SHERIFFDOM OF LOTHIAN AND BORDERS

Case Number: B1749/13

Judgment by

SHERIFF PRINCIPAL
MHAIRI M STEPHEN

in appeal
by

B D

Appellant

against

THE MENTAL HEALTH TRIBUNAL
FOR SCOTLAND

Respondent

Act: Mackay, Advocate instructed by Ormiston Solicitors (for the Appellant)

Alt: Hunter, Solicitor (for the Mental Health Tribunal for Scotland)

Alt: Cobb, Advocate, instructed by the Central Legal Office of the NHS (for the Responsible Medical Officer)

EDINBURGH, 28 February 2014

The Sheriff Principal having resumed consideration of the cause refuses the appeal and makes no order in respect of expenses.

NOTE:/

NOTE:

1. This is an appeal against the decision of the Mental Health Tribunal for Scotland (hereinafter referred to as "the Tribunal") of 28 August 2013. The appeal is in terms of section 320(2) of the Mental Health (Care and Treatment) (Scotland) Act 2003 ("the 2003 Act"). The appeal proceeds on the ground that the Tribunal's decision of 28 August 2013 was based on an error of law. The error of law is the Tribunal's failure to find that the breaches by the Responsible Medical Officer (RMO) and Mental Health Officer (MHO) of their statutory duties in terms of sections 84 to 86 of the 2003 Act rendered the determination by the RMO to extend the Compulsory Treatment Order (CTO) on 4 April 2013 by virtue of section 86 of the 2003 Act invalid.

PROCEDURAL HISTORY AND BACKGROUND

2. The procedural history relevant to this appeal centres on the appellant who has been subject to a CTO since April 2006. The CTO was due to expire on 22 April 2013. In these circumstances the RMO comes under a duty to consider whether it is necessary for the patient to be subject to a CTO after the current order ceases. The RMO gave consideration to this during the last two months of the CTO. During that same period there was a further hearing before the Tribunal to deal with an earlier application made by or on behalf of the appellant for revocation of the CTO. That hearing took place on 13 March 2013. The RMO, having decided that her preliminary view was that the CTO should be extended, decided to await the outcome of the hearing on 13 March 2013. The MHO visited the appellant at home together with the Community

Psychiatric Nurse and Social Worker to discuss the forthcoming hearing on revocation (March 2013) and the likelihood of an extension to the CTO. Both the RMO and the MHO gave evidence before that Tribunal on 13 March 2013 as to the necessity of the CTO. That earlier Tribunal refused the appellant's application for revocation. Following that decision the RMO met with the appellant at the end of March. The MHO was unable to attend. She informed the appellant of her recommendation that the CTO be extended.

3. The RMO and MHO work closely together and have weekly meetings to discuss patients including the appellant. The appellant's Community Psychiatric Nurse (CPN) and Social Worker also attend these meetings. During the critical period of the final two months leading up to the expiry of the CTO, the RMO actively considered whether the CTO should be extended and discussed this matter with the MHO and others at these meetings. Both the MHO and the RMO considered that the statutory conditions for a CTO set out in section 64(5)(a) to (f) were met.

These are:-

(a) That the patient has a mental disorder

(b) That medical treatment which would be likely to –

(i) Prevent the mental disorder worsening; or

(ii) Alleviate any of the symptoms, or effects, of the disorder, is available for the patient;

(c) That if the patient were not provided with such medical treatment there would be a significant risk –

(i) To the health, safety or welfare of the patient; or

(ii) To the safety of any other person;

mms.

(d) That because of the mental disorder the patient's ability to make decisions about the provision of such medical treatment is significantly impaired.

(e) That the making of a Compulsory Treatment Order in respect of the patient is necessary; and

(f) Where the Tribunal does not consider it necessary for the patient to be detained in hospital, such other conditions as may be specified in regulations.

