



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

**UPPER TRIBUNAL CASE No: UA-2024-001142-HM
[2024] UKUT 438 (AAC)
AM v GREATER MANCHESTER MENTAL HEALTH NHS FOUNDATION TRUST
AND SECRETARY OF STATE FOR JUSTICE**

Decided following an oral hearing on 5 December 2024

Representatives

Claimant James Stark of counsel, instructed by Ruth Edwards
of Otten Penna Solicitors

Respondents Did not take part

DECISION OF UPPER TRIBUNAL JUDGE JACOBS

This decision may be made public (rule 14(7) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI No 2698)).

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

Reference: MP/2023/31494

Decision date: 22 May 2024

As the decision of the First-tier 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

1. I made my decision in this case on 5 December 2024 and reserved my reasons for later. These are my reasons.

2. There are two issues in this appeal. The first relates to disclosure of information to AM and others. That is a matter of procedure, although it may have had an impact on the tribunal's decision. The second relates to the tribunal's decision on the conditions of AM's discharge. That is a matter of substance.

I THE ISSUE OF PROCEDURE

A. History and background

3. AM applied to the First-tier Tribunal on 12 December 2023, seeking a variation in the conditions of her discharge under the Mental Health Act 1983. Specifically, she wanted a change to the area of the exclusion zone imposed as one the conditions. The purpose of the zone is to protect V, who was a neighbour of AM. It seems that there was a dispute between the two about a planning application. On 1 May 2015, AM attacked V, who was with her young daughter. AM told V to stay away from her house and hit her with a knife. She stabbed her about 20 times, causing about six cuts to the neck and torso. She only stopped when a neighbour intervened.

4. AM was subject to six conditions. The first four are relatively standard and relate to residence, medical treatment and medication. The fifth imposes the exclusion zone:

5. Not to enter the area of Manchester as delineated by the zone marked on the map supplied by the Ministry of Justice.

The sixth prohibits AM from seeking to contact V or her family.

5. This was the second application to vary the zone. It was to allow AM to take up the offer of work from an organisation for whom she had been volunteering. The previous application was to allow AM to attend a college course. This was allowed, although in the event she did not attend the course, possibly because the college closed.

6. V was invited to make representations under Chapter 2 of Part 3 of the Domestic Violence, Crime and Victims Act 2004. The first response came from the Victim Liaison Officer. The tribunal referred this back, insisting on V's own views. These were provided.

7. The procedural issue is concerned with the way the tribunal dealt with the disclosure of V's representations.

B. Legislation

8. The legislation is contained in the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 (SI No 2699). These are the relevant rules:

2 Overriding objective and parties' obligation to co-operate with the Tribunal

- (1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.
- (2) Dealing with a case fairly and justly includes—
 - (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;

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- (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
 - (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
 - (d) using any special expertise of the Tribunal effectively; and
 - (e) avoiding delay, so far as compatible with proper consideration of the issues.
- (3) The Tribunal must seek to give effect to the overriding objective when it—
- (a) exercises any power under these Rules; or
 - (b) interprets any rule or practice direction.
- (4) Parties must—
- (a) help the Tribunal to further the overriding objective; and
 - (b) co-operate with the Tribunal generally.

5 Case management powers

- (1) Subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedure.
- (2) The Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside an earlier direction.

11 Representatives

- (1) A party may appoint a representative (whether a legal representative or not) to represent that party in the proceedings.

14 Use of documents and information

...

- (2) The Tribunal may give a direction prohibiting the disclosure of a document or information to a person if—
- (a) the Tribunal is satisfied that such disclosure would be likely to cause that person or some other person serious harm; and
 - (b) the Tribunal is satisfied, having regard to the interests of justice, that it is proportionate to give such a direction.

C. V's representations

9. I am not going to set out these. They were short and began: 'This information ... should be kept CONFIDENTIAL AND NOT DISCLOSED TO THE PATIENT.' It was, of course, for the tribunal to decide what could and could not be disclosed. The representations covered three matters. First, there was information about V's activities. Second, there was her reaction to the application. Third, there was a comment, which could be interpreted as a suggestion.

