B291/07

JUDGEMENT OF
SHERIFF PRINCIPAL BA KERR, QC

in the cause

MRS ELIZABETH LAURIE, named person for the patient "AL"
Applicant/Appellant

against

THE MENTAL HEALTH TRIBUNAL FOR SCOTLAND
First Respondents

and

DR GEORGE MACDONALD, Responsible Medical Officer
Second Respondent

and

MR PETER DI MASCIO, Mental Health Officer
Third Respondent

Act: Mr Bowen, Counsel for the Appellant
Alt: Mr Campbell, Counsel for the First Respondent
Mrs Jack, Counsel for the Second Respondent
Ms Cherry, Counsel for the Mental Health Officer

PAISLEY, 30 August 2007

The Sheriff Principal, having resumed consideration of the appeal Allows same, Sets aside the decision of the Tribunal dated 19 and issued on 28 February 2007 and Remits the case to the Tribunal for consideration anew; Finds the first, second and third named respondents liable jointly and severally to the appellant in the expenses of the appeal procedure; Allows an account thereof to be given in and Remits same when lodged to the Auditor of Court to tax and to report thereon.

BA Kerr

NOTE:

Introduction

In this appeal a direct challenge is mounted to the validity of a decision of the Mental Health Tribunal for Scotland (MHTS) on its merits. The appeal is brought to the Sheriff Principal under section 320(2) of the Mental Health (Care & Treatment) (Scotland) Act 2003 and proceeds on the grounds set out in section 324(2)(c), and perhaps (a), of that Act. The appellant is the mother and "named person" of a male patient currently detained in Dykebar Hospital under a compulsory treatment order (CTO): he was detained there in July 2004 under the provisions of previous legislation (the Mental Health (Scotland) Act 1984) which became the present CTO in October 2005 by virtue of certain transitional provisions. In April 2006 she made an application to the Tribunal under Section 100(2)(a) of the 2003 Act for an order revoking the CTO but at the close of the Tribunal's hearing of the matter on 5 February 2007 the motion made by her solicitor on her behalf was for variation only of the CTO in terms of section 103(3)(b)(i) by modifying the measures specified in it to the effect of substituting for hospital detention appropriate community based measures so as to allow the patient to return home to her house to reside there under supervision and with support in terms of a Community Care Assessment by John Garroway, social worker dated 22 August 2006. The designated mental health officer (MHO), who was the only other party represented before the Tribunal, sought a refusal of the application in terms of section 103(3)(c) and that was the order granted by the Tribunal in its final determination issued on 28 February 2007. It is against that order refusing the application that the present appeal is taken.

The judgement or decision of the Tribunal is a document dated 19 February 2007 comprising seventy-two numbered paragraphs from which it is apparent that their decision to refuse the application was informed by their being satisfied that the most appropriate course for the patient's future treatment at the present stage is for him to be transferred to an institution named Linden House near York in England and not to be discharged into the care of his mother in the community. The decision they had to make was ultimately one between two available options for the patient's future,

namely either his discharge to care at home (the option favoured by his mother and named person with the support of certain psychiatrists) or his transfer to Linden House for further treatment in a secure environment (the option favoured by his designated RMO and designated MHO). Implementation of the first of these options requires variation of the CTO whereas the second apparently does not and would be effected instead by a warrant issued by the Scottish Ministers authorising the patient's removal to England on an application made to them by the patient's responsible medical officer (RMO) under the Mental Health (Cross-border transfer: patients subject to detention requirement or otherwise in hospital) (Scotland) Regulations 2005, a statutory instrument promulgated under sections 290 and 326 of the Act. Linden House Hospital is a private institution operated by a company called Care Principles Ltd and is described as providing a specialised autism service in its new medium-secure Asperger unit. The patient (hereinafter referred to as "AL") has been diagnosed as suffering from Asperger's Syndrome.

AL's history as a psychiatric patient is of some longevity. He was diagnosed as mentioned above by Mr John Cameron, a consultant clinical psychologist in 1997 but since 1995 there has been a series of violent assaults on others, chiefly but not entirely young women, or threats made of violence against such persons. Some of these assaults have been serious and these events led ultimately to his detention in Dykebar Hospital and his admission to the Intensive Psychiatric Care Unit there on 14 July 2004. Within two weeks however he seriously assaulted a female nurse there. By the time of his mother's application to the Tribunal in April 2006 there had not been a further violent incident and the application at first proceeded on an apparent footing that there might be agreement among all concerned with AL's welfare that he could be released into his mother's care once a suitable care package of support had been devised. On 21 August 2006 however AL once again assaulted a female member of the nursing staff in Dykebar Hospital and his RMO thereafter considered AL to present a greater risk to others than he had previously thought and too great a risk to be simply discharged into his mother's care even with suitable packaging. The RMO accordingly approached Dr Isobel Campbell of the State Hospital at Carstairs who furnished a report dated 4 October 2006 saying that, while his present position in Dykebar was unsuitable to his needs, the patient should not be transferred to the State Hospital unless and until other avenues had first been tried without success: she

recommended an approach to Linden House or a similar institution in the first instance. The RMO obtained from Dr Mark Davidson an updated risk assessment on AL dated 1 December 2006 which viewed him as presenting now an increased risk and acknowledged that he would be referred to a specialised unit on autistic spectrum disorder. The RMO also approached Linden House and Dr Kareem of that institution with a colleague interviewed AL on 21 November 2006 before furnishing a report dated 5 December 2006. By this route the Linden House option became a matter for the Tribunal's consideration in the latter stages of its hearing of the application (that is to say in January and February 2007).

