

**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/2015/20102, made on 26 February 2016, did not involve the making of an error on a point of law.

REASONS FOR DECISION

A. Introduction

1. This appeal is brought with the permission of the First-tier Tribunal against the decision of that tribunal refusing to discharge the patient from guardianship. She was first received into guardianship on 8 January 2013 and the Court of Protection first made a Standard Authorisation on 14 February 2015. The essence of the case before both the First-tier Tribunal and the Upper Tribunal is that the former was no longer necessary in view of the latter.

B. The legal issue

2. The legal issue for the tribunal was defined by section 72(4) of the Mental Health Act 1983:

72 Powers of tribunals

(4) Where application is made to the appropriate tribunal by or in respect of a patient who is subject to guardianship under this Act, the tribunal may in any case direct that the patient be discharged, and shall so direct if it is satisfied—

- (a) that he is not then suffering from mental disorder; or
- (b) that it is not necessary in the interests of the welfare of the patient, or for the protection of other persons, that the patient should remain under such guardianship.

C. The patient

3. The patient was born on 5 January 1965. Like her mother and brother, she has Huntington's disease; she lives in a specialist nursing home. Her condition is progressive, although the symptoms fluctuate, and affects both her character and cognition. Her behaviour is unpredictable and challenging; she has used violence. By the time of the hearing, she had become more manageable. When out on excursions, she is accompanied by a driver and a carer. She regularly complains to the police about supposed thefts and other matters.

4. The tribunal was concerned about her capacity and arranged for an assessment. Based on the unchallenged opinion of the responsible clinician, the tribunal found that she lacked capacity to decide where to live, to instruct solicitors, and to take part in proceedings herself.

D. The First-tier Tribunal's reasoning

5. The essence of the tribunal's reasoning is this:

- Every case depends on its own merits.
- Neither the Mental Health Act 1983 nor the Mental Capacity Act 2005 has precedence.
- The Standard Authorisation may render guardianship unnecessary or they may complement each other.
- Counsel for the patient argued that the tribunal did not have evidence of necessity for section 72(4), only that some of the powers of guardianship were desirable.
- The Standard Authorisation included power to force a patient to return to their accommodation.
- But it did not deal with the powers of police or others to return a patient.
- Even if that were wrong, there are serious practical difficulties in persuading authorities to act urgently without the powers that go with guardianship.
- The First-tier Tribunal had no power to vary powers given by the General Authorisation.
- It was preferable for one body to make decisions about a patient if that could be achieved in the interests of the patient's welfare.
- The General Authorisation power did not include the powers conferred by section 18 of the Mental Health Act 1983. This was important as the patient was becoming increasingly challenging and may try to leave the home. Her carers had recently had to contemplate seeking help from the police to get her to return.
- This arises as a result of the regular and worthwhile trips that she is allowed.
- The patient has never been required to attend for treatment, but she has had falls and one fracture.
- The patient has never been required to give access to her medical team, but this may be a result of her skilled team negotiating with her. She has, though, caused inconvenience and expense by refusing to see her responsible clinician.

- The patient has never tried to escape, but the responsible clinician believed that she might do so once she realised that she would not be allowed to leave following the tribunal.
- No restriction can be placed on the patient's access to the community under the guardianship. No one wishes to do that. Any restrictions arise from the care plan.
- It was essential to consider the whole effect of the guardianship. The existence of a responsible clinician is important. The patient sees that as important. The staff feel that this is important as the existence of the boundaries under the guardianship are a comfort to her and she knows she can apply for the guardianship to be discharged. This is especially important given that treatment must be psychologically, rather than pharmacologically, based.

E. The arguments

6. There are three grounds of appeal. The local authority has responded to them and the patient's solicitors have replied. In all cases, I merely present a summary of the arguments, which I trust captures their essence.

Ground 1

7. This ground is that the tribunal failed to make findings to show that the powers of guardianship were necessary. It did not make findings that met the standard of necessity, and did not identify the powers that are necessary to be used, given the powers under the Standard Authorisation. It relied on the patient's beliefs, which were irrelevant and poorly evidenced.

