



Rule 14(7) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI No 2698) provides that the names of any persons concerned in this case must not be made public, unless the Upper Tribunal directs otherwise.

THE UPPER TRIBUNAL DIRECTS that: (a) the cover sheet, which identifies the patient by name and which is not part of the decision, must not be made public; and (b) the decision itself, which does not contain the patient's name, may be made public.

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

**UPPER TRIBUNAL CASE No: HMW/1727/2020
[2021] UKUT 53 (AAC)
DB v BETSI CADAWALDR UNIVERSITY HEALTH BOARD**

Decided without a hearing

Representatives

Patient	Andy Howarth of GHP Legal, solicitors
Health Board	Did not take part

DECISION OF UPPER TRIBUNAL JUDGE JACOBS

On appeal from the Welsh tribunal

Reference:	TR30078
Decision date:	29 September 2020
Venue:	Remote hearing

As the decision of the Welsh tribunal involved the making of an error in point of law, it is SET ASIDE under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 and the case is REMITTED to the tribunal for rehearing by a differently constituted panel.

REASONS FOR DECISION

A. What this case is about

1. What decision should a tribunal make if a patient is on leave and not attending a hospital but the clinical team believes that the discipline of recall is necessary to ensure compliance with medication?

B. The case in the Welsh tribunal

2. The patient came before the Welsh tribunal on 29 September 2020, seeking discharge. He was liable to be detained under section 3 of the Mental Health Act 1983, but had been on leave under section 17 from 28 October 2019 and had not set foot in a hospital since that date. His 'virtual bed', as his solicitor has called it, was at two different hospitals during his leave. He was living in a care home with supervised leave in the community. His solicitor argued that it was not appropriate for him to remain liable to be detained, since his care package did not contain a significant component of hospital treatment.

3. The tribunal found that it was appropriate for the patient to remain liable to detention on account of 'the fluctuating nature of his Bipolar Affective Disorder and the evidence that his symptoms are still detectable.' It further found that liability to detention was necessary for his 'health and safety and for the protection of others,' especially in view of 'his propensity to become hostile, aggressive and assaultive'. His care coordinator gave evidence that the patient did not believe that he should be on medication and would discontinue his medication if discharged, as he had done in the past.

4. The responsible clinician explained why he considered that a community treatment order was not appropriate. There was unanimous agreement that an order was not appropriate for the patient.

5. There is no doubt that the tribunal understood the solicitor's argument, because it summarised it in paragraph 8 of its written reasons. It referred to appropriateness in several places in its reasons, quoting 'significant component' regularly. The tribunal found that patient's 'appropriate treatment is medication, support and continuous review by his Care Team.' It further found that 'medication, support and review are significant components of [his] treatment plan.' It went on to record that he was receiving 'appropriate and necessary treatment whilst on Section 17 leave at an appropriate setting for his need,' which it identified as the care home where he was living. It found that 'it is probable that he would not take his medication or remain at [the care home] without the framework of being liable to be detained in hospital for medical treatment. The administration of medication is a significant component of [his] Care Plan.'

6. The Deputy Chairman of the Welsh tribunal gave the patient permission to appeal under section 78A of the Mental Health Act 1983. The Health Board has not taken part in the proceedings and, accordingly, it was not necessary for the patient's solicitor to reply.

C. The Mental Health Act 1983

7. These are the relevant provisions of this Act:

17 Leave of absence from hospital

(1) The responsible clinician may grant to any patient who is for the time being liable to be detained in a hospital under this Part of this Act leave to be absent from the hospital subject to such conditions (if any) as that clinician considers necessary in the interests of the patient or for the protection of other persons.

(2) Leave of absence may be granted to a patient under this section either indefinitely or on specified occasions or for any specified period; and where leave is so granted for a specified period, that period may be extended by further leave granted in the absence of the patient.

17A Community treatment orders

(1) The responsible clinician may by order in writing discharge a detained patient from hospital subject to his being liable to recall in accordance with section 17E below.

(2) A detained patient is a patient who is liable to be detained in a hospital in pursuance of an application for admission for treatment.

(3) An order under subsection (1) above is referred to in this Act as a "community treatment order".

72 Powers of tribunals

(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—

...

