Neutral Citation Number: [2023] EWHC 34 (Admin)

Case No: CO/1672/2021

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/01/2023

Before :

THE HONOURABLE MRS JUSTICE STACEY

- -

Between :

The KING on the application of Teresa Maher	**Claimant**
- and -	
First Tier Tribunal (Mental Health) (1) **The Lord Chancellor (2)** **Secretary of State for Justice (3)**	**Defendants**
- and -	
Richard Wilson-Michael	**Interested Party**

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Mr Dan Squires KC and Mr Timothy Baldwin (instructed by **Saunders Law**) for the **Claimant**
Mr Richard O'Brien (instructed by **Government Legal Department**) for the **First, Second and Third Defendants**
Ms Leonie Hirst and Ms Daniella Waddoup (instructed by **GT Stewart**) for the **Interested Party**

Hearing dates: 22-23 June 2022

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Approved Judgment

This judgment was handed down remotely at 10.30am on 13 January 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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THE HON. MRS JUSTICE STACEY

Mrs Justice Stacey:

1. The claimant in this case is Teresa Maher, whose son Kyle was unlawfully killed by Richard Wilson–Michael, the interested party in these proceedings. He was made the subject of both a hospital order and a restriction order pursuant to s.37 and s.41 of the Mental Health Act 1983 ("MHA 1983") on 4 August 2017. On 9 February 2021 the First-Tier Tribunal (Mental Health), ("FTT"), the first defendant to these proceedings, directed the conditional discharge of Mr Wilson–Michael ("the Conditional Discharge Decision").

2. Ms Maher seeks to challenge the initial refusal of the FTT to provide her with the reasons, or the gist of its reasons for its Conditional Discharge Decision (the First Decision); its failure to allow her to submit and to consider a victim personal statement; and her inability to request a review of the Conditional Discharge Decision. The first defendant refused Ms Maher's requests on 28 October 2020 and 16 February 2021 and the second and third defendants refused her request on 29 October 2020 and 12 February 2021.

3. In a further decision of 2 February 2022 the FTT again refused Ms Maher's request for disclosure of the reasons for the Conditional Discharge Decision ("the Further Decision"). The Further Decision is also under challenge.

4. There are two broad strands to Ms Maher's challenge. The FTT is alleged to have adopted a policy of never providing reasons to victims, such as herself, in its decisions, including the Conditional Discharge Decision, representing an impermissible fetter on its discretion. In the alternative it is alleged that if it had in fact considered Ms Maher's request in its First Decision, it applied an incorrect legal test. It is also alleged to have applied an incorrect legal test in the Further Decision in which it is accepted that it applied its mind to Ms Maher's application. It is a live issue between the parties whether the Further Decision renders the challenge to the First Decision academic. Ms Maher also alleges that she is the victim of discrimination contrary to Article 14 of the European Convention of Human Rights ("ECHR"), read with Article 8, because of the differences between practice and procedures of the FTT as compared to and contrasted with the Parole Board.

5. Ms Maher seeks declarations (1) that the failure of the FTT to give her reasons, or the gist of reasons, for its Conditional Discharge Decision was unlawful; (2) that the failure of the FTT to permit her to submit, and to consider, a victim personal statement ("VPS") was unlawful; (3) that her inability to request a review of the Conditional Discharge Decision was unlawful; (4) that the Further Decision was unlawful; and, finally, (5) damages.

6. The case raises important principles about victims' participation in proceedings before the FTT and the difference of treatment and entitlements between bereaved victims of mentally disordered offenders and those bereaved by offenders serving a sentence under the criminal justice system.

Issues and grounds

7. Six grounds were advanced:

i) That the FTT operated a blanket policy or practice of refusing to provide reasons or a summary or gist of its reasons for its discharge decisions to victims, amounting to an unlawful fetter on its discretion, which it applied to the claimant in its First Decision and which continued, at least up until the Further Decision.

ii) Breach of Article 8/14 by failing to provide the claimant with the reasons or gist of the reasons for the Conditional Discharge Decision in comparison to the entitlements and treatment of victims in Parole Board decisions.

iii) Breach of Article 8/14 by failing to allow the claimant a VPS setting out the impact of the killing on Ms Maher and her family and the effect Mr Wilson-Michael's release would have on them, in comparison to the entitlements and treatment of victims in Parole Board decisions.

iv) Breach of Article 8/14 by failing to allow the claimant a right to request a re-consideration of the Conditional Discharge Decision, in comparison to the entitlements and treatment of victims in Parole Board decisions.

v) No longer pursued.

vi) Failure to apply the correct legal test to the Further Decision since Judge Johnston did not have the power to determine Ms Maher's application under the FTT rules of procedure and in any event incorrectly directed herself on the applicable legal test.

8. The parties had helpfully agreed the issues as follows.

On Ground 1

i) Does the Further Decision of 1 February 2022 render Ground 1 academic?

ii) In not providing the claimant with any reasons for its Conditional Discharge Decision of 9 February 2021 (what I have called the First Decision) was the FTT acting pursuant to an inflexible policy or practice, applicable at the time, that victims were not entitled to reasons for discharge decisions, or did it direct its mind to the claimant's specific request and consider her particular case?

iii) If the answer to question (ii) is the former, was that unlawful and if so what, if any, remedy should flow?

On Ground 6

iv) Did Judge Johnston (the FTT Judge who made the Further Decision) apply the correct legal test in determining on 1 February 2022 that no reasons should be provided to the claimant for the Conditional Discharge Decision?

Grounds 2-4

v) Were the claimant's rights under Article 14 taken with Article 8, ECHR breached by a difference in treatment of victims as between the FTT and the Parole Board ("PB") in respect of:

a) The right to receive reasons or a gist of reasons for the discharge decision;

b) The right to submit a VPS;

c) The right to request a review of the discharge decision.

vi) In particular:

a) Does the provision of reasons/right to submit a VPS/right to request a review fall within the ambit of Article 8?

b) Was the claimant treated differently to others in an analogous situation?

c) If so, was the difference in treatment on grounds of a status within the meaning of Article 14?

d) If so, did the difference in treatment have an objective and reasonable justification?

Procedural history and preliminary applications.

9. Judicial review proceedings were lodged on 10 May 2021 on grounds 1 to 4, prior to the Further Decision. On 14 October 2021 Mr Justice Jay granted permission on ground 1, but refused permission on grounds 2–4. On 22 November 2021 Mostyn J ordered a "rolled up" hearing, but the hearing was adjourned since on 6 January 2022 the FTT informed Ms Maher that it would take a fresh decision on her application for disclosure of the reasons for the Conditional Discharge Decision, resulting in the Further Decision of 1 February 2022. Following the Further Decision, Ms Maher sought permission to add grounds 5 and 6 (although does not pursue ground 5 about which nothing more need be said) to challenge the Further Decision. The parties had agreed that the questions of permission (applicable to grounds 2, 3, 4 and 6) and all substantive matters, if permission is granted, be dealt with together on a rolled up basis and I adopt that course.

10. A number of applications were dealt with at the outset of the hearing. The claimant's unopposed application for permission to amend her statement of facts and grounds including the adding of the further ground, ground 6, was granted. The claimant was given permission to rely on the witness statement of Mr Julian Hendy of 11 February 2022. The Secretary of State for Justice ("SSJ") was given permission to rely on the second and third witness statements and exhibits of William Dowse of 9 March 2022 and 9 June 2022. Permission was given to allow the amended statement of facts and ground to exceed 40 pages in length and for skeleton arguments to exceed 25 pages.

The evidence

11. The evidence consisted of a witness statement together with exhibits from Ms Maher dated 6 May 2021 and a witness statement and exhibits dated 11 February 2022 from Julian Hendy, Director of the charity Hundred Families which provides support to those bereaved as a result of homicides committed by persons with mental health disorders and is a commissioned service of Victim Support. For the second and third defendants, evidence was filed by William Dowse, Head of the Administrative Justice Policy Team

at the Ministry of Justice, consisting of three statements dated 26 February 2022, 9 March 2022 and 9 June 2022 respectively, together with exhibits.

Background facts

12. Both Kyle and Mr Wilson-Michael were living in supported accommodation at 51 Drakefield Rd, Tooting, South West London under the care of the Wandsworth Early Intervention Scheme ("WEIS"), which is a service for people with early symptoms of psychosis, run by South West London and St George's NHS Mental Health Trust.

13. In the early hours of the morning of 21 January 2017 Kyle was on his way to the kitchen when Mr Wilson-Michael confronted him on the staircase and stabbed him with a large kitchen knife. The trial judge described it as an unprovoked "frenzied and excessively violent attack" in which Kyle had no chance to defend himself. Kyle had merely come down the stairs heading for the kitchen in the early hours and was not expecting to meet Mr Wilson-Michael. There were deep stabs to each side of his neck and to his chest, causing fatal arterial and venous damage and passing right through his body. The next door neighbours had been awoken by noise through the party wall and heard Mr Wilson-Michael shouting "I am going to fucking kill you. I am going to fucking end you." Kyle's girlfriend, Rebecca Gore, who was also there at the time, screamed for help and raised the alarm. Ms Gore suffered serious defensive wounds to her to her hand, wrist and upper arm.

14. Mr Wilson-Michael had entered a not guilty plea to murder on the basis of self-defence, but was convicted by a jury of the manslaughter of Kyle on grounds of diminished responsibility and of causing Ms Gore grievous bodily harm with intent on 3 August 2017. The sentencing hearing took place the next day on 4 August 2017 from 4.02pm – 4.14pm. It was not expressly stated, but presumably Ms Maher and her family had made a VPS or at any rate would have had the opportunity to do so prior to the sentencing hearing. With the benefit of psychiatric reports from Dr Reid and Dr Ahmed, HHJ Lodder QC noted that Mr Wilson-Michael had been diagnosed with paranoid schizophrenia of such a nature and degree that made it appropriate for him to be detained in hospital for medical treatment necessary for his own health and the protection of others. He found Mr Wilson-Michael to be "a serious danger, perhaps to yourself but certainly to others." He made a hospital order pursuant to s.37 MHA 1983 with a restriction order under s.41 as it was necessary "for the protection of the public from serious harm for you to be subject to special restrictions because of the nature of the offence and because…the risk of you committing further offences is significant if you were at large." He noted that the psychiatric assessments showed the depth of his mental health problems and paranoid schizophrenia. The judge accepted the evidence of Dr Reid that there were compelling arguments for the case that a hospital order would be most appropriate and he noted Mr Wilson-Michael's lack of insight and history of poor compliance with medication. There were no reporting restrictions and the medical evidence and all proceedings took place in public. Ms Maher and other family members attended.

15. The sentencing remarks do not record any discussion of whether a hospital and limitation direction (often referred to as a hybrid order) was also considered.

16. Ms Maher and her family have been deeply affected by Kyle's killing. Ms Maher already had a history of poor mental health due to difficult events in her life. Kyle was

her only son and she suffered a bereavement reaction, depression and anxiety which has not improved with the passage of time.