4. The CTO in respect of the appellant is a community based CTO requiring the appellant to take medication and to engage with relevant parties. The appellant has been subject to such a CTO for a number of years. When the Tribunal considered the appellant's application to revoke the extension of the CTO ostensibly made on 4 April 2013 he had been subject to a CTO for more than seven years.

5. The 2003 Act provides for the review of CTOs in Chapter 4 of Part 7 of the Act. The duties and procedures to be adopted by the RMO where extension of the CTO appears appropriate can be found in section 84 of the 2003 Act. Section 84 requires the RMO to review the CTO and to give notice to the MHO if he or she is proposing to make a determination extending the order (under section 86 of the Act). When that notice is given the MHO comes under certain obligations and duties which are focussed on the patient. The MHO requires to interview the patient and inform the patient that the RMO is proposing to extend the order. The MHO requires to inform the patient of his rights in relation to the proposed determination and the availability of independent advocacy services and also must take the appropriate steps to

ensure that the patient has the opportunity of using such services. Finally, the MHO requires to inform the RMO of his position on the proposed determination and his reasons and any other relevant considerations. The RMO then must have regard to the views expressed by persons consulted and the MHO and if, having regard to these views, she remains satisfied that it continues to be necessary for the patient to be subject to the CTO then the RMO comes under a duty to make a determination extending the CTO for the appropriate period.

6. At the first hearing of the appellant's application under section 100 of the 2003 Act for revocation of the CTO on 26 July 2013 the Tribunal were addressed on the validity of the extension of the CTO by the solicitor acting for the appellant. It was accepted that the duties imposed on the RMO and MHO in terms of sections 84 to 86 of the Act had not been complied with. In particular the RMO had failed to give notice in writing to the MHO of her intention to make a determination extending the order in terms of section 84. The MHO had failed to interview the appellant in terms of section 85. The hearing before the tribunal was adjourned to allow the RMO and MHO to obtain legal advice and if necessary representation. When the Tribunal reconvened on 28 August 2013 the appellant, the RMO and the MHO were represented. The Tribunal first of all addressed the preliminary issue of the validity of the RMO's determination to extend the order dated 4 April 2013. Having heard parties and considered the matter they concluded that the failures by the RMO and the MHO in respect of their duties did not have the

effect of rendering the determination invalid. Accordingly the Tribunal proceeded to consider the appellant's application for revocation which they ultimately refused having heard again from the RMO, MHO and the appellant. The appellant challenges the decision by the Tribunal to repel the preliminary objection to the validity of the RMO's determination.

SUBMISSIONS FOR THE APPELLANT

7. Mr Mackay for the appellant, patient, spoke to the written submissions he had prepared in support of the appeal. The basis for the appeal is that the Tribunal erred by finding that the clear failures on the part of the MHO and RMO to abide by the statutory duties under section 84 and 85 of the 2003 Act did not have the consequence of invalidating the purported determination by the RMO to extend the patient's CTO. In order words, the Tribunal were wrong to find that the determination was a valid exercise of the RMO's duties under the Act and it follows that the Tribunal were wrong to proceed to hear evidence in relation to the patient's application to revoke said CTO, which they ultimately refused.

8. He submitted that the default by the RMO and the MHO in regard to their clear statutory duties rendered the determination invalid. The correct course would be for me to allow the appeal and set aside the decision of 27 October 2013 and to revoke the determination by the RMO dated 4 April 2013 which purported to extend the appellant's CTO.

9. In support of these submissions reference was made to the approach which the courts have taken to default and failure to comply with a statutory requirement. The most up to date approach to the consequences of failure to follow statutory requirements can be seen in two House of Lords cases - *R* v *Soneji* [2006] 1 AC 340 and *R* v *Clarke* [2008] UK HL 8. In *Soneji* the court took the view that they must look at the consequences of the default in the factual context and ask whether Parliament intended that a default even of a minor nature might result in invalidity. Lord Malcolm followed that approach in a case involving judicial review and statutory interpretation of the Prison Rules – *Shahid* v *Scottish Ministers* [2011] CSOH 192 as did Sheriff Principal Dunlop in *Paterson* v *Kent* 2007 SLT (Sh Ct) 8. I was also referred to *DC Petitioner [2011] CSOH 193; Seal* v *The Chief Constable of South Wales Police* [2007] UKHL 31 and *Crawford* v *HMA* [2006] JC 57.

