

**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 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007:

Although the decision of the First-tier Tribunal under reference MM/2012/06515, made on 13 June 2012, involved the making of an error on a point of law, it is NOT SET ASIDE.

REASONS FOR DECISION

1. Mr P is a patient detained under the Mental Health Act 1983, which I refer to as 'the Act'. The First-tier Tribunal directed his conditional discharge, but gave the Secretary of State for Justice permission to appeal to the Upper Tribunal. I held an oral hearing of the appeal on 10 January 2013. Matthew Barnes of counsel represented the Secretary of State. Mr Pezzani of counsel represented Mr P. The detaining authority was not represented. I am grateful to both counsel for their interesting arguments. I am particularly grateful to Mr Pezzani, who was only instructed at short notice before the hearing.

A. History and background

2. Mr P was born on 10 June 1964. He has used drugs since he was 17. He first became involved with the mental health services in 2003 when he experienced depression consequent upon physical pain. In 2004, he was admitted with paranoia. He was discharged in November that year, but readmitted in the December. He was now diagnosed as having a drug-induced psychosis. He was discharged in January 2005.

3. On 26 August 2005, Mr P set fire to the door of a public house, damaging the door itself, the surrounding brick work and the room within. He was arrested, remanded and then detained under sections 37 and 41 of the Act. He was conditionally discharged in August 2011. He did not engage with his supervision, gambled, mismanaged his finances, harassed his parents for money and misused drugs. Following an overdose, he was admitted to hospital and, on 9 March 2012, recalled by the Secretary of State. His case was referred to the First-tier Tribunal on 13 March 2012 and the hearing took place on 13 June 2012.

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B. The tribunal's decision

4. The tribunal directed that Mr P be conditionally discharged without conditions. After setting out the history of the case and extracts from the evidence, the tribunal set out its conclusions in its final paragraphs:

2.15 On a balance of probabilities, the Tribunal concludes that the Patient's presentation both before his commission of the index offences and continuing until shortly after his admission to the Wells Road Centre [August 2009] was consistent with a paranoid psychosis secondary to illicit substance misuse and not with an underlying mental illness.

2.16 Whilst it is evident from his history, both whilst in the community and in hospital, that the Patient has personality difficulties, they do not meet the diagnostic criteria for personality disorder.

2.17 In summary, the Tribunal is not satisfied that the patient has ever suffered from mental disorder as defined by Section 1(2) of the Act as qualified by subsection (3).

2.18 The Tribunal has reached this conclusion on the balance of probabilities and it remains possible that the Patient does in fact suffer from an underlying, persistent and chronic mental illness which may relapse. Accordingly, the Tribunal is not satisfied that it is not appropriate for him to remain liable to be recalled to hospital for further treatment.

2.19 Finally, the Tribunal was informed that the Patient retains his tenancy of his flat and could return to it on the day of the hearing at any time before 7pm.

C. Events following the hearing

5. Mr P was discharged on the day of the hearing. On 16 July 2012, the Secretary of State imposed conditions regarding supervision, compliance with treatment, accommodation and tests for illicit drugs. On 3 September 2012, the Secretary of State recalled the patient and his case was referred to the First-tier Tribunal. This led to a hearing on 3 December 2012, as a result of which he remains detained.

D. The legislation

6. Sections 1 and 3 are relevant to this case.

1 Application of Act: "mental disorder"

...

(2) In this Act—

"mental disorder" means any disorder or disability of the mind; and

"mentally disordered" shall be construed accordingly;

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and other expressions shall have the meanings assigned to them in section 145 below.

...

(3) Dependence on alcohol or drugs is not considered to be a disorder or disability of the mind for the purposes of subsection (2) above.

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 (ia) 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.

...

(4) Where a patient is conditionally discharged under this section—

(a) he may be recalled by the Secretary of State under subsection (3) of section 42 above as if he had been conditionally discharged under subsection (2) of that section; and

(b) the patient shall comply with such conditions (if any) as may be imposed at the time of discharge by the tribunal or at any subsequent time by the Secretary of State.

(5) The Secretary of State may from time to time vary any condition imposed (whether by the tribunal or by him) under subsection (4) above.

...

E. The grounds of appeal

7. The Secretary of State had two grounds of appeal. One related to the tribunal's finding on diagnosis; the other related to the decision not impose any conditions.

F. The finding that Mr P did not have a mental disorder

8. Mr Barnes criticised this finding on three grounds.

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Going behind the decision to admit

9. Mr Barnes first argued that, by finding that Mr P had never had a mental disorder, the tribunal had sought to go behind the decision to admit and had done so without having the full evidence on which that decision was taken. Mr Pezzani argued that the tribunal's reference to the time of admission was merely part of its explanation for its finding that Mr P did not have a mental disorder at the time of the hearing. I reject Mr Barnes' argument and accept Mr Pezzani's.

10. Mr Pezzani also argued that the standard on admission was lower than on discharge. Mr Barnes disputed that and it is not necessary for me to decide it in this case.

11. I accept that the First-tier Tribunal has no jurisdiction to decide whether the patient was properly detained. The issue for the tribunal is whether the patient should now be discharged. See *Ex parte Waldron* [1986] QB 824 at 846 and *R (Von Brandenburg) v East London and The City Mental Health NHS Trust* [2004] 2 AC 280 at [9(3)]. The tribunal properly confined itself to that issue. It did not purport to decide that Mr P's original detention was unlawful. That is clear from its statement of the legal grounds for decision, which are properly confined to its jurisdiction under section 73.

