

SHERIFFDOM OF SOUTH STRATHCLYDE DUMFRIES AND GALLOWAY

B10/07

JUDGMENT OF SHERIFF PRINCIPAL B A LOCKHART

in the cause

LOTHIAN HEALTH BOARD

Appellants

against

BRIAN MARTIN

First Respondent

MENTAL HEALTH TRIBUNAL FOR SCOTLAND

Second Respondents

Act: Mr A MacSporran, Advocate, instructed by Central Legal Office
Alt: Miss I McKerrow, Advocate, instructed by Andersons
Ms L Dunlop, QC, instructed by Mental Health Tribunal for Scotland

AIRDRIE: 27 April 2007

The Sheriff Principal, having resumed consideration of the appeal, refuses the appeal and adheres to the decision of the Mental Health Tribunal for Scotland of 24 November 2006 complained of; finds the appellants liable to the respondents in the expenses of the appeal allows an account thereof to be given in and remits same when lodged to the Auditor of Court to tax and to report; certifies the cause as suitable for the employment of senior counsel.

NOTE:

Background to the appeal

1. This application is an appeal under section 320(2) of the Mental Health (Care and Treatment) (Scotland) Act 2003 by the appellants to set aside the decision of the Mental Health Tribunal for Scotland's of 24 November 2006 whereby the Tribunal made an order in terms of section 264(2) of the 2003 Act declaring that the first respondent was being detained in conditions of excessive security and specified a period of three months from the date of the order during which the duties under section 264(3) to (5) must be performed by the appellants. The appellants are the relevant

Health Board in terms of section 273 of the 2003 Act and are a relevant party entitled to appeal in terms of section 320(8) of the 2003 Act. The appeal is brought under section 320(2) of the 2003 Act. The decision appealed against falls within section 320(1)(w)(i) of the 2003 Act.

2. The first respondent (the patient) is detained in the State Hospital under a compulsory treatment order. In about May 2006 the first respondent lodged an application with the Tribunal in terms of section 264(2) of the 2003 Act claiming that he was detained in the State Hospital under conditions of excessive security. A hearing was held before the Tribunal on 12 October 2006 and 16 November 2006. The Tribunal issued its decision on 24 November 2006. The appellants seek to have the decision of the Tribunal set aside and to remit the case to a differently constituted Tribunal to consider the first respondent's application under section 264(2) anew. The appeal is taken on the grounds that the Tribunal's decision was based on errors of law and that the Tribunal acted unreasonably in the exercise of its discretion in terms of section 324(2) of the 2003 Act.

3. It is appropriate that I set out at this stage the relevant statutory provisions. Section 264(2) of the 2003 Act, on which the application was based, is in the following terms:

"On the application of any of the persons mentioned in subsection (6) below, 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 three months and beginning with the making of the order, during which the duties under subsections (3) to (5) below shall be performed."

In this case the Tribunal on 24 November 2006 pronounced itself satisfied that the patient did not require to be detained under conditions of special security that can be provided only in a state hospital. Accordingly the Tribunal made an order in terms of section 264(2) of the 2003 Act to the effect that the first respondent was being detained in conditions of excessive security and specified a period of three months from the date of the order during which the duties under section 264(3) to (5) should be performed by the appellants.

4. It was agreed that section 264(3) did not apply as the first respondent was not a relevant patient. Accordingly, within the period of three months from the making of the order, the appellants were required to perform the obligations set out in sections 264(4) and (5) which are in the following terms:

"(4) Where the Tribunal makes an order under subsection (2) above in respect of a patient who is not a relevant patient, the relevant Health Board shall identify a hospital-

- (a) which is not a state hospital;
- (b) which the Board considers, and its managers if they are not the Board agree, is a hospital in which the patient could be detained in appropriate conditions; and
- (c) in which accommodation is available for the patient.

(5) Where the Tribunal makes an order under subsection (2) above in respect of a patient, the relevant Health Board shall, as soon as practicable after identifying a hospital under subsection (3) or as the case may be, (4) above, give notice to the managers of the State Hospital of the name of the hospital so identified."

The annotated note to this section provided in a booklet published by Greens written by Franks & Cobb in respect of the Mental Health (Care and Treatment) (Scotland) Act 2003 states:

"This section in conjunction with ss 265 to 273 provides a right of appeal/review to the Tribunal for "entrapped" patients to obtain an order declaring that the patient is being detained in conditions of excessive security. These provisions are expected to come into force on May 1 2006. This delay is designed to allow sufficient time for medium security facilities for affected patients to be commissioned."

5. It is important in respect of the arguments which were advanced during the appeal that I also set out the following further provisions which are relevant:

(A) Section 265:

- (1) "This section applies where-
 - (a) an order is made under section 264(2) of this Act in respect of a patient; and
 - (b) the order is not recalled under section 267 of this Act.
- (2) If the relevant Health Board fails, during the period specified in the order, to give notice to the Tribunal that the patient has been transferred to another hospital, there shall be a hearing before the Tribunal.
- (3) Where such a hearing is held, 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-
 - (i) a period of 28 days; or
 - (ii) such longer period not exceeding 3 months as the Tribunal thinks fit.beginning with the date on which the order is made during which the duties under subsections (4) to (6) shall be performed."

This section applies if an order under section 264(2) of the 2003 Act has been made and the order has not been recalled on the application of the Health Board under section 267. It should be noted that section 265(4) is not applicable as the patient is not a relevant patient. However the provisions of section 265(5) and (6) are in exactly the same terms as the provisions of section 264(4) and (5). In effect, if, at a second Tribunal hearing, the Tribunal remain satisfied that the patient does not require

to be detained under conditions of special security that can be provided only in a state hospital, the Tribunal can give the Health Board up to a further three months to perform the duties which were originally incumbent on it in terms of section 264(4) and (5) in the original order.

(B) Section 266

"(1) This section applies where-

- (a) an order is made under subsection (3) of section 265 of this Act in respect of a patient;
- (b) the order specifies the period mentioned in paragraph (b)(ii) of that subsection; and
- (c) the order is not recalled under section 267 of this Act ..

(2) If the relevant Health Board fails, during the period specified in the order, to give notice to the Tribunal that the patient has been transferred to another hospital, there shall be a hearing before the Tribunal.

(3) Where such a hearing is held the Tribunal may, if satisfied that the patient does not require to be detained in under conditions of special security that can be provided only in a state hospital make an order-

- (a) declaring that the patient is being contained in conditions of excessive security; and
- (b) specifying the period of 28 days beginning with the day on which the order is made during which the duties under subsections (4) to (6) shall be performed."

This section applies where the order of the second Tribunal, provided it specified a period of longer than 28 days, has not been obtempered and the order has not been recalled on the application of the Health Board under section 267. The third Tribunal may give the Health Board a further 28 days to perform these duties if the Tribunal remains satisfied that the patient does not require to be detained under conditions of special security that can be provided only in the State Hospital. Again, section 266(4) is not applicable as the patient is not a relevant patient, and the provisions of section 266(5) and (6) are in exactly the same terms as section 264(4) and (5) and section 265(5) and (6). Accordingly this section provides a further enforcement mechanism where a patient is not transferred to another hospital following orders made by tribunals first under section 264 and thereafter under section 265. The additional period is then restricted to 28 days.

(C) Section 267:

"(1) this section applies when an order is made under sections 264(2), 265(3) or 266(3) of this Act in respect of a patient.

