbated by a number of factors that are identified in the report.

14. The management of this risk can only be determined following upon G undertaking and completing satisfactorily a sexual offending and spousal violence treatment course. Until this is determined G can be managed within a medium secure facility but subject to considerable restrictions.

15. The State Hospital has the best resourced psychology department in the secure hospital estate in Scotland. This department is capable of providing and delivering appropriate treatment in various forms such as group, two-to-one or one-to-one. It has assessed G and is best placed to decide how to meet his psychological needs. He needs to engage in such treatment before he can progress through the forensic psychiatric hospital network in Scotland with consequential relaxation of restrictions on his movements.

16. Medium Secure forensic psychiatric hospitals would require to impose on G greater restrictions on his movements than are presently afforded him until such time as he had engaged in appropriate course work. Uncertainty exists as to the time scale for such work being undertaken in these hospitals. Prolonged restrictions consequentially pose a risk to the mental health of G.

17. Forensic psychologists at the State Hospital have now engaged with G to address the issues surrounding appropriate therapy for him. Maximum benefit will be provided to him by such treatment being provided by the State Hospital.

Evidence

...

20. In an attempt to focus on the issues in dispute, at the procedural hearing of 7th August 2008, Ms Poole, Advocate representing the Scottish Ministers, and Mr Leighton, Advocate representing the patient, agreed that a statement of areas of agreement and dispute be drawn up by the expert witnesses.

21. As a result Dr Fionnbar Lenihan, Consultant Forensic Psychiatrist, Orchard Clinic, Dr Tom White, Consultant Forensic Psychiatrist, Murray Royal Hospital, Perth, Dr Bill Dickson, Consultant Forensic Psychiatrist, Stratheden Hospital, Dr John Crichton, Consultant Forensic Psychiatrist, Orchard Clinic, Edinburgh, Dr Callum MacCall, Consultant Forensic Psychiatrist, State Hospital, held a meeting, the minutes of which are as follows::-

> 'a. All agree that G's diagnosis is bipolar affective disorder, currently in remission for approximately the last 8 years.
>
> b. All agree that G satisfies the criteria for a Compulsion Order and Restriction Order (CORO).
>
> c. Multiple risk factors interacted at the time of the index offence including deterioration in mental health, attitudinal factors and cannabis misuse. There is a difference of opinion on the relative contribution of these factors.
>
> d. There is a difference of opinion regarding the need for specific psychological sex offending work. Drs Crichton, Lenihan and MacCall support the need for this work to be done. Dr White and

Dr Dickson's view is that he does not need in-depth long term psychological work but rather a modest amount of work to inform the formulation. Dr White has reached this view in light of the assessment made by Dr Lundie.

e. Drs Lenihan and Crichton believe the specific psychological work should be successfully commenced in high security. Dr MacCall believes G requires to complete this work before progressing beyond escorted passes in medium security. Drs White and Dickson believe this work could take place other than in high security.

f. Notwithstanding the differences in opinion, all are in agreement that the proposals for 2:1 psychological treatment proposed by Drs Lenihan and Russell are a sensible and pragmatic way forward. This involves 3 months treatment at the State Hospital followed by 3 months treatment at the Orchard Clinic.

j. Dr Dickson is not happy about MAPPA in effect having the ability to exercise a veto over G's ability to progress from high security.

k. Whereas there are differences of opinion regarding when G moves from high security, there is agreement that this can be to a medium security mixed sex ward.

l. It should be noted that this minute was compiled in the absence of psychological input. We believe psychological evidence is crucial in this case.'

22. Evidential hearings took place on 29th October, 31st October and 18 November 2008 and 23rd April, 24th April, 21st May and 22nd May 2009.

At these oral testimony was given by John Smith, Mental Health Officer, Dr Callum MacCall, the patient's Responsible Medical Officer, Prof. David Cooke, Caledonian University, Dr Thomas White, Consultant Psychiatrist Murray Royal Hospital Perth, Dr John Crichton, Consultant Psychiatrist, Orchard Clinic Edinburgh, Dr Lynda Todd, Consultant Psychologist, State Hospital, Dr Ewan Lundy (*sic*), Consultant Psychologist, Dr Bill Dickson, Consultant Psychiatrist, Stratheden Hospital and the patient, G.

…

Decision

105. The key issue for G is straightforward. All the experts agree he has to undertake appropriate psychotherapy courses before he can be allowed greater contact with others, particularly women. Progress towards the goal of conditions of lesser security would depend upon him engaging in such courses.

