Case No: HMW/1678/2015

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Before UPPER TRIBUNAL JUDGE KNOWLES QC

DECISION

Save for the cover sheet, this decision may be made public [rule 14(7) of the Tribunal Procedure (Upper Tribunal) Rules 2008]. That sheet is not formally part of this decision and identifies the patient by name.

This decision is given under sections 12(2)(a), 12(2)(b)(i) and 12(3) of the Tribunals, Courts and Enforcement Act 2007.

The decision of the Mental Health Review Tribunal for Wales ["the tribunal"] on 12 February 2015 involved the making of an error on a point of law and that decision is set aside. The matter is remitted to the Mental Health Review Tribunal for Wales for rehearing before a differently constituted tribunal.

I invite the tribunal to consider using its powers to transfer this case to the First-tier Tribunal (Mental Health) of the Health, Education and Social Care Chamber as the patient is presently detained in hospital in England.

In advance of the rehearing, updated reports from the patient's Responsible Clinician, the nursing staff and the patient's care co-ordinator are to be obtained. The new tribunal must consider all aspects of the case, both fact and law, afresh and in accordance with the guidance set out in this decision.

REASONS FOR DECISION

The Issue in these Appeals

1. The issue in this appeal was whether the appropriate treatment test in section 72(1)(b)(iia) of the Mental Health Act 1983 ["the Act"] was satisfied with respect to this patient at the time of his tribunal hearing on 12 February 2015. The patient was detained in hospital pursuant to a notional section 37 of the Act and had been so detained in the same hospital since 28 December 2007.

2. I consider the content of reports to the Mental Health Review Tribunal in Wales and suggest that the Practice Direction dated 28 October 2013 issued by the Senior President of Tribunals entitled "First-tier Tribunal: Health Education and Social Care Chamber: Statements and Reports in Mental Health Cases" should be adopted by the Mental Health Review Tribunal for Wales. I allow the appeal for inadequacy of reasoning and because the tribunal materially erred in law by finding that the appropriate treatment test was satisfied by treatment at a hospital other than the one in which the patient was detained. I reject the patient's submission that, on the evidence available to it about the availability of appropriate treatment, the only course was for the tribunal to discharge the patient.

3. I allow the appeal and set aside the tribunal's decision. I remit the case for rehearing to the Mental Health Review Tribunal for Wales and invite it to consider transferring the case to the First-tier Tribunal (Health, Education and Social Care Chamber) as the patient is now detained in a hospital in England.

Factual Background

4. The patient has a diagnosis of dissocial personality disorder and has a long history of involvement with psychiatric services including a number of compulsory admissions to hospital under the Act. He had a substantial forensic history with 34 convictions for offences including theft, robbery, and assault and a long history of drug misuse. Whilst in the community, the patient was non-compliant with psychiatric services and made several attempts on his own life.

5. Since 28 December 2007, the patient had been detained in Llanarth Court Hospital under a notional section 37 order. A tribunal on 14 March 2014 refused to discharge the patient in circumstances where he disputed that appropriate treatment was available to him in hospital.

6. The issue of appropriate treatment was once more central to the patient's case for discharge before the tribunal on 12 February 2015. The tribunal had lengthy reports from the patient's Responsible Clinician [RC] and from two social workers but no report from any nursing staff. The RC's report concluded that the patient had not benefited from psychiatric treatment, noting that (a) he had been in this hospital since 2007 and (b) that attempts to treat him had been made in a variety of settings since 1995. Various treatments had been tried but the patient had not improved. The RC stated that the patient did not wish to have further treatment and that the hospital had no treatment to offer him [page 67]. The RC recommended transfer to another hospital as soon as possible as "*there is nothing further that can be offered at Llanarth Court but it is not possible to discharge him because a community package cannot be formulated to meet his needs. It may be that another clinical team at another hospital would have other ideas for his treatment and*

rehabilitation" [page 67]. Both social work reports were absolutely clear that the patient could not be managed in the community where he would be a risk to himself and to others. Neither of those two reports supported discharge from compulsory detention in hospital.

