THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

UPPER TRIBUNAL CASE NO: HM/2447/2019
[2020] UKUT 110 (AAC)

AD'A V CORNWALL PARTNERSHIP NHS TRUST

Decided following an oral hearing on 23 March 2020 by telephone

Representatives

Patient	Stephen Simblet QC and Roger Pezzani of counsel, instructed by Conroys Solicitors (all pro bono)
The Trust	Did not take part

DECISION OF UPPER TRIBUNAL JUDGE JACOBS

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.

On appeal from the First-tier Tribunal (Social Entitlement Chamber)

Reference:	MP/2019/13803
Decision date:	30 August 2019

Although the decision of the First-tier Tribunal involved the making of an error on a point of law, it is NOT SET ASIDE under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007.

REASONS FOR DECISION

1. As I said at the hearing, I am grateful to all those representing the patient for acting pro bono in this appeal. They have done a service to the patient, to the Upper Tribunal, and to the clarification of the law on the issue that arises.

A. The issue and how it arose

2. The patient, as I will call her, became subject to section 3 of the Mental Health Act 1983 on 16 May 2019. She applied to the First-tier Tribunal under section 66 on 22 May 2019. She was sent to a care home on section 17 leave on 14 June 2019 and was received into guardianship under section 7 on 27 June 2019.

3. That sequence of dates raises the issue whether the tribunal had jurisdiction over the application after the guardianship came into effect. It decided that it did not and therefore struck out the proceedings under rule 8(3)(a) of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 (SI No 2699). I have decided that that was wrong, as the tribunal retained jurisdiction.

4. The patient has since been moved to another care home and made another application to the tribunal, which has been decided.

B. Changes in status in the Upper Tribunal caselaw

5. There are circumstances in which the tribunal retains jurisdiction despite a change in the patient's status after the date of their application but before it is heard and decided. The Upper Tribunal decisions are:

- Detention changed from section 2 to section 3: *KF v Birmingham and Solihull Mental Health Foundation Trust* [2010] UKUT 185 (AAC), [2011] AACR 3.
- Detention under section 3 changed to a community treatment order: *AA v Cheshire and Wirral Partnership NHS Foundation Trust* [2009] UKUT 195 (AAC), [2011] AACR 37.
- Detention under section 3 (after a community treatment order had been revoked) changed to a new community treatment: *PS v Camden and Islington NHS Foundation Trust* [2011] UKUT 143 (AAC), [2011] AACR 42.

6. I am also considering at the moment the position when a patient who was detained under section 3 is made the subject of a hospital order without a restriction order while a reference to the tribunal is pending: *HM/2172/2019*.

C. Jurisdiction and powers

7. A tribunal has authority only to operate within the jurisdiction conferred on it by statute. If it has no jurisdiction, it is under a duty to strike out the proceedings. In the case of the First-tier Tribunal's mental health jurisdiction, that duty is imposed by rule 8(3)(a).

8. The nature of jurisdiction was defined by Diplock LJ in *Garthwaite v Garthwaite* [1964] P 356 at 387:

> In its narrow and strict sense, the 'jurisdiction' of a validly constituted court connotes the limits which are imposed on its power to hear and determine issues between persons seeking to avail themselves of its process by reference (i) to the subject-matter of the issue, or (ii) to the persons between whom the issue is joined, or (iii) to the kind of relief sought, or any combination of these factors.

9. This does not mean that a tribunal necessarily loses jurisdiction if one of those three factors is wrong or changes. Thinking of a typical civil proceeding, like a personal injury claim: (i) the pleadings may need to be amended – for example, to add an additional head of claim; (ii) a party may need to be removed or added – for example, the defendant may be changed from a doctor to the Trust for whom the doctor worked; and (iii) the relief sought may be altered – for example, to add a claim for interim relief. The rules under which these changes are permitted cover two possibilities: (a) they allow mistakes to be corrected in the way that the proceedings were originally constituted; and (b) they allow changes to be made in the light of developments. In other words, once a tribunal has acquired jurisdiction, it may be possible under its rules of procedure to make changes that allow it to retain jurisdiction.

10. A tribunal's jurisdiction is different from the powers it has within that jurisdiction. These may change if the law changes or if the circumstances of the case change.

11. These general points translate to the context of this case like this: as the proceedings were originally properly constituted, the rules of procedure may allow the parties to be changed and the substantive powers and duties available to the tribunal may change to reflect the change in the patient's status. The issue therefore becomes whether those results would be consistent with the Mental Health Act 1983.

