

Capacity, limitation and the Human Rights Act (AP (by his litigation friend, BA) v Tameside Metropolitan Borough Council)

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Personal Injury analysis: Under what circumstances was it equitable to extend time? Eleanor Grey QC, a silk at 39 Essex Chambers, discusses the court's decision in *AP (by his litigation friend, BA) v Tameside Metropolitan Borough Council*.

Original news

AP (by his litigation friend, BA) v Tameside Metropolitan Borough Council [2017] EWHC 65 (QB)

Briefly, what was the background to this case?

The claimant AP was a young man, aged 29 years of age. He had a diagnosis of a learning disability as a result of Down's syndrome and as result he lacked capacity to make decisions for himself about his residence and care, under the Mental Capacity Act 2005. He also lacked the capacity to conduct litigation. In February 2011, he was removed from the family home by the defendant local authority. The authority did this in response to allegations of neglect made against AP's mother, who was caring for him, by his aunt. AP was placed in respite accommodation. Although a prosecution brought against his mother failed in early July 2012, AP was not returned home by the local authority until 12 August 2013, some two-and-a-half years later.

In February 2016, AP through his litigation friend (his brother) brought proceedings under the Human Rights Act 1998 (HRA 1998), claiming declaratory relief and damages for breach of his rights under Articles 5 and 8 of the European Convention on Human Rights. He claimed that he was unlawfully deprived of his liberty during the period in which he had been removed from his mother's care.

What was the key issue before the court and what did the court decide?

The defendant raised a number of issues in its defence, but in this hearing the judge was asked to decide whether the limitation period for bringing claims under HRA 1998, which is one year, should be extended. Under HRA 1998, s 7(5), the court can extend the one-year period to such longer period as it 'considers equitable having regard to all the circumstances'. It was agreed that time began to run on 12 August 2013 and the primary limitation period expired on 13 August 2014; so the proceedings were begun approximately one-and-a-half years out of time.

The claimant argued that his lack of capacity was a good reason to extend time. However, he failed. Mr Justice King declined to extend the one-year limit.

In reaching its decision, what did the court have to say about the fact that a party lacks capacity?

The judge first rejected an argument that section 28 of the Limitation Act 1980 was 'a relevant comparator'. Under these provisions, an action may be brought at any time before the expiration of six years from the date when a claimant ceases to be under a disability, or dies. The claimant argued that this showed that 'significant weight' must be given to the claimant's mental incapacity, and created either a rebuttable presumption in favour of an extension or an exceptional category of cases. AP was a 'vulnerable individual reliant on others to uphold and vindicate (his) rights'.

But King J rejected this argument, holding that it amounted to an unjustifiable gloss on the wide language of HRA 1998, s 7(5). Parliament had chosen not to make special provision for particular categories of claimants. He noted that it was, rather, for the court to examine all the relevant factors in the case, and then to decide whether or not it was equitable to extend time. There was no predetermined list of relevant factors, although proportionality would generally be taken into account.

In the judge's view, the fact that the claimant lacked capacity and was dependent on others to bring a claim under HRA 1998 to vindicate his human rights was a factor which had to go into the balance when determining what would be equitable. But the weight to be given to it would depend on the particular facts of the given case. It would vary according, in particular, to when the claimant first had someone acting on his behalf and looking after his human rights interests, and when that person came into, or was in a position to come into, possession of knowledge of the essential facts. It would also be influenced by the expertise held by that person in identifying human rights claims.

What other factors influenced the court's decision?

Applying the approach described above, the judge noted that what 'stands out on any analysis' was that AP had been continuously represented by his family and by a firm of solicitors who were specialists in human rights claims, since at least September 2012. Even before that, the claimant had had the benefit of an appointed independent mental capacity advocate (IMCA) who had suggested an application to the Court of Protection as early as August 2011. King J found that the family and its legal representatives had knowledge of the essential facts needed to bring a claim by, at the latest, early 2014, and arguably earlier.

To this, the judge added a finding that there had been considerable delay both before and after the expiry of the limitation period. The defendants had not been responsible for any part of this delay. He found that the claim, when eventually made, came as a 'bolt from the blue' after a long silence, and that the defendant would now suffer prejudice if required to investigate and defend it, some 4–6 years after the events in question. Overall, it was not equitable to extend time.

To what extent does the judgment now clarify the law in this area?

King J's judgment represented an application of the general principles set out in *Rabone v Pennine Care NHS Foundation Trust* [2012] UKSC 2, [2012] 2 All ER 381 (para [75]), but in the context of a claimant who lacked capacity. It was also consistent with the approach that the courts take in claims involving a child (see *M (a minor by his litigation friend LT) v Ministry of Justice* [2009] EWCA Civ 419, [2009] All ER (D) 44 (Jun)).

It demonstrates that the court will continue to regard the discretion conferred on the court in HRA 1998 claims as a wide one, to be applied after examining all the features of the case. It is not to be restricted by developing 'presumptions' that apply to particular categories of cases.

What can practitioners take away from this case?

When acting for those who lack capacity and their representatives, do not assume that these legal disabilities will amount to a reason to extend the one-year time limit for actions under the HRA 1998. If in doubt as the limit approaches, consider issuing a protective writ.

Eleanor Grey QC has a thorough understanding of the health and social care sector, and of disciplinary and regulatory proceedings. Eleanor also has extensive experience of inquiries, reviews and investigations. She is currently acting for one of the core participants in the Independent Inquiry into Child Sexual Abuse. In the last two years, she has chaired independent reviews of paediatric cardiac services in Bristol and of the Disclosure and Barring Service (DBS)'s barring function. She has represented clients in high profile and sensitive hearings such as the public hearing of Ian Brady's application to the Mental Health Tribunal for discharge from hospital.

Interviewed by Kate Beaumont.

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