10. Applying the principles which derive from these authorities particularly *Soneji* Mr Mackay looked at the key provisions, namely, sections 84 to 86 of the 2003 Act. The sequence of the duties imposed on the RMO and the MHO and the reasons why the RMO must have regard to the views of the MHO and indeed, the patient, prior to making any determination are important. An examination of the purpose behind the sequence of obligations is necessary as any order made by the RMO relies on compliance with that sequence. This is the test referred to by Lord Rodger in *Soneji* and proper consideration should lead to the conclusion that the seemingly mandatory words of the statute would determine whether it was the purpose of the

legislature that any act done or carried out following a breach of statutory requirements would be invalid. In essence Mr Mackay argued that the omissions on the part of the RMO and MHO were sufficiently material to offend against the principles set out in section 1 of the 2003 Act and therefore lead to the only consequence which any reasonable Tribunal could have reached and that is that the failures on the part of the RMO and MHO must lead to the purported order extending the CTO being invalid.

11. Having considered the duties imposed on both the RMO and MHO in Chapter 7 of the 2003 Act and the approach which the courts have taken when there has been a failure to comply with statutory rules, it was submitted that on the bare facts found by the Tribunal they were not entitled to find that the determination was a valid one. Accordingly, there was no CTO to consider.

12. Mr Mackay referred to the brief findings in fact made by the Tribunal in the decision of 26 July 2013 (at paragraph 4) and following submissions made at the subsequent hearing on 28 August 2013, the reasons given by the Tribunal for their decision to reject the challenge to the validity. These were in effect based on the recent contact which the RMO had had with the patient; that the RMO would know that the MHO supported extension of the CTO and the MHO was aware that the patient had legal advice and representation and was aware of advocacy services. The Tribunal made the decision based upon substantial informal compliance with the rules. They relied on the lack of

prejudice to the appellant. In reaching that decision Mr Mackay argued that the Tribunal had erred in five distinct ways.

13. The appellant articulates five challenges or reasons in support of the argument that the Tribunal erred in law. These essentially follow the reasons given in Condescendence 5 of the appeal as follows:

(a) That the Tribunal gave too much weight to the notion that the object of the act is to ensure that appropriate care and treatment is provided to persons with a mental disorder. Mr Mackay referred to the principles underpinning the legislation set out in section 1 of the Act and which derived from the Millan Report ("new directions" – report on the review of the Mental Health (Scotland) Act 1984). Counsel referred to the decision of Sheriff Principal Dunlop in *Paterson* v *Kent* 2007 SLT (Sh Ct) 8 where the Sheriff Principal referred to the overriding purpose of the legislation and did not refer to the principles.

(b) The Tribunal gave too little weight to the failure of the RMO and MHO to comply with the specific terms of the Act. The failures were neither nugatory or trivial.

(c) The Tribunal failed to take any account of the effect on the appellant of the breaches of statute on the part of the RMO and the MHO. Despite the apparent concession that there was no actual prejudice or rather that no actual prejudice could be demonstrated the Tribunal ought to have known that the appellant was prejudiced. If asked he would have articulated a willingness to comply voluntarily with treatment thus

removing the element of compulsion. The CTO, even a Community based CTO, involves a restriction of a patient's liberty.

(d) The Tribunal failed to take into account the principles set out in section 1(3) of the 2003 Act in discharging their function in terms of the Act.

