SHERIFFDOM OF TAYSIDE CENTRAL AND FIFE

B35/06

JUDGMENT OF SHERIFF PRINCIPAL
R A DUNLOP QC

in the cause

BRIAN PATERSON

Pursuer and Appellant

against

SANDRA KENT

Defender and First Respondent

and

THE MENTAL HEALTH TRIBUNAL

Defender and Second Respondent

And

FIFE HEALTH BOARD

Defender and Third Respondent

Act: Mr Sharp, Advocate, instructed by Messrs Stevenson & Marshall, Solicitors, Dunfermline

Alt: Mr Munro, Solicitor, Fife Council for the First Respondent
Miss Dunlop, QC and Mr K Campbell, Advocate, instructed by Ian Kennedy, WS, Edinburgh, for the Second Respondent
Mr Fitzpatrick, Advocate, instructed by NHS Scotland CLO, for the Third Respondent.

PERTH, 17 May 2006. The Sheriff Principal, having resumed consideration of the cause, allows the appeal; sets aside the second respondent's decision dated 31 January 2006 and recalls the

compulsory treatment order made on that date; in terms of section 65(2) of the Mental Health (Care and Treatment) (Scotland) Act 2003 makes an interim compulsory treatment order authorising for the period of twenty eight days from the date hereof the detention of the appellant in Queen Margaret Hospital, Dunfermline and the giving to the appellant, in accordance with Part 16 of the Act, of medical treatment; remits the cause to a differently constituted Tribunal for consideration of the application of new and directs that a hearing shall take place within twenty eight days of the date hereof; certifies the appeal as suitable for the employment of junior counsel; finds the second respondent liable to the appellant in the expenses of the appeal; allows an account thereof to be given in and remits the same, when lodged, to the auditor of court to tax and report; *quoad ultra* finds no expenses to or by any party.

NOTE:

[1] This is an appeal under section 320 of the Mental Health (Care and Treatment) (Scotland) Act 2003 (hereinafter referred to as "the Act") against a decision of the Mental Health Tribunal for Scotland (hereinafter referred to as "the Tribunal") dated 31 January 2006 in terms of which the appellant was made the subject of a compulsory treatment order under section 64(4)(a) of the Act.

[2] The appellant convened the Mental Health Officer as first respondent and, in response to separate orders for intimation to the Tribunal and Fife Health Board, these parties each lodged answers and were sisted as the second and third respondents respectively. The pleadings disclose two distinct issues. The first issue relates to the competency of the proceedings of the Tribunal and, in the event that they were competent, the second issue relates to certain alleged failings of the Tribunal in the conduct of those proceedings. The first and second respondents made submissions and took up essentially the same position in relation to both issues whereas the third respondent confined itself to submissions on the first issue only. Since the second issue only arises in the event of a decision on the first issue adverse to the appellant it is appropriate to deal with the two issues separately.

Competency of the Tribunal Hearing on 31 January 2006

[3] The chronology of events leading to the hearing before the Tribunal on 31 January 2006 is not in dispute. The appellant was admitted as a voluntary patient to Queen Margaret Hospital, Dunfermline on 25 October 2005. On 22 December 2005 he was detained on a short-term detention certificate in terms of section 44 of the Act. In terms of section 44(1) of the Act the short-term detention certificate authorised the measures referred to in section 44(5), namely the detention of the appellant in hospital for a period of twenty-eight days and the giving of medical treatment to him. The period of the short-term detention certificate expired at midnight on 18 January 2006.

[4] On 16 January 2006 an application was made by the Mental Health Officer to the Tribunal for a compulsory treatment order. This application was made in terms of section 63 of the Act in pursuance of a statutory duty imposed on the Mental Health Officer in terms of section 57(1). That duty arose when subsections (2) to (5) of section 57 applied. In broad terms these subsections relate to the medical examination of the patient by two medical practitioners, leading to the production of a separate mental health report by each (subsection (4)). Of particular relevance is subsection (3) which provides:-

> "(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 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;
>
> (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;
>
> (d) that because of the mental 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."

[5] Once a Mental Health Officer comes under the duty to apply for a compulsory treatment order he or she must do so within fourteen days of the date of the latest medical examination of the patient by the medical practitioners who prepared the mental health reports (subsection 7). In the present case the last date by which an application could be made was 26 January 2006.

[6] Having come under the statutory duty specified in section 57(1) the Mental Health Officer was then required to carry out certain other duties in terms of sections 60, 61 and 62 of the Act. These involve, among others, giving notice to the patient that an application is to be made, interviewing the patient and informing him of his rights and the availability of independent advocacy services and preparing a report with the personal circumstances of the patient and other information relevant to the Tribunal's determination of the application.

