Neutral Citation Number: [2025] UKUT 009 (AAC) **Appeal No. UA-2023-001797-HM**

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Between:

JB

Appellant

- v -

(1) ELYSIUM HEALTHCARE
(2) SECRETARY OF STATE FOR JUSTICE

Respondents

Before: Upper Tribunal Judge Church
Decided on consideration of the papers

Representation:

Appellant:	Arianna Kelly of counsel, instructed by EMG Solicitors
First Respondent:	Eve Mackey of DAC Beachcroft LLP
Second Respondent:	Brenda Campos, Ministry of Justice's Mental Health Unit

On appeal from:

Tribunal:	First-tier Tribunal (HESC) (Mental Health)
Tribunal Case No:	MP/2023/02488
Tribunal Venue:	The Spinney, Atherton
Decision Date:	31 August 2024

RULE 14 Direction

Rule 14(7) of the Tribunal Procedure (Upper Tribunal) Rules 2008 provides that information about mental health cases and the names of any persons concerned in such cases must not be made public unless the Upper Tribunal gives a direction to the contrary.

The Upper Tribunal DIRECTS that this decision, which does not refer to the patient by name, may be made public.

SUMMARY OF DECISION

MENTAL HEALTH (80)

This appeal is about the situation in which a tribunal reaches its decision based on a mistake of fact, and about whether medical treatment which is considered to be appropriate for a patient can properly be said to be "available" to him if the hospital in which he is detained has the resources to provide it but is not willing to do so.

Please note the Summary of Decision is included for the convenience of readers. It does not form part of the decision. The Decision and Reasons of the judge follow.

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal involved an error of law. Under section 12(2)(a), (b)(i) and (3) of the Tribunals, Courts and Enforcement Act 2007, I set that decision aside and remit the case to be reconsidered by a fresh tribunal in accordance with this decision.

REASONS FOR DECISION

Introduction

1. This appeal concerns the decision of a three-member panel of the First-tier Tribunal (Health, Education and Social Care Chamber) (Mental Health) (the **"Tribunal"**) upholding JB's continued detention for treatment under the Mental Health Act 1983 (the **"FtT Decision"**).

2. JB, who is the detained patient and the appellant in these proceedings, has several criticisms of the FtT Decision. He disputes many of the factual findings of the Tribunal and he maintains that the Tribunal was wrong to have found the statutory criteria to have been satisfied.

3. In particular, he says that the Tribunal was misled by the evidence of his then responsible clinician as to the availability of appropriate medical treatment at The Spinney, and that this amounts to a material error of law. He asks for the Upper Tribunal to set aside the FtT Decision and to remit the matter for rehearing.

Factual background

4. JB was admitted to psychiatric hospital on 17 April 2019 on transfer from prison, where he had been remanded in connection with allegations of multiple serious violent assaults, due to concerns about his mental state.

5. JB accepts that he suffers from mental disorder. He says that his mental disorder is post-traumatic stress disorder in the context of his having been drugged and raped on multiple occasions in the past, and having been abused by staff while in hospital.

6. The team treating him at The Spinney considered that his mental disorder was paranoid schizophrenia. Dr Al Noufoury, who was JB's responsible clinician at the date of his hearing before the Tribunal and who has since sadly died, did not

accept that the incidents of drugging, rape and abuse which JB complained of had actually happened. Rather, he considered that JB's belief that they had occurred to be evidence that he was suffering from auditory and tactile hallucinations and paranoid delusions which were symptoms of his paranoid schizophrenia.

7. At the hearing before the Tribunal JB maintained that he didn't need to remain in hospital and was ready to be discharged into the community to live with his mother. The detaining authority argued that the nature and degree of JB's mental disorder made it appropriate for him to be liable to be detained in a hospital for medical treatment, that it was necessary for the protection of others that JB should receive such treatment, and that appropriate medical treatment was available to him at The Spinney.

