Scotland

B2606/05 Elizabeth Byrne v Mental Health Tribunal for Scotland

Glasgow 13th February 2006 Sheriff Principal Taylor

Act: Mrs. Hanlon for the appellant

Alt: Mr. Campbell, counsel for the respondents

The Sheriff Principal, on the respondents' motion, there being no objection thereto, Allows the adjusted answers tendered at the bar to be received although late; on the respondents' motion, there being no objection, Allows the production for the respondents (Transcript of the Mental Health Tribunal for Scotland sitting for 8 December 2005 in respect of Elizabeth Byrne) tendered at the bar to be received and form No 6 of process; having heard Mrs Hanlon, solicitor for the appellant, and Mr Campbell, counsel for the respondents, on the appeal, Allows the appeal; Remits the case to the Mental Health Tribunal for Scotland for consideration anew in terms of Section 324(5)(b)(ii) of the Mental Health (Care and Treatment) (Scotland) Act 2003, and in terms of Section 324(6)(a) of the Mental Health (Care and Treatment) (Scotland) Act 2003 Directs that the Tribunal be differently constituted from the Tribunal which made the decision on 8 December 2005; Refused the appellant's motion for a direction that new medical reports be obtained in terms of Section 324(6)(b) of the Mental Health (Care and Treatment) (Scotland) Act 2003; Finds the respondents (the Mental Health Tribunal for Scotland) liable to the appellant in the expenses of the appeal as taxed; Allows an account thereof to be given in and Remits same when lodged to the Auditor of Court to tax and to report.

Sheriff Principal

B2606/05

JUDGEMENT OF SHERIFF PRINCIPAL
JAMES A TAYLOR

in the cause

ELIZABETH BYRNE

<u>PURSUER</u>

against

MENTAL HEALTH TRIBUNAL FOR SCOTLAND

<u>DEFENDERS</u>

Act: Mrs Hanlon
Alt: Mr Campbell, Advocate

Glasgow, 21 February 2006.

<u>NOTE</u>:

This was an appeal under Section 320 of the Mental Health (Care and Treatment) (Scotland) Act 2003. The appellant was represented by Mrs Hanlon, solicitor and the respondents by Mr Campbell, advocate. After hearing submissions I allowed the appeal and remitted the case back to a differently constituted Tribunal. However, Mrs Hanlon asked me to write a Note. Practitioners in the mental health field have been encountering problems similar to those which she had experienced in this case.

The facts were by and large agreed. The appellant had been made the subject of a Section 18 Order in terms of the Mental Health (Scotland) Act 1984. That became a Compulsory Treatment Order on 5 October 2005 when the 2003 Act came into force. On 25 November 2005 the appellant was examined by her Responsible Medical Officer, Dr Kelly, at Leverndale Hospital where the appellant was a patient. At that time no papers were served upon the appellant. On 6 December 2005 the appellant was informed that there was to be a hearing in her case on 8 December 2005. Late in the afternoon of

6 December 2005, Mrs Hanlon was instructed by the appellant. The earliest date upon which Mrs Hanlon could meet with the appe11ant was on the morning of 8 December 2005. Mrs Hanlon saw the papers in the case for the first time some 10 minutes before the hearing was due to take place. In 2002 Mrs Hanlon's firm, but not Mrs Hanlon, had acted for the appellant in relation to an application under the Adults With Incapacity (Scotland) Act 2000. By letter dated 28 November 2005 the appel1ant had written to the Mental Health Tribunal indicating that she wished to have the Compulsory Treatment Order revoked. Mrs Hanlon had not been consulted by the appel1ant in relation to the application for revocation. Accordingly Mrs Hanlon spoke to Dr Kel1y to ascertain Dr Kelly's views on a motion which Mrs Hanlon proposed to make to have the case adjourned to enable her to familiarise herself with the case and to obtain an independent psychiatric report. Dr Kelly indicated that she would not oppose such a motion and could see the benefit in such. If the independent report concluded that the course of treatment for the appellant should be as Dr Kelly had concluded there might be more chance that the appellant would accept that it was in her interests that she receive such treatment. In the course of the hearing Mrs Hanlon duly made her motion for an adjournment in terms of Rule 65 of the Mental Health Tribunal for Scotland (Practice and Procedure) (No 2) Rules 2005. She explained that she had only met with the appellant that morning, that she had not been able to read the papers as she wished and that she had not obtained the benefit of an independent report. There was no opposition to her motion. Mrs Hanlon intimated that her client consented to the making of an interim extension of the Compulsory Treatment Order in terms of Section 105 of the Act. By so doing the Tribunal would preserve the *status quo* and Ms Byrne would require to continue taking the prescribed medication. Nonetheless the Tribunal refused the motion for an adjournment. In their decision they record that the hospital team had a long-standing knowledge of the patient and they were satisfied that the patient, her named person, her advocate and her solicitor had ful1y represented the patient's interests. Against that decision the appellant appealed.

