Neutral Citation Number: [2025] UKUT 396 (AAC)
Appeal No. UA-2025-001501-HM

IN THE UPPER TRIBUNAL ADMINISTRATIVE APPEALS CHAMBER

Between:

WM

Appellant

- v -

(1) BRADFORD DISTRICT CARE NHS FOUNDATION TRUST

Respondent

Before: Upper Tribunal Judge Johnston
Decided on consideration of the papers

Representation
Appellant: Arianna Kelly of counsel, instructed by MJC Law Solicitors
Respondent: No representation

On appeal from:

Tribunal: First-tier Tribunal (HESC) (Mental Health)
Tribunal Case No: MP/2024/32902
Tribunal Venue: Lynford Mount Hospital

Date: 31 August 2024

RULE 14 Direction

Rule 14(7) of the Tribunal Procedure (Upper Tribunal) Rules 2008 provides that information about mental health cases and the names of any persons concerned in such cases must not be made public unless the Upper Tribunal gives a direction to the contrary.

The Upper Tribunal DIRECTS that this decision, which does not refer to the patient by name, may be made public.

Summary Of Decision

Mental Health (80)

The First-tier Tribunal can make a statutory recommendation that a patient be granted leave of absence with a view to facilitating discharge under section 72(3) of the Mental Health Act 1983 if the responsible clinician has already granted leave under section 17 of that Act.

Please note the Summary of Decision is included for the convenience of readers. It does not form part of the decision. The Decision and Reasons of the judge follow.

Decision

1. The appeal was made out of time. The decision of the Upper Tribunal is to admit the appeal. I have decided that the First-tier Tribunal did make an error of law in finding they had no jurisdiction or power to make a statutory recommendation for leave under section 72(3).

2. Under section 12(2) of the Tribunal Courts and Enforcement Act 2007 (TCEA) I may (but need not) set aside the decision of the First-tier Tribunal, and if I do, I must either remit the case to the First-tier Tribunal or remake the decision.[1] The patient is no longer detained under the section of the Mental Health Act 1983 (MHA) as he was when the First-tier Tribunal made their decision. The decision is therefore not set aside or remitted to the First-tier Tribunal as there would be no purpose in doing so.

Reasons For Decision

The decision to admit the appeal

3. Section 11 of the Tribunals, Courts and Enforcement Act 2007 (TCEA) sets out the right to appeal to the Upper Tribunal. In this case permission to appeal was given by the First-tier Tribunal under section 11(4) of the TCEA on 06 March 2025. The notice of appeal should have been provided so that it was received within one month of the permission given being sent to the parties, (Rule 23(2) of the Tribunal Procedure (Upper Tribunal) Rules 2008) (the rules). According to the First-tier Tribunal's case management system, the grant of permission was sent to the parties on 07 March 2025. The deadline for supplying the appeal to the Upper Tribunal was Monday 07 April 2025. The notice of appeal received by the Upper Tribunal on 12 September 2025 was out of time by five months and five days.

4. Counsel for the appellant explains the delay in sending the notice of appeal in her submissions. The delay was due to being unable to obtain legal aid funding given the lack of information about the appellant's financial information required by the Legal Aid Agency and his lack of capacity to

[1] 12(1) Subsection (2) applies if the Upper Tribunal, in deciding an appeal under section 11, finds that the making of the decision concerned involved the making of an error on a point of law.
(2) The Upper Tribunal—
(a) may (but need not) set aside the decision of the First-tier Tribunal, and
(b) if it does, must either—
(i) remit the case to the First-tier Tribunal with directions for its reconsideration, or
(ii) re-make the decision.

provide this information. There was a further delay as a result of a data breach at the Legal Aid Agency and their computer system being closed down. Those representing the appellant sent the application to the Legal Aid Agency on 1 August explaining the difficulties in obtaining financial information. The Legal Aid Agency sent the grant of funding on 14 August 2025. On 15 August 2025 Counsel was approached by those representing the appellant and replied on 18 August 2025 that he would be unable to provide advice until the end of September 2025. Ms Kelly was then instructed on 18 August 2025 and provided submissions as soon as she was able given planned annual leave in August 2025. Her submissions were dated 11 September 2025 and the notice of appeal was received the next day in the Upper Tribunal. She says the case required specialist Counsel and there are not many who are specialist in this area of law.

