**EXTRA DIVISION, INNER HOUSE, COURT OF SESSION**

**Lord Clarke**
**Lord Mackay of Drumadoon**
**Lord Philip**

**[2009] CSIH 33**
**Appeal Nos: XA137/07 & XA144/07**

OPINION OF THE COURT

delivered by LORD CLARKE

in the Appeals
under Section 322 of the Mental Health (Care and Treatment) (Scotland) Act 2003

by

THE SCOTTISH MINISTERS

Appellants;

against

Decisions of the Mental Health Tribunal for Scotland

Respondents:

in the cases of

N.G. and P.F.

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**Act: Mackenzie, M. Sinclair, Solicitor to the Scottish Government Legal Directorate**
**Alt: Dunlop Q.C., V. Mays, Solicitor to the Mental Health Tribunal**

6 May 2009

## Introduction and Statistory Context

[1] These two appeals concern a question relating to the powers and jurisdiction of the Mental Health Tribunal for Scotland, established under the Mental Health (Care and Treatment) (Scotland) Act 2003. The operation of the provisions of that Act in

relation to the tribunal's jurisdiction was considered in some detail in the recent decision of the Extra Division in *The Scottish Ministers* v *The Mental Health Tribunal for Scotland* in the case of JK (2007) CSIH 9. The Court in that case, however, did not require to consider, or decide, the point that has arisen in the present appeals. The persons to whom these appeals relate (hereinafter referred to as "the patients") were, at the time of the coming into force of the 2003 Act, persons who had been made subject to orders, made by judges, in criminal courts, under the Criminal Procedure (Scotland) Act 1975, to the effect that they should be detained in the State Hospital without limit of time. In the case of the patient, NG, the order was made under section 174(3) of the 1975 Act. In the case of the patient PF, the order was made in terms of section 175(1)(4) of the 1975 Act. Both patients were deemed to be subject to a compulsion order and a restriction order under section 57(2)(a) and (b) of the Criminal Procedure (Scotland) Act 1995, as amended, by the 2003 Act. Both patients had also, prior to the passing of the 2003 Act been transferred from the State Hospital to conditions of lower security. On 6 November 2003, the Scottish Ministers, exercising powers under section 68(2) of the Mental Health (Scotland) Act 1984, directed that the patient NG be conditionally discharged from hospital on 10 November 2003. Three conditions were set out in the order in question, namely that the patient should subject himself to the supervision of such persons as the Scottish Ministers might approve, that he should reside at such address as the Scottish Ministers might approve, and that he should conduct himself in a law abiding and orderly manner. In the case of PF, the Scottish Ministers, on 19 August 2005, in pursuance of their powers under section 68(2) of the Mental Health (Scotland) Act 1984, directed that the patient be conditionally discharged on 25 August 2005. In the order in PF's case, four conditions were set out, namely that the patient should subject

himself to the supervision of such persons as the Scottish Ministers might approve, that he should reside at a specified address, that he should conduct himself in a law abiding and orderly manner, and that he should not visit the Coatbridge area.

[2] The provisions of the 2003 Act were enacted, in part, at least, to make the legal machinery in Scotland regarding the restriction of the liberty of mentally disordered persons, compatible with this country's obligations under the ECHR. To that end, the Mental Health Tribunal for Scotland was set up to provide a body, independent of the Executive, who would have a review function in respect of compulsion orders and restriction orders made in respect of mentally disturbed persons. The current position, in respect of the detention of persons suffering from a mental disorder, is that the court has power, under the Criminal Procedure (Scotland) Act 1995 to impose a compulsion order authorising the detention of persons in hospital in terms of section 57(2)(a) of the 1995 Act and, further, to impose restriction orders regarding the treatment of such persons in appropriate cases (in terms of sections 57(2)(b) and 59). The original orders relating to the patients, with whom the present cases are concerned, were made before the provisions of the 1995 Act came into force and were made under previous legislative provisions. However, the effect of the Mental Health (Care and Treatment) (Scotland) Act 2003 (Transitional and Saving Provisions) Order 2005 (SS1 452), is, that the patients in such cases are deemed to be patients subject to both compulsion and restriction orders made under the relevant sections of the 1995 Act.

