SS v Cornwall Partnership NHS Foundation Trust (Mental Health)
[2023] UKUT 258 (AAC)

IN THE UPPER TRIBUNAL **Appeal No.: UA-2023-000657-HM**
ADMINISTRATIVE APPEALS CHAMBER

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

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

Between:

SS

Appellant

\- v –

Cornwall Partnership NHS Foundation Trust

Respondent

Before: Upper Tribunal Judge Church

Decided following a remote video hearing by CVP on 12 October 2023

Representation:

Appellant:	Mr Roger Pezzani and Mr Schymyck of counsel, instructed by Mr Joseph Railton of Conroys Solicitors
Respondent:	Not represented

DECISION

The decision of the Upper Tribunal is to allow the appeal.
The decision of the First-tier Tribunal made on 28 February 2023 under number MP/2022/26011 was made in error of law.
Under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 the decision is **set aside** and the case is **remitted** to the First-tier Tribunal

for rehearing by a differently constituted panel in accordance with the following Directions:

1. Having regard to the duties and guidance set out in Rule 32(6) of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008; and section E of the relevant Practice Direction; and paragraphs 33.10-33.16 of the Code of Practice to the MHA 1983, the authorities with statutory responsibility for providing aftercare to the appellant in the event that he is discharged must file evidence identifying:

    1. the steps that have already been taken to identify and arrange suitable aftercare for the appellant;
    2. what aftercare the appellant is assessed to need in the event of discharge, including accommodation;
    3. the remaining practical arrangements that are necessary to ensure that aftercare will be made available to the appellant without undue further delay, in the event of his discharge; and
    4. an estimate, as precise as possible, of how long it is likely to take for those arrangements to be made.

2. A senior representative of the authorities with statutory responsibility for the provision of aftercare to the appellant, who may be the author of the report containing the evidence specified above, shall attend the FTT hearing to give evidence.

3. The Responsible Authority must file addendum psychiatric and nursing reports.

These Directions may be amended or supplemented by any judge, registrar or caseworker of the First-tier Tribunal.

REASONS FOR DECISION

What this appeal is about

4. This appeal is about when a tribunal should adjourn to seek information on aftercare that would be available to a patient should the tribunal exercise its power of discharge.

5. This issue was considered by the Upper Tribunal in *AM v West London Mental Health NHS Trust and Secretary of State for Justice* [2012] UKUT 382 (AAC) (***"AM v West London")***. However, unlike in *AM v West London*, in this case there was compelling and uncontradicted evidence that discharge into the community was a realistic alternative to detention in hospital provided that suitable aftercare was available.

Factual background

6. SS is a patient with a diagnosis of paranoid schizophrenia with a mood component. On 7 June 2022 he was detained under section 3 of the Mental Health Act 1983 (**"MHA"**). He has a long history of mental health difficulties. He first came into contact with mental health services in 1996 and has had numerous compulsory hospital admissions since, as well as periods in the community subject to Community Treatment Orders.

7. He was at the time of the decision under appeal, and is now, detained on a Psychiatric Intensive Care Unit (a **"PICU"**) at Bodmin Hospital.

8. On 13 October 2022 SS made an application under the MHA for his section to be reviewed by the First-tier Tribunal. The matter was initially listed to be heard on 6 December 2022, but that hearing was postponed due to SS's representative being unwell. The matter was relisted for 10 January 2023, when a panel of the First-tier Tribunal convened at Bodmin Hospital (the **"January Hearing"**).

9. The panel heard oral evidence about whether an adjournment was needed. The tribunal summarised the responsible clinician's evidence:

> "Dr Mather in his written report prepared on 2nd November 2022 and in his oral evidence today opined that risks could be managed in the community but only if a suitable robust package of care and support could be provided. However, despite this, [SS] remains on a PICU ward. The PICU ward is not resourced or equipped to facilitate a transition to a community setting. Such resources were available locally on Fettle Ward but this ward was unable to offer a bed because of its own policy of limiting its resource to around 2 years for any patient and that [SS] had already had this amount of support from Fettle ward in the past. Dr Mather's assessment was that the PICU ward was simply not resourced or set up to provide the sort of transition assistance and support that [SS] required. If the PICU was to attempt to facilitate a discharge to supported accommodation it would need to be provided with such resources on a one-off basis so that the phased transition with Section 17 trial leave could be facilitated." (Paragraph 1 of the tribunal's decision with reasons, emphasis supplied)

10. The panel also noted:

> "Furthermore, on the written evidence of the professionals, *the patient has been well enough for discharge from hospital for some time if a discharge pathway and accommodation could be agreed*." (Paragraph 4 of the tribunal's decision with reasons, emphasis supplied)

11. Aftercare was, therefore, the key factor. It was not in dispute that SS, as a section 3 patient, was entitled to aftercare, or that aftercare was required as a necessary precondition to discharge. Without it, detention was necessary. With it, it was strongly arguable that detention was not required, and the responsible clinician himself argued that it would not be.

