Neutral Citation Number: [2026] UKUT 28 (AAC)
**Appeal No. UA-2025-000796-HM**

**IN THE UPPER TRIBUNAL**
**ADMINISTRATIVE APPEALS CHAMBER**

**Between:**

**DB**

**Appellant**

**- v -**

**Lancashire & South Cumbria NHS Foundation Trust**
**and**
**Secretary of State for Justice**

**Respondents**

**Before: Upper Tribunal Judge Johnston**

Hearing date: 16 December 2025
Mode of hearing: Video

**Representation:**
Appellant: Ms Curtis, instructed by Mr Battarbee, Southerns Law
Respondent: The respondents took no part in the proceedings

**On appeal:**
Tribunal: First-tier Tribunal (Health, Education and Social Care Chamber)
Tribunal Case No: MM/2024/32775
Tribunal Venue: Video
Decision Date: 24 March 2025

## SUMMARY OF DECISION

The tribunal erred in law (i) by proceeding with the hearing in DB's absence when he had expressed to the First-tier Tribunal his wish to attend and (ii) by proceeding by video, given that doing so prevented a pre hearing examination thereby excluding him from participating in the hearing which made the hearing procedurally unfair.

***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.***

**KEYWORD NAME 80**

## DECISION

**The decision of the Upper Tribunal is to allow the appeal and remit to the First-tier Tribunal for a hearing.**

## REASONS FOR DECISION

### A. Introduction

1. [DB] is detained under section 37 of the Mental Health Act 1983 (MHA) and is subject to restrictions under section 41 of that Act. On 16 December 2024 the Secretary of State referred his case to the First-tier Tribunal pursuant to section 71(2) of the MHA which requires such a referral where the patient's case has not been considered by the First-tier Tribunal within the last three years. The tribunal recorded receipt of the referral on 18 December 2024.

2. The hearing of the reference was listed and hearing notices sent to the parties on 11 January 2025. It was first listed as a video hearing to be heard on 21 March 2025. On 23 January 2025 [DB's] representative applied to the First-tier Tribunal for a face to face hearing and the request was granted on the same date. The date of the hearing did not change. The application for a face to face hearing was to ensure that even if [DB] could not attend the hearing with the witnesses and the tribunal panel as he was in long term segregation, he would be able to speak to the medical member of the tribunal to ensure he was able to participate in the proceedings. It was not until the 20 March 2025, one day before the hearing, that it was listed again as a hearing by video. This was because the tribunal could not assemble a fully constituted panel to sit on the case on 21 March 2025 if it remained face to face. The timeline for what occurred is set out below.

3. On 17 March 2025, five days before the hearing, [DB's] solicitor, Mr Battarbee, had taken instructions from him on the statutory reports prepared for the First-tier Tribunal. Mr Battarbee could not enter the seclusion room but could speak to [DB] and see him though a hatch in the door. He was therefore able to take instructions.

### B. Factual background

4. DB's Statement of Facts and Grounds" (pages 15 – 29 excluding annexes) gives the following helpful narrative. I find that the narrative is accurate because (i) it is not disputed and (ii) it is supported by the evidence before me.

> "12. **At 12:58 hours on 19 March 2025**, less than 48 hours before [DB's] First-tier Tribunal hearing (which had been listed for over two months) the Tribunal Office sent an email to Mr Battarbee which stated that:
>
> We do not have a complete panel available to sit in Lancashire on 21.03.25, we do have members outside this area who could sit remotely.
>
> Please can you let me know if the patient and attendees would be willing to sit on a remote (video) hearing instead?

13. Mr Battarbee made attempts to speak with [DB] via the telephone but was told this was not possible. There was insufficient time for him to physically visit [DB] and ascertain whether his client would be prepared to change his mind and consent to a video hearing.

14. At **16:47 hours on 19 March 2025** Mr Battarbee responded to the Tribunal Office explaining that:

We have made every effort today to obtain our client's view on his face to face hearing becoming a remote hearing on Friday. However, we have been unable to obtain his view on this and therefore we don't have an instruction to agree to a remote hearing.

