IN THE UPPER TRIBUNAL **Case Nos.** HM/3053/2011
ADMINISTRATIVE APPEALS CHAMBER HM/3502.2011

Before Upper Tribunal Judge Rowland

Mr Roger Pezzani (instructed by Ms Katarzyna Podkowik of Guile Nicholas, Solicitors, London N12) represented the Appellants.

The Respondents did not appear and were not represented.

Decisions: The appeals are dismissed.

The applications for permission to apply for judicial review are refused.

It is directed that, save for the frontsheet (which identifies the Appellants by their full names), these decisions may be made public

REASONS FOR DECISIONS

1. These appeals raise the question whether a patient detained under the Mental Health Act 1983 may challenge a decision by the First-tier Tribunal to refuse to make an extra-statutory recommendation as to his future care or treatment.

The legislative scheme

2. The main function of the First-tier Tribunal under the 1983 Act is to consider under sections 72 and 73 whether or not patients who are detained, are subject to community treatment orders or are subject to guardianship should be discharged. It does not have the function of deciding whether leave of absence should be granted (which under section 17 is a matter for the responsible clinician), or of deciding whether a patient should be transferred to another hospital or into guardianship (which, under regulation 7 of the Mental Health (Hospital, Guardianship and Treatment) (England) Regulations 2008 (SI 2008/1184) made under section 19 of the Act, is a matter for the hospital managers and, in the case of guardianship, the relevant social services authority).

3. However, in addition to its powers and duties to discharge patients, the First-tier Tribunal does have statutory powers to make recommendations about matters on which it has no power to make substantive decisions. In particular, when it does not discharge a detained patient or a community patient under section 72(1), it may, under section 72(3)(a), "with a view to facilitating his discharge on a future date, recommend that he be granted leave of absence or be transferred to another hospital or into guardianship". There are other statutory powers to make recommendations – see sections 72(3A)(a) and 74(1)(b) – but those are not material to the present case.

4. Indeed, even section 72(3)(a) is not of direct relevance to the present cases, because the patients in these cases were both admitted to hospital under hospital orders made under section 37, accompanied by restriction orders made under section 41. The question whether or not a patient subject to a restriction order should be discharged is determined by the First-tier Tribunal under section 73(1) and (2), rather than under section 72(1) (see section 72(7)), so that 72(3)(a) does not apply (see *Grant v Mental Health Review Tribunal* (*The Times*, April 26, 1986, QBD) for confirmation of what seems clear enough on the face of the statute).

5. Nonetheless, tribunals do make extra-statutory recommendations in cases involving restricted patients, apparently encouraged by a written parliamentary answer given by Mr Douglas Hogg MP, a Home Office minister who, when asked 25 years ago what would happen if a tribunal which had considered the case of a restricted patient included in its decision a recommendation that the patient be granted leave of absence or be transferred to another hospital or into guardianship, replied –

> "Any such recommendation received by the Home Office is acknowledged, and any comments are offered which can usefully be made at that stage. Correspondence with the tribunal is copied to the patient's responsible medical officer since it is for this officer to consider the recommendation in the first instance. If the responsible medical officer submits a proposal based on a tribunal's recommendation, full account is taken of the tribunal's views. At any subsequent hearing of the case, the statement which the Home Office provides will explain the outcome of any recommendation which the tribunal has made." (*Hansard* HC Vol.121, col.261, October 28, 1987).

6. The relevant functions of the Home Secretary have now been transferred to the Secretary of State for Justice. He is involved because, where a patient is subject to a restriction order, section 41(3)(c) has the effect that certain powers, including the power to grant leave of absence under section 17 or the power to transfer the patient to another hospital or into guardianship under regulation 7 of the 2008 Regulations, "shall be exercisable only with the consent of the Secretary of State".

