Mental Capacity Law Newsletter June 2016: Issue 66

Capacity outside the Court of Protection

Introduction

Welcome to the June 2016 Newsletters. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Newsletter: Neil Allen comments on the Law Commission's interim statement, Charles J on deputies and Article 5, and an updated Guidance Note on judicial authorisation of deprivation of liberty;

(2) In the Property and Affairs Newsletter: Senior Judge Lush on the difference between property and affairs and welfare deputies and new OPG guidance;

(3) In the Practice and Procedure Newsletter: an appreciation of Senior Judge Lush by Penny Letts OBE ahead of his retirement in July;

(4) In the Capacity outside the COP Newsletter: a major report on the compliance with article 12 CRPD of the three jurisdictions of the United Kingdom and a guest article by Roy Mclelland OBE on the new Mental Capacity (Northern Ireland) Act 2016;

In large part because its editors have been all but entirely subsumed with work on the report on CRPD compliance, there is no Scotland newsletter this month.

Remember, you can now find all our past issues, our case summaries, and much more on our dedicated sub-site here. 'One-pagers' of the cases in these Newsletters of most relevant to social work professionals will also shortly appear on the SCIE website.

Editors
Alex Ruck Keene
Victoria Butler-Cole
Neil Allen
Annabel Lee
Anna Bicarregui
Simon Edwards (P&A)

Guest contributor
Beverley Taylor

Scottish contributors
Adrian Ward
Jill Stavert

Contents

Essex Autonomy Project Three Jurisdictions Report: *Towards Compliance with CRPD Art. 12 in Capacity/Incapacity Legislation across the UK*

[*Editorial Note: we reproduce below the Executive Summary of the major report published on 6 June by the Essex Autonomy Project as the culmination of a* collaborative sixteen-month project undertaking an assessment of mental capacity/adult incapacity legislation in the three legal jurisdictions of the United Kingdom: England & Wales, Scotland, and Northern Ireland. *Three of the editors of the Newsletter, Alex, Adrian and Jill are also authors of the report, alongside Wayne Martin, Sabine Michalowski, Colin Caughey, Alison Hempsey and Rebecca McGregor*.]

The *Essex Autonomy Project Three Jurisdictions Report* is a contribution to an ongoing process of legal reform across the UK and around the world, the broad aim of which is to ensure respect for the rights of persons with disabilities.

The report is the culmination of a collaborative sixteen-month project undertaking an assessment of mental capacity/adult incapacity legislation in the three legal jurisdictions of the United Kingdom: England & Wales (which together comprise one jurisdiction for these purposes), Scotland, and Northern Ireland. It is intended (i) to provide technical research support to UK officials who will be involved in the forthcoming UN review of UK compliance with the *United Nations Convention on the Rights of Persons with Disabilities* (CRPD); (ii) to make recommendations in support of ongoing efforts across the UK to reform mental capacity/adult incapacity legislation in order to achieve CRPD compliance; and (iii) to provide analysis, both of current legislation and possible alternatives, that will be useful to those around the world who are involved in the reform of mental health and mental capacity legislation in accordance with the human rights requirements of the CRPD.

Compliance with the CRPD is a work-in-progress in the three jurisdictions of the UK, and this work must continue. We identify a number of recent legislative innovations that have the potential to bring the UK closer to compliance. We consider measures commonly employed in the three jurisdictions but hitherto hardly addressed in discussion of CRPD compliance, in particular autonomous measures such as powers of attorney and advance directives, which present particular challenges and opportunities in the context of CRPD compliance. We also identify a number of other areas in which the statutory arrangements in the UK still fall short of compliance with CRPD Art. 12. We advance a

series of recommendations about how the three UK jurisdictions can remedy these areas of non-compliance.

The main recommendations of the report are as follows:

Recommendation 1: Respect for the full range of the rights, will and preferences of everyone must lie at the heart of every legal regime. That must be achieved regardless of the existence and nature of any disabilities. Achieving such respect must be the prime responsibility of anyone who has a role in taking action or making a decision, with legal effect, on behalf of a person whose ability to take that action or make that decision is impaired. The role may arise from authorisation or obligation. The individual with that role should be obliged to operate with the rebuttable presumption that effect should be given to the person's reasonably ascertainable will and preferences, subject to the constraints of possibility and non-criminality. That presumption should be rebuttable only if stringent criteria are satisfied. Action which contravenes the person's known will and preferences should only be permissible if it is shown to be a proportional and necessary means of effectively protecting the full range of the person's rights, freedoms and interests.

