

SHERIFFDOM OF SOUTH STRATHCLYDE DUMFRIES AND GALLOWAY

B45/09

JUDGMENT OF SHERIFF PRINCIPAL B A LOCKHART

in the cause

M

Appellant

against

**CHRIS MURRAY, MENTAL HEALTH OFFICER,
EAST AYRSHIRE SOCIAL WORK DEPARTMENT**

First Respondent

AND

MENTAL HEALTH TRIBUNAL FOR SCOTLAND

Second Respondent

**DR NICOLA HODELET,
RESPONSIBLE MEDICAL OFFICER FOR THE APPELLANT**

Third Respondent

for appellant, J Carruthers, Advocate, instructed by A C White
for first respondent, Miss C Gilmore, East Ayrshire Council
for second respondent, R Hunter, Solicitor, Hamilton
for third respondent, K Campbell, Advocate

AYR: 17 April 2009

The Sheriff Principal, having resumed consideration of the cause, refuses the appeal and upholds the decision of the Mental Health Tribunal for Scotland dated 9 January 2009; finds no expenses due to or by any party in respect of the appeal; certifies the cause as suitable for the employment of counsel.

NOTE:

Background to the appeal

1. On 3 December 2008 the appellant was detained in Ailsa Hospital, Ayr on a short term detention certificate in terms of section 44 of the Mental Health Care and Treatment (Scotland) Act 2003 (hereinafter referred to as "the 2003 Act"). The first respondent, as the appellant's mental health officer, then made an application to the second respondent, the Mental Health Tribunal for Scotland, in terms of section 63(1) of the 2003 Act for a compulsory treatment order. A Tribunal hearing took place in Ailsa Hospital Ayr on 9 January 2009, as a result of which the Tribunal granted an interim compulsory treatment order in terms of section 65 of the 2003 Act. That order authorised detention of the appellant in Ailsa Hospital for treatment in accordance with section 16 of the 2003 Act for a period of 28 days i.e. until 6 February 2009.

2. An appeal was marked against the Tribunal's decision on 22 January 2009. The appeal was warranted for service on the six parties named in the schedule attached to the application. These parties were ordered to lodge written answers, if so advised, within fourteen days of receipt of the summary application containing the appeal. A procedural hearing was fixed for 5 March 2009 in Ayr Sheriff Court. At that time written answers had been lodged on behalf of the second and third respondents. The first respondent appeared personally and indicated he would be seeking to instruct solicitors. I was advised that at least two of the parties were instructing counsel in view of the importance of the issues in this appeal. A hearing for the appeal was fixed to take place in Airdrie Sheriff Court on 1 April 2009 to suit the convenience of counsel and solicitors. Parties lodged written submissions. I heard the appeal on 1 April 2009.

3. At the hearing before the Tribunal on 9 January 2009 solicitor for the appellant applied to the Tribunal to have the application dismissed before evidence was heard on the basis that the application was misconceived. His submission was that the second medical report provided by Dr Tariq Mahmood, the appellant's general practitioner, with the first respondent's application failed to comply with the provisions of the 2003 Act and the Mental Health Tribunal for Scotland (Practice and Procedure) (No 2) Rules 2005. Rule 44(1)(b) provides:

"A case before the Tribunal is misconceived if it is ...

(b) made otherwise than in accordance with these Rules and has no reasonable prospect of success."

Rule 2/1 provides:

"An application for a compulsory treatment order shall state the matters specified in section 63(2) of the Act."

Section 63 of the Act provides:

"(2) An application ...

(a) shall specify-

- (i) the measures which are sought in relation to the patient in respect of whom the application is made;
- (ii) any medical treatment, community care services, relevant services or other treatment, care or service specified in the proposed care plan by virtue of section 62(5)(j) of this Act; and
- (iii) where it is proposed that the order should authorise measures other than the detention of the patient in hospital, the name of the hospital, the managers of which should have responsibility for appointing the patient's responsible medical officer; and

(b) shall be accompanied by the documents which are mentioned in subsection (3) below

(3) these documents are-

- (a) the Mental Health reports
- (b) the report prepared under section 61 of this Act and
- (c) the proposed care plan.

Relating to the patient"

Accordingly two Mental Health reports required to be provided with the application. In this case the application was accompanied by one report from Dr Hodelet, the third respondent, who was the appellant's responsible medical officer, and who had been in charge of his care in Ailsa Hospital. The second report was provided by the appellant's general practitioner, Dr Tariq Mahmood. His report indicates that he had met the patient initially when he had enrolled in his practice at the Auchinleck Health Centre and subsequently when he examined him in the Intensive Psychiatric Care Unit at Ailsa Hospital on 17 December 2008. The argument presented by solicitor for the appellant to the Tribunal on 9 January 2009 was that the case was misconceived in terms of Rule 44(1) in that the report in support of the application supplied by Dr Tariq Mahmood did not meet the statutory requirements as set out in sections 57 and 58 of the 2003 Act.

