

# Mental Health Law Briefing

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## Recall to Hospital and Deprivation of Liberty

A recent case<sup>1</sup> has considered the Secretary of State's power to recall a Section 37/41 patient and the extent to which a 1:1 escort amounts to a deprivation of liberty for conditionally discharged patients.

### Facts

The case concerned a patient who had been detained under the Mental Health Act 1983 under Sections 37 and 41. In April 2006 the patient was conditionally discharged but was later recalled as it was found that he was engaging in sexually inappropriate behaviour in public places. His case was referred to the MHRT and in April 2007 he was again conditionally discharged to supported accommodation. Not long after his discharge the Secretary of State was provided with two reports from his RMO and ASW both confirming that the patient remained on a 1:1 escort at all times when in public places. The basis for these escorts was because of the patient's past history of inappropriate sexual behaviour involving children and the public. In July of 2007 the Secretary of State issued a warrant recalling the patient to hospital on the basis that the 1:1 escort arrangements amounted to a deprivation of liberty equivalent to detention. The patient applied for a judicial review of the Secretary of State's decision.

The Judge first of all considered whether the Secretary of State's use of a recall was appropriate. He found that a

decision by the Secretary of State to recall would only be lawful if he 'believed on reasonable grounds that something had happened since the decision of the MHRT, or information had emerged which was not available to the MHRT, of sufficient significance to justify recalling the patient.'<sup>2</sup> On the facts of this case it was found that there had been no significant change and the decision to recall was therefore unlawful. Mr Justice Bean made it clear that the appropriate action would have been for the Secretary of State to judicially review the MHRT's decision.

### Comment

In reaching this decision the Court considered the dicta in the *Von Brandenburg* case and to this end the court's decision is not wholly unsurprising. However, of more interest are the Judge's comments in relation to the suggestion by the Secretary of State that a 1:1 escort amounted to a deprivation of liberty. The Judge referred to the case of *R (Secretary of State for the Home Department v. Mental Health Review Tribunal (PH, interested party))* [2002] EWCA Civ 1868 in which a 77 year old male was conditionally discharged by an MHRT to reside in suitable accommodation with a condition that he was not to leave that accommodation without an escort. In that case Keene L J concluded that those conditions did not inevitably mean that the patient would be in a position where he was being deprived of his liberty. It was found that his transfer from hospital to

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<sup>1</sup> *R (on the application of T) v. Secretary of State of Justice* [2008] EWHC 1707 (Admin)

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<sup>2</sup> *Ibid*, para 13

appropriate accommodation together with a condition that he was not to leave that accommodation without an escort did not amount to a transfer from one state of detention to another.

In the current case Mr Justice Bean considered that the precedent set from the *PH* case was that an MHRT would be acting unlawfully if it imposed conditions on a conditionally discharged patient which amounted to a transfer from one state of detention to another.<sup>3</sup> The Judge made it clear that restrictions on liberty of movement did not amount to a deprivation of liberty. He confirmed that the difference between the two was one of fact and degree and one of the matters for consideration was of the duration of the measures in question. In the current case the Judge found that the 1:1 escort was

considered a temporary measure and a plan to move to unescorted leave was evidence of this. In the Judge's view the "..... planned gradual loosening of the restrictions did not amount to detention by another name".<sup>4</sup> The Judge however did confirm that if the condition of a 1:1 escort was intended to continue indefinitely then his decision may well have been different.

Mr Justice Bean's comments in this case provide a useful commentary on the balancing exercise the court undertakes when deciding whether or not there has been a restriction of liberty or in fact a deprivation of liberty.

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<sup>3</sup> Ibid, para 17

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<sup>4</sup> Ibid para 18