



Tribunals Service
Upper Tribunal

Administrative Appeals Chamber
5th Floor, Chichester Rents
81 Chancery Lane
London WC2A 1DD

Tel: 020 7911 7085
Fax: 020 7911 7093
Typetalk: 18001 020 7911 7085
Email: adminappeals@tribunals.gsi.gov.uk
Website: www.tribunals.gov.uk
DX: DX 0012 London/Chancery Lane

Ms Kate Luscombe
Duncan Lewis & Co Solicitors
Woburn House
155 Falcon Road
Clapham Junction
London, SW11 2PD

Our Ref: HM/84/2010

Your Ref: H02763/2

22 Feb 2011

24 FEB 2010

Dear Ms Luscombe,

Re: Mr Albert Haines

I enclose a copy of the decision of the Upper Tribunal. A copy has been sent to all the parties involved.

The enclosed notes tell you how a decision of the Upper Tribunal may be challenged by any party.

Yours sincerely,

Lata Shah
Clerk to the Upper Tribunal

Enc.

Please note that it is the policy of this Office to destroy case files one year after the date of the last judicial action. Accordingly, you should be aware that if you consider that you may require any of the documents of appeal for some purpose in the future, then you should retain the copy of them that this office or the First-tier Tribunal has issued to you.



INVESTOR IN PEOPLE



Tribunals Service

Upper Tribunal

Challenging an Upper Tribunal decision.

A decision of the Upper Tribunal is final. The only ways in which it is open to challenge are set out below.

Set aside. A decision may be set aside by the Upper Tribunal judge if there has been a procedural irregularity in the proceedings and the judge considers that it is in the interests of justice to do so. For example, if a document relating to the proceedings has gone astray or a party or his representative was not present at a hearing. If you wish to apply to set aside you must do so in writing with reasons so that your application is received **within one month** from the date of the attached letter.

Appeal. There is provision for an appeal against a decision of the Upper Tribunal to the Court of Appeal **on a question of law only**. If any party wishes to appeal they must first ask for permission from the Upper Tribunal judge. If the Upper Tribunal judge refuses permission, then the party wishing to appeal can ask for permission from the Court of Appeal itself. If you wish to apply for permission to appeal against the Upper Tribunal decision you must do so in writing with reasons so that your application is received **within one month** from the date of the attached letter.

If any party applies for permission to appeal to the Court of Appeal, the Upper Tribunal judge may review the decision if (1) the judge overlooked a legislative provision or binding authority which could have had a material effect on the decision, or (2) since the decision a higher court has made another decision binding on the Upper Tribunal which, if made before the decision, could have had a material effect on it. If you think that either of those grounds apply you should say so in your application for permission to appeal.

The Upper Tribunal judge may extend either time limit if satisfied that there is a good reason for doing so.



INVESTOR IN PEOPLE

HESC decisions



**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

HM/0084/2010

Appellant: Albert HAINES
First Respondent: West London Mental Health Trust
Second Respondent: Secretary of State (Justice)

DECISION OF THE UPPER TRIBUNAL

**Lord Justice Carnwath, Senior President of Tribunals
Upper Tribunal Judge H. Levenson
Upper Tribunal Judge J. Cooper**

ON APPEAL FROM:

Tribunal: The First-tier Tribunal (HESC Chamber)
Tribunal Case No: MP 2009/07732
Decision Dates: 15th October 2009 (Directions Hearing)

HM/0084/2010

**DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)**

Order

1. Having, on 29th July 2010, in exercise of its power under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 set aside the decision of the First-tier Tribunal dated 15th October 2010 not to grant AH (“the appellant” or “the patient”) a public hearing, the Upper Tribunal now re-makes the decision in exercise of its powers under section 12(2)(b)(ii).

2. The Upper Tribunal directs as follows:

- the First-tier Tribunal is to hold a public hearing of AH’s appeal
- the press and public, as well as AH and his representatives, are to be enabled to attend in person in the same hearing room as the hearing takes place
- the First-tier Tribunal is to liaise with the parties to arrange appropriately secure facilities for the hearing, it being agreed that the hearing will not take place in Broadmoor Hospital, where AH is currently detained
- the matter is to be referred to the President of the Health, Education and Social Care Chamber of the First-tier Tribunal to arrange for any further case management directions to be given, including directions as to public notification of the listing of the appeal.

Hearing

3. We held a further oral hearing of this appeal on 31st January 2011. The appellant AH was represented by Ms Aswini Weeraratne of counsel instructed by Duncan Lewis and Co, Solicitors. The respondent West London Mental Health Trust (“WLMHT”) was represented by Mr Vikram Sachdeva of counsel, instructed by Capsticks, Solicitors. Both counsel also appeared at our earlier hearing and we are grateful to them for their assistance. The Secretary of State for Justice was not represented and on 21st September 2010 his Department indicated that it had no further comment to make. The Secretary of State for Health’s Department indicated that it did not wish to become a party to the appeal, but supplied some helpful information to which we refer in more detail below.

