SHERIFFDOM OF GRAMPIAN HIGHLAND AND ISLANDS AT ABERDEEN

B694/11

INTERLOCUTOR AND NOTE

by

SHERIFF PRINCIPAL SIR STEPHEN S T YOUNG Bt QC

in the cause

AB

Appellant

against

MENTAL HEALTH TRIBUNAL FOR SCOTLAND

First Respondent

MS MARGARET COOPER

Second Respondent

and

DR SALLY WINNING

Third Respondent

Act: Ms J F Cartwright, advocate, instructed by Woodward Lawson, Aberdeen
Alt: (1) Mr R G Hunter, solicitor, Mental Health Tribunal for Scotland
(2) No appearance
(3) Ms L J Gillespie, advocate, instructed by Central Legal Office, NHS Scotland

Aberdeen: 24 October 2011

The sheriff principal, having resumed consideration of the cause, directs the convener of the Tribunal who presided at the hearing on 8 July 2011 in respect of the appellant to submit a report to this court within 21 days of today's date stating (1) whether or

not, before making a compulsory treatment order in respect of the appellant on 8 July 2011, the Tribunal considered the question whether it was necessary that the appellant should be detained in hospital and given medical treatment in accordance with Part 16 of the Mental Health (Care and Treatment) (Scotland) Act 2003 after 21 July 2011 and, if so, (2) what answer it gave to this question.

Note

[1] In this case the second respondent, who is a mental health officer, applied to the Mental Health Tribunal for Scotland under section 63 of the Mental Health (Care and Treatment) (Scotland) Act 2003 ("the Act") for a compulsory treatment order to be made in respect of the appellant. The Tribunal is the first respondent in this appeal, and the appellant's responsible medical officer when the application was made is the third respondent. At the conclusion of a hearing on 8 July 2011 the Tribunal granted the application and made a compulsory treatment order authorising for a period of 6 months beginning with that day the detention of the appellant in the Royal Cornhill Hospital, Aberdeen, and the giving to him, in accordance with Part 16 of the Act, of medical treatment - see sections 64(4)(a)(i) and 66(1)(a) and (b) of the Act. The appellant has now appealed to myself in pursuance of section 320(1)(b) and (2) of the Act on the ground that the Tribunal's decision was based on an error of law - see section 324(2)(a) of the Act.

[2] The background to this appeal is that on 17 June 2011 the appellant's then responsible medical officer granted a short-term detention certificate in respect of the appellant under section 44(1) of the Act. This authorised the detention of the appellant in hospital for a period of 28 days beginning with that day and the giving to him, in accordance with Part 16 of the Act, of medical treatment - see section 44(1) and (5)(b)(ii) and (c). (The appellant was already in hospital when the certificate was granted). In the normal course of events therefore, unless it was revoked or extended, the certificate would have expired at midnight on 14 July 2011. But in this case, since

the application under section 63 of the Act was made by the second respondent before 14 July 2011, the effect of section 68 of the Act was to authorise the appellant's detention for a further period of 5 days, beginning with the expiry of the period of detention authorised by the short-term detention certificate, and the giving to the appellant, in accordance with Part 16 of the Act, of medical treatment - see section 68(1) and (2). In terms of section 68(3), in reckoning this period of 5 days there was to be left out of account any day which was not a working day, and I did not understand it to be in dispute that the effect of this would have been to authorise the appellant's detention in hospital until midnight on 21 July 2011 had the short-term detention certificate not been revoked on the making of the compulsory treatment order on 8 July 2011 - see section 70 of the Act.

[3] Section 64(4)(a) of the Act provides that the Tribunal may make a compulsory treatment order if satisfied that all of the conditions mentioned in section 64(5) are met. These conditions are:

> (a) that the patient has a mental disorder;
> (b) that medical treatment which would be likely to-
> (i) prevent the mental disorder worsening; or
> (ii) alleviate any of the symptoms, or effects, of the disorder,
> is available for the patient;
> (c) that if the patient were not provided with such medical treatment there would be a significant risk-
> (i) to the health, safety or welfare of the patient; or
> (ii) to the safety of any other person;
> (d) that because of the mental disorder the patient's ability to make decisions about the provision of such medical treatment is significantly impaired;
> (e) that the making of a compulsory treatment order in respect of the patient is necessary; and
> (f) where the Tribunal does not consider it necessary for the patient to be detained in hospital, such other conditions as may be specified in regulations.

