**IN THE UPPER TRIBUNAL** **Case No: HM/2224/2014**
**ADMINISTRATIVE APPEALS CHAMBER**

**Appellant:** KD

**First Respondent:** A Borough Council

**Second Respondent** The Department of Health

**Third Respondent** MK

**Fourth Respondent** MAK

**Tribunal** First-tier Tribunal (HESC) Mental Health
**Tribunal Case No:** MP/2013/15812
**Decision Date** 15 January 2014

**Before: Mr Justice Charles**

**Attendances:**

For the Appellant: Peter Mant instructed by Fish & Co

For the First Respondent: Jim Tindall instructed by the Borough Council

The Second Respondent: Joanne Clement instructed by TSol

The Third and Fourth Respondents were not represented and did not appear

***SAVE FOR THE COVER SHEET, THIS DECISION MAY BE MADE PUBLIC. THAT SHEET IS NOT FORMALLY PART OF THE DECISION AND IDENTIFIES THE PATIENT BY NAME.***

**Decision: Although the FTT erred in law in the manner set out in paragraph 89 below pursuant to s. 12(2) of the Tribunals, courts and Enforcement Act 2007 I do not set aside their decision.**

## REASONS

### *Introduction*

1. Permission to bring this appeal was granted by the First-tier Tribunal (the FTT) because in the view of the judge it raises points upon which guidance is needed. Those points concern the relationship between the functions and powers of the FTT under the Mental Health Act 1983 (the MHA) and those of the Court of Protection, managing authorities and supervisory bodies under the Mental Capacity Act 2005 (the MCA) and its Deprivation of Liberty Safeguards (DOLS). The most relevant provisions of the MHA in this case are those relating to guardianship.

2. The two statutes create different statutory regimes directed at different primary purposes. Decision makers under them apply different tests. But what could and so may be, or has been, decided under the MHA can be relevant to decisions to be made under the MCA (and vice versa).

3. *The MCA.* Its DOLS only apply to a placement in a hospital or a care home and it enables authorisations to be given of a deprivation of liberty of a person (P) at such a placement for the purposes of his care or treatment. The most relevant provisions are contained in Schedules A1 and 1A of the MCA. Any other authorisation under the MCA of a deprivation of liberty can only be given to give effect to a decision of the Court of Protection concerning P's personal welfare. So, the Court of Protection by making an order (i) makes a decision on P's behalf that has the effect of approving a placement and a care plan, and (ii) the MCA authorises any deprivation of liberty that the implementation of that care plan will give rise to. In doing so the Court of Protection determines what practically available option is in P's best interests.

4. Accordingly, the MCA enables the authorisation by two distinct routes of situations that amount to (or in my view may amount to - see *AM v (1) Maudsley NHS Foundation Trust and (2) SSH* [2013] UKUT 0365 (AAC) at paragraph 60) a deprivation of liberty.

5. It follows that a reference to a person being deprived of his liberty under or by the MCA is potentially a misleading shorthand. This is because what the MCA authorises and so renders lawful is the implementation of a regime of care or treatment in P's best interests. In addition the Court of Protection can grant injunctions to restrain a person acting in a way that would break the care plan.

6. No authorisation of a deprivation of liberty can be given under the MCA and its DOLS if the relevant person is ineligible to deprived of his liberty by the MCA. The definition of that ineligibility is found in Part 1 of Schedule 1A to the MCA, which together with Schedule A1 is a notoriously difficult piece of legislation to construe and apply. It cross refers to, and so creates a linkage with, the MHA.

7. *The MHA.* In contrast to the MCA, the MHA contains provisions that provide that a person (P) can be admitted to and detained at a hospital for defined purposes and the FTT is given important powers in respect of, amongst others, persons liable to be

detained under the MHA, and persons who are subject to guardianship under the MHA.

8. Decision makers under the MHA do not apply a best interests test. However, the cases show that in some circumstances when applying the "necessity test" under for example s. 72 the MHA decision maker should take into account the availability of an alternative placement pursuant to a care plan. Such a care plan could include one that results in, or may result in, P being deprived of his liberty that is or could be authorised under the MCA or it DOLS.

9. In this case the relevant comparison is between the continuation of guardianship under the MHA and a discharge on the basis that KD will be placed where he is or elsewhere under a care plan which, if amounts to a deprivation of his liberty, would authorised under the MCA or its DOLS.

10. So as Upper Tribunal Judge Jacobs said in *NM v Kent County Council* [2015] UKUT 125 (AAC), which was decided after this appeal was heard, an ideal set of reasons of the FTT would identify the relevant legal differences between the proposed alternatives and include findings of fact sufficient to show their significance to the legal criteria set by s. 72(4) MHA.

***A brief outline of the relevant background in this case***

11. KD has been diagnosed with Korsakov's Syndrome. In 2011, he was admitted to hospital under s. 2 of the MHA and thereafter detained there under s. 3 of that Act. He has been the subject of guardianship since early 2012. He was transferred to his current placement which is a residential care home towards the end of 2012.

