High Court rules that patients with capacity receiving care and treatment in the community will not suffer the distress of hospital detention if such detention would breach their Article 5 rights

In *Cumbria, Northumberland Tyne and Wear NHS Foundation Trust v EG* [2021] EWHC 2990 (Fam), the Court considered whether a person who has mental health problems, but has capacity to make their own accommodation and care choices could lawfully be placed in a community placement under conditions which deprived of the person of their liberty, rather than having to be remitted into hospital. The case arose as a consequence of the Supreme Court decision in *Secretary of State for Justice v MM* [2019] AC 712, where the Court found that a restricted patient could not lawfully be discharged from detention under the Mental Health Act 1983 ("MHA") into a placement where the restrictions on that person amounted to a deprivation of liberty.

The key provision under consideration was section 72(1)(b)(i) MHA which states that a tribunal *"shall direct the discharge of a patient liable to be detained […] if it is not satisfied that he is then suffering from mental disorder or from mental disorder of a nature or degree which makes it appropriate for him to be liable to be detained in a hospital for medical treatment*."

Lieven J held that, on a purely domestic statutory interpretation, section 72(1)(b)(i) MHA did not cover the detention of a restricted patient in a community setting (pursuant to section 17(3) MHA) where that person has not resided in, or been treated by, a hospital for a considerable period of time. She decided the previous cases only applied where someone had been detained in and was receiving treatment in a mental hospital.

However, Lieven J went on to hold that if, as was the case on the facts of the case before the court, the person's Article 5(1)(e) ECHR rights would be breached if they were forced to return to hospital, then relying on the interpretive power under section 3 of the Human Rights Act 1998, the phrase "liable to be detained" in section 72(1)(b)(i) should be construed as meaning liable in law to be detained for treatment, even where that treatment is being provided in the community (so long as it could lawfully be provided in hospital). Lieven J held that construing the provision in this Convention compliant way, does not go against the grain of the legislation but rather fulfils two of its important purposes: a) allowing patients to be detained in less restrictive settings, and b) ensuring that the protection of the public and an appropriate level of detention can be met.

The practical consequence of the decision

The effect of the decision in *EG* is that a mental health patient can be lawfully deprived of their liberty in a community setting pursuant to section 17(3) MHA provided no part of their care plan involved treatment in hospital. The Judge decided that the alternative option of forcing them to be detained in hospital for treatment would be a breach of their Article 5 right.

This is significant as prior to the decision in *EG*, and because of the decision in *MM*, patients for whom a) constant supervision (amounting to a deprivation of liberty) was necessary for their own protection and the protection of the public and b) contact with and treatment in hospital had a negative effect, were unable to lawfully receive care and treatment in the community.

On 30 January 2021 the Government produced a White Paper proposing to fill the gap left by *MM* with the introduction of a new power of "supervised discharge". However, until a legislative solution is formalised, the judgment in *EG* will ensure that patients receiving care and treatment in the community in circumstances that constitute a deprivation of liberty will not suffer the distress of facing detainment in hospital, provided that it can be shown that to do so would breach their Article 5 right.

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