IN THE UPPER TRIBUNAL **Appeal No. UA-2022-000640-HM**
ADMINISTRATIVE APPEALS CHAMBER

On appeal from the First-tier Tribunal (Health, Education and Social Care Chamber)

Between:

ML

Appellant

- v –

Priory Healthcare Limited

First Respondent

Secretary of State for Justice

Second Respondent

Before: Upper Tribunal Judge Church

Following a remote video hearing held on 16 May 2023

Representation:

Appellant:	Mr Roger Pezzani of counsel, instructed by Mrs Yesim Hall of TV Edwards, Solicitors
First Respondent:	Not represented
Second Respondent:	Mr Alex Cisneros of counsel, instructed by the Government Legal Service

DECISION

This decision may be made public (rule 14(7) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI No 2698)).

The decision of the Upper Tribunal is to allow the appeal.

The decision of the First-tier Tribunal made on 25 February 2022 with case reference number MP/2021/20568 involved the making of an error in point of law. It **is SET ASIDE** under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007

and the case is **REMITTED** to the First-tier Tribunal for rehearing by a differently constituted panel under section 12(2)(b)(i).

REASONS FOR DECISION

What this appeal is about

1. This appeal is about ML, a 63 year old man who is a restricted patient detained at Kneesworth House Hospital under sections 47 and 49 of the Mental Health Act 1983 (the **"1983 Act"**). He has been detained for over 35 years, the last 15 years of which have been spent in secure psychiatric hospitals. His tariff expired more than 30 years ago. This appeal arises out of his application to the First-tier Tribunal to review his section. In practical terms, he wanted to secure a conditional discharge by the Secretary of State. The first step towards this was to seek a notification from the First-tier Tribunal under section 74(1)(a) of the 1983 Act (see paragraph 11 below).

2. Legally speaking, the appeal is about the interplay between two different statutory regimes: the 1983 Act and the Mental Capacity Act 2005 (the **"2005 Act"**). The 1983 Act is concerned with the provision of medical treatment of people suffering from mental disorder, and when they should be liable to be detained in hospital for treatment, while the 2005 Act is concerned with the making of decisions in the best interests of those who lack relevant mental capacity. There are inevitably areas of overlap between the two regimes, and this case raises issues about what consideration the First-tier Tribunal must give to the mechanisms available under the 2005 Act when deciding whether the statutory conditions to detention under the 1983 Act are met, and whether continued detention represents the "least restrictive option" for the patient's care.

3. The main thrust of the appeal was that the First-tier Tribunal heard evidence that the Appellant lacked capacity to make decisions in relation to various matters, including whether he should take prescribed psychotropic medication, and evidence that he could be made subject to a care plan which involved a deprivation of liberty that could be authorised under the 2005 Act in accordance with the principles set down in *MC v Cygnet Behavioural Health Ltd and Secretary of State for Justice (Mental Health) (Rev 1)* [2020] UKUT 230 (AAC) (**"*MC v Cygnet*"**).

4. It was argued before the First-tier Tribunal that, in light of this evidence:

    a. continued detention in hospital was not necessary;

    b. section 72(1)(b)(ii) of the 1983 Act was not satisfied; and

    c. section 73 of the 1983 Act required that the Appellant be discharged from detention.

5. The First-tier Tribunal decided that:

    a. each of the statutory criteria to detention was satisfied; and

    b. had the Appellant been subject to a restriction order under section 41 of the 1983 Act, he would not have been entitled to be discharged from liability to be detained in hospital for medical treatment,

    (the **"FtT Decision"**).

Grounds of appeal

6. The Appellant's grounds of appeal against the FtT Decision are that the First-tier Tribunal erred in law either:

a. by deciding whether the criteria in section 72(1)(b) were met without reference to the evidence and submissions on the availability of an alternative regime for achieving his compliance with medication; or

b. by failing adequately to explain what it made of such evidence and submissions.

Factual and Procedural Background

7. On 19 November 1986 the Appellant was convicted of manslaughter by reason of diminished responsibility and sentenced to life imprisonment. The circumstances of the Index Offence are very troubling indeed.