The facts in the first case (on file HM/3053/2011)

7. In the first case before me, the hospital order and restriction order were made in 2005. The patient was conditionally discharged in 2006 but recalled in 2008. He was again conditionally discharged on 1 April 2010 but was recalled on 30 April 2011. Following that recall, the Secretary of State referred the case to the First-tier Tribunal under section 75(1)(a). The case came before the First-tier Tribunal on 7 September 2011. The Appellant's statement of facts, which has not been challenged and which I accept as accurate for the purpose of this appeal, says –

> "6. The appellant did not ask the tribunal to discharge him. His sole application was for a recommendation that he be granted leave outside the hospital.
>
> 7. The tribunal announced at the outset of the hearing and before hearing any evidence that it had decided [it] would not recommend that the appellant

be granted leave. Further, the appellant's solicitor was told that she would not be allowed to ask any questions on the subject of leave. Later in the hearing, when the solicitor attempted to ask such questions of Dr Maganty, the responsible clinician, she was stopped from doing so.

"8. The solicitor had also brought to the tribunal's attention an entry in the appellant's RIO computerised records, dated 22 August 2011, in which the responsible clinician had recorded that "… if the MHRT *[sic]* supports his request for escorted community leave then he will apply to the MoJ for escorted community leave further supported by the recommendation of the MHRT."

8. The statement of reasons was brief and I need set out only paragraph 3 and paragraph 7.

"3. The Tribunal were concerned that in view of the fact that the Team was considering community leave to be imminent that it would not be appropriate for the tribunal to enter into micro management and interfere with the professional judgment of the Responsible Clinician and his Team. When Dr Maganty gave evidence he informed the Tribunal that in fact the letter to the Ministry of Justice had been drafted seeking community leave and would soon be posted. The Tribunal saw nothing in the evidence to suggest that this was not the appropriate course of action."

"7. The Tribunal accepts the evidence of the clinical team that the patient is properly detained and that treatment is appropriate and the patient is progressing well and will shortly have properly monitored community leave."

9. The Appellant sought permission to appeal against the refusal to make an extra-statutory recommendation that the patient be granted leave of absence, on the grounds that the reasons given for the refusal were inadequate, that the First-tier Tribunal had failed to take account of the RIO records and that it had conducted the hearing in such a way as to create the impression that it had formed a concluded view before hearing oral evidence and submissions. In a decision that was at least twice as long as the substantive decision, a different judge of the First-tier Tribunal granted permission to appeal. With that permission, the Appellant now appeals. He also asks, in the alternative, for permission to apply for judicial review.

The facts in the second case (on file HM/3502/2011)

10. In the second case before me, the hospital order and restriction order were made in 2006. On a date not revealed in the documents before me, the patient made an application to the First-tier Tribunal under section 70(b), which came before the First-tier Tribunal on 20 September 2011. The Appellant's statement of facts, which has not been challenged, says –

"6. … Before any evidence had been heard, [the patient's] solicitor told the tribunal that what was sought was an extra-statutory recommendation that he be transferred to less restrictive conditions of detention.

> 7. … According to the solicitor's note, the judge said
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> > 'I am very reluctant to give an extra-statutory recommendation. The only value of extra-statutory recommendations [is] if there are unreasonable obstructions to move by the MOJ. This is my personal view and you will not shift me from this view.'
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> 8. During the course of the hearing, the solicitor asked questions and made submissions in relation to the application for a recommendation."

(I have slightly edited the "solicitor's note" to remove what I think are minor grammatical errors in either the note-taking or the transcription of the note without, I hope, altering the sense of what was recorded.) Dr Shergill, the responsible clinician, who was present both at the hearing before the First-tier Tribunal and before me, said that the solicitor's note accorded with his recollection.

11. The First-tier Tribunal did not discharge the patient. Its statement of reasons did not mention the request for an extra-statutory recommendation at all. The Appellant sought permission to appeal against the refusal to make an extra-statutory recommendation that the patient be granted leave of absence, on the grounds that no or inadequate reasons had been given for the refusal and that the First-tier Tribunal had formed a concluded view before hearing oral evidence and submissions or had failed even to consider whether to make an extra-statutory recommendation. Permission to appeal was refused by a different judge of the First-tier Tribunal and the Appellant applied to the Upper Tribunal for both permission to appeal and, in the alternative, permission to apply for judicial review. I granted permission to appeal and directed that this case should be heard with the one on file HM/3053.2011. I deferred consideration of the application for permission to apply for judicial review.

