MB v South London & Maudsley NHS Foundation Trust (Mental Health)
[2023] UKUT 261 (AAC)

IN THE UPPER TRIBUNAL **Appeal No.** UA-2022-001348-HM
ADMINISTRATIVE APPEALS CHAMBER

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

Between:

MB

Appellant

- v –

South London & Maudsley NHS Foundation Trust

Respondent

Before: Upper Tribunal Judge Church

Decided on consideration of the papers

Representation:
Appellant: Mr Rod Campbell-Taylor of Campbell-Taylor Solicitors (written submissions)
Respondent: Mr Stuart Marchant of Bevan Brittan LLP (written submissions)

DECISION

The decision of the Upper Tribunal is to allow the appeal.
The decision of the First-tier Tribunal made on 8 August 2022 under number MP/2022/09634 was made in error of law.
Under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007 I set that decision aside and remake the decision as follows:

"The patient's application for reinstatement is allowed. His application referenced MP/2022/09634 is reinstated."

REASONS FOR DECISION

Background

1. On 12 April 2022 the Appellant, who was at the relevant time detained under the Mental Health Act 1983 at The Bethlem Royal Hospital, made an application to

the First-tier Tribunal seeking conditional discharge from his section. His application was listed for hearing on 15 July 2022.

2. On 12 July 2022 the Appellant's representative sought the First-tier Tribunal's consent to the withdrawal of the application. The First-tier Tribunal provided its consent the same day.

3. On 5 August 2022 the Appellant's representative made an application for reinstatement of the application withdrawn with the First-tier Tribunal's consent on 12 July 2022, but on 8 August 2022 the First-tier Tribunal refused the application for reinstatement (the **"Refusal to Reinstate"**).

What this appeal is about

4. This appeal is about whether the Refusal to Reinstate involved an error of law. In particular, it is about whether the First-tier Tribunal was wrong not to consider whether the accumulation of evidence resulting from MB having had a further period of testing with greater freedoms amounted to a “relevant change in circumstances” capable of justifying reinstatement.

The permission stage

5. I directed an oral hearing of the permission application, which was held on 5 December 2022. Mr Persey of counsel made submissions on behalf of the applicant. The Respondent was not represented.

6. I was persuaded that the grounds of appeal were arguable. I granted permission to appeal and issued Case Management Directions for the Respondent to respond to the appeal.

7. The Respondent took a neutral position on the appeal.

Why there was no oral hearing of this appeal

8. Neither party asked for an oral hearing. I decided that, given the narrowness of the issue in the appeal and the neutral position of the Respondent, no oral hearing was necessary. I am satisfied that the overriding objective of dealing with cases fairly and justly (which includes dealing with cases in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties (rule 2(2)((a)), and avoiding delay so far as compatible with proper consideration of the issues (rule 2(2)(e))) is best furthered by my determining this appeal on the papers to avoid further delay and cost.

Why I have allowed this appeal

The Law

9. Rule 17 of the Tribunal Procedure (First-tier Tribunal)(Health Education and Social Care) Rules 2008 (the **“FtT Rules”**) makes provision for both the withdrawal by a party of its case in proceedings before the First-tier Tribunal (Health Education and Social Care Chamber) and its reinstatement. It provides (so far as relevant for this appeal):

"**Withdrawal**

17.— (1) Subject to paragraphs (2) and (3), a party may give notice of the withdrawal of its case, or any part of it—

(a) at any time before a hearing to consider the disposal of the proceedings (or, if the Tribunal disposes of the proceedings without a hearing, before that disposal), by sending or delivering to the Tribunal a written notice of withdrawal; or

(b) orally at a hearing.

(2) Notice of withdrawal will not take effect unless the Tribunal consents to the withdrawal …

(4) A party which has withdrawn its case may apply to the Tribunal for the case to be reinstated.

(5) An application under paragraph (4) must be made in writing and be received by the Tribunal within 28 days after—

(a) the date on which the Tribunal received the notice under paragraph (1)(a); or

(b) the date of the hearing at which the case was withdrawn orally under paragraph (1)(b).