8. While in prison, the Appellant was assessed to be suffering from mental disorder and was diagnosed with paranoid schizophrenia. On 23 July 2006 the Secretary of State issued a warrant under sections 47 and 49 of the 1983 Act (i.e. a transfer direction with a restriction direction) restricting the Appellant's discharge without limit of time.

9. The Appellant was transferred from prison to hospital. At the time of the hearing before the First-tier Tribunal, he was detained at Kneesworth House Hospital.

10. He made an application for his section to be reviewed and, on 25 February 2022, the First-tier Tribunal held a remote video hearing of his application.

The case put to the First-tier Tribunal

11. By his application to the First-tier Tribunal the Appellant sought:

a. a notification under section 74(1)(a) of the 1983 Act that he would, if subject to a restriction order, be entitled to a conditional discharge; and

b. a recommendation under section 74(1)(b) of the 1983 Act that if not discharged by the Secretary of State he should continue to be detained in hospital (rather than be remitted to prison).

12. It was accepted by Mr Pezzani that the Appellant suffers from mental disorder (namely a diagnosis of paranoid schizophrenia, as well probably having a personality disorder and traits of autism spectrum disorder). It was also accepted that he required medical treatment to manage the risks associated with his mental disorder.

13. While the Appellant's responsible clinician and all but one of the other witnesses for the detaining authority supported the Appellant's continued detention in hospital, expert evidence from an independent forensic consultant psychiatrist instructed by the Appellant (Dr Chin) and an independent social worker and approved mental health professional instructed by the Appellant (Mr Spencer-Humphrey), as well as the evidence of the Appellant's primary nurse at Kneesworth House, indicated that he could be managed effectively in the community with 24 hour support in the context of a conditional discharge, with any necessary deprivation of liberty being authorised under the 2005 Act.

14. The issue of the Appellant's capacity to make decisions in his best interests was raised in each of the reports before the First-tier Tribunal, and Mr Pezzani made a clear submission about capacity in his position statement:

> "7. There is therefore a wealth of evidence to suggest that ML lacks capacity to make decisions about many of his post-discharge needs. That in turn indicates a reasonable likelihood that an MCA authorisation of a DoL care plan would be available. And that means that consideration of whether ML is entitled to conditional discharge should include an evaluation of how a DoL care plan would affect the question of whether the criteria in s.71(1)(b) are satisfied.
>
> 8. Active symptoms of mental disorder, whether positive or negative, do not on their own mean that detention in hospital or treatment is either appropriate or necessary. Otherwise, every person with a mental disorder would be liable to detention for treatment. The question is whether the symptoms mean that treatment and management of the risks can *only* be achieved by detention in a hospital. If the answer to that question is "no" because treatment and risk management can also be achieved outside hospital, then detention for treatment is neither appropriate nor necessary.
>
> 9. The issue is therefore whether the treatment and risk management that can be provided outside hospital is likely to represent a viable alternative to what is provided in hospital, i.e. is an alternative means of achieving the same ends. Dr Chin and Mr Spencer-Humphrey say that it is. What they recommend is in practice closely analogous to the current regime: it is proposed that ML will continue to have 24-hour support; will continue to receive medication, and care, and supervision. It follows from that that with suitable aftercare ML will be no more likely to relapse and/or present an unmanageable risk to himself or the public *outside* hospital than he does *in* hospital" (see p. 242 of the appeal bundle).

15. The First-tier Tribunal heard evidence that, while the Appellant would choose not to take medication if given a free choice, he would take medication if he were required to do so by a "rule".

The permission stage

16. ML applied to the First-tier Tribunal for permission to appeal the FtT Decision. Permission was refused by a judge of the First-tier Tribunal on the basis that there was no arguable error of law, but ML then applied to the Upper Tribunal for permission to appeal and the matter came before me. I granted permission.

The oral hearing of the appeal

17. I directed a remote video hearing of the appeal. The hearing was attended by Mr Pezzani of counsel and Mrs Hall of TV Edwards on behalf of the Appellant, and by Mr Cisneros of counsel for the Second Respondent. The First Respondent did not attend and was not represented. I am grateful to both counsel for their helpful and clear submissions on this appeal.

