Mental Health Tribunal for Scotland

CASE DIGEST

December 2011

Valerie Mays

Mental Health Tribunal for Scotland

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Mental Health Tribunal for Scotland

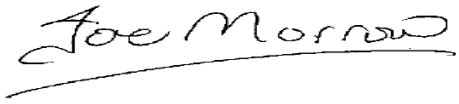
FOREWORD

The fundamental reform of mental health law in Scotland brought about by the Mental Health (Care and Treatment) (Scotland) Act 2003 created a new legal framework for the detention and compulsory treatment of patients who have a mental disorder. Inevitably, a number of issues in respect of the 2003 Act have been raised which have required the courts to clarify the proper construction of the provisions contained in it.

This Case Digest summarises and comments on cases taken on appeal from the Tribunal where a written judgement has been issued by the court.

The contents of the Case Digest are intended to be informative. It is a welcome additional tool for Tribunal members and it is my hope that it will be used as an aide-memoire by Tribunal members, those practising in the area of mental health law and those involved in proceedings before the Tribunal.

I commend the Case Digest to all such persons and am sure it will prove invaluable to those who use it. I am grateful to Valerie Mays for undertaking this work and to Yvonne Bastian for her secretarial support.



Dr J J Morrow
President

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Mental Health Cases

Byrne v Mental Health Tribunal for Scotland

[2007] MHLR 2; 2006 GWD 10-179

Judgement of Sheriff Principal J A Taylor 13 February 2006

Appeal against decision to extend and vary CTO – refusal of motion to adjourn to obtain independent medical report

An application was made to the Tribunal under section 92 of the 2003 Act for an order extending and varying Ms Byrne's (B) compulsory treatment order (CTO). On 6 December 2005, B was told that there would be a hearing in her case on 8 December 2005. She immediately instructed a solicitor, but the solicitor was not able to meet B until the morning of the hearing. B's solicitor requested an adjournment in terms of rule 65 of the Mental Health Tribunal for Scotland (Practice and Procedure) (No. 2) Rules 2005 ("the Rules") on the basis that she had only met B that morning and required further time to familiarise herself with the case and to obtain an independent medical report. The solicitor intimated that B would consent to the making of an interim order extending her CTO in terms of section 105 of the 2003 Act to preserve the *status quo*. The Tribunal refused the motion for an adjournment and went on to determine the application.

Issue

- was the Tribunal's refusal of motion to adjourn reasonable

Held

No Tribunal properly directing itself to the issue could do other than come to the view that insufficient notice had been given to B and that there was no alternative but to grant B's motion for an adjournment. 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 certain responsibilities as an officer of the Court. In some cases a client's interests might not be properly represented because of the client's own actions, and in such a case a motion to adjourn might be refused. In this case however, the failure to have a fully prepared solicitor available to represent B could not in any way be attributed to the conduct of B. B was denied meaningful participation in the Tribunal proceedings (contravening one of the general principles in section 1 of the 2003 Act), because the expert views being expressed by the hospital team could not be competently challenged. Without an independent report B's solicitor would have had no basis in precognition to do so. B was effectively denied the opportunity to lead evidence. In order for her to have had that opportunity, an adjournment would have been necessary. As a result there was ample opportunity for injustice to be done.

Appeal allowed.

Comment

The judgement in Byrne is extremely critical of the Tribunal's decision to refuse the motion to adjourn. The judgement in the Byrne case taken with the judgement in *McGlynn v Mental Health Tribunal for Scotland* make it clear that when a solicitor asks for an adjournment for the purpose of obtaining an independent medical report, the adjournment should be granted. Without such a report, any solicitor representing a patient before the Tribunal has no basis upon which to effectively cross-examine the medical witnesses.

The Sheriff Principal does comment that there may be occasions where the inability to properly represent a client's interests will be attributable to the actions of the client, and accordingly a motion to adjourn might be refused. Each motion to adjourn requires to be assessed on its individual merits and reasons given for the decision made in respect of such a motion. The Tribunal makes decisions in relation to people who have a mental disorder. The circumstances of the patient should be taken account of in any decision the Tribunal makes on a motion to adjourn where, for example, a patient has failed to timeously instruct a solicitor to represent them in proceedings before the Tribunal.

Beattie v Dunbar and Mental Health Tribunal for Scotland

2006 SCLR 777; [2007] MHLR 7; 2006 GWD 10-180

Judgement of Sheriff Principal B A Lockhart 22 February 2006

Application for CTO – competency of application – mental health reports

An application for a compulsory treatment order (CTO) was made in respect of Ms Beattie (B). B submitted that the MHO should not have made an application to the Tribunal as the application was incompetent; the Tribunal had no jurisdiction to hear the application; and the Tribunal had erred in law in determining the application and making a CTO. B submitted that the application was incompetent as the two mental health reports which accompanied the application did not satisfy the statutory requirements of section 57 of the 2003 Act on the basis that (1) one of the reports (the report of Dr O) did not state in terms that the medical practitioner was satisfied that the making of a CTO was necessary as required by section 57(3)(e) of the 2003 Act as he had not shaded the relevant sphere in the form used by him to complete his report and (2) the two medical reports did not specify the same measures which the two medical practitioners thought were necessary, as page 9 (the part of the proforma which requires the medical practitioner to shade spheres indicating the measures which should be authorised by the CTO) of Dr O's report had been mislaid and was not lodged with the papers accompanying the CTO application. As a result the two reports did not conform with section 57(5) of the 2003 Act.

Issue

- whether mental health reports conformed with relevant statutory provisions

Held

Dr O had in error omitted to shade the sphere beside the printed words "I am satisfied that the making of a CTO is necessary for the following reasons". It was however clear from a consideration of the totality of the mental health report prepared by Dr O, and in particular his handwritten comments, that Dr O was satisfied that the making of a CTO was necessary. The proforma page 9 of Dr O's report had become detached and was not before the Tribunal. It was however clear from Dr O's report that he considered B should be detained in a specified hospital. He had stated in the report "because of her severe brain damage, she is very uncooperative and refuses any help offered by health care team… she requires nursing and general medical treatment which would be totally impossible without admission". It was clear that Dr O considered that B required to be detained and that she required to receive medical treatment, which is defined in the 2003 Act. Dr O's report complied with the provisions of section 57(3) and (4) of the 2003 Act and there was coincidence between the measures specified in his report and those specified in the other mental health report. The Tribunal had not erred in law in determining the application.

Appeal dismissed.

Comment

This case reinforces the fact that the forms used by medical practitioners to complete the mental health reports (like the forms used by MHOs and RMOs in respect of applications etc under the 2003 Act) are not forms which are prescribed by statute. They are simply forms which have been provided, in the case of the mental health report pro forma, to allow doctors to easily deal with the various requirements of section 57. The totality of the

information in the reports requires to be taken into account when considering whether the mental health reports conform with the relevant statutory provisions, not simply whether particular spheres have been shaded or boxes completed.

The Sheriff Principal in this case also commented *obiter dicta* (the comments were observations and did not form part of the reasons for the decision) on the issue of independent medical reports. He was of the view that only in very exceptional circumstances, and on specific cause shown, should an independent report obtained by a patient with a view to challenging the conclusions in the MHO's report not be made available to the Tribunal. He noted that it was in the interests of justice that such a report should be available given that the Tribunal is concerned with what is in the best interests of the patient.

Paragraph 12(4) of Schedule 2 to the 2003 Act, however, provides that a person need not give evidence or produce any document if, were it evidence which might be given or a document that might be produced in any court in Scotland, the person having that evidence or document could not be compelled to give or produce it in such proceedings. Consequently, conveners cannot insist on the production of independent medical reports in Tribunal proceedings.

McGlynn v Mental Health Tribunal for Scotland

[2007] MHLR 16; 2006 GWD 13-248

Judgement of Sheriff Principal E F Bowen QC 2 March 2006

Appeal against decision to make CTO – refusal of motion to adjourn – failure to consider making interim CTO

McGlynn (M) was the subject of a short-term detention certificate granted under section 44 of the 2003 Act. Authority to detain her was due to expire on 14 November 2005. An application was made for a compulsory treatment order (CTO), and her detention for a further 5 working day period was authorised under section 68 of the 2003 Act. M's solicitor sought an adjournment on the basis that she had had insufficient time to consult her client and, if necessary, instruct and obtain an independent report before the making of a full CTO was contemplated. The request for an adjournment was refused and the Tribunal made a CTO. M appealed on the basis that the Tribunal acted unreasonably in the exercise of its discretion by failing to grant a request for an adjournment of the hearing in order that further information or evidence might be obtained.

Issues

- was it an unreasonable exercise of discretion for the Tribunal to refuse the request to adjourn
- should the Tribunal have considered making an interim CTO

Held

The matter was governed by rule 8 of the Mental Health Tribunal for Scotland (Practice and Procedure) (No. 2) Rules 2005. Rule 8(2) provides "Before the expiry of the period of 5 days referred to in section 68(2)(a) of the Act, the Tribunal shall hold a hearing ("a first hearing") in order to determine whether an interim CTO should be made and, if it determines it should not be made, to determine the application". It was clear that in the situation with which it was presented the first question the Tribunal ought to have considered was whether an interim CTO should have been made. It was clear from the decision of the Tribunal that it had not considered making an interim CTO. As regards the motion to adjourn, the opportunity to make further enquiries and to obtain an independent report should have been provided in accordance with the principles contained in section 1 of the 2003 Act. The Tribunal had acted unreasonably in the exercise of its discretion.

Appeal allowed.

Comment

In this appeal the Sheriff Principal stated that the correct form of procedure for an appeal to the Sheriff Principal from a decision of the Tribunal should be by way of summary application, by virtue of the provisions of section 3(p) of the Sheriff Courts (Scotland) Act 1907. It is now accepted by practitioners that this is the correct form of procedure and this procedure has been followed in subsequent appeals.

The Sheriff Principal also commented on the right of the Tribunal to be a party to the appeal without seeking the Court's authority. While accepting that that section 324(3) of the 2003 Act gives the Tribunal a right to be a party to an appeal he was of the view that appearance on behalf of a Tribunal whose decision is the subject of appeal is anomalous and a step which should only be taken in exceptional circumstances. This view does not appear to be shared by other Sheriffs Principal nor by the Court of Session, where appearance on behalf of the Tribunal has not been the subject of similar comment.

Smith v Mental Health Tribunal for Scotland

2006 SLT 347; [2007] MHLR 17; 2006 GWD 10-178

Opinion of Lady Smith 17 March 2006

Petition for judicial review – timescale within which a hearing must take place when patient subject to short-term detention certificate and application for CTO made to Tribunal

Mr P had been compulsorily detained at Stratheden Hospital on 10 January 2006 in terms of a short-term detention certificate (STDC) granted under section 44 of the 2003 Act. The STDC authorised the detention of P under section 44(5) of the 2003 Act for a period of 28 days. The Petitioner, Mr Smith (S), (who was Mr P's mental health officer) presented an application to the Tribunal for a compulsory treatment order (CTO) in respect of P. The application was properly and timeously presented under section 63 of the 2003 Act and had the effect of extending the STDC by a further 5 working days to midnight on 14 February 2006 under the provisions of section 68 of the 2003 Act. Section 69 of the 2003 Act provides that where section 68 applies the Tribunal shall, before the expiry of the 5 day period referred to in section 68 of the 2003 Act, determine whether an interim CTO should be made and if it determines that an interim CTO should not be made, determine the application. The Tribunal intimated to S that it was not possible to have a hearing before 14 February 2006. S sought judicial review of that decision. The Petition sought reduction of the Tribunal's decision to refuse to convene a Tribunal hearing to determine S's application for a CTO in respect of P and an order under section 47(2) of the Court of Session Act 1998 ordaining the Tribunal to convene such a Tribunal.

Issue

- competency of decision of Tribunal not to hold a hearing to determine application within period provided by section 69 of 2003 Act

Held

The Tribunal was obliged to convene a hearing to determine whether or not an interim CTO should be made prior to the 5 day period provided by section 68 of the 2003 Act expiring. The Tribunal had an obligation to fix a hearing to take place prior to midnight on 14 February 2006. The obligation to fix a hearing within the 5 day period provided by section 68 is straightforward and clear and not qualified by reference to reasonable practicability. The statutory requirement to hold such a hearing is a mandatory one and the Tribunal had no discretion as to whether or not to fix such a hearing.

Comment

In relation to certain decisions made by the Tribunal, there is no statutory right of appeal. Such decisions can still be scrutinised by the courts through the supervisory jurisdiction of the Court of Session by the aggrieved party bringing a Petition for Judicial Review. There has been one other Petition for Judicial Review of a decision of the Tribunal relating to the decision of the Tribunal not to allow an adjournment for a particular witness to attend to give oral evidence to the Tribunal. That Petition was, however, withdrawn by the Petitioner and therefore no judgement was given in that case.

It should be noted that in this case, the Court did not consider the consequences of failing to hold a hearing within the statutory 5 day period. That issue is however addressed in the case of *Paterson v Kent*.

Paterson v Kent

2007 SLT (Sh Ct) 8; [2007] MHLR 20; 2006 GWD 24-541

Judgement of Sheriff Principal R A Dunlop QC 17 May 2006

Appeal against decision to make CTO – effect of failure of Tribunal to hold hearing within the period prescribed by section 69 of the 2003 Act – refusal of motion to adjourn to obtain independent medical report

Mr Paterson (P) was detained on a short-term detention certificate (STDC) on 22 December 2005. The period for which the STDC authorised detention and treatment expired on 18 January 2006. On 16 January 2006, the mental health officer (MHO) made an application for a compulsory treatment order (CTO) to the Tribunal. As a result, section 68 of the 2003 Act applied. Section 68 provides that where the detention of a patient in hospital is authorised by a STDC or an extension certificate and, before the expiry of the period of detention so authorised an application is made under section 63, (i) the detention in hospital of the patient for a further 5 working day period beginning with the expiry of the period for which the certificate authorised detention of the patient in hospital and (ii) the giving to the patient, in accordance with Part 16 of the 2003 Act, of medical treatment, are authorised.

Section 69 of the 2003 Act provides that where section 68 of the Act applies, the Tribunal shall, before the expiry of the period of 5 days referred to in section 68(2)(a) of the Act—

> (a) determine whether an interim compulsory treatment order (ICTO) should be made; and
> (b) if it determines that an ICTO should not be made, determine the application.

A hearing was convened by the Tribunal on 31 January 2006. The Tribunal had therefore failed to comply with the time limit prescribed by section 69 of the Act.

P appealed against the Tribunal's decision to make a CTO. P submitted that the Tribunal had no discretion to depart from the strict statutory timetable set out in section 69 and the failure of the Tribunal either to determine whether to make an ICTO or to determine the application within the 5 day period vitiated any proceedings of the Tribunal after the expiry of that period. P submitted that on the expiry of the period of 5 days without any determination the Tribunal no longer had any jurisdiction to determine the application for a CTO.

Issues

- consequence of the failure of the Tribunal to comply with the time limit prescribed by section 69 of the Act and hold a hearing to determine the application before the expiry of the period of 5 days referred to in section 68(2)(a)
- whether the Tribunal should have made an ICTO and adjourned the hearing to allow P to obtain an independent psychiatric report and secure representation by his solicitor at the hearing

Held

Whether or not the Tribunal complies with the 5 day time limit, the essential foundation of the application remained and Parliament could not fairly be taken to have intended that the Tribunal's duty to determine the application should disappear on the mere expiry of the 5 day period of "grace" allowed by section 68. In convening the hearing outwith the period of 5 working days, the Tribunal was not acting outwith its jurisdiction.

The case of *R v Soneji* sets out the proper approach to questions of the consequences of the failure to comply with a statutory provision. The emphasis in statutory construction ought

to be on the consequences of non compliance with the relevant statutory requirement, in this case section 69 of the 2003 Act, "posing the question whether Parliament can fairly be taken to have intended total invalidity" in the event of such non compliance.

The answer to the question of whether the consequences of non compliance should be total invalidity required a consideration of the purpose of section 69 and, more generally, of the scope and object of the 2003 Act.

The purpose of the time limit in section 69 is that if a hearing is not held before the expiry of the 5 day period of "grace" authorised by section 68, there will be a break in the patient's detention which, on the hypothesis that the patient is a person who requires to be detained in hospital, is undesirable, not just in the interests of the patient, but in the interests of the public as well. The avoidance of that state of affairs was, in the Court's opinion, the objective sought to be achieved by the provision of a time limit.

The fact that the MHO is under a statutory duty to make application to the Tribunal for a CTO if the provisions of section 57(2) to (5) of the 2003 Act apply underlines the importance that is attached to ensuring that appropriate care and treatment is provided to a patient having a mental disorder. That is the overriding purpose of the legislation, and the Court took the view that it would be inimical to that purpose if the Tribunal were disabled from determining an application properly and timeously brought before it. It was unlikely that Parliament intended that a failure by the Tribunal to comply with the time limit in section 69 would lead to a frustration of the overriding purpose of the 2003 Act.

On the issue of the Tribunal's decision to refuse P's motion for an adjournment, the Court held that the Tribunal's reasons for its decision failed adequately to address either the merits of P's motion for adjournment or the question of whether the Tribunal should make an ICTO. If the Tribunal had correctly identified the matters it required to address, it could not reasonably have refused P's motion for an adjournment, given that he was willing that an ICTO should be made.

Appeal allowed (in relation to decision to refuse P's motion for an adjournment only).