12. An application for KD's discharge from guardianship was made in June 2013. At a hearing on 15 January 2014, the FTT concluded that it was necessary in the interests of the welfare of KD, or for the protection of other persons, that KD should remain under guardianship. It is this decision (the FTT Decision) that is the subject of this appeal. On 12 May 2014 I gave directions that the Appellant was to file a statement setting out defined matters. A number of factors have contributed to the time it has taken for it to be heard.

13. KD asserted and asserts that his care regime at the residential care home where he is placed includes 24 hour supervision and support, that he is not free to leave and that he is not permitted to go out unless accompanied by a member of the care staff (and access to the community is limited by the non-availability of staff). A report of KD's responsible clinician asserts that KD objects to being at that residential home but that he has never attempted to abscond.

14. Prior to the hearing before the FTT members of his family had raised a number of concerns about the suitability of the placement. Initially they proposed that he should reside with them and a hearing before the FTT in September 2013 was adjourned to allow for assessment of this option. After further consideration the family decided that they did not wish KD to live with them but they continued to maintain that he was not at an appropriate placement, that his placement should be reassessed and potential alternatives sought which might allow KD to participate in more engaging and meaningful activities. KD's social worker requested an occupational therapy

report and agreed to identify alternatives, but that report and details of the alternatives were not available prior to the hearing before the FTT on 15 January 2014.

15. Since the hearing before the FTT in January 2014, KD has remained at the same residential care home. In a report published in November 2014, the Care Quality Commission concluded that there were not enough qualified, skilled and experienced staff at that residential care home to meet the needs of its residents and following the publication of that report the First Respondent confirmed, in a statement to the media in November 2014, that it was not commissioning any new placements there.

16. I do not know what, if any, changes have been made at that placement following that report and statement.

17. The Appellant's statement in response to my directions is dated 19 August 2014 and I do not have up to date details of his care regime and care plan at that placement.

18. I joined the Department of Health as a respondent so that, if it wished to make submissions on the points of law of general application, it could do so. It has done so and I am grateful. I joined MK and MAK as respondents because they are respectively KD's eldest daughter and nearest relative, and his wife and it seemed members of KD's family who were challenging the arrangements for KD's care and at one stage were asserting that he should live and be cared for at home. They have taken no active part in the appeal.

19. The Appellant has been represented before me by the solicitor who represented him before the FTT.

20. The FTT Decision contains the following:

> 5. We accepted the uncontested evidence in the report that the patient is suffering from a mental disorder namely amnesic syndrome caused by a past history of extensive use of alcohol. The patient is now residing in a care home where his safety and daily needs are looked after and where he is discouraged and largely prevented from using alcohol which is likely to cause his condition to deteriorate.
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> 6. We accepted the RC's view that significant improvement in the patient's condition is very unlikely. We accepted the evidence in her report that his mental disorder has resulted in such a serious short-term memory loss that he is unable to manage the basic skills of daily living because he cannot retain information or evaluate risk and benefit. Without care and supervision his safety would be at risk from everyday hazards such as traffic. He needs supervision and encouragement to eat, wash and care for himself. Full details of his condition, its effects and the risks involved are set out in detail in the medical and social circumstances report. None of this was contested and we accepted it.
>
> 7. We considered the question of whether or not it is necessary for the patient to be subject to guardianship. The patient told us several times during the hearing that he wished to leave the country and live in India or Florida, though he appeared to have lost contact with any relatives he believes to live in those places. We were satisfied from the evidence of the care coordinator that, if the authority did not have the powers under the guardianship order set out in section 8(1) Mental Health Act 1983, the patient may wish to leave his accommodation and that there was a risk of

> homelessness or conflict with his family who, so the latest addenda to the reports show, no longer wish to accommodate him. We accepted her view that he would be incapable of arranging his own accommodation.
>
> 8. We accepted the care coordinator's view that, without prompting, he would be likely to neglect his nutritional needs and would be at risk from self-neglect and that it is therefore important that the Guardian can require him to live in accommodation suitable to his needs. In all these circumstances we were satisfied that the guardianship order is necessary and that it represents the least restrictive option consistent with safeguarding his welfare.
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> 9. For the same reasons we do not consider that it would be appropriate to order a discharge under our discretionary powers.
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> 10. We were invited by the patient's solicitor to consider whether the order could be said to be necessary if there might be other legal safeguards (e.g. a DOLS authorisation under the Mental Capacity Act) that would be capable of managing the risks to the patient's welfare. We noted the point made by his solicitor that the patient's liberty in the present placement is restricted in practice to some extent and that the guardianship order may not authorise the present level of informal restrictions. We did not find that the present arrangements at his placement affect whether or not the guardianship order should remain in place. Neither did we consider that the order is any less necessary because other (and possibly more stringent) restrictions on the patient's liberty might be put in place under the Mental Capacity Act instead of or in addition to the guardianship order.