I would note that [DB] specifically instructed us on 23 January 2025 to request a face to face hearing (it was originally listed as a remote hearing) and all pre hearing conversations have been on the understanding that this will be a face to face hearing that he would be able to attend in some capacity.

15. **At 12:13 hours on 20 March 2025**, less than 24 hours before the hearing and whilst a decision remained outstanding from the Tribunal Office on the question of whether the face to face hearing would be converted to a video hearing, the Responsible Authority, [hospital], sent the below email to the Tribunal Office:

Good afternoon,

Regarding the F2F hearing currently scheduled for tomorrow, Friday 21/03/25 @ 10.15am.

We were advised by the Tribunal that they were struggling to get a F2F panel and asked if the hearing could be changed to video. The communication received from his solicitor has advised that they have been unable to discuss this with [DB], but back in January, he did request a F2F hearing.

I have spoken to his RC, Dr [S], who has advised that [DB's] mental health has rapidly declined during the last few weeks and he is now in seclusion due to several serious assaults on ward staff.

Due to the increased risk to others, Dr [S], has advised that it is not safe for him to leave the seclusion room and join the F2F hearing tomorrow. Nor would it be feasible for him to join by video due to the fact that he is in a seclusion room and according to Dr [S], he is too unwell to participate in a hearing.

Due to the increased risk, [DB] is being transferred to a High Secure hospital next week. This transfer has been delayed so that the Tribunal Auto Referral hearing could be conducted with his current care team.

A postponement of this hearing will result in a delay of transfer which is urgently required due to the risk and the fact that [DB] requires a higher level of security for his continued care.

We are asking that the auto referral hearing goes ahead as planned, via video, but without [DB] joining.

We will await your further directions on this.

16. At **12:19 hours on 20 March 2025** the Tribunal Office circulated a decision from Legal Officer, F Haji, to say that the face to face Tribunal hearing listed for 21 March 2025 had been postponed and requested all parties to submit new dates by 27 March 2025.

17. At 14:33 hours on 20 March 2025 a further decision was sent from the Tribunal Office, from Judge Allen, which stated that the Legal Officer's decision had been set aside and that the Responsible Authority's application for the FtT hearing on the following day to proceed by way of video was granted. The directions cited what had been sent by [the hospital] and referenced Mr Battarbee's response to the Tribunal Office's original query asking whether the patient and attendees were in agreement to this being a video hearing. At no stage between 12:19 hours to 14:33 hours on 20 March 2025 was [DB's] solicitor invited to provide any additional views in response to what [the hospital] had submitted to the Tribunal Office.

18. Judge Allen stated that,

> 6. I find the reasons stated in the application compelling. I also note the patient has refused to speak with his Solicitor.
>
> 7. Given this is an automatic reference the case should be re-listed before the panel that is available tomorrow who can hear the case remotely and consider further arguments (if presented) as to the merits of an adjournment, or otherwise hear the case. Accordingly, in consideration of the overriding objective, I make the directions listed below.
>
> The order of Legal Officer, F. Hay [sic], dated 20th March 2025, is set aside.
>
> 9. This matter is re-listed to be heard remotely on the morning of 21st March 2025 with a time estimate of half a day.
>
> 10. The Tribunal Office shall note on the file this patient has been identified as being potentially violent, to flag the need to consider requesting risk assessments from the Responsible Authority in respect of any future hearings.

19. Judge Allen's observation that 'the patient has refused to speak with his Solicitor' is factually inaccurate. Mr Battarbee continued to attempt to take instructions from [DB] on the afternoon of 20 March 2025 but was told that it was not possible to speak to [him] over the phone. At no point was Mr Battarbee informed that [DB] was refusing to speak to him, contrary to Judge Allen's observation, rather that it was not possible for the phone call to be facilitated.

20. For the reasons given in the FtT decision, Mr Battarbee's application for an adjournment was refused. This resulted in the [DB's] FtT taking place in his absence without his knowledge, without him being told that a pre-hearing examination would not be taking place and without him being told that his hearing had been changed from a face to face hearing to a video hearing. Throughout these changes in arrangements, [DB] had been unable to speak with his solicitor because the hospital's position was that phone/video contact was not felt to be possible. This is in spite of the fact that as recently as 17

> March 2025, Mr Battarbee had been able to converse with [DB] through a window with the assistance of a monitor in the seclusion suite."

