



Neutral Citation Number: [2026] UKUT 32 (AAC)
Appeal No: UA-2025-001851-HM

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Between:

AN

Appellant

- v -

St Andrew's Healthcare

First Respondent

Secretary of State for Justice

Second Respondent

Rule 14(7) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI No 2698) provides:

'Unless the Upper Tribunal gives a direction to the contrary, information about mental health cases and the names of any persons concerned in such cases must not be made public.'

By way of exemption from this rule, the UPPER TRIBUNAL DIRECTS that this decision and the reasons for it may be made public.

Before: Upper Tribunal Judge Jacobs

Decided on 26 January 2026 following an oral hearing on 23 January 2026.

Representation:

Appellant: Roger Pezzani of counsel, instructed by Bison Solicitors, both pro bono

1st Respondent: Arianna Kelly of counsel, instructed by in-house counsel for St Andrew's

2nd Respondent: Did not take part in the hearing

On appeal from the First-tier Tribunal (Health, Education and Social Care Chamber)

Reference: MP2024/15168

Decision date: 21 October 2025

Hearing: In chambers

Judge: Tribunal Judge K E Lawrence

Summary: Mental health (80)

Deferred conditional discharge – provisional decision – First-tier Tribunal made a finding that the patient did not have a mental disorder – whether patient was being unlawfully detained (no) – whether tribunal could revisit its finding before making a final decision (yes).

DECISION OF UPPER TRIBUNAL

On appeal from the First-tier Tribunal (Health, Education and Social Care Chamber)

Reference: MP2024/15168
Decision date: 21 October 2025
Hearing: In chambers
Judge: Tribunal Judge K E Lawrence

The decision of the First-tier Tribunal did not involve the making of an error on a point of law under section 12 of the Tribunals, Courts and Enforcement Act 2007.

The Secretary of State for Justice has informed the Upper Tribunal that ‘should the Tribunal which deferred a direction for conditional discharge reconvene to consider whether the patient now has the very mental disorder which at the earlier hearing it decided he did not, the Secretary of State would wish to be represented or make observations at that hearing.’

REASONS FOR DECISION

1. AN's solicitor and counsel appeared pro bono on his behalf in the Upper Tribunal. I thank them personally and on behalf of the Upper Tribunal for their generosity in the service they have provided for AN and the assistance they have given me and the Upper Tribunal.

A. What this case is about

2. This case raises two related issues about conditional discharge. The First-tier Tribunal found that AN did not have a mental disorder. It made a provisional decision that AN should be conditionally discharged and directed his responsible clinician to report on arrangements necessary to implement its proposed conditions.

3. The first issue is whether, given the time that has passed, AN is being unlawfully detained. If that is correct, the tribunal should reconvene and direct that he be discharged subject only to being liable to be recalled. I have decided that AN was not being unlawfully detained.

4. The second issue is whether the tribunal would have power to revisit its finding on his mental state when it reconvened. I have decided that the tribunal will have power to revisit its finding on his mental state when it reconvenes.

B. History and background

5. AN killed his mother and was convicted of her manslaughter by the Royal Court of Jersey. On 19 August 2020, the Court made orders under Articles 65 and 68 of the Mental Health (Jersey) Law 2016. On 5 May 2021, he was transferred to St Andrew's Healthcare in England. Section 85 of the Mental Health Act 1983 then applied with the effect that he was treated as detained pursuant to sections 37 and 41 of that Act. Those

sections are equivalent to Articles 65 and 68. On 10 June 2024, AN applied to the First-tier Tribunal.

The decision of 6 May 2025

6. I am going to say this once, but it is important and applies throughout this decision: **this is NOT the decision under appeal to the Upper Tribunal.**

7. AN's application for discharge was heard by the First-tier Tribunal on 21-22 January 2025 and 1-2 May 2005. On 6 May 2025, the tribunal put its decision into writing. The decision records that it was announced at the end of the hearing, which was on 2 May 2025. Despite that, it has been referred to as the decision of 6 May 2025 and I am going to do the same. The tribunal was composed of Tribunal Judge Lawrence, Dr Brown and Mr Watson. I refer to them collectively as the panel.

