IN THE UPPER TRIBUNAL **Case No.** HMW/273/2019
ADMINISTRATIVE APPEALS CHAMBER

Before **Thomas Church, Judge of the Upper Tribunal**

Decision: As the decision of the First-tier Tribunal dated 13 November 2018 under reference TR25377 involved the making of material errors of law, it is set aside pursuant to section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 (the **"TCEA"**).
Since further facts need to be found the case is remitted to the Mental Health Review Tribunal for Wales for rehearing before a differently constituted panel pursuant to section 12(2)(b)(i) of the TCEA.

REASONS FOR DECISION

Background

1. The Appellant was convicted of the index offence of simple arson. On 26th October 2015 he was made subject to a hospital order with a restriction direction (under sections 37 and 41 of the Mental Health Act 1983 (as amended) (the **"MHA"**)).
2. On 14 February 2018 the Appellant applied to the Mental Health Review Tribunal for Wales for a review of his section.
3. The Appellant's application was heard by a panel of the Mental Health Review Tribunal for Wales at a two-day oral hearing on 5th and 6th November 2018 (the **"Tribunal"**). The hearing took place at HMP Cardiff where the Appellant was a remand prisoner awaiting trial on a charge of violent disorder alleged to have occurred while he was a restricted patient detained at Llanarth Court Hospital (**"Llanarth Court"**).
4. The Tribunal heard oral evidence from the Appellant and from five expert witnesses. It also considered extensive written evidence.
5. The Tribunal decided that the statutory criteria under section 72(1)(b)(i) MHA were not met but it was not satisfied that it was not appropriate for the Appellant to remain liable to be recalled to hospital for further treatment. It produced a detailed written decision with reasons dated 13 November 2018 which ordered the Appellant's conditional discharge (the **"Decision"**). The Tribunal decided not to impose any conditions on the Appellant.

The permission stage

6. The Appellant applied to the Mental Health Review Tribunal for Wales for permission to appeal the Decision to the Upper Tribunal.
7. Judge Mark Powell QC, Deputy President of the Mental Health Review Tribunal for Wales, decided that, given the unusual circumstances of the case (including that the application was heard at HMP Cardiff) and given the complexities set out in the Tribunal's judgment, it was appropriate to grant permission to appeal so the issues could be argued before the Upper Tribunal.
8. The matter came before me and I directed an oral hearing, which was held at The Rolls Building, London on 13 September 2019.

Representation at the appeal hearing

9. At the hearing of the substantive appeal Mr Pezzani of counsel (instructed by Duncan Lewis) represented the Appellant. The First Respondent was not represented. Ms Paterson of counsel appeared for the Second Respondent. I am grateful to both counsel for their clear and helpful submissions.

Summary of the Appellant's position

10. While the Appellant's permission application to the Mental Health Review Tribunal for Wales listed five grounds of appeal, for the purposes of the substantive appeal before me Mr Pezzani boiled them down to two: first, the Tribunal failed properly to apply the two-stage process required by section 73 of the MHA and second, the Tribunal failed to give adequate reasons for its decision.

The "two-stage test"

11. Mr Pezzani argued that the Tribunal erred because once it had decided that the criterion set out in section 72(1)(b)(i) MHA was not met (and that it was therefore obliged to discharge the Appellant) it failed to go on to consider whether subsections (1)(b)(ii) and (1)(b)(iia) were also satisfied.
12. The Appellant's case was that it was necessary in this case for the Tribunal to determine:
    a. whether it was necessary for the health or safety of the Appellant or for the protection of other persons that he should receive medical treatment; and
    b. whether appropriate medical treatment was available for him,

    because these matters were relevant to the exercise of its discretion to decide whether it was appropriate for the Appellant to remain liable to be recalled to hospital for the purpose of further treatment.

Inadequacy of reasons

13. Mr Pezzani argued that the Tribunal erred in failing to give "adequate and intelligible" reasons for its decision, identifying two particular instances of the Tribunal failing to address evidence or argument which was relevant and which was material to the decision it had to make.

Relief

14. The Appellant asked me to set aside the Decision and to remit the matter to the Mental Health Review Tribunal for Wales for re-hearing by a differently constituted panel.

Summary of the First Respondent's position

15. The First Respondent was aware of the hearing but opted not to be represented at the hearing and to make no written submissions either. It adopted a neutral position, neither supporting nor opposing the appeal.

Summary of the Second Respondent's position

16. In relation to the ground relating to the "two-stage test" the Second Respondent argued that the words of section 73 subsections (1) and (2) MHA were incapable of supporting the interpretation placed upon them by

the Appellant, which would require the Tribunal to anticipate the circumstances in which an applicant may be recalled and to make findings as to the basis for his resulting detention. The Second Respondent's case was that such an assessment could only be made at the time of recall in the light of the Appellant's presentation at that time, and not before.

17. In relation to the Appellant's inadequacy of reasons arguments, Ms Paterson for the Second Respondent argued that the Appellant sought to set the bar for adequacy of reasons too high, especially given the realities of the task which the Tribunal had to undertake and the time and resources available to it. She invoked a line of authority which emphasizes the importance of appellate courts and tribunals showing due deference to first instance expert tribunals who have heard the evidence. The Second Respondent's case was that the reasons given for the Tribunal's decision comfortably met the standard of adequacy.
18. The Second Respondent opposed the appeal and asked me to uphold the Decision.

My Decision

Ground 1 (the "two-stage test")

19. The Tribunal's jurisdiction in the case of a detained restricted patient is governed by section 73 of the Mental Health Act. Subsections (1) and (2) of section 73 MHA import the criteria in section 72(1)(b) MHA.
20. Section 73 MHA provides:

Power to discharge restricted patients

"73.- (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 subjection 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."

