IN THE UPPER TRIBUNAL **Appeal No.** HM/525/2010
ADMINISTRATIVE APPEALS CHAMBER

Before Judge S M Lane

This decision is made under section 12(1) and (2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007.

The decision of the tribunal heard on 3 December 2009 under reference MP/2009/19180 is SET ASIDE because its making involved an error on a point of law.

The appeal is REMITTED to a fully reconstituted tribunal for a complete rehearing.

REASONS FOR DECISION

1. The appellant, a restricted patient subject to a restriction order, appeals against the First-tier Tribunal's decision of 3 December 2009 to refuse his application for an absolute discharge from hospital. The effect of that decision is that he remained subject to a conditional discharge order. A First-tier Tribunal judge granted the appellant permission to appeal.

2. At the oral hearing of the appeal, the appellant was represented by Ms Bridget Dolan, who was instructed by Ms Corinne Singer of Scott-Moncrieff Harbour and Sinclair. Ms Singer was present, but the appellant did not attend. The Secretary of State had been directed to attend, but following a late flurry of correspondence, was excused. His officials had not grasped the need to respond to the *legal* question of whether the tribunal's decision was made in error of law until the eleventh hour. I did not consider it right to put off the hearing any longer to wait for a submission from the Secretary of State. Ms Dolan's skeleton arguments set out the issues and case law fully, and I concluded that the inquisitorial powers of the Upper Tribunal enabled me to canvass the relevant issues with her. I thank her for her helpful and realistic approach to the issues in the appeal.

Background

3. The appellant, who suffers with paranoid schizophrenia, committed his index offence of manslaughter in July 2000 when he was aged 22. The circumstances were horrific: he killed his grandmother, to whom he was particularly close and who had mainly brought him up, by setting fire to her and stabbing her. He was floridly psychotic at the time. He was admitted to Broadmoor Hospital under s.48/49 MHA on 8 August 2000. In December 2000 he pleaded guilty to manslaughter in the grounds of diminished responsibility and was made subject to court orders under s.37 and s.41 of the Mental Health Act 1983 (MHA 1983). In October 2001 he was transferred to the Medium Secure Unit at Cane Hill Hospital but his condition did not improve substantially until October 2003 when he began treatment with Clozapine. Since then, he has steadily improved and become symptom free. On 7 January 2005 he was conditionally discharged by a MHRT.

4. Thereafter there was a brief period of readmission in the context of personal life events (difficulties with other residents of the supported hostel at which he was living) although there was not any deterioration in his mental health at that time. He remained symptom free during that re-admission and continued to have unescorted community leave throughout. He

was discharged to a different supported hostel in August 2005 and since August 2005 he has lived uneventfully in the community with no incidents of symptomatic relapse or recall.

Grounds of Appeal

5. The grounds of appeal were that the tribunal erred in law in making its decision under section 75(3) of the Mental Health Act 1983 ('MHA 1983') by taking into account an irrelevant consideration, making incorrect assumptions and also by failing to give adequate reasons for its decision. I accept that the reasons given by the tribunal were inadequate but not that it took into account an irrelevant consideration. Little needs to be said about the assumptions said to have been incorrectly made, given that the case will have to be remitted.

The relevant legislation under the Mental Health Act 1983 as amended

6. Section 75(3) is applicable to the appellant. It gives the tribunal the power to direct an absolute discharge in certain circumstances. Section 75 should be read in connection with s. 73, which I set out below. This is because in *R(SC) v Mental Health Review Tribunal,* [2005] MHLR 31 at [59], Munby J considered that, although not formally constrained by the terms of s. 73, a tribunal considering s. 75 would need to consider the key question in s. 73(1)(b) in making up its mind: whether it is satisfied that it is not appropriate for the patient to remain liable to be recalled to hospital for further treatment. If the tribunal is not so satisfied, then it would be difficult to see that it could be appropriate for it to make an order under s. 75(3)(b).