8. This was the tribunal's decision:

Provisional Decision

The tribunal is currently of the view that a conditional discharge should be directed but it is not satisfied that the condition(s) now proposed (set out below) can be implemented immediately. Consequently the tribunal defers a final decision.

The tribunal directs that, by no later than 4 August 2025, it must be advised by Dr Radley as to the progress of the arrangements necessary for the proposed conditional discharge to be implemented, after which time it will decide whether to direct an immediate conditional discharge or, alternatively, whether to reconvene.

Condition(s)

AN shall:

1. Reside at accommodation yet to be specified.
2. Engage with and meet the clinical team as directed by the Responsible Clinician and Social Supervisor to include keeping appointments as required.
3. Disclose to the Responsible Clinician and Social Supervisor any developing intimate relationship with any other person.

9. The tribunal found:

- AN 'is not suffering from mental disorder.'
- He 'does not have ASD [Autism Spectrum Disorder].'
- But 'at the time of the index offence ... AN was suffering from a mental disorder, a severe depressive disorder. ... He is currently not presenting with any symptoms of depression despite the absence of medication and the difficult and restrictive circumstances in which he finds himself. ... However, the tribunal noted that having had one episode of severe depression, there is a potential risk of recurrence and bearing in mind the gravity of the index offence the tribunal was satisfied that it is appropriate for him to remain liable to be recalled to hospital for further treatment. In addition, whilst it is positive that AN has produced a relapse prevention plan, that he sought support with his mental health prior to the index offence and continues to engage with his private therapist, the tribunal was satisfied that the proposed conditions above are necessary and proportionate. ...'

10. Having made those findings, the tribunal concluded:

For the above reasons, the tribunal concluded that the statutory criteria [for detention] were not met. The tribunal was satisfied it had sufficient information, particularly from Mr Weir and the report of Mr Spencer-Humphrey, to formulate draft conditions. The conditions cannot be fulfilled until practical arrangements are made, particularly identifying suitable accommodation and a community team for AN. The tribunal's provisional decision was therefore to defer AN's conditional discharge.

By way of background, the practical arrangements involved discussions with the authorities in Jersey, England and, I was told, Scotland.

11. St Andrew's applied for permission to appeal to the Upper Tribunal against this decision, but permission was refused by the First-tier Tribunal on 30 June 2025. There is no record of an application to the Upper Tribunal for permission to appeal.

The decision of 11 September 2025

12. This followed an application by St Andrew's for the tribunal to reconvene. The application was considered by the panel and refused on 11 September 2025. It had before it 18 items of information. The tribunal recorded that it had 'reviewed both the its decision dated 6 May 2025 and the information it has received concerning the arrangements.' The tribunal explained its decision and gave directions.

Decision

The tribunal is not satisfied that the necessary arrangements have been made for the patient's conditional discharge from hospital because insufficient progress has been made in relation to putting in place suitable arrangements to allow the conditions to be met.

Directions

The tribunal will allow more time for the necessary arrangements to be made. Accordingly, the parties must file a further position statement in relation to the proposed conditions by 9 March 2026. If the necessary arrangements are in place before 9 March 2026 the parties should file further position statements at the earliest opportunity.

The decision of 21 October 2025

13. This followed an application made by AN's representative on 8 October 2025.

14. It was decided by Judge Lawrence on a form headed **Interlocutory Decision Before Hearing**. She set out the application:

1. The patient's legal representative has filed a further position statement (with supporting documents) dated 8 October 2025 requesting that the tribunal reconvene for half a day and limits the hearing to: *'(a) vary the conditions to render them practicable; or (b) direct a conditional discharge subject only to liability to recall. That is what is required by settled law. Fresh evidence should be restricted to those issues. The Tribunal should be astute to ensure that no party is permitted to re-litigate the s.72(1)(b) issues, which were decided in the decision of 6th May 2025'*.

15. The judge refused the application and gave short reasons:

2. The timescale directed by the tribunal in its decision/directions dated 11 September 2025 reflects the complex jurisdictional/funding issues in this case.
3. For the avoidance of doubt the patient's legal representative should note that at any reconvened hearing the tribunal retains its full powers.