17. Although Ms Maher and other family members attended the Crown Court trial of Mr Wilson-Michael, they had difficulty in following the proceedings and felt excluded from the process. She did not understand why Mr Wilson-Michael was being given a hospital order, how a hospital order worked or what they were for. She was either wrongly informed, or wrongly understood, from the Police Family Liaison Officer, David Cochrane, that if Mr Wilson-Michael sought to be released in the future she would have a right of appeal.

18. Mr Wilson-Michael began his hospital order at Springfield Hospital, Tooting, which is in the same street as where Ms Maher had lived for 25 years and where Kyle had been brought up, which Ms Maher found intimidating and frightening. She bumped into his family members in the local shops and in the street from time to time when they came to visit him which made her reluctant to leave her house.

19. Following the criminal trial, the inquest into Kyle's death was resumed at Ms Maher's request. She had engaged solicitors, Saunders Law, by this stage. Through the inquest proceedings she learnt that there had been a police misconduct investigation into Kyle's death that she had not been involved in and had no knowledge of. There had also been an internal investigation by the NHS Trust that she did not know about. It appears that a number of problems emerged concerning the supervision and oversight of Mr Wilson-Michael in the inquest and the internal NHS investigation – the issues are being pursued by Ms Maher in civil proceedings against the NHS Trust under Art.2 ECHR – and it is not for this court to make findings of fact that may be relevant to those proceedings, since the NHS Trust is not a party to these proceedings. Suffice to say that Ms Maher believes that the NHS staff knew that Mr Wilson-Michael had stopped taking his antipsychotic medication some months earlier in November 2016 and had told staff that he had pulled a knife on Kyle and that he would do so again, a few days before the fatal stabbing. She also understands that prior to his death Kyle had informed his key worker that he did not feel safe at Drakefield Road, but his concerns were not acted on.

20. The inquest jury recorded a verdict of unlawful killing with a narrative verdict:

> "We the jury consider that the following aspects possibly caused or contributed to the unlawful killing of Kyle Maher on 21 January 2017.
>
> The inadequacy of the assessment and monitoring of the early intervention service (EIS) of the assailant between the 24 November 2016 and the 21 January 2017.
>
> Failure to spot signs of potential relapse of the assailant by EIS which should have placed the assailant in the red zone from November 2016 to January 21st 2017.
>
> The gathering and sharing of accurate information by EIS was inadequate. This includes appropriate handover of information to form a coherent picture and develop a robust plant from 17 January 2017.

> Failure to generate a mental health trust serious incident report on 17 January 2017.
>
> Lack of escalation within the EIS team when they were unable to initiate face to face contact with the assailant.
>
> Insufficient accountability and oversight at a senior management level within EIS."

21. After Mr Wilson-Michael was sentenced a Victim Liaison Officer ("VLO") should have been assigned straightaway but Ms Maher was not contacted until over a year later in October 2018 when the VLO, Ms Julie Francis, came to see her. She was kept up to date with developments thereafter and informed that Mr Wilson-Michael had been given escorted leave in November 2018 outside Wandsworth and Merton as part of his treatment and that arrangements were being made to transfer him to a different borough. In July 2019 she was informed that Mr Wilson-Michael had been given unescorted leave in hospital grounds in Kent where he was now staying. Ms Maher was concerned about these developments and her daughter was wrongly informed by a VLO that they could have appealed the hospital order when it was made, but that it was too late now to challenge it. In fact all that could have been done would have been to ask the Attorney-General to refer the sentence to the Court of Appeal Criminal Division as being unduly lenient.

22. On 24 August 2020 Ms Maher's solicitors, Saunders Law, were informed that Mr Wilson-Michael's case would be heard by the FTT on 3 November 2020. Saunders Law explained to her that she could make representations about conditions that should be in place if Mr Wilson-Michael was to be discharged, but that she could not make representations to the FTT about the impact that the crime had had on her and her family. She was also informed that she was not a "party" to the case and she would be unable to appeal any discharge decision or know of the reasons for the FTT decision.

23. On 2 October 2020 Saunders provided Ms Maher's and her family's proposed conditions to any discharge that Mr Wilson-Michael should not seek to approach or contact Ms Maher or her daughter, Billie-Jane Lovegrove, or any other member of the victim's family either directly or indirectly; that he should not enter the London Boroughs of Wandsworth or Merton, or the areas of Putney, Hanwell or Ealing; that he should be subject to regular (not merely random) drug and alcohol testing and monitoring; and she asked for stringent and proactive measures to be put in place to ensure that Mr Wilson-Michael was compliant with his antipsychotic medication. The letter also stated "that the family object in the strongest possible terms" to any discharge of Mr Wilson-Michael.

24. On 27 October 2020, in a pre-action protocol ("PAP") letter to both the FTT and MOJ, Ms Maher's solicitors asked that if the FTT was minded to discharge Mr Wilson-Michael at the 3 November hearing, that it should provide detailed reasons as soon as the decision was made. If any conditions were to be attached to his discharge the FTT was asked to provide the details of the conditions and the reasons for them. The letter explained the history of poor engagement by the Victim Contact Service. The letter also asked how the risk posed by Mr Wilson-Michael had been assessed, as Ms Maher understood that he had not yet been given unescorted leave under s.17 MHA 1983 and she questioned how the SSJ or the FTT would have sufficient information before them

adequately to assess the risk that Mr Wilson-Michael might pose in the community. She also referred to his earlier non-compliance with psychiatric treatment when in the community which had led to the index offence.

25. The FTT refused the request by letter dated 28 October 2020, written by Ms Leeson, First-Tier Tribunal (Health, Education and Social Care Chamber) Operations Manager after advice from and the approval of acting Deputy Chamber President Judge Francis Chamberlain. The letter quoted extensively from the Code of Practice for Victims of Crime ("the Victim's Code"):

> "6.14 If you are the victim of an offender who committed a specified violent or sexual offence but has been detained in a hospital for treatment because he or she has a mental disorder, you will still be entitled to participate in the Victim Contact Scheme (VCS). If the offender's detention was made subject to restrictions by the court (a 'restricted patient') you will be provided with information by your Victim Liaison Officer (VLO). If no restrictions are imposed (a 'non—restricted patient'), hospital managers will provide you with information.
>
> 6.15 In the circumstances, as the offender has been diverted away from the criminal justice system and is being treated in hospital as a patient, some of the decisions about the offender's management will be related directly to his or her medical treatment, and as such shall be confidential medical information.
>
> 6.16 You are entitled to make representations about the offender's conditions of discharge, such as conditions that prevent the offender making contact with you or your family or entering the area in which you live.
>
> 6.17 you are entitled to be informed if the offender is to be discharged either with conditions absolutely (this applies to restricted patients) or discharged subject to a Community Treatment Order (this applies to non—restricted patients), and if so, the conditions, if any, in place for your own or your family's protection; changes to those condition; and when those arrangements end (because the offender has been recalled to hospital; absolutely discharged, or the community treatment order has been lifted)."

26. The letter explained that the Chamber President's 2011 Practice Guidance, the online Information for Victims, and agreed Representations Forms were all consistent with the Victim's Code. The letter explained that a VLO is responsible for keeping victims updated about the outcome of hearings and that the FTT would notify the VLO of any conditions once the conditional discharge was confirmed. The FTT would not however provide reasons to victims, but the SSJ and MOJ would see a full copy of the panel's decision. The letter also explained that it was not possible for the victim to ask for the panel's reasons from the FTT directly.

27. The third defendant replied on 29 October 2020 referring Ms Maher back to the FTT stating:

> "For reasons outlined in the General Data Protection Regulations 2018 (GDPR) it is not for the Secretary of State to distribute the Tribunal's decision to parties who would otherwise not receive disclosure. If the victim wishes to request a copy of this decision and reasons, they must direct this request toward the Tribunal, as the controller of this information; however, victims are not currently entitled to this information and the Tribunal is also bound by GDPR legislation. The victim, via her Victim Liaison Officer, will receive confirmation of the outcome of the Tribunal hearing, and if conditional discharge is granted, confirmation of any victim relevant conditions that they have applied."

28. The FTT hearing did not take place in November, however, and was postponed until 9 February 2021 to enable Mr Wilson-Michael's doctors to assess how he responded to overnight leave in the community.

29. On 3 February 2021 Ms Maher's solicitors wrote again to the First and Third Defendants reiterating her request for reasons suggesting that the FTT approach breached principles of legality and open justice.

30. In the lead up to Mr Wilson-Michael's tribunal hearing Ms Maher became increasingly anxious and preoccupied about the hearing. She wanted to have a written statement to be read out on her behalf at the hearing although she did not want to attend herself and was angry and disappointed to be excluded from the process. She found it unfair that her voice was considered unimportant given the impact of the crime on her and her family and that it was affecting her mental health.

31. On 12 February 2021, 3 days after the hearing, the VLO informed Ms Maher's solicitors by email that Mr Wilson-Michael had been conditionally discharged on 9 February with immediate effect. Ms Maher described the wait to find out what had happened as "torture" and was particularly affected by learning that Mr Wilson-Michael had been released three days before she knew of it.

32. The email explained that most of the conditions that Ms Maher had requested had been granted: Mr Wilson-Michael was subject to restrictions not to seek to communicate, approach or contact Ms Maher, Billie-Jane Lovegrove or any other member of the victim's family either directly or indirectly. He was also not to enter the London Boroughs of Wandsworth or Merton, or the areas of Putney, Hanwell or Ealing. She was also informed that Mr Wilson-Michael would reside in a 24 hour staffed mental health hostel where he would continue to be closely monitored in the community by mental health professionals. She was told that if he became unwell or did not take his medication, he would be immediately recalled to hospital. The letter went on to say that the VLO would continue to keep her updated with any development with the patient and she would be sent an annual update in February 2022 and the VLO gave her email address and mobile telephone number to enable Ms Maher to get in touch should she so wish. The letter also acknowledged and apologised for the distress that the news would undoubtedly cause.

33. On the same day, 12 February 2021, Saunders Law repeated their request for reasons for the FTT's decision to discharge Mr Wilson-Michael to provide some degree of transparency and solace to Ms Maher, as well as to assist in narrowing the issues in the intended judicial review proceedings. The FTT response of 16 February 2021 to the letters of both 3 and 12 February was that it had nothing further to add to its letter of 28 October 2020.

34. Saunders Law then wrote to the Lord Chancellor on 9 February 2021 seeking clarification of whether the FTT rules of procedure precluded the FTT from providing the reasons, or a gist of the reasons, for the discharge of the patient and/or the evidence supporting the decision to discharge. The Government Legal Department ("GLD") replied on 12 March stating that the interpretation of rules was ultimately a matter for the courts (or tribunals) and it would not be appropriate to respond to what was perceived as a request for legal advice. Armed with that response Ms Maher's solicitors wrote again to the FTT reiterating her request for the reasons, or at the very least the gist of the reasons and the evidential basis for the Conditional Discharge Decision. She noted the extent to which Mr Wilson–Michael was tested in overnight leave conditions remained unclear and that she remained of the view that he posed a significant risk to the public and that she would seek to overturn the decision to discharge him conditionally.

