



Welcome to the March 2018 Mental Capacity Report. A combination of the January report coming out late in the month, the shortness of February, and the diversion of most of the editors to the Supreme Court in the *Y* case, means that we have had no February report, but are now firmly back on track. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: *Re Y* update, constructing a best interests decision in practice and the JCHR inquiry into DOLS reform;

(2) In the Property and Affairs Report: *Banks v Goodfellow* resurgens, trust corporations and appointees under the microscope;

(2) In the Practice and Procedure Report: Baker J on Charles J and Sir James Munby, children, confinement and judicial authorisation and the problems of litigants in persons;

(3) In the Wider Context Report: the MCA Action day, immigration detention and access to court for those with impaired capacity and international developments of relevance to capacity law reform;

(4) In the Scotland Report: the Scottish Government consultation on the Adults with Incapacity Act, and a round-up of recent relevant case-law;

You can find all our past issues, our case summaries, and more on our dedicated sub-site [here](#), and our one-pagers of key cases on the SCIE [website](#).

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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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Mental Capacity Action Day

The National Mental Capacity Act Forum is holding its annual action day on 5th March at the BMA. The theme for this year is supported decision-making, which will be explored with a range of speakers and workshops. It is (un)fortunately a sell-out already, but we can bring you one (virtual) highlight in the form of this [video](#) made by Grace and Lorraine Currie on living with a brain injury, and the power of art.

Immigration detention, capacity and access to justice

R(VC) v Secretary of State for the Home Department [2018] EWCA Civ 57 (Court of Appeal (Arden Lewison, Beatson LJJ))

Article 5 ECHR – damages – other proceedings – judicial review

Summary

The case concerned a Nigerian national (VC) in the UK who suffered from bipolar affective disorder with psychotic features. He was admitted to hospital on multiple occasions for

treatment under the Mental Health Act 1983 (MHA). VC was also detained under the Immigration Act 1971 by the Secretary of State in an immigration removal centre between 11 June 2014 and 5 May 2016 before being transferred to a psychiatric facility and compulsorily detained under the MHA.

VC challenged the legality of his detention under the Immigration Act and the delay in securing his transfer to hospital for treatment. The first instance court held that the Secretary of State had misinterpreted her policy on the detention of those with mental illness but, save for the period between 3 and 27 April 2015, VC’s detention was not unlawful.

On VC’s appeal, the Court of Appeal disagreed with the first instance judge and held that the Secretary of State’s breaches rendered the detention unlawful between 30 June 2014 and 27 April 2015. In particular, the Secretary of State had not discharged the burden of demonstrating, on the balance of probabilities, that she could and would have detained VC in any event. It followed that VC was entitled to compensatory damages in respect of the period

30 June 2014 to 27 April 2015 and that damages were to be assessed on the basis that VC would have been in the community rather than in detention.

The Court of Appeal also considered an argument that the Secretary of State had discriminated against VC by not making reasonable adjustments under the Equality Act 2010 for mentally ill detainees to make representations on decisions regarding their continued detention and segregation. This argument was supported by the Equality and Human Rights Commission intervening. The Court held that the Secretary of State had failed to discharge the burden of proof to demonstrate that she had complied with her duty to make reasonable adjustments. It was suggested, for example, that a system akin to IMCAs could be devised in which an advocate would assist mentally ill detainees in making representations in respect of decisions to detain or remove a detainee from association. The Court did not accept the Secretary of State's argument that representation at the public expense could not be provided on an anticipatory or continuing basis. Although the Court accepted that cost was a factor in assessing the reasonableness of the proposals, there was no evidence that the Secretary of State had made an assessment of cost and concluded that the proposals were unaffordable.

Comment

This immigration detention case may be of interest to practitioners for the observations made in relation to access to courts for those with cognitive impairments. The Court of Appeal found that mentally ill detainees were at a

substantial disadvantage compared to other detainees because there were circumstances in which issues may arise about their detention about which they would, if they had the ability to do so, want to make representations, but are unable to do so because of their mental illness. The Court noted that while in other detention contexts there are automatic independent reviews of the detention, in immigration detention a bail application has to be initiated by the detainee to obtain an independent review.