[3] It is compulsion orders that authorise detention in hospitals. Restriction orders provide for additional safeguards in the decision making process concerned with the management and possible release of a patient. Part 10, Chapter 2 of the 2003 Act is concerned with the means of review of these orders. It provides that the patient's

responsible medical officer ("RMO"), the Tribunal and the Scottish Ministers have powers and duties in that respect. It, in particular, provides for automatic periodical reviews by the tribunal in relation to such orders. By section 182 of the Act the patient's RMO is required to carry out an annual review of any compulsion order and restriction order in accordance with the provisions of that section. By section 183(2) it is provided that the RMO shall, as soon as practicable, after carrying out the annual review, submit a report in accordance with provisions of section 183 to the Scottish Ministers. The RMO shall make a recommendation that any compulsion order be revoked if certain conditions are held by him not to be satisfied. So too, the RMO requires to make a recommendation, if he is not satisfied that certain conditions are met, that any restriction order in place be revoked.

[4] In his annual review the patient's RMO is, *inter alia*, required to consider (by section 182(3)(b)) whether the conditions mentioned in subsection 4 of section 182 continue to apply in respect of the patient. Section 183(7) provides

> "If, after having regard to any views expressed by the Mental Health Officer, the responsible Medical Officer -
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> (a) is satisfied -
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> (i) that the conditions mentioned in Section 182(4) of this Act continue to apply in respect of the patient; and
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> (ii) that it continues to be necessary for the patient to be subject to the compulsion order and the restriction order; but
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> (b) 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,

the responsible medical officer may include in the reports submitted to the Scottish Ministers under subsection (2) above a recommendation that the patient be conditionally discharged."

[5] Section 184 imposes upon the patient's RMO, apart from the requirement of producing an annual report, all as provided for in section 182, a continuing duty to keep the compulsion order and restriction order under review, where a patient is subject to a compulsion order and restriction order. If, having considered matters specified in section 184(2) the RMO is not satisfied that the patient has a mental disorder, the RMO shall, as soon as practicable after considering those matters, submit to the Scottish Ministers a report complying with the requirements set out in section 183(3) of this Act and including a recommendation that the compulsion order be revoked, under section 184(4). As regards restriction orders, by section 184(5), if having considered matters mentioned in paragraphs (a) to (d) of section 184(2) and being satisfied that certain conditions are met, then, the RMO shall, as soon as practicable after considering those matters, submit to the Scottish Ministers a report including a recommendation that the restriction order be revoked. If having carried out the exercise of considering the matters mentioned in paragraphs (a) to (d) of section 184(2) the RMO is satisfied that the conditions mentioned in section 182(4) of the Act continue to apply in respect of the patient and that it continues to be necessary for the patient to be subject to a compulsion order and a restriction order; but he 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, the RMO may submit to the Scottish Ministers a report, complying with the requirements set out in section 183(3) of this Act, and including a recommendation that the patient be conditionally discharged. The

submission by the RMO to the Scottish Ministers of a report, either under section 183(2) which includes a recommendation, or a report under section 184, triggers a requirement, by virtue of section 185 of the Act, that the Scottish Ministers make a reference to the Tribunal in respect of the compulsion order and restriction order to which the patient is subject. Once such a reference is made the Scottish Ministers have a duty to notify a number of persons as to that fact by virtue of section 185(2)(a)-(g). It should be noted, in parenthesis, that the Mental Welfare Commission also have a power to require the Scottish Ministers to make a reference to the Tribunal (section 186 and section 187).

[6] As well as being obliged to make references to the Tribunal in terms of sections 185, 186 and 187, the Scottish Ministers have a duty under section 188 to keep compulsion orders and restriction orders under review. The Scottish Ministers, if they are not satisfied as to certain matters specified in section 188 have to apply to the Tribunal for the revoking of the relevant compulsion order or the revoking of the relevant restriction order or both, as the case may be (section 188(1) - (5)). By virtue of section 188(7) it is provided

> "If, having considered the matters mentioned in paragraphs (a) to (d) of section (2) above, the Scottish Ministers -
>
> (a) are satisfied -
>
> (i) that the conditions mentioned in 182(4) of this Act continue to apply in respect of the patient; and
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> (ii) that it continues to be necessary for the patient to be subject to the compulsion order and the restriction order; but
>
> (b) are 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,

they may apply to the Tribunal under section 191 of this Act for an order under section 193 of this Act conditionally discharging the patient."