The Law

18. The First-tier Tribunal's jurisdiction over the Appellant was governed by section 74 of the 1983 Act, which imports the criteria in section 73(1) and (2), which in turn import the criteria in section 72(1)(b)(i), (ii) and (iia) of the 1983 Act.

19. Section 72 of the 1983 Act sets out the circumstances in which a tribunal may or, as the case may be, must discharge a patient. It provides (so far as relevant for the purposes of this appeal):

> **"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 or 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 …"
>
> …

20. Section 73 of the 1983 Act sets out the power of the tribunal to direct the discharge of restricted patients. It provides (so far as relevant for present purposes):

> **"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.

21. Section 74 of the 1983 Act provides:

> **"74. Restricted patients subject to restriction directions**

(1) Where an application to the appropriate tribunal is made by a restricted patient who is subject to a limitation or a restriction direction, or where the case of such a patient is referred to the appropriate tribunal, the tribunal –

(a) shall notify the Secretary of State whether, in its opinion, the patient would, if subject to a restriction order, be entitled to be absolutely or conditionally discharged under section 73 above; and

(b) if the tribunal notifies him that the patient would be entitled to be conditionally discharged, may recommend that in the event of his not being discharged under this section he should continue to be detained in hospital.

…

(6) Subsections (3) to (8) of section 73 above shall have effect in relation to this section as they have effect in relation to that section, taking references to the relevant hospital order and the restriction order as references to the hospital direction and the limitation direction or, as the case may be, to the transfer direction and the restriction direction…"

Discussion

22. The Appellant's case focused on the First-tier Tribunal's decision that the criteria in section 72(1)(b)(ii) were satisfied, which it explained in para. 21 of its decision notice (italics added for emphasis):

"21. The Panel equally has no doubt at this time it is necessary for the Patient's health and safety and for the protection of other persons that he should continue to receive medical treatment in hospital. *The Panel is satisfied if the Patient were discharged from a hospital environment with its comprehensive support and supervision the Patient would very quickly cease to accept his medication. The Panel notes that the only environment where his medication regime can be enforced is in hospital.* The Panel also notes that while in prison the Patient refused his medication. The Panel is satisfied that without psychotropic medication the Patient's positive symptoms of degree will return. The Panel is satisfied that if the Patient were so discharged his mental and physical health would deteriorate as his non-compliance would involve his physical health medication as even at the moment he requires prompting for basic hygiene. The Panel is satisfied in these circumstances the safety of the Patient would be at risk as he is at present vulnerable and has suffered bullying and teasing from other patients. The Panel is satisfied that Patient remains a risk of causing harm to other persons in light of the Index Offence. The Panel has no doubt that the Index Offence has serious sexual implications, notwithstanding the absence of a sexual offence charge. The Panel is surprised that Dr Chin contends the opposite in light of the known details. The Panel notes that the Patient was observed in 2021-22 staring at females in the manner described by Dr Singh."

23. Mr Pezzani had placed at the centre of his case for the appropriateness of a conditional discharge that the Appellant lacked capacity to make decisions in relation to his care plan, including whether to take his prescribed medication, and that an authorisation under the 2005 Act, coupled with appropriate conditions of discharge,

provided an alternative legal framework for securing his compliance with medication. The statement that “the only environment where his medication regime can be enforced is in hospital” fails to grapple with this central plank of the Appellant’s appeal.

24. Indeed, despite several witnesses having raised the issue of capacity to make decisions relevant to his care plan in their evidence, the FtT Decision makes a finding only on the Appellant’s litigation capacity (see para. 23 of the FtT Decision at p. 259 of the appeal bundle). It says nothing about the Appellant’s capacity to make decisions about his treatment, care or where he should live, and nothing about the legal implications of a lack of capacity in these domains.

25. While the First-tier Tribunal acknowledged Mr Pezzani’s submission, it did not say what it made of it:

> “Mr Pezzani also contends that the Patient lacks capacity to make decisions about many of his post discharge needs and that a DoLs care plan would be available” (see para. 16 of the FtT Decision at p. 258 of the appeal bundle).

