# [2020] AACR 1

**(JS v South London and Maudsley NHS Foundation Trust and the Secretary of State for Justice [2019] UKUT 172 (AAC))**

**Judge Jacobs** **HM/2550/2018**
**30 May 2019**

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## Mental Health Act 1983 – Withdrawal – Consent – Reinstatement – Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008

The patient was liable to be detained under the Mental Health Act 1983. On 30 May 2018, he applied to the First-tier Tribunal (F-tT) with a view to being discharged from that liability. The patient later applied to withdraw his application, which required the consent of the tribunal. The tribunal gave its consent on 20 August 2018. On 12 September 2018, the patient applied for his application to be reinstated. The F-tT said allowing the reinstatement would have the result of allowing the applicant to have two tribunal hearings within one period of eligibility, which is not the purpose of the reinstatement provision and refused permission to appeal to the Upper Tribunal (UT). The patient appealed the decision to the UT. The issue for the UT was the factors to be taken into account when an application has been made to reinstate a case that was withdrawn with the consent of the F-tT.

*Held,* dismissing the appeal, that:

1. it is not correct to equate an application and a reinstatement. The patient has a statutory right to apply to the tribunal, but the situation changes once the case has been withdrawn with the tribunal's consent after consideration. The issue then becomes whether the tribunal's decision should be reversed (paragraph 14);

2. the factors that the tribunal should take into account neatly divide into three. First, the tribunal should consider whether there is anything to undermine either the patient's application to withdraw or the tribunal's consent. Second, there may have been a change of circumstances that makes it appropriate to agree to reinstatement. Third, the tribunal will have to consider any other factors that may be relevant under the overriding objective. These will include: (a) the reasons given in support of the application, whatever they may be; (b) any prejudice to the patient in refusing consent; (c) any detriment to the other parties if consent is given; (d) any prejudice to other patients if consent is given; and (e) any impact that reinstatement might have on the operation of the tribunal's mental health jurisdiction system as a whole. (paragraph 17).

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### 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 11 of the Tribunals, Courts and Enforcement Act 2007:

The decision of the First-tier Tribunal under reference MP/2018/14663, made on 14 September 2018, did not involve the making of an error on a point of law.

## REASONS FOR DECISION

### A. This case is mainly about reinstatement following withdrawal

1. This case deals with the factors to be taken into account when an application has been made to reinstate a case that was withdrawn with the consent of the First-tier Tribunal. I also explain why the Trust is a respondent to the proceedings.

### B. What has happened

2. The patient is liable to be detained under the Mental Health Act 1983. On 30 May 2018, he applied to the First-tier Tribunal with a view to being discharged from that liability. He then applied to withdraw his application, which required the consent of the tribunal under rule 17 of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 (SI No 2699). The application was made by the patient's solicitor on 18 August 2018:

> …
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> 3. We were informed by [the patient] that after he evaluated his pathway he does not wish to proceed with his application. He explained that based on the clinical evidence he would like to work with the team to secure his discharge.
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> 4. In the light of the circumstances described above, our client has instructed that his application be withdrawn with immediate effect in accordance with his legal rights.
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> 5. [He] has been fully advised on legal implications of withdrawing and understands that he has the option to reapply in this period of eligibility.
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> 6. Additionally, we have advised [him] on rule 17(4) of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 in regards to having his case reinstated within 28 days of the withdrawal date.

I need to explain the reference to a period of eligibility. A patient is only entitled to make one application in each period (section 70 of the 1983 Act). The last day of the patient's current period was 21 August 2018, so the opportunity for making a fresh application in that period was very limited.

