THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

UPPER TRIBUNAL CASE NO: HM/0121/2020
[2020] UKUT ??? (AAC)

AR v WEST LONDON NHS TRUST AND THE SECRETARY OF STATE FOR JUSTICE

Decided following a public oral hearing on 9 September 2020 using the Cloud Video Platform.

Representatives

The patient	Sophy Miles of counsel, instructed by Kate Luscombe of Abbotstone Law, both acting pro bono
The Trust	No representation at hearing
Secretary of State	No representation at hearing

DECISION OF UPPER TRIBUNAL JUDGE JACOBS

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.

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

Reference:	MP/2019/05162
Decision date:	27 November 2019
Venue:	Broadmoor Hospital

As the decision of the First-tier Tribunal involved the making of an error in point of law, it is SET ASIDE under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 and the case is REMITTED to the tribunal for rehearing by a differently constituted panel.

REASONS FOR DECISION

1. The patient's current detention under sections 37 and 41 of the Mental Health Act 1983 dates from 1993, although he had been detained previously. On 20 February 2019, he made an application under section 66 of the Act to the First-tier Tribunal. Following a change of solicitor, he applied for his application to be heard at a public hearing. The tribunal refused, but gave permission to appeal to the Upper Tribunal. The issues on the appeal are: (a) the patient's capacity; and (b) the relevance of incapacity to the application for a public hearing.

2. I held an oral hearing of the appeal. The patient and his legal representatives attended. The other parties did not attend, although the Clinical Director and Associate Clinical Director of Broadmoor had provided a joint written submission. I am grateful for the legal submissions and to the patient for his personal statement of his views. The Secretary of State took no part in the proceedings.

3. As this case concerns the patient's capacity, I need to say something about his capacity to conduct these proceedings. The First-tier Tribunal had decided that he lacked capacity to apply for a public hearing, but that is a different matter from an appeal to the Upper Tribunal on a point of law. He is assumed to have that capacity in relation to that matter by virtue of section 1(2) of the Mental Capacity Act 2005 and his legal representatives had no concerns in that regard. I have accordingly proceeded with this case on the basis that he has capacity to initiate these proceedings, as well as to instruct his representatives and to conduct the proceedings through them. Neither the Trust nor the Secretary of State has argued that I should assess his capacity for this appeal. Proceedings in this tribunal are, in contrast to the First-tier Tribunal, public by default.

A. Legislation

Article 6(1) of the European Convention on Human Rights

Article 6
Right to a Fair Trial

> 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

Section 3 of the Human Rights Act 1998

3 Interpretation of legislation

(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

(2) This section-

(a) applies to primary legislation and subordinate legislation whenever enacted;

(b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and

(c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.

The Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 (SI No 2699)

2 Overriding objective and parties' obligation to co-operate with the Tribunal

(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.

(2) Dealing with a case fairly and justly includes—

(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;

(b) avoiding unnecessary formality and seeking flexibility in the proceedings;

(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;

(d) using any special expertise of the Tribunal effectively; and

(e) avoiding delay, so far as compatible with proper consideration of the issues.

(3) The Tribunal must seek to give effect to the overriding objective when it—

(a) exercises any power under these Rules; or

(b) interprets any rule or practice direction.

(4) Parties must—

(a) help the Tribunal to further the overriding objective; and

(b) co-operate with the Tribunal generally.

11 Representatives

(1) A party may appoint a representative (whether a legal representative or not) to represent that party in the proceedings.

…

(2) If a party appoints a representative, that party (or the representative if the representative is a legal representative) must send or deliver to the Tribunal and to each other party written notice of the representative's name and address.

(3) Anything permitted or required to be done by a party under these Rules, a practice direction or a direction may be done by the representative of that party, except—

(a) signing a witness statement; or

(b) signing an application notice under rule 20 (the application notice) if the representative is not a legal representative.

(4) A person who receives due notice of the appointment of a representative—

(a) must provide to the representative any document which is required to be provided to the represented party, and need not provide that document to the represented party; and

(b) may assume that the representative is and remains authorised as such until they receive written notification that this is not so from the representative or the represented party.

(5) At a hearing a party may be accompanied by another person whose name and address has not been notified under paragraph (2) but who, subject to paragraph (8) and with the permission of the Tribunal, may act as a representative or otherwise assist in presenting the party's case at the hearing.

(6) Paragraphs (2) to (4) do not apply to a person who accompanies a party under paragraph (5).