12. What the tribunal did was to refer to the history of Mr P's behaviour and symptoms. It was as part of that analysis that it mentioned his mental state at the time of the offence and the court's hospital order. That is always permissible and sometimes necessary. The tribunal has to explain its findings of fact. Doing so may require the tribunal to refer to and disagree with a previous diagnosis. For example: if the tribunal finds that a patient does not have a particular disorder that was previously diagnosed, it has to explain why. If there is no evidence that the patient has recovered, the tribunal may have to say that the diagnosis was not appropriate.

13. I accept that the tribunal did not have all the medical evidence relevant to the time when Mr P was admitted. But the tribunal had to make its decision on the evidence before it.

A mental disorder arising from substance abuse

14. Mr Barnes next argued that the tribunal misdirected itself on section 1(3) by finding that a disorder caused by substance abuse was not a disorder within the Act. Mr Pezzani accepted that, but argued that the mistake was not material.

15. I accept the joint argument of counsel on the interpretation of section 1(3). It is limited to dependence. It merely provides that the fact that a person is dependent on alcohol or drugs is not of itself sufficient to justify detention under the Act. It does not cover the consequences that flow from that dependence. A drug-induced psychosis is a mental disorder within the Act. Counsel could not find any authority on this issue, but it follows from the wording of the Act and I base my decision on that. There is also authority in the social security caselaw for distinguishing between alcohol dependence and separate medical conditions

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that may arise from it, although the legislative context is very different: *R(DLA) 6/06* at [21].

16. As to materiality, Mr Pezzani argued that the tribunal would have come to the same decision even if it had not made this error. As I have decided that there are other errors of law in the tribunal's decision, I do not need to decide whether this error was material.

Reasons

17. Mr Barnes finally argued that the tribunal's reasons on diagnosis were inadequate, indeed largely non-existent. The tribunal had merely recited extracts from some of the evidence and then expressed a conclusion. As the responsible clinician had felt unable to decide on the cause of Mr P's psychosis, the tribunal should have explained why it had been able to do so. Mr Pezzani argued that it was possible to discern the tribunal's reasoning. Mr Barnes replied that it was possible to discern what its reasoning might have been, but not what it was.

18. I accept Mr Barnes' argument. As the responsible clinician had not been able to reach a conclusion on the cause of Mr P's psychosis, it was incumbent on the tribunal to say why it had been able to do so. Quite apart from the duty to explain how it had made its diagnosis, the tribunal's reasoning might have been of benefit to the clinician for Mr P's future treatment.

G. The failure to impose conditions

19. Mr Barnes argued that the tribunal's reasons were inadequate for failing to explain why it did not impose conditions on Mr P's discharge. Mr Pezzani argued that there was no rational basis on which the tribunal could have imposed conditions, as it had found that Mr P did not have a mental disorder and there was no evidence that his substance abuse had led to a recurrence of his psychosis. Mr Barnes replied that this was speculation in view of the complete absence of any reasons by the tribunal. I accept Mr Barnes' argument.

20. A tribunal has power to make a patient's discharge conditional even if the patient does not have a mental disorder: *R v Merseyside Mental Health Review Tribunal, ex parte K* [1990] 1 All ER 694 at 699-700. A conditional discharge is so named because the patient is liable to recall. It is permissible to direct a conditional discharge without imposing any further conditions, as envisaged by section 73(4)(b). A tribunal is under a duty to explain its decision, including a decision not to impose further conditions. In some cases, the circumstances alone may be sufficient to show why the tribunal did not impose conditions. This is not such a case. The tribunal found that Mr P had a drug-induced psychosis and that he had continued to use drugs. Indeed, he said that he would do if he were discharged. The tribunal found that that involved a risk of self-neglect. In those circumstances, the tribunal was under a duty to explain why it did not impose conditions.

21. Mr Pezzani remarked that the Secretary of State's decision to impose conditions on Mr P's discharge so soon after the tribunal hearing may have been

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unlawful. He argued that this was analogous to a patient being detained soon after discharge by a tribunal and that similar protection might be appropriate. As Mr Pezzani accepted, the Secretary of State's decision could only be challenged by way of judicial review, which it was now too late to bring. In those circumstances, I merely record what he said.

H. Disposal

22. I have decided that the tribunal's decision involved the making of errors of law. Mr Barnes asked me to quash the tribunal's decision, as it was so manifestly flawed.

23. Disposal is governed by section 12(1) and (2) of the Tribunals, Courts and Enforcement Act 2007:

12 Proceedings on appeal to Upper Tribunal

(1) Subsection (2) applies if the Upper Tribunal, in deciding an appeal under section 11, finds that the making of the decision concerned involved the making of an error on a point of law.

(2) The Upper Tribunal—

(a) may (but need not) set aside the decision of the First-tier Tribunal, and

(b) if it does, must either—

(i) remit the case to the First-tier Tribunal with directions for its reconsideration, or

(ii) re-make the decision.

24. If I were to set aside the decision, I would have to remit the case or re-make the tribunal's decision. Remitting the case would be pointless. Events have moved on and another tribunal has recently decided that Mr P should remain detained. I would be reluctant to re-make a decision in a mental health case without the benefit of the specialist members who sit in the First-tier Tribunal. They would be particularly relevant in view of Mr Pezzani's argument that a finding on Mr P's diagnosis would be important, although not binding, for the future. I would certainly not venture unaided into diagnosis. As neither of those options is appropriate, I can only decide that, despite the errors of law, the tribunal's decision should not be set aside. The result is that this decision provides in effect a declaration of the errors made in the tribunal's decision.

**Signed on original
on 11 January 2013**

**Edward Jacobs
Upper Tribunal Judge**