MENTAL HEALTH LAW UPDATE

DEVON CHAMBERS

APRIL 2020

CASE REPORT:
AD'A v Cornwall Partnership NHS Trust [2020] UKUT 110 (AAC)

Upper Tribunal overturns previous High Court decision preventing detained patients having a hearing where the circumstances of their detention has changed

Ironically, in terms of its timing, on the day the country went into lockdown, the Upper Tribunal took a decision which will have a significant impact for those seeking to challenge restrictions on their liberty under the Mental Health Act 1983. This case originated in Cornwall and the solicitors were Conroys Solicitors of Truro. Sally Daulton of Devon Chambers represented the patient before the First-tier Tribunal and obtained leave to appeal. Before the Upper Tribunal, the patient was represented by Roger Pezzani and Stephen Simblet QC of Garden Court Chambers' Civil Liberties Team.

The patient became subject to an order under section 3 of the Mental Health Act 1983 on 16 May 2019. She applied to the First-tier Tribunal for her detention under section 3 to be discharged on 22 May 2019. Before the hearing of that application, she was sent to a care home on section 17 leave on 14 June 2019 and was received into guardianship under section 7 of the Act on 27 June 2019. At a hearing before the First-tier Tribunal on 12 August 2019, the Tribunal questioned whether it had jurisdiction to deal with an application made when the patient was detained under section 3 of the Act, given that she was now restricted under section 7 of the Act. The matter was adjourned for this issue to be determined on 30 August 2019. At that hearing, the Tribunal determined that it did not have jurisdiction 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). In reaching that conclusion, the First-tier Tribunal relied on the authority of *R(SR) v Mental Health Review Tribunal* [2005] EWHC 2923 (Admin) in which a patient admitted for treatment pursuant to an application under section 3 of the Act had been transferred, prior to the hearing, from section 3 detention to a supervised discharge into the community under section 25A of the Act (now repealed). In *R(SR)* the High Court concluded that there was no jurisdiction to hear SR's application in these circumstances. On 30 August 2019 the First-tier Tribunal concluded:

> *There is no provision which enables the Tribunal to interpret the Act in such a way as to allow the section 3 Tribunal application to continue when the section 3 has ended and a guardianship order is in place. The authority of SR binds the Tribunal.*

Leave to appeal this decision was granted on 15 October 2019.

Following arguments from Stephen Simblet QC and Roger Pezzani, Upper Tribunal Judge Jacobs allowed the appeal. He accepted arguments that the Tribunal still had jurisdiction, since jurisdiction was conferred by the application having been validly made and what had changed was the way in which that jurisdiction would fall to be exercised. He recognised that a number of changes had occurred when the patient was received into guardianship: her status, her acquisition of a new right to apply to the Tribunal under section 66(1)(c) and (2)(c), the Tribunal's powers (to those of discharge from guardianship under section 72(4) of the Act), and the respondent to the application (from the managers of the NHS Trust to the managers of the responsible local social services authority). However, he found that 'There is no reason in principle why any of those changes should affect the Tribunal's jurisdiction under the existing application' [18]. He accepted the argument that to hold otherwise could mean that patients whose detained status changed several times could, through the unavailability of a Tribunal hearing, be deprived of the judicial oversight that is so important to the proper operation of the Mental Health Act 1983.

He considered that *R(SR)* had been wrongly decided and should not have led the First-tier Tribunal to strike out the Tribunal application. He distinguished *R(SR)* on the grounds that it did not involve the guardianship provisions, but added that 'Its general

reasoning is defective … and it should not be applied beyond its immediate context, which no longer obtains' [21]. Included in his reasons for this finding were:

> *[Stanley Burnton J] 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 [21].*

The case is likely to have implications for other patients whose status changes. With an increase in the number of elderly patients with dementia, the change of status to guardianship so that patients can be cared for in the more suitable setting of a dementia care home may well result in an increase in the number of such hearings.

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