The Further Decision

35. Following the issuing and service of judicial review proceedings and after permission had been granted on ground 1 the GLD informed Ms Maher's lawyers that the FTT had decided to take "a fresh decision" on the request in the letter of 27 October 2020 for disclosure of reasons for Mr Wilson–Michael's conditional discharge. Ms Maher was not invited to make any further representations. The Further Decision of 1 February 2022 was an interlocutory decision by Tribunal Judge S Johnston.

36. Judge Johnston set out the reasons for the request as she had ascertained them from the PAP letter of 27 October 2020 as being Ms Maher's alarm at the pace at which Mr Wilson-Michael had been able to progress to unescorted leave and discharge; that it was not clear how the risk he posed in the community had been assessed; and whether he had exercised unescorted or overnight leave by his Responsible Clinician prior to the initial FTT hearing scheduled for November 2020.

37. In paragraph 6 onwards of the Further Decision Judge Johnston set out the law that there is a presumption of privacy in all Mental Health Tribunal cases and Rule 38(1) of the Tribunal Procedure Rules 2008 (TPR):

> "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."

38. She stated:

> "6.The presumption within the TPR, which is of long standing, reflects Parliament's recognition that interference with the principle of open justice is necessary in mental health cases given the private clinical information about a patient that is given

> in those cases. One of the reasons for this privacy is to ensure the patient's therapeutic progress is uninterrupted which has the consequence of ensuring a reduction in risk to the public.
>
> 7. Disclosure or publication of documents or information is governed by Rule 14 of the TPR. In mental health cases, Rule 14(7) says that information about the case and names of persons concerned in such cases must not be made public unless the Tribunal gives a direction to the contrary. It is clear that there is a presumption of privacy.
>
> 8. There is no right for a victim to be provided with such information or to disclosure of reasons in Tribunal proceedings. The right to information is limited to information about whether the Tribunal discharged the patient and what conditions were imposed which relate to contact with the victim or his family (S.41(3)(b) DVCVA 2004).
>
> 9. The victim is not a party to the proceedings (rule 1). It follows that they do not have a right to give evidence given in the proceedings nor do they have a right to appeal the decision to the Upper Tribunal
>
> 10. However Rule 14(7) does give the Tribunal a discretion to direct information be made public.
>
> 11. In considering whether to make the information public I must take into account the open justice principle and Article 6 of the ECHR which includes the giving of reasons for a decision in public. The open justice principle has exceptions. The mental health exception is one. That reasons for a Mental Health Tribunal's decision will generally not be given in public has been recognised since the case of Scott v Scott [1913] AC 417.
>
> 12. The mental health exception is not an absolute rule to be applied in a blanket fashion. It still has to be weighed against the open justice principle given the Tribunal does have a discretion to disclose under Rule 14(7). There may be a case where a departure from this principle is justified, and consideration therefore needs to be given to whether a particular case is such a case.
>
> 13. The discretion under Rule 14(7) must be exercised consistently with the convention rights of the patient and with the overriding objective in the TPR (Rule 2)."

39. Her conclusions were as follows:

> "17. It is said on the victim's behalf that she wants disclosure of the reasons in order to know the details of the clinical progress, risk assessments and leave that the patient has taken. I cannot see

any reason in this case that would make it different than any other case and justify such disclosure, taking into account the presumption of privacy and the exception to the open justice principle in mental health cases.

18. The reasons given for the need for disclosure appear to be concerned with the potential for a merits challenge against the Tribunal's decision; it is unlikely that the information is being sought merely for reassurance, as such reassurance is available through the Victim Liaison Service. The victim is not a party to the proceedings and has no right to appeal the Tribunal's decision, and even a party can only appeal a decision where there has been error of law. Parliament created the specialist Tribunal to consider the need for ongoing treatment of a patient and the TPR is clear that the parties currently in the Rules are those with the evidence that is relevant to this decision. The DVCVA gives a victim the right to relevant conditions but stops well short of making them parties to the proceedings in front of the Tribunal.

19. The information requested contains private clinical information. It therefore differs in substance to the information before the Parole Board. When a patient is made subject to a hospital order made under s.37 of the Mental Health Act 1983: "[t]he sole purpose of the order is to ensure that the offender receives the medical care and attention which he needs in the hope and expectation of course that the result will be to avoid the commission by the offender of further criminal acts." (R v Birch (1989) 11 Cr App R (S) 202 at [210]). I bear in mind that once the reasons are made public, they could be shared to the detriment of the patient.

20. The Mental Health Act sets out what the Tribunal must decide. On the evidence before them they were not satisfied that the patient needed further detention for his mental health or the safety of others. The statutory criteria on which they made their decision is public and available to the victim.

21. In refusing the application for disclosure of the reasons I have taken into account the fact that the conditions that are relevant to the victim were disclosed. She was told that the patient would have to reside at a particular address (although not the address itself), comply with medication and other medical treatment, engage with the clinical team, remain abstinent from illicit drugs and be tested for drugs and alcohol and that he would not enter the exclusion zone or seek to contact the victim or any member of her family. If there is a deterioration in his mental state, the Secretary of State for Justice has the power to recall him to hospital.

22. In reaching this conclusion I have taken into account evidence and submissions provided by the Responsible

> Clinician, the Social Supervisor and patient's representative, which support the conclusion I have reached. No further details of the evidence and submissions in question can be given without causing harm to the patient. I have considered disclosing redacted reasons but have decided that this is not possible for the reasons given above."

40. As a result of the Further Decision, the amended grounds of review (5 and 6) were formulated.

41. Ms Maher has lost confidence in the authorities including the NHS as provider of mental health services. She feels let down by the criminal justice system and alienated because of everything that has happened. She considers that she has been denied a voice and that her and her family's feelings have been ignored. She considers that more information about the reasons for Mr Wilson-Michael's discharge would have helped her come to terms with and understand why he had been released and given her some reassurance about the risk of Mr Wilson-Michael re-offending in the future. It would have provided some comfort to be able to have confidence that support was in place to avoid Mr Wilson-Michael from relapsing or failing in future to take his medication, particularly in light of what she considered to be the failure to act on his relapse in January 2017 that had resulted in the death of Kyle. She would like to know his current level of insight and whether he now has remorse and understanding of what he has done and whether he has shown any responsibility for his actions. She worries about how she would feel if she was to learn that he has re-offended if she had not done everything in her power to prevent another mother from experiencing the grief that she has endured and how "absolutely distraught" this would make her feel.

42. She also wanted to know more about the reasons for the decision so that she could challenge it as she describes her greatest fear being that Mr Wilson-Michael is still dangerous and will hurt somebody or take the life of another person. She does not consider him to be safe and, as explained in her solicitors' letter to the FTT, she continues to believe that he should not have been conditionally discharged.

Victims' Commissioner's Report 2018

43. A report by the Victims' Commissioner[1], Baroness Newlove of Warrington, "Entitlements and experiences of victims of mentally disordered offenders" (June 2018) found that although the law rightly makes a distinction between those of sound mind when committing crimes and those whose judgment is impaired by mental illness, the impact of these crimes upon the victims remains the same. She was concerned that the victims of mentally disordered offenders do not have the same entitlements under the Victim Code as offenders of sound mind and do not receive the same level of support and assistance. Her investigation found that victims feel isolated and unsupported, left behind and overlooked with the differential status. Her report recommended that the gap should be closed and that victims of mentally disordered offenders (both restricted

[1] S.48 DVCVA 2004 requires the Secretary of State to appoint a Commissioner for Victims and Witnesses to promote the interests of victims and witnesses and encourage good practice in their treatment and make recommendations within their remit (s.49).

and unrestricted patients) should have the same level of support and entitlements as victims of serving prisoners, so that the victims are treated equally.

44. The Victims' Commissioner's conclusions chime with the view of Hundred Families, a charity and commissioned service of victim support for families in cases of homicide perpetrated by individuals suffering from a serious mental illness or disorder. In their experience - from a database of around 2,000 cases and working directly with 15-20 families dealing with the FTT - the victims' families want to be heard and to be able to tell the FTT of the devastating impact the offender's actions have had and continue to have. Hundred Families director, Julian Hendy argues for a more open, transparent and accountable system that would be achieved by disclosure of the reasons for discharge and conditional decisions so that the victims and the public would be able to understand better and monitor the FTT's decision making. They also seek for victim impact statements to be able to address the wider impact and context of the offence, rather than just a narrow submission on any conditions that should be imposed if the patient was discharged, to enable the voices of victims' families to be heard.

45. In response to the Victims' Commissioner's report, on 9 December 2021, the Ministry of Justice published a consultation document into a new victim's law "Delivering justice for victims: A consultation on improving victims' experiences of the justice system." The consultation proposed a Victim's Bill to put the Victim's Code on a statutory footing, enhanced from its current status as a code of practice and sought to consult on how victims of crimes of mentally disordered offenders could be put on a more equal footing with other victims.

> "Mentally disordered offenders can be detained in mental health hospitals, and the need for their ongoing detention is reviewed by the First-Tier Tribunal (Mental Health). Victims of mentally disordered offenders are not currently able to submit a Victim Personal Statement as part of this process, nor can they attend the tribunal hearing to read the statement. This means that these victims are not an equal footing with other victims, because victims whose offenders are serving prisoners and are in the Victim Contact Scheme have a right under the Code to submit a Victim Personal Statement, allowing them to share the impact of the offence as part of the parole review process. [footnote 27 reference to the Victims' Strategy]"
>
> "We have heard that allowing Victim Personal Statements at Mental Health Tribunals would be cathartic and empowering for victims, allow them to explain to the tribunal the impact of the patient's offending on them. [footnote 28 reference to the Victims' Commissioner report of 2018] It could assist the tribunal in understanding the context of the offence and why victims have requested certain conditions be attached to the patient's discharge. This could still be considered in a way that is consistent with the statutory test, which the tribunal has to apply when considering discharging a detained patient. [footnote 29 reference to the MHA 1983]"

46. The consultation closed on 3 February 2022 and Delivering Justice for Victims: Consultation Response was presented to Parliament on 25 May 2022. No firm commitment to allowing VPS in the FTT was given, but the Lord Chancellor and SSJ has made a Written Ministerial Statement on 25 May 2022 to work with the judiciary to introduce VPS in this sphere.

Legal framework

MHA 1983 and FTT

47. Mr Wilson-Michael was made the subject of a hospital order under the powers contained in s.37 MHA 1983 as he had been convicted before the Crown Court of an offence punishable with imprisonment and the court was satisfied on the written and oral evidence of two registered medical practitioners that he was suffering from a mental disorder which made it appropriate for him to be detained in a hospital for medical treatment and that the treatment was available for him. The court was also of the opinion, having regard to all the circumstances including the nature of the offence and Mr Wilson-Michael's character and antecedents and to the other available methods of dealing with him, that the most suitable method of disposing of the case was by means of a hospital order. The Crown Court had also satisfied itself from the approved clinician with overall responsibility that arrangements had been made for his admission.

