DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

Save for the cover sheet, this decision may be made public (rule 14(7) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI No 2698)). That sheet is not formally part of the decision and identifies the patient by name.

This decision is given under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007:

Even if the decision of the First-tier Tribunal under reference MP/2016/27062, dated 13 December 2016, involved the making of an error on a point of law, it is NOT SET ASIDE.

REASONS FOR DECISION

A. Introduction

1. This appeal concerns Mr M. The parties' representatives have informed me that he is no longer liable to be detained under the Mental Health Act 1983. In those circumstances, it would not be appropriate to direct a rehearing before the First-tier Tribunal. That is why I have chosen to record that the tribunal's decision was made in error of law, but not to set aside its decision.

B. Reasons and misdirection

2. In my grant of permission, I identified two possible errors of law. I will make some comments on those reasons out of respect for the representatives' brief submissions.

3. One of those errors was that the tribunal's reasons might be inadequate for being 'long on history and evidence but short on discussion.' The representative for the Trust has submitted that given 'the plethora of High Court and Upper Tribunal decisions that deal with the adequacy of the reasons given by a tribunal ... no further judicial guidance is required.' If only all representatives took that view. Sadly, they don't. The result has been that there are far too many decisions that appear to create a series of rules and sub-rules. To make matters worse, each area of law generates its own authorities, duplicating those in other areas, a problem created and exacerbated by the tendency of representatives towards 'silo citation' of cases from their own areas. There is, in truth, only one thing that really has to be said about the quality of reasons, which is that they must be adequate. Everything else is merely application of that principle to the circumstances of a particular case. Mr M's representative has not commented on this issue.

4. I am sure that there is nothing I could say in this case that would be of relevance in any future case. As so often, though, it is difficult to maintain a rigid distinction between misdirection and inadequacy of reasons, given that the reasons are usually the only evidence of how the tribunal directed itself on the law. This

conveniently brings me to the second possible error, which is that the 'tribunal's reasoning shows that it was confused about its role and the relevant of a community treatment order'. I have more sympathy with the First-tier Tribunal now that I have re-read its reasons than I did when I gave permission to appeal, but the reasons at least leave open the possibility that the tribunal may have strayed outside its proper remit.

5. In order to understand this point, I need to explain a little of the background to Mr M's case. He has been known to the mental services since at least 2004. Since then, he has had 11 admissions under the Mental Health Act 1983, seven of which were voluntary. At the time of the tribunal hearing, he had been detained since October 2013, although he had been given periods of leave under section 17. On 21 July 2016, he was given extended section 17 leave to allow him to live in independent accommodation. On 19 September 2016, he was re-admitted to hospital following two overdoses. He was given further section 17 leave in October 2016, so that he could live in supervised accommodation. That was the position when his case came before the First-tier Tribunal on 6 December 2016.

6. The issue for the tribunal was whether Mr M should be discharged under section 72. He was not subject to a community treatment order, so the tribunal could not have been under the impression that it was being asked to deal with his case as a community patient under section 72(1)(c). Nor did the tribunal have power to make Mr M subject to a community treatment order; that can only be done by a patient's responsible clinician (section 17A).

7. The tribunal made a number of references to community treatment orders. The **Jurisdiction, Preliminary and Procedural matters** section of its decision contains two paragraphs on the orders. The first three sentences read:

> A cardinal issue of this application is whether the patient should be discharged from hospital by a CTO. This issue involves knowledge of the nature of a CTO. A CTO may only be imposed by the patient's RC ...

It may be that the judge did not express himself clearly, but that passage appears to begin by suggesting, and to continue by denying, that the tribunal had power to make Mr M subject to an order or was being asked to approve that course. The judge did then make a distinction between discharge from hospital and discharge from the liability to be detained. So it is possible that his reference to 'discharge from hospital by a CTO' may have been intended, not as a direction about the tribunal's powers on the application, but as a statement of how the responsible clinician envisaged Mr M's eventual progress.

8. This interpretation would be consistent with what the tribunal said later:

> 22. Given the patient's progress ..., he should remain on extended section 17 leave but his discharge by the RC could soon take place as long as it is coupled with a CTO. This would be an essential and substantial move forward but the CTO is necessary since it provides a back-up by way of instant recall if the patient is non-compliant with any of the essential conditions outlined above.
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> 23. The RC informed the tribunal that he intended to review the patient in the days following the hearing with a view to securing the necessary

> approvals to place him on a CTO and discharge him from hospital but not from a liability to be recalled to hospital.

It is also consistent with the tribunal's discussion:

> 28. The Tribunal supports the desirability of further gradual progression towards discharge and that is best obtained by his being discharged from hospital and made subject to a CTO by his RC since, on becoming a community patient, he will need the support and back-up provided by the possibility of immediate recall.

9. In view of Mr M's current status, I do not have to decide whether those reasons do or do not show that the tribunal misdirected itself. I limit myself to saying that it is risky if reasons can be read in a way that indicates a misdirection. Clarity that leaves no doubt is the best practice for all tribunals, regardless of the jurisdiction that they exercise.

C. Discharge

10. Mr M's representative has argued that he should have been discharged immediately. That may or may not be the case as a matter of fact. It is, however, something that requires the knowledge and experience of a properly constituted panel of the First-tier Tribunal to decide. That is where the responsibility for the factual issues has been placed and the Upper Tribunal should respect that role, regardless of its legal powers to re-make a decision. Given that Mr M is no longer liable to be detained, I can see no need to venture outside the appropriate role of the Upper Tribunal in mental health cases and state, even in the form of a narrative declaration, that the tribunal should have exercised its power to discharge him. That is why I have exercised my power to refuse to set aside the tribunal's decision regardless of any error of law that it may have made.

Signed on original
on 28 April 2017

Edward Jacobs
Upper Tribunal Judge