106. The key issues for the tribunal are whether G requires to be detained in conditions of special security that can only be provided in a state hospital and, if not, whether an order should be granted.

107. The tribunal has before it the evidence of a number of professionals, some leading authorities in their fields, who disagree on whether G should be allowed to move from the State Hospital before he has engaged in such treatment. All the expert witnesses impressed the tribunal and each presented a persuasive case.

108. Dr White and Dr Dickson support the making of an order under section 264 whilst Dr Crichton along with Professor Cooke oppose any move from the State Hospital until such time as appropriate treatment and

assessment has been undertaken. Dr MacCall positions himself, with his caveats, as being less cautious than Dr Crichton but more cautious than Dr White.

109. Dr Lundie supports G being detained in conditions of at least medium security. Dr Todd was less clear in regard to her support or otherwise of the application. Her evidence centred on the nature and extent of the treatment being dependent upon where G is located. The Tribunal shares with Dr White and Dr Crichton their concern that notwithstanding the period of time Mr O has been at the State Hospital there has only been one attempt apparently at addressing this issue….

110. The Tribunal also shares with Dr White and Dr Crichton their concern that the psychologists involved in G's care do not appear to be prepared to undertake appropriate psychological work until this tribunal has made a decision….

111. The tribunal accepts the submissions of Ms Poole and Mr Leighton there is a two stage statutory test. As was submitted by the respondent in the *BM* case, section 264(2) contains both a power and a pre condition for the exercise of that power. The precondition was "…if satisfied that the patient does not require to be detained under conditions of special security that can be provided only in a state hospital". The power was "make an order (a) declaring that the patient is being detained in conditions of excessive security (b) specifying a period, not exceeding three months and beginning with the making of the order, during which the duties under subsections (3) to (5) below shall be performed."

…

114. The tribunal had due regard to the evidence of both Dr Crichton and Professor Cooke. They are clearly authoritative figures in the field of security issues relating to patients within the secure forensic psychiatric hospitals in Scotland. Their evidence impressed the tribunal as it was clear both witnesses had researched in depth the medical history of G and applied their expertise to reach the conclusion that he should continue to be detained in the State Hospital.

115. On the other hand, the evidence and submission of the Responsible Medical Officer, Dr Callum MacCall, also impressed the tribunal. He, more than anyone who gave evidence, knows well this patient….He remained with the opinion G did not require the special security of the State Hospital and supported the application with the stated caveats…His opinion was shared (without the caveats) by Dr White who had been the former responsible medical officer of G from his admission until 2002…

116. All parties agreed in their evidence that the level of security required for G depends upon the risks he poses. These risks have not yet been fully explored as there has been insufficient psychological input into the formation of risk. All witnesses agree the risk posed by him is violence of a sexual nature in the context of anger and rejection.

117. He does not pose a risk of absconding or present an immediate risk to women. He does not pose a risk to women on a random basis. In the State Hospital he has restricted access to women but in medium security he would have greater contact with women. He would pose a risk in any relationship with a woman should he feel rejected or come under the influence of alcohol or drug abuse.

118. Both Dr MacCall and Dr White considered this risk could be managed in medium security and did not require the high security of the State Hospital. On balance, therefore, the tribunal prefers to accept their opinion on this issue to the understandable disagreement expressed on that aspect by Dr Crichton and Professor Cooke. The tribunal considers Dr MacCall and Dr White have long experience of this patient and in these circumstances accepts their judgement of G.

119. That being so the tribunal is satisfied that G does not require to be detained under conditions of special security that can be provided only in a State Hospital. The precondition contained in section 264(2) is thus met.

…

121. The tribunal agrees with Ms Poole and Mr Leighton that a factor to be considered in the exercise of discretion is regard for the principles set forth in section 1 of the 2003 Act.

122. In Gs' case the tribunal shares the concerns Dr MacCall has expressed in his reservations about him moving to a medium security facility with the risk of failure to engage in an appropriate psychotherapy course. Inevitably G would become entrapped in the medium secure system. If he were to move prematurely then he would inevitable (*sic*) have restrictions placed on his movements much greater than those currently being experienced by him. It is likely he would not be treated like a "normal" medium secure patient until he had engaged in treatment. There is therefore a significant risk of G being stuck in the system with consequential problems relating to his mental health.