Representation

12. Only the appellant patients have been represented before me and I am grateful to Mr Pezzani for the clarity of his submissions. None of the respondents to the appeals (i.e., the hospital managers of the two hospitals and the Secretary of State for Justice) has submitted a response. The First-tier Tribunal has submitted an acknowledgement of service in one case, quite properly indicating that it would not take any part in the proceedings, but not in the other.

13. Dr Shergill, the responsible clinician in the second case, was present at the hearing before me. He did not come to represent the Respondent and was not in a position to make any submissions on the points of law. He told me that he had attended in order to assist the Upper Tribunal if necessary. Given that appeals to the Upper Tribunal are only on points of law, assistance as to the facts is not often necessary and, apart from confirming what happened at the hearing before the First-tier Tribunal, Dr Shergill was not called upon to give evidence. I find it slightly surprising that the First Respondent in that case appears not to have made enquiries about the functions of the Upper Tribunal, as opposed to the First-tier Tribunal. Although the Upper Tribunal has the power to substitute a decision for that of the First-tier Tribunal if it finds an error of law, it will seldom do so in a mental health case in which medical expertise is required, because a judge does not sit with expert

members when hearing appeals from the First-tier Tribunal. Usually, where an appeal is allowed, the case is remitted to the First-tier Tribunal. Although up-to-date information is sometimes useful, it should not generally be necessary for a medically qualified witness to attend in person. I did not enquire precisely how Dr Shergill had come to appear before me. It appears that the Upper Tribunal may need to publish some guidance for hospital managers as to what is expected of them when they are respondents to appeals but do not wish to take an active role.

The arguments

14. Mr Pezzani started by accepting that there was some authority, in the form of one decision of the Court of Appeal and two decisions of High Court judges, against him on the question whether there could be any challenge at all to a refusal to give an extra-statutory recommendation. However, he sought to distinguish the Court of Appeal decision and to persuade me not to follow the High Court judges who followed it.

15. The Court of Appeal decision is *Khatib-Shahidi v Immigration Appeal Tribunal* [2001] IAR 124, in which it was held that there was no right of appeal from an adjudicator to the Immigration Appeal Tribunal against a refusal to make an extra-statutory recommendation for leave to remain on compassionate grounds and that the adjudicator's refusal to make such a recommendation could also not be challenged by way of judicial review.

16. In relation to the right of appeal, the Court of Appeal held that an appeal lay only against a final decision of an adjudicator necessary to dispose of the matter before him and not any other decision. Mr Pezzani submitted that the Court's reasoning did not apply to appeals under section 11 of the Tribunals, Courts and Enforcement Act 2007, such as the present cases. I accept that submission. It seems to me that *Khatib-Shahidi* can be distinguished on the same grounds that *Secretary of State for Work and Pensions v Morina* [2007] EWCA Civ 749; [2007] 1 W.L.R. 3033 (also reported as R(IS) 6/07) and the decisions cited therein were distinguished in *LS v London Borough of Lambeth (HB)* [2010] UKUT 461 (AAC); [2011] AACR 27 at [82] to [97]. If a refusal to make an extra-statutory recommendation may be challenged at all, it is by way of an appeal rather than by way of judicial review. However, the question whether it is challengeable at all must be considered in the light of the observations of the Court of Appeal in respect of judicial review.