7. At the tribunal hearing the RC was clear that there was no appropriate treatment available for the patient either at Llanarth Court or at Aderyn, a rehabilitation hospital run by Llanarth Court but separate from it. A variety of treatments had been tried but nothing had worked. The ward environment was unsuitable and the RC stated that it could be argued that keeping the patient in hospital was detrimental to his mental state. He confirmed that the two other units to which the patient had been referred had both concluded that (a) there was no appropriate treatment available for the patient in hospital and (b) he ought to be discharged into the community. When asked about the options available, the RC confirmed that he would prefer the patient either to be discharged or moved to another hospital such as Aderyn. He stated that it would be irresponsible to discharge the patient into the community without a supportive after-care plan.

8. The nurse who gave evidence did not know the patient well but described the patient's fluctuating mental state and said he might manage in the community with a robust care package. The social worker said that, if discharged, there was nowhere for the patient to go. She thought he would be a good candidate for an Assertive Outreach Team but such a team was not available in his home area. She explained that a bespoke package in the community had been explored. Nothing had come of this as the patient had not moved from a medium secure setting to a low secure setting thereby demonstrating that he could/would co-operate with services in the community.

9. The patient told the tribunal that he would be willing to go to Aderyn and that medication had definitely helped him.

10. Through his solicitor, the patient sought discharge from hospital and the tribunal was referred to copies of the leading authorities on the issue of appropriate treatment. However the tribunal refused to discharge the patient and maintained the section, concluding that appropriate treatment was available to the patient at Aderyn. Without treatment in hospital, it was likely that the patient would disengage from psychiatric services with a consequential deterioration in his mental state. He would be a significant risk to himself and the public at large.

<u>The Appeal before the Upper Tribunal</u>

11. The patient's solicitor applied to the Mental Health Tribunal for Wales for permission to appeal and on 21 April 2015 permission to appeal was granted.

12. The Respondent has not participated in this appeal. On 9 June 2015 the patient was transferred to Ashworth Hospital on Merseyside and, in those circumstances, the Respondent decided that it was not cost effective to participate in the appeal hearing before me. In order that I might have assistance from more than one side with the legal issues in this case, I invited submissions from the Minister for Health and Social Services in the Welsh Assembly Government and his participation in the hearing before me in Cardiff on 12 November 2015 pursuant to rule 33 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

13. I held an oral hearing in Cardiff on 12 November 2015 at which Mr Payne, the patient's solicitor appeared. I am very grateful for his helpful written and oral submissions. Though the Minister provided helpful written submissions, he declined my invitation to appear at the oral hearing of this appeal. As he is not a party to these proceedings, I refer to him as "*the Welsh Minister*" in this decision.

14. In determining this appeal, I have had the benefit of all the material available to the First-tier Tribunal including the decision of the tribunal in March 2014. I have seen the notes of evidence for the hearing on 12 February 2015 recorded by the tribunal judge and those made by the patient's solicitor. I have also received detailed written submissions on behalf of the patient and from the Welsh Minister. Mr Payne also provided a further document on the morning of the hearing responding to some of the submissions from the Welsh minister together with a short email from the patient's RC at the time of the February 2015 tribunal hearing.

15. The notes of evidence from the tribunal judge conflict with those of the patient's representative. Where they do so, I prefer the notes made by the tribunal judge as those made by the patient's solicitor were either made after the hearing itself and those made by him at the hearing were limited as, being engaged in cross-examination and presenting the patient's case, the patient's solicitor was unable to record his questioning to the witnesses and the answers they gave.

16. I was invited to offer guidance on the issue of appropriate treatment. There is already a great deal of established case law on this issue and I doubt whether the contents of this decision add greatly to it. If my summary of the law and my assessment of the issues in this case are of assistance to tribunals, then this decision may, after all, have some significance.

The Tribunal's Decision

17. The reasons for the tribunal's decision comprised 20 paragraphs, of which the first 12 summarised the patient's past history as well as highlighting various incidents during his detention at Llanarth Court. Paragraph 13 stated as follows:

"*Although suffering from personality disorder, with significant risks to self and others, the issue of appropriate treatment and its availability has been raised. Alternative secure placements have assessed him and declined to accept him. It is agreed that no community placement is available that could meet his needs, and we were advised that a plan could not be formulated to meet his needs in the community*".

