Neutral Citation Number: [2024] UKUT 411 (AAC) **Appeal No. UA-2023-000468-HM**

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Between:

IN

Appellant

- v -

St Andrews Healthcare

Respondent

West London NHS Trust

First Interested Party

The Law Society of England and Wales

Second Interested Party

Before: Upper Tribunal Judge Church
Hearing date(s): 13 August 2024
Mode of hearing: Remote hearing via CVP

Representation:
Appellant: Ms Kate Tyrell of Gledhill Gill Solicitors
Respondent: Not represented and did not participate
First Interested Party: Not represented and did not participate
Second Interested Party: Ms Arianna Kelly of counsel, instructed by The Law Society of England and Wales

On appeal from:
Tribunal: First-tier Tribunal (Health, Education and Social Care Chamber)
Tribunal Case No: MH/2022/25432
Tribunal Venue: Remote hearing via CVP
Decision Date: 28 November 2022

SUMMARY OF DECISION

MENTAL HEALTH (80)
TRIBUNAL PRACTICE AND PROCEDURE (34)
(fair hearing 34.2; representatives 34.6; statement of reasons 34.9)

The right of a detained psychiatric patient to have their detention reviewed timeously is a very important right, as is the right to a fair hearing. The Mental Health Act 1983 and the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 contain important safeguards to protect those rights. This case demonstrates how tensions can arise between them.

This decision concerns a tribunal's decision making around whether to adjourn or to proceed with a hearing from which both the patient and the patient's appointed representative are absent, as well as what the tribunal must say in its reasons to clear the required hurdle of 'adequacy'.

I give guidance to the First-tier Tribunal, and to parties and representatives in the First-tier Tribunal, about what to do when a patient with a representative appointed under Rule 11(7)(a) of the first-tier tribunal rules makes a capacious decision not to engage with their representative to provide instructions. I say that the patient should not be left unrepresented and the representative should conduct the hearing on the basis that their implicit instructions are to test the legal test for the patient's continued detention.

I decide that where a patient's liberty is at stake, and where the patient will be neither present nor represented at the hearing, there is a significant risk that the disposal of the proceedings will involve an unlawful interference with the patient's Article 5(4) rights. In such circumstances, if a tribunal is to proceed to dispose of the appeal, it must explain specifically how and why it concluded that doing so was in the interests of justice. It is not enough to simply state that it decided that it was 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 and the following directions.

It is prohibited for any person to disclose or publish any matter likely to lead members of the public to identify the Appellant in these proceedings (rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008).

This order does not apply to: (a) the appellant; (b) any person to whom the appellant discloses such a matter or who learns of it through publication by the appellant; or (c) any person exercising statutory (including judicial) functions where knowledge of the matter is reasonably necessary for the proper exercise of the functions.

This decision may be made public (rule 14(7) of the Tribunal Procedure (Upper Tribunal) Rules 2008).

DIRECTIONS

1. **The case is remitted to the First-tier Tribunal to be reheard at an oral hearing.**

2. **The panel for the re-hearing shall not involve any of the members of the panel whose decision I have set aside.**

These Directions may be supplemented by later directions by a Tribunal Caseworker, Tribunal Registrar or First-tier Tribunal Judge.

REASONS FOR DECISION

Introduction – what this case is about

1. This appeal is about the Appellant, who is a patient detained at Broadmoor **(**a secure psychiatric hospital). It is about his right to have his detention reviewed by a tribunal (even where he makes no application to the mental health tribunal himself), about the fairness of the hearing of that review and, ultimately, about his right to liberty.

2. Balancing the interests of open justice with the need to avoid a disproportionate infringement of the Appellant's right to respect for his private and family life, I have decided not to use his name in this judgment, and I have made an Order under rule 14(1) of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 (the **"HESC Rules"**), which is set out at the top of this judgment. In this judgment I will refer to the Appellant sometimes as **"IN"** and sometimes as **"the patient"**. However I have ordered that my judgment may be made public.

3. This case is about whether the tribunal erred in law when it decided not to adjourn the hearing of the reference and instead to determine the reference as it did, notwithstanding the absence both of IN and his representative from the hearing. It is also about whether the tribunal explained its decision making with adequate clarity.

4. Although the reference itself was about whether IN should continue to be detained under the Mental Health Act 1983 (the **"Mental Health Act"**), this decision is largely about the proper application of the HESC Rules, as well as issues relating to mental capacity under the Mental Capacity Act 2005 (the **"Mental Capacity Act"**).

5. This case raises an issue of wider application about the proper role of a legal representative appointed to act for a patient under rule 11(7)(a) of the HESC Rules when the patient wants to be represented at the hearing but declines to provide express instructions. I give guidance to the First-tier Tribunal, and to parties and representatives, on the proper approach to be taken.

Background

Background to the hearing before the Tribunal

6. IN is currently detained at Broadmoor Hospital for treatment of mental disorder under section 3 of the Mental Health Act, although at the time of the hearing before the Tribunal IN was detained at St Andrew's Hospital, Northampton.

7. Because this appeal turns on quite technical legal issues about procedural fairness, I don't need to go into the detailed factual background of how and why IN came to be detained in hospital, or to provide details of his health difficulties.

8. Because IN didn't apply for a mental health tribunal himself within the first six months of his detention, on 6 October 2022 the hospital managers referred his case to the mental health tribunal for review in accordance with section 68(2) of the Mental Health Act.

9. Because IN hadn't appointed a representative himself, and because IN had said he didn't want to represent himself in relation to the hearing of the reference, on 14 October 2022 a legal representative was appointed by a member of the tribunal staff to represent IN under Rule 11(7)(a) of the HESC Rules.

10. IN's representative made several attempts to communicate with IN. On 19 October 2022 she tried to speak to him on the telephone, but he wouldn't engage with her. On 31 October 2022 his representative attended the hospital at which IN was then detained to meet him in person. At that time IN was accommodated in a seclusion room due to a violent incident on the ward, and when the representative attempted to speak to IN at the door of the seclusion room he refused to come to the door or to engage at all. IN's representative wrote to him on 7 November, and again on 22 November 2022, but received no response.

11. The hearing of the reference was listed to take place on 28 November 2022 by video link. As at the start of the hearing, IN's representative had still not managed to engage with IN.

The Hearing before the First-tier Tribunal

12. At the outset of the hearing before the panel of the First-tier Tribunal that convened to hear the reference (the **"Tribunal"**), IN's representative explained the difficulties she had had with engagement. She told the Tribunal that, while she had been appointed under Rule 11(7)(a) of the HESC Rules to act for IN, she couldn't represent him as she had no instructions.

13. IN's responsible clinician reported to the hearing that IN had capacity to make decisions about:

    a. whether to have a representative,

    b. whether to represent himself,

    c. whether to attend the hearing, and

    d. whether to provide instructions to his legal representative.

14. It was reported that IN didn't want to attend the hearing, didn't care who represented him, and wanted the hearing to go ahead.

15. IN's representative argued that IN not wishing to attend the hearing and not caring who represented him was very different from his not wishing to attend the hearing and not caring whether he was represented at the hearing at all. IN's representative applied for an adjournment of the hearing to another date so she could make a further attempt to take instructions from her client.

16. The Tribunal adjourned very briefly to allow the witnesses from the treating team to visit IN and for Dr Alikhan (IN's responsible clinician) to assess whether IN continued to have capacity to make the relevant decisions about the hearing and to ascertain whether his views on the matters set out above had changed.

17. The Tribunal has given an account in its written reasons of what the witnesses from the treating team said when the hearing resumed after the brief adjournment. That account differs in some important respects from the account which IN's representative has given.

