



Rules 46,  
47 & 49

# The First-tier Tribunal (Health, Education and Social Care Chamber) Mental Health

The Tribunal Procedure (First-tier Tribunal) Health Education & Social Care Chamber Rules 2008

Case Number: [REDACTED]

" " - the patient attended by telephone

Date of Application: 09.09.2020

Patient: [REDACTED] (born [REDACTED])

A patient now liable to be detained under Section 2 of the Act

Responsible Authority: [REDACTED]

Hospital: [REDACTED]

## Before:

STJ Briggs (Judge)

## Application for Permission to Appeal

In accordance with Rule 46<sup>1</sup>, the patient has applied for permission to appeal against a decision, or part of a decision, made on 16<sup>th</sup> September 2020.

## Particulars of Decision Appealed Against

1. That the patient shall not be discharged from liability to be detained.

## Time Limits

The application was made in time.

## Decision whether to Review

Taking into account the overriding objective in Rule 2, the tribunal has decided for the reasons given below, that there was a clear error of law in the decision (or part of the decision) appealed against, and that it should review the decision.

## Decision upon Review

Upon review, the tribunal has decided, for the reasons given below, to take the following action.

<sup>1</sup> The tribunal may treat an application for a decision to be corrected, set aside or reviewed, or for permission to appeal against a decision, as an application for any other of those things (Rule 50)

## Action

1. The tribunal directs that the decision be set aside.

3. And the tribunal further directs that the matter will be listed before a full First-tier Tribunal to re-decide the matter concerned. The matter will be listed before a differently constituted panel.

## The Tribunal considered:

The Rule 46 application and supporting documents; the Tribunal's decision with reasons.

## Summary of Grounds of Application for Permission to Appeal

It is averred that the patient was unable to participate adequately in the video-enabled hearing. Her telephone connection was muted for much of the hearing due to the frequency of interruptions to the other evidence, and as a result she was unable to alert the panel when she "could not hear the evidence".

## The Tribunal's Findings, Analysis and Conclusions with Reasons

1. I have some sympathy with the panel in this case, as the decision makes clear that there were technical difficulties during the hearing affecting the patient's connection and that of other participants. Video hearings have been made necessary by the coronavirus restrictions, and place an additional burden on panels, and particularly judges, to ensure that a hearing is fair to all parties, particularly the patient.
2. I do not agree with the suggestion made in the application that a panel must make a direction under Rule 38 if the microphone of a participant is to be muted. Microphones are generally muted in hearings to control extraneous noise (which can be due to talking, or background sounds, or deficiencies in the audio connection), and that participant will continue to be able to hear what is being said in the hearing room for as long as they remain connected, so they have not been "excluded" for the purposes of Rule 38.
3. The patient was enabled to give her evidence at the beginning and end of the hearing, and she had a muted microphone for much of the rest of the time because "despite being asked to do so she would not stop talking". It is possible to infer that the patient had the opportunity to tell the panel that she could not hear some of the evidence because she was offered the opportunity to speak again at the end of the hearing, although the decision does not record that such a complaint was made, neither is it averred in the appeal.
4. I have set this decision aside because, on balance, it is not clear whether or not the patient had a reasonable opportunity to hear all of the evidence that was given at the hearing. It would have been clearer if the tribunal judge had gone back to the patient at the end of each witness and checked that she had heard and understood the evidence given, and indeed the patient's representative could have checked with her client at the conclusion of the evidence, but there is no evidence that either did so. Representatives are also under a duty to actively engage with the tribunal in the furtherance of the overriding objective, and if it was apparent to the representative that the patient's participation was being curtailed then this should have been raised at a time when steps could have been taken to remedy it.
5. Wherever the deficiency may lie, it is not possible to be sure that the patient had a fair hearing in these circumstances. This case illustrates both the difficulty

for all concerned of managing hearings on video, and the extra care that needs to be taken by all participants to ensure that justice is being done consistently.

Judge: STJ Jo Briggs

Date: 15.10.2020

#### Notice

If the tribunal has taken any action following a review without first giving every party an opportunity to make representations, 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. In the event that permission to appeal has been refused or not admitted, there is a right to make an application to the Upper Tribunal for permission to appeal. Such an application must be made in writing and received by the Upper Tribunal no later than a month after the date on which the First-tier Tribunal (Health, Education and Social Care Chamber) Mental Health sent to you notice of its refusal of permission to appeal, or refusal to admit the application for admission to appeal.