(7) In a mental health case, if the patient has not appointed a representative, the Tribunal may appoint a legal representative for the patient where—

(a) the patient has stated that they do not wish to conduct their own case or that they wish to be represented; or

(b) the patient lacks the capacity to appoint a representative but the Tribunal believes that it is in the patient's best interests for the patient to be represented.

(8) In a mental health case a party may not appoint as a representative, or be represented or assisted at a hearing by—

(a) a person liable to be detained or subject to guardianship …, or who is a community patient, under the Mental Health Act 1983; or

(b) a person receiving treatment for mental disorder at the same hospital as the patient.

38 Public and private hearings

(1) All hearings must be held in private unless the Tribunal considers that it is in the interests of justice for the hearing to be held in public.

(2) If a hearing is held in public, the Tribunal may give a direction that part of the hearing is to be held in private.

(3) Where a hearing, or part of it, is to be held in private, the Tribunal may determine who is permitted to attend the hearing or part of it.

(4) The Tribunal may give a direction excluding from any hearing, or part of it—

(a) any person whose conduct the Tribunal considers is disrupting or is likely to disrupt the hearing;

(b) any person whose presence the Tribunal considers is likely to prevent another person from giving evidence or making submissions freely;

(c) any person who the Tribunal considers should be excluded in order to give effect to a direction under rule 14(2) (withholding information likely to cause harm); or

(d) any person where the purpose of the hearing would be defeated by the attendance of that person.

(5) The Tribunal may give a direction excluding a witness from a hearing until that witness gives evidence.

The Mental Capacity Act 2005

1 The principles

(1) The following principles apply for the purposes of this Act.

(2) A person must be assumed to have capacity unless it is established that he lacks capacity.

(3) A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.

(4) A person is not to be treated as unable to make a decision merely because he makes an unwise decision.

(5) An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests.

(6) Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.

2 People who lack capacity

(1) For the purposes of this Act, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.

(2) It does not matter whether the impairment or disturbance is permanent or temporary.

(3) A lack of capacity cannot be established merely by reference to–

(a) a person's age or appearance, or

(b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about his capacity.

(4) In proceedings under this Act or any other enactment, any question whether a person lacks capacity within the meaning of this Act must be decided on the balance of probabilities.

(5) No power which a person ("D") may exercise under this Act–

(a) in relation to a person who lacks capacity, or

(b) where D reasonably thinks that a person lacks capacity,

is exercisable in relation to a person under 16.

(6) Subsection (5) is subject to section 18(3).

3 Inability to make decisions

(1) For the purposes of section 2, a person is unable to make a decision for himself if he is unable–

(a) to understand the information relevant to the decision,

(b) to retain that information,

(c) to use or weigh that information as part of the process of making the decision, or

(d) to communicate his decision (whether by talking, using sign language or any other means).

(2) A person is not to be regarded as unable to understand the information relevant to a decision if he is able to understand an explanation of it given to

him in a way that is appropriate to his circumstances (using simple language, visual aids or any other means).

(3) The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision.

(4) The information relevant to a decision includes information about the reasonably foreseeable consequences of–

(a) deciding one way or another, or

(b) failing to make the decision.

B. AH v West London Mental Health Trust

4. A three-judge panel of the Upper Tribunal gave two decisions in this case. One was an interim decision ([2010] UKUT 264 (AAC)) dealing with the correct approach to rule 38; the other was a final decision ([2011] UKUT 74 (AAC)) requiring the First-tier Tribunal to hold an oral hearing. They are reported together as [2011] AACR 15. The tribunal set out its view on the approach to rule 38 in its interim decision:

> 44. … we consider that the relevant factors in deciding whether to direct a hearing in public are:
>
> - Is it consistent with the subjective and informed wishes of the applicant (assuming he is competent to make an informed choice)?
> - Will it have an adverse effect on his mental health in the short or long term, taking account of the views of those treating him and any other expert views?
> - Are there any other special factors for or against a public hearing?
> - Can practical arrangements be made for an open hearing without disproportionate burden on the authority?

C. The 'matter' for the First-tier Tribunal was the patient's capacity to conduct the proceedings

5. The tribunal used the four questions set out in *AH* as the structure for its reasons. This is how it began its assessment of the first question:

> There are different opinions as to whether [the patient] has the capacity to make the decision to apply [for] and have a public hearing. … In determining this question, the Tribunal needs to apply the capacity test in the Mental Capacity Act 2005.

The tribunal was right to apply the 2005 Act, but it was in error by identifying 'the matter' as the application for a public hearing.