21. As appears from paragraph 10 of that citation it was argued on behalf of KD that guardianship was not necessary because alternative and less restrictive arrangements could be imposed under the MCA (the way it is put in the Appellant's skeleton argument) and that the guardianship may not authorise (and so render lawful) the existing restrictions on KD's liberty.

22. In other words, it was being submitted that KD was subject to a deprivation of his liberty which as part of the least restrictive available option could and should be authorised pursuant to a DOLS standard authorisation following a discharge of the guardianship and as an alternative to it. This was the submission made to me. It involves:

    i) an acceptance that KD lacked capacity to decide where he should live and the terms of his care plan,

    ii) the existing placement (or an unidentified alternative) was the available option that best promoted KD's best interests, and

    iii) following discharge from guardianship KD would not be ineligible to be deprived of his liberty under the MCA.

    Point (i) was common ground and appears uncontroversial although the view has been taken that he has capacity to instruct his solicitors. But as the history shows point (ii) is controversial. I return to point (iii).

***Guardianship***

23. Section 7 of the MHA provides for the circumstances in which guardianship is permissible and can be put in place and s. 8 sets out its effect:

> **7 Application for guardianship**
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> (1) A patient who has attained the age of 16 years may be received into guardianship, for the period allowed by the following provisions of this Act, in pursuance of an application (in this Act referred to as *'a guardianship application'*) made in accordance with this section.
> (2) A guardianship application may be made in respect of a patient on the grounds that—
> (a) he is suffering from mental disorder ... of a nature or degree which warrants his reception into guardianship under this section; and
> (b) it is necessary in the interests of the welfare of the patient or for the protection of other persons that the patient should be so received.
> (3) A guardianship application shall be founded on the written recommendations in the prescribed form of two registered medical practitioners, including in each case a statement that in the opinion of the practitioner the conditions set out in subsection (2) above are complied with; and each such recommendation shall include—
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> (a) such particulars as may be prescribed of the grounds for that opinion so far as it relates to the conditions set out in paragraph (a) of that subsection; and
>
> (b) a statement of the reasons for that opinion so far as it relates to the conditions set out in paragraph (b) of that subsection.
>
> (4) A guardianship application shall state the age of the patient or, if his exact age is not known to the applicant, shall state (if it be the fact) that the patient is believed to have attained the age of 16 years.
>
> (5) The person named as guardian in a guardianship application may be either a local social services authority or any other person (including the applicant himself); but a guardianship application in which a person other than a local social services authority is named as guardian shall be of no effect unless it is accepted on behalf of that person by the local social services authority for the area in which he resides, and shall be accompanied by a statement in writing by that person that he is willing to act as guardian.
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> **8 Effect of guardianship application, etc**
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> (1) Where a guardianship application, duly made under the provisions of this Part of this Act and forwarded to the local social services authority within the period allowed by subsection (2) below is accepted by that authority, the application shall, subject to regulations made by the Secretary of State, confer on the authority or person named in the application as guardian, to the exclusion of any other person—
> (a) the power to require the patient to reside at a place specified by the authority or person named as guardian;
> (b) the power to require the patient to attend at places and times so specified for the purpose of medical treatment, occupation, education or training;
> (c) the power to require access to the patient to be given, at any place where the patient is residing, to any registered medical practitioner, approved mental health professional or other person so specified.
>
> (2) ----------

24. Importantly, s. 18(3) of the MHA provides that a person who leaves the place of residence specified under this section may be taken into custody and returned to the residence.

25. Section 23 relates to the discharge of a person from guardianship and provides as follows:

> **23 Discharge of patients.**

> (1) Subject to the provisions of this section and section 25 below, a patient who is for the time being liable to be detained or subject to guardianship under this Part of this Act shall cease to be so liable or subject if an order in writing discharging him absolutely from detention or guardianship is made in accordance with this section.
>
> (1A) ------
>
> (1B) An order under subsection (1) or (1A) above shall be referred to in this Act as "an order for discharge".
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> (2) An order for discharge may be made in respect of a patient—
>
> (a) ---------;
>
> (b) where the patient is subject to guardianship, by the responsible clinician, by the responsible local social services authority or by the nearest relative of the patient;
>
> (c) ---------
>
> (3) ---------

26. Section 20 of the MHA deals with the duration and renewal of guardianship and ss. 66(1)(c) and 69(1) of the MHA provide that a person subject to guardianship and his nearest relative may apply to the FTT for a discharge. Section 72(4) provides for the powers of the tribunal on an application:

> **72 Powers of tribunals**
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> (4) Where application is made to the appropriate tribunal by or in respect of a patient who is subject to guardianship under this Act, the tribunal may in any case direct that the patient be discharged, and shall so direct if it is satisfied—
>
> (a) that he is not then suffering from mental disorder; or
>
> (b) that it is not necessary in the interests of the welfare of the patient, or for the protection of other persons, that the patient should remain under such guardianship.