Recommendation 2: All three UK capacity/adult incapacity statutes should incorporate an attributable duty to undertake all practicable steps to determine the will and preferences of persons with disabilities in applying any measure designed to respond to impairments in that person's capabilities.

Recommendation 3: In any process that impacts upon the ability of a person with disability to exercise their legal capacity, the primary obligation of an independent advocate shall be to support the person to overcome obstacles to such matters as comprehension or communication so as to enable them to exercise that capacity for themselves. If such support does not secure the independent exercise of their legal capacity, the duty of the advocate shall be to support the person by identifying and articulating, insofar as it is practicable to do so, the will and preferences of the disabled person in the matter.

Recommendation 4: Statutory advocacy services should be funded at a level that ensures genuine and effective access to independent advocates by persons with disabilities in any matter that impacts upon their ability to exercise legal capacity.

Recommendation 5: The scope of statutory requirements regarding the provision of support should be expanded to encompass support *for the exercise of legal capacity*, not simply support *for communication* (as in AWIA s1(6)) or support *for decision-making capacity* (as in MCA s1(3)).

Recommendation 6: Statutory provisions regarding support in the exercise of legal capacity must be attributable. For example, statutes that state only that support *should be provided* must be supplemented with clear guidance about who bears the responsibility for providing that support.

Recommendation 7: Existing measures such as powers of attorney and advance directives should be recognised for their potential as instruments of support for the exercise of legal agency in circumstances where decision-specific decision-making capacity is impaired, intermittent or absent. In order to fulfil this potential, however, such measures must be embedded in robust Art. 12.4 safeguards.

Recommendation 8: The three jurisdictions should develop definitions (and related guidance) on the concepts of undue influence and conflicts of interest which will be suitable for providing robust safeguards across all aspects of exercise of legal capacity, and in so doing should include consideration of weaving in aspects of related concepts such as "facility, circumvention, lesion" in Scots law and "unconscionable bargains" in English law.

Recommendation 9: Principal mental capacity/adult incapacity legislation should be structured to ensure that provisions and procedures necessary to ensure CRPD compliance apply throughout each respective legal system, and not only to measures relating to the exercise of legal capacity contained within the principal legislation.

Recommendation 10: A regular programme of monitoring and review should be maintained to review compliance with capacity/adult incapacity legislation in all three jurisdictions of the UK.

Care England Mental Capacity Act Implementation Survey: Report

Care England, prompted by the Law Commission's review of mental capacity and deprivation of liberty legislation and the formation of the National Mental Capacity Forum, recently carried out a survey to discover the 'how' and ' how much' of Mental Capacity Act (MCA) implementation in care homes. The report was published on 29 March 2016 and can be found here. Care England, a charity, is a representative body for independent care services in England.

Saskia Goldman, policy officer of Care England, commenting on the report in a recent article for *Community Care*, wrote in respect of its findings that:

> *The MCA is not embedded in practice as it should be across health and social care. Care homes, despite pockets of good practice, are no exception*.

In carrying out its research the charity, using its membership network and social media, surveyed 84 care home managers covering 50 local authority areas. The majority (over 50%) of the respondents' main user groups were adults with dementia, 35% adults with learning disability and 15% adults with mental health problems. The respondents answered questions on the five principles of the MCA, which were aimed at discovering how well the managers lead and supported their staff to understand and enact these principles. The report cautions that the respondents to the survey "*could be, to some extent, a self-selecting group*" and that "*mainly those who are already confident in MCA implementation have come forward to respond to this survey*."

Yet even within this self-selecting group the respondents showed varying approaches and practices which highlighted the problems of giving and managing care in accordance with the MCA. For example in response to the question: "how do you support your staff to understand that the resident or service user must be assumed to have capacity, unless it is proved otherwise?" the respondents' replies showed an over reliance on MCA training alone and did not combine the training with embedding the MCA in everyday good practice. The report comments that "*the most promising approaches, took multiple approaches to communication of the Act, from the classroom to caring, and via a range of communication methods*." There were several

heartening examples of how the MCA had given clients more independence.

The responses to a question on unwise decisions showed a worrying lack of understanding by some managers of the principle of an "unwise decision." As the report states, "*taking a chance is about positive risk-taking, which is not always or necessarily the same thing as supporting someone to make an unwise decision*." The report highlighted the need for more training in this area. Another area of concern was in response to the question about recognising, recording and minimising restraint in accordance with the MCA. Although 86.25% of the respondents felt confident in doing this, 13.75% of respondents did not feel confident. The report reflects that "*self-assessment of MCA knowledge and implementation is not the surest indicator, especially considering that some who felt confident in this aspect of MCA implementation had needs that they had not identified*."