5. I also find that the medical member could have spoken to [DB] through the hatch in the seclusion room door without endangering the medical member or any staff. There was no suggestion that [DB] could cause harm through the hatch. I refer to my findings at paragraph 13 below.

6. Both respondents were specifically directed to tell the Upper Tribunal whether they wished to take part in these proceedings. The Secretary of State for Justice confirmed they did not wish to take part in a statement by then dated 24 November 2025. The NHS Foundation Trust took no part and their reason for this was that [DB] had been moved to another hospital.

## C. Legal framework

7. Section 71 of the Mental Health Act 1983 says as follows:

> **"71 References by Secretary of State concerning restricted patients.**
>
> (1) The Secretary of State may at any time refer the case of a restricted patient to the appropriate tribunal.
>
> (2) The Secretary of State shall refer to the appropriate tribunal the case of any restricted patient detained in a hospital whose case has not been considered by such a tribunal, whether on his own application or otherwise, within the last three years. …"

8. The relevant rules in the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 (SI No 2699) say as follows:

> **"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.

**Case management powers**

**5.**—(1) Subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedure …

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

(g) decide the form of any hearing;

(h) adjourn or postpone a hearing; …

**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.

**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.

## D. The First-tier Tribunal's decision

9. The First-tier Tribunal on 21 March 2025 refused the application to adjourn the hearing made by Mr Battarbee on behalf of [DB]. The basis of the application was that [DB] could not participate in a video hearing as he could not be examined by the medical member remotely. He was in seclusion, would not be able to attend a hearing in person or remotely but he would be able to be examined by the medical member if the hearing was face to face. A face to face hearing with a pre hearing examination by the medical member was therefore his only means of participating in the hearing.

10. The First-tier Tribunal in refusing the application for an adjournment said as follows:

> "Pre-Hearing Medical Examination of the Patient
> A pre-hearing examination of the patient was indicated under the Rules.
>
> However, an interview with the patient did not take place because the patient is in seclusion and has been for some time. When our medical member contacted the hospital to try and arrange the pre-hearing examination, she was told by the staff on the ward that it was not practicable to do so or safe to do so. Our medical member was told that the patient is in such an agitated state that the staff do not even open the door of his room for medication to be supplied and the risk assessment was such that it was deemed to be a clinical risk to take a laptop into the seclusion room so that [the medical member] could interview the patient on the laptop. In any event, according to the staff, when [DB] condition was last reviewed, he was in such a state of mind that it is very unlikely, according to the staff, that he would talk to the medical member. He was said to be laughing to himself incongruously and probably hallucinating. In the circumstances, [the medical member] considered that it was not practicable or safe to conduct a pre-hearing examination even though one had been requested and she was therefore unable to do so.
> …

Jurisdiction, Preliminary and Procedural Matters
…

3. As stated above, the patient did not attend the hearing. The reason for this is, as stated in relation to the PHE, that he was in seclusion and in such a mental state, according to the evidence we were given by the staff, that not only would it not have been safe for him to come to the room where the hearing was being conducted on a laptop in the hospital but it would not have been safe for a member of staff to go into his room with a laptop so that he could participate in the hearing. It was the view of the Treating Team that this would have exposed that member of staff to an unacceptable risk to his or her safety.