[7] As I have already noted, the detention of the appellant in terms of the short-term detention certificate was authorised only until midnight on 18 January 2006. However when the application for a compulsory treatment order was made on 16 January the provisions of section 68 of the Act applied. Section 68 of the Act provides as follows:-

"(1) Where -

(a) the detention of a patient in hospital is authorised by -

(i) a short-term detention certificate; or

(ii) an extension certificate; and

(b) before the expiry of the period of detention so authorised, an application is made under section 63 of this Act,

the measures mentioned in subsection (2) below are authorised.

(2) Those measures are -

(a) the detention in hospital of the patient for the period of 5 days beginning with the expiry of the period for which the certificate authorises the detention of the patient in hospital; and

(b) the giving to the patient, in accordance with Part 16 of this Act, of medical treatment.

(3) In reckoning the period of days mentioned in subsection (2)(a) above, there shall be left out of account any day which is not a working day.

(4) In this section "working day" has the meaning given by section 47(8) of this Act."

[8] It is a matter of agreement that, in terms of this section, the appellant's continued detention after the expiry of the short-term detention certificate was authorised until midnight on 25 January 2006, that is to say five "working" days after 18 January 2006.

[9] Of central importance to the appeal are the terms of section 69 of the Act, which provides:

"Where section 68 of this Act applies, the Tribunal shall, before the expiry of the period of 5 days referred to in section 68(2)(a) of this Act -

(a) determine whether an interim compulsory treatment order should be made; and

(b) if it determines that an interim compulsory treatment order should not be made, determine the application."

[10] It will be observed therefore that, having only convened the hearing on 31 January 2006, the Tribunal failed to comply with the time limit prescribed by section 69 of the Act. The primary issue in the appeal is what is the consequence of that failure.

[11] For the sake of completeness it should be said that the Mental Health Officer was alert to the difficulties that might arise if the Tribunal did not convene a hearing before the expiry of the period of continued detention authorised in terms of section 68. A letter was sent to the Tribunal on her behalf on 24 January 2006 bringing this to the attention of the Tribunal and requesting an urgent response. In fact no response was dispatched until 1 February 2006, that is to say the day after the Tribunal hearing. The failure to comply with the time limit of section 69 put the responsible medical officer in a difficult position. It was plainly felt that the appellant required to be detained further and, having taken advice from the Mental Welfare Commission, a further short-term detention certificate was granted. Counsel for the appellant contended that this short-term detention certificate was invalid having regard to the provisions of section 44(2) of the Act, which in broad terms prohibits a continuous period of detention on the strength of successive short-term detention certificates. Suffice it to say that no party at the appeal sought to argue otherwise and in particular it was not suggested that this second short-term detention certificate had any relevance to the issues in the appeal. Accordingly I have not thought it necessary to rehearse the appellant's submissions on that matter and have simply adopted the common approach of the parties in excluding this factor as

irrelevant.

[12] The primary question in the appeal therefore is the effect of the admitted failure of the Tribunal to comply with the time limit prescribed by section 69.

Submissions for appellant

[13] Under reference to para 9 of the opinion of the Lord Ordinary in *Petition of John Smith* 2006 CSOH 44 (17 March 2006), counsel for the appellant submitted that the provisions of section 69 are mandatory and that the Tribunal had no discretion to depart from the strict statutory timetable.

[14] Counsel submitted that a failure of the Tribunal either to determine whether to make an interim compulsory treatment order or to determine the application within the five days referred to vitiated any proceedings of the Tribunal after the expiry of that period. On the lapse of the period of five days without any determination the Tribunal no longer had any jurisdiction to determine the application for a compulsory treatment order and the only way in which a compulsory treatment order could now be granted was by starting the whole process again by the making of a new application. The purpose of section 69 of the Act was to protect persons in the appellant's position against unnecessarily lengthy periods of detention and his continued detention after the lapse of the five days in question was unlawful.

