

Case Summary

Secretary of State for Justice v KC and C Partnership NHS Foundation Trust [\[2015\] UKUT 0376 \(AAC\)](#)

Issue

Conditional discharge of restricted patients – deprivation of liberty

Facts

KC was convicted of indecent assault on a female under the age of 16 in 2004. As a result, he was made the subject of a hospital order and became a restricted patient pursuant to sections 37 and 41 of the Mental Health Act 1983 (MHA). He was made the subject of a conditional discharge by the First Tier Tribunal (FTT) in November 2010 but was recalled in April 2011. In July 2014, the FTT made a provisional decision to discharge KC from hospital on a number of conditions which all agreed amounted to a deprivation of liberty. The placement was not a care home or hospital and so would require the authorisation of the Court of Protection. The main issue was whether it was lawful for the FTT to discharge KC in such circumstances.

Decision

The Upper Tribunal concluded that a restricted patient lacking the material decision-making capacity who is conditionally discharged is not ineligible to be deprived of his liberty under the Mental Capacity Act 2005 (MCA). If the implementation of the conditions of the discharge would result in a deprivation of liberty, the Upper Tribunal held that this can be authorised under the MCA by the Court of Protection or under the deprivation of liberty safeguards (DOLS) provided that the relevant tests and assessments are satisfied.

Practice implications

This case usefully and importantly confirms that it is entirely possible for a person lacking capacity as to residence/care to be given a conditional discharge from detention under the MHA 1983 if the conditions amount to an objective deprivation of their liberty, so long as that deprivation of liberty is authorised in advance either by the Court of Protection (for supported living placements etc) or DoLS (care homes or hospitals).

A degree of controversy is likely to continue, however, regarding those with capacity. This is because of an earlier case ([SSJ v RB](#) [2011] EWCA Civ 1608) which suggested that they could not be conditionally discharged if the conditions amounted to a deprivation of their liberty. The issue is yet fully to be resolved.

The full version of this case report can be found [here](#). Further reports, articles and guidance notes can be found on our dedicated Mental Capacity Law Resources Page by [clicking here](#).