

**RP v DUDLEY & WALSALL MENTAL HEALTH PARTNERSHIP NHS TRUST AND THE
SECRETARY OF STATE FOR JUSTICE
[2016] UKUT 0204 (AAC)
UPPER TRIBUNAL CASE NO: HM/1556/2015**

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

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.

This decision is given under section 11 of the Tribunals, Courts and Enforcement Act 2007:

The decision of the First-tier Tribunal under reference MP/2014/30090, made on 19 February 2015 at Bushey Fields Hospital, did not involve the making of an error on a point of law.

REASONS FOR DECISION

A. History and background

1. The patient was born in 1989 and has a diagnosis of paranoid schizophrenia. Following conviction for offences of violence in 2010, he was made the subject of hospital and restriction orders under sections 37 and 41 of the Mental Health Act 1983. He was conditionally discharged in September 2011. His case came before the First-tier Tribunal on 19 February 2015 when the tribunal decided that the conditional discharge should continue. It confirmed the conditions that were in place at the time of the hearing:

- The patient shall reside where directed by his Responsible Clinician.
- The patient shall accept medication and any other form of medical treatment prescribed by his Responsible Clinician or any other member of the clinical team.
- The patient shall make himself available for assessment by and cooperate with his Social Supervisor and his Responsible Clinician or his duly appointed deputy.
- The patient shall abstain from using illicit drugs and steroids. He is also to refrain from the consumption of alcohol to excess.
- The patient is to submit to random testing for illicit drugs, steroids or alcohol consumption if required to do so by any member of the clinical team.

2. The patient applied for permission to appeal to the Upper Tribunal, arguing that the First-tier Tribunal had made errors of law by:

- failing to comply with his Convention right under Article 8;
- failing to apply the least restrictive option principle; and

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- failing to explain why it departed from unanimous expert evidence.

The First-tier Tribunal gave permission limited to the Article 8 issue.

3. The progress of the appeal through the Upper Tribunal has not been smooth. I have directions for an oral hearing. The patients' solicitors wrote to say that they had not obtained funding and were trying to contact the patient to see if he wished to withdraw the appeal. They subsequently wrote to say that they were unable to obtain instructions. I gave directions for submissions in writing. Neither of the respondents responded and the patient has not replied.

4. I must, therefore, deal with the Article 8 issue without the benefit of any argument other than that contained in the grounds of appeal.

B. Article 8

5. This provides:

*ARTICLE 8
RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE*

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

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The argument for the patient

6. The argument put by the patient's solicitors was this. Conditions imposed on a discharge must comply with Article 8. This was not put to the First-tier Tribunal, but the tribunal itself was under a duty to consider it.

7. Article 8 was engaged. The recall to which the patient was subject could be exercised without deterioration in his health and merely on the ground of elevated risk. The conditions imposed restrictions on the use of both legal and illegal drugs and required submission to random testing. The condition on consuming alcohol to excess was vague.

8. There was no justification under Article 8(2). The solicitors mention that:

- the offences occurred when the patient was young and had not been diagnosed;
- the tribunal did not find any risk of future offending;
- the patient had been on conditional discharge for 3½ years without recall;

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- the patient was in remission, had been off medication for a year and the Responsible Clinician said he could be managed by his GP; and
- the tribunal's assessment of the risk of relapse assumed a lack of family support. The point here is that the patient's partner did not know he was on conditional discharge, although his best friend and family did.

The argument then moves into relevant and irrelevant conditions under section 73 of the Mental Health Act 1983.

Analysis

9. It would have been helpful, to say the least, if the Secretary of State had made submissions on the Article 8 issue, which is likely to affect other cases.

10. The First-tier Tribunal is under a duty not to act in violation of a patient's Convention right. That is the effect of section 6 of the Human Rights Act 1998:

6 Acts of public authorities

(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

(2) Subsection (1) does not apply to an act if-

(a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or

(b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.

(3) In this section 'public authority' includes-

(a) a court or tribunal ...

11. This does not mean that the tribunal is expected to deal with this issue separately in every case. The way that the grounds of appeal are constructed demonstrates that facts and circumstances that raise Article 8 issues may also raise other legal issues. Any consideration of Article 8 can be subsumed in the tribunal's discussion of the statutory criteria. The tribunal is also entitled to rely on the parties, especially the patient's representative, to assist it by identifying issues specific to Article 8 that arise in a particular case. That is part of the representative's duty to co-operate with the tribunal under rule 2(4)(b) of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 (SI No 2699).

12. In this case, the conditions imposed by the tribunal were the same as those that were then in force. In those circumstances, the tribunal was entitled to expect that the patient's representative would draw its attention to any part of those conditions that might involve a violation of Article 8. I do not know from

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the material before me whether that was done. I assume it was not, as the solicitors say that Article 8 was not expressly put to the tribunal.