21. Section 72 MHA provides:
Powers of tribunals
"72.- (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 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 or 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.
…
(7) Subsection (1) above shall not apply in the case of a restricted patient except as provided in sections 73 and 74 below."

22. Section 73(1)(a) MHA is clear as to the steps that a tribunal must take in its decision-making: first, it must decide whether it is not satisfied as to the matters mentioned in paragraph (b)(i), (ii) or (iia) of section 72(1) above.
23. The thrust of Mr Pezzani's submission was that, once the Tribunal decided it wasn't satisfied in relation to the matters set out in section 72(1)(b)(i) MHA it was "not prohibited" from going on to consider whether sub-paragraphs (ii) and (iia) were satisfied. I agree, and I think this point was uncontroversial with Ms Paterson too.
24. Mr Pezzani said that it would not have been onerous for the tribunal to decide each of the section 72(1)(b) criteria, because it had read and heard evidence

about them and had received written and oral submissions about them. All it had to do was to make a decision on the basis of that evidence and those submissions. I agree that the task he suggests was not particularly onerous, but that was no reason for the Tribunal to perform it if it was not required.

25. Mr Pezzani went on to argue that, not only was the Tribunal “not prohibited” from considering each of these sub-paragraphs, it was positively obliged to consider them, and a failure to reach an explicit decision on the matters set out in each of those sub-paragraphs amounts to a failure to apply the proper test, and therefore an error of law.
26. This is where Mr Pezzani lost Ms Paterson, and it is where he lost me too. Mr Pezzani invoked no authority in support of his proposition. The interpretation which he proposes is not the natural interpretation of the words in sections 72 and 73, and neither is it an interpretation that must be adopted if one is to make sense of those sections. The statute is clear that, as far as the Tribunal’s obligations under section 73(1)(a) MHA are concerned, it was entitled to stop once it decided that it was not satisfied that the matters set out in section 72(b)(i) MHA were the case.
27. Mr Pezzani argued that because each of the three criteria in section 72(1)(b) MHA would need to be satisfied in future were the appellant to be recalled to hospital for treatment under the terms of his conditional discharge, whether each of them was satisfied at the time of the Tribunal’s decision was a relevant consideration to whether they were likely to be satisfied in the future. This doesn’t necessarily follow, because whether something is the case now patently isn’t always determinative of whether that “something” will be the case in the future.
28. However, having satisfied itself that the criterion in section 72(1)(b)(i) MHA was not satisfied, the Tribunal was then obliged to carry out the evaluation called for by section 73(1)(b) MHA, i.e. it had to decide whether it was appropriate for the Appellant to remain liable to be recalled to hospital for further treatment.
29. Clearly there is likely to be considerable overlap between the subject matter of section 72(1)(b)(i), (ii) and (iia) MHA and the matters a tribunal will need to consider when deciding on the appropriateness or otherwise of a patient remaining liable to recall, but there will not necessarily be a complete match in all cases.

Assessing the appropriateness of the Appellant remaining liable to recall

30. A tribunal’s obligation under section 73(1)(b) MHA is to assess the appropriateness of the patient remaining liable to recall to hospital for further treatment, and it must do so in the light of all relevant matters. What will be relevant will depend on the circumstances of the particular case, and perhaps this is what Mr Pezzani meant when he conceded in paragraph 35 of his skeleton argument that consideration of all three criteria would not necessarily be required in every case.
31. The Second Respondent argued that it would be wrong to expect the Tribunal to have to anticipate the circumstances in which the Appellant may be recalled and to make findings as to the basis of his resulting detention, and she argued that such an assessment could only be made at the time of recall. I disagree.

32. The exercise that Ms Patterson described is not the exercise the Tribunal had to perform. The decision that has to be made at the time of recall of a patient who has been conditionally discharged by a tribunal is the Secretary of State's decision whether exercise of the recall power is then justified. That is a matter which clearly couldn't be determined at the time of the conditional discharge since the Secretary of State must believe on reasonable grounds that something has happened since the tribunal's decision to conditionally discharge or information has emerged (which was not available to the tribunal) which is sufficiently significant to justify recalling the patient (see *R (on the application of MM) v The Secretary of State for the Home Department* [2007] EWCA Civ 687 per Toulson LJ at paragraph 50).
33. What the Tribunal had to decide is something different: it had to assess the likelihood of the Secretary of State requiring to exercise his power of recall in respect of the Appellant in the future, or the effect which knowledge of the Secretary of State having the power of recall would have on the Appellant. Without such an assessment it would be in no position to assess the appropriateness of the Appellant's liberty being fettered by remaining subject to it.
34. Given that the power of recall in respect of a conditionally discharged patient can only be exercised for the purpose of the patient receiving further treatment, and given that the patient may be recalled to hospital only (and nowhere else) it is difficult to see how the question of the appropriateness of a patient continuing to be subject to the power of recall could properly be determined without the tribunal making findings about:
    a. whether the patient now suffers from a mental disorder which may be expected to endure or has, now or in the past, suffered from a mental disorder which may be expected to recur;
    b. if the answer to the question posed in paragraph a. is "yes", how likely it is that the patient might experience symptoms of such mental disorder in the future;
    c. what kind of treatment might be available in hospital to treat such mental disorder;
    d. what can reasonably be expected to change in consequence of the patient receiving such treatment in hospital (in other words, what purpose is to be served by the recall?); and
    e. (given the "least restrictive" principal that informs the MHA regime) whether any alternative strategies are available which might manage the risks associated with future deteriorations in the patient's mental health effectively but which place less restriction on the patient's liberty than the patient continuing to be subject to the power of recall.
35. Such findings would, no doubt, be based on evidence of the patient's past experience (of the chronicity of his mental disorder, its symptoms, its response to treatment, the prognosis and the attendant risks), but the findings themselves must be forward-looking in nature.
36. While the Second Respondent suggests that this amounts to "crystal ball gazing" it is by no means uncommon for expert tribunals to be required to exercise their judgment in assessing the likelihood of contingencies arising, and indeed the MHA requires such judgments to be made by clinicians, approved mental health professionals and tribunals every day when it requires them to assess risk.