18. In particular, the Tribunal's reasons state that the evidence of the witnesses from the treating team after the brief adjournment was that IN continued to be capacious in the relevant domains and had said:

    a. he wanted the hearing to go ahead in his absence,

    b. he didn't mind not being represented, and

    c. he wanted the Tribunal to allow him to leave hospital and go home.

19. IN's representative, on the other hand, says the evidence of the witnesses from the treating team, having spoken to IN, remained that:

    a. he didn't want to attend the hearing,

    b. didn't mind who represented him (i.e. he continued to express a wish to be represented), and

    c. there was no evidence to the effect that he was content not to be represented.

20. IN's representative also maintains that she was 'dismissed' from the hearing by Judge Pitt after she declined Judge Pitt's suggestion that she might remain as an

observer. The written reasons do not record any 'dismissal' of IN's representative from the hearing.

21. I have not been provided with any recording of the hearing. Without having heard the evidence at the hearing myself it is difficult for me to resolve the conflict of evidence about what was said. On the basis that the judge appears to have taken a detailed note and produced the Tribunal's written reasons only the day after the hearing, I consider it likely to be a reliable and accurate account of what was said. I have therefore proceeded on the basis that the evidence given at the hearing was as Judge Pitt has recorded it to be in the Tribunal's written reasons.

22. Following the evidence from the treating team as to IN's capacity and his decisions, IN's representative told the Tribunal she felt unable to represent IN without instructions. She said she would leave the hearing should the Tribunal refuse to adjourn.

23. The Tribunal refused the adjournment application and invited IN's representative to remain in the hearing as an observer, which she declined, saying that to be an observer would be inappropriate.

24. IN's representative left the hearing and the Tribunal proceeded to determine the reference in the absence of both IN and his representative.

25. The Tribunal decided that each of the statutory conditions to detention was met and that IN should not be discharged from liability to be detained.

Legal framework

The Mental Health Act 1983

26. The Mental Health Act includes powers for the compulsory detention of patients who suffer from, or in the case of patients detained under section 2 who are suspected to suffer from, mental disorder. Those powers are tightly circumscribed because, generally speaking, people are entitled to enjoy their liberty unless they have been found to have committed a crime for which they have been sentenced to detention by a competent court (see Article 5(4) of the Convention, set out below).

27. In order to ensure that patients' Article 5 rights are protected, the Mental Health Act provides a framework for the periodic review of the lawfulness of mental health detention. A detained patient has rights in various time periods to apply for

a mental health tribunal to consider whether the conditions to continued detention are satisfied at the time of review. The Mental Health Act also provides for referrals to be made to a tribunal to ensure that the lawfulness of a patient's detention will be reviewed periodically even if the patient hasn't exercised their right to make an application.

28. I do not set out these provisions as this appeal does not turn on them.

The Mental Capacity Act 2005

29. The Mental Capacity Act concerns the mental capacity to make decisions, the circumstances in which decisions may be made for those who lack capacity, and the rights of those who lack capacity.

30. The Mental Capacity Act deals with various issues concerning mental capacity. Section 1 sets out the following broad principles:

> **"The principles**
>
> **1.**- (1) The following principles apply for the purposes of this Act.
>
> (2) A person must be assumed to have capacity unless it is established that he lacks capacity.
>
> (3) A person is not to be treated as unable to make a decision unless all practical steps to help him to do so have been taken without success.
>
> (4) A person is not to be treated as unable to make a decision merely because he makes an unwise decision.
>
> (5) An act done, or decision made under this Act for or on behalf of a person who lacks capacity must be done or made in his best interests.
>
> (6) Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's right and freedom of action."

31. Lack of capacity is explained in section 2 of the Mental Capacity Act as follows:

> **"People who lack capacity**
>
> **2.**- (1) For the purposes of this Act, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.
>
> (2) It does not matter whether the impairment or disturbance is permanent or temporary.
>
> (3) A lack of capacity cannot be established merely by reference to-

(a) a person's age or appearance, or

(b) a condition of his, or an aspect of his behaviour which might lead others to make unjustified assumptions about his capacity.

(4) In proceedings under this Act or any other enactment, any question whether a person lacks capacity within the meaning of this Act must be decided on the balance of probabilities.

(5) No power which a person ("D") may exercise under this Act-

(a) in relation to a person who lacks capacity, or

(b) where D reasonably thinks that a person lacks capacity, is exercisable in relation to a person under 16.

(6) Subsection (5) is subject to section 18(3)."

32. Section 3 of the Mental Capacity Act explains when a person is to be considered unable to make a decision for himself. It provides:

"Inability to make decisions

3.- (1) For the purposes of section 2, a person is unable to make a decision for himself if he is unable-

(a) to understand the information relevant to the decision,

(b) to retain that information,

(c) to use or weigh that information as part of the process of making the decision, or

(d) to communicate his decision (whether by talking, using sign language or by any other means).

(2) A person is not to be regarded as unable to understand the information relevant to a decision if he is able to understand an explanation of it given to him in a way that is appropriate to his circumstances (using simple language, visual aids or any other means).

(3) The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision.

(4) the information relevant to a decision includes information about the reasonably foreseeable consequences of –

(a) deciding one way or another, or

(b) failing to make the decision."

The HESC Rules

33. The Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2009 (the **"HESC Rules"**) set out the rules with which the First-tier Tribunal and the parties to proceedings before it, must comply. For the convenience of those unfamiliar with them, I set out below the text of the provisions most relevant to this case.

34. Rule 2 of the HESC Rules sets out the 'overriding objective' of the HESC Rules. It provides:

> **"Overriding objective and parties' obligation to co-operate with the Tribunal**
>
> **2**.- (1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.
>
> (2) Dealing with a case fairly and justly includes-
>
> (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
>
> (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
>
> (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
>
> (d) using any special expertise of the Tribunal effectively; and
>
> (e) avoiding delay, so far as compatible with proper consideration of the issues.
>
> (3) The Tribunal must seek to give effect to the overriding objective when it-
>
> (a) exercises any power under these Rules; or
>
> (b) interprets any rule or practice direction.
>
> (4) Parties must-
>
> (a) help the Tribunal to further the overriding objective; and
>
> (b) co-operate with the Tribunal generally."

35. Rule 4 of the HESC Rules allows non-judicial tribunal staff to carry out judicial functions. It provides:

> **"Delegation to staff**
>
> **4**.- (1) Staff appointed under section 40(1) of the [Tribunals, Courts and Enforcement Act 2007] (tribunal staff and services) or section 2(1) of the Courts Act 2003 (court officers, staff and

services) may, if authorised by the Senior President of Tribunals under paragraph 3(3) of Schedule 5 to the [Tribunals, Courts and Enforcement Act 2007], carry out functions of a judicial nature permitted or required to be done by the Tribunal."

36. Rules 5 of the HESC Rules gives the First-tier Tribunal extensive case management powers. It provides:

"Case management powers

5.- (1) Subject to the provisions of the [Tribunals, Courts and Enforcement Act 2007] any any other enactment, the Tribunal may regulate its own procedure.

(2) The Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside an earlier direction.

