Guidance on mental capacity and the First tier Tribunal's jurisdiction to make health and social care recommendations - MM (as alternative person for C) v Royal Borough of Greenwich [2024] UKUT 179 (AAC)

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3PB

Introduction

1. In *MM (as alternative person for C) v Royal Borough of Greenwich* [2024] UKUT 179 (AAC) the Upper Tribunal (UTJ Stout) grappled with two interesting issues:

    a. The approach that the First-tier Tribunal ("**FtT**") should take to recognising and dealing with appeals where an issue of litigation capacity arises, including where concerns arise as to whether the alternative person is acting in the incapacitated individual's best interests;

    b. The nature of the FtT's jurisdiction under the Special Educational Needs and Disability (First tier Tribunal Recommendations Power) Regulations 2017 ("**the 2017 Regulations**") and its relationship to the underlying health and social care frameworks, including whether and to what extent it is necessary or permissible for the FtT to have regard to, or await completion of, a social care assessment by a local authority before making recommendations.

Factual background

2. The factual background to the decision is as follows.

The appeal to the FtT

3. C was 17 years old at the time of the FtT decision under appeal. He has complex medical needs arising from diagnosis of VACTERL Syndrome and special educational needs arising from ASD and Global Development Delay.

4. C's mother's ("**MM's**") relationship with the Respondent's ("**Greenwich's**") social care department broke down in early 2022.

5. In September 2022, Greenwich amended C's Education, Health and Care Plan ("**EHC Plan**").

6. On 24 November 2022 an appeal was lodged with the FtT. C was aged 16 so a "*young person*" under the Children and Families Act 2014. C was named as the appellant. MM was named as his "*advocate to support him expressing his views*" and a solicitor from Coram Children's Legal Centre was named as C's representative. No formal capacity evidence was submitted alongside the appeal.

7. As part of the appeal, health and social care recommendations were sought.

8. A final hearing took place over two days at which C was represented.

9. Within the Adjournment Notice following day one, the FtT set out provisional findings in respect of sections B and F of the working document. The FtT was asked to make health and social care recommendations on the papers but it found itself "*unable to do that without having sight of the transition to adult care plan that was mentioned by [Greenwich's social worker] in her evidence."* The FtT ordered Greenwich "*to provide the draft or final transition to adult care assessment by 4pm on 6 September 2023*".

10. Between the first and second day of the hearing, Greenwich endeavoured to complete the social care assessment with C and MM however MM did not attend meetings scheduled for that purpose.

11. On 6 September 2023, a "*draft plan*" was filed by Greenwich. The plan was comprehensive but lacking in some detail around MM's needs as a carer.

12. On 18 September 2023, following day two of the hearing, the FtT's final decision was issued. It repeated the findings made on sections B and F from day one. In relation to health and social care it recorded the issues in dispute, alongside reasons for refusing to make recommendations explaining that "*it was unable to do [so] without having sight*

of the transition to adult care plan". This was repeated in respect of both health and social care.

13. The decision recorded the appeal as having been brought by C "*assisted by*" his mother.

The appeal to the UT

14. MM sought (acting unrepresented) permission to appeal to the FtT which was refused. In the decision notice the FtT noted that MM was "*not a party or representative in the appeal*" and that "*in the absence of confirmation from C that he has appointed his mother as his representative, there is a question about whether the application is properly made."* The FtT proceeded to presume that the application was properly made but dismissed it in any event on the merits.

15. MM then instructed Geldards LLP.

16. An application for permission to appeal was filed with the UT and granted on all grounds by UTJ Stout. Within the permission decision, the UT explained that there was good cause for concern regarding C's litigation capacity. Directions were issued for the filing of updating capacity evidence.

17. Kevin McManamon, partner, of Geldards LLP undertook a thorough capacity assessment of C and detailed both the assessment and his resultant findings in a witness statement. On the strength of that statement, the UT concluded (as was agreed between the parties in any event) that C lacked capacity to litigate the appeal. MM was appointed as his alternative person.

