

Welcome to the March 2022 Mental Capacity Report. Highlights this month include:

- (1) In the Health, Welfare and Deprivation of Liberty Report: Capacity to refuse treatment while on a CTO and deprivations of liberty for children;
- (2) In the Property and Affairs Report: testamentary capacity;
- (3) In the Practice and Procedure Report: naming P, public or private hearings, judicial visits and litigation capacity;
- (4) In the Wider Context Report: voting rights and disability, sufficiency of care and Article 8, and Article 2 inquests;
- (5) In the Scotland Report: Guardians' remuneration and the Scottish Mental Health Law;

You can find our past issues, our case summaries, and more on our dedicated sub-site [here](#), where you can also find updated versions of both our capacity and best interests guides.

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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

‘Safe care at home review’ launched.....	2
Supreme Court grants permission to appeal in the case of Jacqueline Maguire	2
Voting rights and disability.....	3
Sufficiency of care and Article 8.....	3
Article 2 inquests, children and detention	5
National Mental Capacity Forum Report released.....	6
Book Review: Memoirs of an Incapacity Judge: “In the right place at the right time”.....	7
7 th World Congress on Adult Capacity, 7-9 June 2022	7

‘Safe care at home review’ launched

The Home Office and DHSC have commenced the Safe Care at Home Review. The aims of the review are:

- *To review the scope and accessibility of the existing protections for adults at risk of or experiencing abuse in their own home by people providing their care*
- *To review the availability and accessibility of the support for adults abused in their own home by people providing their care*

The announcement states that the review will be seeking to engage with experts by experience, people with lived experience and ‘*experts involved in delivery of the existing criminal and safeguarding system (including local authorities and social work professionals, police, Crown Prosecution Service)*’.

The review will not include those in care homes, but does appear to include those in supported living accommodations.

The review will consider:

Protections:

1. *Reviewing access and barriers to justice for adults at risk of or experiencing abuse by people providing their care in their own home where that behaviour amounts to a criminal offence, and access to civil orders such as injunctions and non-molestation orders.*
2. *Reviewing whether existing safeguarding legislation (adult safeguarding provisions in the Care Act, s.20 and 21 Criminal Courts and Justice Act) prevents and protect against this abuse, and how it is applied and accessed in practice.*

Support:

1. *Reviewing the support in place for adults abused in their own homes by people providing their care, which government provides, commissions or funds, including services provided for in legislation (for example, Domestic Abuse Act support services) and victim support services.*
2. *Assessing whether all victims of this abuse receive timely and appropriate*

support, regardless of protected characteristics in line with the Equality Act 2010.

Supreme Court grants permission to appeal in case of Jacqueline Maguire

The Supreme Court has granted permission to appeal the decision of the Court of Appeal in the case of *Jacqueline Maguire v HM Senior Coroner for Blackpool and Fylde* [2020] EWCA Civ 738.

Voting rights and disability

Anatoliy Marinov v. Bulgaria (application no. 26081/17)

Summary

Mr Marinov was placed under partial guardianship in 1999 after he had been diagnosed with psychiatric disorders. His partial guardianship had been approved by a court. As a result, his right to vote was automatically removed due to the Constitutional ban on voting rights for anyone under guardianship.

Mr Marinov brought a challenge in 2015 for restoration of his legal capacity in the Bulgarian domestic courts. Following a number of procedural difficulties in his application, he was ultimately successful in obtaining a judgment restoring his legal capacity in December 2017.

As a result of the guardianship having been in place, Mr Marinov was unable to exercise his voting rights during the March 2017 Bulgarian Elections.

The ECtHR held that there had been a violation of Article 3 of Protocol No. 1 (the right to free elections) to the European Convention on Human Rights ('ECHR').

The court noted that the essence of the complaint was that Mr Marinov had been barred from participating in any form of election while under partial guardianship. The position taken by

the Government was that the removal of voting rights from those under guardianship ensured that only those capable of making informed and meaningful decisions could choose the country's legislature.

While the ECtHR was satisfied that the government's position amounted to a legitimate aim, it noted that the blanket restriction on voting did not distinguish between total and partial guardianships. Consequently, the proportionality of the Constitutional restriction had not been considered in relation to the exercise of the right to vote, nor was it possible to assess the proportionality of the restriction within the legal framework.