In this case the Tribunal stated in its written decision that it was satisfied that the conditions mentioned in paragraphs (a) to (e) were met. It evidently did consider it

necessary for the appellant to be detained in hospital, so paragraph (f) did not apply in this case.

[4] In its application to the circumstances of this case, section 1(1) of the Act provides in short that section 1(4) applies whenever a person is discharging a function by virtue of the Act in relation to a patient who has attained the age of 18 years (which the appellant has). It is not in dispute that in considering whether to make a compulsory treatment order in respect of the appellant the Tribunal was discharging a function by virtue of the Act, and the effect of section 1(4) was that, after having regard to certain specified matters, the Tribunal was required to discharge its function in the manner that appeared to it to be the manner that involved the minimum restriction on the freedom of the appellant that was necessary in the circumstances. In this particular case it is plain (and in my opinion, contrary to the submission of counsel for the third respondent, did not require proof) that the compulsory treatment order made by the Tribunal involved a greater restriction on the freedom of the appellant than the short-term detention certificate since the former authorised the detention of the appellant in hospital for a period of 6 months beginning on 8 July 2011 whereas the authority for his detention in hospital in pursuance of the short-term detention certificate and thereafter section 68 would have expired, at the latest, at midnight on 21 July 2011. So in terms of section 1(4), before making the compulsory treatment order, the Tribunal had to be satisfied that the greater restriction on the appellant's freedom which that order implied, as compared with the restriction implied by the short-term detention certificate and section 68, was necessary in the circumstances. In practice in the context of this particular case I doubt if this requirement added anything to the requirement that, before making a compulsory treatment order, the Tribunal had in any event to be satisfied that the making of such an order in respect of the appellant was necessary - see section 64(4)(a) and (5)(e).

[5] The application to the Tribunal was accompanied by medical reports by the third respondent and the appellant's general practitioner and by a separate report by the second respondent. In short these all recommended that the appellant should be made the subject of a compulsory treatment order and that the measures authorised by the order should be the detention of the appellant in hospital and the giving to him of medical treatment in accordance with Part 16 of the Act.

[6] At the hearing on 8 July 2011, in addition to these reports, the Tribunal heard oral evidence from various persons including the second and third respondents, both of whom confirmed their support for the application. Referring to their evidence, the Tribunal in its written decision stated:

> Both Dr Winning and Ms Cooper are experienced in their respective professional fields and we accept their evidence, which was not challenged.

[7] At the conclusion of the evidence the Tribunal heard a submission by the appellant's solicitor, Mr Woodward-Nutt. What happened then is narrated in the written decision as follows:

> Mr Woodward-Nutt, in his submission asked us to either refuse the application or to adjourn the hearing for a period of ten days or so. While conceding that he was not in a position to contradict the evidence led in respect of the first four criteria, he submitted that the necessity criterion was not satisfied. He based this contention on the fact that the section 44 certificate was not due to expire until the 14th of July. Thus, he suggested, it was premature to grant a compulsory treatment order until the short-term detention certificate expired.
>
> The Tribunal rejected this argument on the basis that necessity related to the need to treat the patient other than informally and that in granting an order in terms of section 63, the section 44 certificate would cease to have effect.
>
> The Tribunal decided, after considering all the evidence submitted, to grant the application for a compulsory treatment order in respect of (the appellant), authorising his detention within Royal Cornhill Hospital, Aberdeen, and giving him medical treatment in accordance with Part 16 of the Act. In doing so, the Tribunal found, unanimously, that the criteria set out within section 64(5) of the Act are met in their entirety as follows:-

The Tribunal then set out the terms of paragraphs (a) to (e) of section 64(5) and explained in relation to each of these paragraphs why it was satisfied that the criteria set out therein were met. In particular in relation to paragraph (e) the Tribunal stated:

> *(e) That the making of a compulsory treatment order in respect of the patient is necessary:*
>
> (The appellant) has refused medication and as a result is too unwell to be treated anywhere other than in a hospital setting and we conclude that a hospital-based order continues to be appropriate and to represent the least restrictive option for him.