4. Section 57 (Mental health officer's duty to apply for Compulsory Treatment Order) provides, *inter alia*,

- (1) "Where subsection (2) to (5) below apply in relation to a patient, a mental health officer shall apply to the Tribunal under section 63 of this Act for a compulsory treatment order in respect of that patient.
- (2) This subsection applies where two medical practitioners carry out medical examinations of the patient in accordance with the requirements of section 58 of this Act.
- (3) This subsection applies where each of the medical practitioners who carries out a medical examination mentioned in subsection (2) above is satisfied-
 - (a) that the patient has a mental disorder;
 - (b) that the medical treatment which would be likely to-

- (i) prevent the mental disorder worsening; or
 - (ii) alleviate any of the symptoms, or effects, of the disorder
- is available to the patient;
- (c) that if the patient was not provided with such medical treatment there will be significant risk-
 - (i) to the health safety or welfare of the patient; or
 - (ii) to the safety of any other persons;
 - (d) that because of the medical disorder the patient's ability to make decisions about the provision of such medical treatment is significantly impaired; and
 - (e) that the making of a compulsory treatment order is necessary.
- (4) This subsection applies where each of the medical practitioners who carries out a medical examination mentioned in subsection (2) above submits to the mental health officer a report (any such report being referred to in this Act as a "mental health report")-
- (a) stating that the medical practitioner submitting the report is satisfied that the conditions mentioned in paragraphs (a) to (e) of subsection (3) above are met in respect of the patient;
 - (b) stating, in relation to each of the conditions mentioned in paragraphs (b) to (e) of subsection (3) above, the medical practitioner's reasons for believing the condition to be met in respect of the patient;
 - (c) specifying (by reference to the appropriate paragraph (or paragraphs) of the definition of "mental disorder" in section 328(1) of this Act) the type (or types) of mental disorder that the patient has;
 - (d) setting out a description of-
 - (i) the symptoms that the patient has of the mental disorder; and
 - (ii) the ways in which the patient is affected by the mental disorder;
 - (e) specifying the measures that should, in the medical practitioner's opinion, be authorised by the compulsory treatment order;
 - (f) specifying the date or dates on which the medical practitioner carried out the medical examination mentioned in subsection (2) above; and
 - (g) setting out any other information that the medical practitioner considers to be relevant.

Section 58 (Medical examinations : requirements) provides:

- "(1) The requirements referred to in section 57(2) of this Act are set out in subsections (2) to (6) below.
- (2) Subject to subsection (4) below and to regulations under subsection (5) below-
 - (a) each medical examination of the patient shall be carried out by an approved medical practitioner; and
 - (b) subject to subsection (6) below, each such examination shall be carried out separately.
- (3) Where the medical examinations are carried out separately, the second shall be completed no more than five days after the first.
- (4) The patient's general medical practitioner may carry out one of the medical examinations of the patient although not an approved medical practitioner.
- (5) Except in circumstances specified in regulations, there must not be a conflict of interest in relation to the medical examination; and regulations shall specify the circumstances in which there is to be taken to be such a conflict of interest.
- (6) The medical examinations need not be carried out separately if-

- (a) where the patient is capable of consenting to the examinations, the patient consents to the examinations being carried out at the same time; or
- (b) where the patient is incapable of consenting to the examinations-
 - (i) the patient's named person;
 - (ii) any guardian of the patient; or
 - (iii) any welfare attorney of the patient,consents to the examinations being carried out at the same time.

5. At the Tribunal on 9 January 2009 in Ailsa Hospital, solicitor for the appellant argued that the medical health report prepared by Dr Tariq Mahmood did not comply with section 57(3) and (4) of the 2003 Act. It did not specify the mental disorder from which the appellant was suffering. It did not specify the symptoms of, or the ways in which the appellant was affected by, any mental disorder. It did not detail any medical treatment likely to prevent the mental disorder worsening or alleviate any of the symptoms, or effects of the disorder, which was available for the appellant. It did not detail that if the appellant were not provided with such medical treatment there would be a significant risk and to whom such risk applied. It did not detail that because of the mental disorder, the appellant's ability to make decisions about the provisions of medical treatment was significantly impaired. It did not detail that the granting of the order was necessary.

