HEALTH CARE AND HUMAN RIGHTS

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Assisted suicide

1. In ***Gross v Switzerland*** the applicant complained that the state, by depriving her of the possibility of obtaining a lethal dose of sodium pentobarbital, had violated her right to decide by what means and at what point her life would end contrary to the Art 8 ECHR.[1] She expressed the wish to end her life on the basis that she was becoming frailer as time passed and was unwilling to continue suffering the decline of her physical and mental faculties and decided to take a lethal dose of sodium pentobarbital. Despite a psychiatrist's report stating that she was able to form her own judgment and that her wish to die was reasoned and well-considered, had persisted for several years and was not based on any psychiatric illness, she was unable to obtain a prescription for the lethal drug from any medical practitioner. Her application for a prescription from the regional health board was refused, the board having considered that neither Art 8 nor the Swiss Constitution obliged the state to provide a person who wished to end her life with the means of suicide of her choice. The decision was upheld in a series of appeals.

2. The ECtHR upheld her complaint. The notion of "*private life*" within the meaning of art.8 was a broad concept encompassing the right to personal autonomy and personal development. In an era of growing medical sophistication combined with longer life expectancies, many people were concerned that they should not be forced to linger on in old age or in states of advanced physical or mental decrepitude which conflicted with strongly held ideas of self and personal identity and ***Pretty v United Kingdom*** applied.[2] An individual's right to decide the way in which and at which point his life should end, provided that he was in a position to freely form his own judgment and to act accordingly, was one of the aspects of the right to respect for private life within the meaning of Art 8: see ***Haas v Switzerland***.[3] The object of Art 8 was to protect the individual against arbitrary interference by public authorities; and the applicant's wish to be provided with a dose of sodium pentobarbital allowing her to end her life fell within the scope of her right to respect for her private life under Art 8. The case concerned whether the state had failed to provide sufficient guidelines defining the circumstances under which medical practitioners were authorised to issue a medical prescription to a person in her condition. The State's medical ethics guidelines

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1 (2014) 58 EHRR 7

2 [2002] 2 FLR 45

3 (2011) 53 EHRR 33

only applied to patients who would die within weeks. As the applicant was not suffering from a terminal illness, her case did not fall within the scope of those guidelines. The state had not submitted any other material containing principles or standards which could serve as guidelines as to whether and under which circumstances a doctor was entitled to issue a prescription for sodium pentobarbital to a patient who, like the applicant, was not suffering from a terminal illness. She had to have found herself in a state of anguish and uncertainty regarding the extent of her right to end her life which would not have occurred if there had been clear, state-approved guidelines defining the circumstances under which medical practitioners were authorised to issue the requested prescription in cases where an individual had come to a serious decision, in the exercise of his free will, to end his life, but where death was not imminent as a result of a specific medical condition. The guidelines on the right to obtain sodium pentobarbital to end life were not sufficiently clear in that respect and breached Art 8. It was primarily up to domestic authorities to issue comprehensive and clear guidelines on whether and under which circumstances someone not suffering from a terminal illness should be granted the ability to acquire a lethal dose of medication allowing them to end their life.

3. In ***R(Nicklinson) v Ministry of Justice*** the Supreme Court considered two cases where the claimants, although suffering from irreversible physical disabilities rendering them immobile, were of sound mind and aware of their predicament.[4] They wished to die at a time of their choosing but were not physically capable of ending their own lives unaided. The claimants in the first case were so disabled as to be unable to commit suicide even with assistance and required a third party actively to end their lives. The claimant in the second case could commit suicide but only with the assistance of a third party. Each claimant, who had a settled and considered wish that his death should be hastened by the necessary assistance, brought judicial review seeking declarations that, under both common law and the ECHC, those who provided him with assistance to bring about his death ought not to be subject to any criminal consequences. The claimants in the first case sought against the Ministry of Justice declarations that the common law defence of necessity was available, in specified circumstances, to a charge of murder in a voluntary active euthanasia case or to a charge of assisted suicide contrary to s 2(1) of the Suicide Act 1961 , or alternatively, that the law of murder or of assisted suicide was incompatible with the right to respect for private life under Art 8, in so far as it criminalised voluntary active euthanasia and/or assisted suicide. The claimant in the second case sought against the DPP an order requiring

[4] [2014] 3 WLR 200

him to clarify his policy statement issued in February 2010 identifying facts and circumstances to be taken into account, in his decision whether or not to consent to a prosecution under section 2(1) of the 1961 Act, so as to enable third parties who might on compassionate grounds be willing to assist the claimant to commit suicide to know whether a prosecution would be more likely than not, and also a declaration that the law on assisted suicide was incompatible with Art 8.

4. The case raised a number of difficult issues. The Supreme Court held that he states which were parties to the Convention had a wide margin of appreciation on whether or not assisted suicide should be lawful; and that a prohibition of assisted suicide such as that imposed by s 2 of the Suicide Act 1961 was within that margin of appreciation. They took the view that the interference with the claimants' right to private life caused by that prohibition had to be balanced against the interests of society in protecting vulnerable people from being pressured into suicide; but that, on the evidence available in the cases before them, it was impossible for the court to make such an assessment: see ***R (Pretty) v DPP***[5] and ***Pretty v United Kingdom***.[6] The Supreme Court went on to hold that, in enacting s 4 of the HRA, Parliament had delegated the power to declare legislation incompatible with the Convention to the Courts, even where the decision fell within the State's margin of appreciation, and the courts should not shirk from exercising it. In exercising that power, the Courts did not force Parliament to act; and that, consequently, it would not have been outside the court's institutional powers for it to declare s 2 of the 1961 Act incompatible with the ECHR: see ***In re G (Adoption: Unmarried Couple)***.[7] However, the Supreme Court found that it would be inappropriate for the Courts to declare s 2(1) incompatible with Art 8 in the cases under consideration. Nevertheless, the purpose of requiring the DPP to publish a code laying out the factors which would be taken into account in deciding whether or not someone who had assisted another person to commit suicide would be prosecuted under s 2 of the 1961 Act was to ensure that the public knew what her policy was. That purpose was not to enable those who wished to commit a crime to know in advance whether they would get away with it; and that it was not appropriate for the court, in effect, to tell the Director what her policy should contain: see

