DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

Save for the cover sheet, this decision may be made public. That sheet is not formally part of the decision and identifies the applicant by name.

The application for judicial review is refused.

The Upper Tribunal has no jurisdiction over the claim for habeas corpus, because either it was not transferred by the Administrative Court or it is outside the powers conferred on the Upper Tribunal by section 15 of the 2007 Act.

REASONS FOR DECISION

A. Introduction

1. Ms S is a mental patient detained under section 3 of the Mental Health Act 1983 and the applicant for judicial review. She is detained by the hospital, which is the second respondent. Her case is currently before the First-tier Tribunal, which is the first respondent.

2. I held an oral hearing of the application on 9 October 2012. Ms S attended for part of the leave on escorted leave. She was represented by Mr Sachdeva of counsel, instructed by Cartwright King Solicitors. I am grateful to Mr Vikram Sachdeva for his written and oral arguments on the interesting issues raised by the application.

B. The transfer from the Administrative Court

3. Ms S challenged by judicial review:

- the decision of the First-tier Tribunal setting aside its own decision that she be discharged;
- her continued detention by the Hospital.

With respect to the latter, she claimed:

- habeas corpus; and
- damages for unlawful imprisonment.

Her application for permission to apply for judicial review was lodged with the Administrative Court and permission was given by Philip Mott QC, who also transferred the 'substantive hearing of this Judicial Review' to the Upper Tribunal. This presents at best an uncertainty and at worst a difficulty, because the Upper Tribunal has no jurisdiction over habeas corpus.

4. The transfer was made under section 31A of the Senior Courts Act 1981:

> **31A Transfer of judicial review applications to Upper Tribunal**
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> (1) This section applies where an application is made to the High Court—
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> (a) for judicial review, or
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> (b) for permission to apply for judicial review.

(2) If Conditions 1, 2, 3 and 4 are met, the High Court must by order transfer the application to the Upper Tribunal.

(2A) If Conditions 1, 2, 3 and 5 are met, but Condition 4 is not, the High Court must by order transfer the application to the Upper Tribunal.

(3) If Conditions 1, 2 and 4 are met, but Condition 3 is not, the High Court may by order transfer the application to the Upper Tribunal if it appears to the High Court to be just and convenient to do so.

(4) Condition 1 is that the application does not seek anything other than—

(a) relief under section 31(1)(a) and (b);

(b) permission to apply for relief under section 31(1)(a) and (b);

(c) an award under section 31(4);

(d) interest;

(e) costs.

(5) Condition 2 is that the application does not call into question anything done by the Crown Court.

(6) Condition 3 is that the application falls within a class specified under section 18(6) of the Tribunals, Courts and Enforcement Act 2007.

(7) Condition 4 is that the application does not call into question any decision made under—

(a) the Immigration Acts,

(b) the British Nationality Act 1981 (c. 61),

(c) any instrument having effect under an enactment within paragraph (a) or (b), or

(d) any other provision of law for the time being in force which determines British citizenship, British overseas territories citizenship, the status of a British National (Overseas) or British Overseas citizenship.

(8) Condition 5 is that the application calls into question a decision of the Secretary of State not to treat submissions as an asylum claim or a human rights claim within the meaning of Part 5 of the Nationality, Immigration and Asylum Act 2002 wholly or partly on the basis that they are not significantly different from material that has previously been considered (whether or not it calls into question any other decision).

Section 31(1)(a) and (b) and (4) provide:

31 Application for judicial review.

(1) An application to the High Court for one or more of the following forms of relief, namely—

(a) a mandatory, prohibiting or quashing order;

(b) a declaration or injunction under subsection (2);

...

(4) On an application for judicial review the High Court may award to the applicant damages, restitution or the recovery of a sum due if–

(a) the application includes a claim for such an award arising from any matter to which the application relates; and

(b) the court is satisfied that such an award would have been made if the claim had been made in an action begun by the applicant at the time of making the application.

5. The Upper Tribunal's judicial review powers are contained in section 15 of the Tribunals, Courts and Enforcement Act 2007:

15 Upper Tribunal's "judicial review" jurisdiction

(1) The Upper Tribunal has power, in cases arising under the law of England and Wales or under the law of Northern Ireland, to grant the following kinds of relief—

(a) a mandatory order;

(b) a prohibiting order;

(c) a quashing order;

(d) a declaration;

(e) an injunction.

(2) The power under subsection (1) may be exercised by the Upper Tribunal if—

(a) certain conditions are met (see section 18), or

(b) the tribunal is authorised to proceed even though not all of those conditions are met (see section 19(3) and (4)).

(3) Relief under subsection (1) granted by the Upper Tribunal—

(a) has the same effect as the corresponding relief granted by the High Court on an application for judicial review, and

(b) is enforceable as if it were relief granted by the High Court on an application for judicial review.