18. The tribunal went on to state that "*we find that there is appropriate treatment available within a hospital setting*" and made reference to the patient's oral evidence that he would accept rehabilitative treatment which was available at Aderyn. It stated that this option was being actively considered by the RC. Though not entirely clear, I read this paragraph as the tribunal concluding that appropriate treatment would be available for the patient at Aderyn. My interpretation of this paragraph is shared by the patient and by the Welsh Minister.

19. The remainder of the tribunal's reasons elaborate upon its conclusion that appropriate treatment was available for the patient. The tribunal referred to psychological treatment - which was appropriate in the past – having to be suspended due to the patient's disruptive behaviour. The tribunal stated that: "*...it is possible that when in a more co-operative phase, this element of treatment can be reinstated...*" It also made reference to the patient's fluctuating mental state which needed monitoring so that changes could be responded to quickly by prescribing or giving PRN medication (medicine to be taken as required). It said this was only possible within a hospital setting.

20. The tribunal acknowledged the unsuccessful attempts to engage the patient in drug and alcohol therapy and concluded that "*this still needed to be addressed*". It went on to state in paragraph 18 that: "*...currently it is not considered appropriate to test him on unescorted leave in the community. His psychosis becomes worse when stressed and he is currently nursed in an environment able to alleviate and respond appropriately when stressed. This requires skilled nursing and management and at times PRN which is only available in hospital*".

21. The tribunal concluded that "*appropriate treatment is required and is available in hospital*" and that, without it, the patient would disengage from psychiatric services and his mental state would deteriorate. He would abuse alcohol and illicit substances and be a significant risk to himself and the public at large.

The Grounds of Appeal

22. I summarise the main grounds of appeal.

23. First it is submitted that the tribunal erred in law by finding that appropriate treatment was available for the patient at Aderyn. Such treatment had to be available at the current hospital and not another unit. Further the tribunal erred in law by making a finding contrary to the

evidence which was that there was no appropriate treatment available either at Llanarth Court or Aderyn. The tribunal should have discharged the patient on the evidence available to it about the availability of appropriate treatment.

24. Second, the tribunal erred by making findings which were not supported by the evidence. For example, with respect to psychological treatment, the tribunal found that this type of treatment could be reinstated if the patient were in a more co-operative phase.

25. Third, the tribunal provided inadequate reasons for its decision. It failed to set out or grapple with any of the submissions made by the patient's representative about appropriate treatment and failed to mention the written and oral evidence of the witnesses, especially the RC. The tribunal failed to explain what evidence it accepted or rejected when reaching its conclusions.

26. The submissions made by the Welsh Minister concede that the tribunal can be criticised for making insufficient findings of fact to support its reasons and erred in law by determining the appropriate treatment test by reference to Aderyn rather than to the detaining hospital, Llanarth Court.

The Relevant Law and Case Law

27. References to The Mental Health Act 1983: Code of Practice for Wales (2008) ["the Welsh Code"] will identify where that Code differs significantly from The Mental Health Act 1983: Code of Practice for England (2008) ["the English Code"].

28. Section 72(1)(b) of the Act (as amended by the Mental Health Act 2007) states that:
"Where application is made to the appropriate tribunal by or in respect of a patient who is liable to be detained under this Act..., 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 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..."

29. Section 145(4) of the Act defines what is meant by medical treatment in the following terms:
"Any reference in this Act to medical treatment, in relation to mental disorder, shall be construed as a reference to medical treatment the purpose of which is to alleviate or prevent a worsening of the disorder or one or more of its symptoms or manifestations".

Section 145(1) states that in the Act, unless the context otherwise requires, *"medical treatment includes nursing, psychological intervention and specialist mental health habilitation, rehabilitation and care"*. That section is to be read subject to the wording in section 145(4).