The Tribunal at paragraph 7 of their decision list the persons from whom they heard evidence, ie oral testimony from a witness box subject to cross-examination. At paragraph 9 of their decision they list the documents lodged which they took into consideration.

Against this background there were four parties separately represented before me by counsel at the hearing of the appeal, namely (i) the applicant/appellant, (ii) the MHTS, (iii) the RMO and (iv) the MHO. I was asked on the appellant's behalf to allow the appeal and set aside the Tribunal's decision in terms of section 324(5)(a) of the Act and then under section 324(5)(b)(ii) to remit the case to the same Tribunal for consideration anew. It was not suggested that I would be in a position to substitute a decision of my own in terms of section 324(5)(b)(i) and indeed it was suggested positively that I would not. I was not invited to make any directions under section 324(6), the view expressed by the appellant's counsel being that there was no need to reconstitute the Tribunal differently and that it would be sufficiently apparent to them from the terms of my decision in the appellant's favour what error(s) they had made in reaching their first decision now appealed for them to understand how they should conduct themselves in their reconsideration of the matter. In any event it might well be that circumstances would have changed materially by the time the Tribunal was reconvened to consider matters anew and there might therefore be additional or different considerations for them to take into account. The motion accordingly was for a straightforward remit to the same Tribunal to consider the case afresh. Counsel for the three respondents, while each inviting me of course to refuse or dismiss the

appeal, did not suggest that I should follow any other course than that proposed for the appellant in the event of my deciding to allow the appeal.

Non-contentious submissions

Counsel for all parties were agreed that the decision of the Tribunal was a discretionary one and constituted an exercise by them of a judicial discretion. In this respect it appears to have been the intention of the 2003 Act to alter the pre-existing position whereby the sheriff decided such matters acting in an administrative capacity. Counsel collectively referred me to a single well-known decision of the House of Lords in an English case as authority for the appropriate test to be applied by an appellate court in deciding whether to overturn or interfere with a discretionary decision of a lower court or tribunal sitting at first instance, namely *G v G (Minors: Custody Appeal)* 1985 1WLR 647, which for the avoidance of doubt in Scotland was expressly adopted as the correct test to apply by Lord President Emslie in *Britton v Central Regional Council* 1986 SLT 207. I was referred to passages of the speech of Lord Fraser of Tullybelton at pages 651A to 653G of the report of the English case and also to the speech of Lord Bridge of Harwich at page 656 of that report. In Lord Fraser's speech a number of formulations of the appropriate test are to be found, either in his Lordship's own words or in passages quoted by him with approval from the opinions or speeches of other judges in other decided cases. As his Lordship said, it is not useful to attempt to analyse and reconcile all the various expressions used by different judges in different cases but fundamentally it is not for an appellate court to interfere with a discretionary decision of the court below merely because it takes a different view of the matter in hand; instead it is necessary for it to be shown that the court below has in exercising its discretion proceeded upon some wrong principle or has produced a decision which is plainly wrong falling outwith the parameters within which reasonable disagreement is possible or has overlooked or inadequately treated some relevant consideration or has fallen into error in its manner of carrying out the necessary balancing exercise. Counsel were at one in urging me to apply such a test but of course at variance as to what should be the result of its application. Much of what counsel said to me revolved around the words "plainly wrong" but from what I have just said it will be seen that those words embody only one aspect of the test and there are other aspects to it.

Counsel for the first named respondents (MHTS) referred me to certain provisions of the 2003 Act and the procedural rules promulgated under it (The Mental Health Tribunal for Scotland (Practice & Procedure) (No.2) Rules 2005) in order to demonstrate that the new régime created by them envisaged the Tribunal having a broader approach to the treatment of evidence before it than was permitted, for instance, in an ordinary court of law hearing an ordinary reparation proof under traditional rules of adversarial procedure. In particular I was referred to sections 1 and 64 of the Act *inter alia* and to rules 4, 60, 61, 62 and 63 of the Practice & Procedure Rules *inter alia*. These rules were said to indicate the conferring on the Tribunal of a wide discretion in its manner of dealing with the evidence required for it to perform its function, which at one point was suggested to be "semi-inquisitorial" rather than one governed by the normally adversarial procedure of the ordinary courts. I did not understand any of the other counsel to disagree with the propositions advanced by their colleague in this regard and indeed counsel for the second and third named respondents each expressly adopted the submissions of counsel for the other respondents who had gone before them.