[8] The making of the submission by the appellant's solicitor in relation to paragraph (e) is described in a little more detail article 5 of the condescendence in this appeal which reads:

> After hearing evidence in this case the applicant's solicitor submitted that taking into account the fact that the existing STDC (as extended) still had over 13 days until it would expire, the fact that the appellant could continue to be treated under the STDC as he would do under the proposed CTO, and the principle of minimal intervention set out in section 1 of the Act, the Tribunal could not be satisfied with regard to the "necessity criteria" under section 64(4)(e) of the Act. The appellant's solicitor accordingly invited the Tribunal to either adjourn the hearing and continue consideration of the application for a period of up to 13 days or to refuse the application.

The response to these averments of the Tribunal was as follows:

> Admitted under explanation that the appellant's solicitor invited the Tribunal to adjourn the hearing for about 10 days.

(In passing, I note that the response of the third respondent is "Not known and not admitted". It is not altogether clear from the Tribunal's written decision whether the third respondent, having given evidence, was still present when the appellant's

solicitor made this submission. If she was, then I would regard her unqualified response as lacking the candour that ought to characterise the pleadings in an appeal such as this).

[9] Three pleas in law were stated on behalf of the appellant. Each of them proposed a different outcome to the appeal. But all three were founded upon the same premise, namely that the decision of the Tribunal to make a compulsory treatment order was based on an error of law. The third of these pleas is in the following terms:

> 3. The decision of the Tribunal at the said hearing being based on error in law, the decision to grant a CTO should be set aside and the case should be remitted back to the Tribunal for consideration anew with a direction that the Tribunal be differently constituted from when it made the previous decision in this case.

[10] At the hearing of the appeal counsel for the appellant submitted that I should sustain this plea and remit the case to the Tribunal for reconsideration accordingly. It was said in short that the Tribunal had erred in law in its interpretation of the word "necessary" where it appeared in section 64(5)(e) of the Act and that the making of a compulsory treatment order in respect of the appellant had not been necessary since the short-term detention certificate, and thereafter the extension of time authorised by section 68, meant that the appellant could continue to be detained in hospital and treated in accordance with Part 16 of the Act for a further period of 13 days after 8 July 2011. It was pointed out that the appellant had responded well to treatment in the past and it was said that the Tribunal had had no evidence before it to the effect that the treatment which he was then receiving would not be successful within the next 10 to 13 days. It was submitted that by the time that period had expired he might have been treated successfully, and hence that it had not been necessary to grant the compulsory treatment order on 8 July 2011. It was said too that the Tribunal had erred in law by failing to consider whether the appellant's need for treatment at that time could be met by other less restrictive means such as a continuation of the hearing with the appellant continuing to be detained under the short-term detention certificate and thereafter the extension authorised by section 68.

[11] The solicitor for the Tribunal submitted that it had not erred in law and that the appeal should be refused accordingly. He pointed out that the effect of section 44(1)(b) and (2) was that the patient could not be made subject to successive short-term detention certificates, and he indicated that it was common for a compulsory treatment order to be granted in respect of a patient before the expiry of a short-term detention certificate (in which case the latter was treated as having been revoked - see section 70 of the Act). Under reference to sections 44(4) and 64(5) he pointed out that the criteria for granting a short-term detention certificate and making a compulsory treatment order were different, and further under reference to sections 44(5), 64(4) and 66(1) that the measures that might be authorised by these two disposals differed. He posed the question upon what basis a compulsory treatment order might be thought to be more restrictive than a short-term detention certificate, and he rejected the contention that the former would always be more restrictive than the latter.

[12] Counsel for the third respondent likewise submitted that there had been no error of law on the part of the Tribunal and that the appeal should therefore be refused. She submitted that the Tribunal had asked itself the correct question, namely whether a compulsory treatment order was necessary, and had concluded that it was. In so doing the Tribunal had applied the correct test in construing the word "necessary" in section 64(5)(e), namely that treatment required to be given to the patient compulsorily rather than on an informal basis. There was nothing in the statutory provisions which prevented the Tribunal from determining an application for a compulsory treatment order while a short-term detention certificate was still in force. At the hearing on 8 July 2011 the appellant had not challenged the evidence of the second and third respondents to the effect that he was in need of compulsory measures. He had a history of failing to take medication or attend medical appointments. Without compulsion and observation he might attempt to leave the hospital, which would not be in his interests. It had been submitted on his behalf that the Tribunal should either adjourn the hearing until the date when the short-term detention certificate had been due to expire, or else refuse the application. The Tribunal had been correct to reject this. To have adjourned the hearing would have served no practical purpose. The appellant would have remained in detention and in need of compulsory care. If, on resuming consideration, the Tribunal had then decided to make a compulsory treatment order, the total period of detention (under the short-term detention