C. The appeal to the Upper Tribunal

16. AN applied for permission to appeal to the Upper Tribunal against Judge Lawrence's decision. On 8 December 2025, Tribunal Judge Chamberlain of the First-tier Tribunal gave permission. The judge wrote:

14. The difficulties in which the Tribunal now finds itself follow from a) its formal finding on 6th May 2025, not that any mental disorder was then not of the requisite nature or degree, but that AN had no mental disorder at all, and b) the lack of any identified, supported and funded accommodation on 6th May 2025. The impasse which followed the Tribunal's decision is evidenced by the quite extraordinary volume of documentation served since 6th May 2025 and listed above.

15. Whether the stage has now been reached that there is no reasonable prospect of the conditions of proposed discharge being implemented is a matter of judgement. Furthermore - and although it is established law that a Tribunal which has deferred a direction for conditional discharge should reconvene if the patient's mental health significantly deteriorates - there is clearly a live issue as to whether a reconvening Tribunal panel can conclude that the patient now has the very mental disorder which at the earlier hearing it decided he did not.

16. I do not find that there is a clear and material error of law here. But I do accept that there may be arguable errors of law, and in an area in which the jurisdiction would benefit from authoritative guidance.

17. I therefore grant permission to appeal to the Upper Tribunal.

18. I do not limit the grounds.

17. The judge also recorded that:

As matters stand further updates are due on 9th March 2026.

18. When the appeal was lodged in the Upper Tribunal, it was referred to me. I directed an urgent hearing, as it was possible that AN was being detained unlawfully. I also drew attention to the limited jurisdiction of the First-tier Tribunal and Upper Tribunal under the decisions of the Supreme Court in *M v Secretary of State for Justice* [2019] AC 712 and *J v Welsh Ministers* [2020] AC 757. I noted that, in the latter, the Court said at [33]:

If the reality is that he [J] is being unlawfully detained, then the remedy is either habeas corpus or judicial review.

That was why I concluded with this remark:

I am sure that Mr Pezzani does not need me to advise him that the Upper Tribunal may not have the powers to provide the necessary remedy for AN, which may have to be sought in the courts rather than the tribunals.

D. Mental Health Act 1983

19. These are the relevant sections:

42 Powers of Secretary of State in respect of patients subject to restriction orders.

(1) If the Secretary of State is satisfied that in the case of any patient a restriction order is no longer required for the protection of the public from serious harm, he may direct that the patient shall cease to be subject to the special restrictions set out in section 41(3) above; and where the Secretary of State so directs, the restriction order shall cease to have effect, and section 41(5) above shall apply accordingly.

(2) At any time while a restriction order is in force in respect of a patient, the Secretary of State may, if he thinks fit, by warrant discharge the patient from hospital, either absolutely or subject to conditions; and where a person is absolutely discharged under this subsection, he shall thereupon cease to be liable to be detained by virtue of the relevant hospital order, and the restriction order shall cease to have effect accordingly.

(3) The Secretary of State may at any time during the continuance in force of a restriction order in respect of a patient who has been conditionally discharged under subsection (2) above by warrant recall the patient to such hospital as may be specified in the warrant.

(4) Where a patient is recalled as mentioned in subsection (3) above—

- (a) if the hospital specified in the warrant is not the hospital from which the patient was conditionally discharged, the hospital order and the restriction order shall have effect as if the hospital specified in the warrant were substituted for the hospital specified in the hospital order;
- (b) in any case, the patient shall be treated for the purposes of section 18 above as if he had absented himself without leave from the hospital specified in the warrant.

(5) If a restriction order in respect of a patient ceases to have effect after the patient has been conditionally discharged under this section, the patient shall, unless previously recalled under subsection (3) above, be deemed to be absolutely discharged on the date when the order ceases to have effect, and shall cease to be liable to be detained by virtue of the relevant hospital order accordingly.

(6) The Secretary of State may, if satisfied that the attendance at any place in Great Britain of a patient who is subject to a restriction order is desirable in the interests of justice or for the purposes of any public inquiry, direct him to be taken to that place; and where a patient is directed under this subsection to be taken to any place he shall, unless the Secretary of State otherwise directs, be kept in custody while being so taken, while at that place and while being taken back to the hospital in which he is liable to be detained.

72 Powers of tribunals

(1) Where application is made to the appropriate tribunal by or in respect of a patient who is liable to be detained under this Act or is a community patient, the tribunal may in any case direct that the patient be discharged, and—

...

