SHERIFFDOM OF GRAMPIAN HIGHLAND AND ISLANDS AT ABERDEEN

B186/09

JUDGEMENT

of

SHERIFF PRINCIPAL SIR STEPHEN S T YOUNG Bt QC

in the cause

KM

Appellant

against

MENTAL HEALTH TRIBUNAL FOR SCOTLAND

First Respondent

MRS JACKIE STUART

Second Respondent

and

DR PAULINE LARMOUR

Minuter

Act: Mr Derek O'Carroll, advocate, instructed by Woodward Lawson, Aberdeen
Alt: Mr Archibald MacSporran, advocate, instructed by Central Legal Office, NHS, Scotland

Aberdeen: 21st August 2009

The sheriff principal, having resumed consideration of the cause, allows the appeal, sets aside the decision of the first respondent made at Aberdeen on 13th February

2009 to grant a compulsory treatment order in terms of section 64(4) of the Mental Health (Care and Treatment) (Scotland) Act 2003 in respect of the appellant and refuses the application dated 5th February 2009 made by the second respondent to the first respondent for such a compulsory treatment order; certifies the appeal as suitable for the employment by each of the appellant and the minuter of junior counsel; *quoad ultra* appoints parties to be heard on all other questions of expenses at Aberdeen Sheriff Court on 24th September 2009 at 4 pm.

Note

[1] In this appeal under section 320(2) of the Mental Health (Care and Treatment) (Scotland) Act 2003 ("the Act") the appellant craved the court (1) to set aside the decision of the first respondent ("the Tribunal") to grant a compulsory treatment order in terms of section 64(4) of the Act, and (2) to substitute for the Tribunal's decision an order that no compulsory treatment was necessary in respect of the appellant and accordingly that no compulsory treatment order should be granted in respect of him. In the alternative he craved the court to remit the case back to the Tribunal for consideration anew with a direction that the Tribunal should be differently constituted from when it made the decision forming the subject matter of this appeal.

[2] The original application to the Tribunal for a compulsory treatment order in respect of the appellant was dated 5th February 2009 and was made by the second respondent who is a mental health officer. The application was considered by the Tribunal at a hearing on 13th February 2009 at which there were present various persons including the appellant himself, his solicitor Mr Woodward-Nutt, his responsible medical officer, Dr Pauline Larmour, and the second respondent. The outcome of the hearing was that the Tribunal granted the application and made a compulsory treatment order in respect of the appellant. A copy of the Tribunal's full findings and reasons for its decision has been lodged in the process of this appeal, and I shall refer to this document as "the decision".

[3] Section 63(1) of the Act provides that an application to the Tribunal for a compulsory treatment order may be made by, and only by, a mental health officer. Section 64 applies where such an application has been made and subsections (2) and (3) require the Tribunal, before determining the application, to afford various persons, including the patient, the mental health officer and the responsible medical officer, the opportunity (a) of making representations (whether orally or in writing), and (b) of leading, or producing, evidence. Thereafter in terms of subsection (4) the Tribunal has a discretion either (a) to make the order sought if satisfied that certain specified conditions are met, or (b) to refuse the application.

[4] Section 57(1) of the Act provides: "Where subsections (2) to (5) below apply in relation to a patient, a mental health officer shall apply to the Tribunal under section 63 of this Act for a compulsory treatment order in respect of that patient". For present purposes subsection (2) is the important one, and this provides: "This subsection applies where two medical practitioners carry out medical examinations of the patient in accordance with the requirements of section 58 of this Act". Section 58 provides, *inter alia*:

> (1) The requirements referred to in section 57(2) of this Act are set out in subsections (2) to (6) below.
>
> (2) Subject to subsection (4) below and to regulations under subsection (5) below-
>
> > (a) each medical examination of the patient shall be carried out by an approved medical practitioner; and
> >
> > (b) subject to subsection (6) below, each such examination shall be carried out separately.
>
> (3) Where the medical examinations are carried out separately, the second shall be completed no more than five days after the first.
>
> (4) The patient's general medical practitioner may carry out one of the medical examinations of the patient although not an approved medical practitioner.

