THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

UPPER TRIBUNAL CASE NO: UA-2024-000831-HM
[2024] UKUT 297 (AAC)
AC V SOUTHERN HEALTH NHS FOUNDATION TRUST AND THE SECRETARY OF STATE FOR JUSTICE

Decided following an oral hearing on 3 September 2024

Representatives

AC	Roger Pezzani of counsel by written submission and Ollie Persey of counsel in person, both instructed by Bison Solicitors, all acting pro bono in the Upper Tribunal
Respondents	Took no part

DECISION OF UPPER TRIBUNAL JUDGE JACOBS

This decision may be made public (rule 14(7) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI No 2698)).

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

Reference:	MP/2023/25826
Decision date:	10 April 2024
Hearing:	Paper consideration

The decision of the First-tier Tribunal did not involve the making of an error on a point of law under section 12 of the Tribunals, Courts and Enforcement Act 2007.

REASONS FOR DECISION

1. This is another case in which a patient's status under the Mental Health Act 1983 changed after they made an application to the First-tier Tribunal. In this case, AC was a conditionally discharged restricted patient who made an application to the tribunal but was then recalled by the Secretary of State before the application had been decided. I have decided that the First-tier Tribunal lost its jurisdiction on the application.

A. History and background

2. AC pleaded guilty to attempted murder in 2016. The Crown Court made him subject to a restricted hospital order under sections 37 and 41 of the Mental Health Act 1983. He was conditionally discharged on 21 October 2021.

3. On 13 October 2023, AC applied to the First-tier Tribunal under section 75(2) of the Act. The application was listed for hearing on 18 April 2024. However, the Secretary of State recalled AC in March 2024 and referred his case to the tribunal.

4. The tribunal directed: (a) that the application and the reference be heard together; and (b) AC's representatives should make a submission on whether the tribunal had jurisdiction over the application.

5. On 10 April 2024, the First-tier Tribunal decided that it did not have jurisdiction in relation to the proceedings on the application. Accordingly, the tribunal struck out the proceedings under rule 8(3)(a) of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) 2008 (2008 SI No 2699). The judge explained:

> It seems to me that a crucial sentence in UTJ Jacobs' reasoning in the DD case appears at paragraph 22: If the First-tier Tribunal ceased to have jurisdiction when DD was conditionally discharged, he would not be able to apply to the tribunal again for 12 months (see section 75). But the present case is quite different. The fact that the recall is administrative is irrelevant because, through the automatic referral it generates, it guarantees the patient a hearing and therefore judicial oversight over his detention. The application, made when the patient was subject to a conditional discharge, therefore adds nothing to the referral. It appears to me that Mr Pezzani concedes this point in his submissions at paragraph 19, in which he states that the Tribunal can and should use its case management powers to coordinate the reference and application.

The 'DD case' that the judge mentioned is *DD v Sussex Partnership NHS Foundation Trust and the Secretary of State for Justice* [2022] UKUT 166 (AAC).

6. The tribunal heard the reference on 25 July 2024. Mr Persey told me that AC has now entered a new eligibility period and wished to make an application to the First-tier Tribunal.

B. The legislation

The First-tier Tribunal's rules of procedure

7. Rule 8 deals with striking out and jurisdiction:

> **8. Striking out a party's case**
>
> (1) With the exception of paragraph (3), this rule does not apply to mental health cases.
>
> …

(3) The Tribunal must strike out the whole or a part of the proceedings if the Tribunal—

(a) does not have jurisdiction in relation to the proceedings or that part of them; and

(b) does not exercise its power under rule 5(3)(k)(i) (transfer to another court or tribunal) in relation to the proceedings or that part of them.

8. Rule 17 deals with withdrawal:

17. Withdrawal

…

(3) A party which started a mental health case by making a reference to the Tribunal under section … 75(1) of the Mental Health Act 1983 may not withdraw its case.

The patient's Convention right under the Human Rights Act 1998

9. Article 5(4) of the European Convention on Human Rights provides:

Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

Mental Health Act 1983

10. These are the relevant provisions of the Act:

70 Applications to tribunals concerning restricted patients.

A patient who is a restricted patient within the meaning of section 79 below and is detained in a hospital may apply to the appropriate tribunal—

(a) in the period between the expiration of six months and the expiration of 12 months beginning with the date of the relevant hospital order, hospital direction or transfer direction; and

(b) in any subsequent period of 12 months.

71 References by Secretary of State concerning restricted patients.

(1) The Secretary of State may at any time refer the case of a restricted patient to the appropriate tribunal.

(2) The Secretary of State shall refer to the appropriate tribunal the case of any restricted patient detained in a hospital whose case has not been considered by such a tribunal, whether on his own application or otherwise, within the last three years.