Comment

This judgement is extremely useful in setting out the approach which should be taken when considering the effect of a failure to comply with a statutory provision in the 2003 Act. It is clear that not all failures to comply with statutory provisions will result in total invalidity. The approach set out by the House of Lords in *R v Soneji* and the other authorities referred to in that case should be followed by the Tribunal in determining the consequences of a failure to comply with a statutory provision. It should be noted, however, that *R v Soneji* and the other cases do not have the effect of allowing the Tribunal to overlook every failure to comply with a statutory provision. In this respect, the words of Lord Bingham of Cornhill in *R v Clarke* [2008] UKHL 8 (6 February 2008) are instructive. He stated "The decisions in *R v Sekhon* and *R v Soneji* are valuable and salutary, but the effect of the sea-change which they wrought has been exaggerated and they do not warrant a wholesale jettisoning of all rules affecting procedure irrespective of their legal effect".

The decision in *R v Soneji* shows that the courts should concentrate, when considering questions of failure to comply with statutory provisions, on (i) the intention of Parliament (i.e. was it intended that a procedural failure should render the proceedings invalid) and (ii) the interests of justice and, in particular, whether the procedural failure caused any prejudice to any of the parties such as to make it unjust to proceed further.

The cases of *JG v MHTS* and *N v Borland and MHTS* also consider the question of the consequence of the failure to comply with a statutory provision of the 2003 Act.

Hughes (Curator *ad litem* to PH) v Mental Health Tribunal for Scotland

[2007] MHLR 29

Judgement of Sheriff Principal E F Bowen QC 19 June 2006

Curator ad litem – funding available for curator ad litem – fair hearing

An application for a compulsory treatment order (CTO) was made in respect of Mr PH. The appellant was appointed curator *ad litem* to Mr PH. The curator raised the issue of funding available to the curator *ad litem* to carry out his functions. Funding was available from the Scottish Legal Aid Board for the curator *ad litem* to instruct a solicitor to act on behalf of the curator. Funding was not, however, available to remunerate the curator *ad litem* for work carried out by him, such as "reading his way in" to the case, considering the views of the patient, issuing instructions to his legal representative and being present personally at the hearing.

The curator *ad litem* appointed a solicitor to provide him with advice and carry out legal services for him in respect of his appointment as curator *ad litem* in terms of the advice and assistance ABWOR scheme administered by the Scottish Legal Aid Board. The solicitor for the curator *ad litem* attended the Tribunal hearing and made a preliminary submission that the patient could not have a fair hearing as required by Article 6 of the European Convention on Human Rights (ECHR) because, in the absence of funding, his curator *ad litem* was unable to carry out any work or be present at the hearing. This submission was rejected by the Tribunal, and the solicitor for the curator *ad litem* thereafter withdrew from acting. The Tribunal heard evidence and proceeded to make a CTO. The curator *ad litem* appealed, arguing that there was an absence of effective representation such as to render the proceedings incompatible with PH's Convention rights.

Issue

- whether lack of funding for curator *ad litem* meant there was an absence of effective representation for the patient, rendering the proceedings incompatible with the patient's Convention rights

Held

The circumstances of the particular case did not, on a proper understanding, raise an issue as to inadequacy of legal representation by reason of lack of funding. Having accepted office as curator, the curator *ad litem* ought to have proceeded with the duties of his appointment, which would have involved instructing representation on behalf of the patient. Funding for such representation was available. The issue of funding of the curator was not one to be explored before the individual Tribunal considering the application for a CTO.

Comment

The patient PH died before the judgement was issued. As a result, the Sheriff Principal makes it expressly clear in his judgement that the views expressed on the issue considered are entirely obiter.

From November 2008, a new scheme in relation to curators *ad litem* was introduced by the Mental Health Tribunal for Scotland. The Mental Health Tribunal for Scotland now pays the fees and expenses of any curator *ad litem* appointed by the Tribunal in respect of proceedings before the Tribunal.

It should be noted that in this case the competency of the curator *ad litem* bringing an appeal to the Sheriff Principal was not addressed. This issue has now been addressed in the case of *Henderson v MHTS* and the case of *Black v MHTS*. In both those cases the respective Sheriffs Principal have made it clear that a curator *ad litem* has no locus to bring an appeal under the 2003 Act. The *Black* case has been remitted to the Court of Session by Sheriff Principal Young under section 320(4) of the 2003 Act as he is of view that the fact that the curator *ad litem* does not have a right to appeal against a decision of the Tribunal means that the provisions of the 2003 Act relating to appeals are incompatible with the patient's Convention rights. The Sheriff Principal appears to have remitted the case to the Court of Session due to the fact that the Court of Session is empowered to make a declaration of incompatibility but he as Sheriff Principal did not have this power. It is true that the Court of Session has the power to make a declaration of incompatibility in relation to a provision of primary legislation or subordinate legislation made under primary legislation (see section 4 of the Human Rights Act 1998). A declaration of incompatibility does not have the effect of setting aside the relevant statutory provision. The 2003 Act is not however "primary legislation" for the purposes of the Human Rights Act 1998 but instead "subordinate legislation" (see section 29 of the 1998 Act). As a result it would appear that if the Court of Session is persuaded that the provisions of the 2003 Act are incompatible with the ECHR that the Court of Session can declare the provision to be *ultra vires* and issue a declarator to that effect (see *Whaley v Watson* 2000 SC 340) and strike down the offending provision.

Lothian Health Board v M

2007 SCLR 478; 2007 GWD 17-309

Judgement of Sheriff Principal B A Lockhart 27 April 2007

Order declaring patient to be detained in conditions of excessive security – onus of proof – correct interpretation of section 264(2)

Section 264(2) of the 2003 Act provides that on the application of any of the persons mentioned in section 264(6) (which includes the patient etc), the Tribunal may, if satisfied that the patient does not require to be detained under conditions of special security that can be provided only in a state hospital, make an order (a) declaring that the patient is being detained in conditions of excessive security and (b) specifying a period, not exceeding 3 months and beginning with the making of the order, during which the duties under subsections 264(3) to (5) shall be performed by the appropriate Health Board. The duties include identifying a hospital which is not a state hospital in which the patient can be detained in appropriate conditions and in which accommodation is available for the patient.

The Tribunal made an order under section 264(2) declaring that the patient (M) was detained in conditions of excessive security and specifying a period of 3 months within which Lothian Health Board required to carry out the duties in section 264(3) to (5). The Health Board appealed against the decision on the basis that (1) the Tribunal had erred in law as to the onus of proof in respect of the application, as the Tribunal had stated that the onus of proof lies with the RMO; (2) that the Tribunal had erred in law in its interpretation of the phrase in section 264(2) "… if satisfied that the patient does not require to be detained under conditions of special security that can be provided only in a state hospital…" as the Tribunal concentrated only on whether the patient required the conditions of special security available at the State Hospital and did not consider whether there was any other hospital in which the patient could appropriately be detained; and (3) that the Tribunal acted unreasonably in the exercise of its discretion in making an order under section 264(2) as it did not make any finding or take into account any of the evidence regarding suitability and availability of alternative accommodation. In view of the absence of a hospital with suitable conditions in existence, the Tribunal had acted unreasonably in the exercise of its discretion and should not have made the order.

Issues

- onus of proof in section 264 application
- construction of the provisions in section 264(2)
- whether Tribunal acted unreasonably in the exercise of its discretion in making an order under section 264(2)

Held

The Tribunal was wrong to comment in the decision that the onus lay with the RMO to demonstrate that the patient requires the conditions of special security that can only be provided in the State Hospital, as the RMO was responsible for the detention of the patient. The onus in section 264 applications is on the patient to lead evidence in order that the Tribunal might pronounce itself satisfied on this matter. If the patient chose not to do so, the application would fall. However, as the Tribunal specifically stated in its decision, the statement made in relation to the onus of proof did not affect the Tribunal's decision. The Tribunal stated that it required to consider all the evidence and decide on the balance

of probabilities which evidence it preferred. It was clear from a perusal of the whole decision that that is exactly what the Tribunal did. Although the Tribunal made an incorrect statement regarding onus in the decision, it was not of importance in this case as it did not affect the Tribunal's decision, and there was accordingly no error in law.

In considering an application under section 264, the Tribunal was correct to restrict its consideration to whether the patient required the conditions of special security that can be provided only in a state hospital and not to consider whether there was another hospital in which the patient could appropriately be detained. The Tribunal required to make its decision according to the condition of the patient and not to make any consideration of other resources available. After the first order has been made under section 264(2), the Health Board will require to consider (i) whether there is a hospital place available in which the patient could be accommodated in conditions of appropriate security; (ii) if no such hospital place is currently available, whether resources could be adjusted to allow a place to become available; and (iii) whether any such place would be adverse to the patient's welfare. If the Health Board consider that no appropriate place is available, or could become available, or that the only place which, in his own interest, the patient could be accommodated is the State Hospital, the appropriate course is for the Health Board to avail itself of the provisions of section 267 and to make an application to the Tribunal for the recall of the order made by the Tribunal in terms of section 264(2). The appropriate time for there to be a discussion of why an order cannot be obtempered is at a Tribunal convened to consider recall of the order.

The Tribunal had not acted unreasonably in the exercise of its discretion under section 264(2) in making the order. It was obvious from the structure of section 264(2) that the sequence of events was intended to be the making of an order and then the search for a place. Where the Health Board considers, after investigation, that it cannot comply for whatever reason with an order declaring that a patient is detained in conditions of excessive security, the proper course is for the relevant Health Board to make an application to the Tribunal for recall of the order in terms of section 267 of the 2003 Act.

Appeal refused.

Robbins v Mitchell [2007] Scot SC 19

Judgement of Sheriff Principal B A Lockhart 4 May 2007 (unreported)

Appeal against decision to refuse application made by patient under section 99 of the 2003 Act – adequacy of reasons – whether Tribunal's decision was supported by facts found to be established by the Tribunal

An application was made to the Tribunal by Mr Robbins (R) under section 99 of the 2003 Act seeking revocation of the section 86 determination extending his compulsory treatment order (CTO). The application was refused by the Tribunal. R appealed on the basis that the Tribunal had erred in law in failing to give adequate reasons for its decision and in respect that it had made a decision unsupported by the evidence. R submitted that the Tribunal decision did not record in any great detail the content of the evidence of the parties who appeared at the Tribunal. R had instructed an independent social work report and it was submitted that the Tribunal's decision did not give adequate weight to that report. It was further submitted that the reasons were not adequate as it was not possible to discern the content of the evidence on which the Tribunal focused and they lacked adequate findings on certain of the statutory criteria.

Issues

- whether Tribunal's decision provided adequate reasons for decision
- whether Tribunal's decision was supported by facts found to be established by the Tribunal

Held

There was no merit in the appeal. The decision of the Tribunal had to be looked at as a whole. From consideration of the document as a whole, it was possible to determine the evidence on which the Tribunal relied. The Tribunal had advised the informed reader of the evidence that it had considered. It had concluded that certain aspects of the evidence outweighed other aspects. The Tribunal had given proper and acceptable reasons for its decision and in particular for preferring the evidence of the RMO and the care team to that of R and the independent social worker. The Tribunal had provided adequate reasons and the findings of the Tribunal justified the decision it had made.

Appeal refused.

Comment

This case makes it clear that in considering whether the Tribunal has provided adequate reasons for its decision, the Tribunal's decision will be looked at in the round. The Court will be reluctant to focus on particular areas of the decision but will consider whether, as a whole, the decision leaves the informed reader and the court in no real and substantial doubt as to the reasons for the decision and the material considerations which were taken into account in reaching it. (*Wordie Property Company Ltd v Secretary of State for Scotland*, 1984 S.L.T. 345 at 348). It is not necessary for the Tribunal to narrate all the evidence it has heard *ad longum* in the decision. The requirement upon the Tribunal is to make findings in relation to the crucial matters at issue. In this case, looking at the decision in the round, the Sheriff Principal was of the view that adequate reasons had been provided.

It should be noted that in this case a particular criticism of the solicitor for R was that there was evidence in the decision of "cutting and pasting from another determination", as there were references to e.g. "her medication", when in fact the patient was male. The fact that this type of point can and will be taken in an appeal shows the value of Tribunal members carefully re-reading a decision, to ensure there are no inconsistencies in it, prior to the final version of the decision being signed.

The case of *Scottish Ministers v Mental Health Tribunal for Scotland (JK)* 2009 SLT 273 also provides further guidance on adequate reasons (see para 52 and 53 of Lord Wheatley's Opinion).

The Scottish Ministers v MHTS (re SW) [2007] CSIH 57

Judgement of the Lord President, Lord Philip and Lord Kingarth 20 June 2007 (unreported)

Order granting conditional discharge – adequacy of reasons

The Tribunal, after hearing evidence, reached the view that the patient SW should be conditionally discharged. A further issue, however, which required to be determined by the Tribunal before the order could be made was whether the conditional discharge should be effective immediately or whether there should be any further deferral under section 195 of the 2003 Act. Section 195 empowers the Tribunal, when making an order conditionally discharging the patient, to defer that discharge until such arrangements as appear to the Tribunal to be necessary for that purpose have been made.

The Tribunal issued its judgement on the issue of conditional discharge some time before March 2007 and then appointed parties to be heard on 7 March in relation to whether there should be any further deferral in the implementation of the order conditionally discharging the patient. The Tribunal received further information from the responsible medical officer and the mental health officer and heard parties on that date.

Following an adjournment, the Tribunal convener made an oral statement of the Tribunal's position – namely that the conditional discharge should be immediately effective. Nothing was, however, recorded in writing by the Tribunal by way of facts found by it relative to, nor its reasons for, that decision. The revised version of the original judgement did not include any statement of the factual basis upon which the Tribunal had reached the view that an immediate conditional discharge was appropriate, contrary to the contention being advanced by the Scottish Ministers that certain further steps required to be taken before such an order should take effect. The Scottish Ministers appealed against the Tribunal decision to the Court of Session.

Paragraph 13(3) of the 2003 Act provides that "a decision of the Tribunal shall be recorded in a document which contains a full statement of the facts found by the Tribunal and the reasons for the decision". That statutory requirement is also reflected in the terms of rule 72(7) of the Mental Health Tribunal for Scotland (Practice and Procedure) (No. 2) Rules 2005.

Issues

- whether failure to give further reasons for conditional discharge order coming into effect immediately fell within one of the grounds of appeal specified in section 324(2) of the 2003 Act
- adequacy of reasons

Held

The appeal properly fell within section 324(2)(b) of the 2003 Act, i.e. that there has been a procedural impropriety in the conduct of any hearing by the Tribunal on the application. The Tribunal's failure to comply with the requirements in relation to the giving of reasons and the factual basis for its decision that the conditional discharge order should come into effect immediately was a procedural impropriety in the conduct of the hearing. In a case of this kind (involving restrictions on the liberty of the patient), it is clearly of importance that the Tribunal should comply with its statutory and regulatory obligation to provide the factual foundations and reasons for its decision. The Tribunal had not complied with this duty.

Appeal allowed.

The case was remitted to the Tribunal with a view to it considering the issue of whether the conditional discharge, which had already been decided on in principle, should have immediate effect and recording its decision on that issue in a document which contains a full statement of the facts found by it on that issue and the reasons for that decision.

Comment

This case emphasises the importance of the Tribunal providing a full statement of the facts found by it and the reasons for its decision in its written decision. The Court noted that it was not surprising that the 2003 Act and the 2005 Rules required this, given that the decision to conditionally discharge a patient is a decision of importance, both to the patient and the community.

Further comments on the reasons for Tribunal decisions have been made by the Court of Session in the case of *Scottish Ministers v Mental Health Tribunal for Scotland (JK)* 2009 SLT 273. In that case, the Court made it clear that the Tribunal must reach a decision based on the evidence. The Tribunal requires to provide clear reasons for making, or failing to make, findings that are central to the questions in issue. In the *JK* case, the Tribunal had rejected statements made by the responsible medical officer in relation to the necessity of the restriction order. The Court held that in these circumstances the Tribunal ought to have given clear and intelligible reasons for the rejection of that part of his evidence.

Laurie (Named Person for AL) v Mental Health Tribunal for Scotland

2007 GWD 32-555

Judgement of Sheriff Principal B A Kerr QC 30 August 2007

Decision to refuse variation of CTO from hospital based CTO to community based CTO – unreasonable exercise of discretion – error in manner of carrying out the necessary balancing exercise

The decision of the Tribunal was appealed on the basis that the Tribunal had acted unreasonably in the exercise of its discretion in refusing to vary a compulsory treatment order (CTO) from a hospital based CTO to a community based CTO. The appeal was brought by the patient's named person. The Tribunal's decision to refuse the application to vary the CTO was informed by the Tribunal being satisfied that the most appropriate course for the patient's future treatment at the present stage was for him to be transferred to an institution known as Linden House, which specialised in the treatment of autistic spectrum disorders. The patient (AL) has Asperger's Syndrome. The decision the Tribunal had to make was ultimately between two available options: either AL's discharge to care at home (the option favoured by his named person with the support of an independent psychiatrist) or his transfer to Linden House for further treatment in a secure hospital environment (the option favoured by his responsible medical officer (RMO) and mental health officer (MHO)).

Issue

- whether the Tribunal had acted unreasonably in the exercise of its discretion

Held

In relation to one aspect of the Tribunal's decision, the Tribunal had acted unreasonably in the exercise of its discretion as it had erred in the manner in which it had handled the balancing exercise required of it, namely by failing to consider properly how to deal with an important adminicle of evidence requiring to be weighed in the balance in that exercise.