(2) on the application of any of the persons mentioned in subsection (4) below the Tribunal-

- (a) shall, if satisfied that the patient required to be detained under conditions of special security that can be provided only in a state hospital, recall the order;
- (b) may, on any other grounds, recall the order"

The annotated note to this section provided in the booklet published by Greens written by Franks and Cobb in respect of the Mental Health (Care and Treatment) (Scotland) Act 2003 in their annotation to this section states:

"The release of patients from the State Hospital is an emotive and politically charged issue where a balance must be struck between the rights and liberties of the individual and the wider issue of public safety. It is stark testament to the sensitivity of these issues that not only does the Act address situations where orders made by the Tribunal under this chapter are not implemented (ss 264 to 266), it also provides for these orders to be the subject of separate applications for recall under this subsec (1)).

Power to apply under this section rests only with the "relevant Health Board" ... Where the Tribunal is satisfied that the patient requires to be detained in conditions of special security which can only be provided in a state hospital, it must recall the order (subsec (2)(a)). The Tribunal can also recall the order on any other ground (subsec (2)(b)). These grounds are not prescribed in the Act, and, accordingly, the Tribunal have a wide discretion when considering applications under this section."

It is to be noted that the Tribunal shall, if satisfied that the patient requires to be detained until conditions of special security that can be provided only in a state hospital, recall the order. Additionally, the Tribunal may on any other grounds recall the order. Accordingly, if a Health Board was of the view that it was not possible to obtemper any order made under sections 264(2), 265(3) or 266(3) because, notwithstanding the fact that the Tribunal was satisfied that the patient did not require to be detained under conditions of special security that can be provided only in a state hospital, no other accommodation was available to allow the patient to be treated in conditions of appropriate security, or that it would not be in the patient's interests in respect of his wellbeing for him to be detained in such conditions, it would be open to the Health Board to apply to the Tribunal to recall the order which had been made earlier.

(D) Section 272:

"(1) The duties imposed by virtue of-

- (a) an order under section 264(2) of this Act;
- (b) an order under subsection (3) of section 265 of this Act which specified the period mentioned in paragraph (b)(ii) of that subsection; ...

shall not be enforceable by proceedings for specific performance or that statutory duty under section 45(b) of the Court of Session Act 1988 (C. 36).

(2) Without prejudice to the rights of any other person, the duties imposed by virtue of-

- (a) an order under subsection (3) of paragraphs 265 of this Act which specifies the period mentioned in paragraph (b)(i) of that subsection
- (b) an order under section 266(3) of this Act ...

shall not be enforceable by proceedings by the Commission for specific performance of their statutory duty under section 45(b) of that Act of 1988."

The 2003 Act accordingly differentiates between, on the one hand, an initial order made by the Tribunal in terms of section 264(2) and a second order specifying a period of three months, both of which are not enforceable by proceedings for specific performance in the Court of Session, and on the other hand, an order made by a second Tribunal under section 265(b)(1) where the period is 28 days or by a third Tribunal under section 266(3) where again the period is 28 days. In the latter circumstances the Tribunal orders are enforceable by an action for specific performance of statutory duty in the Court of Session.

(E) Right of Appeal. Parties have a right to appeal the Tribunal's order to the Sheriff Principal in terms of section 320(2) of the 2003 Act. The grounds on which an appeal may be taken are specified in section 324(2) which provides:

"The grounds referred to in subsection (1) above are-

- (c) that the Tribunal's decision was based on an error of law;
- (d) that there has been a procedural impropriety in the conduct of any hearing by the Tribunal on the application;
- (e) that the Tribunal has acted unreasonably in the exercise of its discretion;
- (f) that the Tribunal's decision was not supported by the facts found to be established by the Tribunal.

In this case the appellants found on grounds (a) and (c).

6. That is the basic statutory framework applicable to this appeal.

7. In their written decision the Tribunal considered the evidence and concluded:

"Having considered the evidence the Tribunal decided that the evidence established that the patient presents a risk of sexually inappropriate behaviour if proper boundaries are not maintained. He presents a risk of aggressive and assaultative behaviour if he is not occupied, preferably on a one to one basis in an activity in which he is interested. He is not at high risk of absconding from hospital. His executive function is not sufficient to plan and execute an escape. He requires 24 hour supervision by trained nursing staff, who can physically restrain him if necessary. He does not require the environmental or procedural security which is in place in a state hospital. He is detained in conditions of excessive security in the State Hospital.

The Tribunal accepted the submission on behalf of the Health Board that the maximum period permitted in terms of section 264(2)(b) of the 2003 Act should be specified in light of the evidence regarding the lack of provision for patients such as the patient."

8. In their statement of reasons the Tribunal said:

"The issue for the Tribunal was what the "conditions of special security that can be provided only in a state hospital" were and whether the patient required to be detained in those conditions. "Conditions of special security

that can be provided only in a state hospital" is not defined in the Act. The Tribunal heard evidence about the special security in a state hospital and security in units with less security. The description of security was in three categories, environmental which described the building and other physical features, procedural, which described the procedures adopted to enforce the physical security and relational security which described the relationship and interaction between those caring for the patients and the patients themselves.

The Tribunal did not consider that section 264(2) of the 2003 Act required it to ascertain whether there was a hospital other than a state hospital in which the patient could be detained in appropriate conditions.

The Tribunal accepted the evidence from Dr Carson and Professor Tyrer that there was no appropriate facility in Scotland or possibly in the UK for the detention of patients with acquired brain injury, which resulted in challenging behaviour however it did not consider that the existence of an appropriate unit was the issue before it but rather whether the patient's challenging behaviour required him to be detained in the conditions of special security that can be provided only in a state hospital."

The Tribunal further stated:

"The Tribunal was addressed by counsel for both the patient and the local authority, Lothian Health Board. Counsel for the Health Board provided a short written submission regarding the question of onus. The Tribunal considered this submission however it did not regard the issue of onus to be decisive. The Tribunal did not reach its decision on the basis that the onus of proof had not been discharged. It considered that the onus lies with the RMO to demonstrate that the patient requires the conditions of special security that can only be provided in a state hospital as the RMO is responsible for the detention of the patient. In this case the RMO does not consider that the patient requires the conditions of special security of the State Hospital and the local authority seeks to demonstrate with evidence from its medical witnesses that the RMO's opinion is ill-founded. The Tribunal requires to consider all the evidence and decide on balance of probabilities which evidence it prefers."

9. This appeal is now taken against the Tribunal's order of 24 November 2006 under section 264(2) of the 2003 Act declaring that the first respondent is being detained in conditions of excessive security and specifying a period of three months from the date of the order in which the duties under section 264(3) to (5) must be performed by the appellants.

Grounds of appeal

10. There were three separate grounds of appeal intimated and argued on behalf of the appellants. I propose to deal with each ground of appeal separately. I shall record the submissions of parties and give my decision on each ground of appeal before going on to a consideration of the next ground of appeal. The grounds of appeal were as follows:

A. The Tribunal erred in law as to the onus of proof in respect of the application. In their decision the Tribunal stated, *inter alia*, that "the onus of proof lies with the RMO to

demonstrate that the patient requires the conditions of special security that can only be provided in a state hospital as the RMO is responsible for the detention of the patient".

B. The Tribunal's decision was based on error of law in relation to their interpretation of the phrase in section 264(2) of the 2003 Act "If satisfied that the patient is not required to be detained under conditions of special security that can be provided only in a state hospital". The Tribunal stated (page 4) "The issue for the Tribunal was what the "conditions of special security that can be provided only in a state hospital" were, and whether the patient required to be detained in those conditions. It also stated (page 6) "the test for the Tribunal however was not to identify an alternative to the State Hospital but to determine whether the patient required the conditions of security that only a state hospital could provide". The Tribunal focused exclusively on whether there were elements of security at the State Hospital which were not required for the first respondent and concluded that these conditions of security were excessive. It was wrong in law to adopt a test which was based solely on conditions of security within the State Hospital and ignore evidence as to whether the patient could be detained in a hospital of lower security.