(e) The Tribunal failed to take into account Article 5 of the ECHR which required that fundamental procedural guarantees are available to those such as the appellant in circumstances where his liberty is at risk. The CTO required the appellant not only to submit to medication but also impinged on his liberty by requiring him to meet and report at regular intervals. The Tribunal failed to take that into account.

These were all factors which the Tribunal failed to take proper account of in reaching their decision.

14. Thus the Tribunal failed to take into account the whole statutory framework including the section 1 principles. Had they done so they would have answered the question of the intention of the Parliament with regard to validity or invalidity in the event of default in a different manner. Reasonable consideration of the principles set out in section 1(3) would have pointed towards invalidity. The Tribunal had failed to place due weight on the seriousness of the non-compliance. The case of *G* v *Scottish Ministers and Another* [2013] UKSC 79 had considered the principles. Section 1 is described

as a provision of particular importance and *inter alia* Lord Reed states: *"section 1 thus sets out an overarching approach to the discharge of functions under the Act".* According to the appellant it is clear that the purpose of the mandatory procedures in section 84, 85 and 86 of the Act is to ensure the application of the fundamental principles set out in section 1 of the Act. Non-compliance with the procedure leads to a fundamental breakdown in the application of the principles which are at the root of the Act known as the "Millan Principles". Failure to comply with those principles is so fundamental that Parliament could only have intended non-compliance to have one consequence which is to invalidate the determination. On that basis I was urged to allow the appeal.

15. I was asked to sanction the employment of junior counsel for the appellant. There were several reasons why it was appropriate to instruct junior counsel. This was a complex matter and a matter of supreme importance to the appellant. Specialist knowledge was required to deal with the statutory interpretation points.

16. In the event that the appeal was unsuccessful and if expenses were awarded against the appellant I was asked to reduce the appellant's liability to nil as he is an assisted person for the purpose of this appeal.

SUBMISSIONS FOR THE MENTAL HEALTH TRIBUNAL SCOTLAND

17. Mr Hunter for the Tribunal considered the Act and the relevant provisions relating to review of a CTO. Mr Hunter agreed with the Sheriff Principal in *Paterson* that the overarching purpose of the Act is the provision of care and treatment to people with a mental disorder. The principles set out in section 1 of the Act can be distinguished from its purpose but in any event an important principle underpinning the Act is the aim to provide maximum benefit to the patient (section 1(3)(f)). There had been no reference to or argument on the application of the principles of section 1 before the Tribunal. There had therefore been no reason for the Tribunal to address the interaction between the statutory requirements and the principles.

18. The issue of prejudice was raised in the appeal and the Tribunal address prejudice at pages 3 and 4 of the judgment. Prejudice to the patient had been explored in the earlier Tribunal in July 2013.

19. The issue in the case, it was submitted, is whether the Tribunal considered the correct test as to the consequences of the default and how they applied the facts to that legal test. Mr Hunter argued that the Tribunal correctly identified the problem and the correct legal test; considered the arguments; decided the matter and gave reasons. They took the view that there had been substantial informal compliance. The purpose and import of section 85 had been met. The appellant had challenged the earlier CTO and was heard on

that challenge in March 2013. The question of whether the statutory test in section 64 been met was a live and recent one. The appellant's view as to the necessity of a CTO was well known.

20. In conclusion the decision making of the Tribunal was beyond criticism they had considered the facts and circumstances of the case logically and carefully. They applied the facts to the default and had answered the correct legal test. The appeal should therefore be refused failing which the cause should be remitted back to the Tribunal for consideration anew in terms of section 324(5) of the 2003 Act.

SUBMISSIONS ON BEHALF OF THE RMO

21. Mr Cobb for the RMO adopted Mr Hunter's submission. He stressed that the context and factual matrix was of significant importance.

22. Mr Cobb considered the authorities to which reference had been made in the other submissions. Beginning with the *London and Clydesdale* case he followed the line of authorities up to the case of *Shahid* v *Scottish Ministers* – on the question of "the consequences of non-compliance with a statutory requirement". He distinguished the decisions in *Clarke, Crawford* and *Shahid* as cases involving issues of fundamental non-compliance.