The ECtHR reiterated that because Mr Marinov lost his right to vote on the basis of a blanket restriction, and that such restrictions were questionable, the indiscriminate removal of Mr Marinov's voting rights without an individual review and solely on the basis of his mental disability could not be considered proportionate to the legitimate aim for restricting the right to vote. Accordingly, the court found a violation of Article 3 of Protocol No. 1 to the Convention.

The court held that Bulgaria was to pay the applicant EUR 3,000 in respect of non-pecuniary damage and EUR 1,926 in respect of costs and expenses.

Sufficiency of care and Article 8

Jivan v Romania (application no. 62250/19) [2022] ECHR 125 (Fourth section)

Article 8 ECHR

Summary

The European Court of Human Rights ("ECtHR") considered an alleged violation of (inter alia) Article 8 in the context of an elderly, disabled man who had become bedridden. The complaint arose from the domestic authorities'

classification of his disability as “medium-level”, which meant he was not entitled to a personal assistant. Only if his situation was categorised as a case of severe disability, pursuant to Romanian law, would he qualify for a personal assistant.

The applicant was in his late eighties in 2017 and had had his leg partially amputated in 2015. He had a range of medical conditions, including cataracts, hearing loss and incontinence. He had recently become bedridden because he had lost his strength to move his wheelchair; and he lived on the fourth floor of a building. He was supported by his son. It was noted, in 2015, that he weighed 40-45 kg. He died in 2020 and his son pursued the application on his father’s behalf.

He had been assessed by social services as being totally dependent and requiring a personal assistant to meet his most basic needs. The Commission for the Assessment of Adults with Disabilities had, however, classified his disability as medium-level. At first instance, the domestic court had determined that he had a severe disability but that was overturned on appeal.

The complaint was that by denying him the benefit of a personal assistant – a right which he should have been entitled to in accordance with Romanian law – his Article 8 rights had been breached because he had been deprived “*of his autonomy and of access to the outside world, thus forcing him into isolation*”. [28]

The court determined that Article 8 was applicable to the case. His conditions were severe: “*he was old, immobilised, partially incontinent, and needed help for his daily activities*”. [34] The authorities’ assessments had impacted on his personal autonomy and dignity.

The court reiterated that Article 8 is principally concerned with protecting the individual against arbitrary interference by public authorities. There

are positive and negative obligations pursuant to Article 8 – the latter may involve the adoption of measures to ensure respect for private life. In considering those obligations, regard must be had to the fair balance between the competing interests and a state’s margin of appreciation.

In this case, the court was concerned with funding for care and medical treatment: the relevant obligation was therefore the positive obligation. Generally, the margin of appreciation is wide in issues of healthcare and economic policy (*McDonald v. the United Kingdom*, no. 4241/12), but where the restriction impacted a particularly vulnerable group, such as the elderly and persons with disabilities, the margin is significantly narrower.

The court acknowledged that that establishing a person’s level of disability involves a personalised and complex evaluation and that it does not, in accordance with the principle of subsidiarity, fall on the court to substitute its views for those of the national authorities. However, the state’s obligation requires that the domestic courts interpret domestic law in a manner that is compliant with the Convention. The domestic court focused on the partial amputation and failed to engage with his broader situation, both medical and social, particularly his autonomy and dignity.

The court concluded that the domestic authorities act reasonably in the circumstances to ensure the effective protection of his right to respect for private life. There had been a violation of Article 8. The court awarded, on an equitable basis, the applicant EUR 8,000 for pecuniary and non-pecuniary damage.

Comment

The facts of this case are extreme. Indeed, the court specifically noted that (para 31):

Article 8 cannot be considered applicable

each time an individual's everyday life is disrupted, but only in the exceptional cases where the State's failure to adopt measures interferes with that individual's right to personal development and his or her right to establish and maintain relations with other human beings and the outside world. It is incumbent on the individual concerned to demonstrate the existence of a special link between the situation complained of and the particular needs of his or her private life (see Zehnalová and Zehnal v. the Czech Republic (dec.), no. 38621/97, ECHR 2002-V).

The court's approach in this case was informed, in particular, by the United Nations Convention on the Rights of Persons with Disabilities ("CRPD"). The CRPD specifically recognises:

- 1) the equal right of people with disabilities to live independently and be included in the community (Article 19);
- 2) that states shall take effective measures to ensure personal mobility with the greatest possible independence for persons with disabilities (Article 20); and,
- 3) the right of persons with disabilities to an adequate standard of living and social protection (Article 28).

Furthermore, the court considered that this case was not a choice between basic care or additional, more expensive care (which would fall within the state's margin of appreciation because it concerns resource allocation) but ensuring the applicant had the appropriate level of care and dignity. Thus, a violation of Article 8 was established.

