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 adjournment decisions of the First-tier Tribunal under reference MM/2011/06268, made on 4 July and 22 September 2011 at Rampton Hospital, did not involve the making of an error on a point of law.

REASONS FOR DECISION

A. What I have to decide

1. At what point in considering the possible discharge of a restricted patient is the tribunal no longer allowed to adjourn but obliged to defer a direction for a conditional discharge? In this case, had the tribunal reached that point? The answer to the first question is in paragraph 26. The answer to the second question is: no.

B. The history of the case

2. Mr C is a mental patient detained in Rampton Hospital. The First-tier Tribunal adjourned his case twice and Mr C has appealed against those decisions. The ground of appeal is that the tribunal should have made a deferred conditional discharge. I held an oral hearing of the appeal on 19 March 2012. Mr Pezzani of counsel represented Mr C. Ms Charbit of counsel represented the detaining authority. The Secretary of State for Justice, as usual, did not send a representative. I am grateful to counsel for their written and oral arguments.

C. The basis of the claimant's detention

3. Mr C was charged with murder. He was found unfit to plead on 22 November 2001 and dealt with under section 5(1) of the Criminal Procedure (Insanity) Act 1964 and paragraph 2 of Schedule 1 to the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991. He was later found fit to plead and was convicted of manslaughter on 23 July 2004. The court made hospital and restriction orders under sections 37 and 41 of the Mental Health Act 1983. As a restricted patient, the provisions of the Act applied only to a limited extent. For the purposes of this case, the circumstances in which Mr C may be discharged differ from those that apply to a non-restricted patient.

D. The Secretary of State's reference to the First-tier Tribunal

4. On 14 March 2011, the Secretary of State for Justice referred Mr C's case to the First-tier Tribunal under section 71(2) of the 1983 Act. That subsection imposes a duty to refer the case of any restricted patient whose case has not been considered by a tribunal for three years.

E. The proceedings before the First-tier Tribunal

5. The case first came before the tribunal on 4 July 2011. Mr C was represented by his solicitor, Ms Ward. The tribunal adjourned the case until 22 September 2011, saying:

> The Tribunal is mindful of the requirement to avoid delay, so far as compatible with proper consideration of the issues. However, it is necessary in the interests of justice to adjourn the case for the following reasons.
>
> 1. Having heard all the evidence available to it, the Tribunal concludes that, with the exception of the availability of suitable after-care for the Patient, none of the criteria for his detention in hospital for treatment are met.
> 2. The Tribunal is satisfied that, on 12th May 2001 when the patient committed the index offence, he was suffering an acute psychotic episode. However, it is unclear whether this was a discrete episode which is unlikely to recur; or whether it may recur; or whether it was symptomatic of an underlying chronic and enduring mental illness which has been in remission for many years. In the light of this finding, the Tribunal is of the view that, if the Patient were discharged, it would be appropriate for him to remain liable to be recalled to hospital for further treatment; and that it may be appropriate to make his discharge subject to further conditions.
> 3. The Responsible Authority is unprepared for the Patient to be conditionally discharged and it is presently unclear whether suitable after-care can be made available for the Patient under Section 117 of the Act.
> 4. Accordingly, upon the authority of *R (on the application of Ashworth Hospital Authority) v Mental Health Review Tribunal for West Midlands and North West Regions* [2001] EWHC Admin 901, noted in Jones 13th Ed. at §**1-856**, the Tribunal adjourns the hearing to give the Responsible Authority the opportunity [for] making arrangements for the after-care of the Patient.

The tribunal directed the responsible clinician to file a report at least 20 days before the next hearing, updating the tribunal. It also directed the Community Health Team to file a report by 5 September 2011 setting out an after-care plan.

6. The case came back before the same panel on 22 September 2011. Mr Pezzani of counsel represented Mr C and Ms Charbit of counsel represented the detaining authority. Mr Pezzani made three submissions:

- The tribunal should not have adjourned on 4 July. It should have ordered a deferred conditional discharge.
- The tribunal should not hear further evidence on the issues in paragraph 2 of the reasons given on 4 July.
- The tribunal should provide him with a copy of its provisional findings recorded on 4 July.

