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 on 5 December 2014 under reference MP/2014/22835) involved the making of an error in point of law, it is SET ASIDE under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007 and the decision is RE-MADE.

The decision is: the First-tier Tribunal had no jurisdiction to proceed with the hearing of the patient's application as his case had been withdrawn.

REASONS FOR DECISION

A. History and background

1. I am grateful to Judge Hinchliffe, Deputy Chamber President with responsibility for the mental health jurisdiction in the First-tier Tribunal, for his investigations into what happened in this case. As will be clear, I have relied substantially on his account for what follows.

2. The patient was detained under section 3 of the Mental Health Act 1983 on 2 September 2014. He applied to the First-tier Tribunal on 10 September.

3. The case was listed before the First-tier Tribunal for 7 November. That was postponed to 11 November, when it was again postponed to 20 November. On that day, it was adjourned to 1 December. On that day, evidence was heard and the case was adjourned to be resumed before the same members on 5 December.

4. On 3 December, the patient's solicitors applied to withdraw the case. That required the consent of the tribunal: see rule 17 of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008. The tribunal provides a form for that purpose, Box E of which contains space to explain why the request is being made. The reasons in this case cover an A4 page. After a short introduction, the solicitors made these points:

- The patient has now heard evidence and considered it at length outside the tribunal. He has also had a chance to consider his family situation.
- He is now willing to accept his medication.
- He accepts the evidence that he should take this medication and no longer wishes to pursue his application or to be discharged.
- If the patient were discharged, this might have an effect in family proceedings on the contact between his children and their mother. If he remains detained, the chances of the children spending Christmas with their mother will be increased.

- He has had time 'to consider his position in the cold light of day.' He is emotive, and has impulse and anger issues that do not help him 'when dealing with legal advice just before Tribunal hearings.'
- Consenting to the withdrawal would not prejudice anyone.
- The application was not tactical, as any future application would be made after medication had had time to take effect. Consent would avoid the unnecessary costs of the hearing on 5 December.
- The judge presiding at the hearing should be involved in making the decision.

Judge Hinchliffe described these as 'Unusually lengthy reasons'.

5. The Senior President has issued a Practice Statement under rule 4(1) of the tribunal's rules of procedure. Paragraph 2 authorises delegation of specified functions to a member of staff; paragraph 3 authorises delegation of overlapping specified functions to a legally qualified member of staff, often called a 'registrar', although that title is used within the tribunal system to cover a variety of roles. Paragraph 2(c) contains the relevant delegated function:

> The giving of consent by authorised tribunal staff under rule 17(2) to a notice of withdrawal lodged by or on behalf of a patient by a representative under rule 17(1)(a), by those tribunal staff responsible for receiving and processing notices of withdrawal, subject to the notice of withdrawal being received by the tribunal not later than 4.30pm on the day before any listed hearing of the patient's application to the tribunal; and subject to there being in existence no concurrent application or reference, and no reason for tribunal staff to believe that consent to the withdrawal should be refused.

Paragraph 4 of the Statement provides for a party to apply for a decision made by a member of staff or a registrar to be considered afresh by a judge.

6. The application came before an appropriate member of staff on the same day. Judge Hinchliffe described this as a procedural irregularity, as the application should have been referred to a registrar or judge. I do not know what, if any, internal procedures or instructions apply in such cases. Whatever they were, the member of staff made a decision consenting to the withdrawal, using a template provided for that purpose. In the box headed **Notice of Withdrawal**, these paragraphs are set out:

> 1. The patient's legal representative has given notice of the patient's wish to withdraw their application to the tribunal.
>
> 2. The Notice of Withdrawal was received by the tribunal no later than 4.30pm the day prior to the listed hearing of the patient's application.
>
> 3. There is in existence no concurrent application or reference.

Judge Hinchliffe has pointed out that the member of staff omitted the paragraph about reason to believe consent should not be given.