> **73.— Power to discharge restricted patients.**
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> (1) Where an application to [the appropriate tribunal] is made by a restricted patient who is subject to a restriction order, or where the case of such a patient is referred to [the appropriate tribunal], the tribunal shall direct the absolute discharge of the patient if—
>
> > (a) [the tribunal is] not satisfied as to the matters mentioned in [paragraph (b) (i), (ii) or (iia) of section 72(1)] above; and
> >
> > (b) [the tribunal is] satisfied that it is not appropriate for the patient to remain liable to be recalled to hospital for further treatment.
>
> (2) Where in the case of any such patient as is mentioned in subsection (1) above—
>
> > (a) paragraph (a) of that subsection applies; but
> > (b) paragraph (b) of that subsection does not apply,
>
> the tribunal shall direct the conditional discharge of the patient.
>
> (3) Where a patient is absolutely discharged under this section he shall thereupon cease to be liable to be detained by virtue of the relevant hospital order, and the restriction order shall cease to have effect accordingly.
>
> **75.— Applications and references concerning conditionally discharged restricted patients.**
>
> (1) Where a restricted patient has been conditionally discharged under section 42(2), 73 or 74 above and is subsequently recalled to hospital—
>
> > (a) …(not relevant to appeal); and

(b) …(not relevant).

(2) Where a restricted patient has been conditionally discharged as aforesaid but has not been recalled to hospital he may apply to [the appropriate tribunal] —

(a) in the period between the expiration of 12 months and the expiration of two years beginning with the date on which he was conditionally discharged; and

(b) in any subsequent period of two years.

(3) Sections 73 and 74 above shall not apply to an application under subsection (2) above … but on any such application the tribunal may—

(a) vary any condition to which the patient is subject in connection with his discharge or impose any condition which might have been imposed in connection therewith; or

(b) direct that the restriction order [, limitation direction] or restriction direction to which he is subject shall cease to have effect;

and if the tribunal [gives] a direction under paragraph (b) above the patient shall cease to be liable to be detained by virtue of the relevant hospital order [, hospital direction] or transfer direction.

7. While s. 75(3) does not set out the criteria by which a tribunal should make its decision, its base line is that a restricted patient who has been conditionally discharged already will, by definition, already have been convicted of a criminal offence sufficiently grave as to merit a possible sentence of imprisonment (s37(1)); found to be suffering from mental disorder meriting his detention in hospital for treatment (s37(2)(a)(i)); found to be someone whose risk of reoffending is such that a restriction order is "necessary for the protection of the public from serious harm" (s41(1)); and found by the Tribunal (unless previously discharged by the Secretary of State under s42(2)) to be someone who, although not requiring for the time being to be detained in hospital for medical treatment (ss 72(1)(b), 73(1)(a), 73(2)(a)), should nonetheless remain liable to be recalled to hospital for further treatment (s73(2)(b)) *R(SC) v Mental Health Review Tribunal* at [56]. It is against this background, as Munby J holds in *R(SC) v Mental Health Review Tribunal* at [57] that the tribunal exercises its powers under s. 75(3):

[57] …"Accordingly, the Tribunal when exercising these powers will need to consider such matters as the nature, gravity and circumstances of the patient's offence, the nature and gravity of his mental disorder, past, present and future, the risk and likelihood of the patient reoffending, the degree of harm to which the public may be exposed if he re-offends, the risk and likelihood of a recurrence or exacerbation of any mental disorder, and the risk and likelihood of his needing to be recalled in the future for further treatment in hospital. The Tribunal will also need to consider the nature of any conditions previously imposed, whether by the Tribunal or by the Secretary of State, under ss 42(2), 73(4)(b) or 73(5), the reasons why they were imposed and the extent to which it is desirable to continue, vary or add to them. ...

An irrelevant consideration?

8. In setting out its reasons, the tribunal said that it took into account the relatively recent date of the index offence and the relatively short time since the appellant had been

conditionally discharged. At the hearing, Counsel refined her submission on irrelevance, and submitted that the length of time since these events could be relevant, but that 'relative' was meaningless unless given some context. As she pointed out, one could just as easily have said those periods represented a relatively long time, especially since the appellant was only 22 years old at the time of the offence.