5 [2002] 1 AC 800
6 (2002) 35 EHRR 1
7 [2009] AC 173

R(Purdy) v DPP.[8] Whether and to what extent assisted suicide should be lawful, and whether the risks to vulnerable people could be mitigated, is inherently a matter for determination by Parliament rather than the Court.

Best interests

5. When granting a declaration to a local authority in relation to the best interests of a person lacking the capacity to understand the immediate medical issues surrounding contraceptive treatment and sterilisation, the Court of Protection in ***A Local Authority v K*** reiterated its role in deciding questions of non-therapeutic sterilisation.[9] A local authority sought a declaration regarding a best interests' determination in relation to issues of contraception for, and sterilisation of, the first respondent, K. K was 21 years old, had Down's Syndrome and an associated mild/moderate learning disability. She lived with her parents who felt that pregnancy would have a seriously adverse effect on her. They were referred to a consultant gynaecologist for contraceptive advice. The parents wanted K to be sterilised. The consultant's recommendation for sterilisation was brought to the attention of a Matron for Safeguarding Vulnerable Adults, who advised that a best interests meeting was appropriate. A second consultant gynaecologist advised that the least restrictive option would be the fitting of a contraceptive coil. A best interests meetings took place between the parents, the local authority and staff from an NHS trust. The conclusion was that a non-therapeutic sterilisation was not in K's best interests. However, the parents indicated that they intended to take K abroad to seek assistance. The local authority issued proceedings, seeking a declaration in relation to contraception and sterilisation, and an injunction preventing K's removal. The parents gave undertakings not to remove K from the jurisdiction. The local authority and the Official Solicitor commissioned a report from a further gynaecological expert who advised that sterilisation was not in K's best interests and was not the least restrictive option.

6. Cobb J held that the test to be applied to ascertain a woman's ability to understand and weigh up the immediate medical issues surrounding contraceptive treatment was formulated in ***A (Capacity: Refusal of Contraception)***, and included consideration of: the reason for contraception and what it did; the types available and how each was used; the advantages and disadvantages of each type; the possible side effects; how easily each type

[8] [2010] 1 AC 345
[9] [2014] 1 FCR 209

could be changed, and; the generally accepted effectiveness of each type.[10] K would not have the capacity to understand and weigh up those factors and a decision would be made in her best interests under the Mental Capacity Act 2005. Cobb J applied the test formulated by Bodey J in ***A Local Authority v A***.[11] The test for capacity to be applied to ascertain a woman's ability to understand and weigh up the immediate medical issues surrounding contraceptive treatment includes consideration of:

- the reason for contraception and what it does (which includes the likelihood of pregnancy if it is not in use during sexual intercourse);
- the types available and how each is used;
- the advantages and disadvantages of each type;
- the possible side-effects of each and how they can be dealt with;
- how easily each type can be changed; and
- the generally accepted effectiveness of each: see ***A Local Authority v A***.

The aim was to achieve the right balance between protection and empowerment, as advised by the expert, and sterilisation would be a disproportionate, and not the least restrictive step to achieve future contraception for K. Risk management was better than invasive treatment. There were less restrictive methods of achieving the purpose of contraception than sterilisation and in the event of a need for contraception, those methods should be attempted

7. It appeared that consultant gynaecologist might be aware of the need to refer the question of non-therapeutic sterilisation to the Court of Protection. The local authority's actions also appeared to be prompted more by the perceived need for injunctive relief than the declaration itself. Referral to the court in such cases should always be considered at the earliest moment, in accordance with the Court of Protection Rules 2007. A treatment decision involving the question of non-therapeutic sterilisation was so serious that the Court of Protection had to make it. In particular, it was to be noted that: (a) the decision of whether someone who lacked capacity to consent should have a sterilisation was a question involving "*serious medical treatment*"; (b) such a question "*should be brought to the court*"; (c) the proposed applicant, whether it be carer, local authority or trust, should usefully discuss the application with the Official Solicitor's department before the application was made; (d) the organisation responsible for providing clinical or caring services should usually be named as a respondent in the application form; (e) proceedings

10 [2011] Fam 61

11 [2010] EWHC 1549 (COP) para 68

had to be conducted by a Court of Protection judge who had been nominated as such by virtue of s 46(2)(a) to (c) of the 2005 Act; (f) at the first hearing of the application the court would: (i) consider whether the person should be joined as a party to the proceedings and give directions to that effect; (ii) if so, consider whether the Official Solicitor or some other person should be invited to act as a litigation friend; (iii) identify anyone else who had been notified of the proceedings and who had filed an acknowledgment and applied to be joined as a party to proceedings, and consider that application; (iv) set a timetable for the proceedings including, where possible, a date for the final hearing. The hearing would generally be in public, given the nature of the application, although the court would ordinarily make an order pursuant to r.92 that restrictions be imposed in relation to publication of information. Where a declaration was needed, the order sought should be in the following or similar terms: '*that the person lacked capacity to make a decision in relation to the [proposed medical treatment or procedure] and that, having regard to the person's best interests, it was lawful for the [proposed medical treatment or procedure] to be carried out by [proposed healthcare provider], or that it was not in their best interests to undergo [the proposed medical treatment or procedure]*'. The order in the instant case would carry on its face a specific recital that any issue of non-therapeutic sterilisation should be brought back before the court so that those who were responsible for K's care were clear about the requirements going forward.