Article 2 inquests, children and detention

R (Boyce) v HM Senior Coroner for Teesside and Hartlepool [2022] EWHC 107 (Admin) (HHJ Belcher)

In June 2018, fifteen-year-old Grace Peers moved to a placement just south of Middlesbrough, subject to a care order under the Children Act 1989. On 5 September she started a new school year, and was almost immediately excluded. Five days later, she was dead by suicide.

The inquest into her death had to grapple with the question of whether Grace was in 'state detention', such that the investigative obligation in Article 2 ECHR was automatically engaged. Any inquest has to ascertain the answer to four factual questions: who the deceased was; how they came by their death; when; and where. In many cases 'how' means 'by what means'. However, where the procedural obligation under article 2 is engaged, there is an enhanced investigative duty, and it means 'by what means and in what circumstances'.

The coroner concluded that Grace was not in state detention at the time of her death, and her mother launched a judicial review.

In *R (Boyce) v HM Senior Coroner for Teesside and Hartlepool* [2022] EWHC 107 (Admin), the Administrative Court concludes that the suicide of a child in care in a placement such as Grace's does not engage the Article 2 procedural obligation. Per *R (Morahan) v HM Assistant Coroner for West London* [2021] EWHC 1603, the enhanced investigative duty arises automatically: (a) where there is an arguable breach of the state's substantive Article 2 duties; and (b) certain categories of case will always give rise to a legitimate suspicion of state responsibility. Examples are killings by state agents, unlawful killings or suicides in custody, and suicides of involuntary mental health patients. In all these categories of case, any death will always give rise to a suspicion that the state was in breach of its substantive obligation under Article 2.

In Grace's case, the court considered the fact that she was living in a placement not of her own free will but as a result of being subject to a care order. It noted that she was not subject to a secure accommodation order, and that she went to school where she was free to leave. Her room at the placement had a lock on the inside. Considering *P v Cheshire West*, the court found that this factor was inconsistent with being under continuous supervision and control. While if she left police assistance would have been sought to find and return her, she was in a very different position from a child in secure accommodation. Her position was not analogous to state detention (a concept which the court noted was expressed in *Ferreira* to have some overlap with deprivation of liberty without being synonymous with it).

Comment

The court also held that even Grace she had been deprived of her liberty and/or detained at the placement, it would have concluded that this would not be attributable to the state because the placement was not a public authority for the purposes of the Human Rights Act 1998. This part of the judgment (although strictly obiter) will no doubt be interesting reading for those concerned with the public/private divide more generally.

National Mental Capacity Forum Report Published

The [National Mental Capacity Forum Chair's Annual Report 2020 – 2021](#) has been published. The report sets out the findings of a series of webinars held in 2020-2021, most of which dealt with issues arising for people with disabilities during the pandemic. The report highlights several issues that will inform the future work of the Forum, and sets out several proposals for 'investing to save': projects in which small investment is considered likely to avoid greatly increased expenditure in the future:

- *The Court of Protection urgently needs a modernised IT system that can cope with the workload, allow tracking of cases and ensure information is generated through proper system reports. During the pandemic the Court managed to continue to function remotely, but the absence of a modern IT system meant that paper files had to be couriered out to judiciary and court staff who were working from home. This was an avoidable expense, created potential security risks as these files contain highly confidential information, and meant that tracking of work was made more difficult. It is to the credit of the Court staff that they managed to maintain a service during lockdown, but the situation needs urgent attention with a modernised information system in place and overall computer upgrades.*
- *The Office of the Public Guardian needs to ensure that all those appointed to hold a Lasting Power of Attorney (LPA) are appraised of their duties to support the person for who they make decisions, and that their responsibilities only take legal force for making a decision on behalf of the person, when the person (donor of the LPA) lacks capacity for that particular decision (unless otherwise specified in the LPA). The donee (holder of the LPA) must undertake a best interests process and ensure that all decisions are taken solely in the best interests of the person who lacks capacity, and not in the interest of others.*
- *All involved in providing services to others need core mandatory training in the five principles of the MCA, and in awareness of pointers to abuse, particularly domestic abuse. Staff and volunteers alike need to know who to contact if they have concerns and need to know that their concerns will be heeded with sensitivity and confidentiality observed as appropriate.*
- *The Government - needs to provide straightforward guidance to Special Educational Needs staff in all sectors to*

prepare parents and guardians for the watershed of age 18, where the legal status of the person changes from 'child' to 'adult'. This should include encouraging parents and guardians to take early action to consider whether the young person has capacity to appoint their own LPA, or whether the Court of Protection will need to be involved. Failure to establish legal protection for the young person via one of these two routes leaves them particularly vulnerable in emergency situations, both for decisions relating to their health and welfare, and for financial decisions.