23. The tribunal had been correct to address the object and purpose of the Act. How otherwise could they consider whether Parliament would have

intended that a failure to comply with statutory requirement would invalidate the decision on a CTO. The object and purpose of the Act being clearly the provision of care and treatment to people with a mental disorder that was a clear and important factor pointing away from invalidating a determination which focussed on the needs and well-being of the patient and the safety of the public. The tests for a CTO were stringent.

DISCUSSION

24. The statutory obligations laid upon the RMO and MHO in connection with Review of Compulsory Treatment Orders can be found in Part 7 Chapter 4 of the 2003 Act. Two matters are clear and uncontroversial in this appeal.

    Firstly, the legislature intends statutory rules should be followed to the letter as Lord Hailsham (as Lord Chancellor) observed in *London and Clydeside Estates Limited* v *Aberdeen District Council* 1980 SC(HL) 1 *"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."*

    Secondly, this did not happen in BD's case. It is not disputed that both the RMO and the MHO fail to discharge their duties strictly in accordance with the provisions of sections 84, 85 and 86 of the 2003 Act.

25. The issue for the Tribunal and therefore for the appellate court is to assess the legal consequences of that non-compliance. In particular whether Parliament can fairly be taken to have intended total invalidity of the purported act or order in the event of failure to follow the letter of the legislation.

26. The starting point must be to look at the authorities and the assistance which may be derived from them in approaching this issue.

27. As I have said the case of *London and Clydeside Estates Limited* marks the departure from the former categorisation of rules as mandatory or directory. The Lord Chancellor's *dicta* are important as they are adopted and developed in the subsequent case of *R* v *Soneji*. The Lord Chancellor considered that the courts require to decide the legal consequences of non-compliance in any particular case on the rights of the subject viewed in the light of *"a concrete state of facts"* which I would describe as the factual matrix or context and *"a continuing chain of events"*. The Lord Chancellor went on to speak about the range of non-compliance from *"a fundamental obligation so outrageously and flagrantly ignored or defied"* to the other end of the spectrum namely an act or omission *"so nugatory or trivial"*. It is therefore clear that the nature and effect of the action or omission is of significant importance as is the background or context against which it occurs.

28. Lord Steyn in *R* v *Soneji* began his analysis of the "new perspective" by looking at the passage from the Lord Chancellor's Opinion in *London and Clydeside Estates* (page 30) and described it as an important and influential dictum leading to a more flexible approach to the consequences of non-compliance. Lord Steyn reviewed the authorities including Privy Council decisions from Commonwealth jurisdictions and in particular a judgment of

the Australian High Court in *Project Blue Sky Inc* v *The Australian Broadcasting Authority (1998)* 194 CLR 355 which he cited with approval. In that case the Judges considered that the classification of mandatory and directory had outlived their usefulness *"because they deflect attention from the real issue which is whether an act done in breach of the legislative provision is invalid"*. The real issue is therefore whether an act done in breach of a legislative provision is invalid. It is the *Project Blue Sky* case which determines that the classification of mandatory or directory comes at the end of the process of enquiry not the beginning and that is often overlooked. The court in *Project Blue Sky* posed another test *"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."* And in determining the question regard must be had to the language of the relevant provision and the scope and object of the whole statute.

29. *Paterson v Kent* 2007 SLT (Sh Ct) 8 is a recent Scottish case dealing with a failure to observe the time limits laid down in section 69 of the 2003 Act. In deciding the case Sheriff Principal Dunlop considered issues similar to those which were presented in this appeal. Sheriff Principal Dunlop looked at the purpose of the 2003 Act and decided that it was unlikely that Parliament intended that failure to comply with a time limit would frustrate the overriding purpose of the Act which is to provide appropriate care and treatment for persons with a mental disorder. *R* v *Soneji* and the authorities discussed in that case from Commonwealth jurisdictions requires the Court

or Tribunal to take account of the scope and purpose of the legislation. *Project Blue Sky Inc* v *Australian Broadcasting Authority* referred to with approval by Lord Steyn decided that regard must be had to the *"the language of the relevant provision and the scope and object of the whole statute"*.