7. The tribunal rejected all three submissions. It then adjourned the hearing for these reasons:

> The Tribunal is mindful of the requirement to avoid delay, so far as compatible with proper consideration of the issues. However, it is necessary in the interests of justice to adjourn the case for the following reasons.
>
> 1. Having regard to §1 of the Reasons for Adjournment on 4th July 2011, the Tribunal needs to hear further evidence to enable it to decide upon the appropriate conditions to which the Patient should be subject upon discharge.
>
> 2. On 22nd September 2011, there was insufficient time following the legal argument that took place before the Tribunal during the preliminary hearing and which concluded at 3.45 pm, to receive the further evidence referred to in §1 *supra*.
>
> 3. Mr Pezzani applied for an adjournment upon the ground that, as he argued, the Tribunal had erred in law in adjourning the case on 4th July 2011 instead of granting the Patient a deferred conditional discharge, but that in the light of the Tribunal decision to hear further evidence on the issue whether, when the Patient committed the index offence on 12th May 2001, he was suffering from an acute psychotic episode that is unlikely to recur or whether it was symptomatic of an underlying chronic and enduring mental illness that has been in remission for many years but which remains susceptible to relapse, he now wished to instruct an independent psychiatrist to examine the Patient and his medical records and report upon that issue.
>
> 4. In determining the conditions to which the Patient should be subject on discharge, the Tribunal would be assisted by evidence from one or more independent forensic psychiatrists on the issue identified in §3 *supra*.

The tribunal went on to set a timetable for the progress of the case.

8. Mr Pezzani then applied for permission to appeal to the Upper Tribunal, which the First-tier Tribunal gave. The case is due to come before the First-tier Tribunal again on 27 and 28 March 2012.

F. The First-tier Tribunal's powers of discharge in sections 72 and 73 of the Mental Health Act 1983

9. Before I come to the arguments, I need to set out the legislation:

72 Powers of tribunals

(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—

…

(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—

(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

(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

(iia) that appropriate medical treatment is available for him; …

(3) A tribunal may under subsection (1) above direct the discharge of a patient on a future date specified in the direction; and where a tribunal does not direct the discharge of a patient under that subsection the tribunal may—

(a) with a view to facilitating his discharge on a future date, recommend that he be granted leave of absence or transferred to another hospital or into guardianship; and

(b) further consider his case in the event of any such recommendation not being complied with.

73 Power to discharge restricted patients

(1) Where an application to the appropriate tribunal is made by a restricted patient who is subject to a restriction order, or where the case of such a patient is referred to the appropriate tribunal, the tribunal shall direct the absolute discharge of the patient if—

(a) the tribunal is not satisfied as to the matters mentioned in paragraph (b)(i), (ii) or (iia) of section 72(1) above; and

(b) the tribunal is satisfied that it is not appropriate for the patient to remain liable to be recalled to hospital for further treatment.

(2) Where in the case of any such patient as is mentioned in subsection (1) above—

(a) paragraph (a) of that subsection applies; but

(b) paragraph (b) of that subsection does not apply,

the tribunal shall direct the conditional discharge of the patient.

…

(7) A tribunal may defer a direction for the conditional discharge of a patient until such arrangements as appear to the tribunal to be necessary for that purpose have been made to its satisfaction; and where by virtue of any such deferment no direction has been given on an application or reference before the time when the patient's case comes before the tribunal on a subsequent application or reference, the previous application or reference shall be treated as one on which no direction under this section can be given.

10. For convenience, I call section 73(1)(a) the detention condition and section 73(1)(b) the recall condition.

11. I do not need to set out section 117. It was agreed that the authorities were not under an absolute duty to provide the after-care necessary to give effect to a tribunal's conditions. Their duty was only to use their best endeavours to do so. This duty would only arise under section 117(1) if Mr C were to 'cease to be detained and (whether or not immediately after so ceasing) leave hospital.'