(3) The Secretary of State may by order vary the length of the period mentioned in subsection (2) above.

(3A) An order under subsection (3) above may include such transitional, consequential, incidental or supplemental provision as the Secretary of State thinks fit.

(4) Any reference under subsection (1) above in respect of a patient who has been conditionally discharged and not recalled to hospital shall be made to the tribunal for the area in which the patient resides.

73 Power to discharge restricted patients

(1) Where an application to the appropriate tribunal is made by a restricted patient who is subject to a restriction order, or where the case of such a patient is referred to the appropriate tribunal, the tribunal shall direct the absolute discharge of the patient if—

(a) the tribunal is not satisfied as to the matters mentioned in paragraph (b)(i), (ii) or (iia) of section 72(1) above; and

(b) the tribunal is satisfied that it is not appropriate for the patient to remain liable to be recalled to hospital for further treatment.

(2) Where in the case of any such patient as is mentioned in subsection (1) above—

(a) paragraph (a) of that subsection applies; but

(b) paragraph (b) of that subsection does not apply,

the tribunal shall direct the conditional discharge of the patient.

…

75 Applications and references concerning conditionally discharged restricted patients.

(1) Where a restricted patient has been conditionally discharged under section 42(2), 73 or 74 above and is subsequently recalled to hospital—

(a) the Secretary of State shall, within one month of the day on which the patient returns or is returned to hospital, refer his case to the appropriate tribunal; and

(b) section 70 above shall apply to the patient as if the relevant hospital order, hospital direction or transfer direction had been made on that day.

(2) Where a restricted patient has been conditionally discharged as aforesaid but has not been recalled to hospital he may apply to the appropriate tribunal—

(a) in the period between the expiration of 12 months and the expiration of two years beginning with the date on which he was conditionally discharged; and

(b) in any subsequent period of two years.

(3) Sections 73 and 74 above shall not apply to an application under subsection (2) above but on any such application the tribunal may—

(a) vary any condition to which the patient is subject in connection with his discharge or impose any condition which might have been imposed in connection therewith; or

(b) direct that the restriction order, limitation direction or restriction direction to which he is subject shall cease to have effect;

and if the tribunal gives a direction under paragraph (b) above the patient shall cease to be liable to be detained by virtue of the relevant hospital order, hospital direction or transfer direction.

C. Jurisdiction - general

11. No tribunal – or court for that matter – has authority to act outside its jurisdiction. That is why rule 8(3)(a) imposes a duty on the First-tier Tribunal to strike out any part of its proceedings in relation to which it has no jurisdiction. The language is mandatory; there is no discretion to be exercised. Once a tribunal is without jurisdiction, the proceedings must be struck out. Once the proceedings have been struck out, there is no power to reinstate them.

12. The tribunal may have had no jurisdiction from the outset or it may have lost it later. In most of the cases involving a change of status, the tribunal had jurisdiction and the issue is whether it retained or lost that jurisdiction following the change of status. This is one of those cases.

13. Whether the tribunal has jurisdiction depends on the circumstances at the time. It cannot be affected by how events unfold. At any moment, the tribunal either has jurisdiction or it doesn't.

14. Whether or not the tribunal has jurisdiction depends on the interpretation of the Mental Health Act 1983. The rules of procedure do not confer jurisdiction. What rule 8 deals with is the proceedings, which exist independently of jurisdiction. In this sense, jurisdiction has the meaning explained 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.

15. The tribunal's jurisdiction is determined by the three factors identified by Diplock LJ. A tribunal may retain jurisdiction despite changes to any or all of those factors. As I explained in *AD'A v Cornwall Partnership NHS Trust* [2020] UKUT 110 (AAC):

> 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. …

D. Jurisdiction – in this case

Applications and references

16. The Act contains a number of provisions that confer jurisdiction on the First-tier Tribunal. The tribunal's jurisdiction may be initiated by an application. Section 75(2) is an example of a provision that confers power to apply to the tribunal. This was the power exercised by AC when he applied to the First-tier Tribunal on 13 October 2023. At that date, he was a restricted patient who had been conditionally discharged and who had not been recalled. He had power to apply to the First-tier Tribunal under section 75(2)(b). He exercised that power and the tribunal had jurisdiction as defined in *Garthwaite*. The tribunal's jurisdiction on the application was governed by section 75(3).

17. The tribunal's jurisdiction may also be initiated by a reference. Section 75(1) is an example of a provision that confers power, indeed a duty, to refer a case to the First-tier Tribunal. This was the power that the Secretary of State exercised following the recall of AC.

18. The issue is what effect, if any, the recall of AC had on the tribunal's jurisdiction on his application.

E. The effect of AC's change of status

19. A patient's status may change under the Act. The Courts and the Upper Tribunal have had to analyse whether the change of status deprives the tribunal of the jurisdiction it has on proceedings that have already been initiated in the First-tier Tribunal. In some circumstances, the tribunal retains jurisdiction; is other circumstances, it does not. Some principles have emerged from the cases.