The First-tier Tribunal's decision

8. The Tribunal decided that each of the statutory criteria to continued detention was met and it upheld JB's section.

9. The Tribunal's decision making in respect of the statutory criteria set out in section 72(1)((b)(iia) of the Mental Health Act 1983 is explained in paragraphs 33 and 34 of its decision as follows:

> "33. **Is appropriate medical treatment available for [JB] at The Spinney?** Yes. Dr Al-Nufory and the SFCMHT would prefer him to try Clozapine as an alternative antipsychotic, and the Tribunal suspects, in the wake of this decision, that [JB] may now be more prepared to countenance a change in his antipsychotic. Whether this change occurs or not, antipsychotic medication given with nursing assistance and subject medical overview is being provided to [JB] at The Spinney. His ability to manage his time out in the community, and his ability to remain free of alcohol and drugs there, will continue to be monitored by random and frequent drug tests and assessment of his presentation when he returns from leave. He continues to be nursed in an environment with the appropriate procedural safeguards, involving air locks and checking. He will speak to his nurses who continue to support him therapeutically.
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> 34. Ms Scowcroft confirmed that psychology is available to [JB] at The Spinney, but her recommendation (supported by Dr McCulloch) was that the focus of psychology at this stage had to be upon working with [JB] to understand and hopefully overcome his barriers to engaging fully with therapists – and if that was successful, then to work on the core issues of [JB] understanding and accepting his illness and the risks associated with this. She anticipates that this next piece of work will be allocated to a different psychologist at The Spinney to try to encourage [JB]'s participation with this. The Tribunal fully agreed that this proposed psychological work was key

and entirely appropriate for [JB], even if he continues at this stage to be unaccepting of the need for this or unable at this particular stage to participate in this because of his barriers to engaging therapeutically and honestly with anyone."

Procedural background

10. JB applied for permission to appeal the FtT Decision, which was refused by the First-tier Tribunal. JB then applied to the Upper Tribunal for permission to appeal, but permission was refused by Judge Jacobs.

11. JB applied to the Upper Tribunal for Judge Jacobs's refusal of permission to be set aside under rule 43 of the Tribunal Procedure (Upper Tribunal) Rules 2008. This was because he had sent recordings that he had made of conversations he had had with his then responsible clinician immediately following the hearing before the Tribunal which he said showed that the evidence that Dr Al Noufoury had given at the hearing had been misleading. Judge Jacobs set aside his refusal of permission in the interests of justice and the matter of permission was referred to me to consider.

12. The Appellant's representative provided detailed submissions identifying potential errors of law made by the First-tier Tribunal, including in its decision-making on the issue of whether JB suffered from paranoid persecutory delusions (it decided that he did, and this was an important plank of its decision that the statutory conditions to continued detention were met), and in the adequacy of the First-tier Tribunal's reasons in that regard.

13. I gave permission to appeal on the basis that it was at least arguable that the audio recordings submitted by JB in connection with his application to set aside Judge Jacobs's refusal of permission show that the Tribunal was misled as to the availability of psychological treatment at The Spinney, resulting in the Tribunal deciding the application based on a material mistake of fact. I did not restrict my grant of permission.

The parties' positions on the appeal

14. Ms Kelly of counsel, for JB, maintained that appropriate medical treatment was not available to JB and the Tribunal's finding that it was amounted to a mistake of fact amounting to an error of law, necessitating that the FtT Decision be set aside and remitted to be reheard. Ms Kelly also invited me to make findings on the approach taken by the Tribunal in relation to fact-finding and whether the Tribunal's approach was lawful.

15. The First Respondent provided a statement from JB's new responsible clinician, Dr Kasmi, that spoke both to JB's diagnosis and the (current) availability of appropriate medical treatment on the ward.

16. Dr Kasmi ventured that there had been no intention to restart psychological sessions as at the date of JB's mental health tribunal and that "to outline that they were going to be offered was an error in the evidence giving". In other words, he accepted that what Dr Al Noufoury said in evidence at the Tribunal was not true.

17. However, Dr Kasmi said that whether this led to the Tribunal deciding to uphold the detention based on appropriate medical treatment being available was a matter for the Upper Tribunal to decide. Dr Kasmi's evidence was that appropriate medical treatment was available to JB on the ward, and all the statutory criteria to continued detention were met.

18. The Second Respondent took a neutral role in the appeal.

19. None of the parties requested an oral hearing of the appeal. I didn't consider that the interests of justice required one.