30. *R* v *Clarke* deals with a defective (unsigned) indictment in criminal proceedings, as did *Crawford*. The House of Lords affirmed that the correct test requires the courts to consider what Parliament intended the consequence to be if there was a breach of a provision. Would an act done in breach be invalid? *Clarke, Crawford* and indeed *Seal* deal with circumstances of fundamental non-compliance.

31. The 2003 Act plainly has as its purpose the provision of care and treatment to persons with a mental disorder whether in hospital or in the community. The title of the Act makes that clear and consideration of the relevant provisions demonstrate clearly that providing medical treatment to patients with a mental disorder is at the core of Part 7 of the Act which deals with Compulsory Treatment Orders. The conditions which must be satisfied before a Compulsory Treatment Order can be made are set out in section 64(4) and (5). The conditions which must be met before a CTO can be granted have as their intention and purpose "medical treatment" - firstly, that medical treatment is available which would be likely to prevent a mental disorder worsening or alleviating any of the symptoms or effects of the disorder. Another essential requirement or condition which must be met involves

consideration of the effect on the patient or any other person if the patient were not provided with such available medical treatment. There must be a significant risk to the health, safety and welfare of the patient or to the safety of another person. These are clearly matters of utmost importance. Furthermore, there is a test of necessity which the Tribunal must be satisfied about. It must be shown that the patient's ability to make decisions about medical treatment is sufficiently impaired because of the mental disorder.

32. The appellant had made an application to the Tribunal to revoke an earlier CTO. The Tribunal had convened to hear that application on 13 March 2013. This is a critical period during which the RMO is obliged to carry out a review of the CTO. Accordingly, it is unsurprising that the Tribunal recorded that the RMO decided to await the outcome of the application to revoke before proceeding further with the review in terms of section 78 of the 2003 Act. In any event, section 83 stipulates the further steps which the RMO requires to carry out where a CTO is not revoked. It therefore appears that the RMO began consideration of the review of the CTO and whether it should be extended prior to the patient's application to revoke being heard; formed a preliminary view (that it should be extended); discontinued consideration of that pending the hearing before the Tribunal at which the RMO (and the MHO) gave evidence to the effect that the conditions for a CTO continued to be met in respect of the patient and that it was necessary for the patient to continue to be subject to a CTO. When the Tribunal refused the patient's application for revocation following the hearing on 13 March 2013, the RMO

resumed consideration of her review as she was obliged to do. The CTO was due to expire on 22 April 2013. The RMO did not rest content with the meeting she had with the patient at the Tribunal hearing but in order to come to a final conclusion on her review met with the patient in the patient's home some two weeks following the Tribunal hearing. The RMO advised the patient then of the intention to extend the CTO. The RMO reached a decision to make a determination extending the CTO. She gave notice to the MHO orally. The MHO had been unable to attend the meeting with the patient on 27 March along with the RMO as planned.

33. It boils down to this that the RMO did not give notice in writing to the MHO of her intention to make a determination extending the CTO. The Tribunal considered this and considered it was not fatal. The MHO was well aware of the RMO's position as to the review after all they had both given evidence before the Tribunal on 13 March. In any event the MHO seemed to be clear as to the RMO's position as to the proposal to extend the CTO. The MHO had intended to be at the meeting on 27 March which, as far as the MHO's obligations are concerned would have constituted the section 85 interview but this did not happen. There was accordingly, a breach of the MHO's duties in terms of the legislation. The Tribunal at the preliminary hearing described the sequence of events as so unsatisfactory as to oblige the Tribunal to allow the RMO and MHO the opportunity of being represented at a further hearing. Accordingly, it could not be said that the Tribunal considered this matter lightly.

