[1999] 1 All ER 481

Reid v Secretary of State for Scotland

HOUSE OF LORDS
LORD SLYNN OF HADLEY, LORD LLOYD OF BERWICK, LORD HOPE OF CRAIGHEAD, LORD CLYDE AND LORD HUTTON

12, 13 OCTOBER, 3 DECEMBER 1998

M G Clarke QC and R A McCreadie (both of the Scottish Bar) (instructed by the Treasury Solicitor, agent for Solicitor to the Secretary of State for Scotland).
G C Bell QC and S G Collins (both of the Scottish Bar) (instructed by Balfour & Manson, Edinburgh, agents for McKennas, Glenrothes).

Their Lordships took time for consideration.
3 December 1998. The following opinions were delivered.

LORD SLYNN OF HADLEY.

My Lords, I have had the advantage of reading a draft of the speech prepared by my noble and learned friend Lord Clyde. For the reasons he gives, I too would allow the appeal and restore the interlocutor of the Lord Ordinary. I also agree with the guidance given by my noble and learned friend Lord Hope of Craighead as to the application of the statutory provisions.

LORD LLOYD OF BERWICK.

My Lords, on 8 September 1967 the respondent Alexander Lewis Hutchison Reid, then aged 17, was convicted of culpable homicide. He was made the subject of a hospital order under what is now s 58 of the Criminal Procedure (Scotland) Act 1995. He was also made subject to a restriction order under s 59 of the Act, without limit of time. A restriction order may only be made if it appears to the court that it is necessary for the protection of the public from serious harm.

The medical evidence at the trial was to the effect that Mr Reid was suffering from what was then known in Scotland as mental deficiency, but is now known as mental handicap. It is common ground (and the sheriff has so found) that he is not mentally handicapped. Instead he is suffering from a 'persistent and permanent mental disorder' characterised by 'abnormally aggressive and seriously irresponsible behaviour'. In other words he is a psychopath. In July 1994 he made an application for his discharge (not for the first time) under s 64 of the Mental Health (Scotland) Act 1984. But Sheriff Reeves refused to make an order. He found that if Mr Reid were to be released now, there would be a very high risk of his reoffending, and his offending would be likely to have a sexual connotation. He reached his conclusion after hearing conflicting evidence from seven

psychiatrists.

Mr Reid presented a petition for judicial review of the sheriff's decision. The Lord Ordinary (Lord Rodger) (1995 SLT 555) dismissed the petition. He based himself on the decision of the Divisional Court in England in R v Mersey Mental Health Review Tribunal, ex p D (1987) Times, 13 April and the subsequent decision of the Court of Appeal in R v Canons Park Mental Health Review Tribunal, ex p A [1994] 2 All ER 659, [1995] QB 60. The Inner House (1998 SLT 162) allowed a

[1999] 1 All ER 481 at 483

reclaiming motion, and granted a decree of reduction of the sheriff's decision. There is now an appeal to your Lordships.

Although the appeal is nominally and in substance an appeal by the Secretary of State for Scotland, it is also in reality an appeal against the decision of the Court of Appeal in the Canons Park case. Regrettably their Lordships in the Inner House regarded the Canons Park case as irrelevant on the ground that the 'terminology' of the English Mental Health Act 1983 differs from that of the Scottish Act. Mr Bell QC for the Secretary of State was unable to sustain that ground. It is now common ground that the relevant provisions of the two Acts are essentially the same. Consistently your Lordships in allowing the appeal have held that the Canons Park case was wrongly decided. Since the Canons Park case and the previous decision in Ex p Dillon have been treated as guiding authority in numerous decisions in the Sheriff's Court in Scotland (see R v Secretary of State for Scotland 1989 SCLR 784) and in mental health review tribunals throughout England (see R v Mental Health Review Tribunal, ex p Macdonald [1998] COD 205) it is clear that your Lordships' decision will have wide repercussions. It is not known how many cases where psychopaths are currently being detained under Pt II of the 1983 Act (England and Wales) or Pt V of the 1984 Act (Scotland) will have to be reconsidered.

But the consequences are even more serious in the criminal field. Take the case of a dangerous psychopath who has been convicted of a grave sexual offence. Instead of being sentenced to life imprisonment, he may quite properly have been made subject to a hospital order under s 58 of the 1995 Act, and a restriction order under s 59. For that purpose it would have been necessary for the court to be satisfied on the evidence of two psychiatrists not only that he was suffering from a psychopathic disorder, but also that medical treatment was 'likely to alleviate or prevent a deterioration of his condition': (see s 17(1)(a)(i) of the 1984 Act). Now suppose that the psychiatrists turn out to be wrong. Suppose that the current of psychiatric opinion has changed, and it is now the better view that treatment never could have had the desired effect. Or suppose, more simply, that the treatment has run its course, and that it has done for the patient all that it was ever likely to do by way of alleviating his condition or preventing any further deterioration. His condition is stable, but he is still suffering from the same psychopathic disorder, and is still dangerous. If their Lordships of the Inner House are correct, the sheriff would be bound to order his discharge. Conditional discharge under s 64(1)(c) and (2) would not be appropriate, since, ex hypothesi, further treatment would serve no purpose. So the sheriff would be bound to order an absolute discharge.

That might not in itself be cause for alarm if the patient could be brought back into the prison system. But it was common ground that until s 6 of the Criminal Procedure

(Scotland) Act 1997 (and s 46 of the Crime (Sentences) Act 1997 in England) there was no way of bringing such a man back into the prison system so as to serve the sentence of life imprisonment which would otherwise have been imposed on him; and s 6 of the Scottish Act and s 46 of the English Act are not retrospective. It is not known how many psychopathic offenders are currently detained in hospital under restriction orders whose cases will now have to be reconsidered, and who may, as a result, have to be released back into the community. The seriousness of these possible consequences does not need to be underlined. The consequences cannot, of course, control the construction of the 1984 Act, if the meaning is clear. But it does lead one to wonder whether a construction which produces such consequences can be correct.

[1999] 1 All ER 481 at 484

It is convenient at this stage to set out the most relevant statutory provisions. The Criminal Procedure (Scotland) Act 1995 provides:

> '… 58.—(1) Where a person is convicted in the High Court or the sheriff court of an offence, other than an offence the sentence for which is fixed by law, punishable by that court with imprisonment, and the following conditions are satisfied, that is to say—(a) the court is satisfied, on the written or oral evidence of two medical practitioners (complying with section 61 of this Act) that the grounds set out in—(i) section 17(1); or, as the case may be (ii) section 36(a), of the Mental Health (Scotland) Act 1984 apply in relation to the offender; (b) the court is of the opinion, having regard to all the circumstances including the nature of the offence and the character and antecedents of the offender and to the other available methods of dealing with him, that the most suitable method of disposing of the case is by means of an order under this section, subject to subsection (2) below, the court may by order authorise his admission to and detention in such hospital as may be specified in the order or, as the case may be, place him under the guardianship of such local authority or of such other person approved by a local authority as may be so specified …
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> 59.—(1) Where a hospital order is made in respect of a person, and it appears to the court—(a) having regard to the nature of the offence with which he is charged; (b) the antecedents of the person; and (c) the risk that as a result of his mental disorder he would commit offences if set at large, that it is necessary for the protection of the public from serious harm so to do, the court may, subject to the provisions of this section, further order that the person shall be subject to the special restrictions set out in section 62(1) of the Mental Health (Scotland) Act 1984, without limit of time …'

The Mental Health (Scotland) Act 1984 provides:

> '… 17.—(1) A person may, in pursuance of an application for admission under section 18(1) of this Act, be admitted to a hospital and there detained on the grounds that—(a) he is suffering from mental disorder of a nature or degree which makes it appropriate for him to receive medical

treatment in a hospital; and (i) in the case where the mental disorder from which he suffers is a persistent one manifested only by abnormally aggressive or seriously irresponsible conduct, such treatment is likely to alleviate or prevent a deterioration of his condition; or (ii) in the case where the mental disorder from which he suffers is a mental handicap, the handicap comprises mental impairment (where such treatment is likely to alleviate or prevent a deterioration of his condition) or severe mental impairment; and (b) it is necessary for the health or safety of that person or for the protection of other persons that he should receive such treatment and it cannot be provided unless he is detained under this Part of this Act …

64.—(1) Where an appeal to the sheriff is made by a restricted patient who is subject to a restriction order, the sheriff shall direct the absolute discharge of the patient if he is satisfied—(a) that the patient is not, at the time of the hearing of the appeal, suffering from mental disorder of a nature or degree which makes it appropriate for him to be liable to be detained in a hospital for medical treatment; or (b) that it is not necessary for the health or safety of the patient or for the protection of other persons that he should receive such treatment; and (in either case) (c) that it is not appropriate for the patient to remain liable to be recalled to hospital for further treatment.

[1999] 1 All ER 481 at 485

(2) Where in the case of any such patient as is mentioned in subsection (1) of this section the sheriff is satisfied as to the matters referred to in paragraph (a) or (b) of that subsection but not as to the matters referred to in paragraph (c) of that subsection he shall direct the conditional discharge of the patient …'

In the Canons Park case [1994] 2 All ER 659 at 680, [1995] QB 60 at 82 Kennedy LJ, who gave the leading judgment, used terms which have been found convenient ever since to describe the three statutory criteria which have to be met under s 3 of the 1983 Act and s 17 of the 1984 Act before a patient suffering from a psychopathic disorder can be admitted and detained for treatment. Under the 'appropriateness' test the nature or degree of the psychopathic disorder must be such as to make it appropriate for him to receive medical treatment in hospital. Under the 'treatability' test the treatment in question must be likely to alleviate or prevent a deterioration in his condition. Under the 'safety' test it must be necessary for him to receive such treatment either for his own health or safety or the safety of others, and it must be shown that such treatment cannot be provided unless he is detained.

Turning to s 64 of the Act one finds what appears to be a reflection of the appropriateness test in s 64(1)(a) and of the safety test in s 64(1)(b). But nowhere is there any reflection of the treatability test. Sheriff Reeves put the point very clearly when he said:

'Nowhere in Part VI [which covers detention of patients concerned in criminal proceedings, and includes s 64] does it say that a criminal who

> has been ordered by the High Court to be detained without limit of time requires to be discharged if his condition is not being alleviated.'

By the end of the hearing before the Lord Ordinary it was common ground that treatability was a factor in the overall decision whether to discharge a patient or not. But it was not decisive. In other words it is open for a sheriff to refuse to order the discharge of a psychopathic patient even though his condition is no longer regarded as treatable. I am bound to say that I am attracted by the common sense of that view, especially in the case of a patient who is subject to a restriction order without limit of time.

But the Inner House took a different view. In their opinion the fact that the psychopathic disorder is no longer regarded as treatable is decisive in favour of a discharge. The Lord Justice Clerk (Lord Cullen) (1997 SLT 162 at 165) put the point as follows:

> '[Counsel for the Secretary of State] submitted that the terminology of s 64 can be treated as wholly independent of the terms of s 17. This seems to me to fail to give proper effect to the use of the word “appropriate” in conjunction with the words “liable to be detained”. That language plainly refers to the judgment which requires to be exercised as to whether or not there should be a liability to be detained in hospital for medical treatment, and hence involves the need to look beyond the existing hospital order. Thus it is necessary in my view to refer to the criteria set out in s 17(1) of the Act.'

A little later he said:

> 'Given that s 64(1) refers back to the terms of s 17(1), what are the matters as to which the sheriff requires to be satisfied before he has to direct the absolute discharge of a patient?'

[1999] 1 All ER 481 at 486

The core of Lord Macfadyen's reasoning is contained in the following paragraph (at 171):

> 'Leaving aside for the moment the language of ss 17(1) and 64(1), it seems to me that in principle if certain cumulative criteria require to be satisfied before a person may be detained, that person should be entitled to his discharge if he establishes that any one of the necessary criteria is no longer satisfied … It would, however, in my view be readily understandable if the effect of s 64(1), properly construed, were to be that discharge would be granted if it could be shown by the patient that, judged at the time of the application for discharge, not all of the cumulative criteria for ordering detention were satisfied. Conversely, it would in my view be unjust and an unwarrantable interference with the liberty of the subject if a person who had been detained because a number of necessary criteria were all satisfied could not obtain his discharge despite proving that one or more of these criteria were no longer satisfied. I would therefore be slow to be persuaded that s 64(1), properly

> construed, could have that effect.'