8. In ***RGB v CWM Taf Health Board*** the husband sought (i) a declaration that the board had unlawfully deprived him and/or his wife of the right to family life; (ii) a declaration that the board had unlawfully deprived him of the right to freedom of assembly and association; (iii) an order directing the board to afford him access to his wife and information about her well-being; (iv) damages.[12] They had married in 1994. In 2007, when aged 64, the wife had been diagnosed with Alzheimer's disease. In 2010, she left the family home to stay with her son, then her daughter. A consultant in geriatric psychiatry reported to the Court of Protection in February 2011 that the wife told him that the husband had been horrible to her family, that she wanted to come out of the marriage, and that she wanted to live with her daughter. The consultant concluded that W had capacity to make those decisions. The Court accepted that opinion and made a declaration accordingly. In December 2011, an advance statement of the wife's wishes was prepared stating that she did not want the husband contacted at all if she became unwell, and that she did not want to go back to him. The husband contended that W's real wishes and feelings were to see him and have him fully involved in her care and welfare,

[12] [2013] EWHC 23 (COP)

and that in so far as she had said the contrary to others, she had done so solely on the basis of the undue influence of her children.

9. The applications were refused. While the husband's views were genuinely held, they were completely wrong. The wife had expressed a clear wish to separate from him and did not want him to be involved in her care. Those were her own decisions reached of her own accord and held consistently over a long period: they were not a result of improper pressure from her children let alone undue influence. At all relevant times, the wife had had the capacity to take those decisions and convey those views. The board had been entirely right to act on W's earlier wishes after she lost capacity; an advance decision or living will remained binding and effective notwithstanding a person subsequently becoming incompetent: see ***R(Burke) v General Medical Council***.[13] There was no right to family life in a case where one of the spouses had indicated clearly that she did not wish it. In terms of best interests, any visit by the husband to the wife, even supervised, would not be entirely benign with no threat to her peace of mind. There was no basis on which to grant the husband any relief.

Best interests and freedom of expression

10. In ***In G (An Adult)*** Sir James Munby P gave useful directions about the proper approach to media interventions.[14] Newspaper publishers applied to be joined as a party to personal welfare proceedings concerning an elderly lady. The local authority had applied to restrict her access to the press. The High Court determined on an interim basis that she lacked capacity under the Mental Capacity Act 2005 s 2 and s 3 and reporting restrictions were granted. The local authority's application was adjourned to enable an assessment of her capacity to engage with members of the press so that the Court could reach an informed view as to whether it was in her best interests that she should do so. The newspapers argued that they had a legitimate interest in the proceedings under Art 10 which was engaged, because the issue of whether she had capacity to communicate with the media affected its ability to receive information about the proceedings. They argued that their journalist's rights under Art 8 by reason of their dealings with the elderly woman.

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13 [2005] QB 424

14 [2014] EWHC 1361 (COP)

11. The application refused. The private life protected by Art 8 included a person's right to define the inner circle in which he chose to live his life, including in particular the right to decide who was excluded from his inner circle. If X chose not to have anything to do with Y, then Y could not impose himself on X by relying on his own Art 8 rights. X could rely on his own Art 8 right to decide who was excluded from his inner circle, and X's Art 8 rights trumped Y's, even if X lacked capacity. X's best interests were determinative: see ***F (Adult: Court's Jurisdiction)***.[15] In the event of dispute, it was for the court to determine on behalf of X what X's best interests required. The identification by the Court of Protection of X's best interests did not give rise to any justiciable issue as between X and Y. Article 10 protected two distinct rights: the right to receive and the right to impart information and ideas. The right of access to information, if it existed at all, arose only in relation to information held by a public body whereas the information in the instant case was held by private individuals. The identification by the Court of Protection of X's best interests did not give rise to any justiciable issue as between X and Y. Nor was there any justiciable issue between X and Y in relation to the question of X's capacity. The newspapers' application to be joined as a party was misconceived because there was between them and the elderly woman, and they could not itself within the relevant Court of Protection Rules 2007. The newspapers did not have a sufficient interest in the proceedings, nor was joinder desirable. There was an assumption that joinder was as unnecessary for the protection of the media as it was undesirable from the point of view of the child or incapacitated adult whose welfare was being considered by the court.

Duty to undertake an effective investigation under Art 2

12. In ***R(Antoniou) v Central and North West London NHS Foundation Trust*** the claimant applied for judicial review of the defendants' failure to conduct an independent and immediate investigation following the suicide of his wife when she was a patient detained in a psychiatric hospital under s 3 of the Mental Health Act 1983.[16] On the evening before her death the wife had expressed suicidal ideations. The hospital put her on hourly observations. The following morning, 10 minutes later than the scheduled observation, staff found her bed stacked against her door, and she was lying on the floor with a ligature around her neck. Resuscitation was unsuccessful. The hospital and the strategic health authority investigated the circumstances of the death under the **Serious Untoward Incidents Policy**. The investigations recorded

[15] [2001] Fam 38

[16] [2013] EWHC 3055 (Admin)

no culpability on the hospital's behalf. An inquest was carried out under the Coroners Act 1988 with a jury. A narrative verdict was given: the wife had not committed suicide; "*her death was inadvertent following self-harming by use of a ligature*". The claimant argued that Art 2, there was a procedural obligation on the state to conduct an immediate and independent investigation into the circumstances of a detained person's death, prior to an inquest. While there had been an investigation into the wife's death, it was not "*independent*".