Grounds of Appeal

18. Four grounds of appeal were brought:

Ground 1: The FtT's conclusion that it could not make recommendations about health care provision was irrational or perverse, alternatively it lacked adequate reasons.

Ground 2: The FtT's conclusion that it could not make recommendations about social care provision was irrational or lacked adequate reasons.

Ground 3: If further evidence was required to make recommendations, the FtT unlawfully failed to give effect to the obligations on it as an inquisitorial tribunal and/or failed to comply with the overriding objective.

Ground 4: The FtT unlawfully failed to consider or determine the issue of C's capacity to litigate the appeal.

The UT's decision

19. The UT addresses Ground 4 first, before turning to the remaining grounds of appeal.

Ground 4: The capacity issue

20. The UT set out section 80 of the Children and Families Act 2014 and Regulation 64 of the Special Educational Needs and Disability Regulations 2014 concerning the process where a young person lacks litigation capacity. It then turned to the decision of UTJ Jacobs in *Buckinghamshire CC v SJ* [2016] UKUT 254 (AAC) at [9]-[11] which (as a reminder) provides:

"9. This is governed by the 2005 Act. Capacity depends on the matter in respect of which a decision has to be made: section 2(1). So a person may have capacity at one time but not at another, and may have capacity in respect of one matter but not another. The matter I am concerned with is the bringing of an appeal; that is what I mean when I refer to (lack of) capacity. The young person may have capacity in respect of that, but not in respect of other decisions that have to be made in the course of the proceedings. Equally, a person may lack capacity to bring an appeal, but have capacity to make other decisions in the course of the proceedings.

10. A person is presumed to have capacity until shown otherwise and then only after all practical steps have been taken without success to help them make a decision: section 1(2) and (3).

11. Whether a person has capacity is a matter of fact for the tribunal to decide. Mr Small argued in HS/0515/2016 that the tribunal had a particular responsibility to ensure that a young person had the necessary capacity. In a sense, that is correct. Any tribunal must be alert to the possibility that a person lacks capacity on a matter. However, the overriding objective for both the First- tier Tribunal and the Upper Tribunal requires parties to co-operate with the tribunal: rule 2(4) of both the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 (SI No 2699) and the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI No 2698). That may involve drawing an issue to the tribunal's attention and, perhaps, providing the tribunal with any evidence it needs to resolve the issue."

21. At [32]-[33] UTJ Stout added two observations to these comments made by Judge Jacobs:

"32. First, the 'matter' in respect of which a young person's capacity needs to be assessed in this context is not just the bringing of an appeal but the ongoing conduct of it, including the decisions that ordinarily need to be made by someone conducting an appeal, such as what changes to the EHCP are sought and how to respond to matters raised by the local authority – in other words, the sort of decisions that are necessary to give instructions to a legal representative on the conduct of an appeal. Helpful further guidance on the approach the Tribunal should take to making an assessment of capacity in this context is to be found in the decision of HHJ Christopher Dodd, sitting in the Court of Protection in A Local Authority v GP and RP [2020] EWCOP 56[1].

33. Secondly, in other contexts it has been held that the threshold at which the Court or Tribunal will be expected to pause proceedings in order to make an assessment of capacity is where there is 'good cause for concern' about the person's capacity to litigate: see Royal Bank of Scotland v AB (UKEAT/0266/18/DA and UKEAT/0187/18/DA) at [23]-[27], approved by the Court of Appeal [2021] EWCA Civ 345 at [12]. I see no reason not to apply that approach in this context too.

22. UTJ Stout considered UTJ Jacobs comments at [16] of *Buckinghamshire v SJ* in which he noted that :

"[16] Mr Wolfe referred me to Annex 1 to the Code of Practice, which deals with young persons who lack capacity. He drew attention to one mistake or infelicity in the wording. The second paragraph says that 'in most cases where a young person lacks capacity, decisions will be taken on their behalf by their parent'. Strictly, as he pointed out, the decision is not taken by the parent on the young person's behalf. Rather, it is taken by the parent in their capacity as the alternative person and in the young person's best interests."