[15] In support of these submissions reference was made to Bennion *Statutory Interpretation* 3rd edn. page 32 et seq., *Barker v Palmer* 1881 8QBD 9, *Petch v Gurney (Inspector of Taxes)* 1994 3All ER 731 and *R v Pinder* 1855 24 LJQB 148. A distinction was drawn between mandatory requirements, the failure to comply with which invalidated the thing done, and directory requirements, the failure to comply with which did not. Particular reliance was placed on the judgment of Millett LJ in *Petch v Gurney* at page 736 in which he stated:

> "The question whether strict compliance with a statutory requirement is necessary has arisen time and time again in the cases. The question is not whether the requirement should be complied with; of course it should: the question is what consequences should attend a failure to comply. The difficulty arises from the common practice of the legislature of stating that something "shall" be done (which means that it "must" be done) without stating

> what are to be the consequences if it is not done. The court has dealt with the problem by devising a distinction between those requirements which are said to be "mandatory" (or "imperative" or "obligatory") and those which are said to be merely "directory" (a curious use of the word which in this context is taken as equivalent to "permissive"). Where the requirement is mandatory, it must be strictly complied with; failure to comply invalidates everything that follows. Where it is merely directory, it should still be complied with, and there may be sanctions for disobedience; but failure to comply does not invalidate what follows."

[16] In *Barker v Palmer* it was said that the rule was that provisions with respect to time are always obligatory unless a power of extending the time is given to the court. *R v Pinder* was an example of a case in which failure to comply with procedures touching on the liberty of the subject resulted in release from detention, even though there may have been grounds for that detention.

Submissions for respondents

[17] Senior counsel for the Tribunal led the submissions in reply and in large measure these were adopted on behalf of the first and third respondents. While acknowledging that there was a failure to comply with the relevant time limits, counsel submitted that that failure did not disable the Tribunal from proceeding to consider and determine the application for a compulsory treatment order. In support of this submission reference was made to *R v Soneji* [2005] 3WLR 303 and *Charles v Judicial and Legal Service Commission* [2003] 2 LRC 423, which it was submitted indicated a new approach in determining the legal consequences of non-compliance with a statutory requirement.

[18] In *Soneji* Lord Steyn expressed the view (para 23) that "the rigid mandatory and directory distinction" had outlived its usefulness and that the emphasis in statutory construction ought to be on the consequences of non-compliance, "posing the question whether Parliament can fairly be taken to have intended total invalidity." This approach was endorsed by Lord Carswell (para 61) and apparently followed by Lord Cullen of Whitekirk (para 52). It had its roots in what was described by Lord Steyn as the "important and influential dictum" of Lord Hailsham of St Marylebone LC in *London & Clydeside Estates Ltd v Aberdeen District Council*, which he cites at para 15. Lord Rodger of Earlsferry proceeded on a different view as to the failure in the case,

putting the issue in terms of the duty of the court. Reference was made particularly to the opening paragraph of his speech in which he says:

> "My Lords, if your young daughter wants to go out with friends for the evening and you agree, but tell her that she must be home by eleven o'clock, she is under a duty to return by then. But this does not mean that her duty is to return by then or not at all. Rather, even if she fails to meet your deadline, she still remains under a duty to return home. On the other hand, if you contract with a conjuror to perform at your daughter's birthday party, you want the conjuror and his tricks only for the party. His duty is accordingly limited to performing at the party held on your daughter's birthday and, if he fails to turn up, he cannot discharge the duty later."

[19] In *Charles v Judicial and Legal Service Commission,* on appeal to the Privy Council, the approach of the Board was to consider whether a fetter on the discharge of an important public function brought about by a failure to observe a number of time limits would be inimical to the whole purpose of the investigation and disciplinary regime which was under consideration in that case. Counsel submitted that that was a proper approach in the present case. The Tribunal had a duty to consider any application properly put before it and to sustain the appellant's argument that they were now disabled from doing so would be inimical to the whole purpose of the statutory regime.

[20] Counsel submitted that the purpose of the 2003 Act was to secure for those with mental health difficulties the provision of the care and treatment they required. If the patient were in the community there was no time limit within which a hearing to determine an application for a compulsory treatment order should take place. It was only this particular category of case - those on a short-term detention certificate extended by section 68 - which attracted the provision for a prompt hearing of the application. It was submitted that the purpose underlying section 69 was to provide continuity of detention. If the hearing were not held before the expiry of the five-day period of "grace" there would be a break in the patient's detention which, on the hypothesis that this is a person who requires to be detained in hospital, would be undesirable. Counsel further submitted that the purpose of section 69 could not have been to prevent excess detention, since nothing in the Act authorised detention beyond the five-day period in any event. Section 69 was a provision about adjudication, not detention.