(5) Except in circumstances specified in regulations, there must not be a conflict of interest in relation to the medical examination; and regulations shall specify the circumstances in which there is to be taken to be such a conflict of interest.

(6) .....

The expression "approved medical practitioner" - see section 58(2)(a) - is defined in section 22(4) of the Act and, in short, means a medical practitioner who has been approved by a local health board as having special experience in the diagnosis and treatment of mental disorder.

[5] The regulations referred to in section 58(5) are the Mental Health (Conflict of Interest) (Scotland) (No.2) Regulations 2005. Regulations 4 and 5 of these provide:

4. -(1) The circumstances in which there is to be taken to be a conflict of interest in relation to the medical examination for the purposes of section 58(5) (requirements for medical examinations relating to compulsory treatment orders) are where-

(a) either medical practitioner is related to the patient in any degree specified in the Schedule;

(b) the two medical practitioners are related to each other in any degree specified in the Schedule;

(c) it is proposed that the compulsory treatment order should authorise the detention of the patient in an independent health care service and either medical practitioner is employed by or contracted to provide services in or to that independent health care service; or

(d) it is proposed that the compulsory treatment order should authorise the detention of the patient in a hospital other than an independent health care service and both medical practitioners are employed by or contracted to provide services in or to that hospital.

(2) For the purposes of paragraph (1)(d), unless a medical practitioner works wholly or mainly in a hospital, that practitioner shall not be regarded as being employed by or contracted to provide services in or to that hospital.

5. -(1) For the purposes of section 58(5), the circumstances in which a medical examination of a patient may be carried out even although there is a conflict of interest in relation to that medical examination are-

(a) where the conflict of interest is in terms of regulation 4(1)(c) or (d);

(b) failure to carry out the medical examination would result in delay which would involve serious risk to the health, safety or welfare of the patient or to the safety of other persons; and

(c) if one of the medical practitioners is a consultant, the other does not work directly with or under the supervision of that consultant.

[6] In this case the medical examinations were carried out by Dr Seonaid Anderson and Dr Larmour and their medical reports were dated 30th January and 3rd February 2009 respectively. It is not in dispute that both Dr Anderson and Dr Larmour were employed or contracted to provide services in or to the Royal Cornhill Hospital in Aberdeen (in which the appellant was then a patient) when the two medical reports were prepared. But it is also not in dispute that at that time Dr Larmour was a consultant and that Dr Anderson did not work directly with or under her supervision. It follows that it was accepted too that the conditions specified in paragraphs (a) and (c) of regulation 5(1) were satisfied in this case. But at the hearing before the Tribunal on 13th February 2009 the appellant's solicitor submitted in short that the condition specified in paragraph (b) of this regulation had not been satisfied with the result (which in itself was not in dispute) that the application would have to be refused by the Tribunal since in this event the second respondent would not have been entitled under sections 57(1) and 63(1) of the Act to make the application in the first place, the two medical examinations not having been carried out by Dr Larmour and Dr

Anderson in accordance with the requirements of section 58 of the Act, and specifically section 58(5).

[7] In the event the Tribunal decided that the condition specified in regulation 5(1)(b) had been met, and it is this part of the Tribunal's decision which is the subject of the present appeal. Having made this decision, the Tribunal went on to consider a range of other issues which are not in themselves the subject of this appeal and, as previously indicated, duly granted the application and made a compulsory treatment order in respect of the appellant.