In making the decision to refuse to vary the CTO, the Tribunal had relied to a large extent on a report prepared by a Dr Kareem. The Court was of the view that the option of Linden House, the one eventually preferred by the Tribunal, depended very much on the Tribunal's acceptance of the evidence and opinion of the RMO, which in turn depended very heavily on the evidence and opinion of Dr Kareem, so far as an understanding was concerned of Linden House as an institution, its facilities and potential benefits for the patient as well as its provision of a secure environment.

While there may be cases in which it would be entirely proper and satisfactory for the Tribunal to proceed on the basis of a report or reports, it was not adequate in the circumstances of this case.

There did not appear to have been any positive line of challenge to the adequacy of Linden House as an institution having facilities likely to be beneficial to AL pursued at the Tribunal on the named person's behalf. Had the procedure before the Tribunal been purely adversarial, that would have been an end of the matter. There was however an inquisitorial element in the approach which the Tribunal is required to adopt in reaching decisions which it is called upon to make. It was incumbent on the Tribunal, in the circumstances of this case, to satisfy itself that the evidence and opinion of the RMO favouring one of the two available options between which the Tribunal had to decide, namely Linden House, was acceptable to it and soundly based.

In order to be satisfied that it was soundly based, it was necessary for the Tribunal to look into the chief foundation on which it rested. It was not enough to take the RMO's word for it in these matters, and it was necessary for the Tribunal to obtain the attendance of Dr Kareem in the witness box to speak to his report and, if it saw fit, to be cross-examined on it, *or at least to consider whether to do so*. Instead, the Tribunal appeared to have accepted the content of Dr Kareem's report and to have been content to leave it untested by any questioning of its author. While the Tribunal had a discretion as to whether or not to call the author of any report to speak to it, it was necessary for the Tribunal to apply its mind to the question of whether or not to require Dr Kareem's attendance in order to exercise that discretion, and from the decision of the Tribunal, it did not appear to have done so. The failure to consider whether to require Dr Kareem's attendance was a substantial omission in the circumstances of the case and an unreasonable exercise of discretion.

In addition, the Tribunal had not considered whether some different weight required to be attached to Dr Kareem's report and its untested content to that which the Tribunal attached to evidence of each of the witnesses who had given oral evidence to the Tribunal. The tenor of the decision indicated that the Tribunal attached to Dr Kareem's report the same weight as it would have done had he spoken to the report as a witness and not been required under cross-examination to alter or qualify any of the views expressed in it. The failure to consider what weight to attach to Dr Kareem's untested report was also a substantial omission in the circumstances of the case and an unreasonable exercise of discretion. There had occurred in the Tribunal's deliberations an error in the manner in which it handled the balancing exercise required of it, namely a failure to consider properly how to deal with an important adminicle of evidence requiring to be weighed in the balance in that exercise.

Appeal allowed.

Comment

It is important to note that the appeal was allowed on account of the Tribunal's omission to call Dr Kareem to the witness box or even to consider doing so and then to consider how to evaluate appropriately the content of his untested report. The appeal was, therefore, allowed on a fairly narrow point. Nevertheless, Tribunal members should bear in mind that, where the Tribunal has conflicting options before it and the Tribunal's choice would be informed by any particular report, the Tribunal should consider whether the author of the report should be called to give oral evidence to the Tribunal. If the decision is taken not to call that witness, the Tribunal will then require to consider what weight it should attach to the content of a report which is untested by any questioning of its author.

D v Mental Health Tribunal for Scotland

Judgement of Sheriff Principal E F Bowen QC 6 May 2008 (unreported)

Application to revoke compulsory treatment order – grounds of appeal

An application for revocation of a compulsory treatment order (CTO) was made by the patient's named person (D) under section 100(2)(a) of the 2003 Act. The Tribunal refused the application. D appealed to the Sheriff Principal under each head of the grounds of appeal specified in section 324(2) of the 2003 Act. D put forward substantive statements in support of each of the grounds of appeal and produced voluminous documentation which she averred supported her view that the grounds of appeal were made out.

Issue

- grounds of appeal

Held

The substantive statements in support of each of the grounds of appeal did little more than rehearse the history of events and the fact that D disagreed with every factual conclusion which might have indicated that her son was ill. An assertion that an appellant does not agree with stated facts does not mean these are wrong, and the fact that a Tribunal may reach a view which an appellant does not like does not constitute bias. No error of law on the part of the Tribunal could be identified. The Tribunal did not exercise its discretion unreasonably given the information which was before it.

Observed that decisions which were made by courts and Tribunals some time ago cannot be the subject of the sort of review which D contemplated.

Appeal refused.

Comment

This appeal shows the difficulties that the appeal courts can have when party litigants seek to appeal decisions of the Tribunal. In this case, the Court commented that it was plain that no court or Tribunal dealing with the patient had ever had before it anything other than, on the one hand, opinions and diagnoses of doctors and health care professionals expressed in apparent good faith, and on the other hand, the competing unsupported opinion of D. There was nothing to indicate that the medical opinion on the patient's condition was wrong.

It should be noted that D further appealed this case to the Court of Session, where again the appeal was refused, and then she attempted to appeal to the Supreme Court. There is nothing particular in this decision for Tribunal members to note, but it does show the difficulties which can arise when those close to the patient do not agree with the medical diagnosis or decisions of the Tribunal. In this case, the patient himself chose not to appeal against his CTO, but the named person did. This demonstrates that a named person can act independently of the patient.

T v Mental Health Tribunal for Scotland

Judgement of Sheriff Principal B A Lockhart QC 28 July 2008 (unreported)

Grounds of appeal – competency – supplementary reasons

The Tribunal required to hold a hearing to review a determination extending T's compulsion order under section 165(2)(b) of the 2003 Act (a 2 year review, as no decision had been made by the Tribunal in respect of the compulsion order in the relevant 2 year period). The Tribunal confirmed the determination extending the compulsion order. The Tribunal's decision was extremely brief, running to only two paragraphs. It simply narrated that the Tribunal's conclusion was that T remained unwell and that the statutory criteria for his continued detention in hospital were satisfied.

T appealed against the Tribunal's decision to confirm the determination. The Court took the view that the Tribunal's decision did not provide full findings on which the Tribunal based its decision, nor reasons for the Tribunal's decision. The Court sought an amended statement of full findings and reasons giving full specification. This was produced by the Tribunal and T was given an opportunity to comment on the reasons and to submit any further grounds of appeal he may have. T took the opportunity to submit various other grounds of appeal.

Issues

- competency of grounds of appeal
- supplementary reasons

Held

Section 324(1) of the 2003 Act specifies the statutory grounds of appeal against decisions of the Tribunal. Section 324(2) provides that the grounds referred to are (a) that the Tribunal's decision was based on an error of law; (b) that there has been a procedural impropriety in the conduct of any hearing by the Tribunal on the application; (c) that the Tribunal has acted unreasonably in the exercise of its discretion; and (d) that the Tribunal's decision was not supported by the facts found to be established by the Tribunal. Having considered all the documentation available, the Court took the view that none of the grounds of appeal fell within the grounds specified in section 324(2) of the 2003 Act.

Appeal dismissed.

Comments

This case is of interest as it shows the importance, as do other cases, of providing adequate reasons for a Tribunal decision. In its supplementary reasons, the Tribunal stated it had originally provided only brief reasons as it thought this would cause the patient least distress. This case involved a patient who was very unwell. Notwithstanding that fact, the Court intimated clearly that the Tribunal's decision did not constitute adequate full findings and reasons for the decision. In this case, the Court allowed the Tribunal to submit an amended statement of reasons. On the basis of that statement of reasons, the Court had no difficulty in dismissing the appeal.

It should be noted that the opportunity to provide supplementary reasons is rarely extended. Appeals are almost invariably determined on the basis of the Tribunal's written decision as originally issued. There has been an appeal to the Court of Session (in respect

of which no written opinion was issued) where the Court allowed supplementary reasons to be provided by the Tribunal. In that case, the appeal was against a decision by the Tribunal in respect of a restricted patient. The patient had been conditionally discharged and the Scottish Ministers appealed on the basis that the conditions which they had suggested should be attached to the conditional discharge had not all been accepted by the Tribunal. It appears that the original reasons did not deal with the issue of the conditions attached to the conditional discharge. Supplementary reasons were submitted. Counsel for the appellant did not take any issue with the competency of those additional reasons. The Court was of the view that there was no prohibition on the issuing of supplementary reasons. It noted there would be no infringement of Article 6 of the European Convention on Human Rights provided the supplementary reasons related to evidence and submissions at the original hearing. In the case mentioned, the supplementary reasons related solely to evidence and submissions at the hearing, and the Court was prepared to accept their competence. It will, however, be the exception to the rule when supplementary reasons are allowed to be submitted. Tribunal members should therefore ensure that Tribunal decisions contain adequate reasons for the decision.

Di Mascio v Mental Health Tribunal for Scotland

2008 GWD 37-559

Judgement of Sheriff Principal J A Taylor 4 August 2008

Test to be applied by Tribunal in terms of section 64(4) of the 2003 Act – section 1 principles – balancing exercise

A mental health officer (D) appealed against a decision of the Tribunal varying the measures specified in a compulsory treatment order (CTO) to provide that the patient (L) should reside with his mother as opposed to being detained in hospital. D submitted that (1) the Tribunal had erred in law and that the test it should have applied in terms of section 64(4) was simply whether it was necessary for L to be detained in hospital. It was argued that in deciding whether or not it was necessary for L to be detained in hospital, the Tribunal should have addressed the question "Is it necessary, to avoid significant risk to the health, safety and welfare of L or to the safety of other persons, to detain L in hospital?" The Tribunal should not have carried out a balancing exercise between L's interests and public safety; (2) the Tribunal had erred in law in taking into account irrelevant considerations and in failing to take account of relevant material and had come to its decision based on a view that the local authority was obfuscating, and the Tribunal wished to have the local authority comply with its desire that L be cared for in the community; (3) the Tribunal's decision could only be supported by the findings in the section of the decision headed "The Facts Found to be Established by the Tribunal"; and (4) the Tribunal had erred in law in varying the CTO without there having been a community care assessment and care plan prepared by the local authority.

Issues

- test in section 64(4)
- whether Tribunal had taken into account irrelevant considerations or failed to take account of relevant considerations
- whether Tribunal's decision supported by facts found to be established
- whether Tribunal erred in law by varying CTO in absence of community care assessment and amended care plan

Held

The Tribunal had applied the correct test. The Tribunal considered the terms of section 64(5) of the 2003 Act and concluded that the conditions set out therein were satisfied. The Tribunal then required to consider the form the CTO should take. When determining what measures should be authorised, the Tribunal required to have regard to the principles set out in section 1. The Tribunal was correct when it stated that it had "to carry out the necessary balancing exercise". The Tribunal had to consider *inter alia* the safety of others, the safety of L, the benefit to L of the order and to come to a decision bearing in mind also the principle of "minimum restriction on the freedom of the patient that is necessary in the circumstances" as set out in section 1(4) of the 2003 Act.

The Tribunal had not erred in law in taking into account irrelevant considerations or in failing to take into account relevant material. The Tribunal had before it a sufficient body of evidence which it had considered to be both relevant and credible to enable it to consider there was sufficient evidence to support L being cared for in the community. Accordingly, it was obliged in terms of section 1 of the 2003 Act to vary the terms of the

CTO to allow L to reside with his mother in the community. The Tribunal approached its task in a responsible and proper manner. The Tribunal explained how it had analysed the competing proposals for the continuing care of L. The Tribunal came to a view on the evidence which it was entitled to reach. It did not come to its decision because it found the local authority to be obfuscating.

The Court rejected the suggestion that what the Tribunal said in the section of its decision headed "Reasons For Our Decision" and "Discussion of the Evidence" could not be referred to in order to find facts to support the Tribunal's decision to vary the CTO. The Court was entitled to look at the decision as a whole, then ascertain the facts which the Tribunal found to be established. If by reading a particular section of the decision it is clear that the Tribunal found a fact to be established, which fact does not appear in the section entitled "The Facts Found to be Established", the Court can have regard to that fact when deciding whether the evidence supported the Tribunal's decision. To do otherwise would allow form to triumph over substance.

The Tribunal had not erred in varying the CTO in the absence of the care assessment and care plan. While the Tribunal had varied the order on an interim basis to enable the local authority to prepare a community care assessment and care plan, the local authority, by failing to complete the care assessment and care plan, effectively frustrated the aim of the Tribunal set out in its interlocutor of 11 March 2008. The Tribunal was entitled to reach its decision given the findings which it had made and the terms of the social work reassessment (which stated that until health staff could demonstrate that the risks posed by L had been lessened, L should not be discharged into the community). The Tribunal had heard 9 days of evidence and submissions and the Tribunal, and not an appellate court, was best placed to form a view of the evidence.

Appeal refused.

Comment

This case is actually the second appeal in the case of the patient L. The first case was the appeal brought by the named person in *Laurie (named person for AL)*. The decision is a clear acknowledgement of the obligation on the Tribunal to have regard to the section 1 principles when deciding the form which a CTO should take. It is also another example of the Court refusing to look only at parts of the Tribunal decision in considering whether the decision is supported by facts found to be established by the Tribunal (see also the case of *Robbins v Mitchell*). It is clear that the courts will consider Tribunal decisions in the round.

B v Mental Health Tribunal for Scotland

2008 GWD 36-543

Judgement of Sheriff Principal Sir Stephen Young Bt QC 23 October 2008

Procedural impropriety – curtailment of cross-examination – formal adoption of the mental health report

An application for a compulsory treatment order (CTO) had been made in respect of B. A hearing took place on 15 April 2008 at which the Tribunal made an interim CTO. During the hearing, the convener intervened in the cross-examination of B's responsible medical officer (RMO) by B's solicitor on the basis that the cross-examination had become repetitive. On 1 May 2008, a second hearing took place before a differently constituted Tribunal and the Tribunal made a CTO. B appealed against the Tribunal's decision to make a CTO on the basis that the convener's refusal to allow B's solicitor to continue to cross-examine B's RMO at the hearing on 15 April 2008 in relation to the conditions which require to be satisfied before a CTO can be made had been objectionable and a procedural impropriety in the conduct of the hearing. The Tribunal had denied B the opportunity to test the evidence in relation to the statutory conditions which require to be satisfied before a CTO can be made. B argued that the procedural unfairness which had occurred at the hearing on 15 April 2008 rendered the CTO made by the differently constituted Tribunal on 1 May 2008 unsound. B also averred that the Tribunal on 1 May 2008 had based its decision on findings made by the differently constituted Tribunal on 15 April 2008 and had therefore erred in law; the error being compounded by the fact that the Tribunal had based its decision on evidence which had not been challenged due to the fact that B's solicitor's cross-examination was curtailed. B submitted that the Tribunal had not heard any evidence on 1 May which entitled it to conclude that the condition in section 64(5)(d), "that because of the mental disorder the patient's ability to make decisions about the provision of such medical treatment is significantly impaired", was met, with the result that the Tribunal had erred in law in making the CTO.

Issues

- whether procedural impropriety in the conduct of the hearing due to curtailment of cross-examination
- whether Tribunal had sufficient evidence before it on 1 May 2008 to make a CTO

Held

There was no procedural impropriety in the conduct of the hearing on 15 April 2008. The convener had discretion to curtail repetitive cross-examination and it was not unreasonable for the convener to have taken the view that the cross-examination of the RMO had become repetitive. If there were other aspects of the RMO's evidence upon which B's solicitor wished to cross-examine the RMO, he could and should have made that clear to the convener. If the convener had then refused to allow B's solicitor to continue, that would have constituted a procedural impropriety. B's solicitor had asked the Tribunal to make an interim CTO and this is what the Tribunal did. As a result, B could not now seek to argue that something of substance was lost by him as a result of the supposed procedural impropriety.

There was nothing to suggest that the Tribunal on 1 May had been influenced by the findings of the previous Tribunal on 15 April. In finding that the conditions for making a CTO were satisfied (including the criterion in section 64(5)(d)), the Tribunal had had

regard to the evidence contained in the CTO application, the accompanying mental health reports and the oral evidence given at the hearing itself. The Tribunal had sufficient evidence before it to entitle it to find that all the conditions, including the condition specified in section 64(5)(d), were satisfied. The Tribunal was entitled to take into account the RMO's mental health report whether or not the RMO formally adopted it as part of her oral evidence.

Appeal refused.

Comment

This case highlights the fact that the right to cross-examine a witness in mental health proceedings, as in other proceedings, is not a right to cross-examine a witness *ad nauseum*, and the Tribunal has discretion to curtail cross-examination which is repetitive. If a line of repetitive cross-examination is being curtailed, best practice would be to clarify with the patient's solicitor whether there are other matters which the solicitor wishes to pursue in cross-examination prior to moving on to consider other evidence. If the patient's solicitor indicates that there are other different aspects of a particular witness's evidence upon which he wishes to cross-examine, a refusal to allow the patient's solicitor to carry out this cross-examination would constitute a procedural impropriety in the conduct of the hearing.

This decision is also useful as it makes it clear that there is no requirement to formally adopt documentary evidence, e.g. that contained in mental health reports or other written reports, before those documents and the evidence contained within them can be taken into account by the Tribunal.

