IN THE UPPER TRIBUNAL **Appeal No. HM/915/2020**
ADMINISTRATIVE APPEALS CHAMBER

On appeal from the First-Tier Tribunal (Health Education and Social Care Chamber)(Mental Health)

Between:

GL

Appellant

- v –

1. Elysium Healthcare Hospital

2. Secretary of State for Justice

Respondents

Before: Upper Tribunal Judge Markus QC

Decision date: 9 November 2020
Decided on consideration of the papers

Representation:
Appellant: Wolton and Co, solicitors
The Respondents did not respond to the appeal

RULE 14 DIRECTION

Save for the cover sheet, this decision may be made public (rule 14(7) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI No 2698)). The cover sheet is not formally part of the decision and identifies the patient by name.

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal made on 2 April 2020 under number MM/2020/00689 was made in error of law. Under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 I set that decision aside and remit the case to be reconsidered by a differently constituted panel.

REASONS FOR DECISION

1. The Appellant (GL) was at all relevant times detained under the Mental Health Act 1983 (MHA) pursuant to a hospital order with restrictions. His case was referred to the First-tier Tribunal (FTT) by the Secretary of State for Justice on 17 December 2019 under section 71(2) MHA. A telephone hearing was listed for 2 April 2020.

2. At the date of the hearing GL resided in a self-contained flat, adjacent to the ward, with another patient. On the morning of the hearing a patient on the ward had tested positive for Covid-19 and had been hospitalised. GL and his flatmate were advised to self-isolate. GL's representative requested an adjournment. The tribunal refused.

3. In the decision notice, the FTT set out the relevant facts and addressed the adjournment application as follows:

> "Initially the Tribunal was advised that the patient would not be able to attend as he was self-isolating as there had been a case of Covid-19 on the ward. The nurse was asked to get a phone to the patient so that he could phone into the hearing. The patient phoned in and the nurse was present with him. The patient's solicitor raised the concern that this had broken the patient's self-isolation and that he was now at risk of being infected. The RC advised that she was unsure what isolation procedures had been put in place, that the main concern was patient to patient contact and that, in any event, the patient had had access to the ward before the case of Covid-19 had been diagnosed. The restrictions were unclear as the situation had changed within the previous 24 hours. The patient after speaking to his representative decided that he did not want to participate in the hearing. He said that he was concerned about being overheard by the other patient he shared the flat with. It was confirmed that the patient was sitting in the lounge of the flat and the other patient was in his bedroom with the door shut. The patient was still concerned that he could be overheard. It is noted that the patient is frequently concerned about this and others finding out his history. He also frequently becomes anxious in meetings and it is unclear how he would have coped had he been able to have a face to face hearing. The Tribunal was satisfied that satisfactory arrangements had been made to enable the patient to attend and it was not appropriate to have a face to face hearing. All hearings are currently being dealt with by telephone/video and this situation may well continue for some months. The patient had been offered the option of having a video hearing but had refused. After hearing the evidence from the professional witnesses, the patient was offered an opportunity to come back into the telephone hearing and he did not want to. The patient's representative argued that the hearing was not a "fair hearing" but the Tribunal is satisfied that in the current difficult climate the hearing was fair and the patient had been given the opportunity to participate and it was largely due to his anxiety that he was unable to do so."

4. The FTT proceeded with the hearing and decided that GL should not be discharged from hospital.

5. I gave GL permission to appeal on the basis that it had arguably been unfair to proceed with the telephone hearing.

6. Neither Respondent has responded to the appeal. GL's representative has requested that the appeal is determined on the papers, without a hearing. I am satisfied that I can fairly determine the appeal without a hearing. I have all the information that I require and I would not be assisted by an oral hearing.

Legal framework

7. The general position under the Tribunal Procedure (First-tier Tribunal)(Health Education and Social Care Chamber) Rules 2008 is that each party to proceedings is entitled to attend a hearing. Rule 39 deals with 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."

Discussion

8. The hearing in this case was listed to take place remotely (by telephone). That was in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal issued by the Senior President of Tribunals on 19 March 2020 in response to the Covid-19 pandemic. The Practice Direction has since been amended but not in this regard. It provides that, where a hearing is necessary, it should be remote (ie not face-to-face) where it is reasonably practicable and in accordance with the overriding objective. GL does not complain about the hearing having been listed in this way. His complaint is that the FTT proceeded with the hearing in his absence rather than adjourning it.

9. A separate Practice Direction for the First-tier Tribunal (Mental Health) provided that during the Covid-19 pandemic it would not be practicable under rule 34 for any pre-hearing examinations to take place.

10. The FTT decided to proceed with the hearing in GL's absence because it concluded that GL "had been given the opportunity to participate and it was largely due to his anxiety that he was unable to do so". Reading this sentence as a whole and the reasons which precede it, it is not clear whether the FTT thought that GL's anxiety did not justify his decision not to participate or whether it thought that adjournment would have served no purpose because it was likely that GL would have been similarly affected by anxiety at a future hearing. On either basis, the decision was flawed.

11. The first error was in the FTT's assumption that the flatmate would not have been able to hear the proceedings. That appears to be the implication of its comment that the door between the lounge and the flatmate's room was shut. However, it cannot be assumed that an internal door is soundproof when closed. It was possible that the flatmate would have been able to overhear, especially if he was making an effort to do so. The tribunal could have investigated further in order to make a finding

of fact in that regard, but it did not. In the absence of a finding of fact supported by evidence, the assumption was unreasonable.

12. The second error was in the FTT disregarding or affording little weight to GL's anxiety. The implication of the FTT's observation that GL was frequently concerned about being overheard and others finding out his history appears to be that his anxiety was without proper foundation. However, the papers which were before the tribunal showed that GL had been the subject of a serious assault in 2012 which, according to the psychiatric report, may have been ordered by a patient who had become aware of GL's past offending. That could well have explained GL's anxiety about both the risk and the consequence of being overheard. In the light of this evidence or further investigation, it was not reasonable of the FTT to discount his anxiety in the way that it did. Moreover, even if the FTT could properly have concluded that GL's anxiety was unfounded or unreasonable, that did not mean that his anxiety was irrelevant. The FTT should have considered whether his anxiety was genuine and, if so, how that would have impacted on his ability to participate in the hearing.

13. As I have indicated above, another interpretation of the FTT's reference to GL's frequent anxiety is that it considered that there was no point in adjourning the hearing in hand because GL's anxiety would cause similar problems at a future hearing. If that was the FTT's view, it was unreasonable. GL's concern about being overheard arose from the specific circumstances on the day: being required to remain in the flat in which his flatmate was also present. There was nothing to suggest that he would have been concerned about being overheard were he to have been in a different part of the hospital.

14. The third error by the FTT was that it approached GL's application as if he was concerned about the mode of hearing. In its reasons the FTT addressed whether it was fair to go ahead with a remote hearing or whether there should have been a face-to-face hearing. Thus it commented on GL's ability to cope with a face-to-face hearing and that such a hearing was not appropriate, on GL having refused a video hearing, and on the likelihood of remote hearings continuing for some months. This missed the point of GL's adjournment application. The fact that the hearing was remote was part of the context in that (in the particular circumstances which transpired) it gave rise to GL's fear of being overheard, but whether or not a remote hearing was appropriate was of itself irrelevant. The FTT's emphasis on mode of hearing gives rise to a real concern that this misapprehension may have affected its conclusion.

15. In the light of the errors by the FTT, the decision must be set aside and remitted for reconsideration by a different tribunal.

Kate Markus QC
Judge of the Upper Tribunal
Authorised for issue on 9 November 2020