

Casenotes

The First Flight of the Fledgling: the Upper Tribunal's Substantive Debut

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Dorset Healthcare NHS Foundation Trust v MH
[2009] UKUT 4 (AAC)

The Upper Tribunal's Administrative Appeals Chamber is the court from which most mental health law in England and Wales, and also the other parts of the UK, will come. Its first substantive decision on a mental health matter was handed down on 8 January 2009, and contains useful guidance on an important matter, namely the process for the disclosure of a patient's medical records when the detaining hospital does not wish to release the entirety of the records; and it also touches on various other aspects of the new appeal process and the procedural code applicable as from 3 November 2008. For these reasons, a comment on the decision is worthwhile, both to outline the new regime and because the decision involves several matters of interest².

The decision indicates that the parties were – no doubt understandably – unfamiliar with the new procedural regime for proceedings in front of the First-tier Tribunal's Health Education and Social Care Chamber, as contained in the *Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008*³ ("TPR"). In addition to allowing the Upper Tribunal to offer important guidance, the decision hints at other interesting points that suggest that, despite the lengthy process by which the mental health legislation was amended and the new tribunal structure put in place, there will be significant litigation to bed down the new legal structure.

The new Tribunal Structures

MH, a patient detained under s3 of the *Mental Health Act 1983* ("MHA 1983") (detention for treatment), had applied to be released: the application will no doubt have been made to the Mental Health Review Tribunal under the provisions of the *Mental Health Tribunal Rules 1983*⁴. However, the hearing was due to occur on 12 November 2008, and so the process to be followed after 3 November 2008 fell under the jurisdiction of the new structure for Tribunals, including fresh appellate arrangements and the new procedural rules.

The MHA 1983 provided in s65 and Schedule 2 for Mental Health Review Tribunals for Wales and for

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2 In due course, arrangements will no doubt be put in place for all Upper Tribunal decisions to be placed onto the Tribunal Service website in a manner that makes them easy to find; at the time of writing, the most easy to follow

database is via the British and Irish Legal Information Institute, see www.bailii.org/uk/cases/UKUT/AAC/ where the case can be found by browsing to January 2009 (last accessed 27 January 2009).

3 SI 2008/2699

4 SI 1983/942, as amended on various occasions

different regions in England: by the time the *Mental Health Act 2007* (“MHA 2007”) was enacted, there were two regions in England, North and South. Section 38 of the MHA 2007 provided that there would be only one MHRT for England. The MHA 2007 was the end product of a lengthy process of reform of mental health law: there was an expert committee which reported in November 1999, a Green Paper in November 1999, a White Paper in December 2000, a Draft Bill in 2002 and a further Draft Bill of 2004, both of which proposed a replacement Mental Health Act, and finally a Bill introduced in 2006 to modify the 1983 Act but in a number of significant respects, which became the *Mental Health Act 2007*. The Draft Bill of 2002⁵ proposed a new Tribunal structure: there was to be a Mental Health Tribunal (cl 3), the main function of which would be its responsibility for making orders for detention for treatment (cl 33ff) rather than reviewing administratively made orders, and also a Mental Health Appeal Tribunal (cl 4), to which there would be an appeal on any point of law arising from a determination by the Tribunal (cl 160ff). The Draft Bill of 2004⁶ also proposed this new structure (cls 4 and 8), with similar powers (cls 38ff and cls 249ff). As noted above, the MHA 2007 made only a minor amendment, namely providing that there was only one Mental Health Review Tribunal in England rather than separate regional bodies.

However, also enacted in 2007 was the *Tribunals, Courts and Enforcement Act 2007* (“TCEA”), s3 of which provides for a First-tier Tribunal and an appellate Upper Tribunal; s7 of the Act allows for Chambers of the First-tier and Upper Tribunals. One of the Chambers of the First-tier Tribunal is the Health, Education and Social Care Chamber⁷: this has taken over the functions of the Mental Health Review Tribunal in England by way of the *Transfer of Tribunal Functions Order 2008*⁸ as of 3 November 2008. In Wales, the Mental Health Review Tribunal for Wales continues to sit via s65 MHA 1983 and Schedule 2 to the Act⁹. Various parts of the 1983 Act has been amended by Art 9 of and Schedule 3 to the 2008 Order:

- (i) references in the MHA 1983 to the Mental Health Review Tribunal have become references to the “tribunal” or the “appropriate tribunal”;
- (ii) the Order adds s66(4) MHA 1983, which provides that “(4) In this Act “the appropriate tribunal” means the First-tier Tribunal or the Mental Health Review Tribunal for Wales”;
- (iii) s77(3) and (4) are amended to indicate the tribunal to which the patient must apply (for those liable to be detained, this depends on the location of the hospital, for those on a community treatment order, it turns on the location of the responsible hospital, and for those subject to guardianship or for conditionally discharged patients it turns on where they reside).