Scottish Ministers v Mental Health Tribunal for Scotland (JK)

2009 SC 398; 2009 SLT 273; 2009 SCLR 224; 2009 GWD 7-126

Opinion of Lord Wheatley, Lord Clarke and Lady Cosgrove 11 February 2009

Revocation of restriction order by Tribunal – proper construction of s. 193 of the 2003 Act

The patient ("JK") had been made subject to a restriction order in terms of section 60 of the Mental Health (Scotland) Act 1960. By virtue of provisions of the Mental Health (Care and Treatment) (Scotland) Act 2003 (Transitional and Saving Provisions) Order 2005 (SSI 2005/452), a restricted patient is to be treated as being subject to both a compulsion order and a restriction order under section 57A(2) and section 59 of the Criminal Procedure (Scotland) Act 1995. The Tribunal considered JK's case and on 22 August 2007 issued a decision revoking JK's restriction order. The Tribunal held that the conditions in section 182(4) of the 2003 Act continued to be met (i.e. that the patient had (i) a mental disorder, (ii) medical treatment was available which would be likely to prevent the mental disorder worsening or alleviate the symptoms of the disorder and (iii) if the patient was not provided with that medical treatment there would be a significant risk to the health, safety or welfare of the patient or to the safety of any other person). The Tribunal was also satisfied that it continued to be necessary for JK to be subject to a compulsion order. The Tribunal however made an order revoking the restriction order on the basis that it was not satisfied that it was necessary, in order to protect any other person from serious harm, for JK to be detained in hospital, whether or not for medical treatment, and it was not satisfied it was necessary for JK to be subject to the restriction order.

The Scottish Ministers appealed against the decision of the Tribunal to revoke the restriction order. The Scottish Ministers appealed to the Court of Session on a number of grounds, namely that (1) in reaching its decision, the Tribunal had erred in law in that it had failed properly to apply the statutory tests for revocation of a restriction order; (2) the Tribunal had acted unreasonably in the exercise of its discretion and had reached a decision which was plainly wrong; and (3) the Tribunal had been guilty of procedural impropriety in reaching a decision unsupported by the facts which had been found proved before it.

Issues

- proper statutory construction of section 193
- adequacy of reasons – failure of Tribunal to deal appropriately with large parts of the evidence, in particular the evidence of the RMO

Held

The Tribunal had erred in its consideration of the correct legal principles which should properly be applied to the patient's case. The purpose of section 193 is to provide a sequential list of tests to be applied to patients who are detained under the relevant legislation, in order to allow for an ordered consideration and review of their circumstances. In terms of section 193(2), if the Tribunal is satisfied that the patient has a mental disorder, and that in order to protect any other person from serious harm it is necessary that the patient be detained in hospital, then the Tribunal must make no order. Section 193(2) must first be considered by the Tribunal in every case. In effect, section 193(2) imposes a threshold requirement on the Tribunal which must be dealt with before it can turn its attention to any other part of section 193. As a result, the Tribunal should have reached a clear and reasoned view on section 193(2), but it did not do so.

The Tribunal misdirected itself in law by failing to properly consider the separate tests in section 193(2) as they might apply to the present circumstances of the patient.

Section 193(5)(b)(i) and (ii) amounts to two separate tests and not to one conflated test. The use of the word "and" at the end of section 193(5)(b)(i) is plainly disjunctive and is intended to convey that what comes next is a separate and distinct consideration. The Tribunal's decision made no mention of the continued necessity test (other than a formal reference to it being made in the findings in law) and the Tribunal only appeared to have considered the serious harm test element of section 193(5)(b)(i) and not the continued necessity element of the restriction order in section 193(5)(b)(ii).

In relation to the serious harm test in section 193(5)(b)(i), the proper issue which the Tribunal has to address is whether the restriction order is necessary to protect the public from a risk of serious harm, rather than from a serious risk of harm. The word "serious" qualified the word "harm" rather than the word "risk".

The terms of section 193 afford no guidance as to how the continued necessity test, contained in section 193(5)(b)(ii), is to be assessed, and the starting point would normally be to look at the reasons why the order was imposed in the first place. The Tribunal should consider the nature of the offence, the antecedents of the patient and the risk that the patient would commit further offences if at large (the three matters referred to in section 60 of the 1960 Act in this case: in other cases it will be section 59 of the Criminal Procedure (Scotland) Act 1995) and reach rational and intelligible conclusions on them, even if only to reject them as being no longer relevant. Having considered those matters, the Tribunal should then go on to consider the nature and effect of the restriction order itself on the patient's present circumstances. The Tribunal should reach a considered view on the evidence as to whether the continuation of the order is necessary. The test involved is a high one, but is not arbitrary. It is a clear and separate test based on historical and policy considerations, which the Tribunal must consider in every case in the context of the factual and opinion evidence it finds established. The Court held that because no mention was made of the continued necessity test in the reasons for its decision, they were unable to be satisfied that the Tribunal had understood the correct test to be applied. The absence of any detailed reasoning in the Tribunal's decision to support the basic assertion in the finding in law, namely that it was not satisfied that it continued to be necessary for the patient to be subject to a restriction order, was a fundamental omission.

The Court decided that a decision on the second and third grounds of appeal was not required, but in relation to those grounds of appeal which dealt with unreasonable exercise of discretion and procedural impropriety in reaching a decision unsupported by the facts found, the Court held that the way in which the Tribunal treated the evidence, particularly that of the RMO, was not satisfactory.

The Tribunal is a specialist Tribunal and regard has to be had to its expert knowledge. Nevertheless, the Tribunal must reach a decision based on the evidence. It requires to provide clear reasons for making or failing to make findings that are central to the questions in issue. In this case, there were unconditional statements by the RMO in his reports, as well as in his evidence, that the restriction order was necessary and should not be revoked. In these circumstances, the Tribunal ought to have given clear and intelligible reasons for the rejection of that part of the RMO's evidence, particularly as the witness was the RMO for the patient and had many years of experience of working with him. The role of the RMO in the statutory scheme is of the highest importance, and the Tribunal therefore requires to pay close attention to all parts of the RMO's evidence. There were unquestionably substantial areas of significant and relevant evidence before the Tribunal, the absence of which in the Tribunal's justification of its decision were simply not explained.

Appeal allowed.

Comment

This Opinion is invaluable for those dealing with restricted patient cases. The Opinion of the Court makes it clear that in the Court's view, the purpose of section 193 is to provide a sequential list of tests to be applied and that the Tribunal must *first* consider the tests in section 193(2) (i.e. (i) the mental disorder test and (ii) the risk of serious harm requiring detention in hospital test) in *every* case before going on to consider any other provision of section 193.

The Opinion also provides some guidance on the purpose of restriction orders. At paragraph 6 of the Opinion, the Court notes:

> "the purpose of restriction orders is to provide additional safeguards in the decision making process concerned with the management and possible release of a restricted patient".

The Court then goes on to outline some of the additional safeguards a restriction order provides.

The Opinion also provides a reminder of the importance of providing adequate reasons as to why the Tribunal has accepted certain evidence and rejected other evidence. In this case, the Court noted that

> "there are unconditional statements by Dr Dewar in his reports as well as in his evidence that the restriction order was necessary and should not be revoked… In these circumstances, the Tribunal ought to have given clear and intelligible reasons for the rejection of that part of his evidence, particularly as the witness was the responsible medical officer for the patient and had many years experience of working with him. The role of the RMO in the statutory scheme is plainly of the highest importance. The Tribunal therefore required to play close attention to all parts of the RMO's evidence."

While of course a Tribunal is entitled not to accept the evidence of a patient's RMO, it should be noted that the Court considers that the Tribunal must pay very close attention to all parts of the RMO's evidence and will have to give clear reasons for rejection of the evidence of the RMO.

Finally, while conveners of restricted patient cases will find the Opinion useful in applying the sequential list of tests in section 193, there are areas of the opinion which appear problematic. At paragraph 34 of the opinion, the Court appears to indicate that where it is accepted that a compulsion order should remain in place (presumably due to the fact that the criteria for revocation of the compulsion order are not made out), then it must follow that it is accepted 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. With respect, this does not appear accurately to reflect the law: for example, a patient who remains subject to a compulsion order (with a restriction order) may be conditionally discharged in terms of section 193(7) of the 2003 Act.

M v Murray

2009 GWD 14-227

Judgement of Sheriff Principal B A Lockhart 17 April 2009

Effect of appeal against Tribunal decision on interim compulsory treatment order – whether second mental health report by GP met statutory requirements in sections 57 and 58 of the 2003 Act

M was detained on a short-term detention certificate in terms of section 44 of the 2003 Act. M's mental health officer (MHO) made an application to the Tribunal for a compulsory treatment order (CTO) in terms of section 63 of the 2003 Act. A Tribunal hearing took place on 9 January 2009. At that hearing, the solicitor for M sought to have the application dismissed before evidence was heard on the basis that the application was misconceived, as the mental health report provided by M's GP failed to comply with sections 57 and 58 of the 2003 Act and the Mental Health Tribunal for Scotland (Practice and Procedure (No. 2) Rules 2005. The Tribunal rejected the submission and made an interim CTO authorising detention of M in Ailsa Hospital and treatment in accordance with Part 16 of the 2003 Act for a period of 28 days, i.e. until 6 February 2009. M appealed against that decision on 22 January 2009.

Issues

- whether there was any live issue between the parties
- effect of appeal on interim compulsory treatment order
- whether second medical report by GP complied with provisions of 2003 Act

Held

Despite the fact that at the date of the appeal hearing the *interim* CTO had expired, the Court was prepared to consider the substantive grounds of appeal. This was on the basis that there were two useful purposes in proceeding to decide the substantive issues in the appeal. First, the Tribunal had made a significant decision about M in respect of his mental health. M's case was that the order was incompetently made. M should not be denied the opportunity to challenge the decision which has been made against him, albeit the period of the order had now expired. In addition, there are very few cases reported on the interpretation of the provisions of the 2003 Act and even less on the application of rule 44(1)(b) as to the circumstances in which an application might be held to be misconceived. It would be helpful if the number of reported decisions on the application of the provisions of the 2003 Act was increased.

Notwithstanding the marking of the appeal, the *interim* CTO remained in force until its expiry. It would be neither sensible nor logical that the Scottish Parliament should pass legislation stipulating that an order may be made with immediate effect for the welfare of the patient and at the same time allow any such order to be circumvented simply by the lodging of an appeal to the Sheriff Principal.

The Tribunal had not erred in law in holding that the application was not misconceived. When considering whether the information in the two mental health reports contained sufficient information to comply with the requirements of sections 57 and 58 of the 2003 Act, it is important not only to look at the application as a whole, but to bear in mind that an order would be made by the Tribunal not on the basis of the application form and the mental health reports alone, but on the basis of all evidence presented to it.

The reasons for the conclusions set out in the mental health reports which accompany the CTO application do not require to be spelt out with the precision of a legal document. The reasons require to be sufficient to allow the MHO, taking each report as a whole, to conclude that the requirements of sections 57 and 58 have been met and that he should proceed to make an application to the Tribunal.

The GP's report, taken as a whole, met the requirements of the 2003 Act.

Appeal refused.

Comment

This case along with the case of *Beattie v Dunbar and MHTS* makes it clear that, in relation to mental health reports, it is likely to be only the most defective examples of such reports which will be fatal to an application. As long as the relevant parts of the proforma used for mental health reports are completed to some extent, it is likely the statutory criteria will have been met. The Courts will read the documents as a whole and decide whether the prescribed information is present or can be inferred from the overall content of the document.

In this decision, the Sheriff Principal also commented on whether a Tribunal held subsequently on 3 February 2009 should have declined to make a further *interim* CTO as the competency of the original application was the subject of appeal. The Sheriff Principal commented that it appears inconsistent with good practice that there should be further procedure on an application which has been appealed on the ground that it is fundamentally incompetent until that appeal has been resolved. He noted that the course of action adopted in the instant case, which involved presentation of a fresh application for a CTO on the expiry of a short-term detention certificate granted on 6 February 2009, would appear to be the appropriate way in which to proceed.

Scottish Ministers v MHTS (NG and PF)

2009 SC 510; 2009 SLT 650; 2009 GWD 18-298

Opinion of Lord Clarke, Lord Mackay of Drumadoon and Lord Philip 6 May 2009

Compulsion order and restriction order – section 193(7) of the 2003 Act – whether Tribunal had power to make a further order for conditional discharge and vary conditions on 2 year review where patient already subject to order for conditional discharge with conditions

NG and PF were subject to deemed compulsion orders and restriction orders under section 57(2)(a) and (b) of the Criminal Procedure (Scotland) Act 1995, as amended by the 2003 Act. Both had been conditionally discharged by the Scottish Ministers prior to the 2003 Act coming into force. NG was conditionally discharged from hospital on 10 November 2003, and 3 conditions were set out in the order. PF was conditionally discharged by the Scottish Ministers on 19 August 2005, and 4 conditions were set out in the order. NG and PF came before the Tribunal for a 2 year review of their deemed compulsion order and restriction order under section 189 of the 2003 Act. That section provides 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 2 years has elapsed with no reference to the Tribunal having been made in terms of section 189(2) or where no application has been made within that period by the patient or the patient's named person. In both the cases of NG and PF, following a hearing on the section 189(2) reference, the Tribunal issued decisions conditionally discharging the patients and imposing certain conditions on that discharge. In the case of NG, the Tribunal imposed 8 conditions, and in the case of PF the Tribunal imposed 9 conditions. The Scottish Ministers appealed against the Tribunal's decisions on the basis that the decisions were based on an error of law.

Issue

- whether it was competent for the Tribunal to make a further order for conditional discharge and vary the conditions of discharge when dealing with a reference under section 189(2) (a 2 year review) when the patient was already subject to an order for conditional discharge with conditions

Held

The Tribunal had clearly failed to have regard to the provisions of paragraph 24 of the Mental Health (Care and Treatment) (Scotland) Act 2003 (Transitional and Savings Provisions) Order 2005 (SSI 2005/452) ("the 2005 Order"). The effect of the transitional provisions in the 2005 Order was that after 5 October 2003, NG and PF were to be treated as if the Tribunal had made an order that they 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.

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), the Court was 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. 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 individually discharged.

The Tribunal had purported, in the case of NG and PF, to revoke the original orders relating to the patients and to substitute new orders of conditional discharge. In the Court's opinion, the wording of section 193(7) was not capable of being read as to extend to such an exercise. The Tribunal in purporting to make the variations they did, exceeded their powers and acted *ultra vires*.

Appeals allowed.

Comment

This decision makes it clear that when the Tribunal is considering a reference in relation to a patient who is subject to a compulsion order and restriction order, and that patient is already subject to an order for conditional discharge, the Tribunal has no power to amend the conditions attached to the order for conditional discharge.

It should be noted that section 200 and 201 of the 2003 Act deal with the issue of how conditions imposed on a conditional discharge may be varied and that variation appealed against. Sections 202 and 204 also deal with the recall of a patient from conditional discharge. The Court was of the view that 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 section 193(7) or deemed to have been so conferred in the transitional cases under the 2005 Order (see paragraph 25 of the Opinion). In argument, the Tribunal had raised the issue that it seemed to be an oddity that the Tribunal, when considering a reference under section 189, had power to revoke the restriction order or the compulsion order – a more far reaching step than altering any conditions to which the patient might be subject on conditional discharge – but did not have the lesser power to alter the conditions of conditional discharge which it had sought to exercise in the cases of NG and PF. The Court did not accept this line of argument.

Section 201, which deals with an appeal to the Tribunal against variations of conditions imposed on conditional discharge, provides that where an appeal is made to the Tribunal, section 193 of the 2003 Act shall apply as if the patient had applied under section 192 of the 2003 Act for an order conditionally discharging the patient. Similar provision is made in relation to section 204 regarding an appeal to the Tribunal against recall from conditional discharge. Therefore the oddity appears that while the Tribunal cannot vary conditions of its own accord and cannot conditionally discharge a patient who has already been conditionally discharged, when a patient appeals against variation of conditions by the Scottish Ministers, the Tribunal must treat that appeal as an application for conditional discharge, meaning that the Tribunal would be empowered to make an order that the patient be conditionally discharged and impose whatever conditions it thought fit on that discharge. In that case, it would appear that the whole provisions of section 193 are opened up and it might, for example, be possible for the Tribunal to revoke the restriction order in such proceedings.

Scottish Ministers v Mental Health Tribunal for Scotland and MM

2010 SC 56; 2009 SLT 1093; 2009 SCLR 800; [2009] MHLR 372; 2009 GWD 29-471

Judgement of Lord Reed, Lord Carloway and Lord Marnoch 23 July 2009

Revocation of restriction order – adequacy of reasons – proper construction of section 193

The Scottish Ministers appealed against an order of the Tribunal revoking the restriction order of MM. The Scottish Ministers appealed on the basis that the Tribunal had erred in law in a number of ways relative to the proper interpretation of section 193 of the 2003 Act by (1) failing to start a consideration of MM's case by addressing the terms of subsection 193(2) as the Court had determined ought to occur in the case of *JK*; (2) failing to address the 4 separate elements in subsections 193(5)(a)(i) and (ii) and 193(5)(b)(i) and (ii); (3) failing to consider the tests in subsections 193(5)(b)(i) and (ii) separately. The Scottish Ministers submitted that the Tribunal had also (4) erred in failing to provide a full statement of facts as required by the 2003 Act and the Mental Health Tribunal for Scotland (Practice and Procedure) Rules 2005; (5) erred in failing to have regard to material considerations and thus had reached an unreasonable decision. It was submitted that the Tribunal had failed to have regard to MM's violent past and the failures of previous supervisory orders. It had not explained how it had reached a conclusion opposite to that recommended by the RMO and (6) the decision was not supported by the facts which the Tribunal had found established.

