IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

HMW/0134/2010

Appellant:

First Respondent:

Second Respondent:
Third Respondent:

DECISION OF THE UPPER TRIBUNAL
ON AN APPEAL
FROM A DECISION OF
THE MENTAL HEALTH REVIEW TRIBUNAL FOR WALES
TRIBIWNLYS ADOLYGU IECHYD MEDDWL CYMRU

Upper Tribunal Judge H. Levenson

ON APPEAL FROM:

Tribunal Case No:	QA669289/1
Decision Date:	19th October 2009
Venue:	Delfryn House

HMW/0134/2010

DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)
ON AN APPEAL

Decision and Hearing

1. **This appeal by the appellant succeeds.** In accordance with the provisions of section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 I set aside the decision of the Mental Health Review Tribunal for Wales/ Tribiwnlys Adolygu Iechyd Meddwl Cymru made on 19th October 2009 (under reference QA669289/1) to the effect that the appellant was not be discharged. The effect of my decision is to leave in place the decision of the same tribunal made on 24th June 2008 which ordered a deferred conditional discharge.

2. I refer the matter to the President of the tribunal below for directions to arrange a further hearing of that tribunal to consider information obtained pursuant to the decision of 24th June 2008. That further hearing will consider the position as it is at the date of the hearing.

3. I held an oral hearing of this appeal on 26th August 2010. The appellant was represented by Mr Stephen Simblet of counsel and Karen Wolton, solicitor. I am grateful to them for their assistance. None of the three respondents attended or was represented or had made legal submissions. It is particularly unfortunate that the Secretary of State took no interest in this case which raised issues of law to be decided.

Background and Procedure

4. The appellant is a man who was born on 7th February 1960 and accumulated a lengthy and varied criminal record, including a sentence of 3 years imprisonment for robbery, which culminated in January 1990 when he stabbed a man to death. Later that year he was convicted in Scotland of culpable homicide. As I understand it, the court order made then has same effect now as if he were a restricted patient under sections 37 and 41 of the Mental Health Act 1983. He had received psychiatric treatment intermittently since about 1979 and after his conviction he was in Carstairs Hospital (which is high security accommodation) for about 9 years, followed by a series of transfers. On 28th July 2006 he was transferred to Hospital A, which has relatively low security, with a view to further rehabilitation. In the words of the tribunal below: "[he] is suffering from paranoid schizophrenia, characterised by paranoid thoughts and auditory hallucinations all of which are under control with medication" (page 20 of the Upper Tribunal file). However, from 2003 the appellant had had periods of unescorted leave (3 hours daily by 2008) and occasional overnight leave staying with his brother, in a major city. There had only been one untoward incident recorded in the community during this period, "one incident of inappropriate behaviour towards a woman in a gym" (page 20).

5. On 24th June 2008 (pages 18 to 20) the tribunal below ordered that the appellant "shall be discharged subject to the conditions set out below, but his discharge is deferred until the Tribunal is satisfied that the necessary arrangements have been made to meet those conditions". The tribunal also directed that it would reconvene to review the decision and its implementation. The Tribunal was not satisfied that the appellant was suffering from any of the specified statutory conditions such that it was appropriate for him to be liable to be detained in hospital for medical treatment but was satisfied that it was appropriate for him to remain liable to be recalled to hospital for further treatment.

6. The conditions were to reside in 24 hour staffed accommodation, the identity of which was to be decided, to comply with medical supervision and treatment as directed by the responsible medical officer, and to comply with the care plan as directed by the named care co-ordinator.

7. However, there was a "wealth of information" required by the tribunal before the discharge could be put into place. The information required was:

> "1. Identification of a suitable placement with 24 hour staffing at a suitable level of qualification to provide the required support and supervision.
>
> 2. A full OT assessment including progress in [the appellant's] proposed voluntary work.
>
> 3. A progress report on the effects of controlled alcohol consumption (pursuant to the MOJ permission received).
>
> 4. A full set of updated reports (by 24 November) and a full aftercare plan (the medical report to include an update on compliance with self medication and results of blood tests in support."