Mr Campbell, for the Mental Health Tribunal, submitted in the first place that the Mental Health Tribunal had acted incompetently and that there was no decision capable of being appealed. He accepted that if this submission was upheld it would mean that the

appellant had been unlawfully detained since the hearing of the Tribunal on 8 December 2005. Mr Campbell relied heavily on the transcript of the hearing on 8 December 2005 which the respondent had lodged as a production. He submitted that it was clear that what happened was that the legal convener of the Tribunal had challenged Dr Kelly in relation to the way in which Dr Kelly had completed the application form. On page 6 of 19 of the application form, Dr Kelly had shaded each of the eight measures which she was seeking. The convener had pointed out to her that the first two options were appropriate for a Compulsory Treatment Order with the patient being detained in hospital. The remaining six options were appropriate if the patient was to be at liberty in the community. The convener indicated that Dr Kelly had to choose between the two alternatives. In the course of the hearing the application was amended to delete any reference to measures appropriate to a community based order. The application was now for an order that the patient be detained in a specified hospital and given medical treatment in accordance with Part 16 of the Act. This, submitted Mr Campbell, was, properly understood, an extension of the then existing Compulsory Treatment Order. In his submission the extension of an order could be made only by the Responsible Medical Officer and that in terms of Section 84 of the Act. By considering the terms of Sections 84 to 92 of the Act one could see that it was a decision for the Responsible Medical Officer only. An application to the Tribunal was neither necessary nor competent. If the patient took exception to the order the patient had the facility to seek revocation which is what the appellant had done on this occasion by writing her letter. It was not however for a Tribunal to make a Section 86 extension. To the extent that the Tribunal purported to extend the order in terms of Section 86, their decision was null. If one looked at Section 320 of the Act one could see no reference there to an appeal under Section 86 of the Act to the Sheriff Principal.

In reply, Mrs Hanlon referred me to the terms of the Tribunal's decision. It opens by saying that it was a decision under Section 103 of the Act. The application had competently been made by the Responsible Medical Officer under Section 92 of the Act.

I came to the view that the application had been competently made in terms of Section 92. When the application was made there was perhaps confusion in the mind of the Responsible Medical Officer as to what orders she wished to have made but the only

way in which some of the orders which she initially sought could have been made was by

making an application under Section 92. Thus, at least at the outset, there was no question but that the Tribunal was the competent body to hear the application. The fact that the application was amended in the course of the hearing did not in my opinion rob the Tribunal of its competency to hear the application. In terms of Section 103(1)(b) of the Act the Tribunal had the power to extend the Compulsory Treatment Order for the period sought. It seems to me obvious that the Tribunal requires to have such a power. For example, a Responsible Medical Officer could make application to the Tribunal in terms of Section 92 of the Act for an order extending and varying a Compulsory Treatment Order. The Responsible Medical Officer may wish to have the Compulsory Treatment Order modified in some respect in the terms of Section 103(1)(a) of the Act. If the Tribunal refused to order the variation it seems obvious that it would require to have the power to order a simple extension. Thus, not surprisingly, that power is given by Section 103(1)(b). The Tribunal purported to come to a decision under Section 103 of the Act. In terms of Section 320(1)(e) an appeal lies to the Sheriff Principal against a decision made under Section 103(1)(b). Accordingly I rejected the submission made on behalf of the Tribunal that their decision had been incompetent.

It is, to say the least, unusual that a Tribunal should come to an appellate court and submit that the decision which the appellant complains of was one which was incompetently made by the Tribunal. It might even be unique. However closer examination disclosed that to have its decision declared incompetent had one very large advantage for the Mental Health Tribunal. It would no longer be competent for the appeal to proceed. Accordingly the actings of the Mental Health Tribunal would not be judicially considered. Given the way in which the Mental Health Tribunal acted one can understand why they might wish to have their actings kept from any form of scrutiny.