The present appeals are concerned with the conditional discharge of the patients in question and by whom, and when that might be done. In that respect section 188(7) just referred to is of significance. The Act goes on, by section 189, to provide for a mandatory reference to the Tribunal by the Scottish Ministers in respect of any compulsion order and restriction order to which a patient is subject, where a period of two years has elapsed with no reference to the Tribunal having been made in terms of section 187(2) or where no application has been made within that period by the patient himself or his "named person".

[7] It is section 193 which vests the Tribunal with its powers when references are made to it under the Statute. Section 193(1) provides that:

"(1) This section applies where -

(a) an application is made under Section 191 or 192(2) of this Act; or

(b) a reference is made under Section 185(1), 187(2) or 189(2) of this Act."

Section 193(2) provides

"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."

Section 193(3), (4), (5) and (6) then sets out the circumstances in which the Tribunal shall make orders revoking compulsion orders, revoking restriction orders and varying compulsion orders. By section 193(7) it is provided as follows

"If the Tribunal -

(a) is satisfied -

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

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

(b) is not satisfied -

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

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

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

[8] Chapter 3 of the Act is headed "CONDITIONAL DISCHARGE"

Section 200 provides as follows

"(1) This section applies where -

(a) a patient has been conditionally discharged by the Tribunal under Section 193(7) of this Act; and

(b) the Tribunal imposed conditions on that discharge under that Section.

(2) The Scottish Ministers may, if satisfied that it is necessary, vary such of the conditions imposed by the Tribunal under Section 193(7) of this Act as they think fit.

(3) Where the Scottish Ministers vary, under subsection (2) above, conditions imposed by the Tribunal under Section 193(7) of this Act, the Scottish Ministers shall, as soon as practicable, give notice of that variation to -

(a) the patient;

(b) the patient's named person

(c) the patient's responsible medical officers; and

(d) the mental health officer."

Section 201 provides a jurisdiction for the Tribunal, in addition to its jurisdiction under section 193. It is an appeal jurisdiction. The provisions of section 201 are as follows

"(1) Where the Scottish Ministers vary, under Section 200(2) of this Act, conditions imposed by the Tribunal under Section 193(7) of this Act on a patient who has been conditionally discharged under that Section, the persons mentioned in the subsection (2) below may, before the expiry of the period of 28 days beginning with the day on which notice is given under section 200(3) of this Act, appeal against the variation of those conditions to the Tribunal.

Section 201(3) provides as follows

"Where an appeal is made to the Tribunal under subsection (1) above, Section 193 of this Act shall apply as if the patient had applied under Section 192 of this Act for an order conditionally discharging the patient."

Section 202 of the Act is in the following terms

"(1) This Section applies to a patient conditionally discharged by the Tribunal under Section 193(7) of this Act.

(2) If the Scottish Ministers are satisfied that it is necessary for the patient to be detained in hospital, they may, by warrant, recall the patient to hospital.

Section 204 then confers a further appellate jurisdiction on the Tribunal in relation to recall orders made under section 202. Section 204 is in the following terms

"(1) Where a patient has been recalled to hospital under Section 202 of this Act, each of the persons mentioned in the subsection (2) below may, before the expiry of the period of 28 days beginning with the day on which the patient returns or is returned to hospital appeal against that recall to the Tribunal.

(2) Those persons are -

(a) the patient; and

(b) the patient's named person

(3) Where an appeal is made to the Tribunal under subsection (1) above, Section 193 of this Act shall apply as if the patient had applied under Section 192 of this Act for an order of conditionally discharging the patient."