48. He was also subject to a restriction order for an unlimited period pursuant to s. 41 MHA 1983 since having regard to the nature of the offences, his antecedents and the risk of his committing further offences if set at large it was necessary for the protection of the public from serious harm. Special restrictions apply to him (s.41(3)) and the powers under the MHA 1983 to transfer or discharge are only exercisable with the consent of the SSJ. Recall from an undischarged s.41 restriction order can only be made on the basis of a relapse in the patient's mental health or failure to comply with a mental health support package.

49. When a patient is made subject to a hospital order under s.37 MHA 1983 "the sole purpose of the order is to ensure that the offender receives the medical care and attention which he needs in the hope and expectation of course that the result will be to avoid the commission by the offender of further criminal acts." (*R v Birch* (1989) 11 Cr App R (S) 202 at [210]).

50. By s.70 of the MHA 1983 a patient who is detained subject to a restriction order may apply to the FTT at certain periods of time and the SSJ may refer the case of a restricted patient to the FTT (s.71) when there has been no consideration of the restricted patient's case by a tribunal within the last 3 years. It is not known by which route Mr Wilson-Michael's case was brought before the FTT, but nothing turns on it.

51. MHA 1983 s.72 sets out the powers of the FTT when an application is made to it concerning the discharge of a patient with a hospital order and provides that:

> "(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—

> (a) … [not relevant]
>
> (b) the tribunal shall direct the discharge of a patient liable to be detained … if it is not satisfied—
>
> > (i) that he is then suffering from [mental disorder or from 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 of 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;"

52. The power to discharge restricted patients is contained in s.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—
>
> paragraph (a) of that subsection applies; but
>
> paragraph (b) of that subsection 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."

53. The tribunal referred to in ss.72 and 73 is the FTT, as we have termed it, which is the first-tier tribunal for mental health and sits within the Health, Education and Social Care Chamber (HESC) which is one of seven first tier tribunal chambers established by s.7 Tribunals, Courts and Enforcement Act 2007 ("TCEA 2007") and order of the Lord Chancellor.

54. Procedure rules for all first-tier tribunals are made by the Tribunal Procedure Committee subject to s.22 and Schedule 5 TCEA 2007. Membership of the Committee is prescribed by statute (paragraph 20 of Schedule 5) and includes the Senior President of Tribunals and persons appointed by the Lord Chancellor and Lord Chief Justice. The content of the Tribunal Procedure Rules is prescribed in detail by Schedule 5, including what procedural matters may be laid down in rules, the delegation of functions of the tribunal to staff, time limits, repeat applications to the tribunal, hearings in public/private, representation and rights of audience, evidence and attendance, costs, correction of errors, and ancillary powers. The Tribunal Procedure Rules come into force as directed by Lord Chancellor (paragraph 28 of Schedule 5 TCEA 2007) and are laid before Parliament subject to the negative resolution procedure. The applicable procedure rules for this claim are the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 ("the FTT Rules").

55. Disclosure or publication of documents or information in the HESC (not only in mental health cases) is governed by Rule 14. Rule 14(7) provides that information about the case and the names of persons concerned must not be made public unless the Tribunal gives a direction to the contrary. The Tribunal also has general powers (not limited to mental health cases) to:

> "8.1 prohibit the disclosure or publication of documents or information 'relating to the proceedings' (Rule 14(1));
>
> 8.2 prohibit the disclosure of a document or information to a person if the Tribunal is satisfied that such disclosure would be likely to cause the person or some other person serious harm and considers it proportionate to give such a direction (Rule 14(2)).
>
> 9. Procedure in mental health cases is governed by Part 4 of the FTT Rules, which provides inter alia that 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 (Rule 38)."

56. The rules concerning private and public hearings (in mental health cases only) are set out in Rule 38 which provides:

> (1) "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.
>
> (2) If a hearing is held in public, the Tribunal may give a direction that part of the hearing is to be held in private.
>
> (3) Where a hearing, or part of it, is to be held in private, the Tribunal may determine who is permitted to attend the hearing or part of it.
>
> (4) The Tribunal may give a direction excluding from any hearing, or part of it—
>
> (a) any person whose conduct the Tribunal considers is disrupting or is likely to disrupt the hearing;
>
> (b) any person whose presence the Tribunal considers is likely to prevent another person from giving evidence or making submissions freely;
>
> (c) any person who the Tribunal considers should be excluded in order to give effect to a direction under rule 14(2) (withholding information likely to cause harm); or
>
> (d) any person where the purpose of the hearing would be defeated by the attendance of that person.
>
> (5) The Tribunal may give a direction excluding a witness from a hearing until that witness gives evidence."

57. Parties to mental health cases are the patient, the 'responsible authority' (the managers of the hospital), the SSJ (if the patient is a restricted patient), and any other person who starts a case by making an application (Rule 1(3)). Parties are entitled to attend the hearing. The tribunal is also required to give notice of proceedings to interested persons, who include (if applicable) any guardian, the Court of Protection, the nearest relative of the patient and any other person who in the tribunal's opinion should have an opportunity to be heard, and may permit such persons to attend the hearing (Rule 33). Victims and their close family members are not parties to the case.

58. The tribunal may give a decision orally at a hearing, but must provide each party with written notice and reasons of its decision. A party may appeal from decisions of the FTT to the Upper Tribunal on an error of law.

59. In deciding whether to direct a conditional or absolute discharge the FTT must apply the law set out in ss.72 and 73 MHA 1983 as set out above.

60. Rule 41 provides for giving full written reasons to the parties which disposes of the case.

Parole Board

61. The Parole Board is constituted under s.239 Criminal Justice Act 2003 ("CJA 2003") as a body corporate, and as such is sponsored by a department of state (the Ministry of Justice: *R (Brooke) v Parole Board* [2008] EWCA Civ 29, [2008] 3 All ER 289). The Parole Board's status is not that of a court or tribunal, but a non-departmental public body: *Brooke* at [12].

62. Although many Parole Board functions are judicial – notably decisions as to release of indeterminate sentenced prisoners – it retains some historic advisory functions under s.239 CJA 2003, including advising the Secretary of State as to licence conditions. There is no right of appeal from a Parole Board decision as to release; such decisions are amenable to judicial review.

63. Parole Board members, including the Chair of the Parole Board, are appointed by the Secretary of State, who is also responsible for approving resources to the Board and is accountable for the Board's business in Parliament.

64. Parole Board procedure is governed by the Parole Board Rules 2019 (2019/1038) ("2019 Rules"), made by the Secretary of State under ss.239(5) and 330 CJA 2003 and subject to the negative resolution procedure in Parliament. The content of the Parole Board Rules is specified only by s.239(5) CJA 2003: "…the Secretary of State may make rules with respect to the proceedings of the Board, including proceedings authorising cases to be dealt with by a prescribed number of its members or requiring cases to be dealt with at prescribed times."

65. Unless a prisoner is entitled to automatic release, their release requires a direction from the Parole Board. If the prisoner is serving an indeterminate sentence[2] their release can only be directed if the Parole Board "is satisfied that it is no longer necessary for the protection of the public that [the prisoner] should be confined".

66. Parole Board oral hearings must be held in private (Rule 15) but the panel chair may admit observers to the hearing and impose conditions on their admittance. Parties at the hearing are the prisoner and the SSJ (Rule 2).

67. Prior to the enactment of the 2019 Rules, the Parole Board was prohibited by Rule 25 of the Parole Board Rules 2016 from giving reasons for its decisions. The Divisional Court in *R (DSD and NBV) v Parole Board & Ors* [2018] WLR(D)195; [2019] QB 285 found that Rule 25 was *ultra vires* s.239(5) CJA 2003. Rule 28 of the 2019 Rules now requires the Parole Board to provide "a summary of the reasons" for a decision taken on the papers or following an oral hearing where a summary is requested by "a victim or any other person".

68. Parole Board Rule 28 provides that where the Parole Board makes a decision either on the papers or following an oral hearing, a party may apply to the Board for the case to be reconsidered on the grounds that the decision is either (i) irrational or (ii) procedurally unfair. The right to request reconsideration is limited to the parties.

[2] Whether that be a prisoner serving an extended sentence (CJA2003 s.246A(6)(b); an offender of particular concern (CJA s.244(A)(4)(b); or a life sentence prisoner (Crime (Sentences) Act 1997 s.28(6)(b)).

69. The consideration whether "it is no longer necessary for the protection of the public that the prisoner should be confined" involves considering whether the prisoner's risk to the 'life and limb' of others is more than minimal.

70. In *A-G's Ref (No.54 of 2011)* [2011] EWCA Crim 2276, Hughes LJ (as he then was) noted that the "absolutely crucial difference" between the regimes for making an indeterminate sentences and that for hospital orders is that under the former regime release is conditional upon the responsible authority being satisfied that the offender is no longer a risk to the public and release from custody is on licence and the offender can be recalled if their behaviour shows them still to be a danger. Under the latter regime, however, the responsible authority must be satisfied that the offender presents no danger arising from their medical condition and on release from hospital, recall is only available if the offender's medical condition relapses.

Victims and Parole Board and FTT processes

71. The Domestic Violence, Crime and Victims Act 2004 ("DVCVA 2004") requires the Secretary of State for Justice to issue a code of practice as to the services to be provided to a victim of criminal conduct (the Victims' Code) (s.32(1)). The most recent iteration of the Victims' Code was issued in April 2021. The one applicable at the time of the Conditional Discharge Decision referred to in this judgment was that of November 2020, but the differences between the two versions, such as they are, are not material for the purposes of this judgment. A 'victim' is defined in the Victims' Code as including a person who has suffered harm which was directly caused by a criminal offence and close relatives (spouse, partner, relatives in direct line, siblings and dependants) of a person whose death was directly caused by a criminal offence. There is no dispute that Ms Maher is a victim under the code.

72. S.35 DVCVA 2004 provides a right for victims to make representations to the local probation board where an individual is convicted of a sexual, violent or terrorist offence and sentenced to more than 12 months' imprisonment and a proactive duty on the local probation board to find out if a victim wishes to make representations. By s.35(4) the matters on which victims must been given the right to make representations are about whether the offender be given the licence conditions or supervision requirements if released and what those licence or supervision requirements should be.

73. A similar right to make representations is conferred by ss.36-8B where an individual is convicted of a sexual, violent or terrorist offence and made subject to a hospital order, with or without a restriction order.

74. Where a hospital and limitation direction (often referred to as a hybrid order) (s.45A and 45B MHA 1983) is made there are similar rights conferred by ss.39-44B which extend to rights to make representations concerning transfer directions as well as restriction orders (where applicable)). Hybrid orders may be made where the court has heard evidence that the offender is suffering from a mental disorder and the making of a hospital order is appropriate, but the court wishes to ensure that after the completion of the period of treatment, the offender will be transferred to the prison estate for the remainder of the sentence, rather than being released from hospital.