(3) In particular, and without restricting the general powers in paragraphs (1) and (2), the Tribunal may-

(a) extend or shorten the time for complying with any rule, practice direction or direction, unless such extension or shortening would conflict with a provision of another enactment containing a time limit;

(b) consolidate or hear together two or more sets of proceedings or parts of proceedings raising common issues, or treat a case as a lead case;

(c) permit or require a party to amend a document;

(d) permit or require a party or another person to provide documents, information or submissions to the Tribunal or a party;

(e) deal with an issue in the proceedings as a preliminary issue;

(f) hold a hearing to consider any matter, including a case management issue;

(g) decide the form of any hearing;

(h) adjourn or postpone a hearing;

(i) require a party to produce a bundle for a hearing;

(j) stay proceedings;

(k) transfer proceedings to another court or tribunal if that other court or tribunal has jurisdiction in relation to the proceedings and-

(i) because of a change of circumstances since the proceedings were started, the Tribunal no longer has jurisdiction in relation to the proceedings; or

(ii) the Tribunal considers that the other court or tribunal is a more appropriate forum for the determination of the case;

(l) suspend the effect of its own decision pending the determination by the Tribunal or the Upper Tribunal of an application for permission to appeal against, and any appeal or review of that decision."

37. Rule 11 of the HESC Rules deals with the appointment of representatives. It provides, so far as relevant to the circumstances of this case:

> **"Representatives**
>
> **11.** …
>
> (7) In a mental health case, if the patient has not appointed a representative, the Tribunal may appoint a legal representative for the patient where –
>
> (a) The patient has stated that they do not wish to conduct their own case or that they wish to be represented; or
>
> (b) The patient lacks the capacity to appoint a representative but the Tribunal believes that it is in the patient's best interests for the patient to be represented…"

38. Rule 34 of the HESC Rules deals with when a pre-hearing examination is required. It provides:

> **"Medical examination of the patient**
>
> **34**.- (1) Where paragraph (2) applies, an appropriate member of the Tribunal must, so far as practicable, examine the patient in order to form an opinion of the patient's mental condition, and may do so in private.
>
> (2) This paragraph applies-
>
> (a) in proceedings under section 66(1)(a) of the Mental Health Act 1983 (application in respect of an admission for assessment) ,unless the Tribunal is satisfied that the patient does not want such an examination;
>
> (b) in any other case, if the patient or the patient's representative has informed the Tribunal in writing, not less than 14 days before the hearing, that –
>
> (i) the patient; or
>
> (ii) if the patient lacks the capacity to make such a decision, the patient's representative,
>
> wishes there to be such an examination; or
>
> (c) if the Tribunal has directed that there be such an examination."

39. Rule 39 of the HESC Rules deals with hearings in a party's absence. It provides:

> **"Hearings in a party's absence**
>
> **39**.- (1) Subject to paragraph (2), if a party fails to attend a hearing the Tribunal may proceed with the hearing if the Tribunal-
>
> (a) is satisfied that the party has been notified of the hearing or that reasonable steps have been taken to notify the party of the hearing; and
>
> (b) considers that it is in the interests of justice to proceed with the hearing.
>
> (2) The Tribunal may not proceed with a hearing that the patient has failed to attend unless the Tribunal is satisfied that-
>
> (a) the patient –
>
> (i) has decided not to attend the hearing; or
>
> (ii) is unable to attend the hearing for reasons of ill health; and
>
> (b) an examination under rule 34 (medical examination of the patient)-
>
> (i) has been carried out; or
>
> (ii) is impractical or unnecessary."

The Convention

40. Article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the **"Convention"**) provides for an individual's right to liberty and security. Paragraph 4 of Article 5 provides:

> "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

41. Article 6 of the Convention provides for an individual's right to a fair trial. Paragraph 1 provides:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

The First-tier Tribunal's decision

42. Insofar as relevant to this appeal, the Tribunal explained its decision-making as follows:

"3. This was a reference which was made by the hospital under s.68(2) of the MHA after a period of detention under s.3 during which [IN] did not appeal to the Tribunal. More details are set out below but the information in the reports provided to the panel prior to the hearing showed that [IN]'s transition from seclusion to the open ward had begun in April 2022 but had stopped in July 2022 after a serious assault on staff. Since that time the evidence showed that he had been in seclusion with at least three staff present whenever his door was opened. He had consistently refused to engage with staff during this period including refusing medication. There had been further incidents of aggression during October 2022. The Tribunal bore this context in mind when deciding whether to proceed with the hearing.

4. The Tribunal also noted that an earlier hearing listed for 23 November 2022 had been postponed at the request of the patient's representative. The postponement of a previous hearing date also formed part of the context that the Tribunal bore in mind when deciding to proceed with the hearing on 28 November 2022.

5. Prior to the hearing [IN] asked the Tribunal to provide him with a legal representative and Ms Tyrrell was appointed under Rule 11(7)(a). At the hearing she informed the Tribunal that after being instructed she wrote to [IN] on many occasions, advised him of the change of date of the hearing, went to the ward to see him in order to take his instructions and offered to re-attend the ward to take instructions. He did not respond to any of her correspondence and did not provide instructions when she went to the ward.

6. Ms Tyrrell told the Tribunal that when she went to the hospital to take instructions the ward nurses had been clear that [IN] had capacity to provide instructions but was choosing not to do so. Dr Alikhan, the Responsible Clinician (RC), also confirmed at the hearing that it was his assessment that [IN] had capacity to make decisions about the Tribunal, about whether he wanted to have a representative, whether he wanted to represent himself and whether he wanted to attend the hearing. Dr Alikhan considered that [IN] had made a capacitous decision not to provide Ms Tyrrell with instructions. {IN] had said that he did not want to attend the hearing and had capacity to make that decision. Dr Alikhan stated that his experience of [IN] was that he had capacity to make decisions and chose to do some things and chose to not do others. Dr Alikhan's view, based on his experience working with [IN], was that he wanted the hearing to go ahead and was not concerned as to who represented him.

7. Ms Tyrrell informed the Tribunal that although she had been appointed to act for [IN] she did not consider that she could represent him at the hearing without any instructions. She submitted that [IN] being unconcerned as to who represented him at the hearing was not the same as [IN] indicating that he did [sic] want to be represented at all. She maintained that the hearing should be adjourned in order for him to have an opportunity to provide instructions to a representative.

8. Dr Alikhan, Ms Faulkner and Nurse Oppong suggested that they speak to [IN] to establish that he retained capacity regarding the Tribunal and to establish his contemporaneous views on whether he wished to provide instructions, to represent himself, to attend the hearing at all and whether he still wanted the hearing to proceed if he did not attend and was not represented, The Tribunal granted a short adjournment to allow them to do so

9. When the hearing resumed the hospital team confirmed that [IN] had said that he wanted the hearing to go ahead and that he did not mind that he would not be represented. He had also said that he wanted the Tribunal to allow him to leave hospital and go home. Dr Alikhan confirmed his opinion that [IN] had capacity to make those decisions. Dr Alikhan also added that if the hearing had been face to face it was possible that [IN] might have provided instructions.

10. Ms Tyrrell remained of the view that she could not represent [IN] as she did not have instructions and would not remain if the hearing proceeded. The Tribunal indicated that she could remain to observe the hearing on behalf of [IN]. Ms Tyrrell stated that she did not wish to observe the hearing and that in her view it would not be legally correct to do so. She maintained that it would be unfair and unjust and therefore a breach of the overriding objective set out in Rule 2 for the Tribunal to proceed with the hearing if [IN] was not represented. The Tribunal should adjourn in order for him to have a further opportunity to provide instructions.

11. The Tribunal considered whether to proceed with the hearing given that [IN] had chosen not to be present and also would not be represented. After referring to the Procedure Rules, in particular Rules 2, 11 and 39, the Tribunal concluded that it was appropriate to proceed to hear the reference.

12. There were a number of reasons for reaching this conclusion. There was clear evidence that [IN] had been informed about the hearing. This had occurred prior to the hearing and included Ms Tyrrell writing to him on a number of occasions and going to the ward to see him in connection with the hearing as well as staff talking to him about the Tribunal.

