



Welcome to the November 2018 Mental Capacity Report, including from the newest recruit to the editorial team, Katherine Barnes. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: an update on the Mental Capacity (Amendment) Bill; sex, risk and public anxiety; and a slew of significant decisions relating to medical treatment;

(2) In the Practice and Procedure Report: Sir James Munby addresses the LAG Community Care Conference and updates from the Court Users Group;

(4) In the Wider Context Report: relevant developments from around the world, including an important decision from Australia reflecting back on practice under the MCA;

(5) In the Scotland Report: a report from the World Guardianship Congress, and the impact in Scotland of an important case concerning disability discrimination and autism.

There is no Property and Affairs Report this month as our editor is having a well-earned break; but he would relay to you if here the frustrating news of the delay to the Law Commission's project on [wills](#).

You can find all our past issues, our case summaries, and more on our dedicated sub-site [here](#).

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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.

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World Congress 2022 in Scotland

The 5th World Congress on Adult Guardianship was held in Seoul, Korea, on 23rd – 26th October 2018. At a meeting of the International Advisory Board on 23rd October, the 7th World Congress on Adult Guardianship, in 2022, was awarded to Scotland. With the next Congress, in 2020, due to take place in Buenos Aires, Argentina, by the time that Scotland hosts the Congress it will have been held in every inhabited continent except Africa. The 2022 Congress will only be the second one in Europe, a significant accolade for Scotland, recognising that at its time Scotland’s legislation of 2000 was world-leading, and also that there are reasonable prospects that by 2022 the current Scottish Government processes of review will have been completed, amending legislation enacted and brought into force, and experience of our updated regime already gained in practice.

Previous World Congresses were in Japan (2010), Australia (2012), United States of America (2014) and Germany (2016). The event has been described as “the Olympics of the subject”. The 5th World Congress in Seoul was typical: approximately 500 from some 30 countries in attendance, 140 presentations in parallel sessions, and important plenary sessions. Scotland’s involvement was significant, with Jan Killeen moderating and

addressing a session on good practice for supported decision-making, her own contribution being on “Creating a national supported decision-making strategic framework”, and Jill Carson speaking on “Making powers of attorney accessible to all: the Scotland story”. My addresses to plenary sessions are available [here](#) (on the CRPD) and [here](#) (enabling citizens to plan for incapacity). I moderated two other sessions, and Scotland was the only country with two participants in the panel discussion at the end of the final general session (Jan and me). I was also involved all day in a workshop session for China, Japan, Korea and other Asian countries after conclusion of the full international part of the Congress.

Alan Eccles, Public Guardian for England & Wales, was the most prominent other UK contributor, addressing a plenary session on the changing mental capacity environment in England & Wales, and how his office has evolved since implementation of the Mental Capacity Act 2005; and also participating in the workshop day for Asian countries.

Overall, the Congress reflected major and diverse efforts across the world to develop better provision and support for people with cognitive impairments, and deliver the promise of the UN Convention on the Rights of Persons with Disabilities in the everyday lives of people with

mental and intellectual disabilities, and their families, supporters and others involved in their lives. Particularly on the final day, there appeared to be a growing recognition of the need to draw together contradictory and disputed viewpoints towards serving a common purpose.

“Guardianship” in the title of these events, though not outdated, masks a much broader range of coverage, leading to the adoption of the sub-title “Supporting the exercise of legal capacity” for the 6th and 7th Congresses.

While not featuring in the official programme, Korea’s own Ms Mi Yeon Kim, elected to serve on the UN Committee on the Rights of Persons with Disabilities from 1st January 2019, attended several sessions and engaged extensively with some of us between and after sessions of the Congress – when, of course, so much of value in such events takes place.

The 7th World Congress will be held in the Edinburgh International Conference Centre on 7th – 9th June 2022.