D. Some preliminary points

10. I am going to talk about the extent to which V's representations should be disclosed. Strictly speaking, though, the starting point is that all material is disclosed to all parties. The legal issue is whether all or part of the representations should be withheld and from whom.

11. The tribunal imposed an interim order withholding the information from everyone except AM's legal representatives. That order could not be made under rule 14(2). Its purpose was to preserve the confidentiality of the representations until that rule could be considered. Doing otherwise would deprive rule 14(2) of any value or effect. The legal basis for the order was the tribunal's general case management powers in rule 5.

12. I could analyse the procedural issue in terms of natural justice and the right to a fair hearing. In practice nowadays, these principles can usually be subsumed within the application of the tribunal's rules of procedure and in particular the overriding objective. That is what I will do.

13. My analysis may seem demanding for a tribunal's decision on a procedural issue. To that, I say: it is necessary for a decision that is capable of having so significant an impact on the hearing and on the outcome of case.

14. In this case at least, it is not helpful to think of a burden of proof. The issue of disclosure was raised by V, who is not a party. AM's legal representatives argued for disclosure. There was no party arguing for the ultimately position taken by the tribunal. The test was whether the tribunal was satisfied, on the evidence and arguments before it, that each of the conditions in rule 14(2) was satisfied.

E. Disclosure of V's representations at the hearing

15. The tribunal set out a sequence of events at the hearing. Mr Stark told me that it was not accurate and offered a different chronology. I do not need to resolve this difference, because it does not matter. What matters is the result, which was this. V's representations were disclosed to AM's legal team. They were not disclosed to AM herself, the responsible clinician, the social worker and the community psychiatric nurse. That restricted the extent to which, and the way in which, the professional witnesses could be questioned.

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F. The tribunal's reasons on disclosure

16. The tribunal gave its reasons under the heading 'Jurisdiction, Preliminary and Procedural Matters'. It explained that it had made its decision on rule 14(2) for these reasons:

- a) The victim of the index offence was stabbed between 15 – 20 times and was fortunate to survive the incident.
- b) The social circumstances report indicated that the victim suffered psychological harm and required CBT.
- c) The evidence before the tribunal (RC report, social circumstances report and care plan) all indicate that there continues to be a lack of insight on the part of AM and that she continues to believe that she was the victim and not the perpetrator.
- d) On this basis, we consider that there is a risk of serious harm.
- e) In terms of proportionality, we consider that the residual belief held by AM that she was the victim and not the perpetrator are of some concern, not least given the severity of the index offence. We do not consider that it is proportionate to reveal the destination where the victim might visit in the Hulme area. We are of the view that on this discreet issue, the protection of the victim outweighs AM's right to have sight of this document and that this is a proportionate remedy given the severe nature of the index offence.
- f) Mr Stark argued that he should be able to take some instructions on the basis that a revised exclusion zone be drafted. We declined that application on the basis that AM would be able to see from the amended exclusion zone, the areas that the victim visited.

17. The following paragraphs dealing with proportionality are also relevant. They come from the tribunal's consideration of the substantive application:

95. We also note the severity of the offence and the likely impact that this had on the victim and the child who witnessed the attack. We further note that the assault only stopped when a bystander came to the rescue and kicked her to the ground. One inference from this is that without such an intervention the assault may well have continued.

102. We do not consider a variation of the exclusion order would adequately protect the victim given the ferocity of the assault and the psychological damage referred to within the social circumstances report. There appears to be an absence of any real empathy towards the victim and the submission fails to take into account the impact that seeing AM is likely to have on either party. This submission is perhaps best reflected by AM's views that the victim had harassed AM in the past. That entrenched outlook is of concern given the proposed variations now sought.