27. So the guardianship is created by an application to the local social services authority or a transfer to guardianship by hospital mangers that is accepted by that authority, who in this case is the First Respondent. It gives the Guardian defined powers and can be brought to an end by the responsible clinician, the responsible local social services authority or the nearest relative (subject to an order under s. 29 of the MHA), or by the FTT applying the s. 72(4) "necessity test".

***Detention / deprivation of liberty during and on discharge from guardianship***

28. The MCA Code of Practice at paragraph 13.16 states that the exclusive right of the Guardian to decide where a person should live does not enable a person to be deprived of his liberty. The Code of Practice MHA at paragraph 26.30 is to the same effect.

29. Those Codes and the FTT's decision in this case precede the decision of the Supreme Court in *Cheshire West v P* [2014] 2 WLR 642 (SC). That decision has had the result that many more people in care homes (and other placements e.g. supported accommodation and children's homes) than was previously thought by many to be the case are being deprived of their liberty. It also has had the effect that the concept of "deprivation of liberty" in breach of Article 5 of the ECHR is wider or arguably wider than that of detention under the MHA.

30. Albeit that the MCA does not confer on the Guardian an express power equivalent to an injunction to prevent the person leaving his place of residence or to dictate the terms of the care plan, in my view, the combination of the express powers conferred on a Guardian and s. 18(3) of the MHA have the practical effects that:

    i) in choosing the place that the relevant person (P) is to live the Guardian will have regard to, and may require a commitment from the provider of the placement in respect of, the terms of the care plan and so the restrictions it is to contain,

    ii) if the care plan is changed the Guardian can require P to live elsewhere, and so

    iii) the relevant person (P) is required to live at a certain place under a care regime and so certain conditions and restrictions,

    iv) so by requiring P to live at a given place a Guardian is at least indirectly requiring him to live there under those conditions and restrictions, albeit that the Guardian cannot impose them on the provider of the care or treatment and they are based on agreement and the performance by the provider of its functions, and in *NL v Hampshire CC* [2014] UKUT 0475 (AAC) the Upper Tribunal decided that it was the care plan and not the guardianship that was the basis of a deprivation of liberty,

    v) the power to return P to his place of residence has the effect of a requirement or an injunction preventing P from leaving.

31. Further, and importantly the power mentioned in (v) is a more readily available, effective and sensible means of enforcing the result that P lives at a certain place than an injunction against a person who lacks capacity to decide where he should live that either restrains him from leaving or which also has a mandatory element that requires him to go to, or to return to, the placement. This is because enforcement of such an injunction against the patient is problematic as it engages issues of contempt against a person who lacks capacity, the issue of a warrant by the court and often a consideration of whether third parties who have assisted the patient are in contempt and should be ordered to take defined steps to return the patient to his placement.

32. This difference between a regime of care whilst guardianship continues and after its discharge is a central factor in this case.

*Eligibility to be deprived of liberty by the MCA*

33. Case D of Schedule 1A of the MCA provides that P is ineligible to be deprived of his liberty by the MCA if he is subject to guardianship and the authorised course of action is not in accordance with a requirement which the relevant regime (and so guardianship) imposes (see paragraph 3 of Schedule 1A).

34. The application of the provisions of Case D and so the position relating to KD's eligibility to be deprived of his liberty by the MCA was not a matter of argument before me. An appeal I heard after this one (*Justice Secretary v (1) KC and (2) C Partnership NHS Foundation Trust* MP/2013/09082) has raised points about the application of paragraph 3 of Schedule 1A of the MCA and the decision of the Court

of Appeal in *B and Another v Justice Secretary* [2012] 1 WLR 2043 which concerns the FTT's power to impose conditions that result in a deprivation of liberty. I have invited further submissions on these issues and my decision in *KC* (who is a restricted patient) may have an impact on (a) the application of paragraph 3 of Schedule 1A to the MCA, (b) whether the conditions imposed by a Guardian render a deprivation of liberty lawful (notwithstanding the decision in *B and Another v Justice Secretary*) and/or (c) how a deprivation of liberty during guardianship is to be made lawful.

35. The issues in *KC* relate to (a) whether paragraph 3 means the terms of the care plan amounting to a deprivation of liberty (and so the authorised course of action) must be imposed by the MHA regime, or that those terms do not conflict with what is imposed by the MHA regime, and (b) whether *B and Another v Justice Secretary* precludes such terms being imposed directly or indirectly under the MHA or only precludes the imposition of conditions or requirements that would of themselves amount to an unlawful deprivation of liberty.

36. History shows that views should not be expressed on the application of Schedule 1A without argument and if the position during the continuation of the guardianship needed to be determined in this appeal I would have asked for further submissions.

37. Although:

i) points were raised before the FTT that KD was being deprived of his liberty and this needed to be authorised under the MCA both during and on discharge of the guardianship, and

ii) I have been invited by KD to express a view on whether he was in 2014 and is now being deprived of his liberty at his present placement,

the focus of this case was and remains on the position on discharge and in my view I do not have to determine whether any such deprivation of liberty should have been or should now be authorised under the MCA.