The Appellant's mental disorder

37. There were two strands to the Appellant's psychiatric history: one that relates to possible psychotic symptoms and one that relates to his dissocial personality disorder.

Dissocial personality disorder

38. The Tribunal heard evidence from Dr Roger Thomas that the Appellant's daily aggression, his controlling behaviour in his dealings with other patients, and his use of threats and violence to get his own way were symptoms of dissocial personality disorder, and not any other mental illness or disorder. The Tribunal read and heard other evidence to support that opinion, and nothing to contradict it and it found on that basis that the Appellant has dissocial personality disorder. It was clearly entitled to do so on the evidence.

Psychotic symptoms

39. When the Appellant was assessed in custody in 2009 he was considered to be suffering from a psychotic illness and was treated with anti-psychotic medication. In 2014 he was noted to have been experiencing auditory hallucinations, but there was doubt as to whether he was acting in response to such stimuli. His 2015 index offence of arson appeared to have been committed in the context of a paranoid psychotic episode, but as the Tribunal put it:

    > "there has been much debate over the years as to whether he does suffer from a serious mental illness such as schizophrenia or not" (see paragraph 6 of the Tribunal's reasons).

    The Tribunal acknowledged that, while at the time of the court's disposal of the Appellant's case for his index offence the expert view was that he was "suffering from a psychotic illness probably paranoid schizophrenia", there was no expert report or witness before the Tribunal that expressed any real confidence in the theory that he does suffer from paranoid schizophrenia.

40. There was some variance in the evidence before the Tribunal on this topic. Dr Roger Thomas's position was emphatic, as the Tribunal acknowledged:

"Dr Roger Thomas is quite clear in his view that the patient does not suffer from any major mental illness such as schizophrenia, nor from any psychotic condition; and he concluded in his oral evidence to us that in that regard "it is not appropriate for the patient to be liable to be detained in a hospital for medical treatment" (see paragraph 12 of the Tribunal's reasons).

41. Dr Gamble's evidence was, in the Tribunal's words, "more cautious" on the issue, noting in paragraph 20 of his report that the Appellant:

    > "has a previous diagnosis of paranoid schizophrenia characterised by auditory and visual hallucinations, as well as delusions of reference. Since his admission to Llanarth Court I have seen no evidence of psychotic symptoms."

42. He said "there is a question whether [the Appellant] suffers from a psychotic illness. I think that the evidence for that is not strong. In my view it is possible that he can become more paranoid and that he can have fleeting psychotic symptoms when highly stressed or under the influence of illicit substances. Given the history of his misuse of amphetamine and other illicit substances the possibility also has to be considered his psychotic symptoms are a result

of substance misuse. At present [the Appellant] presents no symptoms of schizophrenia either positive or negative."

43. The Tribunal concluded that the psychotic symptoms the Appellant was experiencing at the time of the offence were "significantly more likely" to have been drug-induced, than being caused by an illness such as schizophrenia (see paragraph 14 of the Tribunal's reasons), but it stopped short of finding that the Appellant didn't suffer from a psychotic illness:

    "However, we remain cautious about trying to resolve the issue of whether the patient might be found at a later date to have a psychotic illness of a type that might recur in the future. We regard the divergence of expert opinion about this patient to be an important indicator of the difficulty in his diagnosis at any given time, let alone in advance."

44. Given the Tribunal's findings on the treatment available for dissocial personality disorder (see paragraphs 48 to 50 below) the question whether the Appellant also suffered from a psychotic illness was of some significance.

Medical treatment

45. While "medical treatment" is defined in the MHA, "treatment" is not. There is no reason to believe, though, that the reference to "treatment" in section 73(1)(b) MHA is to anything other than "medical treatment", as contemplated in section 72 MHA.
46. The definition of "medical treatment" in section 145(1) MHA is an inclusive rather than an exhaustive one:

    "medical treatment" includes nursing, psychological intervention and specialist mental health habilitation, rehabilitation and care".

This inclusive definition is to be construed in a purposive way in accordance with section 145(4) MHA, which provides:

"Any reference in this Act to medical treatment, in relation to mental disorder, shall be construed as a reference to medical treatment the purpose of which is to alleviate, or prevent a worsening of, the disorder or one or more of its symptoms, manifestations".

47. The Mental Health Act 2007 replaced the "treatability test" with the "appropriate treatment test", and the MHA definition of "medical treatment" hinges on the purpose for which it is administered rather than its effect. In written submissions to the Tribunal the Secretary of State opposed discharge on the basis that while the clinical opinion was that the appellant's mental disorder was untreatable the proper test did not require an assessment of the efficacy of the treatment available or of the appellant's willingness to participate in it. However, it is difficult to see how a form of medical treatment which is not believed to have any realistic prospect of achieving any therapeutic benefit to a patient whatsoever could properly be considered "appropriate" for him even if it fell within the MHA definition of "medical treatment".

Medical treatment for dissocial personality disorder

48. The Tribunal conducted a careful review of the evidence relating to the Appellant's treatment for his personality disorder since 2015. It formed its own view, not only from the reports before it but also the reports' source materials, about what progress had been achieved to date and what might be done in the future. It found that psychological work had achieved some

progress, albeit for a very limited period early in his admission (see paragraph 16 of the Tribunal's reasons), but it decided that any future progress was unlikely:

> "We heard and read no evidence as to any specific form of therapeutic treatment to treat this patient's anti-social personality disorder that would make it appropriate for him to be detained in hospital for treatment for such purposes."