C. The Tribunal acted unreasonably in the exercise of its discretion under section 264(2) in making the order. It did not make any finding about or take into account any of the evidence regarding the suitability and availability of alternative accommodation. The Tribunal accepted that there was no appropriate facility in Scotland or possibly the UK for detention of patients with acquired brain injury which resulted in challenging behaviour (page 4). The Tribunal heard evidence as to the costs involved in building a bespoke unit. None of the experts advocated this. In view of the absence of a hospital with suitable conditions in existence, the Tribunal in the exercise of its discretion should not have made the order. Such an order was meaningless where the applicants could not discharge their obligations under it. The result, in effect is that the applicants are being ordered to build a unit.

I will now deal with each of these grounds of appeal in turn:

A. The Tribunal erred in law as to the onus of proof in respect of the application. In their decision the Tribunal stated, *inter alia*, that "the onus of proof lies with the RMO to

demonstrate that the patient requires the conditions of special security that can only be provided in a state hospital as the RMO is responsible for the detention of the patient".

Submissions for appellants

11. I was referred to the final paragraph of page 6 of the decision:

"... Counsel for the Health Board provided a short written submission regarding the question of onus. The Tribunal considered the submission however it did not regard the issue of onus to be decisive. The Tribunal did not reach the decision on the basis that the onus of proof had not been discharged. It considered that the onus lies with the RMO to demonstrate that the patient requires the conditions of special security that can only be provided in a state hospital as the RMO is responsible for the detention of the patient. In this case the RMO does not consider that the patient requires the conditions of special security of the State Hospital. ..."

The outline submissions on behalf of the appellants at the Tribunal were in the following terms:

"While in practice the issue of burden of proof will not often arise, it is submitted on behalf of the Lothian Health Board that on a proper construction of section 264(2) of the Mental Health (Care and Treatment) (Scotland) Act 2003 the onus of proof is on the applicant, for the following reasons:

1. This is the plain and natural meaning of the language.
2. The "formula" ... "satisfied that the patient is not" ... in the context of section 64 of the Mental health (Scotland) Act 1964 has been judicially interpreted as placing the onus on the applicant by the House of Lords, the European Court of Human Rights and conceded as such before the Inner House by Scottish Ministers
3. Had it been the intention of Parliament to place the onus upon the Health Board, the section could easily have so provided. This can be contrasted with the language used elsewhere, where the onus is clearly the opposite way, such as sections 193(2) and 215(2).
4. In case it be suggested that Article 5 of the Convention on Human Rights requires that section 264(2) should be read so as not to place the onus on the applicant, the subsection is not concerned with the issue of whether the patient should be detained or not. Rather it is concerned with the level of security while detained. As such Article 5 is not engaged."

12. While it was conceded that the Tribunal stated that it did not consider the issue of onus to be decisive, nevertheless the Tribunal stated at page 6 that the onus was on the RMO to demonstrate that the patient requires the conditions of special security that can only be provided in a state hospital as the RMO is responsible for the detention of the patient. Counsel indicated that the appellants attacked that statement.

13. The Tribunal in their decision had stated that the onus was on the RMO. It was submitted that the Tribunal had erred (1) on putting the onus on the wrong person and (2) they had inverted the onus. If the Tribunal was right, then it would mean that, if no evidence was led at all, an order could be made. That flew in the face of a proper construction of section 264(2). I was referred to Walker & Walker second edition para 2.1.1:

"With regard to each disputed issue of fact arising in the course of a litigation, the burden of proof (onus *probandi*) rests with either one party or the other. This means, in very general terms, that if on any issue of fact no evidence is led, or the evidence leaves the matter in doubt, the party on whom the burden of proof rests has not discharged it, and accordingly fails on that issue".

I was also referred to para 2.2.6:

"(d) when a statute provides that an order shall be pronounced or refused if it appears to the court, or if the court is satisfied, that something has or has not occurred, then, in the absence of express statutory provision concerning the burden of proof, it will fall upon the party who will fail if after evidence is heard the court is not satisfied."

I was also referred to the case of *Sanderson v McManus* 1997 SC (HL) 55 at page 62F where Lord Hope of Craighead, when dealing with section 3(2) of the Law Reform (Parent & Child) (Scotland) Act 1986 which provides:

"In any proceedings relating to parental rights the court shall regard the welfare of the child involved as the paramount consideration and shall not make any order relating to parental rights unless it is satisfied that to do so will be in the interests of the child."

said:

"In my opinion the effect of subsec (2) is clear. The court is given a wide discretion as to the considerations pointing one way or the other which they may take into account. But all other considerations must yield to the consideration which is stated by the subsection to be paramount, which is the welfare of the child. As it is told that it "shall not" make any order relating to parental rights unless it is satisfied that "to do so" will be in the best interests of the child, the onus is on the party who seeks such an order to show on balance of probabilities that the welfare of the child requires that the order be made in the child's best interests. It is, of course true, as Lord Weir pointed out in this case, that questions of onus usually cease to be important once the evidence is before the court. The matter then becomes one of overall impression, balancing one consideration against another and having regard always to the consideration which has been stated to be paramount. The court must however be able to conclude that it would be in the child's best interests that the order should be made. If it is unable to come to that view, the proper course for it to take is to make no order."

14. It was submitted that under section 264(2) the onus was on the applicant. This was consistent with a plain reading of the subsection. The Tribunal had to be satisfied that the patient did not require to be detained under conditions of special security that can be provided only in a state hospital. If no evidence was led, no order could be made. At the end of the day, if there was doubt on this matter and a court was not so satisfied, again no order would be made.

15. Counsel contrasted the wording of section 264(2) with the wording of section 267. With recall under section 267, the onus was on those detaining the patient. I was also referred to judicial interpretation of similar provisions. Section 64(1) of the Mental Health (Scotland) Act 1984 provided:

"Where an appeal is made by a restricted patient who is subject to a restriction order, the Sheriff shall direct the absolute discharge of the patient if he is satisfied-

(a) that the patient is not, at the time of the hearing of the appeal, suffering from mental disorder of a nature or degree which makes it appropriate for him to be liable to be detained in a hospital for medical treatment; or

(b) ..."

I was referred to the dicta of Lord Clyde, when considering that provision, in the case of *R v Secretary of State for Scotland* 1999 SC (HL) 17:

"Three observations should be made at this stage on these provisions. Firstly the decision is not one which is left to the discretion of the Sheriff once he is satisfied on the particular criteria. If he is satisfied, he is obliged to grant a discharge. Secondly, the burden of establishing the particular propositions to the satisfaction of the Sheriff will lie on the patient, although in practice it may well be that questions of the burden of proof will not often arise ..."

16. It was submitted that any burden of proof in this case was on the applicant. There was no requirement under Article 5 of the European Convention of Human Rights that was there any onus on those seeking to detain the patient. The issue was not about detention *per se*, but about the level of detention. It was submitted that the onus could not be on the RMO at all. In terms of section 264(6) the RMO is not a person who can make an application under section 264(2) to the Tribunal. It was strange if a person who could not bring an application should have an onus imposed upon him.

17. In this case the submission was that the Tribunal was wrong to state on page 6:

"that the onus lies with the RMO to demonstrate that the patient required the conditions of special security that can only be provided in a state hospital ..."

Although it was accepted that the Tribunal did add:

"The Tribunal considered this submission, however, if it did not regard the issue of onus to be decisive. The Tribunal did not reach the decision on the basis that the onus of proof had not been discharged."