4. In the circumstances, Mr Batterbee, the patient's representative, applied for the hearing to be adjourned. Mr Batterbee accepted that [DB] would not be able to attend the hearing either by coming into the room where the hospital witnesses were giving evidence or, for safety and practicality reasons, by using a laptop taken into his room. Mr Batterbee told the hearing that [DB] had been accepted by a maximum security hospital, …, last September. The staff at this hospital were "trying to get the transfer over the line." The Treating Team feel that the hearing before the Tribunal needs to take place so that the transfer can then be facilitated. [DB] wanted a hearing which was face to face but it was decided by a Tribunal Judge that the hearing should be a video hearing. [DB] had been able to give Mr Batterbee instructions and these were that he wanted a discharge and that he has no mental disorder. Although Mr Batterbee recognised even before the day of the hearing that there would be real problems getting [DB] to give evidence to the hearing so that everyone was kept safe but he was reassured by the fact that a PHE had been requested and the PHE, he felt, would at least allow [DB] to have some kind of input into the hearing because he would have been able to give his views and evidence to the medical member. It had very recently been directed by the Tribunal that there should be no face to face hearing and Mr Batterbee had not been able to speak to [DB] since that direction had been given. Mr Batterbee therefore had certain concerns about the hearing going ahead when the patient was neither able to give evidence to the hearing nor had he had the opportunity of stating his views and evidence to the medical member of the Tribunal. He consequently submitted that the hearing should be adjourned.

5. Dr [S] told us that she had a discussion with [DB's] new consultant at [the next hospital]. [That hospital] had indicated that ideally they would like this hearing to be completed. However, a few days before the hearing was listed, [DB] had assaulted a number of members of staff as he had previously. Members of staff had gone into his room and he had assaulted the ward manager and bitten a member of staff breaking the skin. He had been restrained but this restraint had been very difficult. He was now on a closed door review and medication was provided for him through the hatch in the door. His presentation was described as "agitated". Consequently, the view was taken that it would not be safe for a member of staff to go into his room with a laptop. His risk had escalated so that he now requires maximum security. The plan for him is long-term segregation in this hospital and when he is at [the next hospital].

6. Dr [S] said that she had no optimism that things would improve in a few weeks' time so that even if we adjourned the hearing, there was not any optimism that he would be in any better state in that time. Unfortunately, [DB] is treatment resistant and it is very unlikely that there would be any change in his presentation in a few weeks' time. In response to this evidence from Dr [S], Mr

Batterbee, very sensibly, stated that he understood the risks that were posed by [DB's] current presentation and he was not trying to sound naïve in making this application but felt that the hearing would not be fair.

7. We considered the evidence given by Dr [S] and the submissions made by Mr Batterbee. We accepted the evidence of Dr [S] that it is highly unlikely that [DB] would improve and we felt, as stated above, that the PHE had not taken place for proper and sensible reasons. We accept that this is unfortunate in that we have not heard [DB's] views either in his evidence to the hearing or through the PHE but it would not be right or appropriate in our view to expose our medical member to any unacceptable level of risk nor any member of staff. As there is no optimism that [DB] will improve in the next few weeks and as there is some urgency in having the hearing (which has already been delayed some time since the reference) so that, if we came to the conclusion that we should not discharge [DB], the transfer to [the next hospital] can take place, we came to the conclusion that we would not grant Mr Batterbee's application for an adjournment.

8. This left the question, of course, of whether we could conduct a fair hearing in the absence of [DB], particularly as there had been no PHE. We were satisfied, in accordance with Rule 39(1) that [DB] had been notified of the hearing or that reasonable steps had been taken to notify him of the hearing and we were also satisfied that [DB] was unable to attend the hearing for reasons of ill-health. As mentioned above, we were satisfied that the PHE was impractical. We therefore had to consider whether it was in the interests of justice to proceed with the hearing. Having considered the fact that an adjournment would not, as a matter of high probability, have achieved anything in terms of [DB] being in any different state in a few weeks' time to give evidence to the hearing and bearing in mind that he was competently represented by Mr Batterbee who had taken instructions from him, we came to the conclusion that it was in the interests of justice to proceed particularly as there is some urgency about this hearing in view of the fact that he has been accepted by [the next hospital] and, were he not to be discharged at this hearing, then the transfer could take place very soon. …"

