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 Mental Health Review Tribunal for Wales under reference 07515-2012, made on 22 June 2012 at AOT Wrexham, did not involve the making of an error on a point of law.

REASONS FOR DECISION

A. The issue

1. This is another appeal that raises the issue of the powers of a tribunal when the patient professes to withhold consent to treatment while subject to a community treatment order. In this case, the issue arises in the exercise of the discretionary power to discharge under section 72(1) of the Mental Health Act 1983.

B. History

2. Mr A is the patient and the appellant. I refer to the respondent as 'the hospital'. Mr A has been involved with psychiatric services since 2000 when he began to experience psychotic symptoms related to substance abuse. He was detained under section 3 of the Mental Health Act 1983 in April 2011, but made the subject of a community treatment order in July 2011. He failed to keep appointments to receive his depot injections and avoided meeting staff when they tried to visit. He was recalled to hospital on 18 April 2012. He was again made subject to a community treatment order on 22 May 2012. It was a condition of the order that he 'will take depot injections as prescribed'. His case was referred to the Welsh Tribunal on 3 May 2012 and heard on 22 June 2012.

C. Legal argument

3. I am grateful for the written legal argument of Peter Mant of counsel instructed by Julie Burton Law (for Mr A) and Neil Allen of counsel (for the hospital). Mr Pant applied for an oral hearing. The Upper Tribunal has a discretion whether to hold an oral hearing of an application for permission to appeal. I have exercised that discretion against holding a hearing and have decided the appeal on the papers, because the legal issues were clear and adequately explored in the written submissions.

D. The tribunal's decision

4. The only issue that Mr Pant has argued is Mr A's lack of consent to treatment and its legal effect. I need, therefore, only deal with that aspect of the decision.

5. The case worker who represented Mr A at the hearing argued that the tribunal should direct his discharge as he was not giving true consent. He was only consenting in order to remain out of hospital and, therefore, under unfair or undue pressure. This was also a breach of his Convention right under Article 8 of the European Convention and treatment against his will under Part 4A of the 1983 Act. The tribunal rejected these arguments:

> The Tribunal concludes that the Patient (at present) consents to his treatment and that he does have a choice, and that he exercises that choice at the time of administration of the depot injection. Should the Patient refuse that injection, as is his right, the Tribunal feels that he is aware of the consequences that may follow. The Tribunal unanimously agree this is **not** undue or unfair pressure but the reality of the situation.

6. The President of the Welsh Tribunal gave Mr A permission to appeal to the Upper Tribunal.

E. The legislation

7. The decision to detain Mr A for treatment was governed by section 3 of the 1983 Act:

> **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.

8. The decision to make Mr A the subject of a community treatment order was governed by section 17A:

17A Community treatment orders

(1) The responsible clinician may by order in writing discharge a detained patient from hospital subject to his being liable to recall in accordance with section 17E below.

(2) A detained patient is a patient who is liable to be detained in a hospital in pursuance of an application for admission for treatment.

(3) An order under subsection (1) above is referred to in this Act as a "community treatment order".

(4) The responsible clinician may not make a community treatment order unless–

(a) in his opinion, the relevant criteria are met; and

(b) an approved mental health professional states in writing–

(i) that he agrees with that opinion; and

(ii) that it is appropriate to make the order–

(5) The relevant criteria are–

(a) the patient is suffering from mental disorder of a nature or degree which makes it appropriate for him to receive medical treatment;

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

(c) subject to his being liable to be recalled as mentioned in paragraph (d) below, such treatment can be provided without his continuing to be detained in a hospital;

(d) it is necessary that the responsible clinician should be able to exercise the power under section 17E(1) below to recall the patient to hospital; and

(e) appropriate medical treatment is available for him.

(6) In determining whether the criterion in subsection (5)(d) above is met, the responsible clinician shall, in particular, consider, having regard to the patient's history of mental disorder and any other relevant factors, what risk there would be of a deterioration of the patient's condition if he were not detained in a hospital (as a result, for example, of his refusing or neglecting to receive the medical treatment he requires for his mental disorder).

(7) In this Act–

"community patient" means a patient in respect of whom a community treatment order is in force;

"the community treatment order", in relation to such a patient, means the community treatment order in force in respect of him; and

"the responsible hospital", in relation to such a patient, means the hospital in which he was liable to be detained immediately before the community treatment order was made, subject to section 19A below.

9. Part 4A deals with treatment of community patients, including the relevance of their consent. Section 64B provides:

64B Adult community patients

…

(2) The treatment may not be given to the patient unless-

(a) there is authority to give it to him; and

(b) if it is section 58 type treatment or section 58A type treatment, the certificate requirement is met.