6. The Tribunal rejected the submission that the application itself was misconceived in terms of Rule 44(1)(b) of the 2005 Rules. The Tribunal proceeded to hear evidence from (i) the patient, (ii) Johanna Huston, a nurse at Ailsa Hospital, (iii) Chris Murray, the patient's medical health officer (the first respondent), (iv) Dr Ben Wilson, of Ailsa Hospital, (v) Mr Tom Shaw, solicitor for the patient, and considered a letter submitted by Dr Nicola Hodelet, the appellant's responsible medical officer (the third respondent).

7. The tribunal concluded:

"Mr M has a mental illness, specifically schizophrenia. He is now receiving anti-psychotic medication by way of depot injection to which he is already showing some positive response. He is at significant risk to self - neglect if not treated. The safety of third parties is of considerable concern in view of the patient's threatening behaviour. He has no insight into his illness and would leave hospital were he able to do so. There is no alternative to detention in hospital pending final determination of the matter."

The Tribunal accordingly made an interim compulsory treatment order in terms of section 65 of the 2003 Act. There is no appeal in this case on the grounds that the Tribunal was not entitled to make the interim compulsory treatment order on the basis of the evidence before it. The only point taken

on appeal was that the application before the Tribunal was misconceived because the second medical report which accompanied the application did not meet the requirements of the 2003 Act.

Issues at the appeal

8. There were two issues argued at the appeal hearing before me:

A. There was no live issue between the parties. The appeal was accordingly incompetent and should be dismissed. The interim compulsory treatment order was granted on 9 January 2009 for a period of 28 days. The appeal hearing took place on 1 April 2009. The interim order had then expired.

B. *Esto* the appeal was competent at this stage, the decision at the hearing at Ailsa Hospital, Ayr on 9 January 2009 was based on an error of law in that the application was misconceived as the mental health report prepared by Dr Tariq Mahmood did not conform with the provisions of section 57 and 58 of the 2003 Act. Accordingly the decision making the interim compulsory order should be set aside.

9. I deal with these in turn:

A. There was no live issue between the parties

10. Although I was addressed separately on behalf of the three respondents, essentially their submissions were to the same effect. It was suggested there were three possible propositions as to the potential effect of the lodging of the appeal to the Sheriff Principal in respect of the interim compulsory treatment order granted on 9 January 2009, namely:

(a) the lodging of the appeal maintained the interim compulsory treatment order in force pending determination of the appeal (as contended for on behalf of the patient before a Tribunal on 19 February 2009 in an appeal by the appellant to the Tribunal in respect of the grant of a further short term detention certificate on 6 February 2009). It was submitted that there was no provision of statute law or any provision of common law which would keep the interim compulsory treatment order in force beyond the period of 28 days from 9 January 2009 specified in the order;

(b) the lodging of the appeal to the Sheriff Principal suspended the effect of the interim compulsory treatment order pending determination of the appeal. If the appeal was successful, the interim order would be reinstated. All three respondents rejected this proposal as untenable;

(c) the lodging of the appeal to the Sheriff Principal had no effect on the interim compulsory treatment order made on 9 January 2009. However, the order expired on 6 February 2009. It

was suggested that only if the appeal were successful before 6 February 2009 could the order be revoked.

All three respondents submitted that the situation outlined in sub-para (c) was the correct one.

11. It was accordingly submitted that there was no live issue between the parties to be determined by me. I was invited to follow the case of *MacNaughton v MacNaughton's Trustees* 1953 SC 387 and dismiss the appeal. In that case the Lord Justice Clerk said at 392:

"Our courts have consistently acted on the view that it is their function in the ordinary run of contentious litigation to decide only live, or practical questions, and that they have no concern with hypothetical, premature or academic questions, nor do they exist to advise litigants as to the policy which they should adopt in the ordering of their affairs. The courts are neither a debating club nor an advisory bureau. Just what is a live practical question is not always easy to decide and must, in the long run, turn on the circumstances of the particular case. I doubt whether any good purpose is to be served by trying to extract any general rule from the decided cases. Each case as it arises must be considered on its merits, and the court must make up its mind as to the reality and immediacy of the issue which the case seeks to raise. Unless the court is satisfied that this is made out, it should sustain the plea of incompetency as it is only with live and practical issues that the court is concerned."

12. I was also referred to Macphail, *Sheriff Court Practice*, third edition, para 2.13:

"While the court must exercise its jurisdiction in all matters competently before it, in defended actions it will usually exercise it in the decision of live, practical questions only and will decline, although perhaps less readily than formerly, to entertain questions which are hypothetical or premature, which have been superseded by events, unless some useful purpose will be served such as the clarification of the law for the future. ..."