7. The presiding judge was advised of the withdrawal. She had not previously been consulted. She questioned the member of staff's power to give the consent and, on 4 December, the member of staff consulted Judge Healy. The judge gave a decision setting aside the decision of 3 December. I accept Judge Hinchliffe's

explanation that Judge Healy completed the wrong template, which explains the confusing notice at the end, which relates only to directions. I accept Judge Hinchliffe's explanation that Judge Healy intended to exercise the power of set aside under rule 45, which makes sense of what the judge wrote.

> **45 Setting aside a decision which disposes of proceedings**
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> (1) The Tribunal may set aside a decision which disposes of proceedings, or part of such a decision, and re-make the decision or the relevant part of it, if—
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> (a) the Tribunal considers that it is in the interests of justice to do so; and
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> (b) one or more of the conditions in paragraph (2) are satisfied.
>
> (2) The conditions are—
>
> (a) a document relating to the proceedings was not sent to, or was not received at an appropriate time by, a party or a party's representative;
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> (b) a document relating to the proceedings was not sent to the Upper Tribunal at an appropriate time;
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> (c) a party, or a party's representative, was not present at a hearing related to the proceedings; or
>
> (d) there has been some other procedural irregularity in the proceedings.

8. I accept Judge Hinchliffe's explanation that Judge Healy intended to rely on rule 45(2)(d), which refers to there being a procedural irregularity in the proceedings. That best makes sense of what the judge did, although (i) she did not identify in terms the procedural irregularity, nor (ii) did she distinguish in the reasons between the irregularity and the interests of justice. I will summarise those reasons. After a history and a summary of the solicitors' application, the reasons continue:

- The solicitors suggested that the presiding judge be involved. That did not happen.
- The case 'has taken a disproportionate amount of the tribunal's time with significant cost to the public purse'.
- The judge had spoken to the presiding judge.
- 'As a tribunal we should be reluctant to accept a withdrawal once substantive oral evidence has been heard, as in this case, unless the grounds for the withdrawal relate directly to the patient's mental health in the context of his ability to participate in the hearing.'
- There was no evidence that the patient would now accept medication and the reference to his emotive state and impulsivity undermine his reliability.
- 'In the circumstances of the case and given the cost to the public purse incurred to date' the judge set aside the decision.

9. I note that Judge Hinchliffe disavowed any suggestion that there were tactical considerations behind the application and Judge Healy made no such suggestion either.

10. The hearing proceeded on 5 December and the tribunal decided not to discharge the patient.

11. This led to an application for permission to appeal to the Upper Tribunal against the decisions of Judge Healy and of the tribunal not to discharge the patient. Permission was refused by the First-tier Tribunal. I gave permission to appeal against the decision of the tribunal.

B. Analysis

Did the member of staff have jurisdiction to make the decision?

12. The first question is whether the member of staff had jurisdiction to give consent. If she did not, her decision was of no force or effect and the tribunal was right to proceed with the hearing regardless of what happened on 4 December. I consider that the member of staff did have jurisdiction.

13. Jurisdiction is an important concept for all judicial bodies, especially those like the First-tier Tribunal that are statutory. A tribunal has no power to act outside its jurisdiction. It is, though, important to distinguish between cases in which a tribunal acts without jurisdiction and cases in which it acts wrongly within its jurisdiction. Only the former are without force or effect.

14. The caselaw contains numerous examples of cases that fall on either side of the line. A pair of housing benefit cases provide a useful contrast. In *Warwick District Council v Freeman* (1994) 24 HLR 616, the local authority sought to recover an overpayment of benefit without notifying the claimant of the decision changing his entitlement and creating that overpayment. The Court of Appeal held that this process was invalid. In *Haringey London Borough Council v Awaritefe* (1999) 32 HLR 517, the local authority gave notice that was defective. The Court of Appeal held that this process was valid, albeit defective. The local authorities in those cases were not, of course, judicial bodies, but the same principles apply.

15. Applying that distinction, the member of staff had jurisdiction to make a decision. This leads to the next question.

Was the member of staff's decision defective?

