THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

UPPER TRIBUNAL CASE NO: HM/2172/2019
[2020] UKUT 152 (AAC)

GM v DORSET HEALTHCARE NHS TRUST AND THE SECRETARY OF STATE FOR JUSTICE

Decided following an oral hearing on 8 January 2020, with subsequent written submissions on behalf of the patient

Representatives

Patient	Sean Waters, solicitor, of The Mental Health Practice
Trust	Took no part
Secretary of State	Government Legal Department made no submission

DECISION OF UPPER TRIBUNAL JUDGE JACOBS

Save for the cover sheet, this decision may be made public (rule 14(7) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI No 2698)). That sheet is not formally part of the decision and identifies the patient by name.

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

Reference: MP/2019/17792
Decision date: 12 August 2019

The decision of the First-tier Tribunal did not involve the making of an error on a point of law under section 12 of the Tribunals, Courts and Enforcement Act 2007.

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REASONS FOR DECISION

A. What this case is about

1. There is inevitably a delay between an application or reference being made to the First-tier Tribunal in a mental health case and the hearing. What happens if the patient's status has changed in the meantime? That issue has arisen in a variety of different circumstances over the years. The circumstances of this case have not been considered before, certainly not by the Upper Tribunal or, as far as I know, by the courts.

2. In this case, the patient was detained under section 3 of the Mental Health Act 1983 – all statutory references are to that Act - when his case was referred to the tribunal, but by the time of the hearing he was subject to a hospital order (without a restriction order). This differs from the issue in the other cases that have come before the Upper Tribunal, because a patient may not apply, or be referred, to the First-tier Tribunal for the first six months of a hospital order.

B. What happened

3. The patient was detained, first for assessment under section 2, and then for treatment under section 3. While detained under section 3, his case was referred to the First-tier Tribunal. On 1 August 2019, before the reference could be heard, the patient came before a magistrates' court charged with credit card fraud. The court made a hospital order under section 37, but had no power to make a restriction order under section 41. On 12 August 2019, the tribunal struck out the proceedings on the ground that it had no jurisdiction to hear the reference saying that the reference 'now has no legal effect, leaving the tribunal with no jurisdiction to hear the case.' In the absence of any clear authority on the matter, the tribunal gave permission to appeal to the Upper Tribunal.

4. There is this quirk. The patient had previously been tried and convicted of other offences. The prosecution for credit card fraud could have been dealt with as part of that trial, but it was not. The sequence and timing of the reference and the hospital order only occurred as a result of the separation of the fraud from the other offences.

C. The parties and the oral hearing

5. I held an oral hearing of the appeal on 8 January 2020. Mr Sean Waters attended on behalf of the patient. The Trust, as is usual, did not appear. I had made the Secretary of State for Justice a party to the proceedings, but the Government Legal Department submitted that, as the patient was not subject to a restriction order, this was not an appeal in which it wished to make submissions. On reflection, I accept that that is an appropriate response. I am

grateful to Mr Waters for his arguments and the discussion at the hearing. When I began to draft my decision, I found that my reasoning had departed somewhat from the approach we discussed at the hearing, so I gave the parties a chance to comment on it. Mr Waters took advantage of that opportunity and I am grateful for his detailed and thoughtful response.

D. Conclusion and reasons in outline

6. I first set out my conclusions in outline and then explain them in detail.

7. The Act provides for judicial oversight of compulsory detention. Patients who are detained in pursuance of an application for treatment under section 3 are given the right to apply to the First-tier Tribunal within six months (section 66(1)(b) and (2)(b)), which is how long the initial authority to detain lasts (section 20(1)). That ensures that the *initial* detention is potentially subject to judicial oversight. Thereafter, patients are given the right to apply to the tribunal once within each period for which authority to detain is renewed under section 20 (section 66(1)(f) and (2)(f)). That ensures that the *subsequent* detention is potentially subject to regular judicial oversight. If the patient does not exercise those rights, the Act imposes protective duties on the hospital managers, requiring them to refer their case to the tribunal after six months (section 68(2) to (5)) and then after three years (section 68(6)). Those provisions are well-known, so I have not lengthened this decision by setting them out. I take them as read.