Analysis

20. To establish a mistake of fact amounting to an error of law four requirements must be met:

    a. the mistake must be on an existing fact (including mistake as to the availability of evidence on a particular matter);

    b. the fact must be uncontentious;

    c. the party asserting the error of law must not be responsible for the mistake; and

    d. the mistake must have played a material part in the tribunal's reasoning.

    See *E v SSHD* [2004] EWCA Civ 49), per Carnwath LJ (as he then was).

21. Dr Kasmi's evidence essentially confirms that JB's previous responsible clinician misled the Tribunal on the issue of whether psychological therapy would be offered to JB at The Spinney. Dr Kasmi has indicated that it was decided late in 2022 to discontinue psychological therapy and, by the date of the hearing before the Tribunal, there was "no intention to restart psychological sessions".

22. While other therapies had been undertaken (successfully, in Dr Kasmi's opinion), Dr Kasmi's evidence was that the therapy that remained to be done was "largely to do with mental disorder and its risk to violence. However, this proved limited and counterproductive. It was therefore stopped." Dr Kasmi said "My view is that whilst psychological therapies are available, they are not being given…"

23. The recordings made by JB immediately following the hearing before the Tribunal, adduced in this appeal, establish that Dr Al Noufoury did not intend that JB would resume psychological therapy. It is clear that the Tribunal was misled in this regard.

24. I am therefore satisfied that limbs a. and b. in paragraph are satisfied. The mistake of fact was clearly not of JB's making, so limb c. is also satisfied. Limb d. is more nuanced.

25. It is not disputed by JB that the hospital has the resources to provide psychological therapy, and neither is it disputed that the hospital was not then willing to provide such therapy to JB.

26. Dr Kasmi says that psychological therapies are "available" but they are "not being given". However, as established both in *Rooman v Belgium* [2019] ECHR 105 and *SF v Avon and Wiltshire* [2023] UKUT 205 (AAC), [2024] 1 WLR 1540, appropriate medical treatment cannot be said to be "available" to a patient if the detaining authority is unwilling to provide it. I conclude that psychological therapy was not truly available to JB.

27. It may well be that the Tribunal would have concluded that appropriate medical treatment was available to JB aside from the psychological therapy upon which the Tribunal relied, in which case the Tribunal's mistake of fact about psychological therapy being available to JB at The Spinney would have been immaterial. However, while the Tribunal made reference to other treatment being available on the ward, it clearly attached particular importance to the psychological work that it mistakenly believed to have been available. Indeed, the Tribunal described the psychological work to be "key and entirely appropriate". Further, in its summary of the parties' cases it noted that the Specialist Community Forensic Team had recommended the restarting of psychological treatment as "absolutely necessary inpatient treatment". Limb d. is, therefore, also satisfied.

Conclusions

28. For the reasons I have given I conclude that the Tribunal was labouring under a mistake of fact amounting to an error of law.

29. It is not clear what the Tribunal would have decided had it not been labouring under any mistake of fact. The error cannot, therefore, be said to be immaterial. The interests of justice require me to set aside the decision of the Tribunal to give JB an opportunity to have his detention reviewed effectively.

30. This requires all the statutory criteria to detention to be assessed afresh. This will involve hearing evidence and making findings of fact. The First-tier Tribunal, with its expert members, is best placed to carry out this task.

31. I note that JB disputes many of the findings of fact made by the Tribunal, but because the panel hearing the remitted appeal will not be bound by the FtT Decision and will consider all matters afresh, any errors that the Tribunal may have made in its assessment of the evidence and its findings of fact will be overtaken by the new panel's decision-making.

32. Ms Kelly has invited me to comment on the Tribunal's approach to fact finding. I do not consider it appropriate for me to do so given that the new panel will be deciding matters afresh, other than to say that findings of fact must be made based on evidence rather than mere assertion, and to endorse the approach set out by the Upper Tribunal in *AM v Partnerships in Care Ltd* [2015] UKUT 659 (AAC) and by the High Court in *R (AN) v MHRT* [2005] EWHC 587 (Admin).

33. I allow the appeal and set aside the decision under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007.

34. The case must (under section 12(2)(b)(i)) be remitted for re-hearing by a new tribunal.

Thomas Church
Judge of the Upper Tribunal

Authorised by the Judge for issue on 9 January 2025