34. The essence of the Tribunal's decision at the subsequent hearing on 28 August 2013 with regard to the validity of the extension to the CTO can be characterised as follows:

- That it was very unsatisfactory for the MHO not to comply with any of the duties imposed upon him by section 85 of the Act.
- The Tribunal applied the correct test, namely whether, in the particular circumstances, a failure to comply with the requirements of sections 84 and 85 of the Act would have been intended by the legislature to invalidate the exercise of the power and if appropriate the RMO's duty to extend the CTO?
- The patient was represented before the Tribunal and his solicitor could not point to any prejudice as a result of the failure to comply with the statutory duty.
- The patient had advocacy support and the MHO was aware of that.
- The RMO and MHO had had contact with each other and with the patient as part of the ongoing care plan under the CTO.
- The RMO and MHO had had discussions with the patient at the previous Tribunal hearing on 13 March 2013.
- The RMO was aware that the MHO would be supportive of her proposed determination to extend the CTO.
- That the purpose or objects of sections 84 and 85 had been substantially achieved by these means.

35. Although counsel for the appellant criticised the Tribunal's reliance on the section 85 objectives being achieved by informal means, or at least substantially so, there was no dispute that the background and factual matrix was as stated by the Tribunal. Nevertheless, it was the appellant's argument that these considerations were irrelevant considerations in face of a clear and obvious breach of statutory duty. Furthermore the Tribunal were not entitled to rely on the concession as to the lack of prejudice when it ought to have been clear to the Tribunal that an uninformed patient was clearly prejudiced due to the coercive nature of the proposed order. The appellant put forward the proposition that his attitude to the CTO may well have altered insofar as he may well have been prepared to engage with the treatment plan on a voluntary basis thus obviating the need for an extension of the order. Even a community based CTO imposed restrictions on the patient's freedom of movement and obliged the patient to submit to treatment and meetings.

36. It appears to me that the Tribunal posed the correct question – namely, what consequences should attend the admitted failures in statutory duty? Was it the intention of the legislature that such failures would invalidate the Act of the RMO in extending the CTO? The Tribunal have identified correctly the issue and the test which they require to address. They have given reasons. They deal with the issue of prejudice. Following Lord Steyn in *Soneji* the Tribunal correctly identify the background facts and circumstances and the constant and continuing working dialogue between the RMO, MHO and

indeed the patient. In dealing with the issue the Tribunal was exercising an inherently discretionary jurisdiction and on appeal the test is whether they erred in so doing. The argument on prejudice is, in my view, difficult to sustain given the concession made by the patient's legal representative and indeed, a concession understandably made. The argument advanced on appeal in respect of prejudice takes the matter no further forward as it appears to look at overall prejudice when a patient is subject to a CTO rather than answer the question whether any prejudice was caused by the omissions or failures by the RMO and MHO in respect of their duties under sections 84 and 85? The main object of the MHO's section 85 duties is to take the patient's views and be the conduit for these views to the RMO; to inform the patient as to his rights including participation in the process and use of advocacy services. Without excusing the default, the Tribunal correctly identified the ongoing involvement of the patient actively in the Tribunal system with legal representation and the continuum of dialogue between the patient, RMO and MHO in respect of the treatment compulsitor since 2006. In these circumstances it is not difficult to understand why the Tribunal came to the view they did namely, that the objects of section 85 had been substantially achieved by informal means. The Tribunal were entitled to rely on the absence of any, far less material, prejudice to the patient whether by concession on the part of the patient's solicitor or after careful consideration of the facts.