**The Relevant Decisions**

[9] The foregoing is the statutory context in which the present appeals arise. As has been pointed out, both patients had been conditionally discharged in pursuance of powers under section 68(2) of the Mental Health (Scotland) Act 1984. The position of

such patients is expressly addressed by the Mental Health (Care and Treatment) (Scotland) Act 2003 (Transitional and Saving Provisions) Order 2005 paragraph 24. The provision in question is in the following terms:

> "(1) Where before 5 October 2005 a restricted patient has been conditionally discharged under Sections 64(2) or 68(2) of the 1984 Act, that patient shall be treated as if -
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> (a) the Tribunal had made an order that the patient be conditionally discharged under Section 193(7) of the 2003 Act; and
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> (b) the conditions imposed under Section 64(2) or 68(2) of the 1984 Act had been imposed by the Tribunal."

[10] In the case of both patients references were made on 3 May 2007 by the appellants to the Tribunal in terms of Section 189(2) of the 2003 Act, i.e., the appellants were making the two yearly references in respect of these patients. There was no application by the appellants in terms of section 188(7) for an order under section 193 conditionally discharging the patients. In the case of NG the Tribunal, following the hearing on 28 August 2007, issued a decision. In the case of PF, the Tribunal issued a decision, following a hearing on 5 September 2007. In both cases the Tribunal, in their decisions, stated that they were satisfied that it continued to be necessary for the patient to be subject to the compulsion order and the restriction order but were not satisfied that

> "(i) as the 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) it is necessary for any other reason or purpose for the patient to be detained in hospital."

In both cases, however, the Tribunal went further. They made orders that the patients be conditionally discharged and imposed certain conditions on that discharge. In the case of NG the Tribunal imposed eight conditions as set out at page 4 of the findings and reasons. In the case of PF the Tribunal imposed nine conditions as set out at page 3 of the findings and reasons. It is in relation to those parts of the Tribunal's decisions in which they address the question of conditional discharge of the patients, that the present appeals are brought.

[11] As has been noted the appellants, in neither of the cases, invited the Tribunal to address the question of conditional discharge. The patients were not represented at the hearings. The Tribunal, nevertheless, in the case of NG raised, of its own motion, the question of conditional discharge and the possibility of varying the conditions already imposed in relation to that patient. The appellants made submissions to the Tribunal as to the point which are noted in the Tribunal findings and reasons. In the case of PF the appellants do not appear to have made any representations on this matter before the Tribunal. Having disagreed with the submissions made on behalf of the appellants in the case of NG the Tribunal stated as follows

" • In terms of Section 200(1) that section only applies when a patient has been conditionally discharged by the Tribunal under Section 193(7) (our emphasis) and where the Tribunal imposed conditions on such discharge under that Section. These criteria do not apply in the present case. No previous order for conditional discharge has been made by the Tribunal under Section 193(7) and the Tribunal has not imposed any such conditions. The Tribunal considered that by virtue of Section 193(7) the power is given to the Tribunal to make an Order that the patient be conditionally discharged (provided the appropriate criteria are met) and to

impose such conditions on the discharge as the Tribunal thinks fit;

- the purpose and spirit of the current legislation is to vest responsibility for consideration of patients who are subject to Compulsion Orders and Restriction Orders in the Tribunal, rather than in the Scottish Ministers as the previous legislation provided. Where a reference is made to the Tribunal by Scottish Ministers under Section 189 of the Act requiring the Tribunal to review the Orders to which the patient is subject, we consider that it is entirely appropriate for the Tribunal to consider whether any conditions of conditional discharge to which the patient may already be subject remain reasonable and appropriate for the present circumstances. Having carried out that exercise in this case the Tribunal consider that it is appropriate to make an order here that the patient be conditionally discharged and to impose the following conditions on that discharge, (which are more specific than those set out in the Warrant of Conditional Discharge dated 6 November 2003 under the previous legislation, and which we consider to properly reflect current circumstances)"

The Tribunal then purported to set out the conditions in question.

[12] In the case of PF the Tribunal stated as follows

"Having made these findings, the Tribunal has the powers by virtue of Section 193(7) of the Mental Health (Care and Treatment) (Scotland) Act 2003 to make an order that the patient be conditionally discharged and to impose such conditions on that discharge as it thinks fit. We consider it appropriate to exercise that power and to make an order conditionally discharging the patient. Since the conditional discharge has already been made under the previous legislation this means that the status of the patient will not

change. However in order to reflect the present circumstances we hereby impose the following specific conditions on the patient's discharge:"

The Tribunal then purported to set out the conditions in question.

