Neutral Citation Number: [2021] EWHC 300 (Admin)

Case No: CO/776/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/02/2021

Before :

MRS JUSTICE STEYN DBE

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Between :

THE QUEEN

- on the application of -

SAM GISAGARA	**Claimant**
- and -	
THE UPPER TRIBUNAL (ADMINISTRATIVE APPEALS CHAMBER)	**Defendant**
- and -	
CAMDEN AND ISLINGTON NHS FOUNDATION TRUST	**Interested Party**

- -

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Chris Buttler (instructed by **Campbell-Taylor Solicitors**) for the **Claimant**
David Lawson (instructed by **Hempsons Solicitors**) for the **Interested Party**
The Defendant did not appear and was not represented

Hearing date: 11 February 2021

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Approved Judgment

Mrs Justice Steyn :

1. The Claimant seeks permission to challenge a decision of the Upper Tribunal (Administrative Appeals Chamber) made on 4 February 2020 ("the UT decision") refusing permission to appeal to the Upper Tribunal against a decision of the First Tier Tribunal made on 25 July 2019 ("the FTT decision").

2. The Claimant was detained under s.3 of the Mental Health Act 1983. It is unnecessary, in this permission decision, to detail his long history of compulsory detention in psychiatric hospitals in the UK and abroad, and numerous conditional discharges. In October 2018 the Claimant was discharged on a Community Treatment Order ("CTO"). He was recalled to hospital and had his CTO revoked in March 2019 and again in May 2019. The hearing before the FTT took place as a result of those revocations.

3. At the time of the hearing before the FTT, the Claimant's responsible clinician had sent him home on s.17 leave and she intended to discharge him imminently on a further CTO. The FTT found that there was compelling evidence that the imposition of a CTO was an "essential precondition" to his discharge because without this legal framework the Claimant would not accept his anti-psychotic medication and without that treatment his mental health would soon deteriorate again.

4. As this is a claim for judicial review of an Upper Tribunal decision, CPR 5.7A applies. CPR 5.7A(7) provides:

> "The court will give permission to proceed only if it considers -
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> (a) that there is an arguable case, which has a reasonable prospect of success, that both the decision of the Upper Tribunal refusing permission to appeal and the decision of the First Tier Tribunal against which permission to appeal was sought are wrong in law; and
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> (b) that either—
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> (i) the claim raises an important point of principle or practice; or
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> (ii) there is some other compelling reason to hear it."

5. The application for permission was listed for an oral hearing, pursuant to the order of Freedman J dated 29 December 2020 on the grounds that the arguments are "*sufficiently substantial to merit further consideration at an oral hearing*".

6. In his statement of facts and grounds, and his skeleton argument, Counsel for the Claimant, Mr Buttler, identified the important point of principle as being a conflict of authority as to whether the criteria in the Mental Health Act 1983 for discharging patients from psychiatric detention mirror the criteria for admission. The Court of Appeal held that they do not in *R (Canons Park Mental Health Review Tribunal ex p A* [1995] QB 60. Whereas the House of Lords came to the opposite conclusion in relation to the equivalent provisions in the Scottish Mental Health Act in *Reid v*

Secretary of State for Scotland [1999] 2 AC 512. The House of Lords declined to follow *Canons Park*, but as the Mental Health Act 1983 (i.e., the Act that applies to England and Wales) was not before the House of Lords in *Reid*, *Canons Park* could not be overruled.

7. The Interested Party's statement of grounds, although opposing the grant of permission, submitted that the FTT was bound by *Canons Park* and could not lawfully follow the House of Lords' approach in *Reid*. If that were the case, it would provide strong support for the Claimant's contention that there is an important conflict of authority that requires to be resolved.

8. However, in his skeleton argument and at the hearing Counsel for the Interested Party, Mr Lawson, refuted the contention that there is an ongoing conflict of authorities, drawing attention to two cases in which the Court of Appeal has followed *Reid* rather than *Canons Park.*

9. The doctrine of precedent means that the Court of Appeal cannot depart from any of its own decisions unless one of the three exceptions to the rule identified in *Young v Bristol Aeroplane Co Ltd [1944] KB 718* applies. The exceptions are:

   i) The court is entitled and bound to decide which of two conflicting decisions of its own it will follow.

   ii) The court is bound to refuse to follow a decision of its own which, though not expressly overruled, cannot, in its opinion, stand with a decision of the House of Lords.

   iii) The court is not bound to follow a decision of its own if it is satisfied that the decision was given per incuriam.

