MENTAL CAPACITY REPORT: THE WIDER CONTEXT

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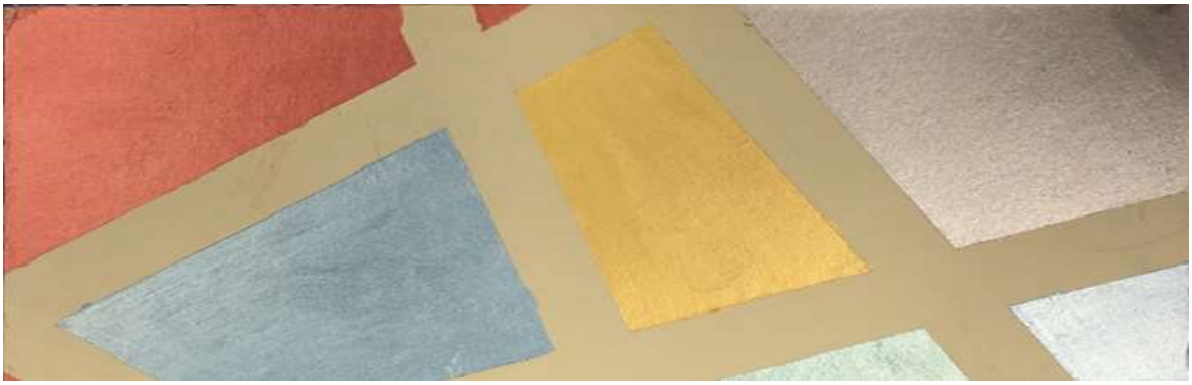

Welcome to the June 2020 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: the Court of Appeal presses the reset button in relation to capacity and sexual relations, and three difficult medical treatment decisions;

(2) In the Property and Affairs Report: the impact of grief on testamentary capacity;

(3) In the Practice and Procedure Report: a remote hearings update, and a pragmatic solution to questions of litigation capacity arising during the course of a case;

(4) In the Wider Context Report: DoLS and the obligations of the state under Article 2 ECHR, the Parole Board and impaired capacity, and recent relevant case-law from the European Court of Human Rights;

(5) In the Scotland Report: the interim report of the Scott Review critiqued.

You can find our past issues, our case summaries, and more on our dedicated sub-site here. We have taken a deliberate decision not to cover all the host of COVID-19 related matters that might have a tangential impact upon mental capacity in the Report, not least because the picture continues to change relatively rapidly. Chambers has created a dedicated COVID-19 page with resources, seminars, and more, here; Alex maintains a resources page for MCA and COVID-19 here.

If you want more information on the Convention on the Rights of Persons with Disabilities, which we frequently refer to in this Report, we suggest you go to the Small Places website run by Lucy Series of Cardiff University.

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The picture at the top, "*Colourful*," is by Geoffrey Files, a young man with autism. We are very grateful to him and his family for permission to use his artwork.

Contents

ENGLAND AND WALES

The Joint Committee on Human Rights – detained young people with learning disability and/or autism

In a hard-hitting report[1] published on 12 June 2000, the JCHR provided a follow-up report to that published in 2019 on the detention of young people with learning disabilities and/or autism in Assessment and Treatment Units (ATUs) and other mental health hospitals. That earlier report had concluded that young people's human rights are being abused; they were detained unlawfully contrary to their right to liberty, subjected to solitary confinement, more prone to self-harm and abuse and deprived of the right to family life. As the JCHR noted in the introduction to its new report:

> *Now that institutions are closed to the outside world as a result of the Covid-19 pandemic, the risk of human rights abuses are even greater. Unlawful blanket bans on visits, the suspension of routine inspections, the increased use of restraint and solitary confinement, and the vulnerability of those in detention to infection with Covid-19 (due to underlying health conditions and the infeasibility of social distancing) mean that the situation is now a severe crisis.*

The JCHR made a series of recommendations, including that:

> *NHS England must write immediately to all hospitals, including private ones in which it commissions placements, stating that they must allow families to visit their loved ones, unless a risk assessment has been carried out relating*

[1] Note, Alex is now a special advisor to the Committee for its inquiry into Human Rights and the Government's response to COVID-19, and had input into this report.

to the individual's circumstances which demonstrates that there are clear reasons specific to the individual's circumstances why it would not be safe to do so.

Figures on the use of restrictive practices, including physical and medical restraint and any form of segregation, detailing any incidences which go beyond 22 hours per day and amount to solitary confinement, must be published weekly by the institutions. These figures must be provided to the Secretary of State for Health and Social Care and reported to Parliament.

The Care Quality Commission (CQC) should carry out all their inspections unannounced; this is particularly important where any allegation of abuse is reported by a young person, parent, or whistle-blower.

The CQC must prioritise in-person inspections at institutions with a history of abuse/malpractice, and those which have been rated inadequate/requires improvement.

The CQC should set up a telephone hotline to enable all patients, families, and staff to report concerns or complaints during this period.

The CQC must report on reasons for geographical variation in practice with resultant harmful consequences.

Now, more than ever, rapidly progressing the discharge of young people to safe homes in the community must be a top priority for the Government. The recommendations from the Committee's 2019 report must be implemented in full.

Comprehensive and accessible data about the number of those who are autistic and/or learning disabled who have contracted and died of Covid-19 must be made available and include a focus on those in detention, for whom the state has heightened responsibility for their right to life.

Not all deprivations of liberty are equal: the limits of the state's operational duty to protect the right to life

R(Maguire) v HM Senior Coroner for Blackpool & Fylde [2020] EWCA Civ 738 (Court of Appeal (Lord Burnett, LCJ, Sir Ernest Ryder and Nicola Davies LJ))

Article 5 – deprivation of liberty – other proceedings – inquests

Summary[2]

The Court of Appeal has held that there are (perhaps surprising) limits to the obligation upon the state under Article 2 ECHR to investigate the death of those subject to the Deprivation of Liberty Safeguards.

Background

The case concerned an inquest into the death of a 52 year old woman, Jacqueline (Jackie) Maguire that Article 2 ECHR was not engaged. Ms Maguire had a diagnosis of Down's syndrome and moderate learning difficulties. She required one-to-one support and had

[2] Note, as Tor and Nicola were involved in the case, they have not been involved in the drafting of this note.

severely compromised cognitive and communication abilities. By the time of her death, she suffered limited mobility, needing a wheelchair to move around outside. She had lived for more than 20 years in a care home in Blackpool where she was deprived of her liberty pursuant to a standard authorisation.

In the week prior to her death, Ms Maguire had complained of a sore throat and had a limited appetite. For about two days before she died, she had suffered from a raised temperature, diarrhoea and vomiting. On 20 February 2017, Ms Maguire asked to see a GP. Staff at the care home did not act on that request. There then followed a chain of events which included a failure on the part of a GP to respond to calls and make a home visit; a further failure on the part of the out of hours GP to triage Ms Maguire properly or to elicit a full history from carers; and poor advice being given to the carers from NHS111. In fact the first medically trained personnel to attend Ms Maguire were an ambulance crew after 8pm on the 21 February 2017, however they had not been notified that Ms Maguire had Down's syndrome and they found themselves unable to take her to hospital as she simply refused to go.