12. The panel also heard from SS's care co-ordinator who, despite making considerable efforts, had not yet identified any appropriate accommodation to which SS could be discharged. The tribunal summarised the situation as follows:

> "No discharge accommodation has been identified despite Mrs Wilson's fairly exhaustive search within the Cornwall area. Currently Mrs Wilson does not have access to a brokerage system and is therefore limited in her efforts by the time she can make available within her current extensive caseload to devote to researching and contacting potential placements. The tribunal hopes that Mrs Wilson can be afforded assistance for the considerable task she is undertaking in the patient's case. There are family connections to areas outside Cornwall and an out of area placement needs to be considered." (Paragraph 2 of the tribunal's decision with reasons)

13. The panel decided, of its own motion, that it was necessary in the interests of justice to adjourn for more information as to "the type of accommodation, its whereabouts and the resources available at any possible discharge accommodation". It explained the rationale for this decision in paragraph 4 of its decision with reasons:

> "The tribunal accepted Mr Conroy's argument that although the Section might appear at first sight to be necessary to facilitate trial Section 17 leave to any placement, Mr Conroy was effectively prevented to make representations on this issue without more information as to the type of accommodation, its whereabouts and the resources available at any possible discharge accommodation."

14. The panel adjourned and directed the Responsible Authority to file reports ahead of the date of the next hearing including, in particular, setting out "proposals for less restrictive hospital provision and/or supported accommodation as part of the patient's discharge pathway."

15. A further hearing of the application took place some 7 weeks later, on 28 February 2023, before a different panel of the First-tier Tribunal (the **"February Hearing"**).

16. It is apparent from paragraph 10 of the tribunal's decision with reasons that the issue at the February Hearing was the same as that faced by the January Hearing:

> "Dr Mather made it clear from the outset that he continues to believe that [SS] no longer needs to be on Harvest Ward, and that with a suitable care package and accommodation he could be managed safely in the community. He also shared the concern of Mr Conroy, that [SS} is becoming institutionalised – [SS] regards Harvest Ward as his home and the staff and patients as his family. Nevertheless, in present circumstances, in the absence of a discharge plan, [SS} needs to remain liable to detention in the interests of his health and safety, and for the protection of other people. Dr Mather told the Tribunal that when [SS} is eventually discharged, it will be necessary for him to be on a CTO so that a statutory framework is in place."

17. Since the January Hearing there had been some significant progress in terms of discharge planning: a potentially suitable placement had been identified, which SS had visited, and the operator of the placement had indicated that they were willing to assess SS's suitability for a placement. However, no assessment

had yet taken place, so there remained some uncertainty as to what would be available to SS should he be discharged from hospital.

18. Despite the circumstances remaining very similar to how they had been at the date of the January Hearing (when the previous panel had considered it necessary in the interests of justice to adjourn for more information on aftercare) the panel conducting the February Hearing decided that it was not appropriate to adjourn the matter again. In relation to this aspect of its decision making it said in paragraph 19 of its decision with reasons:

> "We gave very careful consideration to further adjourning the hearing for more information about future accommodation and a care package, but with some reluctance we concluded that it would not be appropriate to adjourn this hearing again. A considerable amount of work remains to be done on the discharge plan, and this is likely to take some time. There is sufficient evidence to enable a decision to be made today, and at this time we do not consider it to be necessary in the interests of justice for the hearing of this application to be further delayed,"

19. The panel refused the application for an adjournment, and it determined the application, finding that the statutory criteria to continued liability to detention were met and declining to exercise its discretion in favour of discharge (the **"FtT Decision"**).

20. It is the FtT Decision that is the subject of this appeal.

The grounds of appeal

21. Having been refused permission to appeal the FtT Decision by the First-tier Tribunal, SS applied to the Upper Tribunal for permission to appeal and the matter came before me. I was persuaded by Mr Pezzani's submissions on SS's behalf that it was arguable with a realistic prospect of success that the First-tier Tribunal had erred materially in law.