Adrian D Ward

Disability discrimination and autism

The August 2018 Upper Tribunal Administrative Appeals Chamber appeal decision in *C & C v & Ors* [2018] UKUT 269 concerns disability discrimination in the provision of education. Whilst the case relates to a situation arising in England, the fact that the decision revolves around European Convention on Human Rights (ECHR) and Equality Act 2010 rights makes it equally applicable to Scotland. Whilst a full reading of the Upper Tribunal’s decision, particularly its consideration of what is reasonable and objective justification for

differential treatment is strongly advised, this article provides a summary of the main elements of the decision and its implications.

The facts

The case concerns L who has autism, anxiety and Pathological Demand Avoidance. The appellants, L’s parents, brought a claim under the Equality Act 2010 complaining of disability discrimination. This particular appeal was against an earlier decision by the First-Tier Tribunal and relates to an incident where L was excluded from school for a fixed period of 1½ days when L was 11 years old. The reason given for the exclusion was L’s aggressive behaviour. This behaviour was attributable to his autism.

The law

For a person to be protected from disability discrimination by the Equality Act 2010 they must fall within the definition in section 6(1) of the Act which defines a person (P) as having a ‘disability’ if:

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P’s ability to carry out normal day-to-day activities.

Details on what amounts to discrimination generally (which includes failure to provide reasonable adjustments) under the Act can be found in sections 15 and 20. However, section 85(1) deals specifically with discrimination in admissions to schools and section 85(2) provides that:

The responsible body of [a school to which this section applies] must not discriminate against a pupil-

- (a) in the way it provides education for the pupil;*
- (b) in the way it affords the pupil access to a benefit, facility or service;*
- (c) by not providing education for the pupil;*
- (d) by not affording the pupil access to a benefit, facility or service;*
- (e) by excluding the pupil from school;*
- (f) by subjecting the pupil to any other detriment.'*

Section 85(6) also imposes a duty on schools to make reasonable adjustments. Paragraph 2 of Schedule 13 of the Act makes it clear that this duty applies to deciding who is offered admission as a pupil and the provision of education or access to a benefit, facility or service.

However, regulation 4(1)(c) of the Equality Act 2010 (Disability) Regulations 2010¹ states that certain conditions will not amount to impairments within the meaning of the Equality Act. These are:

- (a) a tendency to set fires,*

- (b) a tendency to steal,*
- (c) a tendency to physical or sexual abuse of other persons,*
- (d) exhibitionism, and*
- (e) voyeurism.*

In terms of relevant ECHR rights, the effect of Article 14 ECHR (prohibition of discrimination)² in conjunction with Article 2 of ECHR Protocol 1 (the right to education)³ is that a disabled child should not be denied education where such denial is a disproportionate measure in the particular circumstances.

Decision

The First-Tier Tribunal had considered that L met the definition of a disabled person for the purposes of section 6 of the Equality Act. However, it considered that the Act's protection did not apply because L had been excluded as a result of his 'tendency to physical abuse' thus falling within regulation 4(1)(c) of the 2010 Regulations. The applicants had submitted that regulation 4(1)(c) should be read down or disapplied in order to avoid a breach of Article 14 ECHR (prohibition of discrimination)⁴ in conjunction with Article 2 of ECHR Protocol 1

¹ S.I. 2010/2028.

² Article 14 ECHR states: 'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.' It is clear that 'other status' is deemed to include disability (see *Glor v Switzerland*, ECtHR, April 2009, Application No. 13444/04).

³ Article 2 ECHR Protocol 1 provides: 'No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education

and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.'

⁴ Article 14 ECHR states: 'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.' It is clear that 'other status' is deemed to include disability (see *Glor v Switzerland*, ECtHR, April 2009, Application No. 13444/04).

(the right to education)⁵ but the First-Tier tribunal had not accepted this.