Previously, the method of challenging a decision was judicial review to the High Court (or by special case stated under s78(8) MHA 1983 if that was a suitable approach¹⁰). Now, by reason of s9 TCEA 2007, applications can be made to review decisions of the First-tier Tribunal in England: this allows the Tribunal to correct accidental errors in the decision or the record of the decision, amend the decision, or set it aside and remake it or refer it to the Upper Tribunal¹¹. In addition, it is possible to appeal to the Upper Tribunal: s11 TCEA 2007 provides that an appeal lies to the Upper Tribunal “on any point of law arising

5 Cm 5538-1

6 Cm 6305-1

7 See the *First-tier Tribunal and Upper Tribunal (Chambers) Order 2008*, SI 2008/2684

8 SI 2008/2833

9 It has separate new rules, the MHRT for Wales Rules 2008 (SI 2008/2705), so the MHRT Rules 1983 have no further application.

10 See *Bone v Mental Health Review Tribunal* [1985] 3 All ER 330 and *MP v Nottinghamshire Healthcare NHS Trust* [2003] *Mental Health Law Reports* 39, the effect of which were that it would rarely be appropriate.

11 See TPR 44 for correcting mistakes, TPR 45 for setting aside a decision (which depends on a procedural irregularity and a finding that it is in the interests of justice to set aside a decision), and TPR 46–9 for the process of reviewing a decision (which turns on the Tribunal considering that there is an error of law).

from a decision made by the First-tier Tribunal". There is also an appeal on a point of law to the Upper Tribunal from the MHRT for Wales, this arises from Art 6 of the *Transfer of Tribunal Functions Order 2008* and the consequential amendments made in Sched 3, para 60 of which adds s78A MHA 1983 to provide the statutory basis for the appeal¹². A final change made in the 2008 Order is that the case stated appeal under s78(8) MHA 1983 is abolished by para 59(8) of Sched 3. An application has to be made for permission to appeal¹³. In England, the tribunal must consider whether to exercise its power to review the decision if satisfied that there was an error of law; if it decides not to review the decision or takes no action on a review, the tribunal then considers whether to grant permission to appeal. The Welsh tribunal merely considers whether to grant permission to appeal. If permission is refused, an application for permission may be made to the Upper Tribunal: this is governed by r21 *Upper Tribunal Rules 2008*¹⁴.

The TCEA 2007 also provides that the Upper Tribunal has a judicial review function: ss15ff. It also adds sections to the relevant statutory provisions in England and Wales, Scotland and Northern Ireland to allow (and in most relevant situations to require¹⁵) the normal judicial review courts to transfer cases to the Upper Tribunal: ss19ff. The Lord Chief Justice has issued a Direction to transfer to the Upper Tribunal reviews of First-tier Tribunal decisions where there is no right of appeal¹⁶. However, the normal process of judicial review must be followed if the relief sought includes a declaration of incompatibility under the *Human Rights Act 1998*.

The Facts in the Case

MH sought disclosure of his medical records in the course of tribunal proceedings. The Trust agreed to the request, except for 10 sheets of the records: so, shortly after the new Tribunal provisions came into effect, on 5 November 2008, an application was made for a direction to compel disclosure. Deputy Regional Tribunal Judge Harbour considered the application and on 7 November 2008 made a direction under r5 TPR (case management powers), which includes a specific power in r5(3)(d) to "permit or require a party or another person to provide documents, information or submissions to the Tribunal or a party."

The direction was in two parts: first, that the patient's solicitor "be granted full and unfettered access to all her client's medical records, including any third-party material which is purported to fall within the meaning of s7(4) of the *Data Protection Act 1998*, and any material which is purported to fall within *Data Protection (Subject Access Modification) (Health) Order 2000*, SI 2000/413 (SAMO Health) or Reg 5(1) *Data Protection (Subject Access Modification) (Social Work) Order 2000*, SI 2000/415 (SAMO Social Work)." The second part of the direction allowed the hospital Trust to indicate whether any of that material ought not to be disclosed to MH by reason of the application of r14 TPR until a Tribunal had made an order on it. Rule 14 TPR¹⁷ allows the Tribunal to make a direction prohibiting disclosure of a document "to a person" if it "would be likely to cause that person or some other person serious harm" and

12 Sections 32ff TCEA 2007 provide powers to create rights of appeal to the Upper Tribunal from tribunals in Wales, Scotland and Northern Ireland.

13 See TPR 46 or r30 of the *Welsh Rules*: the latter refers to a "party" whereas the former refers to a "person" being able to make the application.

14 SI 2008/2698

15 The normal process of judicial review must be followed if the relief sought includes a declaration of incompatibility

under the *Human Rights Act 1998* or in certain other circumstances.

16 Available at www.tribunals.gov.uk/Tribunals/Rules/directions.htm (accessed 27 January 2008).

17 This is the replacement for the provisions of r16 and 12 of the *MHRT Rules 1983*, which allowed non-disclosure on the basis of the adverse effect on the health or welfare of the patient or others.

also that it is proportionate “having regard to the interests of justice.”