17. In respect of judicial review, it is important to note that the Court appeared to be satisfied that legitimate criticisms could be made of the adjudicator's decision (see [13]). As to the principle, Kennedy LJ, with whom Ward and Mantell LJJ agreed, said –

> "[26] … as the judge pointed out, the scope of judicial review is not unlimited. He took as his starting point the speech of Lord Diplock in *Council of Civil Service Unions v Minister for Civil Service* [1985] 1 A.C. 374, 408-409, where he said:

> 'To qualify as a subject for judicial review the decision must have consequences which affect some person (or body of persons) other than the decision-maker although it may affect him too. It must affect such other person either:
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> (a) by altering rights or obligations of that person which are enforceable by or against him in private law; or
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> (b) by depriving him of some benefit or advantage …
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> 'For a decision to be susceptible to judicial review the decision-maker must be empowered by public law … to make decisions that, if validly made, will lead to administrative action or abstention from action by an authority endowed by law with executive powers, which have one or other of the consequences mentioned in the proceeding paragraph.'

[27] …

[28] Mr Saini [counsel for the Respondent] … submitted that judicial review is only possible in respect of a body which has a final power of decision unless the applicant or appellant can show that, as a result of that which she seeks to challenge she will suffer some detriment which cannot otherwise be cured. Put another way, the decision has to have an element of finality about it which, Mr Saini submits, is lacking in this case.

[29] In *R. v Martin, ex parte Chaudhary* (17 November 1984 unreported) this court considered a renewed application for leave to move for judicial review of a decision of an adjudicator to make a recommendation to the Secretary of State. At page 4 of the transcript Rose LJ said:

> '… the difficulty with Mr MacDonald's submission in relation to jurisdiction, is that the decision as to whether or not there are compassionate grounds, is one for the Secretary of State, not for the court or the Adjudicator. The practice where adjudicators sometimes make a recommendation to the Secretary of State, which the Secretary of State may generally speaking follow but by which he is not bound, does not affect this … this decision of the Adjudicator is not a decision which is amenable to the judicial process. I say that because first of all, the nature of the decision is merely the exercise of a power of recommendation and is not the final decision.
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> 'Secondly, so far as the subject matter is concerned, it seems to me that compassionate circumstances are not generally speaking … matters which are susceptible to judicial review.'

[30] That decision is plainly a formidable obstacle for Miss Webber to surmount, and Mr Saini went on to indicate what will now happen in practice if the court does not intervene. No doubt the appellant, through her solicitors, will put her full case to the Secretary of State and explain where the adjudicator fell into error. That is something which can be demonstrated from the documents. The Secretary of State can then do one of three things:

> [31] (1) he can grant exceptional leave to remain;
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> [32] (2) alternatively, he can refuse such leave and adopt the reasoning of the Secretary of State, but in that case his decision would plainly be open to challenge by way of judicial review;
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> [33] (3) he can, by a separate process of reasoning, decide that there are no sufficient grounds for granting exceptional leave to remain.
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> [34] Whatever course is followed, the appellant, Mr Saini submits, will be no worse off than if the adjudicator had, at the outset, refused even to consider whether he should make a recommendation as it is conceded he was fully entitled to do.
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> [35] …
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> [36] …
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> [37] I accept, of course, that a favourable recommendation from an adjudicator is an advantage to someone in the position of this appellant, but it is not an advantage to which she has any sort of legal right. If, because of some misunderstanding, an adjudicator refuses to give her that advantage, … she will be no worse off than if at the outset the adjudicator simply refused even to entertain submissions in relation to a recommendation.
>
> [38] Accordingly, I am satisfied that neither of the adjudicator's findings of fact, nor his decision not to recommend are susceptible to judicial review. Even if I were wrong about that, the situation is plainly one in which the appellant has available to her alternative remedies so that it would not, in my judgment, be appropriate for the court to intervene."

18. Insofar as he was dealing with a renewed application for permission to apply for judicial review of a refusal to make an extra-statutory recommendation for a transfer to another hospital, Maurice Kay J in *R.(LH) v Mental Health Review Tribunal* [2002] EWHC 170 (Admin) simply applied *Khatib-Shahidi*. So too did Stanley Burnton J when refusing judicial review of a similar refusal in *R.(H) v Mental Health Review Tribunal* [2002] EWHC 1522 (Admin), but he added at [24] –

> "It does not follow, however, that a failure by a mental health review tribunal to give reasons for a failure to make a recommendation within the scope of section 72(3) would not be susceptible to judicial review in circumstances where the contentions and material before the tribunal justified its consideration of such a recommendation. That is a matter which may be decided on another occasion. I express no view on it."