(4) In deciding whether to grant relief under subsection (1)(a), (b) or (c), the Upper Tribunal must apply the principles that the High Court would apply in deciding whether to grant that relief on an application for judicial review.

(5) In deciding whether to grant relief under subsection (1)(d) or (e), the Upper Tribunal must—

(a) in cases arising under the law of England and Wales apply the principles that the High Court would apply in deciding whether to grant that relief under section 31(2) of the Supreme Court Act 1981 on an application for judicial review, and

(b) in cases arising under the law of Northern Ireland apply the principles that the High Court would apply in deciding whether to grant that relief on an application for judicial review.

(6) For the purposes of the application of subsection (3)(a) in relation to cases arising under the law of Northern Ireland—

(a) a mandatory order under subsection (1)(a) shall be taken to correspond to an order of mandamus,

(b) a prohibiting order under subsection (1)(b) shall be taken to correspond to an order of prohibition, and

(c) a quashing order under subsection (1)(c) shall be taken to correspond to an order of certiorari.

It seems to me that the definitions in section 15(6) preclude the Upper Tribunal from exercising any habeas corpus jurisdiction. So, even if a claim for habeas corpus is within the scope of the powers to transfer applications from the Administrative Court, the Upper Tribunal has no power to deal with them.

6. Looking at the transfer order in this case, there are only two possibilities. One is that Philip Mott QC transferred only the judicial review and not the habeas corpus. In that case, I have no jurisdiction over the latter, because it is not before me. The other possibility is that he did transfer the habeas corpus. In that case, it is before, but I have no jurisdiction to decide it. I have, therefore, given a decision in the alternative without deciding which is correct.

7. Mr Sachdeva told me that the application for habeas corpus was a tactical device to ensure that the Administrative Court listed the case with some urgency. So, I trust that this uncertain method of disposal will not be of any practical significance. Just for the record, it not necessary to use tactical devices to ensure expedition before the Administrative Appeals Chamber. All that is required is an application for expedition, which will be decided by the judge handling the case.

C. Ms S

8. It is not necessary for me to go into any detail about Ms S and her personal circumstances. It is sufficient to say this. She was born on 24 April 1996 and has what was described in a psychiatric report as ' a traumatic and chaotic development history.' Her diagnosis is post traumatic stress disorder. She was admitted to a secure children's home in Northern Ireland where she attempted self-strangulation and was aggressive towards staff. She was moved to England, where she has been detained by the Hospital since 30 June 2011, first under section 2 and then under section 3 under the 1983 Act.

D. The proceedings before the First-tier Tribunal

9. Ms S applied for her discharge to the First-tier Tribunal on 7 November 2011. The tribunal met on 18 January 2012. It decided that she should not be discharged, as this would lead to disengagement and deterioration in her mental state. However, the tribunal expressed concern that a 15 year old girl had been

detained in England for almost a year and was desperate to return to Northern Ireland. Accordingly, the tribunal recommended that she be transferred to a named Unit in Belfast 'or to a similar institution in Northern Ireland' within three months. The tribunal said it would be prepared to meet again if the transfer did not take place.

10. The transfer did not take place and the same panel met again on 18 June 2012. Its decision was dated 20 June 2012.This time the tribunal directed that Ms S be discharged at noon on 30 July 2012. It decided that none of the conditions for detention under section 72(1)(b) of the 1983 Act were satisfied:

> **72 Powers of tribunals**
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> (1) Where application is made to the appropriate tribunal by or in respect of a patient who is liable to be detained under this Act or is a community patient, the tribunal may in any case direct that the patient be discharged, and—
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> ...
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> (b) the tribunal shall direct the discharge of a patient liable to be detained otherwise than under section 2 above if it is not satisfied—
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> (i) that he is then suffering from mental disorder or 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
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> (ii) that it is necessary for the health of safety of the patient or for the protection of other persons that he should receive such treatment; or
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> (iia) that appropriate medical treatment is available for him; ...

11. The issue for the tribunal was essentially one of timing. Ms S wanted to return to Northern Ireland, whereas the Hospital thought that she would not be ready for another six months. The tribunal noted that since the January hearing she had engaged with, and had responded to, treatment. She showed improved insight and was committed to co-operate with those treating her. There had been no more incidents of self-harm. There had, though, been one significant incident in which she had attacked a member of staff. A move to the Unit named in the January decision was not realistic, but there was a place available at a different Unit; it was not a mental health facility. The tribunal decided that it was not necessary to detain Ms S for treatment, as continued detention would be detrimental to her mental state, but it deferred the discharge to allow for arrangements to be made for the transfer to that Unit.