38. Further, in my view it is not necessary or appropriate for me to express a view on whether KD was or is being deprived of his liberty without argument and without being provided with further evidence of the detail of his care regime in the past and now.

39. However I record that my preliminary view is that the Codes I have referred to (see paragraph 28 above) are right and a deprivation of liberty during guardianship can and so should be authorised under the MCA (and so here its DOLS). Accordingly, it would be prudent for a Guardian and the managing authority and supervisory body of the relevant care home to consider whether a DOLS authorisation should be obtained in respect of a placement of P in a care home required by a Guardian when P's care plan there creates or may create a deprivation of P's liberty.

40. Clearly if, on a discharge of the guardianship, the proposed placement of P would create a deprivation of P's liberty its authorisation under the MCA or its DOLS is required to render that alternative lawful.

41. On discharge paragraph 3 of Schedule 1A to the MCA ceases to be engaged and the discharge would not be on terms or conditions and so the decision of the Court of Appeal in *B and Another v Justice Secretary* on the terms or conditions that can be imposed by the FTT is not relevant.

42. In those circumstances "eligibility" under the MCA is governed by Case E of Schedule 1A. Paragraph 3 does not apply to this. Paragraph 5 does and the common assumption before me was that KD would not be "ineligible". In my view, that is correct because the relevant instrument would not authorise him to be a mental health patient (as defined in paragraph 16).

***Timing of an authorisation of a Deprivation of Liberty under the MCA***

43. A standard authorisation under the DOLS can provide for it to come into force at a time after the time at which it is given (see paragraph 63 of Schedule A1 to the MCA). Also, in my view the Court of Protection can approve a care plan and authorise any deprivation of liberty it would create from a date in the future (i.e. when it comes into effect).

***The powers of the FTT, the Guardian, and the Court of Protection***

44. I reject the argument advanced by the First Respondent that to engage the jurisdiction of the FTT to discharge a guardianship under s. 72 of the MHA there must be a move from a "deprivation of liberty" to "a restriction of liberty or less". I do so whether or not a requirement by a Guardian can render a deprivation of liberty at a placement lawful during the currency of the guardianship. In my view, discharge by the FTT (or others) of a guardianship simply means the bringing to an end of the appointment and powers of the Guardian.

45. The powers conferred on the Guardian are "to the exclusion of any other person" and in *C v Blackburn and Darwen Borough Council* [2011] EWHC 3321 (COP) Jackson J held that this meant that the Court of Protection could not override these powers. I agree.

46. It follows that the Court of Protection can only consider a care plan at a placement at which the Guardian requires the person to live and so any authorisation of a deprivation of liberty given by the court can only relate to that placement.

47. This limitation on the jurisdiction of the Court of Protection could give rise to issues relating to where disputes are to be decided concerning the placement of a person who lacks capacity to decide where and the circumstances in which he should live, and to consent to their consequences. Such disputes can raise issues as to whether a Guardian, usually a local authority, can make decisions that determine or affect the outcome of the issues that cannot be challenged under the best interests jurisdiction of the Court of Protection.

48. Similar issues exist under (a) the Children Act as a result of the respective statutory powers of the local authority and the court relating to care plans (see for example *Re S: Re W* [2002] UKHL 10 and [2002] 2 AC 291), and (b) in other proceedings in the Court of Protection concerning the availability of choices of placement (see *ACCG and Another v MN and Another* [2013] EWHC 3895 (COP) and, on appeal and

reported after the hearing in this case [2015] EWCA Civ 411). Usually, such problems are avoided by a cooperative approach being taken by public authorities in the application of their statutory duties. However, they can result in a situation in which the only available challenge to a decision of the relevant public authority is by way of judicial review and/or (as would be the case here) an application under a statutory regime (the MHA). In both cases the Court of Protection would have no jurisdiction.

49. An example of such a stand-off could arise when there is a dispute as to where a person should live and/or the terms of the care plan. I agree with Jackson J (see *C v Blackburn)* that the guardianship regime, including the possibility of an application to the FTT for discharge of the guardianship, is not as well suited as the MCA regime, including an application to Court of Protection for a welfare order, for determining a dispute about which available placement would best promote a person's best interests. The same can also be said about whether the placement and care plan creates a deprivation of liberty and the capacity of the relevant person to consent to them and their consequences.

50. But a Guardian may conclude on a lawful exercise of its statutory powers that it should not direct that a person should reside at placement (or wearing another local authority hat provide a placement or support) sought by others even if the Court of Protection was to conclude that it was in the relevant person's best interests.

51. I suspect that when there is a genuine dispute between available options (usually including a placement or support provide by a local authority – who wearing another hat may also be the Guardian) the Guardian, in line with the approach taken under the Children Act to the terms of a care plan, would decide to take part in or initiate proceedings in the Court of Protection on the basis that it would take account of the views of the court in exercising its own statutory powers as the Guardian, and thereby effectively determining where a person should live and his care plan.

