
COURT OF APPEAL FINDS SECRETARY OF STATE FOR THE HOME DEPARTMENT DISCRIMINATED AGAINST IMMIGRATION DETAINEES

R on the application of ASK & MDA v Secretary of State for the Home Department

On 16 July 2019 the Court of Appeal handed down a judgment which raised important issues concerning the powers of the Secretary of State for the Home Department to detain those who have mental health conditions in immigration detention, and in particular who lack mental capacity. The judgment is complex and whilst the Appellants lost some grounds of appeal they won on their argument that they were unlawfully discriminated against.

ASK and MDA were immigration detainees who were disabled by reason of their mental health needs. As a result of their lack of capacity to conduct legal proceedings the Official Solicitor was invited to act as litigation friend. In a Judgment handed down on 16 July 2019, the Court of Appeal (Lord Justice Hickinbottom, Lord Justice Longmore and Lord Justice Jackson) found that the Home Office had discriminated against the Appellants ASK and MDA under the Equality Act 2010. ASK and MDA lacked capacity by reason of their mental illness to engage in important decisions relating to their continuing detention, segregation and, in the case of ASK, transfer to a mental hospital. The Court held that the Secretary of State for the Home Department had failed to make reasonable adjustments and failed to have due regard to the need to eliminate discrimination for those with mental health conditions in detention.

This decision follows the previous decision in February 2018 in *VC v SSHD* [2018] EWCA Civ 57 in which unlawful discrimination towards those with mental health conditions was found. Despite 17 months passing since that judgment, no sufficient or adequate steps have been taken by the Secretary of State for the Home Department to comply with his duty to eliminate discrimination towards migrants with mental health conditions. During the hearing the Court directed the Secretary of State for the Home Department to file a note on the steps he had taken to address the systemic failures

identified in VC. In the judgment, Lord Justice Hickinbottom made the following important statement about the correct approach to mental capacity in detention, at paragraph 244

“In my view, in this regard, ASK’s case is not materially different from the cases of VC or MDA. Because of his illness, ASK suffered from a disability. It seems likely that, from time-to-time, he lacked the capacity properly to engage with the detention authorities in relation to important decisions that related to him, e.g. with regard to his continuing detention, segregation and non-transfer to hospital. In those respects, he was treated differently from those detainees who were not disabled. In breach of the PSED, the Secretary of State failed to have due regard to eliminate discrimination. Further, the duty on the Secretary of State to make reasonable adjustments having arisen, no adjustments were made and obvious adjustments (e.g. in the form of IMCA-type representation) could have been made. The burden was therefore on the Secretary of State to show he had complied with the duty to make such adjustments; and he adduced no evidence that he had even considered such adjustments and certainly no evidence that he had complied with the duty.”

CALL FOR URGENT STEPS TO PROTECT THE RIGHTS OF MIGRANTS WITH MENTAL HEALTH CONDITIONS

Bhatt Murphy, solicitors for ASK and Deighton Pierce Glynn, solicitors for MDA have long experience of representing mentally ill immigration detainees and are concerned about the risks they face and the slow pace of change. They are asking that the Secretary of State for the Home Department takes immediate steps to provide interim safeguarding arrangements to protect the right of access to justice for detained migrants who may lack capacity to access justice and publish draft arrangements to safeguard the best interests of vulnerable adults and ensure access to justice, for consultation with the Official Solicitor and the Equality & Human Rights Commission and implementation as soon as is practicable.

Legal Representatives and Further Information

ASK, by his litigation friend the Official Solicitor, is represented by [Jane Ryan of Bhatt Murphy solicitors](#), [Leonie Hirst of Hirst Chambers](#) and [Stephanie Harrison QC of Garden Court Chambers](#).

MDA, by his litigation friend the Official Solicitor is represented by [Sue Willman of Deighton Peirce Glynn Solicitors](#), [Leonie Hirst of Hirst Chambers](#) and [Amanda Weston QC of Garden Court Chambers](#).

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