37. I propose to mention the argument advanced on behalf of the appellant with regard to the principles which are set out in section 1 of the 2003 Act. Sub-section 2 requires any person discharging a function under the Act to have regard to the matters mentioned in sub-section 3 which are enumerated. These are said to be the *"principles"* for discharging certain functions under the Act. It is important to note that the requirement to have regard to the principles is qualified by the words *"in so far as they are relevant to the function being discharged."* It appears to me that the principles are separate and distinct from the purpose of the Act and are guiding principles which should be taken account of when decisions are being made under the Act. There is no hierarchy of principle however, some principles will carry more weight than others depending on the function under consideration. It is important to bear in mind that, in the main, decisions under the 2003 Act are made by individuals who are medically qualified or with professional involvement in the area of mental health. In the area of mental health there is inevitably a tension between the need to benefit the patient using a system with informed choices about treatment on the one hand, until, on the other, the same doctor may have to consider exercising a power to detain and forcibly treat individuals against their will. Where is the line to be drawn and in what circumstances should it be crossed? These are complex and potentially contradictory concepts where the need for guidance is required. Guidance is necessary where medical issues interact with legal issues and with an individual who suffers from mental illness. This is a complex and interactive area. The principles set out in section 1(3)(e) and (f) underpin the purpose of

the Act that is to have regard to the range of options and the importance of providing the maximum benefit to the patient. The other principles include the "participation" principle where patients' autonomy is respected and carers, family and friends are encouraged to become involved (section 1(3)(a), (b), (c) and (d)); the "respect" principle (including diversity) section 1(3)(h); the "equality" principle (section 1(3)(g). Finally, discharge of functions under the Act are subject to the "least restrictive option" (section 1(4)). This means that when people take decisions or action without a patient's consent they must attempt to keep to a minimum the restrictions they impose on the patient's liberty.

38. The principles are important and have been reviewed recently by Lord Reed in the decision of the Supreme Court in *G* v *Scottish Ministers and Another* [2013] UK SC 79. The significance and the weight to be attached to the principles will vary depending on the decision to be made. As I have observed some of the principles may not be engaged at all in coming to decisions or taking steps under the Act. Clearly, the object of section 84 of the Act is directed to engagement with the patient – the participation principle. Participation was at the forefront of the Tribunal's mind in considering the consequences of the default. Before the Tribunal there was no suggestion either that the principles had been flagrantly breached in the sense that this had been a deliberate decision on the part of the MHO to avoid his interview with the patient. On the contrary the considerable engagement between the MHO and indeed the RMO and patient was clear for the Tribunal and they

made their decision based upon that factual matrix. The Tribunal were not addressed on the principles but they properly took into account the effect of the default on the patient's participation and his informed participation in the proceedings. They concluded that no prejudice had been suffered by the patient, a conclusion accepted by the patient's representative at the Tribunal. The section 1 principles are guiding principles for those taking decisions in mental health matters. I cannot see that they add to the submissions made before the Tribunal. The Tribunal properly took into account the effect of the MHO's failure to interview the patient.

39. For these reasons I consider that the Tribunal was correct to reject the challenge to the validity of the CTO determination. I am also satisfied that Parliament would not have intended that the omissions on the part of the RMO and MHO would render the determination to extend the CTO invalid. The purpose of the legislation is to ensure the care and treatment of those with mental disorders and indeed, as I have observed, the principles set out in section 1 underpin that purpose in the sense that decisions under the Act are to be for the maximum benefit of the patient. That being so, the conditions which must be met before a CTO can be granted involve the minimising of the undesirable effects of mental disorder by maximising the patient's safety and well-being (both mental and physical); promoting recovery and protecting others from harm. Accordingly, it is inconceivable that Parliament would have intended that the consequence of failure to follow the statutory requirements to the minutest degree would invalidate

treatment orders necessary not only for the benefit of the patient but also the safety of others.

40. The decision of the Tribunal, in my view, discloses no error of law. It follows that the appeal will be refused. Accordingly, the appeal falls to be dismissed and in view of the discussion at the conclusion of the appeal hearing I will make no finding in respect of expenses.