Submissions of parties

Counsel for the appellant in his first address at the outset of the hearing of the appeal took me through the Tribunal's decision more or less paragraph by paragraph and made criticisms of their treatment of several matters discussed in it. Chief among these criticisms were (in order of their presentation) the following. In the first place it was said that the RMO's change of position following upon the assault by the patient on a female nurse on 21 August 2006 was unwarranted when the logic of the situation and the circumstances of that assault were properly considered. The risk of such an assault had been recognised in a risk assessment at least a year earlier and the risk had eventuated because of a change in régime in which the staff had failed to heed warnings given to them. The risk itself remained the same even although it had now eventuated and the occurrence of an assault could not logically justify the RMO's departure from his earlier position of supporting a move to care in the community for the patient to a new position of requiring his continued detention in hospital, perhaps in conditions of even greater security. The implication appeared to be that the

Tribunal were wrong to accept uncritically this erroneous change of position by the RMO which had been fundamental to the idea of transferring the patient to Linden House which the Tribunal had now erroneously endorsed. In the second place the Tribunal's treatment of Dr Kareem's report from Linden House was attacked as failing to acknowledge that it was a mere report not spoken to by its author in evidence and failing to recognise that different weight required to be attached to something having the status therefore of "hearsay" only. This submission was made under reference to paragraphs 52 and 53 of the Tribunal's judgement. In the third place it was pointed out under reference to paragraph 54 of the Tribunal's judgement that any therapeutic benefit to be derived by the patient from a transfer to Linden House was viewed merely as something which could not be ruled out and it was said that the Tribunal's "identifiable reason for transferring him there" was not identified by them and could not be discerned. The Tribunal had found in favour of the Linden House option for AL's future management on the basis of the RMO's opinion and Dr Kareem's report but both of these were suspect. In the fourth place it was submitted that the Tribunal had failed to attach adequate weight to the possibly considerable difficulties the patient might face in being repatriated to Scotland if he were transferred to England, as identified (it was said) by one of the witnesses, Professor Fraser. This matter is referred to in paragraphs 46, 55 and 69 of the Tribunal's judgement and in this connection my attention was drawn to regulation 23 of the Cross-border Transfer Regulations (SI 2005 No 467), which was said to have the effect of terminating all Scottish control over the patient's destiny once he had been transferred to England and become subject to appropriate English measures. The Tribunal was said to have wrongly in their paragraph 69 discounted the risk of his not being repatriated which it was submitted would remain a real one. In the fifth place it was said that the "balancing exercise" which the Tribunal required to carry out among the various considerations favouring each of the two available options for the patient's future and which they had purported to carry out in paragraphs 68 and 69 of their judgement was opaque and inscrutable in that it was not possible to see from what was there set out how on the evidence available to them the Tribunal had come to the conclusion that Linden House should be viewed as the preferred option for AL. In the sixth place it was maintained that the Tribunal had failed generally to grasp the strength of the evidence before them favouring the community care option and the relative weakness of the evidence favouring the Linden House option. It was said that the Linden House

option was "merely in its infancy" or as yet "very limited in scope" and so based upon much less robust evidence than the community care option which was strongly supported by evidence from the named person and from the doctors involved in the patient's care. All involved had been working towards a community care solution until the assault on 21 August 2006 and it was only since then that the Linden House option had begun to be explored, with the consequence that it was not yet far developed and had reached the stage only of funding being identified for a twelve-week assessment. From this it was plain that the Tribunal's decision had to be regarded as manifestly wrong and one therefore which was open to recall by an appellate court when the test discussed by the House of Lords in *G v G (Minors: Custody Appeal)* 1985 1WLR 647 was properly applied to the present case. In the seventh place reference was made to section 290 of the Act and the Cross-border Transfer Regulations and it was submitted that the absence of a warrant obtained from the Scottish Ministers authorising the patient's transfer to England was a matter which should have been recognised by the Tribunal as indicating how limited was the scope so far of the Linden House proposal. It was not suggested, despite the wording relative to this matter of the grounds of appeal which had been lodged, that the Tribunal's decision was *ultra vires* on account of the absence of such a transfer warrant: the matter rather was to be viewed as a makeweight which should have influenced the Tribunal against the course which they wrongly took of endorsing the Linden House option as preferable to that of care in the community. Various other minor criticisms were made of the Tribunal's judgement as it was examined before me but I do not rehearse them here because I do not regard them as having any substantial bearing on the issue here to be decided.

By the end of counsel for the appellant's first address to me I had the impression that it was the sixth submission summarised in the preceding paragraph above that was being advanced as the primary basis for my setting aside the Tribunal's decision and that the other submissions summarised above were each to a greater or lesser degree being put forward as makeweights tending to support the central proposition that the decision was plainly erroneous when regard was had to the weight of evidence favouring the well-developed community care proposal and the relatively lightweight

support existing for the as yet undeveloped plan for a transfer to Linden House. I then heard the submissions of counsel for the three respondents and invited counsel for the appellant to respond if he wished, which he did. By the end of his second (much shorter) address the focus of his submission had I thought shifted somewhat in consequence of some of the dialogue which had taken place between myself and counsel for the respondents in the course of their submissions. In particular greater emphasis was now placed than before on the Tribunal's treatment of the material emanating from Linden House in the shape of Dr Kareem's report. Counsel for the appellant still adhered to his primary submission concerning the relative degrees of development of the two available options and it was emphasised that the community care option had been viewed as a real possibility by all parties prior to 21 August 2006, that it offered a clear destination for the patient in a return to his former home and that all ancillary matters of supervision and the like would remain within the Tribunal's control, all such requirements being funded by the local authority in accordance with their obligations under section 25 of the Act. In addition however it was now maintained as a point of greater significance than previously that, there being an *onus* on the Tribunal itself to be satisfied that the proposed course of a transfer to Linden House would be one likely to benefit the patient, they should in the circumstances of the present case have called Dr Kareem to the witness box to speak to his report and their failure to do so amounted to a flawed exercise of their discretion which undermined fatally their overall discretionary decision to refuse the application.

