

67.9 General judicial guidance etc.

R v Fisher 2019 EWCA Crim 681 D pleaded to manslaughter based on diminished responsibility. Held. [The Court explained the possible disposals in these cases and set out and applied the steps in *R v Edwards* 2018 EWCA Crim 595, 2 Cr App R (S) 17 (p 120), see above.] As reflected in both the guideline and *R v Edwards* 2018, a number of differences between the sentencing options for an individual with a mental disorder, who has committed a serious offence, can be identified.

First, a section 37 hospital order (with or without a section 41 restriction) is not concerned at all with punishment, whilst a sentence of imprisonment with a section 45A hospital direction has a penal element. Both *R v Edwards* 2018 and the guideline emphasise that, whilst rehabilitation and protection of the public are important elements of any sentence of an offender with a mental disorder, punishment may also play a part. One of the statutory purposes of sentencing is punishment (see section 142 of the Criminal Justice Act 2003) and there are cases where the defendant's criminality warrants a particular period in detention despite any medical condition he may have. As described by this court in *R v Cooper* 2010 EWCA Crim 2335 at paras 16-17, the purpose of section 45A is to give the sentencing regime flexibility. In particular, when sentencing an offender with a mental disorder, the court is not faced with the stark choice between ordering detention in hospital for treatment or imprisonment. Section 45A thus allows an offender to be directed to hospital by the court but, if he recovers or is found to be untreatable during that period, then he is remitted to prison to serve the balance of that time. In determining the most suitable sentencing disposal, the court must therefore bear in mind the importance of the penal element in a sentence as well as the rehabilitation and protection of the public, see *R v Edwards* 2018 at para 34(3).

However, whilst in a particular case the punitive element of a sentence is or may be important, even if a fixed period in detention were considered appropriate for a particular crime by way of punishment, where that period (which would be the minimum term of any indeterminate sentence) is clearly going to be less than the treatment period that will result in the risk posed by the offender being reduced to an acceptable level to allow any form of discharge from hospital, then punishment as a discrete purpose of sentence of imprisonment with a section 45A loses its force; because, whichever route is taken, the offender will spend the appropriate custodial period in the same hospital and generally in the same circumstances.

On the facts, a Hybrid Order was wrong and we substitute a Hospital Order with a Restriction Order.

67.41a Hybrid orders Cases

R v Fisher 2019 EWCA Crim 681 D pleaded to manslaughter based on diminished responsibility. The Judge passed a Hybrid Order. Held. [The Court explained the possible disposals in these cases.] The Judge should bear in mind that the limitation direction will cease to have effect at the automatic release of a determinate sentence. para 35 There are differences in the regimes whilst the offender is in hospital. Under a section 37/41 order, an application can be made to the Secretary of State for escorted and unescorted leave, something which cannot be done under the section 45A regime. Under that regime, in effect, barring an emergency, the offender simply cannot leave the hospital at all. In some cases, the ability for a patient to have such leave is an important element in their eventual rehabilitation back into the community. There are clear differences between the regimes so far as release, aftercare and recall are concerned. When subject to a restricted Hospital Order, for release, the offender only has to satisfy the FtT (First-tier tribunal) that his mental health poses no unacceptable risk to the public; whereas, in the case of a section 45A direction, where there is an indeterminate sentence, as well as satisfying the FtT as to that, he must also satisfy the Parole Board that he poses no such risk for any reason, see *R v Vowles* 2015 EWCA Crim 45, 2 Cr App R (S) 6 (p 39) at para 21, 'The advantage of making such an order in an appropriate case is that an offender sentenced to an indeterminate or long determinate sentence can immediately be directed to have treatment in hospital, but the timing of his release is

subject to the decision of the Parole Board which has to take a much wider view of the risks to the public than the [FtT].’ Unlike a Hospital Order, under section 45A, there is the possibility of a patient being released from hospital care back into the prison estate before release into the community, although in most cases that is more hypothetical than real, because a responsible clinician is unlikely to agree to the release of a patient back into the prison estate in those circumstances if that may result in a deterioration of his condition. Where the tribunal conditionally discharges a patient under section 37/41, it will attach often rigorous conditions to the discharge, such as a requirement to a) spend every night at a particular address, b) to meet with the mental health team on sometimes a very frequent basis, c) compliance with a therapeutic regime (which will in most cases include the patient’s compliance with medication), d) abstinence from non-prescribed drugs or excessive consumption of alcohol, and e) to engage in psychological treatment in appropriate cases. The conditions may include testing arrangements to ensure compliance with any therapeutic regime and an abstinence from illegal drugs and alcohol if necessary. It is less likely that the Parole Board would impose such carefully tailored (and helpful) conditions to a release on licence from an indeterminate sentence. Section 117 requires the responsible aftercare bodies, in cooperation with the relevant voluntary agencies, to provide aftercare for patients detained under section 37 or section 45A; and the Parole Board has the power to impose conditions on release which might include conditions as to mental health support. Therefore, it cannot simply be assumed that, once the offender is back in the community, a section 37/41 order will necessarily provide a regime best suited to protect the public as opposed to a post section 45A licence regime; nor that the former will provide a regime best suited to the rehabilitation requirements of the individual prisoner. Each regime contains provisions designed to ensure that the public is appropriately protected from the risks that an offender with a mental health condition may pose. *R v Edwards 2018 EWCA Crim 595, 2 Cr App R (S) 17 (p120)* emphasised at para 30 that each case will depend on its own facts. However, the doctor in this case considered the aftercare arrangements under a restricted Hospital Order to have distinct advantages. On conditional discharge, under such an order, a mental health team led by a psychiatrist and a social worker supervisor (each of whom has to prepare a report each three months), together with a community psychiatric nurse, a psychologist if relevant, and peer workers, will supervise the individual and ensure for example compliance with medication and that his mental state is not deteriorating. Under a life licence as part of an indeterminate sentence, the supervisor will be a probation officer, who, the doctor in this case said, is less likely to notice and/or elicit detriments to an individual’s mental state, let alone ensure that any symptoms are properly and promptly treated.

Based on a number of factors, we substitute a Hospital Order with a Restriction Order.