[8] Being dissatisfied with the Tribunal's decision, the appellant appealed against it to myself as sheriff principal. This he was entitled to do in terms of section 320(1)(b) and (2) of the Act. Section 324 deals with appeals both to the Court of Session and the sheriff principal, and it provides, *inter alia*:

> (1) An appeal-
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> (a) to the sheriff principal under section 320(2) of this Act; or
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> (b) to the Court of Session under section 322(2) of this Act,
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> may be made only on one or more of the grounds mentioned in subsection (2) below.
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> (2) The grounds referred to in subsection (1) above are-
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> (a) that the Tribunal's decision was based on an error of law;
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> (b) that there has been a procedural impropriety in the conduct of any hearing by the Tribunal on the application;
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> (c) that the Tribunal has acted unreasonably in the exercise of its discretion;
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> (d) that the Tribunal's decision was not supported by the facts found to be established by the Tribunal.

(3) The Tribunal may be a party to an appeal under section 320(2) or 322(2) and in any appeal from the decision of the sheriff principal under section 321(1).

(4) The court may, where it considers it appropriate, order the Tribunal to be represented at any hearing of an appeal under section 320(2), 321(1) or 322(2).

(5) In allowing an appeal under section 320(2), 321(1) or 322(2) of this Act the court-

(a) shall set aside the decision of the Tribunal; and

(b) shall-

(i) if it considers that it can properly do so on the facts found to be established by the Tribunal, substitute its own decision; or

(ii) remit the case to the Tribunal for consideration anew.

(6) If the court remits a case under paragraph (b)(ii) of subsection (5) above, the court may-

(a) direct that the Tribunal be differently constituted from when it made the decision; and

(b) issue such other directions to the Tribunal about the consideration of the case as it considers appropriate.

[9] The appeal was lodged with the sheriff clerk on 16th March 2009. It was (correctly) in the form of a summary application which concluded with two pleas in law to the effect that the Tribunal's decision that the condition specified in regulation 5(1)(b) had been met was both an error of law and unfounded in fact. In the event neither the Tribunal nor the second respondent sought to oppose the appeal. In the case of the Tribunal it appears that this was because it was thought that the nub of the appeal was the position adopted by Dr Larmour in the circumstances in which she found herself at the material time and that the argument in support of the Tribunal's

decision could best be advanced by her. Thus she did seek to oppose the appeal, and by interlocutor dated 15th April 2009 I allowed her to be sisted as a party minuter and answers were in due course lodged on her behalf. At the hearing of the appeal itself both she and the appellant were represented by junior counsel.

[10] In advance of the hearing a transcript of the proceedings before the Tribunal on 13th February 2009 was obtained, and during the hearing counsel for the appellant referred me to various passages in this transcript which demonstrate that the account given by the Tribunal in the decision of what had been said by Dr Larmour at the hearing on 13th February 2009 was, at least in part, somewhat misleading (for example, by attributing to Dr Larmour statements which were in fact made during the hearing by the chairman). For present purposes I do not think that it is necessary to rehearse these inaccuracies (which in large part were not disputed by counsel for Dr Larmour) since they are not relevant to my own decision in this appeal. But the Tribunal itself might find it a useful lesson for the future to compare what is recorded in the transcript as having been said by Dr Larmour with what is recorded at pages 3 to 6 of the decision as having been said by her.

[11] The Tribunal dealt with the issue raised by regulation 5(1)(b) at pages 3 to 7 of the decision. In addition to referring to what was said in this context by Dr Larmour the Tribunal at pages 3 to 6, having identified the issue, quoted regulations 4 and 5 in their entirety, explained the procedure which was followed during that part of the hearing when this issue was considered (including, quite properly, allowing the second respondent an adjournment to seek legal advice) and rehearsed the submissions that were made by the appellant's solicitor on the issue. But it is important to notice that in this section of the decision the Tribunal did not set out the facts that it had found to be established in relation to this issue (and here reference may be made to section 324(2)(d) of the Act quoted above).

[12] The Tribunal explained its reasons for holding that the three conditions in regulation 5(1), and in particular the condition specified in paragraph (b), had been met at pages 6 to 7 of the decision in a passage which reads as follows (the underlining in the penultimate paragraph is the Tribunal's):

We then considered Mr Woodward-Nutt's proposition that there had been no permitted conflict of interest.