8. In the case of a patient under a hospital order but with no restriction order, the Act modifies the patient's right to apply for initial scrutiny and the hospital managers' duty to refer. The modifications are contained in Part I of Schedule 1 to the Act. In short, they remove the patient's right to apply to a tribunal within the first six months (by modifying section 66) and the hospital managers' duty to refer the patient's case to the tribunal if the patient has not exercised that right (by modifying section 68). Those provisions show a clear statutory policy that there should be no judicial oversight for the first six months following a hospital order. The rationale is the obvious one that as the order has been made by a court, there has been judicial oversight of the initial detention.

9. It would be contrary to that statutory policy, if the tribunal were to retain jurisdiction under an application or reference that was made before the date of the hospital order. This distinguishes the circumstances of this case from the decisions that have decided that an application survives a change in the status of the patient.

10. Moreover, the tribunal's jurisdiction when there has been a change in the status of the patient depends on the tribunal exercising the powers of discharge

applicable to the patient's status at the time of the hearing. As the tribunal has no jurisdiction at all in the first six months of a hospital order, it cannot have any power of discharge that it can exercise. It is, therefore, conceptually impossible to apply the reasoning in the Upper Tribunal cases that have taken that approach to cases like the present.

11. Finally, I have considered the possibility that the reference might be in abeyance during the first six months that the hospital order was operative but then revive giving the tribunal jurisdiction. I can find no conceptual or legal basis for that result under the Act or the tribunal's rules of procedure.

E. The effect of a hospital order: applications by a patient

12. This case does not involve an application to the First-tier Tribunal. It is, though, still relevant to kook at how the Act deals with applications by patients detained in pursuance of a hospital order in order to understand the structure and policy of the Act. Applications to the First-tier Tribunal are governed by section 66. There is no express provision in the section for a challenge to detention pursuant to a hospital order.

The legislation

13. Section 40 makes general provision for applications:

> **40 Effect of hospital orders, guardianship orders and interim hospital orders**
>
> …
>
> (4) A patient who is admitted to a hospital in pursuance of a hospital order, or placed under guardianship by a guardianship order, shall, subject to the provisions of this subsection, be treated for the purposes of the provisions of this Act mentioned in Part I of Schedule 1 to this Act as if he had been so admitted or placed on the date of the order in pursuance of an application for admission for treatment or a guardianship application, as the case may be, duly made under Part II of this Act, but subject to any modifications of those provisions specified in that Part of that Schedule.
>
> (5) Where a patient is admitted to a hospital in pursuance of a hospital order, or placed under guardianship by a guardianship order, any previous application, hospital order or guardianship order by virtue of which he was liable to be detained in a hospital or subject to guardianship shall cease to have effect; but if the first-mentioned order, or the conviction on which it was made, is quashed on appeal, this subsection shall not apply and section 22 above shall have effect as if during any period for which the patient was

liable to be detained or subject to guardianship under the order, he had been detained in custody as mentioned in that section.

