

Potential criminal offence for care workers to assist people with mental disorders in securing the services of sex workers

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27 October 2021

The Secretary of State for Justice v A Local Authority & Ors [2021] EWCA Civ 1527

The judgment can be accessed [here](#).

Under section 39 of the Sexual Offences Act 2003, it is an offence for a care worker to intentionally cause or incite a person in their care to engage in sexual activity, where that person has a mental disorder and the care worker knows or could reasonably be expected to know that the person has a mental disorder.

In circumstances where it is subsequently proved that an individual does have such a mental disorder, there is a presumption that their carer either knew or could reasonably have been expected to know of the disorder, unless sufficient evidence is adduced to rebut that presumption.

In this case the Court of Appeal considered an appeal against a decision (of Mr Justice Hayden) that care workers would not be committing a criminal offence under section 39 of the Sexual Offences Act 2003 were they to make the practical arrangements for a 27-year-old man to visit a sex worker. The appeal was successful.

The First instance judgment:

The Hon. Mr Justice Hayden, the Vice President of the Court Protection, had previously considered the case of a 27-year-old man in the context of this section 39 provision. It was ultimately concluded in that case that because the man had the mental capacity to decide to consent to having sex, but was unable to make the practical arrangements himself, a care worker who assisted the man to make those arrangements would not be committing an offence under section 39 of the Sexual Offences Act. That judgment had been seen as important for people with mental disorders, by allowing care workers to facilitate contact between those in their care and sex workers, without breaking the law. In his judgment, Mr Justice Hayden said:

“The legislative objective is to criminalise a serious breach of trust and, as I have commented, attracts a significant custodial sentence. The words of the statute need to be given their natural and obvious meaning. They are intending to criminalise those in a position of authority and trust whose actions are calculated to repress the autonomy of those with a mental disorder, in the sphere of sexual relations. Section 39 is structured to protect vulnerable adults from others, not from themselves. It is concerned to reduce the risk of sexual exploitation, not to repress autonomous sexual expression. The language of the section is not apt to criminalise carers motivated to facilitate such expression. In my judgement, the expanded interpretation of this provision, contended for on behalf of the Secretary of State, requires the language of the section to be distorted and the philosophy of the Act to be disregarded.”

The Appeal:

This decision was appealed by the Secretary of State for Justice, on the grounds that Mr Justice Hayden had misinterpreted the meaning and application section 39. The Court of Appeal agreed, holding that the Act had been misinterpreted in the first instance case and that care workers would risk committing an offence under section 39 if they made arrangements for securing the services of a sex worker.

The Lord Burnett of Maldon, Lord Chief Justice of England Wales, found that:

“Section 39 of the 2003 Act is concerned with sensitive moral and ethical issues in the field of penal policy. One of its purposes is to throw a general cloak of protection around a large number of vulnerable people in society with a view to reducing the risk of harm to them. To the extent that the provision discriminates against people in C’s position by comparison with others in the care of the state (or more broadly) it represents the considered view of Parliament striking balances in these difficult areas. Such a view should ordinarily be respected. In my judgment, the discriminatory effect of section 39 cannot be stigmatised as being manifestly without reasonable foundation. The statutory provision is clearly justified.”

Lady Justice King and Lord Justice Baker concurred that the appeal should be allowed, for the reasons outlined in the Lord Chief Justice’s judgment. Therefore, because the appeal succeeded on the grounds that Mr Justice Hayden had misinterpreted section 39 of the Sexual Offences Act, it was found not be necessary for the judgment to also consider whether care workers facilitating access to sex workers by those in their care would be contrary to public policy.

Subject to further appeal, the position has therefore been reversed by the Court of Appeal’s judgement and so any care workers who are found to be enabling those in their care to access sex workers now risk committing a criminal offence.

Comment:

This is an important decision which has already attracted a lot of debate on the likes of Twitter, with some seeing it as a judgment that discriminates against individuals with a mental disorder and is a setback in terms of a person’s right to autonomy where they have capacity to make a particular decision.

Others see it as an important confirmation of the robust legal frameworks that are in place to protect the vulnerable.

The case demonstrates the tension that sometimes exists between the framework of the Mental Capacity Act 2005 on the one hand which promotes the autonomy of the individual where possible and other legislation such as the criminal law which focuses more on protection of the vulnerable and of the public.

It is not known at this time if the decision is to be appealed.

Following on from this judgment it is important to ensure that care staff are aware that they must not take steps that intentionally cause or incite a person in their care who has a mental disorder to engage in sexual activity, as to do so could risk committing a criminal offence.

If you or your team require further advice please do not hesitate to get in touch with our team.

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