Ms Maguire therefore remained at the care home overnight. She was found collapsed the following day. She was admitted to hospital by ambulance and died that evening. A post-mortem examination concluded that her death was as a result of a perforated gastric ulcer with peritonitis and pneumonia.

The coroner at a Pre Inquest Hearing determined that Article 2 ECHR was engaged and therefore conducted the inquest on this basis. However, at the conclusion of the evidence, the coroner reconsidered the position in light of the decision of *R (Parkinson) v Kent Senior Coroner* [2018] EWHC 1501 (Admin) which had been handed down shortly before the hearing had begun. Relying on this decision, the Coroner ruled that the allegations against Ms Maguire's carers and healthcare providers amounted to allegations of individual negligence, which *Parkinson* had clarified as falling outside the state's obligations under Article 2.

The application for judicial review

The application for judicial review contended that the Coroner was wrong to conclude that Article 2 did not apply. It was argued that the law had developed so that the court should now recognise the state's positive obligations under article 2 towards those who may be described as "particularly vulnerable persons under the care of the state". Alternatively, it was argued that the Coroner ought to have concluded that there was sufficient evidence of systemic problems in events leading to Jackie's death that article 2 ought to have been left to the jury. There had been no effective communication system between those authorities charged with protecting Jackie (GP services, NHS111, the ambulance service and the hospital) and no individual with oversight of Jackie's healthcare who could convey an accurate account of her symptoms in circumstances where she was unable to do so. These were regulatory and structural failures. Together with the failure to sedate Jackie on the evening of 21 February, they were capable of amounting to systemic dysfunction.

The second ground of challenge was that the Coroner had erred in law in failing to leave neglect to the jury.

The Divisional Court held that this was not a case in which in which there had been an assumption of responsibility on the part of the State; and the chain of events that led up to Ms Maguire's death was not capable of demonstrating systemic failure or dysfunction. The Divisional Court found that such failings as there may have been were attributable to individual actions and so did not require the state to be called to account. The Divisional Court also found, on the facts, that Coroner had been entitled to find there was no individual failing on the part of those involved which could safely be said to be gross, so as to require him to leave a finding to the neglect.

The application for judicial review was therefore refused.

The appeal

Her mother appealed to the Court of Appeal in relation to the Coroner's approach to Article 2 ECHR.

The core of the appeal concerned the question of whether the case was a 'medical' case, or whether it was a case where the State had assumed responsibility for Ms Maguire. If it was a 'medical' case, then, following the Grand Chamber's decision in *Lopes de Sousa Fernandez v Portugal* (2018) 66 EHRR 28, it would only be in "very exceptional" circumstances that the State's substantive responsibility under Article 2 ECHR would be engaged. Absent those circumstances, there is no 'parasitic' obligation upon the State to ensure the discharge of the heightened procedural obligations that arise from a death for which the State is responsible.

Determining the appeal required the Court of Appeal to undertake a detailed analysis of the complex Strasbourg case-law. It also then had to grapple with how those mapped onto the DoLS regime, and at paragraphs 52 onwards, gave a potted history of that regime, which in material part reads as follows:

> *52. Jackie was placed by Blackpool Council in the small private residential home run by United Response in 1993. In doing so they were discharging their statutory functions of support for an adult with Jackie's combination of difficulties. She had lived at home between 1982 and 1991 but then exhibited bouts of extreme behaviour, diagnosed as a cyclothymic personality disorder. She first moved to an assessment centre before going to the United Response home. She could communicate – indeed her mother described her as a chatterbox. In recent years spinal problems had restricted her mobility to the extent she used a wheelchair for trips outside the home.*
>
> *53. Jackie was unable to care for herself and her circumstances made it unrealistic to suppose that she could continue to live with her family. The home provided a safe and caring environment in which Jackie could live. She was neither physically capable nor sufficiently aware to be able to leave the home on her own. It would have been dangerous for her to do so. As is universally the case in such homes, and in residential and nursing homes looking after the elderly who might harm themselves if they leave unsupervised, entrance and exit was strictly controlled. That ensured that residents could not leave unnoticed and thereby expose themselves (and others) to danger.*
>
> *54. That state of affairs had been the reality on the ground for many decades.*

Nonetheless, the question whether such individuals were deprived of their liberty for the purposes of article 5 ECHR arose for consideration only relatively recently. The significance of the question, for the purposes of article 5 ECHR, was that deprivation of liberty is permitted in limited circumstances and then only supported by clear legal mechanisms.

55. In HL v. United Kingdom (2004) 40 EHRR 761 the Strasbourg Court was concerned with the question whether a mentally disabled and autistic man informally admitted to hospital for a protracted period, where he was sedated, keep under close supervision and would have been physically prevented from leaving had he tried to do so, was detained for the purposes of article 5. He was later detained under the Mental Health Act 1983. The court concluded that the care professionals exercised complete control over him and he was not free to leave. He was therefore deprived of his liberty. As Lady Hale later put it in P v. Cheshire West and Chester Council [2014] 1AC 896, at para. 8:

> *"It therefore became necessary for this country to introduce some ... machinery for the many thousands of mentally incapacitated people who are regularly deprived of their liberty in hospitals, care homes and elsewhere."*

56. The legislative solution was to amend the Mental Capacity Act 2005 by the Mental Health Act 2007. Deprivation of liberty was permitted: (a) if authorised by the Court of Protection; (b) if authorised under the procedures provided for in Schedule A1 which deals with hospitals and care homes within the meaning of the Care Standards Act 2000; and (c) in order to give life sustaining treatment or to prevent a serious deterioration in a person's condition whilst court proceedings are pending. The safeguards in the second category were designed to secure a professional assessment independent of the hospital or care home in which the person concerned was resident, directed at two questions. First whether the person lacks capacity to make the decision whether to be in the hospital or care home for care or treatment. Secondly, whether it is in his or her best interests to be detained. If the answer to both questions is yes, then a standard authorisation may be granted administratively, subject to challenge in the Court of Protection.

57. The degree to which an individual's living circumstances could be construed as constituting a deprivation of liberty within the meaning of Article 5 ECHR so as to require authorisation of the Court or some other form of administrative authorisation was considered in Cheshire West. Two of the appellants before the Supreme Court were young adults. One lived in foster care, the other in an NHS facility. Both had complex needs including learning disabilities. The third was a man in his 30s with Down's Syndrome and cerebral palsy who had lived with his mother until her health deteriorated. The local authority obtained orders from the Court of Protection that it was in his best interests to live in accommodation arranged by them. There was no dispute that all the placements were suitable for all three with "positive features". Nonetheless, the question was whether they were deprived of their liberty. The Court of Appeal had concluded that they were not, but the Supreme Court, by a majority of four to three, came to the opposite conclusion.