13. There was also clear evidence that [IN] had capacity to decide not to provide instructions, not to represent himself and not to attend the hearing. He had been assessed as having capacity in those regards both before and at the time of the hearing. Ms Tyrrell had been told by staff that he had capacity to decide not to provide instructions when she had visited the ward. Dr Alikhan's view prior to the hearing was that [IN] had capacity to make decisions about the Tribunal. He reassessed capacity on the day of the hearing and indicated specifically that [IN] had capacity to decide not to provide instructions, not to

represent himself, not to attend, and to agree to the hearing proceeding in his absence even if he was not represented.

14. The Tribunal noted that Dr Alikhan had stated that if the hearing had been face to face then [IN] might have provided Ms Tyrrell with instructions on the day. The Tribunal accepted that might be so but did not consider that possibility to be sufficient to justify an adjournment when considered against the evidence as a whole. Ms Tyrrell had made repeated efforts to take instructions prior to the hearing but [IN] made a capacious decision not to provide instructions. He also made a capacious decision that he wanted the hearing to proceed, did not want to attend and that he accepted that the hearing could proceed without him being represented or present. The Tribunal did not consider that it was proportionate to adjourn in case [IN] changed his mind on any of these matters in future. He had been afforded a proper opportunity to provide instructions to a legal representative. He confirmed on the day of the hearing that he was content for the hearing to proceed even if he was not represented The Tribunal appreciated the concern that arose from the apparent contradiction of [IN] asking for a legal representative to be appointed and then not providing instructions but his interests had to be weighed together with other aspects to be taken into account when seeking to apply the overriding objective and decision [sic] to adjourn which included cost, resources and avoiding delay.

15. Further, the Tribunal noted the evidence in the report as to [IN]'s general presentation since July 2022 and considered that it was difficult to estimate whether on another occasion [IN] might take a different view of how he wanted the reference to be conducted, whether he might provide instructions and when this might occur. It was therefore unclear that an adjournment would lead to a material change of circumstances as regards the conduct of the hearing within a reasonable time frame.

16. For all of these reasons, the Tribunal concluded that the hearing could proceed fairly and justly in the absence of a legal representative and that it was not appropriate to adjourn on that basis.

17. Essentially the same evidence and reasons led the Tribunal to conclude that the hearing could proceed in the absence of [IN], after considering the provisions of Rule 39. As above, it was clear that he had been given notice and had made a capacious decision not to attend. He confirmed that decision on the day of the hearing having also indicated on the day of the hearing that he was also content not to be represented. He was clear that he wanted the hearing on 28 November 2022 to proceed. No pre-hearing examination was indicated in the Rules. [IN] had capacity to make decisions about the Tribunal and had not asked for a preliminary examination. The Tribunal did not consider that a pre-hearing examination was necessary in these circumstances and it was not suggested by Ms Tyrrell that this was a reason for adjourning. The Tribunal found that it was in the interests of

> justice to proceed in [IN]'s absence where he had decided not to attend and it was not necessary for there to be an examination under Rule 34.
>
> 18. The Tribunal announced that the hearing would proceed. Ms Tyrrell confirmed that she would not remain to observe the proceedings and that she would appeal against the decision to proceed as it was her position that it was not fair and just to do so."

The permission stage

43. Permission having been refused by the First-tier Tribunal and by Judge Jacobs of the Upper Tribunal on the papers, IN applied for the matter of permission to be reconsidered at an oral hearing and it came before me. Having heard oral argument from IN's representative, I was persuaded that the application raised issues of wider application about how the tribunal should proceed when faced with a patient who has chosen not to give instructions to his representative, and that it was appropriate for me to give guidance to the First-tier Tribunal and to participants in tribunal proceedings on issues relating to capacity and the proper application of the HESC Rules to avoid procedural unfairness. I decided that this warranted a grant of permission to appeal. I did not restrict my grant of permission.

44. I made Case Management Directions, joined the Law Society of England and Wales (the **"Law Society"**) as an Interested Party, and directed an oral hearing of the substantive appeal. I directed the Law Society to provide representations.

Discussion

45. First of all, I must say that I have considerable sympathy both for IN's representative and for the members of the Tribunal. They were all doing their best to ensure that IN's right to an effective and timely review of the legality of his detention was upheld, but the circumstances made this a challenging task. I also have considerable sympathy for IN, who was at the relevant time detained in conditions of seclusion. Such conditions can hardly have been conducive to focussing on his hearing.

46. That being said, the hearing before the Tribunal ended up in a bit of a muddle. In the paragraphs that follow I will try to give clear guidance on what should be done should such circumstances arise again.

Rule 11(7) appointments

47. Although there is no dispute in this case that IN's representative was validly appointed under Rule 11(7)(a) of the HESC Rules, in order to make this decision as helpful as it can be to those navigating the issues surrounding such appointments I set out below my understanding of the purpose and background of such appointments.

48. Appointments under Rule 11(7)(a) are regularly made by members of tribunal staff pursuant to Rule 4 of the HESC Rules for "sensible pragmatic reasons" (see *AMA v Greater Manchester West Mental Health NHS Foundation Trust* [2015] UKUT 36 (AAC); [2015] M.H.L.R. 133 at [28]. Such appointments operate as a retainer as between the patient and the legal representative appointed by the tribunal to advise the patient on, and to conduct, the tribunal proceedings pursuant to the patient's instructions and subject to the solicitor's professional obligations and duties (see *YA v Central and North West London NHS Trust* [2015] UKUT 37 (***"YA"***) at [74]-[75]).

49. Rule 11(7)(a) allows capacious patients who wish to be represented but, for whatever reason, haven't appointed a representative to be represented in tribunal proceedings. This reflects one aspect of the overriding objective of the HESC Rules, namely that set out in Rule 2(2)(c) ("ensuring, so far as practicable, that the parties are able to participate fully in proceedings").

50. That provision is a reflection of Strasbourg caselaw concerning the effective participation of those with mental disorders. Proceedings must provide effective guarantees against arbitrariness given the vulnerability of individuals suffering from mental disorders and the need to adduce weighty reasons to justify restrictions on their rights (see *MS v Croatia (no. 2)* [2015] ECHR 196 at [147] (***"MS v Croatia (no. 2)"***).

51. Article 5(4) of the Convention requires that a patient has the opportunity to be heard in person or through some form of representation. They should, absent special circumstances, receive legal assistance in the proceedings (see *MS v Croatia (no. 2)* at [153] and *MH v United Kingdom* [2013] ECHR 1008 at [77c]).

52. Special procedural safeguards may be called for to protect the interests of those who, on account of their mental disabilities, are not fully capable of acting for themselves (see *Winterwerp v Netherlands* (1979-80) 2 EHRR 387 at [60]).

53. Merely appointing a lawyer, without that lawyer actually providing practical legal assistance in the proceedings, cannot satisfy the requirements of necessary "legal assistance" for persons confined who are of "unsound mind".

54. In its submissions on the role of a Rule 11(7) appointed representative, the Law Society submitted that in all cases an MH3 form should be completed before any administrative decision is made as to a patient's involvement or representation, and that form should then be part of the information that is reviewed by a tribunal considering whether the patient's relevant capacity and/or expressed wishes has changed.

55. I agree wholeheartedly with that submission as a statement of good practice, but there is no strict procedural requirement for the completion of such a form. It appears that no MH3 form was completed in this case, but that omission doesn't invalidate or otherwise impugn her Rule 11(7) appointment.

Capacity

56. The principle underlying the Mental Capacity Act is that persons over the age of 16 are assumed to be mentally capable of making their own decisions. This assumption of personal autonomy may be overridden only if that person is assessed as lacking the mental capacity to make a particular decision for him or herself at the relevant time (capacity being both decision specific and time specific). In the absence of a capacity assessment, any doubt must be resolved in favour of the person having relevant capacity.