G. Caselaw

12. It is unfortunate that different series of reports use different names for the same case and the same name for different cases. The confusion thereby caused is compounded by the need to preserve the patient's anonymity, which inevitably leads to the use of initials. I have used, whenever possible, the citation from the official law reports or the Weekly Law Reports.

13. These are the key authorities.

Ashworth

14. The First-tier Tribunal relied on the decision of *R(H) v Ashworth Hospital Authority* [2003] 1 WLR 127. I call this case *Ashworth*. Dyson LJ (at [69]) endorsed this paragraph from the judgment of Stanley Burnton J in the Administrative Court [2002] 1 MHLR 13:

> 69. In general, in a case in which after-care is essential, and satisfaction of the discharge criteria depends on the availability of suitable after-care and accommodation, as in H's case, a tribunal should not direct immediate discharge at a time when no after-care arrangements are in place and there is no time for them to be put in place. The Tribunal should consider whether to exercise its power under section 72(3A) to recommend that the RMO should make a supervision application. If it considers that to be inappropriate (and it should be borne in mind that the previous unwillingness of an RMO to make an application may not persist in the face

> of the Tribunal's views) or unnecessary, and there is uncertainty as to the putting in place of the after-care arrangements on which satisfaction of the discharge criteria depends, the tribunal should adjourn pursuant to rule 16 to enable them to be put in place, indicating their views and giving appropriate directions: c.f. Ex parte Hall [2000] 1 WLR 1323, per Kennedy LJ at 1352D.

Hall

15. *Ashworth* concerned a non-restricted patient. But *R v Mental Health Review Tribunal, ex parte Hall* [2000] 1 WLR 1323, to which the judge referred, concerned a restricted patient. Kennedy LJ began the passage cited by referring to section 73(7). The fact that *Hall* could be cited in *Ashworth* shows that the authorities on adjournments in restricted and non-restricted cases are not necessarily mutually exclusive. This passage was, admittedly, written before the case I come to next.

R(H)

16. What happens if a direction is deferred under section 73(7), but it later becomes clear that the conditions imposed by the tribunal cannot be met? The answer was given in *R(H) v Secretary of State for the Home Department* [2003] QB 320 and [2004] 2 AC 253. I call this case *R(H)*.

17. In *R v Oxford Regional Mental Health Review Tribunal, ex parte Secretary of State for the Home Department* [1988] AC 120, the House of Lords had decided that a tribunal could not reconsider a direction that had been deferred under section 73(7). *R(H)* decided that that was inconsistent with the European Convention on Human Rights. The House of Lords (at [27]) endorsed this paragraph of the Court of Appeal's reasoning:

> 71 Tribunals should no longer proceed on the basis that they cannot reconsider a decision to direct a conditional discharge on specified conditions where, after deferral and before directing discharge, there is a material change of circumstances. Such a change may be demonstrated by fresh material placed before or obtained by the tribunal. Such material may, for instance, show that the patient's condition has relapsed. It may show that the patient's condition has improved. It may demonstrate that it is not possible to put in place the arrangements necessary to enable the conditions that the tribunal proposed to impose on the patient to be satisfied. The original decision should be treated as a provisional decision, and the tribunal should monitor progress towards implementing it so as to ensure that the patient is not left "in limbo" for an unreasonable length of time.

18. The Court of Appeal summarised the position at [98]:

> (i) The tribunal can, at the outset, adjourn the hearing to investigate the possibility of imposing conditions.

(ii) The tribunal can make a provisional decision to make a conditional discharge on specified conditions, including submitting to psychiatric supervision, but defer directing a conditional discharge while the authorities responsible for after-care under section 117 of the Act make the necessary arrangements to enable the patient to meet those conditions.

(iii) The tribunal should meet after an appropriate interval to monitor progress in making these arrangements if they have not by then been put in place.

(iv) Once the arrangements have been made, the tribunal can direct a conditional discharge without holding a further hearing.

(v) If problems arise with making arrangements to meet the conditions, the tribunal has a number of options, depending upon the circumstances:

(a) it can defer for a further period, perhaps with suggestions as to how any problems can be overcome;

(b) it can amend or vary the proposed conditions to seek to overcome the difficulties that have been encountered;

(c) it can order a conditional discharge without specific conditions, thereby making the patient subject to recall;

(d) it can decide that the patient must remain detained in hospital for treatment.