[21] In support of these submissions, the solicitor for the Mental Health Officer submitted that, since the Mental Health Officer was under an obligation to make an application in the circumstances defined in section 57, it could reasonably be inferred that Parliament intended that such applications should be determined. Under reference to *Chief Constable Lothian & Borders Police v Lothian & Borders Police Board and Ors* 2005 CSOH 32, it was submitted that the consequences of a failure to comply with a statutory duty depended upon the terms of the relevant provision and upon the context (para 42). In that case the Lord Ordinary had referred to the speech of Lord Keith in *London & Clydeside Estates Ltd v Aberdeen District Council* in which he said that failure to obtemper a mandatory provision did not necessarily have the consequence that the proceedings with which the failure is connected are rendered invalid. Whether or not it has that effect may turn on the importance of the statutory provision in relation to the statutory purpose which the provision is directed to achieving (para 46). It was submitted that the purpose of section 69 was clear when viewed in light of section 68, a provision which was intended to ensure that the detention of a patient under a short-term detention certificate was capable of being extended. It did not detract from the Tribunal's duty to determine the application.

[22] Counsel for Fife Health Board submitted that the Tribunal remained under a duty to determine the application. The statute was focussed on the interests of both the patient and the public and section 64(4) carried the implication that the Tribunal was bound to entertain and determine the application. While a failure to determine the application within the five-day period specified in section 69 might render the patient's continued detention thereafter unlawful, the status of the appellant at the material time was irrelevant to the Tribunal's duty to determine the application.

Response for appellant

[23] In reply counsel for the appellant accepted that the cases of *Soneji* and *Charles* set out the proper approach to the principal issue in the appeal and that accordingly one should look at the consequences of the Tribunal's failure and whether the purpose of the statute points to invalidity of its order or not. It was submitted that section 69 was intended to protect the patient from unlawful detention and that the overall purpose of the Act was to secure the correct balance between care and treatment of those with mental disorder on the one hand and the protection of the public on the other. There was little point to section 69 if there were no consequence of the Tribunal's failure to

observe the time limit.

Discussion

[24] I take as my starting point the approach of Lord Steyn in *R v Soneji*, namely that the emphasis in statutory construction ought to be on the consequences of non-compliance with the relevant statutory requirement, in this case section 69, "posing the question whether Parliament can fairly be taken to have intended total invalidity" in the event of such non-compliance.

[25] In the authorities reviewed by Lord Steyn there is a clear move away from the classification of a statutory requirement as mandatory or directory. In one such authority (*Project Blue Sky Inc v Australian Broadcasting Authority*), referred to with approval by Lord Steyn, such a classification is described as the end of the inquiry not the beginning and the opinion is expressed that a better test for determining the issue of validity is to ask "whether it was a purpose of the legislation that an act done in breach of the provision should be invalid", regard being had to "the language of the relevant provision and the scope and object of the whole statute."

[26] Lord Steyn also made reference (at page 312C) to *Wang v Commissioners of Inland Revenue* in which Lord Slynn of Hadley, giving the judgment of the Privy Council, suggested that one should ask two questions, firstly, "whether the legislature intended the person making the determination to comply with the time provision" and, secondly, if so, "did the legislature intend that a failure to comply with such a time provision would deprive the decision maker of jurisdiction and render any decision which he purported to make null and void?" It was clearly recognised therefore that, even if the first question were answered in the affirmative, it did not necessarily follow that the authority or power of the decision maker to make a determination was lost the moment that the time for doing so had elapsed.

[27] A similar approach is evident in the cited passage from the judgment of Millett LJ in *Petch v Gurney* when he stated that "the question is not whether the requirement should be complied with; of course it should: the question is what consequences should attend a failure to comply."

[28] That Parliament intended that the Tribunal should comply with the obligation imposed by section 69 is not in issue. If at one time the Tribunal harboured any doubts about that, such doubts

must have been removed by the observations of Lady Smith in the *Petition of John Smith* and counsel explicitly stated that the Tribunal now appreciated that section 69 imposed a binding obligation on it. The contentious matter is what consequences should attend the Tribunal's failure to comply. The answer to that question requires a consideration of the purpose of section 69 and more generally of the scope and object of the whole Act. On that approach I have come to the view that the submissions on behalf of the respondents are to be preferred.

[29] The fact that the Mental Health Officer is under a statutory duty to make application to the Tribunal for a compulsory treatment order if the provisions of section 57(2) to (5) apply underlines the importance that is attached to ensuring that appropriate care and treatment is provided to a patient having a mental disorder. This strikes me as an overriding purpose of the legislation and in my view, adopting the words of Tipping J in *Charles v Judicial and Legal Service Commission*, it would be inimical to that purpose if the Tribunal were disabled from determining an application properly and timeously brought before it.

[30] The provisions of section 57 have in mind not only the interests of the patient but also, in certain cases, the interests of the public. This appears from the terms of section 57(3)(c), which speaks of the existence of a significant risk to the health, safety or welfare of the patient or to the safety of any other person. Those having an interest in the application are entitled to expect that it will be determined and it seems to me unlikely that Parliament intended that a failure by the Tribunal to comply with the time limit of section 69 would lead to a frustration of the overriding purpose to which I have referred.