(b) the tribunal shall direct the discharge of a patient liable to be detained otherwise than under section 2 above 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; or

(iii) in the case of an application by virtue of paragraph (g) of section 66(1) above, that the patient, if released, would be likely to act in a manner dangerous to other persons or to himself.

145 Interpretation

(1) In this Act, unless the context otherwise requires-

...

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'medical treatment' includes nursing, psychological intervention and specialist mental health habilitation, rehabilitation and care (but see also subsection (4) below);

...

(4) Any reference in this Act to medical treatment, in relation to mental disorder, shall be construed as a reference to medical treatment the purpose of which is to alleviate, or prevent a worsening of, the disorder or one or more of its symptoms or manifestations.

D. What 'appropriate ... to be liable to be detained in a hospital for treatment' means

8. The interpretation of section 72(1)(b)(i) was considered by Pitchford J in *R (CS) v Mental Health Review Tribunal and the Managers of Homerton Hospital (East London and City Mental Health NHS Trust)* [2004] EWHC 2958 (Admin). The judge formulated the question for decision in that case as:

39. ... was CS's mental illness of a nature and degree which made it appropriate for her to receive treatment, a significant and justified component of which was treatment in hospital? ...'

He cited, in support, the decision of Wilson J in *R (DR) v Mersey Care NHS Trust* [2002] EWHC 1810 at [30], which used the language of 'a significant component of the plan for the claimant was treatment in hospital.'

E. The error of law

9. It is important, indeed essential, to comply with the requirements of the Act. Section 72(1)(b) provides that a tribunal must direct the discharge of a patient unless specified conditions are satisfied. One of those conditions is that it must be 'appropriate for [the patient] to be liable to be detained in a hospital for treatment'. And that must be interpreted and applied in accordance with the CS case. It seems to me that, although the tribunal used the language of the solicitor's argument put to it on that case, it failed to address the substance of the argument.

10. The evidence showed that the patient had not had any contact with any hospital since going on section 17 leave. It followed that he had not received any treatment in a hospital in that time. From which it followed that he had managed without receiving any part or form of his treatment in a hospital for eleven months. The question then arises: why was it necessary for the patient to be detained in hospital at all?

11. The tribunal's answer was that he needed the discipline of liability to detention in view of the risk that he would not take his medication and that his mental health and judgement would deteriorate as a result. But that cannot overcome the need for a significant component of his treatment to be in hospital. The tribunal found, and was entitled to find on the evidence, that the patient would not take his medication unless he were liable to be detained. And it was undoubtedly the case that the administration of medication was a significant component of his care plan. But the point was where the medication was being delivered, not whether it was necessary or whether it was being delivered. The tribunal should have analysed the components of

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the patient's treatment, which is broadly defined in section 145, and then decided the extent to which they were being delivered in a hospital.

12. This may appear to create a dilemma. The patient is complying with his treatment regime while on leave without the need to attend a hospital, but that is only on account of the discipline provided by the possibility that the leave will be revoked if he does not. If that means that he has to be discharged, he will then disengage from treatment, leading to deterioration and the inevitable new admission. And so on in an unending cycle of discharge and admission. In practice, that situation can be avoided by using some of the other options available under and outside the Act. A community treatment order is an obvious possibility, but the clinical team ruled that out in this case. In the case of a restricted patient, which this patient is not, there is also the option of a conditional discharge. Outside the Act, there is the possibility of using the Mental Capacity Act 2005.

13. It may be that the clinical team failed to take account of CS when they decided that a community treatment order was not appropriate and that the tribunal felt constrained to justify detention under section 3 rather than discharge a patient only for him to be admitted again in the near future. Whether that was part of the tribunal's thinking or not, liability to detention is not a fallback when the possible options are not suitable or not available. To repeat, if the statutory conditions for detention are not met, the tribunal must direct their discharge. Section 3 is not available just because none of the other options is suitable for the patient. If there are no options under the Act, the proper and only course is to discharge the patient.

14. I have considered whether to direct the patient's discharge, but have decided not to do so. This will allow the Welsh tribunal to take a fresh look at this case, in the light of up-to-date evidence of his condition and treatment.

**Signed on original
on 03 March 2021**

**Edward Jacobs
Upper Tribunal Judge**