It was submitted that the Tribunal had misconstrued where the onus should be. Thus there had been something which was capable of influencing their decision. In these circumstances the court should set aside the decision of the Tribunal on that basis.

Submissions for the respondents

18. Counsel accepted that the Tribunal appeared to have made a statement about onus which is probably wrong. At page 6 in the statement of reasons the Tribunal said:

"Counsel for the Health Board provided a short written submission regarding the question of onus. The Tribunal considered this submission however it did not regard the issue of onus to be decisive. The Tribunal did not reach the decision on the basis that the onus of proof had not been discharged. It considered that the onus lies with the RMO to demonstrate that the patient requires the conditions of special security that can only be provided in a state hospital as the RMO is responsible for the detention of the patient ..."

Counsel did not seek to defend the last sentence of that quotation from the statement of reasons. However, it was submitted that it was plain that the decision of the Tribunal did not turn on the question of onus. The Tribunal said so in terms. The Tribunal stated that they did not consider the issue of onus to be decisive. They said that they did not reach their decision on the basis that the onus of proof was not discharged, so any misconception about whether there might be an onus did not effect the result.

19. It was submitted that it was also clear that the Tribunal asked itself the correct question namely:

"The test for the Tribunal was not to identify an alternative to the State Hospital but to determine whether the patient required the special conditions of security that only a state hospital could provide."

It was submitted that the fact that this was the appropriate approach was confirmed by the European Court of Human Rights in the case of *Reid v UK* (2003) 37 EHRR 9. I was referred to para 72:

"It is true in this case that there was considerable medical evidence before the Sheriff concerning the applicant's condition and that the Sheriff made clear and unequivocal findings as to the existence of a serious mental disorder and the risk of the applicant reoffending. These conclusions were reached on an assessment of the evidence as a whole and the burden of proof does not appear to have played any role."

20. In this case there was one sentence which implied that the Tribunal had placed the onus on the wrong person. In the case of *Reid* it was suggested that the question of burden of proof had been capable of influencing the decision. Counsel drew a distinction between that case and the present case. In this case there was no basis in the judgment for suspecting that the question of onus affected the decision. I could be sure that it did not effect the decision because the Tribunal said in terms that it did not effect their decision. This was similar to the dicta of Lord Hope in the case of *Sanderson v McManus* 1997 SC (HL) 55 where Lord Hope said at 62G:

"It is of course true, as Lord Weir pointed out in this case, that questions of onus usually cease to be of importance once the evidence is before the court."

In particular it was emphasised that the Tribunal had stated that they did not consider the issue of onus to be decisive. They said they did not reach their decision on the basis that the onus of proof was not discharged, so any misconception about whether there might be an onus did not affect the result.

21. Counsel for the first respondent wished to associate herself with the arguments put forward by counsel for the second respondents in respect of the onus of proof. Her *esto* position was that, if the court considered the onus of proof was on the patient and had not been discharged, the onus of proof shifted during the hearing on to the Health Board as a result of the interference with Mr Martin's human rights in terms of Article 8(1) of the European Convention on Human Rights. If interference was established in terms of Article 8(1) it then fell to the Health Board to justify interference in terms of Article 8(2).

22. Article 8 of the Convention on Human Rights provides:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

It was submitted imposing conditions of excessive security on a mental patient interfered with his Article 8 rights. The failure to provide Mr Martin with appropriate medical treatment in a secure environment most appropriate to his needs was a breach of Article 8. The basis for this was that it was said that his social and self development were hindered by the conditions of high security and this impacted upon his family and private life. I was referred to the case of *Petty v United Kingdom* 2002 BHRC 149 (para 61). There was evidence brought out at the hearing in terms of the patient's medical treatment that his clinical needs could not be addressed at the State Hospital. The Tribunal had found that he needed close intensive supervision on a 24 hour basis with two nursing staff assigned to him. His condition responded best to being occupied in an activity as it minimised the risk of his challenging behaviour. While at the State Hospital there were enough staff to restrain him, but there were not enough for the appropriate treatment that he required. There was evidence from the RMO and Professor Tyrer that he did not need the special conditions of the State Hospital in terms of the environmental security, the procedural security, the high perimeter fence, alarms,

CCTV, airlock doors, mail screening and x-raying of food. On the basis of his inappropriate medical treatment in the high security conditions of the State Hospital, this hindered his social development and breached Article 8 in terms of his right to private and family life. The high security in the State Hospital was not in proportion to the risk posed by him. That was the evidence brought out at the Tribunal hearing. It was submitted that the onus in these circumstances shifted onto the Health Board to justify this interference with his human rights. Any interference required to be justified and proportionate in terms of Article 8.

Decision on onus of proof

23. I refer to the dicta in *Walker & Walker* para 2.2.6:

"(d) where statute provides that an order shall be pronounced or refused if it appears to the court, or if the court is satisfied that something has or has not occurred, then, in the absence of express statutory provision concerning the burden of proof, it will fall upon the party who will fail if after evidence is heard the court is not satisfied."

In this case, if at the end of the hearing the Tribunal is not satisfied that the patient does not require to be detained under conditions of special security that can be provided only in a state hospital, the Tribunal would not be entitled to make an order under section 264(2). It accordingly appears to me that in these circumstances the onus is on the patient to lead evidence in order that the Tribunal might pronounce itself satisfied on this matter. If the applicant chose not to do so, the application would fail.

I consider the dicta of Lord Hope of Craighead to which I was referred in the case of *Sanderson v MacManus* 1997 SC (HL) 55 at page 62F are relevant. He said:

"In my opinion the effect of subsec (2) is clear. The court is given a wide discretion as to the considerations pointing one way or the other which they may take into account. But all other considerations must yield to the consideration which is stated by the subsection to be paramount, which is the welfare of the child. As it is told that it "shall not" make any order relating to parental rights unless it is satisfied that "to do so" will be in the best interests of the child, the onus is on the party who seeks such an order to show on balance of probabilities that the welfare of the child requires that the order be made in the child's best interests. It is, of course true, as Lord Weir pointed out in this case, that questions of onus usually cease to be important once the evidence is before the court. The matter then becomes one of overall impression, balancing one consideration against another and having regard always to the consideration which has been stated to be paramount. The court must however be able to conclude that it would be in the child's best interests that the order should be made. If it is unable to come to that view, the proper course for it to take is to make no order."

Similarly, in this case if the Tribunal was not satisfied that the patient did not require to be detained under conditions of special security that can be provided only in a state hospital, the Tribunal would not be entitled to make any order.

24. I can readily understand Lord Hope's comments to the effect that, once evidence is before a court, questions of onus would normally cease to be important as it would be the impression which all the evidence made on the court which would lead the court to its decision. This issue was also the subject of comment by Lord Clyde in *R v Secretary of State for Scotland* 1999 SC (HL) 17:

"... Secondly, the burden of establishing the particular propositions to the satisfaction of the Sheriff will lie on the patient, although in practice it may well be that questions of the burden of proof will not often arise."

In this case the Tribunal said:

"... Counsel for the Health Board provided a short written submission regarding the question of onus. The Tribunal considered this submission however it did not regard the issue of onus to be decisive. The Tribunal did not reach its decision on the basis that the onus of proof had not been discharged. ... The Tribunal requires to consider all the evidence and decide on balance of probabilities which evidence it prefers. ..."

In my opinion it was wrong for the Tribunal to comment 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 his patient. However I am satisfied, as the Tribunal specifically stated, that this statement as to onus did not effect their decision. The Tribunal state in terms that they considered the submission regarding the question of onus but did not regard the issue of onus to be decisive. They did not reach their decision on the basis that the onus of proof had not been discharged. The Tribunal stated that it required to consider all the evidence and decide on the balance of probabilities which evidence it preferred. It is clear from a perusal of the whole decision that that is exactly what the Tribunal has done. In my opinion, although they made an incorrect statement regarding onus in the sentence to which I have referred, it is not of importance in this case as it did not effect their decision. There was accordingly no error in law. This ground of appeal fails.

