HM/3865/2014

DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

Save for the cover sheet, this decision may be made public (rule 14(7) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI No 2698)). That sheet is not formally part of the decision and identifies the patient by name.

This decision is given under section 11 of the Tribunals, Courts and Enforcement Act 2007:

The decision of the First-tier Tribunal under reference MP/2014/01331, made on 30 May 2014 at Chineham Court, Basingstoke, did not involve the making of an error on a point of law.

REASONS FOR DECISION

1. This appeal provides the first chance for the Upper Tribunal to consider the application of the decision of the Supreme Court in *Surrey County Council v P* [2014] AC 896 to guardianship under the Mental Health Act 1983.

A. Introduction

2. Mr L has mild to moderate learning disabilities. His understanding of the world around him and of social norms is limited. He has an egocentric view of life, puts his needs before others and projects responsibility for his actions onto others. He can be disinhibited and inappropriately familiar with strangers. He can learn new skills only if they are explained in simple, concrete terms.

3. Mr L was made subject to the guardianship of his local authority and to a detailed care plan. He applied to the First-tier Tribunal for discharge from guardianship on 10 January 2014. The application came before the tribunal for decision on 29 May 2014. The tribunal decided that he should not be discharged, but gave permission to appeal to the Upper Tribunal. I heard the appeal at an oral hearing on 13 October 2014. Mr Roger Pezzani of counsel represented Mr L and Mr Parishil Patel of counsel represented the local authority as guardian. Both counsel also appeared before the First-tier Tribunal. I am grateful to them for their written and oral arguments.

B. Guardianship under the Mental Health Act 1983

4. Section 7 provides for the circumstances in which guardianship is permissible:

7 Application for guardianship

(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.

5. Section 8 provides the effect of guardianship:

8 Effect of guardianship application, etc

(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.

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

6. Section 66(1)(c) provides that a person subject to guardianship may apply to the First-tier Tribunal. Section 72(4) provides for the powers of the tribunal on an application:

72 Powers of tribunals

…

(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.

C. The Code of Practice

7. This was issued under section 118 of the Act. Chapter 26 deals with guardianship. These paragraphs are particularly relevant:

> 26.2 The purpose of guardianship is to enable patients to receive care outside hospital when it cannot be provided without the use of compulsory powers. Such care may or may not include specialist medical treatment for mental disorder.
>
> 26.19 An application for guardianship should be accompanied by a comprehensive care plan established on the basis of multi-disciplinary discussions in accordance with the Care Programme Approach (or its equivalent).
>
> 26.26 Guardians have the power to decide where patients should live. …
>
> 26.30 The power to require patients to reside in a particular place may not be used to require them to live in a situation in which they are deprived of liberty, unless that is authorised separately under the MCA. That authorisation will only be possible if the patient lacks capacity to decide where to live. If deprivation of liberty is authorised under the MCA, the LSSA should consider whether guardianship remains necessary, bearing in mind the guidance earlier in this chapter.

MCA refers to the Mental Capacity Act 2005; LSSA refers to local social service authority.

D. The First-tier Tribunal's decision

8. The tribunal was told that the parties were agreed that the statutory criteria for guardian were met. In those circumstances, the tribunal decided that it would not be appropriate to carry out a medical examination. The parties were also agreed that Mr L was being deprived of his liberty and that he now did not consent to this. Accordingly, the issue put to the tribunal was whether it should exercise its discretionary power under section 72(4) to discharge Mr L from guardianship. It decided not to do so, applying my decision in *GA v Betsi Cadwaladr University Health Board* [2013] UKUT (AAC) 0280 (AAC). It identified the source of Mr L's dissatisfaction in the way that the care plan was being implemented rather than with the guardianship itself. Two short quotations from the reasons capture the flavour, although not the detail, of the tribunal's reasoning:

> 39. … It would seem illogical and invidious to censure the implementation of the guardianship by declaring the whole guardianship illegal if we are not generally able to interfere with or influence its implementation. …