13. The grounds of appeal cite the Court of Appeal decision in *RH v South London and Maudsley NHS Foundation Trust* [2010] MHLR 341. There is, of course, no problem with that. They also reason by comparison with the facts of that case. That is more of a problem. Decisions on Article 8 depend on their facts. They are not unique in that, but there is always a danger in reasoning by comparison with the facts of other cases when so much depends on the circumstances of the individual case. The correct approach is to reason by reference to the terms of Article 8 and the principles established by the caselaw, not by comparison of facts.

14. Coming to *RH*, the issue was whether a restriction order should be lifted. The other judges agreed with Sullivan LJ. He accepted that conditions imposed on a patient could interfere with private or family life. However, the argument in that case concerned only the liability to recall itself. Assuming that that was an interference, he went on to consider justification under Article 8(2). He rejected the grounds of appeal and said that there was a burden on the patient to show why the liability to recall should cease. He made no criticism of the tribunal's failure to mention Article 8, saying that it was not referred to at the hearing. Sedley LJ commented that compliance with Article 8(2) was manifestly discharged in that case by the facts of the conviction and its surrounding and subsequent circumstances.

15. The tribunal's reasons in this case covered just over two pages. Most of that involved a review of the evidence; its reasoning was set out in the final four paragraphs, which covered about a third of a page. In summary, the reasoning was this:

- The patient did not have a mental disorder that made it appropriate for him to be liable to be detained for medical treatment.
- But he should remain liable to recall.
- There had been massive improvements, but issues remained. There was contradictory evidence whether the patient's partner knew of his diagnosis and that he had been detained in hospital. There was no evidence of full family support to identify or prevent relapses, or to report deterioration. A proper safety net would be needed to replace the conditions imposed on his discharge.
- There was a risk of relapse; the patient had only been off medication for a year.

16. Accepting that Article 8 is engaged by virtue of the conditions imposed, the issue is whether the interference is authorised under Article 8(2). That breaks down into two questions. First: was the interference in accordance with law? That will depend on whether the statutory conditions under the Mental Health Act 1983 were satisfied. Second: was the interference necessary in a

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democratic society in the interests of public safety, for the protection of health, or for the protection of the rights and freedoms of others? Again, those questions reflect the statutory criteria.

17. This does not mean that there is no role for Article 8. It does mean that, in the vast majority of cases, the First-tier Tribunal can deal adequately with Article 8 by focusing as it currently does on the statutory criteria, but with Article 8 providing an additional protection in an individual case. It is possible, for example, that the conditions imposed on a conditional discharge might represent an unjustified interference with private or family life. The tribunal is entitled to expect a representative to draw attention to any specific Article 8 issues that arise. This does not absolve the tribunal of all responsibility under section 6 of the Human Rights Act 1998; tribunals cannot ignore obvious issues that arise before them. Their responsibility is greater when a patient is not represented by solicitors or counsel.

18. There is a difference between violations of Article 8 that are bound to arise from the tribunal's decision and those that only arise from the way its decision may be implemented. The former are the tribunal's responsibility; the latter are not. Most conditions that are imposed on conditional discharges are capable of being operated oppressively, but in practice they are not. It is understood when the conditions are imposed that they will be applied reasonably and according to the circumstances at the time. Intervention may be light-handed or heavy-handed as required. The application of Article 8 will be calibrated to the needs of the patient and the public. The tribunal is more likely to be concerned to ensure that the conditions are reasonable in principle.

19. It is for that reason that the tribunal in this case was entitled to re-impose the conditions, including those that the solicitors have particularly mentioned. I take the reference to excess alcohol consumption as an example. It is, as the solicitors say, inherently vague. But it is reasonable for a tribunal to impose some kind of control over alcohol consumption and the difficulties of precise definition are capable of causing as many problems as they try to solve. What matters is how the conditions are operated and Article 8 operates to protect the patient at that stage.

20. Coming to the liability to recall apart from the conditions imposed, the tribunal explained why it considered that an absolute discharge was premature. There was uncertainty about whether the patient's partner knew the full story and the extent of the family's involvement in monitoring his progress. And the patient had only been free from medication for a year. On the evidence as a whole, the tribunal was entitled to be concerned about the risk of relapse. With greater certainty about the monitoring that his family could provide, the tribunal might have taken a different view, which is why (as I read the tribunal's reasoning) it was concerned that discharge without the possibility of recall would be premature.

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21. For those reasons, I consider that the tribunal's reasons show that the decision they made, as opposed to the way that it might be implemented, did not involve any violation of the patient's Convention right under Article 8. Its reasoning was short, but when read in the context of the evidence it was adequate to explain why the decision was made.

**Signed on original
on 26 April 2016**

**Edward Jacobs
Upper Tribunal Judge**