certificate, then section 68 and then the compulsory treatment order) would in all likelihood have been longer than if a compulsory treatment order had been made sooner. To have refused the application would have required the second respondent to submit a fresh application, with consequent waste of time and resources.

[13] In my opinion it was perfectly competent for the Tribunal to have made a compulsory treatment order in respect of the appellant when it did, and I did not understand his counsel to have suggested otherwise. But before making such an order the Tribunal had to be satisfied that this was necessary - see section 64(5)(e) - and that it would involve the minimum restriction on the freedom of the appellant that was necessary in the circumstances - see section 1(4). According to its written decision, the Tribunal rejected the appellant's solicitor's submission that it should either adjourn the hearing and continue consideration of the application for up to 10 (or it may have been 13) days or else refuse it for two reasons. These were (i) that "necessity related to the need to treat the patient other than informally", and (ii) that "in granting an order in terms of section 63, the section 44 certificate would cease to have effect".

[14] I confess that I do not understand the second of these reasons. It is true that, upon the making of a compulsory treatment order in respect of a patient who is then in hospital under the authority of a short-term detention certificate, the certificate is revoked - see section 70. But I do not see how it can be said that this of itself supports either the contention that the making of a compulsory treatment order in respect of the appellant was necessary in the circumstances or the rejection of the submission of the appellant's solicitor.

[15] As for the first reason advanced by the Tribunal, I agree that in order to satisfy the test of necessity in sections 1(4) and 64(5)(e) of the Act it has to be shown that it is necessary that a patient should be treated, as the Tribunal put it, "other than informally", in other words compulsorily. But the compulsory element is present in both a short-term detention certificate and a compulsory treatment order. In order to demonstrate that the making of a compulsory treatment order is necessary it has to be shown, not merely that the patient needs to be treated compulsorily (which can be achieved as well by a short-term detention certificate as by a compulsory treatment order), but also that he or she needs to be treated compulsorily either (a) for a period

longer than that allowed by a short-term detention certificate and any extension authorised under section 68 or (b) subject to measures which can be authorised in pursuance of a compulsory treatment order but not in pursuance of a short-term detention certificate - or of course on the basis of both (a) and (b). So it was not enough that the Tribunal in this case should have been satisfied that it was necessary to treat the appellant "other than informally", that is on a compulsory basis. The possibility of such compulsory treatment was already assured until midnight on 21 July 2011 by virtue of the existing short-term detention certificate and the extension authorised by section 68. As indicated in paragraph [5] above, it was not suggested in this case that any measures were necessary over and above those which could be authorised in pursuance of a short-term detention certificate, in other words detention in hospital and the giving of medical treatment in accordance with Part 16 of the Act. The only advantage, if one may so describe it, of making a compulsory treatment order in this case was that the appellant could be compelled to submit to these measures after 21 July 2011. So what the Tribunal had to ask itself was whether the making of a compulsory treatment order was necessary in order to secure that compulsory treatment continued to be authorised after 21 July 2011. In other words, was it necessary that the appellant should be detained in hospital and given medical treatment in accordance with Part 16 of the Act after 21 July 2011?

