EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

Lord Reed
Lord Carloway
Lord Marnoch

[2009] CSIH 66
XA188/07

OPINION OF LORD REED

in the appeal by

by

THE SCOTTISH MINISTERS
Appellants;

against

a decision of THE MENTAL HEALTH TRIBUNAL FOR SCOTLAND
First Respondents;

and

M M
Second Respondent:

_____

Appellants: Johnston, Q.C.; Miss Poole; Scottish Government Legal Directorate
First respondents: Miss Dunlop, Q.C.; K Campbell; Solicitor to the Mental Health Tribunal
Second Respondent: Murray; Drummond Miller LLP

23 July 2009

[1] I gratefully adopt Lord Carloway's account of the background to this appeal. I agree that the appeal must be allowed on the ground that the Tribunal has failed to provide adequate reasons for its decision. In that regard, I respectfully agree with paragraphs 39 to 42 of your Lordship's Opinion.

[2] In the circumstances, it is unnecessary to consider the remaining grounds of appeal, and in particular those which turn upon the interpretation of section 193 of the Mental Health (Care and Treatment) (Scotland) Act 2003 as amended. From one perspective, this may be regarded as unfortunate. It was common ground between

counsel for the Tribunal and counsel for the Scottish Ministers that there were aspects of the recent decision in *Scottish Ministers* v *The Mental Health Tribunal for Scotland* 2009 SLT 273 ("the *JK* case") which might merit further consideration. It may be of some value, in the circumstances, to record the questions which were raised in relation to the *JK* case, and some further questions which may also merit consideration.

[3] Section 193 is concerned with the powers of the Tribunal where an application or reference is made to it under other provisions of the Act, and with the procedure to be followed. For present purposes the important provisions are those concerning the powers of the Tribunal, which are contained in subsections (2) to (7). Each of these subsections requires the Tribunal to make a specified order (or, in the case of subsection (2), not to make an order) if it is satisfied or not satisfied (as the case may be) of certain specified matters. It can be inferred that, when an application or reference is made, the Tribunal should consider the matters which are specified and decide whether or not it is satisfied in relation to those matters; and, depending on that decision, it is then directed by subsections (2) to (7) as to the order which it must make (or, in the case of subsection (2), must not make). For example, subsection (3) provides:

> "(3) If the Tribunal is not satisfied that the patient has a mental disorder, the Tribunal shall make an order revoking the compulsion order".

It is apparent therefore that the Tribunal should consider whether it is satisfied that the patient has a mental disorder; and, if it is not so satisfied, it must make an order revoking the compulsion order, as directed by subsection (3). If, on the other hand, the Tribunal *is* satisfied that the patient has a mental disorder, then the order which it must make (or not make, as the case may be) depends upon its findings in relation to other specified matters. For example, subsection (2) provides:

> "(2) If the Tribunal is satisfied -
>
> (a) that the patient has a mental disorder; and

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

it shall make no order under this section".

It is apparent therefore that, as well as considering the matter mentioned in subsection 2(a) (which is also of course mentioned in subsection (3)), the Tribunal should also consider the matter mentioned in subsection 2(b); and, if it is satisfied of both matters, it is directed to make no order under the section.

[4] Subsections (4) to (7) are broadly similar in structure, and operate in a similar way. The manner in which they are expressed however gives rise to difficulties of interpretation. For example, subsection (4) provides:

"(4) If the Tribunal -

(a) is satisfied that the patient has a mental disorder; but

(b) is not satisfied -

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

(ii) either

(A) that the conditions mentioned in paragraphs (b) and (c) of section 182(4) of this Act continue to apply in respect of the patient; or

(B) that it continues to be necessary for the patient to be subject to the compulsion order,

it shall make an order revoking the compulsion order".

Subsection (4)(a) directs the Tribunal's attention to the same matter as is mentioned in subsections (2)(a) and (3); and subsection (4)(b)(i) seemingly directs its attention to the same matter as subsection (2)(b). Subsection (4)(b)(ii) introduces two additional matters. One question which arises is how subsection (4)(b) should be interpreted. Does it, for example, apply only if the Tribunal is not satisfied of each of the matters mentioned in (b)(i), (b)(ii)(A) and (b)(ii)(B); or does it apply only if the Tribunal is not satisfied of the matter mentioned in (b)(i) and of one or other (but not both) of the matters mentioned in (b)(ii)(A) and (b)(ii)(B); or does it apply in both of the situations just described?

[5] Subsection (5) is not quite as complex in structure, but it raises a similar problem. It provides:

> "(5) If the Tribunal -
> (a) is satisfied -
> (i) that the conditions mentioned in section 182(4) of this Act continue to apply in respect of the patient; and
> (ii) that it continues to be necessary for the patient to be subject to the compulsion order; but
> (b) is not satisfied -
> (i) that, as a result of the patient's mental disorder, it is necessary, in order to protect any other person from serious harm, for the patient to be detained in hospital, whether or not for medical treatment; and
> (ii) that it continues to be necessary for the patient to be subject to the restriction order,
> it shall make an order revoking the restriction order".

Does subsection (5)(b) apply only if the Tribunal is not satisfied of each of the matters mentioned in (b)(i) and (b)(ii); or does it apply if the Tribunal is not satisfied of one or other of those matters? The former view appears to me to be correct; and that was also the conclusion reached by the court in the *JK* case, as I understand the decision, although it appears that the language in which the court expressed its conclusion, in describing the "and" which links subsection (5)(b)(i) to (b)(ii) as disjunctive rather than conjunctive, may have been misinterpreted. It is however difficult to analyse the structure of such complex provisions using ordinary language. Provisions such as subsections (4) and (5) might be a suitable exercise for a university class in logic, where they could be analysed using the language and tools of formal logic. Counsel, in addressing the court in the present case, resorted to algebra. It is unfortunate that legislation should be so resistant to ordinary comprehension.

[6] Subsection (6) introduces another problem. It provides:

> "(6) If the Tribunal -
> (a) makes an order, under subsection (5) above, revoking the restriction order; and
> (b) is satisfied that the compulsion order should be varied by modifying the measures specified in it,
> it shall make an order varying the compulsion order in that way".