In response to the question "*what would help your home/service to better implement the MCA?*" respondents wanted more training, guidance documents, better support from their local authority and more local 'good practice' schemes. Training providers and organisations that provide easy-reader accessible materials explaining the MCA may like to note one particular response: "*Accessible training often* [is poorly] *pitched and is either insulting or overly complicated*."

One of the greatest barriers to MCA implementation was seen to be information and knowledge not filtering down in homes where "*managers considered that the MCA, capacity assessment, Best Interest Decisions and DoLs were the concern of managers only*." The report responds that "*this should not be the cases and all staff should be engaged with, and inform these processes*."

In conclusion, this was a very useful survey and report. It showed amongst other things that managers who responded most confidently to the survey were those that tended to use a range of approaches to implementation of the MCA. The report also showed evidence of best practice in many care homes, but reflected that the data is not consistent with experiences across the sector as gathered in feedback to the research at the National Mental Capacity Action Day in March 2016. There is therefore a pressing need for further research to be carried out to assess the MCA implementation in care homes more widely.

Beverley Taylor

Disappointing appointees

A recent report by the Local Government Ombudsman into the way in which Halton Borough Council discharged its obligations as appointee for a woman, Miss Y, with disabilities rendering her unable to manage her own financial affairs makes dismal reading. The Council, which charged Miss Y for the privilege of its appointee services "*for at least seven years and possibly longer* […] *failed to effectively manage Miss Y's money while it was responsible, as appointee, for her financial affairs*," including by:

- failing to identify that Miss Y was being overpaid income support and miscalculating her entitlement to housing benefit, which resulted in an overpayment. When both of these errors became apparent the council repaid the amounts, leaving Miss Y with nothing in

her account when the family took over her finances again;

- overpaying utility bills on her behalf for communal services she used in the supported living placement where she lived, to the sum of around £400;

- failing to provide her with money for clothes, leading her sister to have to spend almost £300 of her own money on clothes for her; and

- failing to make a proper best interests determination as to whether she should spend around £800 to go on a holiday.

One point that the report could have emphasised, but did not, is the very limited scope that appointees have (or should have) to make decisions regarding the money of those whose benefits they are administering. Unless they are also property and affairs deputies, the scope of their authority to administer the money (and in particular) the capital of the person is very limited. For further discussion of this, we recommend the excellent report by Empowerment Matters on making financial decisions.

Sexual exploitation and learning disability

At the second in the (excellent) 'Safeguarding Adults and Legal Literacy' seminar series, Alex's attention was drawn to an extremely helpful toolkit of training materials prepared under the auspices of the Association for Real Change to assist those with learning disabilities to protect themselves against sexual exploitation. The materials, developed in conjunction with experts by experience, including both peer education and staff training materials, and can be accessed for free here.

Short note: coercive and controlling behaviour

South Yorkshire Police report that a man from Sheffield has been jailed for two years and four months after pleading guilty to the new offence of coercive and controlling behaviour under s.76 Serious Crime Act 2015 and to eight counts of assault and criminal damage. This is the first successful conviction for South Yorkshire Police (and must be one of the first in the country) under new legislation enabling police to prosecute for coercive and controlling behaviour.

The court heard that the man had abused his partner over an almost two-year period, controlling her diet, exercise, what clothing she wore and when she could see her friends and family, as well as ensuring that he was with her at all times.

Those whose practice includes inherent jurisdiction cases will be aware of the evidential difficulties in such cases, where it is being argued that an individual is subject to a controlling influence. It appears that in this case, but unlike many others, the woman who was subject to the abuse came forward to the police.

Short Note: Children and Social Work Bill

By way of heads-up, readers will want to keep a close eye out on the progress of the Children and Social Work Bill introduced into the House of Lords on 20 May 2016, because it promises to bring the regulation of social workers back under the direct control of government, as opposed to being devolved to the Health and Care

Professions Council. This will also have implications, we anticipate, for the way in which Best Interests Assessors are accredited in their specific roles. A useful article can be found in *Community Care* outlining some of the Bill's key provisions.

Amended Law Society Practice Note on Representation in Mental Health Tribunals

An updated version of this Practice Note has now been published, taking into account (in particular) the decision of Charles J in *Re YA* as to the approach that representatives are to take when acting under rule 11(7), as well as information on Care & Treatment Reviews.