Both the Lord Justice Clerk and Lord Macfadyen would have agreed with the way the point was put by Roch LJ in his dissenting judgment in the Canons Park case [1994] 2 All ER 659 at 676, [1995] QB 60 at 78:

> '… it cannot, I would suggest, be accepted that Parliament intended that a tribunal should when reviewing a decision under s 3 … apply only two of the three criteria laid down in the 1983 Act to justify the compulsory detention of patients suffering from psychopathic disorder or mental impairment.'

There are, I think, considerable difficulties in reading s 64 as if it 'referred back' to s 17 when it does not in fact say so. But before coming to those difficulties I wish to address the point of principle mentioned by Lord Macfadyen. Is there anything so very strange in Parliament having provided that of the three criteria necessary for the making of a hospital order under s 58 of the 1995 Act, which in turn refers to s 17 of the 1984 Act, only two should be decisive when it comes to considering the discharge of a patient subject to a restriction order under s 64?

It seems to me that Parliament has intentionally drawn a distinction between two different types of psychopathic disorder, one being likely to yield to treatment in the sense envisaged by s 17(1)(a)(i), and the other not. If the psychopathic disorder is of a type which is likely to yield to treatment, then the next question is whether that disorder is of a nature and degree which makes it appropriate for the patient to receive that treatment in a hospital. But if the psychopathic disorder is not of a type which is likely to yield to treatment, then that is the end of the matter. The psychopathic offender cannot be admitted as a patient under s 58 and must be sent to prison instead. I can see no reason why Parliament should not have intended the decision as to the type of pathological disorder from which the offender is suffering to be made once and for all at the outset. For that is the time when it has to be decided whether to send him to prison or not. If that be so, then one would not expect treatability to be in issue when the case comes to be considered under s 64. Either the treatment has worked in which case he is no longer suffering from that disorder, and he is eligible for discharge under s 64(1)(a); or he is still suffering from that disorder, in which case it remains, by definition, treatable. What Parliament did not envisage was that an existing psychopathic disorder might be regarded as treatable today and untreatable tomorrow owing to a change in psychiatric thinking. If that had been within the contemplation of Parliament, there would surely have been

provision for the revocation of hospital orders, and the substitution of an appropriate term of imprisonment.

At the end of his admirably clear and succinct reasons Sheriff Reeves said:

> 'I am told that psychiatrists would today be unlikely to recommend admission to the state hospital. However, the applicant was properly admitted and detained, and I have not been satisfied that he is now not

suffering from a mental disorder of a nature or degree which makes it appropriate for him to be liable to be detained in a hospital for medical treatment.'

I agree with the sheriff that what psychiatrists would be likely to recommend today is not the relevant question. Mr Reid was properly admitted and detained in 1967. The fact that many psychiatrists would take a different view today would only be relevant if Mr Reid had been detained under Pt V of the Act, and his period of detention had expired. Then the question would arise whether his detention ought to be renewed under s 30(2). There is a specific reference in that context, as one would expect, to the grounds set out in s 17(1) (see s 30(3)). But Mr Reid is not detained under Pt V. He is detained without limit of time under Pt VI, and the authority for his detention continues under s 62(1)(a) until his absolute discharge. In those circumstances I do not find it at all surprising that of the three criteria necessary for the making of a hospital order under s 58 of the 1959 Act, only two are relevant when it comes to an appeal under s 64. Indeed my surprise is the other way round. I would find it most surprising if Parliament intended a dangerous psychopathic offender to be released into the community merely because the disorder from which he is still suffering is no longer regarded as treatable. With respect therefore I cannot accept the principle which governed Lord Macfadyen's approach. The considerations which arise on the admission of a restricted patient are not the same as those which arise on his discharge. For the same reason I do not agree with the passage which I have quoted from the judgment of Roch LJ in the Canons Park case.

Against that background I now turn to s 64. At the outset it is vital to bear always in mind that the section falls within Pt VI of the Act, and not Pt V. The legislative purpose underlying Pt V of the Act, corresponding to Pt II of the English Act, was considered by the House in R v Bournewood Community and Mental Health NHS Trust, ex p L (Secretary of State for Health intervening) [1998] 3 All ER 289, [1998] 3 WLR 107. Putting it very briefly, the purpose was to encourage the admission of patients on a voluntary basis, and to discourage the use of compulsory powers, except where necessary: see especially the judgment of my noble and learned friend Lord Goff of Chieveley ([1998] 3 All ER 289 at 295–297, [1998] 3 WLR 107 at 113–116), and the crucial importance attached to s 131(1) of the English Act reproduced verbatim in s 17(2) of the Scottish Act. There is a reflection of the same approach in ss 35A to 35J of the Scottish Act introduced into Pt V by s 4 of the Mental Health (Patients in the Community) Act 1995: see K (a patient) v Craig (1998) Times, 7 December. It is obvious, therefore, that the legislative purpose underlying Pt V of the Act is very different from the purpose underlying Pt VI of the Act. Indeed Pt VI might as well have found a place in Pt VI of the Criminal Procedure (Scotland) Act 1995. So it is difficult to see what room there is for any presumption in favour of the liberty of the subject, when the patient would, in the example given, have been sentenced to a term of life imprisonment if not made subject to a hospital order.

It is said that a construction of s 64 should be favoured which produces symmetry between s 64 and the provisions of Pt V of the Act, and in particular

s 33, which covers the discharge of non-criminal patients. But how does this help? In the discharge of non-criminal patients the central role is played by the responsible medical

officer. But the responsible medical officer does not feature in the discharge of a patient who is subject to a restriction order. Clearly he is not competent to order the discharge of such a patient, and still less is the patient's nearest relative: see s 33(5). In the case of a restricted patient it is the Secretary of State who plays the central role, as one can see from s 68 of the Act and other provisions in Pt VI. So I do not think much help is to be gained from a comparison with s 33. Indeed s 62(1) specifically provides:

> '(a) none of the provisions of Part V of this Act relating to the duration, renewal and expiration of authority for the detention of patients shall apply, and the patient shall continue to be liable to be detained by virtue of the relevant hospital order until he is absolutely discharged under sections 63 to 68 of this Act …'

Section 33 is specifically disapplied by Pt II of Sch 2.

And so I come to the language of s 64. The first point to be made is the obvious one that whereas s 58(1)(a)(i) of the 1995 Act makes specific reference to s 17(1) of the 1984 Act, s 64 does not. If Parliament had intended a patient to be discharged whenever the conditions set out in s 17(1) were not all satisfied, then it would have been easy enough to say so. A form of wording was suggested by Kennedy LJ in the Canons Park case. An alternative form of wording might have been 'the sheriff shall direct the discharge of the patient if satisfied that one of the grounds set out in section 17 has ceased to apply'. But Parliament has not taken this simple course. The only explanation that I can think of is that Parliament intended s 64 to stand on its own without reference back to s 17(1)

There are other linguistic pointers in the same direction. First there is the problem of interpretation noted by the Lord Justice Clerk (1998 SLT 162 at 165). In s 17(1)(a) the question is whether it is appropriate for the patient to receive medical treatment. In s 64(1)(a) the question is whether it is appropriate for the patient to be liable to be detained in hospital for medical treatment. If s 64 is referring back to s 17, then on the face of it s 64(1)(a) would seem to cover all three statutory criteria. But that would mean that s 64(1)(b) is rendered otiose. The Lord Justice Clerk preferred on balance the view that s 64(1)(a) only 'refers back' to s 17(1)(a); and this is also the view of Lord Macfadyen. But the problem only arises at all if one assumes (wrongly in my view) that s 64(1) is intended to refer back to s 17(1).

There is another pointer to be found in s 64(1)(c). Where a patient suffering from a pathological disorder has been conditionally discharged, the Secretary of State can recall him at any time for further treatment: see s 64(2)(a) coupled with s 68(3). It could not, I think, be suggested that the Secretary of State can only recall such a patient if the treatment is likely to alleviate or prevent a deterioration in his condition. Parliament has given him an unfettered discretion. But if continuing treatability is not a decisive consideration under the recall procedure (it would always be a relevant consideration) why should it be a decisive consideration under s 64(1)(a)?

It is said that the phrase 'liable to be detained in a hospital for medical treatment' in s 64(1)(a) is the link which imports the treatability test from s 17(1). But once a hospital order has been made, coupled with a restriction order, the patient continues to be liable to be detained for medical treatment until he is absolutely discharged: see s 62(1)(a). The only question under s 64(1)(a) is whether he is still suffering from a mental disorder of a

nature or degree which

makes it appropriate for him to continue to be liable to be detained for medical treatment. Bearing in mind the wide definition of medical treatment in s 125, I am unable to see how 'treatability' in the narrow sense, that is to say treatment which is likely to alleviate or prevent a deterioration in the patient's condition, arises.

It is said that the construction favoured by the Inner House is more consistent with the judgment of the European Court of Human Rights in X v UK (1981) 4 EHRR 188. The relevant passage (at 209–210 (para 58) is as follows:

> 'The [judicial] review should, however, be wide enough to bear on those conditions which, according to the Convention, are essential for the "lawful" detention of a person on the ground of unsoundness of mind, especially as the reasons capable of initially justifying such a detention may cease to exist … This means that in the instant case Article 5(4) required an appropriate procedure allowing a court to examine whether the patient's disorder still persisted and whether the Home Secretary was entitled to think that a continuation of the compulsory confinement was necessary in the interests of public safety.'

As Mr Clark QC pointed out, the court was concerned with the question whether the disorder still persisted, not whether, if it persisted (as it does on the facts of the present case) it is still regarded as treatable.

In the end it comes back to the language of s 64. Are the words clear enough to require the sheriff to order the discharge of a pathological offender, thereby releasing him back into the community, on the ground that his condition is no longer regarded as treatable? I can give only one answer to that question. They are not. In my view the Canons Park case was rightly decided. I agree with the conclusion and reasoning of the Lord Ordinary, and would allow the appeal on that ground.

As for the second ground of appeal I have nothing to add to what will be said by my noble and learned friend Lord Clyde. The sheriff's finding on the evidence was that medical treatment had alleviated Mr Reid's condition, and would continue to do so. I am unable to accept the view of the Inner House that there was no evidence to support that finding, or that it was so contrary to common sense as to justify the court's intervention on judicial review. I would allow the appeal on that ground also.

LORD HOPE OF CRAIGHEAD.

My Lords, the respondent was 17 years old when on 8 September 1967 he was convicted in the High Court of Justiciary at Glasgow of culpable homicide. He pled guilty to the charge, which appears from the circumstances of the offence to have been reduced on the ground of diminished responsibility. Had it not been for reports by two medical practitioners that he was suffering from mental deficiency, it seems likely that he would have been charged with murder and, if found guilty, sentenced to life imprisonment.

After hearing the oral evidence of the two medical practitioners the trial judge was satisfied in terms of s 55(1) of the Mental Health (Scotland) Act 1960 that he was suffering from mental disorder of a nature or degree which would warrant his admission to a hospital under Pt IV of that Act and that the most suitable method of disposing of the case was by means of a hospital order. He was also satisfied in terms of sub-s (5) of that section that, on account of his dangerous, violent or criminal propensities, the respondent required treatment under conditions of special security. So he made an order under s 55 that he was to be detained in the State Hospital. He also made an order restricting the

[1999] 1 All ER 481 at 490

respondent's discharge from hospital without limit of time. This order was made under s 60(1) of that Act, which enabled the court to impose the special restrictions which that section set out to protect the public against the risk that he would commit further offences if set at large.

The powers which the trial judge exercised are now to be found in ss 58 and 59 of the Criminal Procedure (Scotland) Act 1995. Section 58(1)(a) of that Act requires the court to be satisfied, before it makes a hospital order, that the grounds set out in s 17(1) of the Mental Health (Scotland) Act 1984 apply in relation to the offender. And s 59(1) of the Criminal Procedure (Scotland) Act 1995, which now requires that a restriction order should only be made where it is necessary for the protection of the public from serious harm, provides that where a restriction order is made the special restrictions are those set out in s 62(1) of the Mental Health (Scotland) Act 1984. The effect of the transitional provisions in Sch 4 to the 1984 Act is that the orders which the trial judge made under the Mental Health (Scotland) Act 1960 are to be treated as having been made with reference to the corresponding provisions of the 1984 Act. So it is to the provisions of that later Act that one must turn in order to discover the effect of the restriction order on the respondent's liability to be detained in a hospital.