16. The second question is whether the member of staff's decision was defective. It is possible for a decision to be so defective as not to amount to a decision at all. In *R(IB) 2/04*, a Tribunal of Commissioners described such cases as those 'which have so little coherence or connection to legal powers that they do not amount to decisions ... at all.' I do not consider that the decision was defective.

17. Paragraph 2(c) of the Practice Statement allows a member of staff to consent, although not to refuse to consent, to an application to withdraw. This is subject to conditions, one of which is that there is 'no reason for tribunal staff to believe that consent to the withdrawal should be refused.' I note that the test is posed in terms of 'tribunal staff'. It is not stated in abstract terms of whether there is reason to believe that consent should be refused. It is limited to what should be apparent to tribunal staff. This is posed in general terms. The test is not what this particular member of staff should believe, but what staff generally,

although presumably ones 'responsible for receiving and processing notices of withdrawal', should believe.

18. What reason was there for tribunal staff to believe that consent should not be given? There was no tactical ploy here. The only reasons I have are those given by Judge Healy, so I will consider whether they should have caused tribunal staff to believe that consent should not be given.

19. Judge Healy first commented on the disproportionate time that the case had taken. It is true that there had been delays, but it is important to look at why they occurred. The hearing on 7 November did not go ahead as a result of the patient being transferred between hospitals. The hearing on 11 November did not go ahead as a result of uncertainties about the actions of the patient's nearest relative. The hearing on 20 November did not go ahead as a result of the production of evidence that the patient and his representative needed to consider. The hearing on 1 December was not completed as a result of the patient's representative not having had all the documents and not having time to take instructions on them. It is desirable that tribunals should spend public money efficiently, but I cannot see anything in the history of the delays in this case for which the patient or his solicitors could be held responsible. This factor alone should not have put tribunal staff on notice that consent should be refused.

20. Judge Healy second commented;

> As a tribunal we should be reluctant to accept a withdrawal once substantive oral evidence has been heard, as in this case, unless the grounds for the withdrawal relate directly to the patient's mental health in the context of his ability to participate in the hearing.

I accept that the circumstances there set out would justify consenting to withdrawal, but I can see no reason why consent should be limited to such circumstances. Indeed, the judge recognised this by saying the tribunal should be *reluctant* to consent in other circumstances. But why should the tribunal be reluctant if a patient's solicitors are having difficulty helping the patient to understand the evidence and what would be the best course of action for him? It does not take a great feat of imagination to read between the lines of the application for consent to see that the patient's representative needed time to communicate with him effectively and that the emotional intensity of a hearing was not conducive to that task. Again, this factor alone should not have put tribunal staff on notice that consent should be refused.

21. Judge Healy third commented that she did not have evidence to show that the patient's change of mind was reliable, especially given his emotional and mental state. That is true, but the solicitors had dealt with that by their explanation that the patient was able to see things more clearly when free from the immediate emotions of a hearing. Judge Healy did not deal with that. Once more, this factor alone should not have put tribunal staff on notice that consent should be refused.

22. I am not at this stage embarking on a critique of Judge Healy's reasons. The point is that the test is whether tribunal staff had reason to believe that consent should not be given. I do not intend any disrespect to tribunal staff, but there is a

limit to what can realistically be expected of them. They are not lawyers with experience of mental health cases. Taking the judge's reasons in turn:

- The first reason does not on scrutiny contain any reason for refusing permission. Indeed, as the solicitors pointed out, consenting to the withdrawal would actually save costs.
- The second reason seems rather sophisticated to attribute to tribunal staff. It may be that there is guidance to assist the staff, but if there is, I have not been shown it.
- The third reason concerns an assessment of evidence. Again, it seems unrealistic to expect tribunal staff to analyse evidence and to appreciate the significance of lack of evidence. That is especially so, when (as I have said) the application dealt with the issue in an apparently rational way.

Was Judge Healy's set aside decision valid?

23. The third question is whether Judge Healy's set aside decision was valid. I consider that it was not.

24. I did not give permission to appeal specifically against this decision, but the tribunal's jurisdiction to proceed with the final day of the hearing depends on the validity of this decision. The Social Security Commissioners did not go behind a decision of an appeal tribunal on a set aside determination, but the position is different now that those decisions are subject to appeal to the Upper Tribunal.