[31] While it might be argued, as was suggested by the submission of counsel for the appellant, that the overriding purpose would not be frustrated because a fresh application could be made and the whole procedure start of new, it is not immediately apparent what useful purpose would be served by adopting such a course of action. In any event, section 69 plainly envisages a degree of expedition with which the appellant's submission would not consist and this is reinforced by rule 4 of the Mental Health Tribunal for Scotland (Practice and Procedure)(No.2) Rules 2005 (SSI 2005/519) (hereinafter referred to as "the 2005 Rules") which provides that, as an overriding objective, proceedings before the Tribunal should be handled as fairly, expeditiously and efficiently as possible. While the speed with which proceedings are handled may require to be moderated in the interests of fairness, there is no obvious unfairness to the appellant in allowing the existing

proceedings to continue rather than requiring the procedure to start afresh with the submission of another application.

[32] If, as I have suggested, an overriding purpose of the legislation is to ensure that appropriate care and treatment is provided to a patient having a mental disorder, what is the purpose of the time limit of five working days prescribed by section 69? In my view it cannot be the protection of persons in the appellant's position against unnecessarily lengthy periods of detention because nothing in the Act, least of all section 69, authorises detention beyond the five-day period specified by section 68. On the expiry of that period, and in the absence of a compulsory treatment order or interim compulsory treatment order having been made, the appellant cannot lawfully be detained further, at least without some intervening period of liberation (section 44(1) and (2) and *R v Lothian Health Board (No 2)* 1993 SLT 1021).

[33] In my opinion the purpose of the time limit in section 69 is that suggested by counsel for the Tribunal. If the hearing is not held before the expiry of the five-day period of "grace" there will be a break in the patient's detention which, on the hypothesis that this is a person who requires to be detained in hospital, is undesirable, not just in the interests of the patient but in the interest of the public as well. The avoidance of that state of affairs is in my opinion the objective sought to be achieved by the provision of a time limit and was recognised by Lady Smith in the *Petition of John Smith* as a compelling reason for holding the Tribunal to its obligation to comply with it. Thus a balance is struck between the need to protect the patient's right to liberty on the one hand and the avoidance of an inappropriate release from detention on the other.

[34] When one sets section 69 in the context of the scope and object of the Act as a whole, particularly Part 7, it seems to me that the Tribunal has a duty to entertain and determine all applications for a compulsory treatment order and, in relation to those cases in which the provisions of section 68 apply, to do so within the time limit prescribed by section 69. In those latter cases however it does not follow that the Tribunal's duty is to determine the application within that time limit or not at all and in this regard the duty of the young daughter to which reference was made by Lord Rodger of Earlsferry at the start of his speech in *R v Soneji* is an apt analogy. Whether or not the Tribunal complies with the time limit, the essential foundation of the application remains and in my view Parliament cannot fairly be taken to have intended that the Tribunal's duty to determine that application should disappear on the mere expiry of the five-day period of "grace" allowed by

section 68. Accordingly, subject to the possibility of discretionary control by the court to which I refer hereunder, I am satisfied that in convening the hearing outwith the period of five working days the Tribunal was not acting outwith its jurisdiction.

[35] The submission of counsel for the appellant that there was little point in prescribing a time limit if there was no consequence for the Tribunal if it failed to observe it was in my view founded on a false premise. Quite apart from the public condemnation of the Tribunal that might attend the inappropriate release of a patient from detention, it is clear from the decision in the *Petition of John Smith* that its obligation to comply with the time limit may be enforced by judicial review. Contrary to the submission of counsel for the appellant I do not consider that the issue in that case was confused by the existence of the second short-term detention certificate. The key point of that case was the fact that the hearing was going to take place outwith the five-day extension of detention following the expiry of the first short-term detention certificate. There was only one application before the Tribunal and the court's intervention was founded on the Tribunal's failure to act within that period. The second short-term detention certificate was therefore irrelevant to the issue in the case.