5. Rule 5(3)(a) gives me the power to extend time for complying with any rules, practice direction or direction. When I am considering this, I must seek to give effect to the overriding objective set out in Rule 2 of the rules. That is to deal with cases fairly and justly.

6. The question therefore is whether it is fair and just to extend time in the circumstances set out above? Those representing the appellant had difficultly gathering the financial information required by the Legal Aid Agency through no fault of their own. To have continued acting in the best interests of their client is commendable. Further delays were due to a breach of the Legal Aid Agency's computer system. Once legal aid had been granted it was then August when many barristers are on holiday. Those representing instructed Counsel who completed submissions as soon as they were able and the notice of appeal was sent the next day.

7. In deciding to admit the appeal I also note that an experienced judge of the First-tier Tribunal has decided that, although there is no clear and material error of law to enable him to review the reasons, there "is an arguable error of law and that we should have the Upper Tribunal's authoritative guidance on the point".

8. Given the reasons for the delay set out above were no fault of the appellant and the fact that the First-tier Tribunal is seeking guidance I have decided it is fair and just to admit the appeal.

9. The respondent in the case has not responded to the directions although they were not obligatory. I am told by Counsel for the appellant that the respondent has declined to seek legal representation in these proceedings and communicated their wish not to actively participate. Whilst I cannot see that the respondent has communicated this to the Upper Tribunal, I have no reason to doubt what Counsel has said in her submissions.

The appeal

The relevant law

10. The power to make statutory recommendations is found in section 72 of the MHA. The relevant parts of that section are as follows:

> 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—
>
> (a) the tribunal shall direct the discharge of a patient liable to be detained 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 warrants his detention in a hospital for assessment (or for assessment followed by medical treatment) for at least a limited period; or
>
> (ii) that his detention as aforesaid is justified in the interests of his own health or safety or with a view to the protection of other persons;
>
> (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;
>
> …

> (3) A tribunal may under subsection (1) above direct the discharge of a patient on a future date specified in the direction; and where a tribunal does not direct the discharge of a patient under that subsection the tribunal may—
>
> (a) with a view to facilitating his discharge on a future date, recommend that he be granted leave of absence or transferred to another hospital or into guardianship; and
>
> (b) further consider his case in the event of any such recommendation not being complied with. …

11. The purpose of statutory recommendations was considered by Judge Jacobs in RB v Nottinghamshire Healthcare NHS Trust [2011] UKUT 73 (AAC) (RB V NHC NHS Trust). In that case he said a paragraph 12:

> "The power to make statutory recommendations is discretionary for the tribunal, but it must be exercised, like all a tribunal's discretions, judicially. And once begun, it must be followed through fairly. It is obviously designed to assist in identifying the best way forward for the patient. But it operates by moral pressure and moral authority, not by order. The tribunal must be mindful of that limitation when deciding whether to make a recommendation in the first place. If it does so, it must carry the process through judicially, although the exercise of its powers will be tempered by the reality that it has no power to coerce."

12. Judge Jacobs also considered statutory recommendations in RN v Curo Care [2022] UKUT (RN v CC). The recommendation in this case was for a Community Treatment Order under section 72(3)(A)(a) but his description of the purpose of a recommendation is relevant. At paragraph 8 and 9 Judge Jacobs said this:

> "8….The tribunal has no power to make an order, but it is able to use its power to recommend when it considers that the conditions are satisfied at the time of the hearing, perhaps because the tribunal is aware of local facilities that the responsible clinician is not. But the power is not so limited. It can also be used to trigger consideration of the steps that could be taken to move the patient towards eventual release on an order. This was not a case in which the evidence showed that a community treatment order would never become a realistic option in the foreseeable future. In those

> circumstances, I cannot say that the tribunal would not have been persuaded to make a recommendation.
>
> 9. … But a recommendation is not limited to the present, as I have said. The power can be used as a trigger for action in the future. The tribunal's reasons do not allow for the possibility."