> 40. … If we were to discharge in this case, we would be acting inconsistently with the logic of our reasoning that the support and protection of other people afforded by the guardianship is necessary, …

E. The GA case

9. The tribunal's emphasis on logic and consistency reflects my reasoning in *GA*, which concerned a discretionary power to discharge a patient from a community treatment order. This is what I said:

> **H. Analysis**
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> 18. I deal with this case *for the sake of argument only* on the assumption that Mr A did not give informed consent to the condition in the community treatment order or to receiving treatment under that condition. I also assume, again for the sake of argument only, that the tribunal's finding that he did consent was perverse.
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> 19. That leaves me to decide how the tribunal should exercise its discretionary power in section 72(1) to discharge Mr A in view of his lack of consent. Having read and reconsidered my reasoning in *SH*, I still agree with it. The only issue is whether it applies to the discretionary power as well as to the duty in section 72(1)(c).
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> 20. The duty to discharge under section 72(1)(c) is defined by reference to the key factors of mental disorder, protection and treatment. My reasoning was based around those factors and showed that the issue of consent to the delivery of treatment did not arise as a matter of jurisdiction.
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> 21. The same reasoning cannot apply to the residual discretionary power. It allows a tribunal to direct discharge even when this is not required by section 72(1)(c). It must therefore allow the tribunal to take account of factors other than the criteria that justify detention. Otherwise it would be redundant. It is not possible as a matter of interpretation to exclude issues of consent from the jurisdiction of the tribunal in exercise of that power. However, that is not the end of the matter.
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> 22. Mr Allen hit the point when he used the concept of perversity. The discretionary power is not limited by the three key factors of mental disorder, protection and treatment that are found in section 72(1)(c). It may be exercised even if those conditions for detention remain satisfied. Indeed, it is only relevant if those conditions are satisfied. To emphasise: the discretionary power only arises when the patient requires treatment and should be subject to recall by the responsible clinician. If the tribunal is nonetheless to justify discharge, logic requires that it must be satisfied that the identified needs for treatment and protection can be properly catered for. Any other decision would be self-contradictory and perverse.
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> 23. A tribunal exercising its discretionary power must act consistently with the logic of its reasoning. Having decided that the patient does require

> treatment and should be subject to recall, it will have two options. One is to refuse to discharge the patient, who then remains subject to the 1983 Act and the powers of recall, leave and treatment under that Act. The other option is to discharge the patient under the discretionary power. That allows the authorities: (i) to detain the patient again under the 1983 Act; or (ii) if the patient lacks capacity to consent to treatment, to make arrangements for treatment under the Mental Capacity Act 2005. I can see no point in (i), which is a more cumbersome way to achieve the same effect as recall. As to (ii), the tribunal could only properly exercise its discretion to leave a patient to be dealt with under the 2005 Act if satisfied that the patient did lack capacity and would be treated under the powers of that Act. If the tribunal were to direct discharge without those factors being satisfied, it would act inconsistently with the logic of its reasoning that the patient required treatment. It would potentially leave the patient and the public without the protection that it had decided was required.
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> 24. This does not deprive the discretionary power of all scope. It does mean the power is one to be used in exceptional circumstances only. It will almost certainly only be appropriate where discharge would be consistent with the existence of the statutory criteria in section 72(1)(c). I note that Richard Jones gives an example of a tribunal using its power to allow a patient to join his parents in the USA, where he could receive treatment: *Mental Health Act Manual* (15th edition) at page 400.
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> 25. Nor does it leave a patient who does not consent to the treatment being delivered without a remedy. All it means is that the First-tier Tribunal will not usually have the power to provide that remedy. The patient must go to the court.