The law

6. Section 2(1) of the Mental Capacity Act 2005 refers to 'a decision … in relation to the matter'. What was 'the matter' before the First-tier Tribunal?

7. The authoritative statement of the law on capacity to litigate derives from the decision of the Court of Appeal in *Masterman-Lister v Brutton & Co (Nos 1 and 2)* [2003] 1 WLR 1511. It is accepted as consistent with the Mental Capacity Act 2005.

8. In *Bailey v Warren* [2006] EWCA Civ 51, the Court of Appeal had to identify 'the matter' when a personal injury action had been compromised before proceedings had begun. The majority, Ward and Arden LLJ, decided that 'the matter' in question was the capacity to conduct litigation, not just the capacity to compromise.

9. Hallett LJ gave the first judgment. In contrast to her colleagues, her analysis was that 'the matter' was the compromise. Arden LJ disagreed:

> 122. For my part, however, I do not think that a distinction can be drawn in this way. Obviously, where the transaction is self-contained and clearly separate from other matters, it is easy to determine the issue to which capacity should be related. Examples would include the making of a gift or the making of a will. It may not be so easy, however, to determine the issue to which capacity should be related where the transaction is multi-faceted, and a choice exists as to whether to break the transaction down into its component parts, to which capacity is related seriatim, or to treat the transaction as a single indivisible whole. A will may consist of a series of gifts but on the authorities the question of capacity is assessed in relation to the will as a whole. A person making a will is not making a series of separate decisions as to gifts but is making a decision as to the nature and effect of the claims of all the persons who might have claims upon him. Thus the gifts are interdependent and connected. Likewise this court in the *Masterman-Lister* case considered that litigation down to the administration of any award of damages was to be treated as a single transaction and not as a series of individual steps. Kennedy LJ regarded this conclusion as one of common sense (para. 27).
>
> 123. It seems to me that the right approach must be to ask as a matter of common sense whether the individual steps formed part of a larger sequence of events which should be seen as one, or whether they were in fact self-contained steps which were not connected with each other.

10. Ward LJ preferred Arden LJ's analysis:

> 173. Thus there can be no argument but that the material capacity must be 'issue specific', that is to say, directed to the transaction which is to be effected. The problem that arises is to define the ambit of that issue or that transaction.
>
> …

> 177. … I consider that the answer is provided by the terms of Part 21 itself and the several references in the rules, which I emphasised, to the purpose to be served by having a litigation friend, namely having someone able properly to conduct the proceedings on behalf of the patient. That is the capacity which the patient lacks. Thus the enquiry should be focused on the capacity to conduct the proceedings as Arden L.J. describes in paragraph 126. This it seems to me is totally consistent with *Masterman-Lister*. …
>
> 178. If, as it seems to me, the relevant capacity is capacity to conduct proceedings, then the client must be able to understand all aspects of those proceedings and take an informed decision, with the help of such explanation as he is given, which bears upon them. It cannot be judged piecemeal. …

11. The Supreme Court referred to these authorities in *Dunhill v Burgin (Nos 1 and 2)* [2014] 1 WLR 933 and came to the same conclusion:

> 13. The general approach of the common law, now confirmed in the Mental Capacity Act 2005, is that capacity is to be judged in relation to the decision or activity in question and not globally. Hence it was concluded in *Masterman-Lister* that capacity for this purpose meant capacity to conduct the proceedings (which might be different from capacity to administer a large award resulting from the proceedings). This was also the test adopted by the majority of the Court of Appeal in *Bailey v Warren* [2006] EWCA Civ 51, [2006] CP Rep 26, where Arden LJ specifically related it to the capacity to commence the proceedings (para 112). It would have been open to the parties in this court to challenge that test, based as it was mainly upon first instance decisions in relation to litigation and the general principle that capacity is issue specific, but neither has done so. In my view, the Court of Appeal reached the correct conclusion on this point in *Masterman-Lister* and there is no need for us to repeat the reasoning which is fully set out in the judgment of Chadwick LJ.
>
> 14. Under the Rules as amended when the Mental Capacity Act 2005 came into force (the Civil Procedure (Amendment) Rules 2007 (SI 2007/2204 (L20)), 'patients' in rule 21.1(1)(a) has been replaced by 'protected parties', and in rule 21.1(2)(d) a 'protected party' is defined as 'a party, or intended party, who lacks capacity to conduct the proceedings'. Thus the current test is stated in the same terms as that which was applicable to these proceedings. The current rule 21.1(2)(c) defines 'lacks capacity' to mean 'lacks capacity within the meaning of the 2005 Act'. Given that the courts had already arrived at a test of capacity on which the 2005 Act test was closely modelled, it seems unlikely that this has introduced any differences between the old and the new law. But that question does not arise in this case, where the issue is what is meant by the 'proceedings' which the party must have the capacity to conduct.
>
> 15. This is a question of construing the Rules. Rule 21.2(1) provides that 'a protected party must have a litigation friend to conduct proceedings on his