[16] The difficulty in this case is that I do not think that one can be confident that the Tribunal did ask this question, let alone answer it in the affirmative. I say this since it was implicit in the submission made by the appellant's solicitor to the Tribunal on 8 July 2011 (especially as this submission is recounted in article 5 of the condescendence and admitted by the Tribunal) that the appellant might so far recover by midnight on 21 July 2011 as no longer to be in need of compulsory treatment thereafter. If that were to have been the case, then the making of a compulsory treatment order would not have involved the minimum restriction on the freedom of the appellant that was necessary in the circumstances since such an order would have authorised compulsory treatment for a period of up to 6 months when all that was required was compulsory treatment until, at the latest, 21 July 2011 (which would have been secured by the short-term detention certificate and the extension authorised by section 68). The obvious answer to this submission would have been that the Tribunal was satisfied, not merely that it was necessary that the appellant should

receive compulsory treatment, but that it was necessary also that he should receive such treatment for a period of time after 21 July 2011. The Tribunal was evidently satisfied on the first of these matters. But the omission of any explicit statement in the written decision, in response to the appellant's solicitor's submission, that it was satisfied, as it had to be, on the second as well tends to suggest that the Tribunal did not address this point. For, if it had done so, it would surely have said so in order to explain why the submission of the appellant's solicitor had been rejected. On the other hand there is the statement which the Tribunal did make at the end of its written decision under reference to section 64(5)(e) which I have quoted at the end of paragraph [7] above. Read in isolation this would tend to suggest that the Tribunal was satisfied that the appellant's detention in hospital after 21 July 2011 was necessary.

[17] In other circumstances I think that I might have resolved this uncertainty by concluding that the Tribunal had not addressed this particular issue. Had I done so, I should have allowed the appeal, set aside the decision of the Tribunal to make a compulsory treatment order and remitted the case to the Tribunal for consideration anew with a direction that the Tribunal be differently constituted from when it made the original decision. But it was pointed that, if I were to do this, the basis upon which the appellant could be required to submit to compulsory treatment would immediately fall notwithstanding that it might be in his interests that he should continue to be subject to such treatment. The fact that these proceedings are conceived as much for the benefit of the patient as for any other person is I think an important consideration and justifies the taking of a more informal and pragmatic approach to the resolution of this uncertainty. It will be recalled that this appeal takes the form of a summary application, and rule 2.31 of the Summary Applications and Appeals etc Rules 1999 allows me to make such order as I think fit for the progress of a summary application in so far as this is not inconsistent with section 50 of the Sheriff Courts (Scotland) Act 1907. In the circumstances I have decided that the appropriate course would be to direct the convener of the Tribunal who presided at the hearing on 8 July 2011 in respect of the appellant to submit a report to this court within 21 days of today's date stating (1) whether or not, before making a compulsory treatment order in respect of the appellant on 8 July 2011, the Tribunal considered the question whether it was necessary that the appellant should be detained in hospital and given medical

treatment in accordance with Part 16 of the Act after 21 July 2011 and, if so, (2) what answer it gave to this question. Thereafter, depending on what answers are given by the convener, I would anticipate that I shall be in a position to decide the appeal one way or the other.

SHERIFFDOM OF GRAMPIAN HIGHLAND AND ISLANDS AT ABERDEEN

B694/11

JUDGEMENT

of

SHERIFF PRINCIPAL SIR STEPHEN S T YOUNG Bt QC

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AB

Appellant

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MENTAL HEALTH TRIBUNAL FOR SCOTLAND

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Act: Ms J F Cartwright, advocate, instructed by Woodward Lawson, Aberdeen
Alt: (1) Mr R G Hunter, solicitor, Mental Health Tribunal for Scotland
(2) No appearance
(3) Ms L J Gillespie, advocate, instructed by Central Legal Office, NHS Scotland

Aberdeen: 17 November 2011

The sheriff principal, having resumed consideration of the cause and seen the note dated 8 November 2011 by the convener of the Tribunal who presided at the hearing on 8 July 2011 in respect of the appellant, sustains the first plea in law for each of the

first and third respondents, repels the pleas in law for the appellant and refuses the appeal; finds the appellant liable to the first and third respondents in the expenses of the appeal but modifies his liability therefor as an assistant person to nil; certifies the appeal as suitable for the employment by the appellant and the third respondent of junior counsel.

Note

[1] This note should be read in conjunction with the note appended to my interlocutor dated 24 October 2011. I have now seen the note dated 8 November 2011 by the convener of the Tribunal who presided at the hearing on 8 July 2011 in respect of the appellant. In it she records that she had considered the terms of both my interlocutor dated 24 October 2011 and the note appended thereto and had provided copies of these documents to her fellow members of the Tribunal. She then states:

> It is the clear recollection of the three members of the Tribunal that before making the compulsory treatment order referred to, consideration was given to the question whether it was necessary that the appellant should be detained in hospital and given medical treatment in accordance with Part 16 of the Mental Health (Care and Treatment) (Scotland) Act 2003 after 21 July 2011.
>
> The answer given to the question was in the affirmative.
>
> In view of the evidence presented to us in relation to the severity of his mental disorder, we were left in no doubt that the appellant would require to be detained and provided with treatment for a longer period than the remainder of the section 44 certificate would allow, even if extended in terms of section 68 of the Act.

