R (OK) v FIRST-TIER TRIBUNAL AND CAMBIAN FAIRVIEW (INTERESTED PARTY)
[2017] UKUT 0022 (AAC)
UPPER TRIBUNAL CASE NO: JR/1559/2016

DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

The application for judicial review of the decision of the First-tier Tribunal in its mental health jurisdiction taken by Judge Johnston on 6 June 2016 in respect of case reference MP/2016/06775 is dismissed.

REASONS FOR DECISION

1. This is one of those rare cases, identified by Lady Hale in *R (H) v Secretary of State for Health* [2006] 1 AC 441 at [4], involving 'a patient who is so severely mentally disordered that she cannot apply to a court or tribunal [to] challenge her detention in hospital'.

A. This is a challenge to a decision to strike out proceedings

2. This is a challenge to a decision striking out proceedings on the ground that there had been no valid application. Judge Johnston did not express herself in terms of that rule. She said that 'the matter may be closed as an invalid application.' Strictly, that is the wrong approach; she should have struck out the proceedings. But her choice of words matters not. What matters is the substance, and there can be no doubt about what she intended and the legal basis on which that could be achieved.

3. The decision under challenge is important. A decision to strike out proceedings carries the right of appeal to the Upper Tribunal. It is:

- a decision - *Patel v Secretary of State for the Home Department* [2015] EWCA Civ 1175 at [51];
- of the First-tier Tribunal – rule 8 confers the duty on the tribunal, not on a judge of that tribunal;
- that is not an excluded decision – see section 11(1) and (5) of the Tribunals, Courts and Enforcement Act 2007.

This Chamber of the Upper Tribunal has regularly heard appeals against decisions to strike out proceedings, as in *KC v London Borough of Newham* [2010] UKUT 96 (AAC).

4. The existence of a right of appeal, is usually (although not necessarily) a bar to bringing judicial review proceedings: *R (Khan) v Secretary of State for the Home Department* [2015] 1 WLR 747. If I had understood the case from the outset as well as I now do - an understanding that has only been acquired with the assistance of the parties' submissions - I would have treated the application for judicial review as an application for permission to appeal. It would, though, add no value were I now, at the end of the proceedings, to reconstitute them formally as what they should have been all along.

B. Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 (SI No 2699)

5. These are the relevant rules:

7 Failure to comply with rules etc.

(1) An irregularity resulting from a failure to comply with any requirement in these Rules, a practice direction or a direction, does not of itself render void the proceedings or any step taken in the proceedings.

8 Striking out a party's case

(1) With the exception of paragraph (3), this rule does not apply to mental health cases.

(2) The proceedings, or the appropriate part of them, will automatically be struck out if the applicant has failed to comply with a direction that stated that failure by the applicant to comply with the direction would lead to the striking out of the proceedings or that part of them.

(3) The Tribunal must strike out the whole or a part of the proceedings if the Tribunal—

(a) does not have jurisdiction in relation to the proceedings or that part of them; and

(b) does not exercise its power under rule 5(3)(k)(i) (transfer to another court or tribunal) in relation to the proceedings or that part of them.

(4) The Tribunal may strike out the whole or a part of the proceedings if—

(a) the applicant has failed to comply with a direction which stated that failure by the applicant to comply with the direction could lead to the striking out of the proceedings or part of them;

(b) the applicant has failed to co-operate with the Tribunal to such an extent that the Tribunal cannot deal with the proceedings fairly and justly; or

(c) the Tribunal considers there is no reasonable prospect of the applicant's case, or part of it, succeeding.

(5) The Tribunal may not strike out the whole or a part of the proceedings under paragraph (3) or (4)(b) or (c) without first giving the applicant an opportunity to make representations in relation to the proposed striking out.

(6) If the proceedings, or part of them, have been struck out under paragraph (2) or (4)(a), the applicant may apply for the proceedings, or part of them, to be reinstated.

(7) An application under paragraph (6) must be made in writing and received by the Tribunal within 28 days after the date on which the Tribunal sent notification of the striking out to that party.

(8) This rule applies to a respondent as it applies to an applicant except that—

(a) a reference to the striking out of the proceedings is to be read as a reference to the barring of the respondent from taking further part in the proceedings; and

(b) a reference to an application for the reinstatement of proceedings which have been struck out is to be read as a reference to an application for the lifting of the bar on the respondent from taking further part in the proceedings.

