

**SHERIFFDOM OF LOTHIAN and BORDERS at EDINBURGH**

**Case Number B2362/11**

**NOTE**

**by**

**CHARLES NORMAN STODDART,  
Temporary Sheriff Principal**

**in Appeal**

**in the cause**

**J. B.**

**APPELLANT**

**against**

**THE MENTAL HEALTH TRIBUNAL  
FOR SCOTLAND**

**RESPONDENTS**

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**For the Appellant: Party**

**For the Respondents: Mr R Hunter, Solicitor, Hamilton**

**For the Mental Health Officer: Miss Finlay, Solicitor, Edinburgh**

**EDINBURGH, 10 January 2012**

**Introduction**

[1] This is an appeal under section 320(1)(u) of the Mental Health (Care and Treatment)(Scotland) Act 2003 ("the 2003 Act") by J.B, the mother of a hospital patient C.B. On 12 November 2011, C.B. was made the subject of a short-term detention certificate and on the same day his mother was granted the status of named person by default by virtue of section 251(1) of the 2003 Act. However on 16 November 2011 the Mental Health Officer for C.B. applied to the Mental Health Tribunal ("the Tribunal) under section 255(6) of the 2003 Act for an order under section 257 to declare that J. B. was no longer to be the named person, on the basis that it was inappropriate for her to continue as such. On 24 November 2011 the Tribunal pronounced the order sought.

[2] J.B ("the Appellant") lodged a Note of Appeal against this decision, following which Answers

were lodged both by the Tribunal and by the Mental Health Officer. Having heard parties, on 10 January 2012 I allowed the appeal and remitted the case for re-hearing by a differently-constituted Tribunal. For reasons which will become clear it was not necessary for me to reach a concluded view on the Grounds of Appeal as originally lodged, because a fundamental point of competency emerged during the submissions made to me.

[3] The point arose because the decision of the Tribunal was made by a single member, namely a Convener, rather than a tribunal composed of more than one member. Although this fact was not focused in any of the Grounds of Appeal, Mr Hunter for the Tribunal very properly drew my attention to it and advanced a number of submissions to me on the proper construction of the relative provisions of the 2003 Act and The Mental Health Tribunal for Scotland (Practice and Procedure) (No.2) Rules 2005 (SSI 2005 No.519), hereafter "the Rules" Although one of these submissions was to the effect that the decision under appeal was of such an interim or preliminary nature as could legitimately be made by a single member under Rule 43, he ultimately conceded that since at the time the decision was made there were no other live proceedings pending before the Tribunal, it could not be said that the Tribunal decision to remove J.B as the patient's named person was an interim or preliminary matter in the context of other proceeding, all as required by Rule 41. He therefore rested his case on the interpretation of the relative primary legislation

#### **The law**

[4] Mr Hunter referred me first to Schedule 2 to the 2003 Act and in particular to Parts 2 and 3 of that Schedule which deal respectively with the Organisation and Administration of the Tribunal and Tribunal Procedures. Paragraph 7 provides (so far as relevant):

*"7 (1) The functions of the Tribunal shall be discharged by such numbers of tribunals as may be determined from time to time by the President.*

*(3) Subject to.....any rules made under paragraph 10(1) below, a tribunal constituted under sub-paragraph (1) above shall consist of [a Convenor and two members]."*

[5] Paragraph 7(5) imposes a general duty on the President to secure that the functions of the Tribunal are discharged efficiently and effectively, while paragraph 7(6) allows the President to give such directions and to issue such guidance about the administration of the Tribunal as appear to the President to be necessary or expedient to secure that those functions are so discharged.

[6] Paragraph 10(1) of Schedule 2 contains the general power of the Scottish Ministers to make rules as to the practice and procedure of the Tribunal; these include *inter alia* provision for or in connection with (a) the composition of the Tribunal for the purposes of the discharge of particular functions. Paragraph 12 makes provision about the citation of witnesses, while Paragraph 13(1) makes it clear that where a decision is to be made by more than one member of the Tribunal, the decision of the Tribunal shall be made by majority.

[7] Finally, section 329(2) of the 2003 Act provides that in this Act, unless the context otherwise requires, reference to the Tribunal is, where the power conferred by paragraph 7(1) of Schedule 2 is exercised, to be construed as a reference to the tribunal concerned.