> In the event of a significant improvement in the appellant's mental health, we were also mindful of the power available to (the third respondent) to suspend, revoke or vary the compulsory treatment order at any time before its expiry.

[2] In light of these comments I am quite satisfied that the Tribunal did not err in law in granting a compulsory treatment order in respect of the appellant. And I might add here that I am satisfied too that there was sufficient evidence before the Tribunal in the two mental health reports by the third respondent and the appellant's general practitioner respectively and the report by the second respondent, as amplified at the hearing itself by the oral evidence of the second and third respondents, to entitle the Tribunal to conclude that the making of a compulsory treatment order in respect of the appellant was necessary and that the greater restriction on the appellant's freedom which the order implied, as compared with the restriction implied by the short-term detention certificate and section 68, was necessary in the circumstances. I have therefore refused the appeal.

[3] It was not in dispute that in this event I should find the appellant liable to the first and third respondents in the expenses of the appeal but should modify his liability therefor as an assistant person to nil, and also that I should certify the appeal as suitable for the employment of junior counsel. I am satisfied that this is appropriate in the circumstances.

[4] For the sake of completeness it may be of interest to mention that after copies of my interlocutor and note dated 24 October 2011 had been issued to the parties the appellant's solicitor asked to address the court. This I allowed him to do at a hearing that I was able to arrange at short notice on 27 October 2011. The solicitor for the first respondent also appeared at this hearing. The third respondent was not represented, her solicitor having previously indicated that he had no objection to the procedure outlined in the note appended to my earlier interlocutor and that the third respondent was content not to be present or represented at the forthcoming hearing.

[5] Before this hearing I was under the impression that the question for consideration would be whether on the one hand only a copy of my interlocutor dated 24 October 2011 should be sent to the convener of the Tribunal or whether on the other hand

copies of both the interlocutor and the note appended thereto should be sent to her. I had gained this impression in light of an exchange of e-mails, the salient parts of which were as set out in the following paragraph.

[6] On 25 October 2011 the appellant's solicitor (Mr Woodward-Nutt) sent my secretary an e-mail in which he stated, *inter alia*:

> There is some doubt as to how matters should proceed with regards to further communications with the convenor of the tribunal who made the decision forming the subject matter of this appeal. Are you able to clarify with the Sheriff Principal whether it is simply the interlocutor or both the interlocutor and the note that is to be put to the convenor? My feeling was that the Sheriff Principal intended simply for the interlocutor containing the two questions to be intimated, presumably so as to ensure there is no possibility that the response to the questions could be influenced by the details contained within the note ..... I believe that Mr Hunter may take a contrary view to my own.
>
> Could you please seek clarification from the Sheriff Principal and thereafter revert to myself and Mr Hunter? Mr Hunter has kindly undertaken to hold off intimation to the convenor until we hear from you further.

My secretary forwarded this e-mail to me and I responded *inter alia* as follows:

> I had envisaged that both the interlocutor and note would be intimated to the convener. It seems to me that she is entitled to an explanation why the questions are being asked. But they are quite straightforward questions of fact, and I take it that Mr W-N is not suggesting that she would give anything other than honest answers to them or that she would compromise her integrity by allowing her answers to be influenced by what she reads in the note. I am not sure whether, as a MHTS convener, she has to take the judicial oath. But I would certainly expect her to adhere to the standards to be expected of any judicial office-holder when she is acting as a convener.

> If Mr W-N is not happy about both the interlocutor and note being intimated to the convener, I should be willing to hear him and the other parties .....
>
> By all means copy this response to everyone please.