(9) If a respondent has been barred from taking further part in proceedings under this rule and that bar has not been lifted, the Tribunal need not consider any response or other submission made by that respondent.

32 Procedure in mental health cases

(1) An application or reference must be-

…

(b) signed (in the case of an application, by the applicant or by any person authorised by the applicant to do so); …

C. What happened

6. I am grateful to Judge Hinchcliffe, Deputy Chamber President for the First-tier Tribunal's mental health jurisdiction, who has provided the statement on which I have drawn in part for this history.

7. The patient has been detained under section 3 of the Mental Health Act 1983 since 2009. He has diagnoses of autistic spectrum disorder, severe learning disability, epilepsy and challenging behaviour including self-harm and aggression towards people and property.

8. An application in respect of the patient, dated 6 March 2016, was submitted to the First-tier Tribunal under section 66 of the Mental Health Act 1983. The solicitor says that the date was a mistake, but that does not concern me. The important point is that it was signed not by the patient but by his solicitor, who certified that it was submitted on behalf of the patient, 'who has personally authorised me to submit this application on their behalf'.

9. On 8 March 2016, the solicitor applied under rule 11(7)(b) of tribunal's rules of procedure to be appointed the patient's legal representative for the proceedings. That was done on 15 March 2016 and the case came before the tribunal for hearing on 29 April 2016. Having heard the evidence of the patient's responsible clinician, the tribunal found that 'It does not appear that the patient has the capacity to authorise anyone to make an application on his behalf and has not done so.' There is some inconsistency in the tribunal's decision and reasons. The tribunal recorded that it was 'satisfied that the application is

invalid', but the decision made was to adjourn the hearing to allow the patient's solicitor 'to consider whether they agree that the application is invalid or provide reasons why they consider that it is valid.'

10. Judge Hinchliffe says that the tribunal's decision was in exercise of its duty under rule 8(5) to allow the patient's representative to make representations. What the tribunal did is certainly consistent with that, although the tribunal's reasons do not refer to that requirement.

11. Be that as it may, the hearing was not resumed. The solicitor submitted a document to stand as both representations to the tribunal and as an application for permission to apply for judicial review. She accepted that the patient did not have capacity to apply to the First-tier Tribunal. It was in those circumstances that Judge Johnston gave the decision that I set out in paragraph 2.

D. What the parties have said

12. Judge Hinchliffe provided a response to the appeal. Coming as it does from the Deputy Chamber President in judicial review proceedings, it is only to be expected that it is not contentious. He has set out the sequence of events on which I have relied in the previous section and made some objective remarks about the law. In particular, he has set out the various ways in which the Mental Health Act 1983 provides for a patient's case to be brought before the First-tier Tribunal.

13. The argument for the patient is, in summary, that there is a gap in the legislation that fails to provide for patients who lack the capacity to decide to apply to the First-tier Tribunal. In order to overcome that deficiency, section 66 of the Mental Health Act 1983 should be interpreted, pursuant to section 3 of the Human Rights Act 1998, in a way that is compatible with the patient's Convention rights. The Convention rights engaged are Article 5, 6 and 14. The proposed interpretation that protects those rights is to read section 66(1)(i) as applying to a 'patient (with the assistance of a litigation friend if needed)'. In *R (H) v Secretary of State for Health* [2006] 1 AC 441, the House of Lords decided that the overall scheme of the Mental Health Act 1983 was compatible with the Convention rights of a patient detained under section 2 for assessment. That case is said to be distinguishable, because the patient here is detained under section 3, where different time scales apply.

E. Analysis

14. When I gave permission to bring these proceedings, my understanding of what had happened was less clear than it is now. That is why I was somewhat vague in identifying the decision that was properly the subject of the proceedings. With the benefit of the parties' submissions, in particular that of the First-tier Tribunal, I now identify the relevant decision as that of Judge Johnston.

15. As I have explained, the proper legal basis for the decision was rule 8. It may appear logical to say that, if an application is invalid, there are no

proceedings and that all the First-tier Tribunal has to do is declare that to be the case. That is not how the rules of procedure are structured. A document in the form of an application was submitted. It did not comply with rule 32(1)(b), but rule 7 provides that that did not render the proceedings void. The result is that the application was effective despite failing to comply with rule 32. As the effect of the failure to comply with rule 32 was to deprive the tribunal of jurisdiction, it was under a duty to exercise its power under rule out and strike out those proceedings.