Short Note: Capacity to appeal

In the linked cases of *London Borough of Hillingdon v WW (Special educational needs : Other)* [2016] UKUT 253 (AAC) and *Buckinghamshire County Council v SJ (Special educational needs: Other)* [2016] UKUT 254 (AAC), Upper Tribunal Judge Jacobs gave a helpful analysis of the route by which the right of a young person to appeal against relevant decisions of a local authority under s.51 Children And Families Act 2014 may be made effective where the young person lacks the capacity to bring an appeal. Readers with a specific SEN interest are directed to the analysis at paragraphs 11-19 in the first or 12-20 in the second judgment (being identical), where Upper Tribunal Judge Jacobs addresses in turn each of the four potential scenarios in relation to an appeal, namely that: (1) the young person has capacity; (2) the young person lacks capacity; (3) the young person's capacity is in doubt; or (4) the young person's capacity changes during the course of the proceedings.

Of wider importance, perhaps, is UT Judge Jacobs' observation at paragraph 9 that

> *"capacity depends on the matter in respect of which a decision has to be made: section 2(1). So a person may have capacity at one time but not at another, and may have capacity in respect of one matter but not another. The matter I am concerned with is the bringing of an appeal; that is what I mean when I refer to (lack of) capacity. The young person may have capacity in respect of that, but not in respect of other decisions that have to be made in the course of the proceedings. Equally, a person may lack capacity to bring an appeal, but have capacity to make other decisions in the course of the proceedings."*

By analogy, we suggest, it would be entirely possible that a person would have the capacity to bring an application under s.21A MCA but not to have the capacity then to instruct his or her legal representatives in respect of all the decisions that may need to be brought during the course of that application.

Short Note: independent panels and discharge

In *South Staffordshire and Shropshire Healthcare NHS Foundation Trust & Anor v The Hospital Managers of St George's Hospital* [2016] EWHC 1196 (Admin), Cranston J confirmed that, in principle, an NHS Trust detaining a patient under the Mental Health Act 1983 can bring judicial review proceedings against the panel of hospital managers to which it has delegated powers under s.23(6) of the Act to decide whether to discharge a patient. He emphasised, however, that such a challenge would only rarely succeed.

The Northern Ireland Mental Capacity Act

[*Editorial Note: we are delighted that Roy McClelland OBE, who led the Bamford Review (described below) to its conclusion has written this description for us of the key points of the new Mental Capacity (Northern Ireland) Act 2016. We understand that a more detailed article co-written by Professor McClelland will be forthcoming in the International Journal of Mental Health and Capacity Law*]

Introduction

Alex Ruck Keene's article in the August 2014 Newsletter "Throwing down the gauntlet – the mental capacity revolution in Northern Ireland" drew attention to new legislative proposals being consulted upon by the Department of Health, Social Services and Public Safety (NI) in 2014. With the granting of Royal Assent in March 2016 those proposals have finally found their way onto the statute book in the form of the Mental Capacity (Northern Ireland) Act 2016.

Background

While the initial stimulus for legislative reform has origins in UK case law[1] going back more than 20 years the policy steer for NI's Department of Health, Social Services and Public Safety (DHSSPS) and the Department of Justice (DoJ) came from the outworking's of a major review of mental health and learning disability, the Bamford Review, established in 2002. The Review continues to provide the citizens of NI with a road map for mental health reform, including reform of legislation.

The vision underpinning the Bamford Review and its implementation is "a valuing of all who have mental health needs or a learning disability, including rights to full citizenship, equality of opportunity and self-determination."[2] Equality goes to the heart of the Review and as its report Equality of Opportunity states "because a person has a mental health problem or a learning disability does not of itself mean that he or she is incapable of exercising his or her rights."[3]

The Review's final report A Comprehensive Legislative Framework[4] proposed a rights-based approach as the guiding principle for reform of legislation. A core principle of the Framework is respect for the decisions of all who are assumed to have the capacity to make their own decisions. Grounds for interfering with a person's autonomy should be based on impaired decision-making capacity. The legislative framework also proposed that the provision of care and treatment for mentally disordered offenders should be under the same legislative framework.

Central to the Bamford proposals for legislative reform were five key demands:

- repeal of separate and discriminating mental health legislation;
- a single legislative framework in which all health and welfare issues are considered equally;

[1] *Re T (Adult: Refusal of Treatment)*; CA 1992
Re C (Adult: Refusal of Treatment); FD 1994

[2] Bamford Review of Mental Health and Learning Disability (2007). A Comprehensive Legal Framework for Mental Health and Learning Disability. Belfast: DHSSPS.
[3] Bamford Review of Mental Health and Learning Disability (2006). Human Rights and Equality of Opportunity.
[4] Footnote 2.