49. This conclusion was open to it on the evidence.
50. The Tribunal then went on to consider the availability of specialist nursing care and milieu therapy (see paragraph 21 of the Tribunal's reasons). While it expressly declined to consider whether the grounds in section 72(1)(b)(ii) or (iia) MHA were established, the Tribunal concluded that:

> "the hospital environment itself is unlikely to be of benefit to [the Appellant] unless he is found at some later date to be suffering from a condition such as a psychotic condition that is amenable to medical treatment, whether it turns out to be drug induced and short lived, or more long lasting and serious such as schizophrenia."

51. The Tribunal concluded, then, that neither medical treatment in the traditional sense, nor in the broader sense which it carries in the MHA, was likely to be available for the Appellant's personality disorder, and it was entitled to that view.

Medical treatment for psychosis

52. Given its findings about hospital treatment not being appropriate for the Appellant's personality disorder the question arises whether the Tribunal was entitled to find that it was appropriate for the Appellant to remain liable to recall to hospital for treatment when it largely ducked the question of whether the Appellant suffered from any psychotic condition (albeit one that was in remission) that might relapse in the future and make such treatment appropriate.
53. While the wording of section 73(1)(b) MHA effectively places the burden on the Appellant to satisfy the Tribunal that it is not appropriate for him to remain liable to recall, the Tribunal still had to consider the matters relevant to a determination of whether such liability to recall was appropriate. In many cases this will not be a difficult task, as often there will be a clear diagnosis and a degree of understanding of the nature of the diagnosed disorder, including its chronicity and its response to treatment in the past.
54. In this case the Tribunal had before it considerable evidence of fact and expert opinion. It had a broad discretion in its assessment of the evidence before it.
55. The Tribunal made no express findings as to the availability in hospital, or the appropriateness of, medical treatment for any psychotic condition that the Appellant may suffer from.
56. As discussed in paragraph 83 below, the Tribunal found facts from which it can be inferred that there is a significant risk that the Appellant would use drugs in the future, and that if he does so there is a significant risk that he might experience psychotic symptoms, and that in that context there is a significant risk that he might be violent. Similarly, it may be inferred from what it says in paragraph 23 of its reasons (quoted in paragraph 50 above) that it considered that a psychotic condition of either type contemplated (i.e.

whether a schizophrenic condition or a drug induced psychosis) would be amenable to medical treatment and that such treatment would be available in hospital.

57. Given how central these issues were to the narrow question the Tribunal had to answer, though, it should really have made express findings. The Tribunal's reasons left us to infer what would be available and appropriate from what it said about what wasn't available and appropriate, and by its use of the word "unless". Without express findings a reader could be forgiven for believing that the Tribunal simply assumed that appropriate treatment would be available and appropriate rather than determining judicially, based on evidence and a weighing of all relevant factors, that it would be. The Tribunal also failed to explain why it was not persuaded by the arguments and evidence marshalled by the Appellant "that it was not appropriate for the patient to remain liable to be recalled to hospital for further treatment", which required it to consider whether the management of the risks associated with the Appellant's mental disorder might be achieved by means other than his continuing to be subject to the power of recall (as to which see paragraphs 72 to 89 below) and to weigh the potential benefits of hospital treatment on any psychotic condition with the potentially negative effects of such hospital treatment on his personality disorder (as to which see paragraphs 90 to 95 below).
58. Without express findings and an explanation of how the relevant factors were weighed we can't be sure how the Tribunal reached its decision on these key matters.

Ground 1 – conclusions

59. While I don't accept the narrow argument Mr Pezzani put forward about the Tribunal being required to decide the matters set out in all three limbs of section 72(1)(b) MHA, I am persuaded by the thrust of the Appellant's case that the Tribunal erred in law in failing to apply the proper test under section 73(1)(b) MHA. This required it to make findings on substantially similar matters, albeit on a forward-looking basis rather than on the basis of an assessment of the state of play at the time of the Decision, and it required the Tribunal to make a decision on the appropriateness of the Appellant remaining subject to the power of recall on the basis of those findings. It did not do so (or, if it did, it failed to explain how it did so). Simply stating that it was not satisfied that it was not appropriate for the Appellant to continue to be liable to be recalled to hospital for further treatment was not enough. Either way, this amounts to a material error of law.

Ground 2 (adequacy of reasons)

60. I was referred by counsel to case law dealing with the duty of courts and tribunals to give reasons for their decisions.
61. The Appellant relied upon the Court of Appeal's decision in *Simetra Global Assets Ltd & Anor v Ikon Finance Ltd & Ors* [2019] EWCA Civ 1413 and the Upper Tribunal's decision in *HK v Llanarth Court Hospital* [2014] UKUT 410 (AAC).
62. The Second Respondent relied upon the Court of Appeal's decision in *Criminal Injuries Compensation Authority v Hutton & Ors* [2016] EWCA Civ 1305, the judgment of the House of Lords in *Biogen Inc v Medeva plc* [1997]

RPC 1 and the Court of Appeal's decision in *Re C (A Child) (Adoption: Placement Order)* [2013] EWCA Civ 431.