D. The legislation

12. These are the relevant provisions of the Mental Health Act 1983:

> **3 Admission for treatment**
>
> (1) A patient may be admitted to a hospital and detained there for the period allowed by the following provisions of this Act in pursuance of an application (in this Act referred to as "an application for admission for treatment") made in accordance with this section.
>
> (2) An application for admission for treatment 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 makes it appropriate for him to receive medical treatment in a hospital; and

…

(c) it is necessary for the health or safety of the patient or for the protection of other persons that he should receive such treatment and it cannot be provided unless he is detained under this section; and

(d) appropriate medical treatment is available for him.

(3) An application for admission for treatment 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—

(a) such particulars as may be prescribed of the grounds for that opinion so far as it relates to the conditions set out in paragraphs (a) and (d) 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 (c) of that subsection, specifying whether other methods of dealing with the patient are available and, if so, why they are not appropriate.

(4) In this Act, references to appropriate medical treatment, in relation to a person suffering from mental disorder, are references to medical treatment which is appropriate in his case, taking into account the nature and degree of the mental disorder and all other circumstances of his case.

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.

(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—

(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.

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.

(2) The period within which a guardianship application is required for the purposes of this section to be forwarded to the local social services authority is the period of 14 days beginning with the date on which the patient was last examined by a registered medical practitioner before giving a medical recommendation for the purposes of the application.

(3) A guardianship application which appears to be duly made and to be founded on the necessary medical recommendations may be acted upon without further proof of the signature or qualification of the person by whom the application or any such medical recommendation is made or given, or of any matter of fact or opinion stated in the application.

(4) If within the period of 14 days beginning with the day on which a guardianship application has been accepted by the local social services authority the application, or any medical recommendation given for the purposes of the application, is found to be in any respect incorrect or defective, the application or recommendation may, within that period and with the consent of that authority, be amended by the person by whom it was signed; and upon such amendment being made the application or recommendation shall have effect and shall be deemed to have had effect as if it had been originally made as so amended.

(5) Where a patient is received into guardianship in pursuance of a guardianship application, any previous application under this Part of this Act by virtue of which he was subject to guardianship or liable to be detained in a hospital shall cease to have effect.

66 Applications to tribunals

(1) Where-

…

(b) a patient is admitted to a hospital in pursuance of an application for admission for treatment; or

(c) a patient is received into guardianship in pursuance of a guardianship application; …

an application may be made to the appropriate tribunal within the relevant period-

(i) by the patient (except in the cases mentioned in paragraphs (g) and (h) above) …, and

(ii) in the cases mentioned in paragraphs (g) and (h) above, by his nearest relative.

(2) In subsection (1) above the 'relevant period' means-

…

(b) in the case mentioned in paragraph (b) of that subsection, six months beginning with the day on which the patient is admitted as so mentioned;

(c) in the case mentioned in paragraph (c) of that subsection, six months beginning with the day on which the application is accepted; …

67 References to tribunals by Secretary of State concerning Part II patients

(1) The Secretary of State may, if he thinks fit, at any time refer to the appropriate tribunal the case of any patient who is liable to be detained or

subject to guardianship . . . under Part II of this Act or of any community patient.

(2) For the purpose of furnishing information for the purposes of a reference under subsection (1) above any registered medical practitioner or approved clinician authorised by or on behalf of the patient may, at any reasonable time, visit the patient and examine him in private and require the production of and inspect any records relating to the detention or treatment of the patient in any hospital or to any after-care services provided for the patient under section 117 below.

(3) Section 32 above shall apply for the purposes of this section as it applies for the purposes of Part II of this Act.

68 Duty of managers of hospitals to refer cases to tribunal.

(1) This section applies in respect of the following patients—

…

(b) a patient who is admitted to a hospital in pursuance of an application for admission for treatment;

…

(2) On expiry of the period of six months beginning with the applicable day, the managers of the hospital shall refer the patient's case to **[**F2the appropriate tribunal.

72 Powers of tribunals

(1) Where application is made to the appropriate tribunal by or in respect of a patient who is liable to be detained under this Act or is a community patient, the tribunal may in any case direct that the patient be discharged, and—

…

(b) the tribunal shall direct the discharge of a patient liable to be detained otherwise than under section 2 above if it is not satisfied—

(i) that he is then suffering from mental disorder or from mental disorder of a nature or degree which makes it appropriate for him to be liable to be detained in a hospital for medical treatment; or

(ii) that it is necessary for the health of safety of the patient or for the protection of other persons that he should receive such treatment; or

(iia) that appropriate medical treatment is available for him; or

(iii) in the case of an application by virtue of paragraph (g) of section 66(1) above, that the patient, if released, would be likely to act in a manner dangerous to other persons or to himself.

…

(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.

E. The Human Rights Act 1998

13. Mr Simblet began and ended his argument by referring to section 3 of this Act and to the patient's Convention rights in Article 5(1)(e) and (4) and Article 6. I will not be referring to them, as I consider that the issue can be resolved consistently with those rights under normal principles and without reliance on section 3.