Issues

- adequacy of reasons
- proper construction of section 193

Held

The Tribunal had failed to provide adequate reasons for its decision. The reports from the RMO and the independent expert instructed on behalf of MM recommended the retention of the compulsion order and the restriction order. For the reasons to be regarded as adequate, the Tribunal was bound to explain why the views of the psychiatrists were being discounted. The Tribunal in the decision stated that it was not explained to the Tribunal what risk existed were the restriction order to be lifted. This was not borne out by the material before the Tribunal in the various reports, nor was the reference to the Tribunal being unable to find in the papers evidence indicating risk supportable having regard to the material before the Tribunal.

The Tribunal required to consider whether the test for revocation of the restriction order under section 193(5)(b)(ii) was met. It was not clear from the reasoning that the Tribunal did in fact do so or, if they did, what factors they had regard to. It was also not clear whether the Tribunal had applied itself properly to subsection 193(5)(b)(ii), i.e. whether the restriction order was necessary. The Court notes that the existence of the restriction order presupposes the continuation of a compulsion order which, in MM's case, authorised detention in hospital. The Court opined that the issue of whether the restriction order should continue is primarily concerned with whether the compulsion order should remain without limit of time and should not be revoked except by order of the Tribunal. In assessing that issue, the Tribunal ought presumably to be considering at least the factors which permit the imposition of a restriction order under subsection 59(1) of the 1995 Act. There was little, if any, indication that the Tribunal had directed itself to those factors.

The approach of the Tribunal in this regard was inconsistent with the guidance from the Court in the case of *JK*.

Appeal allowed.

Comment

In this case, given that the Court dealt with the appeal and allowed the appeal on the ground that the Tribunal failed to provide adequate reasons for the decision, the Court felt it unnecessary to consider the remaining grounds of appeal, in particular those which related to the interpretation of section 193 of the 2003 Act.

Lord Reed, however, took the opportunity to comment that there were aspects of the *JK* decision which might merit further consideration. Lord Reed stated that it was difficult to analyse the structure of the complex provisions in section 193 using ordinary language. Lord Reed went so far as to say that provisions such as subsections (4) and (5) might be a suitable exercise for a university class in logic, where they could be analysed using the language and tools of formal logic. He noted that Counsel, in addressing the Court in the appeal, resorted to algebra. He commented that it was unfortunate that legislation should be so resistant to ordinary comprehension.

There is an interesting discussion about the purpose of section 193(2). This seemed to leave the Court in the position of deciding that the statutory provisions were logically redundant. The Court noted that that would run contrary to one of the ordinary principles of statutory interpretation, namely that statutory provisions are presumed not to be otiose. The alternative, which was postulated, was that identical express conditions in section 193 be given different meanings in the context of different provisions of that section, e.g. that the words appearing in subsection (5)(b)(i) be given a different meaning from the identical words appearing in subsection (2)(b). Lord Reed noted that that approach runs contrary to another ordinary principle of statutory interpretation, namely that when the legislative uses the same language in different parts of a statute, it intends that language to have a consistent meaning.

Lord Reed commented that in *JK*, the Court considered that section 193 provided a sequential lists of tests and that section 193(2), in particular, required to be considered first by the Tribunal in every case: it imposed what was in effect a threshold requirement, which the Tribunal must deal with before it could turn its attention to any other part of section 193. In *JK*, the Tribunal was held to have misdirected itself by applying subsection 193(5) without considering the "separate tests" contained in section 193(2) (see paragraphs 32 to 34 and 41 of the *JK* judgement). It was noted that while it might be helpful for the Tribunal to consider section 193(2) and section 193(3) at the outset, as they could provide the Tribunal with an answer without it necessarily requiring to consider the other matters raised in the remaining subsections, there was no legal requirement to approach matters in that way. Lord Reed noted that this was a matter which may, at some point, require to be reviewed.

The Court's attention was also drawn to the passage in the opinion of the Court in *JK* at paragraph 34 where the implication of the second sentence, in particular, is that if the Tribunal does not make an order under section 193(4), then it must follow that it is satisfied of the matter referred to in subsection (4)(b)(i). As it is also satisfied under subsection (4)(a), it follows that the requirements of subsection (2) are met, since subsection (2)(a) is identical to subsection (4)(a) and subsection (2)(b) is the counterpart of subsection (4)(b)(i). Counsel for the Scottish Ministers and the Tribunal argued that the reasoning in this passage was incorrect. If that were correct, the Tribunal could never make an order under sections 193(5) or 193(7) as such orders could only be made in circumstances where the patient had a mental disorder and it was accepted that the

compulsion order should remain in place. It was argued that if the Tribunal did not make an order under section 193(4), that was not necessarily because subsection (4)(b)(i) was inapplicable; it could be that although the Tribunal was not satisfied of the matter referred to in that subsection, it was satisfied of one or other or indeed both of the matters referred to in subsection (4)(b)(ii). Lord Reed noted that there appeared to be force in that submission and this was another matter which may at some point require to be reviewed.

This case serves to highlight the complexity of the provisions in section 193 and the fact that there are still some unresolved issues in relation to the proper construction of that section. It should be noted however that the comments made by Lord Reed in Scottish Ministers v Mental Health Tribunal for Scotland and MM are *obiter dicta* and JK remains the leading authority on how the Tribunal should apply the provisions of section 193 of the 2003 Act.

KM v Mental Health Tribunal for Scotland

[2009] MHLR 384; 2009 GWD 40-694

Judgement of Sheriff Principal Sir Stephen Young Bt QC 21 August 2009

CTO application – Mental Health (Conflict of Interest) (Scotland) (No. 2) Regulations 2005 – whether permitted conflict of interest in the medical reports accompanying CTO application

An application for a compulsory treatment order (CTO) had been made in respect of KM. A hearing took place to consider the application. Regulation 5 of the Mental Health (Conflict of Interest) (Scotland) (No. 2) Regulations 2005 ("the 2005 Regulations") makes provision as to 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 the medical examinations. All of the conditions specified in regulation 5(1)(a) to (c) require to be met before there will be a permitted conflict of interest in the medical reports. At the hearing, KM's solicitor submitted that the condition in regulation 5(1)(b) of the 2005 Regulations had not been satisfied, with the result that the application should be refused by the Tribunal as two medical examinations had not been carried out in accordance with the requirements of section 58 of the 2003 Act. Regulation 5(1)(b) of the 2005 Regulations is in the following terms "(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". The Tribunal decided that the condition specified in regulation 5(1)(b) had been met and made a CTO. KM appealed against the Tribunal's decision on the grounds that (i) the Tribunal had erred in law in deciding that there was a permitted conflict of interest in the medical reports and (ii) the Tribunal's decision was not supported by facts found to be established by it.

Issues

- whether Tribunal had erred in law in concluding that the condition in regulation 5(1)(b) of the 2005 Regulations was satisfied
- whether Tribunal's decision was supported by facts found to be established by it

Held

The Tribunal had erred in law in deciding the issue by reference to what was in the mind of the responsible medical officer (RMO) at the material time, when what the Tribunal 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 KM on the date it was carried out would have resulted in delay which would have involved serious risk to the health, safety and welfare of KM or to the safety of other persons.

The Tribunal appeared to have based its conclusion that the condition had been met solely upon the fact that the RMO had considered seeking a second medical examination but had discounted taking this further because of delay. Regulation 5(1)(b) of the 2005 Regulations demands that the circumstances of each case should be assessed on their own merits. The circumstances must be assessed at the time consideration is being given to carrying out the second medical examination of the patient for the purposes of section 57(2) of the 2003 Act, and not at some earlier or later point in time.

The Tribunal has to be satisfied that this condition has been met in any given case and, before it can be so satisfied, there has to be placed before it sufficient evidence to allow the Tribunal to make findings in fact which will in turn support the inference that the condition

has been met. In the Tribunal's decision, there were no facts found to be established by the Tribunal which would support the proposition that failure to carry out the medical examination of KM on 3 February 2009 would have resulted in delay which would involve a serious risk to KM's health, safety or welfare or to the safety of other persons.

Appeal allowed.

Comment

This judgement makes it clear that where the question of a permitted conflict of interest arises, the Tribunal requires to (i) assess the circumstances of each case on its own merits and be satisfied that the relevant conditions have been met in that case; and (ii) ensure that it makes sufficient findings in fact which will support the decision that the conditions specified in regulation 5(1) of the 2005 Regulations have been met.

The judgement also provides some useful guidance (see paragraph 20) on the questions which those responsible for the care of the patient and the Tribunal may wish to consider in order to reach a decision on whether regulation 5(1)(b) is satisfied, namely (1) what are the alternatives to carrying out the medical examination at that time, (2) in respect of each alternative 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 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 a serious risk to the health, safety or welfare of the patient or to the safety of others.

This judgement also contains some observations on the conduct of the Tribunal hearing. The Sheriff Principal notes that there had been some discussion of the issue of delay and the condition specified in regulation 5(1)(b) of the 2005 Regulations. He states that he uses the word "discussion" advisedly since, in contrast to the conventional method of proceeding in a court of law, it was not a situation where the RMO was examined in chief and then cross-examined respectively by the MHO and KM's solicitor, who then both made submissions on the issue. He notes that what happened was essentially a discussion (in the ordinary sense of the word) of the issue in which all four of the convener, the RMO, KM's solicitor and the MHO participated, and in which assertions in the nature of evidence (chiefly, as was to be expected, by the RMO, but also at times by the convener) and submissions were freely intermingled. The Sheriff Principal expresses no opinion on the question of whether this was an appropriate way to proceed, other than to observe that it does seem to him on reading the transcript to have introduced an element of confusion into the proceedings. While the Sheriff Principal is at pains to express no opinion on the question of whether this is an appropriate way toconduct a Tribunal hearing it does seem that the Sheriff Principal is suggesting that such an approach is less desirable than the conventional approach which would involve evidence and submissions being separated.

Henderson v Mental Health Tribunal for Scotland

2011 SCLR 129; 2010 GWD 26-507

Judgement of Sheriff Principal E F Bowen QC 23 July 2010

Curator ad litem – whether entitled to bring an appeal

An appeal was brought by and in the name of the curator *ad litem* to a patient RM. The curator *ad litem* had been appointed by the Mental Health Tribunal for Scotland under rule 55(1)(a) of the Mental Health Tribunal for Scotland (Practice and Procedure) (No. 2) Rules 2005 on the basis that RM did not have the capacity to instruct a solicitor to represent his interests in proceedings before the Tribunal. The Tribunal considered an application for a compulsory treatment order (CTO) and made a CTO. The curator *ad litem* to RM marked an appeal on a number of grounds. In essence these were based on the proposition that the curator *ad litem* had insufficient opportunity to meet the patient in advance of the hearing and that the Tribunal erred in proceeding to deal with the application before he could do so. The appeal was not opposed by the Tribunal on the merits. The issue which arose was whether the curator *ad litem* to RM had title to bring an appeal.

Issue

- whether appeal by curator *ad litem* was competent

Held

The appeal at the instance of RM's curator *ad litem* was not competent. The curator *ad litem* was not a "relevant party" who may appeal to the Sheriff Principal against a decision of the Tribunal to which section 320 of the 2003 Act applies. Section 320(5) makes provision as to the meaning of "relevant party". The omission of a reference to a curator *ad litem* in section 320(5) must have been deliberate. There were several sections in the 2003 Act where lists of persons appear, and where those identified are qualified to make applications or are afforded an opportunity to be heard. These included a reference to any curator *ad litem* appointed in respect of the patient by the Tribunal. Had it been the intention of Parliament to grant a right of appeal to a curator *ad litem*, the Court would have expected the section 320(5) list to be in similar terms to those other provisions. The fact that curators *ad litem* are not mentioned led the Court to conclude that a conscious decision was taken not to include curators *ad litem* in the appeal process. The Court noted that the view may well have been that the involvement of a curator *ad litem*, appointed by the Tribunal for the purposes of proceedings before it, ceases at the conclusion of those proceedings.

Appeal dismissed.

Comment

At paragraph 9 of the judgement, the Sheriff Principal comments that while the curator *ad litem* cannot appeal against a decision of the Tribunal, the patient is not necessarily left without a remedy. He states that an appeal could be marked by the patient's named person or by a guardian or welfare attorney where such appointments have been made. The Tribunal has some doubts as to whether this can be seen as an effective remedy. The interests of, for example, a patient's named person are not always the same as those of the patient. The Scottish Government has been informed of the decision in this case to allow consideration to be given to whether any amendment of the legislation may be required.

The issue of whether it was competent for a curator *ad litem* to appeal against a decision of the Tribunal was also considered in the case of *Black v Mental Health Tribunal for Scotland* where Sheriff Principal Sir Stephen Young BT QC also held that a curator *ad litem* did not have a right to appeal a Tribunal decision. In that case, the Sheriff Principal remitted the appeal to the Court of Session under section 320(4) of the 2003 Act. The Court of Session has heard the remitted appeal but has not yet issued its judgement.

WS v Mental Health Tribunal for Scotland

2011 SC 43; 2010 SLT 991; 2010 GWD 29-607

Judgement of the Lord Justice Clerk, Lord Brodie and Lord Marnoch 20 August 2010

Tribunal refusing to make order returning appellant to English hospital – competency of Tribunal decision – whether competent to appeal against refusal to make order under section 220(5) of the 2003 Act to the Court of Session

WS was admitted to the State Hospital in 1996. In 2007, on his application, the Tribunal made an order under section 264 of the 2003 Act declaring that WS was being detained in conditions of excessive security. He was transferred to Linden House, a medium secure facility in Yorkshire. In 2008, he was involved in a serious disturbance at Linden House and the Secretary of State for Justice made an order under section 80 of the Mental Health Act 1983 for the return of WS to the State Hospital. WS was returned to the State Hospital and appealed to the Tribunal against the decision to return him there. He did so purportedly under section 220 of the 2003 Act. The Tribunal held a preliminary hearing to decide whether the appeal was competent. The Tribunal, to allow facilitation of an appeal, decided to refuse to make an order in terms of section 220 of the 2003 Act rather than holding the appeal to be incompetent. That decision was appealed to the Court of Session. At the appeal hearing it was argued that section 220 should be read in such a way as to allow a patient in WS's circumstances a right to appeal to the Tribunal under section 220 to ensure compatibility with the European Convention on Human Rights.

Issues

- competency of Tribunal decision
- competency of appeal to the Court of Session

Held

The appeal was entirely misconceived. The right to appeal to the Tribunal under section 220 of the 2003 Act and consequently the right to appeal to the Court of Session under section 322 of the 2003 Act arises only if the patient is transferred to the State Hospital under section 218 of the 2003 Act. WS was not transferred under that section. He was transferred by the Secretary of State for Justice in the exercise of his powers under the Mental Health Act 1983. As WS was not transferred to the State Hospital under section 218, the Tribunal had no jurisdiction under section 220 of the 2003 Act. It was therefore not open to the Tribunal to make a decision under that section "to allow facilitation of an appeal" to the Court of Session. The Tribunal should have dismissed the section 220 appeal as being incompetent.

In relation to the Convention argument the Court held that as the Convention point was given nothing more than a passing mention in the Tribunal proceedings and was not the subject of any detailed legal submission, the point could not properly be taken in the appeal to the Court of Session. In any event, the Court commented that there was no reason why a Convention argument should arise in this case, since WS had not been deprived of any meaningful remedy in respect of his complaint. He had two remedies, both of which he had failed to pursue. The first was to challenge the decision of the Secretary of State for Justice by an application for judicial review of that decision in the English courts. The second remedy had been available to WS in Scotland for two years, namely to apply again to the Tribunal under section 264 of the 2003 Act seeking an order from the Tribunal that he was being detained in conditions of excessive security.

Appeal refused

M v Mental Health Tribunal for Scotland

2010 SLT (Sh Ct) 235; 2010 GWD 31-652

Judgement of Sheriff Principal J A Taylor 31 August 2010

Short-term detention certificate – approved medical practitioner granting short-term detention certificate, then granting extension certificate when no power to do so, and subsequently granting further short-term detention certificate – whether Tribunal on application for revocation of short-term detention certificate has power to determine validity of short-term detention certificate – whether section 50 of the 2003 Act compatible with Article 5 of ECHR

M appealed against a decision of the Tribunal to refuse an application to revoke a short-term detention certificate (STDC). A STDC in respect of M was granted on 26 January 2010, which was due to expire on 18 February 2010. On 18 February 2010, an approved medical practitioner granted an extension certificate in terms of section 47 of the 2003 Act. It was agreed between the parties that the extension certificate was unlawful, as there had been no change in the mental health of the patient, which is one of the criteria which require to be satisfied for the granting of an extension certificate under section 47. On 19 February, the mental health officer made an application for a compulsory treatment order (CTO). On 25 February, the CTO application was withdrawn. M was informed that the CTO application had been withdrawn, but was not told that she was free to leave the hospital. On the same day, the approved medical practitioner granted a second STDC. That certificate was the subject of the appeal to the Tribunal. Parties agreed that M had been unlawfully detained in hospital from 18 to 25 February.

Section 44 of the 2003 Act provides that a STDC cannot be granted where immediately before the granting of the STDC the patient is subject to a STDC; an extension certificate; section 68 of the 2003 Act; or a certificate granted under section 114(2) or 115(2) of the 2003 Act. M argued that she had been purportedly detained under an extension certificate and thereafter purportedly by virtue of section 68 of the 2003 Act, and *de facto* detained, albeit unlawfully, from 18 to 25 February. M argued (1) that her detention under the second STDC breached Article 5 of her Convention rights and (2) if section 44 of the 2003 Act was construed only to prohibit detention where M was immediately before the medical examination detained lawfully under section 68, then that was incompatible with M's Convention rights.

