

# Restricted Patients, CTOs and Deprivation of Liberty

The decision in *SOSJ –v- MM & Welsh Ministers –v- PJ* [2017] EWCA Civ 194

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A common problem for health and social care staff is how to manage patients in the community who need to be deprived of their liberty. This judgement takes away with one hand, but gives with the other. It reduces the scope for managing restricted patients subject to conditional discharge, while increasing the options available for patients subject to a Community Treatment Order (CTO).

## The issue before the court

The issue for the court in *MM* was whether a patient who is conditionally discharged can be deprived of his liberty in the community if he agrees to it. The response from the Court of Appeal is clear:

*"it cannot be said that it was Parliament's intention to authorise detention outside hospital when a patient is conditionally discharged. If that conclusion presents practical difficulty then it is a matter for Parliament to consider".*

## The facts of the case in *MM*

*MM* was a restricted patient who had agreed to a conditional discharge to a community placement which would have amounted to a deprivation of liberty. The court considered whether the Upper Tribunal was right to conclude that the First Tier Tribunal could make it a condition of discharge that he comply with a care plan which would deprive him of his liberty. The reasons given were relatively straightforward: liberty is a fundamental right which cannot be overridden without clear and unambiguous words in a statute to that effect. This is not so in respect of the language relating to the powers of a Tribunal. Furthermore, even where a patient consents to such arrangements this does not legitimise the deprivation. In such circumstances, if a patient agrees to stay in a placement and is likely to do so, the better outcome is that he should be absolutely discharged.

This leaves unresolved the fundamental problem of how to deal with patients who present a significant risk in the community, who need to be deprived of their liberty but who also need to be moved on from hospital to

make any progress. Yet if this decision in relation to MM appears to limit the scope for managing patients in the community, the decision in PJ broadens it significantly.

### **The facts of the case in PJ**

PJ was also capable, but subject to a Community Treatment Order. As a result of the conditions imposed on him he was subject to near continuous supervision and only limited escorted leave. Although these particular circumstances may not have amounted to a deprivation of liberty, the court took the opportunity to consider how conditions under a CTO may impinge on a patient's right to freedom.

Instead of starting with the primary rule that any fundamental right, such as a right to freedom, can only be removed if there is express statutory authority to that effect, the court noted that where the wording of a statute is not specific, the power to remove freedom can be implied where it is necessary to do so and the purpose of the statute would otherwise be frustrated.

With this in mind the court concluded that it is permissible to impose a deprivation of liberty on a patient subject to a CTO where that is a lesser restriction on freedom of movement than detention for treatment in hospital. So, as long as the conditions a Responsible Clinician imposes on a patient fit the criteria set out in ss.17A(4)-(5) of the Mental Health Act and the patient is no more restricted than he had been in hospital, the patient may be deprived of his liberty.

This is a matter of language and logic, rather than statutory interpretation. It is the result of considering *'the express provisions of the statute in their context'*. Curiously, the judgement does refer to the guidance in the Code of Practice, which states at paragraph 29.31 that the conditions attached to a CTO:

*"... must not deprive the patient of their liberty and should:*

- *be kept to a minimum number consistent with achieving their purpose*
- *restrict the patient's liberty as little as possible while being consistent with their care plan and recovery goal*
- *have a clear rationale, linked to one or more of the purposes in paragraph 29.28 above, and*
- *be clearly and precisely expressed, so that the patient can readily understand what is expected."*

### **Conclusions from the judgement**

- A capable patient cannot consent to a deprivation of liberty which enables him to be managed in the community so that the deprivation of liberty can be enforced
- The First Tier Tribunal has no power to impose conditions on a restricted patient through a requirement to comply with a care plan, for example, which give rise to a deprivation of liberty
- A patient subject to a CTO can be subjected to conditions imposing a

deprivation of liberty as long as they are consistent with the requirements of s.17A(4)-(5) and are less restrictive than detention in hospital. The practical effect of this may be that for patients detained under the Mental Health Act who need to be deprived of their liberty there is now scope for care plans to be used to significantly restrict a patient's liberty. Such care plans will have to justify infringement of the patients other human rights, such as a right to privacy and family life, will have to be less restrictive in effect than the hospital environment and will need to be carefully prepared before any implementation of a CTO.

For more information on this case please contact Simon Lindsay on 0370 194 1719 or [simon.lindsay@bevanbrittan.com](mailto:simon.lindsay@bevanbrittan.com)