We accepted the thrust of section 58 and the 2005 Regulations was to ensure complete independence of the two mental health reports (CTO 2's) lodged with the CTO application. If possible one of these reports should be by an AMP from outwith the proposed hospital at which the patient should be detained or by the patient's GP. Should the two medical examinations be by psychiatrists from the "detention" hospital then there would be a veneer of suspicion these examinations were not independent and there could be a conflict of interest.

However, the 2005 Regulations recognised (due to the strict time limit of 28 days in preparing a CTO application and its hearing) delay could result in arranging a second medical examination (other than an GP - not applicable in this case) by a psychiatrist from outwith the "detention" hospital. The fact that the MHO had commendably sought the guidance of the Mental Welfare Commission in this case could not overcome the 2005 Regulations, which were for the protection of the patient. Neither could the 2003 Act Code of Practice be relied upon by us for guidance. Indeed, section 274(5)(b) specifically excludes the Tribunal from following or being bound by the Code of Practice. In the event of conflict between the Code of Conduct and legislation, the legislation must clearly prevail.

We decided looking, on the whole, at the position the RMO found herself in late January 2008, with the STDC time limit running out, the fact that she considered seeking a second medical examination/mental health report from a psychiatrist from "Dundee, Edinburgh or Inverness" but had discount (sic) taking this further because of delay, was sufficient in our view to trigger the RMO using Regulation 5 - permitted conflicts of interest. If the RMO had not considered seeking a psychiatrist from "Dundee, Edinburgh or Inverness" we would have held there had been a conflict of interest between the two medical examinations/mental health reports and the CTO application would have in our view, as a consequence, fallen.

> We accepted from the evidence we had heard, there was permitted conflict of interest, as the criteria of Rule 5(1) had in our view been met.

[13] Referring to this passage in the decision, counsel for the appellant submitted in short that it was plain that the Tribunal had misdirected itself in law on this issue. In this I think counsel was correct. In a nutshell it seems to me that the Tribunal erred in law in deciding this issue by reference to what was in the mind of Dr Larmour at the material time, when what it ought to have done was to consider objectively whether it had been established as a matter of fact that failure to carry out the second medical examination of the appellant on 3rd February 2009 would have resulted in delay which would have involved serious risk to the health, safety or welfare of the appellant or to the safety of other persons. Such a finding would have been an inference drawn from other facts which the Tribunal had found established in the case, in particular in relation to the length of any delay that would have resulted from failure to carry out the second medical examination at that particular point in time and the reasons why such a delay would have involved serious risk to the health, safety or welfare of the appellant or to the safety of other persons. Needless to say, nowhere between pages 3 to 7 of the decision is there to be found any account of what these other facts might have been. Instead, as is clear from the penultimate paragraph in the passage quoted above from its decision, the Tribunal based its conclusion that the condition specified in regulation 5(1)(b) had been met solely upon the fact that Dr Larmour had considered seeking a second medical examination/mental health report from a psychiatrist from "Dundee, Edinburgh or Inverness" but had discounted taking this further because of delay. In so doing the Tribunal in my opinion clearly misdirected itself in law.

[14] In passing, it is interesting to notice here that, in contrast to the position in Scotland, in England the corresponding regulations, namely the Mental Health (Conflicts of Interest) (England) Regulations 2008, do appear to provide in effect for the application of a subjective test which involves considering what was in the mind of the medical practitioner or approved mental health professional at the material time. Thus paragraph (1)(b) of regulation 6 provides in short that, except where paragraph (3) applies, there will be a potential conflict of interest where the two doctors are members of the same clinical team or one of the doctors and the patient

are members of the same team. Paragraph (3) provides (my emphasis) that paragraph (1)(b) "shall not prevent a registered medical practitioner giving a medical recommendation or an (approved mental health professional) making an application if, in their opinion, it is of urgent necessity for an application to be made and a delay would involve serious risk to the health or safety of the patient or others".

