Deprivation of liberty in the community: The Court of Appeal decides

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Summary

The Court of Appeal has now given its judgment in two important cases about whether conditions amounting to a deprivation of liberty can be placed on mental health patients outside hospital - MM (about conditions on discharge for restricted mental health patients) and PJ (about conditions imposed as part of a Community Treatment Order).

The Court found that the position for conditionally discharged restricted patients is very different from that of patients discharged on a CTO.

In short, the Court found that there is no power to include conditions amounting to a deprivation of liberty outside hospital as part of the conditional discharge of patients who have been detained under a restricted hospital order. By contrast, the statutory framework around CTOs allows 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.

The judgment could mean that discharge of patients on restricted hospital orders into the community becomes more difficult. For CTO patients, they will no longer be able to use the Tribunal to challenge the legality of their CTO on the basis of conditions imposed which amount to a deprivation of liberty.

What were the cases about?

MM

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) and a restriction order under s.41. He had capacity to make decisions about his care. He applied to the First Tier Tribunal ('the Tribunal') for 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 a deprivation of liberty under the Cheshire West two-part 'acid test' (i.e. Is the person under continuous supervision and control? Are they free to leave?).

MM argued that any 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 a 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 a deprivation of liberty and that a patient with capacity could consent to such conditions.

The Secretary of State appealed to the Court of Appeal (see 'What did the Court of Appeal Decide?' below).

PJ

PJ also had a mild learning disability and autistic spectrum disorder and what was described as significant impairment in his behaviour. He was detained under s.3 MHA in 2009 and was made the subject of a Community Treatment Order (CTO) by his Responsible Clinician 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 (which we also refer to as '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 - based on the reality of PJ's position (rather than the technicality that CTO conditions are not directly enforceable) - the Tribunal had been wrong to conclude that he was not deprived of his liberty. The Upper Tribunal gave a checklist of factors for Tribunals to go through when considering whether CTO conditions would cause a breach of Article 5 by unlawfully depriving someone of their liberty.

Welsh Ministers appealed to the Court of Appeal – see below for the outcome.

What did the Court of Appeal decide?

Conditionally discharged restricted patients (s.37/41 patients)

The Court of Appeal found that the Tribunal cannot impose conditions which would amount to an 'objective' deprivation of liberty (i.e. that the person is under continuous supervision and control and not free to leave) outside hospital, because the statutory framework under the Mental Health Act simply does not allow for this.

The fact that a patient with capacity consents to the conditions does not mean the Tribunal can impose them. (In this context, the Court of Appeal touched on whether it is even possible to give valid consent in this scenario given that the threat of coercion could invalidate any apparent consent, but declined to reach a definitive conclusion on that).

If the Tribunal is satisfied that a patient is agreeable to supervision outside hospital and that this will protect both the patient and the public, it can grant an absolute discharge or a conditional discharge with conditions which do not involve an objective deprivation of liberty. Granting conditions which amount to a deprivation of liberty outside hospital is not an option.

In respect of patients who lack capacity, the Court of Appeal indicated that the Tribunal could still defer discharge to permit an application to the Court of Protection to authorise a deprivation of liberty for an incapacitated patient which might provide 'free standing deprivation of liberty safeguards in certain circumstances'. The Tribunal cannot however impose conditions amounting to a deprivation of liberty, and deprivation which arises as a result of the care plan will be the jurisdiction of the DoLS framework or Court of Protection alone.

Community Treatment Orders

The Court of Appeal found that the position is very different in relation to CTOs because of the different statutory framework.

Specifically, the Court found that the purpose of the Responsible Clinician's power to put in place conditions as part of a CTO is to provide for lesser restrictions on movement than detention in hospital and these conditions can amount to a deprivation of liberty provided they are used for the specific purposes set out in the CTO scheme - e.g. ensuring that the patient receives medical treatment, preventing risk of harm to their health/safety or protecting others.

The Court of Appeal's logic was that this is a necessary implication because Responsible Clinicians must be able to impose such conditions in order to fulfil the purpose of the CTO scheme - i.e. to enable people to be gradually integrated into the community whilst also protecting them and others. Further, the framework around CTOs - including clear criteria for conditions which can be imposed, time limits and regular rights of review - is a procedure prescribed by law which makes imposing conditions amounting to a deprivation of liberty permissible.

An important proviso to this is that the conditions cannot impose any greater restriction on the patient's freedom of movement than detention for treatment in hospital would do.

The Court 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 Article 5 rights (with its power being limited to discharging the person from detention if the statutory criteria are not met). Contrary to what was suggested by the Upper Tribunal, it is therefore inappropriate for the Tribunal to be applying any kind of checklist to issues of whether or not conditions would breach Article 5. The legal route for challenging conditions imposed as part of a CTO is via judicial review, not the Tribunal.

Practical Impact

This Court of Appeal judgment turns the previous legal rulings in these cases on their head.

For s37/41 patients looking to be conditionally discharged, there is no power to impose any 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. The Court gave relatively little steer on this, other than to say that a condition of residence in itself is not a deprivation of liberty and the most common condition that might be a deprivation of liberty is *"continuous supervision including the lack of availability of any unescorted leave"*. In practical terms, this judgment could lead to s37/41 patients having to stay in hospital longer and more legal challenges about what care arrangements do and do not constitute a deprivation of liberty.

In terms of CTOs, the case leaves the way clear for Responsible Clinicians to impose conditions constituting a deprivation of liberty as part of the CTO, although care will be needed to ensure any CTO is less restrictive than detention in hospital. Tribunals must now revert to the position as it was before PJ whereby they review only the MHA criteria and do not adjudicate arguments relating to deprivation of liberty or the HRA compliance of post-hospital care plans. The nature and effect of conditions are not a matter for the Tribunal and any challenge to the conditions imposed lies in judicial review proceedings.

How we can 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 s117 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.

If you need advice in relation to the impact of this case in the context of a patient's care, please contact Gillian Weatherill on: +44(0)191 4044045 or gweatherill@dacbeachcroft.com.

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