B. The Tribunal's decision was based on error of law in relation to their interpretation of the phrase in section 264(2) of the 2003 Act "If satisfied that the patient is not required to be detained under conditions of special security that can be provided only in a state hospital". The Tribunal stated (page 4) "The issue for the Tribunal was what the "conditions of special security that can be provided only in a state hospital" were, and whether the patient required to be detained in those conditions. It also stated (page 6) "the test for the Tribunal however

was not to identify an alternative to the State Hospital but to determine whether the patient required the conditions of security that only a state hospital could provide". The Tribunal focused exclusively on whether there were elements of security at the State Hospital which were not required for the first respondent and concluded that the conditions of security were excessive. It was wrong in law to adopt a test which was based solely on conditions of security within the State Hospital and ignore evidence as to whether the patient could be detained in a hospital of lower security.

Submissions for the appellants

25. It was admitted that the point at issue in this ground of appeal was what happened when a patient making an application fell between two stools - where there were elements of security of the State Hospital which were not required for him but, on the other hand, next step down, medium security may not be sufficient security for him.

26. It was suggested that there were two approaches to this matter:

- (i) The approach which the Tribunal had taken in this matter - to confine itself to looking solely at whether the patient required all the measures of the high security at the state hospital i.e. look at Carstairs in isolation; or
- (ii) Whether the Tribunal is obliged to look at, or even if not obliged, whether it is relevant to look to lower security units outwith the state hospital to see if the patient could be detained there.

27. I was invited to examine the Tribunal's decision. In pages 2 and 3 the findings in fact of the Tribunal were set out. The decision continued:

The issue for the Tribunal was what the "conditions of special security that can be provided only in a state hospital" were and whether the patient required to be detained in those conditions. "Conditions of special security that can be provided only in a state hospital" is not defined in the Act. The Tribunal heard evidence about the special security in a state hospital and security in units with less security. The description of security was in three categories, environmental which described the building and other features, procedural, which described the procedures adopted to enforce the physical security and relational security which described the relationship and interaction between those caring for the patients and the patients themselves.

The Tribunal did not consider that section 264(2) of the 2003 Act required it to ascertain whether there was a hospital other than a state hospital in which the patient could be detained in appropriate conditions.

The Tribunal accepted the evidence of Dr Carson and Professor Tyrer that there was no appropriate facility in Scotland and possibly in the UK for the detention of patients with acquired brain injury, which resulted in challenging behaviour however it did not consider that the existence of an appropriate unit was the issue before it but rather whether the patient's challenging behaviour required him to be detained in the conditions of special security that can be provided only in a state hospital.

The Tribunal accepted the submission by counsel for the patient that the report by Dr Smith should be given less weight as it was less detailed and it was not spoken to by its author. The Tribunal noted that despite a high level of agreement between Dr Grey and Professor Tyrer in their written reports they had reached different conclusions about the issue of excessive security, however the Tribunal had the opportunity to hear their evidence and to seek clarification from Professor Tyrer, which confirmed that Professor Tyrer considered the patient to be inappropriately placed and not in need of the special conditions of security that can only be provided in a state hospital. Dr Carson's evidence tended to emphasise that other facilities in the UK would not be able to manage the patient and that the Robert Ferguson Unit at the Royal Edinburgh Hospital in Edinburgh had not been able to manage his behaviour.

The test for the Tribunal however, was not to identify an alternative to the State Hospital but to determine whether the patient required the special conditions of security that only a state hospital could provide.

The Tribunal noted that Dr Carson and Professor Tyrer have experience of low secure units and have emphasised the lack of suitable provision for a patient with acquired brain injury such as the applicant."

28. Counsel indicated that that was how the Tribunal had approached section 264(2). They had only looked at the position regarding the State Hospital, without looking at the facilities provided by existing medium secure units and had erred thereby. It was submitted that the Tribunal nowhere stated what the conditions were at a medium security hospital, nor did they make any finding that the patient could be detained in medium security.

29. I was referred to section 29(4) of the 1984 Act and to the case of *Ferns v Ravenscraig Hospital* 1987 SLT (Sh Ct) 76. Section 29(4) of the Mental Health (Scotland) Act 1984 provides:

"Where a patient is transferred to a state hospital under section 1(a) of this section he or his nearest relative may, within 28 days of the date of the transfer, appeal by way of summary application to a Sheriff of the Sheriffdom within which the hospital from which the patient was transferred is situated against the decision of the managers of that hospital to transfer the patient; and on any such appeal the Sheriff shall order the return of the patient from the hospital to which he was transferred unless he is satisfied that the patient, on account of his dangerous, violent, or criminal propensities, requires treatment under conditions of special security, and cannot suitably be cared for in a hospital other than a state hospital."

Lord Caplan stated in *Ferns v Ravenscraig Hospital supra* at 80F:

"The object of the relative provisions in section 29(4) is plain enough. The Sheriff must not only be satisfied that the patient, because of his dangerous, violent or criminal propensities, requires treatment under conditions of special security but that he cannot suitably be cared for in a hospital other than a state hospital. ... Thus I agree

with Sheriff McInnes in *Managers of Strathdene Hospital* that evidence should be led from which the court can infer that no other hospital in Scotland is a suitable alternative to the State Hospital and that the sufficiency of the evidence would depend on the circumstances of each case ..."

30. It was submitted that this application was not dealing with precisely the same language but it was instructive that the exercise in that case which the Sheriff Principal had in mind was not an exercise of looking at the individual patient in the context of what Carstairs offers by way of security but it was an exercise at looking at the lower levels of security i.e. medium security to see if he could be detained safely there.

31. Section 264 (2) of the 2003 Act reads:

"... 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"

It was suggested it was for the Tribunal to identify a non-state hospital in which the patient could be detained in appropriate conditions. It was clear that the Tribunal was not interested in looking at a hospital which was not a state hospital in which the patient could be detained in appropriate conditions. The Tribunal was only interested in looking at the State Hospital in isolation. The Tribunal was not interested in looking at what facilities were available at medium secure or lower secure units at the time of the Tribunal.

32. As a matter of statutory construction, it was submitted that section 264(2) should be read as equivalent to saying "Can the patient be detained in a less secure hospital in appropriate conditions?". Counsel's primary position was that it was for the patient (the original applicant) to lead evidence to satisfy the Tribunal that the patient could be detained in appropriate conditions in a lower security unit.

33. If he was wrong in that, his secondary position was that, even if it was not for the patient to lead the evidence, where evidence has been led about levels of security in a medium secure unit and whether the patient could be detained there, that was still relevant for the Tribunal's decision under section 264(2). It was submitted that such evidence should not simply be excluded as had been done by the Tribunal in this case. As a matter of construction it was submitted that the Tribunal was wrong to close its eyes to evidence before it about security conditions outwith the State Hospital. It thereby erred in law.

Submissions for the respondents

34. It was submitted that section 264(2) contained both a power and a precondition for the exercise of that power. The precondition was "... 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". The power was "make an order (a) declaring that the patient is being detained in conditions of excessive security (b) specifying a period, not exceeding three months and beginning with the making of the order, during which the duties under subsections (3) to (5) below shall be performed".