52. Also, if the relevant person (P) lacks the relevant capacity, there is the added complication that the placement required by the Guardian may involve an unlawful deprivation of liberty if it is not authorised under the MCA and so under its DOLS or by the Court of Protection.

53. I suspect that, as appears to be the position here, a Guardian would not before the FTT take the position that it was going to play a trump or jurisdictional card to preclude a discharge of the guardianship if the FTT did not think it was still necessary.

54. But each case will have to be addressed by reference to its own circumstances.

***The approach to be taken by the parties and the FTT on an application to discharge a guardianship under s. 72 of the MHA on the basis that an alternative has the consequence that the guardianship is no longer necessary as it is not the least restrictive way of achieving what is in the patient's best interests***

55. The FTT has a statutory discretion and a limited jurisdiction. For example, it has no jurisdiction to authorise or otherwise render lawful a deprivation of a person's (P's) liberty during and after discharge of his guardianship.

56. The resolution of:

i) what issues the FTT as an investigatory tribunal should decide, and

ii) the evidence and argument that should be provided by the parties,

are informed by the point that in exercising its statutory discretion the FTT should take account of practically available (and so lawful) options (see for example *AM v (1) Maudsley NHS Foundation Trust and (2) SSH* [2013] UKUT 0365 (AAC)).

57. In my view, the FTT should not exercise its statutory power to discharge a guardianship if the consequence of doing so would be to bring about an unlawful deprivation of liberty.

58. So, if it is satisfied that the relevant person (P) lacks capacity to consent to the proposed placement and care plan and it would create an unlawful deprivation of P's liberty a FTT should not discharge the guardianship until a lawful alternative placement is in place and so until either a DOLS standard authorisation (or a court order) authorising the deprivation of liberty is in place.

59. If an authorisation of a deprivation of liberty at the relevant placement has been given during the guardianship, the underlying test for eligibility will change on discharge from an application of Case D to Case E (see paragraphs 33 to 42 above) and in my view the existing DOLS (or court order) should be confirmed or renewed on this basis before the discharge is ordered by the FTT.

60. *Other potential issues.* If, as here, it is said that the person subject to guardianship is being deprived of his liberty at the placement where the Guardian requires him to live, the issue arises whether he is being deprived of his liberty and if he is whether that is unlawful absent a MCA authorisation. Notwithstanding the decision of this tribunal in *NL* it seems to me at least strongly arguable that whether the guardianship or the care plan is the basis of the unlawful deprivation of liberty does not matter because either way P would be subjected to an unlawful deprivation of liberty if MCA authorisation is required. But as the FTT does not have jurisdiction to resolve and cure this unlawfulness, if it is satisfied that there is a deprivation of liberty it should generally adjourn so that its lawfulness can be addressed and resolved elsewhere before the FTT exercises its discretion to discharge the guardianship. This is because in many cases the unlawfulness relied on would exist whether or not the guardianship was discharged and, subject to any argument that a MCA authorisation is not needed during the guardianship, the lawfulness of the existing and the future implementation of the care plan if it involves a deprivation of liberty is a matter for the Court of Protection. However the issue may be relevant in limited circumstances to the exercise of the s.72(4) test, for example if the FTT did not think that the relevant restrictions were necessary and an alternative without them was available.

61. In some cases it may be argued that on a discharge from guardianship a DOLS (or court order) to authorise a deprivation of liberty is not necessary because the relevant person has the capacity to consent to the placement, the care plan and its consequences or that the placement and care plan do not create a deprivation of liberty and no order is needed from the Court of Protection consenting to it because its provider can and will rely on ss. 5 and 6 of the MCA in providing it.

62. These arguments would have an impact on whether the alternatives the FTT has to take into account are lawful. In many cases such possible arguments will be bound up in a dispute on where the relevant person should live and so a best interests decision that the Court of Protection is better suited to make.

63. In my view, FTTs will have to determine on a case by case basis whether they should determine such issues or refuse to do so on the basis that they should be determined by the Court of Protection because for example, applying Rule 2 of the Tribunal Procedure Rules 2008, this is the proportionate way of determining the disputes and whether a deprivation of liberty needs to be authorised by the Court of Protection or its DOLS (including the possibility of an application to the Court of Protection for a declaration on whether there is a deprivation of liberty and so the DOLS applies or under s. 21A of the MCA).

64. *The approach of the FTT.* The FTT is an investigative tribunal. But this does not mean that it has to embark on an investigation of and so identify all available options and initiate the gathering of evidence about them. Rather, in my view the parties have the primary obligation of providing and advancing:

i) evidence on the available options, including sufficient detail of their terms and availability,

ii) evidence to support argument that an identified option is or would be the appropriate option (which may have to include evidence on other possibilities), and

iii) argument on the application of the "necessity test" set by s. 72(4) of the MHA to the identified and competing options.

65. It is from that evidential base and those arguments that the FTT performs its investigatory and decision making function on whether it should seek more information before reaching its final decision or in making that decision.

