

Landmark Court of Protection ruling that it is not unlawful for carers to help individuals with learning disabilities and mental disorders to visit sex workers

On 30 April 2021, the Court of Protection considered whether carers would be in breach of the Sexual Offences Act 2003 ("SOA") by making practical arrangements for a 27-year-old man with autism to have contact with a sex worker.

14 May 2021

Introduction

On 30 April 2021, the Court of Protection considered whether carers would be in breach of the Sexual Offences Act 2003 ("SOA") by making practical arrangements for a 27-year-old man with autism to have contact with a sex worker.

The central question was whether a carer who gave such support would be 'intentionally causing' or 'inciting' P to engage in sexual activity, which is prohibited under Section 39 SOA.

Mr Justice Anthony Hayden, vice president of the Court of Protection, ruled that carers should not be prosecuted for helping certain patients with "this most important sphere of human interaction".

Background

P was diagnosed with autistic spectrum disorder and Klinefelter (XXY) syndrome. Klinefelter syndrome is a genetic disorder that occurs in 1 in 660 men where the male has an additional X chromosome which in P's case affected social interactions and physical development. In the years that followed, P's behaviour was sometimes aggressive and dangerous.

Between 2014 and 2017, P was detained in hospital, pursuant to the Mental Health Act 1983. P's admission had become necessary as a result of a deterioration in his mental health and threats that he was articulating which were of a sexual nature - it is important to note that the threats were never acted upon. Throughout the period of his admission, P received a range of medication, including antipsychotic treatment. He also participated in psychosexual, psychological, occupational and psychiatric therapies.

Due to P's progress he was discharged into a house suitable for three occupants and their carers. P told his Care Act advocate and litigation friend that he wanted to be able to have sex and wished to know whether he could have contact with a sex worker. P's litigation friend raised the matter with P's social worker, and these proceedings were commenced by the Local Authority to address whether a care plan to facilitate contact with a sex worker could be implemented without the commission of an offence under the SOA.

Under S.39 of the SOA, an offence punishable by up to ten years in prison is committed if a care worker causes or incites a person with a mental disorder to engage in sexual activity (Lincolnshire CC v AB [2019] EWCOP 43). The key question for the judge was whether facilitating P's contact with a sex worker would mean an offence had been committed under the SOA 2003, by P's carer.

In preparation for these proceedings, several assessments were undertaken and the Court made declarations that P lacked capacity to conduct these proceedings, decide where to live, decide what care and treatment to receive, decide to use the internet and social media and decide his financial affairs. However, it was agreed that P had the capacity both to engage in sexual relations and to decide to have contact with a sex worker.

Judgment

In his judgment, Mr Justice Hayden said that 'it is no longer the objective of the law to prevent people with mental disorders from having sexual relationships, rather it is to criminalise the exploitation and abuse of such adults by those with whom they are in a relationship of trust'. Mr Justice Hayden highlighted the central philosophy of the SOA is to protect those in relationships predicated on trust where the relationship elevates vulnerability: "The Act brings a range of professionals within the ambit of the criminal law, if they abuse the power bestowed on them by the unequal nature of their relationships with vulnerable adults or children." He went on to emphasise the need to protect those with mental disorders whilst enabling independent choices in this most important sphere of human interaction.

Individuals with mental health disorders have, in the past, effectively been prevented by the law from engaging in sexual relations. Mr Justice Hayden explained that this was 'undoubtedly, historically, motivated by a paternalistic desire to protect them, it had the countervailing consequence of dismantling their autonomy and failing to respect their fundamental human rights'.

The fact that P repeated his wishes to his carer consistently and cogently over the course of the last three years, was taken into account. Section 39 criminalises care workers who are found to be "causing or inciting sexual activity". Here however, the wish to experience sex had been articulated clearly and consistently by P himself. Mr Justice Hayden noted that:

"In P's case there is clear and cogent evidence that he has the capacity to engage in sexual relations and to decide to have contact with a sex worker. He understands the importance of consent both prior to and during sexual contact. He appreciates the link between sexual intercourse and pregnancy. He recognises the possibility of sexually transmitted disease. He lacks capacity to make the practical arrangements involved in identifying a suitable and safe sex worker and is unable to negotiate the financial transaction. What is proposed is that P will be assisted in these arrangements by carers who are sympathetic and content to help him".

Mr Justice Hayden concluded that the SOA should not be interpreted to encompass the proposed actions of the care worker. He was clear that any such interpretation would be contrary to the clear words of the statute and even if that were not the case would be incompatible with the Human Rights Act.

The hearing and judgment did not consider any plan for P to visit a sex worker. That decision will be considered at a separate time when a comprehensive risk assessment has been completed and care plan devised.

You can read the full [judgment](#) here.

This is an important decision clarifying that s.39 of the SOA should not be used to criminalise care workers in scenarios like this where a patient wishes to engage in sexual activity and has capacity to make decisions about sex but is unable to do so without support. However, carers must not be the driving factor and in this case it was the patient himself who clearly and consistently articulated the wish to experience sex. If you require legal advice and support with this please do not hesitate to contact our team of specialist lawyers.

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