[13] The present appeals against the Tribunal's decisions are brought under Section 324(2)(a) of the 2003 Act i.e, that those decisions were based on an error of law.

**The appellants' submissions**

[14] Counsel for the appellants' submission to the Court, under reference to the relevant statutory provisions, was that the Tribunal was given a single opportunity to impose conditions on a conditional discharge and that was at the point when it, the Tribunal, granted the conditional discharge of the patient in question. Thereafter, it was contended, the Tribunal had no power to vary a patient's conditions of discharge. Variations of the conditions of discharge, it was submitted, was the preserve of the appellants as provided for by section 200. Where under section 201 a variation of conditions, made by the appellants, was appealed by a patient to the Tribunal, the appeal was treated, (by virtue of the provisions of section 201), as if the patient had applied for an order for conditional discharge. In that event, and in that event only, the Tribunal required to treat the appeal as if it was a new application for conditional discharge. It could then make a new order conditionally discharging the patient and imposing such conditions on the discharge as it thought fit.

[15] In the case of NG the Tribunal, as has been seen, stated "no previous order for conditional discharge has been made by the Tribunal under section 193(7) and the Tribunal has not imposed any such conditions". In so stating, the Tribunal had ignored, or overlooked, the effect of the transitional provisions in the 2003 Order

referred to above, which was that after 5 October 2003 NG was to be treated as if the Tribunal had made an order that he be conditionally discharged under section 193(7) of the 2003 Act, and that any conditions imposed under the orders made by virtue of section 64(2) or 68(2) of the 1984 Act had been imposed by the Tribunal.

[16] In the case of PF there appeared to be a similar failure on the part of the Tribunal to have regard to his status, in law, by virtue of the provisions of the 2003 Order. In both cases, it was contended, these failures on the part of the Tribunal involved errors of law in reaching their respective decisions. The Tribunal's decisions were fundamentally flawed in the interpretation which they sought to place upon the provisions of section 193(7). In the present cases, the Tribunal were dealing with section 189 references. Section 193 sets out the orders which the Tribunal may make in such cases. The proper construction to be placed on section 193(7) which conferred the power to make "an order that the patient be conditionally discharged and impose such conditions on that discharge as it thinks fit," was that an order under section 193(7) might be made in respect of a patient who is detained in hospital at the time the order was proposed to be made, rather than in respect to a patient who had already been conditionally discharged and was no longer detained in hospital. There was no express reference, in the Act, to the Tribunal having the power which the Tribunal in the present cases claimed it had namely, (a) a power to make a fresh order conditionally discharging a patient who was already subject to an order for conditional discharge or (b) a power effectively to vary the conditions of an existing conditional discharge order. That the absence of any such powers was a deliberate choice of the legislature, it was submitted, could be seen by having regard to certain other provisions in the Act.

Section 195 of the Act provides

"Where the Tribunal makes an order under Section 193(7) of this Act conditionally discharging a patient, it may defer that discharge until such arrangements as appear to the Tribunal to be necessary for that purpose have been made"

The reference in that provision to the "discharge" being deferred supported, it was said, the argument that section 193(7) was intended to be confined to the conditional discharge of patients presently detained rather than those who had already been conditionally discharged. Moreover section 196 provides that specific orders made by the Tribunal under section 193 should not have effect until the first to occur of either the expiry of a period for appealing against the order in question or the disposal of any such appeal. The orders referred to were

(a) An order revoking a compulsion order;

(b) revoking a restriction order;

(c) conditionally discharging a patient; or

(d) varying a compulsion order by modifying the measures specified in it.

There was no reference in that list to the type of order purportedly made by the Tribunal, in the present cases, namely an order purporting to discharge a patient, already discharged and effectively varying the conditions of that discharge.