Two issues are raised by the decision of the Inner House to allow the respondent's reclaiming motion against the interlocutor of the Lord Ordinary, which dismissed his petition for judicial review of the sheriff's interlocutor refusing his summary application under s 63 of the Mental Health (Scotland) Act 1984 to order his discharge. The first relates to the proper construction of the provisions of s 64(1) of that Act, which sets out the matters as to which the sheriff must be satisfied before an order for the discharge of a restricted patient may be made. The second relates to the approach which the Inner House took when they were examining the sheriff's decision on the evidence. The first issue is by far the more important, as any guidance which we can give on this matter will affect the position of other patients, hospital managers and medical practitioners as well as that of the Secretary of State and the Mental Welfare Commission for Scotland in the exercise of their functions and duties under the Act. It will affect the public also, bearing in mind that the purpose of a restriction order is to protect the public against the risk that the patient may commit further offences if he is given his discharge. And it may assist consideration of this matter by the Scottish Parliament, bearing in mind that legislation on mental health in Scotland, not being a reserved matter as defined by s 30 of and Sch 5 to the Scotland Act 1998, will be within its legislative competence. The second issue is a relatively simple one, as to whether the approach which the Inner House took to this case can be reconciled with the fact that they were dealing with a petition for judicial review

and not with an appeal from the sheriff's decision on the evidence.

As to the second issue I do not wish to add anything to the reasons which have been given by my noble and learned friend Lord Clyde, with which I agree, for holding that the learned judges of the Second Division were in error in departing from the approach to the evidence which had been taken by the Lord Ordinary. On one view that would be sufficient for the disposal of this appeal, as the sheriff made it clear that the opinion which he had formed of the evidence was unaffected by his decision as to whether he was bound by s 64(1) to order the respondent's discharge if he was satisfied that his condition was not being alleviated. He accepted the view of the respondent's responsible medical officer that his condition was being alleviated by medical treatment which he was receiving in the hospital. But it is clear that this would not be sufficient for the disposal of the wider issues which have been raised by this case. I should like

therefore to make the following observations in order to explain why I also disagree with the Secretary of State's argument on the first issue.

Section 64(1) of the Mental Health (Scotland) Act 1984 sets out three conditions to which the sheriff must direct his attention when he is considering whether or not to direct the patient's absolute discharge. The first two are stated in the alternative. The third is one as to which he must be satisfied in either case. They are set out in the subsection in these terms:

> '(a) that the patient is not, at the time of the hearing of the appeal, suffering from mental disorder of a nature or degree which makes it appropriate for him to be liable to be detained in a hospital for medical treatment; or (b) that it is not necessary for the health or safety of the patient or for the protection of other persons that he should receive such treatment; and (in either case) (c) that it is not appropriate for the patient to remain liable to be recalled to hospital for further treatment.'

The first two conditions relate to the patient's present state, while the third requires the sheriff to look to the future. If he is satisfied as to one or other of the first two conditions but not the third, the sheriff is required by s 64(1) to direct a conditional discharge. The effect of a conditional discharge is that the patient may be recalled to hospital by the Secretary of State by warrant at any time under s 68(3) during the period of the restriction order and that he must comply with such conditions, if any, as may have been imposed on him. These are important safeguards bearing in mind the purpose of making a restriction order, which is to protect the public from serious harm in view of the risk that as a result of his mental disorder the patient would commit offences if set at large: s 59(1) of the Criminal Procedure (Scotland) Act 1995. A further safeguard is that which is provided by s 64(7) of the 1984 Act, which enables the sheriff to defer a direction for the conditional discharge of a restricted patient until such arrangements as appear to him to be necessary for that purpose have been made to his satisfaction.

The situation regarding the conditional discharge of a patient who is subject to a restriction order without limit of time is thus comparable with that regarding the release on life licence of a prisoner convicted of murder who is serving a sentence of life

imprisonment. But these safeguards apply only where the sheriff is unable to be satisfied that it is not appropriate for the patient to remain liable to be recalled to hospital for further treatment and his order is for the patient's conditional discharge. If he is satisfied on this point and one or other of the previous conditions is also satisfied, his duty under s 64(1) is to direct the patient's absolute discharge.

The problem which has arisen in this case is due to the fact that the diagnosis of the mental disorder from which the respondent is now suffering is no longer the same as it was when the judge made the original hospital order. It was recognised by 1980 that he was not suffering from mental deficiency. The mental disorder from which he suffers is that which s 17(1) of the 1984 Act describes as 'a persistent one manifested only by abnormally aggressive or seriously irresponsible conduct'. He has been described as having a psychopathic personality, and s 1(2) of the Mental Health Act 1983, which applies to England and Wales, defines the expression 'psychopathic disorder' in these terms. Some of the witnesses who gave evidence said that they preferred the term 'anti-social personality'. Terminology apart however, the important point is that there is now a substantial body of medical opinion that this is a condition which is not susceptible of treatment in a hospital.

[1999] 1 All ER 481 at 492

Section 17(1) of the 1984 Act describes the grounds on which a patient may be admitted to a hospital. It says that the ground which must be applied, in the case where the mental disorder from which the patient suffers is a persistent one manifested only by abnormally aggressive or seriously irresponsible conduct, is that medical treatment in a hospital is likely to alleviate or prevent a deterioration in his conduct. This provision gives effect to the policy that psychopaths should only be detained under compulsory powers in a hospital where there is a good prospect that the treatment which they will receive there will be of benefit.

Medical opinion which says that this condition is not susceptible of treatment in a hospital may be capable of being reconciled with the statute in a practical way, because those who hold to this opinion will refrain from recommending that a hospital order should be made in cases of this kind. The sheriff made a finding of fact in this case to the effect that, if the respondent's offence was committed today, psychiatrists generally would be unlikely to recommend admission to the State Hospital. On this view these persons would be sentenced after conviction to detention in a young offender institution or to imprisonment. But we are dealing in this case with a patient who has been since 1967 liable to be detained in a hospital under a hospital order. That is the background against which I now turn to the issue as to the meaning of the conditions in s 64(1) of the 1984 Act about which the sheriff requires to be satisfied.

It seems to me that this issue resolves itself into two questions. The first is as to the relationship between conditions (a) and (b) in s 64(1) for obtaining a discharge and grounds (a) and (b) in s 17(1) for being admitted to and detained in a hospital. The second is as to the meaning of the expression 'medical treatment' in regard to cases of this kind, bearing in mind that condition (c) in s 64(1) requires the sheriff to consider whether or not, in regard to the question whether the patient should be given an absolute or a conditional discharge, it is appropriate that the patient should remain liable to be

recalled to hospital 'for further treatment'.

As to the first of these two questions, I consider that the issues to which the sheriff is required to address his mind when he is considering an application for discharge under s 64(1) are the same as those which have to be considered when an application is made under s 18(1) for admission to a hospital. The language is different because in the case of an application for admission to a hospital it must be shown positively that all the relevant conditions are satisfied. An application for discharge requires that these issues be addressed negatively, because it will be enough that one of the relevant conditions for admission to a hospital is not satisfied. But there is a sufficient link between the language of the two subsections to show that the conditions are the same. This is to be found in the phrase 'which makes it appropriate for him to be liable to be detained in a hospital for medical treatment' which appears in s 64(1)(a). The same phrase is used in s 33(3) and (4) of the 1984 Act in regard to the procedure for obtaining a discharge under Pt V of the Act. It refers to the status which a patient acquires when the grounds for admission are satisfied, which the patient then retains until he ceases to be so liable under the various procedures laid down in the Act.

We are, of course, dealing in this case with the provisions for discharge which appear in Pt VI of the Act. Section 62(1)(a) provides that none of the provisions of Pt V relating to the duration, renewal and expiration of authority for the detention of patients shall apply to a patient in respect of whom a restriction order is in force. But it seems to me that there is no escape from the fact that Parliament has chosen to use the same language in s 64(1)(a) and (b) in Pt VI of

the Act as it has used in s 33(4)(a) and (b) in Pt V. Furthermore, I do not think that it is possible to give any other meaning to this phrase where it appears in ss 33(3) and 33(4), in view of the fact that an order for discharge by the managers of the hospital or by the patient's nearest relative may be met by a report by the patient's responsible medical officer that the grounds set out in s 17(1) apply in relation to the patient. In the case of an order for discharge by the nearest relative which is met by such a report, the issue which the sheriff has to resolve before he can be satisfied that 'the patient is not at the time of the hearing of the appeal suffering from mental disorder of a nature or degree which makes it appropriate for him to be liable to be detained in a hospital for medical treatment' is whether the grounds set out in s 17(1) apply. If they do, he must refuse the appeal by the nearest relative. If they do not, he must order the patient's discharge.

I find myself in agreement with the views which were expressed by Roch LJ about the corresponding provisions in s 72(1)(b) of the Mental Health Act 1983 in his dissenting judgment in R v Canons Park Mental Health Review Tribunal, ex p A [1994] 2 All ER 659 at 674–676, [1995] QB 60 at 76–78. Having reached the conclusion that Parliament did not intend to refer here simply to the 'appropriateness' test and that the words used refer clearly in the case of psychopathic disorder and mental impairment to the 'treatability' test, he said ([1994] 2 All ER 659 at 675, [1995] QB 60 at 77):

> 'A psychopathic patient is not liable to be detained in hospital for medical treatment, unless the treatment is likely to be of some good to him. If his psychopathic disorder is untreatable then it is not of a nature which makes

> it appropriate for him to receive medical treatment in a hospital. The policy of the 1983 Act in relation to patients with psychopathic disorders is treatment not containment.'

As he observed, it cannot be accepted that Parliament intended that a tribunal—in our case, the sheriff—should, when reviewing a decision relating to the patient's discharge, apply only two of the three criteria laid down in the Act to justify the compulsory detention of patients suffering from mental disorder in a hospital (see [1994] 2 All ER 659 at 676, [1995] QB 60 at 78).

The grounds set out in s 17(1) were analysed by the Lord Ordinary, who said that he had been greatly assisted by the analysis of the equivalent provisions in the Mental Health Act 1983 by Kennedy LJ in R v Canons Park Mental Health Review Tribunal, ex p A [1994] 2 All ER 659 at 680ff, [1995] QB 60 at 82ff. In that passage Kennedy LJ referred to the various tests which appear in s 17(1) of the 1984 Act as 'the appropriateness test', 'the treatability test' and 'the safety test.' I too regard this as a helpful analysis. But I respectfully disagree with both Kennedy LJ and with the Lord Ordinary as to the conclusion which they draw from it as to the relationship between 'appropriateness' and 'treatability'. The Lord Ordinary (1997 SLT 555 at 559) explained his position in the following passage:

> 'It is worth noticing that a doctor need only confront this question ["the treatability test"] in cases where he has already decided that the patient is suffering from "mental disorder of a nature or degree which makes it appropriate for him to receive medical treatment in a hospital". So this additional test is not part of the test as to the appropriateness for the patient of medical treatment in hospital.'

It seems to me that, in the case of the person in whose case the 'treatability' test requires to be satisfied, the question as to whether the 'appropriateness' test is satisfied cannot be addressed unless and until the treatment which one is talking

about has been identified. The 'treatability' test refers to 'such treatment', as also does the 'safety' test. The effect of the 'treatability' test, where it applies, is to define the treatment which needs to be considered in order to see whether all three tests can be met. It is only if the 'treatability' test is satisfied that it will be necessary to consider whether it is appropriate that that treatment should be received by the person in a hospital and, if so, whether it is necessary for his health or safety or for the protection of other persons that he should receive such treatment. No good purpose would be served by considering the 'appropriateness' test first in those cases which must pass the 'treatability' test. The analysis, while helpful, tends to obscure the fact that in those cases these two tests are in practice not capable of being separated. As Lord Macfadyen (1998 SLT 162 at 172) put it in the Second Division, the 'treatability' test is incorporated in the 'appropriateness' test. The medical practitioner must ask himself first, what is the mental disorder from which the person is suffering? The next question, if it is of a kind which must pass the 'treatability' test, is whether that test is satisfied. Only then can it be determined whether the treatment which would have that effect makes it appropriate for him to receive it in a

hospital.