20. First, the provisions of the Act are primary.

21. Second, the precise analysis depends on the provisions involved, as it did in *VS v Elysium Healthcare and the Secretary of State for Justice* [2021] UKUT 186 (AAC). In that case, Upper Tribunal Judge Mitchell emphasised that a patient could become a restricted patient under different provisions and that the analysis depended on which provisions applied.

22. Third, the change of status does not necessarily deprive the tribunal of jurisdiction. My decision in *DD v Sussex Partnership NHS Foundation Trust and the Secretary of State for Justice* [2022] UKUT 166 (AAC) is an example. In that case, I decided that a tribunal retained jurisdiction when a restricted patient applied to the tribunal but was conditionally discharged before the application was heard. This was the decision mentioned by the First-tier Tribunal judge in the passage I have quoted in paragraph 5.

23. Fourth, a patient is protected by the exercise of judicial oversight. *GM v Dorset Healthcare NHS Trust and the Secretary of State for Justice* [2020] UKUT 152 (AAC)

is an example of both this point and the first point. The case of a patient who was subject to section 3 was referred to the tribunal. Before it could be heard, he was made subject to a hospital order without a restriction order. I decided that the tribunal had no jurisdiction, because there was a statutory bar on the patient applying to the tribunal for the first six months following the order. I also decided that this was consistent with the principle of judicial oversight because the hospital order had been made by a court, thereby providing the initial oversight.

24. On recall in this case, section 75(1)(a) required the Secretary of State to refer the case to the First-tier Tribunal within one month. The exercise of that duty is subject to the Convention right under Article 5(4). This requires the Secretary of State to act with 'such promptness within that month as is required by Article 5(4).' In practice, this means 'within days, not weeks, of the return of the patient to hospital, and normally within a few days.' See *R (Rayner) v Secretary of State for Justice* [2009] 1 WLR 310 at [11] and [24]. The duty to refer, as qualified by the Convention right, ensures judicial oversight for the patient.

25. The protection given by the making of the reference is reinforced by rule 17(3) of the tribunal's rules of procedure, which prevents the Secretary of State withdrawing the case on the reference. In other words, the protection of the reference once made is not under the control of the Secretary of State.

26. On recall in this case, section 75(1)(b) applied section 70. The effect was to set the clock running again before AC had power to apply to the First-tier Tribunal. The result was a prohibition on making an application to the tribunal for the first six months following the patient's return to hospital. I note Mr Pezzani's point that section 70 restricts the right to 'apply' and AC has already done that. I do not read the section as limited to the mere act of making an application. I read it as covering both that and pursuing the application to its conclusion.

27. A patient's status can change and change again in quick succession. This is particularly likely with a succession of community treatment orders and recalls to stabilise a patient's condition. The Act makes detailed provision for applications and references to ensure regular judicial oversight. It has not, though, provided for every eventuality and the way the provisions work could deprive the patient of effective judicial oversight, as I said in *DD* at [22]. It is possible, although probably unlikely, that a patient could be recalled and then conditionally discharged quickly without a reference being made. That could leave the patient without recourse to the First-tier Tribunal. The principle of judicial oversight is, however, not limited to oversight by the First-tier Tribunal. As the Court of Appeal decided in *Rayner*:

> 46. I conclude that, while section 75 of the 1983 Act, if it stood alone, might now not be regarded as sufficient to achieve the protection of Article 5(4) rights required by the ECHR and the Strasbourg jurisprudence, the combination of that statutory mechanism, the right of the patient to enforce the Secretary of State's statutory duty (as interpreted in the light of the Convention) by way of judicial review, and the right of the patient to challenge the lawfulness of his detention directly in the courts on its substantive merits by judicial review and/or *habeas corpus* does suffice to comply with Article 5(4). The patient has direct

> access as of right to the courts and can obtain swift redress if he is being unlawfully detained. I would only add that, as a matter of procedure, if judicial review has to be resorted to by a patient, he or she would normally find it quicker and more effective to apply for an order enforcing the Secretary of State's statutory duty rather than embark on a direct challenge in the courts to the lawfulness of the detention.

Taking account of the patient's Article 5(4) protection and judicial review, I consider that the legislative provisions governing the recall of a conditionally discharged patient provide effective judicial oversight.

28. So, the tribunal was right to decide that it had no further jurisdiction on AC's application and to strike out the proceedings.

F. Pro bono representation

29. Finally, the Upper Tribunal is always grateful when counsel and solicitors act pro bono, as they have in this case.

Authorised for issue
on 19 September 2024

Edward Jacobs
Upper Tribunal Judge