DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

As the decision of the First-tier Tribunal (made on 28 June 2010 under reference MP/2010/02300) 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.

DIRECTIONS:

A. 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.

B. The tribunal must undertake a complete reconsideration of the issues that are raised by the patient's application under the Mental Health Act 1983.

C. In doing so, the tribunal must consider the patient's circumstances as they are at the date of the rehearing.

REASONS FOR DECISION

A. THE PARTIES AND THE PROCEEDINGS

1. The parties to this appeal are a patient detained under the Mental Health Act 1983 and the managers of the hospital where is he detained. The patient lodged his application for permission to appeal in September 2010 and it was transferred to me in January 2011. I directed an oral hearing, which was held on 11 March 2011. I gave permission to appeal at the hearing and allowed the managers of the hospital a chance to respond. They wrote to say that they 'have no further comment and therefore will not be making any representation.' I have, therefore, decided the appeal without further reference to the patient or his representatives.

B. THE HEARING

2. The patient is detained under section 3 of the Mental Health Act 1983. It is not necessary to set out his background or the evidence. It is sufficient to say that on 27 January 2010, he applied to the First-tier Tribunal for his detention to be considered. He was represented at the hearing by Ms Drane of Wolton & Co (Solicitors). Her instructions were to ask the tribunal to make a recommendation for a community treatment order under section 72(3A)(a):

> (3A) Subsection (1) above does not require a tribunal to direct the discharge of a patient just because it thinks it might be appropriate for the patient to be discharged (subject to the possibility of recall) under a community treatment order; and a tribunal–
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> (a) may recommend that the responsible clinician consider whether to make a community treatment order; ...

That was how she had prepared the case and how she presented it at the start of the hearing. She told me that the presiding judge told her that the tribunal would not be making a

recommendation and invited her to consider what other position she might adopt. It was then necessary for her to consult with her client and present her case on a different basis. I expressly gave the chance to the managers to comment on this account of what happened, but they have neither supported nor contradicted it.

C. HOW THE TRIBUNAL WENT WRONG IN LAW

3. I will deal with the appeal first on the basis of Ms Drane's account of what happened at the hearing. On that basis, the tribunal failed to allow the patient to present the case he wished to present. Tribunals are entitled to preview the case before the hearing begins. That preview may lead the panel to come to provisional conclusions. That is proper and it is equally proper for them to tell the parties what they are. As Lightman J said for the Court of Appeal in *Costello v Chief Constable of Derbyshire Constabulary* [2001] 1 WLR 1437:

> 9. Mr Jarand, for the claimant, stated that at the commencement of the hearing before him, the judge said words to the effect that the Ford was obviously stolen, and he complained that the conduct of the judge in saying this precluded (at any rate the appearance of) a fair trial. But counsel adduced no evidence that the judge made this statement or that any complaint about it was made at the hearing, and the judge was not invited (as he should have been) prior to the hearing of this appeal to comment on this attribution to him. In these circumstances it is not open to the claimant to raise this matter on this appeal. But even if it was open to him and the judge indeed did make some such statement, it is to be borne in mind that, having preread the skeletons and papers, it was perfectly proper (if not inevitable) that the judge had formed a provisional view before coming into court and, if it was proper for him to have formed this view, it must equally have been proper for the judge to inform the parties of his view so long as he did not give the impression that he had a closed mind on this issue. For this disclosure enabled the parties to know the way he was currently thinking and accordingly where attention needed to be focused (most particularly by the claimant) at the trial to change his mind.

4. What is not permissible is to reach firm conclusions and prevent the parties from arguing to the contrary. That is unwise, as Megarry J observed in *John v Rees* [1970] Ch 345 at 402:

> As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change. Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence events.

Not only is it unwise, it is a breach of natural justice and the Convention right to a fair hearing.

5. Megarry J's words apply as much to me as to the First-tier Tribunal, as I have not had the judge's account of what happened. It may be that there was some misunderstanding between him and Ms Drane. Even if there was, I accept her account that she told the tribunal

that the patient would like a recommendation that he be considered for a community treatment order. On that more limited basis, the tribunal still made an error of law. The judge did not explain in the reasons for the tribunal's decision why it had not made a recommendation. It recorded the psychiatric evidence that a community treatment order was not a short-term option. The tribunal was required to take that evidence into account, but not obliged to accept it. It had to make its own judgment. That is the purpose of section 72(3A): if the responsible clinician had considered a community treatment order as a realistic option, plans would have been made to prepare the patient for release on that basis. Failure to explain the tribunal's judgment on this issue is an error of law.

D. DISPOSAL

6. I now have to consider whether either of those errors justifies me setting aside the tribunal's decision. I have power not to do so under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007:

> (2) The Upper Tribunal—
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> (a) may (*but need not*) set aside the decision of the First-tier Tribunal, and
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> (b) if it does, must either—
>
> (i) remit the case to the First-tier Tribunal with directions for its reconsideration, or
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> (ii) re-make the decision.

7. There would be no point in setting aside a decision for failing to consider a recommendation if that was not a realistic possibility on the evidence before the First-tier Tribunal. Equally there would be no point in setting aside a decision for failing to mention why the tribunal did not make a recommendation when that recommendation would not be possible on the tribunal's findings. I discussed those possibilities with Mr Simblet, who appeared for the patient at the hearing of the application.

8. As to the possibility of the tribunal recommending a community treatment order, I have the difficulty that I do not have the benefit of the knowledge and experience available to the First-tier Tribunal through its panel members. However, I also note that the tribunal does not have to decide that a patient does satisfy the conditions for release on a community treatment order. It is only necessary to recommend that the responsible clinician should consider whether to make one. The tribunal has no power to make an order, but it is able to use its power to recommend when it considers that the conditions are satisfied at the time of the hearing, perhaps because the tribunal is aware of local facilities that the responsible clinician is not. But the power is not so limited. It can also be used to trigger consideration of the steps that could be taken to move the patient towards eventual release on an order. This was not a case in which the evidence showed that a community treatment order would never become a realistic option in the foreseeable future. In those circumstances, I cannot say that the tribunal would not have been persuaded to make a recommendation.

9. As to the tribunal's reasons, they may deal adequately with the patient's condition at the time of the hearing and show that he was not at that time ready for release. But a

recommendation is not limited to the present, as I have said. The power can be used as a trigger for action in the future. The tribunal's reasons do not allow for the possibility. They do not, by themselves, show why the tribunal did not make a recommendation.

10. In those circumstances, I remit the patient application to the First-tier Tribunal for reconsideration.

Signed on original
on 11 April 2011

Edward Jacobs
Upper Tribunal Judge