9. I agree that counsel is right in the context of mental health appeals. It is not the mere passing of time that is significant, but what happens during the time that has passed. Time may show that the patient's mental state is erratic, has remained the same, has stabilised, improved, or worsened. This, in turn, will be a factor to consider in deciding whether there are unacceptable risks in an absolute discharge; in other words, whether it is appropriate for the patient to be absolutely discharged under section 73(1) or remain discharged conditionally.

10. The problem with the tribunal's reference to the passing of time in this case is that there is no explanation of why that is significant in refusing the application. This is a not a question of irrelevance, but of inadequate reasons.

11. If this had been the only failing, I would not have set aside the decision. There were, however, additional inadequacies in the reasons which do justify setting it aside for error of law. There is no need in this decision to set out the case law on the adequacy of reasons at length. It is enough to say that 'the essential requirement is that what the tribunal says should enable the parties and any appellate tribunal readily to analyse the reasoning that was essential to the decision' and that 'the tribunal should provide an explanation as to why it has accepted the evidence of one expert and rejected that of another': *BB v South London and Maudsley NMH Trust and the Ministry of Justice* [2009] UKUT 157 (AAC) at [6]. At [18], the Upper Tribunal emphasises that, where there is 'a coherent, reasoned opinion expressed by a suitably qualified expert, the tribunal needed to state with clarity how and why it disagreed with that reasoning.'

12. The most important failure in this is the tribunal's failure to explain why it rejected the reports of both the consultant forensic psychiatrist (CFP) and forensic social worker (FSW), the latter of which contained a detailed risk analysis. Both reports were strongly supportive of the appellant's absolute discharge. The first respondent accepted both reports and also supported the absolute discharge. Apart from an oblique reference to a 'Dr Fotiadou' (who happens to be the CFP, though one would not know it from the Reasons), the tribunal does not mention these reports at all. Yet they were key to the appellant's application. While the tribunal was under no obligation to accept the conclusions of these two experts, they were under an obligation to explain clearly why they rejected their opinions. They simply did not do so. What it did instead was to set out the facts upon which the reports were based and move directly to the criteria in *R(SC) v Mental Health Review Tribunal.*

13. During the hearing, I asked counsel whether the defects in the Reasons could be cured by the addition of two sentences/phrases: before the lengthy findings of fact in paragraph 2, I could add the words 'We have considered the expert reports which reveal that …'; and before paragraph 3 I could add 'We are not persuaded that the opinions of the CFP and FSW represent a satisfactory assessment of the risks of granting an absolute discharge for the following reasons', followed by the six reasons the tribunal gave in response to the guidance in *R(SC) v Mental Health Review Tribunal*. Since the parties knew what the opinions were, it was not necessary to recite them.

14. I have, however, been persuaded that this would not be sufficient. These were strong, clearly reasoned reports by experts supporting absolute discharge. The tribunal's reasons for rejecting them consisted of possibilities which were remote, on the evidence before them. If the tribunal was going to act on remote possibilities, it had to explain itself cogently. This could not be cured by a few sentences.

15. For completeness sake, I would add that I do not accept that the tribunal made incorrect assumptions about, for example, the availability of alcohol and cannabis at clubs and establishments that the appellant would frequent in his business as a DJ. The use of drugs and alcohol at many such venues are common knowledge. Where the tribunal went wrong in this 'assumption', as in others, was in failing to weigh the evidence in assessing whether there was any real risk that the eventualities they posed would occur.

16. As a final matter, tribunals should by now be aware that their decisions are to contain numbered paragraphs: Practice Statement on the Form of Decisions and Neutral Citation, at [2].

17. It would be inappropriate for me to substitute my own decision. The decision whether to order an absolute discharge of a restricted patient is clearly better left to an expert mental health tribunal.

18. The appellant should be aware that success before the Upper Tribunal is no indication of the outcome of the appeal before the First-tier Tribunal.

[Signed on original]

S M Lane
Judge of the Upper Tribunal

[Date]

17 December 2010