## E. The grounds of appeal and the parties' submissions

11. I have again taken the grounds from the Statement of facts and grounds of [DB]. They said as follows:

"10. The FtT erred in that:-

a. On 20 March 2025 Judge Allen erroneously acceded to the Responsible Authority's application to convert the face to face FtT hearing listed on 21 March 2025 to a video hearing, contrary to [DB's] request for a face to face hearing having been previously granted, by

i. The imposition of a remote video hearing in place of a face to face hearing which removed the possibility of the medical member conducting a pre-hearing examination, the request for which had been granted;

ii. Giving undue weight to the contents of the Responsible Authority's application that the proposed transfer, accepted on 30 September 2024, was

urgently required and a postponement of the hearing would result in delay in the transfer;

iii. Failing to seek a response from [DB's] solicitor as to the Responsible Authority's application;

iv. Disregarding [DB's] right to a fair hearing;

b. On 21 March 2025 the FtT unreasonably refused the application for an adjournment in the circumstances of this case where,

i. Procedural and administrative logistics had operated unfairly to exclude [DB] from effective participation in his hearing by the imposition of a remote video hearing less than 24 hours before the listed face to face hearing was due to take place

ii. The imposition of the video hearing prevented the pre-hearing examination taking place contrary to the arrangements and expectation of [DB] and the FtT erroneously found r39 to be satisfied on the basis [DB] was unable to attend for reasons of ill-health and the pre-hearing examination was impractical without appreciating the difference a face to face hearing would have made

iii. Failed to have any or any adequate regard to [DB's] right to participate in his hearing such that it would be fair

iv. Fettered its own discretion by appearing to consider itself bound by Judge Allen's decision made the previous afternoon to conduct the hearing via video

c. Failed to seek to give effect to article 6(1) and the principle of equality of arms."

## F. Analysis

12. The first ground on which I am allowing the appeal is because the tribunal proceeded with the hearing in the absence of [DB] when he had expressed his wish to participate in the proceedings. By proceeding with the hearing by video on that day, they prevented him from participating in any way as he could not have a pre-hearing examination and was therefore precluded from any participation in breach of rule 2. On the facts before me [DB] accepted he could not attend the tribunal hearing as he was in seclusion but he would have been able to see the medical member in person in the same way that Mr Battarbee saw him as set out in his witness statement (page 25 of the bundle) and explained to the tribunal in his application for an adjournment.

13. Rule 2 sets out that dealing with a case fairly and justly includes ensuring, so far as practicable, that the parties are able to participate fully in the proceedings. Rule 2(3) requires the tribunal to seek to give effect to the overriding objective when it exercises any power under the rules. There was a way for [DB] to partially participate in the hearing by being examined in person by the medical member. The medical member could have done this by conducting the examination on the day or a few days before the hearing and then attending the hearing remotely or in person with the rest of the

panel. Proceeding with the hearing by video that day meant he was unable to participate in the proceedings in any way in breach of rule 2.

14. Additionally, the description of the seclusion room given by Mr Battarbee at paragraph 2 of his witness statement (page 25 of the bundle) describes an area which was private, with seating and a window and a monitor to speak to [DB]. It was not argued and is not clear to me on the facts whether the hearing could have been conducted in this space. If it could have been, [DB] could have attended the hearing. I make no findings on this as the information before me is not clear as to whether this was possible or not.

15. The second ground on which I am allowing the appeal is that the tribunal by proceeding with the hearing in the above circumstances, was procedurally unfair, in breach of the rules of natural justice, and in breach of the overriding objective specified in rule 2 for the following reasons.

16. The tribunal made the decision not to grant the adjournment application before they considered rule 39 and in applying rule 39 did not consider rule 2.

17. Rule 39 has been considered by Judge Jacobs in PC v Cornwall Partnership NHS Trust [2023] UKUT 64 (AAC). In this case Judge Jacobs sets out that rule 39 is in two parts. At paragraph 5 and 6 of that decision he says as follows:

> "5. Rule 39 is in two parts. The first part in paragraph (1) is positive. It sets out conditions that allow a tribunal to proceed in the patient's absence. The second part in paragraph (2) is negative. It set out circumstances in which a tribunal must not proceed. The rule uses the same word – 'may' – in both paragraphs, but it has a different meaning in each. In paragraph (1), it authorises the tribunal to proceed without requiring it to do so. In paragraph (2) with the addition of 'not', it is a prohibition. To put it another way, paragraph (2) contains condition precedents that must be satisfied before the power in paragraph (1) arises. I come back later to the importance of keeping the paragraphs separate.
>
> 6. Paragraph (2) contains two conditions. Both must be satisfied before the power to proceed arises. Paragraph (2)(a) deals with non-attendance. A tribunal may not proceed unless it is satisfied as a matter of fact that either the patient had decided not to attend or was unable to attend for reasons of ill health. If the tribunal is not so satisfied, it must not proceed, regardless of whether the conditions in paragraph (1) are satisfied. Paragraph (2)(b) deals with medical examinations."