- (b) the tribunal shall direct the discharge of a patient liable to be detained otherwise than under section 2 above if it is not satisfied—
 - (i) that he is then suffering from mental disorder or from mental disorder of a nature or degree which makes it appropriate for him to be liable to be detained in a hospital for medical treatment; or
 - (ii) that it is necessary for the health of safety of the patient or for the protection of other persons that he should receive such treatment; or
 - (iia) that appropriate medical treatment is available for him; ...
- (6) Subsections (1) to (4) above apply in relation to references to the appropriate tribunal as they apply in relation to applications made to the appropriate tribunal by or in respect of a patient.
- (7) Subsection (1) above shall not apply in the case of a restricted patient except as provided in sections 73 and 74 below.

73 Power to discharge restricted patients

- (1) Where an application to the appropriate tribunal is made by a restricted patient who is subject to a restriction order, or where the case of such a patient is referred to the appropriate tribunal, the tribunal shall direct the absolute discharge of the patient if—
 - (a) the tribunal is not satisfied as to the matters mentioned in paragraph (b)(i), (ii) or (iia) of section 72(1) above; and
 - (b) the tribunal is satisfied that it is not appropriate for the patient to remain liable to be recalled to hospital for further treatment.
- (2) Where in the case of any such patient as is mentioned in subsection (1) above—
 - (a) paragraph (a) of that subsection applies; but
 - (b) paragraph (b) of that subsection does not apply,the tribunal shall direct the conditional discharge of the patient.
- (3) Where a patient is absolutely discharged under this section he shall thereupon cease to be liable to be detained by virtue of the relevant hospital order, and the restriction order shall cease to have effect accordingly.
- (4) Where a patient is conditionally discharged under this section—
 - (a) he may be recalled by the Secretary of State under subsection (3) of section 42 above as if he had been conditionally discharged under subsection (2) of that section; and
 - (b) the patient shall comply with such conditions (if any) as may be imposed at the time of discharge by the tribunal or at any subsequent time by the Secretary of State.
- (5) The Secretary of State may from time to time vary any condition imposed (whether by the tribunal or by him) under subsection (4) above.
- (6) Where a restriction order in respect of a patient ceases to have effect after he has been conditionally discharged under this section the patient shall, unless previously recalled, be deemed to be absolutely discharged on the date when the

order ceases to have effect and shall cease to be liable to be detained by virtue of the relevant hospital order.

(7) A tribunal may defer a direction for the conditional discharge of a patient until such arrangements as appear to the tribunal to be necessary for that purpose have been made to its satisfaction; and where by virtue of any such deferment no direction has been given on an application or reference before the time when the patient's case comes before the tribunal on a subsequent application or reference, the previous application or reference shall be treated as one on which no direction under this section can be given.

(8) This section is without prejudice to section 42 above.

75 Applications and references concerning conditionally discharged restricted patients.

(1) Where a restricted patient has been conditionally discharged under section 42(2), 73 or 74 above and is subsequently recalled to hospital—

- (a) the Secretary of State shall, within one month of the day on which the patient returns or is returned to hospital, refer his case to the appropriate tribunal; and
- (b) section 70 above shall apply to the patient as if the relevant hospital order, hospital direction or transfer direction had been made on that day.

E. The European Convention on Human Rights

20. The relevant Convention right is the right to liberty under Article 5:

ARTICLE 5

RIGHT TO LIBERTY AND SECURITY

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

...

- (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

...

4. 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.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

F. R (H) v Secretary of State for the Home Department

21. The background to this case is the decision of the House of Lords in *R v Oxford Mental Health Review Tribunal, ex parte Secretary of State for the Home Department* [1988] AC 120. The House decided that if a tribunal gave a direction that a patient be conditionally discharged but deferred it under section 73(7), it could not later reconvene to consider whether the patient should be discharged. That conclusion was challenged

under the Human Rights Act 1998. In *R (H)*, both the Court of Appeal and the House of Lords decided that it was permissible for the tribunal to make a provisional decision on discharge and if necessary to reconsider its direction. This avoided the conclusion in the *Oxford* case by delaying the giving of even a deferred direction for discharge until arrangements for implementing its proposed conditions were in place. The delay operated through a provisional decision.