In the appeal to the Upper Tribunal the First-Tier Tribunal's finding that L had a 'tendency to physical abuse.' was not challenged. The issue before the Upper Tribunal was whether the First-Tier Tribunal had made an error of law when it found that L was not 'disabled' insofar as his 'tendency to physical abuse' was concerned. In particular, the Upper Tribunal had to determine whether regulation 4(1)(c) of the 2010 Regulations was compatible with Article 14 read in conjunction with Article 2 ECHR Protocol 1. It concluded that it was not compatible.⁶

The Upper Tribunal referred to section 3(1) of the Human Rights Act 1998 which requires that, provided it does not disturb a fundamental feature of regulation 4(1)(c), allowed the tribunal to read and give effect to this regulation in a way which is compatible with ECHR rights.⁷ It found that, when construed in accordance with section 3 of the Human Rights Act 1998, regulation 4(1)(c) does not apply to schoolchildren who have a recognised condition that is more likely to result in a tendency to physical abuse.⁸ L thus met the definition of a disabled person for the purposes of section 6 of the Equality Act, the First-Tier Tribunal had therefore made a material error on the point of law and L had indeed been unlawfully discriminated against when he had been excluded from school on that occasion.⁹

In reaching its decision the Upper Tribunal considered the public policy consideration underpinning regulation 4(1)(c) which was not to protect people where their condition results anti-social or criminal activity.

Moreover, in considering Article 14 ECHR in conjunction with Article 2 ECHR Protocol 1, the Upper Tribunal felt that in permitting the exclusion from the definition of 'disability' as a result of their aggressive behaviour regulation 4(1)(c) allowed disabled children such as L to be treated differently to other disabled children. However, it asked, could this difference be justified? In other words, had the ECHR requirement for proportionality in the limitation of its rights been met? It concluded that it had not in this case.

The Upper Tribunal considered that there was a lack of evidence that the regulation struck the right balance. The effect of regulation was extremely severe (and one which apparently affects a significant number of schoolchildren) because it permitted schools to exclude disabled children such as L on the basis of a 'tendency to abuse' without having to provide justification even where this behaviour might actually be the result of the school's own failure to make reasonable adjustments. Moreover, it noted that aggressive behaviour was not necessarily a choice for autistic children, who might not understand their behaviour thus making it inappropriate to label it as criminal or anti-social. Indeed, if the regulation did not apply, schools

⁵ Article 2 ECHR Protocol 1 provides: 'No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in

conformity with their own religious and philosophical convictions.'

⁶ At para 93.

⁷ At paras 94-95.

⁸ At para 95.

⁹ At paras 101-102.

would not be compelled to accept violent behaviour, they would simply have to demonstrate that they had made reasonable adjustments or justify the proportionality of any decision to exclude the child.¹⁰

Implications for Scotland

As with the rest of the UK, what this ultimately means for disabled children where they have a condition that gives rise to a 'tendency to physical abuse' is that they will be protected against exclusion without proper justification. Schools will be required to genuinely make reasonable adjustments for such children before any justification for exclusion is considered reasonable and objective, in other words proportionate.

Jill Stavert

Safeguarding vulnerable adults in Scotland: Good practice across the counselling professions

This resource, Safeguarding vulnerable adults in Scotland, authored by the Report's two Scottish Contributors, Adrian Ward and Jill Stavert, offers information to assist practitioners in Scotland in determining the legal obligations to vulnerable adults. It focuses in particular on laws which may affect adults who come into contact with counselling and psychotherapy services and provides assistance to practitioners in Scotland in determining their legal obligations to

vulnerable adults. The resource explains in clear terms the legislative framework, key organisations, duties of confidentiality, social care support, disclosure obligations, and handling vulnerable witnesses in court. It also highlights the importance of international human rights legislation in the development of laws.

Although the guidance is intended for practitioners in Scotland, much of the advice regarding the Human Rights Framework is equally applicable across the UK. The resource also serves as a useful and comprehensive reference guide to the legal framework in Scotland for cross-border practitioners outside of Scotland who may not be familiar with the relevant provisions.

Annabel Lee

¹⁰ The Upper Tribunal made no reference to this, and it is beyond the scope of this article, but it should be noted that the UN Convention on the Rights of Persons with Disabilities in fact considers that reasonable and objective justification for the denial of rights which is related to a person's disability or related impairment is discriminatory and thus unacceptable. See, for

example, Committee on the Rights of Persons with Disabilities, *General comment No. 6 (2018) on equality and non-discrimination*, CRPD/C/GC/6, 26 April 2018. Available at: https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/6&Lang=en

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Conferences

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 December. 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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