63. Ms Paterson, for the Second Respondent, said the case before the Tribunal was a complex one in which the opinions of the professionals who gave written and oral evidence were divided on both the aetiology of the Appellant's condition and likely prognosis, and as such there was a range of reasonable conclusions open to the Tribunal. She argued that the Tribunal applied the law correctly to the facts and the reasons it gave for its decision were adequate.
64. She relied upon the line of authority summarised by Gross LJ in *CICA v Hutton and Ors and the First-tier Tribunal* [2016] EWCA Civ 1305 regarding the principles that should be applied by an appellate tribunal reviewing the decision of a specialist tribunal. She directed me, in particular, to paragraph 57 of Gross LJ's judgment, in which he "pulls the threads" of the authorities together:
    "(i) First, this Court should exercise restraint and proceed with caution before interfering with decisions of specialist tribunals. Not only do such tribunals have the expertise which the "ordinary" courts may not have but when a specialised statutory scheme has been entrusted by Parliament to tribunals, the Court should not venture too readily into their field.
    (ii) Second, if a tribunal decision is clearly based on an error of law, then it must be corrected. This Court should not, however, subject such decisions to inappropriate textual analysis so as to discern an error of law when, on a fair reading of the decision as a whole, none existed. It is probable, as Baroness Hale said, that in understanding and applying the law within their area of expertise, specialist tribunals will have got it right. Moreover, the mere fact that an appellate tribunal or a court would have reached a different conclusion, does not constitute a ground for review or for allowing an appeal.
    (iii) Thirdly, it is of the first importance to identify the tribunal of fact, to keep in mind that it and only it will have heard the evidence and to respect its decisions. When determining whether a question was one of "fact" or "law", this Court should have regard to context, as I would respectfully express it ("pragmatism", "expediency" or "policy", *per Jones*), so as to ensure both that decisions of tribunals of fact are given proper weight and to provide scope for specialist appellate tribunals to shape the development of law and practice in their field.
    (iv) Fourthly, it is important to note that these authorities not only address the relationship between the courts and specialist appellate tribunals but also between specialist first-tier tribunals and appellate tribunals."
65. Ms Paterson maintained that the Court of Appeal's decision in *Simetra Global Assets Limited & Anor v Ikon Finance Ltd &* Ors [2019] EWCA Civ 1413 was of no assistance to the Appellant because in it the Court of Appeal acknowledged that "what is required [within the text of the judgment] will depend on the nature of the case and that no universal template is possible" and, ultimately, this is a matter of judicial discretion. Ms Paterson also argued that what was said by Judge Gwynneth Knowles QC sitting in the Upper Tribunal in *HK v Llanarth Court Hospital* [2014] UKUT 0410 (AAC) didn't raise the bar in terms of what a first instance tribunal must address within its

judgment to ensure that its reasons meet the standard of adequacy because her comments on reasons writing were merely suggestions which may assist in the production of "adequate and intelligible reasons", and were not intended to be prescriptive.

66. Ms Paterson is, of course, right that both the Court of Appeal and the Upper Tribunal were clear in the authorities cited that an assessment of adequacy of reasons cannot be carried out by way of a prescriptive checklist of points, as what is required will always be dependent on the particular circumstances of each particular case. However, it would be unwise to ignore the helpful guidance given in those decisions, and while a failure to comply with the first or last of Judge Knowles QC's five point list of desirable practices in reasons writing in *HK v Llanarth Court Hospital* [2014] UKUT 0410 (AAC) is unlikely of itself to render a tribunal's reasons inadequate I struggle to think of circumstances in which a failure to comply with her second, third or fourth recommendations would not make a tribunal's reasons vulnerable to challenge. Those recommendations are:
    a. "the tribunal's reasons should address how the tribunal dealt with any disputes as to either the law or the evidence. If this is not done, the unsuccessful party might believe that the tribunal has ignored important issues"…;
    b. …"the reasons themselves must be clear and unambiguous. It is not for a party to deduce the reasons for a decision";
    c. "what is required is to explain
        i. what facts the tribunal found as a result of that evidence and
        ii. what conclusions on those facts the tribunal reached".

Each of these requirements were applicable in this particular case.

67. Mr Pezzani had no argument with the summary of principles set out in *CICA v Hutton and Ors and the First-tier Tribunal* on which the Second Respondent relied but he maintained that neither that case nor any of the other authorities relied upon by the Second Respondent could save the Tribunal's reasons because this case fell squarely within the situation that Gross LJ identified in his paragraph (ii) quoted above, i.e. a decision which involved a clear error of law that must be corrected.
68. In this particular case the issues were very narrow. Given that none of the witnesses before the Tribunal opposed discharge the Tribunal didn't need to deal in any detail with section 72(b) or section 73(1)(a) MHA. The Tribunal's task was all about section 73(1)(b) MHA: was it satisfied that it was not appropriate for the Appellant to remain liable to be recalled to hospital for further treatment? If it wasn't satisfied of this then it had to decide whether conditions should be imposed.
69. That was what it had to decide, and having done so it had to explain with adequate clarity how it assessed the evidence including, where there was a conflict, why it preferred one piece of evidence (whether of fact or opinion) over another. It had to make findings of fact relevant to the issue of the appropriateness or otherwise of the Appellant remaining liable to recall to hospital for further treatment, and it had to do so by reference to its assessment of the evidence. It had to explain, by reference to its findings of fact, why it decided as it did.
70. The Tribunal's reasons didn't need to be lengthy, and they didn't need to recite all the evidence or all the argument it heard. They didn't need to

address any matters that weren't in dispute. They did need to cover the matters set out in paragraphs 68 and 69 above and they needed to do so in a way that would allow the reader to understand not only what the Tribunal decided, but also how and why it decided as it did. Most importantly, its reasons had to be explicit enough to allow the Appellant to understand why he didn't receive the unconditional discharge he'd asked for.

The Appellant's specific criticisms of the Tribunal's reasons

71. Mr Pezzani identified two specific failures in the Tribunal's explanation of its decision:
    a. the Tribunal failed to address Dr Gamble's relevant evidence that were hospital admission needed in the future it could be achieved by admission under the provisions of Part II of the MHA, and that it was not therefore appropriate that the Appellant should continue to be liable to recall; and
    b. the Tribunal gave inadequate reasons for rejecting the argument put by the Appellant's representative that it was not appropriate for the Appellant to remain liable to recall because the setting and environment of a psychiatric hospital was positively harmful to him and would remain so at any future date.