Counsel for the respondents, who each as previously recorded adopted one another's submissions, took up *inter alia* the following positions in relation to the major issues in contention. The decision was a discretionary one which should not be interfered with and the Tribunal had been given a wide discretion in how to deal with evidential material before it or which might be obtained by it. They were entitled to place great weight on the opinion of Dr Macdonald as being the patient's designated RMO who in turn was entitled to form the professional view he had formed as to the best course for the patient's welfare on the basis of the material which was available to him. The "identifiable reason" referred to by the Tribunal in paragraph 54 of their judgement

for transferring AL to Linden House was clearly the opinion formed by the RMO (referred to in the same sentence at paragraph 54 and the first sentence of paragraph 51) that Linden House would be of therapeutic benefit to him. Both the RMO and the Tribunal were entitled to have regard to the assault of 21 August 2006 as something tending to show that the patient now presented a greater risk than had been previously thought, a view supported also by Dr Davidson who was the author of the risk assessments. The Tribunal were moreover entitled to proceed on the view they had formed of the evidence and opinion of the RMO without calling Dr Kareem to speak to his report if they thought fit, especially as no one at the hearing seemed to be suggesting that there was anything inadequate or defective about Linden House and the facilities offered by that institution. Their treatment of Dr Kareem's report (at paragraphs 52 and 53 of and elsewhere in their judgement) was a matter more of weight than of substance and so was entirely satisfactory in the circumstances of the case. In any event no motion had been made by any party for him to be called to the witness box. It was wrong to suggest that the "balancing exercise" which the Tribunal had to conduct was to be found only in paragraphs 68 and 69 of their judgement where it could be seen to be inadequate: it was to be found over a much broader section of the judgement and had been satisfactorily carried out. Importantly, the community care option for AL's future care and management had been described to the Tribunal by the witnesses supporting it as no more than "feasible" and it was quite wrong to suggest that it was any more fully developed than the counter-proposal for a transfer of the patient to Linden House. It was also wrong to think of the body of evidence and opinion supporting the community care option as strong and cohesive: it was not and the correct view of it showed it to be qualified and not fully agreed on certain important matters (most notably in regard to the degree of supervision which would be required, placed at fifty hours per week by one witness but at twenty-four hours per day by another). It was therefore a false portrayal to say that the Tribunal had been faced with a choice between one option (care in the community) which was well-developed and supported by a strong body of evidence on the one hand and another option (Linden House) which was so far of very limited scope and supported only by the RMO: it was incorrect to proceed from there to the conclusion that the Tribunal's decision in favour of the Linden House proposal was manifestly erroneous. The absence, lastly, of a transfer warrant obtained from the Scottish Ministers was of no consequence because the stage had not yet been reached of even applying for such

a thing: logically such an application came subsequently to the Tribunal's decision and if, as here, an application had been made for revocation or variation of the existing CTO then that matter had to be resolved before it could become appropriate for the RMO to make application under the Cross-border Transfer Regulations for Ministerial authorisation for the patient's transfer to England.

Sheriff Principal's Opinion

The Tribunal which sat to hear this case have undoubtedly dealt in a comprehensive manner with the issues raised and the material laid before them and are to be commended for that. It does not however follow necessarily that they have exercised the discretion vested in them in an entirely proper manner. I address below the various issues in the appeal which in my view require determination, not in the order of their importance nor in the order in which they were presented to me by counsel but in the order which appears to me to be logically most appropriate.

Transfer Warrant

I am not in doubt that the absence of a transfer warrant was not a factor of which the Tribunal required to take account. I accept the submission of counsel for the respondents that application for such a warrant under the Cross-border transfer Regulations 2005 by the RMO is a matter logically subsequent to resolution by the Tribunal of the issues raised by the present application for variation of the CTO. By the time the RMO had formed the view that the preferred course for AL would now be a transfer to Linden House the named person's application for revocation of the CTO had already been depending before the Tribunal for several months and it was clear that that application required to be disposed of in the MHO's favour (he being a supporter of the RMO's opinion) before it could become appropriate for the RMO to commence the application procedures for a Ministerial warrant to be issued under the regulations. The Tribunal therefore could not and should not have been influenced in either direction in making their decision by the fact that a transfer warrant had not yet

been applied for nor yet issued. They were not so influenced and in this regard proceeded correctly.

Assault of 21 August 2006

On 21 August 2006 AL assaulted a female nurse within the secure environment of Dykebar Hospital and the RMO thereafter formed the view that the patient presented now a greater risk than he had previously thought. In this he was supported by Dr Davidson, one of the providers to him of risk assessments, who expressed the same view in an updated assessment of risk on 1 December 2006. The RMO began to consider what other provision might now be made suitably for the patient within a secure environment, which led eventually to the proposal for a transfer to Linden House.

I can see that there is a certain logic in the submission of counsel for the appellant who maintained that the assault's occurrence did not alter the level of risk, from which he sought to argue that it accordingly provided no justification for the RMO to depart from his previous position in which he had (it was said) favoured along with others a move towards care in the community. The risk had been foreseen more than a year earlier in a risk assessment of June 2005 and its eventuation in August 2006 made no difference to the existence or degree of that risk which remained the same as it always was, especially when it is borne in mind that the assault was the consequence of a change in régime resulting from a decanting of the Arran Ward in which the staff had apparently failed to heed certain warnings given to them. One might say that the assault was a further eventuation of a risk which had existed and been recognised for much longer and which had already eventuated on several previous occasions (although only once in the secure environment of Dykebar very shortly after AL's arrival there in 2004).