> behalf'. By rule 21.4(3), a litigation friend must be someone who can 'fairly and competently conduct proceedings' on behalf of the patient. This in itself suggests a focus on proceedings in general rather than on 'the proceedings' as framed. Furthermore it applies right at the start of any proceedings. Indeed, as will be seen later, rule 21.10 applies to claims which are settled before any proceedings have begun. Read as a whole, therefore, rule 21 posits a person with a cause of action who must have the capacity to bring and conduct proceedings in respect of that cause of action. The proceedings themselves may take many twists and turns, they may develop and change as the evidence is gathered and the arguments refined. There are, of course, litigants whose capacity fluctuates over time, so that there may be times in any proceedings where they need a litigation friend and other times when they do not. CPR 21.9(2) provides that when a party ceases to be a patient (now, a protected person) the litigation friend's appointment continues until it is ended by a court order. But a party whose capacity does not fluctuate either should or should not require a litigation friend throughout the proceedings. It would make no sense to apply a capacity test to each individual decision required in the course of the proceedings, nor, to be fair, did the defendant argue for that.

12. All those authorities were concerned with CPR Part 21 or its predecessor in the Rules of the Supreme Court. CPR does not apply to proceedings in the First-tier Tribunal. I cannot, though, see any relevant difference between litigation under CPR and an application to the Health, Education and Social Care Chamber of the First-tier Tribunal in its mental health jurisdiction. It would be a strange result if the test of the patient's capacity were to change as the case moved through the judicial hierarchy from the Upper Tribunal to the Court of Appeal, although the application of the test might vary.

13. Applying the Supreme Court's approach to this case, there was no evidence that the patient's capacity was fluctuating. There was evidence, disputed, that it had improved over time, but there was no evidence of fluctuation at the time of the proceedings before the First-tier Tribunal. It follows that 'the matter' for the First-tier Tribunal was the patient's ability to conduct proceedings. It should have assessed the claimant's capacity on that basis.

How the First-tier Tribunal went wrong in law on 'the matter'

14. There are two ways of analysing the First-tier Tribunal's reasoning. One is that the tribunal treated 'the matter' as being the application for a public hearing, which is what it said. On that basis, it was in error of law for misdirecting itself. The other is that the tribunal dealt with the patient's capacity in relation to the public hearing as part of his capacity to conduct the proceedings generally. Having found that he did not have capacity in relation to the public hearing, it was inevitable that it had to find that he lacked capacity to conduct 'all aspects of those proceedings' (to borrow Ward LJ's phrase). In which case, rule 11(7)(b) was

engaged and the tribunal should have appointed a representative. In practice, no doubt the tribunal would have appointed the representative that the patient had chosen for himself, albeit without the capacity to do so. In this, I am treating the capacity to appoint a representative and the capacity to conduct proceedings as inextricably interrelated, following Charles J in *YA v Central and North West London NHS Trust* [2015] UKUT 37 (AAC), [2015] AACR 31. For convenience, I quote from the overview at the start of his judgment:

> (7) An assessment of a person's capacity to appoint a representative must involve an assessment of their capacity to decide whether or not to appoint one, and it is this choice that identifies the specific decision that is the subject of the capacity assessment set as the trigger to the power conferred by in Rule 11(7)(b). To have the capacity to make that choice the decision maker has to be able to sufficiently understand, retain, use and weigh the reasons for and against the rival decisions and thus their advantages, disadvantages and consequences. So to have capacity to appoint a representative a patient needs to have more than only an understanding that they can make an application to a mental health review tribunal or have someone else make it for them, and thus the limited capacity referred to in *R(H) v SSH* [2006] 1 AC 441.
>
> (8) Although there is substantial overlap between them a person's capacity (a) to appoint a representative and (b) to conduct proceedings himself are not mutually exclusive concepts. But, in this context, the differences between them are theoretical rather than real because a relevant factor to be taken into account in deciding whether or not to appoint a representative is the capacity of the patient to conduct the proceedings and an inability by the patient to appreciate that he or she lacks the capacity to conduct the proceedings themselves effectively determines that he or she does not have the capacity to make that choice. A distinction between these two issues of capacity would found an argument that Rule 11 does not provide a procedure that complies with Article 5(4).