14. Section 69 makes three distinct provisions for applications:

> **69 Applications to tribunals concerning patients subject to hospital and guardianship orders.**
>
> (1) Without prejudice to any provision of section 66(1) above as applied by section 40(4) above, an application to the appropriate tribunal may also be made—
>
> (a) in respect of a patient liable to be detained in pursuance of a hospital order or a community patient who was so liable immediately before he became a community patient, by the nearest relative of the patient in any period in which an application may be made by the patient under any such provision as so applied;
>
> (b) in respect of a patient placed under guardianship by a guardianship order—
>
> (i) by the patient, within the period of six months beginning with the date of the order;
>
> (ii) by the nearest relative of the patient, within the period of 12 months beginning with the date of the order and in any subsequent period of 12 months.
>
> (2) Where a person detained in a hospital—
>
> (a) is treated as subject to a hospital order, hospital direction or transfer direction by virtue of section 41(5) above or section 80B(2), 82(2) or 85(2) below ...; or
>
> (b) is subject to a direction having the same effect as a hospital order by virtue of section 47(3) or 48(3) above,
>
> then, without prejudice to any provision of Part II of this Act as applied by section 40 above, that person may make an application to the appropriate tribunal in the period of six months beginning with the date of the order or direction mentioned in paragraph (a) above or, as the case may be, the date of the direction mentioned in paragraph (b) above.
>
> (3) The provisions of section 66 above as applied by section 40(4) above are subject to subsection (4) below.
>
> (4) If the initial detention period has not elapsed when the relevant application period begins, the right of a hospital order patient to make an application by virtue of paragraph (ca) or (cb) of section 66(1) above shall be

exercisable only during whatever remains of the relevant application period after the initial detention period has elapsed.

(5) In subsection (4) above–

(a) 'hospital order patient' means a patient who is subject to a hospital order, excluding a patient of a kind mentioned in paragraph (a) or (b) of subsection (2) above;

(b) 'the initial detention period', in relation to a hospital order patient, means the period of six months beginning with the date of the hospital order; and

(c) 'the relevant application period' means the relevant period mentioned in paragraph (ca) or (cb), as the case may be, of section 66(2) above.

Section 40

15. The effect of the deeming provision in section 40(4) is that a patient is treated as if admitted in pursuance of an application for admission for treatment. That reflects the language of section 3. Section 66(1)(b) provides for patients in those circumstances to have a right to apply to the First-tier Tribunal 'within the relevant period'. That period is fixed, for patients within section 66(1)(b), by section 66(2)(b) at six months. But, for the purposes of the deeming provision in section 40(4), section 66(1)(b) and (2)(b) are omitted by virtue of paragraph 9(a) and (b) in Part I of Schedule 1. In other words, there is no power, still less a right, for the patient to apply within the first six months of detention.

16. The effect of section 40(5) is that any previous application for admission and detention under section 3 ceases to have effect, leaving detention as a result of the hospital order to take effect under the deeming provision in section 40(4).

17. Section 20, read in accordance with paragraph 6(a) in Part I of Schedule 1, provides that the authority to detain lasts only for six months from the date of the hospital order, unless it is renewed. The renewal under section 20 is within section 66(1)(f), which provides for patients to have a right to apply to the First-tier Tribunal within the period for which detention is renewed. There is no modification of section 66(1)(f) in Part I of Schedule 1.

18. The result is that a patient detained in pursuance of a hospital order has no right to make an application for the first six months, but may do so thereafter if the authority to detain is renewed.

Section 69

19. This section makes three distinct provisions.

20. Section 69(1) provides for applications by nearest relatives, but only within the same period as the patient. So this aligns the position for nearest relatives with those that apply to the patient, preventing the restriction on applying within the first six months being avoided or subverted.

21. Section 69(2) makes provision for cases falling within the specified sections, none of which is relevant to this case.

22. And section 69(3) to (5) provides for an application by a patient who is subject to a community treatment order. There was discussion at the hearing about those subsections, and the possibility that the references in section 69(4) and (5)(c) to section 66(1)(ca) and (cb) were mistakes for section 66(1)(b) and (c). On reflection, there is no need to do anything other than accept the language as it stands. These subsections are limited to section 66 in so far as it applies to patients who are subject to community treatment orders, the provisions for which are not disapplied under Part I of Schedule 1. The alternative is to read them as applying to provisions that are disapplied but not to the specified provisions that are not, which would produce an anomalous result. Accordingly, these subsections have no relevance to this case.

F. The effect of a hospital order: references by hospital managers

23. The provisions for applications allow patients to initiate judicial scrutiny of their detention initially and then at regular intervals. The Act also provides for the possibility that a patient may not apply to the First-tier Tribunal by imposing protective duties on the hospital managers to refer a patient's case to the tribunal.