22. I gave permission to appeal on the following grounds:

1. given that the availability of suitable aftercare was centrally relevant to the First-tier Tribunal's performance of its statutory duty (and not "incapable of affecting the outcome" c.f. *AM v West London)*, the First-tier Tribunal erred in law by determining the application instead of adjourning to seek further information about the aftercare that would be available to SS;
2. the First-tier Tribunal's refusal to adjourn unfairly and unjustly deprived the patient of evidence he needed to support his application for discharge; and
3. the First-tier Tribunal erred by deferring assessment of the issues surrounding aftercare to the determination of a theoretical future application rather than dealing with them itself.

The oral hearing of the appeal

23. A remote video hearing of the appeal was held on 12 October 2023. The Respondent did not participate. The Appellant was very ably represented by Mr Pezzani and Mr Schymyck of counsel, who were instructed by Mr Railton of Conroys Solicitors.

24. I am grateful to them for their thorough preparation for the appeal and their clear submissions, particularly as they provided their services on this appeal pro bono.

25. Mr Pezzani updated me on developments since the date of the FtT Decision (which were, in brief summary, that while SS had been transferred between various hospital wards, he was now back on the same PICU ward where he had been detained at the date of the last hearing, and no firm discharge plan has yet been made). Mr Pezzani also expanded on the matters set out in SS's Statement of Fact and Grounds of Appeal.

The Law

26. Section 72 of the MHA sets out the circumstances in which a tribunal may or, as the case may be, must discharge a patient. It provides (so far as relevant for the purposes of this appeal):

> **"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 or 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 …"
>
> …

27. Rule 5 of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 (the **"FtT Rules"**) gives the First-tier Tribunal very wide case management powers, including the power to regulate its own procedure (rule 5(1)) and to adjourn or postpone a hearing (rule 5(3)(h)).

28. Rule 2 sets out the overriding objective which the tribunal must seek to give effect to whenever it exercises any power under the FtT Rules or interprets any rule or practice direction. It provides (so far as relevant to this appeal):

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

2.-(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;

(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.

…"

Analysis

Ground 1: the tribunal erred in law by refusing to adjourn to seek further information about available aftercare, given that this was centrally relevant to the First-tier Tribunal's performance of its statutory duty

29. The leading authority on whether it is appropriate to adjourn a mental health case due to a lack of information about available aftercare is the decision of the Upper Tribunal in *AM v West London*. In that case, Judge Jacobs decided that the tribunal had not been wrong to proceed to determine the application rather than to adjourn, because in the circumstances of that case the information about discharge was not relevant to the decision the tribunal had to make: while the social work evidence available to the tribunal may have been incomplete, and perhaps even inadequate, it did not affect the tribunal's ability to give the applicant a fair hearing or to deal with the case fairly and justly because, on the tribunal's findings, M had not yet progressed to the point where the issue of what aftercare was in fact available to him would arise because he was not ready for discharge from hospital whatever support might be available in the community. In his decision refusing permission to appeal Judge Jacobs' decision in *AM v West London* to the Court of Appeal (reported as *AM v West London Mental Health NHS Trust* [2013] EWCA Civ 1010; [2013] MHLO 73) Richards LJ said that the key question in such a situation was whether information about discharge and aftercare was "incapable" of affecting the decision whether to adjourn:

> "8. For my part, I acknowledge that aftercare information should be provided in accordance with the provisions to which Mr Pezzani has referred, and that he has put forward very good reasons why it should be provided so as to enable the patient to make full submissions and to enable the Tribunal to make a properly informed decision on discharge.
>
> 9. I also recognise the need for great caution before reaching a conclusion that information about aftercare could make no difference and is therefore unnecessary, given the importance attached to its provision, the fact that a patient depends on the authorities for its provision and also the need to ensure procedural fairness. But it seems to me, as it did to the Upper Tribunal Judge and evidently to Sir Stanley Burnton, that it must, as a matter of principle, be open to a Tribunal to conclude in the circumstances of a particular case that information or better information of aftercare is incapable of affecting the decision, and that an adjournment to secure its provision could achieve nothing beyond additional expense and delay and would therefore be inappropriate, The question to my mind is whether this is such a case."

30. If it can be said that information about aftercare is not required because it wouldn't make any difference to the decision the tribunal is charged with making, then it can also be said that an adjournment to seek such information would be inappropriate. In other words, it is not in the interests of justice to delay proceedings for the purpose of obtaining irrelevant evidence.

31. However, given the evidence before the tribunal at the February Hearing, which was accepted by the tribunal, this was clearly not such a case. Since it was accepted that SS was fit to be discharged if an appropriately robust package of care was available to him, what aftercare was actually available to him was centrally relevant, and eminently capable of affecting the outcome, especially given the responsible clinician's evidence recorded in the reasons issued following the February Hearing that SS's continued detention on the PICU ward was "counter-therapeutic", i.e. that it was inimical to the purpose of the MHA (see paragraph 20 of the tribunal's decision with reasons).