66. This obligation to provide evidence rests on all the parties and those giving evidence to the FTT. The MHA decision makers have this obligation as part of their duties to consider relevant options. The party seeking discharge has to provide the relevant detail of the relevant alternatives he relies on.

***A check list for FTT's when an issue involving an argument that an alternative involving the application of the MCA is said to be the basis for a discharge of guardianship***

67. I suggest that it is likely to assist the determination of such a case for the FTT to address the following questions.

68. (1) *Is the proposed alternative actually available in practice? If not when will it be available?* This will involve considering:

i) Whether the relevant placement and care plan are agreed and defined.

ii) If not when will it be agreed and so defined.

iii) The terms of the care plan and whether its application will result in a deprivation of liberty.

iv) If the answer to (iii) is yes or maybe has an authorisation under the MCA's DOLS or an order of the Court of Protection been obtained.

v) If such an authorisation has not been obtained, can it be obtained and if so how and when will it be obtained. This will involve considering (a) whether P lacks capacity applying the MCA tests, (b) whether P is not ineligible (and so is eligible) to be deprived of his liberty by the MCA and (c) whether the decision makers under the MCA are likely to conclude that the proposed placement is in P's best interests.

vi) If there is already an authorisation under the DOLS or from the Court of Protection when this will be confirmed on the basis of a change in the status of P from Case D to Case E.

These questions will enable the FTT to form a view on whether on discharge of the guardianship the proposed alternative is lawful or is likely to be made lawful

69. *What are the advantages and disadvantages of the rival alternatives?* This will involve:

i) An identification of the relevant legal differences between the proposed alternatives.

ii) Making the findings of fact that are needed to apply those differences to the circumstances of the case and in particular to the legal criteria set by s. 72(4) MHA, which is the test they have to apply.

These questions will enable the FTT to form a view on whether the availability of a lawful alternative would satisfy the test for a direction that the patient be discharged from guardianship.

70. *Have the parties provided sufficient evidence and argument on the above issues?* This involves considering whether the parties have sufficiently complied with the approach set out in paragraph 64 above.

71. *What issues should the FTT decide?* This engages issues that inform the availability of alternatives and thus, for example, an argument that (a) the patient has capacity, or (b) the placement does not give rise to a deprivation of liberty (see paragraphs 61 and 62 above).

72. *Should the FTT adjourn or discharge the guardianship?* This is the ultimate question and will depend on the assessment of the earlier ones. The choice between adjournment and discharge will turn on the prediction as to whether and when evidence can be obtained to demonstrate the existence of a practically available alternative.

73. I repeat that absent the existence of a practically available alternative the FTT should not order discharge on the basis that one can be made available.

***Returning to this case***

74. Applying the check list set out above the position concerning the availability of a lawful alternative was not clear. I gave directions in an attempt to seek greater clarity on KD's case on his likely compliance with a placement and as to KD's present position on (a) the alternative arrangements for his care, the evidence relating to their availability and their legality, and (b) the forum in which, the manner in which and when issues as to what arrangements for his care would be in his best interests would be resolved.

75. In light of the history, unsurprisingly KD's position in his statement and in submissions sought to keep alive the prospect of moving from his present placement to another one or to the care of his family. It seems that care by his family save over short periods is not an available option and this was accepted in submissions. But it is not clear from what I have been told whether another placement in a care home is available or likely to be available or whether in the medium term KD (through his family and advisers) would accept that his present placement is in his best interests.

76. The responses to my directions included one that a decision on discharge might be deferred for a short time on the basis that if his family are not able to accept KD's return to his care he would remain at his present placement pending resolution in the Court of Protection of where he should live. The reference to a short time is founded on an urgent application for an authorisation under the MCA's DOLS or an order of the Court of Protection.

77. The "nuts and bolts" of this had still not been put in place by the time the appeal was heard. For example, the attitudes of the Guardian, the care home and the supervising authority were not set out. Nor were the time scales for any investigation of a change of placement with or without the issue of proceedings in the Court of Protection.

78. As I have indicated in my view the <u>prospect</u> of an alternative placement being made available is not sufficient to found a discharge.

79. That conclusion and the answers to question (1) on my check list show that the best KD could have hoped for at the FTT (and now) is an adjournment to ascertain the availability of a lawful alternative placement on discharge. Those answers would also show that then and now there is some real uncertainty as to what placement is being suggested in the short and medium term. A continuation of the present placement with a DOLS authorisation (if needed) could be obtained quickly but the clear wish for a change and so the selection of a longer term alternative is also relevant to the discharge of the guardianship.

80. The uncertainties and lack of accord on what is in KD's best interests concerning his placement and care mean that on the existing evidence (and that before the FTT) there is a real risk that clarity would not be achieved by a short adjournment.

81. Turning to question (2) on my checklist, the answers to my directions given in respect of KD's likely compliance with a continuation of his present placement do not materially alter the evidence on this before the FTT.

