**HM/2611/2012**

# 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.

As the decision of the First-tier Tribunal (made after a hearing on 23 March 2012 under reference MP/2011/15317) 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 issue

1. There are two issues in this case. One concerns the adequacy of the tribunal's reasons; the other concerns the interpretation and operation of section 74 of the Mental Health Act 1983, which I refer to as the Act. I have set the decision aside for inadequacy of reasons and decided that the tribunal correctly applied section 74. I have set out my analysis of section 74, as it is of general application and I heard argument from counsel.

### B. The parties

2. This appeal is brought by Mr C, who is a mental patient. He is detained by the first respondent. The Secretary of State for Justice is the second respondent.

### C. Background

3. Mr C was born in 1969 and was known to psychiatric services from 1990. While detained voluntarily in 1995 he began a relationship with a fellow patient. They split up and she formed a new relationship. In April 1996, he spent five days in hospital following suicidal ideation. On 2 May 1996, two days after his release, he killed his former girlfriend and her new boyfriend by stabbing them 90 times. He was convicted on two counts of murder at a retrial in November 1998. The jury rejected a defence of diminished responsibility. In August 2000, he was transferred to Broadmoor Hospital pursuant to a direction of the Secretary of State under sections 47 and 49 of the Act. That made him a restricted patient under section 79 of the Act. He was transferred to his present hospital in 2009. While there, he has had unescorted leave in the grounds and escorted leave in the community, all without incident. At the time of the hearing before the First-tier Tribunal, he had recently been transferred to a low security ward.

## D. The application to the First-tier Tribunal

4. On 1 July 2011, Mr C applied to the First-tier Tribunal under section 70 of the Act. He was examined by the medical member on the day of the hearing, 23 March 2012. The tribunal decided:

> If the patient had been subject to a Restriction Order under Section 41, the patient would NOT have been entitled to be discharged from liability to be detained in hospital for medical treatment.

5. The judge provided written reasons for that decision. The first paragraphs set out a history. The next two paragraphs deal with diagnosis, which was agreed. The judge then summarised the cases for continued detention and entitlement to discharge, and Mr C's oral evidence. Finally, the judge gave the tribunal's conclusions. I need to quote only some of those reasons.

6. As part of the case for Mr C, his solicitor had argued that any discharge would be subject to conditions imposed by the Parole Board, which would diminish any risk he might represent. The tribunal rejected that argument:

> The hypothesis upon which s.74(1)(a) requires the tribunal to proceed is that the applicant is subject to a restriction order, so that conditional discharge would envisage the discharge being subject only to such conditions as the tribunal could properly impose under s.73(4).

7. On discharge, the tribunal accepted the view of the responsible clinician:

> We prefer and accept the evidence, opinion and recommendations of [the responsible clinician], supported by the other mental health professionals whose reports were before us. In our view Mr C… needs further psychological work, and also to be tested with exposure to an extensive programme of unescorted community leave before it could be concluded that he is safe to return to living in the community, even subject to conditions.

The case for Mr C was contained in the evidence of Dr Kahtan. The tribunal made two comments on his evidence. First, it rejected Dr Kahtan's opinion that there was no link between Mr C's mental disorder and the murders that he had committed. It considered that this opinion was (i) 'counter-intuitive', (ii) contrary to the psychiatric evidence supporting the defence of diminished responsibility, and (iii) inconsistent with Dr Kahtan's acceptance that Mr C's disorder had previously justified detention. Second:

> we also have regard to the fact that the [responsible clinician] is and has been the treating doctor and is, by virtue of that fact, better placed to assess the benefits that Mr C… has received, and is likely to receive, from appropriate treatment, as well as to assess the risks that, if discharged, he would present.

## E. The appeal to the Upper Tribunal

8. The First-tier Tribunal gave Mr C permission to appeal to the Upper Tribunal. I directed an oral hearing, which took place before me on 3 December

2012. Mr Roger Pezzani of counsel appeared for Mr C. Ms Sonia Hayes of counsel appeared for the second respondent. I am grateful to them for their written and oral submissions. The Secretary of State was not represented.