For these reasons I would hold, in agreement with the learned judges of the Second Division on this point, that the sheriff must, in an appeal under s 64(1), treat condition (a) in that subsection as having been satisfied if, where the mental disorder from which the patient suffers is a persistent one manifested only by abnormally aggressive or seriously irresponsible conduct, he is satisfied that medical treatment in a hospital is not likely to alleviate or prevent a deterioration of his condition.

As for R v Canons Park Mental Health Review Tribunal, ex p A, I would not wish to go so far in this case as to say that it was wrongly decided. The applicant in that case had been admitted to hospital under s 3 of the Mental Health Act 1983. She had not been made the subject of a hospital order under Pt III of the Act, and no order had been made under s 41 restricting her discharge. So the court was concerned with the provisions for discharge in s 72, not with those in s 73 which apply where the patient is subject to a restriction order. This may seem to be a distinction without a difference, as the matters about which the tribunal must be satisfied in s 73 are the same as those mentioned in s 72(1)(b)—leaving aside the additional matter as to whether or not it is appropriate that the patient should remain liable to be recalled to hospital for further treatment. But there are significant differences in the structure and language of the legislation which is set out in the two Acts. I think that it is sufficient for the purposes of this case to say that we should decline to follow the Canons Park case when construing the words used in s 64(1) of the Mental Health (Scotland) Act 1984.

But there remains the question what is meant by 'medical treatment' in this context. The expression is defined in s 125, which says that it 'includes nursing, and also includes care and training under medical supervision'. The definition is a wide one, which is sufficient to include all manner of treatment the purpose of which may extend from cure to containment. But in the case of those mental disorders to which the 'treatability' test applies, its purpose is satisfied only if such treatment is likely to alleviate or prevent a deterioration of the person's condition. How is this test to be applied to those very difficult cases where the medical practitioner would not now have said there were grounds for admission to and detention in a hospital but the patient is nevertheless liable to be detained in a hospital and is in fact being detained there because that status has already been conferred upon him by the making of a hospital order?

I regard this as a practical question which will need to be resolved in each case on the evidence. But it is worth drawing attention to two points which arise out of the evidence which was before the sheriff when he was considering the respondent's application. The first is that in her report of 7 June 1994 Dr M A E Smith expressed the opinion that the respondent was not suffering from a mental disorder which was susceptible to treatment. Yet she said that unconditional discharge was not an option in his case. In her view there were sufficient grounds to support an appeal for the respondent to be given a conditional discharge. Several of the other psychiatrists who gave evidence were of the view that, while this had been in the past unsuccessful, further attempts should be made to give him a rehabilitation programme with a view to his eventual discharge from the State Hospital. The second is that a conditional discharge may only be directed under s 64(2) where the sheriff is not satisfied under s 64(1)(c) that it is not appropriate for the patient

to remain liable to be recalled to a hospital 'for further treatment'. In those cases where the 'treatability' test applies, the word 'treatment' in s 64(1)(c) must mean treatment which is likely to alleviate or to prevent a deterioration of the condition from which the person is suffering. These points raise important issues on which I should like to add these observations in the hope that they may assist practitioners.

It is hard to reconcile an opinion that medical treatment in a hospital is not, and never will be, likely to alleviate the condition or to prevent it from deteriorating with the view the sheriff should be invited to order a conditional discharge. The mental disorders from which patients who have been made the subject of a restriction order under Pt VI of the Act are suffering will vary from case to case. The acute dilemma which underlies Dr Smith's opinion arises in the case of those conditions where the 'treatability' test must be satisfied to justify the patient's detention in a hospital and a restriction order is in force because of the need to protect the public from serious harm. If the sheriff is satisfied that medical treatment in a hospital is not likely to alleviate or prevent a deterioration of the patient's condition, he must direct the patient's absolute discharge. He cannot direct a conditional discharge, because the only purpose of a conditional discharge is to enable the patient to be recalled to hospital for 'further treatment'—that is to say in the case of those conditions to which it applies, treatment which satisfies the 'treatability' test. In other words, a conditional discharge is not an option in these cases. If the 'treatability' test cannot be satisfied, the only option is an absolute discharge.

I appreciate that views differ among psychiatrists as to whether the kind of mental disorder from which the respondent is suffering is susceptible to medical treatment of any kind. These differences of view were amply demonstrated by the written reports which were before the sheriff in this case. There was general agreement that medical treatment was not likely to alleviate the condition, and the respondent has not been receiving any medication or other psychiatric treatment which is designed to achieve that result. Where views differed was in regard to the question whether the fact that his behaviour was being controlled while he remained in the hospital could be attributed to medical treatment which he received there, or whether it was due simply to the fact that he was being confined in secure conditions which prevented the symptoms of his condition from being manifested. It was agreed that his detention in the hospital was preventing a deterioration of his condition because his abnormally aggressive or seriously irresponsible behaviour was being controlled or at least being modified. So one of the two purposes to which the 'treatability' test is directed was being

satisfied. But was this as a result of 'medical treatment' which he was receiving there or was it due simply to the fact that he was being detained in the hospital?

The expression 'medical treatment' is, as I have said, given a wide meaning by s 125(1) of the Act. It includes nursing, and it also includes care and training under medical supervision. The width of the expression is not diminished where it requires to be examined in the context of the 'treatability' test. Medication or other psychiatric treatment which is designed to alleviate or to prevent a deterioration of the mental disorder plainly falls within the scope of the expression. But I think that its scope is wide enough to include other things which are done for either of those two purposes under medical supervision in the State Hospital. It is also wide enough to include treatment

which alleviates or prevents a deterioration of the symptoms of the mental disorder, not the disorder itself which gives rise to them. Dr Thomas White, who is the respondent's responsible medical officer, said in his report that there was evidence that the respondent's anger management improves when he is in the structured setting of the State Hospital in a supervised environment. The environment is one which is set up and supervised by the medical officers of the hospital. While the question is one of fact for the sheriff to decide on the facts of each case, I consider that it will be open to him in such circumstances to find that the 'treatability' test is satisfied.

The advantage of giving a wide meaning to the expression 'medical treatment' in the context of the 'treatability' test is that it would enable the sheriff to give patients who suffer from these types of mental disorder a conditional discharge. The sheriff would first have to be satisfied that one or other of the conditions referred to in paras (a) and (b) of s 64(1) applied to the patient. This would not be because the 'treatability' test did not apply, but because detention for medical treatment in a hospital was no longer appropriate or necessary. There are indications in the reports which were before the sheriff in this case that this might be achieved by means of a carefully designed rehabilitation programme, similar to that which is available for training for freedom in the case of prisoners in the penal system who are serving life sentences, with which the patient was willing to co-operate. The aim would be to reduce the level of control to a point where a conditional discharge would enable him to demonstrate his ability to cope with his symptoms after his release under supervision into the community, once the sheriff was satisfied that the arrangements which he considered to be necessary for that purpose had been made. The Secretary of State would have power to recall the patient to hospital for further treatment in the exercise of his discretion under s 68(3) at any time. In this way the important safeguards which the conditional discharge system provides in the case of patients who have been made the subject of a restriction order would remain available, so long as this was necessary to protect the public from the serious harm which might result if the patient were to commit offences after his release from the hospital.

For these reasons I too would allow this appeal and restore the interlocutor of the Lord Ordinary.

LORD CLYDE.

My Lords, this appeal raises two issues relating to the discharge into the community of persons who have been detained in hospital on account of mental disorder. The subject matter is of difficulty and importance, involving a reconciliation between the interests of the patient who seeks to live his life freed from the restraints of state control and the interests of the members of the public who may reasonably require the assurance that there is no threat to the peaceful enjoyment of their own lives through the release of someone who has been

suffering some form of mental disorder. This tension cannot readily be resolved. Delicate and difficult decisions may be required in the assessing of the situation and the balancing of the different interests. But the regulation of it has been a matter for

Parliament and it is with the proper construction of the provisions which Parliament has laid down that the first of the two questions falls to be determined in the present case

The present case concerns one who was ordered to be detained in hospital by a criminal court. But the relevant statutory language is to be found both in the civil and the criminal context and the issue for decision extends to both kinds of case. Furthermore it was recognised by the parties before us that there was no substantial difference in effect between the provisions in the Scottish legislation and the corresponding provisions in the English Mental Health Act 1983, so that it is proper to take account of the view of the English courts on the matter.

The facts can be stated shortly. The respondent was convicted of culpable homicide in the High Court sitting in Glasgow on 8 September 1967. He was then 17 years of age. The court in the light of certain evidence which was presented both orally and in written reports took the view that he was suffering from a mental disorder within the meaning of the Mental Health (Scotland) Act 1960, namely mental deficiency, and ordered his detention in the State Hospital at Carstairs under s 55 of that Act. The court also made a restriction order under s 60 of that Act, restricting his discharge from hospital without limit of time. In 1985 he was moved to Sunnyside Hospital at Montrose. But in the following year he was convicted of an assault upon an eight-year-old girl, sentenced to three months' imprisonment and, after his release from prison, recalled to the State Hospital. The 1960 Act was repealed and replaced by the Mental Health (Scotland) Act 1984 and thereafter the respondent's detention has continued to be regulated by the provisions of the 1984 Act. The respondent is not mentally handicapped, nor does he now suffer from mental deficiency. But he does suffer from a mental disorder manifested only by abnormally aggressive and seriously irresponsible behaviour. He is said to have a psychopathic personality and I shall for convenience refer to him as a psychopath. Although the court in 1967 proceeded upon the ground of a mental deficiency it may be noticed that in one of the two medical reports then before the court the psychopathic diagnosis was already anticipated. In recent years he has made several unsuccessful appeals to the sheriff under s 63 of the 1984 Act for his discharge. The present appeal arises from a decision by the Second Division in an application for judicial review of a decision pronounced by the sheriff on 19 July 1994 refusing his appeal for discharge. The Lord Ordinary refused his application for review. The Second Division allowed the respondent's reclaiming motion. The Secretary of State for Scotland has taken an appeal to this House.

It is convenient at this stage to set out the terms of the first four subsections of s 64 of the 1984 Act:

> '(1) Where an appeal to the sheriff is made by a restricted patient who is subject to a restriction order, the sheriff shall direct the absolute discharge of the patient if he is satisfied—(a) that the patient is not, at the time of the hearing of the appeal, suffering from mental disorder of a nature or degree which makes it appropriate for him to be liable to be detained in a hospital for medical treatment; or (b) that is not necessary for the health or safety of the patient or for the protection of other persons that he should receive such treatment; and (in either case) (c) that it is not appropriate for the patient to remain liable to be recalled to hospital for

further treatment.

[1999] 1 All ER 481 at 498

> (2) Where in the case of any patient as is mentioned in subsection (1) of this section the sheriff is satisfied as to the matters referred to in paragraph (a) or (b) of that subsection but not as to the matters referred to in paragraph (c) of that subsection he shall direct the conditional discharge of the patient.
>
> (3) Where a patient is absolutely discharged under subsection (1) of this section he shall thereupon cease to be liable to be detained by virtue of the relevant hospital order, and the restriction order shall cease to have effect accordingly.
>
> (4) Where a patient is conditionally discharged under subsection (2) of this section—(a) he may be recalled by the Secretary of State under section 68(3) of this Act as if he had been conditionally discharged under subsection (2) of that section; and (b) he shall comply with such conditions (if any) as may be imposed at the time of discharge by the sheriff or at any subsequent time by the Secretary of State.'

Three observations should be made at this stage on these provisions. Firstly, the decision is not one which is left to the discretion of the sheriff once he is satisfied on the particular criteria. If he is satisfied, he is obliged to grant a discharge. Secondly, the burden of establishing the particular propositions to the satisfaction of the sheriff will lie on the patient, although in practice it may well be that questions of the burden of proof will not often arise. Thirdly, paras (a) and (b) are stated in the alternative but para (c) is stated as additional to either of them and relates to the question whether the discharge should be an absolute discharge or a conditional discharge. Thus if the sheriff is satisfied that the provisions of that paragraph are met in addition to either (a) or (b) then he is required to grant an absolute discharge. If he is not satisfied of that but is satisfied so far as concerns either para (a) or para (b), then in terms of sub-s (2) he is required to direct the conditional discharge of the patient. In the present case the respondent sought an absolute discharge, or, failing that, a conditional discharge. But for the resolution of the problem of construction this aspect of the case may be put on one side and attention can be directed to paras (a) and (b).