26. It appears from this short acknowledgement, and its “noting” in para. 21 that “the only environment where his medication regime can be enforced is in hospital” that, rather than rejecting Mr Pezzani’s argument, the First-tier Tribunal simply ignored it.

27. The Second Respondent opposed the appeal. The position that Mr Cisneros took was a rather technical one: he pointed to section 72(1)(b)(ii) being made up of two parts, either of which is capable of satisfying that limb of the statutory criteria. The first relates to the necessity of the patient receiving medical treatment *for his own health and safety*, and the second relates to the necessity of his receiving it for *the protection of other persons*. Mr Cisneros submitted that the FtT Decision had upheld continued detention on both bases, while the Appellant’s grounds of appeal challenged only the first basis, but not the second. Therefore, he argued, even if Mr Pezzani was correct that the First-tier Tribunal had erred, the outcome would not have been materially different because it would still have found the detention criteria to have been satisfied on the second basis.

28. It is adequately clear to me from the FtT Decision, when read as a whole, that the First-tier Tribunal’s decision turned on its concern that the Appellant might not comply with his psychotropic medication, and that if he did not comply with it his positive symptoms of degree would be liable to return, and these symptoms would present risks that would not be manageable in the community. This concern applied just as much to the risks contemplated by the second limb of section 72(1)(b)(ii) as to the first: if the Appellant did not relapse this would contain the risk not only to his own health and safety but also risks that would otherwise necessitate detention for treatment in the interests of the protection of other persons.

29. If the Appellant’s compliance could be secured and authorised under the 2005 Act, together with appropriate conditions of discharge, then the risk of relapse would be contained, and contained lawfully.

30. Mr Cisneros’s submissions refer in shorthand to the first of the two parts of section 72(1)(b)(ii) as being about “whether ML’s detention is necessary for his own health and safety”, and the second being about whether “his detention is necessary

for the protection of other person" (see paras. 11, 27 and 28 of the Second Respondent's response to the grounds of appeal at pp. 267 and 271 of the appeal bundle). While I appreciate that this was just shorthand, it mischaracterises the criteria in a very important respect: these criteria are not simply about the necessity of detention. Rather, they are about the necessity of the patient receiving medical treatment. Indeed, each of the criteria in section 72(1)(b) hinges on medical treatment: (i) requires there to be mental disorder that makes liability to detention for medical treatment appropriate, (ii) is about the necessity of receiving that treatment, and (iia) is about the availability of the treatment that is necessary. The First-tier Tribunal said that it was:

> "satisfied that the Patient remains a risk of causing harm to other persons in light of the Index Offence. The Panel has no doubt that the Index Offence has serious sexual implications, notwithstanding the absence of a sexual offence charge…" (see para. 21 of the FtT Decision),

but the 1983 Act does not permit patients to be detained simply to protect them or other persons, no matter how grave the risks may be. The need for detention must relate to the therapeutic endeavour.

31. Therefore, the First-tier Tribunal's findings in relation to the risk that the patient might cause harm to others *must* flow from its decision that liability to detention in hospital was necessary to secure medication compliance: *if* discharged the Appellant would not take medication; and *if* he stopped his medication his positive symptoms would return; and *if* the symptoms returned there would be risks to himself *and* others). The grounds of appeal for which I granted permission to appeal do, therefore, extend to both limbs of section 72(1)(b)(ii), and if the First-tier Tribunal erred in finding that "the only environment where his medication regime can be enforced is in hospital" that error would be material in the sense that such error would undermine its conclusion with respect both to the risk to the Appellant's own health and safety and to the need to protect others.

32. Mr Cisneros agreed with the Appellant's case that, were he discharged from hospital, the 2005 Act could be used to authorise a medication regime to the extent that he lacks capacity to make decisions relevant to that, but he maintained that the First-tier Tribunal was correct to say that the only setting where he could *currently* receive medication was in hospital, because there was no DOLS authorisation in place, and no guarantee that one could be obtained.