30. Section 3(2) of the Act also makes reference to *"appropriate medical treatment"* as part of the grounds which must be satisfied on an application to admit a patient to hospital compulsorily for treatment. Section 3(4) reads as follows:
"In this Act, references to appropriate medical treatment, in relation to a person suffering from mental disorder, are references to medical treatment which is appropriate in his case taking into account the nature and degree of the mental disorder and all the other circumstances of the case".
Thus the "*appropriate medical treatment*" test in section 72(1)(b)(iia) must also be read in the light of section 3(4).

31. I observe that the definition of medical treatment in the Act is inclusive and not exhaustive. It includes interventions which are not ordinarily considered to be "medical". Indeed the provision of nursing care can constitute the entirety of a patient's medical treatment. The definition does not address the willingness of a patient to accept treatment.

32. The test set out in section 145(4) is one of an intention to bring about therapeutic benefit rather than the likelihood of achieving such benefit. In paragraph 34 of MD v Nottinghamshire Health Care NHS Trust [2010] UKUT 59 (AAC), UT Judge Jacobs said:
"Section 145(4) provides that it is sufficient if the treatment is for the purpose of preventing a worsening of the symptoms or manifestations. That envisages that the treatment required may not reduce risk. It is also sufficient if it will alleviate but one of the symptoms or manifestations, regardless of the impact on the risk posed by the patient."

33. The Welsh Code states that the purpose of treatment is not the same as likelihood as medical treatment may be for the purpose of alleviating or preventing a worsening of mental disorder even though it cannot be shown in advance that any particular effect is likely to be achieved [paragraph 4.4]. The Welsh Code elaborates on what is meant by "*treatment*" in paragraph 4.6:
"Even if particular mental disorders are likely to persist or get worse despite treatment, there may well be a range of interventions which would represent appropriate medical treatment for the person living with them. It should never be assumed that any disorders are inherently or inevitably untreatable. Nor should it be assumed that likely difficulties in achieving long term and sustainable change in a person's underlying disorder make medical treatment to help manage their condition and the behaviours arising from it either inappropriate or unnecessary."

34. Treatment must actually be available to the patient [Welsh Code, paragraph 4.12] though it need not be the most appropriate treatment

that could be provided [Welsh Code, paragraph 4.11]. What constitutes appropriate treatment for the patient is a matter of clinical judgment which may change over time [Welsh Code, paragraph 4.11]. Paragraph 4.14 of the Welsh Code states:
"Treatment which aimed merely to prevent a disorder worsening is unlikely, in general, to be appropriate in cases where standard treatment approaches would aim and be expected significantly to alleviate the patient's condition. However there may be some patients with persistent mental disorders for whom management of the undesirable effects of their disorder is all that can realistically be hoped for."

35. In respect of patients with a personality disorder, paragraph 35.11 of the English Code observes that:
"People with personality disorders may take time to engage and develop motivation for [long-term] treatment. But even patients who are not engaged in that kind of treatment may need other forms of treatment, including nurse and specialist care, to manage the continuing risks posed by their disorders and this may constitute appropriate medical treatment."
The Welsh Code does not contain a paragraph equivalent to paragraph 35.11 of the English Code.

36. The risk posed by a patient can be relevant as to whether the appropriate treatment test is satisfied. In MD v Mersey Care NHS Trust [2013] UKUT 127 (AAC) UT Judge Jacobs said at paragraph 9:
"The treatment that is appropriate for a particular patient is determined by the patient's medical condition and the risk a patient presents is a consequence or feature of that condition. Risk is as relevant to treatment as any other feature of the disorder."

37. Even if the treatment is both appropriate and available, it must satisfy the necessity test set out in section 72(1)(b)(ii).

38. A patient's engagement with treatment was considered by UT Jacobs in L-H v Partnerships in Care and the Secretary of State [2013] UKUT 500 (AAC) where he held that:
    (a) Treatment that is otherwise available and appropriate does not cease to be so merely because the patient refuses to engage or co-operate with it (paragraph 18).
    (b) A patient's refusal to engage with therapy is not decisive, although it is potentially a relevant factor that has to be taken into consideration (paragraph 26).
    (c) Although s.145 defines treatment widely, there is a common thread that runs through all the elements: its purpose must be to confer some benefit on the patient, if only to the extent of preventing the patient's condition getting worse. However the definition is so broad that it may not be difficult to identify something that will, at the least, prevent a worsening (paragraphs 24 and 40).
    (d) Precision of fact-finding focused on the terms of the definition and the particular treatment that the hospital says is available will help to

ensure that patients are only detained in accordance with the legislation (paragraph 38).