82. On the assumption that a lawful alternative was or would shortly be available Question (2) on the check list would identify that central issues in this case are those identified by paragraph 26.12 of the Code of Practice MHA, which should be read with in particular paragraphs 26.11 and 26.13. It reads:

> 26.12 But guardianship may still be appropriate in such cases if:
>
> - there are other reasons - unconnected to the move to residential care - to think that the patient might benefit from the attention and authority of a guardian;
>
> - there is a particular need to have explicit statutory authority for the patient to be returned to the place where the patient is to live should they go absent; or
>
> - it is thought to be important that decisions about where the patient is to live are placed in the hands of a single person or authority - for example, where there have been long-running or particularly difficult disputes about where the person should live.

83. In this case the first and third bullet points inform the key issue identified in the second bullet point concerning the statutory authority to return KD to his present placement. As explained earlier (see paragraph 31 above) this has significant advantages over an injunction because it can be exercised swiftly and effectively.

84. The continued existence of this power is the subject of paragraphs 7 and 8 of the FTT's reasons. In my view, on the evidence before it the FTT were entitled to reach the conclusion that they did in these paragraphs on the need for the continued existence of that power and on that basis that the continuation of the guardianship was the least restrictive available option. Those reasons support the legal ground for the FTT's conclusion.

85. Indeed it seems to me that unless and until there is much greater clarity about KD's placement argument that he has not attempted to leave whilst the guardianship has been in place do not provide a convincing base for the view:

i) that, if the guardianship is discharged, KD will remain where he is, and so in a placement he has said he wishes to leave and which his family do not support, and/or

ii) that the risk of him absconding is satisfactorily covered by the proposed alternative (with or without an injunction).

86. So, in my view paragraphs 7 to 9 of the reasons in the FTT Decisions cover the key issues on whether there should have been an immediate discharge.

87. I agree that paragraph 10 contains errors of law. As to that I sympathise with the FTT in this developing area of the law. There the FTT put the argument presented in a way that indicates that it was to the effect that KD should be discharged because a lawful alternative under the MCA might (the FTT's word) or would be or become available. I repeat that in my view, the FTT would have been right to reject that argument because no such alternative was in place.

88. But paragraph 10 should have been directed to whether there should be an adjournment.

89. As to that and generally I accept that the reasoning in paragraph 10 goes wrong because by it the FTT did not address and identify the availability of a possible alternative by following the course I have suggested above or otherwise and because it reflects a misunderstanding of the relevance of other arrangements to the application of the test set by s. 72(4) of the MHA.

90. However, in my view the conclusion on the continued needed for the statutory authority to return KD to the placement, and thus something that could not be effectively replicated if the guardianship was discharged would have provided strong grounds for the conclusion that there should not be an adjournment so that alternatives that might make a difference to this conclusion could be identified and put in place.

***Relief***

91. The First Respondent (the Borough Council) submitted without contradiction that KD's nearest relative can apply again for discharge of the guardianship. So, even if as I have found the FTT erred in law it invited me to exercise my discretion under s. 12 of the Tribunal Courts and Enforcement Act 2007 not to set aside the decision as requested on behalf of KD with a direction that the application made in 2013 (and heard by the FTT in January 2014) should be heard by a differently constituted FTT who should consider and make findings about the availability of an alternative option (adjourning if necessary to obtain further evidence), and consider whether it would be the least restrictive option.

92. In my view, the following factors are relevant to the exercise of that discretion:

    i) these issues can be addressed on a new application (as to which the time limits may have now been reset),

    ii) although I make no criticism of this because of the developing issues or law and procedure involved, the relevant evidential base for (a) the existence of the alternative option or options relied on by KD, or (b) the steps that would be taken to obtain them and their prospects was not provided to the FTT, or I add in sufficient detail to me on this appeal, notwithstanding my directions for the provision of such evidence,

    iii) the issue on which the FTT erred in their approach in law was on whether there should be an adjournment, and their conclusion on the need for the statutory power to return KD to the placement provided a strong ground for refusing an adjournment, and

    iv) matters must have moved on since 2014 in a number of respects or potential respects (e.g. reaction to the report of the Care Quality Commission in November 2014 bringing about change at the present placement and possibly in the views of the family who I was told KD continues to visit post January 2014) and these and the availability of a new placement may have a significant impact on the need for the continued existence of the statutory authority to return KD to his placement.

93. Although I accept that the present circumstances could be put to a new FTT on remission, I have concluded that the factors set out in the last paragraph found the

conclusion that the appropriate course is for KD's discharge from guardianship to be dealt with on a new application to the FTT supported by appropriate evidence and argument on the respective positions of KD, his family, the Guardian and the providers and potential providers of KD's care.

94. In that context, and in the context of any proceedings in the Court of Protection, an issue might arise as to KD's capacity to conduct proceedings. Also the question whether a deprivation of KD's liberty needs to be authorised under the MCA (and so its DOLS) during the continuance of the guardianship merits consideration.

Signed on the original

Mr Justice Charles

President of the UT(AAC)

Date: 18 May 2015