4. AH attended the hearing of 31st January 2011 by way of video-link from Broadmoor Hospital, having attended the earlier hearing in the same fashion. He had expressed dissatisfaction with certain technical aspects of the quality and utility of the link on the previous occasion, but at this later hearing he told us that the system had worked satisfactorily from his point of view.

Background

5. Further details are set out in our decision of 29th July 2010. In brief, the appellant AH is detained in Broadmoor Hospital, a high security hospital, pursuant to sections 37 and 41 of the Mental Health Act 1983. He was convicted on two counts of attempted wounding in September 1986 and has been detained in hospital since then, having most recently been transferred back to Broadmoor in January 2008. His mental disorder had been classified as mental illness and psychopathic disorder but in September 2008 it was reclassified as psychopathic disorder alone. On 9th April 2009 he applied to the First-tier Tribunal for discharge and for his appeal to be heard in public, so that the public could be aware of what he sees as failings in the system, especially in relation to his diagnosis.

6. On 15th October 2009 a judge of the First-tier Tribunal refused the application for the appeal to be heard in public and on 25th February 2010 the Upper Tribunal gave the appellant permission to appeal to the Upper Tribunal against that decision of the First-tier Tribunal.

7. On 29th July 2010 we allowed the appeal, set aside the decision of the First-tier Tribunal and directed that there be a further hearing before us (at which the Department of Health was invited to appear) to consider further evidence as to:

- (a) the practicalities and potential cost of providing a public hearing (including by use of video facilities)
- (b) how often public hearings have been applied for in the last five years, the number of occasions on which they have in practice been held and how they have been managed, and
- (c) (so far as readily available) practices elsewhere in the United Kingdom, in Europe and in other common law countries.

The Law

8. Rule 38(1) of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 provides that all hearings must be held in private unless the Tribunal considers that it is in the interests of justice for the hearing to be held in public. In our decision of 29th July 2010 we held that the rule 38 presumption is not of itself incompatible with article 6 of the European Convention on Human Rights but that the following factors must be considered in any application for a public hearing:

- (a) whether it is consistent with the subjective and informed wishes of the patient (assuming that he is competent to make an informed choice);
- (b) whether it will have an adverse effect on his mental health in the short or long term, taking account of the views of those treating him and any other expert views;
- (c) whether there are any other special factors for or against a public hearing;
- (d) whether practical arrangements can be made for an open hearing without disproportionate burden on the hospital or relevant authority.

9. We considered factor (c) to have been satisfied in the present case because (paragraph 48):

“ ... this case is out of the ordinary and for that reason merits special consideration. The patient has been kept in detention at public expense over 23 years, often in conditions of high security, and it is only recently that there has been a change in his diagnosis ... this potentially gives the case some heightened public significance ...”.

The Further Information

10. Judge Cooper, who had been a regional chairman of the Mental Health Review Tribunal before it was subsumed into the First-tier Tribunal, explained that having consulted colleagues and from his own knowledge it appeared that over the last 7 years there had been 10 applications for tribunal hearings to be in public (out of perhaps 100,000 hearings), only one had been granted and that application was subsequently withdrawn.

11. We are aware that as a result of our decision there might be more such applications, but the factors referred to in paragraph 8 above would still have to be taken into account in deciding whether to grant any particular application and it is unlikely that a public hearing will be ordered other than in a relatively few cases.

12. Richard Rook is the Head of Mental Health Act Policy in the Mental Health and Disability Division of the Department of Health. He informed us by letter that in Scotland, Northern Ireland and Wales the rules do in principle permit public hearings. Enquiries showed that public hearings could not be recalled to have taken place in any of the jurisdictions, but that there had been occasional requests in Wales which had been refused on the ground that it would not be in the patient's best interests. In the Republic of Ireland, there is no provision for the tribunal to sit in public and the compatibility of that provision with the European Convention on Human Rights has been questioned, but there has been no legal challenge to date.

13. Dr Kevin Murray is the Clinical Director of Broadmoor Hospital. On 8th November 2010 he signed his second witness statement in this case. He provides estimated additional costs per day for the different formats of public hearing as follows: (a) public hearing within Broadmoor: £792; (b) public hearing outside Broadmoor at a court building or tribunal office (with the court or tribunal providing its usual services): £1,739; (c) patient remaining within Broadmoor giving video link evidence with the public elsewhere (and the court or tribunal service meeting the costs of the public venue): £400. He states that the cost of a usual half-day review hearing in private is £967. He expresses concern that such a public hearing would set a precedent for other patients, and estimates that the additional costs to Broadmoor could be in the region of £150,000 per year (based on 170 tribunals per year). He is also concerned that the costs to the NHS would be significant. He gives the preferences of the WLMHT in order as: a hearing in private, alternatively a Court or video link. He states that a live public tribunal at Broadmoor would be disruptive, incurring significant risk and cost to the hospital, and would be an example other patients would seek to follow.

