28 November 2018

THE COURT ORDERED that no one shall publish or reveal the name or address of the appellant who is the subject of these proceedings or publish or reveal any information which would be likely to lead to the identification of the appellant or any member of his family in connection with these proceedings.

PRESS SUMMARY

Secretary of State for Justice (Respondent) v MM (Appellant) [2018] UKSC 60
On appeal from [2017] EWCA Civ 194

JUSTICES: Lady Hale (President), Lord Kerr, Lord Hughes, Lady Black, Lord Lloyd-Jones

BACKGROUND TO THE APPEAL

Under the Mental Health Act 1983 ('MHA') a Crown Court may impose upon a mentally disordered offender a hospital order together with a restriction order, if this is considered necessary to protect the public from serious harm. Such a patient is liable to indefinite detention and can only be discharged by the respondent Secretary of State or the First-tier Tribunal ('FtT'). A discharge may be conditional, such that the patient remains subject to recall to hospital as well as to the conditions. The issue in this case is whether the conditions imposed can, if the patient consents, be so restrictive as to amount to a deprivation of liberty within the meaning of article 5 of the European Convention on Human Rights.

MM has a diagnosis of mild learning disabilities, autistic spectrum disorder and pathological fire setting. In 2001, when aged 17, he was convicted of arson offences. He was made the subject of a hospital order and a restriction order. Apart from a period of conditional discharge from December 2006 to April 2007, he has been detained in hospital ever since. He is considered to represent a serious risk of fire setting and of behaving in a sexually inappropriate way towards women.

MM applied to the FtT for conditional discharge in May 2015. He was prepared to consent to a care plan that required him to live at a particular place, from which he would not be free to leave and would not be allowed out without an escort. The FtT ruled it had no power to impose conditions on discharge which themselves amounted to a deprivation of liberty. The Upper Tribunal held that it had, but the Court of Appeal held that it did not. MM appealed to the Supreme Court, arguing that if this condition cannot be imposed, he will have to remain in conditions of greater security in hospital, and the MHA's rehabilitative purpose will be frustrated.

JUDGMENT

The Supreme Court by a majority of 4 to 1 (Lord Hughes dissenting) dismisses MM's appeal. It holds that the MHA does not permit either the FtT or the Secretary of State to order a conditional discharge of a restricted patient subject to conditions which amount to detention or a deprivation of liberty. Lady Hale (with whom Lord Kerr, Lady Black, and Lord Lloyd-Jones agree) gives the main judgment.

REASONS FOR THE JUDGMENT

The Secretary of State has complete control over the conditions imposed on restricted patients and whether the patient should be recalled to hospital. The MHA does not specify what conditions may be imposed. In practice, the conditions usually require residence at a stated address and for both clinical and social supervision **[11-12]**. The purpose of conditional discharge is to enable the patient to make a safe transition from the institutional setting of a hospital to the community **[14]**.

The word 'discharge' in sections 42(2) and 73(2) MHA, when referring to the conditional discharge of restricted patients, must mean actual discharge from the hospital in which the patient is currently detained, as he remains liable to be detained **[20]**. Although there is nothing in the MHA which expressly prohibits a condition which amounts to a detention or deprivation of liberty in another setting, there are compelling reasons not to construe ss 42(2) and 73(2) in this way:

- It is difficult to see why the patient's consent would be required for the exercise of a power to impose such a condition, yet all parties agree that consent is needed **[30]**.
- The power to deprive a person of his liberty is an interference with a fundamental right. The principle of legality means express language is required. Parliament was not asked to consider whether the general terms of ss 42(2) and 73(2) MHA included a power to impose a different form of detention, without prescribed criteria for such detention or, if imposed by the Secretary of State, any procedural safeguards **[31]**.
- As a practical matter, there is always a concern that the patient's willingness to comply with the proposed condition is motivated more by his desire to get out of hospital and that he might then withdraw his consent and demand to be released. The patient would not be bound by his consent to comply with the condition **[32]**.
- Most compellingly, such a power would be contrary to the whole scheme of the MHA, which provides in detail for only two forms of detention (in a place of safety for up to 36 hours, or in a hospital), each with associated specific powers to convey a patient there, to detain him and to retake him if he absents himself from such detention without leave. There is no equivalent express power to convey a conditionally discharged restricted patient to the place where he is required to live or to detain him there, nor is he liable to be taken into custody and returned anywhere unless and until he is recalled to hospital by the Secretary of State **[33-36]**. The fact that a conditionally discharged restricted patient can apply far less frequently than a hospital patient to the FtT for his release indicates that Parliament did not consider that such patients might be subject to conditions which required the same degree of protection as those deprived of their liberty **[37]**.

Accordingly, the MHA does not permit either the FtT or the Secretary of State to impose conditions amounting to detention or a deprivation of liberty upon a conditionally discharged restricted patient and MM's appeal is dismissed **[38]**.

Lord Hughes, dissenting, would have held that the FtT did have the power, if it considered it right in all the circumstances, to impose conditions on the discharge of a restricted patient so long as the loss of liberty involved was not greater than that already authorised by the hospital and restriction orders. If the treatment of the patient had progressed to the point where the nature of the detention could be relaxed, it was plainly in the public interest that it should be, and he did not consider that the MHA prohibited such arrangements **[39-49]**.

References in square brackets are to paragraphs in the judgment