In the Court of Appeal

22. This is reported at [2003] QB 320.

23. The Court of Appeal has recently dealt with the status of a decision of one of its decisions when an appeal to the Supreme Court against that decision has been dismissed. In *Commissioners for His Majesty's Revenue and Customs v Medpro Healthcare Ltd* [2026] EWCA Civ 14, the Court referred to an earlier decision and said:

27. ... It was this decision that the Supreme Court endorsed, although it is fair to say that in the Supreme Court at [9] Lord Neuberger said that the Supreme Court should not be taken as approving all its reasoning. Nevertheless, the position in this court is that, unless it is inconsistent with the decision of the Supreme Court, we must follow a previous decision of this court.

I have not found anything inconsistent between what the Court of Appeal said and what the House of Lords said on appeal. I note that the House of Lords quoted extensively from the judgment of the Court of Appeal.

24. These are the relevant paragraphs of *R(H)* in the Court of Appeal:

70. ... If the tribunal remains seised of the matter until the actual direction for conditional discharge is given, it seems to us highly desirable that the tribunal should be able to have regard to relevant fresh material, should there be any. We view as unsatisfactory the conclusion of Lord Bridge, at p 128, that a tribunal should be compelled to discharge a patient whose condition has deteriorated since the tribunal first considered the matter.

The new regime

71. Tribunals should no longer proceed on the basis that they cannot reconsider a decision to direct a conditional discharge on specified conditions where, after deferral and before directing discharge, there is a material change of circumstances. Such a change may be demonstrated by fresh material placed before or obtained by the tribunal. Such material may, for instance, show that the patient's condition has relapsed. It may show that the patient's condition has improved. It may demonstrate that it is not possible to put in place the arrangements necessary to enable the conditions that the tribunal proposed to impose on the patient to be satisfied. The original decision should be treated as a provisional decision, and the tribunal should monitor progress towards implementing it so as to ensure that the patient is not left 'in limbo' for an unreasonable length of time.

...

76. Where a tribunal is considering the case of a restricted patient it may conclude that the patient is suffering from a mental disorder of a nature or degree which makes it essential for his safety or that of others that he be detained in hospital for treatment. It may, however, come to one of a number of other

conclusions, namely: (i) the patient is clearly no longer suffering from mental disorder and there is no risk of a relapse or renewed outbreak of illness such as to make it appropriate for him to be subject to any further treatment or supervision; (ii) the patient is probably no longer suffering from mental disorder, but there is a risk that this diagnosis may be wrong and that the patient is merely in remission. Supervision or treatment is appropriate to guard against this risk; (iii) the patient is still suffering from mental disorder which requires treatment or supervision for his own health and safety or the protection of others. This can be provided satisfactorily either in hospital or in the community.

...

90. Where the tribunal is not satisfied that a restricted patient is suffering from mental illness, psychopathic disorder, severe mental impairment or mental impairment, the tribunal must discharge the patient, either absolutely or conditionally. That is the effect of section 73(1) and (2) when read together with section 72(1)(b)(i). The effect of those provisions reflects the first of the three requirements in *Winterwerp's case* 2 EHRR 387. In order to comply with *Winterwerp's case* and *Johnson's case* 27 EHRR 296 a conditional discharge must not be deferred under section 73(7) beyond a reasonable limited period. After that the tribunal must discharge the patient whether or not it has proved possible to put in place arrangements to accommodate the conditions that the tribunal originally wished to impose. If it has not, then the tribunal should make appropriate modification to the conditions so that it will be possible for the patient to comply with them. Thus far there is no incompatibility between the Act and the Convention.

91. It is possible that a tribunal may conclude that a patient is still suffering from mental illness, psychopathic disorder, severe mental impairment or mental impairment, that this is no longer of a nature or degree that makes it necessary that the patient should be detained in hospital for treatment, even if he cannot receive treatment in the community, but that it is appropriate that the patient should be subject to recall. In such a situation the tribunal may defer discharge for a reasonably limited period to enable arrangements to be put in place for a conditional discharge. If, however, the preferred arrangements prove impossible, the tribunal must make appropriate modifications to the conditions and direct the discharge of the patient. Such a course is necessary because in this situation the second and third requirements in *Winterwerp's case* will not be satisfied.