All three respondents submitted that there was no live issue on which to adjudicate in this case. The interim compulsory treatment order had expired on 6 February 2009.

13. Counsel for the appellant submitted that the appeal had been marked timeously, namely on 22 January 2009. He pointed out that, when a further hearing before the Tribunal took place on 3 February 2009 on this application, with a view to a further interim compulsory treatment order being made with effect from the expiry of the initial order, the Tribunal refused to consider making a further interim compulsory treatment order on the basis that an appeal was pending in respect of the existing order made by the Tribunal. It was accepted that at the date of the hearing of the appeal there was no live issue. However, when the summary application intimating the appeal had been lodged, there was a live issue between the parties at that time. It was submitted that the passage of time, over which the appellant had no control, made no difference. The summary application was under the control of the Sheriff Principal. Time was necessary to convene interested parties, have written answers lodged as advised, and fix a diet convenient to counsel, solicitors and the Sheriff Principal.

This meant that inevitably the interim compulsory treatment order would have expired before the appeal was heard. There was only a period of 15 days between the marking of the appeal and the expiry of the interim compulsory treatment order. Once the appeal was lodged, the appellant lost control of the appeal process and when the appeal would be heard. It was accepted that on this occasion, in all the circumstances, the appeal was heard relatively quickly. This was a test case on the point in issue. Parties required time to prepare and instruct counsel.

14. Counsel for the appellant referred me to Macphail, Sheriff Court Practice, third edition as follows:

- (i) "18.02 On the general principle that there should be finality in litigation, appeals should be neither necessary nor desirable, but that principle is over-ridden not only by the need to recognise the human infallibility of judges, to correct any errors they may make and to produce just results in particular cases, but also by the need to maintain and develop a uniform and coherent system of law ..."
- (ii) "18.68 In general, when an appeal is taken against an interlocutor, the effect of the appeal is to sist all execution upon the decree until appeal has been determined by the appellate court ... The operation of a sentence of imprisonment for a breach of interdict is suspended by an appeal, but the sentence, or any unexplored portion, must be served after the date of dismissal of the appeal. The effect of an interlocutor *ad factum praestandum* is suspended until it is adhered to by the appellate court."

It was suggested there was no provisions in the 2003 Act to allow the view to be taken that the general rule set out in 18.68 of Macphail should not apply. The effect of the appeal was to sist all execution upon the order until the appeal had been determined. It was submitted that, under the 2003 Act as framed, there could be no continued detention of the patient upon the marking of an appeal.

15. Even if the appellant was wrong on that issue it was submitted that the appellant was still entitled to have his appeal heard where it had been competently taken. It was in the interests of justice that the substantive grounds of appeal be considered by the court. To deprive the appellant of his right of appeal would deprive the appellant of the statutory protection afforded him by the Act and would hinder the development of mental health law thereby. The consequences of upholding the respondent's preliminary plea would be to leave the law on the substantive issue uncertain.

Decision

16. I am prepared to consider the substantive grounds of appeal in this case. I refer to:

- (i) para 2.13 of Macphail

"A court ... will decline, although perhaps less readily than formerly, to entertain questions ... which had been superseded by events, unless some useful purpose will be served such as the clarification of the law for the future"

(ii) *Humphreys v S* 1986 SLT 683 which dealt with detention in a place of safety. Lord President Emslie giving the opinion of the court, stated:

"... It is desirable for this court to make this clear for the guidance of children's hearings and sheriffs in the future. In any event we have decided to deal with the appeal on its merits for such value as that exercise may have ..."

17. In my opinion there are two useful purposes in proceeding to decide the substantive issues in this case:

- (a) The Tribunal have made a very significant decision about the appellant in respect of his mental health. The appellant's case is that the order was incompetently made as it breached Rule 44(1)(b) - albeit on an interim basis. That order fundamentally affects his reputation. It is a matter of record that the Tribunal took a certain view on 9 January 2009 of the appellant's mental condition. In my opinion the appellant should not be denied the right to challenge that decision which has been made against him, albeit the period of the order has now expired.
- (b) There are very few cases reported on the interpretation of the provisions of the 2003 Act, and even less on the application of Rule 44(1)(b) as to the circumstances in which an application might be held to be misconceived. I accept it would be helpful if the number of reported decisions on the application of the provisions of the 2003 Act was increased.

18. I require to give my view on the submission which was made to me on behalf of the appellant that, when the appeal was marked, the interim compulsory treatment order was suspended pending the determination of the appeal. I do not accept that submission. In my opinion, notwithstanding the marking of the appeal, the order remained in force until the date of its expiry, namely 6 February 2009.