24. The first protective duty arises under section 68(2) to (5). It applies once a patient has been detained for six months without applying to the tribunal. But this duty is disapplied by paragraph 10 in Part I of Schedule 1 except for 'a patient who is transferred from guardianship to a hospital in pursuance of regulations made under section 19' (section 68(1)(e)). The second protective duty to refer arises if a patient's case has not been considered by the tribunal for three years (section 68(6)). And the third duty arises if a community treatment order is revoked (section 68(7)). These two duties are not disapplied. So, the general position is that there is no power or duty to refer during the first six months, the same position as for applications.

G. The authorities

In the Upper Tribunal

25. There are four relevant authorities. This is what they have decided.

26. If the application to the tribunal was made when the patient was detained under section 2 of the Mental Health Act 1983, but the detention had changed to section 3 by the time of the hearing, the tribunal retains jurisdiction and has to apply the section 3 criteria: *KF v Birmingham and Solihull Mental Health Foundation Trust* [2010] UKUT 185 (AAC), [2011] AACR 3.

27. If the application to the tribunal was made when the patient was detained under section 3 of the Act but the patient has become subject to a community treatment order by the time of the hearing, the tribunal retains jurisdiction and has to apply the community treatment order criteria: *AA v Cheshire and Wirral Partnership NHS Foundation Trust* [2009] UKUT 195 (AAC), [2011] AACR 37.

28. If the patient's case was referred to the tribunal when the patient was detained under section 3 of the Act (after a community treatment order had been revoked) but the patient has become subject to a new community treatment order by the time of the hearing, the tribunal retains jurisdiction and has to apply the community treatment order criteria: *PS v Camden and Islington NHS Foundation Trust* [2011] UKUT 143 (AAC), [2011] AACR 42.

29. If the application to the tribunal was made when the patient was detained under section 3 of the Act but the patient has been received into guardianship by the time of the hearing, the tribunal retains jurisdiction and has to apply the guardianship criteria: *AD'A v Cornwall Partnership NHS Trust* [2020] UKUT 110 (AAC).

In the Administrative Court

30. There are two relevant authorities.

31. In *R v South Thames Mental Health Review Tribunal, ex parte M* [1997] EWHC 797 (Admin), [1998] COD 38, Collins J came to the same conclusion as the Upper Tribunal later reached in *KF*. This is how he explained his conclusion:

> First of all, if one goes back to ss 2 and 3 one sees that what is permitted by each is the admission to the hospital and the detention there. Section 66(1) does not refer to the detention, merely to the admission, as the foundation for the right of application to the tribunal. Effectively what I think Miss Lieven has to submit is that if s 66(1) had read 'where a patient has been admitted to a hospital', then the submissions of Miss Richards would carry weight, but it does not. It says: 'is admitted'. The patient is no longer admitted, submits Miss Lieven. The difficulty with that is that, as it seems to me, 'admission' is something which happens at a moment in time. A person is admitted to a hospital and may then be detained in that hospital. But what founds the right of appeal, and this is the way Parliament has phrased it, is the admission not the detention. That that is the right view