The critical impasse

92. The critical impasse arises where a tribunal considers that it is necessary for the health or safety of the patient or the safety of others that the patient continues to receive psychiatric treatment, and that it is reasonable for such treatment to be provided in the community, but the psychiatrists who would have to provide such treatment refuse to do so because they disagree with the tribunal's view that the patient can safely be treated in the community. We think that it is unlikely that this impasse will arise in circumstances where the tribunal has concluded that it is not satisfied that the patient is any longer suffering from a mental illness, although the present may be such a rare case. The impasse in question will classically arise in the case of a patient who, while of unsound mind, can be expected to remain free of symptoms provided that he continues to receive treatment. In such a situation there is more scope for disagreement

between a tribunal and the psychiatrists called upon to provide such treatment as to whether it can be safely be [sic] provided in the community or only under detention in hospital.

...

Summary

98. The following summary of the position of a tribunal considering the conditional discharge of a restricted patient substantially accords with submissions made to us on behalf of the Secretaries of State.

(i) The tribunal can, at the outset, adjourn the hearing to investigate the possibility of imposing conditions.

(ii) The tribunal can make a provisional decision to make a conditional discharge on specified conditions, including submitting to psychiatric supervision, but defer directing a conditional discharge while the authorities responsible for after-care under section 117 of the Act make the necessary arrangements to enable the patient to meet those conditions.

(iii) The tribunal should meet after an appropriate interval to monitor progress in making these arrangements if they have not by then been put in place.

(iv) Once the arrangements have been made, the tribunal can direct a conditional discharge without holding a further hearing.

(v) If problems arise with making arrangements to meet the conditions, the tribunal has a number of options, depending upon the circumstances: (a) it can defer for a further period, perhaps with suggestions as to how any problems can be overcome; (b) it can amend or vary the proposed conditions to seek to overcome the difficulties that have been encountered; (c) it can order a conditional discharge without specific conditions, thereby making the patient subject to recall; (d) it can decide that the patient must remain detained in hospital for treatment.

(vi) It will not normally be appropriate for a tribunal to direct a conditional discharge on conditions with which the patient will be unable to comply because it has not proved possible to make the necessary arrangements.

In the House of Lords

25. This is reported at [2004] 2 AC 253.

26. Mr Pezzani relied on this paragraph:

28. There was no time between 3 February 2000 and 25 March 2002 when the appellant was, in my opinion, unlawfully detained, and there was thus no breach of article 5(1)(e). There is a categorical difference, not a difference of degree, between this case and that of *Johnson*. Mr Johnson was a patient in whose case the *Winterwerp* criteria were found not to be satisfied from June 1989 onwards. While, therefore, it was reasonable to try and ease the patient's reintegration into the community by the imposition of conditions, the alternative, if those conditions proved impossible to meet, was not continued detention but discharge, either absolutely or subject only to a condition of liability to recall. His detention became unlawful shortly after June 1989 because there were, as all the doctors agreed, no grounds for continuing to detain him. The present case is quite different. There

was never a medical consensus, nor did the tribunal find, that the *Winterwerp* criteria were not satisfied. The tribunal considered that the appellant could be satisfactorily treated and supervised in the community if its conditions were met, as it expected, but the alternative, if these conditions proved impossible to meet, was not discharge, either absolutely or subject only to a condition of recall, but continued detention. The appellant was never detained when there were no grounds for detaining him.

G. The scope of the appeal in the Upper Tribunal

27. The application of 8 October 2025 sought two orders. One was an order that the tribunal reconvene for half a day. The other was that the issues and evidence be limited as requested. The judge's refusal was of both requests and she gave reasons for refusing both. She refused to order that the tribunal reconvene because time was needed to deal with complex jurisdictional and funding issues. She refused to limit the issues and evidence because, in her view, the tribunal at the reconvened hearing would retain its full powers.

28. The nature of the First-tier Tribunal's decision is important because it affects the Upper Tribunal's jurisdiction. Judge Chamberlain gave unlimited permission. That means that the Upper Tribunal has jurisdiction over both aspects of the decision. Judge Lawrence's statement of the tribunal's powers at the reconvened hearing was not just a passing remark for the information of the parties. It was integral to the second part of the application as it contains her reason for refusing it. The Upper Tribunal has jurisdiction to decide whether it was correct.