3. The tribunal gave its consent on 20 August 2018. That decision was made by an authorised member of staff purporting to act under the authority of the Senior President's Practice Statement on Delegation of Functions to Staff and Registrars of 10 June 2014. In fact, that Statement had been replaced by one of 27 April 2015. But no matter, because the terms of the later Statement were equally applicable. Paragraph 2(c) provided for the relevant delegation:

> The giving of consent by authorised tribunal staff under rule 17(2) to a notice of withdrawal lodged by or on behalf of a patient by a representative under rule 17(1)(a), by those tribunal staff responsible for receiving and processing notices of withdrawal, subject to the notice of withdrawal being received by the tribunal 48 hours or more before the scheduled start time of the hearing of the application to the tribunal; and subject to the case not being part-heard, there being in existence no concurrent application or reference, and no other reason for tribunal staff to believe that consent to the withdrawal should be refused, such as it appearing that the withdrawal is merely tactical;

Paragraph 4 provided for referral to a registrar or judge:

> In accordance with rule 4(3) of the Tribunal Procedure (First-tier Tribunal) (Health Education and Social Care Chamber) Rules 2008, within 14 days after the date that the Tribunal sends notice of a decision made by an authorised member of tribunal staff or a Registrar (pursuant to an approval under paragraph 3 above) to a party, that party may apply in writing to the Tribunal for the decision to be considered afresh by a judge (if the decision was made under paragraph 3 above) or by a Judge or Registrar if made under paragraph 2 above).

No such application was made.

4. However, on 12 September 2018, the patient applied for his application to be reinstated under rule 17(4). His solicitor explained:

At the material time, our client was of the opinion that he wished to make further progress with his clinical team. However, since this withdrawal application was accepted our client has reviewed his position and wishes to challenge his detention.

Our client has considered all of the legal advice provided and believes that he is making effective progress and considers that this is the appropriate time to seek discharge from his section.

The Tribunal Judge refused the application on 14 September 2018, saying:

> The patient is now in a new period of eligibility and has the right to make a fresh application to the tribunal. I note that the current period of eligibility began on 22 August 2018, two days after the previous application was withdrawn. The patient should have been given legal advice about his eligibility at the time he decided to withdraw. Allowing the reinstatement would have the result of allowing the applicant to have two tribunal hearings within one period of eligibility, which is not the purpose of the reinstatement provision.

5. The patient applied for the reinstatement decision to be set aside under rule 45 of the Rules, but the tribunal refused this application on 26 September 2018. The Tribunal Judge said:

I accept of course that, had the application not been withdrawn, he might have had two hearings within the one entitlement period. But I cannot agree that that fact entitles the patient to reinstatement of a withdrawn application.

6. The application for permission to appeal to the Upper Tribunal was presented as a challenge to the rule 45 decision of 26 September 2018. It was based on a misunderstanding of rule 45, which is only concerned with procedural failings (*SK v Secretary of State for Work and Pensions* [2016] UKUT 529 (AAC), [2017] AACR 25). The judge was right to refuse the set aside application, because there had been no procedural failings. What the patient wanted to challenge was the decision of 14 September refusing to reinstate his application. I therefore treated his application for permission to appeal as relating to that decision and waived any procedural irregularity under the Upper Tribunal's rules of procedure that would otherwise have prevented me doing so.

7. I held an oral hearing on 28 February 2019 and gave permission to appeal on the grounds that: (a) there is no authority on the tribunal's power to reinstate an application in a mental health case; and (b) given the importance of a patient's liberty enshrined in the Convention right under Article 5(4), it was an issue that merited full consideration on an appeal.

8. The respondents have not made any submissions on the appeal. The only submissions have been made by Oliver Lewis of counsel, orally at the hearing and subsequently in writing.

## C. Rule 17 - withdrawal and reinstatement

9. This provides:

**Withdrawal**

**17** (1) Subject to paragraphs (2) and (3), a party may give notice of the withdrawal of its case, or any part of it—

(a) at any time before a hearing to consider the disposal of the proceedings (or, if the Tribunal disposes of the proceedings without a hearing, before that disposal), by sending or delivering to the Tribunal a written notice of withdrawal; or

(b) orally at a hearing.