23. UTJ Stout agreed with the substance of this conclusion explaining at [38] that:

"…The difference between the mechanism for appointment of an alternative person in contrast to an 'ordinary' litigation friend cannot make any difference to the principle that

[1] For a consideration of that decision see here https://www.3pb.co.uk/content/uploads/A-Local-Authority-v-GP-by-3PB-Barristers.pdf

the right of appeal remains in substance that of the young person and that the alternative person is conducting the appeal on their behalf and in their best interests and not in their own right. If that were not the case, then regulation 64 would be doing exactly what AM (Afghanistan) and Jhuti recognised would be unlawful under common law and Article 6: it would be preventing the incapacitated party from accessing, and participating properly in, their appeal rights."

24. Applying those legal principles to the facts of the appeal at hand, UTJ Stout found at [47]-[50] that:

*"47…**this was a case where the fact that C probably did not have capacity to conduct the appeal 'shouted out' from the papers. The Tribunal ought to have recognised that this was an issue just from reading the bundle and before even starting the first day of hearing.** That is because of C's diagnosis of global developmental delay and the general description of his learning and communication difficulties.*

*48. **Once the hearing had started and C was not participating in the hearing, the onus was in my judgment on the Tribunal to satisfy itself that the appeal was being properly conducted by him or on his behalf. This is an important part of the Tribunal's duties when dealing with appeals concerning young persons because, as the legal principles I have set out above make clear, if a young person does have capacity, it is important that the Tribunal ensures that they and not their parent conduct the appeal and make the decisions in the proceedings (unless the Tribunal is satisfied that the young person has capacity and has properly authorised their parent to conduct the appeal for them). Equally, if the young person does not have capacity, then regulation 64, as well as common law procedural fairness and Article 6 of the ECHR, require the Tribunal to ensure that the correct person is appointed to conduct the appeal on their behalf acting in their best interests. As is clear from the legal principles set out above, a person who lacks capacity is, essentially by definition, unable to participate in the proceedings** and continuing without safeguarding their rights by the appointment of a litigation friend will be unfair.*

*49. **Although professional legal representatives obviously also have a responsibility to ensure that their client has capacity and is able properly to give them instructions, and to alert the Tribunal if there is any issue in that regard, the***

Tribunal cannot rely on the parties' representatives to do this, however experienced those representatives may be. *That is particularly so in the context of appeals under section 51 of the CFA 2014 where it is (in my experience) unfortunately relatively common for parties to forget or overlook the statutory change in appellant from parent to young person at the end of compulsory schooling. It is the Tribunal's responsibility to ensure a fair hearing.*

50. ***That does not mean, of course, that the Tribunal should ignore the fact that there is a legal representative. A Tribunal faced with this situation should always begin by making respectful enquiries as to whether the legal representative has considered the issue of who their client is (or should be) and their capacity****. However, in this case, where it was in my judgment obvious from the papers that C probably lacked capacity (and now, in the light of my decision on this appeal, clear that he did lack capacity), I am satisfied that the Tribunal's failure to pause the proceedings, assess C's capacity and appoint an alternative person constituted an error of law."* (emphasis added).

25. The UT then turned to the issue of materiality recognising (as was common ground between the parties) that "*there may be many cases in this context where it can truly be said that the fact an appeal proceeding with a wrongly named appellant or without an alternative person being appointed made no material difference…*" ([51]).

26. Matters were potentially impacted in this appeal due to MM's failure to engage with Greenwich and the consequent impact that that non engagement had on the FtT's decision that social care recommendations could not be made.

27. UTJ Stout found that in that circumstance (at [52]):

"it became a relevant factor for the FtT to take into account in deciding what to do in relation to the health and social care recommendations that MM as C's alternative person ought to have been conducting the appeal on his behalf and in his best interests. To the extent that her actions had in the view of the FtT led to a situation where it was unwilling to deal with part of the appeal, the FtT needed to consider whether MM (who it should have appointed as alternative person) had failed to act in C's best interests and, if so, it needed to take that into account in deciding, in accordance with the overriding objective, how to proceed to do justice in the case"

28. The FtT could not have taken over from MM and taken decisions in C's best interests – the UT was clear that would have been an error of law as the FtT does not exercise a best interests jurisdiction (unlike the Court of Protection).

