

Deprivation of Liberty and Conditional Discharge

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Secretary of State for Justice v KC and C Partnership NHS Foundation Trust [2015] UKHT 376

The court has ruled that it is possible for restricted patients who lack capacity to be conditionally discharged in circumstances that amount to a Deprivation of Liberty, as long as the deprivation is authorised in accordance with the MCA.

Background

KC was convicted of indecent assault on a female under the age of 16 in 2004. He was made subject to a hospital order pursuant to s.37/41 of the Mental Health Act.

This case came before the First-Tier Tribunal (FTT) in July 2014 to consider an application for Conditional Discharge. It was accepted by all parties that conditions needed to be imposed to protect the public and that these conditions would amount to a Deprivation of Liberty. It was also accepted that KC lacked the mental capacity to provide his valid consent to the care plan.

The FTT made a 'provisional decision' that KC should be conditionally discharged but that the conditions could not be implemented immediately. Following this decision, the local authority applied to the Court of Protection seeking declarations that it would be lawful and in KC's best interests to move to a proposed placement with the associated community supervision and management.

The Secretary of State appealed this decision on the basis of the binding authority set out in *RB v Secretary of State for Justice*, which states that no FTT can direct the Conditional Discharge of a restricted patient on conditions that would result in a Deprivation of Liberty.

Decision

On hearing the appeal the Judge concluded that:

- The FTT can impose conditions that amount to a Deprivation of Liberty where that deprivation has been authorised in accordance with the MCA;
- Both MCA authorisations (the Court of Protection and Deprivation of Liberty Safeguards) can be granted to come into effect on a future date providing the MCA decision maker is aware of the proposed FTT conditions;
- MCA decision makers cannot override conditions identified by the FTT and must choose between alternatives put to them by the proposed FTT conditions.

The Judge also commented obiter that restricted patients who have capacity should be entitled to consent to a Conditional Discharge where the conditions would amount to a Deprivation of Liberty. We await further case law on this point as currently the decision of RB still stands in relation to capable patients.

Comment

This is a long awaited decision which enables forensic patients with longstanding risk factors to move through the hospital system into the community with the appropriate supervision and restrictions to keep both themselves and the wider public safe.

There will inevitably be complex practical challenges with the timing and joining up of the FTT, DOLS/Court of Protection processes and availability of community placements. We also await further testing of the position in relation to capable restricted patients.

If you would like to talk through our mental health law capabilities, or have questions about what we can offer, then please contact [Gill Weatherill](#) or [Susan Thompson](#).

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