75. Right 11 of the Victims' Code explains the victim contact scheme and the VLO scheme where the offender of a specified violent or sexual offence, has been sentenced to 12

months or more in prison, or given a hospital order with or without a restriction order. The code also explains the obligations on the Parole Board towards victims:

> "11.8 The Parole Board must:
>
> consider all representations that victims have made about licence conditions; where a victim has requested a licence condition which has not been included, or has been amended, and provide an explanation for this non-inclusion or amendment;
>
> read a Victim Personal Statement if one is submitted;
>
> consider any application by the victim to be permitted to attend the hearing and read their Victim Personal Statement or have it read by someone else on their behalf;
>
> unless there is a good reason for not doing so, agree to the statement being read at the hearing by the victim or someone else on their behalf;
>
> provide a summary of the parole decision upon application, unless there is a good reason for not doing so"

Details about the VPS are then set out.

76. The 2019 Rules reflect the right to receive a summary of the Parole Board decision. Rule 27 states that:

> "where a victim or any other person seeks disclosure of a summary of the reasons for a decision [that the prisoner is fit for release]…the Board must produce a summary of the reasons for that decision, unless the Board chair considers that there are exceptional circumstances why a summary should not be produced for disclosure."

77. Rule 27(8) sets out that for the purposes of Rule 27 "victim" means:

> "a person who is participating in the Victim Contact Scheme in respect of a prisoner who is party to proceedings under these Rules."

78. Rule 28 provides that where the Parole Board has determined that a prisoner is fit for release, a "*party*" may apply to the Parole Board within 21 days for the case to be reconsidered on the grounds that the decision is irrational or procedurally unfair. A victim would not be considered a party to the proceedings, but has a right to request the SSJ to seek a reconsideration.

79. Pursuant to the SSJ's "*Guidance: Challenge to a parole decision"* victims are told about their "*right to raise issues"* with a Parole Board decision. The guidance states "*if you think there is a problem with the parole decision you can ask the [SSJ] to take this into account*" in deciding whether to request a reconsideration by the Parole Board. The

victim's right to request a reconsideration is also set out in the Victims' Code which provides:

> "Asking for a parole decision to be reviewed (Reconsideration Mechanism)
>
> 11.9 The Parole Board considers certain offenders for parole (release on licence) or re-release following recall and does so based on their risk of harm to the public.
>
> 11.10 If the Parole Board decides it is safe to release an offender the decision is provisional for 21 calendar days in the majority of cases (except standard determinate recalls). The Secretary of State may ask the Parole Board to reconsider the decision during this period, if he has an arguable case that:
>
> • the correct process was not followed in the review of the offender for parole – for example, important evidence was not taken into account; or
>
> • the decision was irrational - the decision cannot be justified based on the evidence of risk that was considered.
>
> As a victim, you may submit a request to the Secretary of State asking that an application for reconsideration is made, if you believe that the decision meets either of these tests. Your request must be submitted within the 21-day provisional window. The Secretary of State will only do so where there is evidence the criteria is met. You will receive a letter informing you of whether the Secretary of State makes an application for reconsideration or not."

80. Pursuant to the Victims' Code victims have a right to submit a VPS to the Parole Board. The Parole Board thus provides for victims to make representations beyond the statutory minimum matters in s.35(4) DVCVA 2004. Paras 6.25-6.32 of the Code provide that:

> "[a VPS gives the victim] the opportunity to explain in [their] own words how a crime has affected [them and their] family, whether physically, emotionally, financially, or in any other way. [They] may have already made a VPS closer to the time of the offence or prior to the trial. At this stage, [they] will have the chance to make a new VPS for use by the Parole Board to reflect [their] current views or feelings … [The VPS] should include [the victim's views] on … the possible impact that …the prisoner's release or move to open conditions would have on [the victim]."

81. Further guidance is provided by "Joint Agency Guide to the VPS: A guide for all criminal justice practitioners". That guidance states:

> "[The VPS] is important as it gives victims **a voice** in the criminal justice process by helping others to understand how the crime has affected them. It provides an opportunity for victims to communicate verbally and/or in writing the effects the crime has had on them (and also their family members). It is the victim's way of telling the court about the crime they have suffered and the impact it has had on them whether physical, emotional, psychological, financial or in any other way…The VPS may also be used…at Parole Board hearings, where the victim can additionally set out how the crime continues to affect them and/or their family and the impact that any outcome from one of those reviews may have on them."

82. In addition to the 2019 Rules and the Victims' Code the Parole Board provides "Information for Victims":

> "What will I be told about the decision?
>
> Whether the decision is made on the papers or at an oral hearing, the probation service are given a copy of the decision letter at the same time as the offender. Your Victim Liaison Officer will tell you what the decision is and give you an outline of the reasons behind a decision. If the offender is released but the Parole Board was not able to set all of the licence conditions that you asked for, the panel will give reasons why it was not possible, which the Victim Liaison Officer will share with you.
>
> Is the decision letter available to anyone else?
>
> The law[3] does not allow the decision letter to be seen by anyone other than the offender and the authorities. This is partly because of the personal information it will contain."

Practice of FTT and other Courts and Tribunals dealing with mental health patients in giving reasons to non-parties for their decisions

83. The very helpful evidence from Mr William Dowse, Head of the Administrative Justice Policy Team in the Ministry of Justice, sets out the practice of the FTT, the Family Courts and the Court of Protection with respect to the giving of reasons for their decisions. His evidence concerning the Parole Board has been incorporated in the sections above.

Reasons for FTT decisions

84. The FTT does not have any formal document setting out its approach concerning the provision of reasons to victims or the families of deceased victims: the rules are silent and victims are not party to the FTT proceedings. There is no specific process or form by which a victim can apply to the FTT for reasons. The process for applying in this

[3] A reference to Rule 2, 2019 Rules

case was that the FTT received a pre-action letter of claim from the Claimant's legal representatives. It would appear that no records are kept by the FTT of whether any other families of victims, or indeed victims themselves, have requested reasons for FTT discharge decisions. Mr Dowse is only aware of three cases in the FTT where reasons have been made public: Ian Stuart Brady, Jared Britton and Albert Haines. In each of their cases the patient's request that the FTT hearings be held in public was granted. The FTT published the reasons for its decision to allow the hearing to be conducted in public in each of their cases but only in the case of Mr Brady and Mr Haines did the FTT also publish the reasons for its discharge decision either at the request of or with the approval of the mental health patient concerned.

85. When a person is detained under the MHA 1983 they are diverted away from punishment for treatment. The person being detained is a mental health patient, and as such vulnerable. When discharge is considered by the FTT it is, pursuant to the statutory criteria, focused on clinical considerations i.e., how the patient is progressing, the extent of their mental disorder and what that means for their risk to the public.

86. The role of the FTT in these cases is therefore fundamentally different to that of the Parole Board. The Parole Board is not making decisions in respect of mental health patients. Nor does the Parole Board's decision-making exercise (which is focussed on the risk of the prisoner re-offending and harm to the public) necessarily involve, nor centre on, the detailed clinical information which is at the heart of a decision by the FTT. The Parole Board does not exercise a protective function towards a prisoner such as the FTT exercises in respect of the patient. Rather, the Parole Board is only concerned with protection of the public from the prisoner re-offending.

Court of Protection

87. The Court of Protection is the specialist court within HM Courts and Tribunals Service which deals with decisions regarding people who may lack capacity to make a decision themselves. The establishment and jurisdiction of the court is provided by the Mental Capacity Act 2005. Rule 4.1 of the Court of Protection Rules 2017 gives the general rule that a hearing is to be held in private but under rule 4.3 an order can be made for attended hearings to be in public. Rule 4.2 provides that an order may be made for the publication about material relating to the proceedings or of the text or a summary of the judgment of the court. Rule 4.3 is supported by Practice Direction 4C – 'Transparency', which provides that the court will "ordinarily" make an order for attended hearings to be in public. There are wide powers to make an order for only part of a hearing to be in public or to exclude certain persons or class of persons from the hearing held in public. If there is good reason, the Court of Protection may prohibit access by the general public access and the press.

88. Court of Protection judgments may be published, following guidance issued in 2014 by the then President of the Court of Protection that emphasised the need for "transparency in order to improve public understanding of the court process and confidence in the court system". It also made clear that judgments "will often need to be published in appropriately anonymised form". Breach of an order imposing restrictions on information about the publication of all information relating to the proceedings is punishable by contempt proceedings.

Family Courts

89. Family proceedings involving children are held in private and usually only those directly involved can attend, although rules of court (the Family Procedure Rules 2010, taken with their associated Practice Directions) do allow for accredited media representatives and legal bloggers to attend in most cases, but subject to restrictions on what they may publish about the case. Judges dealing with such cases have discretion to allow attendance at, and publication of information from, these cases. The Family Procedure Rules also permit any other person to attend but only with the court's permission and agreement from the parties.

90. There are various legal provisions dealing with the question of what information can be disclosed from family proceedings, including reporting restrictions and laws on contempt of court. Although accredited media representatives and legal bloggers are allowed into the courtroom, any publications about that hearing will be subject to existing reporting restrictions under section 12 of the Administration of Justice Act 1960 (providing that it is a contempt to publish information from proceedings concerning children held in private, subject to any provision made in rules of court) and section 97 of the Children Act 1989 (prohibiting any publication which identifies the child involved) as well as any additional reporting restrictions imposed by the court. The court also has the discretion to exclude them from the courtroom if deemed appropriate to do so. Judgments in such proceedings are anonymised, so that the children involved cannot be identified.

Grounds of challenge

Ground 1: fettering of discretion on provision of reasons in the First Decision.

Submissions

91. It was submitted on behalf of Ms Maher that at least until 1 February 2022 the FTT had adopted a practice or policy of never providing reasons to victims or their families as evidenced by the First Decision and the absence of any procedure that envisaged either the making or consideration of such a request. The first defendant, which states that it takes a non-adversarial position in the proceedings and seeks to assist the court, refers to the importance of the protection of mental health patients justifying an exception to the open justice principle. It is reflected in its rules that do not require decisions of the FTT in mental health cases to be published or provided, other than to the parties and the presumption that information about mental health cases should generally remain private to the parties. The second and third defendant submitted that the issue of whether the FTT had fettered its discretion in the First Decision was not a matter for the second and third defendant. Beyond asserting that there was no policy or practice capable of acting as a fetter to the FTT's discretion, the interested party did not address the contents of the First Decision directly.

Discussion

92. It is common ground that the FTT has a discretionary power to give reasons, or the gist of the reasons, for its decisions. If the FTT had not brought its "mind to bear on [Ms Maher's specific] case" in the First Decision and not considered her individual request for reasons, but was operating an "inflexible and invariable" policy or practice, it would have unlawfully breached the "rule against fettering discretion" as "a discretionary

power … must [be] exercise[d] on each occasion in the light of the circumstances at the time" (*R (MAS Group) v SSERA* [2019] EWHC 158 [56] & [57]).