(vi) It will not normally be appropriate for a tribunal to direct a conditional discharge on conditions with which the patient will be unable to comply because it has not proved possible to make the necessary arrangements.

The House of Lords quoted this passage: at [24].

19. Mr Pezzani told me that tribunals regularly adjourn at the start of the hearing if it is clear, for example, that the evidence is not complete. But he and Ms Charbit agreed that paragraph (i) was not limited to the start of the hearing. I accept their submissions. If it were otherwise, there would be a gap. Suppose that, after hearing evidence, the position is too unclear for a deferred direction. If the tribunal cannot adjourn then, what can it do? Paragraph (i) must mean that the tribunal can adjourn at any time before it is under a duty to direct a discharge.

H. A summary of the arguments

20. Mr Pezzani based his argument on what he called the plain wording of the legislation and of the tribunal's reasons on 4 July 2011. Those reasons showed that the tribunal was satisfied on matters of fact that placed it under a duty to direct Mr C's conditional discharge. The only order it could properly make in the circumstances was to defer that direction under section 73(7). The tribunal was wrong to adjourn in reliance on *Ashworth*. That case applied only to non-restricted patients. It was appropriate to adjourn their cases, because there was no power to order their conditional discharge. The tribunal could adjourn or

direct an absolute discharge. It was possible to direct discharge at a future date, but that was nonetheless a discharge. For restricted patients, the tribunal had power to defer a direction for a conditional discharge under section 73(7). Mr Pezzani invited me to set aside the adjournment decisions, to re-make them by substituting a decision under section 73(7), and then to remit them to the First-tier Tribunal.

21. Ms Charbit did not significantly challenge Mr Pezzani's analysis of the law, but did take issue with his analysis of the tribunal's reasons. She argued that, when read as a whole, those reasons showed that the tribunal was not yet in a position to direct a conditional discharge.

I. How section 73 operates

22. This is my analysis of the operation of section 73 and the relationship between the powers to adjourn and to defer a direction for a conditional discharge.

Adjournment

23. The First-tier Tribunal has the power to adjourn as one of its case management powers under rule 5(3)(h) of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 (SI No 2699). The power must be exercised judicially and in accordance with the overriding objective in rule 2. As a procedural power, it cannot be exercised to override the provisions of the substantive legislation. In particular, a tribunal cannot adjourn if it is obliged to give a decision under section 73 of the 1983 Act.

Section 73

24. Section 73 contains conditions and consequences. The conditions are set out in section 73(1). The consequences depend on which conditions are met. If and only if the tribunal is satisfied that the patient should not be detained but should be subject to recall, these two consequences follow. The first consequence is a duty - the tribunal must direct a conditional discharge under section 73(2). The second consequence is a power – the tribunal may defer that direction under section 73(7).

25. The language of section 73(7) is important. The tribunal does not defer the patient's conditional discharge. It defers the direction for the discharge. That is what section 73(7) says and it is significant. That presupposes that there is a direction to discharge ready to take effect. Until there is, there is nothing to defer. That means that the conditions for discharge must be identified and included in the direction. The deferral allows time for the necessary arrangements to be made. That means the arrangements necessary for the conditional discharge. And it is impossible to make those arrangements without knowing what the conditions for the discharge are. Section 73(7), by its terms, operates until the tribunal is satisfied that the arrangements are in place. Once it is, there is nothing left for the tribunal to do except to lift the deferral.

26. In summary, the tribunal cannot exercise the power in section 73(7) unless it finds that the patient should not be detained but should be subject to recall and it formulates a direction, including conditions for discharge, that can take effect if the necessary arrangements can be made. Until then, it is free to adjourn.

The effect of R(H)

27. *R(H)* does not override the detention and discharge conditions. They still have to be satisfied before a tribunal can direct a conditional discharge, let alone defer one. Its effect is like a board game in which a player (the tribunal) who lands on a particular square is sent back. Where the tribunal has to go depends on the information that it receives. It may be relevant to the detention condition by showing that treatment in hospital is still required. Or it may be relevant to the discharge condition by showing that different conditions are required. That is what the Court of Appeal decided and the House of Lords endorsed.