Capacity to make decisions about applying to the mental health tribunal

57. There is clear Upper Tribunal authority on the test to be applied in respect of a decision whether to make an application to the mental health tribunal.: "The patient must understand that they are being detained against their wishes and that the First-tier Tribunal is a body that will be able to decide whether they should be released" (*VS v St Andrew's Health Care* [2018] UKUT 250 (AAC), confirmed by the majority of a three judge panel of the Upper Tribunal in *SM v Livewell Southwest CIC* [2020] UKUT 191 (AAC).

Capacity to decide whether to appoint a representative

58. While *VS v St Andrew's Health Care* sets the bar for the test for capacity to decide whether or not to make an application to the mental health tribunal very low, the leading authority on the test for a patient's capacity to decide whether to appoint

a legal representative to conduct mental health tribunal proceedings sets the bar for that decision much higher: in *YA* Charles J held that the capacity to make a decision about whether to appoint a representative was inextricably related to the capacity to conduct the proceedings, making the distinction between them "theoretical rather than real" (see *YA* at [57]-[60]). This makes the test for capacity to decide whether to appoint a representative a relatively demanding one.

59. Charles J said that the making of a decision whether or not to appoint a representative requires the ability to "sufficiently understand and weigh the reasons for and against the rival decisions and thus their advantages, disadvantages and consequences." (*YA* at [58]). To do so the patient "has to be able to sufficiently understand, retain, use and weigh the assistance a representative will or may be able to give on the issues in the proceedings having regard to their nature and complexity". The relevant factors listed in *YA* at [58] include "the ability to conduct the proceedings without help".

> "58. Accordingly, the distinction between the capacity to appoint a representative and the capacity to conduct proceedings narrows. This is because, to assess the advantages, disadvantages and consequences of choosing whether or not to appoint a representative, the decision maker has to be able to sufficiently understand, retain, use and weigh the assistance a representative will or may be able to give on the issues in the proceedings having regard to their nature and complexity. So factors that the patient will have to be able to sufficiently understand, retain, use and weigh will be likely to include the following:
>
> i) the detention, and so the reasons for it, can be challenged in proceedings before the tribunal who on that challenge, will consider whether the detention is justified by the provisions of the [Mental Health Act],
>
> ii) in doing that, the tribunal will investigate and invite and consider questions and argument on the issues, the medical and other evidence and the legal issues,
>
> iii) the tribunal can discharge the section and so bring the detention to an end,
>
> iv) representation would be free,
>
> v) discussion can take place with the patient and the representative before and so without the pressure of a hearing,
>
> vi) having regard to that discussion a representative would be able to question witnesses and argue the case on the facts and the law, and thereby assist in ensuring that the tribunal took all relevant factual and legal issues in t account,
>
> vii) he or she may not be able to do this so well because of their personal involvement and the nature and complication of some of the issues (e.g. when they are finely balanced or

depend on the likelihood of the patient's compliance with assessment or treatment or relate to what is the least restrictive available way of best achieving the proposed assessment or treatment).

viii) having regard to the issues of fact and law his or her ability to conduct the proceedings without help, and so

ix) the impact of these factors on the choice to be made."

60. There are three principal aspects of capacity that are relevant to patients involved in proceedings before the mental health tribunal:

    a. the initial decision whether to make an application to the mental health tribunal;

    b. once an application or referral has been made, the decision whether to appoint a representative or to conduct their own case;

    c. conducting the proceedings, whether in person or through a representative.

61. I won't say anything further about a. because that issue does not arise where, as here, the proceedings were initiated not by application but rather by a referral by the hospital managers pursuant to section 68(2) of the Mental Health Act.

62. As far as b. is concerned, in this appeal there is no dispute that IN had capacity to decide to ask the tribunal to appoint a legal representative to act for him under Rule 11(7)(a), and the validity of that appointment is not in question.

63. However, *YA* is still relevant to this case (see paragraphs [59]-[60] above) because the appointment of a representative isn't the end of the story: having appointed a representative (or had one appointed on their behalf) a patient must make decisions about the conduct of the proceedings through their representative, including decisions around instructing their representative. The same approach must apply to those decisions.

64. Capacity to conduct proceedings involves understanding the issues on which the patient's consent or decision is likely to be necessary in the course of those proceedings. This requires the ability to recognise a problem, to obtain, receive and understand relevant information, including advice, and the ability to communicate that decision (see *Masterman-Lister v Brutton & Co* [2003] 3 All ER

162 (**"*Masterman-Lister"*)** (cited with approval by the Supreme Court in *Dunhill v Burgin (Nos 1 and 2)* [2014] 1 WLR 933).

65. Following the logic in *YA* and *Masterman-Lister*, for IN to be able to make a capacious decision not to provide instructions he had to be able to understand the consequences of the exercise of that choice in terms of his representative's ability to present his case and indeed the potential that she might feel professionally unable to continue to act for him.

66. It is sometimes said that a "longitudinal approach" is required in respect of issues of capacity. This is just a clever way of saying that the issue must be kept under review by all parties and by the tribunal because mental capacity is not only decision-specific but time-specific too, and sometimes subject to considerable fluctuation. If a review shows that the patient has lost relevant capacity, the tribunal should terminate a Rule 11(7)(a) appointment and make a Rule 11(7)(b) appointment in its place (under which the representative acts in the patient's best interests rather than on their instructions). Similarly, should a patient with a Rule 11(7)(b) representative regain capacity the tribunal should terminate that appointment and make a Rule 11(7)(a) appointment in its place.

Who is to assess capacity to make decisions about providing instructions?

67. The guidance given by the Law Society in its note on 'Representation before Mental Health Tribunals', and reinforced by Ms Kelly at the hearing before the Upper Tribunal, is that advocates should assess the question of capacity for themselves, but in the event of difficulty they should seek the opinion of the patient's responsible clinician and, failing that, the tribunal's medical member:

> "The question of whether the person is able to provide instructions is a judgment that in many cases an experienced mental health advocate will be able to make themselves. In the rare cases where you are unable to form an opinion you should obtain the opinion of the responsible clinician (RC) – either directly or via the mental health act administrator – as to the client's litigation capacity by reference to the test in *Masterman-Lister.* You should also ask the RC for their opinion on the client's capacity to appoint you.
>
> You should consider the validity of the RC's assessment; it is not automatic that the RC's assessment is sufficient evidence. If still unsure, where appropriate, the Tribunal Medical Member can also be asked to provide a view.

> Ultimately, within active Tribunal proceedings, it is for the tribunal to decide whether the patient has capacity to instruct a solicitor, or not, with reference to *YA* guidance found at paragraph 58 of *YA*."

68. In the 27th edition of his Mental Health Act Manual, Richard Jones criticises the Law Society's guidance and counsels a different approach to assessing capacity:

> "The tribunal should not require the patient's responsible clinician (RC) to provide it with an assessment of the patient's mental capacity to instruct a solicitor as this would involve the RC in a conflict of interest in that the tribunal would be asking the RC to give an opinion on the capacity of an individual who is on the opposite side of the dispute. For the same reason, the patient's legal advocate should not follow the Law Society's advice that where the advocate is unable to form an opinion on the patient's mental capacity to provide instructions, the opinion of the patient's RC should be sought … Conducting such an assessment might also be beyond the RC's area of competence. It is suggested that if, during her examination of the patient, the medical member of the tribunal suspects that the patient lacks the required capacity, she should inform her colleagues of her assessment. Guided by this assessment, the tribunal should then decide, applying the best interests test, whether to appoint a solicitor to represent the patient. The principles and approach set out in the Mental Capacity Act 2005 (see in particular ss. 1 to 5) and its associated statutory guidance in the Code of Practice: Mental Capacity Act 2005 (see in particular Ch. 4) should be applied"

69. Yet another approach was proposed on behalf of IN: it was argued that not only was it inappropriate for a patient's responsible clinician to assess the patient's capacity to give instructions, neither was it appropriate for a tribunal medical member to do so. It was argued that the issue of a patient's capacity to give instructions was a matter solely for the accredited representative to assess, and the question they had to answer was: "can the patient understand the issue and can they tell their representative about it in order for those instructions to be acted upon?"