If subsection (6)(a) is applicable, the Tribunal must be satisfied that it continues to be necessary for the patient to be subject to the compulsion order: otherwise, subsection (5)(a)(ii) would not apply, and the Tribunal could not make an order revoking the restriction order. It appears, therefore, that the Tribunal can be satisfied that it continues to be necessary for the patient to be subject to the compulsion order, and yet can simultaneously be satisfied, in terms of subsection (6)(b), that the compulsion order should be varied by modifying the measures specified in it. In the present case, for example, the compulsion order specifies that the patient should be detained in hospital. Can the Tribunal be satisfied in terms of subsection (5)(a)(ii) if it is not satisfied that it is necessary for the patient to be detained in hospital? The language of subsection (5)(a)(ii) ("*the* compulsion order", rather than "*a* compulsion order") might be thought to suggest not; but, as I have explained, subsection (6) seems to imply that satisfaction that the compulsion order is necessary can co-exist with satisfaction that it should be varied. This can have a bearing, in a case such as the present, on the question whether satisfaction in terms of subsection (5)(a)(ii) can reasonably co-exist with non-satisfaction in terms of subsection (5)(b)(i) (which also refers to the detention of the patient in hospital).

[7] Subsection (7) raises further questions. It provides:

> "(7) If the Tribunal -
>
> (a) is satisfied -
>
> (i) that the conditions mentioned in section 182(4) of this Act continue to apply in respect of the patient; and
>
> (ii) that it continues to be necessary for the patient to be subject to the compulsion order and the restriction order; but
>
> (b) is not satisfied -
>
> (i) that, as a result of the patient's mental disorder, it is necessary, in order to protect any other person from serious harm, for the patient to be detained in hospital, whether or not for medical treatment; and
>
> (ii) that it is necessary for the patient to be detained in hospital,
>
> the Tribunal may make an order that the patient be conditionally discharged and impose such conditions on that discharge as it thinks fit".

This raises the now familiar question as to how one should interpret a provision in the form of subsection (7)(b). A question also arises as to how one should interpret the requirement that the Tribunal be satisfied that it continues to be necessary for the patient to be subject to the compulsion order: in this context, unlike the context of subsection (5), there is no possibility of the compulsion order being varied, since *ex hypothesi* the restriction order is not to be revoked. Does one therefore in this context consider the necessity of the compulsion order on the basis that it cannot be modified, but in the context of subsection (5) consider the same question on the basis that the order may be varied? A similar point also arises in relation to subsection (4)(b)(ii)(B).

[8] A further question concerns how the Tribunal is to go about its consideration of the question whether it continues to be necessary for the patient to be subject to the restriction order. In the *JK* case, the court said that the Tribunal must consider historical and policy considerations, the historical considerations being the matters which were in contemplation, under the legislation then in force, at the time the original order was imposed. Your Lordship suggests at paragraph 44 that the Tribunal requires to have regard to the same factors as are relevant when such an order is imposed by a court under sections 59 of the Criminal Procedure (Scotland) Act 1995. This a question which may benefit from further consideration in an appropriate case.

[9] In the light of subsections (3) to (7), a fundamental question also arises as to the purpose and meaning of subsection (2). Subsection (3) applies only if the Tribunal is not satisfied that the patient has a mental disorder: if that condition is met, it follows that subsection (2) cannot apply, since it applies only if the Tribunal is satisfied that the patient has a mental disorder. Subsections (4), (5), (6) and (7) apply only if the Tribunal is not satisfied that, as a result of the patient's mental disorder, it is necessary, in order to protect any other person from serious harm, for the patient to be

detained in hospital, whether or not for medical treatment: that condition is imposed by subsections (4)(b)(i), (5)(b)(i) and (7)(b)(i), and subsection (6) only applies if subsection (5) applies. If that condition is met, it would appear to follow that subsection (2) cannot apply, since it applies only if the Tribunal *is* satisfied of the same point. What, then, is the purpose of subsection (2)? On the face of things, it directs the Tribunal to make no order under the section in circumstances under which it could not in any event have made any such order. Counsel for the Scottish Ministers submitted that subsection (2) was logically redundant. That submission runs contrary to one of the ordinary principles of statutory interpretation, namely that statutory provisions are presumed not to be otiose. The only apparent alternative, which was also discussed in the present case, requires that identically expressed conditions be given different meanings in the context of different provisions: for example, that the words appearing in subsection (5)(b)(i) be given a different meaning from the identical words appearing in subsection (2)(b). That approach runs contrary to another ordinary principle of statutory interpretation, namely that when the legislature uses the same language in different parts of a statute, it intends that language to have a consistent meaning.

[10] In the *JK* case, the court considered that section 193 provided a sequential list of tests. Subsection (2), in particular, must be considered first by the Tribunal in every case: it imposed what was in effect a threshold requirement, which the Tribunal must deal with before it could turn its attention to any other part of the section. The Tribunal was held to have misdirected itself in that case by applying subsection (5) without considering the "separate tests" contained in subsection (2): see paragraphs 32-34 and 41. In the present case, neither counsel for the Scottish Ministers nor counsel for the Tribunal sought to support this approach. Counsel for the Scottish Ministers submitted that, although subsection (2) was logically redundant,

it might nevertheless be helpful, as a practical matter, for the Tribunal to consider it and subsection (3) at the outset, as they could provide the Tribunal with an answer without its necessarily requiring to consider the other matters raised in the remaining subsections. There was however no legal requirement to approach matters in that way: the court's statements in *JK* to the effect that it was an error in law to do otherwise than consider subsection (2) *in limine* should be regarded as *obiter dicta*. Counsel for the Tribunal also expressed reservations about these statements, but questioned whether they could be regarded as *obiter*: on the contrary, they appeared to represent the ground of the decision in that case. This is a matter which may at some point require to be reviewed.