[17] Most significantly, however, perhaps, for present purposes, it was submitted, were the provisions of sections 200 and 201. Those provisions, taken together, clearly showed a legislative intention to the effect that the power to vary the conditions of discharge of a patient, already discharged, lay with the appellants and the appellants alone. Section 201 gave the Tribunal a restricted appellate jurisdiction in relation to any such variation by the appellants but, it was to be noted that the legal consequences of such an appeal being taken was not that the Tribunal might vary the conditions of

the existing discharge, but that they were to deal with matters as if the patient had made an application under section 192 for his conditional discharge and any condition thereafter imposed would be imposed as of new.

[18] An express power of variation, in respect of a compulsion order, is conferred upon the Tribunal by virtue of section 193(6). That the legislature had provided that express varying power, when no such express varying power was provided in relation to conditional discharge orders, was a strong indication that no such power fell to be implied.

[19] Quite apart from the appellant's argument which sought to demonstrate that the Tribunal's approach was misconceived, having regard to the wording of the statutory scheme itself, there were certain practical and policy considerations, which supported the view that the Tribunal had adopted an invalid approach to matters. These were as follows. Once a patient had been discharged from hospital the appellants were involved in respect of his day to day management via regular reporting by the RMO, the Mental Health Officer and the Community Psychiatric Nurse. Such patients are, in addition, regularly reviewed by the appellants' principal medical officer who was a forensic consultant psychiatrist. Accordingly, it was contended that the appellants were in a better position than the Tribunal to consider whether a patient's conditions of discharge should be varied, or not, and what the nature of any such variations should be. If the conditions were varied by the appellants and the patient did not object to this and, accordingly, did not exercise any right of appeal under section 201, it was preferable that these varied conditions remain undisturbed rather than being subject to possible variation by the Tribunal who did not have any continuing duty in monitoring the patient and any associated risk. There was, furthermore, as a consequence of the approach taken by the Tribunal to its powers, a serious risk of

overlapping jurisdictions causing confusion and uncertainty. If the Tribunal were to be in the position of making a fresh order for the conditional discharge of an already conditionally discharged patient and they proceeded to pronounce such an order, nothing, in principle, would prevent the appellants from exercising their powers under section 200 to vary any new conditions imposed by the Tribunal. If the patient then chose to appeal the exercise of the appellants' section 200 power, the appeal against their order would come to the Tribunal under section 201 and as a result the Tribunal would in effect be sitting as an appellate Tribunal in an appeal against a variation of conditions that they themselves had imposed. Such situation could surely not have been the intention of parliament. For all the foregoing reasons the appeals should be allowed.

**Submissions on behalf of the Tribunal**

[20] In response senior counsel for the Tribunal accepted that the Tribunal had apparently failed to address the provisions of the 2003 Order as they affected the patients in these cases and in this failure they had been guilty of an error in law. But, it was contended, nevertheless, the Tribunal were not wrong in reaching the conclusion that, having regard to the provisions of the 2003 Act, they had the power they sought to exercise. At an early point in her submissions, senior counsel referred to that power being a power to make a "replacement order" for conditional discharge. She accepted that the phrase "replacement order" was not to be found within the language of the legislation and, as shall be seen, we consider that the use by counsel of that phrase betrayed, however unwittingly, the problem with the appellants' approach to matters. Senior counsel went on to say that what the Tribunal had done in these cases was clearly "sensible and pragmatic" in that they were seeking to clarify

and bring up to date the conditions appropriately to be applied to the patients in question. However sensible and pragmatic what the Tribunal was seeking to do, it was, however, accepted by counsel that that was beside the point, if what was done was *ultra vires*, having regard to the provisions of the statute. There were certain points which it was said demonstrated that what the Tribunal did was *intra vires*. It was clear that the patients' cases were competently before the Tribunal for review under section 189. Such a review, it was submitted, involved a full consideration of the patient's circumstances at the time of the review. It could not be disputed that the Tribunal had the power to revoke either any restriction or compulsion order as a consequence of such hearing. To do so would involve taking more serious steps than altering any conditions to which the patient might be subject on his conditional discharge. Senior counsel submitted that it would seem odd if the Tribunal had these greater powers but not the lesser powers that they sought to exercise. There was nothing in the 2003 Act which expressly prohibited the Tribunal from dealing with the condition to which a patient was subject as someone already conditionally discharged. It was difficult, it was submitted, to envisage any logical reason that should be the intended position. While the present two cases were "transitional", the point raised in these appeals would apply to non-transitional cases when the Tribunal itself had actually exercised its powers under section 193(7). The previous statutory position which obtained under section 66 of the Mental Health (Scotland) Act 1984 was that on an appeal taken by a patient, already conditionally discharged, to the Sheriff, the Sheriff had the power to continue the discharge with possible variation of conditions. The appeal procedure in question was one which the patient could make to the Sheriff on a two yearly basis. Accordingly, it was said, that procedure under the 1984 Act was a direct analogy to the two year review provided for under section 189