This approach however has in my view only a theoretical logic and ignores the reality and practical common sense of the situation. The assault of 21 August 2006 went at least so far as to demonstrate that the perceived risk was not merely theoretical and would in fact eventuate in AL's case or, perhaps more accurately, was not one which after a sufficient period of management in a secure environment was now becoming merely theoretical but was still one which would eventuate again from time to time if suitable circumstances and conditions for it arose. I do not think moreover it to be greatly significant that this new assault on 21 August 2006 occurred in circumstances of a régime change which may have been upsetting to the patient and not perfectly managed by the staff: circumstances and conditions upsetting to AL and having consequences not fully foreseen by those around him could equally occur from time to time in a community setting and it is surely not to be envisaged that he would spend his whole time incarcerated within his mother's house and garden twenty-four hours per day for the rest of his life. Faced with a clear demonstration on 21 August 2006 that the risk of an attack upon others could still become a real occurrence I find it understandable and not illogical that the RMO should reconsider his position in relation to the patient's future treatment and management and turn his thinking toward a continuation of detention in some form. Dr Macdonald was in effect acknowledging from late August 2006 onward that he had previously been taking a perhaps over-sanguine view of the risk presented by AL and was now brought back to a more realistic appreciation of the situation by the occurrence of the assault. In this he was, I note again, supported by Dr Davidson.

Repatriation

I do not find myself in agreement with the proposition that the Tribunal failed to attach adequate weight to the difficulties of repatriation identified by Professor Fraser which might be experienced were AL to be transferred out of Scotland into England. The amount of information supplied to the Tribunal on this subject appears to me to have been meagre. In paragraph 46 of their judgement they record the fact that Professor Fraser considered that "AL might face considerable problems in repatriating". They mention that fact again at paragraph 55. In paragraph 69 they express the view that the risk identified by Professor Fraser would be reduced by the

expectation that AL's transfer to Linden House would endure for a limited period of some twelve months overall. When one looks to see what more Professor Fraser may have said on this topic than the Tribunal have recorded (as noted above) one finds that it seems to have been not much: in his report dated December 2006 he states (at paragraph 14) only that it has been his experience that out-of-region placements face considerable problems in repatriating (as might a placement in Carstairs) and that such a placement would require to have "a firm contracted time-tabled agreement to receive him back in Strathclyde". In my view more importance is being attached to this matter by the appellant than is properly justified by the material relative to it placed before the Tribunal and I do not consider the view taken by them in paragraph 69 of their judgement to be at all out of place. It may be that regulation 23 of the Cross-border transfer Regulations 2005 would have the effect on the patient's transfer to England of placing him under the jurisdiction of English legislation and regulation in place of that of the Scottish Tribunal but that will not prevent interested persons from making appropriate applications to the relevant English authorities for his return to Scotland in due course. I do not consider this aspect of the case to present any great problem and I regard the criticism of the Tribunal's approach to it as not justified.

Extent of balancing exercise

It was suggested that the necessary balancing exercise extended only to paragraphs 68 and 69 of the Tribunal's judgement and that it could not be seen from those paragraphs how it had been conducted to reach the result arrived at by the Tribunal. I consider this view of the matter however to be unduly narrow. It appears to me that the balancing exercise is conducted by the Tribunal over a much broader section of their judgement, comprehending the paragraphs thereof numbered 51 to 55 inclusive and 63 to 70 inclusive, and that a reading of these paragraphs as a whole more than adequately reveals how the Tribunal have weighed against one another the bodies of material before them favouring each of the available options for AL's future care and treatment or management and have come down in favour of the Linden House option as the preferred course. I do not mean by this to say that I regard the Tribunal as having conducted their balancing exercise perfectly in all respects (see below) but I

do regard it as sufficiently clear from the passages referred to of their judgement, taken as a whole, how they have done it (see also below).

The "identifiable reason"

The Tribunal in paragraph 54 of their judgement say that "there is, on the contrary, an identifiable reason for transferring him" to Linden House and it was complained to me that they failed, confusingly, to identify that reason. Clearly it is a matter of substantial importance to know if at all possible what are the Tribunal's reason(s) for determining the central issue in the case in favour of endorsing the transfer to Linden House. It appears to me however more than tolerably clear that the reason identified by the Tribunal for their favouring the option of a transfer to Linden House is their acceptance from Dr Macdonald of his view that the régime at Linden House would be therapeutically beneficial to the patient. They say in the second half of the same sentence that they attach weight, as they were entitled to do, to the evidence of the RMO that he considered a transfer to Linden House to be beneficial to AL and this echoes the content of their final sentence in paragraph 51 where they record the RMO's said view in somewhat fuller terms. I have little difficulty in deducing from paragraph 54 and from their judgement as a whole that their chief reason for deciding as they did was their acceptance of this view from the RMO together with their acceptance from Dr Kareem that Linden House is suitably equipped to manage the risks presented by the patient. The fact that their chief reason(s) can be so identified is of importance in considering (below) whether there are or are not shortcomings in the manner in which they have conducted the necessary balancing exercise and exercised their discretion.