If one puts aside para (c), since it relates only to the question whether the discharge is to be absolute or controlled, it becomes evident that the question in the present case affects those who have come to be detained otherwise than through the criminal process, because the provisions set out in paras (a) and (b) of s 64(1) appear also in practically identical terms in sections relating to the civil context. In s 22 where a patient has been admitted under Pt V of the Act an officer known as the 'responsible medical officer,' whose identity is defined in s 59 of the Act, is required within a stated period after the patient's admission to obtain certain information and carry out certain consultations and then to order the discharge of the patient if he is satisfied on either of the same two matters as are set out in paras (a) and (b) of s 64. The appearance of the same two criteria can again be found in s 33. That section deals with the discharge of patients and the two criteria appear twice in terms which are not materially different. In s 33(3) they appear as

the two considerations on either of which the responsible medical officer or the Mental Welfare Commission are required to order a discharge. In s 33(4) where an appeal is made to the sheriff by a patient under ss 26, 30 or 34 of the Act, the sheriff is required to order a discharge if he is satisfied on either of the same two considerations.

It is in the context of s 64 that the present case has arisen. Section 64(1)(a) requires the sheriff to make an assessment of the nature and degree of any mental disorder from which the patient is suffering. He may not be suffering from any such disorder. But if he is it must not be such as in its nature or degree to make

it appropriate for him to be liable to be detained in a hospital for medical treatment. It is at his stage that the argument turns to s 17 of the Act and it is appropriate to set out the relevant terms of that section.

Section 17(1) provides:

> 'A person may, in pursuance of an application for admission under section 18(1) of this Act, be admitted to a hospital and there detained on the grounds that—(a) he is suffering from mental disorder of a nature and degree which makes it appropriate for him to receive medical treatment in a hospital; and (i) in the case where the mental disorder from which he suffers is a persistent one manifested only by abnormally aggressive or seriously irresponsible conduct, such treatment is likely to alleviate or prevent a deterioration of his condition; or (ii) in the case where the mental disorder from which he suffers is a mental handicap, the handicap comprises mental impairment (where such treatment is likely to alleviate or prevent a deterioration of his condition) or severe mental impairment; and (b) it is necessary for the health or safety of that person or for the protection of other persons that he should receive such treatment and it cannot be provided unless he is detained under this Part of this Act.'

The problem which arises in the present case is whether the ingredients set out in sub-paras (i) and (ii) in s 17(1)(a) do or do not require to be considered by the sheriff under s 64(1)(a). In the present case the respondent falls into the condition described in sub-para (i). It is only with that sub-paragraph that the case is directly concerned, but the argument equally extends to sub-para (ii). The sheriff in the present case took the view that there was nothing in Pt VI of the Act to require a discharge of a patient if his condition was not being alleviated. In the Outer House while the argument evidently fluctuated it appears to have been matter of agreement between the parties that the sheriff's approach was correct. Only in the Second Division was the issue made one of clear controversy. The view which the judges there took was that it was sufficient for a discharge that the sheriff was satisfied that the criterion regarding treatment in sub-para (i) was not met.

It is to be noticed that while s 17(1) refers to it being appropriate to receive medical treatment in a hospital, s 64(1)(a) refers to it being appropriate to be liable to be detained in a hospital for medical treatment. The distinction between these phrases is of significance. As was noticed in the court below the phrase 'liable to be detained' occurs

on a number of occasions in Pt V and Pt VI of the Act. In my view it refers to the situation where the patient is lawfully obliged to enter hospital. That occurs upon the granting of the formal authorisation for the admission, such as the approval by the sheriff under s 21, where the application has been made to him in a civil context, or the order of a court in a criminal context, which gives the requisite authority for conveyance and admission to hospital by virtue of s 60 of the Act. The point is illustrated by s 17(2). That subsection secures that nothing in the Act is to be construed so as to prevent a patient from being admitted to hospital without any application, recommendation or order 'rendering him liable to be detained under this Act' or from remaining in the hospital 'if he has ceased to be so liable to be detained'. The state of being 'liable to be detained' appears to be the state which is reached where all the statutory provisions requisite for admission have been completed and the appropriate approval or order authorising the admission to hospital has been made. But what is important is that in order to have the status of one who is liable to be detained it will be necessary that all the terms of s 17(1) have been

satisfied. The use of the words 'liable to be detained' cannot in my view be explained simply by reason of the fact that the applicant is currently detained. If that had been intended Parliament would have made the test in terms that it was not appropriate for him to continue to be detained. The express use of the phrase which has a clear meaning in the Act must in my view refer to the provisions of s 17(1).

Thus it seems to me that in considering the matter of discharge the sheriff is led to s 17 in order to be determine whether or not it is appropriate for the patient to be liable to be detained. But s 64(1)(a) does not require him to look at all of the elements in s 17(1). The first part of s 17(1)(b) is expressly echoed in s 64(1)(b), so s 64(1)(a) cannot be read as including that same consideration. Section 64(1)(a) is looking essentially at the nature and the degree of the mental disorder; and once that aspect of the scope of it is noticed, then the grounds for the liability for detention can correspondingly be taken to be only such grounds as are relevant to such matters. Thus it is to s 17(1)(a) that the sheriff must look. The question then arises whether that does or does not include the two special cases contained in sub-paras (i) and (ii). Those two provisions seem to me to be qualifications on the generality of the opening provision in s 17(1). They deal respectively with particular kinds of mental disorder. They require the likelihood of a particular outcome of the treatment, or, in the case of mental impairment, a severity of that condition. In the case of the particular forms of mental disorder with which these two paragraphs are concerned the additional qualifications set out in them have to be met over and above the initial requirement that the patient is suffering from a mental disorder of a nature or degree which makes it appropriate for him to receive medical treatment. The nature of the disorder in sub-para (i) and the nature or degree of the disorder in sub-para (ii) are essential considerations in deciding whether the patient satisfies the requirements of s 17(1). Thus they come to be part of the matter which the sheriff requires to consider under s 64(1)(a) in applying his mind to the question whether the patient is or is not suffering from mental disorder of a nature or degree which makes it appropriate for him to be liable to be detained in a hospital for medical treatment.

It is argued that if Parliament had intended these matters to be considered by the sheriff Parliament could have said so. But it seems to me that Parliament has said so in using the

language which it has in s 64(1)(a). The express addition of the words 'for hospital treatment' in the statutory formula contained in s 64(1)(a) seems to me significant. The propriety which is to be assessed is not just a propriety for detention, but a propriety for detention in hospital for medical treatment. The medical treatment for which the patient is to be detained may vary according to the nature and degree of his disorder. In the case of the psychopath the treatment must be such as is likely to alleviate or prevent a deterioration of his condition. On the other hand there could be mental illness outwith the scope of the psychopathic condition described in sub-para (i) or the mental handicap referred to in sub-para (ii) other than severe mental impairment, and in such a case the particular efficacy of the treatment would not be a determinative consideration for the purposes of a possible discharge.

Attention was drawn to the provisions of s 33 to support the argument that a distinction should be drawn between the satisfaction of the provisions in s 17(1) and the satisfaction of the provisions of s 64(1). As I have already mentioned sub-ss (3) and (4) of s 33 refer to the two matters which are set out in s 64(1). But contrasting language is used in sub-s (6). There provision is made for the situation where the responsible medical officer does not consent to the taking effect of an order for discharge made by the managers of a hospital. In such an

event he is to furnish the managers with a report 'certifying that in his opinion the grounds set out in section 17(1) of this Act apply in relation to the patient'. In s 34 there is provision for a like report in the case of an order for discharge made by a relative. The use of language directly referring to the grounds set out in s 17(1) in contrast even in the same section with the use of the formula comprising the two criteria set out in s 64 was founded upon to support the argument that the later section should not be construed as importing the grounds set out in s 17(1) except to the extent that the express terms of the provisions coincide. But in my view the context may sufficiently explain the difference in the formula used. Where the matter is one of the grounds for discharge the formula adopted in s 64 is used. On the other hand where the requirement is for a report by the responsible medical officer refusing consent to a proposed discharge the substance of the report can appropriately be framed under reference directly to the statutory provision for admission.

It is also useful to look at the history of the relevant provisions. As counsel for the appellant explained, the changes which were effected by the Mental Health (Amendment) (Scotland) Act 1983 and later embodied in the consolidating legislation of 1984 were prompted by two particular but distinct factors. One was the desire to improve the formulation of the conditions for admission to detention. That was done by s 8 of the 1983 Act, substituting a new s 23 in the 1960 Act. The substance of this was reproduced as s 17 in the consolidation of 1984. Quite distinct from that was the necessity to re-write the provisions for discharge following on the decision of the European Court of Human Rights in X v UK (1981) 4 EHRR 188. What was required was access to a court to determine matters of discharge, and that was done by s 21 of the 1983 Act by provisions which came to form ss 63 to 67 of the 1984 Act. Counsel for the appellant argued that the separate origins and the distinct reasons for the formulation of what have become ss 17 and 64 point to the absence of any symmetry between them. But while the amendments were prompted by distinct considerations it does not follow that

the amended sections were not intended to relate to each other in a coherent scheme. Indeed it seems to me significant that while in its original formulation in the 1983 Act the conditions for admission were laid out under four distinct heads, when Parliament came to consolidate the legislation it turned heads (b) and (c) into the sub-paras (i) and (ii) which form part of s 17(1)(a). Thus something of a pattern was achieved in the relationship between heads (a) and (b) in s 64(1) and heads (a) and (b) in s 17.

Of course the pattern is not precise. The latter part of s 17(1)(b) which states that the treatment cannot be provided unless the patient is detained, is not exactly mirrored in s 64. But in the case of one who is already in detention it can well be taken to be sufficiently covered by the consideration of the appropriateness of the liability to detention and the necessity for treatment. The necessity for detention is inevitably an element in considering that matter. The appearance of para (c) in s 64(1) and the possibility of further treatment which a conditional discharge involves might be thought to sit uneasily with the making of an order for discharge of a psychopath on the ground that the requirements of treatment set out in sub-para (i) of s 17(1)(a) are no longer met. But it is not difficult to anticipate that cases could occur where the patient has reached a position of stability but where after release from hospital his condition may change and recall may become desirable. In the case of psychopathic patients, even if the provisions for discharge can be overcome, such a course may well require to be seriously considered.

The decision of the European Court of Human Rights in X v UK (1981) 4 EHRR 188 was to the effect that there had been a breach of art 5(4) of the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969 in light of the inadequacy of the proceedings then available to determine the lawfulness of the patient's detention. What the court required was a review which, as the court (at 209–210 (para 58) stated, was—

> 'wide enough to bear on those conditions which, according to the Convention, are essential for the "lawful" detention of a person on the ground of unsoundness of mind, especially as the reasons capable of initially justifying such a detention may cease to exist … This means that in the instant case Article 5(4) required an appropriate procedure allowing a court to examine whether the patient's disorder still persisted and whether the Home Secretary was entitled to think that a continuation of the compulsory confinement was necessary in the interests of public safety.'

It was pointed out that the European Court did not specify the treatability of the patient as a condition to be examined by the court. But the court was concerned with the procedures rather than the grounds for discharge and it is not to be concluded from what the court said that in the present case the susceptibility of treatment may not be a proper criterion in determining discharge. As I have mentioned it was in light of this decision that Parliament introduced the mechanism of appeal to the sheriff. I find it hard to believe that the intention would have been to omit from the sheriff's consideration criteria which had been prescribed for the admission of the patient. Such a course would not have measured up to the scope of review which the European Court considered

appropriate. Quite apart from that, it seems to me reasonable to expect that a court dealing with an application for discharge would consider the grounds which warrant detention and, where they were cumulative, be required to grant a discharge if any one of them was no longer sound. It was argued that matters of treatability were for the responsible medical officer and not for the court. Certainly one can see in s 33 the important and indeed controlling part which that officer may play in the matter of discharge. But consistently with the view taken by the European Court of Human Rights it would not be proper to leave the matter of sub-para (i) to the officer and exclude it from the jurisdiction of the court.