Mrs Hanlon attacked the decision of the respondents on four fronts. In the first place, she submitted that in terms of Rule 9(3) the clerk was obliged to give notice of the application to, amongst others, the patient. The period of notice was not specified. A clue as to what might be a reasonable time could be deduced from the terms of Rule 9(5). That rule provides that if, for example, the patient wished to make representations or to lead or produce evidence at the hearing, a notice of response had to be given to the

Tribunal within 14 days of receipt of the notice. Accordingly it must be anticipated that more

than 14 days notice will be given to the patient of the date of hearing. Mrs Hanlon accepted that on occasion there would be a degree of urgency which might preclude a period of notice in excess of 14 days being given. Such urgency need not have occurred in this case. She also submitted that the Tribunal must act in accordance with natural justice. She made reference to the case of *Barrs* v *British Wool Marketing Board* 1957 SC 72, *Tait v Central Radio Taxis* 1989 SL T 217, *R v Secretary of State for the Home Department* 1993 3 WLR 154 and *Ritchie v Secretary of State for Scotland* 1999 SLT 55.

The second ground upon which the appellant attacked the respondents' decision was based upon the refusal of the respondents to allow the unopposed motion for an adjournment. It was pointed out to the Tribunal that there would be no prejudice to any party. In terms of Section 105 of the Act an interim extension of the Compulsory Treatment Order was competent. Mrs Hanlon invited the Tribunal to grant the adjournment but to make an interim order in terms of Section 105. Her client had agreed to this even although the treatment under Part 16 of the Act would have continued under the interim extension. She informed the Tribunal that she had been in touch with an independent psychiatrist who had arranged to see the appellant on the evening of 8 December 2005. She was about to send to the psychiatrist a letter of instruction inviting him to look at the principles of the Act and the Section 64 test to ascertain if it had been met. He would also be invited to look at the application and the care plan accompanying it. The Tribunal's reasons for refusing the motion to adjourn, which are set out in page 4 of their decision, did not constitute a coherent explanation for their refusal.

The third attack was based upon Sections 1(3)(c) and (g) of the Act. Section 1 sets out the principles which the Tribunal must adopt when discharging certain of their functions. Section 1(3)(c) provides for the importance of patient participation and Section 1(3)(g) provides for the principle that the patient is not to be treated in any way less favourable than a person who is not a patient. Given that the appellant had impaired intellectual function and needed assistance to participate, the principles had been denied to the appellant. She had been discriminated against.

Finally, Mrs Hanlon submitted that there had been a breach of Articles 5 and 6 of the European Convention for the Protection of Human Rights. She relied upon the cases

of *Vermeulen v Belgium* 2001 32 EHRR 15, *Bonish v Austria* 1987 9 EHRR 191 and

Winterwerp v The Netherlands 1979-802 EHRR 387.

Perhaps not surprisingly Mr Campbell's response to these attacks was brief. There was not much he could say. In so far as the attack on the lack of notice was concerned, he submitted that such notice as was required would be dictated by the circumstances of the case. With that I agree. The primary purpose of the notice was to convene parties and to inform the relevant persons of the hearing. That had been achieved. Because of the involvement of Mrs Hanlon's firm in 2002 the firm would have had some knowledge of the circumstances of the appellant. Whether an adjournment should have been allowed was a matter for the discretion of the Tribunal. Mr Campbell accepted, as he was forced to, that the Tribunal's reasoning for refusing the adjournment was less than clear. He surmised that perhaps because the Tribunal had agreed not to deal with the appellant's application for revocation, they thought it was appropriate to deal with the application by the Responsible Medical Officer. He was unable to provide any clue as to why the Tribunal could not have dealt with the application for revocation and the application under Section 92 for an extension and variation in the same way. In so far as the Section 1 principles were concerned, Mr Campbell submitted that the patient had been there in person and had been asked for and had given her views. The advocate elected to say nothing but the appellant's mother had contributed. It was, in his submission, difficult to see what more could have been done as everybody had been present and their views sought. These views had been taken into account as could be seen from paragraph 9 of the decision. The attack based upon the articles in the European Convention for the Protection of Human Rights relied upon the material previously put before me by the respondents.