When section 73(7) may not be used

28. The tribunal may not bypass the detention and discharge conditions and use section 73(7) as (i) a device for gathering information that it needs. Nor may it bypass difficulties in formulating conditions for discharge and use section 73(7) to gather the information it needs to decide (ii) whether a conditional discharge would be possible or (iii) what conditions might be appropriate. The proper approach in all three circumstances is to adjourn for the information to be obtained. It is only permissible to use section 73 when (a) it is able to find, on the balance of probabilities, that the patient should not be detained but should be subject to recall, and (b) it has drafted the conditions for the discharge.

29. The duty under section 117 does not arise until the tribunal has made its decision: *W v Doncaster Metropolitan Borough Council* [2004] EWCA Civ 378 at [51]. But that does not justify using section 73(7) in order to obtain information about after-care. There is no reason in principle why a tribunal may not adjourn for enquiries to be made about the type of support that might be provided.

The classic impasse

30. In *R(H)*, the Court of Appeal referred to a situation that it called the critical impasse. It described the impasse in this paragraph:

> 92 The critical impasse arises where a tribunal considers that it is necessary for the health or safety of the patient or the safety of others that the patient continues to receive psychiatric treatment, and that it is reasonable for such treatment to be provided in the community, but the psychiatrists who would have to provide such treatment refuse to do so because they disagree with the tribunal's view that the patient can safely be treated in the community. We think that it is unlikely that this impasse will arise in circumstances where the tribunal has concluded that it is not satisfied that the patient is any longer suffering from a mental illness, although the present may be such a rare case. The impasse in question will

> classically arise in the case of a patient who, while of unsound mind, can be expected to remain free of symptoms provided that he continues to receive treatment. In such a situation there is more scope for disagreement between a tribunal and the psychiatrists called upon to provide such treatment as to whether it can be safely be provided in the community or only under detention in hospital.

The Court then suggested the solution:

> 96 We consider that in a case such as the present the provisions of section 73 of the Act operate as follows. Where a tribunal decides (i) that a restricted patient is suffering from mental illness for which psychiatric treatment is necessary for the health or safety of the patient or the protection of other persons and (ii) that detention in hospital for that treatment is not necessary if, but only if, psychiatric treatment is provided in the community, the tribunal can properly make a provisional decision to direct a conditional discharge, but defer giving that direction to enable arrangements to be made for providing psychiatric treatment in the community. The health authority subject to the section 117 duty will then be bound to use its best endeavours to put in place the necessary after-care. If it fails to use its best endeavours it will be subject to judicial review. If, despite its best endeavours, the health authority is unable to provide the necessary services, the tribunal must think again. If, as is likely in those circumstances, it concludes that it is necessary for the patient to remain detained in hospital in order to receive the treatment, it should record that decision.

31. I notice that the Court said that the tribunal 'can properly make a provisional decision', not that it was obliged to do so. Whether it was under a duty to do so would depend on its findings of fact. In the situation envisaged, the tribunal might find that the patient should not be detained but should be subject to recall. Those might be permissible findings on the balance of probabilities, despite the tribunal having some doubt. And if it made those findings, the tribunal would be under a duty to direct a conditional discharge. However, if the tribunal was not satisfied on the balance of probabilities, it would have to adjourn to obtain the necessary information.

Borderland

32. There is, then, a clear conceptual distinction between the circumstances in which only adjournment is permissible and those in which only section 73(7) may be used. In practice, the tribunal may not find it easy to decide which is the proper course. The tribunal may, for example, be unsure about what conditions to impose. It could adjourn for information about what sort of after-care might be available. Or it might feel confident enough to formulate conditions and defer a direction with a view to reconsideration if necessary. The choice will be a matter of judgment for the tribunal. In this borderland, the Upper Tribunal should support the tribunal's decision for reasons of practice and for reasons of principle. As a matter of practice, the Upper Tribunal did not hear the evidence given. Nor

does it have access to the knowledge and experience of a psychiatrist and a social worker. That makes it difficult and dangerous to second guess. And as a matter of principle, as Lord Bingham said in *R(H)*:

> 27. … it is undesirable to restrict the procedural freedom of tribunals in a field as important and sensitive as this, where personal liberty and safety and public protection are all at stake: the outcome should not turn on procedural niceties.