35. It was submitted that the words of the precondition were not ambiguous. The detention requirement must stem from the condition of the patient. It was said for the appellants that the non requirement to be detained under conditions of special security arose from the existence of suitable facilities for the patient elsewhere. Counsel accepted that as a matter of language that could possibly be the case, but I was asked to compare the situation of a Children's Commissioners' complaint about juveniles being detained in adult prisons in response probably that a juvenile had to be left in an adult prison not because of his delinquency, but because there was no place for him in an institution catering for under eighteens. Counsel used that analogy to say that she accepted that one could interpret the word "require" as involving not simply the needs of the patient, but the constraints which arose from the system. However, it was counsel's submission that this was not the sense in which the word "require" was used in section 264(2).

36. In the first place, if the concept of what was required embraced not only the condition of the patient but also a consideration of what resources might be available elsewhere, that section should simply have said "Does not require to be detained in a state hospital". Looking at the words of subsection (2) the particular words "under conditions of special security that can be provided only in a state hospital" could have been omitted and the subsection allowed to read "Does not require to be detained in a state hospital". The use of these words, it was submitted, only had context if the concept in requiring the Tribunal to make its decision according to the condition of the patient and not making any consideration of other resources available.

37. If I was not with counsel on that interpretation of the subsection, based on the words of the subsection alone, and did not feel that the wording of the subsection directed the Tribunal to consider only whether the particular patient required the conditions of special security that can only be

provided in a state hospital, then her *estoppel* position was that regard required to be had to certain extraneous material when considering the construction of the section.

38. I was referred to two cases:

(1) *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg* 1975 AC 591.

That case held that a court, in a case which involved interpretation of the section of an Act, could look at report of a Parliamentary Committee which concerned the consideration of the bill which led to the Act in question. In particular I was referred to Lord Reid at page 613H:

"One must first read the words in the context of the Act read as a whole. One is entitled to go beyond that. The general rule in construing any document is that one should put oneself "in the shoes" of the maker or makers and take into account relevant facts known to them when the document was made. The same must apply to Acts of Parliament ... It has always been said to be important to consider "the mischief" which the Act was apparently intended to remedy. The word "mischief" is traditional. I would expand it in this way. In addition to reading the Act you look at the facts presumed to be known to Parliament when the bill which became the Act in question was before it, and you consider whether there is disclosed some unsatisfactory state of affairs which Parliament can properly be supposed to have intended to remedy by the Act ... I think we can take this report as accurately stating the "mischief" and the law as it was then understood to be, and therefore we are fully entitled to look at those parts of the report which deal with those matters."

Viscount Dilhorne said at page 622D:

"Can one refer to the notes on the clauses of the draft bill appended to it by the committee, and in the present case to the terms of the draft conventions prepared by the committee and attached to their report? Is it legitimate to make use of such parts of a report as an aid to construction of the Act? In my opinion it is. The reason why one is entitled to consider what was the mischief at which the Act was aimed is surely that that will throw a revealing light on the object and purpose of the Act, that is to say the intention of Parliament; and, applying Lord Halsbury's observations cited above, what more accurate source of information both as to the law at the time and as to the evil of defect which the Act was intended to remedy can be imagined than the report of such a committee or, for that matter the reports of the Law Commission.

(2) *Pepper (Inspector of Taxes) v Hart* 1993 AC 593. I was referred to Lord Browne Wilkinson at page 634D:

"In my judgment, subject to the questions of the privileges of the House of Commons, reference to Parliamentary material should be permitted as an aid to the construction of legislation which is ambiguous or obscure or the literal meaning of which leads to an absurdity. Even in such cases reference in court to Parliamentary material should only be permitted where such material clearly discloses the mischief aimed at or the legislative intention lying behind the ambiguous or obscure words ..."

39. It was suggested that there were three pieces of material to which I could reasonably refer as an aid to the construction of the relevant sections of the 2003 Act. These were as follows:

(1) The Millan Report (which led to the 2003 Act):

"82. We have received evidence from the state hospital and the Mental Welfare Commission that there are significant numbers of "entrapped patients". These are patients who no longer require the level of security afforded by the state hospital, but for whom appropriate local services are not available. The state hospital's board suggests that there is currently little incentive for local health boards and trusts to arrange secure psychiatric services. The local public is unlikely to welcome such services (indeed quite the reverse), and funding arrangements do not create incentives to develop such services. The board strongly advocated that an explicit statutory duty be placed on health boards to commission local services to address the need for a range of medium and low security services for mentally disordered offenders.

83. We have considerable sympathy with the position of the state hospital on this point. However, we have decided that, in terms of our core remit of reviewing the Mental Health (Scotland) Act 1984, it would be more appropriate for us to propose another means of addressing this problem, which is more directed at the rights of individual patients. This is that patients should have a continuing right to appeal against the level of security to which they are subjected.

84. It seems to us that to detain a patient unnecessarily in conditions of high security is inconsistent with respect for the patient's rights, and our general principle, of *Least restrictive alternative*. Furthermore, the proposed development of medium secure units would seem to make it more likely that such an appeal right would be practicable."

(2) Eighteenth Report of Health and Community Care Committee of Scottish Parliament dated 4 December 2002:

"Appeals against excessive security.

197. The provisions on appeals appeared to be generally welcomed. However many witnesses expressed serious concerns that the Bill did not expressly set out a right to appeal against being held in conditions of excessive security, as had been recommended in the Millan Report. In practice, such a provision would usually relate to cases where a CTO, recommending that a patient be held under conditions of medium security has been approved, but that because a space in a medium secure unit is not available, the patient is sent to the state hospital at Carstairs instead.

198. This is already happening under current law: the Committee understands that there may have been as many as 50 or more so called "entrapped" patients at Carstairs in recent years, and that this is an ongoing problem. Many have been there for months or even years despite agreement that Carstairs is an inappropriate place for them to be. The underlying problem is that there is only one specialist medium-secure unit in Scotland, the Orchard Clinic at the Royal Edinburgh Hospital. Plans to create a second unit in the Glasgow area have been ongoing for some years, but are currently stalled. Everyone who expressed a view on this matter agreed that there should be an appeal against excessive security in the Bill.

199. In the Committee's view it is scandalous that patients have been, and are continuing to be, entrapped in the state hospital when carers and staff are agreed that a high security setting is not only unnecessary

and inappropriate but may be inhibiting the patient's chance of recovery. We strongly recommend that all patients should be able to appeal against the level of security at which they are detained.

200. The Committee agrees that the recommendation of the Justice 1 Committee that the Bill should provide for an appeal against excessive security."

It should be pointed out that in terms of section 29(4) of the Mental Health (Scotland) Act 1984 when a person was sent to the state hospital he or she could appeal within 28 days after the transfer. That right was preserved under section 126 of the 2003 Act but the right of appeal lasts for 12 months. The Millan Committee recommended that there should be an appeal against excessive security. This was not in the original bill and this gap was the subject of the criticism to which I have referred above in the Health and Community Care Committee's report. This led to the following statement Mrs Mary Mulligan, the Deputy Minister for Health and Community Care to the Scottish Parliament at the third stage of the Bill.

"We have faced many difficult issues during the Bill's passage, but one of the most difficult concerns patients who are detained at an excessive level of security, in particular those in the state hospital who are ready to move on but have not been found places in local services. That issue is, rightly, of great concern. Through discussions with the Health and Community Care Committee, we have been able to make considerable progress. I believe that our amendments meet the aspirations of both Millan and the committee.

Before I explain the details of the amendments, I will set out the context. We have always recognised that it was wholly wrong that some patients should spend prolonged periods at the state hospital after their condition had improved to the extent that they could be safely treated in a less secure and more local environment. However, when we first considered the Millan recommendations, it seemed to us that the real problem was the lack of appropriate local services. An appeal right is of little use if there is genuinely no bed available that can meet the patient's needs.