13. In R(O(a minor)) v Secretary of State for the Home Department [2022] UKSC 3 (RO v SSHD) the court was deciding an appeal as to the level of the registration fee for minors applying for British Citizenship. At paragraph 29 of his judgment Lord Hodge said this:

> 29. The courts in conducting statutory interpretation are "seeking the meaning of the words which Parliament used": *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, 613 per Lord Reid of Drem. More recently, Lord Nicholls of Birkenhead stated:
>
> > "Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context."
>
> (*R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] AC 349, 396). Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. …"

14. In Wathen-Fayed v Secretary of State for Housing, Communities and Local Government [2025] UKSC 32 (WF V SS for HCLG), a case considering the interpretation of the Cremation Act 1902 the Lord Hamblen set out particular principles of statutory interpretation. At paragraph 57 he says:

> *57. Secondly, there is a presumption against absurdity. As explained in R (PACCAR Inc) v Competition Appeal Tribunal [2023] UKSC 28; [2023] 1 WLR 2594 ("PACCAR") at para 43 (per Lord Sales):*
>
> > *"The courts will not interpret a statute so as to produce an absurd result, unless clearly constrained to do so by the words Parliament has used: see R v McCool [2018] 1 WLR 2431, paras 23-25 (Lord Kerr of Tonaghmore*

> *JSC), citing a passage in Bennion on Statutory Interpretation, 6th ed (2013), p 1753. See now Bennion, Bailey and Norbury on Statutory Interpretation, 8th ed (2020), section 13.1(1): 'The court seeks to avoid a construction that produces an absurd result, since this is unlikely to have been intended by the legislature'. As the authors of Bennion, Bailey and Norbury say, the courts give a wide meaning to absurdity in this context, 'using it to include virtually any result which is impossible, unworkable or impracticable, inconvenient, anomalous or illogical, futile or pointless, artificial, or productive of a disproportionate counter-mischief'. The width of the concept is acceptable, since the presumption against absurdity does not apply mechanistically but rather, as they point out in section 13.1(2), '[t]he strength of the presumption ... depends on the degree to which a particular construction produces an unreasonable result...'"*

Factual background

15. The appellant was admitted to hospital on 14 June 2024. He was initially detained under section 2 of the MHA, then section 3, and then had a period of informal admission prior to being further detained under section 3 on 13 November 2024. Those representing at the First-tier Tribunal were appointed under Rule 11(7)(b) of the MHA by the First-tier Tribunal prior to the hearing. This rule gives the tribunal the discretion to appoint a representative if the patient lacks capacity to appoint a representative and it is in his best interests to be represented.[2]

The First-tier Tribunal hearing

16. The appellants hearing before the First-tier Tribunal was heard on 7 February 2025. An application was made on his behalf for a statutory recommendation under section 72(3) set out above.

[2] 11(7) In a mental health case, if the patient has not appointed a representative, the Tribunal may appoint a legal representative for the patient where— … (b) the patient lacks the capacity to appoint a representative but the Tribunal believes that it is in the patient's best interests for the patient to be represented.

17. In the decision the relevant evidence is as follows:

(i) From the pre hearing examination – "he would like more leave.
(ii) At paragraph 1- " in respect of section 17 leave, [the doctor] was concerned that, as [the appellant] was clear he did not want to be in hospital, he may not return from unescorted leave."
(iii) At paragraph 2 which sets out the nursing evidence - "Whilst on section 17 escorted leave, [the appellant] struggles to walk up the hill. … There have been no falls. There is no previous history of absconding from leave. As [the appellant] is adamant he does not wish to be in hospital, there is a risk that he may abscond if he were granted unescorted leave."