Evidence on alternatives to recall

72. The Tribunal had before it evidence from Dr Gamble, the Appellant's responsible clinician, to the effect that the risks associated with the Appellant's mental disorder might be managed adequately under Part II of MHA, without the need for the power of recall.
73. Mr Pezzani argued that the Tribunal failed to address this at all, but that isn't quite fair. In paragraph 26 of its reasons the Tribunal acknowledged Dr Gamble's evidence on this point:

    > "Dr Gamble considered that the patient's craving for drugs falls short of a mental disorder itself and was certainly not such as to justify detention in hospital in its own right. He reminded us that the patient had in the past abstained from substance misuse for long periods, but he agreed it still represents a significant issue in terms of risk management in the future. In his view the terms of ss. 2 or 3 MHA might suffice to treat such an episode. He warned against a long period in hospital to treat a drug induced psychosis. He was not in favour of there being a power to recall, and he proposed that the patient be granted an absolute discharge."

74. That evidence was clearly pertinent to the issue of the appropriateness of the Appellant continuing to be liable to recall to hospital for further treatment. Given that this was the most important matter (indeed, virtually the only matter) the Tribunal had to decide, it was incumbent on the Tribunal to address it.
75. The Tribunal did not say expressly what it made of Dr Gamble's evidence in this regard. Instead it said this:

    > "The contribution made by Dr Noir Thomas on the point in his report (para. 44) was in our view the most apt, to the effect that if the patient is not "discharged from his order then he can remain … with a potential for recall in the event that there is a psychotic relapse in the future. It

would likely be only in these circumstances that [the patient] is again considered for hospital admission. The appropriate level of security will have to be determined if and when this situation ever arises."

76. This contribution from Dr Noir Thomas is fine as far as it goes, but it is nothing more than a statement of the options available should the Appellant be the subject of a conditional discharge. It doesn't grapple with the issue raised by Dr Gamble's evidence, which was whether the retention of the power of recall was appropriate given the other means of achieving treatment in hospital under the MHA.
77. The Tribunal then went on to provide its conclusion:

    "The conclusion the tribunal arrived at was that the patient had failed to discharge the burden of persuading us to bring the s41 order to an end under s.73(1)(b). <u>We decided on the evidence we heard that the patient should remain liable to be recalled to hospital for treatment.</u>"
78. It wasn't enough for the Tribunal to rely on the fact that the burden was on the Appellant to show that it was not appropriate for him to remain subject to the power of recall. Since the Appellant had presented credible expert evidence to support his case that the risks associated with his mental disorder could be managed without retention of the power of recall it was incumbent on the Tribunal to explain why it wasn't persuaded by that evidence.
79. As Ms Paterson argued, and as Mr Pezzani accepted, it was for the Tribunal to assess the evidence and, given the different positions taken by different witnesses, there was a broad range of options open to it. Mr Pezzani conceded that it would have been open to the Tribunal to reject Dr Gamble's evidence on the sufficiency of relying on the machinery of Part II of the MHA to manage the Appellant. He conceded also that the Tribunal may well have had good reasons for doing so, but he maintained that the Tribunal failed to say what they were, and that this rendered its reasons inadequate.
80. The Second Respondent's case on this was that any determination of the adequacy or otherwise of the Tribunal's must be based on a "fair reading of the decision as a whole" without subjecting it to "inappropriate textual analysis" (to use Gross LJ's expressions in *CICA v Hutton and Ors and the First-tier Tribunal*).
81. Ms Paterson pointed to the Tribunal's findings of fact that:
    c. the psychotic symptoms which the Appellant was experiencing at the time of his offence were "significantly more likely to have been drug induced, than being caused by an illness such as schizophrenia" (see paragraph 14 of the Tribunal's reasons);
    d. "the environment of a psychiatric hospital [was] no longer of itself of any current benefit to [the Appellant] in the short term, at least while he is free from psychosis" (see paragraph 22 of the Tribunal's reasons);
    e. "the hospital environment itself is unlikely to be of benefit to him unless he is found at some later date to be suffering from a condition such as a psychotic condition that is amenable to medical treatment, whether it turns out to be drug induced and short lived, or more long lasting and serious such as schizophrenia" (see paragraph 23 of the Tribunal's reasons);
    f. there was a probability that [the Appellant] would use drugs again which would lead to a deterioration in his mental health which, in turn, would

lead to a significant risk of his behaviour becoming violent (see paragraphs 24 and 25 of the Tribunal's reasons and, in particular, the following passage from paragraph 25)

> "…Sharon Hall in her report dated 16th October 2018 accurately identified what we consider to be the key issue for the future (at page 7) "[The Appellant's] long history of substance abuse has asserted a significant impact on his mental health in the form of inducing psychotic symptomology and it is at these times when [the Appellant] is using substances and experiencing psychotic symptoms that he present [sic] a significant risk of violence." That was supported by the appellant's most recent Responsible Clinician, Dr Gamble who agreed that [the Appellant's] drug use "still represents a significant issue in terms of risk management in the future."