19. I refer to the following:

(i) *Mrs Elizabeth Laurie named person for the patient AL v The Tribunal & George MacDonald & Mr Peter D Mascao* Paisley Sheriff Court dated 30 August 2007. Sheriff Principal B A Kerr, QC stated:

"The Tribunal, however, are not in my opinion in the position of an umpire presiding over a contest between two or more adversaries who present their cases and then ask for a decision on those cases, as

would be the position for a Sheriff or Judge presiding over a proof in a reparation action or a contractual dispute litigated in accordance with traditional pools of adversarial procedure. Instead, there is in my opinion an inquisitorial element in the approach which the Tribunal is obliged to adopt in reaching the decisions which it is called upon to make. This is apparent in my view from *inter alia* the wording of the Tribunal's procedural rules, to which I have referred above, which clearly envisage the frequent appearance before the Tribunal of "relevant persons" (a category widely defined), who may well not be legally represented and who may require the assistance of the Tribunal in obtaining evidence material to the issues to be decided or in bringing out such evidence from the witnesses who testify before the Tribunal. It is also apparent, I think, from section 1 of the Act, which sets out a long list of matters to which a person (which I take to include the Tribunal) must have regard when discharging the function under the Act in relation to a patient: this I take to mean that the Tribunal are required to have regard to the matters listed, as far as relevant to their function, whether or not the parties appearing before them raise those matters for their consideration, or to make submission on them.

(ii) *Glasgow City Council v D H & T H* dated 7 July 2003 where Lady Cosgrove, giving the opinion of the court said:

"Furthermore it has to be born in mind that an application for a remedy such as an exclusion order differs very significantly from ordinary civil litigation in respect that such an order is not concerned with achieving a permanent determination of rights and duties but with securing the protection of vulnerable persons in the light of information and advice which may change from time to time."

(iii) *Stirling v D* 1995 SC 358 at 363 where Lord Murray, giving the opinion of the court said:

"... If a child at risk is subject to a supervision requirement for its own protection, it does not seem to us to be in keeping with the purposes of the Act that, pending appeal against discharge of that requirement there should be no supervision for the protection of that child."

In my opinion, when an interim compulsory treatment order or a compulsory treatment order is made, while this reduces the patient's liberty, it allows the patient to receive medical treatment said to be likely to prevent the patient's mental disorder worsening or to alleviate any of the symptoms or effects of the disorder. An order also allows a patient to be provided with medical treatment where, in the Tribunal's view, if this did not happen, there would be a significant risk to the health, safety or welfare of the patient or to the safety of any other person. Such an order comes into force immediately it is made. This is not a litigation. The whole procedure is designed for the welfare of the patient. The application is made by the mental health officer, who is obliged to act if he receives the information specified in the 2003 Act in reports from the patient's responsible medical officer and his general practitioner. The Tribunal making the order includes a qualified psychiatrist. I take the view that it would be neither sensible nor logical that the Scottish Parliament should pass legislation in these circumstances, stipulating that an order may be made with immediate effect for the welfare of the patient, and at the same time allow any such order to be circumvented simply by the lodging of an appeal to the Sheriff Principal. This order was made on 9 January 2009 for a period of 28 days. In

my opinion it continued in force, despite the marking of the appeal, until it expired on 6 February 2009. However, for the reasons I have already given, I am prepared to deal with the substantive appeal.

B Whether the decision made by the Tribunal on 9 January 2009 was based on an error of law in that the application was misconceived as the mental health report prepared by Dr Tariq Mahmood did not conform with the provisions of sections 57 and 58 of the 2003 Act.

20. Counsel for the appellant reiterated the submissions on the contents of the Mental Health report prepared by Dr Tariq Mahmood which were made by solicitor for the appellant to the Tribunal and recorded by me in para 5 hereof. Counsel also referred to a publication by the Scottish Government entitled "Mental Health (Care and Treatment) (Scotland) Act 2003 Code of Practice". He advised me that this document had been sent to all practitioners who were involved in mental health care. He took the view that legal and medical practitioners paid heed to it as an annotated guide to the Act. I was referred to section 274(1) of the 2003 Act which provides:

"The Scottish Ministers shall, in accordance with this section, draw up, give effect to and publish a code of practice giving guidance to any person discharging functions by virtue of this Act ... as to-

- (a) the discharge of such of those functions and
- (b) such matters arising in connection with the discharge of these functions

as they think fit."