Only in the most extreme circumstances could it be thought that less than 48 hours notice of a hearing was adequate. No reason was given to me as to why such a short period of notice was given to the appellant. I can only assume that there was no good reason. Bearing in mind that the application records that the appellant's symptoms include "vague disordered thinking" and that she has "impaired intellectual function" such a short period is wholly inadequate. That Mrs Hanlon's firm acted for the appellant in relation to an application under the Adults With Incapacity (Scotland) Act 2000 is in

my mind quite irrelevant. Mrs Hanlon had not been instructed in this application. The decision which the Tribunal reached at the hearing on 8 December 2005 is little short of astonishing. It was not challenged that Mrs Hanlon had explained to the Mental Health Tribunal that she had

seen her client for the first time that morning and that she had seen the papers in relation to the application only 10 minutes prior to the hearing commencing. In my opinion no Tribunal properly directing itself to the issue could do other than come to the view that insufficient notice had been given to the appellant and that there was no alternative but to grant the appellant's motion for an adjournment. This is particularly so when the appe1lant invited the Board to make an interim order which maintained the *status quo* and the fact that a further Tribunal would have to be convened at some time in the future to deal with the appellant's application for revocation. How the Mental Health Tribunal could be satisfied that the patient's best interests were capable of being represented by her solicitor in the foregoing circumstances is unfathomable. It is not for the Tribunal to say whether a solicitor is able to represent the patient's interests properly. That can only be a matter for the individual solicitor who bears certainly responsibilities as an officer of the court. In some cases the inability to properly represent a client's interests will be attributable to the actings of the client and accordingly a motion to adjourn might be refused. In this case however the failure to have a fully prepared solicitor available to represent the appellant could not in any way be attributable to the conduct of the appellant. Less than 48 hours notice had been given to a patient who *inter alia* had "impaired intellectual functions". Representation cannot be meaningful when the solicitor has seen the papers for the first time 10 minutes before the Tribunal starts. That is particularly so when expert evidence is led as was done here. Mrs Hanlon very properly did not cross-examine the expert witness who gave evidence. She would have had no basis in precognition to do so. The relevance to the decision to refuse an adjournment of the hospital team having a long standing knowledge of the appellant is difficult to see. It serves only to highlight the flawed thinking of the Tribunal. If true it meant that the applicant to the Tribunal, the Responsible Medical Officer, knew considerably more about the appellant than did the solicitor instructed by the appellant. All the more reason, one might think, to grant the motion in order that the imbalance might be redressed. When the Scottish Parliament passed the 2003 Act and provided that

one of the principles which the Tribunal had to bear in mind when it came to discharging its functions was that the patient should participate, it, I am sure, considered that the participation should be meaningful. In this case the patient was denied meaningful participation because the expert views being expressed by the hospital team could not be competently challenged. Mere

attendance at the hearing is not, as was submitted by Mr Campbell, the test. It requires to be meaningful attendance.

Lord President Clyde in *Barrs v British Wool Marketing Board* said:-

"It is not a question of whether the tribunal has arrived at a fair result; for in most cases that would involve an examination into the merits of the case, upon which the tribunal is final. The question is whether the tribunal has dealt fairly and equally with the parties before it in arriving at the result. The test is not "Has an unjust result been reached?" but "Was there an opportunity afforded for injustice to be done?" If there was such an opportunity, the decision cannot stand. Hence, if one party is al1owed to give evidence, and this is denied to another, the decision would be reduced, not because the evidence led had convinced the tribunal, for this could hardly ever be established, but because the standards of fair play which underlie all such proceedings had not been satisfied."

In the present case Ms Byrne was effectively denied the opportunity to lead evidence. In order for her to have had that opportunity an adjournment would have been necessary. Thus there was ample opportunity for injustice to be done. The fact that Mrs Hanlon had not the opportunity to prepare for the case through no fault of either hers or Ms Byrne, only compounds the problem for the Tribunal. Their decision could not stand.

Accordingly I considered that the various attacks made by the appellant against the decision of the Mental Health Tribunal were wholly justified. She was not given adequate notice of the date of the hearing, she should not have been denied an adjournment, the Mental Health Tribunal disregarded the principles set out in Section 1(3)(c) and (g) and the Mental Health Tribunal breached the appel1ant's human rights in terms of the Convention. Accordingly in terms of Section 324(5) and 324(6) of the Act I allowed the appeal, set aside the decision of the Tribunal and remitted the case

to a differently constituted Tribunal for consideration anew. Mrs Hanlon invited me in terms of Section 324(6)(b) to issue directions to the Tribunal that up to date medical reports should be produced before they consider the case of new. I refused that motion. I considered it is a matter for the Mental Health Tribunal to regulate their own procedure.

I granted the appellant's motion that the Mental Health Tribunal should be liable for Ms

Byrne's expenses. I will leave others to comment on whether the exercise of resisting this appeal was a responsible use of taxpayers' money.