Neutral Citation Number: [2026] UKUT 57 (AAC)

Appeal No. UA-2025-001046-HM

IN THE UPPER TRIBUNAL

ADMINISTRATIVE APPEALS CHAMBER

Between:

DB

Appellant

v

Humber Teaching NHS Foundation Trust

First Respondent

Secretary of State for Justice

Second Respondent

Rule 14(7) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI No 2698) provides:

> **'Unless the Upper Tribunal gives a direction to the contrary, information about mental health cases and the names of any persons concerned in such cases must not be made public.'**

By way of exception, the UPPER TRIBUNAL DIRECTS that this decision and the reasons for it may be made public.

Any breach of this order is liable to be treated as a contempt of court and may be punishable by imprisonment, fine or other sanctions under section 25 of the Tribunals, Courts and Enforcement Act 2007. The maximum punishment that may be imposed is a sentence of two years' imprisonment or an unlimited fine.

Before: Upper Tribunal Judge Jacobs

Decided on 05 February 2026 without a hearing.

Representation:

Claimant:	Ollie Persey of counsel, instructed by Zac Sussex of Reeds Solicitors
The Trust:	Did not take part.
SoS:	Alex Cisneros of counsel, instructed by the Government Legal Department

Summary: Mental health (80)

Restricted patient – application for conditional discharge – patient willing to remain in the hospital on informal basis – permissible - M v Secretary of State for Justice [2019] AC 712 at [20] explained.

DECISION OF UPPER TRIBUNAL

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

Reference: MM/2024/31973
Decision date: 24 April 2025
Hearing: Remote
Panel: Judge C Fyall, Dr JE Hobson and Mrs EFG Standfield

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

A. What this case is about

1. DB is a restricted patient. He was conditionally discharged from hospital, but recalled by the Secretary of State. His case was referred to the First-tier Tribunal. At the hearing, his counsel (Roger Pezzani) suggested that he would be willing to remain in the hospital informally if conditionally discharged. The tribunal decided that this was not permissible. I have decided that it was.

B. Why I did not hold an oral hearing

2. I gave DB permission to appeal to the Upper Tribunal and allowed the Respondents one month in which to respond to the appeal. Neither did so. This was what I anticipated, as it is common practice in mental health appeals. I asked DB's solicitor whether he wanted an oral hearing. He replied that he did not. I therefore approached the case on the basis that I would decide it on a consideration of the papers. Having embarked on that task, I realised that the case raised the correctness of the Secretary of State's statement of policy on *The recall of conditionally discharged restricted patients*. At that point, I changed my mind and directed an oral hearing. The Secretary of State made submissions supporting the appeal. Having seen the arguments for DB and the Secretary of State, I changed my mind again and decided that a hearing would not add value to the proceedings. So, eventually, I have made this decision without a hearing.

C. The history of the case

3. DB was detained under section 37 of the Mental Health Act 1983 and subject to restrictions under section 41. He was conditionally discharged. Given the issue I have to decide, I note in passing that he was an informal inpatient in May and November 2024. The Secretary of State recalled him to hospital on 27 November 2024 by warrant under section 42(3). The warrant was issued on the basis that his mental state had declined, he had not been compliant with his antipsychotic medication and he had said

he did not intend to remain compliant. Accordingly, on 6 December 2024, his case was referred to the First-tier Tribunal. DB's case finally came on for hearing on 24 April 2025, when the tribunal decided that he should not be discharged.

4. The tribunal found that DB's treatment 'could only be given if [he] remained subject to detention.' It went on:

> 24. Mr Pezzani [counsel for DB] made, at the close of today's hearing, what he described as a tentative argument that the Tribunal could have discharged the section on the basis that DB was able to remain on a voluntary basis at [the] ward. Having considered this matter subsequently and in reaching its decision, the Tribunal was satisfied that this was also not a possible option for the Tribunal – see Lady Hale in *Secretary of State for Justice v MM* [2018] UKSC 60, para 20, where she says ''discharge' in …section 73(2) when referring to the conditional discharge of restricted patients, cannot mean discharge from the liability to be detained, because the patient remains liable to be detained. It must therefore mean discharge from the hospital in which the patient is currently detained.'