The order was made on an ex parte basis, no doubt because of the close proximity of the Tribunal hearing. The Trust was served with the direction, and applied for a review of the decision under s9 TCEA 2007. The judgement records that the Trust did not make reference to the relevant provisions of the TPR (as outlined above, r49 TPR, which allows a review under r47 when an application is made for permission to appeal under r46). Any procedural irregularity is unlikely to be important on the facts: r7(2) TPR allows a Tribunal to waive failures to comply with procedural requirements if it is just to do so.

The Tribunal, which met on 12 November 2008, refused to review the decision of Judge Harbour but referred the question of disclosure to the Upper Tribunal: it stayed the underlying proceedings¹⁸. It purported to grant permission to appeal subsequently (of its own decision of 12 November, so it seems, though the Upper Tribunal records that it was considering both the decision of 7 November of Judge Harbour and the Tribunal decision of 12 November). The reasons given by the Tribunal for refusing to review the decision of Judge Harbour were that it was inappropriate for it to do so as “... the direction was made competently and by the Tribunal at a level of authority equivalent to (or greater than) that which we enjoy today...”¹⁹.

By the time of the hearing in front of the Upper Tribunal²⁰, MH had been placed on a Community Treatment Order (under s17A of the *Mental Health Act 1983*): the parties agreed that the appeal had therefore lapsed (a conclusion with which the Upper Tribunal agreed), and so the Upper Tribunal made no order on the appeal²¹. However, it went on to give – albeit obiter²² – guidance on various matters raised.

The Guidance Offered

(i) Jurisdiction

The first question raised was whether a case management decision could be appealed to the Upper Tribunal. Section 11(2) TCEA 2007 provides that “Any party to a case has a right of appeal”: but this has to be read together with s11(1), which defines the right to appeal as “a right to appeal to the Upper Tribunal on any point of law arising from a decision made by the First-tier Tribunal other than an excluded decision”. An “excluded decision” is defined in s11(5) and under s11(5)(d) this includes decisions taken under s9 TCEA to review or not to review an earlier decision.

However, the question was not whether the refusal on 12 November to review the decision of Judge Harbour was an excluded decision, but whether the case management process gave rise to a “decision” for the purposes of s11(1) TCEA. There is jurisprudence arising in the context of the Social Security Commissioners (whose work has also passed to the Upper Tribunal by reason of the *Transfer of Tribunal Functions Order 2008*) that not all determinations are “decisions”. This has been approved recently at the level of the Court of Appeal, in *Secretary of State v Morina* [2007] 1 WLR 3033: in this case a determination of a legal member of a Social Security Appeal Tribunal (the equivalent of a first instance

18 r5(3)(j) TPR.

19 Para 18 of the judgment.

20 The date of the hearing is not given on the transcript as released, which merely records the date of the judgment, 8 January 2009.

21 Para 9 of the judgment.

22 It was a decision of a three-judge panel of the Administrative Appeals Chamber, including the two Chamber Presidents, one of whom is the Deputy Senior President of Tribunals: so it has fairly good persuasive value even if it not technically binding.

23 s14(1) of the Social Security Act 1998

tribunal) that an application for permission to appeal was out of time could not be appealed to a Social Security Commissioner, whose jurisdiction²³ was in the following terms: “... an appeal lies to a commissioner from any decision of an appeal tribunal ... on the ground that the decision was erroneous in point of law.” The Court of Appeal concluded that a refusal to extend time was not a “decision” and so the Commissioner – who had accepted jurisdiction but dismissed the claim on its merits – had erred in concluding that he had jurisdiction.

The parties in *MH* agreed the approach²⁴: the jurisdictional provisions in s11 TCEA were express about what was excluded from the appeal process (ie excluded decisions) and so there was no need to adopt a limited definition of “decision”. The Upper Tribunal, however, did not rule on this submission²⁵: rather, it relied on an alternative but narrower ground that an interlocutory decision to order disclosure was not to be excluded from the definition of “decision”²⁶. The Upper Tribunal then noted that, in any event, any conclusion that there was no right of appeal under s11 TCEA would merely have led to the Upper Tribunal exercising its alternative jurisdiction by way of judicial review²⁷.

The existence of the judicial review function may mean that it is moot as to whether the primary submission of the parties needs to be resolved, since the issue will proceed to the Upper Tribunal one way or another (assuming, of course, that procedural differences between the appeal and judicial review functions can be overcome). Of course, it is worth stating that it is highly unsatisfactory that the appellate process governing the detention of persons who are mentally disordered should be tied down by highly legalistic arguments of whether a decision is not in fact a decision when it comes to the appeal process. So if the point ever does have to be determined, it is to be hoped that the position adopted by both parties in *MH* will be accepted, with the result that any decision made by a First-tier Tribunal can be appealed unless it is an excluded decision (as set out in s11(5) TCEA). Any policy concerns supporting a limited definition of “decision” should not carry much weight: leave to appeal is required (so providing a filter mechanism), and leave will not be granted if either there is no merit in the appeal, or if it does not raise a point of law (as is required by s11(1) TCEA) or there is an alternative method of securing a reconsideration of the decision challenged (such as a review or, as should have happened on the facts, as discussed below, the reconsideration of the direction).