D. The patient's capacity was not an essential requirement for a public hearing

15. This is how the tribunal ended its long analysis of the claimant's informed choice of a public hearing:

> … Without being able to make an informed choice [the patient] cannot have a public hearing.

The patient and the Trust both submitted that this was not the correct approach. I accept those submissions.

16. The three-judge panel in *AH* did not deal with this issue and I am not aware of any other authority that has done so. I can see no reason in principle why

patients who lack capacity should not be entitled to have their best interests put to the tribunal and taken into account in support of an application for a public hearing, just as patients who have capacity are entitled to have their views considered. Quite the contrary. The starting point is the patient's Convention right under Article 6(1). That confers a right to a public hearing. It is a qualified right, but the limited exceptions do not necessarily exclude the possibility of a hearing being in public just because a party lacks capacity to apply for one. The right to apply for a public hearing may also be a factor in the overriding objective for those who lack capacity, as it includes 'ensuring, so far as practicable, that the parties are able to participate fully in the proceedings' (rule 2(2)(c)). In this regard, it is important to remember that even persons who lack capacity may nonetheless be entitled to have their personal views taken into account. A finding of incapacity does not necessarily exclude a person from all participation in decision-making. Arden LJ set this in the context of autonomy in *Bailey v Warren*:

> 105. … Capacity is an important issue because it determines whether an individual will in law have autonomy over decision-making in relation to himself and his affairs. If he does not have capacity, the law proceeds on the basis that he needs to be protected from harm. Accordingly, in determining an issue as to an individual's capacity, the court must bear in mind that a decision that an individual is incapable of managing his affairs has the effect of removing decision-making from him. The decision is not made lightly: as Kennedy LJ put it in *Masterman-Lister v Brutton* [2003] 1WLR 1516, 'no court should rush to interfere' (para. 27). This is so even though, if he were declared to be incapable for the purpose of any decision, his advisers could maximise his contribution to that decision-making process by seeking and taking into account his views so far as he was able to express them. It is surely necessary in a democratic society to maximise an individual's contribution in this way, and the law should encourage this to be done. …

Peter Jackson J set this in a wider context in *Wye Valley NHS Trust v B* [2015] EWCOP 60:

> 10. Where a patient lacks capacity it is accordingly of great importance to give proper weight to his wishes and feelings and to his beliefs and values. On behalf of the Trust in this case, Mr Sachdeva QC submitted that the views expressed by a person lacking capacity were in principle entitled to less weight than those of a person with capacity. This is in my view true only to the limited extent that the views of a capacitous person are by definition decisive in relation to any treatment that is being offered to him so that the question of best interests does not arise. However, once incapacity is established so that a best interests decision must be made, there is no theoretical limit to the weight or lack of weight that should be given to the person's wishes and feelings, beliefs and values. In some cases, the conclusion will be that little weight or no weight can be given; in others, very significant weight will be due.

> 11. This is not an academic issue, but a necessary protection for the rights of people with disabilities. As the Act and the European Convention make clear, a conclusion that a person lacks decision-making capacity is not an *'off-switch'* for his rights and freedoms. To state the obvious, the wishes and feelings, beliefs and values of people with a mental disability are as important to them as they are to anyone else, and may even be more important. It would therefore be wrong in principle to apply any automatic discount to their point of view.

E. Did the tribunal take the wrong approach to the patient's capacity?

17. This was the second ground of appeal. It is sufficient to say that, not having had the benefit of the guidance that I give below, it is not surprising that the tribunal did not approach the issue correctly.

The request for guidance

18. In giving permission to appeal in the First-tier Tribunal, Tribunal Judge Fyall wrote:

> It would be extremely helpful to have the Upper Tribunal's guidance in respect of what are the relevant and salient facts a patient needs to understand in order to have the relevant competency to make an informed choice as contemplated by *AH*.

Before the Upper Tribunal, both Ms Miles and, in their written submission, the Clinical Directors supported the request for guidance, especially on the information that the patient needs to understand.