19. Mr Pezzani submitted that those High Court decisions were wrongly decided because *Khatib-Shahidi* should have been distinguished rather than followed. There were two limbs to his argument.

20. First, he submitted that, whereas the applicant in *Khatib-Shahidi* had no right even to make submissions in relation to a recommendation, that is not the case where a restricted patient seeks a recommendation of the type contemplated in Mr Hogg's written answer. That written answer, he submitted, creates a legitimate expectation that such patients will be able to seek recommendations that might favourably influence the Secretary of State. If it does not do so by itself, it does so, he submitted, when combined with the long-standing practice of the First-tier Tribunal and its predecessors of actually making such extra-statutory recommendations.

21. I do not agree. That written answer may create a legitimate expectation as to how recommendations will be regarded by the Secretary of State, although whether it actually makes any difference to what the position would be anyway I rather doubt. What it cannot rationally be thought to do is to create any expectation that the making of a recommendation will be considered by the First-tier Tribunal in all cases or in any particular case. Nothing in the written answer implies that the Secretary of State expects there to have been consideration of a recommendation in every case or in every case of a particular type. If that had been intended, no doubt legislation would have been introduced suitably to amend the 1983 Act and so provide. As it is, the contrast between the existence of paragraph (3)(a) in section 72 but no equivalent provision in section 73 is stark and obviously deliberate. Nor can the practice of the First-tier Tribunal create substantive rights (although implied procedural rights may be another matter). The First-tier Tribunal is a creature of statute and cannot arrogate to itself further functions. In any event, there is no evidence before me as to whether there is a general practice and, if so, as to exactly what the practice is or how consistent it is. There is a long gap between saying that recommendations are often made and saying that there is a practice of always considering requests to make such recommendations and, indeed, one of Mr Pezzani's complaints was that the First-tier Tribunal's approach was in fact inconsistent.

22. Mr Pezzani's second limb was based on general public law principles. First, he submitted that it is well established that the Courts require there to be procedural fairness even when a tribunal is making, or considering whether to make, a mere recommendation rather than a decision. I accept that proposition, although all the examples he gave except one were in cases where there was a statutory power to make a recommendation or at least a statutory recognition of a power to make a recommendation. The exception, *R.(D'Cunha) v Parole Board* [2011] EWHC 128 (Admin), involved a request by the Secretary of State for advice, which was accepted by the Parole Board, and so the giving of advice was a necessary part of the decision-making process in that particular case. Secondly, Mr Pezzani submitted that the Courts require there to be procedural fairness if a recommendation, whether statutory or not, has an effect on the making of a public law decision, even if it has only an indirect effect on the decision. Again, I accept the proposition, although in the case cited, *R. v Panel on Take-overs and Mergers, ex parte Datafin Plc* [1987] 1 Q.B. 815, consideration of the effect of the Panel's decisions was principally for the purpose of deciding whether the Panel had a sufficiently public law character to be subject to the supervisory jurisdiction of the High Court.

23. However, while acceptance of these propositions may be sufficient to show that decisions arising out of applications for extra-statutory recommendations may sometimes be challengeable, they do not show that they always are.

24. The first difficulty facing Mr Pezzani is that, whereas the existence of a statutory power may imply a right to make representations as to whether it should be exercised and a right to be given reasons for the power being exercised or not exercised, there can be no right to an opportunity to invite a tribunal to act beyond its powers and it is sufficient explanation for not making an extra-statutory recommendation that the patient is not entitled to one. Even if not expressly stated in the formal statement of reasons, that explanation can normally be implied. Although the First-tier Tribunal can in practice make a recommendation if it wishes to do so, it is, I suggest, inappropriate to talk in terms of it having a "power" to do so. It has no *legal* power to make an extra-statutory recommendation and can never be compelled to do so.