## F. Section 74

9. This section governs the tribunal's powers when a person has been transferred from prison to a hospital.

> **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 direction 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.
>
> (2) If in the case of a patient not falling within subsection (4) below—
>
> (a) the tribunal notifies the Secretary of State that the patient would be entitled to be absolutely or conditionally discharged; and
>
> (b) within the period of 90 days beginning with the date of that notification the Secretary of State gives notice to the tribunal that the patient may be so discharged,
>
> the tribunal shall direct the absolute or, as the case may be, the conditional discharge of the patient.
>
> (3) Where a patient continues to be liable to be detained in a hospital at the end of the period referred to in subsection (2)(b) above because the Secretary of State has not given the notice there mentioned, the managers of the hospital shall, unless the tribunal has made a recommendation under subsection (1)(b) above, transfer the patient to a prison or other institution in which he might have been detained if he had not been removed to hospital, there to be dealt with as if he had not been so removed.
>
> (4) If, in the case of a patient who is subject to a transfer direction under section 48 above, the tribunal notifies the Secretary of State that the patient would be entitled to be absolutely or conditionally discharged, the Secretary of State shall, unless the tribunal has made a recommendation under subsection (1)(b) above, by warrant direct that the patient be remitted to a prison or other institution in which he might have been detained if he had not been removed to hospital, there to be dealt with as if he had not been so removed.

(5) Where a patient is transferred or remitted under subsection (3) or (4) above the relevant hospital direction and the limitation direction or, as the case may be, the relevant transfer direction and the restriction direction shall cease to have effect on his arrival in the prison or other institution.

(5A) Where the tribunal has made a recommendation under subsection (1)(b) above in the case of a patient who is subject to a restriction direction or a limitation direction—

(a) the fact that the restriction direction or limitation direction remains in force does not prevent the making of any application or reference to the Parole Board by or in respect of him or the exercise by him of any power to require the Secretary of State to refer his case to the Parole Board, and

(b) if the Parole Board make a direction or recommendation by virtue of which the patient would become entitled to be released (whether unconditionally or on licence) from any prison or other institution in which he might have been detained if he had not been removed to hospital, the restriction direction or limitation direction shall cease to have effect at the time when he would become entitled to be so released.

(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 relevant hospital direction and the limitation direction or, as the case may be, the transfer direction and the restriction direction.

(7) This section is without prejudice to sections 50 to 53 above in their application to patients who are not discharged under this section.

## G. Analysis – adequate reasons

10. Mr Pezzani argued that the tribunal's reasons were inadequate on two grounds. Ms Hayes argued that the tribunal's decision was reasoned, rational and could be understood. She presented a detailed analysis of the evidence to show that its conclusions were referable to the evidence before it. I accept that the tribunal's reasons were inadequate on one of Mr Pezzani's grounds. That renders it unnecessary to deal with his other ground.

11. Ms Hayes' argument convinced me that it was permissible for the tribunal to make the decision it did on the evidence before it. Mr Pezzani accepted that that was the case. He argued that what she was doing was working backwards from the tribunal's decision and extrapolating on how it might have come to that conclusion. I might have accepted Ms Hayes' argument if the tribunal had only had the written report of Dr Kahtan. She was right that he had not been unequivocally in support of discharge in his written evidence. However, the judge recorded his unequivocal oral evidence that 'he would be seeking a recommendation for conditional discharge.' The result was that there was a conflict in the medical evidence that the tribunal had to resolve, which it did by

rejecting his evidence. What the tribunal then had to do was to explain why. It said that the responsible clinician had more experience of Mr C than did Dr Kahtan. That is not of itself a reason for preferring evidence. It is the background to almost every case and it does not always follow that greater knowledge means greater insight. The tribunal should have explained what it was in the responsible clinician's experience that made her view preferable. The tribunal also commented on Dr Kahtan's view on the link between the index offences and Mr C's mental state. I do not understand why this should necessarily undermine the doctor's view on discharge. The issue for the tribunal was the risk at the time of the hearing. Any connection between his mental disorder and the murders was merely evidential on that issue, not decisive.

## H. Analysis – section 74

12. Mr Pezzani argued that the tribunal had misdirected itself and had failed to take account of the practical reality of likely Parole Board conditions when deciding whether detention was necessary. Ms Hayes argued that the tribunal had acted correctly within the limits of its jurisdiction. I accept Ms Hayes' argument.

13. The First-tier Tribunal is a statutory tribunal created under section 3(1) of the Tribunals, Courts and Enforcement Act 2007. As such, it has only the jurisdiction conferred on it by statute: *Evans v Bartlam* [1937] AC 473 at 480. The issue is: what is the scope of the tribunal's jurisdiction under section 74 of the Act.