93. It is clear from the wording of the First Decision that the FTT had not considered the specifics of Ms Maher's request and took the view that victims were not entitled to reasons for its decisions. It applied a blanket policy or practice at that point of not providing reasons, or the gist of reasons at the request of a victim. If there was any lingering doubt on the matter from the contents of the letter itself and reference in the letter from the SSJ that "victims are not currently entitled to this information", the fact that the FTT volunteered to look at the matter "afresh" and produce its Further Decision on 1 February 2022 suggests that they have failed to have done so previously.

94. The fact that reasons have been published in two cases following the granting of a request by a patient for a public hearing is no answer to the point, since it is a different matter if it is the patient who seeks publication. It follows that the First Decision was unlawful. The consequences that flow from that and whether it is academic in light of the Further Decision, fall to be considered after consideration of ground 6 and the Further Decision itself.

Ground 6: the Further Decision

95. The issues in this ground were whether the FTT had the power to make its Further Decision and if so, if it applied the correct legal test.

96. Mr Squires' point on Ms Maher's behalf on the first issue was that having decided not to provide reasons for its release decision of 9 February 2021, the FTT was *functus* and Judge Johnston had no legal power to make the Further Decision nearly a year later.

Discussion

97. The FTT is a creature of statute with no inherent jurisdiction. The overriding objective of the FTT Rules, set out at rule 2, is to enable the tribunal to deal with cases fairly and justly.

> "(2) Dealing with a case fairly and justly includes—
>
> (a) dealing with the case 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;
>
> (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
>
> (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
>
> (d) using any special expertise of the Tribunal effectively; and
>
> (e) avoiding delay, so far as compatible with proper consideration of the issues.

> (3) The Tribunal must seek to give effect to the overriding objective when it—
>
> (a) exercises any power under these Rules; or
>
> (b) interprets any rule or practice direction."

98. The FTT Rules contain wide powers of case management and to regulate its own procedure:

> "5.— Case management powers
>
> (1) Subject to the provisions of the 2007 Act [TCEA] and any other enactment, the Tribunal may regulate its own procedure.
>
> (2) The Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside an earlier direction."

99. I conclude that the FTT Rules are sufficiently widely drafted to have enabled it to consider the request made by Ms Maher on both occasions – in both the First Decision and Further Decision. In making the First Decision it was giving a direction in relation to the conduct of the proceedings under its power under FTT Rule 5(2) and did so in accordance with the overriding objective by avoiding unnecessary formality and operating flexibly by replying in letter form and avoiding delay. It was the same with the Further Decision and it is also implicit in Rule 5(2) that the FTT may revisit an earlier direction since it has power to amend, suspend or set aside an earlier direction. I suspect that if the Further Decision had reached a different conclusion the procedural objection would not have been taken.

100. I therefore reject the first argument that the FTT had no power to make the Further Decision. It is now accepted that the FTT was not applying a blanket policy at that stage and that Judge Johnston considered Ms Maher's request and applied her mind to it in the Further Decision. She took the decision afresh and she was not involved in the First Decision. The issue is whether she applied the correct legal test.

101. It is also accepted that the open justice principle applies to the FTT as a tribunal within the TCEA 2007 and it is well established that matters of individual liberty are paradigm examples of the exercise of a judicial function. A tribunal's determination of a patient's right to liberty is a determination of a 'civil right' under Art.6 (*Aerts v Belgium* [1998] 21 EHRR 55 at 59).

102. The open justice principle is "of constitutional importance and…the rights that flow from it are fundamental in nature" (*R(DSD) v Parole Board* [2018] EWHC 694 (Admin)). All parties accepted Mr Squires' description that the open justice principle is an evolving concept and the clear trend is towards greater openness. As per Lord Sumption in *Khuja v Times Newspapers* [2017] UKSC 49: "[Its] significance has if anything increased in an age which attaches growing importance to the public accountability of public officers and institutions and to the availability of information about the performance of their functions." [13]

103. In *Khuja* the reason, or justification, for the open justice principle was stated as "the value of public scrutiny as a guarantor of the quality of justice." In *AH v West London MHT and SSJ* [2010] UKUT 264 (AAC) Carnwath LJ said this:

> "The importance of the principle of open justice has been emphasised by the European Court of Human Rights on many occasions. For example, in *Diennet v France* [1996] 21 EHRR 554 at 33, it said:
>
> "This public character protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. By rendering the administration of justice transparent, publicity contributes to the achievement of the aim of Article 6(1), namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society, within the meaning of the Convention."
>
> It follows that any exceptions must be clearly justified."

104. The usual rule is that "proceedings are required to be subjected to the full glare of a public hearing" (*R v Legal Aid Board ex p. Kaim Todner* [1999] QB 966) which includes the obligation to hold hearings in open court to which the public and press have access, the right of the press to report on legal proceedings, judicial decisions being placed in the public domain, and that evidence or information communicated to a court is presumptively available to the public (see *DSD* at [170]).

105. The only aspect of the principle under consideration in this case concerns the placing of judicial decisions into the public domain (see for example *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 2*) [2011] QB 218 [37]-[41]). Although other aspects of the FTT proceedings were not compliant with the basic premise of the open justice principle, it was accepted that they fell within permitted exceptions. Whilst the open justice principle is of general application, its practical operation varies according to the nature of the work of a particular judicial body, it may be context specific and does not operate on an all or nothing basis. As Ms Hirst described it, it "is not hard-edged" and there are exceptions in order to protect the rights of others, such as those under Art.8 ECHR to a private and family life.

106. The exception relevant to this case, first articulated in *Scott v Scott* [1913] AC 417 in the language of the time,[4] referred to "cases of wards of Court and of lunatics [where] the court is really sitting primarily to guard the interests of the wards or the lunatics" where it may be "necessary…that the court should exclude the public." To place the quotation in its full context:

> "While the broad principle is that the Courts of this country must, as between parties, administer justice in public, this principle is subject to apparent exceptions…But the exceptions are

[4] Which is no longer acceptable language, but repeated verbatim for accuracy.

> themselves the outcome of a yet more fundamental principle that the chief object of Courts of Justice must be to secure that justice is done. In the two cases of wards of Court and of lunatics the Court is really sitting primarily to guard the interests of the ward or the lunatic. Its jurisdiction is in this respect parental and administrative, and the disposal of controverted questions is an incident only in the jurisdiction. It may often be necessary, in order to attain its primary object, that the Court should exclude the public. The broad principle which ordinarily governs it therefore yields to the paramount duty, which is the care of the ward or the lunatic." (p437)

107. *Scott v Scott* and the development of the common law in England and Wales of the concept of open justice and the component aspects of a fair trial predated the ECHR and Art. 6. Since the overlay of the Human Rights Act 1998 and ECHR rights to the common law open justice principles, it is often expressed in terms that derogations from the principle of open justice must be ordered only when it is necessary and proportionate to do so, with a view to protecting the rights which the claimant (or others) are entitled to have protected by such means (see for example the White Book Commentary at 39.2.2).

108. In *Pickering v Liverpool Daily Post and Echo Newspapers plc* [1991] 2 AC 370 the application of the exception to the open justice principle to information about an upcoming hearing before the Mental Health Review Tribunal ("MHRT") (the predecessor to the FTT) was considered by the House of Lords in the context of a contempt application and the intended publication by a newspaper of details of Mr Pickering's forthcoming MHRT hearing at which he was seeking a discharge from a hospital order. The court was satisfied that it was sufficiently clear from the legislation that the order or direction of the MHRT whether to discharge, either absolutely or conditionally, could be published. But it was held that:

> "To the extent that the recorded reasons for the decision disclose the evidential and other material on which it is based, there is no difficulty in holding that this falls, as it must, within the protected area." (424E-F)

And could therefore not be published. Furthermore

> "….. [T]he conditions, if any, imposed by the tribunal seem to me to belong within the area of matters relevant to the patient's mental condition which ought from their nature to remain subject to protection from publication." (424G-H)

109. The case left unanswered what was described as the "both difficult and important" question of what the position would have been if the newspaper had been threatening to publish part of the evidence before the tribunal.

110. In *R (Mersey Care NHS Trust) v Mental Health Tribunal* [2005] 1 WLR 2469, the claimant was the NHS trust responsible for Ian Brady, a convicted murderer. The MHRT had granted Mr Brady's request for a public hearing of a statutory review of his restriction order. On a statutory appeal to the High Court by the NHS Trust challenging

the decision to allow the hearing to be in public, the MHRT decision was overturned since it had failed to take into account not only the interests of the patient, but also the wider public interest and the impact on the patient of a public hearing. It had also failed to give adequate reasons for its decision. In reaching his conclusion Beatson J (as he then was) noted that a presumption in favour of hearings in private was justified when required for the protection of the private lives of the parties, as recognised by Parliament in s.78 MHA 1983. In such a case it is for the person who desires a public hearing to demonstrate why the "normal" rules (as set out in the MHRT rules of procedure presuming in favour of hearings in private (just as in the FTT Rules)) should not be followed [13(7)].

111. I am mindful that the FTT is a specialist tribunal and courts should be slow to interfere on review (*Department for Work and Pensions v Information Commissioner* [2016] Civ 758 [34]). This court may only interfere if an error of law is demonstrated in the FTT's reasoning such that it strayed beyond the bounds of the exercise of its discretion.

112. Which brings us to the reasoning in the Further Decision.

113. In line with *AH* there can be no criticism of Judge Johnston starting with the presumption of privacy in cases involving the mental health of a patient since the purpose of the Conditional Discharge Decision was to assess the mental health of Mr Wilson-Michael. Specifically its purpose was to consider if Mr Wilson-Michael was suffering from a mental disorder or from mental disorder of a nature or degree which made it appropriate for him to be liable to detained in a hospital for medical treatment; whether it was necessary for his safety or the protection of other people that he should receive such treatment; and, the availability of appropriate medical treatment pursuant to s.73 MHA 1983. The presumption applied both on the facts of the case and in accordance with the FTT Rules. The question is whether the judge had applied the correct legal test of what was required to rebut that presumption and if she had erred in law in her conclusions.

114. In the Further Decision Judge Johnston did not direct herself that departing from the open justice principle can only be justified in exceptional circumstances when they are strictly necessary to secure the proper administration of justice, but jumped straight to the presumption contained in the FTT Rules. As a consequence she did not engage with the purpose of the open justice principle which is to both assist in justice being done through transparency and also to enable the public to have confidence in the system.

115. In this case Ms Maher's loss of confidence in both the criminal justice and mental health system was all too apparent in her application for reasons for the Conditional Discharge Decision. Her confidence would no doubt have been further undermined when the original date was postponed after she had pointed out that Mr Wilson-Michael appeared not to have had any unescorted leave before the original hearing date and she questioned whether the FTT would have sufficient information to judge whether to discharge Mr Wilson-Michael. The date of the original hearing was then postponed for his doctors to assess how he responded to overnight leave in the community. Ms Maher may well have thought there was a link between her application and the postponement of the original hearing date because of her bringing to their attention what she understood was a gap in the information in order to assess the s.73 criteria.