"(4) any person in the discharge of functions by virtue of this Act ... shall have regard (so far as they are applicable to the discharge of those functions by that person) to the provisions of any code of practice published under subsection (1) above for the time being in force. "

21. It was submitted that the Code of Practice related to medical practitioners. It was accepted that subsection (5) provides:

"The references in subsections (1) and (4) above to a person discharging functions by virtue of this Act or part VI (mental disorder) of the 1995 Act does not include references to ...

- (b) the Tribunal.

The general note attached to Greens annotated version of this Act compiled by Ronald A Franks and David Cobb states:

"The section makes provision for a Code of Practice to be drawn up and published by Scottish Ministers containing guidance to those persons discharging functions under the Act. ... Such persons must have regard to the Code of Practice ... The Courts, prosecutors and the criminal Courts, the Tribunal and the Commission are specifically excluded from this requirement, but are likely to have regard to the code of practice when considering the discharge of functions by other persons. The purpose of the Code of Practice is to give guidance on the working of the legislation and to identify and promote issues of good practice. A Code of Practice must always be

read alongside and in conjunction with the legislation. In the unlikely event of the terms of a conflict between the Code of Practice and the legislation, the legislation will prevail."

22. Counsel for the appellant referred me to paras 17, 18, 18, 20 and 26 of the Code of Practice. Counsel for the first respondent and solicitors for the second and third respondents emphasised that the Tribunal were excluded from those who required to have regard to the Code of Practice. It was submitted that it was the Tribunal in this case who were assessing whether the mental health reports before the Tribunal met the statutory requirements. As far as the Tribunal was concerned, the Code of Practice was of little assistance. The Tribunal did not look at the Code of Practice, but to the provisions of the Act. It was the Tribunal's task when considering whether the medical report provided by Dr Tariq Mahmood satisfied the requirements of sections 57 and 58 of the 2003 Act to have regard to the statutory provisions and to decide whether the medical report as presented met these statutory requirements.

23. I accept that submission. I accordingly propose, as did parties before me, to go through the various statutory requirements and comment thereon. I do so on the basis of the decision in the case of *S B v Dunbar & MHTS* 2007 SCLR 777 where the court accepted the submission that:

"Taken as a whole, it was quite clear that Dr Odemy's report indicated that he considered that the making of a compulsory treatment order was necessary, that the patient should be detained in a specified hospital and that she should be given medical treatment as defined in the Act and in accordance with the provisions of part 16 of the Act."

I do so also having regard to the circumstances in which Dr Tariq Mahmood prepared his report. In terms section 57 of the 2003 Act, a medical health officer is obliged to apply for a compulsory treatment order if two medical practitioners carry out medical examinations of the patient in accordance with the requirements of sections 57 and 58 of the 2003 Act. In this case the mental health officer, the first respondent, was presented with the reports from Dr Hodelet (the third respondent) who was the appellant's responsible medical officer and Dr Tariq Mahmood, his general practitioner. He took the view that both reports met the requirements of sections 57 and 58. He was not being asked to grant a compulsory order. He was required to place these reports before the Tribunal in order that the Tribunal might decide, on the basis of all the evidence which it heard or received, whether or not to make a compulsory treatment order or an interim compulsory treatment order. This was an action which the mental health officer was taking for the welfare of the appellant on the information available to him. He was not embarking on a litigation against the appellant. The Tribunal then considered, not only the written application, the two mental health reports, the mental health officer's report and his proposed care plan, but also oral evidence from the appellant, Joanna

Huston, a nurse in the hospital, the first respondent, Dr Ben Wilson of Ailsa Hospital and Mr Tom Shaw the solicitor for the appellant, and written evidence from the third respondent, the appellant's responsible medical officer. Having considered all that evidence, the Tribunal granted the application.

24. It is important, when considering whether the information in the two mental health reports contained sufficient information to comply with the requirements of sections 57 and 58 of the 2003 Act, not only to look at the application as a whole, but to bear in mind that an order would be made by the Tribunal not on the basis of the application form and the mental health reports alone, but on the basis of all the evidence presented to it. The medical reports with the application form are only the means by which the whole procedure is commenced. I emphasise that the application is made by the mental health officer in the interests of the appellant. The reasons for the conclusions set out in the mental health reports which accompany the application do not require to be spelt out with the precision of a legal document. The reasons require to be sufficient to allow the medical health officer, taking each report as a whole, to conclude that the requirements of sections 57 and 58 have been met and that he should proceed to make an application to the Tribunal and to present them with a proposed care plan in terms of the 2003 Act.

25. Against that background, I comment on the statutory requirements as follows:

(i) Section 57(2). "This subsection applies where two medical practitioners carry out medical examinations of the patient in accordance with the requirements of section 58 of this Act."