[36] Counsel for the Tribunal made reference to the discussion in *Charles v Judicial and Legal Service Commission* (page 430 para 17) regarding the opinion of Lord Hailsham in *London & Clydeside Estates Ltd v Aberdeen District Council* that the jurisdiction of the court in these matters is inherently discretionary. If I understood counsel correctly, the suggestion was that the court could exercise its discretion to give relief for the non-fulfilment of the time limit in question or not according to the circumstances of the case. It was suggested from certain observations in *Soneji* that there appeared to be some scope for looking at the nature and extent of the breach of the relevant statutory provision, so that in some cases the breach will invalidate what follows and in others not. Standing the contention for the appellant, which did not turn to any extent on matters relevant to an exercise of discretion, it does not seem to me that I need embark upon a consideration of this issue and I would reserve my opinion in relation to it. In *Chief Constable Lothian & Borders Police v Lothian & Borders Police Board and Ors* (at para 47), in a passage which was not specifically referred to, Lord Reed discusses his understanding of what Lord Hailsham was saying and his opinion might usefully inform discussion in an appropriate case in the future.

[37] In the result I have concluded that the appellant's challenge to the competency of the Tribunal's

hearing on 31 January 2006 is not well founded. In these circumstances it is unnecessary to deal with an argument advanced by the respondents that, on the hypothesis that the Tribunal could not competently continue the proceedings after the expiry of the five-day time limit, the appeal itself was incompetent. I now turn to consider the second distinct issue in the appeal.

The Hearing of 31 January 2006

[38] The essence of the appellant's complaint in relation to the hearing on 31 January 2006 is that, rather than proceeding finally to determine the application by the making of a compulsory treatment order, the Tribunal should have made an interim compulsory treatment order and continued the hearing to allow the appellant firstly to obtain an independent psychiatric report and secondly to secure representation by his solicitor at the hearing.

Submissions for appellant

[39] It was submitted that it appeared from the full reasons for its decision that the Tribunal had not firstly considered whether to make an interim compulsory treatment order as it was required to do by rule 8(2) of the 2005 rules. Reference in this regard was made to *Annie McGlynn v The Mental Health Tribunal for Scotland* (unreported Sheriff Principal Bowen 2 March 2006).

[40] It was explained that the appellant had had less than 24 hours notice of the hearing and this was insufficient to allow him to make the necessary arrangements for adequate representation at the hearing. There had been no meaningful participation by the appellant in the hearing and the Tribunal had failed to have proper regard to the principles set out in section 1(3) of the 2003 Act. Reference in this regard was made to *Elizabeth Byrne v The Mental Health Tribunal for Scotland* (unreported Sheriff Principal Taylor 21 February 2006), the submissions on behalf of the appellant in which were largely adopted and repeated in the present case. These submissions were underpinned by particular reference to *Barrs v British Wool Marketing Board* 1957 SC 72, *R v Secretary of State for the Home Department ex parte Doody* 1993 3WLR 154, *Vermeulen v Belgium* 2001 32EHRR 15, *Dombo Beheer BV v Netherlands* 1993 18EHRR 213, A *Guide to Human Rights Law in Scotland*, Reed & Murdoch, 2001 at para 5.55 and Blackstone's *Human Rights Digest* page 177 to 179.

Submissions for first and second respondents

[41] In reply counsel for the Tribunal invited me to reject this second ground appeal. She stated that the relevant papers for the hearing had been dispatched by courier on Friday 27 January 2006 for delivery the same day. She was willing to accept however that the appellant did not in fact receive those papers until Monday 30 January, although the reason for that delay was not known. The appellant was represented at the hearing by an advocacy worker and was himself able to participate in the hearing, including expressing his views on the issue of care in the community. These latter submissions were echoed by the solicitor for the Mental Health Officer.

[42] Counsel referred to the over-riding objective specified in rule 4 of the 2005 Rules and submitted that a balance required to be struck between giving reasonable notice and dealing with matters expeditiously. In relation to those patients in the same position as the appellant short notice was to be expected in the event that the application was only submitted to the Tribunal shortly before the expiry of the short-term detention certificate.

[43] With reference to the authorities relied on by counsel for the appellant, it was submitted that the interplay between articles 5 and 6 of the European Convention on Human Rights was not straightforward and that two competing views were evident, namely -

1. that the right to liberty is a "civil right" and accordingly any proceedings which may result in the deprivation of liberty must be article 6 compliant; and
2. that article 5 deals with the right to liberty and the circumstances in which it may be limited and it was therefore the primary provision as far as procedures are concerned, borrowing if necessary from some of the concepts developed in relation to article 6.

In support of this submission reference was made to Jones, *Mental Health Act Manual* page 796 para 5-036, Karen Reid, *A Practitioner's Guide to the European Convention on Human Rights* page 407 and *R (West) v Parole Board* 2005 1WLR 350.

[44] Counsel submitted that the starting point for any examination of the circumstances with a view to assessing compatibility with Human Rights law should be the jurisprudence relating to article 5.