103. Finally, we note the evidence of Dr Mathews [the Responsible Clinician] who indicated that he thought that if there was a chance encounter that this would

impact negatively on both the victim and AM. In the context of Mr Stark's submission and (i) the need for optimisation of medication and (ii) the precarity of her mental health as regards external stress, in our judgment this is sufficient to point to harm.

18. The tribunal was also aware that:

- AM knew where V lived.
- She had not attempted to approach or contact her.
- AM said in a pre-hearing interview that if she recognised someone she knew she would walk away.
- There had only been two inadvertent breaches of the zone. One related to a bus taking a diversion.
- AM voluntarily wears a tag so that her movements can be monitored.
- She has complied with all the other conditions.
- She has not been recalled to hospital.
- The area of the zone has already been reduced once without incident.

G. Analysis – likely to cause ... serious harm

19. There are two conditions that must be satisfied in order to give a direction under rule 14(2). Both must be satisfied. I will take them in turn. First, likelihood of serious harm under paragraph (2)(a).

20. This largely involves issues of fact: who might be harmed, what harm might befall them and whether it was serious. It also involved an estimate of the likelihood of that happening.

21. The tribunal mentioned three persons who might be harmed if the size of the zone were reduced: AM, V and the child who was with her when she was attacked.

22. On the language of subparagraph (a), the harm must be caused by the disclosure. That covers both harm arising from V knowing that information has been disclosed to AM and harm that may arise from AM's knowledge of its contents. It is easy to infer the nature of the harm for each of the three persons who might be affected. For AM, she might experience a deterioration in her mental health. For V, she might experience anxiety at the possibility of a chance encounter with AM or physical harm if AM were to attack her. For V's child who was with her when she was attacked, there was the possibility of anxiety at the prospect of meeting AM or actually encountering her.

23. Both seriousness and likelihood required not only consideration but separate consideration for each person and each kind of potential harm. The tribunal provided neither. That was an error of law. I note that the tribunal referred to risk rather than likelihood. Risk may be a relevant factor, but it is not the legal test.

H. Analysis – interests of justice ... proportionate

24. I now come to the second condition under paragraph (2)(b). This is essentially a matter of judgment, although it will depend on findings of facts.

25. The analysis of proportionality for the purposes of paragraph (2)(b) has to be undertaken in accordance with the overriding objective. Having regard, as required, to the interests of justice supports and blends with that objective. The objective incorporates considerations of natural justice. That requires the party to know the case they have to meet, which blends with full participation in the proceedings. In the context of rule 14(2), this will depend on effective use of the right to representation. And that in turn must blend with the duty to co-operate, which applies both to the parties and their representatives. The tribunal is entitled to that co-operation both in making its judgment and in implementing any direction it gives.

26. The analysis will need to consider what is to be disclosed and to whom. Different disclosure may be appropriate to different people. Some parts of the information may be irrelevant and so can be discarded on that count. Some parts may be disclosed to some but not to others. Disclosure to any individual may be full or partial. It may be verbatim or may consist of the gist of what the victim has said.

27. Generalisations by their nature are generally best avoided when the issue depends on the individual circumstances of the case. Taking the risk, I would say that, as a bare minimum, there must be sufficient disclosure to allow legal representatives to take instructions and ask questions to elicit the evidence relevant to the substantive issue. The tribunal should be able to rely on them to co-operate by acting in accordance with the limits imposed under rule 14(2).

28. The tribunal set out a detailed consideration of proportionality applying the criteria set out in *Bank Mellat v Her Majesty's Treasury* [2014] AC 700. As far as I can tell, that related only to the substantive issue, not to paragraph (2)(b). Some of them could, though, be relevant, which is why I have quoted them above.

29. Even taking the whole of the tribunal's reasons into account, its decision contained no structured or sufficient account of the interests of justice, as required by paragraph (2)(b). That is another error of law.