33. For the reasons Judge Jacobs gave in *MC v Cygnet*, there being uncertainty about whether the machinery of the 2005 Act will be available to authorise a deprivation of liberty does not obviate the need for a tribunal to consider alternatives to detention when determining whether the statutory criteria in section 72(1)(b) of the 1983 Act are satisfied.

34. In *MC v Cygnet* Judge Jacobs undertook a helpful review of the authorities that consider the point of transition of a mentally incapacitous patient from the 1983 Act regime to the 2005 Act regime, concluding that nothing in the Supreme Court's decision in *M v Secretary of State for Justice* [2017] 1 WLR 4681 and [2019] AC 712 (**"*M v SSJ*"**) undermined what Lieven J had decided in *Birmingham City Council v SR and Lancashire County Council v JTA* [2019] EWCOP 28 (**"*SR and JTA*"**):

> "26. *SR and JTA* was a case under the 2005 Act and Lieven J sits as a judge of the Court of Protection. It was not her role to decide whether the 1983 Act had been applied correctly, but she was aware of how the issues she had to decide related to the 1983 Act. She had to decide how the 2005 Act could be operated in a way that co-ordinated with the decisions taken under the 1983 Act. She confirmed that it would be possible to give an authorisation in advance or while a conditional discharge was deferred. Her reasoning is clear, cogent and persuasive."

35. I agree.

36. Judge Jacobs reiterated the point that he had made in *DN v Northumberland, Tyne & Wear NHS Foundation Trust* [2011] UKUT 327 (AAC), [2012] AACR 19 (at para. 10), that the "least restriction" principle was inherent both in the conditions to continued detention under the 1983 Act and a patient's rights to liberty and respect for his private and family life under Articles 5 and 8 of the Convention. He went on to explain at para. 28 of *MC v Cygnet*:

> "28. Those factors combine to provide the imperative for the First-tier Tribunal to apply the 1983 Act in a way that allows a patient to be discharged if there are means by which the patient's case can appropriately be dealt with under other legislation. The 2005 Act is such legislation. If a patient's case is to be dealt with correctly under the 1983 Act and fairly and justly under the tribunal's rules of procedure, the tribunal is under a duty to find a way that allows both Acts to be applied in a co-ordinated manner."

37. Judge Jacobs explained that if an advance authorisation of a prospective deprivation of liberty had already been given then the tribunal may be able to proceed to a conditional discharge "without more ado", but if there was no advance authorisation there were still at least two possible methods of achieving a successful, lawful and safe transition from the 1983 Act to the 2005 Act regime:

> "*The different hats approach*
>
> 30. If appropriate, the same judge could sit in the Court of Protection and in the First-tier Tribunal to ensure that all decisions could be made that would allow the patient to be conditionally discharged on appropriate conditions and with the benefit of a deprivation of liberty authorisation. This was the suggestion of the Court of Appeal in *M*. The Supreme Court did not deal with this possibility, but nor did it come within the possibilities that the Court expressly said it would not deal with. It was simply silent on the point.
>
> 31. The First-tier Tribunal and Upper Tribunal have been flexible in the way that they exercise their jurisdictions. The two tribunals sat together with the same panel to hear an appeal to the First-tier Tribunal and judicial review proceedings in the Upper Tribunal in *Reed Employment plc v the Commissioners for Her Majesty's Revenue and Customs* [2010] UKFFT 596 (TC). And the same panel of the Upper Tribunal heard an appeal together with a judicial review transferred from the High Court in *Fish Legal and Emily Shirley v Information Commissioner, United Utilities plc, Yorkshire Water Services Ltd, Southern Water Services Ltd and the Secretary of State for the Environment, Food and Rural Affairs* [2015] UKUT 52 (AAC), [2015] AACR 53 at [12]-[13]. The Lands Chamber of the Upper Tribunal has also approved in