of the 2003 Act and, accordingly, similar powers might be supposed were intended for the Tribunal as those which the Sheriff had had.

[21] Senior counsel then turned to consider the provisions of sections 200 and 201. In the first place she argued that they revealed an absence of any legislative policy that the Tribunal should only have a single opportunity to have input into a patient's conditions of discharge. Secondly, by providing that the appeal to the Tribunal under section 201 should be treated, as an application under section 192, the legislature was placing such an appeal on the same category as hearings in the present cases (section 193(1)). If section 193 applied to the appeal procedure under section 201 and the appeal fell to be treated as a patient's application for discharge then, it was submitted, there was no reason why another form of review, that held under section 189 could not be regarded as an application in relation to which the powers contained in section 193(7) were available.

[22] Furthermore if the terms of section 193 could not be read as including the power in the Tribunal to vary conditions, where a patient was already discharged, then, senior counsel submitted, there was no process available for the updating of conditions. That submission was made on the footing that section 200 was, as it was put by counsel, "a supplementary power" which might be appropriately employed where something had arisen in relation to the patient which required an immediate alteration to the conditions currently in place "or where the change which was required was administrative in nature." The provisions of section 200 could not be intended as the means for alteration of conditions, in all cases, because, it was said, the patient is given a right of appeal in only one situation, namely where there has been an alteration to the conditions which he then seeks to challenge. What was to happen if the patient requested an alteration to his conditions and the minister refused

that request? The only means of challenging such a refusal would be by way of judicial review. All of these considerations, it was said, pointed to it having been the intention of parliament that the Tribunal should have a locus for altering the conditions of already discharged patients. In the context of a two yearly review, where the Tribunal identified a matter which it considered needed addressing in the interests of the patient, the absence of the exercise of any such power might conflict with the principles set out in section 1 of the Act to which a person discharging functions in relation to patients under the Act shall have regard. Senior counsel, at various times, referred to what the Tribunal had done in the present cases as imposing "replacement orders", as has been previously noted, but at other times she talked of "replacement conditions" having been imposed and, again, at other times she spoke of the Tribunal imposing "a fresh conditional discharge". Ultimately senior counsel suggested that the appropriate description of what the Tribunal did was to impose a replacement set of conditions.

**Decision**

[23] While both sides, in the course of their submissions, referred to certain authoritative guidance, given in cases dealing with the principles of statutory interpretation, there was no real dispute, ultimately, between them as to what the appropriate approach to interpretation of the relevant provisions in this case should be. Each said that the wording of the relevant provisions was consistent with the position they put forward. Senior counsel for the Tribunal could not, and did not, go as far as to suggest that the construction of the provisions, advanced on behalf of the appellants, produced an obvious absurdity. The furthest she could go was to suggest that the construction advanced by her had the merit of producing a sensible and

pragmatic outcome, having regard to the various considerations that she had put before the Court. Having regard to the wording of the relevant statutory language, taken as a whole, we have come to the clear conclusion that the submissions advanced on behalf of the appellants are to be preferred.