5. There are three grounds of appeal, but it is only necessary to deal with the first ground. It raises this issue: is it permissible for a patient to be conditionally discharged while remaining voluntarily in hospital?

D. Mental Health Act 1983

6. These are the relevant sections:

> **42 Powers of Secretary of State in respect of patients subject to restriction orders.**
>
> (1) If the Secretary of State is satisfied that in the case of any patient a restriction order is no longer required for the protection of the public from serious harm, he may direct that the patient shall cease to be subject to the special restrictions set out in section 41(3) above; and where the Secretary of State so directs, the restriction order shall cease to have effect, and section 41(5) above shall apply accordingly.
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> (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; and where a person is absolutely discharged under this subsection, he shall thereupon cease to be liable to be detained by virtue of the relevant hospital order, and the restriction order shall cease to have effect accordingly.
>
> (3) The Secretary of State may at any time during the continuance in force of a restriction order in respect of a patient who has been conditionally discharged under subsection (2) above by warrant recall the patient to such hospital as may be specified in the warrant.
>
> (4) Where a patient is recalled as mentioned in subsection (3) above—
>
> (a) if the hospital specified in the warrant is not the hospital from which the patient was conditionally discharged, the hospital order and the restriction order shall have effect as if the hospital specified in the warrant were substituted for the hospital specified in the hospital order;

(b) in any case, the patient shall be treated for the purposes of section 18 above as if he had absented himself without leave from the hospital specified in the warrant.

(5) If a restriction order in respect of a patient ceases to have effect after the patient has been conditionally discharged under this section, the patient shall, unless previously recalled under subsection (3) above, be deemed to be absolutely discharged on the date when the order ceases to have effect, and shall cease to be liable to be detained by virtue of the relevant hospital order accordingly.

(6) The Secretary of State may, if satisfied that the attendance at any place in Great Britain of a patient who is subject to a restriction order is desirable in the interests of justice or for the purposes of any public inquiry, direct him to be taken to that place; and where a patient is directed under this subsection to be taken to any place he shall, unless the Secretary of State otherwise directs, be kept in custody while being so taken, while at that place and while being taken back to the hospital in which he is liable to be detained.

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; …

(6) Subsections (1) to (4) above apply in relation to references to the appropriate tribunal as they apply in relation to applications made to the appropriate tribunal by or in respect of a patient.

(7) Subsection (1) above shall not apply in the case of a restricted patient except as provided in sections 73 and 74 below.

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.

(3) Where a patient is absolutely discharged under this section he shall thereupon cease to be liable to be detained by virtue of the relevant hospital order, and the restriction order shall cease to have effect accordingly.

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

(a) he may be recalled by the Secretary of State under subsection (3) of section 42 above as if he had been conditionally discharged under subsection (2) of that section; and

(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.

(6) Where a restriction order in respect of a patient ceases to have effect after he has been conditionally discharged under this section the patient shall, unless previously recalled, be deemed to be absolutely discharged on the date when the order ceases to have effect and shall cease to be liable to be detained by virtue of the relevant hospital order.

(7) A tribunal may defer a direction for the conditional discharge of a patient until such arrangements as appear to the tribunal to be necessary for that purpose have been made to its satisfaction; and where by virtue of any such deferment no direction has been given on an application or reference before the time when the patient's case comes before the tribunal on a subsequent application or reference, the previous application or reference shall be treated as one on which no direction under this section can be given.

(8) This section is without prejudice to section 42 above.

75 Applications and references concerning conditionally discharged restricted patients.

(1) Where a restricted patient has been conditionally discharged under section 42(2), 73 or 74 above and is subsequently recalled to hospital—

(a) the Secretary of State shall, within one month of the day on which the patient returns or is returned to hospital, refer his case to the appropriate tribunal; and

(b) section 70 above shall apply to the patient as if the relevant hospital order, hospital direction or transfer direction had been made on that day.

131 Informal admission of patients.

(1) Nothing in this Act shall be construed as preventing a patient who requires treatment for mental disorder from being admitted to any hospital or registered

establishment in pursuance of arrangements made in that behalf and without any application, order or direction rendering him liable to be detained under this Act, or from remaining in any hospital or registered establishment in pursuance of such arrangements after he has ceased to be so liable to be detained.