The Court's recognition of the difficulties faced by mentally ill detainees in accessing an independent review is welcome and is supported by Article 13 of the Convention on the Rights of Persons with Disabilities (CRPD). Although this was not cited by the Court, Article 13 provides that States "shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings..." The recent annual report of the UN High Commissioner for Human Rights on the right to access justice under article 13 of the CRPD (available [here](#)) made the following recommendations which resonate in the domestic context:

- States should modify civil, criminal and procedural laws which prevent persons with disabilities from directly or indirectly participating in judicial or administrative processes on an equal basis with others either by granting third-party recognition in law or in fact without free and informed consent or by denying legal standing.

- States should also implement laws and policies that ensure that information needed to defend rights is accessible, and that free and affordable legal aid is provided to persons with disabilities in all areas of law.
- States should implement anti-discrimination measures including providing procedural accommodations where necessary, in all their forms and in all legal proceedings.

On one view, this case also calls into question the correctness of the approach taken by the Court in *Bostridge v Oxleas NHS Foundation Trust* [2015] EWCA Civ 79 (which was not mentioned in the judgment). In that case, the Court of Appeal readily accepted that if Mr Bostridge had not been unlawfully recalled under a Community Treatment Order (CTO), he would have been lawfully detained in any event under s.3 MHA rather than in the community. He therefore suffered no loss and was entitled to receive nominal damages only. In *Bostridge*, there was no real analysis of whether the defendant in that case (Oxleas NHS Foundation Trust) had discharged the burden of proof to the requisite standard, but rather an assumption that because Mr Bostridge was detainable under the MHA, he would have been detained under section 3 of the MHA in any event. At the very least, the decision in *Bostridge* should be read in light of this most recent Court of Appeal judgment.

How many more cases does it take?

A Safeguarding Adults review commissioned by Somerset Safeguarding Adults Board into serious abuse at Mendip House has been [published](#). Mendip House was a home for 6

adults with autism run by the National Autistic Society. It was one of a number of separately registered properties on the Society's Somerset Court campus, where service users were sent by a large number of placing authorities.

It closed on 31 October 2016 following allegations of serious abuse made by whistle blowers. The allegations included care staff playing on their Playstations while on shift and failing to take service users out as a result; using residents' funding to pay for their meals during outings over a number of years, bullying, service user absconding, humiliation of service users, including throwing food at them.

The review highlights concerns about the risks of not investigating and managing safeguarding incidents and in particular the recruitment of staff in such placements. It also puts particular emphasis on the need for placing authorities, many of whom are inevitably far from the placement they fund, to conduct coordinated reviews of the individuals placed in such homes.

Personal Injury Payments and Care Needs Assessments

In a story reported by [Community Care](#) (but where the underlying judgment is not available), the High Court has rejected an application for judicial review of a decision by the Local Government and Social Care Ombudsman that a woman's personal injury award should not be taken into account by the responsible local authority when assessing her eligible needs.

The application was brought by Wokingham Borough Council. It concerned a woman for whom the local authority had a duty under the Care Act, reported to have been awarded a sum

of £1.3 million in 1998 for damages arising out of a claim for clinical negligence dating back to 1975.

Wokingham Borough Council carried out a needs assessment in July 2015 shortly after the woman moved into the borough. It argued that her personal injury award, £729,675 of which it maintained had been awarded specifically to pay for her care needs, ought to be taken into account when assessing her eligible needs. It limited her payments accordingly and while it did eventually agree to reinstate her funding and to provide some back payments, it refused to do so back to the point at which she was first identified as having eligible needs. The woman's solicitor complained to the Local Government and Social Care Ombudsman that the local government had made an error by failing to disregard her personal injury award.

The ombudsman concluded that the law provides that personal injury awards must be disregarded in financial assessments unless the court orders an undertaking that no application for public funding should be made accordance with the judgment in *Peters v East Midlands SHA* [2009] EWCA Civ 145. Accordingly, it upheld her complaint and ordered the council to backdate payments for her care for all her assessed eligible needs. Mr Justice Fraser refused the application for judicial review of the ombudsman's decision and, further, certified the application as totally without merit.