F. Why the tribunal retained jurisdiction

14. The tribunal relied on the decision of Stanley Burnton J in *R (SR) v Mental Health Review Tribunal* [2005] EWHC 2923 (Admin). That case is easy to distinguish, because it was decided on different provisions. It is, though, entitled to more respect than being brushed aside on that ground, as the reasoning is capable of applying to the sections I have to apply in this case. I begin by setting out my analysis of the legislation and then explain why I have not followed Stanley Burnton J's reasoning.

My analysis

15. The patient was admitted for treatment pursuant to an application under section 3. That application was supported by clinical recommendations under section 3(3). There is a clear policy in the Act that, when detention is based on clinical decision-making, the patient is given access to the tribunal for judicial supervision of their detention. That policy is effected by section 66(1)(b) and (2)(b), which provides for the patient to apply to the tribunal within six months. Section 68 then provides a back stop for the hospital managers to refer the case to the tribunal if the patient has not taken advantage of section 66. And section 67 confers a power on the Secretary of State to refer a patient's case to the tribunal at any time.

16. The tribunal's jurisdiction is essential for that process to work. It is integral to the operation of the Act and is conferred on the tribunal by section 66. It deals with applications to the tribunal. That is what the heading to the section says and that is what it does. The patient made an application on 16 May 2019. At that stage, she was detained under section 3. There is no doubt that the tribunal acquired jurisdiction. And it acquired the powers in exercise of that jurisdiction under section 72(1)(b).

17. When she was received into guardianship, a number of changes occurred. Her status changed. With that change, she acquired a new right to apply to the tribunal under section 66(1)(c) and (2)(c). The tribunal's powers changed to those conferred by section 72(4). And the appropriate respondent to any application changed from the managers to the responsible local social services authority: see the definition of 'responsible authority' in rule 1(3) of the tribunal's rules of procedure.

18. There is no reason in principle why any of those changes should affect the tribunal's jurisdiction under the existing application. Indeed, the survival of that jurisdiction is consistent with, perhaps even required by, the policy of judicial supervision. And the tribunal has the necessary powers to make the changes to the proceedings consequent upon the patient's change of status.

- The change of status of itself does not effect jurisdiction, unless it in some way affects the constituent elements of legal jurisdiction as set out in *Garthwaite v Garthwaite*. The patient's status under the Act is important for the purposes of their liberty, but of itself it does not affect their legal status in instituting or pursuing legal proceedings. Applications to the tribunal operate in the patient's personal capacity. Rule 1(3)(a) defines an applicant as 'a person … who starts Tribunal proceedings'.
- The existence of a new right to apply to the tribunal does not necessarily undermine the survival of an existing application. Mr Simblet made a telling point. Suppose a patient's status changed quickly from one status to another and back again, time and again. It is possible that this could happen so often and so quickly that the patient could never exercise their section 66 right, depriving them of the judicial oversight that is so important in the Act. For some patients with fluctuating conditions, this is not fanciful. The survival of an existing application does not provide a perfect solution to that problem, but it contributes to the solution. It is, though, capable of providing a faster solution that those provided by sections 67 and 68.
- The tribunal's powers are conferred on it in exercise of its jurisdiction. They are not themselves matters of jurisdiction. The jurisdiction remains the same: to decide whether to discharge the patient. The conditions that decide how the jurisdiction to discharge is to be exercised have changed, but the ultimate issue for the tribunal has not.
- The change in the parties could be effected by substitution of the local social services authority for the managers under rule 9(1)(b).

It may be that there are other differences, such as the nature and content of reports that have to be provided, but they should not be an obstacle. They can be resolved by appropriate case management directions.

R (SR)

19. In order to understand the reasoning in this case, it is necessary to know about the decision and reasoning of Collins J in *R v South Thames Mental Health Review Tribunal, ex parte M* [1997] EWHC 797 (Admin), [1998] COD 38, which Stanley Burnton J distinguished.