8. The Mental Health Tribunal for Wales Rules 2008 provide in rule 28(5) that:

> 28(5) Where the Tribunal makes a decision with recommendations, the decision may specify any period at the expiration of which the Tribunal will consider the case further in the event of those recommendations not being complied with.

9. In the present case a further hearing was initially fixed for 8th December 2008 but, partly because of delays in identifying a suitable placement near the appellant's brother, the effective further hearing did not take place until 19th October 2009.

10. On 19th October 2009 the tribunal decided that "The patient shall not be discharged". At that time the tribunal was satisfied that the appellant was suffering from mental disorder such that it was appropriate for him to be liable to be detained in a hospital for medical treatment, that it was necessary for his own health or safety tor foe the protection of other persons that he should receive such treatment and that appropriate medical treatment was available for him.

11. The tribunal's reasons were expressed as follows:

> [The appellant] is a 49 year old man who has been subject to restriction since the index offence of culpable homicide in 1990. He has a diagnosis of paranoid schizophrenia which was not challenged at the Tribunal.
>
> While his custodial care has reduced over the years to low security, no-one seems to have addressed the issue relating to the index offence, due to his refusal to engage in discussion, evidenced at the hearing by his strong reaction to a mention of the circumstances leading to his detention. He has no insight into his past behaviour or the risks which the multi-disciplinary team have identified. He has therefore been contained during detention but no progress has been made therapeutically. ...
>
> [Since July 2008] ... a number of placements have been considered and been rejected as unsuitable ... Unit B [in the city where his brother lives] has now been identified as a possible placement. However, it is a mixed gender unit and the [responsible clinician] for the unit has not yet met [the appellant] and was not involved in his assessment. The clinical team at [Hospital A] and the nursing staff at [Unit B] all support a conditional discharge to Unit B. However, change of environment, change of clinical supervision and nursing support were all identified in evidence as risk factors for a deterioration in [the appellant]'s mental state. The placement also presents the challenge of a mixed gender environment, interaction with women being a matter of concern. [The appellant has been consuming controlled amounts of alcohol under supervision and he told the Tribunal he would like to have more if allowed.
>
> Given the number of risk factors associated with the move to a new placement, the Tribunal considered that removing the protection of the Mental Health Act at the same time would place [the appellant] and others at unacceptable risk.
>
> There are a number of advantages to the proposed placement at [Unit B], in particular the proximity to his [community mental health team] and his brother who attended the Tribunal and appears very supportive). It also has the benefits of proximity to urban life and offers scope for step-down rehabilitation as and when appropriate. We therefore recommend that a move be effected as soon as practicable but with the support of the Mental Health Act for the time being".

12. I observe at this point that the tribunal seems to have taken into account matters to which it had not referred in its July 2008 decision (such as the problem of a mixed gender environment), that if changes of environment and supervision were now risk factors, they must have been risk factors in July 2008 (or if they were not risk factors then, something unidentified must have happened to make them risk factors), that the tribunal could have deferred its decision for a report from the responsible clinician at Unit B (given that all the other relevant staff at both institutions supported the

transfer), that the transfer was recommended despite the above, but that (given that the appellant could have remained liable to be recalled to hospital for further treatment as had been envisaged by the July 2008 tribunal) no reason seems to have been given as to why it was necessary to retain the "support of the Mental Health Act for the time being".

13. On 17th November 2009 the appellant applied for permission to appeal to the Upper Tribunal against the decision of the Mental Health Review Tribunal for Wales. On 19th November 2009 he was actually transferred to Unit B (where he has been ever since).