(6) The Tribunal must notify each party in writing of a withdrawal under this rule."

10. The proper approach to the exercise of a tribunal's discretion on an application for reinstatement under rule 17(4) of the FtT Rules (set out by Judge Jacobs in JS v South London and Maudsley NHS Foundation Trust & another [2019] UKUT 172) (**"JS"**) requires, among other things, consideration of whether there has been a change of circumstances, and consideration of the reasons given in support of the application.

The Refusal to Reinstate

11. The First-tier Tribunal set out the brief reasons given in support of the application for reinstatement as follows:

"the withdrawal was 'to allow for further testing and implementation of discharge arrangements and was informed by the advice of the client's RC and clinical team. Although the client is now just within a new period of eligibility it is fair and just that the current (withdrawn) application is allowed to continue.'"

12. The First-tier Tribunal's reasons for the Refusal to Reinstate were (as might be expected) brief. I set them out in full:

"1. I note that this application was made within twenty eight days of the withdrawal of the application and so is in time.

2. I have referred myself to the Upper Tribunal judgment in JS v South London and Maudsley NHS Foundation Trust and the Secretary of State for Justice [2019] UKUT 172 (AAC) in which Upper Tribunal Judge Jacobs clearly

sets out the factors which should be taken into account when deciding whether the discretion to reinstate should be exercised.

3. Firstly, I must consider whether there is anything to undermine either the patient's application to withdraw or the Tribunal's consent. The application to reinstate is silent on this point and I therefore must assume there is not, otherwise it would surely have been brought to my attention as a factor in support of the application to reinstate.

4. Secondly, I need to consider whether there has been a change in circumstances that makes it appropriate to agree to reinstatement. Clearly the patient now wants to pursue his application but I do not consider that this in itself is a persuasive reason to reinstate because the patient is, in any event, entitled to make a fresh application to the Tribunal.

5. Finally, I must consider any other factors that may be relevant under the Overriding Objective which include;

a. The reasons given in support of the application

b. Any prejudice to the patient in refusing consent

c. Any detriment to the other party if consent is given

d. Any prejudice to other patients if consent is given and

e. The impact that reinstatement might have on the operation of the Tribunal's jurisdiction as a whole.

6. I have set out the brief reasons given in support of the application and there is nothing before me to lead me to conclude that there would be any detriment to the patient in refusing the application to reinstate given their right to make a fresh application to the Tribunal."

Applying the law to the facts in this case

13. The reasons for the Refusal to Reinstate make no reference to the reasons for the patient's withdrawal application: the only "change in circumstances" it appears to consider is that when he applied to withdraw MB didn't want to pursue his application, but when he applied to reinstate, he did. This is a mischaracterisation. The application to reinstate can only properly be understood in the context of the reasons for which he chose to withdraw, which was to give himself an opportunity to be tested further and to allow for plans for discharge to be developed further.

14. I am satisfied on the balance of probabilities, based on the First-tier Tribunal's written reasons, that it failed to consider whether a change of circumstances (i.e. the Appellant having been tested further in the period between his application to withdraw and his application to reinstate) could justify reinstatement. This failure is inconsistent with the proper approach to an application to reinstate set out in JS, which imposes no limit on what may amount to a "relevant change of circumstances".

15. If I am wrong about this, and the First-tier Tribunal did give consideration to the matters I have said that it failed to consider, then its reasons were inadequate. While the Refusal to Reinstate was an interlocutory decision, and so brevity in reasoning was to be expected, the adequacy of the First-tier Tribunal's reasoning must be

assessed in the context of the fact that these proceedings concern a deprivation of the patient's liberty. In that context I consider that they fall below the standard of adequacy as they fail to address the central thrust of the application it was considering.

Disposal

16. For these reasons I am satisfied that the First-tier Tribunal erred in law, the error was material and the Refusal to Reinstate should, therefore, be set aside.

17. I am in a position to remake the decision as it should have been made, and I do so in the terms set out at the beginning of this decision.

Thomas Church
Judge of the Upper Tribunal

Authorised for issue on **10 May 2023**

Corrected on **19 June 2023**