Supreme Court Judgment in MM - Clarity at Last?

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Finally, we now have the Supreme Court conclusion to the long-running issue of conditional discharge and deprivation of liberty.

In this briefing, we look at the judgment in MM and its practical impact.

What was MM about?

MM had a mild learning disability and autistic spectrum disorder, and his behaviours included pathological fire starting. He was convicted of arson in 2001 and a criminal court imposed a hospital order under s.37 Mental Health Act (MHA) with restrictions (s.41). He had capacity to make decisions about his care. He applied to the First-Tier Tribunal ('the Tribunal') seeking a conditional discharge. Expert evidence was put forward to say that he could be safely managed in the community under a conditional discharge, but everyone agreed that the proposed care plan would amount to an 'objective' deprivation of liberty applying the Cheshire West 'acid test' (i.e. whether the person is subject to continuous supervision and control and not free to leave).

MM argued that the conditional discharge (amounting to an objective deprivation of liberty) would be lawful if he consented to it. However, the Tribunal rejected that argument and decided that it could not grant a conditional discharge which would amount to an objective deprivation of the patient's liberty outside hospital.

MM appealed to the Upper Tribunal, which decided in his favour, concluding that the Tribunal could impose conditions amounting to an objective deprivation of liberty where a patient with capacity validly consents to such conditions.

The Secretary of State appealed to the Court of Appeal, which held that the Tribunal cannot impose conditions which would amount to an objective deprivation of liberty outside hospital, because the statutory framework under the MHA simply does not allow for this.

MM appealed to the Supreme Court.

What did the Supreme Court decide?

The Supreme Court found that neither the Tribunal, nor the Secretary of State can conditionally discharge a patient with conditions amounting to detention or a deprivation of liberty, on the basis that this would be "*contrary to the whole scheme of the Mental Health Act*".

The court considered what the word 'discharge' means when referring to restricted patients (s.37/41), finding that it means the actual discharge from the hospital in which the patient is currently detained.

The court commented that a power to impose conditions amounting to detention or deprivation of liberty on conditional discharge, would be an interference with the patient's fundamental right to liberty. Therefore, whilst there is nothing in the MHA which *expressly* prohibits such a condition being imposed, this power should not be inferred.

The court also considered the powers and safeguards under the MHA as they apply to conditionally discharged patients, as opposed to patients detained in hospital or in a place of safety. The court found that, unlike patients detained in hospital or a place of safety, there is no power to 'take and convey' a conditionally discharged patient to the place where he is required to live, nor can he be taken to custody and returned anywhere, unless he is recalled to hospital. In terms of safeguards, a conditionally discharged patient's right to apply to the Tribunal is far less frequent than a patient detained in hospital. The court found that these factors highlighted the fact that the MHA was not designed to deprive conditionally discharged patients of their liberty following discharge from hospital through the imposition of conditions.

On the issue of consent, the court found that, if there were a power to impose such a condition, it would be difficult to see why the patient's consent would be required. The court also noted that there would be problems if the patient's willingness to comply with the condition was driven by his desire to get out of hospital. Following discharge, a patient may change his mind and decide not to comply with the condition and he could not be compelled to do so.

In respect of patients who lack capacity, the court did not decide whether the Court of Protection (COP) could authorise a future deprivation of liberty following a conditional discharge by the Tribunal, or whether the Tribunal could defer its

decision to allow for the COP to authorise a deprivation of liberty. The court did however allude to the fact that, assuming these actions are possible, this may give rise to discrimination between patients who have capacity, and those who lack capacity.

Practical Impact

Following the Supreme Court's decision, it remains the case that for s.37/41 patients seeking a conditional discharge, there is no power to impose conditions amounting to a deprivation of liberty. Careful thought will therefore have to be given as to what conditions would and would not constitute a deprivation of liberty.

In practical terms, this judgment maintains the 'status quo' and the possibility that some restricted patients will stay in hospital for longer, with continued debates about what care arrangements do and do not amount to a deprivation of liberty.

How can we help?

Our national team of mental health and mental capacity specialists have extensive experience in advising health and social care providers - both in the NHS and the independent sector - in relation to all aspects of the law in this area, including:

- Advice on all aspects of the Mental Health Act, including issues arising in relation to s. 37/41 cases and Community Treatment Orders;
- Representation at First-Tier Tribunals;
- Advice on the interface between the Mental Capacity Act and Mental Health Act;
- Advice and training on issues arising out of the Transforming Care Agenda;
- Advice on the community management of complex patients;
- Advice on s.117 and funding disputes;
- Advice and representation in Court of Protection proceedings.

We also provide training on all aspects of the Mental Health Act and Mental Capacity Act, including induction and refresher courses for s.12 Approved Clinicians.

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