The remainder of the section deals with patients who are aged 16 or 17.

E. *The recall of conditionally discharged restricted patients*

7. This is the name of a statement of policy issued by the Ministry of Justice on 4 February 2009. Paragraphs 8-15 read:

> **Informal admissions**
>
> 8. Recall must be considered where there is any admission to psychiatric hospital. As with any consideration of recall, public safety is of paramount importance. In deciding whether recall is indicated where a patient has been informally admitted to hospital, relevant factors are:
>
> - the likely length of admission. If an admission of more than a few weeks is likely then recall is indicated, unless there are compelling reasons against recall.
> - any evidence of increased risk to others will lead to recall.
> - regardless of the fact that the patient is in hospital voluntarily, would the supervising psychiatrist seek to detain the patient if he wished, or attempted to leave?
>
> 9. In answering these questions we are guided by the information provided by, and discussions with the supervisors and our knowledge of the background, history and risk factors in the case. For example, has the patient a pattern of rapid deterioration or previous non-compliance?
>
> 10. Where a decision is taken not to recall but to allow the informal admission to continue then the case must be reviewed regularly. A weekly up-date will normally be appropriate, but a longer period may be indicated depending upon the circumstances of the case.
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> **Informal admissions and risk of self-harm/suicide**
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> 11. Where a patient has been informally admitted because of risk of self-harm/suicide and there is no evidence of risk to others, it may not be appropriate to recall. Again, it is not possible to cover the differing circumstances of cases but the following principles should be applied in considering the case.
>
> 12. If the medical evidence is that the patient does not meet the criteria for compulsory detention under the Mental Health Act, then recall will not normally be indicated, regardless of the likely length of admission
>
> 13. If the medical evidence is that the patient, while in hospital voluntarily, does meet the criteria for compulsory detention under the Mental Health Act, then recall may be indicated if the likely length of admission is more than about a month.
>
> **Admission under Section 2 or Section 3 of the Mental Health Act 1983**
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> 14. If a Restricted patient requires compulsory detention in hospital under the Mental Health Act then recall will almost invariably be appropriate.

15. The only circumstances where recall may not be indicated would be where discharge was imminent (within days rather than weeks), or where the admission is solely due to self-harm/suicide issues and the admission is likely to last less than about a month.

F. Case law

M v Secretary of State for Justice [2019] AC 712.

8. The First-tier Tribunal relied on the reasoning in this Supreme Court case. Lady Hale gave the only judgment. The issue was whether it was permissible to impose a condition on a patient's discharge that deprived them of their liberty. The Court decided that this was not permissible. That decision is binding on the First-tier Tribunal and the Upper Tribunal, as well as the Court of Appeal. This case raises a different issue, but the tribunal relied on the Court's reasoning at [20]. For context, this was in a section of the judgment headed *The Arguments*, although they are interspersed with judicial comments. Also for context, I set out the preceding paragraphs:

> 17. In *Secretary of State for the Home Department v Mental Health Review Tribunal for Mersey Regional Health Authority* [1986] 1 WLR 1170, Mann J held that it meant 'discharge from hospital', so that a condition could not be imposed that the patient reside in another hospital, even if not under conditions of detention. In *R (Secretary of State for the Home Department) v Mental Health Review Tribunal, PH as interested party* [2002] EWHC 1128 (Admin); [2002] MHLR 241, known as 'PH', Elias J held that it meant 'discharge from detention in hospital', so that there could be a discharge on condition of residence in another hospital: but he also held that the crucial question was whether the conditions amounted to detention, which was not permitted. The Court of Appeal proceeded on the assumption that this proposition was correct and decided that the conditions imposed were not such as to amount to a deprivation of liberty and therefore that they were not ultra vires: [2002] EWCA Civ 1868; [2003] MHLR 202.
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> 18. The MHA draws a clear distinction between being actually detained, being liable to be detained, and being neither. A patient who is detained in hospital under compulsory powers such as a hospital order, including a restriction order, is actually detained. A hospital order or other compulsorily detained patient who is granted leave of absence under section 17 of the MHA remains 'liable to be detained' (see section 17(1)). A patient who is released from hospital under a community treatment order under section 17A is not liable to be detained (see section 17D(2), as inserted by section 32(2) of the 2007 Act). But a restricted patient who is granted a conditional discharge remains liable to be detained: this much appears from section 42(2), which states that a restricted patient who is *absolutely* discharged ceases to be liable to be detained, with the clear implication that a restricted patient who is conditionally discharged remains liable to be detained.
>
> 19. This must mean that 'discharge' has a different meaning when referring to restricted patients in sections 42(2) and 73(2) from the meaning that it has in sections 23 and 72 when dealing with the discharge of unrestricted patients. Section 23(1) states that 'a patient who is for the time being liable to be detained … shall cease to be so liable' if ordered to be discharged by his responsible

