**IN THE UPPER TRIBUNAL**
**ADMINISTRATIVE APPEALS CHAMBER**

**Appeal No. UA-2022-001362-HM**

On appeal from First-tier Tribunal (Health Education and Social Care Chamber)

**Between:**

**A.C.**

Applicant

– v –

**Cornwall Partnership NHS Trust**

Respondent

**Before: Upper Tribunal Judge Wikeley**

Hearing Date: 21 March 2023
Determination date: 22 March 2023

**Representation:**
Applicant: Mr Alex Schymyck, instructed by Conroys, Solicitors
Respondent: No attendance

## NOTICE OF DETERMINATION OF APPLICATION FOR PERMISSION TO APPEAL

**I refuse permission to appeal.**

This determination is made under section 11 of the Tribunals, Courts and Enforcement Act 2007 and rules 21 and 22 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698).

**THE UPPER TRIBUNAL ORDERS that:**

**Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698), no person shall, without the consent of the Upper Tribunal, publish or reveal:**

**(a) the name or address of 'AC', who is the Applicant in these proceedings,**
**(b) or any information that would be likely to lead to the identification of her or any member of her family in connection with these proceedings;**

**but the determination itself may be made public (other than the front cover sheet).**

## REASONS FOR DETERMINATION

### This application for permission to appeal: the result in a sentence

1. The renewed application for permission to appeal to the Upper Tribunal is dismissed as there is no arguable error of law in the decision of the First-tier Tribunal.

### Introduction

2. I held a conventional face to face oral hearing of this renewed application for permission to appeal on 21 March 2023 at Field House in London. The Applicant, who did not attend, was represented by Mr Alex Schymyck of Counsel, instructed by Conroys, Solicitors. I am grateful to him for his economical, helpful and well-focussed submissions. The Respondent did not attend and was not represented, but there was no direction that it should appear.

### Background

3. The Applicant was living in Cornwall when she was admitted to hospital in November 2021. She did not wish to return to her home in Cornwall but wanted to relocate to West Sussex, where her family was now based. On 22 October 2022 the First-tier Tribunal (FTT) decided that the Applicant should not be discharged from liability to be detailed under section 3 of the Mental Health Act 1983. The FTT also declined to make a statutory recommendation, although it made an extra-statutory recommendation about discharge planning.

4. On 15 November 2022 the FTT (Judge Westcott) refused the Applicant permission to appeal.

5. On 14 December 2022 Judge Jacobs in the Upper Tribunal refused permission to appeal 'on the papers'.

6. Finally, and by way of context, Mr Schymyck very properly advised me at the outset of the renewal hearing that the matter had become academic on the facts, in that the Applicant had been discharged to West Sussex on a CTO on 27 February 2023.

### The test to be applied in deciding a permission application

7. In order to give the Applicant permission to appeal to the Upper Tribunal, I must find that the proposed grounds of appeal are arguable, in the sense that there is a realistic prospect of success in showing that the First-tier Tribunal went wrong in law in some way. However, for the reasons that follow, and despite the best efforts of Mr Schymyck to persuade me otherwise, I am not satisfied that there is any such arguable *error of law* in the First-tier Tribunal's decision.

8. In making my determination, I also bear in mind the cautionary approach required by Lady Hale in *Secretary of State for the Home Department v AH (Sudan)* [2007] UKHL 49. Giving guidance in the context of specialist tribunals (that was an asylum case, but the same principle applies here too), Lady Hale said as follows:

> "This is an expert tribunal charged with administering a complex area of law in challenging circumstances. To paraphrase a view I have expressed about such expert tribunals in another context, the ordinary courts should approach appeals from them with an appropriate degree of caution; it is probable that in understanding and applying the law in their specialised field

> the tribunal will have got it right: see *Cooke v Secretary of State for Social Security* [2001] EWCA Civ 734, [2002] 3 All ER 279, para 16. They and they alone are the judges of the facts. It is not enough that their decision on those facts may seem harsh to people who have not heard and read the evidence and arguments which they have heard and read. Their decisions should be respected unless it is quite clear that they have misdirected themselves in law. Appellate courts should not rush to find such misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently."

9. For convenience, and by way of shorthand, I refer to this principle as 'the Lady Hale principle' in this determination.

10. At the same time, and in a similar vein, I must also bear in mind the guidance of the Supreme Court and the Court of Appeal on the appropriate level of intensity of review when considering a challenge to the decision of a first instance tribunal. See, for example, the judgment of Lord Hope in *R (Jones) v First-tier Tribunal (Social Entitlement Chamber)* [2013] UKSC 19, where he held that it is:

> "well established, as an aspect of tribunal law and practice, that judicial restraint should be exercised when the reasons that a tribunal gives for its decision are being examined. The appellate court should not assume too readily that the tribunal misdirected itself just because not every step in its reasoning is fully set out in it" (at para [25]).

11. For convenience, and by way of shorthand, I refer to this principle as 'the Lord Hope principle' in this determination.

**The grounds of appeal**

12. The Applicant submits that the Tribunal made two distinct errors of law in its determination.

13. First, Mr Schymyck submits it was procedurally unfair to refuse the Applicant's adjournment request in circumstances where the Applicant could not make an application for discharge due to having no suitable accommodation and aftercare available.

14. Second, it is argued that the decision to make an extra-statutory recommendation where the power to make a statutory recommendation was available undermined the purpose of the statute and/or was irrational.