18. Where the tribunal went wrong is considering rule 39(2)(b)(ii). An examination under rule 34 could not take place if the hearing was remote or the medical member could not attend the hospital to conduct the examination but it could take place if the hearing was face to face or the medical member went to the hospital in person.

19. They say at paragraph 7 of their decision:

> "We accept that this is unfortunate in that we have not heard [DB's] views either in his evidence to the hearing or through the PHE but it would not be right or appropriate in our view to expose our medical member to any unacceptable level of risk nor any member of staff."

20. This is obviously correct. However, neither the medical member nor the staff would be exposed to any risk if the hearing was face to face without [DB] but with a pre hearing examination conducted through the hatch of the seclusion room or the medical member attending the hospital to conduct an examination and the hearing proceeding remotely if a face to face hearing could not have been facilitated in the area outside the seclusion room. This could have been facilitated in a safe way, as explained in paragraph 13 above. If the tribunal had been able to provide a full panel for the face to face hearing that had been listed since January, two months prior to the hearing, [DB] would have been able to participate in the hearing by seeing the medical member. The tribunal did not address this in applying rule 39(2)(b)(ii) despite the submissions made by Mr Battarbee.

21. As Judge Jacobs said in PC v Cornwall Partnership NHS Trust above "paragraph (2) contains condition precedents that must be satisfied before the power in paragraph (1) arises." An examination by the medical member was not impractical or unnecessary if the hearing had been face to face or the medical member attended the hospital to conduct an examination. When applying rule 39 the tribunal had to do so to in accordance with rule 2. They did not do so and this was an error of law.

22. Turning to rule 39(1)(b) when applied in accordance with rule 2 it was not in the interests of justice to proceed with a form of hearing which provided [DB] no chance of participation in the hearing when some participation could be facilitated. This led to [DB] not having the opportunity to participate and only finding out days after the hearing that it had proceeded in his absence and without his knowledge.

23. In discussing the importance of procedural fairness and the importance of the decision before the tribunal on [DB's] liberty, counsel referred me to a recent case R(A Child) [2025] EWCA 1504. Although in a different jurisdiction the judgement sets out at paragraph 34 why procedural fairness is important. It is relevant to this case for two reasons. Firstly, as far as [DB] knew the hearing had been listed as a face to face hearing since 23 January 2025 following the granting of an application. This was only changed the day before the hearing and without [DB's] knowledge or ability to give instructions. Secondly, what was at stake for [DB] was his liberty. At paragraph 34 of that judgment Moylan LJ said this:

> 34 In respect of Ground 4, I propose first to refer to what was said in the judgment of the court, given by Baker LJ, in Re A:
>
> > "[29] There are at least two fundamental reasons why procedural fairness is important. The first is that it helps to improve the chances of reaching the right result. In John v Rees [1970] Ch 345, at 402, Megarry J noted that there are some who would say that, when the outcome of a case is obvious, why force everybody to go through the tiresome waste of time involved in framing charges against a person and giving them an opportunity to be heard? Megarry J eloquently answered that question in the following way:
> >
> > "As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change. Nor are