29. What the FtT should have done was explained at [54] namely: "*consider those circumstances. If it concludes that the alternative person has not in a particular respect acted in the incapacitated person's best interests, it must recognise that fact and take it into account as appropriate in its case management and substantive decision making*".

30. UTJ Stout then, interestingly, considered the question of whether the FtT ought to have removed MM as alternative person and appointed a litigation friend in her place. For various reasons, UTJ Stout comments in this regard are *obiter* and not binding, however, given the novelty of the issue it is helpful to have some understanding of what the UT made of the point.

31. UTJ Stout explained at [60]-[61] that the FtT likely did have the power to remove an alternative person not acting in the incapacitated person's best interests and to appoint a litigation friend:

"59…However, on reflection, I accept Mr Wyard's submission that, in principle, in an appropriate case, ***the Tribunal could appoint someone as a litigation friend in an appeal under the CFA 2014 who is not the alternative person*** *required to be appointed under regulation 64. I arrive at that conclusion through a number of steps as follows:- first, because the Special Educational Needs and Disability Tribunal does not only exercise the jurisdiction under the CFA 2014, it also has jurisdiction over claims of disability discrimination in schools under the Equality Act 2010 (EA 2010). Its procedure, like that of the other Tribunals in the Health, Education and Social Care Chamber, is governed by The Tribunal Procedure (First-Tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 (SI 2008/2699) (the FT Rules). Those rules contain no provision about capacity or appointment of litigation friends. In respect of all cases other than appeals under the CFA 2014, accordingly, the reasoning of the Court of Appeal in AM (Afghanistan) and the EAT Jhuti leads irresistibly to the conclusion that the First tier Tribunal (Health, Education and Social Care Chamber) must generally have power, where a litigant lacks capacity, to appoint a litigation friend.*

60. If the Tribunal has that case management power generally, the question then becomes whether regulation 64 'cuts down' that power in cases under the CFA 2014. It seems to me that, up to a point, it does. That is because regulation 64 is in mandatory terms and, in most cases, applying regulation 64 will result in an outcome that is procedurally fair and Article 6 compliant. As such, in most cases, the Tribunal should not resort to the residual, implied case management power to appoint a litigation friend under the FT Rules. I say 'should' because it seems to me there are two alternative analyses of how the Tribunal's powers work in this respect. First, it could be said that where regulation 64 applies, the residual, implied case management power does not exist as it is not needed to ensure fairness or compliance with Article 6 and therefore does not fall to be 'read into' the FT Rules in accordance with the principles discussed in Jhuti. Alternatively, secondly, it could be said that the implied case management power exists but it would be inappropriate to exercise it because the express provisions of the legislation prescribe what should happen in such cases and should therefore take precedence. In any event, it seems to me that, ***if applying regulation 64 resulted in a situation that was unfair or not Article 6 compliant (such as might occur if an alternative person persisted in conducting the appeal in a way that clearly conflicted with the interests of the incapacitated party), the reasoning in AM (Afghanistan) and Jhuti would lead to a conclusion that the Tribunal has power to remedy that by appointing a replacement litigation friend of its motion.****"* (emphasis added)

32. In exercising such a power, the FtT would need to first consider alternative steps as explained at [63]-[64]:

"*63. In cases where concerns arise as to whether a parent appointed as alternative person is acting in the best interests of the young person,* ***it seems to me that the Tribunal should first consider what it can do to 'neutralise' that conduct so that the conduct of the alternative person does not prejudice the young person's participation in the proceedings. This is a matter of ordinary, pragmatic case management.*** *The Tribunal might begin, for example, by explaining to the alternative person their duty to act in the young person's best interests. That might be sufficient to prevent the conduct. In this case, the Tribunal went some way towards doing that on the first day of the hearing when it explained that it was in 'everyone's interests' for the transition plan to be completed, but that very general warning is not in my judgment a substitute for explaining properly to a parent who is (or should be) acting as alternative person the nature of their 'best interest' duties.*