116. The reasons for and against rebutting the presumption of privacy in mental health cases needed to be weighed against the open justice principle as a proportionality exercise for the FTT to undertake when considering whether to exercise its discretion. Without having set out the rationale for the open justice principle the exercise becomes unbalanced.

117. The consideration thus focussed too much on Ms Maher's reason for her request, and in any event the Further Decision glosses over the full reasons for the request, summarising it as being in order to mount a legal challenge against the Conditional Discharge Decision. There are a number of difficulties with this. It formed a small aspect of the reasons Ms Maher put forward for seeking reasons for Mr Wilson-Michael's conditional discharge. Nor did it engage with why Ms Maher might have understandable concerns about it, such as the pace and progress towards discharge in a relatively short space of time after the index offence, and her experience and perception of the failures of the mental health services in managing Mr Wilson-Michael's condition in the community previously. Nor is it clear why wanting reasons in order to challenge a decision would be a good reason for not providing them. It is true that Ms Maher is not a party to the proceedings, but she has locus in judicial review proceedings, and a public body could not refuse to provide reasons for a controversial decision as a way of trying to avoid challenge[5].

118. The tribunal judge has fallen into the error identified by Carnwath LJ in *AH* at [42] in focussing on the motives of the applicant in seeking to know the reasons, or the gist of the reasons, for the FTT's decision. For the reasons Carnwath LJ explained in *AH* at [43], those considerations should not have been given weight in the overall balance. In this case, as in *AH*, the emphasis on why Ms Maher wanted more information clouded the tribunal's consideration of other, more relevant issues.

119. The judge did not direct herself that the extent of the derogation should be no more than is strictly necessary to achieve the desired purpose. She did not consider providing Ms Maher with a gist or summary of the reasons in a way that would protect Mr Wilson-Michael's privacy and provide the reassurance and solace she craved from understanding more about the Conditional Discharge Decision.

120. In the final sentence the Further Decision does not explain why a redacted version of the Conditional Discharge Decision could not meet the privacy rights of Mr Wilson-Michael or why redacted reasons were not "possible" [22]. It did not adequately explain her reasons.

121. In any event, the Further Decision did not engage sufficiently with the reasons that Ms Maher had put forward[6]. The request sets out the history of poor engagement by the Victim Contact Service and VLO for the first year after Mr Wilson-Michael's conviction. Indeed, in her submissions Ms Hirst for Mr Wilson-Michael acknowledged the significant failings in communication by the authorities at earlier stages of the process, and accepted they led to a heightened desire for transparency and solace in Ms Maher's case.

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[5] And if they did the refusal would probably be a good ground of challenge in itself.

[6] I have only taken account of what was before the FTT as I am mindful that I have been given a much fuller account than was provided in the request to the FTT.

122. It is a minor detail but it is also wrongly stated in the Further Decision that Ms Maher had been told that Mr Wilson-Michael would be tested for drugs and alcohol, and that he was required to remain abstinent, when that was not set out in the letter.

123. It is worth returning to the reasons for the importance of the open justice principle which include ensuring public confidence in judicial decisions through transparency and it is a developing area of the law. The direction of travel in the last 30 years or so has been towards openness and a more rigorous scrutiny of exceptions to the open justice principle and creative thinking about how conflicting rights can be reconciled. The case of *Pickering* is a good example – in 1991 it was thought that the conditions attached to a discharge decision for a mental health patient justified an exception to the open justice principle, but by 2004 and the DVCVA 2004, this was no longer the case. The progress towards openness and transparency in the Court of Protection, Family Courts and the Parole Board are also good examples.

124. Mr O'Brien and Ms Hirst are right to say that the other jurisdictions relied on by the claimant are not exact matches, but the approach of the FTT is something of an outlier. The important reasons for the open justice principle are well set out in the authorities and the practice guidance in the Family Courts of 2014. Suspicion and mistrust thrive when accurate information is not made available to the public about matters which affect them.

125. In this case Ms Maher had exceptional reasons for wanting a gist of the reasons for the Conditional Discharge Decision which were the history of poor engagement by the criminal justice and victim support services and the depth of her lack of confidence in the mental health services to both treat and protect mental health service users and patients (including Kyle) and to minimise their risk to others, based on her own experiences and perception. The FTT has therefore either applied too high a threshold to exceptionality or failed sufficiently to consider the reasons put forward by Ms Maher. It is telling that the FTT could not think of any circumstances that would meet the exceptionality test it was applying.

126. The Further Decision did not engage sufficiently with Ms Maher's reasons and did not provide adequate reasons for its decision, in particular a failure to consider if a gist of the reasons could have been provided to Ms Maher, nor why redacted reasons were not "possible".

127. I therefore conclude that the FTT reached an unlawful decision in its Further Decision on the facts of this case. I agree with Ms Hirst that it is not appropriate to make wider pronouncements – it is for Parliament to consider with the benefit of the Victims' Commissioner's report whether and if so what legislative changes are required to balance the competing interests of privacy rights and the open justice principle, and also for the Tribunal Procedure Rules Committee.

Grounds 2- 4: discrimination contrary to Article 8/14 ECHR in the provisions of reasons (ground 2), VPS (ground 3) and right to request reconsideration (ground 4)

128. ECHR Article 14 provides:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any

> ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

129. Article 8(1) provides:

> "Everyone has the right to respect for his private and family life, his home and his correspondence."

130. Article 14 ECHR is not a free-standing anti-discrimination provision, but its purpose is to ensure that Convention rights can be enjoyed.

131. It is for the claimant to show (1) that her case falls within the "ambit" of a Convention right, such as Art 8; (2) that there was a difference of treatment in respect of that right as between herself and others put forward for comparison; (3) that the differential treatment was on the basis of a "status" falling within Art 14; and, (4) that she is in an analogous position to victims as before the Parole Board. If she succeeds, it is for the defendant to show that the treatment was objectively justified in the sense of being a proportionate means of achieving a legitimate aim. The claim will succeed unless the defendant discharges its burden of proof.

132. At the heart of these grounds is the different treatment and different rights and entitlements of, on the one hand, victims of crime when the offender is subject to an indeterminate prison sentence and their release from custody is being considered by the Parole Board and, on the other hand, when the offender is subject to a hospital order with or without a restriction order and their discharge is being considered by the FTT. It is convenient to start with the generic features of these three grounds that rely on the same legal principles, to avoid unnecessary repetition.

133. The second and third defendants challenged only whether Ms Maher was in an analogous position to a bereaved mother whose son's unlawful killer had been given an indeterminate prison sentence and, if the court were to be satisfied on this point and the burden had shifted to the defendants, the question of justification. Other than conceding that if he had been given an indeterminate prison sentence Ms Maher would have been treated differently by the Parole Board to the FTT, Mr Wilson-Michael challenged each of the elements necessary for Ms Maher to establish her claim and he supported the defendants in their objective justification defence. The first defendant was neutral and made no submissions on grounds 2-4.

Ambit

134. The first question is whether the subject matter of the complaint falls within the ambit of the substantive ECHR right to family life. It is common ground that no breach of ECHR right is required and that the question of 'ambit' is to be interpreted flexibly, but Ms Hirst submits that the connection between the treatment complained of and the right to family life is too tenuous in this case, and goes beyond the scope of the authorities. She considers it to be significant that *DSD* did not discuss breach of ECHR rights of the victims as an issue.

135. The case law supports a broad, expansive scope to be applied to the consideration of the nexus between the ECHR right relied on and the treatment. See for example *R (Clift) v SSHD* [2007] 1 AC 484 [12]:

> "The prohibition of discrimination in Article 14 … extends beyond the enjoyment of the rights and freedoms which the Convention and Protocols require each State to guarantee. It applies also to those additional rights, falling within the general scope of any Convention article, for which the State has voluntarily decided to provide."

136. More recently in *Smith v Lancashire Teaching Hospital* [2018] QB 804 the Court of Appeal rejected a suggestion that a measure had to be "very closely connected" to a substantive right to fall within the ambit of Article 14. "[On] the contrary, the authorities have emphasised the width and flexibility of the ambit test" and it referred to Sir Nicholas Bratza's observation in *Zarb Adami v Malta* (2007) 44 EHRR 3 at I-17 that "it is indisputable that a wide interpretation has consistently been given by the Court to the term 'within the ambit'".

137. *Smith* concerned the payment of bereavement damages to family members. The discrimination in that case was the differential treatment as between married partners and cohabitees for dependency damages. It was a positive measure introduced by the State which was not required by Art 8, but was "a modality of the exercise of the rights guaranteed by Art 8" and the Court found that the State would

> "…be in breach of Art 14 if the measure has more than a tenuous connection with the core values protected by Art 8 and is discriminatory and not justified. It is not necessary that the measure has any adverse impact on the complainant … other than the fact that the complainant is not entitled to the benefit of the positive measure in question." [72]

138. The court found that bereavement damages fell within the 'ambit' of Art 8 even though they were not required by Art 8 since they were "intended to reflect the grief that ordinarily flows from the intimacy which is usually an inherent part of the relationship between husband and wife and civil partners" and are thus "positive measures … by which the State has shown respect for family life, a core value of Art 8" [72].

139. I agree with Mr Squires KC's submissions that the *Smith* analysis is analogous. It is immaterial that Art 8 does not require the Parole Board to release a summary of its reasons to victims, but the fact that it does so is demonstrative of respect for family life since victims include close relatives. It goes without saying that providing reasons to family members about why an offender who has killed their close relative is being released shows respect for the family life of the victim left coping with the grief of their loss. The loss of a close family member through homicide strikes at the heart of family life. The connection with Art 8 is not as tenuous as the interested party sought to present. Nor does the fact that the point was not raised or argued in *DSD* take the matter any further.

Other status

140. This point too may be taken briefly. Art 14 sets out the well-known list of protected characteristics or suspect grounds, but it is a non-exhaustive list allowing for "other status". Ms Maher describes her status, or identifiable characteristic, as being the mother of a son whose killer was given a Hospital Order and a Restriction Order.

141. The cases have emphasised that a generous interpretation is appropriate (see e.g *R (Stott) v SSJ* [2020] AC 51 [56(i)] and *R(SC) v SSWP* [2019] EWCA Civ 615 [62], [64], *Clift v UK* (App no 72015/07) at [60]):

> ""a status need not be innate or an inherent aspect of an individual's personality but may be a feature of a person's circumstances or living situation on which a legal consequence depends" (*SC* [76])"

142. There is no dispute that being subject to a hospital order with or without a restriction order (and thus detained in hospital), as opposed to being imprisoned for a crime, would constitute a difference in "status". The question is whether the same can be said for victims of those offenders. Ms Hirst's argument was that the reason for the differential treatment was not related to Ms Maher's status but that of Mr Wilson-Michael. She also argued that the reason for the differential treatment was because the treatment was meted out by separate public bodies governed by different rules and statutes. But her argument failed to acknowledge the scope of the "increasingly generous view of what is capable of amounting to a relevant status" followed by the UK's courts (*Clift* [65]). The different functions and statutory powers of the Parole Board as compared to the FTT are not determinative of Ms Maher's status.