13. The Divisional Court refused the application. Application refused. Article 2 imposed on the state a substantive obligation to establish a framework of laws, precautions, procedures and means of enforcement which would, to the greatest extent reasonably practicable, protect life: see ***R (Middleton) v HM Coroner for Western Somerset***.[17] The Art 2 obligation that applied to detained persons is to have in place proper systems for the prevention of self-harm and suicide; and an operational obligation to take reasonable steps to protect detained persons from any real and immediate risks of self-harm or suicide of which the relevant authority was, or ought to have been, aware of. In England and Wales, the procedural obligation tended to be discharged through an inquest. There had been circumstances where an independent investigation, apart from an inquest, was required in order to fulfil the obligation; however, they were all instances where an inquest was either not held or was inappropriate. There was no domestic authority requiring the state, in fulfilling its Art 2 obligations, to conduct an independent investigation from the outset into a detained person's death in hospital: see ***R(Amin)) v Secretary of State for the Home Department***,[18] ***R(JL) v Secretary of State for the Home Department***[19] and ***R(Smith) v Oxfordshire Assistant Deputy Coroner***.[20] If the law required such an investigation to be "*automatically*" triggered, the Supreme Court would have said so in Smith when it made *obite*r statements on the proper approach to when the procedural duty under Art 2 arose and how it should be discharged. Furthermore, there was no Strasbourg case law indicating that such action was required when a state had a procedural system for investigating deaths which included an inquest: see ***Jordan v United Kingdom***,[21] ***Ramsahai v Netherlands***,[22] ***Silih v Slovenia***.[23]

[17] [2004] 2 AC 182
[18] [2004] 1 AC 653
[19] [2009] 1 AC 588
[20] [2011] 1 AC 1
[21] (2003) 37 EHRR 2
[22] (2008) 46 EHRR 43
[23] (2009) 49 EHRR 37

14. The Claimant therefore had to argue for an extension of the existing law. Persons detained under the 1983 Act posed a high suicide risk and, in those circumstances, the hospital authorities, as agents of the state, were bound by the substantive obligations in Art 2. If the precautions taken under those obligations failed, then the Art 2 procedural obligations were triggered. The investigation into the circumstances of a death would be opened to public scrutiny by an "*enhanced*", narrative inquest and that would generally fulfil the state's Art 2 procedural obligation: see ***Middleton***. Such an inquest met the minimum standards identified in ***JL*** and reiterated in ***Smith***. There were no particular characteristics of this case requiring the state to conduct an immediate and independent investigation in order to discharge the procedural obligation. While in the cases of deaths in custody and detention, the state had instituted independent investigation systems for the Prisons and Probation Ombudsman and the Independent Police Complaints Commission, it did not follow that, as a matter of law, a similar system to investigate suicides of detained patients was required. The state did not have to do so as a matter of the existing law. Whether the United Kingdom wished to create such a system on grounds of public policy was a different point. It was not bound to do so as a matter of domestic or European law as it stood.

Medical treatment

15. In ***R(Tracey) v Cambridge University Hospitals NHS Foundation Trust*** the claimant judicially an NHS trust decision concerning the treatment of his wife and the lawfulness of the Secretary of State's non-resuscitation policy.[24] The wife had terminal lung cancer and had been admitted to hospital following a road traffic accident. The trust had placed a Do Not Attempt Cardio-Pulmonary Resuscitation (DNACPR) notice on her medical file. That order was cancelled after three days when the family expressed concern about it. Three days later, her condition deteriorated and another notice was imposed after consultation with her family. The wife died two days later. The issues were whether Art 8 was engaged by a DNACPR decision; whether clinicians were obliged to involve the patient in a DNACPR decision; whether the trust had breached its duty to consult and notify in relation to the first notice; whether the wife should have been given an opportunity to obtain a second opinion when the first notice was imposed; whether the trust's policy was sufficiently clear and precise; whether the Secretary of State had breached Art 8 by failing to promulgate national guidance about the process of making DNACPR decisions which was clear and directed at patients.

[24] [2014] EWCA Civ 822

16. The application succeeded in part. The fact that there was no Strasbourg authority which specifically decided that Art 8 was engaged by a decision to impose a DNACPR notice did not mean that it was not engaged. A decision as to how one managed death touched in the most immediate and obvious way a patient's personal autonomy, dignity and quality of life: see ***Pretty v United Kingdom*** and ***Glass v United Kingdom*** applied.[25] It was clearly not the law that Art 8 was never engaged in any case involving the provision or withholding of medical treatment: see ***Tysiac v Poland***[26]and R***(Condliff) v North Staffordshire Primary Care Trust***.[27] The Court had to be slow to give general guidance on when it would be inappropriate to consult a patient on a DNACPR decision. The degree of patient involvement required by Art 8 depended on the circumstances. However, since such a decision would potentially deprive the patient of life-saving treatment, there should be a presumption in favour of patient involvement. There needed to be convincing reasons not to involve the patient. It was inappropriate to involve the patient in the process if the clinician considered that to do so was likely to cause physical or psychological harm. However, doctors should be wary of being too ready to exclude patients from the process on the grounds that their involvement was likely to distress them. The Court should be very slow to find that such decisions, if conscientiously taken, violated a patient's rights under Art 8. It was not inappropriate to involve the patient if the clinician formed the view that resuscitation would be futile. The fact that the clinician considered that resuscitation would not work meant that the patient could not require him to provide it, but did not mean that the patient was not entitled to know that such an important clinical decision had been taken. Furthermore, if the patient was not told about such a decision, he would be deprived of the opportunity of seeking a second opinion. However, in circumstances it had not been inappropriate to consult in relation to the first notice and the trust had not demonstrated convincing reasons for its failure. There had been a breach of the Art 8 procedural obligation to involve the patient before the first notice was imposed. On the other hand, it was unclear whether a doctor was under a legal obligation to offer to arrange a second opinion in all circumstances. In any event, there was no basis for holding that Art 8 required him to do so. That would represent an unacceptable intrusion into the realm of clinical judgment. Further, there was no obligation to offer to arrange a second opinion in a case where a patient was being treated by a multi-disciplinary team all of whom took the view that a DNACPR notice was appropriate. In any case, under Art 8(2), any policy which interfered with an