Under reference to *Megyeri v Germany* 1993 15EHRR 584 and *Magalhaes Pereira v Portugal* 2003 36EHRR 49 it was submitted that, while some form of representation may be called for, one should be wary of any suggestion that there must always be legal representation. This was particularly so in a system which had been introduced in a move away from the courts.

[45] Under reference to *M v Germany* 1984 38D&R 104 and Jones, *Mental Health Act Manual* page 792, it was submitted that an independent psychiatric report was not indispensable and the question was whether the psychiatric evidence before the Tribunal was "sufficient in scope and nature" to provide a reasonable basis for the Tribunal's decision.

[46] With regard to *Annie McGlynn v The Mental Health Tribunal for Scotland* it was pointed out that the appeal had been conceded, although the reason for that concession was not specified. It was submitted that the terms of section 69 were not entirely satisfactory. While logic would suggest that the Tribunal could make an interim compulsory treatment order because it was unable to reach a final conclusion on the application, section 69 was drafted in terms that suggested that the Tribunal should only determine the application if not making an interim compulsory treatment order. This was consistent with the fact that the criteria for interim and full orders are the same.

Discussion

[47] Although section 69 is capable of being read as limiting the Tribunal to a choice between making an interim compulsory treatment order or determining the application, I do not consider that such a construction takes proper account of the fact that what is envisaged by paragraph (a) is an order of an interim nature. In my view no sensible meaning can be given to the description "interim compulsory treatment order" other than that it is an order made pending full consideration of the application for a compulsory treatment order. This is plainly the sense in which section 69 was understood when the 2005 Rules were being promulgated. In terms of rule 8(2) the hearing prescribed by section 69 is described as "a first hearing" and in terms of rule 8(3), where the Tribunal makes an interim compulsory treatment order, a further hearing requires to be fixed unless the Tribunal has determined that a compulsory treatment order should not be made. The terms of rule 8(4) clearly indicate that the further hearing is intended to be the occasion on which the Tribunal considers and determines the application.

[48] In terms of Rule 8(2) the Tribunal is to hold a first hearing "in order to determine whether an interim compulsory treatment order should be made and, if it determines that it should not be made, to determine the application." I respectfully agree with the opinion of Sheriff Principal Bowen in *Annie McGlynn v The Mental Health Tribunal for Scotland* that this provision makes it clear that the first question which the Tribunal ought to consider is whether an interim compulsory treatment order should be made.

[49] In my opinion the Tribunal has either failed to ask that question or, having asked it, has failed adequately to explain its reasons for not making an interim compulsory treatment order. In paragraph 1 of its full findings and reasons for its decision of 31 January 2006 the Tribunal states as follows:-

> "The Tribunal heard representations from Peter Hemmings, an advocacy worker on behalf of the patient, that an interim compulsory treatment order should be made (a) because inadequate notice of today's Tribunal hearing had been given to the patient and (b) to allow the patient to arrange solicitor representation. The Tribunal decided that any defective notice was cured by the appearance of the patient and that his views had been adequately represented at the Tribunal."

[50] In my view the single sentence reason given by the Tribunal for refusing the appellant's motion is flawed. The complaint made was not one of defective notice but of notice that allowed insufficient time to permit the arrangement of appropriate representation. In any event, even assuming that the Tribunal addressed that matter, there is no adequate explanation of why the request for an adjournment was refused.

[51] It should also be noted that no reference is made to the fact that, according to the appellant, Mr Hemmings had also indicated that he wished a continuation to obtain an independent medical report. In the pleadings in this appeal the appellant's averment that that formed part of the reasons for seeking the adjournment is admitted on behalf of the Mental Health Officer. However there is no similar admission on behalf of the Tribunal, although in answer 8 there is an admission that its decision to determine the application on 31 January resulted in the appellant not having the opportunity to instruct his own medical report in response to the application. Coupled with the immediately following admission that a patient is entitled to have investigations carried out on his

behalf it is reasonable to infer that the Tribunal would consider the need to instruct a further medical examination as a proper ground for allowing an adjournment, particularly in those cases in which the patient has only had sight of the case against him for a short period of time.

[52] I am satisfied therefore that the Tribunal's reasons for its decision fail adequately to address either the merits of the appellant's motion for an adjournment or the question it required to address in terms of rule 8(2), namely whether or not an interim compulsory treatment order should be made. I now turn to consider whether, had it done so, the Tribunal's decision would have been any different.