(2) Notice of withdrawal will not take effect unless the Tribunal consents …

(4) A party which has withdrawn its case may apply to the Tribunal for the case to be reinstated.

## D. There was nothing tactical about the withdrawal in this case

10. The caselaw on withdrawal and Senior President's Practice Statement show a concern that it should not be used for tactical purposes. The classic example would be of patient who applied to withdraw just before the close of a hearing, having seen that the evidence and submissions were against discharge. Whatever the scope of a tactical withdrawal, there was nothing tactical about the circumstances in this case. I have not had to consider the proper approach in such cases.

## E. The patient has no right to reinstatement

*The argument*

11. Mr Lewis argued that the First-tier Tribunal in a mental health case had no power to do anything other than reinstate a withdrawn application on request. Any other approach, he argued, would be a violation of the patient's Convention right under Article 5(4):

**Article 5 – right to liberty and security**

…

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

Mr Lewis argued that the patient was entitled to make an application and to have it considered judicially. His right to make the application was unconditional. It could be made for good reasons, bad reasons or no reasons at all. So, Mr Lewis asked, why should he have to give any reasons for reinstatement?

12. This argument only arises if the application to reinstate is made after the eligibility period has ended. If it has not, the patient can make a fresh application without needing to apply for reinstatement. The only possible advantage I can see in reinstatement might be the

convenience of reviving the previous proceedings with the reports that have already been made.

*Why I reject the argument*

13. I do not accept Mr Lewis's argument as a matter of interpretation of rule 17. Rule 17 applies to all the jurisdictions covered by the Rules. The Article 5(4) Convention right has no application to the jurisdictions other than mental health, so it would not be appropriate to confer a right to reinstatement in cases to which the Convention right does not apply. For this cross-jurisdictional approach to interpretation, see *BPP Holdings Ltd v Revenue and Customs Commissioners* [2016] 1 WLR 1915 at [20]; *Eclipse Film Partners No 35 LLP v Revenue and Customs Commissioners* [2016] 1 WLR 1939 at [1]; *AS (Afghanistan) v Secretary of State for the Home Department* [2019] EWCA Civ 208 at [28] and Note 2; and *VK v Commissioners for Her Majesty's Revenue and Customs* [2016] UKUT 331 (AAC), [2017] AACR 3 at [4].

14. If the argument is going to work, it can only be as a matter of application in mental health cases generally or in the particular circumstances of an individual mental health case. In other words, the effect of Article 5(4) would be that the First-tier Tribunal could only properly exercise its discretion in favour of reinstatement. I do not accept that either. It is not correct to equate an application and a reinstatement. The patient has a statutory right to apply to the tribunal, but the situation changes once the case has been withdrawn with the tribunal's consent after consideration. The issue then becomes whether the tribunal's decision should be reversed. That is no longer a matter just for the patient. As a matter of principle, a judicial decision (even one made under delegated authority) should only be reversed by an equal or higher authority and not by virtue of any rigid rule. There is no violation of the Convention right when a patient has withdrawn an application. The patient was entitled to take proceedings and did so, but then decided to apply to withdraw, which was approved by the tribunal. That is the position so far as mental health cases generally are concerned, and I can see nothing in this particular case to justify a different result.

15. Part of the argument was that the patient had a right to have an application considered in respect of each eligibility period. It is correct that a patient has the right to make an application in respect of each period, but that is not the same thing as the right to have it considered in respect of that period. A mental health application has to be considered at the time of the hearing. Given that an application to the tribunal affects the patient's liberty, the tribunal naturally aims to list the case at the earlier appropriate date. But if the application is made towards the end of the eligibility period, it is possible that the hearing may not take place until the period has ended. And the tribunal will have to decide the case on the circumstances at the time of the hearing, not at the time of the application. In other words, the application will not be considered in respect of the period in which it was made.