25. The second difficulty facing Mr Pezzani is that, while the making of a recommendation may confer an advantage, a refusal even to consider making a recommendation does not confer a corresponding disadvantage: it is neutral in its effect on the Secretary of State's decision making.

26. Moreover, as was pointed out in *Khatib-Shahidi*, if what a First-tier Tribunal says might have an influence on the Secretary of State adverse to a patient and if that part of its decision were flawed, it is likely that either the Secretary of State could be dissuaded from having any regard to that part of the decision or else a direct challenge to the Secretary of State's decision would succeed without it being necessary separately to challenge the First-tier Tribunal's decision. Thus a flawed extra-statutory decision should not in fact have any effect.

27. For these reasons, I do not consider *Khatib-Shahidi* to be distinguishable from the present cases on the question whether a refusal to make an extra-statutory recommendation is susceptible to a challenge on a point of law and I would in any event reject Mr Pezzani's submissions even were I not bound by *Khatib-Shahidi*. I would not entirely exclude the possibility of *Khatib-Shahidi* being distinguished in another case if it could be shown, not only that either a recommendation made in terms other than those sought by a patient or else a refusal to make a recommendation that implied an adverse recommendation was flawed, but also that the circumstances were such that there was no alternative and more appropriate remedy. However, I find it difficult to conceive of such a case and certainly neither of the present cases comes close to meeting those requirements.

28. Mr Pezzani also made the point that questions of leave and transfers are often inextricably bound up with the question whether a person is lawfully detained, since the First-tier Tribunal is obliged to discharge a patient if suitable treatment is not available (see section 72(1)(b)(iia), read in the case of restricted patients with section 73(1) and (2)). But, if it is sought to argue that continued detention without leave or a transfer is becoming unlawful, it is open to a patent to seek a discharge but to invite the First-tier Tribunal to adjourn the proceedings in order to give the hospital managers an opportunity to arrange the leave or transfer and for the Secretary of State to give his consent so as to avoid a premature discharge being necessary.

Resort to a mere extra-statutory recommendation in such a case would hardly appear adequate. If the case is not that strong, then questions about leave and transfers are not matters for the First-tier Tribunal. Any remedy lies in persuasion of, or proceedings in the Administrative Court against, the hospital managers or the Secretary of State. There may be practical difficulties in pursuing such remedies, including funding, but those do not affect the legal position.

Specific challenges

29. In both of the present cases, the principal challenge is based on the fact that the First-tier Tribunal refused to allow the patient's representative to advance arguments in favour of it making a recommendation. For the reasons I have given, the patients had no right to advance such arguments and the First-tier Tribunal did not therefore err in law in that regard.

30. In the first case, my attention was drawn to the evidence that the responsible clinician was intending to ask the Secretary of State to consent to leave only if the First-tier Tribunal supported the proposal, so that he too was seeking a recommendation. However, the responsible clinician has no more right to request an extra-statutory recommendation than a patient does and the First-tier Tribunal's comments may have been aimed as much at him as at the patient's representative. In any event, the First-tier Tribunal made sure that the letter to the Ministry of Justice seeking the Secretary of State's consent would be sent without it making a positive recommendation, although to some extent it gave its blessing to the responsible clinician's proposal in the final sentence of paragraph 3 of the statement of reasons. Therefore, the First-tier Tribunal's refusal to make a recommendation did not have the effect that no request for consent to leave would be made, which the patient's representative might quite reasonably have feared at the beginning of the hearing would be the position.

31. Mr Pezzani also advanced a separate challenge to the First-tier Tribunal's reasoning. He submitted that the First-tier Tribunal, having identified community leave as a treatment that was needed and knowing that it was not available at the time of the hearing, failed adequately to address section 72(1)(iia) and wrongly assumed that leave would become available. In the context of this particular case, I do not accept that the First-tier Tribunal did err in law. The patient's representative had indicated that a discharge was not sought, which implied an acceptance that suitable treatment was available as, on the evidence before it, the First-tier Tribunal was entitled to find. She had not kept discharge as a live issue and had not sought an adjournment to see whether the Secretary of State's consent was forthcoming. I accept that the Secretary of State's consent to leave was required and to that extent it was wrong for the First-tier Tribunal to say that the patient "will" shortly have leave, but the First-tier Tribunal can hardly have overlooked the need for consent given the discussion about the letter to the Ministry of Justice mentioned in paragraph 3 of its statement of reasons and it seems to me that the words "very probably" or "almost certainly" should be read into paragraph 7 of the decision after "will". Even if it had regarded leave as essential, it was not obliged to consider adjourning of its own motion if it considered the likelihood of consent being refused to be very low, since presumably the patient could have made an application to the First-tier Tribunal if he