[53] I had the benefit of an interesting discussion with regard to the interplay of articles 5 and 6 of the European Convention on Human Rights and the competing views about whether the proceedings before the Tribunal required to be article 6 compliant. In *R (West) v Parole Board* Lord Bingham found it unnecessary to resolve the question whether or not the civil limb of article 6(1) was engaged, since the common law duty of procedural fairness required to be observed and he was not persuaded that the civil limb of article 6(1) would afford any greater protection. He concluded that proceedings conducted in accordance with that degree of fairness would be compliant with article 5(4) and this was a conclusion with which the remainder of their Lordships agreed.

[54] I have already noted the provisions of rule 4 of the 2005 Rules with regard to the overriding objective to secure that proceedings are handled as fairly as possible and in my view it is as unnecessary to resolve the question of whether article 6 is engaged as it was in the case of *R (West) v Parole Board*. As was made clear in *R v Secretary of State for the Home Department ex parte Doody* (per Lord Mustill at page 168 F/G), "the principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects."

[55] In the present case I consider that the decisive feature in favour of allowing an adjournment is the short period of notice, particularly as the appellant was willing that the Tribunal should make an interim compulsory treatment order. While the appellant was aware some days before the hearing that an application for a compulsory treatment order was to be made, the detail of that application, in particular the detail of the medical reports and the care plan, was not disclosed to him until less than twenty four hours before the hearing. In my view that afforded the appellant insufficient time

to allow proper preparation for and meaningful participation in the hearing that then took place. To that extent at least there was procedural unfairness to the appellant. The most obvious and unsurprising consequence of this minimal period of notice is that the appellant's solicitor was unable to re-arrange her business so as to attend the hearing.

[56] While I do not rule out the possibility that some form of representation other than by a solicitor may be sufficient in some circumstances, I do not consider it unreasonable that the appellant should have the services of a solicitor in the present case. In *Megyeri v Germany* it is stated that "where a person is confined in a psychiatric institution ... he should - unless there are special circumstances - receive legal assistance in subsequent proceedings relating to the continuation, suspension or termination of his detention. The importance of what is at stake for him - personal liberty - taken together with the very nature of his affliction - diminished mental capacity - compels this conclusion." These observations seem to me relevant in the present case and I note that similar considerations informed the decision of the sheriff principal in the not dissimilar circumstances found in *Elizabeth Byrne v The Mental Health Tribunal for Scotland*.

[57] I am not without some sympathy for the Tribunal with regard to the difficulties that face it when confronted with an application made shortly before a short-term detention certificate is due to expire. The demands of the legislative time scale mean that in such cases the period of notice may necessarily be short. In my view however the shorter the period of notice the more likely will it be that an adjournment of the hearing will be required in the interests of fairness.

[58] In light of these considerations I am satisfied that, had the Tribunal correctly identified the matters it required to address, it could not reasonably have refused the appellant's motion for an adjournment given that the appellant was willing that an interim compulsory treatment order should be made. Accordingly its decision cannot stand.

[59] There was little dispute that, were I disposed to recall the Tribunal's order, I should make an interim compulsory treatment order before remitting the matter back to the Tribunal. I have already noted that the criteria for making an interim compulsory treatment order and a compulsory treatment order are the same. In light of my conclusion that an interim compulsory treatment order can be made pending consideration of an application for a full order, it seems to me that an interim compulsory treatment order may be made if the Tribunal is satisfied that *prima facie* the criteria for

making such an order are met. Given that the Tribunal felt able to make a compulsory treatment order on the evidence put before it, it must follow that there were at least *prima facie* grounds for making an interim compulsory treatment order. In these circumstances, given that the Tribunal's order must be recalled, I consider it appropriate to make an interim compulsory treatment order at my own hand, which will authorise the continued detention of the appellant pending full consideration of the application.

[60] With the provisions of rule 4 in mind, I have remitted the matter back to a differently constituted Tribunal with the direction that a hearing should be fixed within twenty-eight days from today's date.

[61] In the result that has emerged it was agreed that the second respondent (the Tribunal) should be found liable to the appellant in the expenses of the appeal. The first respondent also sought expenses against the Tribunal in the event that the appellant succeeded and the third respondent was content that there should be no expenses to or by. Junior counsel for the Tribunal submitted that among the respondents there should be no expenses to or by.

[62] The ground upon which the appellant has succeeded was a ground which was resisted by the first respondent at the appeal and with which she made common cause along with the Tribunal. In these circumstances I do not consider it reasonable to find the Tribunal liable for the first respondent's expenses. In my view the appellant should receive his expenses from the Tribunal but otherwise there should be no expenses to or by any party.

[63] I was requested to certify the appeal as suitable for the employment of junior counsel and in my view that is appropriate. Although I was not asked to sanction the employment of senior counsel, and in view of my decision that is not relevant in any event, I would have considered it appropriate to do so.