Section 64C(2) effectively defines *authority to give treatment*:

64C Section 64B – supplemental

…

(2) There is authority to give treatment to a patient if-

(a) he has capacity to consent to it and does consent to it;

(b) a donee or deputy or the Court of Protection consent to it on his behalf; or

(c) giving it to him is authorised in accordance with section 64D or 64G below.

Section 64D provides for giving treatment without consent if need be and section 64G provides for giving emergency treatment.

10. The tribunal's powers in Mr A's case were governed by section 72:

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—

…

(c) the tribunal shall direct the discharge of a community patient if it is not satisfied–

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

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

(iii) that it is necessary that the responsible clinician should be able to exercise the power under section 17E(1) above to recall the patient to hospital; or

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

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

(1A) In determining whether the criterion in subsection (1)(c)(iii) above is met, the tribunal shall, in particular, consider, having regard to the patient's history of mental disorder and any other relevant factors, what risk there would be of a deterioration of the patient's condition if he were to continue not to be detained in a hospital (as a result, for example, of his refusing or neglecting to receive the medical treatment he requires for his mental disorder).

…

11. Article 8 of the European Convention provides:

Article 8

Right to Respect for Private and Family Life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

F. SH v Cornwall Partnership NHS Trust [2012] UKUT 290 (AAC)

12. In this case, I decided that the First-tier Tribunal, which is equivalent to the Welsh Tribunal, had no jurisdiction under section 72(1)(c) of the 1983 Act to

deal with issues of consent to treatment when a patient was on a community treatment order. After analysing the legislation, I came to this conclusion:

> 16. The result is that the tribunal has the right to order the release of the patient, but no more. It does not have power to order that the patient be recalled to hospital. Nor does it have any power to direct the responsible authority to take any steps in respect of the patient's treatment, including steps to allow it to give treatment without consent. Those would be surprising limitations on the tribunal's powers, if it had jurisdiction to deal with issues of consent. The tribunal can make recommendations about treatment (as under section 72(3A)(a)), but they are powers only. It has no right to impose that recommendation on the clinical staff.

G. The arguments on the appeal

13. Mr Pant has made two submissions. Taking them together, his argument is this:

- the tribunal was wrong to find that Mr A had consented to his treatment;
- the condition requiring that he submit to treatment was unlawful;
- so the community treatment order was unlawful;
- the tribunal should have discharged Mr A under its discretionary power in section 72(3).

14. Mr A did not wish to have injections. He was only submitting to them because of the terms of the order and of the consequences of non-compliance. The condition imposed on him took no account of his right to withhold consent and if that was implied, this had not been made clear to him. Accordingly, the condition should not have been imposed and was unlawful at common law and an interference with his autonomy and private life contrary to Article 8.

15. Contrary to my decision in *SH*, the tribunal did have jurisdiction under its discretionary power to discharge Mr A in the circumstances of this case.

16. Whether Mr A consented is not merely a question of fact, but involves issues of both fact and law. His understanding and views on treatment were relevant to whether he gave effective consent. Given that his wishes were inconsistent with treatment under the 1983 Act and that he was highly unlikely to comply with medication if he were discharged, the tribunal could only have properly concluded that he did not consent and should be discharged. His consent was not informed, because he was under pressure of the consequences if he did not comply. The tribunal gave no reasons for finding that Mr A was not subject to unfair or undue pressure.

17. Mr Allen's argument, in so far as relevant, is this:

- the tribunal has no jurisdiction to adjudicate on issues of consent;
- *SH* was rightly decided and applied to the discretionary power in section 72(1) and not just to section 72(1)(c);
- it would be bordering on the perverse if the tribunal had jurisdiction to consider consent in respect of one power but not in respect of another;

- discharge could not automatically follow, even if the order had not been validly made;
- it was not open to the Upper Tribunal to disturb the tribunal's finding on consent;
- there is no valid analogy between conditional discharge and a community treatment order;
- recall and section 17 leave was perhaps more appropriate than a community treatment order for Mr A.

H. Analysis

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.

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).

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.

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.

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.

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.

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.

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.

I. Disposal

26. The tribunal decided, indeed it seems that this was not in dispute, that it was not under a duty to discharge Mr A under section 72(1)(c). It could only direct his discharge, if at all, under the residual discretionary power in section 72(1). There was no evidence to show that the case was in the exceptional category that would allow the tribunal to direct Mr A's discharge. It did not show that Mr A's necessary treatment could be administered outside the scope of the 1983 Act. The tribunal was right to decide as it did. That is why I have dismissed the appeal.

27. Mr Allen updated me on the changes that have taken place since this appeal was brought. If I had found the tribunal to be in error, I would have had to consider whether it was appropriate to set aside its decision in the light of what has happened. In the circumstances, that issue does not arise.

Signed on original
on 12 June 2013

Edward Jacobs
Upper Tribunal Judge