[11] Our attention was also drawn to a particular passage in the Opinion of the Court in the *JK* case, at paragraph 34:

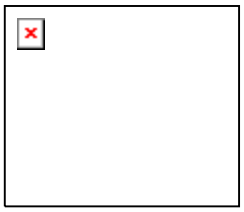
> "It is accepted that the patient has a mental disorder; it is also accepted that the compulsion order should remain in place. In respect of this latter conclusion, it must be assumed that the tribunal was satisfied that, as a result of the patient's mental disorder, it was necessary in order to protect any other person from serious harm for the patient to be detained in hospital, by reference to s.193(4). As both tests in s.193(2) were thus, on the face of things, clearly satisfied, it would seem that the tribunal's obligation was to make no order under s.193. Their failure to do so was in our view a fundamental error".

The implication of this passage - and, in particular, of the second sentence - is that, if the Tribunal does not make an order under section 193(4), then it must follow that it is satisfied of the matter referred to in subsection (4)(b)(i). Since it is also satisfied under subsection (4)(a), it follows that the requirements of subsection (2) are met, since subsection (2)(a) is identical to subsection (4)(a), and subsection (2)(b) is the counterpart of subsection (4)(b)(i).

[12] Counsel for the Scottish Ministers and counsel for the Tribunal were in agreement that the reasoning in this passage was incorrect. If it were correct, the Tribunal could never make an order under subsections (5) or (7), since such orders could only be made in circumstances where the patient had a mental disorder and it

was accepted that the compulsion order should remain in place. The error was in the second sentence quoted. If the Tribunal did not make an order under section 193(4), that was not necessarily because subsection (4)(b)(i) was inapplicable: it could be because, although the Tribunal was not satisfied of the matter referred to in that subsection, it *was* satisfied of one or other (or both, depending on how the provision should be interpreted) of the matters referred to in subsection (4)(b)(ii). There appears to me to be force in that submission. This is a another matter which may, at some point, need to be reviewed.

[13] In the circumstances, I agree that the appeal should be disposed of as your Lordship proposes.



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23 July 2009

1. Legislation

[14] The intricacies of the Mental Health (Care and Treatment)(Scotland) Act 2003 (asp 13), when dealing with the detention and treatment of convicted persons, pose significant problems of interpretation. The Act stipulates that, as a general principle, there ought to be "the minimum restriction on the freedom of the patient..." (s 1(4)). It introduced section 57A into the Criminal Procedure (Scotland) Act 1995 (c 46). That section provides that a mentally disordered person, who is convicted of an offence punishable by imprisonment, may be made the subject of a "compulsion order" by the Court. Such an order may authorise the giving of medical treatment to the offender (ss 57A(2) and (8)). This may involve his detention in hospital, where the treatment can

only be given if the offender is in hospital (ss 57A(5)(a)). It is a pre-requisite of the making of a compulsion order that the treatment is likely either: (i) to prevent the mental disorder worsening; or (ii) to alleviate symptoms or effects of the disorder (ss 57A(3)(b)). In addition, compulsion orders can only be made if two further conditions are met, viz:

> "57A (3)(c) that if the offender were not provided with such medical treatment there would be a significant risk -
> (i) to the health, safety or welfare of the offender; or
> (ii) to the safety of any other person; and
> (d) that the making of a compulsion order in respect of the offender is necessary".

The Court must also be satisfied that the making of such an order is "appropriate" (ss 57A (2)(b)), having regard to:

"57A (4)(b) all the circumstances, including -
(i) the nature of the offence...
(ii) the antecedents of the offender; and
(c) any alternative means of dealing with the offender".

[15] A compulsion order subsists only for six months (ss 57A (2)). However, where:

> "59(1) ...it appears to the Court -
> (a) having regard to the nature of the offence...
> (b) the antecedents of the person; and
> (c) the risk that as a result of his mental disorder he would commit offences if set at large
> that it is necessary for the protection of the public from serious harm so to do, the court may...further order that the person shall be subject to the special restrictions set out in Part 10 of the Mental Health (Care and Treatment)(Scotland) Act 2003, without limit of time".

Clearly, the words "having regard to the nature of" ought to have appeared before the commencement of sub-section (a). However, the significant features of this section are, first, the words "without limit of time" and, secondly, the reference to Part 10, which subjects the offender's treatment regime, including any detention in hospital, to the jurisdiction of the Mental Health Tribunal. It is the Tribunal which will determine whether there is to be any relaxation in that regime having regard to the elaborate, if not labyrinthine, statutory scheme set out in Part 10.

[16] The scheme involves periodic reviews by the offender's (now patient's) responsible medical officer (RMO), who is customarily a consultant psychiatrist:

> "182(3) (b) to consider -
> (i) whether the conditions mentioned in subsection (4) below continue to apply in respect of the patient;
> (ii) whether, as a result of the patient's mental disorder, it is necessary, in order to protect any other person from serious harm, for the patient to be detained in hospital, whether or not for medical treatment;
> (iii) whether it continues to be necessary for the patient to be subject to the compulsion order; and
> (iv) whether it continues to be necessary for the patient to be subject to the restriction order.
> ...
> (4) Those 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 the effects, of the disorder;
> is available for the patient; and
> (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".

It is immediately obvious that the terms of the RMO's review under subsection 182(3)(b) of the 2003 Act echo the requirements for the making of the original compulsion order and any restriction order under, respectively, subsections 57A(3)(b) and (c) and 59(1) of the 1995 Act.

[17] Following upon his review, the RMO reports to the Scottish Ministers (s 183(3)) and, at certain stages, recommends whether a compulsion order and/or restriction order ought to be revoked. This occurs if he is satisfied of certain matters but not satisfied of others. These matters need not be set out at length because they find their way, by way of repetition, into the critical provisions relative to the powers of the Tribunal to revoke or to vary the orders upon a reference from the Scottish Ministers, based on the RMO's recommendations. It is with those provisions that this appeal is primarily concerned. In particular, it is with their references to being satisfied and not satisfied of multiple matters, expressed sometimes in the alternative and sometimes as

cumulative, that the Court has wrestled against the background of the recent analysis by the Extra Division in *Scottish Ministers* v *The Mental Health Tribunal* 2009 S.L.T. 273 (referred to hereinafter as *JK*).

