



STJ12
Rules 46,
47 & 49

The First-tier Tribunal (Health, Education and Social Care Chamber) Mental Health

The Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008

Case Number: MP/2021/
Date of Application: 5th October 2021.

Patient: _____ **(born _____)**
a patient now subject to a Community Treatment Order

Responsible Authority:
Hospital: Community

Before:

Judge D Birrell

Application for Permission to Appeal

In accordance with Rule 46¹, The solicitor acting for _____ has applied for permission to appeal against a decision, or part of a decision, dated 18th November 2021, in respect of the above-named patient.

Particulars of Decision Appealed Against

The decision not to discharge the community treatment order.

Time Limits

The application was in time (Rule 46(2)).

Decision whether to Review

Taking into account the overriding objective in Rule 2, the tribunal has decided for the reasons given below, that there was a clear error of law in the decision (or part of the decision) appealed against, and that it should review the decision.

Decision upon Review

Upon review, the tribunal has decided, for the reasons given below, to take the following action.

¹ The tribunal may treat an application for a decision to be corrected, set aside or reviewed, or for permission to appeal against a decision, as an application for any other of those things (Rule 50).

Action

1. The tribunal directs that the decision be set set aside.
2. The tribunal further directs that the matter will be re-decided
3. And the tribunal further directs that the matter will be listed before a full First-tier Tribunal to re-decide the matter concerned. The matter will be listed before a differently constituted panel.

The Tribunal considered:

Decision with reasons Judge Nadin dated 18th November 2021

Form P10 + statement of facts and grounds dated 25th November 2021

Written response from Judge Nadin to the grounds of appeal dated 1st December 2021.

Summary of Grounds of Application for Permission to Appeal

1. There is a comprehensive statement of grounds in this case which I do not propose to recite in full. In short, Mr Conroy argues that the tribunal fell into error in requiring to give his evidence first and refusing to accede to his submission that given the burden of proof the responsible authority should instead do so. Further, that the reference by Judge Nadin to a policy which required the tribunal to hear the patient's evidence first, as justification for this direction, was erroneous as no such policy exists or could exist.
2. Mr Conroy also contends that the additional justification for the direction, namely that by hearing from first this prevented potential technical difficulties from hindering his participation in the proceedings is inadequate to overcome the essential unfairness of the direction itself.

Reasons for the Tribunal's Decision, including Brief History and Analysis of Key Material

My Duty under Rule 47(1) of The Rules

1. On receiving the application for permission to appeal, my first task was to consider whether to review the decision in accordance with Rule 49 of the Rules.
2. Rule 49 permits me to review decisions of the First-tier Tribunal if I am satisfied that there has been an error of law.
3. For the reasons set out below, I am satisfied that there has been an error of law and so on review I have set aside the decision and direct that the case is re-decided by a new panel.

My Duty under Rule 47(2) of the Rules

4. In all the circumstances, I have concluded that the overriding objective of the Rules would not be served by my granting permission for the applicant to appeal to the Upper Tribunal.
5. No points of law of general importance arise in this application. In the circumstances, I refuse permission to appeal. The applicant is at liberty to apply directly to the Upper Tribunal for such permission, if she so wishes.

The error of law.

6. It is common ground that when the panel hearing this case on the 18th

November convened Judge Nadin directed that give his evidence first.

7. She did so without consulting with Mr Conroy who, on being informed of this direction, objected to it and, it is uncontroversial, that Judge Nadin rejected Mr Conroy's submission that the responsible authority should be heard first. This he contended would be consistent with where the burden of proof lies and allows for the patient to make an informed decision at the conclusion of that evidence as to whether they wish to give evidence at all.
8. Mr Conroy in addition contends that Judge Nadin in summarily rejecting his submission referred to a *policy* which required this order of evidence in CVP hearings.
9. Upon receipt of the grounds of appeal I took the step of inviting Judge Nadin to comment on them, specifically the issue of whether she referred to a policy in this way.
10. Judge Nadin's written decision is in many respects a model of how to approach providing reasons and she describes at paragraph 5 of her decision the exchange between her and Mr Conroy in some detail. There is no reference to a policy in that section of her reasons.
11. Judge Nadin's response to my request for comment on the grounds of appeal was admirably frank. She reports that having looked at her notes, which she accepts are not verbatim, she had not recorded using that term but accepts that it is possible that she did do so.
12. Judge Nadin also made the point that there is no fixed rule or direction on the order of evidence in this tribunal and so in accordance with Rule 5, the tribunal can determine the form of any hearing.
13. The error of law, in my judgment, is that if the justification for the direction on the order of evidence included reference to a policy, whether that was intended to convey a tribunal wide policy or a policy specific to this judge it would constitute an unlawful fetter of the tribunals discretionary powers. (see RC-v-NHS Islington [2013] UKUT 0167 (AAC))
14. The refusal to countenance the submission made by Mr Conroy lends weight to the impression that Judge Nadin's direction on the order of evidence was fixed and represented therefore a policy rather than a case specific decision.

Directions.

15. This case is to be re-listed for hearing before a differently constituted panel on a date to be fixed between 13th December 2021 and 7th January 2022, when the parties and witnesses are available.
16. New HQ1 not later than 4pm on the 8th December 2021.

Judge: D Birrell

Date: 4th December 2021.

Notice

If the tribunal has taken any action following a review without first giving every party an opportunity to make representations, any party that did not have an opportunity to make representations may apply for such action to be set aside and for the decision to

be reviewed again. In the event that permission to appeal has been refused or not admitted, there is a right to make an application to the Upper Tribunal for permission to appeal. Such an application must be made in writing and received by the Upper Tribunal no later than a month after the date on which the First-tier Tribunal (Health, Education and Social Care Chamber) Mental Health sent to you notice of its refusal of permission to appeal, or refusal to admit the application for permission to appeal.