My secretary duly copied my response to the parties' solicitors and shortly afterwards the first respondent's solicitor sent an e-mail to my secretary as follows:

> It may be helpful for Mr Woodward-Nutt, in considering the Sheriff Principal's remarks ..... , to be aware that members of the Tribunal are covered by the Statement of Principles of Judicial Ethics for the Scottish Judiciary.
>
> http://www.scotland-judiciary.org.uk/Upload/Documents/Principles.pdf
>
> I trust that this will be sufficient to satisfy Mr Woodward-Nutt and thus avoid the effort and expense of a hearing to determine this matter.

But this was evidently not enough to satisfy the appellant's solicitor for he then sent an e-mail to my secretary saying that he would be very grateful to have the opportunity to be heard by myself on the point.

[7] In the event at the hearing on 27 October 2011 the appellant's solicitor moved that I should recall my interlocutor dated 24 October 2011 and proceed without further ado to dispose of the appeal or alternatively that I should remit the appeal to the Court of Session. In short he submitted under reference to *Harper of Oban (Engineering) Ltd v Henderson* 1988 JC 103 that it was wrong that the Tribunal should get a second bite of the cherry, so to speak. He pointed out that the Tribunal was a party to the appeal, but emphasised that he was not suggesting that the members of the Tribunal would in fact deal inappropriately with the matter in response to my interlocutor of 24 October 2011. But he reminded me that the members of the Tribunal were not required to take the judicial oath and he submitted that an informed observer, looking at the matter objectively, might conclude that justice would not be done if the course of action outlined in my interlocutor were to be followed. He drew attention to the statement in paragraph [17] of my earlier note in which I had explained that it had been pointed out that, if I were to allow the appeal and set aside the decision of the

Tribunal to make a compulsory treatment order in respect of the appellant, the basis upon which he could be required to submit to compulsory treatment would immediately fall notwithstanding that it might be in his interests that he should continue to be subject to such treatment. He suggested with reference to section 324(5)(a) of the Act that Parliament must have been aware that an inevitable consequence of allowing an appeal in a case such as this would be to remove the basis upon which a patient could be required to submit to compulsory treatment, and he submitted that the procedure outlined in my interlocutor of 24 October 2011 constituted an attempt on my part to circumnavigate the intentions of Parliament.

[8] In response the solicitor for the first respondent submitted in short that I should refuse both the appellant's motions. He referred here to *T v Mental Health Tribunal for Scotland* (Airdrie Sheriff Court, 28 July 2008, unreported) and the decision of an Extra Division of the Court of Session in what is described in an e-mailed transcript (which I was shown) of the opinion of the court as an "Appeal to the Court of Session by the Scottish Ministers under section 322 of the 2003 Act against a decision of the Mental Health Tribunal for Scotland in the case of M" (M's full name is stated in the e-mail but not the date of the opinion or the precise name of the case).

[9] I had no difficulty in deciding to refuse both the motions for the appellant - and in saying this I am assuming for the moment that it would actually have been competent for me to have recalled my interlocutor of 24 October 2011. It might have been a different matter if I had suggested in my earlier note how the convener of the Tribunal should answer the questions which had been posed in this interlocutor. But I had not done this. I had put to her two straightforward questions of fact, and it seemed to me to be wrong to suggest, to borrow the language of the Lord Justice Clerk (Ross) in the final paragraph of the opinion of the court in *Harper of Oban (Engineering) Ltd v Henderson*, that the circumstances were such as to create in the mind of a reasonable man a suspicion that the convener would not answer these questions honestly and impartially, uninfluenced by the terms of my note.

[10] In addition to refusing both the appellant's motions in the interlocutor which I pronounced at the end of the hearing on 27 October 2011, I directed for the avoidance of doubt that copies of both the interlocutor dated 24 October 2011 and the note

appended thereto should be transmitted to the convener of the Tribunal who had presided at the hearing on 8 July 2011 in respect of the appellant. I also refused the motion which was made by his solicitor for leave to appeal to the Court of Session. At that stage of course I did not know how the convener would answer the questions which had been put to her. It seemed to me in the circumstances that it would be much more sensible that I should receive her answers and dispose of the appeal in light of them. Thereafter, if the appeal were to be refused, the appellant would be free to appeal against my decision to the Court of Session without leave in terms of section 321(1) of the Act. If, on the other hand, I were to allow the appeal in light of the convener's answers, there would be no need for the appellant to appeal to the Court of Session in any event.