### **Submissions on behalf of the Tribunal**

[8] Mr Hunter submitted that it was for the President of the Tribunal to allocate its decision-making functions to tribunals either consisting of three members or not; and that in consequence the President could competently allocate the making of a particular decision to a tribunal consisting of a Convenor alone. This was what had happened in the present case and it was rendered competent as a result of the wording of paragraph 7(1) of Schedule 2, where the position of the statutory body (the Tribunal) was contrasted with the body which carried out its function (a tribunal). The very language used suggested that a Tribunal might be validly constituted by one member. Mr Hunter told me that in relation to paragraph 12 (which was concerned with the citation of witnesses) the Tribunal's functions were in practice carried out by a single member of the Tribunal. Further, paragraph 13 made it clear that there would be circumstances where a decision could be made by one member, otherwise there would be no need for the provision. Turning finally to section 329(2) of the 2003 Act, Mr Hunter submitted that it emphasised that the President had the power (but no requirement) to allocate the work of the Tribunal to more than one tribunal for the discharge of the Tribunal's functions. On this basis and in the whole circumstances the decision under section 257 of the 2003 Act which was presently under appeal did not require to be made by a tribunal consisting of three members (a general, a medical and a legal member).

[9] Mr Hunter then submitted that there were sound policy reasons why, in certain circumstances, a single-member decision might require to be made, such as an emergency situation where, for example, an extension of a Compulsory Treatment Order made by a criminal court required to be extended on an interim basis at the last minute. As a matter of policy in such cases, the Tribunal would exercise its powers by a legal member sitting alone. Similar considerations might apply to extensions of Interim Compulsory Treatment Orders under section 105 of the 2003 Act. Issues in relation to named persons were, as a matter of policy, currently dealt with by one member. Further, there were always a number of case management responsibilities of the Tribunal which were simply carried out by "Duty Convenors". On the whole matter, it was for the Tribunal to decide which decisions could be made by one person and the statutory provision should be interpreted in that light. Mr Hunter invited me to hold that the Tribunal decision under section 257 had been made by a tribunal properly constituted and that there was no competency issue arose, such as to prevent me making a decision on the merits of the Grounds of Appeal as lodged.

### **Submissions by the other parties**

[10] Miss Finlay for the Mental Health Officer made no submissions on the issue of competency. The Appellant herself submitted that if as a matter of law the Tribunal had been improperly constituted, that of itself would mean that her appeal should be allowed.

### **Decision**

[11] I came to the view that the Tribunal was not properly constituted when it took the decision under section 257 of the 2003 Act. When the Mental Health Officer applied for an order to remove the appellant as the named person for the patient, the Tribunal was faced with an important substantive decision. That such a decision was in fact taken is clear from the decision document; it appears that the Convenor (sitting alone) heard oral evidence from the Appellant and considered a range of written material before making a number of Findings-in-fact. Before making the order sought, she set out the evidence on which these Findings were made and recorded the full reasons for her decision.

[12] That decision affected the rights and duties of the Appellant herself, but it also affected the position of her son, the patient. A patient in his position will always have a named person, either by nomination or by default and indeed if the person does not have a named person then the Mental Health Officer must take steps to ensure that a named person is appointed: see section 255 of the 2003 Act. The role of the named person is to represent the interests of a patient and to support and (if necessary) intervene in proceedings on his behalf. The named person acts independently of the patient and has defined rights set out in law. In particular, the named person has the right to raise proceedings in respect of the patient and is entitled to receive intimation of any proceedings raised by anyone else. The named person is therefore an important figure with an equally important substantive role.

[13] In the context of the application before the Tribunal in the present case, what had to be decided was whether it was inappropriate for the named person to continue in that role. If the Tribunal was so satisfied, then that named person would have no further part to play. That is a significant step in the proceedings; in my view it is one which cannot be taken by a tribunal consisting of a single member. I do not consider that the statutory provisions relied on by Mr Hunter are capable of the interpretation which he sought to put on them. I agree that there are some decisions which can be made by a single member, for example in an emergency situation, or where by virtue of the Rules an interim or preliminary decision requires to be made in the context of other proceedings. There was no emergency in the present case; furthermore, I do not think that even if there had been other proceedings extant at the time the decision in this case had been taken, it would have been of an "interim" or "preliminary" nature. On the contrary, it was a final determination of the relative statutory rights and duties.

[14] In these circumstances I think there has been a fundamental error of law in this case, in that the Tribunal making the decision under appeal was not properly constituted. I shall therefore allow the appeal under section 324(5) of the 2003 Act and set aside the decision of the Tribunal.

## **Conclusion**

[15] Mr Hunter submitted that if the appeal was allowed, the matter should be remitted to the Tribunal for rehearing; in that event it would be open to me to direct that the Tribunal should be differently constituted. Neither of the other parties made submissions on disposal.

[16] I agree that the case should be remitted for rehearing. In conformity with the views I have expressed on the significance of the matter, I shall direct that the rehearing must take place before a panel of the Tribunal consisting of three members.

**(Signed) Charles Stoddart**