



FIRST DIVISION, INNER HOUSE, COURT OF SESSION

**Lord President
Lord Philip
Lord Kingarth**

[2007] CSIH 57

OPINION OF THE COURT

delivered by THE LORD PRESIDENT

XA59/07

in

APPEAL

by

THE SCOTTISH MINISTERS

Appellants;

against

S.W.

Respondent:

**Act: McNeill; R. Henderson, Office of the Solicitor to the Scottish Executive
Alt: Govier; Legal Services Agency
Non Participating Party; The Mental Health Tribunal for Scotland**

20 June 2007

[1] This is an appeal by the Scottish Ministers against a determination of the Mental Health Tribunal by which it, by order made on 7 and communicated on 22 March 2007, granted with immediate effect a conditional discharge in respect of S.W., the patient in question.

[2] The background is that the patient pled guilty in 1998 to culpable homicide on the basis of diminished responsibility and various hospital orders were made in terms

of the Criminal Procedure (Scotland) Act 1995 with respect to his detention subject to restriction on discharge.

[3] It appears that his mental health has improved since that time and a reference was made to the Tribunal in relation to future arrangements in respect of him. The matter which was primarily in issue between the parties, that is to say between the Ministers and the patient, was whether or not the patient was still suffering from a mental disorder. He, the patient, had sought an absolute discharge on the basis that he was no longer so suffering. The Tribunal, after a hearing of several days and an adjournment to consider its position, reached the view that the patient was continuing to suffer from a mental disorder which gave rise to a risk of harm primarily to himself but also in certain circumstances potentially to others. In these circumstances it decided that any discharge must be conditional. A matter which required, however, to be determined before any order of conditional discharge could be made was whether the time was right for making such an order. That depended upon certain procedures being satisfactorily carried through - in particular satisfactory experience in relation to an increasing number of nights per week during which the patient was free to leave the hospital and live in his own accommodation.

[4] The Tribunal having issued its judgment some time before 7 March 2007 in relation to the substantive issue before it, then appointed parties to be heard on 7 March in relation to whether there should be any further deferral in the implementation of the conditional order. The Tribunal having received further information from the Responsible Medical Officer and the mental health officer and heard parties, the Tribunal Chairman, following a short adjournment, made an oral statement of the Tribunal's position - namely, that the conditional discharge should be immediately effective. Nothing was, however, recorded in writing by the Tribunal by

way of facts found by it relative to nor its reasons for that decision (that is, that the conditional discharge be immediately effective). Certain notes were made, on behalf of the parties, of the Chairman's remarks. Their notes are not identical as to what was said, in particular the note taken on behalf of the Ministers does not include a statement that the patient was "in a position to cope with a full order [that is a full conditional discharge order] today". That is not to say that that was not said by the Tribunal Chairman. But, nonetheless, this court is left in uncertainty as to what was actually said at that time. Thereafter there was issued to parties a revised version of the judgment which had been issued in relation to the substantive issue, with certain amendments directed to certain practical suggestions which had been discussed at the hearing on 7 March. But there was not associated with that intimation any statement of the factual basis upon which the Tribunal had reached the view that an immediate conditional discharge was appropriate, contrary to the contention being advanced by the Scottish Ministers that certain further steps required to be taken before such an order should take effect.

[5] The statutory provision in relation to matters of that kind is to be found in the Schedule 2 to the Mental Health (Care and Treatment) (Scotland) Act 2003 which, by paragraph 13(3), provides that "a decision of the Tribunal shall be recorded in a document which contains a full statement of the facts found by the Tribunal and the reasons for the decision". That statutory requirement is reflected in the terms of the relevant rules of procedure and practice contained in The Mental Health Tribunal for Scotland (Practice and Procedure) (No. 2) Rules 2005, and in particular in Rule 72(7) thereof. It is not surprising that a provision of that kind should be made in relation to decisions of such importance, both to the patient and the community, as orders of the kind here in question are. It was not disputed on behalf of the patient that the

Tribunal had failed to comply with its statutory duty in that no document had been brought into existence which recorded a full statement of the facts found by the Tribunal and its reasons for the decision in question, that is the decision that a conditional discharge order should come into effect immediately.

[6] Mr. Govier, on behalf the patient, submitted that, notwithstanding that there had been a failure to comply with that procedural requirement, in the circumstances it was not appropriate for us to allow this appeal. A question does arise in relation to the basis upon which this appeal is brought. Section 324(1)(b) of the statute provides that appeals may be brought to the Court of Session under section 322(2) but only on one or more of the grounds mentioned in section 324(2). That subsection provides that the grounds referred to in subsection (1) are “(a) that the Tribunal’s decision was based on an error of law; (b) that there has been a procedural impropriety in the conduct of any hearing by the Tribunal on the application; (c) that the Tribunal has acted unreasonably in the exercise of its discretion and (d) that the Tribunal’s decision was not supported by the facts found to be established by the Tribunal.”

[7] Mr. McNeill, on behalf of the Scottish Ministers, invited us to give consideration to whether or not an appeal might properly lie under either of, or perhaps more than one of them, subparagraphs (b), (c) and (d). We are of the view that this appeal does properly fall within subparagraph (b), albeit that involves a somewhat expansive construction of the phrase “in the conduct of any hearing”. But having regard to the structure of the rules, which include rule 72(7) within the group of provisions under the heading “The hearing” and to the natural meaning of the expression, we are satisfied that its failure to comply with the requirements in relation to the giving of reasons and the factual basis for its decision can be regarded as a procedural impropriety in the conduct of the hearing, and therefore we are satisfied

that this court has jurisdiction under this process to have regard to what has happened and to allow the appeal if satisfied it is otherwise well-founded.

[8] Mr. Govier submitted that, although there had been a failure to comply with the statutory requirement, that had not materially affected the decision of the Tribunal; no party could have been in any doubt as to the facts upon which the Tribunal had proceeded. In that regard he relied on what had been recorded by the patient's representative as had been said at the hearing. Again we have to note that we cannot be fully satisfied as to what was said on that occasion and, in any event, we are not satisfied that it can be said that no mischief would be done by refusing the appeal. We are satisfied that in a case of this kind it is clearly of importance that the Tribunal should comply with its statutory and regulatory obligation to provide the factual foundation and the reasons for its decision. That could, in the circumstances of the present case, have been done in relatively short compass and might yet be done under the procedure which we envisage now happening.

[9] Mr. Govier submitted to us that this court should hold in the circumstances of the case that it was appropriate that there should be a conditional discharge as at 5 March of this year. But having regard to the absence of any factual basis in the material before us to allow us to reach any decision on the matter, quite apart from the disability in ordinary circumstances of these matters being determined by an expert tribunal, we are not satisfied that is the appropriate way forward. We are satisfied that what is appropriate is what was urged on us by Mr. McNeill, namely, that the case be remitted to the Tribunal with a view to their considering in the whole up-to-date circumstances of the case - and that may include the need to hear further evidence on the matter - the issue whether the conditional discharge, which had already been decided on in principle, should have immediate effect; and it recording

its decision on that issue in a document which contains a full statement of the facts found by it on that issue and the reasons for that decision.

[10] For these reasons we allow the appeal.