



STJ2

The First-tier Tribunal (Health, Education and Social Care Chamber) Mental Health

Interlocutory Decision Before Hearing

The Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008

By Rule 6 an application may be made by sending or delivering an application, in writing, to the tribunal. An application must include the reasons for making that application. Additionally, by Rule 2(4) parties must help the tribunal to deal with the case fairly and justly, and must co-operate with the tribunal generally.

Case Number:

Date of Application: 30th June 2020

Patient:

(born

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A patient now liable to be detained under Section 3 Mental Health Act 1983

Responsible Authority:

NHS Trust

Hospital:

Before:

Judge D Birrell

Details of Application / Request to Tribunal

1. On the 5th August 2020, Judge Postgate postponed this case and in doing so made directions for the future hearing and declined to make certain directions requested by Messrs Conroy Solicitors.
2. Specifically, Judge Postgate refused the application for a face to face preliminary hearing and for there to be some form of judicial visit or contact with the patient in advance of the hearing.
3. On the 12th August Messrs Conroy Solicitors applied to appeal Judge Postgate's decision which included the following documents: -
 - Form P10
 - Statement of facts and grounds Roger Pezzani dated 12th August 2020
 - Postponement decision Judge Postgate dated 5th August 2020
 - Statement by Mr B Conroy dated 12th August 2020
 - Report by Dr dated 16th July 2020
4. The grounds of appeal as drafted by Mr Pezzani are in summary, that the Practice Direction, which Judge Postgate relied upon as justification for her refusal to grant the application for a PHE ought not to have prevented her from making an individualised decision based on the specific facts and circumstances of this case, which, if she had considered them, would have led to the conclusion that such an examination is in the interests of justice and would promote the overriding objective, because this would facilitate the patients' participation in the proceedings. I emphasise this is very much a summary of the grounds.
5. Mr Conroy in his written submissions also argues that there ought to be some form of judicial visit in advance of the hearing which may also somehow promote the patient's attendance or participation in the proceedings.
6. On the 21st August I wrote to Messrs Conroy Solicitors enquiring of them whether in

fact what they are seeking, in practical terms, is a re-assessment of the application for directions which Judge Postgate declined to make, pursuant to Rule 6 of the Tribunal Procedure Rules.

7. Mr Conroy responded promptly in the affirmative to that proposal and so I am, with his consent, treating his application under Rule 46 as if it is an application under Rule 6 for Judge Postgate's directions to be re-visited and considered afresh. For the avoidance of any doubt the matters now under consideration are; a PHE and a judicial visit.

Decision

8. The application for a PHE pursuant to R34 of the TPR is granted.
9. This will take the form of a video enabled PHE which will take place on the day of the hearing before the substantive proceedings begin.
10. The application for a face to face visit by the judge or any other panel member is refused.

Directions.

11. This case will be listed for a full day on the _____; the hearing will take place remotely by video link.
12. There will be a video enabled PHE conducted on the day of hearing at 9:30 am through the CVP and the responsible authority will take such steps as are necessary to ensure that this can happen promptly and without obstacle from their end.
13. The substantive hearing will then begin at 11:00 am.

Reasons

14. Judge Postgate in refusing to grant the application for a PHE referred to the Pilot Practice Direction the relevant part of which states: -
"Pre-hearing Assessments"
7. Rule 34 of the 2008 Rules requires that in certain circumstances, an appropriate member of the Tribunal must, so far as practicable, examine the patient in order to form an opinion of the patient's mental condition.
8. During the Covid-19 pandemic it will not be 'practicable' under rule 34 of the 2008 Rules for any PHE examinations to take place, due to the health risk such examinations present."
15. The Practice Direction has its genesis in the unprecedented public health crisis which the world has faced because of the Covid19 pandemic.
16. All courts and tribunals in this country have faced unparalleled challenges because of the pandemic, this much is self-evident and well known.
17. The Mental Health Tribunal is unique in that it does not, by convention, conduct its business in a hearing room within an HMCTS building, but rather travels to the location in which the patient is detained. There are more than a thousand locations in England with detained patients.
18. Any response to this unprecedented situation must, I accept, also ensure that cases continue to be dealt with fairly and justly; in ways that are proportionate to the importance of the case; the complexity of the proceedings; and avoid delay wherever possible.
19. With the onset of the pandemic, hospitals for obvious reasons did not want people visiting them and the tribunal equally did not want to put its members at risk of contracting, or passing on, a potentially deadly virus by despatching them to hospitals, even if they could get access.
20. The tribunal's response to the pandemic was, initially, to hold telephone hearings and then gradually to use the now well known CVP for video enabled hearings.

21. It was also the case that at the outset judges sat alone to determine cases and so, video enabled or not, a PHE was not possible.
22. The situation now is, as Mr Pezzani points out, that video enabled hearings with a full panel means that there is no insurmountable obstacle to a PHE conducted by that means. It is also argued that the Practice Direction is not the end of any consideration and regard must also be had to the Rules, including the overriding objective, dealing with cases justly and ensuring so far as practicable participation in the proceedings.
23. I accept that is the case.
24. There are features in this case which are out of the ordinary and which suggest that if it is possible to secure the cooperation of the patient for a video enabled preliminary hearing that will, potentially, promote those factors I have identified above. In summary, the patient appears to be voluntarily mute and there is, disagreement between the experts as to what, if any, mental disorder he may be suffering from. I accept that the PHE will not, even if it takes place, provide anything other than an opportunity for the medical member to take the steps necessary to form a provisional opinion on the patient's medical condition, but in doing so this may also, in the very particular circumstances of this case, promote the patient's involvement in the proceedings.
25. I have purposely hedged my comments about with caveats because it may well be that the patient will have nothing to do with the PHE, or the proceedings, as is foreshadowed in this application. It may, however, be successful and I accept that it is reasonable, looking at the matter in the round to try.
26. What I do not accept is that it is appropriate to depart from the position of remote hearings and to direct that there is any form of face to face contact between the panel, the parties or the patient.
27. As I have already pointed out, we are still facing an unprecedented public health crisis. Some restrictions which were imposed contemporaneously with the Pilot Practice Direction have been relaxed, however we are still not having any face to face hearings for the reason I have already identified. Which is to say, we will not put our members at risk of contracting, or passing on, a potentially deadly virus by despatching them to hospitals, even if they can, as suggested in this case, get access.
28. The concerns which have been raised about the patient's engagement or participation in the proceedings, beyond the grant of the PHE, can be addressed in other ways. The panel and the parties will have to bring to bear the ingenuity and adaptability which has been the hallmark of the tribunals response to this pandemic. But that must be done in a way which protects the health and safety of all concerned.

Judge: D Birrell

Date: 21st August 2020.

Notice

If a party, or any person given notice of this decision, wishes to challenge the decision, they may do so by renewing their request or by applying for another interlocutory decision that amends, suspends or sets aside the first decision.