Practicalities

33. Few things in life are certain, but I am confident of this: all the judges and members who hear mental health cases want to carry out their duties conscientiously and lawfully. I have set out my analysis in a way that may provide some guidance to help them do that. In order to do so, I have assumed that the parties, and the Upper Tribunal on appeal, know the tribunal's thinking. In practice, they will usually not know. A tribunal's deliberations are confidential. The tribunal may adjourn without giving any indication that it has reached any view (provisional or otherwise) on the detention and discharge conditions or on the conditions that might be imposed on discharge. If it does, it will be next to impossible to show that it was not entitled to adjourn. Mr Pezzani was only able to construct an argument because the tribunal on 4 July set out its thinking in some detail. I now come to those reasons.

J. The tribunal's reasons

34. It is clear that the tribunal did not intend to defer a direction for Mr C's conditional discharge. If that was what it intended to do, the judge would have completed a different template. The question is: had the tribunal reached the stage at which deferring a direction was the only option open to it?

The reasons given on 4 July 2011

35. The difficulty in understanding these reasons is that you get different results depending on where you start. Mr Pezzani emphasised the apparently clear words of paragraph 1 of those reasons and argued that the other reasons should be read consistently with them. Ms Charbit emphasised the other reasons and argued that this undermined the apparently clear wording of paragraph 1. That produced a different interpretation. I spent some time trying to understand the tribunal's precise thinking and came up with yet another interpretation.

36. This range of possible interpretations is significant. The tribunal could only exercise the power in section 73(7) if it was in a position to direct a discharge. Its thinking can only be discerned from its reasons. Those reasons must be read as whole. There is no reason to give any one passage primacy over any other. Paragraph 1 supports Mr Pezzani. Paragraph 3 supports Ms Charbit. Bits of paragraph 2 support each of them. The very uncertainty about how different parts of the reasoning fit together in a consistent whole shows that the tribunal was not in a position to make findings on the detention and discharge conditions

or to formulate conditions for discharge. The reasons do not show that the necessary preconditions for the exercise of the power to defer were present. That is one reason why I have dismissed this appeal.

The reasons given on 22 September 2011

37. Moreover, looking at the two hearings together would produce the same outcome whatever the tribunal should have done on 4 July.

38. If the tribunal should on that date have deferred a direction for conditional discharge, it could on 22 September have reconsidered that under *R(H)*. Paragraph 1 of its reasons on that date show that, at least by then, it was unsure about what conditions to impose on any discharge.

39. On the other hand, if the tribunal on 4 July should have adjourned, as it did, it was of the same mind in September. In fact, the reasons for an adjournment were stronger then. The tribunal had become concerned about the detention condition and agreed with Mr Pezzani that there should be independent evidence on that issue. That factor alone would have justified an adjournment.

40. Either way, when the September reasoning is factored in, the result is the same. Following the second hearing, the case properly stood adjourned for information to be obtained. That is the other reason why I have dismissed this appeal.

K. Forms of disposal

41. Mr Pezzani argued that I could re-make the tribunal's decision of 4 July as at that date. As I have decided that the tribunal's decisions did not involve any error of law, the power to re-make a decision does not arise. But I doubt whether I could give the relief in the form sought by Mr Pezzani. Whether a patient is to be discharged has to be judged at the time of the hearing. In my view, that would mean at the time of the hearing before me. If that is right, I could not have re-made the decision without up-to-date medical evidence. And, even with that evidence, I would have been most reluctant to re-make a decision without the advice and assistance of the specialist members available to the First-tier Tribunal.

Signed on original
on 22 March 2012

Edward Jacobs
Upper Tribunal Judge