(e) If the tribunal finds that the patient is not prepared to engage and will never be brought to engage, that will not necessarily be decisive. This is because the definition includes much that does not require the patient's engagement in formal therapy (paragraph 42).

39. Finally, it may be that medical treatment is still available for a patient but, because of the circumstances of a particular case, it is no longer appropriate. There has been no reported case where a tribunal has found that a patient's treatment in hospital constituted mere containment.

Some Preliminary Observations: Reports for the Tribunal

40. This case would have been a difficult one for any tribunal to determine but the tribunal's task was rendered more difficult than it might otherwise have been by (a) the absence of written evidence from a key professional, namely the patient's named nurse and (b) the absence of written evidence focussed on matters relevant to the criteria for detention in s.72(1). I also note that the issues in this case are ones which are not uncommon for tribunals.

41. Where a patient is detained in hospital, nursing staff have a great deal more contact with a patient than either doctors or social workers and their written and oral evidence can be crucial for a tribunal's understanding of the patient's circumstances. It is highly desirable in my view that the patient's named nurse should attend the tribunal hearing, but this is not always possible because of shift patterns and leave. A report by the named nurse should make good the deficit in part if that person cannot attend the tribunal hearing itself. In this case not only was there no nursing report but also the nurse who attended the tribunal hearing was neither the patient's named nurse nor had in-depth knowledge of the patient, having only worked with him for four weeks.

42. The other reports before the tribunal had limitations. Though the RC's report was 24 pages long, his opinion was confined to about a page at the report's conclusion. It did not address in clear terms the risks to the patient and to others if he were to be discharged though I infer from the RC's comment, that it was not possible to discharge the patient as a community package could not be formulated to meet his needs, that such risks would have existed had the tribunal been minded to order discharge. The social work reports – one from a hospital social worker and the other from a local authority social worker based in the community – failed to address in sufficient detail (a) whether the provision of medical treatment in hospital was justified or necessary in the interests of the patient's health or safety or for the protection of others and (b) whether the patient, if discharged from hospital, would be likely to act in a manner dangerous to themselves or others.

43. On 28 October 2013 the Senior President of Tribunals issued a Practice Direction on Statements and Reports in Mental Health Cases before the First-tier Tribunal in the Health, Education and Social Care Chamber. This Practice Direction contains valuable instruction on the contents of reports from RCs, nursing staff and those responsible for preparing social circumstances reports (often but not exclusively, social workers). It is couched in mandatory terms such that the Responsible Authority for the patient "*must*" send to the tribunal the documents containing the information specified in the Practice Direction. Though the Practice Direction applies to England, this is not the case in Wales.

44. I consider that it would be desirable for the Mental Health Review Tribunal for Wales to adopt the contents of the above Practice Direction to assist tribunals sitting in Wales. At present, the Schedule to The Mental Health Review Tribunal for Wales Rules 2008 stipulates the reports which should be provided to Welsh tribunals but provides little useful guidance on the content of such reports. There is equally no useful guidance in the Welsh Code on the content of reports for tribunals.

45. Had the full complement of reports been available to the tribunal hearing this case and had those reports contained the information required by the above Practice Direction, I am of the view that the tribunal would have been greatly assisted in what was a difficult case.

The First Ground of Appeal: Appropriate Medical Treatment

46. The patient submitted that this was a unique case because the RC argued that there was no appropriate treatment available to the patient in hospital. In those circumstances the patient submitted that the tribunal was obliged to accept that evidence and should have discharged the patient. I disagree. The tribunal is not obliged to accept the evidence of any witness however important that witness might be. Instead the tribunal is required to evaluate the evidence and reach its own conclusions.