32. This case was, therefore, a case that fell within the category identified by Dyson LJ in *R (H) v Ashworth Hospital Authority & Ors* [2002] EWCA Civ 923 at §69:

> "I would endorse the general observation of the judge at paragraph 69: "In general, in a case in which after-care is essential and satisfaction of the discharge criteria depends on the availability of suitable after-care and accommodation, as in H's case, a tribunal should not direct immediate discharge at a time when no after-care arrangements are in place and there is no time for them to be put in place. […] If […] there is uncertainty as to the putting in place of the after-care arrangements on which satisfaction of the discharge criteria depends, the tribunal should adjourn pursuant to rule 16 to enable them to be put in place, indicating their views and giving appropriate directions: c.f. *Ex parte Hall* [2000] 1 WLR 1323, per Kennedy LJ at 1352D."

33. By the date of the February Hearing the matter had already been adjourned twice. While the first adjournment was due to SS's representative not being able to attend, the second adjournment was for the very same reasons that SS's representative was arguing it should be adjourned again. The overriding objective includes "avoiding delay, so far as compatible with proper consideration of the issues" (rule 2(2)(e) of the FtT Rules), but the fact that the proceedings had been adjourned before, and a further adjournment would introduce further delay, does not necessarily mean that it would not be in the interests of justice to adjourn again. Although in one sense little had changed since the January Hearing in that SS was still detained under section 3 on the PICU ward and no aftercare provision had been agreed, the previous adjournment had not been wholly unsuccessful in that a potential placement willing to assess SS had been identified. There was a reasonable prospect that a further adjournment might result in the information that would allow the tribunal to decide whether continued detention in hospital was necessary.

Ground 2: the First-tier Tribunal's refusal to adjourn unfairly and unjustly deprived the patient of evidence he needed to support his application for discharge

34. Ground 2 approaches the issue of adjournment through the prism of procedural unfairness by reference to common law and Convention principles.

35. As explained by Richards LJ in the passage from his refusal of permission to appeal *AM v West London* to the Court of Appeal quoted in paragraph 29 above, the detained patient depends upon the authorities who have the statutory responsibility to provide him section 117 aftercare for the provision of information about the care that is available. In a case like this, where the detaining authority's position is that the patient is ready to be discharged subject to provision of an appropriate package of care, the detained patient is placed in an invidious position because the failure by the authority liable to provide him with that care to progress his discharge planning and to provide information about what is available, prevents him from presenting his case for achieving his liberty effectively. Without such information, his application was bound to fail.

36. The courts have long recognised the injustice of one party denying another the means to make their case. In *Armory v Delamirie* (1721) 1 Strange 505 it was held that a party will risk adverse findings where he has, in breach of duty, made it difficult or impossible for an opposing party to adduce relevant evidence. The underlying principle extends beyond property disputes between chimney sweeps and jewellers: it is that the interests of justice require that a party should not be disadvantaged by an absence of evidence which is under the control of another party. This point is all the stronger where the party who controls the evidence is a State agency which has statutory and procedural duties to provide the evidence, but has not, and where the party denied the evidence is an individual whom the State is depriving of his liberty.

37. Looking at the issue in the context of the Convention for the Protection of Human Rights and Fundamental Freedoms (the **"Convention"**), the requirement

to ensure a fair hearing in accordance with Article 6(1) of the Convention must extend to disclosure obligations. In the context of the Article 5(4) right of a person to take proceedings to challenge the lawfulness of his or her detention and for a court to decide that matter speedily and to order release from detention if the detention is not lawful, SS's Article 5 rights can only be protected effectively if the tribunal has the information it needs to decide whether continued detention in hospital represents the least restrictive option for his care.

38. Given the finding that SS required a robust package of aftercare, without the information on the aftercare that was available, which was something that only the State entity could provide, the tribunal could not (and did not) order his discharge.

39. For these reasons I am satisfied that the decision not to adjourn was procedurally unfair because it deprived SS of the opportunity to mount an effective challenge to his detention.

Ground 3: the First-tier Tribunal erred by deferring assessment of the issues surrounding aftercare to the determination of a theoretical future application rather than dealing with them itself

40. In explaining its decision to press ahead with determining the application notwithstanding the lack of aftercare information the tribunal said (at paragraph 20):

> "We note that [SS] will be able to make another application to the Tribunal in the near future. The Tribunal that hears any such application will no doubt expect that significant progress will have been made towards finding accommodation and formulating a sufficiently robust discharge and care plan."