[25] [2004] 1 FLR 1019

[26] [2007] 1 FCR 666

[27] [2012] 1 All ER 689

individual's rights under Art 8(1) had to be accessible and clear. At the time of wife's hospital admission, the trust's policy on resuscitation and the initiation of DNACPR notices had been available online, but was directed to clinicians rather than patients and was not disseminated to them unless specifically requested. However, by the time of the hearing, the trust had recognised the inaccessibility of its previous policy and addressed those shortcomings. Criticisms that the trust's policy was insufficiently clear were unfounded. The absence of a mandatory national DNACPR policy was not a violation of Art 8. The question of whether to consult and notify patients before imposing DNACPR notices was inevitably one of the utmost sensitivity and difficulty. The decision would be difficult and sometimes controversial, regardless of whether the DNACPR policy was formulated at a local level or nationally.

Mental health and access to the Court

17. In ***DD v Durham CC*** the appellant appealed against the refusal of his application for leave to bring proceedings against the respondent local authorities under s 139(2) of the Mental Health Act 1983 for the failure of two approved mental health professionals to discharge their duties under the Act.[28] The appellant, who had mental health issues, had been convicted of assault and sentenced to a two year extended sentence of imprisonment for public protection. His detention in prison was extended following an attack on a visiting psychiatrist and an approved mental health professional made an application for his detention under s 2 of the 1983 Act at a facility called the Hutton unit and he was admitted and detained there. At the end of the 28 day period for assessment a further assessment was conducted by a different approved mental health professional acting on behalf of the local authorities. That approved mental health professionals concluded that the appellant should remain at the Hutton Unit and made an application under s 3 of the 1983 Act for his detention for treatment and further assessment.

18. The appellant brought a claim on the basis that the Hutton Unit practised a regime which was not suitable for him, given his mental condition. It was accepted that for the purposes of his application under s 139 of the 1983 Act the conditions in the Hutton Unit amounted to an arguable breach of his rights under the European Convention on Human Rights 1950. He submitted that the two approved mental health professional owed a duty to him; that by making the application for admission to the Hutton unit, each was in breach of duty and that the local authorities were responsible vicariously for that

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[28] [2013] EWCA Civ 96

breach of duty. The appellant argued that under the statutory scheme the approved mental health professional had the legal responsibility not only for assessing whether a patient should be detained but also for the suitability of the hospital at which the patient was to be detained and the regime under which he would be held; and that that responsibility gave rise to an obligation under the HRA to take reasonable steps to ensure that the patient's rights under Art 3 and Art 8 were not infringed.

19. The Court of Appeal held that the scope of the duty of an approved mental health professional was a question of law of some importance. Although it was desirable that the Court of Appeal should determine that question without remitting the matter for decision by a judge with the possibility of a further appeal, there were a number of reasons why that was not possible. There was no pleading or other document which set out the basis of the duty and whether it rested under the provisions of the HRA as the duty of a public authority or was a duty derived from the terms of the 1983 Act. It would be necessary in deciding the point to ensure that the decision fitted within the overall provisions of the 1983 Act, taking into account the nature of the responsibility placed on the nearest relative and possibly also the obligations of a court when making a hospital order under s 37 or of the Secretary of State when transferring a prisoner to a hospital under s 47. There was no prospect of the parties being able to reach an agreement as to facts as at the instant stage, or even as to assumed facts. As there was no detailed pleading upon which such an issue could be determined, the court did not have a sufficient factual basis on which to found its decision. The only point that the Court of Appeal could consider was whether the judge was correct in refusing leave. The threshold under s 139 was a low one and there was no doubt that the appellant's argument met that threshold. It was at least arguable, in the light of the decision in ***St George's Healthcare NHS Trust v S***,[29] that there was a duty of the kind suggested by the appellant on an approved mental health professional; that an approved mental health professional had a duty to satisfy himself that it was appropriate for the patient to be detained and it must be arguable that the duty extended at least to bringing a degree of independent judgment to bear on the recommendation as to the hospital and regime made by the medical practitioners.

Mental health and deprivation of liberty

[29] [1999] Fam 26 paras 23-25

20. In ***MH v United Kingdom*** that applicant challenged a decision that her detention under the Mental Health Act 1983 was lawful.[30] She was severely disabled and had lived at home with her mother. After the mother began struggling to cope, on January 31, 2003 a warrant was executed for her detention in hospital under s 2. During that detention, a barring order was issued under s 25(1) which certified that the applicant, if discharged, was likely to act in a manner dangerous to others or herself. Pursuant to s 66(1)(a), while the applicant was detained under s 2, she could have applied for discharge within 14 days to the Mental Health Review Tribunal. She did not do so because she lacked legal capacity to instruct solicitors, and after that 14-day period expired, she had no further right to apply to the tribunal. On February 27, 2003, the local authority applied to displace the mother as her nearest relative, which had the effect of automatically extending the applicant's detention under s 29(4). On March 6, 2003 her solicitors requested the Secretary of State for Health to make a reference to the tribunal under s 67 for her discharge. The tribunal convened that month, but refused to discharge her. The applicant was moved into suitable residential accommodation on July 21, 2003. The mother brought judicial review of her daughter's detention, seeking declarations that s 66(1) was incompatible with Art 5(4) insofar as it placed the onus for applying for discharge on the detained patient; that s 66(1) was incompatible with Art 5(4) (as neither a detained patient nor her nearest relative had any right to apply to the tribunal when a barring order had been issued); and that s 29(4) was incompatible with Art 5(1) as it authorised the indefinite detention of a patient admitted under s 2 where an application had been made to displace the patient's nearest relative. The Court of Appeal declared that s 2 and s 29(4) were incompatible with Art 5(4) but the House of Lords set those declarations aside.