> *58. The result was that across the country steps were taken in a substantial number of instances to seek authority to deprive people of their liberty in circumstances which had been thought unnecessary until then. Nothing changed in the practical arrangements in place for many in hospitals and care homes, but the appropriate authority was sought.*

Mapping the Strasbourg obligations onto the facts of Ms Maguire's case, the Court of Appeal noted that:

> *68. Jackie was a vulnerable adult who was unable to care for herself. She had learning disabilities which affected her ability to make choices for herself. She lacked capacity to make decisions affecting her living arrangements, healthcare and welfare. She shared those characteristics with a large number of young adults who, for a wide variety of reasons, are in a similar position. An increasing number of elderly adults are in a parallel situation as a result of the infirmities of old age, especially diminished mental faculties or dementia. Individuals who share these characteristics may be accommodated in a range of different circumstances. Many live at home cared for by family members. Large numbers live in care or nursing homes, some paying for the care themselves, others with public funding. Others are under the more direct care of a local authority or the NHS. Since the amendment to the Mental Capacity Act 2005 made in 2007, and more particularly since the decision of the Supreme Court in Cheshire West, a substantial number of them will be subject to DoLS with the consequence that were they to seek to leave the home or hospital in which they reside their carers would have lawful authority to stop them.*

The underlying argument made by the Appellant was that "*the undeniable vulnerability of an individual in Jackie's position, coupled with the fact of a DoLS authorisation dictates that she was owed the operational duty under of article 2 ECHR with the result that the procedural obligation explained in Middleton applied and the jury should have been able to comment on the quality of medical care provided to Jackie and the absence of any plan for emergency admission"* (paragraph 70).

However, the Court of Appeal observed, it was important to focus on the scope of the operational duty and why it might be owed. Its analysis of the Strasbourg case-law led it to conclude (at paragraphs 72-3) that:

1. The Divisional Court was right to identify the unifying feature of the application of the operational obligation or duty to protect life as one of state responsibility, and arising in circumstances where the State owes a substantive to the people concerned to protect them from a type of harm entirely within the control of those who cared for them. Examples of this situation included those considered in the case of (1) *Nencheva v. Bulgaria* (App. No 48606/06), where the Bulgarian state was in breach of its positive obligation for failing to take prompt action to protect the lives of young people in a residential care home where 15 disabled children died, in circumstances where the authorities were aware of the appalling conditions in the care home and of an increased mortality; and (2) *Câmpeanu v. Romania* [GC] (App. No. 47848/08), where the Romanian authorities knew that the facility in

which the deceased was kept lacked proper heating and food, had a shortage of medical staff and resources and inadequate supplies of medication, such that placing the individual in question in the institution unreasonably put his life in danger, a danger compounded by their continuing failure to provide him with medical care. The Court of Appeal therefore concluded that this meant that the Article 2 substantive obligation is tailored to harms from which the authorities have a responsibility to protect those under its care (paragraph 73);

2. The fact that an operational duty to protect life exists does not lead to the conclusion that for all purposes the death of a person owed that duty is to be judged by Article 2 standards. Relying heavily on the case of *Dumpe v Latvia*, in which on (the Court of Appeal considered) similar facts, the ECtHR had considered that the operational duty did not apply to the provision of medical treatment of someone in a care home, the Court of Appeal concluded that the procedural obligation is not the same where the death has not resulted from neglect or abuse for which the State could or should be held liable. Rather, the procedural obligation is to set up an effective judicial system to determine liability – which could include the civil courts, as well as the operation of an inquest.

Rejecting the central grounds of appeal, the Court of Appeal held that:

> *96. The question whether an operational duty under article 2 was owed to Jackie is not an abstract one which delivers a "yes" or "no" answer in all circumstances. She was a vulnerable adult incapable of looking after herself and lacking capacity to make decisions about her care. As the decisions of the Strasbourg Court in Nencheva and Câmpeanu show, the article 2 operational duty is owed to vulnerable people under the care of the state for some purposes. If a death in this jurisdiction in a hospital or care home for which the state was responsible resulted from conditions described in either of those cases, the substantive or operational duty under article 2 ECHR would be engaged. So too if the state was aware of the shortcomings, through regulatory inspections, and did not act on them. There would be a direct analogy in the latter situation with the failure of social services to protect children over a prolonged period when they knew of serious abuse (Z v. United Kingdom discussed in para. 46 above). The potential application of the operational duty discussed in Watts v. United Kingdom (see para. 45 above) when moving vulnerable elderly people from one home to another on account of the exceptional risk involved is another example of the operational duty arising within a defined area of activity.*
>
> *97. The approach illuminated by those cases (and the prison cases) does not support a conclusion that for all purposes an operational duty is owed to those in a vulnerable position in care homes, which then spawns the distinct procedural obligation (with all its components) in the event of a death which follows either alleged failures or inadequate interventions by medical professionals. On the contrary, as Dumpe most clearly demonstrates, it is necessary to consider the scope of any operational duty. Had Mr Dumpe's death followed ill-treatment or neglect of the sort considered by the*

Strasbourg Court in Nencheva and Câmpeanu the position would have been different. The circumstances of the death would be judged by reference to the operational duty.

98. In our view, there is a close analogy between the circumstances of Jackie's death and that of Mr Dumpe. The criticisms of medical care in Dumpe were in fact more wide-ranging. Dumpe was a decision of a Chamber of the Strasbourg Court and so lacks the authority of a Grand Chamber judgment.

[...]

99. The decision in Dumpe may not represent "clear and constant jurisprudence of the Strasbourg Court" but there is no decision of that court to which our attention has been drawn which suggests that the operational duty is owed to those in an analogous position to Jackie in connection with seeking ordinary medical treatment. To hold that the operational duty was engaged in this case would certainly be to move beyond any jurisprudence of the Strasbourg Court. The conclusion would not flow naturally from existing Strasbourg jurisprudence, as the conclusion in Rabone did in respect of involuntary psychiatric patients at risk of suicide (see Lord Brown's observation quoted in para. 43 above). In any event, we respectfully agree with the reasoning in Dumpe which in our view flows from the decisions to which the court referred, is consistent with the approach to deaths from natural causes of prisoners, and applied the decision of the Grand Chamber in Lopes de Sousa. The caveat in para. 163 of Lopes de Sousa[3] *does not affect the outcome in a case of this sort.*

[...]

100. In our judgment, the coroner was right to conclude that, on the evidence adduced at the inquest, there was no basis for believing that Jackie's death was the result of a breach of the operational duty of the state to protect life. It followed that the procedural obligations on the state identified in Jordan did not arise. For the purposes of the inquest the conclusions were governed by section 5(1) of the 2013 Act and in particular "how Jackie came by her death" rather than "how and in what circumstances".

101. Jackie's circumstances were not analogous with a psychiatric patient who is in hospital to guard against the risk of suicide. She was accommodated by United Response to provide a home in which she could be looked after by carers, because she was unable to look after herself and it was not possible for her to live with her family. She was not there for medical treatment. If she needed medical treatment it was sought, in the usual way, from the NHS. Her position would not have been different had she been able to continue to live with her family with social services input and been subject to an authorisation from the Court of Protection in respect of her deprivation of liberty whilst in their care.