47. Turning to the tribunal's conclusion that appropriate treatment was available to the patient because he said he would go to Aderyn, I am satisfied that, in so concluding, the tribunal materially erred in law. A tribunal only has jurisdiction to determine the appropriate treatment test with regard to the treatment that a patient is receiving at the detaining hospital. In this case that was Llanarth Court and not Aderyn. Though s.72(1)(b)(i) uses the phrase "*liable to be detained in a hospital for medical treatment*", the hospital concerned is not any hospital but the hospital where the patient is presently detained. That seems to me the clear meaning of the words "*in a hospital*" when those words are read alongside the powers of the tribunal to recommend "*transfer to another hospital*" pursuant to s.72(3)(a). Otherwise, "*appropriate medical treatment*" would mean medical treatment theoretically available to a patient elsewhere and, in those circumstances, would be a test capable

of being satisfied without exception for each and every patient detained under the Act.

48. On the basis of the above error of law, I allow this appeal.

49. Finally, the patient submitted that, on the evidence before it, the tribunal's findings that appropriate treatment was available at Llanarth Court flew in the face of the written and oral evidence. On the evidence available, the patient said that the tribunal should have discharged him.

50. Looking at the evidence as a whole, I am not convinced that there was no evidence of appropriate treatment being provided to the patient. In coming to that conclusion, I bear in mind the tests in s.145(4) and s.3(4) and I take into account that the tribunal failed to make sufficient findings of fact to support its reasoning on this issue.

51. First, the patient appeared to be prescribed Venlafaxine, a drug used to treat depression and anxiety disorders [pages 65-66]. He was also prescribed Haloperidol and Lorazepam in 2015 and the RC told the tribunal that the medication prescribed was for relief [presumably, of the patient's symptoms or manifestations of his mental disorder] [page 166].

52. Second, the effects of the patient's mental disorder were being managed on the ward by nursing staff even though that meant the patient was spending long periods in seclusion. The nurse evidence was that the patient responded to firm boundaries and that his mental state fluctuated [page 167]. The nurse expressed doubt that much positive progress was being made ["*I don't think we are doing a lot for him*"] but this patient may have fallen into the category described in paragraph 4.14 of the Welsh Code, namely the patient with persistent mental disorder for whom the management of the undesirable effects of their disorder is all that can realistically be hoped for.

53. Third, and despite the RC's opinion that appropriate treatment was not available in Aderyn, the option of a transfer to Aderyn was clearly available to this patient given (a) his stated willingness to move there and (b) the social work evidence about the reasons why it was impossible to create a bespoke community package. I note the RC's evidence that he would prefer the patient to be discharged or moved to another hospital such as Aderyn [page 165]. Visits to Aderyn had taken place as part of planning a future move and it was entirely foreseeable that such planning by Llanarth Court would be necessary in the immediate future to move the patient to Aderyn. Such rehabilitative planning falls within the definition of medical treatment in s.145 and appears to have been appropriate for the patient given the RC's oral evidence.

54. Thus, I disagree with the submission that the evidence inevitably led to the conclusion that Llanarth Court was not providing appropriate treatment for the patient within the meaning of s.72(1)(b). I note that paragraph 4.15 of the Welsh Code recognises that:

"Although it very often will, appropriate treatment does not have to involve medication or individual or group psychological therapy. There may be patients whose particular circumstances mean that treatment may be appropriate even though it consists only of nursing and specialist day-to-day care under the clinical supervision of an approved clinician in a safe and secure therapeutic environment with a structured regime" [paragraph 4.15].

55. Further, what is appropriate treatment cannot be judged in isolation – s.3(4) requires tribunals to have regard to the nature and degree of the patient's mental disorder and all the other circumstances of the case, including the patient's own health and safety and the protection of other persons. In this case the evidence pointed towards serious consequences for the patient's own mental health and for others if he were discharged at the time of the tribunal hearing.

56. Patients with a personality disorder represent a particular challenge for tribunals. If such a patient is receiving care of the type described in paragraph 4.15 of the Welsh Code but, as in this case, apparently making little progress, it may in some circumstances be difficult to distinguish appropriate treatment from mere detention. The key lies in section 145(4) which makes clear that the purpose of treatment must be to benefit the patient. If the purpose of the treatment the patient receives is to prevent a worsening of the symptoms or manifestations of his mental disorder, it is likely to constitute appropriate treatment even though the outcome of such treatment may have little or no beneficial effect on the patient.

