



information sheet

January 2011 No 1

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Deprivation of Liberty & Conditional Discharge

The Upper Tribunal have now determined that it is not necessary to examine the effect of any conditions attached to a conditional discharge where a patient is to be discharged from hospital. Further it has concluded that a patient's consent to the conditions is irrelevant in considering whether any conditions amount to a deprivation of liberty.

We acted on behalf of a patient, RB, who was granted a conditional discharge by the Mental Health Tribunal, but against which the Secretary of State for Justice appealed on the basis that the conditions imposed amounted to a deprivation of liberty contrary to Article 5 of the European Convention on Human Rights. Previously decided cases determined that where the conditions amounted to a deprivation of liberty, rather than a restriction on the patient's liberty, the conditional discharge could not be a valid one. In this case we sought to argue that the Tribunal were entitled to find that the conditions were such that they did not amount to a deprivation of the patient's liberty and that even if they did, the fact that RB consented to those conditions and restrictions prevented the conditions amounting to a deprivation of liberty and any breach of his human rights.

In a decision handed down by the Upper Tribunal exercising their function to determine such appeals, three senior Judges including the Senior President of the Tribunal Service, Lord Justice Carnwath and the Health Education & Social Care Chamber President, Judge Sycamore, it was decided that the Secretary of State's appeal should be dismissed and the original decision of the Tribunal upheld. Their reason for this was that where a Tribunal found that a care home, not being a hospital, was suitable accommodation for a patient this provided sufficient jurisdiction for a conditional discharge to be granted without further need to examine the conditions. It had been argued that the conditions to be imposed on RB would amount to a deprivation of liberty and the Tribunal rejected the need to examine the extent of the conditions given that RB was to be accommodated in a care home rather than a hospital.

In reaching this decision the Tribunal Judges found that they were not bound by the Court of Appeal decision in the case of ***PH (R (Secretary of State for the Home Department) v Mental Health Review Tribunal [2002] EWCA CIV 1868***) that the validity of the conditions proposed by the First Tier Tribunal depended solely on whether they amounted to detention. The Upper Tribunal were entitled to find that as RB would be discharged from hospital that was sufficient to enable the First Tier Tribunal to grant a conditional discharge without the need to consider the effect of the conditions to be imposed.

On the issue of RB's consent, the Upper Tribunal Judges rejected the arguments advanced on behalf of RB that his consent would nullify the effect of any deprivation of liberty although their findings in this regard did not impact on the outcome of the case. Distinguishing the ***Storck*** case (***Storck v Germany (2005) 43 EHHR 96***), where the patient had for part of her stay been a voluntary patient, the Upper Tribunal considered that RB could not be said to have consented to his initial psychiatric detention as he has been detained under the Mental Health Act 1983 throughout by virtue of a Court imposed hospital order. The Upper Tribunal held that "the very limited choice to [remain under detention in hospital or subject to conditions in the community] cannot be equated to a free and unfettered consent to psychiatric detention or to the conditions proposed by the Tribunal. A person's consent to alternative conditions of his detention is not the same as his consent to the existence of the regime itself."

The Upper Tribunal also set out considerations in relation to the precedence of previous decisions over the Upper Tribunal and determined that while they were not bound by any decisions of the High Court, given that as the Upper Tribunal they are exercising a role of equivalent status, they would need to follow any approach adopted by the Court of Appeal and the High Court unless they were satisfied that such an approach was wrong.

Finally, the Upper Tribunal gave an indication to the Secretary of State for Justice that while it may be customary not to be represented at the First Tier Tribunal they should in future give careful consideration to participation at the First Tier in cases where there is a clear difference of opinion between the Secretary of State for Justice and those who are responsible for the patient's care.

In upholding a decision first made by the First Tier Tribunal in April 2009, RB and his treating team are now in a position to proceed with arrangements for his conditional discharge from the hospital where he was currently detained. The neutral citation for this case is Secretary of State for Justice v RB [2010] UKUT 454 (AAC). Please contact us if you need more information.