41. This suggests that the tribunal saw the availability to SS of an opportunity to apply to the tribunal again before too long mitigated any unfairness that its determining the application before it without seeking further information may involve.

42. However, that there are periodic rights to apply to the tribunal does not mean that procedural unfairness in relation to one set of proceedings can be remedied by the possibility of initiating further proceedings in the future: there must be fairness in all proceedings, and in every hearing (see *R (Citizens UK) v Secretary of State for the Home Department* [2018] EWCA Civ 1812; [2018] 4 WLR 123 per Singh LJ at §94). In any event, it cannot be known whether SS would exercise his right to make a further application to the tribunal, especially given that he now viewed the PICU ward as his home and the staff and patients his family. If he didn't exercise such rights his detention would not be reviewed by a tribunal until such time as a section 68(6) MHA reference would be made, which would be over three years away.

43. Given the way that the responsible clinician expressed his opinion on the statutory criteria, which opinion the panel accepted, the tribunal's determining of the application without information on aftercare amounted in practical terms to an abdication of its role, because without that evidence it couldn't know whether

ongoing detention represented the least restrictive option for SS's care and so it couldn't properly answer the questions posed by section 72 MHA. In refusing to adjourn it wasn't avoiding further delay. Rather, it was kicking the can down the road for the next tribunal to deal with.

Conclusions

44. The Upper Tribunal is typically reluctant to interfere with case management decisions of the First-tier Tribunal, an area in which the First-tier Tribunal enjoys a very broad discretion under the FtT Rules. It might be thought that the decision which the tribunal took at the February Hearing to refuse to adjourn and to determine the application for discharge based on the limited information it had, was within the range of reasonable responses open to the tribunal on the facts, especially since this was the third hearing listed for the application, and another adjournment would involve further delay.

45. However, when exercising its case management powers the tribunal had to seek to further the overriding objective (rule 2(3)). While "avoiding delay" is one aspect of dealing with cases fairly and justly (rule 2(2)(e)), that objective is qualified by the words "so far as compatible with proper consideration of the issues". If the step taken to avoid delay is liable to hamper proper consideration of the issues, then it does not further the overriding objective.

46. Other aspects of the overriding objective were also relevant to the decision not to adjourn. In particular, rule 2(2)(a) requires the tribunal to deal with the case in ways which are "proportionate to the importance of the case … and the resources of the parties". At stake was the applicant's liberty, which was clearly a weighty matter, and in the context of the "resources of the parties" it was relevant that SS was wholly reliant on the local authority for information on how it would exercise its discretion as to the particular package of care which it would make available to discharge its section 117 duty.

47. It was accepted that SS didn't need to be in hospital if an appropriate package of care were available to him in the community, and that this had been the case for some time. The responsible clinician's evidence, accepted by the panel, was that not only did SS not need to be in hospital, he needed *not* to be in hospital, because being there was "counter-therapeutic". The tribunal heard that SS was becoming institutionalised to the extent that he considered the PICU ward to be his home and the staff and patients on the ward to be his family. There was a clear risk that the longer he remained there, the more institutionalised he would be, and a successful discharge would become more difficult to achieve.

48. The only reasons not to adjourn for aftercare information would be either because it is not relevant because the patient had not reached the stage at which discharge was a realistic prospect, or because there was no realistic prospect of such aftercare information being produced. Clearly neither of those situations was applicable in SS's case.

49. I am persuaded that, in the unusual circumstances of this case, information about aftercare was so central to the issue the tribunal had to decide that it was bound to exercise its discretion in favour of granting the adjournment sought, and its failure to do so amounted to a material error of law because it deprived SS of

the information he needed to mount an effective challenge to his detention, and because without it the tribunal couldn't properly answer the questions posed by section 72 MHA. I am satisfied that all three grounds are made out.

50. Further, even if I am wrong on all of that, the tribunal failed adequately to explain why it was not in the interests of justice to adjourn again, which was itself a material error of law.

Disposal

51. For these reasons I am satisfied that the First-tier Tribunal erred in law in a way which was material, and the FtT Decision should be set aside.

52. Because further evidence is required and further findings of fact are necessary, and because the First-tier Tribunal with its expert members is the appropriate body to make those findings, I exercise my discretion under section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 to remit the matter to the First-tier Tribunal for re-hearing before a different panel in accordance with the Directions set out above.

Thomas Church
Judge of the Upper Tribunal

Authorised for issue on

22 October 2023