The technicality raised by the Upper Tribunal is not the only one that might arise in the context of the appeal provisions. Another obvious issue is what is meant by a “point of law” within s11 TCEA. Is it meant to cover just the substantive law relating to the powers under the MHA 1983? What of procedural points? More importantly, does it include what might be called a “public law” point of law (including the rationality of the decision), such as would have been raised in past judicial review proceedings? Is this something that falls within the separate judicial review function of the Upper Tribunal rather than its appeal function? There is the obvious difference that the First-tier Tribunal would be the named respondent in a judicial review and able to defend its decision: in an appeal, respondents are parties to the lower tribunal²⁸. The *MH* decision indicates that procedural points of law are covered by the statutory reference to “point of law”, but there was no judicial review type of challenge, and so the question of

24 Para 6 of the judgment.

25 Para 8 of the judgment.

26 Paras 7 and 8 of the judgment; the submission was based on a comment of Sir Anthony Clarke MR in para 50 of *Morina* that “In some contexts the word “decision” might well include an interlocutory decision such as a refusal of an adjournment or an order to disclose documents. All

depends upon the particular circumstances.”

27 In *Morina*, the conclusion that the Commissioner had no power to hear the appeal meant that the challenge to it was by way of the remedy of judicial review to the High Court.

28 See r1(3) of the Upper Tribunal Rules.

whether a public law challenge is within s11 TCEA will have to await another case. Having said that, it is worth noting that the Upper Tribunal's own guidance to potential appellants proceeds on the basis that a public law error of law is a ground of appeal: in its leaflet "Appealing to the Administrative Appeals Chamber of the Upper Tribunal from the First-tier Tribunal – Mental Health Decisions,"²⁹ examples given of being wrong in law include "The tribunal had no evidence, or not enough evidence, to support its decision" or "The tribunal did not give adequate reasons for its decision in the written statement of its reasons," both of which are obvious public law errors of law.

There is also a further procedural technicality that perhaps ought to have been addressed in *MH* but which was not, namely the ambit of the definition of an "excluded decision" within s11(5) TCEA (ie a non-appealable decision). This seems to have been an issue on the facts, because one of the decisions in front of the Upper Tribunal was the decision of the Tribunal on 12 November not to review Judge Harbour's direction. The important part of s11(5) is sub-para (d), which excludes from the appeal process a decision to review "or not to review" an earlier decision. In para 17 of the judgment, the Upper Tribunal notes that the response of the hospital to the disclosure order was to seek a review under s9 TCEA; and para 18 records that the Tribunal "considered reviewing the earlier decision; but decided that it should not do so". In other words, it was a decision made under s9 TCEA not to review an earlier decision, and so it seems that this was an excluded decision. If this analysis is right, it does not mean that the Upper Tribunal should not have proceeded to the merits of the case in front of it: it could have become a judicial review decision rather than an appeal in relation to the Tribunal decision of 12 November, and there was also the initial decision of Judge Harbour, though the judgment does not indicate that the correct procedural steps to have that matter in front of the Upper Tribunal – or the waiver of those procedural requirements – were taken.

(ii) Procedural Issues and the Overriding Obligation

Having decided that it had jurisdiction, the Upper Tribunal turned to the question of the impact of the addition to the procedural regime applicable to the First-tier Tribunal of the overriding objective "to deal with cases fairly and justly" (r2(1) TPR). The parties are required to "help the Tribunal to further the overriding objective" and also cooperate generally with the Tribunal (r2(4) TPR). This requires the parties "cooperate and liaise with each other concerning procedural matters, with a view to agreeing a procedural course promptly where they are able to do so, before making any application to the tribunal" because "dealing with cases fairly and justly ... includes the avoidance of unnecessary applications and unnecessary delay"³⁰. The Upper Tribunal noted that there may be instances where the parties could agree but would nevertheless require an order be made: for example, where a hospital might require a court order to overcome the requirements of confidentiality. In such a situation, the parties should identify directions they can agree and then put them before the Tribunal for its approval. Where there are genuine differences such that the Tribunal has to determine the appropriate way to proceed, the liaison between the parties should aim to agree what can be agreed and identify the issues on which the tribunal has to rule. The Upper Tribunal stressed also that the need to liaise has to be carried out so as not to produce unavoidable delay in an urgent situation.

The Upper Tribunal's reminder of the need of the parties to ensure that the overriding objective is secured

29 Available at www.administrativeappeals.tribunals.gov.uk/FormsGuidance/howToAppeal.htm (accessed 27 January 2009; the document is labelled Version 1).

30 Para 13 of the judgment.

is obviously appropriate: although new to the procedural rules relating to the First-tier Tribunal, it is a well-established part of both the *Civil Procedure Rules* and the *Criminal Procedure Rules* that govern other courts³¹. It is an essential part of the process of active case management: in an extreme situation, it might be enforced by way of the wasted costs regime in s29(4) TCEA 2007 and TPR 10(1). Nevertheless, as the Upper Tribunal noted, there may be occasions when a Tribunal order is required because the parties cannot deal with the matters by agreement, including when there are issues arising in relation to confidentiality or data protection; and that the right of the patient to a speedy review of his or her detention cannot take second place to the need to apply to the Tribunal only when cooperation does not work.