21. The ECtHR felt it was convenient to split the detention into three stages:

    (a) the first 27 days until February 27, 2003;

    (b) between February 27, 2003 and March 26, 2003, when the tribunal gave its ruling; and

    (c) between March 26, 2003 and July 21, 2003, when M was moved into appropriate residential accommodation.

22. The fact that competent persons with legal capacity could, during the first 14 days of their detention, apply to the tribunal for discharge, satisfied the

[30] (2014) 58 EHRR 35

requirements of Art 5(4) because they had an opportunity to challenge the lawfulness of their detention speedily. However, such a remedy was not available to the applicant because she lacked legal capacity. Since the right set out in Art 5(4) was guaranteed to everyone, it was clear that special safeguards were needed for detained mental patients who lacked legal capacity. The ECtHR decided that it would have been wholly unreasonable to expect the applicant to have attempted during the first 27 days to bring a habeas corpus petition. Further, since a barring order had been made, the applicant could not have been reasonably expected to immediately get her mother or her solicitors to request the Secretary of State to refer her case to the tribunal. Accordingly, there had been a violation of Art 5(4) in relation to the first 27 days' detention.

23. As for the second period, the tribunal hearing had taken place about one month after the applicant's detention was automatically extended. That was not an unreasonably long period to have been without judicial control on the legal basis of a fresh authorisation of hospital detention following an automatic consequence of the law's application. In making a reference, the Secretary of State had to exercise any power compatibly with an individual's Convention rights: that meant that, once a request was made for a referral, he was under a duty to refer if not to do so would infringe a patient's rights under Art 5(4). Where, as in this case, the incompetent patient was "*befriended*", the means existed for operating s 29(4) compatibly with the requirements of Art 5(4); and for that reason, no failure to comply with those requirements could be found in the case as regarded the second period of her detention. Article 5(4) did not guarantee mental patients or other detainees a right to take proceedings against an order of detention issued by a judicial body applying an appropriate judicial procedure; and the lapse of time between March 26 2003 and July 21 2003 was not long enough to have brought into play that aspect of the guarantee afforded to her by Art 5(4). There was therefore no breach of Art 5(4) in respect of the final period of detention.

24. In the well-known case of ***Cheshire West and Chester Council v P*** the Supreme Court considered whether and in what circumstances treatment amounted to a deprivation of liberty in breach of Art 5.[31] Two sisters, P and Q, had learning disabilities and did not have the capacity to give a valid consent to any arrangements for their care. When they were 16 and 15 years old, they were removed from a dysfunctional and abusive home environment

[31] [2014] AC 896

and taken into local authority care. P was eventually placed with a foster mother, who provided her with support in most aspects of daily living. Q had to be escorted when travelling as she was unaware of danger when crossing the road. She attended a further education unit daily during term time and at other times was taken out on trips and holidays by her foster mother. P was happy with the arrangements and showed no wish to leave the home on her own but had she attempted to do so the foster mother would have restrained her. Q, whose behaviour was more challenging and harder for an individual to manage, was placed in a small, specialist home for adolescents, with a bedroom of her own. In term time she was accompanied to attend the same further education unit as P attended. Q's care needs required continuous supervision and control. She showed no wish to go out on her own but would have been prevented from leaving had she tried. In best interest proceedings in the Court of Protection, the judge made a declaration that, inter alia, the living arrangements for P and Q did not amount to a deprivation of their liberty so as to engage Art 5. The Court of Appeal dismissed the sisters' appeal, holding that although neither sister was free to leave their respective accommodation, the relative normality of their living arrangements, which were no more intrusive than was necessary for their own protection, meant that neither P nor Q was deprived of her liberty so as to engage Art 5.

25. In the second case a 39-year-old man suffering from cerebral palsy and Down's syndrome who lacked the mental capacity to make decisions as to his care, was moved, initially pursuant to an interim order in the Court of Protection, to local authority accommodation close to his family home after his mother became unable to look after him. The accommodation was a housing association bungalow which he shared with two other residents and one or two members of staff. His disability prevented him from leaving the accommodation alone but he was given support to attend a day centre and to visit his mother. His occasional aggressive behaviour and his habit of pulling at his continence pads and placing them and their contents in his mouth, required a range of more intrusive measures in his care plan including, when necessary, physical restraint and the forcible removal of pieces of continence padding from his mouth. Subsequently, staff dressed him in an all-in-one body suit to prevent him from accessing his continence pads. In best interest proceedings brought by the local authority in the Court of Protection, the judge found that it was lawful and in P's best interests that he continue to reside in the accommodation under the care plan, and made an order to that effect under s 16 of the Mental Capacity Act 2005, but also found that the plan involved a deprivation of his liberty for the purposes of Art 5. The Court of Appeal allowed the local authority's appeal against the judge's declaration that the care plan engaged his Art 5 rights, holding that the judge had erred in

failing to take account of the benevolent purpose of the restrictions imposed and should have compared his circumstances with the lives which other persons of a similar age and with the same capabilities as he would normally expect to lead.