[18] Section 193 of the Act is in the following, amongst other, terms:

> "(2) If the Tribunal is satisfied -
>
> (a) that the patient has a mental disorder; and
>
> (b) that, as a result of the patient's mental disorder, it is necessary, in order to protect any other person from serious harm, for the patient to be detained in hospital, whether or not for medical treatment,
>
> it shall make no order under this section.
>
> (3) If the Tribunal is not satisfied that the patient has a mental disorder, the Tribunal shall make an order revoking the compulsion order.
>
> (4) If the Tribunal -
>
> (a) is satisfied that the patient has a mental disorder; but
>
> (b) is not satisfied -
>
> (i) that, as a result of the patient's mental disorder, it is necessary, in order to protect any other person from serious harm, for the patient to be detained in hospital, whether or not for medical treatment; and
>
> (ii) either -
>
> (A) that the conditions mentioned in paragraphs (b) and (c) of section 182(4) of this Act continue to apply in respect of the patient; or
>
> (B) that it continues to be necessary for the patient to be subject to the compulsion order
>
> it shall make an order revoking the compulsion order.
>
> (5) If the Tribunal -
>
> (a) is satisfied -
>
> (i) that the conditions mentioned in section 182(4) of this Act continue to apply in respect of the patient; and
>
> (ii) that it continues to be necessary for the patient to be subject to the compulsion order; but
>
> (b) is not satisfied -
>
> (i) that, as a result of the patient's mental disorder, it is necessary, in order to protect any other person from serious harm, for the patient to be detained in hospital, whether or not for medical treatment; and
>
> (ii) that it continues to be necessary for the patient to be subject to the restriction order,
>
> it shall make an order revoking the restriction order.
>
> (6) If the Tribunal -
>
> (a) makes an order, under subsection (5) above, revoking the restriction order; and
>
> (b) is satisfied that the compulsion order should be varied by modifying the measures specified in it,
>
> it shall make an order varying the compulsion order in that way.
>
> (7) If the Tribunal -
>
> (a) is satisfied -

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

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

(b) is not satisfied -

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

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

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

The significant feature of a conditional discharge is that the patient can be recalled to hospital if that course is deemed "necessary" (s 202(2)).

[19] Schedule 2 of the 2003 Act deals with proceedings before the Tribunal. It provides that the Tribunal's decision "shall be recorded in a document which contains a full statement of the facts found by the Tribunal and the reasons for the decision" (para 13(3)). This provision is repeated in the rules applicable to the Tribunal (Mental Health Tribunal for Scotland (Practice and Procedure) (No 2) Rules 2005 (SSI 519) rule 72(7)). The Rules state that their overriding objective is "to secure that proceedings before the Tribunal are handled as fairly, expeditiously and efficiently as possible". They permit the Tribunal to cite witnesses, to obtain documents and to commission expert testimony, if requested to do so by a party or on their own initiative (rules 59 and 60). Although the proceedings may be generally adversarial (rule 63(3)), the Tribunal can adopt a more inquisitorial role than that available to a court (rule 63(5)).

[20] In the event of the Tribunal deciding to revoke a restriction order, an appeal lies to the Court of Session (s 322), but only on the grounds (s 324):

"(a) that the Tribunal's decision was based on an error of law;

(b)that there has been a procedural impropriety in the conduct of the hearing by the Tribunal on the application;

(c) that the Tribunal has acted unreasonably in the exercise of its discretion;

(d) that the Tribunal's decision was not supported by the facts found to be established by the Tribunal".

2. The Tribunal Proceedings

[21] MM was convicted at Glasgow Sheriff Court of an offence libelling that:

> "on 24 October 2000 at HM Prison, Barlinnie...you did assault [ADR]...and strike him on the face with a razor blade or similar instrument to his severe injury and permanent disfigurement".

The incident occurred when MM had been on remand in the prison. He had fashioned a weapon out of a melted plastic pen and a razor blade and had used this to slash the complainer during a period of evening recreation. On 28 April 2003, the Sheriff made what was then a Hospital Order in terms of section 58 of the 1995 Act, coupled with a restriction order in terms of section 59. As a result of the operation of the transitional provisions relative to the 2003 Act, MM fell to be regarded as a patient subject to compulsion and restriction orders in terms of the new legislation.

[22] On 17 April 2007, having reviewed MM's case, his RMO reported to the Scottish Ministers. This report narrated that MM, who was by then 24 years of age, had recently been transferred from the State Hospital, Carstairs, where he had been admitted from Barlinnie in September 2002, to a less secure environment at Leverndale Hospital. His personal history was that he had been born and raised in Possil. His parents had a volatile relationship and separated on numerous occasions during his childhood. His father, who died in 1997, was often in jail. His mother had a drug addiction. His older brother has a long history of criminal activity. His older sister, who was said to have been involved in prostitution, was murdered in 1998. MM was expelled from school following episodes of violence and truancy. He abused alcohol and substances. His behaviour deteriorated and referrals to the Children's Hearing followed. He was sent to Kerelaw School Residential Unit in 1998 and, following a series of car thefts and numerous abscondings, incarcerated in its Secure Unit, from which he was discharged in 1999. Over the next few years he was regularly convicted of offences, mainly for breach of the peace, theft of cars,

housebreaking, road traffic matters and vandalism. Meantime, he had fathered a daughter, born in about 2002, with a girl from whom he later became estranged.

[23] MM's mental state was examined in 1999, when he was found to be suffering from depressive episodes. In the following year, when he was on remand at Longriggend Young Offenders Institution, a psychiatrist noted him to be perplexed and exhibiting paranoid beliefs. He had been admitted to Stobhill Hospital Intensive Psychiatric Care Unit, but had attempted to assault a nurse there with a home made weapon. He was sent to Barlinnie where, in June 2000, he was still perplexed and appeared deluded to a degree suggesting schizophrenia. He spent a short time at the State Hospital before returning to Barlinnie. At the time of the offence in October 2000, he told psychiatrists that he had attacked his fellow prisoner because he believed that he had been trying to read his thoughts.