- principles supporting the dignity of the person should be explicitly stated in the legislation;

- a presumption of decision-making capacity, with respect for decisions and provision of all necessary;

- support to enable participation in a decision;

- where an individual's capacity is impaired the best interests of the person should be protected and promoted.

Together these have formed the litmus test for the fidelity of the present legislative proposals with the Bamford Review.

Northern Ireland Mental Capacity Act

The DHSSPS and DoJ responded to the challenge. Beginning in 2008 it has been a lengthy process. To the Departments' credit a significant factor has been extensive engagement with stakeholders throughout. The Mental Capacity Bill entered the Northern Ireland Assembly in June 2015 and after a rigorous process of debate and consultation completed its journey in March 2016. Royal Assent was granted in March 2016.

Fundamental for the Bamford vision for legislative reform, the Act will provide equally for all circumstances and for all aspects of a person's needs – financial, welfare, health – *including mental health*.

The Act is principles-based. The principles are set out at the start and underpin the entire legislation: First Principle: capacity. A person is not to be treated as lacking capacity unless it is established that the person lacks capacity in relation to a matter. The person is not to be treated as unable to make a decision for himself or herself about the matter unless all practicable help and support to enable the person to make a decision about the matter have been given without success. The person is not to be treated as unable to make a decision for himself or herself about the matter merely because the person makes an unwise decision. Second Principle: best interests. The act must be done, or the decision must be made, in the person's best interests. The person making the determination must have special regard to the person's past and present wishes and feelings, the beliefs and values that would be likely to influence their decision if they had capacity and any other factors that thy would be likely to consider if able to do so.

Conclusion

The Mental Capacity Act (N Ireland) sign-posts an end to discriminatory mental health legislation. Speaking during the Final Stage debate, Health Minister, Simon Hamilton said: "*First and foremost, this Bill is about reducing the stigma still felt by many people suffering from mental disorder. It will introduce a new rights based legal framework that applies equally to every adult where there is a need to intervene in their lives on health grounds*."[5] This statement not only reflects the innovation at the heart of this new legislation it signals ownership of its value base by Northern Ireland's political leaders.

Legislation per se is only one part of the process of reform. Appropriate resources must be allocated to enable effective implementation. A detailed Code of Practice is required to provide clarity on many aspects. Training will be needed for a wide range of professionals. A

[5] https://www.health-ni.gov.uk/news/global-first-legislation-reduce-mental-health-stigma-passes-final-stage.

comprehensive information programme must be provided for service users, carers and attorneys. Nevertheless, this legislation provides the framework for a societal shift in its care and treatment of those with a mental disorder.

Strasbourg and the principles of participation

AN v Lithuania [2016] ECHR 462 (European Court of Human Rights (Fourth Section))

Other proceedings – EctHR

Summary

In the most recent in a long string of cases considering "incapacitation" proceedings in Eastern European countries, the ECtHR has drawn together a number of important threads as regards the application of both articles 6 and 8 to these proceedings. The observations of the court are – again – ones that resonate in different ways for practice in the Court of Protection.

Article 6

The Court reiterated a number of important general principles relating to proceedings for removal of legal capacity, thus:

> *89. In the context of Article 6 § 1 of the Convention, the Court accepts that in cases involving a mentally-ill person the domestic courts should also enjoy a certain margin of appreciation. Thus, for example, they can make appropriate procedural arrangements in order to secure the good administration of justice, protection of the health of the person concerned, and so forth (see Shtukaturov v. Russia, no. 44009/05, § 68, ECHR 2008).*
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> *90. The Court accepts that there may be situations where a person deprived of legal capacity is entirely unable to express a coherent view. It considers, however, that in many cases the fact that an individual has to be placed under guardianship because he lacks the ability to administer his affairs does not mean that he is incapable of expressing a view on his situation. In such cases, it is essential that the person concerned should have access to court and the opportunity to be heard either in person or, where necessary, through some form of representation. Mental illness may entail restricting or modifying the manner of exercise of such a right, but it cannot justify impairing the very essence of the right, except in very exceptional circumstances, such as those mentioned above. Indeed, special procedural safeguards may prove called for in order to protect the interests of persons who, on account of their mental health issues, are not fully capable of acting for themselves (see D.D. v. Lithuania, cited above, § 118).*
>
> *91. The Court also reiterates that there is the importance of ensuring the appearance of the fair administration of justice and a party to civil proceedings must be able to participate effectively, inter alia, by being able to put forward the matters in support of his or her claims. Here, as with other aspects of Article 6, the seriousness of what is at stake for the applicant will be of relevance to assessing the adequacy and fairness of the procedures (see P., C. and S. v. the United Kingdom, no. 56547/00, § 91, ECHR 2002-VI)."*