## F. How the tribunal should exercise the discretion to reinstate

16. As there is no right to reinstatement, the tribunal has a discretion whether or not to reinstate the party's 'case'. It must, like all discretions, be exercised judicially and that involves complying with the overriding objective of the tribunal's rules of procedure, which is 'to enable the Tribunal to deal with cases fairly and justly' (rule 2(1)). Mr Lewis argued that the patient had a legitimate expectation that his detention would be considered by a tribunal and that the default position should be to allow reinstatement 'unless there are strong reasons not to do so.' I do not accept that. What the patient is entitled to is to have an application for reinstatement considered properly in accordance with the overriding objective. I have already

explained why it is not proper to disregard the fact that a tribunal has agreed to the patient withdrawing an application.

17. Considered methodically, the factors that the tribunal should take into account neatly divide into three. First, the tribunal should consider whether there is anything to undermine either the patient's application to withdraw or the tribunal's consent. Just to give some examples, the application may have been based on a misunderstanding of the facts or the law. Or there may be an issue whether the patient had capacity or gave informed consent. Or the tribunal's reasons for consenting may have been defective. Second, there may have been a change of circumstances that makes it appropriate to agree to reinstatement. Third, the tribunal will have to consider any other factors that may be relevant under the overriding objective. These will include: (a) the reasons given in support of the application, whatever they may be; (b) any prejudice to the patient in refusing consent; (c) any detriment to the other parties if consent is given; (d) any prejudice to other patients if consent is given; and (e) any impact that reinstatement might have on the operation of the tribunal's mental health jurisdiction system as a whole.

18. The only decision of the Upper Tribunal on reinstatement is, as far as I know, *Pierhead Purchasing Ltd v the Commissioners for Her Majesty's Revenue and Customs* [2014] UKUT 321 (TCC). These are the relevant paragraphs from Proudman J's judgment:

> 23. Although, as I have said, there is no guidance in the rules, the F-tT applied the additional principles set out (in the context of delay in lodging an appeal) in *Former North Wiltshire DC v. HMRC* [2010] UKFTT 449 (TC). Those were the criteria formerly set out in CPR 3.9 (1) for relief from sanctions: see the decision of the Court of Appeal in *Sayers v. Clarke Walker* [2002] EWCA Civ 645 at [21]. In *North Wiltshire* (see [56] to [57]) the F-tT concluded that it was not obliged to consider these criteria but it accepted that it might well in practice do so. The same reasoning applies to the present case. The criteria were,
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> - The reasons for the delay, that is to say, whether there is a good reason for it.
> - Whether HMRC would be prejudiced by reinstatement.
> - Loss to the appellant if reinstatement were refused.
> - The issue of legal certainty and whether extending time would be prejudicial to the interests of good administration
> - Consideration of the merits of the proposed appeal so far as they can conveniently and proportionately be ascertained.
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> 24. I was asked by Mr Jones to provide guidance as to the principles to be weighed in the balance in the exercise of discretion to reinstate. Because of the view I have formed I do not think it is appropriate to set any views in stone. I agree with the F-tT in the *Former North Wiltshire* case that the matters they took into account are relevant to the overriding objective of fairness. I also believe that the guidance given in *Mitchell v. News Group Newspapers Limited* [2013] EWCA Civ 1537 in relation to relief from sanctions is helpful. It is perhaps instructive that CPR 3.9 (which does not of course apply to Tribunals in any event) does not now exist in its original form. Fairness depends on the facts of each case, all the circumstances need to be considered and there should be no gloss on the overriding objective.
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> …