[3] "*The Court would emphasise at the outset that different considerations arise in certain other contexts, in particular with regard to medical treatment of persons deprived of their liberty or of particularly vulnerable persons under the care of the state, where the state has direct responsibility for the welfare of these individuals. Such circumstances are not in issue in the present case.*"

The Court of Appeal then rejected the alternative submission that, even if this was a "medical case", it fell into the category of "very exceptional circumstances" which can give rise to a breach of the operational duty under Article 2. It noted that:

> *106. There is nothing in the materials before us which suggests that there is a widespread difficulty in taking individuals with learning disabilities (or elderly dementia patients) to hospital when it is in their interests to do so. The criticism of the care home, the paramedics and the out of hours GP is that between them they failed to get Jackie to hospital on the evening of 21 February; and that a plan, protocol or guidance should have been in place that would have achieved that end. That is remote from the sort of systemic regulatory failing which the Strasbourg Court has in mind as underpinning the very exceptional circumstances in which a breach of the operational duty to protect life might be found in a medical case. The making of plans in individual cases and the detail of guidance given to paramedics is far removed from what the court describes in the passage we have set out.*

Comment

It is, one might think, a strange asymmetry in the law that the State may have authorised a deprivation of liberty of a person, in a State-regulated facility, but not at the same time be considered to be under an operational duty to secure the right to life of that person such as to give rise to the full-fledged duty to investigate and account for the circumstances of their death.[4]

It is, with respect, perhaps a little challenging that the Court of Appeal had to find the answer to that question in the decision in the case of *Dumpe* – an admissibility decision in which the Strasbourg court had not had to grapple with the full thorniness of the different levels of Article 2 obligation because it could find that the applicant had not exhausted their domestic remedies. As the Court of Appeal noted, the Strasbourg court had also not – in that case – grappled with the question of the relevance of State involvement in authorising deprivation of liberty, as Article 5 had not formed part of its consideration.

With respect, therefore, *Dumpe* does not provide the soundest of foundations upon which to establish the distinction that the Court of Appeal found itself constrained to identify.

The real answer may lie in the fact that the concept of deprivation of liberty as developed in England and Wales has escaped very significantly beyond the bounds of that identified by Strasbourg. The potted history of the DoLS regime given by the Court of Appeal gives a hint of this, emphasising the universality (and, the tenor suggests, the unexceptionable nature) of the arrangements made for those in the position of Ms Maguire.

If the concept had retained the link to the exercise of coercion that was so central to the underlying Strasbourg case-law, then there would be no need to engage in the challenging

[4] At least in circumstances where there could be any suggestion that the State's failings may have brought about or hastened the person's death, as opposed to the position where there could be no suggestion but that the death was as a result of natural causes with no suggestion of any failure on the part of the State.

intellectual exercise of explaining why not all deprivations of liberty are equal when it comes to engaging the obligations of the State under Article 2 ECHR. Put another way, if every deprivation of liberty always and everywhere involved the exercise of power (either directly by, or sanctioned by the State) to bring about a state of affairs contrary to the will of the person, then it would be very difficult to see why that should not carry with it the corollary that an obligation would arise to secure the right to life of that person. Conversely if – as is now the case in England & Wales – a deprivation of liberty can arise in circumstances where there is no indication that the person was unhappy with the situation, but they lacked the capacity to consent to the arrangements for them, then it is not so obvious why the operation of reactive mechanisms to ensure a check on those arrangements should automatically give rise to such an obligation.

Entirely coincidentally, just before this judgment was handed down, Alex recorded a conversation with Dr Lucy Series discussing her work on the evolution of the concept of confinement for purposes of care, their conversation being available here.

As a final note, it may have been the case that there was nothing on the materials before the Court of Appeal to suggest that – at the time it considered the matter in February 2020 – there was a "*widespread difficulty in taking individuals with learning disabilities (or elderly dementia patients) to hospital when it is in their interests to do so*." However, many might consider that the issue over the past few months of the COVID-19 is not so clear-cut.

The Ombudsman's office bares its teeth

The Local Government and Social Care Ombudsman has **published** an important report into its investigation into the complaint against City of Bradford Metropolitan District Council.

The complainant was a woman, 'Ms G' described as having Autism Spectrum Disorder, severe anxiety disorder, depressive disorder and physical impairments including hypertension and severe chronic pain. The council carried out a social care assessment in June 2014 via the Ms G's psychiatrist, with who she had a good relationship, which found that she had eligible needs. The council eventually agreed to make direct payments available so that she could fund a support worker. In fact, no support was provided, and the Ombudsman's decision sets out the various meetings, complaints, and correspondence that took place as Ms G tried to access the support to which she was entitled. Her difficulties in communicating arising from her autism were not understood by the Council, which failed to accommodate them or to consider appointing an advocate for her. The Ombudsman found multiple failings in addition to the failure to provide support, including failing to respond to Ms G's request for a payment that she could use to help someone to complete the necessary financial assessment, failing to make reasonable adjustments as required by the Equality Act, and causing distress to Ms G by describing her as difficult and uncooperative. In addition to an apology, the Ombudsman recommended that the Council:

> *pays Ms G £60,000 to acknowledge the substantial adverse impact on her wellbeing caused by the failure to provide her with the support the Council assessed she needed and the associated distress and severe anxiety she*

> *experienced. The impact includes (but is not limited to) the adverse and severe impact on her ability to get the support she needed with daily living skills such as meal preparation and planning, dealing with day to day matters with other organisations, accessing health services with suitable support, avoiding social isolation and travelling safely to and from her home. This is likely to have exacerbated her severe anxiety and depressive disorders. The remedy is calculated based on the substantial difficulty Ms G has had since being assessed and left without formal support for over five years. This equates to £1,000 monthly x 60 months; and*
>
> *discusses with Ms G and her representative whether the payment will impact on her entitlement to benefits/finances and if necessary, pay an independent professional person to provide her with financial advice.*

The Ombudsman also made wider recommendations that the Council:

> *reviews the findings of this investigation and consider whether training is needed for officers responsible for care and support planning around autism and the duty to make reasonable adjustments; and*
>
> *consider whether its policies and procedures relating to people who use services who are autistic and have associated mental health disorders is in line with best practice.*

It is very unusual for the Ombudsman to recommend payment of such a substantial sum, but it undoubtedly reflects the dire straits in which Ms G was left for over 5 years.

Parole Board hearings, participation and impaired decision-making capacity

R (EG) v Parole Board & Ors [2020] EWHC 1457 (Admin) (Administrative Court (May J))

Other proceedings – judicial review

Summary[5]

A prisoner, EG, had learning difficulties which prevented him from instructing a (legal) representative to act for him in the review the Parole Board was conducting of the necessity of his continued detention. He challenged the failure of the Parole Board and the Secretary of State for Justice to secure his effective participation in his parole process so as to ensure a timely review of his continued detention as required by Article 5 of the European Convention on Human Rights.

It was not in dispute that an oral hearing was necessary in EG's case; nor was it contested that if the Parole Board Rules did not provide a proper mechanism to enable EG, as a person lacking capacity, to participate in his hearing then he would have been prevented from having a fair hearing and would have been entitled to succeed in his claim.

The claim had a long and complex history, not least because of the publication (part-way through) of a new set of Parole Board Rules in

[5] Note, as Alex was involved in this case, and whilst he drafted the summary, he did not draft the comment.

2019, which provided (at Rule 10(6)(b))for the appointment of *"a representative (solicitor or barrister or other representative)* […] *where the prisoner lacks the capacity to appoint a representative and the panel chair or duty member believes that it is in the prisoner's best interests for the prisoner to be represented."*

The claim was very widely framed, including by reference to the Equality Act 2010 and the Public Sector Equality Duty, but, not least because of the way in which the wider aspects had been pleaded and developed, May J confined herself to specific consideration of EG's position, in particular the need for a litigation friend (or other mechanism) to enable his effective participation in his parole process.