123. This tribunal also shares the concerns of both Dr MacCall and Dr Crichton that G is less likely to engage in treatment in a medium secure hospital.

124. Ms Poole made reference to the principle of "maximum benefit" and Mr Leighton that of "least restrictive option". With regard to the latter it appears to the tribunal if G moved to a medium secure hospital then, until such time as a psychotherapy course was satisfactorily completed, he would have to endure greater restrictions on his movements than currently experienced at the State Hospital. Such a course could take 12 to 18 months according to Dr Todd.

125. The tribunal accepts the submissions made by Ms Poole with regard to the exercise of the discretion. It takes the view that G remaining within the State Hospital and engaging with the psychology department there will achieve maximum benefit. It also accepts Ms Poole's submission that G moving to conditions of medium security poses for women, with whom he would come into contact, a risk that would be otherwise significantly reduced if, by that time, he had engaged in appropriate psychotherapy. This potential risk was referred to by a number of witnesses and is a feature of the reservations spoken to by Dr MacCall. Most of the expert witnesses agreed the exact nature of the risk he poses to women with whom he would come into contact is still unclear and will remain so until he has undertaken appropriate work.

126. The tribunal shares the view of the witnesses that G requires to undergo psychological intervention courses relating to sexual offending before he can make further progress through the forensic psychiatric hospital system.

> The tribunal has been informed by witnesses who should know that the forensic psychology department of the State Hospital has the best available resources within the secure forensic hospitals in Scotland to provide such psychotherapy. Indeed the evidence is this psychotherapy department has now focused its attention on G and has carried out the necessary groundwork in preparation for him undertaking appropriate sexual offending risk reduction work. In addition there is more likelihood of him engaging in this at the State Hospital.
>
> 127. All these factors lead the tribunal to the conclusion it is of maximum benefit to G that he should undertake such work at the State Hospital. Accordingly the Tribunal in the exercise of its discretion does not make an order in terms of s.264 of the Mental Health (Care and Treatment) (Scotland) Act 2003."

Submissions of the Parties

[8] Mr Leighton for the appellant submitted that that decision was flawed on three grounds: (i) it failed to have regard to the purpose of section 264 to alleviate the problem of patients trapped in conditions of excessive security identified in New Directions, Report on the Review of the Mental Health (Scotland) Act 1984, January 2001, Chairman The Right Honourable Bruce Millan – (Millan Report) – particularly paras 79-91; (ii) it depended upon the Tribunal taking irrelevant material, namely resources, into account, and (iii) in reaching it the Tribunal had failed in their obligation to have regard to the factors set out in section 1(3)(a) and (g) of the 2003 Act, namely the wishes of the appellant and the need to ensure that he was not treated less favourably than a non-patient. Once it had been decided that the appellant did not

require to be detained under the conditions of special security of the State Hospital, it followed that it was inherently desirable that he should be transferred into conditions of medium security. That was the logical result in light of the terms of section 1(4). It was only in exceptional circumstances that the Tribunal could refuse to make an order, such as if the patient did not wish to be transferred in a case in which the application was made by someone other than the patient. Under reference to *Lothian Health Board* v *BM* 2007 SCLR 478, Mr Leighton maintained that the availability of resources, including facilities for treatment, was an irrelevant factor. The Tribunal were bound to treat the appellant in the same way as a non-patient who would have the right to choose and accordingly to make what the Tribunal might consider to be a bad choice. It was not open to the Tribunal to exercise its discretion in favour of making no order on the ground that that would be of maximum benefit to the appellant.

[9] In his submission for the respondent Mr Campbell invited the court to distinguish the circumstances in *Lothian Health Board* v *BM*, that being a case where risk to the public was not an issue and the "resources" in question were the availability or otherwise of accommodation for the patient in a lower security establishment. The issue had also arisen there in relation to the Tribunal's determination of the first element or precondition of the test. In the present case the resources considered were the quality and depth of particular treatment available at the State Hospital. The appellant's submissions about the inherent desirability of moving him to medium secure accommodation and the very restricted discretion available to the Tribunal amounted to dilution of the two stage approach to a one stage decision. The reliance placed by the appellant on the purpose of the section was misplaced. There was no question of the appellant being "entrapped" at the State

Hospital. His refusal to agree to and undergo psychological intervention was a stumbling block. There was a far greater prospect of his becoming entrapped in a more intensive security environment in a different establishment. Mr Leighton's submissions about patient choice and non-discrimination were also misguided. There was agreement among the professionals that the appellant remained appropriately subject to a compulsion order and restriction order. His refusal to follow the treatment regime designed to reduce the risk that he might pose could not be equiparated to the decision of a person with full capacity and not subject to any restraint to make decisions about his physical treatment. The issue was in what surroundings the treatment should be administered and not whether that treatment was appropriate.