Book review: *Memoirs of an Incapacity Judge: "In the right place at the right time"*

Memoirs of an Incapacity Judge: "In the right place at the right time" (Gordon Ashton; available in paperback/Kindle via Amazon, 2022). Review by Alex Ruck Keene.

I should start this book with a declaration of interest: I have known Gordon Ashton for many years now, and (as he records) was recruited by him to work on the Court of Protection Practice, now published by LexisNexis. When still a judge, he was notable for his willingness to challenge orthodoxy; now in retirement, his characteristically brisk approach is even more notable, and this book makes powerful reading for anyone concerned both with the securing the rights of those with cognitive impairments, and the Mental Capacity Act 2005. I would go almost so far as to say that the chapter on life as an incapacity judge, and the appendices gathering relevant writings (including the introductions to a number of editions of the Court of Protection Practice) should make compulsory reading for Court of Protection practitioners. I say this because, from an uniquely informed perspective, Gordon questions whether the dream he has had of "a jurisdiction which would resolve the vacuum in decision-making for those who lack capacity [...] become a reality or is it turning

into a nightmare?" I will leave readers of the book, of whom I hope there are many, to discover his conclusions in this regard, but it is a vital question.

Gordon's memoirs are also of no little interest for the light that they shed on the "coal face" of the law – the courtrooms presided over by District Judges, who hear the vast majority of cases before both the Court of Protection and civil cases more generally, but whose judgments are rarely reported and about who too little is perhaps known. But the book should not be taken to be either to be a dry legal text, or a recital of legal achievements (although the achievements noted, in understated fashion, are extraordinary). It is motivated by a driving passion the source of which is explored in a chapter that is nearly as painful to read as it must have been to be write, above his beloved son Paul, who was learning disabled and died aged 28 in deeply troubling circumstances "due to failures of supervision" by those charged with his care. It is not surprising that some of the most challenging questions Gordon asks in this book are those directed at the safeguards that might be thought to protect those in Paul's situation.

All proceeds go not to Gordon, but to the Parkinson's Society. But that this charity will benefit from your purchase is the least of the reasons for considering buying it.

[Full disclosure: Alex was provided with a review copy by Gordon. He is always happy to review books in the field of mental capacity and mental health law (broadly defined)]

7th World Congress on Adult Capacity 7-9 June 2022

Against the odds, preparations and involvements from across the world are moving strongly forward to assure the success of the 7th World Congress on Adult Capacity in Edinburgh International Conference Centre on 7th–9th June

2022. Speakers from 29 countries across five continents (at latest count) have committed to attend personally (subject to any remaining controls affecting their individual journeys) to contribute to plenary and parallel sessions of the Congress. For Scotland and the UK, it will combine major involvement of Scotland's law reform process, led by the Scott Review Team, and eminent contributions from across the UK, with a once-in-a-lifetime worldwide perspective, with both contributions and interactions from far and wide. The event has by now been allocated to every inhabited continent except Africa, but this will be only the second time in Europe. The event is a must for everyone with an interest in mental capacity/incapacity and related topics, from a wide range of angles and backgrounds, including people with mental and intellectual disabilities themselves, and their families and carers; professionals, legislators, administrators, providers of care, support and advocacy services, and others. The event will provide:

- a focus for developments of human rights-driven provision for people with mental and intellectual disabilities,
- a powerful springboard for future research, reform and practical delivery,
- an opportunity to share and discuss worldwide practical experience and initiatives across the huge range and variety of relevant disabilities, in many cultural settings,
- as the first Congress since the start of the pandemic (the 2020 event having been postponed until 2024), a unique opportunity to consider the impact of the pandemic on human rights across the world,
- for professionals and workers in all relevant disciplines and services, an essential understanding of the rapidly evolving practicalities, possibilities and expectations that now set the standards of best practice, and
- in particular for practising lawyers and other professionals, an enhanced understanding of

current law, its proper interpretation, and forthcoming developments.

Certificates for CPD purposes will be provided to all who request them.