> seems to me to be underlined by considering s 66(1)(f). Section 66(1)(f) founds the right of appeal upon the furnishing of a report. The language is not 'has been furnished' but is 'is furnished ... and the patient is not discharged', which of course means that Parliament there has recognised that there must be something more than the provision of the report.
>
> The matter is as it seems to me put beyond doubt by consideration of subsection (2) because that, in dealing with the relevant period, talks about 14 days beginning with the day on which the patient is admitted, as so mentioned (that is to say as mentioned in paragraph (a)). That underlines the point that admission is something which occurs at a moment in time; it is not a continuing state of affairs. Again in s 66(2)(a) the expression 'is admitted' is used.
>
> If one goes to s 72 one sees that there is nothing in that which suggests that the change of circumstances (that is to say the change in the nature of the detention from s 2 to s 3) affects the validity of the application, nor is there any reason why it should. The powers of the tribunal under s 72 are, it is common ground, to be exercised on consideration of the state of affairs before the tribunal. That was settled (indeed the language of the section makes it clear) by the decision of this Court in R v Hallstrom ex parte W [1986] 1 QB 824, [1985] 3 All ER 775. Accordingly when the matter comes before the tribunal, if there has been the change from s 2 to s 3, then the tribunal must exercise its powers in relation to a patient who is liable to be detained otherwise than under s 2 above and therefore must consider what are loosely described as the s 3 criteria in determining the case before them. Since the Act makes clear that the basis for an application lies in the admission, whether under 2 or 3, then the determination of the tribunal on the s 2 application cannot prevent the applicant from making a subsequent s 3 application if the s 2 application is unsuccessful. Accordingly, in my view, the guidance note was absolutely correct in the guidance that it gave in this regard.
>
> What the tribunal has to do and what, as I understand it, many tribunals at present do is to consider the s 2 application in the light of the situation of the patient when he or she appears before the tribunal. It decides then whether the relevant criteria, be it s 2 or 3, are met and makes an order accordingly. Of course it follows that if there has been a transfer from s 2 to s 3 the wider powers of the tribunal, set out in s 72(2), will be available to it.

32. Naturally, Mr Waters relied on that decision and Collins J's point that the right to apply is triggered by admission, not by detention.

33. However, that case was distinguished in *R (MN) v Mental Health Review Tribunal* [2008] EWHC 3383 (Admin), 106 BMLR 64. There the patient had applied to the tribunal while subject to a hospital order and restriction order. By the time his case came before the tribunal, the restriction order had come to an end, but the hospital order remained in force. The tribunal decided it had no jurisdiction. On judicial review, Plender J decided that the tribunal had been correct. The judge looked at the scheme of the Act and quoted section 41(5):

> (5) Where a restriction order in respect of a patient ceases to have effect while the relevant hospital order is in force, the provisions of Section 40 above and Part I of Schedule 1 to this Act shall apply to the patient as if he had been admitted to the hospital in pursuance of a hospital order (without a restriction order) made on the date when the restriction order ceased to have effect.

He then explained what this meant:

> 7. Putting that language more crudely but colloquially, I would express it as follows. On the termination of the restriction order in relation to the patient, the patient will be treated as though he had been admitted to hospital in pursuance of an ordinary hospital order, that is to say one made without restriction, on the date on which the restriction order ceased to have effect. The last word requires some emphasis. It is from the date of the termination of the restriction order that the patient is treated as though he had been admitted to the hospital otherwise than on a restriction order.

34. The judge distinguished the decision of Collins J:

> 12. I have been referred to two domestic authorities of some relevance but neither is directly in point. The first is the judgment of Collins J in *R v South Thames Mental Health Review Tribunal, ex p M* CO/2700/1997. In that case Collins J held that a change in status of a patient from a s 2 to a s 3 patient would not deprive him of a tribunal hearing in circumstances in which the change took place after the application was made but before being heard. This is an unsurprising if important decision.
>
> 13. The difference in the status of a patient governed by s 2 and one in s 3 relates to the provision of or other nature of the detention. Detention pursuant to s 2 is provisional for investigation into the patient's condition and under s 3 it is more enduring. It is not surprising that where a patient applies to a tribunal during the initial six months of his detention under s 2 (see para 26) that should continue to give the tribunal jurisdiction, notwithstanding that his six-month period has elapsed. The right of application to the tribunal under s 2 and under s 3 is much the same. In each case the application is to be made as soon as the patient has been

admitted to hospital. In each case the rules of participation are the same. There is in particular no provision for participation by the Secretary of State, as there is under the 1983 rules.

14. I therefore find the judgment of Collins J neither questionable nor inconsistent with the position adopted by the tribunal in the present case.