[24] Concern about MM's mental state arose again in 2002, when he smashed up his cell under a delusion that a prison officer was outside his cell window, on the second floor, trying to gain entry to kill him. He was delusional and suffering from auditory hallucinations, causing him to be returned to the State Hospital, where he remained until his transfer to Leverndale. He made good progress in the State Hospital. He was prescribed anti-psychotic and anti-depressive medication, although the former was discontinued temporarily in 2006. He was allowed home visits to his mother's house, and was able to make contact with his daughter. His transfer to Leverndale followed a successful appeal to the Tribunal concerning excessive security. He had been frustrated at the time it had taken for him to be transferred to Leverndale but, at the time of his review, there were no signs of any disturbance of mood or symptoms of psychotic illness.

[25] The RMO concluded:

> "[MM] has recently been transferred to the low-secure forensic unit on Ward 6, Leverndale Hospital. He has coped well with his transfer from the State

> Hospital. There has been no sign of deterioration in his mental state and we feel that he is appropriately placed within a low-secure forensic ward setting. As he has only recently moved to this setting, he remains relatively untested in conditions of lower security. He has little experience of living independently for any significant period and therefore requires ongoing rehabilitation in this setting to test his compliance, skills and the stability of his mental state.
> [MM] has a diagnosis of a psychotic illness with an affective component. He also has features consistent with an underlying diagnosis of both anti-social and borderline Personality Disorder. In addition there is also a history of substance misuse.
> Treatments are available to prevent deterioration in his mental state and it is my opinion, therefore, that he continues to meet the criteria for detention under the [2003 Act]. If he were not detained then there is a risk to both his own health and safety, and the safety of others.
> [MM] has previously failed to comply with supervision measures. There is evidence of a relationship between deterioration in his mental state and serious offending behaviour and therefore it is my opinion that he continues to meet the criteria for a Compulsion Order and Restriction Order under the [2003 Act]".

The RMO completed a CORO 1 Form, which included the following:

"I consider that the patient...has a mental disorder;
that medical treatment which would be likely to -
prevent the mental disorder worsening; or
> alleviate any of the symptoms, or effects, of the disorder is available for the patient.
> If the patient were not provided with such medical treatment there would be a significant risk -
to the health, safety or welfare of the patient; or
to the safety of any other person;
> I am satisfied that it continues to be necessary for the patient to be subject to the compulsion order.
> I am satisfied that as a result of the patient's mental disorder, it is necessary, in order to protect any other person from serious harm, for the patient to be detained in hospital, whether or not for medical treatment.
> I am satisfied that it continues to be necessary for the patient to be subject to the restriction order".

The RMO made "no recommendation (i.e. I consider that the compulsion order and

the restriction order should remain unchanged)".

[26] An earlier report dated 31 May 2006, from a consultant psychiatrist instructed by

MM's law agent relative to his appeal about his conditions of excessive security at the

State Hospital, was available. That psychiatrist reached the view that:

> "1. [MM] suffers from a mental disorder, namely a mental illness which takes the form of recurrent psychotic disorder with marked depressive features. ...In addition to his mental illness, there is evidence that he suffers from a co-morbid substance abuse problem, and underlying personality disorder.

> 2. I believe that there is medical treatment which is likely to prevent the mental disorder worsening, and alleviate its symptoms or effect and that that is available to the patient. This treatment involves the prescription of a prophylactic antipsychotic drug, an antidepressant drug to prevent deterioration in his mood and specific psychological treatments aimed at reducing his substance misuse and reducing his pro-offending beliefs. I believe that if he were not provided with such medical treatment there would be a significant risk primarily to the health safety or welfare of another person. I therefore conclude that the conditions outlined in section 182(4)...continue to apply in his case. I therefore conclude that it is necessary for [MM] to be subject to the Compulsion Order and Restriction Order.
> 3. I also believe that, as a result of his mental disorder, it is necessary in order to protect any other person from serious harm, that he be detained in hospital and that it is necessary for him to be detained in hospital. I have reached this view given the history of the serious nature of the offence, evidence of supervision failure in the past (including reoffending while under statutory supervision). I therefore cannot support his conditional discharge at present.
> 4. Given that he has not been involved in violence for three years, appears to be complying with his medication and psychological treatments and has received positive reports from his off-ward activity placements, I agree with the assessment made about the low risk he would present to the public if a suitable management package was in place. I agree...that he could be safely transferred to conditions of lesser security".

[27] MM's mental health officer (MHO) reported on his social circumstances on 23 April 2007. He concluded:

> "[MM] is a young man who by his own admission has made great advances in the State Hospital environment. He has been transferred to Leverndale Hospital following a successful Appeal against excessive security and in this setting he has remained mentally stable and the use of antipsychotic medication has not been deemed necessary.
> All associated with his care believe he is able to progress and that the re-establishment of contact with his daughter is a priority. The pace of change is a frustration for [MM] but it would be anticipated this will increase following an updated Risk Assessment."

[28] A hearing before the Tribunal occurred on 26 November 2007. Although MM was represented by his law agent, the Scottish Ministers were not, being content to rely upon a short written "Position Statement" dated 16 July 2007. This Statement referred to the RMO's opinion that MM was "appropriately detained and continues to require to remain subject to a Compulsion Order and a Restriction Order". The Tribunal did have the RMO's report and earlier psychiatric reports upon MM. They also had a letter dated 23 November 2007, apparently sent to them by the RMO, from Dr LJ, a consultant clinical forensic psychologist. This letter confirmed that she had,

in terms of a "Preliminary Risk Assessment and Risk Management Plan dated July 2007", been conducting a "clinical psychology assessment of [MM's] personality structure and functioning" and was preparing a detailed report. Attached to the letter was the Preliminary Plan, which had been drawn up by the RMO and his staff. The Plan detailed MM's past violent behaviour, including assaults on fellow patients when in the State Hospital in November 2002 and August 2003, and his violent ideation. It referred to the finding on MM in May 2007 of "self penned" pictures and poems containing violent and sectarian themes, although he claimed that these dated from 2003/2004. The Plan continued:

"Risk Management Factors

> R1: Plans Lack Feasibility
> ...
> [MM] acknowledges the importance of support and contact with psychiatric services, viewing his time at the State Hospital as allowing him to 'grow up and learn about his illness'. However, he appears to view his move to Low Secure Care as a means to facilitate discharge, rather than the next step in his rehabilitation... His plan is to establish a relationship with his daughter and her mother...although to date the nature of this relationship has been limited. He appears unrealistic to the challenges that maintaining a relationship and parenting may bring... In addition, there is clear evidence that the remaining family would be unable to provide consistent help to [MM].
>
> R.2 Exposure to Destabilisers
> ...
> There are numerous possible destabilisers that could disrupt his progress.
> His mother is undergoing further medical investigations. She has had a previous malignancy and decline in health/bereavement could be difficult for [MM] to manage without intensive support
> Increased availability of drugs and alcohol
> Re-establishing relationship...
> Deterioration in mental state
> Exposure to previous anti-social circle/peers/contacts and risk of recidivism
> Any publicity/reinvestigation of his sister's unresolved murder case
> On the ward, there is adequate professional supervision and he appears to respond well to the structure of the hospital environment".

The Plan added that "it was felt that there were significant issues which required further assessment and precluded sound risk scenario planning". The conclusion, which was expressly based upon MM "remaining in a low secure structured environment where his mental state and compliance can be closely supervised", was

that: (i) he presented a "low" risk of causing serious physical harm; (ii) there was no imminent risk; but (iii) there was a possible risk of self harm.

[29] The Tribunal determined that, in terms of section 193(5), they were satisfied that: MM continued to have a mental disorder; the conditions mentioned in section 182(4) of the Act continued to apply; and it continued to be necessary for MM to be subject to the compulsion order. They were not satisfied:

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

These words, of course, are taken directly from section 193(5). The Tribunal revoked the restriction order.

[30] The reasoning of the Tribunal, contained in a Note attached to the decision, is in short compass:

> "The Tribunal considered the papers lodged with the application for review and noted that a report dated 23rd November setting out the up to date position relating to the treatment of [MM] was lodged. That report illustrated that in recent times meditation (*sic*) for any psychotic illness had for a time been stopped with no apparent relapse into violence and although the medication had on the suggestion of Dr [D] been resumed, he suggested in his evidence that he considered it prudent to do so but did not maintain that he was doing so because of any perceived risk of a return to violence. The reports indicated that there had been no violent incidents for some 4 years although some concern had been expressed about some sectarian drawings made by [MM] in recent times.
> The Tribunal also heard oral evidence from the patient, the RMO and the MHO explaining the up to date position. It was clear from the evidence of the RMO and MHO that the stage had been reached where the patient was at a stage when he was being considered for release and was able to be allowed unescorted leave and but required considerable assistance with everyday tasks because of his unfamiliarity with these tasks. Although it was said in evidence that it would be preferable for the restriction order to be maintained in case there was a relapse in [MM's] condition, it was not explained to us in terms what risk existed to other people if the restriction order was to be lifted either by the RMO or the MHO. Nothing we could find in the papers indicated such a risk and indeed on the contrary the indications from the lack of violent incidents and the lack of medication pointed in our view to the opposite view. The witnesses were unanimous in saying that the patient had made considerable progress in his treatment and was co-operating enthusiastically, so much so that he was described as being a completely different individual from the one who committed the index offence.

> There was an indication in the report dated 23rd November that a risk assessment was in the process of being prepared by a consultant forensic psychologist, but we were told, and accepted that it was unlikely to assist us in relation to risks to other people. It was said that it would assist in deciding how best to introduce [MM] to the outside world. In these circumstances we have revoked the restriction order".

The Tribunal completed a CORO 2 form; marking the box (D) setting out the statutory test for revoking a restriction order. They did not mark the box (A), said to be applicable where the Tribunal does not make an order. This states that the Tribunal is satisfied that the patient has a mental disorder and that it is necessary, as a result of that disorder, in order to protect any other person from serious harm, for the patient to be detained in hospital, whether or not for medical treatment.

3. Submissions

THE SCOTTISH MINISTERS

[31] The Scottish Ministers contended that the Tribunal had erred in law in a number of ways relative to the proper interpretation of section 193 (Grounds of Appeal, GROUND II). First, they had failed to start their consideration of MM's case by addressing the terms of subsection 193(2). That is what the Court had determined ought to occur in *JK* (*supra*), where it was said (Lord Wheatley at para [32]) that the purpose of the subsection was to provide a sequential list of the tests to be applied. Subsection 193(2) had to be viewed as containing a threshold requirement (*JK* (*supra*) para [33]). Secondly, the Tribunal had failed to address the four separate elements in subsections 193(5)(a)(i) and (ii) and (b)(i) and (ii). They had misinterpreted the test in subsection 193(5)(b)(i), which referred to the necessity to protect persons from serious harm, in considering that it referred to "risk of serious harm", which was akin to the test in subsection 182(4)(c). Thirdly, the Tribunal had erred in failing to consider the tests in subsections 193(5)(b)(i) and (ii) separately. They had simply considered risk and not the necessity of continuing the restriction order, having regard to the reasons for its original imposition in terms of section 59 of the 1995 Act. They

ought to have considered, first, why the order had been imposed and, secondly, the role which a restriction order has within the statutory framework. Notably they required to consider the use of a conditional discharge of a person subject to a restriction order into the community, subject to recall.

[32] The Tribunal had also erred (GROUND III) in failing to provide a full statement of facts as required by the legislation, including the rules (*supra*). This amounted to "procedural impropriety in the conduct of the hearing" (*Scottish Ministers* v *SW* [2007] CSIH 57, Lord President at para [7]). The reasons given required to be adequate in the sense of informing the parties why the decision had been made and enabling them to analyse the reasoning (*R (H)* v *Ashworth Hospital Authority* [2003] 1 W.L.R. 127, Dyson LJ at para 72, quoting Lord Phillips of Worth Matravers MR in *English* v *Emery Reimbold & Strick Ltd (Practice Note)* [2002] 1 W.L.R. 2409 at paras 19 and 20). This inadequacy had been admitted by the Tribunal in their answers to the Grounds of Appeal (Answer 3) but not by MM. The Tribunal had referred specifically only to one report, said to be dated 23 November 2007. There was no specific mention of the RMO's report at all. Although the Tribunal said that they could find nothing in the papers to indicate a risk to other people, that risk had been specifically covered in the RMO's report. The Tribunal had further erred in failing to have regard to material considerations (GROUND IV) and thus had reached an unreasonable decision. They had failed to have regard to MM's violent past and the failures of previous supervisory orders. They had not explained how they had reached a conclusion opposite to that recommended by the RMO. Finally, (GROUND V) the Tribunal's decision was not supported by the facts which they had found established. Therefore, the Tribunal decision required to be set aside and the case remitted to be addressed anew.