14. On 2nd December 2009 the Mental Health Review Tribunal for Wales refused to grant permission to the appellant to appeal to the Upper Tribunal (pages 24 to 26). The refusal contained ten bullet points of fact justifying the final decision of the tribunal. Many of the points cited had not been referred to in the reasons given for the actual decision. A right of appeal to the Upper Tribunal in a case such as the present one only lies on a point of law. It is difficult to see how it is appropriate for a refusal of permission to appeal to be based on an expanded statement of facts.

15. The application for permission was renewed to the Upper Tribunal itself and on 25th January 2010 I gave permission on the basis that the grounds of appeal were arguable.

The Nottinghamshire Case

16. Those representing the appellant, and the tribunal below, have both relied on the decision of the House of Lords in R (on the application of H) v Secretary of State for the Home Department and the Secretary of State for Health [2003] UKHL 59. The case is known under various names and I do not know why the neutral citation number was not used in the proceedings below. The Mental Health Review Tribunal, the Royal College of Psychiatrists and the Nottinghamshire NHS Healthcare Trust were all interested parties, which is why I refer to it as the Nottinghamshire case.

17. In that case the tribunal found that the patient was not suffering from mental illness necessitating his detention in hospital and adjourned the hearing in order that a care plan could be drawn up with a view to his conditional discharge. One of the proposed conditions was that he be supervised by a named psychiatrist. The health authority was unable to find a psychiatrist willing to supervise him. At the reconvened hearing the tribunal decided to conditionally discharge him but to defer the discharge until satisfactory arrangements had been made to meet the conditions. It took the view that he probably still suffered from an underlying mental illness that did not require continued detention in hospital but did require psychiatric supervision. The health authority remained unable to find a psychiatrist for him and he continued to be detained in hospital. At that time the law was understood to prevent the tribunal in these circumstances from reconsidering its decision at a reconvened hearing to accommodate any changes in circumstances.

18. The patient sought judicial review, arguing that he had been unlawfully detained and that at the reconvened hearing the tribunal should have been able to, and should

have, ordered his absolute discharge. He was unsuccessful in the Administrative Court and in the Court of Appeal and appealed to the House of Lords. The House of Lords held that the patient had not in fact been unlawfully detained, although there had been a breach of article 5(4) of the European Convention on Human Rights because the tribunal had been precluded from reconsidering its decision to conditionally discharge the patient but had to leave him in a kind of limbo. The House of Lords unanimously and specifically endorsed (in paragraph 27) the following ruling made by the Court of Appeal (cited in paragraph 23):

> "[71] Tribunals should no longer proceed on the basis that they cannot reconsider a decision to direct a conditional discharge on specified conditions where. After deferral and before directing discharge, there is a material change of circumstances. Such a change may be demonstrated by fresh material placed before or obtained by the tribunal. Such material may, for instance, show that the patient's condition had relapsed. It may show that the patient's condition has improved. It may demonstrate that it is not possible to put in place the arrangements necessary to enable the conditions that the tribunal proposed to impose on the patient to be satisfied. The original decision should be treated as a provisional decision, and the tribunal should monitor progress towards implementing it so as to ensure that the patient is not left "in limbo" for an unreasonable length of time".

The Argument

19. The appellant argues that there was no change in his condition or any fresh evidence subsequent to the June 2008 decision such that the tribunal could have lawfully reconsidered this decision. I agree that there was no evidence of any change in his condition or evidence relating to his behaviour or similar factors that could have by itself led to the decision being revisited. However, the tribunal was entitled (or even obliged) to see whether it was possible to put in place the necessary arrangements and to monitor progress towards this, and to change the decision once it was satisfied that this could not be done within a reasonable time.

20. However, I do agree that the reasoning of the tribunal was inadequate in the respects that I have identified in paragraph 12 above, and for that reason this appeal is allowed. The Mental Health Review Tribunal for Wales will now have to carry out in this case the exercise envisaged by the Court of Appeal and the House of Lords in the Nottinghamshire case.

H. Levenson
Judge of the Upper Tribunal
3rd September 2010