16. Rule 8 is strangely constructed. It begins by providing that only paragraph (3) applies to mental health cases, but paragraph (5) then makes provision for cases within that paragraph. The most sensible interpretation is that paragraph (5) also applies to mental health cases, in so far as it relates to paragraph (3). Otherwise, the reference to paragraph (3) in paragraph (5) would be redundant. The result is consistent with the overall structure of rule 8, which provides either for a person to make representations before a case is struck out (paragraph (5)) or to apply for reinstatement (paragraph (6)). Neither of those options would be available if paragraph (5) did not apply to mental health cases.

17. The effect of the tribunal's decision to adjourn was to give the solicitor a chance to make representations. That complied with the requirement in rule 8(5).

18. Section 66 of the Mental Health Act 1983, provides for patients and their nearest relatives to apply to the First-tier Tribunal within a specified time of certain events occurring. In addition, section 67 confers on the Secretary of State power to refer a patient's case to the tribunal at any stage and section 68 imposes a duty on hospital managers to refer cases to the tribunal in specified circumstances. There are other provisions in sections 69 to 71. It is also possible for an application to be made on the patient's behalf and in their best interests by someone authorised under the Mental Capacity Act 2005.

19. In *R (H) v Secretary of State for Health* [2006] 1 AC 441, Lady Hale said of the duties imposed by section 68:

> 13. … These duties were introduced in order to ensure that patients who had not exercised their rights to apply, perhaps because they lacked capacity or had become institutionalised, were not 'lost' in the system.

The circumstances of that case also illustrate the way that the Secretary of State's power under section 67 can be used on request in order to protect a patient who lacks capacity. The patient was detained for assessment under section 2. She lacked the capacity to apply to the tribunal. Her mother, as her nearest relative, applied for her discharge under section 23, but this was blocked under section 25. Shortly before the period of her detention was due to come to an end, an application was made to the County Court to displace the nearest relative. This had the effect of prolonging the patient's detention for the duration of those proceedings. In the meantime, neither she nor her nearest relative could bring her case before the tribunal. However, on request the Secretary of State exercised the power under section 67 to refer her case to the tribunal. That is a

useful illustration of how the powers and duties can operate to protect a patient who does not have the capacity to apply to the tribunal.

20. I can see no basis on which to distinguish this case from *R (H)*. The time periods differ according to the basis on which the patient is within the Act. The patient's solicitor is right that the House of Lords was concerned with a patient detained under section 2, for which the time limit was 28 days. But I cannot find anything in the speech of Lady Hale, with whom all the others agreed, to suggest that the period of time was significant, still less decisive. More important in her reasoning was the proper use of the Secretary of State's power to refer a case to the tribunal:

> 27. Even if the patient's nearest relative has no independent right of application, there is much that she, or other concerned members of the family, friends or professionals, can do to help put the patient's case before a judicial authority. The history of this case is a good illustration. The patient's mother was able to challenge every important decision affecting her daughter. Most helpfully, she stimulated the Secretary of State's reference to the tribunal very quickly after it became clear that her daughter was to be kept in hospital longer than 28 days. Had MH been discharged once the 28 days were up there would, in my view, have been no violation of her rights under article 5(4). It follows that section 2 of the Act is not incompatible with article 5(4). Section 29(4), however, is another matter.

That reasoning is equally applicable to a patient detained under section 3 rather than section 2.

21. I accept that there appears to be a gap in the protection of a patient's right to bring their case before the First-tier Tribunal, but that is apparent only when the tribunal's rules of procedure are considered in isolation. It disappears when the various duties and powers under those rules, the Mental Health Act 1983 and the Mental Capacity Act 2005 are considered as a package. This case is governed by the reasoning in *R (H)*. There is no violation of the patient's Convention rights. An application for the Secretary of State to refer his case could have been made under section 67 and, if that was refused, the patient could have had recourse to judicial review.

22. I deal finally with Judge Hinchliffe remark that 'the case had been struck out on the basis of consent.' The solicitor has objected that there is no power to strike out by consent. That is correct. It is, though, clear what the judge meant. He meant that it was struck out on the basis that the solicitor had accepted that the patient lacked capacity to apply to the tribunal, the inevitable result of which was that the tribunal lacked jurisdiction.

Signed on original
on 12 January 2017

Edward Jacobs
Upper Tribunal Judge