THE MENTAL HEALTH TRIBUNAL

[33] The Tribunal were anxious to grapple with the proper interpretation of subsection 193(5)(b). They submitted that both parts of (b) (i.e. (i) and (ii)) required to be satisfied for revocation to follow. Thus, for example, if a Tribunal were not satisfied of (i), they still required to go on to consider whether they were also not satisfied of (ii). If it were otherwise, subsection 193(2) would have no content. The Court in *JK* (*supra* at para [33]) had erred in considering that the Tribunal must have determined the issue in 193(5)(b)(i) by virtue of having considered the same question in 193(2). The Tribunal in that case could have determined the issue under 193(5)(b)(ii) and thus not reached 193(5)(b)(i) at all. As a generality, it ought not to be a fatal error to have failed to address subsection 193(2) first. There was no reason in law why a Tribunal required to approach the section sequentially, although it might be sensible to do so in many cases where an answer to the issue in subsection 193(2) resulted in no order being made. However, *JK* (*supra* at para [35]) could be seen as reaching the correct decision if its use of the word "disjunctive" were read as "conjunctive". In that situation, subsection 193(5)(b)(ii) may have particular meaning in the situation where a patient is not detained in hospital, having been conditionally discharged under the restriction order.

THE PATIENT "MM"

[34] MM accepted the interpretation of subsection 193(5)(b) presented by the Tribunal in submissions. The scheme of section 193 was to provide a "pigeon hole" for each potential outcome. In that context, if a sequential approach were not adopted, the terms of subsection 193(2) would be superfluous. The Tribunal had considered that MM was properly detained in hospital under a compulsion order, but being considered for "release". Subsection 193(5)(b)(ii) provided an overriding necessity test involving factors other than those requiring detention in hospital. Thus, the Tribunal could recall a patient who remained subject to a restriction order but who

had been conditionally discharged. In assessing necessity, the Tribunal required to consider the factors specified in section 59 of the 1995 Act.

[35] The Tribunal had referred to the documents and oral testimony presented. It was accepted that they had not explained why they had rejected the content of the RMO's reports and that this was a potential inadequacy in reasoning. But they clearly had applied their mind to the question of risk. They observed that medication had been stopped without adverse effect. As a specialist Tribunal, they were entitled to draw their own conclusions from that. Since they were not satisfied that there was a risk, they were not entitled to continue the restriction order using subsection 193(5)(b)(i). In the absence of evidence of necessity, they were not entitled to found upon subsection 193(5)(b)(ii) either.

[36] It was accepted that the decision was part of the conduct of the Tribunal hearing (*Scottish Ministers* v *SW* (*supra*)). The reasons were brief but adequate. Adequacy depended on context (*Chief Constable* v *Lothian & Borders Police Board* 2005 S.L.T. 315, Lord Reed at para [70]). Every decision was capable of improvement (*JK* (*supra*) para [50]). But the reasons did not require to be lengthy (*DH* v *Kennedy* 1999 S.C.L.R. 961). It was apparent from them how the decision had been reached and that was all that was required (*English* v *Emery Reimbold & Strick* (*supra*), Lord Phillips MR at para 16). That was especially so given the overriding purpose of efficiency and expedition expressed in the Tribunal's rules.

4. Decision

[37] The question of whether a court should make a compulsion order, involving the detention of an offender in hospital, is answered having regard to five elements. These are, in summary: (1) the existence of a mental disorder; (2) the availability and need for in-patient treatment; (3) the positive effect of the treatment; (4) the existence of a "significant risk" to the offender or to the "safety of any other person"; and (5) general

necessity (1995 Act s 57A). In relation to a compulsion order, the court is simply considering the need for compulsory medical treatment over a limited period as an alternative to punishment. The additional test of whether a restriction order should be imposed involves consideration of whether such an order is "necessary for the protection of the public from serious harm" having regard to the offence, the offender's background and the risk that he might commit further offences (1995 Act s 59). The necessity element is directed towards determining whether an order, without initial limit of time, subject to review by the Scottish Ministers and revocable only by the Tribunal, is needed for the protection of members of the public.

[38] One problem with the 2003 Act is that it appears to set out a different test for the revocation of the restriction order from that applying to its original imposition. This can be seen especially if subsection 193(2) is seen as a threshold requirement for revocation, since, other than requiring the persistence of a mental disorder, it asks only whether hospital detention is necessary "in order to protect any other person from serious harm". If that requirement is *in limine*, then the requirement of general necessity in subsection 193(5)(b)(ii) has to be seen as an additional element. In that regard, the use of the words "disjunctive" and "conjunctive" by the Court in *JK* (*supra* at para [35]), when looking at subsections 193(5)(b)(i) and (ii), may be apt to confuse, since the Court appeared to mean that the two necessity elements relative to detention and the restriction order were additional to one another; both had to be met for revocation to follow. However, if correct, the effect is that, even if a Tribunal were to consider it not necessary for a patient to continue to be subject to a restriction order, that order could not be revoked if, under subsection 193(5)(b)(i), the Tribunal considered that, at the time, it remained necessary for him to be detained in hospital.