12. The Hospital applied for permission to appeal to the Upper Tribunal on three grounds:

- procedural irregularity in excluding the responsible clinician from the hearing while Ms S gave her evidence;
- irrationality; and
- inadequate reasons.

Ms S was invited to make representations, which were drafted by Mr Sachdeva. The application was then decided by Tribunal Judge Healy.

13. The judge was obliged to consider first whether to review the decision. This requirement is imposed by rule 47 of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care) Rules 2008 (SI No 2699):

> **47 Tribunal's consideration of application for permission to appeal**
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> (1) On receiving an application for permission to appeal the Tribunal must first consider, taking into account the overriding objective in rule 2, whether to review the decision in accordance with rule 49 (review of a decision).
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> (2) If the Tribunal decides not to review the decision, or reviews the decision and decides to take no action in relation to the decision, or part of it, the Tribunal must consider whether to give permission to appeal in relation to the decision or that part of it.

Rule 49(1)(a) limits the tribunal's power of review and governs the procedure:

> **49 Review of a decision**
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> (1) The Tribunal may only undertake a review of a decision—
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> (a) pursuant to rule 47(1) (review on an application for permission to appeal) if it is satisfied that there was an error of law in the decision;
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> ...
>
> (2) The Tribunal must notify the parties in writing of the outcome of any review, and of any right of appeal in relation to the outcome.
>
> (3) If the Tribunal takes any action in relation to a decision following a review without first giving every party an opportunity to make representations, the notice under paragraph (2) must state that any party that did not have an opportunity to make representations may apply for such action to be set aside and for the decision to be reviewed again.

Mr Sachdeva told me that he was not aware that a review was being considered and was only aware of an application for permission to appeal. I accept that, but the rules of procedure are clear and obligatory. If he or those instructing him had consulted the rules, they could not have been in any doubt.

14. Judge Healy identified an error of law in the inadequacies in the tribunal's reasoning. In particular:

- It overstated the significance of Ms S being separated from her family. She had been detained in England for a year, but she was subject to an interim care order and had not lived with her family since 2009
- It did not deal with the history of physical and emotional abuse by her mother.
- It made no mention of the fact that her mother had removed her from the Unit identified by the tribunal when she was previously resident there.
- It did not refer to the view of the High Court in Northern Ireland that separation provided the best chance for her to engage with professionals.

- It did not refer to the views of those with parental responsibility for Ms S.
- There was no discussion whether appropriate treatment was available at the Unit identified. It did not have the facilities currently available to Ms S.
- It did not explain why it made its decision despite Ms S not having been tested with greater freedom and responsibility that would come with a move to the Unit.
- It did not deal with the risk of relapse once in the community.

The judge did not deal with the other grounds of procedural irregularity or irrationality.

15. Having found the decision to be in error of law, the judge set the decision aside and directed a rehearing before a different panel in accordance with section 9(4)(c) and (5)(a) of the Tribunals, Courts and Enforcement Act 2007:

> (4) Where the First-tier Tribunal has under subsection (1) reviewed a decision, the First-tier Tribunal may in the light of the review do any of the following—
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> ...
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> (c) set the decision aside.
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> (5) Where under subsection (4)(c) the First-tier Tribunal sets a decision aside, the First-tier Tribunal must either—
>
> (a) re-decide the matter concerned, ...

E. The arguments

16. There were four strands to Mr Sachdeva's argument. First, the test of adequacy of reasons was not demanding. Second, the tribunal's reasons were adequate. Third, Judge Healy had made errors in identifying some of the supposed inadequacies. Fourth, Judge Healy had not confined herself to the issues raised in the Hospital's application for permission to appeal.

The standard required for reasons

17. There is a vast number of authorities on the standard that reasons have to attain. Ultimately, they are all specific instances of the basic principle that reasons must be adequate to ensure that:

- the parties, especially the party whose case has not been accepted, know why the tribunal made the decision it did; and
- an appeal court can judge whether the tribunal has made an error of law.

The authorities were decided in different contexts and emphasise different points according to the supposed inadequacies in the particular cases. Without intending any disrespect to Mr Sachdeva, it is easy to extract statements that support a particular argument, whether for or against the adequacy of the reasons given by a tribunal. I prefer to focus on the basic principle and the tribunal's reasoning before me.

The tribunal's reasoning

18. Mr Sachdeva argued that the tribunal had given adequate reasons. It had found that circumstances had improved since January. Ms S's only treatment was in the form of psychological therapies, with no medication. The key consideration for such therapies was insight and the tribunal found that her insight had improved. Her relationship with her family had also improved; she was particularly close to her brother's ex-fiancée. In addition, there was the risk to her health if she remained separated from her family.