Amid the difficulties and threats of the pandemic and now war, but with excellent support and best advice, the organising committee opted for a live, in-person event, to a huge welcome from intending participants weary of life by online communications and platforms – helpful though they have all been in the absence of alternatives. Despite the difficulties, the organising committee has also been able to ensure financial viability through any uncertainties that may remain, with hugely valued support from both Scottish and UK Governments, and others, led by the Law Society of Scotland, and including supporters such as the National Guardianship Association of the United States, and with more promised in the pipeline, all to be duly acknowledged in the near future. Further such support continues to be welcome, from any who still wish to commit to contributing to the success of the event.

In terms of the programme, well over 100 abstract submissions (several of them multiple submissions by teams) from across the globe, each to be presented personally at the Congress, and all of a high standard, have been rigorously reviewed and accepted. The line-ups for the plenary sessions now appear to be largely settled, though with some potential contributors still to be confirmed.

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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 contributor to 'Assessment of Mental Capacity' (Law Society/BMA), and a contributor to Heywood and Massey Court of Protection Practice (Sweet and Maxwell). To view full CV click [here](#).



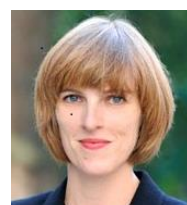
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Nicola appears regularly in the Court of Protection in health and welfare matters. She is frequently instructed by the Official Solicitor as well as by local authorities, CCGs and care homes. She is a contributor to the 5th edition of the *Assessment of Mental Capacity: A Practical Guide for Doctors and Lawyers* (BMA/Law Society 2019). To view full CV click [here](#).



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Katie advises and represents clients in all things health related, from personal injury and clinical negligence, to community care, mental health and healthcare regulation. The main focus of her practice however is in the Court of Protection where she has a particular interest in the health and welfare of incapacitated adults. She is also a qualified mediator, mediating legal and community disputes. To view full CV click [here](#).



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Arianna has a specialist practice in mental capacity, community care, mental health law and inquests. Arianna acts in a range of Court of Protection matters including welfare, property and affairs, serious medical treatment and in matters relating to the inherent jurisdiction of the High Court. Arianna works extensively in the field of community care. To view a full CV, click [here](#).



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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.



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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

Members of the Court of Protection team are regularly presenting at **Advertising conferences and webinars arranged both by Chambers and by others.** **training events**

Centre for Health, Law, and Society Symposium: Redrawing the Boundaries of Mental Health and Capacity Law The University of Bristol Law School is holding an online conference on **Wednesday, 9 March from 2:00-5:00PM**. The online event will be split into three sessions, and include Dr Camillia Kong as keynote speaker, and a response from Dr Lucy Series. The link to the event is: <https://www.bristol.ac.uk/law/events/2022/chls-symposium-2022.html>

UK Mental Health Act reform: Can it deliver racial justice and ensure the rights and wellbeing of people with mental health problems? A free conference is being held online on 9 March, co-hosted by Race on the Agenda and Mind, the title being: For more details, and to register, see [here](#).

7th World Congress on Adult Capacity, Edinburgh International Conference Centre [EICC], 7-9 June 2022 **The world is coming to Edinburgh – for this live, in-person, event.** A must for everyone throughout the British Isles with an interest in mental capacity/incapacity and related topics, from a wide range of angles; with live contributions from leading experts from 29 countries across five continents, including many UK leaders in the field. For details as they develop, go to www.wcac2022.org. Of particular interest is likely to be the section on “Programme”: including scrolling down from “Programme” to click on “Plenary Sessions” to see all of those who so far have committed to speak at those sessions. To avoid disappointment, register now at “Registration”. An early bird price is available until 11th April 2022.

The Judging Values and Participation in Mental Capacity Law Conference The *Judging Values in Participation and Mental Capacity Law* Project conference will be held at the [British Academy](#) (10-11 Carlton House Terrace, London SW1Y 5AH), on **Monday 20th June 2022 between 9.00am-5.30pm**. It will feature panel speakers including Former President of the Supreme Court Baroness Brenda Hale of Richmond, Former High Court Judge Sir Mark Hedley, Former Senior Judge of the Court of Protection Denzil Lush, Former District Judge of the Court of Protection Margaret Glentworth, Victoria Butler-Cole QC (39 Essex Chambers), and Alex Ruck Keene (39 Essex Chambers, King’s College London). The conference fee is £25 (including lunch and reception). If you would like to attend please register on our events page [here](#) by 1 June 2022. If you have any queries please contact the Project Lead, Dr Camillia Kong: camillia.kong@bbk.ac.uk.

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 April. 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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