In circumstances where the applicant had not been present at, or aware of, the proceedings for incapacitation (brought at the behest of his mother on the basis of the schizophrenia from which he was suffering), the court highlighted that:

> *96. The applicant was indeed an individual with a history of psychiatric troubles. From the case material, however, it appears that despite his mental illness, he had been a relatively independent person. Indeed, and despite his suicide attempts in 2004 and 2006, for most of the time he lived alone, and could apparently take care of himself. Furthermore, the Court notes that the applicant played a double role in the proceedings: he was an interested party, and, at the same time, the main object of the court's examination. His participation was therefore necessary, not only to enable him to present his own case, but also to allow the judge to have at least brief visual contact with him, and preferably question him to form a personal opinion about his mental capacity (see Shtukaturov, cited above, § 72). Given that the potential finding of the applicant being of unsound mind was, by its very nature, largely based on his personality, his statements would have been an important part of his presentation of his case (see D.D. v. Lithuania., cited above, § 120; see also Principle 13 of the Recommendation No. R (99) 4 by the Council of Europe).*

The court could not, further, be satisfied that the hearing was fair despite the fact both the applicant's mother and the prosecutor attended the hearing, because "*there was no one at the court hearing who could, on the applicant's behalf, rebut the arguments or conclusions by his mother or the prosecutor*" (paragraph 98). The court placed particular weight upon the fact that there was a lack of any meaningful involvement by the relevant social services department in determining the merits of the applicant's case. Furthermore, it transpired "*that the court ruled exclusively on the basis of the psychiatric report without summoning the medical expert who wrote it for questioning (see D.D. v. Lithuania, cited above, § 120). Furthermore, that medical expert report to the effect that the applicant could not take care of himself appears to be based on an account by the applicant's mother, without there being any proof that those circumstances had been verified by the State or municipal authorities themselves. Similarly, the Court observes that the Akmenė District Court did not call anyone else as a witness so that more light could be shed on the applicant's state of health*."

The court was also distinctly unimpressed by the fact that, in subsequent proceedings for his forced hospitalization, "*the lawyer appointed by the Legal Aid Service 'represented' him without even having seen or talked to him*" (paragraph 103).

The court held that the applicant had deprived of a clear, practical and effective opportunity to have access to court in connection with his incapacitation proceedings, and particularly in respect of his request to restore his legal capacity which was (essentially) fobbed off on formal grounds, such that there had been a violation of article 6(1) ECHR.

Article 8

The court noted that it has consistently held that:

> *… deprivation of legal capacity undeniably constitutes a serious interference with the right to respect for a person's private life protected under Article 8 (see, for example, Matter v. Slovakia, no. 31534/96, § 68, 5 July 1999). It reiterates that Article 8 secures to the individual a sphere within which he or she can freely pursue the development and fulfilment of his personality (see Smirnova v. Russia, nos. 46133/99 and 48183/99, § 95, ECHR 2003-IX (extracts)). It has not been disputed by the Government that the Akmenė District Court's decision of 31 January 2007 deprived the applicant of his capacity to act independently*

> *in almost all areas of his life: at the relevant time he was no longer able to sell or buy any property on his own, work, choose a place of residence, marry, or bring a court action in Lithuania. The Court cannot but hold that the deprivation of legal capacity thus amounted to an interference with his right to respect for his private life (see Shtukaturov, cited above, § 83).* (paragraph 111).

Further, whilst national authorities should enjoy a wide margin of appreciation in a "*complex matter as determining somebody's mental capacity*", "*the margin of appreciation to be accorded to the competent national authorities will vary in accordance with the nature of the issues and the importance of the interests at stake. A stricter scrutiny is called for in respect of very serious limitations in the sphere of private life*" (paragraphs 116-117) The court reiterated that "*whilst Article 8 of the Convention contains no explicit procedural requirements, the decision-making process involved in measures of interference must be fair and such as to ensure due respect of the interests safeguarded by Article 8 (see Görgülü v. Germany, no. 74969/01, § 52, 26 February 2004). The extent of the State's margin of appreciation thus depends on the quality of the decision-making process. If the procedure was seriously deficient in some respect, the conclusions of the domestic authorities are more open to criticism (see Shtukaturov, cited above, § 89)*" (paragraph 118).