The key issues May J had to decide were therefore: (1) whether a solicitor can act in a dual capacity in parole reviews, as they do in the Mental Health Tribunals; (2) whether the 2019 Rules, properly construed, permit the appointment of a litigation friend; and (3) the role of the Official Solicitor as litigation friend of "last resort" for prisoners in their parole review. Before deciding these, however, she made some observations about the dispute between the parties (including the intervener Equality and Human Rights Commission) as to the precise number of prisoners who might require steps to be taken to secure their participation. She declined to resolve the dispute, however, noting that it was something of a red herring as "[t]*he case of EG shows that the issue of prisoners lacking capacity to participate in their parole review is not theoretical and that there is a need to be addressed*" (paragraph 74).

Solicitors acting in a dual capacity

After a careful review of the evidence, including that adduced by the Law Society as intervener, May J concluded that "the safeguards in terms of training and accreditation, taken together with specific legal aid funding arrangements create, in my view, a very particular mechanism for the representation by solicitors acting in the best interests of patients lacking capacity to participate effectively at a hearing before the MHT. There is currently no similar accreditation scheme, and different arrangements for public funding, in respect of a parole review for a prisoner who lacks capacity" (paragraph 85). She continued

> *87.* […] *For a prisoner who lacks capacity, the risk assessment process that is fundamental to a parole review considering release from prison engages a consideration of many similar matters to those arising at a MHT where the tribunal is considering release from hospital, such as: mental capacity and human rights, housing, risk to others and a suitable care package. In the MHT the effective participation in his or her hearing by a patient lacking capacity is in my view able to be secured because they are represented by someone who has had to demonstrate extensive experience, who has attended at a special training course and who has been screened and interviewed. I do not see how effective participation in their parole review for a prisoner who lacks capacity could be ensured if they were to be represented by a "best interests" solicitor without similar safeguards. That some prisoners lacking capacity may in the past have been represented by a solicitor acting in their best interests without challenge is not, in my view, an answer to the issue which has now been raised.*

> *88. Accordingly I agree with submissions made by the other parties that, in the absence of an analogous system of accreditation to that operating in the MHT, EG needs a litigation friend to act in his best interests, amongst other things to give instructions to his solicitors. That raises the question of whether the 2019 Rules enable the Board to make such an appointment.*

The 2019 Rules

May J concluded that: "*whilst considerably wanting in clarity, the Rules must and do permit the Board to appoint a litigation friend where one is needed to facilitate access of a non-capacitous prisoner to his or her parole review*" (paragraph 93). She considered that the plain wording of Rule 10(6) in its reference to "*other representative*" to encompass the potential for a litigation friend, but that, bearing in mind the obligations under s.3(1) HRA 1998 to construe legislation compatibly with the ECHR:

> *99* […] *even if I am wrong to do so, it would in my view require much clearer wording for me to conclude that the 2019 Rules prevented the Board from being able to appoint a litigation friend where it was necessary to ensure a fair hearing. The disadvantage to which a prisoner lacking capacity risks being subject, without a person to act in his best interests upon the available material and to instruct a solicitor or other legal representative to act in his parole review, would be so extreme that an explicit exclusion would be required before a court could conclude that this was what Parliament had intended. I think Mr Auburn is right to say that having a litigation friend is so fundamental to ensuring a fair hearing for a person who lacks mental capacity that it would require words which clearly exclude such an appointment before a court could find that it was not provided for.*

In this, May J also held that, even if Rule 10(6) did not assist, it would be possible to construe the wider case management power in Rule 6 so as to enable the appointment of a litigation friend.

The role of the Official Solicitor

By the time the matter came before May J, the Official Solicitor had agreed to act for EG in the parole process subject to certain conditions. However, going forward, complex arguments were advanced by the Official Solicitor (in her own right) as to her powers to act before the Parole Board. May J did not express a final conclusion on the construction of the relevant provisions (s.90(3A) Senior Courts Act 1981), but provisionally preferred the wider construction advanced by the Parole Board to the effect that the Official Solicitor did have such power, but she "*could not be expected reasonably to exercise that power in circumstances where her department was untrained or otherwise ill-equipped to do so*" (paragraph 116). She made no finding as to whether that was the case there, but noted that "one of the purposes of consulting affected parties, like the OS, when introducing rule changes must be to identify and address such issues," the OS not having been consulted.

Discrimination

Declining to consider in detail the wide-ranging claims formulated in this regard, May J's conclusion was:

> *131.* […] *confined to the existence of a mechanism for affording EG full and proper representation in preparation for, and at, his oral hearing. In his case no other difficulty has been identified: his lack of capacity was picked up at an early stage and his solicitors have got legal aid to represent him in his parole process; what is wanting is a litigation friend to represent his best interests in giving his solicitors instructions, alternatively an accreditation system (or similar) to permit his solicitors properly and ethically to act in a dual capacity, as solicitors are able to do in the MHT.*

Delay

On the facts, May J found that "[e]*ven for a prisoner with his complex needs, a delay of over two and a half years appears to me to involve a breach of* [his Article 5(4) rights]. She identified a number of relevant considerations going to the further consideration of the consequences of this delay, but did not resolve them in the judgment.

Comment

The case is a clear example of the importance of the HRA 1988 in safeguarding the rights of vulnerable people. While May J concluded that the references to "other representative" in the Parole Board Rules 2019 permitted the appointment of a litigation friend, importantly she relied heavily on the interpretative duty in s.3(1) HRA 1988 to bolster this conclusion. Indeed, as set out above, May J explained that given the fundamental nature of rights involved, it would only be possible to draw the contrary conclusion in the event of an "explicit exclusion". As such, this case is not only significant for mental capacity and prison law practitioners, but it also adds to the jurisprudence on the approach to s.3 HRA 1988, indicating that that court should be slow to reach the conclusion that no human rights compatible interpretation is possible.

Inclusive justice: a system designed for all

The Equality and Human Rights Commission has published an important report looking both at how the criminal justice system currently fails to respond the needs of those with disabilities or with mental health conditions, and what steps would be required to bring about an inclusive system.

THE WIDER WORLD

ECtHR's guide on Article 5 ECHR

The Court has updated (on 30 April 2020) its guide on the right to liberty and security which provides a useful, concise summary of its jurisprudence. Relevant to the pandemic, it stresses that the context of measures is important when determining whether liberty is restricted or deprived, "*since situations commonly occur in modern society where the public may be called on to endure restrictions on freedom of movement or liberty in the interests of the common good*" (para 6).

As to the objective element, firstly, the relevant factors include "*the possibility to leave the restricted area, the degree of supervision and control over the person's movements, the extent of isolation and the availability of social contacts*" (para 11). Secondly, as to the subjective element, "[t]*he fact that a person lacks legal capacity does not necessarily mean that he is unable to understand the consent to* [the] *situation*" (para

16). And for a fuller discussion of "legal" and "mental" capacity in the context of consent to deprivation of liberty, see Alex's paper. Thirdly, State responsibility "*is engaged if it acquiesces in a person's loss of liberty by private individuals or fails to put an end to the situation*" (para 22).

What might in due course be of relevance when LPS comes into force (see paras 21-22 of Neil's blog), factors relevant to the "quality of law" which safeguards against arbitrariness "*include the existence of clear legal provisions … for setting time-limits for detention*" (para 34). Given the absence of urgent time-limits prior to an LPS authorisation, this could prove significant.