The approach taken by the European Court in X v UK was followed by Sedley J, with whose judgement Mann J agreed, in the Divisional Court in R v Canons Park Mental Health Review Tribunal, ex p A [1994] 1 All ER 481. In his dissenting judgment in the Court of Appeal Roch LJ stressed the point that consistently with the decision of the European Court of Human Rights it cannot be accepted that Parliament intended that the tribunal was entitled to refuse a discharge where one of the three criteria laid down for admission was not satisfied. However the appeal court by a majority reversed the decision of the Divisional Court. The relevant provisions of the Mental Health Act 1983 are not in all respects the same as the corresponding terms of the Scottish Act, but the similarities are marked. The provisions in ss 73(1) along with s 72(1)(b)(i)and (ii) are similar to the provisions of s 64 of the Scottish Act. The essential issue which arose in relation to the English provisions in the Canons Park case is the same as that which has arisen in the present case. While the judges in the Second Division concentrated on the Scottish legislation on the basis of the differences in terminology between the two Acts both parties before us were at one in accepting that the English case

could not be distinguished. Having taken the view which I have of the Scottish legislation I am not prepared to follow the view taken by the majority of the Court of Appeal in the Canons Park case. It does not seem to me that the view taken by the majority sufficiently meets the statutory reference to the disorder being 'of a nature or degree which makes it appropriate for him to be liable to be detained in a hospital for medical treatment'. It is that phrase which, as I have already mentioned, seems to me to give a sufficient answer to the argument that if Parliament had intended to include 'treatability' as a criterion for discharge it could have said so. I would add that while the labelling of the respective parts of s 17(1) which Kennedy LJ proposed, involving a three-fold division of 'appropriateness,' 'treatability' and 'safety' as the tests to be applied, appears to be a very attractive and convenient method of reference to the various ingredients, it carries with it a possible danger of affirming a tripartite scheme of criteria which then seems difficult to fit with the scheme set out in s 64(1). In the present case the labelling may operate as a distraction from the proper understanding of the provisions. I am also conscious that the construction which I favour is contrary to that adopted by Sheriff McEwan in R v Secretary of State for Scotland 1989 SCLR 784, following R v Mersey Mental Health Review Tribunal, ex p D (1987) Times, 13 April. But the earlier understanding which is reflected in these cases cannot stand in the way of the proper construction of the critical provision.

How then should a sheriff deal with an appeal brought before him under s 64? Clearly the onus is on the appellant to satisfy him on the particular matters embodied in s 64.

The standard of proof is the balance of probabilities, but the importance of the issue for the parties and the public is such as to require particular care and consideration. He must be ready to turn his attention to all of the three paragraphs.

Firstly, so far as (a) is concerned (1) he must first decide whether the appellant has at the time of the hearing a mental disorder. If he is satisfied that he has not, then he must order a discharge. (2) If the appellant has a mental disorder the sheriff must identify the nature and degree of it. Then (3) he should turn to the matter of medical treatment in hospital. He will have to consider the nature and effectiveness of any possible treatment. Where the appellant is a psychopath or has a mental impairment which is not severe he must consider whether such treatment is likely to alleviate or prevent a deterioration of the condition. If he is satisfied that such treatment is not likely to do so, then he is bound to grant a discharge. (4) If he is not so satisfied, or if he is dealing with any other kind of mental disorder, he must consider the propriety of the appellant receiving the medical treatment in detention in hospital. In doing so he must look to the nature and degree of the mental disorder. If he is satisfied in the light of all the evidence before him and in the whole circumstances that the appellant is not suffering from mental disorder of a nature or degree which makes it appropriate for him to be detained in a hospital for medical treatment, then he must discharge him. The circumstances which he may consider can include the matter of the health and safety of the patient and the safety of other persons, including members of the public; that is to say the propriety, as distinct from the necessity, of his continued detention in hospital. If he is satisfied that the requirements of para (a) have been met, then it is not necessary for him to consider para (b), and should turn to para (c).

Secondly, if he is not satisfied that the provisions of para (a) have been met, then he should turn to para (b). The single question here is whether he is satisfied that it is not necessary for the health or safety of the patient or for the protection of other persons that the patient should receive medical treatment in hospital. The standard here is one of necessity, not desirability. If he is so satisfied then he

must discharge the appellant, and he should then turn to para (c). If he is not so satisfied he must refuse the appeal.

Finally, if he has been satisfied on either heads (a) or (b) he must then consider head (c). Here the question is whether it is or is not appropriate for the patient to remain liable to be recalled to hospital for further treatment. In the light of his decision on this matter he will grant a conditional or an absolute discharge.

Parliament has in the past extended the scope for the detention of psychopaths. By virtue of ss 23(1) and 55 of the Mental Health (Scotland) Act 1960 psychopaths over the age of 21 were excluded from qualifying as liable to be detained under the Act except where the court had granted an order for their detention after conviction of a criminal offence. The age limit was removed by s 8 of the Mental Health (Amendment) (Scotland) Act 1983. Parliament was evidently satisfied that the psychopathic condition was susceptible to alleviation by treatment. On the other hand the sheriff in the present case held that current psychiatric opinion would question the efficacy of treatment and he recognised that psychiatrists generally would be unlikely to recommend admission to the State

Hospital if the respondent's offence had been committed today. The sheriff also held that if the respondent was released there was a very high risk of him reoffending. But the possibility that a psychopath may be at once a public danger and beyond treatment may well have been regarded by Parliament as remote, having regard particularly to the wide terms of the definition of 'treatment'. Views have evidently differed in the past as to the extent to which such persons can benefit from medical treatment, although the hope must continue to be that medical science will progress to a greater understanding of the condition and the developing of ways of alleviating or resolving it. Moreover it may well be that generalisations cannot readily be made in regard to this difficult condition. While further study and research is continuing it may be the more difficult to affirm with confidence that the condition in any particular case is truly unresponsive to treatment or that no alleviation or stabilisation can be achieved in the secure environment of a hospital.

Anxiety might well be felt over the proposition that a sheriff is bound to discharge a psychopath where he is not satisfied from the evidence before him that treatment is no longer likely to alleviate or prevent a deterioration of his condition, so that he no longer qualifies under sub-para (i). In the civil context the balance may properly fall in favour of the liberty of the individual if further detention in hospital can serve no further purpose in alleviation or securing the stability of his condition. In the case of one who has been convicted of a criminal offence such anxiety would be well justified if the only course open was to release the patient freely into society. But Parliament has allowed for that situation in providing not only for an absolute discharge but also for a conditional discharge. Moreover in terms of s 64(7) the sheriff may defer his direction for a conditional discharge until 'such arrangements as appear to the sheriff to be necessary for that purpose have been made to his satisfaction.' In the present case the respondent sought either an absolute or a conditional discharge. It may also be noted that Parliament has recently made a further provision by s 6 of the Crime and Punishment (Scotland) Act 1997, enabling a court to pronounce both a sentence of imprisonment and a hospital direction, and no doubt if the situation is considered to be unsatisfactory further statutory provisions can be made.

I now turn to the second issue in the appeal. This concerns the extent of the supervisory jurisdiction in an application for judicial review. The statutory appeal which the respondent made to the sheriff was a summary process which is not open to the ordinary means of statutory appeal. This has been described in

[1999] 1 All ER 481 at 505

terms of a distinction that the sheriff in such an appeal is acting in an administrative rather than a judicial capacity (F v Management Committee and Managers of Ravenscraig Hospital 1988 SC 158). Challenge to such a decision accordingly requires to be taken by way of judicial review and that is what the respondent has done in the present case.

Judicial review involves a challenge to the legal validity of the decision. It does not allow the court of review to examine the evidence with a view to forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from the procedures

which either by statute or at common law as matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse, or irrational, or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or of sufficient evidence, to support it, or through account being taken of irrelevant matter, or through a failure for any reason to take account of a relevant matter, or through some misconstruction of the terms of the statutory provision which the decision-maker is required to apply. But while the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies it is perfectly clear that in a case of review, as distinct from an ordinary appeal, the court may not set about forming its own preferred view of the evidence.

These principles are quite clear. But having been invited to examine some of the evidence by the present appellant it seems to me that the judges in the Second Division went further than was appropriate in the analysis and assessment of it. The sheriff heard the oral evidence of seven psychiatrists as well as the respondent. He also had written reports from the psychiatrists and these were put before the Second Division. But in the summary procedure which was used there was no record made of the oral evidence beyond the brief account which the sheriff gives of the material before him. Where one only has an incomplete record of the evidence and the evidence is that of highly qualified experts dealing with the delicate matter of mental disorder, great caution ought to be taken in revisiting the substance of the decision which the sheriff reached. In the circumstances of the present case it seems to me to be particularly difficult to conclude that there was truly no evidence to support the conclusion which was reached or that the conclusion was perverse.

It was not suggested before us that the sheriff had misconstrued what is meant by the expression 'medical treatment'. It is defined in s 125 of the Scottish Act as including nursing and also care and training under medical supervision. In s 145 of the English Act it is defined as including nursing, and also care, habilitation and rehabilitation under medical supervision. Plainly the expression is wide in its scope. The inclusive character of the definition allows of other things to be comprehended in it and it was not suggested that the particular things noted in the English definition would not also fall within the scope of the Scottish definition, as indeed may much else. The sheriff was plainly aware of the terms of the statutory definition and indeed used its terminology to express the nature of the treatment which he found the respondent was continuing to receive in conditions of maximum security. I see no ground for holding that he misdirected himself in law as regards the question which he had to answer.

It was recognised by the judges of the Second Division that the word 'condition' in s 17(1)(a)(i) includes the manifestations and symptoms of the patient's disorder. The sheriff accepted the evidence of Dr White that 'in the

structured setting of the State Hospital in a supervised environment … Mr. Reid's anger management improves, resulting in his being less physically aggressive'. The sheriff later states: 'Medical treatment has alleviated his condition and should continue to do so.' The sheriff found that although psychiatrists generally would be unlikely to recommend admission to the State Hospital if the respondent had committed the original offence

today, due partly to the current opinion on the efficacy of treatment, the respondent has received and is continuing to receive medical treatment. Dr White was the respondent's responsible medical officer and no doubt the sheriff would be amply justified in respecting his view. The sheriff also found that the majority medical opinion was that rehabilitation should take place in another hospital and he expressed the view that 'presumably rehabilitation will alleviate his condition'. Without going further I find enough in the sheriff's note to entitle him to reach the conclusion which he did.

It was suggested on behalf of the respondent that the sheriff's mistaken view on the matter of the construction of s 64(1) vitiated his approach to the evidence and his factual conclusion. But the sheriff clearly proceeded to consider the matter of treatment on the assumption that he was mistaken on the matter of construction. It is precisely that which he intended to signify by the use of the words 'in any event' which introduce his consideration of the facts. I find no reason to believe that his consideration of the evidence was tainted by the view which he had taken on the matter of construction. His conclusion on the factual question proceeded on a correct legal basis and does not seem to me to have been irrational.

For the foregoing reasons I would allow the appeal by the Secretary of State and restore the interlocutor of the Lord Ordinary of 29 May 1996 in so far as it dismisses the petition.

LORD HUTTON.

My Lords, this appeal raises the question whether the respondent, Alexander Lewis Hutchison Reid, who on 8 September 1967 was convicted of culpable homicide after he had killed a woman by stabbing her with a knife and was ordered to be detained in hospital with a restriction on his discharge without limit of time, was entitled to be discharged from hospital in 1994 notwithstanding the fact that the sheriff, who heard his application for discharge under ss 63 and 64 of the Mental Health (Scotland) Act 1984, found: 'In the event of the applicant being released now, there is a very high risk of him reoffending. Any such offence is likely to have a sexual connotation.'

Therefore this appeal gives rise to issues of great importance and of grave public concern. Broadly stated, where a psychopath is convicted before a court of killing or injuring another two courses are open to the court. The court may sentence the psychopath to imprisonment for life or for a fixed term of years or, as in this case, the court may order him to be detained in hospital with a restriction on his discharge without limit of time. Great public concern arises as to whether a convicted psychopath should be released from hospital where there is a real risk that after release he may cause injury to another person.

But there is another issue which arises. When a psychopath is convicted and is sent to prison, if he is sentenced for a fixed term of years he is entitled to be released on the expiration of that term, even if it is feared on reasonable grounds that he will endanger the public in the future. And if in Scotland a psychopath is sentenced to imprisonment for life, the Secretary of State for Scotland has certain powers under the Prisoners and Criminal Proceedings (Scotland) Act 1993 to release him on licence before the end of his natural life. Therefore the question arises whether it is just that a psychopath, ordered by

a court after conviction to

be detained in hospital, should continue to be held in hospital after many years of detention (and this respondent has now been detained in hospital for more than 30 years since he was aged 17, apart from a few months in prison) because of the risk that if he were released he might attack another person.