[24] The Tribunal, as was accepted by counsel on their behalf, had clearly failed to have regard to the provisions of the 2003 Order, which was the starting point for considering the status of the patients who were before them. Had the Tribunal done so, it is possible that their approach to matters may have been different. Be that as it may the legislation, in our view, sets out a deliberately detailed allocation of powers and responsibilities. The powers of the Tribunal, in a reference under section 189 are specifically set out at section 193 and are carefully circumscribed. Having regard to the wording of section 193(7) it is, in our opinion, clear that the intention of parliament as expressed in the words used is that the jurisdiction to impose conditions in respect of a discharged patient arises at, and only at, the time the Tribunal makes an order for the discharge of the patient. Having been satisfied as to the conditions contained in section 193(7)(a), and having not been satisfied as to the matter specified in section 193(7)(b), the Tribunal has the power to order a detained patient to be conditionally discharged and to specify what the relevant conditions should be. In other words, the section 193(7) powers are only available to the Tribunal when they are deciding whether a patient, who at the commencement of the reference under section 185(1), 187(2) or 189(2) is not discharged, should be conditionally discharged. Senior counsel for the Tribunal was unable to point to any provision in the legislation whereby the Tribunal has power conferred upon it either to revoke or vary an order, whereby a patient has become conditionally discharged. There is no such provision. Yet, in truth, however much senior counsel sought to dress up what

the Tribunal had done in the present case with language such as "imposition of a replacement order" or "imposition of fresh conditions", what the Tribunal purported to do, in the present cases, in our opinion, was to revoke the original orders, relating to the patients, and to substitute therefor new orders of conditional discharge. In our opinion the wording of section 193(7) is not capable of being read as to extend to such an exercise.

[25] That the foregoing is the correct view of matters, is, in our judgment, put beyond any real doubt by the provisions of section 200 and section 201. While section 193(7) provides for how the status of a conditionally discharged patient may come about by the order of the Tribunal, Chapter 3 of the Act is, in our judgment, concerned with the way in which that status may be altered once it has been conferred. We do not accept the gloss which Senior Counsel for the Tribunal sought to put on the scope of section 200. Not only do sections 200 and 201 address the question as to the way in which a variation of conditions imposed on conditional discharge may be varied and that variation appealed against, sections 202 and 204 deal with the recall of a patient from conditional discharge. As has been seen, sections 202, in particular, provides

> "(1) This Section applies to a patient conditionally discharged by the Tribunal under Section 193(7) of this Act
>
> (2) If the Scottish Ministers are satisfied that it is necessary for the patient to be detained in hospital, they may, by warrant, recall the patient to hospital"
>
> The Tribunal have no power to recall the conditionally discharged patient to hospital. Section 204 confers on the Tribunal an appellate function where the patient has been recalled under section 202."

In our judgment, those provisions, serve to demonstrate the restrictive scope and nature of the Tribunal's right to intervene in the status of a conditionally discharged

patient, once that status has been conferred by them under section 193(7) or deemed to have been so conferred in the transitional cases under the 2003 Order.

[26] The risks of multiplicity of orders and confusion, as regards the variation of conditions, which might arise if the approach of the Tribunal were to be upheld, as discussed by counsel for the appellants, are in our opinion real. What senior counsel for the Tribunal never satisfactorily addressed, in our opinion, was that, in substance, what the Tribunal did in these cases, was to revoke the existing orders for conditional discharge and substitute therefor new orders. There was nothing in the language of the statute which, in our judgment, gives them with the power to do so. We agree with counsel for the appellants that further support, if needed, for the appellants' contentions on the matter may be gathered from the wording of sections 195 and 196. What is more, it is, in our opinion, possible to identify clear policy reasons for the parliamentary intention having been that the altering of the status and conditions of a conditionally discharged patient, who is no longer detained, and is living in the community, should be reserved to the appellants solely. It is no doubt the appellants' duty to monitor the position of the discharged patient in the community, and seek to make the necessary adjustment to conditions in the light of experience. In the present case neither the appellants nor, the patients, sought any variation of the conditions in question. The Tribunal in purporting to make the variations they did exceeded their powers and acted *ultra vires*. Senior counsel for the Tribunal, as has been noted, accepted that the question ultimately was one of *vires*. Even if we had been persuaded by some of the things she said as to the expediency of vesting the Tribunal with the powers they purported to exercise, such considerations cannot overcome the clear obstacle that we identify, namely that the acts in question were not *intra vires*.

[27] For the foregoing reasons we shall allow both appeals and remit the section 189 references in each case to the Tribunal to determine anew.