At page 2 of form CTO2, Dr Tariq Mahmood indicates that he examined the patient on 17 December 2008 and that he did so "separately from the other medical practitioner providing a mental health report" He states at page 2 that he had seen the appellant at Auchinleck Health Centre at the time of registration. On examination on 17 December 2008 in the IPCU the appellant "refused to engage". Dr Tariq Mahmood confirmed this again at page 3. It is clear that a medical examination was carried out by Dr Tariq Mahmood as required.

(ii) Section 57(3) "This subsection applies where each of the medical practitioners who carries out a medical examination mentioned in subsection (2) above is satisfied:

(a) **"that the patient has a mental disorder"** At page 3 of form CTO2, Dr Tariq Mahmood indicates by using a shaded circle "that the patient has a mental illness". In terms of section 328 of the 2003 Act "mental disorder" means *inter alia* "any mental illness". In addition at page 3 Dr Tariq

Mahmood concludes "from his history and records it is obvious he suffers from schizophrenia". The requirements of the sub-clause are met.

(b) that medical treatment which would be likely to -

(i) prevent the mental disorder worsening or

(ii) alleviate any of the symptoms or effects of the disorder, is available for the patient.

At page 4 of the form CTO2, Dr Tariq Mahmood has completed the box beneath the statement "I am satisfied that medical treatment is available which would be likely to prevent the mental disorder worsening or alleviate any of the symptoms or effects of the disorder". The form continues "Please state below the patient's needs for medical treatment for medical disorder, the proposed medical treatment that will meet those needs, and who will provide that medical treatment." In his handwriting Dr Tariq Mahmood states "continue treatment as per advised by Dr Nicola Hodelet, consultant psychiatrist Ailsa Hospital, Ayr." In my opinion, the report meets the requirements of this subsection.

(c) "that if the patient were not provided with such medical treatment there would be a significant risk (i) to the health, safety or welfare of the patient; or (ii) to the safety of any other person"

At page 3 of form CTO2, Dr Tariq Mahmood has indicated by shading the relevant circles "I am satisfied, for the reasons stated below, that if the patient were not provided with treatment there would be a significant risk to the patient's health, safety or welfare and to the safety of any other person". In handwriting, below that confirmation, he states "I have not been able to examine Mr M, but from his history and records it is obvious that he suffers from schizophrenia. He is known to have relapses and needs treatment for his own safety and welfare." While he states "I have not been able to examine Mr M", Dr Tariq Mahmood, in my opinion means that in the sense that the appellant refused to engage with him. They did have a face to face meeting. Dr Tariq Mahmood was entitled to have regard to the hospital records in producing his report. I consider what is said complies with the requirements of the subsection.

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

At page 5 of form CTO2, Dr Tariq Mahmood has completed the box beneath that typed statement. In my opinion by doing so he is confirming the statement to be his view. He adds in writing: "Mr M refused to engage. He was reported coming in and out of his room and nursing station. He did not seem to have any insight. He refuses to engage and have any meaningful discussion for his treatment and future welfare". The requirements of this subsection are met.

(e) "that the making of a compulsory treatment order is necessary"

There is a statement at page 5 of form CTO2: "I am satisfied, for the reasons stated below, that the making of a compulsory treatment order is necessary e.g. explain why the patient cannot be treated on a voluntary basis". In my opinion Dr Tariq Mahmood confirms that typed statement at page 5 of CTO2 by stating in the box immediately beneath it: "He has been refusing to comply with his treatment in community. He seems to have relapsed." The requirements of this subsection are met.

(iii) Section 57(4) "this subsection applies where each of the medical practitioners who carries out a medical examination mention in subsection (2) above submits to the mental health officer a report (any such report being referred to in this Act as a "mental health report")

(a) stating that the medical practitioner submitting the report is satisfied that the conditions mentioned in paragraphs (a) to (e) of subsection (3) above are met in respect of the patient.

From what I have recorded above, I take the view that Dr Tariq Mahmood was so satisfied.

(b) stating, in relation to each of the conditions mentioned in paragraphs (b) to (e) of subsection (e) above, the medical practitioner's reasons for believing the condition to be met in respect of the patient.

Dr Tariq Mahmood's reasons for believing these conditions to be met have been set out by me above when dealing with the requirements of section 57(3)(b) to (e). Counsel for the appellant criticised these reasons as lacking in specification and detail and not meeting certain of the matters specified in the Code of Practice. While it is true that further specification could well have been given, the question for me is whether information which has been given is sufficient to allow the mental health officer to present the application to the Tribunal, who will then decide, after considering all the evidence presented to them, whether to grant an interim compulsory treatment order. Taking the application as a whole, against that background, I am not prepared to hold that the requirements of the 2003 Act have not been met.