> clinician, the hospital managers or (in certain circumstances) his nearest relative. It contains no power to grant a conditional discharge. Section 72 deals with the tribunal's powers to discharge non-restricted patients who are liable to be detained and also confers no power to impose a conditional discharge. 'Discharge' in sections 23 or 72 must therefore mean an absolute discharge, not only from detention but also from the liability to be detained.
>
> 20. On the other hand, 'discharge' in sections 42(2) and 73(2) when referring to the conditional discharge of restricted patients, cannot mean discharge from the liability to be detained, because the patient remains liable to be detained. It must therefore mean discharge from the hospital in which the patient is currently detained. …

9. I emphasis the words used in respect of the first case cited in [17]: 'even if not under conditions of detention.' I have not found those words in the report of the case itself. Maybe I have missed them. I also note that in [18] Elias J identified the crucial question as whether 'the conditions amounted to detention'.

Cases in which the courts have accepted that a conditionally discharged patient may be admitted for treatment either formally under section 3 or informally

10. In *Dlodlo v Mental Health Review Tribunal for the South Thames Region* (1997) 36 BMLR 145, the patient, while conditionally discharged, had been admitted to hospital under section 3 before the Secretary of State issued a warrant recalling him. The case came before the Court of Appeal on habeas corpus. The argument for the patient was that the Secretary of State had no authority to issue the warrant. Sir Thomas Bingham MR gave the only judgment. He drew attention (at 148) to the:

> … clear contrast between the regime of control which exists in the case of ordinary patients admitted under s 3, and patients admitted in the rare and much more serious circumstances contemplated by s 37, combined with a restriction order under s 41.

He spelt this out at 147. The former were subject to control by the responsible clinician and the hospital managers. The latter were subject to a much more restrictive regime under which various powers can only be exercised by the Secretary of State or by the First-tier Tribunal. He went on (at 149):

> … it is clear that a warrant under s 42(3) cannot have the effect of producing a physical result. It is a form of legal authority. It authorises the compulsory admission of a patient and the detention of such a patient. It also authorises, I think inevitably, the reinstatement of the regime of control under s 41. That is, of course, the purpose of the Secretary of State authorising the recall so that he can resume the restrictive powers which he seeks to exercise over the patient. In my judgment, 'recall' must be understood as authorising not only the physical recall, but also the reinstatement of a regime of control.

He then referred to the *Mersey Regional Health Authority* case and Mann J's decision that discharge meant only release from hospital. Sir Thomas went on (still at 149):

> I would readily accept that view, and I see no inconsistency with the view which I prefer, namely, that recall not only authorises a compulsory readmission and detention, but also authorises the reinstatement of a regime of control.

There is nothing to suggest that Sir Thomas, or the Court as a whole, considered that the admission under section 3 was incompatible with the conditional discharge. Indeed, if they were incompatible, the Court could simply have said so without the need for further analysis about the effect of a warrant.

11. In *R v North West London Mental Health NHS Trust, ex parte S* [1998] QB 628, the conditionally discharged patient was detained under section 3. He argued that he could only be detained by recall under section 42(3). The Court of Appeal rejected that argument. It decided that the powers under section 3 and section 42(3) were not mutually exclusive.