I. Materiality

30. Materiality usually means that a mistake will only amount to an error of law if it made a difference to the outcome of the case. The test is different if the mistake was a procedural irregularity. As Brooke LJ explained in *R (Iran) v Secretary of State for the Home Department* [2005] EWCA Civ 982:

9. ... It may be convenient to give a brief summary of the points of law that will most frequently be encountered in practice:

...

vi) Committing or permitting a procedural or other irregularity capable of making a material difference to the outcome or the fairness of the proceedings; ...

So, the test I have to apply is whether the tribunal's procedural mistakes were capable of making a difference. I consider that they were, as they restricted the ability of AM's representatives to obtain evidence relevant to disclosure.

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31. By the way, this is why the following paragraph of Brooke LJ's judgment uses a double negative:

10. Each of these grounds for detecting an error of law contain the word 'material (or 'immaterial')'. Errors of law of which it can be said that they would have made no difference to the outcome do not matter.

Brooke LJ did not, and could not say, that mistakes only matter if they made a difference. Materiality is not a binary issue for procedural and other irregularities. There are three possibilities: (a) the irregularity made a difference; (b) it did not make a difference; and (c) it could have made a difference.

II THE ISSUE OF SUBSTANCE

A. Legislation

32. The legislation is contained in the Mental Health Act 1983. These are the relevant provisions:

42 Powers of Secretary of State in respect of patients subject to restriction orders

...

(2) At any time while a restriction order is in force in respect of a patient, the Secretary of State may, if he thinks fit, by warrant discharge the patient from hospital, either absolutely or subject to conditions; ...

73 Power to discharge restricted patients

(1) Where an application to the appropriate tribunal is made by a restricted patient who is subject to a restriction order, or where the case of such a patient is referred to the appropriate tribunal, the tribunal shall direct the absolute discharge of the patient if—

- (a) the tribunal is not satisfied as to the matters mentioned in paragraph (b)(i), (ii) or (iia) of section 72(1) above; and
- (b) the tribunal is satisfied that it is not appropriate for the patient to remain liable to be recalled to hospital for further treatment.

(2) Where in the case of any such patient as is mentioned in subsection (1) above—

- (a) paragraph (a) of that subsection applies; but
- (b) paragraph (b) of that subsection does not apply,

the tribunal shall direct the conditional discharge of the patient.

(4) Where a patient is conditionally discharged under this section—

...

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- (b) the patient shall comply with such conditions (if any) as may be imposed at the time of discharge by the tribunal or at any subsequent time by the Secretary of State.
- (5) The Secretary of State may from time to time vary any condition imposed (whether by the tribunal or by him) under subsection (4) above.

75 Applications and references concerning conditionally discharged restricted patients

...

- (2) Where a restricted patient has been conditionally discharged as aforesaid but has not been recalled to hospital he may apply to the appropriate tribunal—

...

- (3) Sections 73 and 74 above shall not apply to an application under subsection (2) above but on any such application the tribunal may—
 - (a) vary any condition to which the patient is subject in connection with his discharge ...

B. Work or employment

33. As my conclusion on the procedural issue justifies a rehearing, it is unnecessary to deal in detail with the substantive issue. Any errors that were made will be subsumed by the rehearing. I need only deal with one issue in order to give my view on a point of law.

34. Mr Stark argued that:

The Tribunal erred in law in relying upon two cases as to dismissal from employment and one of the non-renewal of a contract as meaning that a public authority placing restrictions upon or refusing to lift restrictions meant that A8 [Article 8 of the European Convention on Human Rights] was not engaged.

35. I agree with Mr Stark that the cases the tribunal relied were on were not directly applicable. I do, though, consider that, regardless of the legal position under Article 8, the tribunal was entitled to take into account the nature and extent to which the boundaries of the exclusion zone were imposing a restriction on AM's ability in practice to take up an offer of work. That was a relevant consideration when considering whether to vary her conditions on discharge.

Authorised for issue
on 23 December 2024

Edward Jacobs
Upper Tribunal Judge