(iii) Tribunal Power to Reconsider Regional Judge Direction

As noted in the fact, the First-tier Tribunal had referred the matter to the Upper Tribunal after declining to review the decision of the Deputy Regional Judge. This was an error, or an overly timid approach³²: the Upper Tribunal made plain that the Tribunal had the jurisdiction to reconsider the decision of the Deputy Regional Judge, there being no issue of seniority to inhibit it from such a step. This was particularly so as it could consider fuller submissions, namely those from the Trust that had not been in front of Deputy Regional Judge Harbour. The Upper Tribunal emphasised that the direction-making regime had significant flexibility and allowed account to be taken of fresh circumstances and arguments, to which it then moved.

However, before turning to that, it is worth trying to reconstruct the position of the First-tier Tribunal. Unfortunately, its reasoning process is covered only briefly, namely that it felt it was inappropriate to review a decision made competently by a Deputy Regional Judge. It is worth noting the review provisions set out in s9 TCEA 2007 and r49(1) TPR: it can only happen if there is an error of law in the initial decision. The First-tier Tribunal's view that the case management direction of Judge Harbour was made "competently" suggests that it felt that there was no error of law and so it had no power to review, which was the application in front of it; it then seems to have considered permission to appeal, which is consistent with the requirement in r50 TPR that an application for a review can be treated as an application to do other things, including seeking permission to appeal. The failure identified, which was the error made by the Trust and not corrected by the Tribunal, was not applying the case management regime with the correct level of flexibility.

(iv) "Appealing" Directions

The Upper Tribunal indicated that the Trust should not have sought a review of the direction made: rather, it should have asked the Tribunal to amend the direction. The flexibility in the regime allowing this to be done comes from two provisions: r5(2) TPR allows a direction "amending, suspending or setting aside an earlier direction" and the direction making procedure set out in r6 TPR states:

"6(5) If a party, or any other person given notice of the direction under para (4), wishes to challenge a direction which the Tribunal has given, they may do so by applying for another direction which amends, suspends or sets aside the first direction."

This language does not suggest that r6(5) is the exclusive process. But the Upper Tribunal decision

31 The *Civil Procedure Rules* can be found at www.justice.gov.uk/civil/procrules_fin/ and the *Criminal Procedure Rules* at www.justice.gov.uk/criminal/procrules_fin/.

32 Para 19 of the judgment.

33 Para 17 of the judgment.

indicates that, on the facts, it was by far the best process. It stated³³ that “an application under those provisions was clearly the appropriate course”. This would have allowed the First-tier Tribunal to consider representations that had not been before the Deputy Regional Judge and possibly have avoided the delay occasioned by the appellate process: and it would have resolved that the Trust was in fact willing to disclose the disputed pages to MH’s solicitor, albeit on a slightly different basis than that contained in Judge Harbour’s direction: but this alternative basis would have been acceptable to MH’s solicitor.

Given the factual position in front of the Upper Tribunal, it is hardly surprising that it emphasised the value of r6(5) TPR. This is consistent with general civil litigation: an *ex parte* direction in legal proceedings will invariably have a provision in it granting the other parties liberty to apply to challenge the direction at an *inter partes* hearing, on the basis that an *ex parte* process does not allow all the relevant arguments to be considered; the reminder given by the Upper Tribunal³⁴ that any *ex parte* direction should include a specific reference to r6(5) TPR is in effect a reminder that “liberty to apply” should always be a standard direction.

What will be of interest as the case law develops is the extent to which a party who disagrees with a direction made after a contested process should make use of r6(5) TPR: if there are fresh arguments which can be advanced on a further consideration of the position, this may justify seeking a change in the direction. However, there will no doubt be circumstances in which there is nothing more that a party can say, leaving the alternative only of seeking to challenge the direction by way of review/appeal or judicial review (if there is no right of appeal). The discussion above of whether an “error of law” in the appeal provisions includes a public law error will also be relevant at this stage.

(v) Disclosure of Medical Records – The Substantive Position and the Correct Process

The main underlying issue was the extent to which medical records ought to be disclosed. The Upper Tribunal noted the general proposition of the full disclosure of all relevant materials³⁵, and then discussed the regime in r14(2)-(6) TPR to which reference was made in Judge Harbour’s direction. However, it then noted that there is a more general regime to which reference should have been made, namely that material in the patient’s records that is confidential from the perspective of a third-party may also be protected from disclosure. One example given was that of a potential carer for a patient having a medical condition relevant to their ability to care for the patient, which information had been passed on confidentially³⁶. In such a case, the need for fair trial at the Tribunal (a right of the patient by reason of Art 6 European Convention on Human Rights) might conflict with the duty of confidence owed to the third-party (a right of the third-party by reason of Art 8).