The Local Government Ombudsman has confirmed that it will look at similar cases in a similar way. Local authorities will no doubt regret the financial implications of such a decision in these financially straitened times; those acting

on behalf of clients with significant care needs will doubtless welcome the decision.

European Committee on Prevention of Torture – UK response

The UK response to the report of the European Committee on the Prevention of Torture has now been published, following the visit of the Committee in 2016. For present purposes of particular interest is the Government's response to the Committee's recommendation that the MHA 1983 be amended "*so as to require an immediate external psychiatric opinion in any case where a patient does not agree with the treatment proposed by the establishment's doctors; further, patients should be able to appeal against a compulsory treatment decision to the Mental Health Tribunal. Patients should provide their consent to treatment in writing on a specific form.*" This recommendation comes from the same place as (although does not expressly refer to) the line of Strasbourg jurisprudence on Article 8 ECHR started in *X v Finland* and developed in *LM v Slovenia*. At paras 194-199, the Government, in essence, dodged a substantive response by outlining current practice and highlighting the work of the independent Mental Health Act Review.

Mapping institutional and community care across Europe

A useful comparative study of institutional, coercive and community-based mental health services across Europe can be found in the updated *Mapping Exclusion* report produced by Mental Health Europe.

Legal capacity law reform across the world

The most recent Report of the Special Rapporteur on the rights of persons with disabilities, Catalina Devandas Aguilar, contains both a review of her activities in 2017 and a thematic study on the right of persons with disabilities to equal recognition as a person before the law including, in particular, a useful (if frustratingly high-level) survey of reform efforts around the world which are moving in different directions towards compliance with the CRPD (the Northern Ireland Mental Capacity Act getting a mention in footnote 16...).

Not mentioned by the Special Rapporteur, probably because it came out too recently, is an interesting report by the Tasmanian Law Reform Institute reviewing the Guardianship and Administration Act 1995 (Tas) in light of subsequent developments around the world.

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Alex is recommended as a 'star junior' in Chambers & Partners for his Court of Protection work. He has been in cases involving the MCA 2005 at all levels up to and including the Supreme Court. He also writes extensively, has numerous academic affiliations, including as Wellcome Research Fellow at King's College London, and created the website www.mentalcapacitylawandpolicy.org.uk. To view full CV click [here](#).



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Simon has wide experience of private client work raising capacity issues, including *Day v Harris & Ors* [2013] 3 WLR 1560, centred on the question whether Sir Malcolm Arnold had given manuscripts of his compositions to his children when in a desperate state or later when he was a patient of the Court of Protection. He has also acted in many cases where deputies or attorneys have misused P's assets. To view full CV click [here](#).



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Adrian is a recognised national and international expert in adult incapacity law. While still practising he acted in or instructed many leading cases in the field. 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; 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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Conferences

Conferences at which editors/contributors are speaking

Edge DoLS Conference

The annual Edge DoLS conference is being held on 16 March in London, Alex being one of the speakers. For more details, and to book, see [here](#).

Central Law Training Elder Client Conference

Adrian is speaking at this conference in Glasgow on 20 March. For details, and to book see [here](#).

Royal Faculty of Procurators in Glasgow Private Client Conference

Adrian is speaking at this half-day conference on 21 March. For details, and to book, see [here](#).

Law Society of Scotland: Guardianship, intervention and voluntary measures conference

Adrian and Alex are both speaking at this conference in Edinburgh on 26 April. For details, and to book, see [here](#).

Other conferences of interest

UK Mental Disability Law Conference

The Second UK Mental Disability Law Conference takes place on 26 and 27 June 2018, hosted jointly by the School of Law at the University of Nottingham and the Institute of Mental Health, with the endorsement of the Human Rights Law Centre at the University of Nottingham. For more details and to submit papers see [here](#).

Advertising conferences and training events

If you would like your conference or training event to be included in this section in a subsequent issue, please contact one of the editors. Save for those conferences or training events that are run by non-profit bodies, we would invite a donation of £200 to be made to the dementia charity [My Life Films](#) in return for postings for English and Welsh events. For Scottish events, we are inviting donations to Alzheimer Scotland Action on Dementia.

Our next report will be out in early 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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