19. Judge Fyall's request needs to be adjusted to take account of my decision that a patient does not need to have capacity to litigate in order to apply for a public hearing. Subject to that, the judge was right to ask for 'guidance'. The test is set out in section 3(1) of the Mental Capacity Act 2005. The previous caselaw – especially, *Masterman-Lister v Brutton & Co* and *Bailey v Warren* - is consistent with that provision and may be helpful, after making allowance for the different subject matter. The caselaw makes clear that competence is assessed with the benefit of any advice or explanation that the person is likely to receive; this is embodied in section 3(2) of the Mental Capacity Act 2005.

20. Beyond those general remarks, here are the more obvious salient features of a public hearing, although I do not claim that they are comprehensive.

- The tribunal's powers of disposal are the same, regardless of whether or not the hearing is held in public. Those powers will vary according to the nature of the case. Having the hearing in public will not affect the decision that the tribunal makes within the scope of its jurisdiction under the Mental Health Act 1983. It does not acquire power at a public hearing to deal with any issue that is outside its jurisdiction.

- The tribunal's procedural powers are also the same regardless of the form of the hearing. They include the power to exclude people from all or part of the hearing. The nature of the hearing will not affect the way that the hearing is conducted, the evidence that is relevant, what the patient is allowed to say, or the outcome of the case.
- Members of the public, including the press, are allowed to observe and may wish to do so, although they may not. They not allowed to take any part in the proceedings.
- A public hearing is no guarantee of publicity, even if members of the public do observe. The tribunal's power to limit disclosure remain the same as for a private hearing.
- A hearing may adversely affect the patient's health, for example as a result of receiving adverse publicity or realising that no one is interested in the case.
- Although the patient may want publicity, this may have a detrimental effect on others, such as his family or any victim.

21. It is essential for the tribunal to remember that the issue is the patient's capacity, not the wisdom of the decision that is made. A patient with capacity has the capacity to make a bad decision or a decision for bad reasons. Hence the importance of the requirement that capacity is specific to the matter in relation to which a decision has to be made. As the Court of Appeal said in *PC v NC and York Council v C* [2014] Fam 10:

> 35. … The determination of capacity under MCA 2005, Part 1 is decision specific. Some decisions, for example agreeing to marry or consenting to divorce, are status or act specific. Some other decisions, for example whether P should have contact with a particular individual, may be person specific. But all decisions, whatever their nature, fall to be evaluated within the straightforward and clear structure of MCA 2005, ss 1 to 3 which requires the court to have regard to 'a matter' requiring 'a decision'. There is neither need nor justification for the plain words of the statute to be embellished. …

22. The quality of the decision is only relevant in two ways. First, it may be evidence that the patient's decision-making is affected by 'an impairment of, or a disturbance in the functioning of, the mind or brain' for the purposes of section 2(1) of the Mental Capacity Act 2005. As the Court of Appeal said in *Re MB* [1997] EWCA Civ 3093 at [30.3]: 'Although it might be thought that irrationality sits uneasily with competence to decide, panic, indecisiveness and irrationality in themselves do not as such amount to incompetence, but they may be symptoms or evidence of incompetence.' Second, it may be a factor to be taken into account, once the issue of competence has been decided, when applying rule 38 as part of its assessment of whether a public hearing is in the interests of justice.

F. Rule 38

23. So far, I have said:

- *AH* did not decide that a patient must have capacity in order to be allowed a public hearing; and
- the wisdom of the patient's wishes is relevant to the application of the rule.

Those points aside, rule 38 was not in issue before me. I would, though, make this point, because it seems that the four questions may have acquired a significance that is not justified. The test under rule 38 is whether a public hearing is in the interests of justice. The four questions are merely factors relevant to applying that test, as the tribunal said in *AH*. Having considered each of the questions, the tribunal is left with the ultimate issue: is a public hearing in the interests of justice? That requires an exercise of judgment on the overall significance of the tribunal's analysis of the questions to the interests of justice.

G. Why I have remitted the case rather than re-made the decision

24. The patient wanted me to re-make the decision and direct that his application to the First-tier Tribunal be heard at a public hearing, as the tribunal did in *AH*. I have not re-made the decision, for these reasons. First, it would be necessary to obtain evidence on his capacity that took account of my guidance on the salient factors that should be taken into account. Second, the constitution of the First-tier Tribunal makes it better suited to assess that evidence. Third, if I were to find that the patient did not have capacity to conduct proceedings, it would be necessary to appoint a legal representative for him. That is better handled by the First-tier Tribunal itself.

Signed on original
on 10 September 2020

Edward Jacobs
Upper Tribunal Judge