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.

This decision is given under section 11 of the Tribunals, Courts and Enforcement Act 2007:

The decision of the First-tier Tribunal under reference MP/2019/06725, made on 10 June 2019, involved the making of a material error on a point of law. It is set aside pursuant to section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 (the **"TCEA"**).

Since further facts need to be found the case is remitted to the First-tier Tribunal for rehearing before a differently constituted panel pursuant to section 12(2)(b)(i) of the TCEA.

REASONS FOR DECISION

A. This case is about hearings in a party's absence

1. This case is about what a Tribunal needs to decide if an absent party is represented at their hearing but the representative leaves during the course of the hearing, and what it needs to say in its reasons.

B. What happened

2. The Appellant was detained in hospital under section 3 of the Mental Health Act 1983 (as amended) when she applied for her section to be reviewed in March 2019. Her application was listed for an oral hearing to take place at The Beacon in Ramsgate on 10th June 2019, by which date the Appellant had been discharged from hospital but remained liable to recall to hospital under the terms of a Community Treatment Order (**"CTO"**).
3. The Appellant requested a pre-hearing examination (**"PHE"**), which was scheduled for the day of her hearing.
4. However, on the day of her hearing the Appellant did not attend either for her PHE or for the hearing itself. This was unexpected and her representative, Miss Warr, confirmed that the Appellant had been informed of the date and time of the hearing (see paragraph 2 of the "Jurisdiction, Preliminary and Procedural Matters" section of the decision with reasons (its **"reasons"**)).
5. Ms Warr, attempted to contact the Appellant numerous times on the morning of the hearing but could not reach her (see paragraph 3 of the "Jurisdiction, Preliminary and Procedural Matters" section of its reasons).

6. Ms Warr made an application for an adjournment on the basis that she was without instructions and because there were new reports that Ms Warr was concerned the Appellant may not have seen (see paragraph 4 of the "Jurisdiction, Preliminary and Procedural Matters" section of its reasons).
7. Having heard submissions from Ms Warr the panel of the First-tier Tribunal which had convened to hear the appeal (the **"Tribunal"**) refused the application. It set out its reasons in paragraphs 8 to 13 of the "Jurisdiction, Preliminary and Procedural Matters" section of its reasons. These were:
   "8. The patient had been informed of the tribunal date and time and had chosen not to attend without any explanation.
   9. The matter had already been adjourned once.
   10. In balancing the patient's interests and dealing with the case fairly and justly with the requirements under r.2 of the Tribunal Rules (2008) (sic), particularly the need to deal with issues proportionately and to avoid delay, the tribunal considered that the hearing should proceed.
   11. The Tribunal was concerned that if the hearing was adjourned the patient may not attend at the next date, causing further delay and expense.
   12. There was no indication that the patient wished to withdraw the application and the reports from the RC and Ms. Outhwaite were not in substance any different to the reports already obtained and seen by the patient.
   13. The tribunal further considered that (sic) the criteria at r.39(1) and (2) of the Tribunal Rules (2008) (sic) and held that, the patient having been notified of the hearing date and time, it was in the interests of justice to proceed with the hearing."
8. After the Tribunal refused Ms Warr's application for an adjournment she told the Tribunal that she was unable to represent the Appellant at the hearing and left the hearing.
9. The Tribunal continued with the hearing in the absence of both the Appellant and her representative and, after hearing oral evidence from the Responsible Authority's witnesses, decided not to discharge the Appellant's CTO (the **"Decision"**).

C. The permission stage

10. Ms Warr applied to the First-tier Tribunal for permission to appeal the Decision on the basis that the Tribunal should not have gone ahead with the hearing in the absence of both the Appellant and her representative, and that its determination of her application when she was neither present nor represented denied her of her right to a fair trial.
11. A salaried judge of the First-tier Tribunal decided not to review the Decision and refused permission to appeal.
12. Ms Warr then applied to the Upper Tribunal for permission to appeal and the matter came before me.
13. In the application for permission to appeal Ms Warr raised the following grounds:
    a. The Tribunal failed to consider whether a legal representative should be appointed for the Appellant under rule 11(b) of the Tribunal Procedure

(First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 (the **"Rules"**);

b. The Tribunal failed to consider rule 39(2)(b) of the Rules;
c. The Tribunal's reasons are inadequate in that they do not explain why it decided to proceed in the absence of the Appellant's representative (or acknowledge that the representative was not present for the substantive hearing); and
d. The Tribunal was wrong to proceed with the hearing in the absence of both the Appellant and her representative, which breached the Appellant's right to a fair trial and her right to respect for her private and family life under Articles 6(1) and 8 of the European Convention on Human Rights (as incorporated into domestic law by the Human Rights Act 1998).

Ms Warr made further criticisms of the reasoning in the First-tier Tribunal's decision refusing permission to appeal to the Upper Tribunal, but given that this appeal relates to the Decision and not the decision to refuse permission to appeal I need not deal with them here.