H. Analysis – was Judge Lawrence right to refuse the application to reconvene?

29. Both St Andrew's and AN wanted the tribunal to reconvene. Before me, they both argued that Judge Lawrence made a mistake of law by not directing that the tribunal reconvene. Each had a different motive.

30. St Andrew's wanted the tribunal to reconvene, because AN did have a mental disorder. Before me, the argument was that his mental state had deteriorated since 6 May 2025. That raises the issue of whether the tribunal had power to reconsider its finding on AN's mental state.

31. AN wanted the tribunal to reconvene, because he was being unlawfully detained in violation of his Convention right under Article 5. Given the time that had passed since 6 May 2025, the tribunal has no option but to direct that he be discharged conditional only on being liable to recall. This argument would block St Andrew's attempt to show that AN has a mental disorder.

32. Mr Pezzani relied on Lord Bingham's statement in [28] of *R (H)*. In particular, he relied on the statement of the effect of the decision of the European Court of Human Rights in *Johnson v United Kingdom*:

... Mr Johnson was a patient in whose case the *Winterwerp* criteria were found not to be satisfied from June 1989 onwards. While, therefore, it was reasonable to try and ease the patient's reintegration into the community by the imposition of conditions, the alternative, if those conditions proved impossible to meet, was not continued detention but discharge, either absolutely or subject only to a condition of liability to recall. His detention became unlawful shortly after June 1989

because there were, as all the doctors agreed, no grounds for continuing to detain him. ...

I accept that Lord Bingham correctly summarised the effect of the European Court's decision. Accordingly, the position is this. Patients who do not have a mental disorder may be detained for a reasonable period in order to make arrangements to ease them back into the community. If those arrangements are not identified within a reasonable time, the patient must be discharged either absolutely or subject only to the possibility of recall.

33. There are two points to make about *R(H)*.

34. First, this was the case in which the provisional decision was authorised as a way to avoid the problems that arose under the *Oxford* decision. The courts were developing the arrangements and, although the tribunal had some experience of how it was working, the Court of Appeal and the House of Lords were not in position to understand the full range of circumstances in which it would apply. It would not be surprising if their analysis did not expressly consider every possible eventuality.

35. Second, the Court of Appeal, the House of Lords and now the Supreme Court have the luxury of looking at cases after the event. That is why it was possible for Lord Bingham to say almost to the day when Mr Johnson's detention became unlawful. The First-tier Tribunal and, to a lesser extent, the Upper Tribunal have to deal with case in real time.

36. Although I accept what Lord Bingham said at [28], he did not say anything about how to identify the point at which a person is taken definitively as having or not having a mental disorder. In *Johnson*, 'all the doctors agreed'. The doctors were not agreed about AN in May 2025 and are still not agreed. The First-tier Tribunal has made a finding, but that was only in a provisional decision. There will be no operative finding unless and until the tribunal makes a (deferred) direction for discharge, assuming one is made. The Court of Appeal said at [70] that it was 'highly desirable that the tribunal should be able to have regard to relevant fresh material'. It referred at [71] to 'a material change of circumstances' and gave examples of patients whose condition had relapsed or improved. Although it is not in issue as St Andrew's case was put to me, the Court of Appeal's reasoning in [70] is wide enough to allow the tribunal to revisit its findings even without a change of circumstances. Indeed, as I will explain in the next section, the tribunal will be required to make a finding on AN's mental state at the time when it makes a final decision on his application for discharge.

37. That is why I have rejected the submissions that Judge Lawrence made a mistake of law by refusing to reconvene. The panel had agreed that more time was needed to explore whether it would be possible to set make arrangements for AN's discharge. The tribunal had originally allowed three months. In September, it allowed a further six months. Even allowing for the Christmas and New Year period, that reflected the complexity of the task the tribunal had set for the authorities. Within a month, AN was asking the judge to override the panel's decision. Given my analysis of the law, she was entitled to refuse that application.

I. Analysis – was Judge Lawrence right about the tribunal's powers when it reconvenes?

38. The starting point is the tribunal's decision of 6 May 2025, as varied on 11 September 2025. The decision is binding on the parties for so long as it remains operative: *R (Majera) v Secretary of State for the Home Department* [2022] AC 461.