Issues

- whether Tribunal had power to determine the validity of STDC in section 50 appeal
- whether breach of Article 5(4) of the European Convention on Human Rights

Held

The Tribunal's powers were circumscribed by the terms of section 50 of the 2003 Act. In order for a Tribunal to exercise its powers under section 50(4) to revoke a certificate, it must not be satisfied on certain matters specified in section 50(4)(a) and (b). It was not suggested the Tribunal was in a position not to be satisfied on such matters. The Tribunal did not, in the circumstances of this case, have the power to revoke the STDC. The terms of section 50(4) could not be met.

Article 5(4) of the Convention requires that the State provides persons deprived of their liberty with a means by which they can challenge the lawfulness of their detention. Such a provision existed in the 2003 Act. Section 291 of the 2003 Act could have been invoked by M. If the Tribunal was satisfied that M was being unlawfully detained in hospital, it could make an order requiring the managers of the hospital to cease to detain M under section 291(2) of the 2003 Act.

Appeal refused.

Comment

The importance of this decision for Tribunal members is that when a STDC is being challenged this case is authority for the proposition that any arguments in relation to the validity of the STDC cannot be considered in a section 50 appliction. The appropriate remedy would be for the patient to bring an application under section 291 in relation to unlawful detention.

It appeared to be accepted that the section 47 extension certificate which was granted on 18 February 2010 could not be a complete nullity, albeit it was accepted it was unlawful and invalid. For it to be a nullity, it would require to be reduced. If at the time the second STDC was granted on 25 February 2010 M was not able to bring herself within the categories of persons set out in section 44(2), the STDC granted on that date was valid and M was not unlawfully detained from that date. The Sheriff Principal notes that he doubts whether one can be "purportedly" subject to a certificate, noting that one is either subject to a certificate or not.

Sheriff Principal Taylor's judgement was appealed to the Court of Session, however the appeal was abandoned.

JG v Mental Health Tribunal for Scotland

2010 GWD 40-817

Judgement of Sheriff Principal J A Taylor 14 October 2010

Requirement to notify patient that CTO application is to be made under section 60(1) of the 2003 Act – whether notification given prior to mental health officer being in possession of two mental health reports complied with section 60(1) duty – whether failure to comply with section 60(1) duty rendered compulsory treatment order application incompetent

Section 60(1) of the 2003 Act provides that where a mental health officer (MHO) is required by section 57(1) of the 2003 Act to make an application under section 63 of the 2003 Act for a compulsory treatment order (CTO) in respect of a patient, the MHO shall, as soon as practicable after the duty to make the application arises (and, in any event, before making the application) give notice that the application is to be made to the patient, the named person and the Mental Welfare Commission.

The MHO gave notice to the patient of the intention to make a CTO application when she was in possession of only one mental health report. The duty to make a CTO application does not arise until the MHO is in receipt of two medical reports. JG argued that the application made by the MHO for a CTO in respect of him was incompetent. The Tribunal rejected this argument and made a CTO.

Issues

- whether MHO had complied with terms of section 60 in that notice was given to the patient before the duty to make an application to the Tribunal, imposed by section 63, had crystallised
- if MHO had not complied with terms of section 60, whether the failure affected the competency of the application or the validity of the subsequent proceedings and the making of a CTO

Held

The duty to give notice arose when the MHO came into possession for the first time of two medical reports which met the requirements of sections 57 and 58 of the 2003 Act. The MHO therefore failed to obtemper the terms of the statutory provisions and, accordingly, notification was not given to JG in strict compliance with the statutory provisions.

The provisions of section 60 with regard to notification are directory, notwithstanding the use of the imperative "shall" in that section. What was being dealt with is a statute which prescribes a sequence for carrying out acts and the deviation from that sequence was not substantial. Broadly speaking, the purpose of the notification had been achieved.

Even if the notification provisions in section 60 are not directory, the consequence of the failure to notify the patient on a second occasion that it was the intention to apply for a CTO when notification had been given some 6 days earlier than the duty arose, is not sufficient to render the subsequent proceedings invalid. The deviation from the statutory provisions was nugatory and JG had not suffered any prejudice.

Appeal refused.

Comment

This case is another example of the Court being asked to consider the effect of a failure to comply with the statutory procedure under the 2003 Act. Sheriff Principal Taylor applied the cases of *London and Clydeside Estates Ltd v Aberdeen District Council* (1980 1 WLR 182) and *R v Soneji* (2005 3 WLR 303). This case, along with the case of *Paterson v Kent* and *N v Borland and MHTS* show the approach the Courts have taken to challenges on the grounds that statutory procedures or timescales have not been followed or met. It can be seen that the Courts have taken a fairly robust approach. It should be noted, however, that *Soneji* and the other relevant authorities are not a panacea able to remedy every defect in an application or a determination. There is, as Lord Hailsham notes in *London and Clydeside Estates* at p189-90, "a spectrum of possibilities". Some failures will be so severe that a court will hold that they invalidate the act done; but other failures will be seen as trivial or nugatory, and Parliament would not have intended that the consequences of such a failure to comply would be total invalidity.

Black v Mental Health Tribunal for Scotland

Judgement of Sheriff Principal Sir Stephen Young Bt QC 21 February 2011 (unreported)

Curator ad litem – whether entitled to bring an appeal – whether section 320(5)(a) of the 2003 Act required to be read in a way that was compatible with the patient's Convention rights

A mental health officer made an application to the Tribunal for a compulsory treatment order (CTO) in respect of the patient M. The Tribunal appointed a curator *ad litem* in terms of rule 55 of the Mental Health Tribunal for Scotland (Practice and Procedure) (No. 2) Rules 2005 ("the 2005 Rules") on the basis that M did not have the capacity to instruct a solicitor to represent her interests in proceedings before the Tribunal. A hearing on the application took place before the Tribunal, at which the curator *ad litem* appointed to represent M's interests in the Tribunal proceedings requested the Tribunal make an *interim* CTO to allow an independent psychiatric report to be obtained on behalf of M. The Tribunal refused this request and proceeded to make a CTO. The curator *ad litem* appealed against the decision of the Tribunal to make a CTO. The curator *ad litem* submitted that the Court was obliged in terms of section 3(1) of the Human Rights Act 1998 to read and give effect to section 320(5)(a) of the 2003 Act in a way that was compatible with M's Convention rights and that in order to do so the Court should read section 320(5) to include a reference to a curator *ad litem* appointed in respect of the patient by the Tribunal.

Issues

- whether it was competent for the curator *ad litem* to bring an appeal
- whether section 320(5)(a) required to be read and given effect to in a way which was compatible with M's Convention rights, in particular Article 5(4) and Article 6(1)

Held

The curator *ad litem* to M was not entitled to appeal against the making by the Tribunal of a CTO in respect of M. Section 320(2) of the 2003 Act provides that a relevant party to proceedings before the Tribunal may appeal to the Sheriff Principal against a decision to which the section applies. Section 320(5) makes provision as to the meaning of a relevant person in this context. It specifies a list of persons which does not include a curator *ad litem*. This can be contrasted with the list of persons whom, before determining an application for a CTO, the Tribunal is required to afford the opportunity of making representations (whether orally or in writing) and of leading or producing evidence. That list includes specifically any curator *ad litem* appointed in respect of the patient by the Tribunal. The inescapable conclusion to be drawn from a comparison of the two lists is that Parliament intended that a curator *ad litem* should not be entitled to appeal against the making by the Tribunal of a CTO.

The curator *ad litem* had no title to pursue the appeal. The curator *ad litem* was appointed under rule 55 of the 2005 Rules. It is clear from a consideration of the 2005 Rules that the scope of the appointment as curator *ad litem* was restricted to representing M's interests in proceedings before the Tribunal. Those proceedings came to an end when the Tribunal made a CTO in respect of M. At that point, the curator *ad litem* was *functus officio*.

In relation to the issue of whether section 320(5)(a) of the 2003 Act required to be read in a way that was compatible with M's Convention rights by including a reference to a curator *ad litem* appointed by the Tribunal, the Court held that to read into section 320(5)(a) words

which would allow a curator *ad litem* to appeal in place of the patient would fly in the face of the clear implication that Parliament did not intend a curator to have a right of appeal. To read into section 320(5)(a) words which would allow the patient's curator *ad litem* to appeal would go against the grain of the legislation and would fall on the wrong side of the boundary between interpretation and amendment of the statute. In its present form section 320(5)(a) cannot be read and given effect in a way which is compatible with M's rights under Article 5(4).

The Sheriff Principal remitted the case to the Court of Session under section 320(4) of the 2003 Act.

Comment

There is an interesting discussion in this appeal in relation to the interplay between Article 5(4) and Article 6(1) of the European Convention on Human Rights (ECHR). The Sheriff Principal takes the view that Article 5(4) clearly applies, but is not sure whether Article 6(1) is engaged.

It is clear that Article 5(4) is engaged in proceedings before the Tribunal. The Tribunal satisfies the definition of a "court" for the purposes of Article 5. The Sheriff Principal notes at paragraph 12 of the judgement that what Article 5(4) demands is that the patient should be entitled to take proceedings by which the lawfulness of his/her detention in pursuance of a CTO made by the Tribunal shall be decided by the Court. As mentioned, the Tribunal satisfies the definition of a court for the purposes of Article 5(4). The patient has, therefore, had the lawfulness of his/her detention reviewed in the Tribunal proceedings. There is no requirement that a further right of appeal be provided in relation to a review of detention in terms of Article 5(4) (*Jecius v Lithuania* (2002) 35 E.H.R.R. 16, *Lanz v Austria* [2002] ECHR 12).

The interplay between Articles 5 and 6 was also briefly alluded to in *Paterson v Kent* where it was noted that there are competing views on whether Article 6 is engaged in Tribunal proceedings. In *Paterson v Kent*, the two competing views are summarised as follows: (1) that the right to liberty is a "civil right" and accordingly any proceedings which may result in a deprivation of liberty must be Article 6 compliant and (2) that Article 5 deals with the right to liberty and the circumstances in which it may be limited and is the primary provision as far as procedures are concerned, borrowing if necessary from some of the concepts developed in relation to Article 6 – such as proceedings having a judicial character and ensuring equality of arms between the parties. Sheriff Principal Dunlop referred to the case of *R (West) v Parole Board* 2005 1WLR 350 where Lord Bingham found it unnecessary to resolve the question whether or not the civil limb of Article 6 was engaged as the common law duty of procedural fairness required to be observed and Lord Bingham was not persuaded that the civil limb of Article 6 would offer any greater protection. Sheriff Principal Dunlop took the view that, as in the case of *R (West) v Parole Board*, it was unnecessary to resolve the question of whether Article 6 was engaged in the *Paterson* case.

In the case of *Reinprecht v Austria* (2007) 44 EHRR 39, which involved pre trial detention under Article 5, the European Court of Human Rights (ECtHR) clarified the extent to which the guarantees of Article 6 apply to review of lawfulness of detention, in respect of which Article 5(4) is the *lex specialis*. *Reinprecht* makes it clear that the full range of guarantees under Article 6 does not extend to proceedings concerning the review of the lawfulness of detention. In that case the applicant had complained about the lack of a public hearing, which is a specific right under Article 6, in his appeals against pre trial detention in respect of an alleged offence. The ECtHR held that a public hearing was not necessarily guaranteed under Article 5(4).

MP v JL, Dr TH and Mental Health Tribunal for Scotland
Judgement of Temporary Sheriff Principal C N Stoddart 7 April 2011 (unreported)

Recorded matter – Tribunal deciding not to make a recorded matter – whether Tribunal had erred in law – whether decision represented misuse of discretion – meaning of recorded matter

MP was subject to a compulsory treatment order (CTO). MP made a section 100 application to the Tribunal seeking variation of the CTO from a hospital based order to a community based order. At the hearing, however, MP's solicitor asked the Tribunal to revoke the order completely or, alternatively, to vary the CTO by modifying the CTO to include a recorded matter in terms of section 100(2)(b)(ii) of the 2003 Act.

If the Tribunal is satisfied that the conditions specified in section 64(5) of the 2003 Act are met, the Tribunal may make a CTO. Section 64(4)(a)(ii) provides that the Tribunal may make an order "specifying such medical treatment, community care services, relevant services, other treatment, care or service as the Tribunal considers appropriate (any such medical treatment, community care services, relevant services, other treatment, care or service so specified being referred to in this Act as a "recorded matter")".

MP requested a recorded matter requiring "up to date reports from occupational therapy, social work, housing and the responsible medical officer as to what progress has been achieved in advancing the patient's care pathway towards a community placement". In effect, MP was seeking an order for the preparation of a series of progress reports. The Tribunal decided neither to revoke the CTO, nor to make any recorded matter. MP appealed on the basis that the Tribunal had erred in law and had acted unreasonably in the exercise of its discretion.

Issues

- whether what MP had sought by way of recorded matter could competently have been granted
- whether the Tribunal had exercised its discretion unreasonably

Held

What MP sought before the Tribunal was not a recorded matter in terms of the statutory definition in section 64(4)(a)(ii) of the 2003 Act. A recorded matter is an order specifying that certain treatment or services must be provided as part of a CTO. It is not a mechanism for obtaining reports. If the Tribunal had acceded to the request made by MP, it would have erred in law. It would have been incompetent for the Tribunal to have acceded to the request made by MP.

Even if it had been competent for the Tribunal to make a recorded matter which consisted solely in the obtaining of a series of reports, there was nothing amounting to an error of law in the Tribunal's decision not to do so.

On the unreasonable exercise of discretion ground of appeal, the well known test set out in *G v G (Minors: custody appeal)* [1985] 1 WLR 647 had not been met. The decision was one which was within the Tribunal's discretion to reach and was not "plainly wrong". On a fair reading of the Tribunal's decision, the Tribunal clearly reached the view that MP presently required treatment in a highly structured setting with significant support and that she was not yet capable of living in the community. In those circumstances, the Court had difficulty seeing how the obtaining of a series of reports showing what progress had been achieved in advancing the patient's care pathway to a community placement would have assisted.

Appeal refused.

N v Borland and Mental Health Tribunal for Scotland

2011 SLT (Sh Ct) 135; 2011 SCLR 436; 2011 GWD 16-398

Judgement of Sheriff Principal B A Lockhart 9 May 2011

Section 57(7) of the 2003 Act – failure to lodge mental health reports which require to accompany CTO application before expiry of 14 day period – whether failure to comply with statutory provision vitiates the CTO application

The Tribunal made a compulsory treatment order (CTO) in respect of N. A CTO application had been made to the Tribunal and received by it on 9 March 2011. In terms of section 63(2)(b) of the 2003 Act, the application requires to be accompanied by the mental health reports, the report prepared by the mental health officer (MHO) under section 61 of the Act and the proposed care plan relating to the patient. When the application was lodged with the Tribunal, in error the two mental health reports did not accompany the application. The mental health reports were received by the Tribunal on 11 March 2011.

Section 57(7) of the 2003 Act provides that where a MHO is required by section 57(1) to make an application for a CTO, the MHO shall make the application before the expiry of the 14 day period beginning with the date of the mental health reports (where they specify the same date) or, where they specify different dates, the latest of those dates. The period of 14 days commenced on the date of the joint examination for the two mental health reports and expired on 10 March 2011. At the hearing, N's solicitor argued that as the application required to be accompanied by the mental health reports and those reports were not received until the 14 day period had expired, the application was invalid.

Issue

- validity of CTO application when mental health reports accompanying application not received within 14 day period specified in section 57(7) of the 2003 Act.

Held

The delay in lodging of the mental health reports did not vitiate the application. There was substantial compliance with the requirements of the 2003 Act on 9 March 2011 when the application, the MHO's report and the care plan were lodged with the Tribunal. There was total compliance 15 hours after the time limit expired when the mental health reports were lodged. No prejudice had been suffered by N. The two medical reports were timeously available for the hearing on the CTO application. The two doctors were available to give evidence and were questioned by the solicitor for N. There was an opportunity for N to lead any evidence he thought appropriate at the Tribunal hearing.

Parliament did not intend that failure to comply with the terms of section 57(7) of the 2003 Act by some 15 hours would frustrate the overriding purpose of the legislation, which is to provide appropriate care and treatment for persons having a mental disorder. The application for a CTO, the MHO's report, the care plan, the medical reports and the Tribunal's full findings and reasons point conclusively to the fact that N is in need of compulsory measures of care. Such a course is in his and the public interest. It is inconceivable that the intention of Parliament was that such a course would be frustrated by the failure to observe a time limit by some 15 hours in a situation where there has clearly been no prejudice to N.

Appeal refused.

Comment

This case is another example of the approach that the Courts have taken in appeals brought on the basis that there has been a failure to comply with the statutory provisions of the 2003 Act. The comments made in relation to the case of *JG v MHTS* 2010 GWD 40-817 are applicable.