The guide also incorporates the significant *Rooman* decision which is worth setting out in full as to when deprivation of liberty is justified for purposes of Article 5(1)(e) (the relevant limb for purposes of both DoLS and the MHA 1983):

> *121. The administration of suitable therapy has become a requirement of the wider concept of the "lawfulness" of the deprivation of liberty. Any detention of mentally ill persons must have a therapeutic purpose, aimed at curing or alleviating their mental-health condition, including, where appropriate, bringing about a reduction in or control over their dangerousness (Rooman v. Belgium [GC], § 208).*
>
> *122. The deprivation of liberty under Article 5 § 1(e) thus has a dual function: on the one hand, the social function of protection, and on the other a therapeutic function that is related to the individual interest of the person of unsound mind in receiving an appropriate and individualised form of therapy or course of treatment. Appropriate and individualised treatment is an essential part of the notion of "appropriate institution" (Rooman v. Belgium [GC], § 210).*

Finally, rather than looking at the right to compensation in Article 5(5) through the lens of a procedural versus substantive violation, the guide reminds up that the court focuses more on the seriousness of the violation:

> *295.* [C]*ompensation which is negligible or wholly disproportionate to the seriousness of the violation would not comply with the requirements of Article 5 § 5 as this would render the right guaranteed by that provision theoretical and illusory (Vasilevskiy and Bogdanov v. Russia, § 22 and 26; Cumber v. the United Kingdom, Commission decision; Attard v. Malta (dec.)).*

It might be argued that this approach would be subtly different if one could logically have a serious violation which would have ultimately made no difference to the outcome. In other words, should we be focusing on the seriousness of the violator's conduct and lack of legal compliance ('procedural justice'), rather than concentrating on whether the outcome would have been any different ('substantive justice')? From the ruminations of Neil, a frustrated human rights lawyer…

When should a relationship not attract the protection of Article 8 ECHR?

Evers v Germany [2020] ECHR 356 (European Court of Human Rights, Fifth Section)

Article 8 ECHR – right to family life

This case concerned the application of Articles 8

and 6 in the context of a private (sexual) relationship between a man (the applicant) and the adult daughter of his partner. The background facts are of great importance.

The daughter, referred to as V, had a moderate learning disability: "*She was highly restricted in her ability to comprehend, concentrate and memorise things, as well as in her sense of orientation. Her ability to communicate was limited to word fragments, which rendered impossible any meaningful communication. She had no ability to make judgments, as her intellectual development corresponded to that of a four-year-old child*."

V's mother, the man's partner, had been appointed V's guardian. Criminal proceedings were instigated against the applicant in 2009, when he was around 70 years old and V was 22 years old. His partner had reported sexual contact between them and that the applicant had admitted the same and "*attributed the incident to the fact that* [his partner] *had refused the applicant sexual intercourse in the past.*" V became pregnant by the applicant. His partner subsequently withdrew the allegations, and said she consented to the planned marriage of her partner and her daughter.

The criminal proceedings were discontinued on the basis that V's GP said she was '*perfectly capable of physical resistance*' if she had not consented to sexual relations with the applicant. V was later placed in a residential home for people with disabilities, and a professional guardian appointed in place of her mother, on the basis that her mother had failed to prevent her from suffering sexual abuse by the applicant. These decisions were made by a district civil court which obtained expert evidence as to V's mental functioning and found that she had no comprehension of sex, marriage or pregnancy, and was susceptible to "*every seemingly friendly suggestion.*" In light of their decisions, criminal proceedings were re-instigated against the applicant. By this time, V had given birth to a son who had been placed with a foster family. The applicant and V had separate contact with the son every 4-6 weeks. The criminal proceedings were eventually discontinued on the basis that the applicant and V's mother both paid fines to non-profit organisations.

Subsequently, the applicant and his partner visited V at the care home, and V became so distressed she required medication. The guardian decided to prohibit contact between V and the applicant, who had continued to say that he wanted to pursue an intimate relationship with V, and between V and her mother. The applicant said that the reason for V's distress was that she wanted to come him and live with them, and he objected to her having been fitted with a contraceptive coil. He and his partner set up a website about their fight for a common family life. The district court was asked to determine whether the contact ban should remain. V had a guardian ad litem appointed and the judge met V with her guardian and guardian at litem at the care home. The contact ban was upheld. The European Court summarised the court's reasons as follows: "[t]*he applicant's and V.'s child was the result of a severe, massive and illegal violation of V.'s personality rights - not to say the criminal sexual abuse of a person incapable of resistance. V. had been fully incapable of forming the will to resist seemingly friendly suggestions. Her mental disorder had precluded the ability even to grasp the substance, consequences and risks of sexual acts and pregnancy; her blindly confident and obedient personality had meant that*

convincing her to engage in sexual relations had not required significant effort." The Court also noted that V had never asked after the applicant or given any indication she wanted to see him, or that she had any grasp of who he was other than a friend of her mother's.

The applicant alleged that his rights under Article 8 and Article 6 had been breached. The ECtHR found that his Article 8 rights were not even engaged, but that there had been an Article 6 breach. Interesting dissenting opinions found instead that Article 8 was engaged but not breached, and that Article 6 was not breached either.

The majority held that:

1. there was no issue of the applicant having a family life under Article 8. "*The mere fact that the applicant had been living in a common household with* [his partner] *and V and that he is the biological father of V's child does not, in the circumstances of the present case, constitute a family link which would fall under the protection of Article 8 of the Convention under its 'family life' head*;

2. nor could the applicant rely on a right to private life under Article 8. It did not guarantee a right to establish a relationship with a *particular person, and in any event 'private life does not as a rule come into play in situations where a complainant does not enjoy "family life" within the meaning of Article 8 in relation to that person and where the latter does not share the wish for contact. This is all the more so if the person with whom it is wished to maintain contact has been the victim of behaviour which has been deemed detrimental by the domestic courts.*"

3. However, the District Court's decision to uphold the contact ban breached Article 6 because even though they had sufficient evidence for their conclusion, and had been justified in disclosing only parts of the guardianship case file to the applicant, there should have been an oral hearing at which the applicant was heard, not only V. This was because of the far-reaching nature of the contact ban and the need for the court to *"form their own impression of the applicant and [V] to explain his personal situation."*

No damages were awarded.

The dissenting judgments took a completely different approach, finding that Article 8 was engaged, though it had not been breached, and pointing out the inconsistency between finding that there was a relevant civil right for Article 6 purposes, but no engagement of Article 8. The question that should have been asked was '*whether the ban affected an aspect of the applicant's own social identity with the result that his right to a private life under Article 8 of the Convention could have been said to be engaged to this limited extent'*. This would, in the view of the minority, have ensured that the court considered both aspects of the applicant's case from the right perspective:

> *In short, viewing the decision-making process through the lens of Article 8 of the Convention would have ensured that the rights of the absent "party" – V. – remained centre stage. Shifting the focus to Article 6 of the Convention meant, in contrast, that the applicant risked becoming the central if not sole focus of the Court's assessment. In addition, when assessing the balance struck by the national courts via Article 8 of the*

> *Convention, the Court could have emphasised the very limited nature of the private life interest on which he could rely thereunder - namely his own social identity - and the fact that he had no unilateral right to insist on contact with a person like V. The State's positive duty to protect V. as a vulnerable person from acts of abuse would also have come fully into play."*

On Article 6, the dissenting judges considered that there was no underlying civil right for the applicant to have contact with V. There was no such right in statutory law as V was not a child. The minority considered that there was no material difference between not having a civil right to contact and the existence of an order prohibiting contact. One judge, who found that that neither A6 nor A8 was engaged, quoted Milan Kundera:

> *...the more the fight for human rights gains in popularity, the more it loses any concrete content, becoming a kind of universal stance of everyone toward everything, the world has become man's rights and everything in it has become a right: the desire for love the right to love, the desire for rest the right to rest, the desire for friendship the right to friendship, the desire to exceed the speed limit the right to exceed the speed limit, the desire for happiness the right to happiness, the desire to publish a book the right to publish a book, the desire to shout in the street in the middle of the night the right to shout in the street.*

Another concluded, more prosaically, that "[i]*t is difficult not to avoid the impression in the circumstances of the present case that the wrong conclusion has been reached in the wrong case involving the wrong applicant*."