We now accept that an appeal provision is not only an important protection for the individual patient, but should act as a spur for the development of the local forensic services, which are a key component of our strategy for mentally disordered offenders.

We recognise that if the amendments are to achieve their objective, they have to be backed up by the Executive intensifying the pressure on boards and local authorities to agree and implement plans that will address any remaining shortcomings against the assessed need. We need to build on the progress made with the development of the Orchard Clinic here in Edinburgh and with the new facility at Stobhill in Glasgow by ensuring that the west, north, and north east of Scotland produce proposals that will secure local services for those areas. ...

The basis for deciding that the patient is held in conditions of excessive security is that the statutory criteria for detention in a state hospital are no longer met. If the Tribunal decides that the patient is being held in conditions of excessive security, it may make an order giving the appropriate health board up to three months to find a suitable hospital place. At the suggestion of the Committee, we have reduced the maximum time period from six months to three and made it clear that the place found must be available for

the patient. Where the patient is a "restricted" patient, the Board must ensure that the place that they identify is one that the Scottish Ministers agree is suitable."

Amendment 682 provides:

"that if at the end of the specified period the patient has not been transferred from the State Hospital, the Tribunal must hold a further hearing. That addresses a concern of the Committee that the patient should not have to take formal steps to raise the case again. At the review, the Tribunal can give the Board another chance, by allowing it another period of up to three months to find a suitable place, or the Tribunal can move straight to a final order."

Amendment 683 provides: "

"that if the Tribunal allows the Board more time, there can be a final Tribunal hearing at the end of that period if the patient has still not been transferred. At that stage, the Tribunal again may make a final order. The effect of the final order is that the Board has 28 days to find a suitable place for the patient.

We are confident that Boards will comply with this new statutory duty imposed by the amendments. As with any such duty, failure to comply would leave the Board open to procedures in the Court of Session for breach of statutory duty."

It was submitted that when one looked at the above material from the Millan Report and Parliamentary Committees, it was plain that the test for consideration in section 264(2) for the exercise of the power related to an analysis of the patient's need for security and did not involve the Tribunal in a broader examination of where the patient might be placed or whether the patient might require to be detained in the State Hospital because there was nothing else suitable for him elsewhere. The object of the order was to give the Health Board an opportunity to obtain suitable accommodation for the patient in light of the findings of the Tribunal. Indeed, looking at the material to which I have been referred, it was clear that the suggestion that the first Tribunal might conclude that, although the patient did not require to be detained in the State Hospital, there was no other place in which he could be accommodated, would be the very antithesis of the intention behind the legislation. As the Deputy Minister for Health & Community Care said to the Scottish Parliament:

"If the Tribunal decides that the patient is being held in conditions of excessive security, it may make an order giving the appropriate Health Board up to three months to obtain a suitable place."

If the Health Board did not take that first opportunity afforded to it to find a suitable place for the patient, further Tribunals in terms of sections 265 and 266 could allow more time for a place to be found or resources adjusted to accommodate the patient. If the Health Board did not consider that there was any suitable accommodation, or that it was not in the patient's interests that he should be accommodated other than in the State Hospital, it would be open to the Health Board to make an application for recall in terms of section 267 of the 2003 Act.

40. I was also referred to section 1(4) of the 2003 Act that:

"the person shall discharge the function in the manner that appears to the person to be the manner that involves the minimum restriction on the freedom of the patient that is necessary in all the circumstances."

In that situation, if a person (namely the Health Board) was discharging a function under the 2003 Act, they were required to exercise that function in the manner which involved the minimum restriction on the freedom of the patient which was necessary in all the circumstances. It was clear that, for a person to continue to be detained in conditions of security which exceeded the security which the person required, was not the least restrictive alternative. It was submitted in deciding the pre-condition the approach adopted by the Tribunal was the correct one in law.

Decision

41. It was said for the appellants that this decision was based on an error of law in relation to the Tribunal's interpretation of the phrase "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". The Tribunal stated at page 4:

"The issue for the Tribunal was what the "conditions of special security that can be provided only in a state hospital" were and whether the patient required to be detained in those conditions. ...

The Tribunal did not consider that section 264(2) of the 2003 Act required it to ascertain whether there was a hospital other than a state hospital in which the patient could be detained in appropriate conditions."

It is clear from their decision that the Tribunal focussed exclusively on whether there were elements of security at the State Hospital which were not required for the first respondent and then concluded that these conditions of security were excessive. It decided to ignore evidence which I was informed was before the Tribunal as to whether the patient could be detained in a hospital of lower security, or whether indeed detention in such a hospital would be in the patient's interests. Although the Tribunal noted:

"The Tribunal accepted the evidence from Dr Carson and Professor Tyrer that there was no appropriate facility in Scotland or possibly in the UK for the detention of patients with acquired brain injury, which resulted in challenging behaviour ... "

The Tribunal concluded:

"however it did not consider that the existence of an appropriate unit was the issue before it but rather whether the patient's challenging behaviour required him to be detained in the conditions of special security that can be provided only in a state hospital."

42. I accept the submission which was made by counsel for the respondents that the words "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" in the context of section 264(2) of the 2003 Act is not ambiguous and relates only to a consideration of the condition of the patient. In my opinion at this stage in the statutory procedure a consideration of other resources available elsewhere is not relevant.

43. A consideration of three factors, taken together, persuade me to reach that conclusion:

(a) The words themselves are clear. I suggest that what the Tribunal is being asked to do is to look at the conditions of special security that can be provided only in a state hospital and then answer the question of whether the patient's medical condition requires him or her to be detained in these conditions. It is clear from the Tribunal's findings that the Tribunal was satisfied that the patient does not require to be detained in the conditions of special security that could be provided only in a state hospital. It would appear to me that that is a conclusion which, on the basis of the evidence which the Tribunal said it accepted, the Tribunal was entitled to reach. In my opinion the question of what other resources might be available at the time of the first Tribunal is not a relevant issue. The Tribunal is being asked to answer one question, namely whether the patient does not require to be detained under conditions of special security that can be provided only in a state hospital. If satisfied on that issue, the Tribunal is then entitled to proceed to make an order (a) declaring that the patient is being detained in conditions of excess security and (b) specify a period not exceeding three months and beginning with the making of the order, during which the duties under subsections (3) to (5) of the 2003 Act shall be performed.

(b) The sections of the Millan Report, the Eighteenth Report of the Health & Community Care Committee, and the official report of the Third Stage of the Scottish Parliament when considering this Bill, which I have set out in full in the submissions for the respondents. I accept the submissions made by counsel for the respondents thereon. In particular I refer to page 16 of the Third Stage Parliamentary report:

"If the Tribunal decides that the patient is being held in conditions of excessive security, it may make an order giving the appropriate health board up to three months to find a suitable hospital place ... If at the end of the specified period the patient has not been transferred from the State Hospital, the Tribunal must hold a further hearing. That addresses a concern of the Committee that the patient should not have to take formal steps to raise the case again. At the review, the Tribunal can give the board another chance, by allowing it another period of up to three months to find a suitable place. ..."

It respectfully appears to me that the first Tribunal is being asked to determine the precondition and thereafter to make an order giving the Health Board time to find a suitable hospital place.

It is not being asked at the first Tribunal to consider evidence of whether an alternative hospital place is available at that time.