26. The Supreme Court held that since the term "*deprivation of liberty*" in the context of the living arrangements of a mentally incapacitated person was to be given the same meaning in domestic law as in Art 5, it was to be construed by reference to the relevant jurisprudence of the ECtHR. Under that jurisprudence the difference between a restriction and a deprivation of liberty was one of fact and degree depending on the actual situation of the person concerned, but in cases concerning the placement of mentally disturbed people in hospitals or care homes the test to be applied was whether the person was under continuous supervision and control, and was not free to leave. The same test applied even where the person was being confined for a benevolent or beneficial purpose, under Court order, in a non-institutional setting which aimed at providing an environment of relative normality and to which the person did not object. Moreover, as a matter of policy, persons of extreme vulnerability needed to be subject to periodic checks on whether the legal justification for the constraints on them continued to be made out. As a result, the appellants' living arrangements were to be considered on the basis that mentally incapacitated persons had the same rights to liberty as everyone else, so that living arrangements which amounted to a deprivation of liberty in the case of a non-disabled person would be a deprivation of liberty of the disabled person.

27. The Supreme Court found in the first case, that although P lived in an ordinary family home and Q in a small home suited to her needs and neither wished to leave their respective accommodation, since both were in fact under the complete supervision and control of those caring for them and would have been prevented from going out without supervision, both were in truth deprived of their liberty and a declaration would be made to that effect. In the second case the Supreme Court allowed the appeal: the arrangements for his care constituted a deprivation of his liberty because his life was under the complete control of his carers and subject to occasional, albeit necessary, physical restraint and intrusive procedures, or the Court of Appeal ought not to have interfered with the judge's findings to that effect on the facts of the individual case; and that, accordingly, the judge's declaration would be restored

28. In ***TW v Enfield LBC*** the appellant appealed against a decision refusing permission to bring a claim against the respondent local authority for unlawful detention.[32] She suffered from obsessive compulsive disorder. An approved social worker applied for his compulsory admission to hospital. Under the Mental Health Act 1983 s 11(4) the social worker should have consulted the appellant's father as her nearest relative before making the application, unless it was not "*reasonable practical*" to do so. The social worker decided that consultation was not "*reasonable practicable*" because the appellant had alleged sexual abuse by her father and had insisted that her case details should not be disclosed to her family, and the breach of confidence would be detrimental to her health. She applied for permission to bring a claim against the local authority for unlawful detention on the grounds that it had been reasonably practicable to consult her father, who would have objected to her admission. The judge, applying ***R(E) v Bristol City Council***,[33] held that the social worker had been entitled to regard consultation with her father as not reasonably practicable because it would have contradicted her express wish that her family not be told about her case and it might have affected her health.

29. The Court of Appeal allowed the appeal. The construction of the word "*practicable*" in s 11(4) involved domestic law and human rights aspects, but they were part of a single unitary construction exercise. From the domestic law aspect, "*practicable*" meant more than physically possible, and it had to have sufficient elasticity to take account of the circumstances in which the powers of mental health professionals had been exercised: see ***R(M) v Hackney LBC***.[34] In considering what was reasonably practicable, it was legitimate to look at what might be the result of the proposed action. The obligation to consult the nearest relative might result in a conflict between a patient's right to liberty under the European Convention on Human Rights 1950 Art 5 and her right to maintain the confidentiality of her medical history and file had to be part of her Art 8 rights. Section 11(4) imposed on an approved social worker an obligation to strike a balance between a patient's Art 5 rights not to be detained unless that was done by a procedure that was in accordance with the law and the patient's Art 8(1) right to her private life. Where the obligation to consult the nearest relative would interfere with the patient's Art 8(1) rights, the decision whether it was reasonably practicable to consult the nearest relative would depend on whether it was justified and proportionate in the circumstances. A patient's assertion, even if founded on fact and reasonable, that consultation would lead to an infringement of her

32 [2014] EWCA Civ 362
33 [2005] EWHC 74 (Admin)
34 (2011) WLR 2873

Art 8(1) rights could not lead automatically to a conclusion that it was not reasonably practicable to consult the nearest relative. Nor was a social worker's conclusion that the patient's Art 8(1) rights would be infringed enough to lead to a decision that there should be no consultation. Equally, it would be wrong to conclude that because consultation with the nearest relative would involve disclosure of the patient's case that had to lead to a conclusion that it was not reasonably practicable to consult the nearest relative. The analysis in ***E*** of the construction of s 11(4) by reference to Art 8 had been incomplete, and not be applied. The Court of Appeal went on to find that was an arguable case that the decision not to consult had been made on the wrong basis.

30. In ***R(Lee-Hirons) v Secretary of State for Justice*** the appellant appealed against a decision dismissing his claim for judicial review of the Secretary of State's decision to recall him to detention in hospital under s 42(3) of the Mental Health Act 1983. A hospital order and restriction order had been imposed following his conviction for arson and burglary. A year later he applied to the First-tier Tribunal to be discharged from hospital. The FTT decided that he was suffering from a mental disorder and that it was appropriate to detain him in hospital. That decision was set aside by the Upper Tribunal for insufficient reasoning and remitted. The FTT conditionally discharged him. His social supervisor subsequently reported concerns regarding his mental health and he was recalled to hospital under s 42(3). The Secretary of State referred his case to the FTT to consider whether his detention should continue. The judge found that he had informed his social supervisor that he was being recalled because his mental health had deteriorated and held that the recall decision and detention were lawful.