57. I have been invited by the Welsh Minister to comment on the need for RCs to be aware of the distinction between the availability of appropriate treatment and its effectiveness. I do so not because I consider that the RC in this case had ignored this matter. Detained patients like the one in this case challenge the effectiveness of many clinically recognised and appropriate treatments. Where little or no apparent progress is made often over a long period, it can be tempting to conclude that there is nothing further that can be offered. The RC in this case had come to that honest view. However it will be a matter for the judgment of the tribunal if the point has been reached where the medical treatment given to a patient is no longer appropriate. Precise fact finding by the tribunal which is focussed on both the terms of the test in section 72(1)(b)(iia) and the particular treatment that the hospital says is available for the patient is essential. The same precision of analysis is also required of RCs when preparing reports and giving oral evidence to tribunals and, to that end, the guidance on the content of reports in the Practice Direction referred to in this judgment will be of assistance.

58. In R (on the application of Epsom and St Helier NHS Trust) v Mental Health Review Tribunal [2001] EWHC Admin 101 Sullivan J said in paragraph 52:

"The matter has to be looked at in the round, including the prospect of future in-patient treatment, but there will come a time when, even though it is certain that treatment will be required at some stage in the future, the timing of that treatment is so uncertain that it is no longer "appropriate" for the patient to continue to be liable to detention. It is the tribunal's function to use its expertise to decide whether the certainty, or the possibility, of the need for in-patient treatment at some future date makes it "appropriate" that the patient's liability to detention shall continue."
The approach outlined by Sullivan J has much to recommend it to tribunals troubled by the issue of appropriate treatment for detained patients.

The Other Grounds of Appeal

59. Both parties were in agreement that the tribunal made insufficient findings of fact to support its reasons. Additionally the patient asserted that the tribunal erred by making findings which were not supported by the evidence.

60. The tribunal's reasons in this case left much to be desired. I gave some guidance to tribunals on writing reasons in HK v Llanarth Court Hospital [2014] UKUT 410 (AAC) which was ignored in this case.

61. First, the tribunal's reasons were not set out by reference to the relevant criteria for detention. Second, and much more significantly, the tribunal simply failed to address any of the submissions made by the patient's solicitor about appropriate treatment. There was no mention of the RC's written and oral evidence which is striking given that much of the tribunal's reasoning focussed on the appropriateness of the treatment available to the patient. It is even more surprising since the tribunal had been supplied with a copy of the previous tribunal decision in March 2014 which referred to the evidence about the appropriateness of treatment and came to reasoned conclusions about that issue.

62. Third it is wholly unclear from the tribunal's reasons what evidence it accepted and what evidence it rejected and why this was so. Fourth, the tribunal made findings which were wholly unsupported by the written and oral evidence before it. For example, the tribunal found that psychological treatment could be reinstated when the patient was more co-operative – that was simply not the clinical plan for this patient. Likewise there was no prospect of rehabilitative therapy for drug misuse at Llanarth Court though the tribunal's reasons suggested that this was in contemplation.

63. The tribunal's reasons were simply inadequate as I have outlined and, in consequence, it materially erred in law, I allow the appeal on these grounds.

Conclusions

64. I allow the appeal in this case for the above reasons and it follows that I set aside the tribunal's decision. I remit the case to the Mental Health Review Tribunal for Wales for re-determination by a differently constituted tribunal in accordance with the principles set out in this decision.

65. Since the tribunal hearing in February 2015, the patient has been transferred to Ashworth Hospital in Merseyside. In those circumstances, it is desirable that the Mental Health Review Tribunal for Wales considers exercising its powers to transfer this case to the First-tier Tribunal (Mental Health) in the Health, Education and Social Care Chamber in order that a hearing can be arranged without undue delay at Ashworth. I invite it to do so.

Gwynneth Knowles QC
Judge of the Upper Tribunal
21 December 2015.

[signed on the original as dated]