[10] For the Scottish Ministers Ms Poole submitted that the decision made by the Tribunal was fully justified by the material before them and the findings they made, and was one which it was within their discretion to make. The appellant's failure to engage in the treatment recommended made it impossible to gauge with confidence the degree of risk that he would pose to women should he continue to refuse to undertake the treatment proposed for him. The importance of sex offender reduction treatment was stressed in the findings made at paragraphs 122 to 126. She supported and supplemented the submissions for the respondent in relation to the relevance of resources and the distinguishing features of the case of *Lothian Health Board* v *BM*. She accepted that it was appropriate for the Tribunal to take account of the matters set out in section 1 of the 2003 Act, but submitted that the relevance of the various factors inevitably depended upon the circumstances before the Tribunal. In particular section 1(4) referred to "the minimum restriction on the freedom of the patient that is necessary in the circumstances". That had been wrongly described by Mr Leighton as

establishing a principle that the least restrictive option should be selected. The circumstances in which the most appropriate treatment might be administered, as well as the risk posed by the patient subject to a compulsory order and restriction order, were clearly relevant factors which had to be taken into account along with the patient's own wishes. It was clear from paragraph 121 of the Tribunal decision that the Tribunal had regard to the whole terms of section 1 of the 2003 Act as they were obliged to do. However not every factor mentioned in that section applied, and in particular the situation of the appellant could not be said to be "comparable" to that of a fully competent person with freedom to decide well or badly in relation to his own physical medical treatment. The Tribunal had a wide circumstance-dependent discretion which they had exercised properly.

Discussion and Decision

[11] In a carefully considered decision the Tribunal concluded, in relation to the first stage of the test, or the "precondition" as they described it, that the appellant did not require to be detained under conditions of special security that can be provided only in a State Hospital. They found the evidence of both Dr Crichton and Professor Cooke, who opposed any move from the State Hospital until such time as appropriate treatment and assessment had been undertaken, to be impressive. Against that they weighed the evidence of others, including Dr White, who was previously the appellant's responsible medical officer, and particularly Dr MacCall who, as current responsible medical officer, was seen by the Tribunal as knowing the patient well and who struck the Tribunal as a consultant who considered carefully issues affecting a patient before reaching a conclusion. In the end the Tribunal preferred the opinion of Dr MacCall and Dr White in deciding that the precondition was satisfied. Any

objective reader of the decision could be forgiven for concluding that the Tribunal's decision on that point could have gone either way. However that decision was not challenged by the Scottish Ministers as interested party in recognition of the role of the Tribunal as an expert adjudicating body which heard, took into account, and evaluated all the evidence presented to them.

[12] Having reached that difficult decision, the Tribunal embarked upon an equally careful analysis of the evidence in relation to the second part of the test, that is the question whether an order should be made. In doing so, I do not consider that they erred in any respect in their application of the law, nor that they left any relevant material out of account or took account of irrelevant material. Section 264(2) of the 2003 Act is written in very clear terms which grant to the Tribunal, in the event that they decide that the patient does not require to be detained under conditions of special security that can be provided only in a State Hospital, a discretion to decide whether in all the circumstances to make an order first of all declaring that the patient is being detained in conditions of excessive security and secondly specifying a period during which the duties under the subsequent subsections shall be performed. The terms of subsection 2 are that "the Tribunal may" make such an order, and are unqualified other than in respect of the precondition which was held to be satisfied. Of course the exercise of that discretion is subject to the general rules that apply to the exercise of any discretion, in particular that all relevant material should be taken into account and that material irrelevant to the exercise of discretion should be left out of account. That gives effect to the aim, articulated in the Millan Report, of avoiding the unnecessary detention or "entrapment" of patients in conditions of excessive security in the State Hospital.