39. I have set out the tribunal's decision. By its terms, it is provisional only. The tribunal said that it was *currently* of the view that a conditional discharge should be directed and that it deferred a *final* decision.

40. That form of decision was authorised by *R (H)*.

41. The tribunal formed the view that AN did not have a mental disorder but that it was appropriate for him to be liable to recall, subject to specified conditions. It is permissible for a tribunal to make an order in those terms under section 73(2). Any patient who is conditionally discharged is liable to be recalled. That is implicit in section 73(2)(b) and is expressed in section 73(4)(a). The tribunal may, but need not, impose further conditions under section 73(4)(b).

42. I need to look more closely at section 73(2)(a). This refers back to section 73(1)(a), which in turn refers back to section 72(1)(b)(i), (ii) and (iia). Section 72(1)(b)(i) is what matters. This refers to whether the patient 'is then suffering from mental disorder'. The important word is *then*. Read literally, that seems to refer to the time of the application. However, the House of Lords has decided that it does not mean that. In *R (Von Brandenburg) v East London and the City Mental Health NHS Trust* [2004] 2 AC 280, Lord Bingham said:

9(3). It is plain from the language of sub-paragraphs (a)(i) and (b)(i) of section 72(1), quoted above, that the focus of the tribunal's enquiry into the mental health of the patient is on whether he is not 'then suffering' from mental disorder or mental illness. 'Then' refers to the time of the tribunal's review and the tribunal has no power to consider the validity of the admission which gave rise to the liability to be detained: see *Ex parte Waldron* [1986] QB 824, 846. The tribunal will doubtless endeavour to assess a patient's condition in the round, and in considering issues of health, safety and public protection under sub-paragraphs (a)(ii) and (b)(ii) of section 72(1) it cannot ignore the foreseeable future consequences of discharge, but the temporal reference of 'then' is clear and the tribunal is not called upon to make an assessment which will remain accurate indefinitely or for any given period of time.

So, *then* refers to the time of the tribunal's review. Lord Bingham did not say whether that meant the hearing or the decision. In practice, they will usually be the same. This case is different.

43. Under the terms of the tribunal's decision of 6 May 2025, the tribunal expressly refrained from making a *final decision* (to use its words). Although the tribunal found that AN did not have a mental disorder, that was made on the evidence available to the tribunal at the time. When it makes its final decision, it will have to make a finding on the evidence available at that time. That finding may be the same as its finding of 6 May 2025 or it may be different. Either way, a finding is necessary in order to comply with section 72(1)(b)(i) and with the decision of the House of Lords in *Von Brandenburg*. And, of course, it is consistent with the Court of Appeal in *R (H)* at [70].

44. There is no form of estoppel or any similar concept operating in mental health law. As Lord Bingham said in *Von Brandenburg*:

9(2) As the Master of the Rolls pointed out in paragraph 30 of his judgment quoted above, the condition of many of those suffering from mental disorder will not be static. Episodes of acute illness may be followed by episodes of remission. Thus it does not follow that a tribunal decision, however sound when made, will remain so. Other things being equal, the longer the period since the decision was made the greater the chance that the patient's mental condition may have altered, whether for better or worse.

The patient had been detained under section 2 of the Mental Health Act 1983. A tribunal had directed his discharge, but before he left the hospital he was admitted under section 3. The House of Lords decided that it was lawful for an approved social worker to apply for the patient to be detained on the basis of a reasonable and bona fide opinion that this would be justified by information not known to the tribunal: see [10]. It was not necessary to show a change of circumstances: see [12]. *Von Brandenburg* was concerned with unrestricted patients. I consider that the point is equally applicable to restricted patients, which AN is. Even if it is not, it provides some support for my reasoning

45. If the issue arises whether a tribunal should make a different finding at a reconvened hearing, fairness requires that the patient be given notice that the issue arises. See *Von Brandenburg* at [12]. In this case, AN and his legal team are aware of the issue and the evidence relevant to it.

46. That is why I have rejected AN's argument that the judge was wrong in what she said about the tribunal's powers when it reconvened. She was right.

**Authorised for issue
on 26 January 2026**

**Edward Jacobs
Upper Tribunal Judge**