In finding that the applicant's Article 8 rights had been infringed, the court had particular regard to the fact that the proceedings before the Akmenė District Court did not give the judge an opportunity to examine the applicant in person. "*In such circumstances, it cannot be said that the judge had the benefit of direct contact with the person concerned, which would normally call for judicial restraint on the part of the Court. Furthermore, the applicant's incapacitation proceedings ended at one level of jurisdiction, his participation in that decision-making process being reduced to nothing*" (paragraph 120).

The court emphasised that "*when restrictions on the fundamental rights apply to a particularly vulnerable group in society that has suffered considerable discrimination in the past, the Court has also held that then the State's margin of appreciation is substantially narrower and must have very weighty reasons for the restrictions in question. The reason for this approach, which questions certain classifications per se, is that such groups were historically subject to prejudice with lasting consequences, resulting in their social exclusion. Such prejudice could entail legislative stereotyping which prohibits the individualised evaluation of their capacities and needs. In the past, the Court has identified a number of such vulnerable groups that suffered different treatment, persons with mental disabilities being one of them (see Alajos Kiss v. Hungary, no. 38832/06, § 42, 20 May 2010, and Kiyutin v. Russia, no. 2700/10, § 63, ECHR 2011)*" (paragraph 125).

Comment

In light of the principles set out above, what would the Strasbourg court make of a decision (say) by the Court of Protection made on the papers to appoint a property and affairs deputy for a person, a decision that can only be made on the basis of a determination that the person is factually incapable of making decisions as to their property and affairs? In light of Rule 3A of the Court of Protection Rules, introduced in July last year, and the express direction to the court to consider how the person concerned is to participate in what (in effect) are partial incapacitation proceedings, there are grounds to

think that the court might think somewhat less dimly of such proceedings. However, the ringing – and consistent – statements that, in principle, persons to be subject to such proceedings should see the judge (and that judge should, in essence, conduct their own capacity assessment upon them) do not sit entirely easily with Court of Protection practice even as modified by Rule 3A. They should also – we suggest – serve as a reminder that justification will always be required in relation to any steps that are to be taken away from participation in CoP proceedings by way of full party status, together with representation by a representative charged with putting matters forward in support of P's contentions (we suggest either as to capacity or best interests). In other words, party status and 'direct' representation (i.e. representation on the basis of such instructions as can be obtained from P, not 'best interests' representation as at present) should be the starting point, not the end point, in any consideration of how rights under Articles 6 and 8 ECHR (let alone 12 and 13 CRPD) are to be secured.

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Conferences at which editors/contributors are speaking

The Use of Physical Intervention and Restraint: Helpful or Harmful?

Tor will be speaking at this free afternoon seminar jointly arranged by 39 Essex Chambers and Leigh Day on 13 June. Other confirmed speakers include Bernard Allen, Expert Witness and Principal Tutor for 'Team-Teach,' two parents / carers and Dr Theresa Joyce, Consultant Clinical Psychologist and National Professional Advisor on Learning Disabilities on the CQC. For more details, and to book, see here.

Mental Health Lawyers Association 3rd Annual COP Conference

Charles J will be the keynote speaker, and Alex will be speaking at, the MHLA annual CoP conference on 24 June, in Manchester. For more details, and to book, see here.

ESCRC seminar series on safeguarding

Alex is a member of the core research team for an-ESRC funded seminar series entitled 'Safeguarding Adults and Legal Literacy,' investigating the impact of the Care Act. The third seminar in the series will be on 'Safeguarding and devolution – UK perspectives' (22 September). For more details, see here.

Deprivation of Liberty in the Community

Alex will be doing a day-long seminar on deprivation of liberty in the community in central London for Edge Training on 7th October. For more details, and to book, see here.

Taking Stock

Both Neil and Alex will be speaking at the 2016 Annual 'Taking Stock' Conference on 21 October in Manchester , which this year has the theme 'The five guiding principles of the Mental Health Act.' For more details, and to book, see here.

Editors
Alex Ruck Keene
Victoria Butler-Cole
Neil Allen
Annabel Lee
Anna Bicarregui
Simon Edwards (P&A)

Guest contributor
Beverley Taylor

Scottish contributors
Adrian Ward
Jill Stavert

Advertising conferences and training events

If you would like your conference or training event to be included in this section in a subsequent issue, please contact one of the editors. Save for those conferences or training events that are run by non-profit bodies, we would invite a donation of £200 to be made to Mind in return for postings for English and Welsh events. For Scottish events, we are inviting donations to Alzheimer Scotland Action on Dementia.

Chambers Details

Our next Newsletter will be out in early July. Please email us with any judgments or other news items which you think should be included. If you do not wish to receive this Newsletter in the future please contact marketing@39essex.com.