**The first ground: the FTT's decision not to adjourn the hearing**

15. At the outset of the FTT hearing Mr Schymyck made an application for an adjournment. He argued that there had been a lack of discharge planning regarding the Applicant's wish to move to West Sussex. This application was dealt with by the FTT in its decision as a preliminary issue (see para 4e-4k). The FTT refused the application but indicated the matter would be revisited in the event that "information regarding aftercare is an essential part of deciding on the discharge criteria".

16. Mr Schymyck, in his submissions at the oral renewal hearing, contended that the Applicant had been put in an impossible position – it was agreed on all sides she should not return to her Cornwall address, but she was unable to show that there were suitable arrangements in place in West Sussex. In essence, the decision to

refuse the adjournment had meant she was unable properly to exercise her statutory right to have her continued detention reviewed.

17. There is both a high-level and a more specific response to this ground of appeal.

18. First, in high-level terms, appellate courts and tribunals are typically loath to interfere in a first instance tribunal's decisions on case management issues. So, while in theory FTT case management rulings are appealable (at least so long as they are not "excluded decisions" by statute: see *LS v LB of Lambeth* [2010] UKUT 461 (AAC); [2011] AACR 27), it is not the role of the Upper Tribunal to 'micro-manage' such decisions on appeal where its jurisdiction is confined to errors of law. Precedent confirms that a case management ruling should only be interfered with if it is "plainly wrong" (see e.g. Lord Templeman in *Ashmore v Corporation of Lloyd's* [1992] 1 WLR 446 at 454A-B).

19. Second, and more specifically, there is the case law on adjournments in the mental health jurisdiction, such as *AM v West London MH NHS Trust* [2012] UKUT 382. The FTT was plainly well aware of those principles and reached a reasoned decision not to adjourn (while keeping the door open to revisiting the issue, depending on how the hearing progressed). As Judge Jacobs ruled in refusing permission on the papers, "it was rational not to adjourn to wait for an unknown period until [the Applicant was] well enough to take part". Or, putting it more bluntly as Judge Westcott did, in the event the evidence suggested that "the issue of aftercare was a red herring ... an adjournment to secure its provision would have achieved nothing beyond additional expense and delay and would therefore have been inappropriate". This is, moreover, a case of the Lady Hale principle applying. Bearing in mind the broad discretion that the FTT has in such matters, I cannot say there is an arguable error of law in its approach.

**The second ground: the FTT's decision not to make a statutory recommendation**

20. The FTT declined to make a statutory recommendation under section 72(3), reasoning that "The evidence is that the transfer to another hospital nearer her family has been considered by the clinical team as part of the discharge planning, but planning was stopped due to her deterioration. We accept that she will not be ready to participate in the planning for a few weeks" (para 19). Instead, it made "an extra-statutory recommendation that the RC or his successor in the new ward and the care coordinator consider fully [the Applicant's] aftercare needs and act appropriately and with speed to identify an acute ward nearer to her family and appropriate accommodation in West Sussex" (para 20).

21. In his oral submissions, Mr Schymyck placed greater emphasis on the second ground of appeal as the more novel argument. In short, he argued that the FTT's decision to make a non-statutory recommendation, thus eschewing the additional moral force it carried, undermined the purpose of the statute. This was, he argued, inconsistent with fundamental public law principles, such as the principle that the FTT had to act in accordance with the statutory framework. Mr Schymyck further submitted that the matter was ripe for guidance from the Upper Tribunal, notwithstanding the fact that the Applicant had herself now been discharged.

22. I am not persuaded by these submissions. As Judge Jacobs observed, refusing permission on the papers, the FTT's approach to this issue was inextricably bound up with its stance on the issue of adjournment. The FTT's reasoning was certainly compressed, but it was adequate (and the Lord Hope principle is

applicable here) – it concisely explained a rational basis for making an extra-statutory as opposed to a statutory recommendation (which indeed, as events have unfolded, has borne fruit). On the facts it was entitled to take the view that it should not get involved in the onward supervision of the patient's care – Judge Westcott's citation of *R v Nottingham MHRT ex p Home Secretary* (Times, 12 October 1988) is very much in point in this context. Accepting for the purpose of argument that an appeal which has become academic can still be heard (see *DD v Sussex Partnership Trust and Secretary of State for Justice, MIND intervening* [2022] UKUT 166 (AAC)), it does not seem to me that this is a case which could usefully add anything more by way of guidance to the observations in Judge Jacobs's decision in *RB v Nottinghamshire Healthcare NHS Trust* [2011] UKUT 73 (AAC) at paras 12-16 (available on the UTAAC 'old' pre-2016 decisions website).

23. In the Applicant's grounds of appeal, the second ground was also put on the alternative basis of irrationality. Mr Schymyck did not pursue that point in his oral submissions and I consider he was wise to do so. An irrationality or perversity challenge involves the submission, in effect, that the FTT reached a decision that no tribunal properly directing itself as to the relevant law and applying it to the material facts could have reached. This is a high threshold to satisfy. It will typically only be satisfied if it is arguable that the FTT's findings were so "wildly wrong" as to merit being set aside (see Sir John Donaldson MR in the Court of Appeal's decision in *Murrell v Secretary of State for Social Services*, reported as Appendix to Social Security Commissioner's decision *R(I) 3/84* and see also *Yeboah v Crofton* [2002] EWCA Civ 794 *per* Mummery LJ at paragraphs 92-95). The irrationality threshold is not met in the present case.

**Conclusion**

24. As I am not persuaded that either ground of appeal is arguable, I therefore refuse the renewed application for permission to appeal.

**Nicholas Wikeley**
**Judge of the Upper Tribunal**

Signed on the original on 22 March 2023