70. I do not agree entirely with any of these approaches. Ultimately, where capacity is in issue at a hearing (as it was in this case when doubts were raised about IN's capacity and the hearing was adjourned briefly to allow Dr Alikhan and the other members of the treating team to speak with IN to assess his current capacity), it is a matter that must be decided by the tribunal. It must be decided by the tribunal making of findings of fact based on evidence, and by applying the Mental Capacity Act and the authorities that were binding on it to those findings of fact.

71. A tribunal is not precluded from relying on the evidence of a patient's responsible clinician and/or other witnesses, and it may also rely on evidence from the tribunal's medical member or, indeed, any observations made by other panel members of the patient's presentation during the hearing. The panel must assess all the relevant evidence regarding capacity critically, just as it must assess any other evidence critically. It must consider issues such as potential conflicts of interest and the witness's understanding of the issues relevant to the assessment in question, when assessing the reliability of the evidence before it.

The Tribunal's decision re IN's capacity to make decisions about giving instructions

72. Dr Alikhan gave evidence that IN had capacity to make the decisions relevant to the hearing (recorded in paragraph [9] of the Tribunal's written reasons):

> "When the hearing resumed, the hospital team confirmed that [IN] had said that he wanted the hearing to go ahead and that he did not mind that he would not be represented. He had also said that he wanted the Tribunal to allow him to leave hospital and go home. Dr Alikhan confirmed his opinion that [IN] had capacity to make those decisions. Dr Alikhan also added that if the hearing had been face to face it was possible that IN might have provided instructions."

73. The Tribunal accepted this evidence, but it is not clear from the Tribunal's reasons for its decision to what extent IN's ability to understand the consequences of such a decision was tested by Dr Alikhan when he assessed IN. It isn't clear whether Dr Alikhan ascertained whether IN was aware how his refusal to give instructions might have affected his representative's ability to present his case, and while it is reported that he didn't mind that he would not be represented, it is not clear whether IN understood that the risk of not being represented at the hearing arose from his refusal to give instructions to his representative and if he were to give instructions. If Dr Alikhan explored such matters with IN and explained this to the Tribunal, the Tribunal's reasons don't say that.

74. The Tribunal appears to have accepted Dr Alikhan's evidence at face value. In the circumstances, there wasn't much else it could do, since Dr Alikhan and the other witnesses from the detaining authority were the only people who had had any degree of engagement from IN.

75. IN's representative could form no opinion on IN's capacity because he had refused to engage with her at all, and neither could the Tribunal's medical member, who had not carried out any pre-hearing examination. Because the hearing was a remote hearing, it was not possible to send the medical member

to perform a capacity assessment, and because IN chose not to participate in the hearing it was not possible even for the panel members to observe his interactions during the hearing. As such, the Tribunal had only Dr Alikhan's assessment to go on, and the Mental Capacity Act presumption of capacity in the absence of evidence to the contrary.

76. In the circumstances, the Tribunal was entitled to decide that IN had capacity, but given the importance of that issue in the context of its decision, its reasons for doing so may be inadequate. I discuss the adequacy of the Tribunal's reasons further under the heading 'The adjournment application and the reasons for it' below.

What is a Rule 11(7)(a) appointed legal representative to do in the absence of express instructions?

77. The Law Society is the representative body for solicitors in England and Wales. It seeks to promote and protect the rule of law as well as to advance the interests of solicitors. The Law Society maintains a mental health accreditation scheme and publishes guidance to practitioners in the form of a practice note entitled 'Representation before Mental Health Tribunals', the most recent version of which is dated 23 February 2024. I joined the Law Society as an Interested Party because of its role described above, and because I considered that its input would assist.

78. While the Law Society took a neutral position on the facts of this appeal, it made a submission setting out its position on the issue I had highlighted in my grant of permission about the proper role of a legal representative appointed under Rule 11(7)(a) who is unable to elicit express instructions from their client.

79. It advocated the following approach in paragraph 21 of its skeleton argument:

> "(a) Steps must be taken to identify the reasons why the patient is not providing instructions and all practical steps must be taken to support the patient to do so. In the present case, the patient was in seclusion during the remote hearing and his responsible clinician's view was that "if the hearing had been face to face it was possible that [the patient] might have provided instructions".
>
> (b) If, despite practicable steps taken, a patient still does not engage, a review of their capacity to decide to appoint a representative and to conduct the proceedings is called for, since their lack of engagement calls for inquiry as to whether they are able to use or weigh

> up information about the need for representation, and the fact that a representative requires instructions on which to act, and as to whether they are now electing not to be represented despite previously having sought representation. There are two possible outcomes:
>
> i. patient has capacity to decide to appoint a representative and to conduct the proceedings, and has made a capacious decision that they do not want to be represented. In this case the Tribunal will need to decide whether to revoke the Rule 11(7)(a) appointment to enable the patient to conduct the proceedings themselves.; or
>
> ii. they now lack such capacity, in which case a Rule 11(7)(b) appointment must be made by the Tribunal."

80. I endorse the approach of seeking to understand the reasons for the patient not providing instructions, taking an enabling approach to the patient's engagement, and being alert to the possibility that the lack of instructions might be indicative of a lack of capacity. However, neither of the "two possible outcomes" which the Law Society posits is applicable to the circumstances of this case.

81. Here, the Tribunal assessed IN to have capacity to make relevant decisions and decided that the decision not to provide instructions was a capacitous one. While IN is reported as having said he was content for the hearing to proceed without him being represented, it remains that IN didn't wish to conduct the proceedings for himself and he appears still to have preferred to be represented at the hearing. In these circumstances, the termination of the Rule 11(7)(a) appointment wouldn't be appropriate, and IN didn't lack capacity to make relevant decisions, so a Rule 11(7)(b) appointment would not have been available to the Tribunal.

82. Ms Tyrell , for IN, argued that the only way that a detained patient could appear before the mental health tribunal was if he had capacity to conduct proceedings and wished to conduct them for himself. She proposed that capacious patients who don't wish to engage with their legal representative or the tribunal process should be afforded "similar safeguards" to those in place for incapacious patients who may be represented in their best interests. She argued that Rule 11(7)(b) appointments should be available not only to patients who lack the capacity to provide instructions, but also to those who have capacity to provide instructions but have failed to do so.

83. That isn't what the HESC Rules provide for. For very good reason, patients are permitted to make decisions for themselves where they have capacity to do so, even if those decisions may be considered by some to be unwise. It would be

contrary to the enabling principles of the Mental Capacity Act for patients to have decisions made for them if they have capacity to make the decisions for themselves.

84. Ms Tyrrell suggested that IN was unable to communicate his instructions, but there was no compelling evidence to support this. Patients who have the relevant understanding to make decisions but are truly unable to communicate their decisions would be assessed as not having capacity (see section 3(1)(d) of the Mental Capacity Act). IN was not in this situation. He was able to communicate his decisions, he just chose not to give any instructions. That was his right.