JG v Mental Health Tribunal for Scotland

2011 GWD 22-502

Judgement of Sheriff Principal C A L Scott 17 June 2011

Evidence of RMO given over telephone – whether procedural impropriety in the conduct of the hearing – whether Tribunal had failed to carry out proper balancing exercise in making decision

The Tribunal granted an application by JG's responsible medical officer (RMO) to vary an existing compulsory treatment order (CTO) from a community based order to a hospital based order. The evidence of the RMO was elicited by conference call over the telephone. It was argued on behalf of JG that the conduct of the hearing had been unfair. Concern was expressed that another person was present in the background when the RMO was giving evidence. The RMO initially denied this stating that "he was alone", but it appears that later it was accepted by the RMO that he had passed a note to a patient. The Mental Health Tribunal for Scotland (Practice and Procedure) (No. 2) Rules 2005 ("the 2005 Rules") provide at rule 66(1) that hearings must take place in private. JG submitted that there had been a breach of these rules in this case and that the Tribunal's recognition of the breach, coupled with its failure to act upon it, constituted a procedural impropriety in the conduct of the hearing. In addition to founding upon the apparent presence of an individual in the background, it was submitted that the quality of the telephone line had caused certain difficulties and that JG's agent had been deprived of a proper opportunity to cross-examine the RMO. It was also submitted that the Tribunal had failed to carry out a proper balancing exercise in arriving at its decision, on the basis that insufficient weight had been attributed to the breach of procedure relating to the requirement for Tribunal proceedings to be held in private, the unsatisfactory quality of the evidence and the overriding principle of fairness which required to inform the Tribunal's approach.

Issues

- whether fact that RMO passed a note to a patient while giving evidence by telephone constituted a procedural impropriety in the conduct of the hearing
- whether Tribunal had erred in carrying out the necessary balancing exercise in making decision

Held

The argument regarding the procedural impropriety had not been established. Receipt of telephone evidence is specifically authorised by rule 52(2)(c) of the 2005 Rules. Any technical difficulties which arose in the course of the hearing were *de minimis* and did not materially impact on the proper conduct of proceedings. Even if the procedural requirement for privacy were to equate to the requirement that only those participating in the hearing should be privy to the detail of what is being discussed, there was no realistic suggestion in the present case that privacy had been breached beyond the momentary appearance of a disinterested and uninformed individual charged solely with receiving a note passed by the RMO. The suggestion that the Tribunal or JG's agent was in some way prevented from procuring qualitative evidence from the RMO was not made out. The transcript and the Tribunal's findings adequately dispose of that line of argument.

The Tribunal had not exercised its discretion upon a wrong principle and its decision was not plainly wrong. There was an abundance of material which served to inform the Tribunal's decision. Notwithstanding the Tribunal's reservations and criticisms as to the

RMO's perceived attitude, the Tribunal was entitled to look at the material before it in its entirety. It was entitled on the one hand to criticise certain aspects of the RMO's contribution, but on the other to accept separate, substantive aspects of it.

Appeal refused.

Comment

Sheriff Principal Scott makes some interesting comments in relation to his view of rule 66 of the 2005 Rules. He is of the view that rule 66 is more concerned with the circumstances in which a public hearing should or should not take place, rather than attaching absolute confidentiality to the proceedings.

He also commented that the conduct of Tribunal proceedings must be a matter for the Tribunal itself to regulate. He noted that the Tribunal will always require to be alert to the constraints of procedural propriety and fairness. However, where possible, the format of the proceedings should be afforded the degree of flexibility and tolerance which the procedural rules clearly envisage.

It would seem best practice when taking telephone evidence to obtain confirmation from the person giving evidence that they are alone and that they will not be interrupted.

LA v Mental Health Tribunal for Scotland

2011 GWD 26-594

Judgement of Sheriff Principal B A Lockhart 20 July 2011

Section 44 certificate – whether certificate complied with section 44(9) – validity of short-term detention certificate

LA applied to the Tribunal for revocation of a short-term detention certificate (STDC) granted in respect of her. A *proforma* DET2, issued by the Scottish Executive, is the form used by most detaining authorities. This form is non statutory and there is no legal requirement that the form be used. The DET2 form sets out the five conditions in section 44(4) of the 2003 Act and provides space for the medical practitioner granting the certificate to supply reasons for believing that the conditions mentioned in section 44(4) are met in respect of the patient as required by section 44(9) of the 2003 Act. At the hearing, it transpired that the DET2 form was missing page 2. The Tribunal adjourned the hearing to allow the responsible medical officer (RMO) to locate page 2 of the DET2 form. After adjournment, the RMO advised the Tribunal that page 2 could not be found and she could not be sure it was ever completed.

LA's solicitor then challenged the validity of the STDC on the basis that what was completed, namely the form DET2 without page 2, was not a valid certificate. It was submitted that the certificate did not sufficiently explain the reasons why the medical practitioner granting the certificate believed the conditions in section 44(4)(b) to (e) were met. In particular, it was argued that the provisions of section 44(4)(b) (significantly impaired decision making) and 44(4)(c) (necessity to detain the patient in hospital for the purpose of determining what medical treatment should be given or giving medical treatment to the patient) had not been complied with. The Tribunal rejected that submission and went on to refuse the application to revoke the STDC. LA appealed against that decision on the basis that the Tribunal had erred in law. In addition, further grounds of appeal were that there had been a procedural impropriety in the conduct of the hearing and that the Tribunal had exercised its discretion unreasonably, as the Tribunal did not adjourn to give due consideration to what had been said on the preliminary issue as to the validity of the STDC by the solicitor for LA.

Issues

- whether STDC satisfied requirement in section 44(9) that approved medical practitioner state reasons for believing conditions mentioned in section 44(4) are met in respect of the patient
- whether failure to adjourn to consider submission made by LA's solicitor constituted procedural impropriety in the conduct of the hearing
- whether Tribunal had unreasonably exercised its discretion by failing to give appropriate consideration to the submissions made by LA's solicitor

Held

Taking the material as a whole, the Tribunal was entitled to hold that the approved medical practitioner had complied with the provisions of section 44(4)(a) to (e) and 44(9) of the 2003 Act. The Tribunal had before it a valid section 44 STDC and was entitled to proceed to hear evidence as to whether that STDC should be revoked in terms of section 50 of the 2003 Act.

The completion of the form DET2 or other document sufficient to satisfy the provisions of section 44(4) and (9) does not require to be done with the same precision as a conveyancing document. The correct approach for the Tribunal is to consider all the material before it and to decide whether, taking that material as a whole, the provisions of section 44(4)(a) to (e) and (9) of the 2003 Act have been complied with. Having regard to the material before the Tribunal, the Tribunal was entitled to hold that there was a valid STDC and proceed to hear the application under section 50.

In relation to the grounds of appeal relating to procedural impropriety in the conduct of the Tribunal hearing and unreasonable exercise of discretion by the Tribunal in reaching its decision, there was no requirement for the Tribunal to adjourn to give due consideration to what had been said on the preliminary issue by the solicitor for LA. If the Tribunal was satisfied, having heard the argument on behalf of LA, that there was no merit in what was said and it had before it a valid STDC, it was entitled to say so. There was no necessity for the Tribunal to retire to consider the issue. The Tribunal's decision indicates clearly that it had considered the matter and in the view of the Court reached an appropriate and correct decision.

Appeal refused.

Comment

Like the case of *Beattie v Dunbar and Mental Health Tribunal for Scotland*, this case reinforces the point that the forms used by medical practitioners to complete short-term detention certificates and the like are not forms which are prescribed by statute. The totality of the information in any certificate/form/report requires to be taken into account when considering whether the certificate/form/report conforms with the relevant statutory provisions, and not simply whether particular *proforma* boxes have been completed.

G v Mental Health Tribunal for Scotland

2011 GWD 29-638

Opinion of Lord Justice Clerk, Lord Bonomy and Lord Brodie 23 August 2011

Section 264 of the 2003 Act – detention in conditions of excessive security in State Hospital – discretion of Tribunal to make no order when satisfied that the patient does not require to be detained under conditions of special security which can be provided only in a State Hospital

In 1998, G was acquitted by reason of insanity at the time of the offence on an indictment comprising charges of rape, breach of the peace and assault. A compulsion order and a restriction order were imposed and he was detained in the State Hospital. G submitted an application to the Tribunal under section 264 of the 2003 Act seeking an order declaring that he was being detained in conditions of excessive security and specifying a period, not exceeding 3 months, whereby the Health Board shall identify a hospital which is not a State Hospital in which the patient could be detained in appropriate conditions and where accommodation is available for the patient and give notice to the Managers of the State Hospital of the hospital so identified.

At the Tribunal, there was evidence from a number of psychologists and psychiatrists. There was a difference of opinion regarding the need for specific psychological sex offending work. Some of the experts were of the view that the management of G's risk of sexual and spousal violence could only be determined following upon G undertaking and completing satisfactorily a sexual offending and spousal violence treatment course. All were agreed that some work was needed, but there was a dispute as to whether this work required to take place before G could be moved to conditions of lower security.

On the evidence, the Tribunal was satisfied that G did not require to be detained under conditions of special security that can be provided only in a State Hospital and that the precondition contained in section 264(2) of the 2003 Act was met. The Tribunal refused, however, to exercise its discretion to make an order in terms of section 264 of the 2003 Act declaring that G was being detained in conditions of excessive security or specifying a period during which the duties in section 264(3) to (5) shall be performed. The Tribunal gave reasons as to why he required to undergo psychological intervention courses relating to sexual offending before he could make further progress through the forensic psychiatric hospital system. The Tribunal concluded that it was of maximum benefit to G that he should undertake such work at the State Hospital, and in exercise of its discretion the Tribunal refused to make the order in terms of section 264 of the 2003 Act.

G appealed on the basis that (i) the Tribunal had failed to have regard to the purpose of section 264 of the 2003 Act; (ii) in making its decision, the Tribunal had taken irrelevant material, namely resources, into account; and (iii) in reaching its decision, the Tribunal had failed in its obligation to have regard to the principles set out in section 1(3)(a) and (g) of the 2003 Act.

Issue

- circumstances in which it may be appropriate as a matter of law for the Tribunal to pronounce no order for arrangements to be made for the transfer of a patient detained in the State Hospital to conditions of lesser security, following a finding that the patient is being detained in conditions of excessive security.

Held

Having carefully considered all the evidence before it, the Tribunal concluded that the first stage of the test in section 264 of the 2003 Act, i.e. that the appellant did not require to be detained under conditions of special security that can be provided only in a State Hospital, was met. The Tribunal carefully analysed the evidence in relation to the second part of the test, i.e. the question of whether an order should be made. In doing so, the Tribunal did not err in law, nor did it leave any relevant material out of account or take account of any irrelevant material. Section 264(2) of the 2003 Act is clear and grants to the Tribunal, in the event that it decides that the patient does not require to be detained under conditions of special security that can be provided only in the State Hospital, a discretion to decide whether in all the circumstance to make an order first of all declaring that the patient is being detained in conditions of excessive security and secondly specifying a period during which the duties under the subsequent subsections shall be performed.

The Court rejected the submission that in the light of the opinion of the Sheriff Principal in *Lothian Health Board v M*, the treatment resources and facilities available in hospitals with varying levels of security were irrelevant to the Tribunal's consideration of the issue. The Tribunal heard the various differing opinions of a number of noted experts in the field of mental disorder who were aware of the need to administer further treatment to G, the availability of treatment at both the State Hospital and the medium secure hospital and the physical security arrangements at both. These are factors relevant to the question of whether an order under section 264 of the 2003 Act should be made. The factors were plainly relevant to the assessment of the likely risk that G could pose in either situation. Thus, the availability and quality of resources arose in quite a different way from that in which they arose in *Lothian Health Board v M*.

With regard to the submissions that the Tribunal had failed to have regard to the section 1 principles, the Court held that the requirement upon the Tribunal to have regard to the section 1 principles did not mean that it was bound to accede to the wishes of G to follow a course of action and make a choice that was inconsistent with the view of every expert as to the appropriate course to be followed in the interests of his wellbeing. G's position as a patient in the State Hospital subject to a compulsion order and restriction order is not "comparable" to that of an individual with full mental capacity exercising his freedom of choice to make a bad decision about his own physical wellbeing. G's wishes were a factor to be taken into account by the Tribunal and, indeed, were taken into account. However, in the particular situation in which G found himself, where he was recognised by those providing expert evidence to the Tribunal as posing an as yet not fully explored risk to females in certain circumstances and where that risk could be addressed by a course of treatment which G had been ambivalent about undertaking, but which was available in the environment in which he was then detained, G's position was not comparable to that of the ordinary free citizen of full capacity.

Appeal refused.

Other Cases of Interest

Winterwerp v the Netherlands

(1979) 2 EHRR 387

Judgement of Judge Pedersen, President; Judges Wiarda, Evrigenis, Teitgen, Lagergren, Liesch and Gölcüklü 24 October 1979

Right to liberty – art. 5(1) of the ECHR detention of persons of unsound mind – meaning of "unsound mind" – art. 5(1) lawful detention of persons of unsound mind – meaning of "lawful" – deprivation of liberty – compulsory detention of persons of unsound mind – art. 5(4) right to take judicial proceedings to test lawfulness of detention

The applicant W had been compulsorily detained under the relevant Dutch legislation dealing with mentally ill persons and complained that art. 5 (right to liberty) and art. 6 (right to a fair hearing in the determination of civil rights) of the European Convention on Human Rights (ECHR) had been violated. W had been detained by court orders which were renewed periodically, but he had not been notified that the proceedings were in progress or been allowed to appear or be represented. On several occasions, his requests for release were not forwarded to the court by the public prosecutor, who was entitled to take this action in certain circumstances. As a result of his detention, W automatically lost the capacity to administer his property.

Issues

- meaning of "unsound mind" for the purposes of art. 5(1)(e) of the ECHR
- whether Dutch legislation detaining W compatible with art. 5 of the ECHR
- whether the automatic loss of capacity to administer his property was a breach of W's art. 6(1) rights

Held

(1) W's inability to have his detention reviewed by a court and the failure to hear him constituted a violation of art. 5(4).

(2) The denial of capacity to administer his property without a proper judicial determination constituted a violation of art. 6(1).

Comment

The detention of "persons of unsound mind" is authorised under the ECHR. Art. 5(1) of the ECHR provides that

> "Everyone has a right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> > (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants."

For the purposes of art. 5 therefore, the preconditions of detention are that the individual in question must be of "unsound mind"; the detention must be "lawful"; and any procedure prescribed in domestic law must be followed.

"Unsound mind"

In *Winterwerp*, the European Court of Human Rights took the view that the term "persons of unsound mind" was not susceptible to a definitive interpretation, as its meaning was continually evolving as research progressed, treatment developed and society's attitudes to mental illness changed. However the Court noted that art. 5(1)(e) could not be taken to permit the detention of a person simply because his views or behaviour deviated from the norms prevailing in a particular society. This is reflected in the meaning of "mental disorder" in section 328 of the 2003 Act. Section 328(2) provides that a person will not be regarded as having a mental disorder solely by reasons of the matters listed in section 328(2), which include sexual orientation; sexual deviancy; transsexualism; transvestism; dependence on, or use of, alcohol or drugs; behaviour that causes, or is likely to cause, harassment, alarm or distress to any other person; acting as no prudent person would act.

Lawfulness

Detention in terms of art. 5(1)(e) is only permitted for protection of the person and/or protection of others. In *Winterwerp*, the European Court set out three basic requirements of detention under art. 5(1)(e). Detention will only be lawful if (1) the mental disorder relied upon to justify detention is established by objective medical expertise; (2) the nature or degree of disorder must be sufficiently extreme to justify detention; and (3) the detention should last only as long as the mental disorder (and its required severity) persist.

In the case of *Ashingdane v UK* (1985) 7 EHRR 528, the Court also held that the detention of a person of unsound mind will be lawful only if the detention is in a hospital, clinic or other appropriate institution.

Procedure prescribed by law

As mentioned, art. 5(1) requires that any detention be in accordance with the procedure prescribed by law. That means that any procedures set out in the domestic law, i.e. in the 2003 Act, for the detention of a patient having a mental disorder must be followed. (See, however, the cases dealing with the consequences of failing to comply with a statutory provision – *R v Soneji and Another* [2005] 3 WLR 303 *et al*.)

Review

Art. 5(4) provides that:

> "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

In *Winterwerp*, the Court stated that the compulsory detention of persons of unsound mind required a review of its lawfulness to be available at reasonable intervals, even where the initial decision issued from a court, as the reasons initially warranting confinement may have ceased to exist. It went on to state that the reviewing authority must possess the characteristics of a court, i.e. it must be independent both of the executive and of the parties, and in addition the procedure followed must have a judicial character with guarantees appropriate to the kind of deprivation of liberty in question. The Court noted that while the judicial proceedings referred to in art. 5(4) did not always need to be attended by the same guarantees required under art. 6(1) for civil or criminal litigation, it was essential that the person concerned should have access to a court and the opportunity to be heard either in person or, where necessary, through representation. The Court also stated that mental illness might entail restrictions on or modifications of the exercise of procedural rights, but could not justify impairing its very essence. The Court commented

that special procedural safeguards might be necessary to promote the interests of persons whose mental condition rendered them less than fully capable of acting for themselves.

It should be noted that the Tribunal satisfies the definition of a "court" for the purposes of art. 5(4). The 2003 Act and the Tribunal's Rules of Procedure also makes provision for procedural safeguards to protect the interests of those whose mental condition may render them unable to act for themselves through the power to appoint a curator *ad litem* to represent the patient's interests in the Tribunal proceedings.

London and Clydeside Estates Ltd v Aberdeen District Council and Another

[1980] 1 WLR 182; 1980 SLT 81; 1980 SC (HL) 1

Judgement of Lord Hailsham of St Marylebone (Lord Chancellor), Lord Wilberforce, Lord Fraser of Tullybelton, Lord Russell of Killowen and Lord Keith of Kinkel
8 November 1979

Compulsory purchase – compensation – certificate of alternative development – omission of reference to rights of appeal – validity of certificate – Land Compensation (Scotland) Act 1963 (c. 51), ss. 25 and 26 – Town and Country Planning (General Development) (Scotland) Order 1959 (SI 1959/1361).

