

# CTOs and Deprivation of Liberty - Supreme Court Decides

Published 18 December 2018

We now have the Supreme Court conclusion to the long-running issue of Community Treatment Orders (CTOs) and deprivation of liberty.

By way of headline - there is no power to impose CTO conditions which amount to a deprivation of liberty.

Where does that leave us?

In this briefing, we look at the judgment in [PJ](#) and its practical impact.

## What was PJ about?

PJ had a learning disability and autistic spectrum disorder, with a history of violent offending. Having been detained under s.3 MHA in 2009, he was then discharged from hospital under a CTO in 2011. The CTO required him to live in a residential placement which significantly restricted his liberty by providing for near continuous supervision and only very limited unescorted leave from his residential placement.

PJ applied to the Mental Health Review Tribunal for Wales ('the Tribunal') for his discharge, on the basis that the care arrangements breached his human right not to be unlawfully deprived of his liberty under Article 5. The Tribunal refused to exercise its power of discharge, having concluded that the CTO conditions did not constitute a deprivation of his liberty.

PJ appealed to the Upper Tribunal, which found that the Tribunal should have focused on the reality of PJ's position, rather than the technicality that CTO conditions are not directly enforceable. The Upper Tribunal held that, if PJ was unlawfully deprived of his liberty, the Tribunal could not allow this situation to continue and gave a checklist of factors for Tribunals to go through when considering whether CTO conditions would breach Article 5 by unlawfully depriving someone of their liberty.

Welsh Ministers (on behalf of the Tribunal) appealed to the Court of Appeal, which decided that the statutory framework around CTOs does allow for conditions amounting to a deprivation of liberty to be included as part of the CTO, as long as these are less restrictive than when the patient was detained in hospital. It also ruled that the Tribunal does not have the power to consider or change the terms of the CTO or to consider its legality in terms of Human Rights Act compliance, making it inappropriate for the Tribunal to be applying any kind of checklist to decide whether or not conditions would breach Article 5.

That decision was appealed to the Supreme Court.

## What did the Supreme Court decide?

Overtaking the Court of Appeal's decision, the Supreme Court has found that there is no power to impose conditions in a CTO which have the effect of depriving a person of his liberty because there is nothing in the Mental Health Act that permits this - either expressly or by implication. As one of the Supreme Court judges said: *"If he cannot be made to take his medication, how can Parliament have intended an even greater interference with his fundamental rights?"*

The Supreme Court also firmly rejected the idea that CTO conditions do not amount to a deprivation of liberty because they are unenforceable, reiterating that it is the actual situation of the person on the ground which matters. It also rejected the argument that a different test for deprivation of liberty should apply where the purpose of imposing the conditions is to enhance, rather than further curtail, the person's freedom. In line with the established 'acid test' for deprivation of liberty (i.e. Is the person under continuous supervision and control and not free to leave?), the purpose of the restrictions is not a relevant factor.

What if the Tribunal finds that a patient is being deprived of his liberty under a CTO? Although the Tribunal has no power to revoke or vary CTO conditions, the Supreme Court has said these can be relevant to whether the statutory criteria for the CTO are made out, highlighting the Tribunal's duty to discharge the patient from a CTO if those criteria are not met and the Tribunal's discretion to discharge in any event. The Supreme Court concluded that the concern is *"more theoretical than*

real" and that, where the Tribunal identifies an unlawful deprivation of liberty, "it must be within its powers to explain to all concerned what the true legal effect of a CTO is".

If someone is being unlawfully detained because CTO conditions are being used as a basis for depriving them of their liberty, however, the legal route for remedying this would be via a 'habeas corpus' application or a judicial review challenge.

Hot on the heels of the Supreme Court decision in MM, this brings the position for conditional discharge and CTOs in line with one another - in neither case can conditions imposed as a part of care arrangements in the community amount to a deprivation of liberty.

## Practical Impact?

The bottom line is that Responsible Clinicians can no longer impose CTO conditions amounting to a deprivation of liberty and - in practice - Tribunals may well be considering whether an unlawful deprivation arises and taking appropriate steps.

What happens next in light of this?

- Mental health providers will need to conduct organisation-wide audits to pick up cases where current CTO conditions may amount to a deprivation of liberty, with a view to reviewing care plans and/or the appropriate legal framework for those patients.
- Recognising that it may not be possible to review the position for all community CTO patients where this could be an issue overnight, some form of prioritisation will be necessary - e.g. looking at particular cohorts of patients where CTO conditions are most likely to amount to a deprivation of liberty and/or reviewing those cases which are coming up for Tribunal to ensure that care plans do not impose restrictions which could be said to deprive the patient of their 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 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.

## Authors



**Gill Weatherill**

Newcastle  
+44 (0)191 404 4045  
[gweatherill@dacbeachcroft.com](mailto:gweatherill@dacbeachcroft.com)



**Helen Kingston**

Newcastle  
+44 (0)191 404 4046  
[hkingston@dacbeachcroft.com](mailto:hkingston@dacbeachcroft.com)



**Sarah Woods**

Bristol  
+44 (0) 117 918 2744  
[swoods@dacbeachcroft.com](mailto:swoods@dacbeachcroft.com)



**Matthew Nichols**

Bristol  
+44 (0)117 918 2124  
[matnichols@dacbeachcroft.com](mailto:matnichols@dacbeachcroft.com)