64. ***In some cases, the Tribunal may find that it is possible simply to ignore any prejudicial aspect of a parent's conduct so that it has no adverse effect on the young person. Alternatively, the Tribunal might be able to afford an opportunity for any prejudice to be remedied.*** *For example, in this case, potentially, time could have been allowed at the hearing for MM to put forward her views on the transition plan and for the local authority's social worker to respond.*" (emphasis added)

Grounds 1-3: health and social care

33. Much of the decision in so far as it concerned health and social care recommendations turned on the facts of the appeal. 10 points of guidance were drawn out of the applicable underlying health and social care legal frameworks as they bear on the issue of when a FtT may decline to make recommendations in relation to health and social care, where such recommendations are sought.

34. That guidance is set out fully at [108] of the decision, however, in summary it is as follows:

    a. The FtT's power to make health and social care recommendations is materially the same as the power to make orders in respect of the contents of sections B and F. Where an appellant seeks recommendations under the 2017 Regulations they are not to be viewed as an optional extra. It is as important that a tribunal decides health and social care issues as it does the educational elements of the EHC Plan.

    b. The lesser impact on a local authority of recommendations (i.e. the necessity only to provide a reasoned response rather than implement recommendations) is not a reason for the FtT to regard its decision making as any less important. The FtT is the only independent tribunal with jurisdiction to adjudicate on healthcare and social care provision. If made by the specialist tribunal following detailed consideration of the evidence and for strong reasons, it may be difficult for a local authority or responsible commissioning body to provide lawful cogent reasons for refusing to implement it.

    c. The FtT exercises an inquisitorial jurisdiction in relation to health and social care in the same way as it does in relation to special educational needs.

d. The burden is on the parties to put the evidence necessary to make out their respective cases on health and social care recommendations before the FtT. Where they fail to do so, the FtT may decide the appeal on the evidence before it or exercise its inquisitorial jurisdiction and case management powers to make directions for the provision of evidence.

e. The Tribunal is not required to ensure that the various statutory steps that the local authority should have carried out under the health and social care legislation before making or amending the EHCP are completed. Health and social care assessments are not necessary preconditions to the exercise of its jurisdiction, but merely one means by which the evidence may be put before it.

f. There is no statutory requirement for an assessment before health and social care provision can be included in an EHC Plan. Nor does the FtT have express jurisdiction to recommend that an assessment is carried out (although it can make such orders as part of its case management powers).

g. It may be relevant for the FtT to take into account certain elements of the underlying statutory framework when making recommendations, for example, regard to the statutory framework will enable it to understand which provisions needs to be in section H1 and H2.

h. The social care legislative framework may inform the approach the FtT takes where there has been a breakdown in the relationship between a parent and social services. A lack of cooperation by a parent should not in and of itself be treated by a local authority as an obstacle to completing an assessment for a child or young person. If the FtT fails to exercise its jurisdiction to make recommendations in such a case it risks reinforcing a legally erroneous approach by the local authority.

i. A recommendation for social care provision made by the FtT will carry more weight if it is made on the basis of evidence and by reference to the relevant eligibility criteria. As a matter of good practice where social care recommendations are sought, the FtT should require the local authority to provide it with the relevant local criteria. The same goes for healthcare, although the FtT may need to make third party orders against the responsible commissioner if necessary.

j. There are important differences between the FtT's jurisdiction over health and social care and that concerning education. There is, for instance, nothing wrong with make recommendations on a time limited basis in accordance with *VS v Hampshire County Council.*

Click here to read the judgment.

Matthew Wyard acted for the successful appellant instructed by Geldards LLP. Matthew is a public law barrister specialising in education, health and social care disputes. He is ranked in all the main directories for administrative and public law, education law and court of protection work. He is widely published, including as an author of the 'Education Law Handbook' the leading textbook on education law. He regularly advises on and litigates judicial reviews and appeals in the Upper Tribunal.

24 June 2024

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