The two available options compared

The major proposition advanced by counsel for the appellant in his opening address was that it was manifestly wrong for the Tribunal to have favoured the Linden House option over the care in the community option because the one was so underdeveloped by comparison with the other and supported by evidence of such lesser weight than

the strong body of evidence supporting the other. One option, in other words, was so strong that the choice of the other had to be viewed as plainly erroneous. This was said to meet the test discussed by Lord Fraser in *G v G (Minors: Custody Appeal)* 1985 1 WLR 647 but I do not find myself in agreement with the proposition in either of its branches.

The Tribunal appear to me to have conducted their balancing exercise on the central issue in the following manner. They had before them the evidence given from the witness box of several witnesses supporting to a greater or lesser extent the community care option. The applicant/named person was unequivocally in favour of care in the community and the views of the patient himself, so far as ascertainable through others including his advocate, coincided with those of his mother. Mr John Cameron, the psychiatrist who had longest knowledge of the patient, also had a clear view favouring care in the community. Professor William Fraser, an expert in autistic spectrum disorder, favoured on balance a community care solution at this stage but only narrowly, seeing advantages and disadvantages in a specialist autism unit placement but viewing a home-based package as the least restrictive approach. John Garroway, social worker, considered care in the community to be a feasible option and had prepared a community care assessment at the end of August 2006, which was available to the Tribunal, but did not have a view to express on Linden House one way or the other. This testimony the Tribunal weighed against that of Dr George Macdonald, the RMO, who gave evidence favouring clearly the Linden House option, having obtained a report from Dr Kareem of that institution (who was not a witness) and having consulted two other witnesses, namely Dr Isobel Campbell and Dr Mark Davidson. These last-named witnesses were each forensic psychiatrists but neither were taken by the Tribunal to be expressing a view on the central issue of choosing between the two available options. The former (Dr Campbell) opined that it was not (or at least not yet) appropriate to transfer AL to the State Hospital at Carstairs and recommended the RMO to try Linden House or a similar institution: she did not however provide information or evidence as to the facilities or potential benefits to be found there. The latter (Dr Davidson) in an updated risk assessment of December 2006 concurred with Dr Macdonald's view that AL since 21 August 2006 now

presented a greater risk than previously thought and acknowledged that the move to Linden House was now a possibility but did not comment on its merits or demerits. The evidence of all these witnesses was open to cross-examination and thus capable of being tested before the Tribunal or by the Tribunal themselves. In addition the Tribunal had available to them a number of reports, as listed in paragraph 9 of their judgement. These included reports or assessments of varying ages compiled by the witnesses named above, two older reports/assessments by a social worker (Claire Twigg), the report aforesaid of Dr Kareem and three reports of the MHO, the last of these being of recent date in January 2007. The Tribunal having weighed all these elements against one another came down in favour of the opinion expressed to them by the RMO to the effect that there would be therapeutic benefit to the patient in a transfer to Linden House at this stage which would also be sufficiently secure to manage the risk presented by him.

It might be thought from what is set out above that the only evidence and opinion laid before the Tribunal favouring the Linden House option was that of Dr Macdonald, the RMO, which must be outweighed by that of Mr Cameron and Professor Fraser, even if the evidence of the latter was somewhat qualified, and their supporters. Even if that be a correct view however of how the evidence lay it was in my opinion entirely open nevertheless to the Tribunal to accept the evidence and opinion of Dr Macdonald, provided they were satisfied that it was soundly based (on which see below), and to prefer it if they thought fit to that of the other witnesses seen and heard by them in support of the community care option. He was the RMO and they were entitled in my view to attach considerable weight to his evidence, as they said they did. He had consulted others before forming his own opinion and had obtained a report from Linden House, so that he was not proceeding entirely on some idea of his own without other professional input. He was moreover supported by the MHO who was of a similar view concerning AL's welfare and was presenting that view to the Tribunal, albeit from a different position as a party to the application proceedings which meant he could not be a witness and his position could not be tested in quite the same way: nevertheless he was a person qualified to comment knowledgably from experience in such matters. In light of these considerations I reject the notion that the evidence

supporting one option was so much stronger than that supporting the other as to oblige the Tribunal in effect to choose care in the community and to discard the proposed transfer to Linden House.

Nor do I consider that either option can be said to have been, as presented to the Tribunal, so much more developed than the other that they were obliged to prefer one to the other on that ground. No doubt the community care option had been longer in consideration than the relatively recently proposed transfer to Linden House, which the RMO had pursued only since being pointed in that direction by Dr Campbell in early October 2006 and he had obtained a report from Dr Kareem only in early December 2006, but from that it does not follow that the former had become markedly more developed or that the latter had to be viewed by the Tribunal as "still in its infancy". As I understand the position the community care option had been thought about and had been made the subject of a community care assessment by John Garroway; it is perhaps reasonable to assume that there would not be a financial problem in light of the provisions of section 25 of the Act but the necessary care package had yet to be put together and there remained a major disagreement to be ironed out concerning the extent of supervision required. John Garroway appeared to think fifty hours per week to be sufficient, whereas Mr John Cameron and the RMO were both suggesting twenty-four hours per day, that is to say three and a half times greater and a very significant difference. The Linden House option on the other hand had progressed to the point of the patient having been interviewed and assessed by Dr Kareem and the funding found for a twelve-week period of assessment to commence at Linden House where a bed was immediately available. Although a transfer warrant from the Scottish Ministers had not yet been applied for (understandably in my view: see above), it was not envisaged by the MHO that there would be difficulty in obtaining one if and when it became appropriate to apply for one. In these circumstances I do not see any very material difference between the state of development of the two options and I take the view that there was in this respect little to choose between them.