20. Collins J was concerned with a transfer from section 2 detention to section 3. This was his reasoning:

> First of all, if one goes back to ss 2 and 3 one sees that what is permitted by each is the admission to the hospital and the detention there. Section 66(1) does not refer to the detention, merely to the admission, as the foundation for the right of application to the tribunal. Effectively what I think Miss Lieven has to submit is that if s 66(1) had read 'where a patient has been admitted to a hospital', then the submissions of Miss Richards would carry weight, but it does not. It says: 'is admitted'. The patient is no longer admitted, submits Miss Lieven. The difficulty with that is that, as it seems to me, 'admission' is something which happens at a moment in time. A person is admitted to a hospital and may then be detained in that hospital. But what founds the right of appeal, and this is the way Parliament has phrased it, is the admission not the detention. That that is the right view seems to me to be underlined by considering s 66(1)(f). Section 66(1)(f) founds the right of appeal upon the furnishing of a report. The language is not 'has been furnished' but is 'is furnished ... and the patient is not discharged', which of course means that Parliament there has recognised that there must be something more than the provision of the report.
>
> The matter is as it seems to me put beyond doubt by consideration of subsection (2) because that, in dealing with the relevant period, talks about 14 days beginning with the day on which the patient is admitted, as so mentioned (that is to say as mentioned in paragraph (a)). That underlines the point that admission is something which occurs at a moment in time; it is not a continuing state of affairs. Again in s 66(2)(a) the expression 'is admitted' is used.
>
> If one goes to s 72 one sees that there is nothing in that which suggests that the change of circumstances (that is to say the change in the nature of the detention from s 2 to s 3) affects the validity of the application, nor is there any reason why it should. The powers of the tribunal under s 72 are, it is common ground, to be exercised on consideration of the state of affairs before the tribunal. That was settled (indeed the language of the section makes it clear) by the decision of this Court in R v Hallstrom ex parte W [1986] 1 QB

824, [1985] 3 All ER 775. Accordingly when the matter comes before the tribunal, if there has been the change from s 2 to s 3, then the tribunal must exercise its powers in relation to a patient who is liable to be detained otherwise than under s 2 above and therefore must consider what are loosely described as the s 3 criteria in determining the case before them. Since the Act makes clear that the basis for an application lies in the admission, whether under 2 or 3, then the determination of the tribunal on the s 2 application cannot prevent the applicant from making a subsequent s 3 application if the s 2 application is unsuccessful. Accordingly, in my view, the guidance note was absolutely correct in the guidance that it gave in this regard.

21. Stanley Burnton J was concerned with a transfer from section 3 detention to a supervised discharge into the community. This was the forerunner of the community treatment order and has now been abolished. I am not going to set out the judge's reasoning in full. I will limit myself to explaining why I do not agree with it.

- The judge purported at [22]-[23] to distinguish the wording of one provision from another when they are in fact the same, and relied on differences that are merely related to the structure of the provisions, reflecting the structure of the legislation, rather than matters of substance.
- He relied on the tribunal's powers under section 72, which is separate from section 66, the provision that confers jurisdiction. Upper Tribunal Judge Rowland has already pointed out that the judge misread section 72(1): *AA* at [45]. Anyway, the judge accepted at [27] that the governing provision in *SR* was different from section 72(4), and it is that subsection which is relevant to this case.
- He used the rules of procedure to interpret the legislation at [28]-[30]. Relying on secondary legislation is always difficult, as he recognised at [31], and the problem is greater when that legislation is in rules of procedure, because they cannot confer jurisdiction. I have referred to the First-tier Tribunal's rules of procedure, but only to show that they are consistent with and support the basic distinction between jurisdiction and powers. I have not used them to interpret the Act; especially, I have not used them to define or limit the tribunal's jurisdiction.
- He noted at [32] that allowing the tribunal to retain jurisdiction would allow a patient to make another application under section 66. That is right, but: (a) the same was true in *ex parte M*; and (b) the legislation limits the number of applications within a period, but not the number of hearings that take place within that period. The same effect that the judge thought inappropriate can occur when a patient makes an application towards the end of an eligibility period – they are entitled to one application in each period. The application will not be heard until the next eligibility period has begun and, if it is

unsuccessful, the patient may immediately exercise the right to make an application is the new eligibility period.

In summary, *SR* is distinguishable from the case before me, as it did not involve the guardianship provisions. Its general reasoning is defective for the reasons I have given, and it should not be applied beyond its immediate context, which no longer obtains.

G. The effect of the later application and decision

22. I accept that it was appropriate for this appeal to continue despite the subsequent application and decision by the tribunal, as the issue was an important one of jurisdiction and counsel were available to argue it fully. It is true that the Trust did not take part, but that is the norm in mental health cases. The case has had the best argument I could have had from experienced and specialist solicitors and counsel.

23. The subsequent application, though, does have an effect on how I dispose of this appeal. When I put this point to Mr Simblet, he argued that the decision under appeal should be set aside and that the logical consequence was that there should be a rehearing. I do not accept that. Just because a decision was wrong in law does not mean that it has to be set aside. Section 12(2)(a) allows for the possibility that the Upper Tribunal may decide not to set a decision aside even those it was made in error of law. It is true that the patient was deprived of her right to a hearing, but every hearing is decided on the circumstances at that time. She has now had a hearing and nothing can recover her right to a hearing in respect of an earlier date. That is why I have not directed a rehearing.

Authorised for issue
on 30 March 2020

Edward Jacobs
Upper Tribunal Judge