David Barnes
Chief Executive and Director of Clerking
david.barnes@39essex.com

Alastair Davidson
Senior Clerk
alastair.davidson@39essex.com

Sheraton Doyle
Practice Manager
sheraton.doyle@39essex.com

Peter Campbell
Practice Manager
peter.campbell@39essex.com

London 81 Chancery Lane, London, WC1A 1DD
Tel: +44 (0)20 7832 1111
Fax: +44 (0)20 7353 3978

Manchester 82 King Street, Manchester M2 4WQ
Tel: +44 (0)161 870 0333
Fax: +44 (0)20 7353 3978

Singapore Maxwell Chambers, 32 Maxwell Road, #02-16,
Singapore 069115
Tel: +(65) 6634 1336

For all our services: visit www.39essex.com

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THE QUEEN'S AWARDS FOR ENTERPRISE INTERNATIONAL TRADE 2013

Alex Ruck Keene: alex.ruckkeene@39essex.com

Alex is recommended as a 'star junior' in Chambers & Partners 2016 for his Court of Protection work. He has been in cases involving the MCA 2005 at all levels up to and including the Supreme Court. He also writes extensively, has numerous academic affiliations and is the creator of the website www.mentalcapacitylawandpolicy.org.uk. He is on secondment for 2016 to the Law Commission working on the replacement for DOLS. To view full CV click here.

Victoria Butler-Cole: vb@39essex.com

Victoria regularly appears in the Court of Protection, instructed by the Official Solicitor, family members, and statutory bodies, in welfare, financial and medical cases. Together with Alex, she co-edits the Court of Protection Law Reports for Jordans. She is a contributing editor to Clayton and Tomlinson 'The Law of Human Rights', a contributor to 'Assessment of Mental Capacity' (Law Society/BMA 2009), and a contributor to Heywood and Massey Court of Protection Practice (Sweet and Maxwell). To view full CV click here.

Neil Allen: neil.allen@39essex.com

Neil has particular interests in human rights, mental health and incapacity law and mainly practises in the Court of Protection. Also a lecturer at Manchester University, he teaches students in these fields, trains health, social care and legal professionals, and regularly publishes in academic books and journals. Neil is the Deputy Director of the University's Legal Advice Centre and a Trustee for a mental health charity. To view full CV click here.

Annabel Lee: annabel.lee@39essex.com

Annabel appears frequently in the Court of Protection. Recently, she appeared in a High Court medical treatment case representing the family of a young man in a coma with a rare brain condition. She has also been instructed by local authorities, care homes and individuals in COP proceedings concerning a range of personal welfare and financial matters. Annabel also practices in the related field of human rights. To view full CV click here.

Anna Bicarregui: anna.bicarregui@39essex.com

Anna regularly appears in the Court of Protection in cases concerning welfare issues and property and financial affairs. She acts on behalf of local authorities, family members and the Official Solicitor. Anna also provides training in COP related matters. Anna also practices in the fields of education and employment where she has particular expertise in discrimination/human rights issues. To view full CV click here.

Simon Edwards: simon.edwards@39essex.com

Simon has wide experience of private client work raising capacity issues, including *Day v Harris & Ors* [2013] 3 WLR 1560, centred on the question whether Sir Malcolm Arnold had given manuscripts of his compositions to his children when in a desperate state or later when he was a patient of the Court of Protection. He has also acted in many cases where deputies or attorneys have misused P's assets. To view full CV click here.

Adrian Ward adw@tcyoung.co.uk

Adrian is a practising Scottish solicitor, a consultant at T C Young LLP, who has specialised in and developed adult incapacity law in Scotland over more than three decades. Described in a court judgment as: "*the acknowledged master of this subject, and the person who has done more than any other practitioner in Scotland to advance this area of law*," he is author of *Adult Incapacity*, *Adults with Incapacity Legislation* and several other books on the subject. To view full CV click here.

Jill Stavert: J.Stavert@napier.ac.uk

Professor Jill Stavert is Reader in Law within the School of Accounting, Financial Services and Law at Edinburgh Napier University and Director of its Centre for Mental Health and Incapacity Law Rights and Policy. Jill is also a member of the Law Society for Scotland's Mental Health and Disability Sub-Committee, Alzheimer Scotland's Human Rights and Public Policy Committee, the South East Scotland Research Ethics Committee 1, and the Scottish Human Rights Commission Research Advisory Group. She has undertaken work for the Mental Welfare Commission for Scotland (including its 2015 updated guidance on Deprivation of Liberty). To view full CV click here.