Related to this question is the concern of psychiatrists that when treatment in a hospital will no longer alleviate or prevent a deterioration of a psychopath's condition, he should not be kept in hospital, using the hospital merely as a place of detention: in their view the place in which to detain a dangerous person who may injure others and who cannot benefit from medical treatment is a prison and not a hospital. These are all issues which form the background to the difficult point of statutory construction which was argued before this House.

The full facts and statutory background of the present case have been set out in the judgment of my noble and learned friend Lord Clyde and I gratefully adopt that recital. The appeal raises two legal issues. One is confined to the question whether the Inner House was entitled to set aside the finding made by the sheriff in this particular case that medical treatment in a hospital was likely to alleviate the respondent's condition. My conclusion, for reasons which I later state, is that the Inner House was not entitled to set aside this finding of the sheriff, with the consequence that the respondent was not entitled to be discharged from hospital, irrespective of the outcome of the argument on the second legal issue, which raises a point of statutory construction and relates to the matter of great public concern to which I have referred.

It is desirable to turn first to this issue of construction which relates to s 64(1) and (2) of the 1984 Act. But before considering the provisions of s 64(1) and (2) it is convenient to set out the provisions of s 17(1) of the Act relating to a patient's admission to, and detention in, a hospital.

Section 17 provides:

> '(1) A person may, in pursuance of an application for admission under section 18(1) of this Act, be admitted to a hospital and there detained on the grounds that—(a) he is suffering from mental disorder of a nature or degree which makes it appropriate for him to receive medical treatment in a hospital; and (i) in the case where the mental disorder from which he suffers is a persistent one manifested only by abnormally aggressive or seriously irresponsible conduct, such treatment is likely to alleviate or prevent a deterioration of his condition; or (ii) in the case where the mental disorder from which he suffers is a mental handicap, the handicap comprises mental impairment (where such treatment is likely to alleviate or prevent a deterioration of his condition) or severe mental impairment; and (b) it is necessary for the health or safety of that person or for the protection of other persons that he should receive such treatment and it cannot be provided unless he is detained under this Part of this Act …'

Whilst I recognise that there is medical debate as to the appropriateness of the term 'psychopath' in modern times, it is convenient for the purpose of considering the construction of ss 17 and 64 to use that term in relation to a person whose mental disorder is 'a persistent one manifested only by abnormally aggressive or seriously irresponsible conduct.'

Section 64 provides:

> '(1) Where an appeal to the sheriff is made by a restricted patient who is subject to a restriction order, the sheriff shall direct the absolute discharge of the patient if he is satisfied—(a) that the patient is not, at the time of the hearing of the appeal, suffering from mental disorder of a nature or degree

> which makes it appropriate for him to be liable to be detained in a hospital for medical treatment; or (b) that it is not necessary for the health or safety of the patient or for the protection of other persons that he should receive such treatment; and (in either case) (c) that it is not appropriate for the patient to remain liable to be recalled to hospital for further treatment.
>
> (2) Where in the case of any such patient as is mentioned in subsection (1) of this section the sheriff is satisfied as to the matters referred to in paragraph (a) or (b) of that subsection but not as to the matters referred to in paragraph (c) of that subsection he shall direct the conditional discharge of the patient …'

The problem of construction arises because, in setting out the grounds for admission to, and detention in, a hospital, s 17(1)(a) sets out two matters in relation to medical treatment in separate sub-paragraphs. Paragraph (a) requires the person to be suffering 'from mental disorder of a nature or degree which makes it appropriate for him to receive medical treatment in a hospital', and sub-para (a)(i) requires that in the case where the mental disorder from which the person suffers is a persistent one manifested only by abnormally aggressive or seriously irresponsible conduct 'such treatment is likely to alleviate or prevent a deterioration of his condition'. But s 64(1)(a) in setting out the matters as to which the sheriff is to be satisfied before directing the discharge of a patient only contains one requirement in one sub-paragraph, which is (a), in relation to medical treatment, which is that 'the patient is not, at the time of the hearing of the appeal, suffering from mental disorder of a nature or degree which makes it appropriate for him to be liable to be detained in a hospital for medical treatment'. Therefore the question arises whether s 64(1)(a) is to be construed by reference back to s 17(1)(a).

This difference in the wording of s 17(1)(a) and s 64(1)(a) has caused a number of courts to give two different constructions to s 64(1)(a) and to s 72(1)(b) of the English Mental Health Act 1983, the provisions of ss 3 and 72(1)(b) of the English Act being basically similar to the provisions of s 17 and 64(1)(a) of the Scottish 1984 Act, although s 64(1)(a) relates to a patient subject to a restriction order and s 72(1)(b) relates to a

patient who is not subject to a restriction order. Section 3 provides:

> '(1) A patient may be admitted to a hospital and detained there for the period allowed by the following provisions of this Act in pursuance of an application (in this Act referred to as "an application for admission for treatment") made in accordance with this section.
>
> (2) An application for admission for treatment may be made in respect of a patient on the grounds that—(a) he is suffering from mental illness, severe mental impairment, psychopathic disorder or mental impairment and his mental disorder is of a nature or degree which makes it appropriate for him to receive medical treatment in a hospital; and (b) in the case of psychopathic disorder or mental impairment, such treatment is likely to alleviate or prevent a deterioration of his condition; and (c) it is necessary for the health or safety of the patient or for the protection of other persons that he should receive such treatment and it cannot be provided unless he is detained under this section …'

Section 72 provides:

> '(1) Where application is made to a Mental Health Review Tribunal by or in respect of a patient who is liable to be detained under this Act, the tribunal may in any case direct that the patient be discharged, and … (b) the tribunal

> shall direct the discharge of a patient liable to be detained otherwise than under section 2 above if they are satisfied—(i) that he is not then suffering from mental illness, psychopathic disorder, severe mental impairment or mental impairment or from any of those forms of disorder of a nature or degree which makes it appropriate for him to be liable to be detained in a hospital for medical treatment; or (ii) that it is not necessary for the health or safety of the patient or for the protection of other persons that he should receive such treatment; or (iii) in the case of an application by virtue of paragraph (g) of section 66(1) above, that the patient, if released, would not be likely to act in a manner dangerous to other persons or to himself …'

The two differing views have been clearly set out in a number of judgments. One construction was stated by Kennedy LJ (with whose judgment Nourse LJ agreed), in reversing the decision of the Divisional Court, in R v Canons Park Mental Health Review Tribunal, ex p A [1994] 2 All ER 659, [1995] QB 60. The construction adopted by Kennedy LJ ([1994] 2 All ER 659 at 680, [1995] QB 60 at 82) was, I think, influenced by his view that three separate tests were required in respect of a psychopath for admission and detention under s 3 of the 1983 Act:

> 'A patient suffering from psychopathic disorder may not be admitted to hospital and detained for treatment unless three criteria are satisfied, namely: (1) his disorder is of a nature or degree which makes it

appropriate for him to receive medical treatment in a hospital, and (2) such treatment is likely to alleviate or prevent a deterioration of his condition, and (3) it is necessary for his health or safety, or for the protection of others, that he should receive such treatment, and it cannot be provided unless he is detained. Those three criteria which can, for convenience, be referred to as the appropriateness test, the treatability test and the safety test, are set out in s 3 of the 1983 Act …'

He then said ([1994] 2 All ER 659 at 683, [1995] QB 60 at 86):

> '… but I see no reason why the words of s 72(1)(b)(i) should be read as a form of legal shorthand referring back to the three tests which have to be positively satisfied before a patient can be admitted and detained, and which are set out in section 3. If that was what Parliament intended to achieve when enacting s 72(1)(b) it could have said so, but I find it difficult to see how it could have done so without transferring the onus of proof and thus putting the tribunal in the same position as the responsible medical officer.'

This construction was adopted by the Lord Ordinary in the present case (1997 SLT 555 at 559):

> 'When a doctor recommends the detention of someone suffering from this form of mental disorder, he will have to have been satisfied as to all the various criteria which I have mentioned in relation to the generality of cases. But in addition under s 17(1)(a)(i) he has to consider whether any medical treatment in hospital "is likely to alleviate or prevent a deterioration" of the patient's condition. Kennedy LJ christens this "the treatability test". It is worth noticing that a doctor need only confront this question in cases where he has already decided that the patient is suffering from "mental disorder of a nature or degree which makes it appropriate for him to receive medical treatment in a hospital". So this additional test is not part of the test as to the appropriateness for the patient of medical treatment in hospital. The doctor has already satisfied himself that such treatment would be appropriate but, having done so, he must then ask whether with such a psychopathic patient

> the medical treatment in hospital "is likely to alleviate or prevent a deterioration" of the patient's condition. Unless he is satisfied on that point, he cannot recommend the patient's admission and detention.'

The other construction of s 72(1)(b) was stated in the Divisional Court in the Canons Park case [1994] 1 All ER 481 by Sedley J (with whose judgment Mann LJ agreed). Sedley J (at 487) first referred to the 'treatability test' as defined by counsel for the applicant:

> 'In all these provisions it is central to Mr Gordon's case that in relation to psychopathic disorder they contain what he calls the treatability test, that

> is to say, the requirement that medical treatment in a hospital is likely to alleviate or to prevent a deterioration in the patient's condition.'

He then stated (at 490):

> 'As a straightforward matter of construction I prefer Mr Gordon's argument. Put simply, it is never "appropriate" under the provisions of the 1983 Act relating to admission, renewal or reclassification for a patient to be "liable to be detained in a hospital for medical treatment" for psychopathic disorder if he or she is not at that point in time treatable. The phrase "appropriate for him to be liable", while clumsy, picks up the language of ss 3 and 20 which include in their criteria for liability to detention the appropriateness of medical treatment as well as the likelihood of its being effective, and thus reasserts the role of expert assessment by the tribunal in its turn.'

In the Court of Appeal in the Canons Park case Roch LJ agreed with the construction placed upon s 72(1)(b) by Sedley J. In the present case the judges of the Inner House gave the same construction to s 64(1)(a) as Sedley J gave to s 72(1)(b), although two judges in the Inner House expressed the view, from which I would respectfully differ, that because of the difference in wording between the Scottish and English statutory provisions, no assistance could be derived from the reasoning of the judgments in the Canons Park case. Lord Macfadyen (1998 SLT 162 at 172) put it as follows:

> 'There is, certainly, no repetition in s 64(1)(a) of the language of the subparagraphs. That, however, does not seem to me to be the end of the matter. It seems to me that the subparagraphs of s 17(1)(a) are to be seen as setting out certain specific provisions which qualify the generality of the introductory words of para (a). Paragraph (a) tests the appropriateness of receipt of medical treatment in hospital by reference to the nature or degree of the mental disorder. Subparagraph (i) then provides that where the disorder is a psychopathic disorder, such treatment will not be appropriate unless it is likely to alleviate or prevent deterioration of the condition. Similarly, subpara (ii) provides that where the disorder is mental handicap, such treatment will not be appropriate unless the handicap is treatable mental impairment or severe mental impairment. Paragraph (a) therefore forms a unit comprising a general rule and two special rules, all addressing the question of whether it is appropriate that the person receive medical treatment in hospital. It is only if a person passes the test set by para (a), including in cases where they are relevant the special tests set in subpara (i) or (ii), that it can be said that the person suffers from a mental disorder of a nature or degree which makes it appropriate for him to receive medical treatment in hospital. Accordingly, when one turns back to s 64(1) at the

> stage of an application for discharge, a patient can satisfy the test in para (a) of that section if he shows that his condition is of the sort mentioned in s 17(1)(a)(i) and that treatment in hospital is unlikely to alleviate or

> prevent a deterioration of his condition, because if he shows that, he shows that the nature of his mental disorder is not such as to make it appropriate for him to be liable to be detained. Accordingly, to adopt the shorthand terminology derived from R v Canons Park Mental Health Review Tribunal, ex p A, I am of opinion that the treatability test is incorporated as part of the appropriateness test in s 64(1)(a).'

In my opinion the construction given to s 72(1)(b) by Sedley J and to s 64(1)(a) by the Inner House was correct. Whether a psychopath should be admitted to, and detained in, a hospital to receive medical treatment under s 17(1)(a) will depend, in part, on whether the treatment is likely to alleviate or prevent a deterioration of his condition. Accordingly when a sheriff has to decide under s 64(1)(a) whether he is satisfied that a psychopathic patient is not suffering from mental disorder of a nature or degree which makes it appropriate for him to be liable to be detained in a hospital for medical treatment, he will be so satisfied when the treatment is not likely to alleviate or prevent a deterioration of the psychopathic patient's condition.