> 40. If making the decision myself, I would take into account the following matters in favour of reinstating the appeal:
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> - A large sum of money is at stake which could mean make or break for the appellant.
> - Fraud has been alleged, in effect against Mr Hercules, and unless he is permitted to reinstate the appeal, his name will always be subject to a blot.
> - The prejudice to HMRC will be less than that outlined above to the appellant and Mr Hercules if the appeal is consolidated with the appeal as to the WOWGR licence.
> - Although the F-tT did not ascribe blame to counsel, it proceeded on the assumption that the appellant was not told of the possibility of its WOWGR licence being withdrawn.
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> 41. Against reinstating the appeal I take into account the 5 following matters.
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> - There has been delay in applying to reinstate. It is true that the appellant said that it did not appreciate the risk until 29 August 2012 (so that there could not have realistically have been an application to reinstate before that date), but the application to reinstate was not made until 16 October 2012. A further two months therefore passed after the date of withdrawal of the WOWGR licence before the application was made, more than twice the 28 days permitted by Rule 17.
> - Whether the licence was properly withdrawn is a matter which can be litigated, and is being litigated, separately.
> - The case is very different from *ATEC* where the default of the legal adviser was patent and indeed gross.
> - The importance of finality and the undesirability of allowing the appellant to have two bites at the cherry, in other words, to change its mind. Extending time would be prejudicial to the interests of good administration and legal certainty. Although, as the F-tT pointed out, the rules about appeals being allowed out of time in exceptional, rare and limited cases may well not apply to the situation where it is sought to reinstate an appeal which has not been heard (see [47]), and this is a case where the rules themselves contemplate reinstatement ([49]), it is still necessary that the facts justifying the extension of time, and the application, should be proved.
> - The fact that Mr Hercules admitted to failing to declare a number of sources of income in his personal tax returns and also to deliberately understating the appellant's profits.
> - The fact that Mr Hercules was found to have lied to the F-tT about his knowledge that the appellant would have to pay the VAT, and the fact that he had taken steps (although legitimate steps) to avoid payment of that VAT.
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> 42. Taking these considerations into account and weighing them in the balance it is in accordance with the overriding objective to refuse permission to reinstate the appeal, and, if I am wrong in dismissing the appeal, I would myself refuse permission.

19. I do not disagree with anything that Proudman J said, all of which could be incorporated into the three part structure I have suggested for analysis. Mr Lewis has commented in detail on *Pierhead* and I accept that he is correct in identifying the obvious differences between that case and this. It would be wrong to try to approach any case by comparison with any other. Each must be considered individually on its own merits. However similar the facts and circumstances may appear to be, there may be aspects of other cases that influenced the

decision but were not included in the reasoning or are not readily apparent from the way the reasons were expressed. See *Piglowska v Piglowski* [1999] 1 WLR 1360 at 1372 and *In re K (A Child) (External Relocation: Judge's Evaluation)* [2016] 4 WLR 160 at [54].

## G. Why there was no error of law

20. There is no issue of the patient's capacity to apply for withdrawal. The application was made with the benefit of legal advice. He was advised on his rights in law and had access to any advice he wanted from his solicitors on the wisdom of withdrawing his case. It appears that his decision was fully informed, both on the evidence and the law. The tribunal's consent was properly given. The authorised member of staff may have used the wrong Statement, but the minor differences between the 2010 and 2015 versions could not have affected the decision to consent. In particular, there was noting to suggest that the application was tactical.

21. As far as I can tell, there was no change of circumstances. The information that was available to the patient did not change and there was nothing in his circumstances that had altered. What appears to have happened is that he changed his mind about his need to do further work with his clinical team. He considered that he was now ready for discharge.

22. There is no issue of the patient's capacity to apply for reinstatement. The application was made with the benefit of legal advice and the judge who dealt with it was entitled to treat the contents as comprehensive of the case that the patient wanted to rely on. They were short and not particularly informative. All the application said was that the patient had changed his mind. There was no evidence or argument that this was a feature of his mental condition.