18. In the Tribunal's conclusions at paragraph 15 they give reasons for their refusal to make a recommendation for section 17 leave.

> "As section 17 leave is already authorised, the tribunal does not have the power or jurisdiction to make a statutory recommendation for unescorted leave – the wording of section 72(3)(a) is clear; tribunal [sic] can only "… recommend that he be granted leave of absence…"- [the appellant] already has leave of absence authorised under section 17 and for this reason the tribunal cannot and does not make a statutory recommendation for leave."

The analysis

19. I agree with Judge Chamberlain when he says that the First-tier Tribunal gave adequate reasons for the decision given their interpretation of section 72(3) MHA. They explained they did not make a recommendation for leave as they had no power or jurisdiction to grant such a recommendation as the patient already had some leave. The issue before me is whether the First-tier Tribunal were right in their interpretation of their powers under this section.

20. I find that that their interpretation of their powers under this section were wrong for the reasons set out below.

21. Applying a purposive approach to interpreting section 72 of the MHA and noting the principle set out in RO v SSHD that "*a phrase or passage must be read in their context",* section 72 tells the tribunal when they "shall" discharge a patient and when they "may" delay that discharge or make recommendations. For example, if the tribunal is not satisfied that the detention of a patient under section 3 of the MHA is necessary for the health, safety or the protection of others that

he should receive such treatment they must discharge him. Section 72(3) gives the tribunal a discretion to delay discharge or make a recommendation.

22. The tribunal may only exercise this discretion *"with a view to facilitating discharge"* but they do have a discretion to do this. As Judge Jacobs says in RB v Nottinghamshire Healthcare NHS Trust:

> "The power to make statutory recommendations is discretionary for the tribunal, but it must be exercised, like all a tribunal's discretions, judicially. And once begun, it must be followed through fairly. It is obviously designed to assist in identifying the best way forward for the patient." (my emphasis)

23. I agree with Judge Jacobs that the discretion given to the tribunal to make a recommendation is designed to identify the best way forward for the patient. If a patient has one form of leave, for example escorted leave, the tribunal when looking at the best way forward must be able to recommend that he is granted unescorted leave. Successful unescorted leave will facilitate discharge on a future date as the patient may show his treating team he is able to manage this successfully without restrictions. That leave is quite different from escorted leave.

24. There are no words in section 72(3) MHA which limit that discretionary power when the patient already has leave. This interpretation would be to imply words that are not in the section and dilute the purpose of the section which is to facilitate discharge in the future. As Judge Jacobs said in RN v CC the discretion to make a recommendation "can be used as a trigger for action in the future."

25. Following on from this, the interpretation of the tribunal in limiting their discretion to make a recommendation would produce an absurdity as defined in WF V SS for HCLG above: *the courts give a wide meaning to absurdity using it to include virtually any result which is … unworkable or impracticable …"* (see paragraph 13 above).

26. It would be unworkable and impracticable to limit the discretionary power of the tribunal to recommend different types of leave for patients who are detained under the MHA as different types of leave are appropriate at different stages of a patient's treatment. Escorted garden leave to allow the patient to have a cigarette is entirely different to unescorted leave to their home. The latter is designed for a different purpose which may be, for example, to test the patient's readiness for discharge.

27. As a consequence of their interpretation of section 72(3) the tribunal did not consider whether to exercise their discretionary power to make a statutory recommendation for leave. I am unable to say whether they should have made such a recommendation or not as I was not there listening to the evidence. Given the evidence recorded in the decision it may well have been arguable either way. The error of law is that the First-tier Tribunal considered they had no power or jurisdiction to make the recommendation.

28. As the patient is no longer detained under the same section of the MHA, I am not setting aside the decision and remitting it to the First-tier tribunal. There is no purpose in doing this as the section on which the patient was detained was discharged.

Sarah Johnston

Judge of Upper Tribunal Johnston

25 November 2025