> principle the practice of the same judge sitting in the county court at the same time as presiding as a member of a panel of the Property Chamber of the First-tier Tribunal in *Avon Ground Rents Ltd v Child* [2018] UKUT 204 (LC) at [84]. All of these cases are consistent with the suggestion by the Court of Appeal in *M* that the same judge could sit at the same time in the First-tier Tribunal and the Court of Protection in order to exercise both jurisdictions concurrently or separately.
>
> *The ducks in a row approach*
>
> 32. If it is not possible or appropriate for some reason to follow the same hat [sic] approach, it would be a proper use of the tribunal's powers to adjourn, to make a provisional decision or to defer discharge in order to allow the necessary authorisation to be arranged. I discussed these possibilities in *DC v Nottinghamshire Healthcare Trust and the Secretary of State for Justice* [2012] UKUT 92 (AAC). The choice may come to little more than a matter of preference for the tribunal. It may, though, depend on how sure the tribunal is that the mental capacity decision will be put in place and how confident it is of the terms of any such decision (the terms of the care package, for example)."

38. I have considerable sympathy for the First-tier Tribunal having to grapple with what was a very complex matrix of considerations, but Mr Pezzani had made a clear case, supported by evidence, that conditional discharge with a full care package to 24-hour staffed specialist accommodation represented an alternative means of containing the risks that a failure by the Appellant to comply with his prescribed medication might eventuate. It was incumbent on the First-tier Tribunal to address that case and to explain how it came to conclude that the section 72(1)(b) criteria were nonetheless satisfied, and that continued detention represented the least restrictive option for the management of the concerns arising from the Appellant's mental disorder.

39. It appears that the First-tier Tribunal was under the misapprehension that there was no way for it to co-ordinate the 1983 Act proceedings with a 2005 Act authorisation, and it made its decision on the section 72(1)(b) criteria without reference to the possibility that an alternative framework for managing the Appellant was available. That amounted to a material error of law.

40. If I am wrong on that, and the First-tier Tribunal considered the possibility but dismissed it, that still leaves the issue as to the adequacy of its reasons (the second ground of appeal).

41. In *Simetra Global Assets Ltd & Anor v Ikon Finance Ltd & Ors* [2019] EWCA Civ 1413 at para. 46 Males LJ provided a compelling analysis of what amounts to "adequacy" in judicial reasons. He said:

> "46. Without attempting to be comprehensive or prescriptive, not least because it has been said many times that what is required will depend on the nature of the case and that no universal template is possible, I would make four points which appear from the authorities and which are particularly relevant in this case. First, succinctness is as desirable in a judgment as it is in counsel's submissions, but short judgments must be careful judgments. Second, it is not necessary to deal expressly with every point, but a judge must say enough to show that care has been taken and that the evidence as a

> whole has been properly considered. Which points need to be dealt with and which can be omitted itself requires an exercise of judgment. Third, the best way to demonstrate the exercise of the necessary care is to make use of "the building blocks of the reasoned judicial process" by identifying the issues which need to be decided, marshalling (however briefly and without needing to recite every point) the evidence which bears on those issues, and giving reasons why the principally relevant evidence is either accepted or rejected as unreliable. Fourth, and in particular, fairness requires that a judge should deal with apparently compelling evidence, where it exists, which is contrary to the conclusion which he proposes to reach and explain why he does not accept it.
>
> 47. I would not go so far as to say that a judgment that fails to follow these requirements will necessarily be inadequately reasoned, but if these requirements are not followed the reasoning of the judgment will need to be particularly cogent if it is to satisfy the demands of justice. Otherwise there will be a risk that an appellate court will conclude that the judge has "plainly failed to take the evidence into account."

42. Given the importance and centrality of Mr Pezzani's argument that there was a less restrictive alternative to hospital detention, I am satisfied that the FtT Decision's failure to deal expressly with it renders the reasons inadequate. This itself amounts to a material error of law.

43. For these reasons I am satisfied that the FtT Decision involved the making of an error of law which was material.

Disposal

44. Section 12(2) of the Tribunals, Courts and Enforcement Act 2007 gives me a discretion whether to set aside a decision which I have found to involve an error of law.

45. In all the circumstances, the interests of justice require that I exercise my discretion to set aside the decision in this case. Because further facts need to be found I remit the matter to be redetermined by the First-tier Tribunal.

Thomas Church
Judge of the Upper Tribunal

Authorised for issue on

20 September 2023