The Upper Tribunal indicated that the language of r5(3) TPR gave the First-tier Tribunal adequate power to deal with these issues appropriately: this is the power to “(3) ... (d) permit or require a party or another person to provide documents, information or submissions to the Tribunal or a party”. The Upper Tribunal suggested the following points should govern the process (though it emphasised the importance of fitting the process to the individual case):

- (i) the parties should always try to resolve things between themselves (para 24);
- (ii) since full disclosure is the norm, the hospital (or other authority) raising questions of non-

³⁴ Para 35 of the judgment

³⁵ Citing at para 20 of the judgment the recent case of *R (Roberts) v Home Secretary* [2005] 2 AC 738, which arose in the context of hearings in front of the Parole Board.

³⁶ Para 23 of the judgment

disclosure has the burden of demonstrating why there should be no disclosure (para 25);

(iii) if the responsible authority cannot obtain third-party consent to disclosure (or where it is impractical), the documents should usually (in fact, except in “quite exceptional circumstances”) be disclosed to the patient’s solicitor on the basis of an undertaking as to non-disclosure – which would be for the purpose of allowing the solicitor to decide whether to seek a direction for further disclosure (paras 26–8); the solicitor should then provide a skeleton argument as to why disclosure is necessary, to which the responsible authority should reply, and if the parties are not able to resolve the difference between them, an application should be made to the Tribunal (paras 29–30);

(iv) if exceptional circumstances arise in which a responsible authority cannot rely on an undertaking as to non-disclosure, it should set out the reasons and identify the relevant documents in a skeleton argument, to which the patient’s solicitor will reply; if this does not allow the dispute to be resolved, the matter can go before the Tribunal (paras 29³⁷ and 30);

(v) although any dispute which requires a Tribunal decision will usually be capable of being determined on the day of the substantive hearing, a more complex situation might involve seeking a ruling in advance by a single judge, which in turn might require an oral hearing if it cannot be determined on the papers and might also involve inviting the third party to give views via the responsible authority (paras 31–2).

The last part of the guidance is worth noting in full. The judgment states at para 32:

“32. We can also envisage circumstances in which the tribunal will need to obtain information as to the third-party’s views on the issue of disclosure. Where this occurs, the tribunal should notify the responsible authority which should then obtain this information and submit it to the tribunal, thus avoiding where possible any direct involvement by the third-party in the tribunal’s procedures.”

The Upper Tribunal commented that a version of Deputy Regional Judge Harbour’s order modified to refer to the process relating to confidential third party material would have been appropriate on the facts; and it added the suggestion referred to above that an *ex parte* direction should include a reference to the right to seek a modified direction under r6(5) TPR.

This part of the Upper Tribunal’s guidance provides a useful reminder that the provisions relating to non-disclosure on the basis of causing serious harm (in r14 TPR) cannot be the exclusive regime, as issues of third-party confidentiality may arise. The *Human Rights Act 1998* is the obvious starting point for this. All public bodies, including courts, have to act in a manner consistent with the rights set out in the European Convention on Human Rights: s6(1) of the 1998 Act. This does not apply if a primary statute requires a breach of the Convention: s6(2). But nothing in the *Mental Health Act 1983* or any other statute requires a Tribunal to direct disclosure of confidential information irrespective of any Convention right involved, so the Convention must be followed when discretionary powers are being considered. Confidentiality invariably raises issues under Article 8 of the Convention, namely respect for private matters: the important point to remember is that Article 8 rights can be breached only if two elements are met. One element is substantive, namely that it is proportionate to breach the privacy rights involved. This proportionality can be met if disclosure is necessary to ensure a fair process at the Tribunal hearing for the patient. But there is an essential second element arising under Article 8: any breach of confidentiality must be “in accordance with the law”. This requires a legal regime to determine the

³⁷ Note that the transcript as released has two paragraphs numbered 29: if this error is amended, the references to paragraph numbers after 29 in this article may become inaccurate by one.

question of proportionality, which the process under r5(3)(d) TPR as supplemented by the guidance in this case provides.

Nevertheless, the process and substantive test for disclosure should perhaps be spelled out in the Tribunal Procedure Rules. The substantive test would no doubt be phrased along the lines of disclosure being ordered where it was reasonably required to ensure a fair hearing of the Tribunal. The process ought to include the involvement of any third party in the absence of good reasons. This is one aspect of the Upper Tribunal's decision that might require further consideration, given its view that the responsible authority should be the body that puts forward the views of the third-party.

The case of *R (TB) v Stafford Crown Court*³⁸, cited by the Upper Tribunal for the proposition that Arts 6 and 8 of the European Convention are involved, is important in relation to the process to be followed. TB was a prosecution witness in a criminal trial (she was the victim of an alleged assault). The defendant obtained an order for disclosure of her records (on the basis that they were relevant to her credibility); this was successfully challenged in judicial review proceedings on the basis that (i) the records were confidential, (ii) the confidentiality belonged to the patient, not the hospital, and (iii) the requirement in the *Criminal Procedure Rules* that cases be dealt with justly meant that the Crown Court had to give the witness notice of the application and allow her to make representations on the issue of disclosure, and it was not sufficient for the Trust to represent the patient as their interests might differ.