had not been granted leave and wished to argue that suitable treatment was not available to him.

32. In any event, when I asked Mr Pezzani what had in fact happened about leave after the hearing before the First-tier Tribunal, I was told that, despite the lack of a clear recommendation by the First-tier Tribunal, the Secretary of State did give his consent and leave was granted, although the leave was subsequently revoked and the patient recalled. Thus the First-tier Tribunal's assumption or prediction turned out to be correct and any defect in the decision was immaterial. In those circumstances, even if I had been satisfied that there had been an error of law, I would not have set the decision aside (see section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007).

33. In the second case, some criticism was made of the judge, both because he described his position as a "personal" one and because, it was said, his approach during the hearing was inconsistent, since on one hand he recognised a practice of making extra-statutory recommendations but then he refused to hear representations but did not stop the patient's solicitor from asking questions relating to the question of transfer. I do not accept those criticisms. It is arguable that "personal" was not the best word to use – if it was in fact used – but, in context, it seems to be no more than a recognition, consistent with Mr Pezzani's complaint of inconsistency, that other panels of the First-tier Tribunal might take a different view as to the circumstances in which it might be appropriate to make an extra-statutory recommendation. Presumably the other members of the panel in this case were content with his approach because otherwise they would have demurred. Since, for the reasons already given, a patient has no right to make any representations at all in respect of extra-statutory recommendations, the panel's position represented a concession to the patient because it gave his representative an opportunity to make representations if it was sought to argue that the case fell within the class of cases in which the judge had indicated that the panel would be prepared to make a recommendation. As to the questioning, since it is not suggested that it prejudiced him, it hardly lies in the mouth of the patient to complain that the First-tier Tribunal did not stop his own representative from asking questions, particularly if they were not relevant to the issue it had to decide.

Comment

34 If extra-statutory recommendations by the First-tier Tribunal are regarded as a useful contribution to decision making in a significant number of cases, it may be that consideration should be given either to formalising such recommendations – through, perhaps, a formal request by the Secretary of State for advice and/or a practice direction of the Chamber President of the Health, Education and Social Care Chamber or the Senior President of Tribunals – or to legislating to give the First-tier Tribunal a statutory role as regards leave and transfers for restricted patients. However, these are matters for others.

35. In the absence of any formalisation, some inconsistency – even if more perceived than actual – in the approaches of the First-tier Tribunal to the making of extra-statutory recommendations seems inevitable. Courts and tribunals of all types and at all levels make comments or suggestions that are not necessary for their

decisions. It is a matter of judgment when to do so and among the matters taken into consideration are likely to be whether the court or tribunal considers itself sufficiently well informed to make a useful comment or suggestion and whether doing so is likely to be seen as inappropriate interference with another body's decision making. I will not express any view as to the circumstances in which the First-tier Tribunal should or should not make extra-statutory recommendations in mental health cases, save that, if some panels are routinely spending a great deal of time considering issues not necessary for the exercise of their statutory functions for no better reason than that a party has asked them to do so, I would deprecate that practice.

Conclusion

36. I dismiss both appeals. The applications for permission to apply for judicial review were made only in the alternative, should appealing not be the correct route for challenging the First-tier Tribunal's decisions in these cases. Indeed, the applications have not even been registered by the Upper Tribunal as separate cases. Since I have decided that appealing was the correct route, I refuse permission to apply for judicial review in both cases.

Mark Rowland
29 May 2012