[13] I reject the submission advanced on behalf of the appellant that, having regard to the purpose of section 264 to avoid entrapment of patients in conditions of excessive security and in light of the opinion of the Sheriff Principal in *Lothian Health Board* v *BM*, the treatment resources and facilities available in hospitals with varying levels of security were irrelevant to the Tribunal's consideration of the issue. The Tribunal heard the various differing opinions of a number of noted experts in the field of mental disorder who were aware of the need to administer further treatment to the appellant, the availability of treatment at both the State Hospital and the Orchard Clinic, and the physical security arrangements at both. These are factors relevant to the question whether an order in the terms identified above should be made. In the context these factors were plainly relevant to the assessment of the likely risk the appellant could pose in either situation. Thus the availability and quality of resources arose in a quite different way from that in which it arose in *Lothian Health Board* v *BM*. The Tribunal rightly shared the concerns of Drs MacCall and Crichton that the appellant was less likely to engage in treatment in a medium secure hospital, such as the Orchard Clinic, and was entitled to conclude that there was a risk that he would fail to engage in an appropriate psychotherapy course. That in turn gave rise to the possibility of "entrapment" in a medium secure environment where he would have to endure greater restrictions on his movements than he was experiencing at the State Hospital over the period of 12 to 18 months that the course might take to complete. It was, in my opinion, within the discretion of the Tribunal to decide that, having regard to the continuing undetermined nature of the risk the appellant might pose to women in an environment of medium security, and the uncertainty as to how that should be managed, and the greater prospect of the expeditious completion of a suitable course of treatment at the State Hospital, the appropriate course to follow was to make no

order. It was entirely consistent with the provisions of the section and indeed with common sense for the Tribunal to take the course that they considered would achieve the best outcome in the interests of all, including the women to whom he could pose a risk as well as the appellant himself, or in their words to take "the view that G remaining within the State Hospital and engaging with the psychology department there will achieve maximum benefit". The Tribunal's obligation to select the least restrictive option was qualified by the requirement that it should do so "so far as necessary".

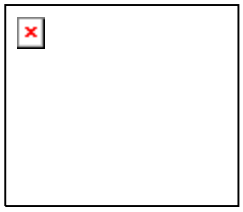
[14] I do not accept that the requirement upon the Tribunal to have regard so far as relevant to the facts as set out in section 1 of the 2003 Act meant that they were bound to accede to the wishes of the appellant to follow a course of action and make a choice that was inconsistent with the view of every expert as to the appropriate course to be followed in the interests of his wellbeing. His position as a patient in the State Hospital subject to a compulsion order and restriction order is not "comparable" to that of an individual with full mental capacity exercising his freedom of choice to make a bad decision about his own physical wellbeing. He is detained by order of the court *inter alia* to provide protection from harm to the public. The appellant's wishes are a factor to be taken into account by the Tribunal and plainly were. However, in the situation where he was recognised by every expert to pose an as yet not fully explored risk to females in certain circumstances and where that risk could be addressed by a course of treatment which he had been ambivalent about undertaking, but which was available in the environment in which he was then detained, his position was not comparable to that of the ordinary free citizen of full capacity. In paragraph 126, in words which accord with good sense and are entirely consistent

with the wise and careful exercise of discretion consistently with having regard to all relevant factors, the Tribunal said this:

> "The tribunal shares the views of the witnesses that G requires to undergo psychological intervention courses relating to sexual offending before he can make further progress through the forensic psychiatric hospital system. The Tribunal has been informed by witnesses who should know that the forensic psychology department of the State Hospital has the best available resources within the secure forensic hospitals in Scotland to provide such psychotherapy. Indeed the evidence is this psychology department has now focused its attention on G and has carried out the necessary groundwork in preparation for him undertaking appropriate sexual offending risk reduction work. In addition there is more likelihood of him engaging in this at the State Hospital."

The Tribunal gave clear and comprehensive reasons for the decision in that and the preceding paragraphs.

[15] For these reasons I propose to your Lordships that the appeal should be refused.



SECOND DIVISION, INNER HOUSE, COURT OF SESSION

Lord Justice Clerk
Lord Bonomy
Lord Brodie

[2011] CSIH 55
XA141/09

OPINION OF LORD BRODIE

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Appellant: Leighton; Drummond Miller LLP
Respondents (The Mental Health Tribunal for Scotland): K Campbell; Legal Secretary to Tribunal
Interested Party: (The Scottish Ministers): Poole; M Sinclair, Scottish Government Legal Directorate

23 August 2011

[16] For the reasons given by Lord Bonomy I agree that the appeal should be refused.