May LJ noted that the request for disclosure of TB's medical records meant that "22. ... The court was being invited to trample on TB's rights of privacy and confidentiality". This meant that a procedure is required that is

"23. ... fair and affords due respect to the interests protected by Art 8. The process must be such as to secure that the views of those whose rights are in issue are made known and duly taken account of. What has to be determined is whether, having regard to the particular circumstances of the case and notably the serious nature of the decisions to be taken, the person whose rights are in issue has been involved in the decision making process, seen as a whole, to a degree sufficient to provide them with the requisite protection of their interests. ..."

He went on to indicate in fairly strong terms the idea that TB's interests could be protected by the Trust:

"27. I would firmly reject the suggestion that it would have been sufficient for the interest of TB to be represented only by the NHS Trust. The confidence is hers, not theirs. Their interests are different. They have a wider public interest in patient confidentiality generally and may have particular interests relating to her care which could conflict with hers. Mr Lock submits that the Trust should be able to advance these wider public interest submissions against disclosure without having the role cast on it of acting also as an advocate for the patient's confidentiality. I agree. I agree also that the Trust should not be saddled with the heavy burden of making enquiries of the patient, finding reasons why he or she might object and putting those reasons before the court. Further, there may be material in the notes which the Trust can legitimately withhold from the patient under s7 of the *Data Protection Act 1998* as modified by the *Data Protection (Subject Access Modifications) (Health) Order 2000*.

28. In my view, the burden of protecting TB's privacy should not be placed on the Trust. The burden resides with the court and she herself was entitled to notice and proper opportunity for representation."

It will be important for the Upper Tribunal to give reasons as to why this approach is not to be followed

38 [2007] 1 WLR 1524, [2007] *Mental Health Law Reports* 115

in relation to third-party confidentiality in the First-tier Tribunal setting. There are obviously some differences between an open court criminal trial and a private Tribunal hearing in which there is significant power to control publicity: the question will be whether these differences are such that the strength of May LJ's comments are diminished to such an extent that there is a presumption against direct involvement in the process by the third-party.

The reason why this process should be set out in the Rules is that it is sufficiently important that it should be available to all affected without the need for a search of case law; this is particularly so as not all patients are legally-represented, and the third party involved will invariably not be represented when the question of disclosure arises. In addition, the inclusion of the issue in the rules will allow consideration of the other issues that might arise, including its interaction with other provisions of the rules, which should not depend on a process as ad hoc as the development of case law. An obvious example of this is the medical examination of the patient under r34 TPR. In carrying this out, the medical member of the Tribunal is allowed to have access to the patient's records: in the course of this, the medical member may view material that is covered by third party confidentiality. What should happen if this material is so important to the formulation of his or her views on the case or the Tribunal's decision that it needs to be revealed to the parties so that they can deal with it, pursuant to the duty to act fairly. This was summed up by Stanley Burnton J in *R (Ashworth Hospital Authority) v MHRT; R (H) v Ashworth Hospital Authority* [2002] Mental Health Law Reports 13 at para 86:

“86. ... The parties should be given the opportunity to address and to comment on any significant findings of the medical member, both because fairness so requires and because they may have comments or evidence to put before the Tribunal that may lead it to depart from the provisional opinion formed by the medical member. ...”³⁹

This may obviously raise issues of third-party confidentiality if that is part of the material on which the medical member relies.

(vi) Status of Upper Tribunal Decisions

The final matter on which the Upper Tribunal gave guidance was the status of its decisions: this is fairly straight-forward and obviously sensible. In short the Administrative Appeals Chamber of the Upper Tribunal used the case to adopt the rules as to precedent which applied to Social Security Commissioners⁴⁰, namely that (i) the Judges of the Upper Tribunal speak with equal authority and their decisions on matters of legal principle should be followed; (ii) a decision of a Three-Judge Panel of the AAC is to be followed over a conflicting decision of a single Judge; and (iii) a single Judge should follow the decision of a Three-Judge Panel unless there are compelling reasons – such as a decision of a superior court affecting the legal principles involved; and a single Judge should follow another single Judge unless there is an error.

Additional Points of Commentary

There are two other points arising that merit comment, the first of which is the involvement of a “Deputy Regional Tribunal Judge”: where does this title come from? As noted above, the TCEA 2007 establishes the First-tier Tribunal, and s4 of the Act provides for the appointment of judges of the Tribunal, which

³⁹ This was endorsed by the Court of Appeal, [2002] Mental Health Law Reports 314 at para 84.

⁴⁰ See Case No R(I) 12/75, 12 August 1975, available at <http://www.osscsc.gov.uk/aspx/view.aspx?id=599> (accessed 25 January 2009) – the Social Security Commissioners website, which will presumably transfer to the Tribunals website at some stage.

explains the “Tribunal Judge” tag. The “Deputy Regional” part of the designation arises as follows. The Tribunal Chambers have a Chamber President (by reason of s7(2) and (3) TCEA 2007). The President of the Health, Education and Social Care Chamber, HHJ Sycamore, has delegated functions to the former Regional Chairs of the Mental Health Review Tribunal. They are now known as Regional Judges, and any deputies they appoint are Deputy Regional Tribunal Judges. (The titles may change during 2009, as Deputy Chamber Presidents are appointed and full-time salaried Tribunal Judges begin operation in relation to mental health work.)