85. Ms Tyrrell's proposed solution to her concern about capacious patients being left unrepresented before a tribunal because of their not having given instructions to their representative isn't the only one. There is another way of looking at the situation.

86. The circumstances of this case are that IN had (capaciously):

    a. asked for a representative to be appointed to act for him in connection with the section 68(2) reference,

    b. decided not to attend the hearing of his reference,

    c. chosen not to provide any express instructions to his representative, and

    d. not said expressly that he wished his representative's appointment to be terminated or otherwise indicated that he didn't want her to represent him.

87. The only proper inference to be drawn from the set of circumstances set out in the paragraph above is that was that IN preferred to be represented at the hearing by a legal representative (even if he had said that he would be content for the hearing to go ahead without his being represented).

88. It is not appropriate for such a patient to be left without representation, even if he has indicated that he is willing for the hearing to go ahead without representation.

89. So, what was the appointed representative to do, given that she was retained to act on IN's instructions and he had refused to engage with her to provide any?

90. Given the nature of the proceedings in question – a hospital managers' reference under section 68(2) of the Mental Health Act – it can (indeed it must) be inferred

that IN wished his representative to test the detaining authority's case for his continued detention, because that is the whole purpose of a hearing of a section 68(2) reference (and the finding of relevant capacity means that the Tribunal must have come to the view that IN understood that).

91. It would no doubt have assisted IN's representative to have received more detailed instructions so she could make specific challenge to what was said in the reports produced on behalf of the responsible authority and so she could explain in more nuanced terms what IN wanted. However, it was sufficient for her to know that IN wanted her to put the case for his continued detention to the test. That would have achieved the purpose of a section 68(2) reference, which is to ensure that even if a patient does not exercise his right to make an application for a mental health tribunal, he still has "the lawfulness of his detention decided speedily by a court and his release ordered if the detention is not lawful" (per Article 5(4) of the Convention).

92. While it was perfectly appropriate for IN's representative to have sought an adjournment, her saying that she would not represent her client at the hearing if her application for an adjournment was refused, put the Tribunal in a difficult position.

93. Although I have no doubt that IN's representative sincerely believed she was unable to fulfil her professional obligations were she to continue with the hearing without express instructions from her client, it was not appropriate for her to withdraw (or to threaten to withdraw) representation at the hearing in those circumstances. Her telling the Tribunal that she would leave the hearing if the application was refused could be seen as an attempt to force the Tribunal's hand and, in practical terms, to usurp the Tribunal's role managing the proceedings.

94. There can be no question of a representative failing in her duty to act on instructions where the Tribunal has assessed the patient as having capacity to decide not to give instructions (a finding that the representative is bound to accept), the patient has said he wants to be represented but has not provided any express instructions, and the representative acts on inferred instructions that she is to test the detaining authority's case for his continued detention. In such circumstances the representative must accept the decision of the Tribunal as to the patient's capacity and represent him accordingly on the basis outlined above in paragraphs [87]-[91] above.

Was the representative's appointment terminated?

95. Since the District Tribunal Judge who refused IN's permission application to the First-tier Tribunal raised the issue of whether there was a termination of the representative's Rule 11(7)(a) appointment I feel that I should deal with that question for the sake of completeness.

96. In *YA* Charles J discussed how an appointment under Rule 11(7)(a) might be brought to an end, given that the appointment was made by the tribunal rather than by the patient. He said:

> "…the appointment by the tribunal would have been under rule 11(7)(a) and based on the wish or request of the patient and so the patient effectively has the right to terminate the appointment even if formally the tribunal has to end it".

97. The District Tribunal Judge said that the representative's leaving the hearing was "in effect her termination of the acceptance of the appointment under rule 11(7)(a) in combination with the patient's effective termination of the appointment by failing to give instructions" (see paragraph 5 of District Tribunal Judge Gledhill's refusal of permission dated 22 December 2022).

98. I do not agree with this analysis. It is not necessary to infer from IN's not engaging with his representative that he wished to terminate her appointment. Rather, IN is reported as having continued to express a preference for being represented. Neither is it necessary to infer from his representative's leaving the hearing that she considered herself no longer retained to act for IN. Indeed, her parting words appear to have been a statement of her intention to apply for permission to appeal the Tribunal's decision, which indicates that she considered herself still to be instructed.

99. In any event, the District Tribunal Judge's analysis is at odds with the Tribunal's own explanation of its decision making in its reasons: the Tribunal proceeded on the basis that IN's representative's appointment survived both IN's refusal to engage with her and her decision to leave the hearing. It was perfectly entitled to do so.

The adjournment application and the reasons for it

100. The Tribunal had extensive case management powers under Rule 5 of the HESC Rules and it had a broad discretion how to exercise them. Appellate courts or

tribunals should be slow to interfere with case management decisions of first-instance courts or tribunals.

101. However, where a tribunal's management of proceedings has the consequence that a detained patient is neither present nor represented at a hearing to review his detention, whether on the basis of capacious instructions or on a 'best interests' basis where the patient is in capacious, and where there is therefore a risk that the patient's Article 5(4) rights might be frustrated, it must be appropriate for the Upper Tribunal to apply more intense scrutiny.

102. Judge Jacobs has highlighted that following procedure rules is particularly important in mental health cases where a patient's liberty is at stake (see *PC v Cornwall Partnership NHS Trust* [2023] UKUT 64 (AAC) at [14]).

103. Rule 35(1) sets out the default position that the tribunal must hold a hearing before making any decision which disposes of mental health proceedings (although Rule 35(3) allows an adult community patient to opt to have their reference dealt with on the papers in certain circumstances).

104. Rule 39 sets out the circumstances in which a hearing can proceed in the absence of the patient. Proceeding with a hearing in the absence of the patient is prohibited unless the tribunal is satisfied that proceeding is in the interests of justice and:

    a. the patient has either decided not to attend or is unable to do so for reasons of ill-health, and

    b. a medical examination has been carried out or is impractical or unnecessary.

105. Ms Tyrrell, for IN, argued that Rule 39 of the HESC Rules needed to be "strengthened" to provide greater "protection" to patients who have capacity but who refuse to engage. She argued that Rule 39(2)(b)(ii) should be deleted so that a tribunal is prohibited from proceeding with a hearing in accordance with Rule 39(1) and (2)(a) unless a Rule 34 medical examination has been carried out.

106. The making of amendments to the HESC Rules is clearly beyond the jurisdiction of the Upper Tribunal, so I shall not express a view on it. I must review the Tribunal's decision in terms of whether it is in accordance with the law and the procedure rules as they are, not as a party thinks they *should* be.

107. One element of the overriding objective dealing with cases fairly and justly (see Rule 2 of the HESC Rules) is "ensuring, so far as practicable, that the parties are able to participate fully in the proceedings" although, as discussed below, dealing with cases fairly and justly is multifaceted.

108. IN's representative applied for an adjournment. She told the Tribunal she felt professionally embarrassed by her lack of instructions and would be unable to represent IN at the hearing, should the hearing proceed without her having the opportunity to take instructions from IN.

109. If a patient does not attend a hearing and the patient's representative leaves during the course of the hearing, but after the tribunal has decided to refuse to adjourn and to proceed with the hearing in the patient's absence, the tribunal must make a fresh assessment as to whether it is in the interests of justice to proceed taking this new factual development into account (see *DA v Kent and Medway NHS & Social Care Trust* [2019] UKUT 348 (AAC); [2020] M.H.L.R. 178).