82. Ms Paterson argues that it is clear from those findings why a recall would probably be necessary in the future. I disagree.
83. First, several of what Ms Paterson cites as findings of fact by the Tribunal are simply summaries of the evidence given, with no clear view of the evidence being offered, so I don't accept that they are findings of fact. However, I do accept that it is possible to infer the facts which Ms Paterson argues for from the findings the Tribunal did make and from the way it has recited the evidence. Even if they are accepted as findings of fact, though, all they establish is that there is a significant risk that the Appellant will use drugs in the future, that if he does so there is a significant risk that he might experience psychotic symptoms, and that in that context there is a significant risk that he might be violent. It doesn't necessarily follow from those findings that in such circumstances the Appellant couldn't be managed, as Dr Gamble suggests, by admission to hospital under Part II of the MHA.
84. It was argued for the Second Respondent that it wasn't incumbent on the Tribunal to specify every nuance of its reasoning especially since its conclusion was supported by one of the psychiatrists who had recently examined the Appellant (Dr Noir Thomas).
85. It wasn't incumbent on the Tribunal to specify every nuance of its reasoning, but it was incumbent on it to make clear how and why it decided the key issue in the appeal, i.e. whether it was appropriate for the Appellant to remain liable to recall to hospital for further treatment. Its position on whether any routes other than exercise of the power of recall might be sufficient to manage the relevant risks was a necessary part of that.
86. Ms Paterson argued further that it was implicit in the Tribunal's reasoning that it considered that Dr Gamble's suggestion didn't address adequately the management of the risk occasioned by the Appellant's potentially violent behaviour.
87. Again, I disagree. The Tribunal did not engage with the point raised by Dr Gamble. It simply cited with approval a passage from Dr Noir Thomas's evidence. Simply placing the quote from Dr Noir Thomas's evidence after its summary of Dr Gamble's evidence and saying that Dr Thomas's evidence was "the most apt" does not explain what position it took on Dr Gamble's evidence, since the passage quoted from Dr Noir Thomas did not itself address the issue raised by Dr Gamble and summarised in paragraph 26 of its reasons.

88. Males LJ dealt with just this issue in *Simetra Global Assets Ltd & Anor v Ikon Finance Ltd & Ors* [2019] EWCA Civ 1413 in his discussion of the Court of Appeal's decision in see *Flannery v Halifax Estate Agencies Ltd* [2000] 1 WLR 377. In that case the trial judge, having heard conflicting expert evidence, dismissed the claim, saying he preferred the evidence of the defendant's expert to that of the plaintiff's expert, and that as a result it wasn't right to say that the property in question was affected by structural movement. As Males LJ put it at paragraph 39:

    > "It was accepted that this would have been a conclusion open to him on the evidence and that the defendant's counsel had given in his closing submissions what would have been valid reasons for the view which the judge took. However, the Court of Appeal held that it could not speculate whether these were indeed the judge's reasons and that the judgment as it stood was "entirely opaque". It held that failure to give reasons for a conclusion essential to the judge's decision was a good ground of appeal."

89. Ms Paterson went to great lengths to infer reasons from the Tribunal's own words and from its quotation of the words of others, but the reality is that while Ms Paterson's reasons might have been the Tribunal's reasons, equally they might not have been, and because the Tribunal didn't say so explicitly we can't be sure how and why it decided as it did.

Evidence on harmful effect on Appellant of hospital setting

90. At his hearing it was argued on behalf the Appellant that the setting of a psychiatric hospital was positively harmful to him. The Tribunal said in paragraph 28 of its reasons:

    > "The further argument as presented to us on behalf of the patient was that he should not be liable to recall, because the setting and the environment of a psychiatric hospital is already positively harmful to the patient and will remain so at any future date. It was argued that the patient is now being "merely contained" and that the situation would re-apply in the future. On careful analysis we found that representation goes further than the evidence. In our view the arguments relating to placement in hospital and the appropriate form of treatment will have to be addressed in the light of whatever evidence there is then available regarding the patient's mental health. The precise circumstances relating to a potential recall are impossible to predict."

91. It was argued on behalf of the Appellant that had the Tribunal accepted the proposition that the environment of a psychiatric hospital was positively harmful to him that would have been a powerful reason for the Tribunal to find that the retention of the power of recall was not appropriate and to order an unconditional discharge.
92. Mr Pezzani quoted passages from the evidence of Dr Gamble, Dr Duffy, Dr Thomas and Sharan Hall about the likely effect of further treatment in hospital to show that the argument summarised in paragraph 28 of the Tribunal's reasons was supported by the evidence, but the passages quoted by Mr Pezzani have to be read in context, and when they are it is clear that the opinions given relate to the likely effect of further treatment in hospital for the Appellant's personality disorder only.

93. There is an attractiveness to the argument that if detention for further treatment in hospital (which is the sole permitted purpose of a recall) would be counter-therapeutic it cannot be appropriate that the power of recall is retained. However, there was evidence before the Tribunal to support findings that the Appellant was likely to take drugs and, in consequence, to experience psychotic symptoms and an increase in his risk profile, and that, should he do so, hospital treatment might be appropriate for his symptoms of psychosis even though it would be counter-therapeutic for his personality disorder. Indeed, Dr Gamble himself argued that sections 2 or 3 of the MHA could be used to admit the Appellant to hospital for treatment should he experience psychotic symptoms.
94. As such it was open to the Tribunal to find that the representation made on behalf of the Appellant which it summarised in paragraph 28 of its reasons went "further than the evidence", but the Tribunal didn't set out its reasoning and what I have said in paragraph 93 above is not necessarily representative of the Tribunal's thinking. It stated that it conducted a "careful analysis" that led it to conclude that the representation went further than the evidence, but it left the reader to take this careful analysis on trust.
95. Further, it didn't explain how it balanced the potentially negative impact on the Appellant of the hospital environment (given his personality disorder) with the potentially positive impact of hospital treatment on symptoms of psychosis that he might experience, and it omitted to explain how it made its decision as to the appropriateness of the Appellant remaining subject to recall in the light of that balancing exercise.

Ground 2: conclusions

96. The giving of reasons for a decision by a tribunal is the performance of a statutory duty. Rule 41 of the Tribunal Procedure Rules 2008 provides:

    "41.- (1) The Tribunal may give a decision orally at a hearing.