[39] In looking at the decision of the Tribunal, the first issue for the Court is to determine whether the reasons are adequate. That issue is resolved using the well

known test of whether they "deal with the substantial questions in issue in an intelligible way" and "leave the informed reader and the court in no real and substantial doubt what the reasons for [the decision] were and what were the material considerations which were taken into account in reaching it" (*Wordie Property Co* v *Secretary of State for Scotland* 1984 S.L.T. 345, Lord President (Emslie) at 348). Of course, reasons do not require to be either lengthy or elaborate. Indeed, the need for clarity dictates that, if possible, reasons should be succinct but intelligible. In matters involving restriction orders, efficiency and effectiveness in the decision making process is, perhaps, particularly important. The content of the decision does not meet the test in question.

[40] This Tribunal were presented with a case involving a patient who undoubtedly has a mental disorder, notably a psychotic illness with an underlying anti-social component and a borderline personality disorder. He has a disturbed and seriously violent past. The report from the RMO, which will usually be the starting point for any assessment of the prospect of him causing serious harm to others, stated clearly that the psychiatrists considered that he was appropriately placed in a "low-secure ward setting"; that is to say detained in hospital. It was explained that the reason for this was that his compliance and mental stability were relatively untested in conditions of lower security. The report said specifically that, were he not detained in hospital, there would be a risk to both his own health and to the safety of others. It explained why that was so and stated that there was evidence of a relationship between deterioration in his mental health and serious offending behaviour. It accordingly recommended retention of the compulsion and restriction orders. This was also what the report from MM's instructed consultant had said in May 2006 in opposing even conditional discharge because of the appellant's history of violence and the evidence of supervision failure in the past.

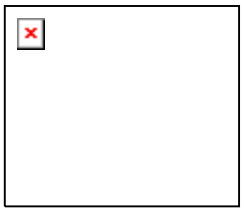
[41] For their reasons to be regarded as adequate, the Tribunal were bound to explain why the views of the psychiatrists were being discounted. The first problem in understanding the decision is the reference to "a report dated 23rd November setting out the up to date position", which illustrated that MM's anti-psychotic medicine had been stopped without a relapse into violence. There is no report of 23 November, or at least none that is evident in the papers presented to the Court. The only document dated 23 November is a single page letter from a psychologist outlining her work in developing a risk management plan. It does not deal with MM's mental state or the degree of danger to the public posed by his release from detention. It does not mention his medication.

[42] It is apparent that, in the form in which that letter was faxed to the Tribunal, there was attached to it a "Violent Risk Assessment and Management Plan" from the psychiatrists, but this was dated July 2007. As outlined above, this made it clear that its assessment of MM as presenting a low risk of causing serious physical harm was based on the assumption that he remained detained in a "low secure structured environment". It also made it clear that leaving the hospital environment would expose MM to stressors, notably drugs and alcohol and exposure to his previous anti social circle of contacts. MM was described as having difficulty with coping with such stressors. On the face of things, the Tribunal's statement that it was not explained to them what risk existed, were the restriction to be lifted, is not borne out by the material before them, nor is the reference to the Tribunal being unable to find in the papers anything indicating risk supportable having regard to that material. The risk was starkly apparent in the psychiatric reports, viz.: that were MM to be released into the community he would be exposed to stressors which might see him return to his violent and recidivist ways. On this basis alone, the Tribunal's reasoning must be regarded as inadequate and the decision must be set aside.

[43] Assuming that the Tribunal decided that it was not necessary, for the protection of others from serious harm, for MM to be detained in hospital in terms of subsections 193(2) and/or 193(5)(b)(i), they required to go on and consider whether the test for revocation under 193(5)(b)(ii) was met. It is not apparent, from the reasoning, that the Tribunal did that or, if they did, what factors they had regard to. The Tribunal state that they were satisfied, in terms of subsection 193(5)(a)(ii) that it continued to be necessary for MM to be subject to *the* compulsion order. The compulsion order in MM's case authorised his detention in the low secure unit at Leverndale. Determining thereafter that, in terms of section 193(5)(b)(i), it was not necessary for him to be so detained is, on the face of things, contradictory. Of course the compulsion order could have been varied under subsection 193(6), but that was not done.

[44] It is not clear whether the Tribunal applied themselves properly to subsection 193(5)(b)(ii); that is to say the question of general necessity. The existence of the restriction order pre-supposes the continuation of a compulsion order which, in this case, authorised detention in hospital. The general issue of whether the restriction order should continue is primarily concerned with whether the compulsion order should remain without limit of time and should not be revoked except by order of the Tribunal. In assessing that issue, the Tribunal ought presumably to be looking at least at the factors which permit the imposition of a restriction order under subsection 59(1) of the 1995 Act. There is very little, if any, indication that the Tribunal directed themselves to these factors. Rather, they seem to have concluded that, because they did not consider that, by reason of his mental disorder, MM would present a danger if released from detention, the restriction order should therefore be revoked. While, in the first place, the Tribunal's premise is not accepted, that, secondly, is not the correct approach and is inconsistent with the guidance in *JK (supra)*.

[45] The appeal should therefore be allowed, the decision of the Tribunal set aside and the case remitted to the Tribunal for consideration anew in terms of subsections 324(5)(a) and (b)(ii) of the 2003 Act.



EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

Lord Reed
Lord Carloway
Lord Marnoch

[2009] CSIH 66
XA188/07

OPINION OF LORD MARNOCH

in the appeal by

THE SCOTTISH MINISTERS
Appellants;

against

a decision of THE MENTAL HEALTH TRIBUNAL FOR SCOTLAND
First Respondents;

and

M M
Second Respondent:

_____

Appellants: Johnston, Q.C.; Miss Poole; Scottish Government Legal Directorate
First respondents: Miss Dunlop, Q.C.; K Campbell; Solicitor to the Mental Health Tribunal
Second Respondent: Murray; Drummond Miller LLP

23 July 2009

I also agree that this appeal should be allowed on the ground that the Tribunal has failed to provide adequate reasons for its decision. Further, I am in entire sympathy with both of your Lordships in highlighting in various ways the severe difficulties of construing the legislation in question. For my part, I am particularly struck by the lack of any clear correspondence between the reasons for imposing a restriction order and the reasons for revoking it. This, in turn, seems to me to deprive the statutory provisions of any clear objective, thus making it difficult, if not impossible, to apply even a purposive construction to them.