23. The reasons that the judge gave for refusing to reinstate the application were short, as is to be expected of an interlocutory decision. There was no reference to the terms on which the application was made, but that is hardly surprising given that the only reason given was that the patient had changed his mind. That is not a compelling reason to allow reinstatement; the reason given for the application did not advance the patient's case. Nor was there any evidence of particular prejudice to the patient if the application were refused, other than the loss of the right to make an application in the previous period. What the judge did was to focus on the fact that the patient was now in a new eligibility period. That was sensible. It was the key factor, because otherwise the patient could simply have made a new application to the tribunal without the need for reinstatement. It was the only possible prejudice to the patient.

24. The judge began by saying:

> "The patient is now in a new period of eligibility and has the right to make a fresh application to the tribunal. I note that the current period of eligibility began on 22 August 2018, two days after the previous application was withdrawn. The patient should have been given legal advice about his eligibility at the time he decided to withdraw".

The judge was right about the new eligibility period and the right to apply within that period. The only criticism I can make is that the patient had indeed been given advice about the legal effect of what he was doing. That is what the solicitor had said in the application to withdraw; it expressly mentioned eligibility periods. But that does not undermine what the judge said; it merely makes the point stronger against the patient.

25. The judge finished by saying:

> "Allowing the reinstatement would have the result of allowing the applicant to have two tribunal hearings within one period of eligibility, which is not the purpose of the reinstatement provision".

That was wrong. There is no objection to having two hearings in the same eligibility period. What is not allowed is to have more than one application in one period. But an application made in one period may not be heard until the next, when the patient has the right to make another application, resulting in two hearings in the same period. However, I do not accept that a judge exercising the mental health jurisdiction can have overlooked so obvious a point. Something must have gone wrong with this sentence. It may be that the judge was trying to say that, leaving aside the technically retrospective effect of the reinstatement, the patient was getting two goes in one eligibility period, but that is mere speculation. The most important point to make about this sentence is this. Even if it shows a misdirection in law, what basis was there on which the judge could properly have exercised the discretion to reinstate the patient's case? I can find none.

26. In conclusion, nothing in my scheme of analysis supports reinstating the patient's application. There was nothing to undermine his application to withdraw or the tribunal's consent. There was no change of circumstances since that consent had been given. There was nothing in the application to reinstate that could properly allow the tribunal to accept the application. The only factor worth considering was the loss of the right to apply to the tribunal in the previous period; I have explained why I reject Mr Lewis's argument. The judge's reasoning on that issue is in part garbled, although it is possible to speculate about what the final sentence might mean. But whatever the judge meant, the effect of any mistake in the reasoning could not have been, in legal terms, material.

## H. The Trust is a party to this appeal

27. On 20 November 2018, the Head of Mental Health Legislation at the Trust wrote to the Upper Tribunal to say that the Trust had nothing to contribute to the proceedings and added:

The Trust also observes the irregularity in cases such as this whereby the Trust is named as the first respondent. No decision of the Trust, nor any aspect of the patient's detention, is in issue. If there is scope to cite the cases as one between the patient and the Tribunal, we would urge that this be done as more accurately reflecting the nature of the appeal.

As I explained in a direction, the Trust was properly named as a respondent on the appeal to the Upper Tribunal and this accurately reflects the nature of the appeal to the Upper Tribunal. I will repeat that explanation here in case other Trusts have also misunderstood the nature of Upper Tribunal proceedings.

28. The Trust was the responsible authority and, as such, a party to the proceedings in the First-tier Tribunal: see the definition of 'the managers' in section 145(1) of the Mental Health Act 1983 and the definitions of 'party' and 'responsible authority' in rule 1(3) of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008. On appeal by the patient to the Upper Tribunal, everyone else who was a party before the First-tier Tribunal became a respondent: see the definition of 'respondent' in rule 1(3) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI No 2698). That is standard procedure in appeal generally.

29. The Trust's letter shows a confusion between an appeal and a judicial review. In the latter, the tribunal is the respondent, and others may be interested parties. That was the position before the mental health jurisdiction was conferred on the newly created Upper Tribunal on 3 November 2008. No longer.