19. I accept that Mr Sachdeva correctly summarised the tribunal's reasoning. And I take his point that Judge Healy did not find that the decision was irrational. But the duty to provide adequate reasons applies even if the tribunal was entitled to make the decision it did. Their function is not limited to the identification of error.

20. In this case, the medical experts from Northern Ireland and from the Hospital were agreed that Ms S was not yet ready for a return to Northern Ireland. Just to take one example, the evidence from the Southern Health and Social Care Trust of 1 June 2012 referred to the 'relative fragility' of her progress and to 'the risk of re-emergence of aggressive behaviours'. They gave detailed and cogent reasons for those opinions. The tribunal was entitled to disagree. It was charged to make its own decision on the evidence before it and using its own expertise. But the Hospital was entitled to know why that evidence was rejected. It was not sufficient merely to find that Ms S had more insight and a better relationship with her family. As I understand it, those matters were not in dispute. The Hospital's opinion was that further work was necessary despite those improvements. To understand the tribunal's decision the Hospital needed to know how the tribunal had resolved that issue in favour of Ms S. The reasons given were not necessarily incompatible with its views. It was not evident from them why the tribunal had not accepted the Hospital's case.

21. As the tribunal was discharging Ms S, there was also this consideration. Those charged with her care in Northern Ireland would benefit from the tribunal's reasoning in order to know why their view of her mental state had been rejected. They would need to take that reasoning into account in deciding on her future management. But the reasons as drafted were of little value on that score.

The mistakes in Judge Healy's reasoning

22. I accept that Judge Healy appears to have been mistaken in some of her reasons. Just to take one example, the evidence from the High Court in Northern Ireland was historic by June 2012.

23. However, as I read Judge Healy's decision, her various reasons were merely elaborations of that defect in the tribunal's reasoning. They were instances of the factors that the tribunal should have taken into account. Moreover, judicial review is a discretionary remedy. It would not be appropriate to give a remedy if Judge Healy had come to the correct decision despite those mistakes. For me the key question is: were the reasons given for the decision dated 20 June 2012

inadequate? If they were not, Judge Healy had no power to set it aside and I must quash her decision. If they were, she had power to make the decision and I must refuse the application for judicial review. I have already explain why I agree with her conclusion that the reasons were inadequate.

Going beyond the scope of the application for permission to appeal

24. Mr Sachdeva relied by analogy on the authorities on the reconsideration procedure under section 103A of the Nationality, Immigration and Asylum Act 2002 (now repealed), especially *DK (Serbia) v Secretary of State for the Home Department* [2008] 1 WLR 1246. He argued that (i) Judge Healy was wrong to go beyond the grounds of appeal submitted by the Hospital and (ii) Ms S was entitled to retain the benefit of findings made in her favour.

25. I do not accept that the authorities on the reconsideration procedure are relevant under section 9 of the 2007 Act. They both involve an internal process within the same tribunal, but there the similarity ends. They were designed to achieve different purposes. The reconsideration procedure was designed to reduce the scope of appeals. The review procedure is designed to reduce the need for appeals by a more efficient means of disposing of clear cases. They also operate differently. The reconsideration procedure allowed a focused and limited correction of errors. The review procedure is wider. It allows inadequacy in reasons to be corrected, but it also allows the application for discharge to be undertaken afresh. I recognise that the reconsideration procedure could also achieve a similar result, but it was not the principal way in which it operated. Although in some cases they could operate to a similar effect, the difference between the two procedures is one of kind, not degree. Finally, the nature of the reconsideration procedure was spelt out in rules and practice directions. There are no such constraints on the review procedure.

26. There may be a natural justice issue if the First-tier Tribunal sets aside a decision on grounds that differ from the application for permission to appeal. I do not consider that the issue arises here. The essence of the grounds of appeal were that the tribunal had not explained why it had discharged Ms S despite the evidence presented by the Hospital. Judge Healy, as I have said, was merely setting out the particulars on which she had found an error of law on that ground.

F. Two final issues

27. I want to comment on two other issues.

28. The first issue concerns the exclusion of the clinical team while Ms S gave her evidence. Judge Healy did not (need to) deal with this issue. Mr Sachdeva's only comment was that the Hospital had not objected at the time and it was too late to do so after the event. Assuming that this issue will arise again at the rehearing, the Hospital is now on notice and can, if it wishes, arrange for representation so that it will know what Ms S says if the clinical team is again excluded.

29. The second issue concerns constitution. At one stage, there was a suggestion that this case could be reheard by the same members sitting with a different presiding judge. Regardless of whether that is a permissible constitution, it presents difficulties as the members would have heard evidence at the earlier hearing which the judge had not. That would be, at the least, unsatisfactory. See *R(U) 3/88* at [7].

Signed on original
on 11 October 2012

Edward Jacobs
Upper Tribunal Judge