Similar situations/analogous position

143. The purpose of analysing the similarity of situation as between the different treatment of people not sharing the same status is at the heart of the comparative exercise that is central to the consideration of understanding discrimination so that it can be identified whether the reason for the differential treatment is because of the suspect ground identified in Art 14 or other status.

144. In this case, as already noted, Ms Maher framed her comparator as the mother of someone whose son was unlawfully killed and the offender being given an indeterminate prison sentence. In that case when the Parole Board come to consider whether to release the killer, the mother of the victim would have the benefit of the rights contained in the 2019 Rules. Both Ms Maher and her hypothetical comparator are victims, as defined in the statutory code and their circumstances materially identical.

145. Since I have found that Ms Maher has "other status" it follows that she has correctly framed the comparison. The significance of the different underlying statutory regimes and purpose as between MHA 1983 and the Sentencing Act 2020 is a matter for the next stage in the process, whether the defendants have objectively justified the differential treatment.

Objective justification

146. The parties agreed the four step test for justification under the ECHR, including Article 14 set out in *Bank Mellat v HM Treasury (No 2)* [2014] AC 700:

(i) whether there is a legitimate aim for the difference in treatment contained in the measure, sufficiently important to justify the limitation of a Convention right;

(ii) whether the measure is rationally connected to the legitimate aim;

(iii) whether a less intrusive measure could have been used; and

(iv) whether a fair balance has been struck between the rights of the individual and interests of the community.

147. However the parties did not agree as to the margin of appreciation or degree of scrutiny to be applied by the court to the assessment of the explanation for the differential treatment advanced by the second and third defendants. The second and third defendants submitted that because the alleged discrimination is not on the basis of a core or suspect ground, such as race or sex or sexual orientation, the test for whether the alleged difference in treatment is justified is whether it is "manifestly without reasonable foundation' (see *R (Carson) v SSWP* [2006] 1 AC 173 at [55]-[60]; *R (Drexler) v Leicestershire County Council* [2020] EWCA Civ 502 at [76] or that no more than "sufficient reason" is required (*R (SM) v Lord Chancellor* [2021] 1 WLR 3815 at [21]).

148. The interested party placed his arguments for the adoption of more light touch level of scrutiny on the basis that a decision within the institutional competence of the executive or legislature is entitled to a significant degree of deference. In this case deference to Parliament and the Tribunal Procedure Rules Committee was called for.

149. Ms Maher submitted that the status relied on by a claimant - whether it be a "suspect" ground identified in the non-exhaustive list contained within Art. 14, or "other status" was only one of the relevant factors to be considered when determining the level of scrutiny to be applied. The key issue is whether the case involves a challenge to something that is "pre-eminently a matter of political judgment" and in particular whether it involves "decisions [that] concern the allocation of scarce public resources" (*Drexler* [71]). For such matters the executive or legislature are more appropriate primary decision-makers than the courts given their institutional competence and democratic accountability (*Drexler* [76] and [79]), and a significant degree of deference will apply to their assessment that a measure is proportionate. It is that consideration that is critical in determining the level of scrutiny that is required, rather than the basis of the alleged discrimination. Ms Maher's case was not advanced by the defendants as being about allocation of scarce resources, but the different functions of the Parole Board and FTT and the privacy rights of patients.

150. Both the second and third defendants and the interested party submitted that whatever the evidential threshold test, the second and third defendants had met it.

151. I next turn to the objective justification grounds advanced by the second and third defendants. The first was the different nature of the functions performed by the FTT when determining an application to discharge a restricted patient under section 73 of the MHA1983 from the functions of the Parole Board. Mr Wilson-Michael was being assessed as a mental health patient and the FTT was restricted in its adjudication to the

statutory matters set out in ss.72 and 73 MHA 1983. The Parole Board is assessing the risk re-offending and of harm and the protection of the public if an offender is released. The different functions of the two bodies (FTT and Parole Board) justify differential treatment of the victims, dependent on whether the offender is subject to a hospital order with or without a restriction order or an indeterminate prison sentence.

152. For Mr Wilson-Michael Ms Hirst relied not only on the different functions and purposes of Parole Board hearings and the hearings before the FTT, but also their very different procedures and rules, and the primary and secondary legislation. The legitimate aim was to ensure that an appropriate procedure is adopted for two very different types of proceedings, with a different nature and purpose.

153. By way of background, the decision for a sentencing judge in the Crown Court as between the imposition of an indeterminate custodial (or indeed other) sentence or the making of a hospital order with or without a restriction can be finely balanced. The court must consider all the evidence and not feel bound by medical opinion. In considering whether a hospital order is the most suitable disposal the court must always have regard to the extent to which the offender requires treatment, the extent to which the offending is attributable to the mental condition, the extent to which punishment is necessary, and the need to protect the public, including the regime for deciding upon release and the nature of the supervision after release (*R v Vowles* [2015] EWCA Crim 45).

154. Mr Squires submitted that although there are differences in the purposes of the FTT and the Parole Board, the specific differences must be justified and pointed to the striking disparity between the Parole Board having to provide reasons in every case, and the FTT only in exceptional circumstances, none of which could be envisaged.

Discussion

155. For the reasons set out above, Ms Maher has established a prima facie case under Art.14/8 and the focus of attention is on whether the second and third defendants have objectively justified the three impugned differences in treatment. Starting with some general observations before addressing each specific ground, as explained above, the Parole Board has a different function and role to that of the FTT. They are each dealing with offenders, but the similarity ends there. The Parole Board is required to consider if it is satisfied that it is no longer necessary for the protection of the public that an offender be detained whereas the FTT is concerned with the treatment of a mental health patient, their clinical progress and assessment of risk.

156. I am satisfied that in general terms the second and third defendants have shown that there is a legitimate aim in protecting mental health patients. I also accept that they are entitled to a considerable margin of appreciation where, as here, the claimant is relying on a non-suspect classification but some "other status" and the issues also concern the balancing of competing ECHR rights. Allocation of public resources is merely one factor to be considered since all relevant factors are to be considered in the proportionality exercise.

Ground 2: lack of reasons

157. Turning to the specific grounds of challenge. Since I have found the First Decision and the Further Decision to be unlawful it follows that they cannot be relied on to justify the failure to allow Ms Maher to know of the gist of reasons for Mr Wilson-Michael's conditional discharge. Although I am satisfied that the measure is rationally connected to the legitimate aim, the second and third defendants have not proved that a fair balance has been struck between the rights of Mr Wilson-Michael and the interests of the community in transparency and the open justice principle and Ms Maher's right to family life. There is no doubt about the extreme distress and anguish after Kyle's death made worse by her not being allowed to know of the reasons for the Conditional Discharge Decision and the benefit that she would have gained from being more involved.

158. The second and third defendants have not established that there were no less intrusive measures available to meet their legitimate concerns about patient privacy – such as providing the gist, or summary, or a redacted version of the Conditional Discharge Decision.

Ground 3: VPS

159. I take a different view on ground 3. Ms Maher and her family would have had an opportunity to provide a VPS at the time of the Crown Court sentencing hearing. That was her opportunity to explain the impact of the crime upon her and her family either by reading it herself or having it read aloud on her behalf in open court. It is a powerful tool. It is directly relevant at that stage of a case as the Court is required to consider the level of harm in the sentencing exercise.

160. When looking at the different purposes of the FTT hearing, a VPS of the type sought by Ms Maher would have very limited relevance to the FTT task in hand and the essentially clinical nature of the exercise and the refusal was objectively justified. My conclusion would not preclude victims in FTT hearings being allowed to provide more expansive representations or a VPS before an FTT hearing, it is merely that a failure to align the FTT representations to the Parole Board VPS is not unlawful. I also note that the differences between what may be contained in a Parole Board VPS and an FTT representation is not so very different. But the ground must fail as objective justification has been made out because of the different purposes in the function of the Parole Board and the FTT, and the clinical nature of the exercise of the FTT function.

Ground 4: reconsideration request

161. In relation to this ground, in addition to the different purposes in the function of the Parole Board and the FTT, and the clinical nature of the exercise of the FTT function, the second and third defendants raised two further points specific to ground 4. Firstly that in principle the rights to reconsideration as between the FTT and Parole Board were the same: there was no right for victims to request a reconsideration of a Parole Board decision and the only legal route of challenge from both FTT and Parole Board decisions was by way of judicial review.

162. Secondly the third defendant cited a further legitimate aim for not allowing Ms Maher to request a reconsideration of the Conditional Discharge Decision that had not been fully articulated in the pleadings and was developed during the course of argument. It crystallised as being "to avoid a procedure lacking the necessary clinical expertise,

which, contrary to the likely expectations of the victim, would be of no relevance to the question of whether the decision should be reconsidered, and would also carry with it associated administrative time and cost." Permission was given to Mr O'Brien to put the formulation in writing and for Mr Squires to provide written submissions in response, since it evolved somewhat during the course of the hearing.

163. Mr Squires' response noted that two separate and distinct additional matters were now being relied on. On the first Mr Squires submitted that there was no material difference between a Parole Board victim's lack of expertise in risk management and an FTT victim's lack of knowledge of mental health clinical expertise. On the second, no evidence had been submitted in support of the additional administrative time and cost and the defendant had not discharged its burden of proof. There would need to be some evidence as to the time and costs likely to be involved. The vague reference to administrative time and cost, without elaboration or evidence did not satisfy the evidential threshold and standard of proof. But even allowing for common sense and taking judicial note that it would obviously and inevitably involve some extra work in processing and considering a request for the SSJ to apply for a reconsideration, he submitted that the impact on victims of crime of being shut out from having any input in the possibility of a reconsideration far outweighs the minimal additional time and cost in processing a request that the SSJ apply for a reconsideration.

164. I agree with Mr Squires that the administrative costs argument is not sufficiently evidenced and something of a makeweight. But I return to the different functions of the Parole Board and FTT respectively. The FTT is concerned with narrow clinical issues. The broader basis for Parole Board decisions is sufficient to justify victims not being able to ask the SSJ to seek a reconsideration.

165. I acknowledge Ms Maher's concern at being shut out of the process, but the FTT is engaged in a primarily clinical assessment and exercise. There is a real distinction with knowing the outline, gist or summary of the reasons for the FTT decision in order to understand it and help come to terms with the outcome and possibly obtain some closure.

166. In any event if matters have gone awry to the extent of straying into unlawfulness, irrationality or Wednesbury unreasonableness territory, judicial review is potentially available.

Conclusion

167. In summary, grounds 2, 3, 4 and 6 grounds are arguable and permission is granted. On the full hearing, grounds 1, 2 and 6 are well founded but grounds 3 and 4 fail. The failure of the FTT to give Ms Maher reasons, or the gist of reasons, for its Conditional Discharge Decision in its First Decision was unlawful and it was not cured by the Further Decision, which was also unlawful. The failure of the FTT to permit Ms Maher to submit a VPS was not unlawful, nor was her inability to request a review of the Conditional Discharge Decision.