12. In *R (Rayner) v Secretary of State for Justice* [2009] 1 WLR 310, the patient was admitted to a hospital as a voluntary patient while on a conditional discharge before the Secretary of State issued a warrant recalling him to the same hospital where he was already a patient. Keene LJ set out the history:

> 6 The claimant, Daniel Rayner, was convicted in April 2002 of assault and possession of an offensive weapon. He was diagnosed as suffering from schizophrenia, and in August 2002 the Crown Court made hospital and restriction orders under section 37 and 41 of the 1983 Act. In August 2004 an MHRT directed his conditional discharge under section 73. He was duly released, but in May 2005 he was readmitted as a voluntary patient to Pembury Hospital in Kent. He was thus already in hospital when, on 14 June 2005, the Secretary of State for the Home Department issued a warrant under section 42(3), formally recalling him to that hospital. From that date the claimant was being compulsorily detained in hospital under the 1983 Act

There is nothing to suggest that the Court considered that the voluntary admission was incompatible with the conditional discharge.

13. Is the reasoning in *Dlodlo*, *S* and *Rayner* consistent with the reasoning of the Supreme Court in *M*? Sir Thomas Bingham thought so in *Dlodlo*, because he said that his reasoning was consistent with the *Mersey Regional Health Authority* case, which was cited by the Supreme Court. One way to reconcile the authorities is to say that when the Supreme Court referred to discharge from hospital, it meant discharge from hospital under the restriction order regime. If it matters, Mr Pezzani for DB in the First-tier Tribunal envisaged that DB would remain voluntarily, not as part of a condition of the discharge.

14. These cases show that admission to a hospital is consistent with a patient remaining on a conditional discharge. A patient may be admitted informally for treatment while subject to a conditional discharge and thereby liable to be detained on recall. And a patient may be admitted for treatment under section 3 while subject to a conditional discharge. In combination, they show that different forms of admission can operate independently.

G. Arguments

15. I am grateful to both counsel for their clear and succinct written arguments, which I accept, subject to one caveat.

The argument for the Secretary of State

16. Mr Cisneros analysed *M* as deciding

> … a narrow question of statutory construction within the restricted patient scheme. It does not establish a general rule that:
>
> a. 'discharge' is only ever physical; or
>
> b. a Tribunal is prohibited from considering post-discharge informal admissions when applying s.72.

He emphasised that this was consistent with Lady Hale's broader approach to detention and deprivation of liberty. They

> … are not limited to the physical reality of a person's detention, but depend on both:
>
> a. the objective, factual reality of the person's situation, including the level of supervision and control and whether they are free to leave; and
>
> b. the legal reality of that detention.

17. I accept those arguments, but I accept the argument about Lady Hale's broader approach with caution. It derives in part from the *Cheshire West* case: *Surrey County Council v P* [2014] AC 896. The Supreme Court has recently reconsidered that case and judgment is awaited. I have, therefore, not relied on it in reaching my decision in this case.

18. Mr Cisneros argued that the First-tier Tribunal had been wrong to treat *M* as creating a binary position in which a patient must either be detained in a hospital or discharged into the community. That was inconsistent with the Secretary of State's statement of policy and with the authorities I have cited. He argued that the statutory scheme was 'directed to the management and reduction of risk' and 'recognises that risk may be appropriately managed and mitigated through informal admission, rather than requiring continued formal detention.'

The argument for DB

19. Mr Persey argued that the First-tier Tribunal's interpretation of *M* 'produces absurdity and incoherence.' It should be interpreted to avoid both. Otherwise, it would mean that the Supreme Court had overturned the cases I have cited and done so without any analysis. Informal admission is a potentially relevant factor to the question whether detention is necessary. He also relied on section 3 of the Human Rights Act 1998. Finally, he agreed with a suggestion I had made in a direction that 'when the Supreme Court referred to discharge from hospital, it meant discharge from hospital under the restriction order regime.'

H. Section 131

20. This section deals with informal admissions. Subsection (1) deals with two possibilities: (a) a patient who is admitted informally: and (b) a patient who remains informally after ceasing to be liable to be detained. If DB were to remain informally in hospital once the conditional discharge took effect, he would technically be admitted informally under possibility (a). Although he would in practice remain in the hospital, possibility (b) would not apply, because he would not cease to be liable to be detained: see *M* at [18].

I. Conclusion

21. Detention cannot be a condition of discharge under section 73(4)(b). But a patient may remain in the hospital, or later be admitted, informally during a conditional discharge. This possibility is one of the factors that may be taken into account when deciding whether to discharge a patient conditionally.

Authorised for issue
on 05 February 2026

Edward Jacobs
Upper Tribunal Judge