Section 25 of the Land Compensation (Scotland) Act 1963 empowers a person whose interest in land is proposed to be acquired by an authority possessing compulsory purchase powers to apply to the local planning authority for a certificate of alternative development as to the nature of the development for which planning permission might reasonably have been expected to be granted if the land was not to be compulsorily acquired for another purpose. A certificate is relevant for the purpose of the amount of compensation to be paid in respect of the compulsory purchase. Article 3(3) of the Town and Country Planning (General Development) (Scotland) Order 1959 provides that if such a certificate is issued it shall include a statement in writing of the rights of appeal to the Secretary of State in terms of section 6 of the 1959 Act and the Order. The owners of three areas of ground applied to Aberdeen County Council for a certificate of alternative development in respect of that ground, which the council proposed to acquire for educational purposes. The council granted a certificate stating that the planning permission could not reasonably be expected to be granted other than for educational purposes, but omitting any mention of the applicants' right of appeal to the Secretary of State. The applicants appealed out of time and their appeal was rejected. They thereafter raised an action seeking reduction of the certificate of alternative development and declarator that the local authority was bound to issue a fresh certificate of alternative development in respect of the three areas of ground.

Issues

- effect of failure to include statement in writing of the rights of appeal to the Secretary of State on validity of certificate
- whether authority could issue fresh certificate

Held

The certificate issued by the authority contained a defect which enabled it to be successfully attacked as invalid. The requirement to include the notice in relation to rights of appeal was a mandatory requirement, and the failure to include the information was fatal to the certificate.

The duty imposed upon the council to issue a certificate was a continuing one, and the time limit prescribed in article 3(2) of the 1959 Order was directory and not mandatory and a decree was pronounced ordaining the council to issue an amended certificate.

Appeal allowed.

Comment

The facts and circumstances of this case, and indeed the conclusion that the certificate was invalid, are not particularly relevant to Tribunal members. What is relevant, however, is the approach taken by the Court in this case to the question of the consequences of failure to comply with a statutory provision.

The speech of Lord Hailsham ([1980] 1 WLR 182 at 184-190) is an influential speech and has been applied and referred to in other cases, including mental health appeals. Lord Hailsham commented on the use of language such as "mandatory" and "directory" (at page 190, paragraph B) and stated:

> "In such cases, though language like "mandatory," "directory," "void," "voidable," "nullity" and so forth may be helpful in argument, it may be misleading in effect if relied on to show that the courts, in deciding the consequences of a defect in the exercise of power, are necessarily bound to fit the facts of a particular case and a developing chain of events into rigid legal categories or to stretch or cramp them on a bed of Procrustes invented by lawyers for the purposes of convenient exposition."

At page 189, paragraph E to H he states:

> "When Parliament lays down a statutory requirement for the exercise of legal authority it expects its authority to be obeyed down to the minutest detail. But what the courts have to decide in a particular case is the legal consequence of non-compliance on the rights of the subject viewed in the light of a concrete state of facts and a continuing chain of events. It may be that what the courts are faced with is not so much a stark choice of alternatives but a spectrum of possibilities in which one compartment or description fades gradually into another. At one end of this spectrum there may be cases in which a fundamental obligation may have been so outrageously and flagrantly ignored or defied that the subject may safely ignore what has been done and treat it as having no legal consequences upon himself. In such a case if the defaulting authority seeks to rely on its action it may be that the subject is entitled to use the defect in procedure simply as a shield or defence without having taken any positive action of his own. At the other end of the spectrum the defect in procedure may be so nugatory or trivial that the authority can safely proceed without remedial action, confident that, if the subject is so misguided as to rely on the fault, the courts will decline to listen to his complaint."

As mentioned in the comments made in the other cases dealing with the effect of failure to comply with a statutory provision, what Lord Hailsham is making clear is that the effects of a failure to comply with a statutory provision are not uniform but variable. There is "a spectrum of possibilities". Some failures to comply will be so severe that a court will hold that they invalid the act done, but other failures will be seen as trivial or nugatory, and Parliament would not have intended that the consequences of such a failure to comply would be total invalidity.

Porter v Magill

[2002] 2 AC 357; [2002] 2 WLR 37; [2002] 1 All ER 465

Judgement of Lord Bingham of Cornhill, Lord Steyn, Lord Hope of Craighead, Lord Hobhouse of Woodborough and Lord Scott of Foscote 13 December 2001

Local government – audit – loss due to wilful misconduct – policy to sell council properties in marginal wards – legal advice that policy unlawful – revised policy adopted by housing committee and endorsed by council – allegations of breach of statutory obligations and gerrymandering – auditor certifying substantial loss due to wilful misconduct of responsible persons – whether evidence establishing wilful misconduct – auditor's refusal to discharge himself following objections to conduct of investigation – whether investigation conducted fairly – whether real possibility of bias – Local Government Finance Act 1982 (c. 32), s. 20 – Human Rights Act 1998 Schedule 1, Part 1, art. 6(1)

In local government elections in 1986, the Conservative party retained control of a city council with a substantially reduced majority. In the belief that home owners were more likely than council tenants to vote Conservative, P (the leader of the council) and W (the deputy leader of the council) formulated a policy to sell, under powers conferred by section 32 of the Housing Act 1985, 500 council properties across the city with a target of 250 sales in eight identified marginal wards. The housing committee adopted that option and the committee's decision was later approved by the council. Measures to implement the policy were introduced and the progress of the policy was monitored. Opposition councillors objected that the policy prevented the council from meeting its statutory obligations as a housing authority and gave notice of objection to the auditor under section 17 of the Local Government Finance Act 1982. The objectors requested that the council's auditor certify a sum due to the council as a result of wilful misconduct under section 20 of the 1982 Act, on the ground that all expenditure arising from the policy was unlawful.

Having completed his investigation into the statutory objections, the auditor announced his provisional findings in a televised press statement which attracted considerable publicity. His provisional findings were made available to those involved and submissions were invited on those findings. After an audit hearing, the auditor gave a final decision. He found, with regard to P and W, that the council had adopted a policy which had the main purpose of achieving electoral advantage for the majority party, that P and W were party to its adoption and implementation in the knowledge that it was unlawful and that the policy so promoted and implemented by them had caused financial loss to the council. The auditor certified that those responsible for the policy, including P and W, had jointly and severally, by their wilful misconduct, caused the council to lose approximately £31m. P and W appealed to the Divisional Court, which rejected their appeals but reduced the amount of loss to £26,462,621. P and W then appealed to the Court of Appeal, who held by majority that as P and W had acted on what they believed to be legal advice, they were not guilty of wilful misconduct. The Court of Appeal allowed the appeals and quashed the auditor's certificates. The auditor thereafter appealed to the House of Lords.

Issues

- whether there was evidence to support a finding that P and W were guilty of wilful misconduct
- whether auditor independent and impartial; whether there was apparent bias on the part of the auditor
- whether unreasonable delay on the part of the auditor contravened P's and W's Convention rights

Held

(1) A public power given to a local authority might only be exercised for the public purpose for which it had been conferred, and those who exercise such a power otherwise misconducted themselves and that where they so acted, knowingly or recklessly, they were guilty of wilful misconduct and were liable under section 20 of the 1982 Act to make good to the local authority any consequent loss. While the council might lawfully dispose of its property in exercise of its powers under section 32 of the 1985 Act, it could not do so lawfully to promote the electoral advantage of any party represented on the council.

(2) There were no grounds to doubt the correctness of the findings on which, as primary fact finders, the auditor and the Divisional Court had based their decisions and that those findings precluded P's and W's claim to reliance on legal advice. The chain of causation was unbroken between P's and W's wilful misconduct and the loss caused to the council.

(3) Although the auditor's role within the context of the 1982 Act required him to act as investigator, prosecutor and judge, the requirement of the tribunal's independence and impartiality was met by the right of appeal from his decision provided by section 20(3) by way of a full rehearing by the appellate court. Since the Divisional Court's conduct of the appeals satisfied the requirement of independence and impartiality, that element of P's and W's rights under art. 6(1) of the European Convention of Human Rights (ECHR) were fully protected.

(4) The appropriate test in determining an issue of apparent bias was whether the fair-minded and informed observer, having considered the relevant facts, would conclude that there was real possibility that the tribunal was biased. Since the auditor had emphasised in his public statement that his findings were provisional, since a progress statement would have been appropriate in view of the public interest in the matter and having regard to the auditor's subsequent conduct, no real possibility of bias was shown.

(5) Having regard to the complexity of the case and the volume of evidence, to the immense scope of the auditor's investigations and to his constant activity in pursuit of information, the proceedings did not exceed the reasonable time requirement in art. 6(1) of the ECHR. P's and W's Convention rights were not infringed, and they suffered no unfairness at common law.

Appeal allowed.

Comment

The rather complicated facts and circumstances of this case and the issue of whether or not Dame Shirley Porter and Mr Weeks were guilty of wilful misconduct are not particularly relevant to Tribunal members. What is relevant is the fact that the Court took the opportunity in this case to tweak and restate the test for apparent bias.

There are two situations in which apparent bias may arise. The first situation is where there is a connection between a tribunal member and a party or witness involved in the case in question or possibly between a tribunal member and an organisation or cause that may benefit from the outcome of the case. The second situation is where the conduct of the tribunal member during the tribunal proceedings gives rise to concern.

As regards the test for apparent bias, in *Porter v Magill* Lord Hope stated in paragraph 103 of the judgement ([2002] 2 AC p. 494)—

> "The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased".

This is the test that the Tribunal should apply when considering any question of apparent bias. It is important to remember that the test relates to the fair-minded and informed observer, not to those involved in the proceedings, for example the patient or the named person. While the standpoint of the person complaining of apparent bias is important, it is not decisive. In *Hauschildt v Denmark* (1989) 12 E.H.R.R. 266, 279 para. 48, the Court emphasised that what is decisive is whether any fears expressed by the complainer are objectively justified. The complainer's views are clearly relevant at the initial stage when the court has to decide whether the complaint is one which should be investigated. But they lose their importance once the stage is reached of looking at the matter objectively (*Porter v Magill* [2002] 2 AC 357 per Lord Hope at p. 495).

The question which always requires to be asked in considering whether a tribunal is impartial due to apparent bias is what the fair-minded and informed observer would have thought, and whether his conclusion would have been that there was a real possibility of bias.

R v Soneji and another

[2005] 3 WLR 303

Judgement of Lord Steyn, Lord Rodger of Earlsferry, Lord Cullen of Whitekirk, Lord Carswell and Lord Brown of Eaton-under Heywood.

Crime – sentence – confiscation order – failure to certify "exceptional circumstances" for postponing proceedings more than six months after date of conviction – whether invalidated confiscation orders – Criminal Justice Act 1988 (c 33), s. 28 and Proceeds of Crime Act 1995 (c 11), ss. 71, 72A

The defendants pleaded guilty to an offence of conspiracy to convert property and to remove it from the jurisdiction knowing or suspecting that it represented the proceeds of criminal conduct, contrary to section 1 of the Criminal Law Act 1977. The judge sentenced the defendants to periods of imprisonment. He also made confiscation orders in respect of both defendants. The defendants appealed against those orders on the basis that there had been a failure to comply with the statutory provisions, namely that the period of postponement was not to exceed more than six months from the date of conviction except where the court was satisfied that exceptional circumstances existed. The Court of Appeal held that the failure of the judge to consider or make any finding that there were such exceptional circumstances in the defendants' case deprived the judge of jurisdiction to make a confiscation order. The Court of Appeal accordingly quashed the confiscation orders. The Crown appealed to the House of Lords against the decision of the Court of Appeal quashing the confiscation orders.

Issues

- whether failure to certify "exceptional circumstances" for postponing proceedings more than six months after date of conviction invalidated confiscation orders
- consequence of failure to comply with statutory provision

Held

The correct approach to an alleged failure to comply with a provision prescribing the doing of some act before a power was exercised was to ask whether it was a purpose of the legislature that an act done in breach of that provision should be invalid. Since section 71(1) of the 1988 Act imposed a duty on the court when an offender has been convicted to consider confiscation proceedings, with the purpose of the sequence of such proceedings and the postponement power being to make the sentencing process rather than the confiscation procedure as effective as possible, the judge's failure to adhere to the requirements of section 72A(3) had caused no prejudice to the defendants in respect of their sentences and any other prejudice to them caused by the delay was outweighed by the public interest in not allowing convicted offenders to escape confiscation for *bona fide* errors in the judicial process. Accordingly, the failure would not have been intended by Parliament to invalidate the confiscation orders.

Appeal allowed.

Comment

This case is a very helpful case for Tribunal members when considering the effects of failing to comply with a statutory provision. The speech of Lord Steyn ([2005] 3 WLR at 305–316) is particularly useful.

At page 315, paragraph 23, he states as follows:

> "Having reviewed the issue in some detail I am in respectful agreement with the Australian High Court that the rigid mandatory and directory distinction, and its many artificial refinements, have outlived their usefulness. Instead, as held in *Attorney General's Reference (No. 3 of 1999)*, the emphasis ought to be on the consequences of non-compliance, and posing the question whether Parliament can fairly be taken to have intended total invalidity. That is how I would approach what is ultimately a question of statutory construction."

He also refers at page 314, paragraph 21, to the case of *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, noting that in that case the Court concluded:

> "A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid. This has been the preferred approach of courts in this country in recent years, particularly in New South Wales. In determining the question of purpose, regard must be had to 'the language of the relevant provision and the scope and object of the whole statute.'"

Lord Steyn notes that this reasoning contains an improved analytical framework for examining such questions.

In considering the question of whether the failure to comply with a statutory provision in the 2003 Act has the effect of invalidating, for example, a CTO application or a determination extending a compulsory treatment order or a compulsion order, the Tribunal will require to apply the approach taken by the courts in the *Soneji* case. This will require the Tribunal to have regard to the purpose of the particular statutory provision which has not been complied with, having regard to the scope and object of the 2003 Act, namely that appropriate care and treatment is provided to a patient having a mental disorder, and posing the question whether Parliament can fairly be taken to have intended the consequences of non compliance to be total invalidity of, for example, the CTO application or determination extending a CTO or CO. In considering this, the Tribunal will also require to be alert to whether any prejudice has resulted to the patient as a result of the failure to comply with the particular statutory provision.

L v Board of State Hospital

2011 SLT 233

Opinion of Lady Dorrian 2 February 2011

Mental health – consultation – s. 1 of the 2003 Act – Board of State Hospital taking decision that visitors would no longer be allowed to bring food parcels for patients and patients would no longer be allowed to order food from outside sources – whether failure to consult patients

Human rights – art. 8 right to respect for private and family life – whether decision to prohibit food parcels and patients purchasing food from external sources engaged art. 8 – whether interference justified under art. 8(2) of the European Convention on Human Rights

A patient in the State Hospital (L) petitioned the Court for judicial review of a decision of the Board of the State Hospital to prohibit visitors from bringing food parcels into the State Hospital and patients from ordering food from outside sources. L sought reduction of the decision on the grounds that the Board of the State Hospital had failed to consult patients as required by section 1 of the 2003 Act and that the decision constituted a breach of L's rights under art. 8 of the European Convention on Human Rights (ECHR).

Issues

- whether decision of the Board of the State Hospital should be reduced due to lack of consultation with the patients
- whether decision to prohibit food parcels and ordering food from outside sources constituted a breach of art. 8 of the ECHR

Held

The respondents had failed to consult patients as required by section 1 of the 2003 Act and the decision of the Hospital Board to prohibit visitors bringing in food parcels and to prohibit patients from ordering food from outside sources fell to be reduced. While some consultation had taken place, it was questionable whether any feedback from the patients was properly put before the Board before the decision was made. The consultation which did take place did not enable patients to consider and comment on all three options eventually put to the Board regarding visitors. With regard to purchasing, the option eventually selected by the Board, an outright ban, did not seem to have been put to the patients at all.

Observed

(1) The degree to which a person may expect freedom to do as he pleases and engage in personal and private activity will vary according to the nature of accommodation in which he lives. This will be the case for those in prison or detained within the State Hospital. While such limitations may arise from the nature of the place, they are justified in terms of art. 8(2). The loss of control over those aspects of life which would otherwise be under a person's sole and direct control are all concomitants of the justifiable deprivation of liberty which follows on imprisonment or detention in the State Hospital. Prisoners and patients detained in the State Hospital retain their rights under art. 8 and any interference with those rights requires to be justified.

(2) A person's right to choose what they eat and drink is a matter in respect of which art. 8 is engaged. The additional restrictions which the Board sought to impose required to be justified.

(3) The reservation under art. 8 in respect of the protection of health does not require to refer to public health in general. It is capable of applying where a particular section of the community which requires protection has been identified. The promotion of the health of patients by reference to dietary needs, especially patients likely to be in the State Hospital for a long period, may be a significantly important objective to justify interference with art. 8 rights of patients.

Comment

This case is of interest to Tribunal members as it shows a decision of the Board of the State Hospital being reduced due to a failure to comply with the section 1 principles in the 2003 Act. The case highlights the fact that those discharging a function under the 2003 Act have a duty to have regard to the matters mentioned in section 1. The principles impose legally binding duties upon those discharging functions under the 2003 Act. This case clearly shows that a failure to adhere to the principles may render an action unlawful and open to successful challenge.

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