10. The Court of Appeal refused permission to appeal against my decision. Richards LJ said:

> … an appeal would have no real prospect of success. If treatment is being administered without the applicant's consent, his remedy lay with an application to the court, as the UT judge held at para 25 of his determination, and not with an order under section 72 of the Mental Health Act for his discharge. The result seems perfectly sensible. If, by reason of an absence of consent, a patient who is subject to a community treatment order cannot lawfully be given the treatment he or she requires under the order, the appropriate course would appear to be recall to hospital pursuant to the order itself, rather than discharge under section 72.

F. The arguments

11. Mr Pezzani began by setting out what he called 'essential propositions of law':

- Whether a person is deprived of liberty requires an assessment of their whole situation.

- A person is deprived of liberty if they are obliged to live in a particular place, subject to constant monitoring and control, only allowed out with close supervision, and unable to move away without permission.
- It is irrelevant that the deprivation arises from a benevolent or beneficial purpose.
- Guardianship does not authorise a deprivation of liberty.
- The right to liberty may be violated only to the extent allowed by law.
- The interpretative principle in section 3 of the Human Rights Act 1998 applies to tribunals.
- As a public authority, the tribunal must act lawfully under section 6 of that Act.
- The burden is not on the patient.

12. He then argued that Mr L was deprived of his liberty by virtue of the guardianship. He described this as the 'force' that caused the deprivation of liberty; take it away, he argued, and the deprivation of liberty disappeared. The tribunal had erred in law in these way:

- By failing to take account of Mr L's whole situation.
- By abdicating its duty under section 6 of the Human Rights Act.
- By interpreting the discretion conferred by section 72(4) in a way that was incompatible with Mr L's Convention right.
- By relying even in part on the absence of convincingly cogent evidence as to what would happen if Mr L were discharged.
- By misinterpreting *GA* in a way that was in breach of its duty under section 6 of the Human Rights Act.
- By placing the burden on proof on Mr L.

13. Mr Patel argued that the tribunal had not made any error. The guardianship was only relevant to whether Mr L was free to leave his place of residence. The other elements of control were all a consequence of his care plan.

G. Guardianship and deprivation of liberty

14. There are three components to a deprivation of liberty. They were conveniently set out by Baroness Hale in *Surrey County Council v P* at [37]:

> (a) the objective component of confinement in a particular restricted place for a not negligible length of time; (b) the subjective component of lack of consent; and (c) the attribution of responsibility to the state.

Component (a) is not limited to physical confinement. It requires more than this, as Lord Neuberger identified at [63]:

> I consider that the Strasbourg court decisions do indicate that the twin features of continuous supervision and control and lack of freedom to leave are the essential ingredients of deprivation of liberty (in addition to the area and period of confinement).

Mr Pezzani relied in particular on a passage from Baroness Hale's judgment at [46]. She was making the point that the test was the same for everyone, whether or not they were disabled. In doing so, she gave a description of what could be a deprivation of liberty:

> If it would be a deprivation of my liberty to be obliged to live in a particular place, subject to constant monitoring and control, only allowed out with close supervision, and unable to move away without permission even if such an opportunity became available, then it must also be a deprivation of the liberty of a disabled person.

15. Like the First-tier Tribunal, I will deal with the case on the basis that Mr L was deprived of his liberty. The question is: what was the cause of the deprivation? Was it, as Mr Pezzani argued, the guardianship? Or was it, as Mr Patel argued, the care plan? I accept Mr Patel's argument.

16. It is possible for guardianship to be set up in a way that does involve a deprivation, but guardianship of itself does not necessarily involve a deprivation of liberty. Mr Pezzani accepted that and that is what the Code of Practice says. Guardianship provides a minimal legal framework of control within which other care can be provided. The features of guardianship are set out by section 8(1). They allow the guardian to control only three aspects of the patient's life:

- where the patient lives;
- attendance for treatment and training; and
- access for medical or other attention.

Those are the statutory limits on the powers of a guardian as such. I find it difficult to imagine a case that could realistically arise in which those basic powers could be used in a way that would satisfy the conditions for deprivation of liberty.