Comment

This decision of ECtHR is of considerable interest. The pragmatic reasons for the majority's refusal to say that Article 8 was engaged are clear, even if the legal basis is less obvious. They are careful to tie their reasoning to the particular circumstances of the case - obviously horrified by the relationship between the applicant and his partner's daughter. It may be that the case can therefore be distinguished when looking at other private and family relationships concerning a person with a mental disability, or family law cases where the parent of a child has been accused or convicted of assault against that person. The case is, at the very least, a reminder that it should not be automatically assumed that Article 8 protects every relationship, and that in particular it does not generate a right to have contact with a specific person. The minority's reasoning, however, is perhaps more convincing.

Escalation and Articles 2 and 5 ECHR

Aftanache v Romania [2020] ECHR 339 (European Court of Human Rights, Fourth Section)

Article 2 ECHR – duty to protect life – Article 5 ECHR – deprivation of liberty

Summary

In *Aftanache v Romania*, the applicant contended that his life was put at risk by medical personnel from the ambulance service and hospitals, who refused to administer his insulin treatment despite his precarious condition. He also argued that he had been unlawfully deprived of his liberty when he was taken against his will to hospital for testing, in disregard of his actual medical condition.

The facts of the case are on their face sufficiently unlikely that they do not afford of an easy summary. The story started when Mr Aftanache went to a pharmacy to get some medicine, having been feeling ill for around 10 days and taking cold medication. On arrival, he had to sit down as he was feeling weak. He explained his situation to the pharmacist and she called an ambulance to help him. When the ambulance arrived, one of the nurses suspected had taken drugs and confronted him. He denied having taken drugs and informed the paramedics about his medical condition. A blood test performed in the ambulance confirmed an imbalance in his glucose level. As there was no insulin available in the ambulance, the applicant asked the paramedics to help him walk home to take his treatment. They refused and allegedly told him that they would first take him to hospital to check what prohibited drugs he had taken, and only after that would he receive insulin. He refused to be taken to the hospital; according to him, the paramedics then closed the ambulance door and restrained him on a stretcher. One of the paramedics called the police for help. In the commotion, Mr Aftanache managed to alert his wife.

When the police arrived, he told them he needed to take his insulin from his home and reiterated that he was not under the influence of drugs. He asked the police officers to accompany him to his home. They refused, but assured him that he would get his insulin at the hospital. They accompanied the ambulance to hospital; when he arrived he told the doctor on duty that he had diabetes and needed to take his insulin. The ambulance paramedics told the doctor that Mr Aftanache was on drugs. The doctor refused to administer the insulin, asking him to take a blood test for prohibited drugs first. He refused to take the test. The doctor then decided that his state did not qualify for emergency treatment and sent him to the local psychiatric hospital. He was taken there by the same ambulance under the same police escort. There, he was again restrained on a stretcher and the medical personnel tried to inject him with medication to calm him down. He refused the medication and eventually managed to untie himself, and called his diabetologist. When he told her about his situation, she tried to talk to the medical personnel, but they refused to take the call. His diabetologist phoned a nurse whom she knew was working in the same medical facility and asked her to explain the applicant's situation to the medical team attending him. Meanwhile, wife arrived at the hospital. She was informed that the applicant would be transferred to another psychiatric hospital outside town, where he would receive appropriate treatment for his drug addiction. Together with the nurse sent by the applicant's diabetologist, she insisted that the applicant's situation had been caused by his chronic disease and that he was not a drug addict. Eventually, the applicant relented and accepted to be tested for drugs. To that end, he was taken back to the originally hospital by the same ambulance and police escort. The doctor tested his blood and confirmed that he had not taken any prohibited drugs. The applicant then received insulin, but in a dose that was different from his prescribed treatment. The blood test also revealed that the applicant was severely anaemic. Because of that, and since the applicant still had a fever, he was advised to go to a different hospital, where he ultimately went (with his wife, rather than by ambulance, and via his home to get his insulin), and received adequate treatment.

Mr Aftanache having failed to get any satisfaction from the domestic authorities, who conducted a distinctly half-hearted criminal investigation, he took his case to Strasbourg.

Article 2

The ECtHR helpfully recalled that Article 2 can be in play even if the person whose right to life was allegedly breached did not die, referring back to the Grand Chamber decision in *Nicolae Virgiliu Tănase v. Romania* [2019] ECHR 491. Where the complaint is made by a person with a serious illness, and where the person is not killed but survived, and where they do not allege any intent to kill, the criteria for a complaint to be examined are:

> *49.* […] *firstly, whether the person was the victim of an activity, whether public or private, which by its very nature put his or her life at real and imminent risk and, secondly, whether he or she has suffered injuries that appear life-threatening as they occur. Other factors, such as whether escaping death was purely fortuitous, may also come into play. The Court's assessment depends on the circumstances. While there is no general rule, it appears that if the activity involved by its very nature is dangerous and puts a person's life at real and imminent risk, the level of injuries sustained may not be decisive and, in the absence of injuries, a complaint in such cases may still fall to be examined under Article 2 (see Nicolae Virgiliu Tănase, cited above, § 140, with further references).*
>
> *50. The Court has further held that an issue may arise under Article 2 where it is shown that the authorities of a Contracting State have put an individual's life at risk through the denial of the health care which they have undertaken to make available to the population generally (see Lopes de Sousa Fernandes v. Portugal [GC], no. 56080/13, § 173, 19 December 2017).*

On the facts of the case as presented by the applicant, to which the Government of Romania had not presented "any sustainable alternative version," it was clear that he and his wife had informed all those involved of his condition and his urgent need for medication; his diabetologist had also tried to speak with the hospital doctors, but her intervention had been ignored; and the denial of treatment caused a threat to his life serious enough to engage the State's responsibility under Article 2 ECHR to carry out a proper procedural investigation. The ECtHR had little hesitation in finding that the Romanian authorities had not discharged their duty to do so, such that the duty was breached. Interestingly, the court considered that "the gross deficiencies identified in the domestic investigation make it impossible to assess whether the State complied with its positive obligation to protect the applicant's life. For that reason, the Court will not make a separate assessment of the admissibility and merits of this part of the complaint" (paragraph 73).