[15] It follows from what I have said so far that I should allow the appeal and set aside the decision of the Tribunal. In terms of section 324(5)(b) of the Act I then have a choice either (i) to substitute my own decision if I consider that I can properly do so on the facts found to be established by the Tribunal, or (ii) to remit the case to the Tribunal for consideration anew. Counsel for Dr Larmour conceded that, if the appeal were to be allowed, there would be no point in remitting the case to the Tribunal for consideration anew. If I understood him correctly, he appeared at times during the course of his submissions to be suggesting that the evidence before the Tribunal had been sufficient to satisfy it that the condition specified in regulation 5(1)(b) had been met and that upon consideration of this evidence I should myself find that the condition had been met. But the difficulty here is that section 324(5)(b)(i) requires me to consider the matter in light, not of the evidence which was before the Tribunal, but of the facts found to be established by it. As already indicated, there were no facts found to be established by the Tribunal which would even begin to bear out the proposition that failure to carry out the medical examination of the appellant on 3rd February 2009 would have resulted in delay which would have involved serious risk to his health, safety or welfare or to the safety of other persons. It follows in my opinion that I have no alternative, having set aside the decision of the Tribunal, but to refuse the application for a compulsory treatment order in respect of the appellant upon the basis that, Dr Larmour and Dr Anderson not having carried out their medical examinations of the appellant in accordance with the requirements of section 58 of the Act, the second respondent ought not to have made the application to the Tribunal in the first place - see sections 57(1) and 63(1) of the Act.

[16] In the course of the hearing before the Tribunal Dr Larmour stated several times during the discussion of the issue that she considered that the condition specified in regulation 5(1)(b) had been met in this case. I use the word "discussion" here advisedly since, in contrast to the conventional method of proceeding in a court of

law, this was not a situation where Dr Larmour was examined in chief and then cross-examined respectively by the second respondent and the appellant's solicitor who then both made submissions on the issue. On the contrary, what happened was essentially a discussion (in the ordinary sense of the word) of the issue in which all four of the chairman, Dr Larmour, the appellant's solicitor and, to a lesser extent, the second respondent participated and in which assertions in the nature of evidence (chiefly, as was to be expected, by Dr Larmour but also at times by the chairman) and submissions were freely intermingled. I express no opinion on the question whether this was an appropriate way to proceed other than to observe that it does seem to me on reading the transcript to have introduced an element of confusion into the proceedings. Against this background it was perhaps not surprising, but unfortunate nonetheless, that on each occasion that Dr Larmour stated that she considered that the condition specified in regulation 5(1)(b) had been met (and notwithstanding that the issue had by then been clearly identified as such by both the chairman and the appellant's solicitor) the opportunity was not taken to ask her why she was of this opinion. If she had been asked, it may be that she would have been able to put before the Tribunal cogent reasons which would have allowed it in turn to find in point of fact that the condition had been met. Given that she was not asked, she cannot be criticised for not having advanced these reasons, if indeed they existed. At the end of the day it was for the second respondent, whose application it was, to ensure that the necessary evidence was put before the Tribunal to satisfy it, if such indeed was the case, that the condition had been met.

[17] It was said by counsel for the appellant that this case raised an issue of some importance, not only to the appellant, but also to the mental health authorities in the North East in particular and more broadly throughout Scotland as a whole. He explained that an appeal which raised this issue had not previously been brought before either in Scotland or in England under the equivalent legislation there. He suggested that it might be that the authorities at the Royal Cornhill Hospital might benefit from guidance by the court in relation to their internal procedures and the decisions to be made by them when a conflict of interest arose as it had in this case. These observations were echoed by counsel for Dr Larmour who referred to the possible geographical difficulties raised by this case and indicated that medical practitioners who had to apply the 2005 Regulations would benefit from judicial

guidance as to what amounted to delay in the context of regulation 5(1)(b) and whether words such as "urgent necessity" should be implied in this particular provision.