10. In *R (H) v North & East London Mental Health Review Tribunal* [2002] QB 1 the Court of Appeal held that the "*criteria that the tribunal has to consider on an application under section 73 are the same criteria that have to be satisfied before a patient can be admitted under section 3*" (Lord Phillips MR giving the judgment of the Court at [15] and [20]). The Court of Appeal's attention was drawn to both *Canons Park* and *Reid*. In following *Reid,* the Court of Appeal must, unsurprisingly, have considered that the second of the *Young v British Aeroplane* exceptions applied.

11. In *R (Von Brandenburg) v East London and The City Mental Health NHS Trust* [2002] QB 235 Lord Phillips MR referred at [17] to Counsel's attack on a decision of Laws J that there was no cross-reference between the section 3 regime and the tribunal's functions under sections 66 and 72(1). He said:

> "17. …[Counsel] submitted that the decision of the House of Lords in *Reid v Secretary of State for Scotland* [1999] 2 AC 512, which relates to provisions of the Mental Health (Scotland) Act 1984 which are essentially identical to those of the Mental Health Act 1983, demonstrates that the criteria for admission under section 3 and discharge under section 72 mirror one another.

> 18. This is plainly correct."

12. Again, the Court of Appeal was made aware of the conflicting authority of *Canons Park* and may be taken to have applied the second exception.

13. In *B v Secretary of State for Justice* [2012] 1 WLR 2043 Arden LJ (with whom Moses and Maurice Kay LJJ agreed) said at [25]:

> "The conditions referred to in section 73(1)(a) mirror the detention criteria in section 3. As Roch LJ put it in his dissenting judgment in *R v Canons Park Mental Health Review Tribunal, Ex p A [1995] QB 60*, 77, cited with approval by Lord Hope of Craighead in *Reid v Secretary of State for Scotland [1999] 2 AC 512*, 528, it is evident from section 72 that: "The policy of the Act, in relation to patients with psychopathic disorders, is treatment not containment.""

14. The Court of Appeal has repeatedly held that the approach taken in *Reid* applies to the Mental Health Act 1983. The criteria for discharging patients from detention pursuant to the Mental Health Act 1983 mirror the criteria for admission. Counsel for the Claimant and Counsel for the Interested Party both acknowledge that the submission that tribunals are bound by *Canons Park* is wrong.

15. Nevertheless, Mr Buttler maintains his application for permission. The crux of his argument is that the Claimant was on s.17 leave. He relies on *R (CXF) v Central Bedfordshire Council* [2018] EWCA Civ 2852 (a case concerning after-care services pursuant to s.117) for the proposition that it will be a question of fact whether a patient who has been granted leave of absence from hospital under s.17 is still "detained" rather than only "liable to be detained". In this case, he submits the FTT failed to determine whether the Claimant was still detained and whether he still required treatment which could not be provided unless he was detained under s.3.

16. Giving reasons for refusing permission to appeal, Kate Markus QC, a Judge of the Upper Tribunal, said:

> "3. At the FTT hearing the evidence of the responsible clinician (RC) had been that she intended to discharge the Appellant on a community treatment order (CTO) as soon as possible and that she would have done so the day after the hearing in the FTT had an AMHP been available. Even so, she intended to discharge him by the following week. In the meantime he was at home on section 17 leave. Her clear evidence was that putting in place a CTO was a necessary pre-condition for his discharge, as without it he would not accept his medication. The other mental health professionals were also of the view that a CTO was required in order to ensure the Appellant's compliance with his medication.
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> 4. The Appellant's representative at the FTT hearing had submitted that, in the light of the evidence that the Appellant needed to be given medication under compulsion but not in

hospital, the conditions in section 3(2) of the MHA were not satisfied and so he should be discharged. The FTT rejected this. It held that its power to discharge was governed by section 72(1) and not section 3(2), and the test was whether it was appropriate for the patient to be liable to be detained in hospital. The FTT held that this test was satisfied because he was on section 17 leave and would not be discharged until a CTO was in place. In essence, it was appropriate that the Appellant be liable to be detained in hospital because a CTO was a necessary condition for his discharge.