25. It is helpful to consider first what Judge Healy should have done. She should have done three things. First, the judge should have considered whether there was a procedural irregularity for the purposes of rule 45(2)(d). Second and if there was, the judge should have considered whether it was in the interests of justice to set aside the decision for the purposes of rule 45(1)(a). If it was, she should have set aside the decision consenting to withdrawal. That would leave the application for consent outstanding, which would have to be dealt with. So, third, the judge should have considered afresh whether to accept the application to withdraw. The second and third steps are closely connected. What the judge in fact did was to deal with all three of those issues together, perhaps in the result losing sight of the need to find a procedural irregularity. That was important, because unless and until that was established, the other two questions did not arise.

26. It is important to appreciate the limits on the scope of rule 45. For one thing, it deals with matters of procedure. Rule 45 could not be used if the member of staff lacked jurisdiction to give consent. It would be desirable to have a formal decision recording that that was the case, but it could not be given under rule 45. Matters of jurisdiction are not matters of procedure: *Jaffray v Society of Lloyd's* [2008] 1 WLR 75 at [8]. As such, they are outside the scope of rule 45. For another thing, the rule does not provide for any appeal against or challenge to the merits of a decision that disposes of proceedings. It is limited to cases in which something has gone wrong with the way that the tribunal handled the case. Judge Healy's decision reads like a reconsideration of the application to withdraw. That is outside the scope of rule 43. As I have said, it seems to me that

this is an impression created by the judge trying to do two, or possibly three, things at once.

27. If – I emphasise that word – Judge Healy intended to do either of the things I discussed in the previous paragraph, she had no power to do so and her decision would be in error of law.

28. There are two possibilities that merit consideration as procedural irregularities.

29. One is that the application suggested contacting the presiding judge, but this was not done. Judge Healy recorded this as a fact, but did not identify it as a procedural irregularity. I do not consider that it was. The presiding judge's involvement was merely a suggestion made in the application, not a requirement imposed by the Practice Statement or, as far as I know, any guidance. Its purpose was obviously to cover the possibility that any doubts the member of staff might have could be allayed by consulting the presiding judge. Since the member of staff did not have any doubts, she did not need to take up that suggestion.

30. The other possibility is that the member of staff failed to complete the decision by recording the paragraph about reason to believe consent should not be given. I assume that this involves clicking to include the relevant passage in the template. This was an omission, but it was not a procedural irregularity. The reciting of the terms of the delegation may serve a useful function in acting as a check list for the member of staff, but the precise completion of a form of template is not a matter of procedure. What matters is the substance of what is done, not the particular manner in which it is done. That is why I have been able to accept that Judge Healy was applying rule 45 rather than undertaking some other exercise.

31. My conclusion is that there was no procedural irregularity in what the member of staff did. It may be that a judge in the mental health jurisdiction would have refused consent. But that is not the test. I have explained what the test is and why that test was satisfied. The member of staff had power to do what she did. There were no procedural irregularities in how she exercised her power. At root, the only objection is that she made the wrong decision. But that does not justify setting it aside.

32. This does not mean that the tribunal has no power to act if a judge disagrees with the decision made by a member of staff acts. It just means that the judge cannot use rule 45. If there were an application for permission to appeal, the tribunal could use its review powers under rule 49. There is also power under paragraph 4 of the Practice Statement for another party to apply for the matter to be considered afresh. It might be better if that power included power for a judge to act without an application, but that is not a matter for me.

C. The effect of my decision

33. My decision is that Judge Healy was in error of law by setting aside the member of staff's decision. On that basis, the patient's case had been withdrawn and the First-tier Tribunal had no jurisdiction to proceed with the hearing on 5 December 2014. As that decision was made without jurisdiction, it is of no force

or effect. I have set it aside and re-made it to record that the tribunal had no jurisdiction to make a decision on the patient's detention.

Signed on original
on 6 July 2015

Edward Jacobs
Upper Tribunal Judge