[18] The geographical difficulties to which counsel referred stem from the fact, so it appears, that the Royal Cornhill Hospital is the only psychiatric hospital in Aberdeen and that otherwise the nearest psychiatric hospitals, or psychiatric units within general hospitals, are at Montrose, Dundee, Elgin and Inverness. In addition to the medical staff of the Royal Cornhill Hospital there are in Aberdeen some general practitioners who are approved medical practitioners within the meaning of section 22 of the Act. But it appears that the terms of these practitioners' contracts of engagement with the NHS in Scotland are such that, except in the case of a practitioner who is already a patient's general practitioner, they are unable or unwilling to carry out medical examinations of patients at the Royal Cornhill Hospital for the purposes of section 58 of the Act. All this means that if, as in the present case, a patient in the Royal Cornhill Hospital does not have a general practitioner, the authorities at the hospital are faced with the problem of satisfying the requirements of sections 57(2) and 58 of the Act within the statutory time limits that apply in this type of case without falling foul of the terms of section 58(5) and the 2005 Regulations.

[19] It appears from what Dr Larmour said at the hearing on 13th February 2009 (see pages 16C, 18D and 35E of the transcript) that hitherto there has been what she described as a "local arrangement" with the management of the Royal Cornhill Hospital that, if a patient in one part of the hospital does not have a general practitioner, then a doctor who is an approved medical practitioner from another part of the hospital will be called upon to carry out one of the required medical examinations. Although Dr Larmour did not say so specifically, the other examination will presumably be carried out normally by the patient's responsible medical officer (which is what happened in this case). It seems too from what the second respondent said at the hearing (see pages 21E/F and 29A/B of the transcript) that this practice has the blessing of the Mental Welfare Commission, and Dr Larmour evidently considered (see page 31C) that the practice was consistent with the Code of Practice issued by the Scottish Government in relation to the implementation of the provisions of the Act.

[20] Needless to say, it is not enough to satisfy the condition specified in regulation 5(1)(b) that what was done in this case in the way of carrying out the two medical examinations of the appellant should have been consistent with the hospital's internal arrangements and the Code of Practice and have had also the blessing of the Mental Welfare Commission. At the end of the day it is the Tribunal that has to be satisfied that this condition has been met in any given case and, before it can be so satisfied (if, that is, the point is not admitted), there has to be placed before it evidence sufficient to allow it to make findings in fact which will in turn support the inference that the condition has been met. As I have already indicated, it may be that, if she had been asked the right questions, Dr Larmour would have been able to supply the necessary material to the Tribunal to allow it to draw this inference. In truth I do not know. But what I can say about regulation 5(1)(b) is that it demands that the circumstances of each case should be assessed on their own merits and not simply resolved in accordance with some predetermined local arrangement at the hospital in question (which, so it appears, is essentially what happened in this case - see pages 16C, 18D and 35E referred to in the previous paragraph). Moreover, the circumstances must be assessed at the time that consideration is being given to carrying out a second medical examination of the patient for the purposes of section 57(2), and not at some earlier or later point in time. And what those responsible for the care of the patient have to ask themselves (bearing in mind always that their decision may subsequently be challenged and so have to be explained and justified to the Tribunal) is whether failure to carry out the medical examination at that time would result in delay which would involve serious risk to the health, safety or welfare of the patient or to the safety of other persons. In order to answer this a number of preliminary questions may have to be asked including (1) what are the alternatives to carrying out the medical examination at that time, (2) in respect of each of these alternatives what delay, if any, would ensue before a medical examination of the patient could be carried out, (3) as regards any such delay, what impact would it have given the applicable statutory time limits (including any possible extension of these) and, in particular, what impact would it have on the health, safety or welfare of the patient or the safety of other persons, and (4) why any such impact would involve, not just a risk, but a serious risk, to the health, safety or welfare of the patient or to the safety of other persons.

[21] It was agreed that I should certify the appeal as suitable for the employment by both the appellant and Dr Larmour of junior counsel, and I am satisfied that it would be appropriate to do so. It was also agreed that all other questions of expenses should be reserved for a further hearing (which I should be content to discharge if agreement can be reached between the parties on these questions).