31. The appeal was dismissed. The judge had relied on the decision in ***Christie v Leachinsky*** that written reasons were not required in order to effect a lawful arrest, as he considered that there was a valuable analogy between arrest for a criminal offence and the recall of a conditionally discharged patient.[35] He was not bound to follow ***R(Wooder) v Feggetter*** so as to hold that the reasons for recall had to be given in writing.[36] There was no issue in ***Wooder*** as to the form in which reasons had to be given; the issue in that case was whether reasons should be given at all. There were also contextual differences between the exercise of the power of recall and the issue of a certificate by a doctor. A patient who was to be the subject of such a certificate was necessarily already detained in hospital and there was unlikely to be the kind of urgency that

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35 [1947] AC 573

36 [2003] QB 219

might apply to a recall decision, where practical considerations militated against a requirement of written reasons as opposed to an oral explanation. It was also significant that Art 5 did not require written reasons for apprehension, and did not distinguish between arrest on suspicion of a criminal offence and detention in circumstances such as the instant case. Article 5 required that the patient must be "*promptly and adequately informed of the facts and legal authority relied on to deprive him of his liberty*", but did not require that information was to be given to the patient immediately when detained: see ***X v United Kingdom***.[37] The duty was intended to be satisfied by providing an explanation for recall within 72 hours, as stipulated in guidance issued by the Department of Health. As Art 5 did not require reasons for the detention of a patient to be given to him when he was detained, it did not require those reasons to be given in writing: see ***Van der Leer v Netherlands*** (A/170).[38] Article 5.2 required the reasons to be adequately and promptly given to a patient following detention. The obligation contained in the guidance to provide an explanation for recall as soon as possible, and in any event within 72 hours, and a written explanation within 72 hours, satisfied the requirements of Art 5.2. Therefore, a failure to provide adequate reasons promptly after detention would result in a breach of Art 5.2, but not of Art 5.1: see ***Fox v United Kingdom***.[39] The Secretary of State had, therefore, not complied with his duty to provide adequate reasons within 72 hours, and the reasons for his failure were not good reasons. There was therefore a clear and admitted breach of his policy and a breach of Art 5.2.

32. However, those breaches did not render unlawful what was originally a lawful recall. A failure to comply with Art 5.2 did not constitute a breach of Art 5.1. At common law a breach of a public law duty rendered a detention unlawful if it affected the decision to detain: see ***R(Lumba) v Secretary of State for the Home Department***.[40] A failure promptly to provide full reasons for a lawful detention did not itself affect the decision to detain or to continue to detain; it did not therefore render the detention unlawful at common law, any more than it did under the ECHR.

33. In ***Re X*** the Court of Protection issued a preliminary judgment containing answers to questions arising in cases where the care arrangements for mentally incapacitated persons might amount to a deprivation of their liberty within the meaning of Art 5, as part of the Court's objective following the

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37 (1982) 4 EHRR 188
38 (1990) 12 EHRR 567
39 (1991) 13 EHRR 157
40 [2012] 1 AC 245

decision in ***Cheshire West and Chester Council v P***.[41] Sir James Munby P gave The answers produced the following guidance:

- Any Court of Protection authorisation of a deprivation of liberty had to be by a judge, not a court officer.
- An initial application to the Court of Protection to authorise an individual's deprivation of liberty did not have to involve an oral hearing; it could be dealt with on the papers as long as there was an unimpeded right to request a speedy review at an oral hearing.
- The Court gave guidance about the proper approach to determining which cases were to be dealt with on the papers and which at an oral hearing.
- The Court did not, at the current time, list the irreducible matters to be addressed in evidence before making an order satisfying the requirements of Art 5(1)(e).
- Evidence, particularly medical evidence, had to comply with the three criteria in ***Winterwerp v Netherlands***.[42] Evidence was to be succinct and focused. Professional medical opinion was necessary to establish unsoundness of mind, but where the facts were clear, a general practitioner opinion rather than that of a consultant psychiatrist would suffice.
- The question whether an urgent authorisation granted pending completion of assessments could be extended would be answered in a future judgment.
- There was no answer at the current time to the question whether Art 5(1) or Art 6 required the particular individual to be joined to any application seeking authorisation of a deprivation of liberty.
- The question whether a detained resident was to be joined by virtue of the Mental Capacity Act 2005 s.21A would be answered in a future judgment.
- Article 5 did not require relevant individuals to be joined as parties to an application seeking authorisation of a deprivation of liberty. It only required that they should be able to "*participate*" in a way which enabled them to present their cases "*properly and satisfactorily*". They were always to be given an opportunity to be heard, whether as a party or not. If they were a party, they would need a litigation friend. If they participated other than as a party, no litigation friend was needed. Further consideration of this question was needed.
- The maximum period of extension to an urgent authorisation granted under s 21A of the 2005 Act would be addressed in a future judgment.

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41 [2014] EWHC 25 (COP)

42 (1979) 2 EHRR 387

- Where a deprivation of liberty had been authorised, it was typically to be reviewed annually unless circumstances required a shorter period.
- Reviews had to be judicial processes.
- Reviews did not have to be by an oral hearing and could take place on the papers where necessary.
- Whether a review occurred under a paper-based or oral procedure was not dependent on the nature of the initial authorisation procedure.
- The question what obligations were imposed by Art 5(4) by way of party status at the review stage was not answered at the current time.
- A litigation friend did not have to act by a solicitor, but if they did not otherwise have a right of audience, the court's permission would be needed.
- The requirements necessary for any streamlined procedural process to comply with Art 5 and Art 6 were outlined in the answers to questions 3, 4 and 20.
- The Court outlined the amendments which would need to be made to the Court of Protection Rules 2007.
- The Court outlined the amendments which would need to be made to the practice directions if they were to be compliant with Art 5.
- The Court outlined the amendments which would need to be made to the standard Court of Protection forms and specified which matters the application form was to include.
- Applications had to be considered separately and on their own merits. A separate application had to be made for each individual, even if there were multiple people in the same placement. However, in the latter situation, a generic statement could be attached to each application form.

13 October 2014