    (2) Subject to rule 14(2) (withholding information likely to cause harm), the Tribunal must provide to each party as soon as reasonably practicable after making a decision (other than a decision under Part 5) which finally disposes of all issues in the proceedings or of a preliminary issue dealt with following a direction under rule 5(3)(e)-

    (a) a decision notice stating the Tribunal's decision;

    (b) written reasons for the decision; and

    (c) notification of any right of appeal against the decision and the time within which, and the manner in which, such right of appeal may be exercised."

97. It is established law that a judge's failure to give adequate reasons for his or her conclusions may itself establish an error of law. This is for very good reasons. As Henry LJ put it in *Flannery v Halifax Estate Agencies Ltd* [2000] 1 WLR 377):

    > "fairness surely requires that the parties especially the losing party should be left in no doubt why they have won or lost. This is especially so since without reasons the losing party will not know…whether the court has misdirected itself, and thus whether he may have an available appeal on the substance of the case..."

98. Judge Gwynneth Knowles QC (sitting in the Upper Tribunal) pointed out in *HK v Llanarth Court Hospital* [2014] UKUT 0410 (AAC) at paragraph 10, that

the giving of clear reasons for a decision is of particular importance for patients who are detained under the MHA, given the serious interference with their right to liberty pursuant to Article 5 of the European Convention on Human Rights (now incorporated into English and Welsh law by the Human Rights Act 1998).

99. While the Appellant was discharged from his section he was discharged conditionally, and this meant that he remained liable to recall to hospital, and to the imposition of conditions, as well as the continued requirement for the responsible clinician to obtain the permission of the Secretary of State to matters such as leave and transfer. This amounts to a significant restriction on his liberty.
100. What is required of a judge's reasons depends on the particular circumstances of the case. Ms Paterson suggested, on behalf of the Second Respondent, that one has to consider what it is realistic to expect of the reasons of a first instance tribunal. She highlighted the heavy caseload of mental health tribunals and the limited time available to judges for writing up, contrasting it with the High Court or the Upper Tribunal.
101. I cannot accept that what is required of a judge's reasons varies according to the particular circumstances of the judge, a particular part of the justice system, or indeed of the justice system as a whole. The reasons must be looked at objectively to assess whether a reader would be able to understand how and why the material points were decided as they were. If the reasons would have been inadequate if produced by a well-resourced judge with sufficient time to write the judgment they must also be inadequate if produced by a judge with a frenetically busy list and failing IT. The circumstances of the judge might explain why inadequate reasons were produced and they might make us more sympathetic to the writer of them, but they can't render inadequate reasons adequate.
102. I have approached my task of assessing the Tribunal's decision with caution and restraint. I did so conscious of the fact that the Tribunal heard evidence of fact and opinion over the course of two days and conscious that the Tribunal was comprised of a panel of three expert members. I have not asked myself what I would have decided had I heard the Appellant's application myself, but have instead approached the decision on the basis that the Tribunal, having heard and read a substantial amount of evidence from multiple sources had a generous ambit of discretion and a wide range of options available to it in terms of how it weighed the evidence, which evidence it preferred, what findings of fact it should make and, ultimately, whether or not it should grant the unconditional discharge sought.
103. While I have subjected the Tribunal's reasons to textual analysis (that is what appellate judges do), I don't think I've subjected them to "inappropriate textual analysis". While the task of addressing the Appellant's specific criticisms involved close analysis of specific passages of the Tribunal's reasons I have been careful to step back and consider those passages in the context of what it said in the reasons as a whole, regardless of where it said it. Rather than interrogate the reasons with a determination to find them wanting I have proceeded on the assumption that the Tribunal had a good grasp of the relevant law and procedure and was likely to have got things right.

104. While there was much to commend the Tribunal's reasons I concluded that they fell short of the required standard of adequacy because:
    a. they failed to include sufficient findings about the Appellant's mental disorder other than his personality disorder and the treatment available for it to support its decision (given the Tribunal's findings in relation to treatment for his personality disorder);
    b. they failed to include clear findings as to whether any risks associated with the Appellant's mental disorder could be managed adequately without his continuing to be liable to recall under his conditional discharge, despite hearing credible evidence from Dr Gamble that they could;
    c. they failed to explain how the Tribunal balanced the potentially negative impact on the Appellant of being in a hospital environment (given the evidence it heard in relation to his personality disorder) with the potentially beneficial impact that hospital treatment might have on any symptoms of psychosis he may experience; and
    d. when the reasons are read as a whole it is not adequately clear why the Tribunal was not satisfied that it was inappropriate for the Appellant to continue to be liable to recall to hospital for further treatment

These inadequacies amount to a material error of law.

Disposal

105. For the reasons set out in paragraphs 59 and 104 above I find that the Tribunal erred in law. I am satisfied that these errors are material, in the sense that had they not been made the outcome of the appeal might have been different.
106. Having concluded that the Tribunal erred in law in a way which was material I had to decide on the most appropriate way to dispose of the appeal.
107. The Appellant has been discharged from his section and is no longer in hospital, but that doesn't mean his appeal is academic. He remains subject to the power of recall and all that that entails. This represents a significant limitation on his liberty.
108. Given that further facts need to be found on the matters I have highlighted in this decision I am not in a position to remake the Decision myself.
109. I therefore set aside the Decision and remit the matter to the Mental Health Review Tribunal for Wales for re-hearing by a differently constituted panel.
110. Nothing in this decision should be taken as amounting to any view as to what the ultimate outcome of the remitted appeal should be. All of that will now be for the good judgment of the Mental Health Review Tribunal for Wales.

(Signed on the original)

Thomas Church
Judge of the Upper Tribunal

Dated **18 October 2019**