For these reasons I do not accept the submission that the Tribunal's decision must be considered "plainly wrong" within the meaning of the test discussed in *G v G supra* by Lord Fraser so as to open it up for review on this ground by an appellate court.

Dr Kareem's report

There is however one aspect of the Tribunal's decision which has caused me concern and continues to do so, namely the manner in which they have treated the "evidence" of Dr Kareem and dealt with his report. Their treatment of it is to be found chiefly in paragraphs 52 and 53 of their judgement, where they summarise his opinion as expressed in that report, although it is referred to briefly in several other paragraphs.

Dr Kareem was not called to the witness box but his evidence and opinion are in my view very important to the decision which the Tribunal were called upon to make, the central issue being to make an informed choice between the two available options for the future care and treatment and management of AL. One of those options, that preferred eventually by the Tribunal, depended very much on their acceptance of the evidence and opinion of the RMO which in turn depended very heavily on the evidence and opinion of Dr Kareem so far as an understanding was concerned of Linden House as an institution, its facilities and potential benefits for the patient as well as its provision of a secure environment. From the information available to me it appears that Dr Macdonald's knowledge of these matters must have been derived almost entirely from Dr Kareem: it may be that he did more than receive and read Dr Kareem's report, for example he may have conversed with Dr Kareem by telephone or at Dykebar in November 2006, but there is nothing to indicate that he has investigated Linden House at first hand in any way or to detract at all from the perception that Dr Kareem was the sole source of his information on the subject of this privately operated institution in England. The other people whom Dr Macdonald consulted preparatory to forming his opinion about a transfer to Linden House were Drs Campbell and Davidson but neither of them were, on the information available to me, in the position of supplying information to Dr Macdonald about Linden House and its operation. Dr Campbell merely pointed him in its direction with the words (in

her report of 4 October 2006) "I recommend that he be assessed by a specialist Forensic Asperger's Service, for example, that at Linden House run by Care Principles or that run by Brookdale" while Dr Davidson merely recorded (in his updated risk assessment of 1 December 2006) his awareness that AL would be referred to a specialised unit with greater expertise in the treatment and risk management of sufferers from autistic spectrum disorder. It thus appears that the information and opinion contained in Dr Kareem's report remains central to the RMO's understanding of the institution to which he was proposing to transfer his patient and of what it had to offer.

I do not doubt that there will be many cases coming for decision before the Mental Health Tribunal for Scotland in which it will be entirely proper and satisfactory for them to proceed on the basis of a report or reports, in order for instance to inform themselves on ancillary matters or to make minor decisions on the way to reaching a major decision on the issue before them, without the need to call the author of such a report to speak to it from the witness box. Indeed it is apparent from the procedural rules of the MHTS to which my attention was drawn that the Tribunal are given wide powers and discretions to decide what evidence they should take into account or call before them and in what form. Thus under rule 59 of the Practice & Procedure Rules it is open to the Tribunal on request or *ex proprio motu* to demand production of documents; under rule 60 evidence in written form is competent but the Tribunal may require attendance to give oral testimony; under rule 61 the Tribunal may cite witnesses on its own initiative as well as on request; under rule 62 the Tribunal may obtain *ex proprio motu* an expert's report and it may require that expert's attendance to speak to the report; and under rule 63 the Tribunal are given within very broad limits an almost complete discretion as to the manner in which they conduct the hearing before them. From this it appears that the manner in which the Tribunal in the present case treated the content of Dr Kareem's report was altogether competent but I do not think it was adequate in the circumstances of the case before them.

From what I could glean at the hearing of the appeal it seems clear that no request or suggestion was made to the Tribunal by the solicitor representing the applicant for Dr Kareem to be required to attend as a witness to speak to his report and be cross-examined upon it. Nor does it appear that any positive line of challenge to the adequacy of Linden House as an institution having facilities likely to be beneficial to AL was being pursued before the tribunal on the applicant's behalf. Had the procedure appropriate to the Tribunal's hearings been purely adversarial that would have been an end of this matter. 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 of a sheriff or judge presiding over a proof in a reparation action or a contractual dispute litigated in accordance with traditional rules of adversarial procedure. Instead there is in my opinion an inquisitorial element in the approach which the Tribunal is required 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 a 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, so far as relevant to their function, whether or not the parties appearing before them raise those matters for their consideration and make submissions on them. Accordingly it was in my view incumbent on the Tribunal in the circumstances of the present case to satisfy itself that the evidence and opinion of the RMO favouring one of the two available options between which the Tribunal had to decide was acceptable to it and soundly based. In order to be satisfied that it was soundly based it was I think necessary for the Tribunal to look into the chief foundation on which it rested so far as concerned Linden House itself, the facilities it had to offer and the likelihood or otherwise of its services being of some therapeutic benefit to the patient. It was not in the circumstances enough to take the RMO's word for it on these matters, for which his source was someone else, but necessary in my

view for the Tribunal to obtain the attendance of Dr Kareem in the witness box to speak to his report and if thought fit to be cross-examined on it or at least to consider whether to do so. Instead the Tribunal appear in paragraphs 52 and 53 of their judgement (and elsewhere where it is briefly adverted to) to have accepted the content of Dr Kareem's report *pro veritate* and to have been content to leave it untested by any questioning of its author in the witness box before them.