Article 5

The court reiterated that Article 5(1) can apply to deprivations of liberty of a very short length. It continued:

> *81. The Court has already established in its case-law that the taking of a person by the police to a psychiatric hospital against his or her will amounts to "deprivation of liberty" (see Ulisei Grosu v. Romania, no. 60113/12, §§ 27-32, 22*

> *March 2016). In the present case, there is nothing to suggest that, as a matter of fact, the applicant could have freely decided not to accompany the paramedics and police officers to the hospitals or that, once there, he could have left at any time without incurring adverse consequences (ibid., § 28).*
>
> *82. The Court considers that throughout the events there was an element of coercion which, notwithstanding the relatively short duration of the events, that is about six hours (see paragraph 19 above), was indicative of a deprivation of liberty within the meaning of Article 5 § 1.*

No legal basis was offered by the authorities for the applicant's deprivation of liberty, but the court of its own motion identified possible reasons, dismissing each in turn. Of particular note is the court's observation that:

> *99. The Court accepts that the applicant, faced with a denial of treatment that he considered vital for him, could have been uncooperative. However, it cannot but note that not only was he denied treatment, but he was also falsely accused of drug use and threatened with psychiatric confinement. Throughout that time, he was suffering from an imbalance in his blood sugar level. A certain state of discomfort and agitation is thus understandable in those circumstances. However, there is no evidence that the medical professionals had considered his personal circumstances and the possible explanations for his behaviour before recommending admission to the psychiatric hospital. Consequently, the Court considers that the applicant's alleged agitation was not sufficient to render the measure of confinement necessary.*

The court therefore had little hesitation in finding that there was a breach of Article 5(1) as well.

Comment

Whilst the facts of the case appear on their face almost unbelievable, many will be able to recall situations of escalation in other situations leading – sometimes – to fatal outcomes (another, domestic, example, in the MCA context, is the case of ZH, although in that case, fortunately, the individual did not die, even if they suffered serious psychiatric injury in consequence). The case is of wider interest, perhaps, for three key points:

(1) The important reminder of the scope of Article 2 even where the individual in question does not die, but the relevant failures of the state put their life at sufficient risk;

(2) The reminder that deprivation of liberty can arise in a short period of time – in this case, around 6 hours;

(3) The reiteration of the importance of the presence of coercion when identifying if a situation gives rise to a deprivation of liberty. This is a routine mantra in the Strasbourg case-law, which sits at an interesting tangent to the way in which the case-law has developed in England and Wales in which deprivation of liberty can arise in a situation such as MIG's where it is difficult to identify any element of coercion (for more on this, see Alex's discussion paper).

Supported decision-making report

The European Network of National Human Rights Institutions and Mental Health Europe have published a new report on supported decision-making for people with disabilities. It highlights what supported decision-making entails in theory and in practice, as well as outlining developments in Europe and the role of National Human Rights Institutions in ensuring compliance with international standards. The report contains a useful review of the position in many European states, although, oddly, only singles out (within the UK) the amendment in Scotland to the Mental Health (Care and Treatment) Act 2003 in 2015 which enabled the making of advance statements in the psychiatric context. On the face of it, the Mental Capacity Act (Northern Ireland) 2016, which allows for advance decisions to refuse all forms of treatment – whether for mental disorder or physical disorder – looks much more radical.

It would also – perhaps – have been useful if the authors of the report not blinkered themselves by seeing legislation using the term 'best interests' as leading to the same end point of automatic overriding of the person's will in favour of the judgment of professionals. They could, for instance, have considered the raft of cases before the Court of Protection (including some considered in this month's report) in which it can be said with a straight face that the decision made properly respected the individual's rights, will and preferences – and, importantly, responded to situations where the individual in question could not on any view be said to be in a position to make the decision themselves: the case of MSP, for instance. The case-law of the Court of Protection also contains decisions that address the quintessentially hard cases that the Committee on the Rights of Persons with Disabilities has historically found so hard to address.

The MCA is undoubtedly not perfect, or perfectly applied, but it is capable of being applied in a way that does not meet the caricature of the type of legislation against which the Committee has – rightly – set its face.[6]

Book review

The Approved Mental Health Professional Practice Handbook (Kevin Stone, Sarah Vicary, Tim Spencer-Lane, 2020, Policy Press, c.£20.00)

This book fulfils a very important role for those who are training to become Approved Mental Health Professionals, those acting as AMHPs, and - I suggest - those working alongside AMHPs. It does not seek to be a one-stop shop for the legal provisions that are so central to the discharge by AMHPs of their role (nor to replace the acknowledged Bible of the law in this area, Richard Jones' Mental Health Act Manual[7]). Nor does it seek to direct AMHPs in the way that the Codes(s) of Practice to the Mental Health Act.[8] Rather, it

[6] Although, as Alex has noted, it may be that, when it has put before it draft legislative frameworks which actually does address those cases, the new constitution of the Committee is willing to take a much more constructive approach.

[7] Although not referred to in the handbook, a rather easier read for those who want to navigate their way through the provisions of the MHA is the opening part of the Mental Health Tribunal Handbook (LAG 2015), which contains an excellent and accessible outline of the Act.

[8] One of the book's strengths is the way that it addresses the numerous differences between the way that the MHA is implemented in practice in England and Wales, not least through the operation of separate statutory Codes for both.

seeks to put the role of the AMHP into its wider context, and to enable putative and practising AMHPs to reflect upon their complex – and crucial – role. It does so in clear, accessible text, divided into three parts: (1) the AMHP in context; (2) the AMHP in practice; and (3) the AMHP in theory.

A key message of the book is the evolution both of mental health (and connected) legislation and its application in practice – and the authors even manage to address the (so far unimplemented amendments to the MHA 1983 contained in the Coronavirus Act 2020, as well as flagging areas where further change is likely, to be addressed in online resources (the page at present awaiting updates).

The authors are to be congratulated on a work which contains a huge amount within a (relatively) short compass, and will be sure rapidly and rightly to be bought and thumbed extensively by those working in this complex but vital role.

[Full disclosure: Alex was sent a review copy by the authors. He is always happy to review works in or related to the field of mental capacity, health and mental law (broadly defined)]

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Katherine has a broad public law and human rights practice, with a particular interest in the fields of community care and health law, including mental capacity law. She appears regularly in the Court of Protection and has acted for the Official Solicitor, individuals, local authorities and NHS bodies. To view full CV click here.

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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 recognised national and international expert in adult incapacity law. He has been continuously involved in law reform processes. His books include the current standard Scottish texts on the subject. His awards include an MBE for services to the mentally handicapped in Scotland; honorary membership of the Law Society of Scotland; national awards for legal journalism, legal charitable work and legal scholarship; and the lifetime achievement award at the 2014 Scottish Legal Awards.

Jill Stavert: j.stavert@napier.ac.uk

Jill Stavert is Professor of Law, Director of the Centre for Mental Health and Capacity Law and Director of Research, The Business School, Edinburgh Napier University. Jill is also a member of the Law Society for Scotland's Mental Health and Disability Sub-Committee. 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.

Conferences

At present, most externally conferences are being postponed, cancelled, or moved online. Members of the Court of Protection team are regularly presenting at webinars arranged both by Chambers and by others.

Alex is also doing a regular series of 'shedinars,' including capacity fundamentals and 'in conversation with' those who can bring light to bear upon capacity in practice. They can be found on his website.

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 the dementia charity My Life Films in return for postings for English and Welsh events. For Scottish events, we are inviting donations to Alzheimer Scotland Action on Dementia.

Our next edition will be out in 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 Report in the future please contact: marketing@39essex.com.

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