14. I was persuaded that it was arguable with a realistic prospect of success that the Tribunal had erred in law because, while it had referred to considering rule 39(1) and (2) of the Rules, its explanation of its decision-making did not extend to all the matters which rule 39(2)(b) of the Rules required it to be satisfied of (i.e. either that a PHE has been carried out or that a PHE was either impractical or unnecessary). It was therefore arguable that the Tribunal had failed to apply the proper test in deciding whether to proceed with the hearing in the Appellant's absence or, if even if it had applied the proper test, that it failed adequately to explain its reasons for doing so.
15. I granted permission on that basis but I didn't restrict my grant of permission to that ground. I gave the Respondent one month from the date that my permission to appeal was sent to the parties (which was 30 August 2019) to respond to the appeal, but the Respondent has not responded to the appeal and the Upper Tribunal has not received any application from or on behalf of the Respondent for an extension of time to allow it to respond.

D. My decision

16. When deciding whether to grant permission to appeal the test I had to apply was whether it was arguable with a realistic prospect of success that the Tribunal erred in law in a way which was material. The test I now have to apply is whether on the balance of probabilities the Tribunal did indeed make a material error of law.
17. In relation to the first ground of appeal identified by the Appellant I am not persuaded that the Tribunal erred by failing to consider whether a representative should be appointed for the Appellant under rule 11 of the Rules. The Appellant had already appointed a representative and there is no suggestion that she had withdrawn her instruction. Neither was there any suggestion that the Appellant lacked capacity to make decisions as to representation at the hearing, so she was to be presumed to have capacity. In the circumstances it was not incumbent on the Tribunal to consider making an appointment under rule 11(7) of the Rules.

18. In relation to the ground of appeal which persuaded me to grant permission to appeal, I note that the Tribunal referred in its reasons expressly both to rule 39(1) and to rule 39(2) of the Rules.
19. Unless there is an indication to the contrary it is proper to proceed on the assumption that, as an expert tribunal, the Tribunal will have got the law right (see Gross LJ in *CICA v Hutton and Ors and the First-tier Tribunal* [2016] EWCA Civ 1305 at paragraph 57).
20. The Tribunal was aware that the Appellant's representative had made numerous attempts to contact the Appellant on the morning of the hearing to take instructions and had been unable to do so. It is more likely than not that the Tribunal had in mind both limbs of rule 39(2) when it made its decision to proceed, and given the information it had it is more likely than not that it took the view that it was impractical to carry out a PHE given that the Appellant had not attended and could not be contacted.
21. Had the Tribunal set out its thought process and its findings on this matter explicitly it would undoubtedly have improved its reasons but the omission of such an account, by itself, would probably not have rendered its reasons inadequate. However, that is not the only deficiency in the reasons.
22. The reasons set out the Tribunal's decision-making on the representative's application for an adjournment, but what they don't say is that the Appellant's representative left the hearing after it announced its decision to refuse the adjournment application, and they also don't say that the Tribunal then went on to consider afresh whether, in those changed circumstances, it should proceed with the hearing given that not only was the Appellant not present, she was also unrepresented.
23. The Tribunal may well have felt that the representative's decision to leave the hearing was a tactical one. However, whatever the rights or wrongs of the representative's decision about her ability to represent her client in those circumstances, it was incumbent on the Tribunal to make a fresh assessment as to whether it was in the interests of justice to proceed with the hearing taking this development into account. It is by no means clear to me from its reasons that the Tribunal did make such an assessment. The Tribunal devoted 6 paragraphs to its decision to refuse the adjournment application. By contrast, there is a total absence of any reference to consideration being given to whether to adjourn once it became clear that the Appellant would be unrepresented at the hearing. It is likely that this is because the Tribunal did not consider the matter afresh as it should have done. Even if it did consider this question, but failed to explain it, such a deficiency is sufficient to render its reasons inadequate because the Appellant cannot understand how or why it decided to proceed, or whether this was in accordance with the law.
24. For these reasons I am satisfied that the Tribunal erred in law. I am satisfied that the error was material, in the sense that had the Tribunal not erred it might have decided to adjourn rather than to determine the Appellant's application, giving the Appellant another opportunity to give her evidence and/or to be represented. The appeal is therefore allowed to the extent described above.
25. Having concluded that the Tribunal erred in law in a way which was material I have to decide on the most appropriate way to dispose of the appeal. Given that further facts need to be found I am not in a position to remake

the Decision myself. I therefore set aside the Decision and remit the matter to the First-tier Tribunal for re-hearing by a differently constituted panel.

26. Nothing in this decision should be taken as amounting to any view as to what the ultimate outcome of the remitted appeal should be. All of that will now be for the good judgment of the First-tier Tribunal.

Signed

Thomas Church
Judge of the Upper Tribunal

Dated **11 November 2019**