The Tribunal of course have a discretion, as appears from the procedural rules to which I have referred, to decide whether or not to call the author of a report to the witness box to speak to it. It was necessary however for them to apply their mind to the question whether or not to require Dr Kareem's attendance in order to exercise that discretion and this they do not appear to have done. Had they done so, a nice question might have arisen as to whether the appellate court is entitled to take a different view but the whole tenor of those parts of their judgement which relate to Dr Kareem's report demonstrate that they failed even to consider the matter of his attendance and instead took the content of his report as correct without considering whether to have it tested in the witness box. Their failure to consider whether to require his attendance was in my opinion a substantial omission in the circumstances of the case. The matter however does not end there because, having accepted Dr Kareem's report at its face value, they do not appear either to have considered whether some different weight required to be attached to its untested content from that which they attached to the evidence of each of the witnesses who had testified from the witness box. The tenor of their judgement so far as relative to Dr Kareem's report indicates that they attached to it the same weight as they would have done had he spoken to his report as a witness and not been required under cross-examination to alter or qualify any of the views expressed in it. Their failure to consider what weight to attach to his untested report was also in my opinion a substantial omission in the circumstances of the case.

I have considered whether it was open to the Tribunal simply to accept the RMO's opinion as conclusive in favour of the Linden House option without seeking to look behind it in the manner indicated above but have concluded that in the circumstances

of the case it was not. It might be thought that it was not open to the Tribunal to second-guess the opinion of the RMO, and in some situations with which a Tribunal might have to deal that might be so, but in the present case that was precisely what the Tribunal were being required to do, namely gainsay his opinion if they thought fit. In the circumstances of the present case the central issue for their decision was whether those favouring each of the two available options were right or wrong in their preference and the RMO was one of those whose opinion therefore had to be closely examined. Central to his opinion favouring the Linden House option was the evidence and opinions contained in Dr Kareem's report and it was therefore necessary for the Tribunal to examine the content of that report carefully too: this they failed to do and so fell into error.

I take the view that the failures of the Tribunal to apply their minds to the two matters discussed above were not minor omissions only but shortcomings relating to a matter central to the issue which the Tribunal were required to decide, that matter being how to treat Dr Kareem's report as an important foundation of Dr Macdonald's opinion concerning the institution known as Linden House and the benefits which it might confer on his patient. I therefore consider that there occurred in the Tribunal's deliberations an error in the manner in which they handled the balancing exercise required of them, namely a failure to consider properly how to deal with an important adminicle of evidence requiring to be weighed in the balance in that exercise. That error brings the Tribunal's decision within the parameters of the test set out and discussed in the case of *G v G (Minors: Custody Appeal)* 1985 1 WLR 647 and opens the way to the conclusion, which I now reach, that the Tribunal in this case acted unreasonably in the exercise of its discretion in terms of section 324(2)(c) of the Act.

Conclusion

Having come to the view that the Tribunal have in this one respect acted unreasonably in the exercise of their discretion, I find it appropriate to allow the appeal on this ground and to proceed, as section 324(5)(a) and (b) require and as I was invited to do, to set aside the decision of the Tribunal and to remit the case to them for consideration

anew. It will be seen from what has been said above that I do not consider the other criticisms made of the Tribunal's decision and their handling of the application to have any validity and the appeal is allowed solely on account of their omission to call Dr Kareem to the witness box or even to consider doing so and then to consider how to evaluate appropriately the content of his report. I do not say that the Tribunal reached the wrong result on account of that omission nor that they reached a correct result despite it: only that the omission constituted a flaw in the manner in which they went about the exercise of their discretion and the resultant decision accordingly cannot stand. It is as I view the circumstances of the case not for the appellate court to form a view as to which of the two options available for AL's care, treatment and management at this stage should be preferred because I too, like the Tribunal at present, lack the necessary insight into Linden House and the extent of any benefits which it might bring to the patient: in this respect I agree with the submissions of all counsel made at the outset to the effect that I should not be attempting under section 324(5)(b)(i) to substitute a decision of my own for that of the Tribunal. I agree moreover with counsel that there is in the circumstances no reason to direct under section 324(6)(a) that the Tribunal should now be differently reconstituted. I am tempted to issue a direction under section 324(6)(b) to the effect that the Tribunal should now see and hear Dr Kareem as a witness speaking to his report and evaluate his evidence for themselves, thus going against the suggestion of counsel in this respect, but have decided to refrain from doing so on the view that a direction in such specific terms might unduly fetter the Tribunal's discretion in reconsidering the whole matter at a time when the whole circumstances of the patient and the case may have changed. I have therefore pronounced an interlocutor in terms of section 324(5)(a) and (b)(ii) alone.

Expenses

It was agreed before me that in the event of the appeal being allowed the appellant (who has I believe the benefit of legal aid) should be found entitled to her expenses of the appeal procedure jointly and severally against the three respondents. In addition counsel for all parties concurred in a motion for certification of the appeal as suitable for the employment of junior counsel and in my view this is clearly a case in which

that motion should be granted: this appeal is I think the first in Scotland in which a decision of the Tribunal has been directly challenged on its merits and several of the questions raised in it were not only complex but also plainly novel.

BA Kerr