He then referred to the second case cited to him:

15. The second authority quoted to me is *R (on the application of SR) v Mental Health Review Tribunal* [2005] EWHC 2923 (Admin), 87 BMLR 132, a judgment of Stanley Burnton J (as he then was). That matter arose in circumstances unlike the present. But in that case, as in the present, Stanley Burnton J had to consider how—as he put it—patients with different status are treated. At [22] of his judgment he said:

> … s 72 qualifies the powers of the tribunal by reference to the status of the patient. Given the meaning of 'application to the tribunal' in s 66 and other provisions of Pt II of the Act, the more natural interpretation of the words 'where application is made to a … tribunal by or in respect of a patient who is subject to after-care and supervision' in s 72(4A) is that he is so subject when the application is made.

As I read them, those words fortify and support my observations as to the separate treatment of those who are admitted to the tribunal under various categories and fails to support the proposition which, it seems to me, Mr Southey must advance that there is some fluidity or movement between the patients in the various categories.

35. The circumstances of *MN* are closer to those of this case than the other authorities. And the reasoning of Plender J is more consistent with my analysis of the relevant provisions of the Act than with that of the other authorities. Moreover, the effect of section 41(5), as the judge understood it, is very similar to the way that section 40(4) has applied in this case. The patient was detained under section 3 when the hospital order was made. Section 40(4) operated to treat the hospital order as if the patient had been detained in pursuance of an application for admission for treatment. But that is just a deeming provision and a means of fitting patients detained in pursuance of a hospital order into the structure of the Act. It does not mean that there was any continuity in the patient's detention. The reality is that his detention changed from one regime to another, as section 40(5) makes clear. The result is similar to the effect of section 41(5) in *MN*.

36. Plender J's decision is not binding on me, not least because it dealt with different provisions, but I agree with it and apply its approach. It shows that

there is no universal rule that applies to all cases of a change of status and that the significance of a change of status depends upon the proper analysis of the relevant sections of the Act.

H. Mr Waters' final submissions

37. This is how Mr Waters summarised his written submissions on a patient who becomes subject to a hospital order after an application or reference has been made to the First-tier Tribunal:

1. There is no specific injunction in the legislation or case law against hearing an application made prior to an unrestricted Hospital Order being made.
2. There is clearly jurisdiction to review the decision of another Court judicially as Managers specifically have the power to do so.
3. In a similar situation where an unrestricted section 47 transfer is made a Tribunal Hearing is available and the Tribunal is entitled to discharge, again confirming the principle that there is both jurisdiction and authority to have judicial oversight of a decision made in respect of a person detained under Part III of The Act by another Court. This is persuasive as it relates to similar provisions within the same section of the same Act.
4. As there is no 'universal law' … applying to a change in status under The Act, the particular circumstances of this case allow for discretion, which should be exercised so as to preserve and champion fairness and balance in the circumstances outlines in paragraph 10 of this section, above.

38. *First submission* – I accept this.

39. *Second submission* – This summary does not, perhaps, best capture the quality of the argument put. The point is that the hospital managers retain the power to discharge a patient even during the first six months of the order, so it is anomalous if a tribunal does not have that power during that time. I do not accept that there is an anomaly. The power to discharge is available to prevent detention changing into containment once the conditions for detention cease to exist. The position of the First-tier Tribunal is different, because it provides judicial oversight, which has already been provided by the court making the hospital order.

40. *Third submission* – This is not the position here and I am not persuaded that the point overrides my analysis of the legislation.

41. *Fourth submission* – I do not accept this. The issue is the tribunal's jurisdiction. That is not a matter of discretion. It depends on the interpretation of the legislation. Fairness and balance are relevant in so far as they help in that task, but there is no scope for the flexibility that Mr Waters would like me to exercise in the circumstances of this case.

I. Conclusions

42. For the reasons I have given, the First-tier Tribunal was correct to decide that it had no jurisdiction in this case.

Authorised for issue
on 4 May 2020

Edward Jacobs
Upper Tribunal Judge