14. There are broadly two regimes for those who have committed offences and are detained in hospital as a result of having a mental disorder. One regime is the exclusive preserve of the mental health authorities – the Secretary of State for Justice, the responsible clinician and the tribunal. A patient is subject to this regime if the criminal court makes a hospital order and, perhaps, a restriction order. The patient is not subject to criminal sanction, so on recovery there is only one issue - discharge from the scope of the Mental Health Act. In exercising its jurisdiction, the tribunal's role is as a decision-maker. The other regime is the joint preserve of the mental health authorities and the Parole Board. A patient is subject to this regime if, while in prison, the Secretary of State for Justice directs transfer to a mental hospital. The patient is subject to criminal sanction, so on recovery there are two issues – release, which is for the Parole Board, and discharge from the scope of the Act, which is for the mental health authorities. In exercising its jurisdiction, the tribunal's role is only advisory. A recommendation for a conditional or absolute discharge means only discharge from the scope of the Act. In practice, it takes effect as transfer back to prison, unless the Parole Board authorises release. Section 74(1)(b) allows a tribunal to specify that the patient remain detained if the patient is not conditionally discharged as recommended.

15. Mr Pezzani cited *R (Abu-Rideh) v Mental Health Review Tribunal and the Secretary of State for the Home Department* [2004] EWHC 1999 (Admin). The case concerned a foreign national who was detained as a suspected terrorist. He was transferred to Broadmoor Hospital under section 48 of the Act. The Mental

Health Review Tribunal refused to recommend discharge as this would involve a return to prison where his health would deteriorate. He sought a judicial review of this decision. Counsel for the Tribunal, Miss Grey, argued that the tribunal was not limited to considering the possibility of discharge into the community, which would not be permissible under the terrorist legislation. She argued (at [39]) that the tribunal 'had to face up to that practical reality.' Gage J refused the application, saying:

> 45. Turning to Mr Bowen's second reason, namely that the phrase "restriction order" used in section 74(1)(a) must mean that the Tribunal's considers discharge into the community: I do not accept this as correct. It seems to me much more likely, as Miss Grey submitted, that it is a statutory device referring back to the criteria set out in the section 73. I do not accept that that phrase means that the Tribunal can only consider the alternative to discharge into the community. In this connection it is convenient to deal with Mr Bowen's submission on the meaning of discharge in section 74(1)(a) and (b). I prefer Miss Grey's submission that discharge here refers to no more than discharge from hospital. It does not exclude consideration of discharge back to prison.

I am not technically bound to follow that analysis, but I respectfully agree with it.

16. The tribunal in this case decided that 'conditional discharge would envisage the discharge being subject only to such conditions as the tribunal could properly impose under s.73(4).' That is precisely correct. The tribunal's jurisdiction is limited to issues of discharge. It has no power to impose conditions as to release, which is the exclusive preserve of the Parole Board. The tribunal was right to refuse to take account of the conditions that might be imposed by the Parole Board. It limited itself to the conditions that could be imposed under section 73. That was the correct analysis. It takes account of the respective roles of the mental health and Parole Board. The tribunal had to limit itself to discharge from the scope of the Act. If it recommended discharge, it was then a matter for the Board to decide what action to take, if any, in respect of release. It would have been wrong to take account of possible Board conditions. That would have been to trespass into the proper role of the Board, to anticipate its decisions, and to speculate without evidence on the conditions that might be imposed if it decided on release.

17. I accept that a tribunal has to take account of practical reality, as decided by *Abu-Rideh*. However, in that case the practical reality was known to the tribunal. The claimant could not be released. He could be discharged, but that would mean a return to prison, which the tribunal found would be contrary to his mental health. In contrast, the tribunal in this case did not know what the Parole Board would do. It did not know whether it would agree to Mr C's release. And if it did, the tribunal did not know what conditions might be imposed. What those conditions might be if the Board were to authorise release was not part of the practical reality; it was speculation. The only practical reality known to the

tribunal was that, if it recommended discharge, Mr C would be transferred back to prison under section 74(4).

## I. The effect of my decision

18. There will now be a `of the First-tier Tribunal, which will decide Mr C's application on the evidence before it and as at the time of the hearing.

**Signed on original** **Edward Jacobs**
**on 4 December 2012** **Upper Tribunal Judge**

**Corrected on 19 December 2012**