17. Guardianship does not exist for its own sake. It exists for the purpose of providing a basic framework of compulsion within which care can be provided, as paragraph 26.2 of the Code of Practice explains. That is why an application for guardianship should be accompanied by a comprehensive care plan, as advised by paragraph 26.19 of the Code. It is in the details of that plan that the potential for restriction, supervision and control sufficient to amount to a deprivation of liberty lies. That is what the tribunal found and I can find no flaw in the tribunal's conclusion. It was a realistic analysis and, I consider, the only realistic analysis.

18. I accept that it is necessary to take account of what the caselaw calls the whole situation. I also accept that guardianship and a care plan go together, but a care plan need not involve a deprivation of liberty. It would be a distortion of the limited effect of guardianship in this case, and I suspect generally, to see it as the cause of a deprivation of liberty that arises from the contents of the care plan.

19. I therefore dismiss this appeal on the ground that the guardianship did not give rise to a deprivation of liberty and the tribunal was not obliged to exercise

its discretion to discharge the patient. It exercised its discretion rationally, relying on relevant considerations only. For what it is worth, I consider that it came to the correct conclusion.

H. The relevance of GA to guardianship

20. The tribunal was right to apply the reasoning of *GA* to the context of guardianship. I there reasoned from the logic of the structure of the legislation and the need for coherence in fact-finding and decision-making. Those considerations apply as much to guardianship as they do to community treatment orders or, for that matter, detention in hospital. Given the importance of the welfare of those suffering from a mental disorder and of the need for protection of other persons, it is difficult to imagine a case in which the tribunal could properly exercise its discretion to discharge without there being appropriate safeguards to ensure the necessary treatment and protection.

I. The burden of proof under section 72(4)

21. Mr Pezzani pointed out, correctly, that the burden of proof under section 72(4) was not changed when the burden under section 72(1) was changed. I am not persuaded that that was a mistake or an oversight. Rather, it is a further indication of the nature of guardianship. Unlike detention in a mental hospital, guardianship is not designed to involve a deprivation of liberty. This is what the Code of Practice envisages in paragraph 26.30.

22. As to Mr Pezzani's argument that the tribunal had misplaced the burden of proof, he relied on the way in which the presiding judge had expressed the tribunal's reasons in various paragraphs. I want to comment on his argument, because representatives regularly present arguments along those lines. In assessing their validity, it is important to distinguish between the legal burden and the evidential burden. Taken in the context of the tribunal's reasons as a whole, I consider that the way the judge expressed herself merely reflected the reality of the case as it was presented to the tribunal. I do not read them, individually or collectively, as directions on the legal burden, regardless of where that lay.

J. The concessions

23. The tribunal's reasons show that the panel were not entirely comfortable with counsel's concessions. Paragraph 30 in particular makes the point clearly. In my case management directions, I said:

> I wish to discuss this issue. It is clear that the tribunal was not comfortable with answering an exam question posed by the parties. It did not agree that the concessions of fact on which counsel had agreed were sound or realistic. In those circumstances, should it not have refused to accept the concessions and proceeded to make its own findings on the evidence?

24. At the hearing, Mr Pezzani accepted that the tribunal was not required to decide the case on the basis of the concessions and was entitled to require the parties to produce evidence on which it could make findings of fact. He told me that the panel had given no indication of its disquiet at the hearing and that he only became aware of it when he read the tribunal's reasons. I have not made enquiries of the presiding judge about what was or was not said at the hearing. I content myself with saying that tribunals are not required to accept concessions unless they are satisfied that they are correct. That applies to matters of fact and law. Tribunals are entitled to require the parties to satisfy them by evidence and argument that concessions are sound and, if they fail to do so, tribunals are not obliged to accept them.

Signed on original
on 21 October 2014

Edward Jacobs
Upper Tribunal Judge