In my opinion in s 17(1), in the case of a psychopathic patient, para (a) is so closely linked to sub-para (a)(i) that when s 64(1)(a) refers to mental disorder of a nature or degree which makes it 'appropriate for him to be liable to be detained in a hospital for medical treatment', the treatment referred to is treatment which 'is likely to alleviate or prevent a deterioration of his condition'. I consider that emphasis on the distinction between 'appropriateness' and 'treatability' tends to lead to an erroneous construction of s 64(1)(a). I also consider that the practical application of the distinction between 'the appropriateness test' and 'the treatability test' as stated by the Lord Ordinary (1997 SLT 555 at 559) gives rise to considerable artificiality, because I think that a doctor, seeking to apply s 17(1)(a) to a psychopath, would not decide, first, whether it was appropriate for the psychopath to receive medical treatment in a hospital, and then go on to decide whether the treatment in hospital was likely to alleviate or prevent a deterioration in his condition. Rather, in deciding whether his mental disorder was of a nature or degree which made it appropriate for him to receive medical treatment in a hospital, he would decide at the same time and as part of the one question, whether such treatment was likely to alleviate or prevent a deterioration of his condition.

In my opinion there is no force in the argument that if s 64(1) refers back to s 17(1), then s 64(1)(a) would also cover the requirement in s 17(1)(b) leaving s 64(1)(b) otiose, because I think, as Lord Macfadyen (1998 SLT 162 at 172) stated, that s 64(1)(a) reflects s 17(1)(a) and s 64(1)(b) reflects s 17(1)(b).

I further consider that the construction given to s 64(1)(a) by the Inner House is strongly supported by the policy underlying s 64(1)(a) and s 72(1)(b) which provide for a judicial body to decide whether a patient detained in hospital should be discharged. In X v UK (1981) 4 EHRR 188 at 189 the European Court of Human Rights held:

> 'The right guaranteed by Article 5(4) to test the lawfulness of detention does not incorporate a right for the court to substitute its discretion on all matters for that of the decision-making authority; but the scope of the judicial review must be sufficient to enable enquiry to be made whether, in

> the case of the detention of a mental patient, the reasons which initially justified the detention continue thereafter to subsist.'

Section 64(1)(a) and s 72(1)(b) were passed to give effect to that ruling of the European Court of Human Rights. Under s 17(1)(a) and s 3 one of the reasons which initially justifies the detention of a psychopathic patient is that medical treatment would be likely to alleviate or prevent a deterioration of his condition. Therefore I consider that in enacting s 64(1)(a) and s 73(1)(b) Parliament intended that a judicial body would have power to determine whether that reason continued to subsist. Accordingly I am in agreement with the view of Roch LJ in the Canons Park case [1994] 2 All ER 659 at 676, [1995] QB 60 at 78, who, referring to the criticisms made by the European Court of Human Rights in X v UK stated:

> 'Parliament would have failed to meet those criticisms if a tribunal, despite being satisfied that medical treatment was not likely to alleviate or prevent deterioration in the psychopathic patient's condition and had never been likely to do so, was not then under a duty to direct the patient's discharge. The terms of s 66 of the 1983 Act make the tribunal's function under s 72 as a reviewing body, in my view, quite clear, and it cannot, I would suggest, be accepted that Parliament intended that a tribunal should when reviewing a decision under ss 3 or 20 apply only two of the three criteria laid down in the 1983 Act to justify the compulsory detention of patients suffering from psychopathic disorder or mental impairment.'

I do not consider that the validity of this reasoning is weakened in relation to the respondent by the consideration that s 64(1) is contained in Pt VI of the 1984 Act relating to a patient who has committed a criminal offence and is detained in hospital pursuant to a hospital order made by the court which convicted him, whereas s 17(1) is contained in Pt V of the Act, which relates to a patient who has not been convicted by a court, because where such a patient appeals to the sheriff for discharge from detention in the hospital the material wording of s 33(4)(a) and (b) is identical to the wording of s 64(1)(a) and (b), s 33(4) providing:

> 'Where an appeal is made to the sheriff by a patient under sections 26, 30 or 34 of this Act, the sheriff shall order the discharge of the patient if he is satisfied that—(a) the patient is not at the time of the hearing of the appeal suffering from mental disorder of a nature or degree which makes it appropriate for him to be liable to be detained in a hospital for medical treatment; or (b) it is not necessary for the health or safety of the patient or for the protection of other persons that he should receive such treatment.'

The second principal issue on this appeal relates to the findings of fact made by the sheriff in relation to the medical treatment of the respondent. Section 125(1) of the 1984 Act contains a definition of the term 'medical treatment'. It provides: '… "medical treatment" includes nursing, and also includes care and training under medical supervision.'

In the first part of his decision the sheriff, in my opinion, gave an erroneous construction to s 64(1)(a) and stated: 'Nowhere in Pt VI does it say that a criminal who has been ordered by the High Court to be detained without limit of time requires to be discharged if his condition is not being alleviated.' But I consider it to be clear that the sheriff then turned to consider what the result of the appeal to him would be if this construction were wrong and the 'medical treatment' referred to in s 64(1)(a) was treatment which was likely to alleviate or prevent a deterioration of the respondent's condition. I am of this opinion because

immediately after the passage in his judgment giving the erroneous construction to s 64(1)(a) he stated:

> 'In any event I agree with Dr White (as stated in his recommendation number two … in his report) that "in the structured setting of the State Hospital in a supervised environment, that Mr Reid's anger management improves, resulting in his being less physically aggressive. There is evidence that when this structure or supervision is lessened that Mr Reid poses more of a danger to others eg his abuse of parole while an in-patient in Sunnyside Hospital, Montrose." Medical treatment has alleviated his condition, and should continue to do so.' (My emphasis.)

And in his decision he had previously set out the finding:

> 'He has not received medication for his condition for more than ten years. He has continued to receive medical treatment in conditions of maximum security. This treatment includes nursing and also includes care and training under medical supervision.'

Therefore the sheriff made a finding of fact that medical treatment was likely to alleviate the respondent's condition. Accordingly the sheriff was not satisfied as to the matter set out in s 64(1)(a). Although he was not invited by the solicitor appearing for the respondent to address the matter set out in s 64(1)(b) it is clear that the sheriff was not satisfied as to that matter because he states in his findings of fact, to which I have earlier referred: 'In the event of the applicant being released now, there is a very high risk of him reoffending. Any such offence is likely to have a sexual connotation.' Therefore as the sheriff was not satisfied either as to the matter set out in s 64(1)(a) or as to the matter set out in s 64(1)(b), he was not entitled to direct either the absolute discharge or the conditional discharge of the respondent.

Accordingly the second issue which arises for determination is whether the Inner House was entitled to set aside the ruling of the Lord Ordinary and hold that there was no evidence to justify the sheriff's conclusion that medical treatment was likely to alleviate the respondent's condition. I am in agreement with the opinion of the Inner House that treatment which alleviates the symptoms and manifestations of the underlying medical disorder of a psychopath is 'treatment' within the meaning of s 17(1)(a)(i) even if the treatment does not cure the disorder itself.

The petition to the Lord Ordinary was a petition for judicial review, and was not an

appeal against the decision of the sheriff. Therefore the Lord Ordinary summarised his jurisdiction with complete accuracy when he said (1997 SLT 555 at 557):

> 'At the outset it must be recalled that, when it introduced an appeal mechanism, Parliament laid down that the appeal was to be to the local sheriff. Parliament has therefore laid on him the responsibility for hearing and deciding the appeal. In a judicial review there can be no question of a judge of the Court of Session considering the issue in the appeal afresh and substituting his view for that of the sheriff. I can interfere with the sheriff's decision only if there was a procedural irregularity or he erred in law or reached a decision on the facts which was Wednesbury unreasonable.'

It is clear that there was a difference of opinion between the seven psychiatrists who gave evidence before the sheriff. The sheriff recognised this and stated that 'the majority opinion among the witnesses was that the medical treatment provided by the State Hospital had not alleviated and would not alleviate his condition'. But the sheriff referred to the evidence of Dr Chiswick, who was in

favour of an absolute discharge of the respondent, and who stated that 'Dr White's plans for anger management etc would be regarded by him as treatment'. And it is clear from the passage of his decision which I have set out above that the sheriff accepted the opinion of Dr White, who was the responsible medical officer for the respondent, that the anger management of the respondent in the structured setting of the State Hospital in a supervised environment resulted in his being less physically aggressive. In other words it was Dr White's opinion that the symptoms of his underlying condition were alleviated, and this led the sheriff to the conclusion that medical treatment 'should continue' to alleviate his condition.

Therefore, in my view, contrary to the opinion of the Inner House, the Lord Ordinary was right to decide that, given the evidence which was before the sheriff, it would be wrong to hold that no sensible sheriff could have reached the decision which he did. I consider the Lord Ordinary's conclusion is also supported by the consideration that the Inner House reached its decision by reference to the written reports of the seven psychiatrists, but it is clear that they also gave oral evidence before the sheriff, the transcripts of which were not before the Inner House, and in the course of that oral evidence the sheriff may have heard additional matters which supported the decision to which he came.

I recognise that if the Inner House had been hearing an appeal from the decision of the sheriff, it would have been open to it to have come to the conclusion that it was not satisfied that medical treatment was likely to alleviate the respondent's condition, but I differ, with respect, from its decision that there was no basis for the sheriff to conclude that medical treatment was likely to alleviate his condition. Accordingly I would allow the appeal on this ground and would uphold the ruling of the sheriff that the respondent was not entitled to a direction that he be discharged from hospital.

In conclusion I return to the issues of importance and public concern to which I referred

at the commencement of this judgment. In the present case the sheriff did not order the discharge of the patient who was subject to a restriction order because there was medical evidence before him which entitled him to find that the supervision which the patient received in the structured setting of the State Hospital which improved the patient's anger management constituted 'medical treatment' within the meaning of s 64(1)(a) which was likely to alleviate his condition. But there may be other cases where the evidence before a sheriff does not lead to a finding by him that a psychopathic patient is receiving treatment which is likely to alleviate his condition. In such a case under the construction which I and the majority of your Lordships place upon s 64(1)(a) the sheriff would be obliged to direct the absolute discharge of the patient irrespective of what fears there might be that he would be likely to harm other persons.

I am of opinion that in such a case the sheriff would not be entitled to give a direction for the conditional discharge of the patient, because if the medical evidence was that medical treatment in the hospital was not likely to alleviate or prevent a deterioration of the psychopath's condition, it is difficult to see in relation to s 64(1)(c) how the sheriff could take the view that it was appropriate for the psychopath to remain liable to be recalled to hospital for further treatment. I consider that in relation to, for example, a schizophrenic patient, the position in respect of a conditional discharge might be different, because I think that psychiatrists might give evidence before a sheriff that the improvement in the patient's condition in hospital had been such that it was no longer appropriate to detain him for medical treatment, but that there was a risk that he might have

a relapse which would make it appropriate for him to be recalled to hospital for further treatment.

As I have stated, the danger which could arise under s 64(1)(a) is that a sheriff would be obliged to direct the absolute discharge from hospital of a psychopath, who might well harm members of the public, if the evidence adduced before him satisfied him that medical treatment in hospital was not likely to alleviate or prevent a deterioration of his condition (including the symptoms and manifestations of that condition). But a proposal to change s 64(1)(a) to remove or reduce that danger gives rise to the problem whether it would be just to detain a psychopath for many years in hospital when medical treatment was not likely to alleviate or prevent a deterioration of his condition and when, if at the time of his conviction, he had been sentenced to imprisonment instead of being ordered to be detained in hospital subject to a restriction order without limit of time, he might have been released at the end of his term of imprisonment or, where a life sentence was imposed, by the order of the Secretary of State for Scotland, by the date when he applied to a sheriff to be discharged from hospital.

This is a problem of great difficulty which, in my opinion, can only be resolved by Parliament. It cannot be resolved by the courts under the present legislation and, moreover, I consider that the balancing of the protection of the public as against the claim of a psychopath convicted many years ago that he should not continue to be detained in hospital when medical treatment will not improve his condition, is an issue for Parliament to decide and not for judges.

Appeal allowed.
[1999] 1 All ER 481 at 516