The other point that is worth a comment is whether the parties’ concession that the appeal had lapsed because MH had been placed on a Community Treatment Order (“CTO”) was correct. There have been two relevant decisions to consider, one relating to what happens when a patient due for a Tribunal whilst detained on s2 MHA 1983 (detention for assessment) is placed on a s3 order, the other relating to a s3 patient placed on the now deleted after-care under supervision provisions of s25A⁴¹. The former situation arose in *R v South Thames Mental Health Review Tribunal ex p M* 3 September 1997, [1998] COD 38. M was detained under s2 MHA 1983 on 9 July 1997; on 10 July she applied for a Tribunal hearing, and the date was fixed for 18 July. On 15 July, she was placed under s3 MHA. The decision giving rise to the proceedings was that the Tribunal’s view that it was the hearing to which she was entitled to apply having been placed under s3 MHA – in other words, that she had no further right to apply to a Tribunal⁴². Collins J determined that the Tribunal view was wrong: M had a right to apply to a Tribunal from the fact of admission under s2, had exercised that right, and had not lost it by the change of status from s2 to s3. So the Tribunal hearing did not extinguish the separate right arising by reason of the s3 admission. What did change, however, was the criteria to be applied, because the Tribunal had to consider the situation of the patient on the day it met, and so the s3 criteria had to be applied despite the application having been made when the patient was under s2.

The position relating to a s3 patient placed on aftercare under supervision (“ACUS”) is different: this was decided in *R (SR) v Mental Health Review Tribunal* [2006] Mental Health Law Reports 121. The patient applied to the Tribunal whilst detained under s3, but was placed on a supervised discharge under s25A shortly before the hearing: the Tribunal was then cancelled. SR challenged this, arguing that it should have proceeded as fixed and have considered the supervised discharge criteria⁴³. The judge dismissed this challenge. He held that a fresh application was needed if the patient changed status to that of an ACUS patient. There were several reasons for this, namely there were different time limits in s66(2) MHA for the making of an application (which started as of the date of the s3 order or of the ACUS order), the Tribunal having jurisdiction might be different if the patient moved when placed on ACUS, and the “responsible authority” (on whom the application was served, who was responsible for providing reports to the Tribunal and who is a party to the proceedings) differed according to whether the patient was detained or subject to ACUS. Further, the natural meaning of the statutory language as to the discharge of an ACUS patient in s72(4A) – “where application is made to a ... Tribunal by or in respect of a patient who is subject to after-care under supervision” – properly required the patient to be so subject at the time of application.

41 The provisions of s25A are deleted by s36 MHA 2007; there are transitional provisions retaining the regime until May 2009 for patients already subject to aftercare under supervision – see *The Mental Health Act 2007 (Commencement No 6 and Aftercare under Supervision: Savings, Modifications and Transitional Provisions) Order 2008 (SI 2008/1210)*

42 See s77(2) MHA: there is one right to apply to a Tribunal during any period giving rise to a right to apply; s66 MHA sets out the rights to apply, including when a patient is placed on s2 and when a patient is placed on s3 or a s3 order is renewed under s20.

43 Former s72(4A) MHA 1983.

How does this case law apply if the s3 patient is placed on a CTO before a Tribunal hearing? The rationale in SR has some application: the time limits in s66 MHA are different and there may be different responsible authorities⁴⁴. (Of course, there are different time limits in relation to a patient under s2 and a patient under s3, and it is possible for a patient to be transferred between hospitals at any stage, which will change the responsible authority.) But there are various other features to consider. For example, (i) the tribunal task in relation to a community patient is also set out in s72(1) MHA 1983 (not in a separate subsection, as in the case of an ACUS patient); s72(1) simply refers to an application being made and then sets out tests according to the status of the patient, and so the point arising from the language of s72(4A) does not apply; (ii) the s3 order applicable at the date of application remains in place, being suspended rather than ended, in contrast to an ACUS order, which represented a cleaner break from the s3 detention⁴⁵; and (iii) the CTO ends if the s3 order “ceases to have effect” (s17C(c) MHA), so a decision by the Tribunal that the s3 is not justified ends the CTO. It is also to be noted that the duty of managers to refer a case under s68 applies in relation to a community patient as from the date the detention of the patient commenced, suggesting that there is a continuum of compulsion in different forms rather than a complete break, as happened under the ACUS regime.

One suspects that this is a point that might have to be determined at some stage in the future, and the Upper Tribunal's endorsement of a concession made should not be taken to determine the position.

⁴⁴ Indeed, if a patient detained in England is placed on a CTO in Wales, then a different Tribunal may have jurisdiction: but there are provisions allowing transfer – r5(3)(k) TPR, or r23 of the Welsh Rules in the vice versa situation.

⁴⁵ If an ACUS patient deteriorated, consideration had to be given to whether a fresh sectioning process should be followed.