



UA-2023-000013-HM

**THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)**

**UPPER TRIBUNAL CASE NO: UA-2023-000013-HM
[2023] UKUT 64 (AAC)**

PC v CORNWALL PARTNERSHIP NHS TRUST

Decided without a hearing

Representatives

Claimant	Conroys Solicitors
NHS Trust	Took no part

DECISION OF UPPER TRIBUNAL JUDGE JACOBS

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

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

Reference:	MH/2022/21504
Decision date:	3 November 2022
Hearing:	Remote

As the decision of the First-tier Tribunal 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.

REASONS FOR DECISION

A. The issues

1. I have set the decision of the First-tier Tribunal aside on the ground that it failed to make the necessary findings of fact to justify proceeding in the patient's absence. I explain why the rules on proceeding in the patient's absence are particularly important in the mental health jurisdiction. I also correct the misunderstanding in the First-tier Tribunal's decision to refuse permission to appeal.

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2. The grounds of appeal also criticised the tribunal's conclusion on whether a medical examination was impractical, but I do not need to deal with that issue, as any error will be subsumed by the rehearing.

B. What happened

3. PC was subject to a Community Treatment Order. He was recalled on 19 August 2022 and his case was referred to the First-tier Tribunal on 22 August 2022. His case was listed for 7 October 2022, but the hearing was postponed as the social circumstances report had not been filed. It was relisted for 3 November 2022. The report was not provided until 2 November, the day before the hearing. PC's solicitor applied on that day for the hearing to be postponed, but this was refused by a judge. The hearing took place on 3 November 2022, when the solicitor applied for the hearing to be adjourned. This was refused and the tribunal proceeded in PC's absence.

C. The power to proceed in the patient's absence

4. Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 (SI No 2699) provides for a hearing to proceed in the patient's absence:

39. Hearings in a party's absence

- (1) Subject to paragraph (2), if a party fails to attend a hearing the Tribunal may proceed with the hearing if the Tribunal—
 - (a) is satisfied that the party has been notified of the hearing or that reasonable steps have been taken to notify the party of the hearing; and
 - (b) considers that it is in the interests of justice to proceed with the hearing.
- (2) The Tribunal may not proceed with a hearing that the patient has failed to attend unless the Tribunal is satisfied that—
 - (a) the patient—
 - (i) has decided not to attend the hearing; or
 - (ii) is unable to attend the hearing for reasons of ill health; and
 - (b) an examination under rule 34 (medical examination of the patient)-
 - (i) has been carried out; or
 - (ii) is impractical or unnecessary.

This rule is not limited to patients, but I refer only to a patient being absent as that is what happened in this case.

5. Rule 39 is in two parts. The first part in paragraph (1) is positive. It sets out conditions that allow a tribunal to proceed in the patient's absence. The second part in paragraph (2) is negative. It set out circumstances in which a tribunal must not proceed. The rule uses the same word – 'may' – in both paragraphs, but it has a different meaning in each. In paragraph (1), it authorises the tribunal to proceed without requiring it to do so. In paragraph (2) with the addition of 'not', it is a prohibition. To put it another way, paragraph (2) contains condition precedents that must be satisfied

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before the power in paragraph (1) arises. I come back later to the importance of keeping the paragraphs separate.

6. Paragraph (2) contains two conditions. Both must be satisfied before the power to proceed arises. Paragraph (2)(a) deals with non-attendance. A tribunal may not proceed unless it is satisfied as a matter of fact that either the patient had decided not to attend or was unable to attend for reasons of ill health. If the tribunal is not so satisfied, it must not proceed, regardless of whether the conditions in paragraph (1) are satisfied. Paragraph (2)(b) deals with medical examinations.

D. In this case, the tribunal did not make findings to show that paragraph (2)(a)(i) or (ii) was satisfied

7. The tribunal dealt with the application to adjourn as a preliminary issue. That required it to decide whether it was entitled to proceed in the patient's absence. If it was not, it had no option but to adjourn. The tribunal set out the steps taken to notify the claimant and found that:

We are satisfied that reasonable steps have been taken to notify him of the hearing by the detaining authority, CPN and his solicitor who have all told him by telephone or in writing.