8. The local authority's response is that the test is not whether the powers have been or are likely to be used, but whether guardianship is necessary in the interests of the welfare of the patient. The tribunal did not give inappropriate weight to the patient's opinions. It is wrong to argue that the guardianship serves no purpose.

9. The reply is that the possible use of the powers are relevant to the necessity test under section 72(4). The tribunal failed to deal cogently in its reasons with this.

10. I reject this ground of appeal. I do not accept that the ground misstates the legal test and I accept that the possible use of the powers of guardianship is relevant when considering the section 72(4) test. But I reject the arguments that the tribunal failed to identify the relevant powers, that it gave inappropriate weight to the patient's views, or failed to give cogent reasons.

11. The tribunal referred several times to the importance of having the section 18 power to ensure that the patient returned to her home. It noted that there would be practical difficulties in operating under the Mental Capacity Act 2005 to achieve this. It noted that the patient was allowed significant time out of the home and that this was worthwhile, albeit it with the risk that she might not agree to return. The staff had had to consider using their powers to ensure her return. Her condition was also deteriorating. The tribunal also referred to the

powers to ensure treatment and to provide access to the medical team. All those references were soundly based in the evidence of the patient's condition at the time of the hearing and its likely progression.

12. It is right that the tribunal mentioned the value to the patient, and therefore to her welfare, of her views on the guardianship, but it did not give those views undue significance. Reading the reasons as a whole, this is but one small part of the tribunal's reasoning that was neither essential nor determinative. It was entitled to take it into account, given the psychological basis of her treatment.

Ground 2

13. This ground seems to be a development from the first ground, arguing that the tribunal compounded the errors there identified by failing to take into account or to mention matters that ran counter to its findings, specifically the significance of the patient having the right to apply for discharge and the appropriateness of guardianship running together with the Standard Authorisation.

14. The local authority's response is that the arguments put are contradictory in themselves and with the first ground.

15. The reply is that the response does not deal with all the issues raised or dispute that the tribunal ignored the evidence referred to. The patient's grounds can be put in the alternative.

16. I reject this ground of appeal.

17. With regard to the first issue of the effect of tribunal proceedings on the patient, the points made are valid ones, but they make too much of what is only a small part of the tribunal's reasoning. If this had been the sole or even just a central basis for its reasoning, the position might be different. But the passage under attack is contained in two sentences in paragraph 40 of the tribunal's reasons and in the only sentence in paragraph 41. The tribunal's reasoning is soundly based without these sentences.

18. With regard to the second issue of the coexistence of guardianship and the Mental Capacity Act 2005 authorisation, this argument all turns on a possible difficulty in the event of a clash of views about where the patient is best housed. This seems to me to be a non-issue at this stage. The home in question is a specialist home for the patient's condition. As far as I can tell, no one doubts that that is the best place for her to be. If that changes, then it may (or may not) be a reason to reconsider whether guardianship is appropriate.

Ground 3

19. This ground refers to the decision of Charles J in *KD v A Borough Council and the Department of Health* [2015] UKUT 0251 (AAC). The argument is that the tribunal failed to followed the guidance in this case and failed to take account of the duplication of powers in relation to care planning.

20. The local authority's response is that the guidance in that case was directed to disputes about placement, which did not exist in this case.

21. The reply is that the Mental Capacity Act 2005 powers made the guardianship powers unnecessary. The *KD* checklist was plainly relevant.

22. I reject this ground of appeal. I accept that *KD* was relevant, but it is important to recognise that the checklist is not legislation and should not be elevated to that status. As Charles J said in paragraph 67 that 'it is likely to assist'. Moreover, it must not be interpreted as a rigid template. Ultimately, every case is different and what matters is the substance of the tribunal's reasoning rather than whether a tribunal's reasons follow a particular format. For the reasons I have given under the other grounds, I consider that the tribunal explained clearly what powers were available to the patient's guardian and why they were valuable in addition to the powers under the Mental Capacity Act 2005.

Conclusion

23. For those reasons I dismiss this appeal.

**Signed on original
on 22 September 2016**

**Edward Jacobs
Upper Tribunal Judge**