> those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events."
>
> [30] This leads to the second reason why fairness is important. The last point made by Megarry J in that passage in John v Rees was one also noted by Lord Reed JSC in Osborn [R (Osborn) v Parole Board [2013] UKSC 61; [2014] AC 1115] at paragraphs 68-70. When setting out the values which underlie the concept of procedural fairness, Lord Reed pointed out that the purpose of a fair hearing is not only that it improves the chances of reaching the right decision. Those values also include the avoidance of the feelings of resentment which will arise if a person is unable to participate effectively in a decision-making process which affects them. In this way the law seeks to protect the value of human dignity.
>
> [31] As Lord Reed put it at paragraph 68: "… justice is intuitively understood to require a procedure which pays due respect to persons whose rights are significantly affected by decisions taken in the exercise of administrative or judicial functions. Respect entails that such persons ought to be able to participate in the procedure by which the decision is made, provided they have something to say which is relevant to the decision to be taken.
>
> 32. These principles apply to all litigation, including in the protective jurisdictions in the family courts and the Court of Protection. The fact that the welfare of a child is the paramount consideration in proceedings under the Children Act 1989 and the inherent jurisdiction relating to children, and that any act done, or decision made, under the Mental Capacity Act 2005 for or on behalf of a person who lacks capacity must be done, or made, in his best interests does not obviate the requirement for a procedure which pays due respect to persons whose rights are significantly affected by such decisions. *The specific procedural requirements will, however, be tailored to take into account the nature of the protective jurisdiction and the extent to which such persons are permitted to participate will depend on the specific circumstances of the case.*" (emphasis added)"

23. In this case the only way for [DB] to participate in the proceedings was an examination by the medical member which would be reported to the tribunal. Fairness is not only about reaching the right decision; it is about

> "the avoidance of the feelings of resentment which will arise if a person is unable to participate effectively in a decision-making process which affects them. In this way the law seeks to protect the value of human dignity"; and as said by Lord Reed above, "justice is intuitively understood to require a procedure which pays due respect to persons whose rights are significantly affected by decisions taken in the exercise of administrative or judicial functions. Respect entails that such persons ought to be able to participate in the procedure by which the decision is made, provided they have something to say which is relevant to the decision to be taken."

24. [DB's] case was about his liberty. His rights were significantly affected. He ought to have been able to participate in the hearing in the only way he could. He did not know until some days after the hearing that it had occurred at all. He had thought that as he was not seen by the medical member as he was told he would be, that the

hearing did not take place. Even if the tribunal reached the right ultimate result [DB] did not have the opportunity to participate, and the proceedings were unfair. [DB] experienced the same resentment described by Lord Reed in the case above. Mr Battarbee informed me that [DB] said subsequently that he was "stitched up".

25. Finally, I asked Counsel whether she thought that the fact the matter was an automatic reference to the tribunal had any bearing on this decision. She said and I agree, that given [DB] had not had his detention considered by an independent tribunal for three years, the need for procedural fairness in ensuring his participation was even more acute.

26. For the sake of completeness, I am not allowing the appeal on the interlocutory decision to grant the Responsible Authorities application to proceed with the hearing by video for the following reasons.

27. Judge Allen's decision was clear that the tribunal panel convening the next day could hear and consider arguments as to the merits of an adjournment. Her decision was an interim decision taken on the information before her. She had limited time as the hearing was listed for the next day and so an immediate decision was necessary. Although she misunderstood the email from Mr Batterbee and assumed [DB] had refused to speak to him, she made it clear that her decision was not binding on the tribunal panel hearing the case. She did not have the full information before her and on the basis of the information she had, her decision was reasonable. Her decision should have made no material difference to the decision to proceed made by the tribunal hearing the case. I therefore conclude that Judge Allen's decision did not contain an error of law.

## G. Conclusion

28. It is for the reasons above that I set aside the decision and remit the case to the First-tier Tribunal for rehearing.

## DIRECTIONS

29. I therefore direct as follows:-

(a) The parties must give at least three available dates to the First-tier Tribunal within 14 days of receiving this decision. These dates must be within two months from the end of the 14 days.

(b) The First-tier Tribunal must list the case for hearing within the period in (a) above.

(c) The patient must have a pre hearing examination by the medical member of the tribunal panel hearing the case in person to be safely facilitated by the hospital.

(d) The First-tier Tribunal must give directions for reports by the current Responsible Authority and a new statement from the Secretary of State

for Justice to be lodged with them in time for [DB's] solicitor to be able to take instructions and prepare for the hearing.

**Sarah Johnston**
**Sitting as a Judge of the Upper Tribunal**
**21 January 2026**