That dealt with rule 39(1)(a). The tribunal then explained why 'it is in the interests of justice to proceed'. That dealt with rule 39(1)(b). I see no error of law in either of those conclusions. So far so good. But the tribunal did not make any finding on rule 39(2)(a)(i) or (ii). On the face of its reasoning, it looks as if it overlooked paragraph (2)(a). Perhaps it thought the answers were self-evident. If it did, they are not self-evident to me.

8. Starting with paragraph (2)(a)(i), the question was: had the patient decided not to attend? He did not notify his solicitor or the tribunal that he had decided not to attend. The issue was whether the tribunal could infer that he had decided not to do so. There was evidence that the patient 'is often very difficult to contact as his engagement is poor. A previous tribunal had been adjourned on three occasions as he did not attend. His contact with services is sporadic and occasional.' But that did not mean that the patient had decided not to attend. It may be that his absence was more to do with a manifestation of his condition rather than a conscious decision. That brings us to paragraph (2)(a)(ii) and the question: was he *unable* to attend for reasons of ill health, such as his mental condition? Again, the tribunal did not analyse that possibility, let alone make a finding.

9. So, the tribunal did not make a finding to show that either paragraph (2)(a)(i) or (ii) was satisfied and it was not self-evident from what it did say that one or other of them must be satisfied. In those circumstances, paragraph (2) was not satisfied, regardless of any finding that might be made under paragraph (2)(b). Proceeding in the patient's absence was an error of law.

E. The refusal of permission by the First-tier Tribunal judge

10. I now deal with the reasons given by the judge who refused permission to appeal. I am not attributing those reasons to the panel that decided the appeal. Nor am I saying that any defects in that judge's reasons permit me to set aside the tribunal's decision. An appeal to the Upper Tribunal lies only against the decision of the First-tier Tribunal

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on the reference. The reasons given for refusing permission are not part of that decision. The Upper Tribunal does not review those reasons: *CIS/4772/2000* at [2]-[11]. Nor may they be used to show that a point of law arises from the decision: *Albion Water Ltd v Dŵr Cymru Cyf* [2009] 2 All ER 279 at [67].

11. The judge who refused permission set out the text of rule 39, but only as it was originally made in 2008, rather than the version with the new paragraph (2) that was substituted in 2014. I am sure that this mistake did not affect the judge's reasoning, but it is always good to start with the correct law.

12. The judge wrote that he was satisfied the tribunal's reasons

address the legal criteria correctly. They record that [the patient] had been notified of the hearing by his legal representatives and his care coordinator and were entitled to find that the requirements of rule 39 had been met. There is no requirement for proof that he [the patient] was aware of the hearing date, simply that on the balance of probabilities that he has been notified of it, or that reasonable steps had been taken to do so.

13. That seems to me to confuse rule 39(1)(a) and 39(2)(a). The former is about notification or service. That does not require actual knowledge, as the reference to 'reasonable steps' shows. Actual knowledge may be irrelevant under paragraph (2)(a)(i). It is possible for a patient to say: 'I am not coming to the hearing, regardless of when and where it will take place.' But knowledge of the hearing may also be relevant as part of the factual foundation for an inference that the patient has decided not to attend, but it is not of itself a sufficient foundation for that finding or a substitute for that finding.

F. The importance of a hearing in mental health cases

14. The general principle in all chambers of both the First-tier Tribunal and the Upper Tribunal is that a party has a right to a hearing and is entitled to attend that hearing. The rules (rule 1(3) in the rules for the Health, Education and Social Care Chamber) provide that this 'means an oral hearing'. They also confer power on a tribunal to proceed without a hearing and to proceed with a hearing in the absence of a party. For mental health cases, those powers are more restricted. So rule 35(1) provides the default rule that the tribunal must hold a hearing in a mental health case; rule 35(3) then allows a patient to opt out of a hearing of their reference. Rule 39 contains additional restrictions in paragraph (2). The reason for the restrictions in rules 35(3) and 29(2) is to be found in the special importance of safeguards when a patient's liability to be detained is in issue. A tribunal must always operate within its rules of procedure and that is particularly important when liberty is at stake. This is why I have dealt not only with the tribunal's reasoning but also with the reasoning in the refusal of permission.

**Authorised for issue
on 02 March 2023**

**Edward Jacobs
Upper Tribunal Judge**