5. Mr Buttler submitted that the FTT's approach was fundamentally flawed because it involved a rejection of the fundamental principle that the conditions for discharge in section 72 are intended to be a mirror of those for detention in section 3. If the section 3 conditions were not satisfied then the patient must be discharged. He submitted that the FTT's observation that the Appellant's representative "had confused the criteria for admission for treatment with the criteria to be applied by the tribunal" showed that the FTT rejected that fundamental principle.

6. Mr Buttler's submission as to application of this principle and the relevant statutory criteria in the present case was as follows. The RC's evidence was that the Appellant satisfied the criteria for a CTO, the only obstacle having been the availability of an AMHP. One of those criteria was in section 17A(5)(c) which was that, subject to be liable to recall, medical treatment could be provided without the Appellant continuing to be detained. It followed that the Appellant did not satisfy the criterion in section 3(2)(c) that the medical treatment could not be provided without being detained under section 3. As the discharge criteria in section 72(1)(b)(i) and (ii) are the flipside of section 3(2)(c), the FTT was obliged to direct the discharge of the Appellant.

7. Mr Buttler submitted that the FTT failed to recognise that the criteria for a CTO were incompatible with the criteria for detention and so failed to inquire of the RC whether, in the light of her intention to discharge on to a CTO, she nonetheless considered that the criteria for detention were satisfied.

8. I am satisfied that these submissions have no arguable merit. The tribunal was required to consider the exercise of its powers and duties in the light of the actual circumstances at the time of its decision. At that time there was no CTO in place. It was clear from the RC's evidence that a CTO was a necessary pre-condition of the Appellant's discharge and, until a CTO was in place, he needed to be liable to be detained in order to secure compliance with medical treatment. The handwritten note of her evidence "I don't feel he needs to be detained in hospital"

> should not be taken in isolation but must be read in the context of her evidence as a whole. He did not need to be detained in hospital if he was on a CTO. However, as he was not on a CTO he did need to be detained albeit that he could be granted section 17 leave.
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> 9. If Mr Buttler was correct, it would mean that as soon as the RC considered that a CTO was appropriate they would have to discharge the patient because, on the basis of Mr Buttler's submissions, the RC's view would mean that the conditions in section 17A were satisfied and so section 3 could not be. Furthermore, once discharged a CTO could not be made because the patient would not be a detained patient within section 17A. That would be unworkable and a nonsense.
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> …
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> 11. In the light of this, Mr Buttler's submissions regarding *R v Canons Park MHRT ex p A* [1995] QB 60 and *Reid v Secretary of State for Scotland* [1999] 2 AC 512 are not relevant. The decision of the FTT was not arguably inconsistent with the approach in *Reid*."

17. It is not arguable that the Upper Tribunal erred in rejecting the submission that the responsible clinician's decision that the Claimant should be discharged once a CTO was in place showed that the s.3 criteria were not met.

18. Mr Buttler did not seek to challenge the Upper Tribunal's conclusion that such an approach would be unworkable and he acknowledged that it would be inconsistent with s.72(3A). His contention was that by focusing on the CTO the Upper Tribunal was raising and knocking down a "straw man", rather than addressing the argument based on the fact the Claimant was on s.17 leave. However, the focus on s.17 is not apparent in the Claimant's applications for permission to appeal to the FTT or the UT, or even in the statement of grounds and skeleton argument in this judicial review claim, and the Upper Tribunal heard oral argument and addressed the submissions that were made.

19. In any event, focusing on s.17 does not demonstrate an arguable error. There was compelling evidence that if the Claimant were discharged he would not take his medication. The legal framework of a CTO was an essential precondition to his discharge. The responsible clinician's decision to grant the Claimant leave to be absent from the hospital, pursuant to s.17, subject as the FTT observed to the requirement that he "*can be brought back to hospital at any time*", until she was able to put a CTO in place within the next few days, does not detract from the clear import of the evidence that the Claimant needed to be detained until a CTO was in place.

20. While I accept that there was an arguable error of law in the FTT's decision at §18, in my judgment the Upper Tribunal made no arguable error in concluding that it made no difference to the outcome. Nor does the claim meet the requirements of rule (7)(b)(i) or (ii) of CPR 5.7A. The important point of principle relied on in the

summary grounds has evaporated and I am not satisfied that any other important point of principle arises on the facts and arguments deployed below in this case.

21. Accordingly, permission is refused.