(c) The terms of sections 265, 266, 267 and 272. In my opinion the tenor of these sections, taken together, does not envisage a situation at the first Tribunal where, if the Tribunal is satisfied that the patient does not require to be detained under conditions of special security that can be provided only in a state hospital, it should immediately proceed at that hearing to consider evidence of what other facilities are available. The purpose of the order is to allow the Health Board, having considered the Tribunal's decision on the precondition, time to identify a hospital place in which the patient can be detained in appropriate conditions. In my opinion it makes sense that resources should not be expended in attempting to identify a place in advance of a decision by the Tribunal that the patient was being detained in conditions of excessive security. Before the first Tribunal takes place, parties do not know if there will be a finding that the patient is being detained in conditions of excessive security, and, if so, to what extent. It is only when the order has been made that time should be taken to identify a hospital place appropriate to the patient's needs in light of the Tribunal's findings. If the Health Board does not obtemper the order in terms of section 264(2), and the order has not been recalled under section 267, the application comes back to the Tribunal, first under section 265 and thereafter under section 266. As I read these sections, they are both concerned with giving the Health Board further time to find an appropriate hospital placement for the patient.

After a first order has been made under section 264(2), in my opinion 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 in which, in his own interests, 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 first order. This procedure could also be used if, after continued efforts and further time being given by a second or third Tribunal, an appropriate facility was not available. At a Tribunal hearing under section 267, the patient's advisers will have notice of the grounds on which the Health Board seek recall of the order and they will be able to instruct their own medical experts to comment thereon. It appears to me

that this construction of the provisions is borne out by the terms of sections 265(1) and 266(1) of the 2003 Act, being the provisions for second and third Tribunals. Both provide that the section applies where an order by a previous Tribunal has been made (and by inference not obtempered) and where the order has not been recalled under section 267 of the 2003 Act. I consider these provisions envisage that 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.

44. For these reasons I consider the Tribunal's interpretation of the terms of section 264(2) is correct.

C. The Tribunal acted unreasonably in the exercise of its discretion under section 264(2) in making the order. It did not make any finding about or take into account any of the evidence regarding the suitability and availability of alternative accommodation. The Tribunal accepted that there was no appropriate facility in Scotland or possibly the UK for detention of patients with acquired brain injury which resulted in challenging behaviour (page 4). The Tribunal heard evidence as to the costs involved in building a bespoke unit. None of the experts advocated this. In view of the absence of a hospital with suitable conditions in existence, the Tribunal in the exercise of its discretion should not have made the order. Such an order was meaningless where the applicants could not discharge their obligations under it. The result, in effect is that the applicants are being ordered to build a unit."

Submissions for appellants

45. In terms of section 264(2) the power was a discretionary one placed on the Tribunal because of the use of the word "may" rather than "shall". It was submitted they had not purported in their decision to exercise any discretion as to whether to grant the order at all. They had not taken into account evidence given about the suitability or otherwise of medium secure units and the unavailability of places elsewhere. Professor Tyrer had said he would wish the patient tested in the State Hospital before any transfer. There was certain evidence from Dr Carson and Professor Tyrer that any move from Carstairs to medium security would be inhumane. There would be no quality of life in a medium security unit, whereas at Carstairs, because of the secure perimeter, the patient could obtain recreation facilities within the wall e.g. gardening. In a medium security unit there are no recreational facilities on site. That would effectively mean that, for reasons of restraint, he could

not be taken outside the unit unless under appropriate supervision and might even be locked up most of the time. It was submitted that there were various factors which the Tribunal could and should have taken into consideration, even if the Tribunal thought that the patient was being detained in conditions of excessive security. Because of their interpretation of section 264(2) the Tribunal had closed their eyes to a lot of important material and had not exercised their discretion reasonably.

46. I was asked to set aside the decision of the Tribunal and refer the matter to a differently constituted Tribunal.

Submissions for the respondents

47. Counsel for the respondents accepted that, if the question of resources was not relevant in the assessment of the precondition, and the question of the requirement focused exclusively on the patient, an issue might arise concerning whether the resources question should fall to be taken into account when the Tribunal come to decide whether or not to make an order. Once the precondition had been satisfied, the Tribunal still had a discretion. The word "may" as opposed to "shall" was used. It was suggested by counsel that for the same reasons as given in her submissions under the second ground of appeal, it would be wrong to take questions of resources into account at that stage. It was submitted for the appellant that the Tribunal should consider as relevant the fact that, up until the Tribunal had made its decision as to why it considered the patient was being detained in conditions of excessive security, it was difficult or even impossible to identify somewhere else for the patient to be detained. If that was to be considered a legitimate reason for not granting an order, the whole point of the exercise would be torpedoed.

48. It was submitted that what section 264(2) envisaged was that the Tribunal would first consider whether the patient was being detained in conditions of excessive security. It would secondly consider whether or not to make an order that something should be done about that situation.

49. It was submitted 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. It was submitted it was clear why this was so. It made good sense in not expending resources attempting to identify a place in advance of a decision by the Tribunal that the patient needed to move. One could also expect that the existence of an order might lead to a difference of focus as far as the search was concerned.

50. The structure of the section did not permit the relevant Health Board to pre-empt the whole exercise by saying "We will be unable to find anything, so there is no point in even making an order". The first Tribunal should not take into account the fact that any order by it on the Health Board in terms of section 264(2) might be unduly demanding. In terms of section 264(2) the Health Board could be given three months from the making of the order to perform its duties under subsections (3) to (5) of the section. In terms of section 265(3) a further three months could be given from the date of a further hearing, and then in terms of section 266(3) a further period of 28 days from the date of the third hearing could be given. This would give time for resources to be adjusted to accommodate the patient. If the Health Board considered that resources prevented it from fulfilling any order made by the Tribunal, it was open to it to apply under section 267 to have the order recalled. I was referred to section 267(2):

"On the application of any of the persons mentioned in subsection (4) below, the Tribunal-

- (a) shall, if satisfied that the patient requires to be detained under conditions of special security that can be provided only in a state hospital, recall the order;
- (b) may, on any other grounds, recall the order."

Discretion was given to recall the order "on any other grounds". Accordingly, one could envisage a situation, where the Health Board has found serious difficulty in identifying a facility for the patient, the Health Board returning to the Tribunal and laying these circumstances before the Tribunal with a motion for recall. The onus would then be on the Health Board as it would have all the information before it about current resources, whether an adjustment to current resources was practicable, and whether such a move was in the patient's interests. In addition the patient's advisers would be on notice about the reasons for the application for recall and would have the opportunity to prepare for the Tribunal with their own expert evidence.

Decision

51. I accept the arguments presented by counsel for the respondents. I have set out my views on the approach of the Tribunal when dealing with the second ground of appeal. The terms of the legislation, the intention of the legislation as revealed in the Millan Report and the debates of the appropriate Parliamentary Committees, and the construction of the provisions of the Act to which I have referred, all militate in favour of the approach adopted by the Tribunal which was urged on me by counsel for the respondents. Orders under sections 264, 265 and 266 are concerned with giving the Health Board time to adjust resources to produce an appropriate placement for a patient once the

Tribunal is satisfied that the patient does not require to be detained under conditions of special security that can be provided only in a state hospital. Where a Health Board considers, after investigation, that it cannot comply, for whatever reason with any order under sections 264(2), 265(3) or 266(3), or where it considers a move not to be in the interests of the patient on the basis of the medical evidence available to it, the proper course is for the Health Board to make an application to the Tribunal for recall of the order in terms of section 267 of the 2003 Act.

52. I consider that the Tribunal did not exercise its discretion in an unreasonable manner.

Conclusion

53. The appeal accordingly fails on all three grounds argued before me. I uphold the decision made by the Tribunal. Parties were agreed that expenses should follow success. I have accordingly made an award in favour of the first and second respondents against the appellants.

54. Parties indicated that this was the first case of its kind which had required a judicial decision and was of substantial importance to all concerned in the mental welfare field. In these circumstances I am prepared to certify the cause as suitable for the employment of senior counsel.