



information sheet

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Setting Aside a Tribunal Decision: Upper Tribunal Judicial Review Decision

We acted for RB in one of the first judicial reviews heard by the Upper Tribunal from a decision of the First Tier Tribunal Principal Judge. The decision deals with the way reviews are to be dealt with where contentious points of law are involved.

In April 2009, the First Tier Tribunal granted a conditional discharge to RB, a patient detained in a medium secure unit under s.37/41 MHA. As part of the usual conditions on discharge he was to reside at a particular care home and not leave the grounds without an escort. As the patient embraced this willingly, the tribunal accepted that consent meant that there would be no continued detention and, thus not be unlawful as had been contended by the Secretary of State for Justice who relied on *R (G) v MHRT (2004) EWHC 2193*.

The Secretary of State sought a review from the RTJ (Regional Tribunal Judge as then known) who decided that the panel had erred in law since it was impossible, on the authority of *G*, to argue that the condition would amount to anything less than a deprivation of liberty. He referred the original application to a freshly constituted tribunal panel. The patient made representations against this, but the RTJ decided not to change his decision and refused permission to appeal further. An application to the Upper Tribunal was then made, which proceeded as a judicial review of this second decision of the RTJ.

The patient's case was that there was a legitimately contentious issue involving the distinction between a deprivation, as opposed to a restriction, on liberty. The RTJ should have allowed the matter to be appealed to the Upper Tribunal for the legal points to be fully addressed, rather than refer the matter to a new panel, which would either follow the RTJ's decision on law thus rendering the appeal pointless, or discharge, thus creating an endless process of appeals by the Secretary of State followed by set aside and remitting to fresh panels.

The Judges confirmed that it was appropriate for the RTJ to set aside a tribunal decision only where there had been a clear error of law by the First Tier Tribunal panel. The rules are not intended to usurp the function of the Upper Tribunal to deal with contentious points such as the ones identified here relating to deprivation as against restriction on liberty. The RTJ's decision to set aside ran to thirteen pages showing that he was not dealing with a clear error of law for which the review power was appropriate. It also caused delay contrary to the overriding objective which would have been prevented by allowing the matter to proceed to the Upper Tribunal.

The Upper Tribunal quashed the RTJ's second decision, set aside the RTJ's first decision and granted permission to the Secretary of State to appeal against the original decision to conditionally discharge. Provided the Secretary of State pursues this permission, the contentious issues surrounding deprivation of liberty and consent will be argued before the Upper Tribunal.

The Judges expressed concern that the Secretary of State had not participated in their proceedings and expressed the hope that where issues of significance arose, the relevant government department would provide assistance. In this case the Judges would have wished to consider any policy reasons which lay behind the decision to seek a review of the conditional discharge.

Citation R(RB) v First Tier Tribunal (Review) [2010] UKUT 160 (AAC)