110. In the 'Preliminary and Procedural Matters' section of the Tribunal's written reasons the judge refers to the HESC Rules and specifically references Rules 2, 11, 34 and 39. It is adequately clear from its written reasons that when the Tribunal decided to proceed it did so in the knowledge that the patient wouldn't be represented (even if it preceded her actually leaving). The judge says that the Tribunal concluded that the hearing could proceed "fairly and justly" in the absence of both IN and his representative, and no adjournment was necessary for the following reasons:

    a. there was clear evidence that IN had been informed of the hearing (this is not in dispute),

    b. there was clear evidence that IN had capacity to decide not to provide instructions, not to represent himself, not to attend the hearing, and to agree to the hearing proceeding even if he was unrepresented,

    c. IN had not requested a pre-hearing examination, the Tribunal didn't consider one to be necessary, and Ms Tyrrell hadn't suggested that this was a reason for adjourning,

    d. IN's position on those issues listed in b. above (as well as his continued capacity in that regard) was confirmed during the brief adjournment in the hearing,

e. IN was clear that IN wished the hearing to go ahead,

f. it was not proportionate to adjourn proceedings "in case" IN changed his mind as to those matters listed in b. above,

g. IN had been afforded a "proper opportunity" to provide instructions to his legal representative,

h. IN's interests ("noting" the "apparent contradiction" of him asking for a legal representative to be appointed and then not providing instructions) had to be weighed together with other aspects to be taken into account when seeking to apply the overriding objective, including cost, resources and avoiding delay (see paragraphs 16 and 17 of the Tribunal's written reasons).

111. The Tribunal appears to have placed weight on its finding that IN's representative had had a "proper opportunity" to take instructions but IN had chosen not to provide any instructions. The phrase "proper opportunity" sits uncomfortably with the Tribunal's description of the factual background to the hearing: during the period leading up to the hearing IN was detained in conditions of seclusion, was refusing medication, and was exhibiting significant degree of mental disorder. On the sole occasion when IN's representative attended the hospital in person, her attempts to take instructions from IN were made from outside the locked door of the seclusion room. This is, to say the least, a less than ideal setting for such a sensitive task, and it is perhaps not surprising that she was unsuccessful.

112. Further, because no pre-hearing examination had been requested and the hearing was in the form of a remote hearing, neither IN's representative nor any of the panel had had an opportunity to engage with IN on the day. These factors should have led the Tribunal to consider in greater depth whether IN's representative could really be said to have had a "proper opportunity" to take instructions, and whether an adjournment was required to facilitate more meaningful participation from IN. Similarly, while no pre-hearing examination had been requested, and the Tribunal has stated baldly that it didn't consider that one was necessary, the Tribunal has not explained *why* it decided that it was unnecessary to hold one, given the circumstances that the Tribunal found itself in. Given that the hearing was a remote hearing, it is likely that conducting a medical examination before conducting the hearing would be impracticable due to the medical member not being at the hospital where IN was detained, but if it

was appropriate to hold one that could be rendered practicable by adjourning the hearing to another date.

113. Dr Alikhan (whose evidence the Tribunal accepted on the issue of IN's capacity to decide whether to provide instructions tohis representative) told the Tribunal that "if the hearing had been face to face it was possible that [IN] might have provided instructions". While I agree with the Tribunal that this falls very far short of establishing that an adjournment would necessarily have achieved greater participation from IN, the fact that Dr Alikhan appears to have been able to engage with IN when he and the other witnesses from the treating team visited him during the hearing tends to suggest that there was a realistic prospect that IN might engage sufficiently to allow him to give meaningful input into his representation, and given the importance of the legal case for IN's continued detention being tested robustly, the Tribunal should have considered, or explained, in greater depth whether proceeding with the hearing really was in the interests of justice.

114. In explaining its decision to refuse to adjourn the Tribunal noted that the matter had previously been listed for 22 November 2022 (six days prior to the hearing) but that had been postponed at the request of the patient's representative. Judge Pitt says that postponement "formed part of the context that the Tribunal bore in mind when deciding to proceed with the hearing on 28 November 2022 (see paragraph 4 of its written reasons).

115. IN's representative has criticised the Tribunal for taking that postponement into account, even though it had nothing to do with the patient refusing to provide instructions, and indeed that hearing had been listed before Ms Tyrrell was appointed by the First-tier Tribunal.

116. The overriding objective of the HESC Rules is multifaceted, requiring a tribunal to factor all aspects of dealing with cases "fairly and justly", and the different facets can sometimes pull in different directions. Rule 2(2) provides a list of aspects which dealing with a case fairly and justly is said to "include". The list includes not only "ensuring, so far as practicable, that the parties are able to participate fully in the proceedings" (Rule 2(2)(c)), but also more practical considerations such as "dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues the anticipated costs and the resources of the parties" (Rule 2(2)(a)) and "avoiding delay, so far as compatible with proper consideration of the issues" (Rule 2(2)(e)).

117. Even the issue of how to protect a patient's Article 5 rights itself involves competing considerations: on the one hand it is important to maximise the patient's participation in the proceedings but on the other hand adjournments may jeopardise the ability to achieve an adequately speedy determination.

118. I am not persuaded that it was an error of law for the Tribunal to have taken the procedural history of the matter into account as part of the context of its decision whether to adjourn, but I would expect such a factor to carry relatively little weight compared to the risk that IN's Article 5(4) rights might be infringed by the reference being determined without his being present or represented. From the Tribunal's reasons it is not at all clear what weight it gave to the different competing factors.

119. At this point I pause to remind myself of the guidance that the Supreme Court gave in *R (Jones) v First-tier Tribunal (Social Entitlement Chamber)* [2013] UKSC 19, on the level of intensity of review that is appropriate when considering a challenge to the decision of a first instance tribunal. At [25] Lord Hope said that it was:

> "well-established, as an aspect of tribunal law and practice, that judicial restraint should be exercised when the reasons that a tribunal gives for its decision are being examined. The appellate court should not assume too readily that the tribunal misdirected itself just because not every step in its reasoning is fully set out in it"

120. It may be that the Tribunal thought that the concerns about IN being denied an effective hearing carried less weight because the patient had an opportunity to make his own application for his detention to be reviewed by a mental health tribunal, but the reason for s68(2) is that some patients don't make applications, and their detention still needs to be tested and a hearing of a reference should be conducted on the basis that the patient might never exercise any right to make an application. Such a patient could be waiting another 3 years before his case is referred again.

121. The Tribunal had an inquisitorial jurisdiction, so it is not necessarily the case that the patient being absent from and unrepresented at the hearing meant that his detention would not be reviewed effectively, but while the Tribunal "noted" the contradiction between IN asking for a representative and his refusing to engage with her, it didn't explain in sufficient depth why it was in the interests of justice to proceed.

122. It is not enough for the Tribunal simply to state that it was in the interests of justice to proceed. Despite taking the restrained approach commended by Lord Hope in *R(Jones) v SSWP*, I find that the Tribunal's failure to explain (a) how it balanced the competing factors for and against granting an adjournment, and (b) why it was in the interests of justice to proceed with the hearing in the absence of both the patient and his representative, renders its reasons for refusing the adjournment application inadequate. That inadequacy amounts to an error of law.

Materiality

123. The inadequacy of the Tribunal's reasons amounts to a material error of law because it is in the nature of an inadequacy of reasons that those reasons don't permit the reader to understand how the decision was made, whether the correct tests were applied, or whether those tests were applied correctly.

Conclusion

124. I therefore conclude that the decision of the First-tier Tribunal involves a material error of law. I allow the appeal and set aside the decision under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007.

What happens next

125. The case must (under section 12(2)(b)(i)) be remitted for re-hearing by a new tribunal subject to the directions above.

Thomas Church
Judge of the Upper Tribunal

Authorised by the Judge for issue on 10 November 2024
Corrected on 10 December 2024