(iv) Section 57(4)(c)"specifying (by reference to the appropriate paragraph (or paragraphs) of the definition of "mental disorder" in section 328(1) of this Act) the type (or types) of mental disorder that the patient has"

At page 3 of form CTO2, Dr Tariq Mahmood shaded the circle indicating "The patient has a mental illness". In terms of section 328(1) of the 2003 Act "mental disorder" means any - (a) mental illness". Further Dr Tariq Mahmood adds on page 3: "From his history and records it is obvious that he suffers from schizophrenia".

(v) Section 57(4)(d) "setting out a description of (i) the symptoms that the patient has of the mental disorder and (ii) the ways in which the patient is affected by the mental disorder.

At page 3 of form CTO" Dr Tariq Mahmood indicates that the patient "refuses to engage". At page 5 of CTO2, Dr Tariq Mahmood states "Mr M refuses to engage. He was reported coming in and out of his room and nursing station. He did not seem to have any insight. He refuses to engage and have any meaningful discussion for his treatment and future welfare" and "He has been refusing to comply with his treatment in the community. He seems to have relapsed". Again it was said that there required to be further specification to meet this provision. I refer to the comments which are made when dealing with section 57(4)(b). In my opinion there has been compliance with this provision.

(vi) Section 47(4)(e) "specifying the measures that should, in the medical practitioner's opinion, be authorised by a compulsory treatment order".

At page 5 of form CTO2, Dr Tariq Mahmood shaded the circles under the printed statement "it is my opinion that the following compulsory measures should be authorised by the compulsory treatment order (a) detaining a patient in a specified hospital (b) giving the patient medical treatment in accordance with part 16 of the Act". It is clear that those framing CTO2 did not envisage any further specification. It is clear from section 16 of the 2003 Act that treatment under section 16 would not be static and would depend on the responsible medical officer's view of the patient's progress as to what his treatment should be at any given time. "Medical treatment in accordance with part 16 of the Act" is, in my opinion, sufficient specification.

(vii) Section 57(4)(f) "specifying the date or dates on which the medical practitioner carried out the medical examination mentioned in subsection (2) above"

At page 2 of form CTO2, Dr Tariq Mahmood indicates that he examined the patient on 17 December 2008.

(viii) Section 57(4)(g) "setting out any other information that the medical practitioner considers to be relevant"

Dr Tariq Mahmood did not make any other observation. This is a discretionary matter and there was no requirement on him to do so.

26. As far as section 58 of the 2003 Act is concerned, authority is given for one of the medical health reports to be prepared by the patient's general medical practitioner. There were not more than five days between the two reports. There was no conflict of interest. The examinations were carried out separately. There is no breach of the requirements of section 58 of the 2003 Act.

27. In the whole circumstances, I am not prepared to accept that in terms of Rule 44(1)(b) of the 2005 Rules the application presented to the Tribunal on 9 January 2009 was misconceived as it was made other than in accordance with the Rules and had no reasonable prospect of success. I take the view that Dr Tariq Mahmood's report, taken as a whole and made in the circumstances I have outlined in paras 23 and 24 hereof, meets the requirements of the 2003 Act. Notwithstanding the fact that the interim compulsory treatment order has expired, I hold that the Tribunal was entitled to make the order on 9 January 2009. The appeal accordingly fails.

Other matters

28. I was informed that the Tribunal, when asked to make a further interim compulsory treatment order on 3 February 2009 on the original application, declined to do so as the competency of the original application was the subject of this appeal. I understand the appellant was in fact detained after 6 February 2009, when the original interim compulsory treatment order expired, on a further short terms detention certificate. I was asked to give my opinion as to whether the Tribunal was correct to refuse to hear the application for a further interim compulsory treatment order in respect of this application on 3 February 2009.

29. I do not think it is appropriate that I should do so formally. I do not have access to the papers which were before the Tribunal hearing on 3 February 2009 and the issue is not, and has never been, an issue in this appeal. I would only comment that it appears inconsistent with good practice that there should be further procedure on an application which has been appealed, on the ground that it is fundamentally incompetent, until that appeal has been resolved. I would further comment that the course adopted in this case, which I understand involved presentation of a fresh application for a compulsory treatment order on the expiry of the short term detention certificate granted on 6 February 2009, would appear to be the appropriate way in which to proceed.

30. Parties made various submissions to me about rights of appeal under the Act. I do not consider these are issues for me in this process. I do not propose to rehearse them or to comment thereon. My task is to deal with appeals taken against decisions of the Mental Health Tribunal for Scotland made in terms of the 2003 Act.