



Welcome to the December 2019 Mental Capacity Report – our 100<sup>th</sup>\*. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: an important guest article from Inclusion London, and reflections from Tor and Alex on 100 issues;

(2) In the Property and Affairs Report: a report of an interview with HHJ Hilder and deputyship refunds;

(3) In the Practice and Procedure Report: the administration of appeals, and important judgments shedding light by analogy on fact-finding, costs and vulnerable witnesses;

(4) In the Wider Context Report: assisted dying, Article 2 obligations and informal patients, and reports of developments in Northern Ireland, Jersey and wider afield;

(5) In the Scotland Report: an important judgment on guardianship and deprivation of liberty, a judicial review of conditions of excessive security and further observations on the operation of ‘foreign’ powers of attorney in England & Wales from the Scottish perspective.

You can find all our past issues, our case summaries, and more on our dedicated sub-site [here](#). If you want more information on the Convention on the Rights of Persons with Disabilities, which we frequently refer to in this Report, we suggest you go to the [Small Places](#) website run by Lucy Series of Cardiff University.

Happy holidays, and we will return in February 2020.

\* Confession: there was a numbering glitch a long way back which means that this is no.99 in this series, but in our defence no.1 in fact represented the formalisation of informal updates Tor and Alex had been doing for several months.

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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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## HEALTH, WELFARE AND DEPRIVATION OF LIBERTY

### We are not Ps we are People

*[In this our 100<sup>th</sup> issue, we thought that it was most important to start with something written from the point of those to whom the MCA is applied day-in, day-out, inside and outside the Court of Protection; we are therefore very grateful to Svetlana Kotlova of [Inclusion London](#) for her work in coordinating and supporting the following guest article]*

There are too many problems with the law and how it doesn't uphold human rights of people with learning difficulties, autism and mental health support needs. It allows discrimination often in the name of protection and making sure people are safe. It often excludes people from making important decisions about their life and it does not address the power imbalance that so many individuals experience no matter where they live and what they do. Many problems are also to do with how the laws are implemented and enforced.

I asked Andrew Lee Director of People First and Christine Spooner Chair of People First to help me write this article. Below we discuss how the Mental Capacity Act works for people who are on the receiving end. We also talk about fundamental problems that underpin our laws and the way people with learning difficulties are treated. We are very grateful for this opportunity to put across our point of view.

#### ***Why learning difficulties?***

We use the term learning difficulties. We know in law these words have a different meaning. We use this term because we believe in the Social Model of Disability, which says disability is not about impairment, it is the barriers people with impairments face. Learning difficulties describes our impairment and we are disabled by the lack of accessible information, communication, prejudice and discrimination and the lack of support.

#### ***Compulsion in the name of caring***

Christine told me:

*Too many people who come to my house somehow know what's best for me. They start telling me how to do things and what should happen before even talking to me and when I demand they get out of my house, I'm labelled as rude, unreasonable, ungrateful or angry. Yes, I get angry, and so I should be. Just imagine someone came to your house, started telling you what to do straight away, changed*

*things how they wanted without talking to you. You would not be smiling and asking them to come again.*

*Of course, most people want to help and do good, but somehow still deep down their mind they think they know better what is good for me. They almost treat me like a child. This attitude comes at every stage, from small decisions to big. Most of the time people do not even understand that what they are doing is wrong. I am used to fighting my corner. I don't care what they think. But it is not easy to live a life where you always have to fight with people who are close to you and are supposed to help you. Why do I have to remind people to recognise me as a person and respect my choices, no matter whether they agree or disagree? I feel the only people who can understand what I am going through are other people with learning difficulties. This is why self-advocacy and peer support are so important.*

Compulsion in the name of care is deeply rooted in discriminatory attitude towards disabled people and people with learning difficulties in particular. We have not been seen as "normal" human beings. Society as a whole still doesn't know what to do with us. The support we need can cost a lot and the support that promotes our liberty and our autonomy costs even more.

Andrew says:

*Supporting us is a difficult and very skilled job. It is much easier to lock us away in institutions or our homes, make decisions for us and protect us from living a life. And although the laws have changed, discrimination is still there and real life does not resemble what should happen under the law. The choice we have are only the choices we are given, the often have nothing to do with our aspirations and we really want our life to be.. the same as everybody else..*

### ***Discriminatory nature of our laws***

Only people with learning difficulties, autism and mental health support needs could be detained, preventatively because professionals think they are a danger to others. We as society would not agree with a proposition to detain all dangerous people, but we accept it when it comes to people with learning difficulties and mental health support needs. And it is often forgotten that there are many of us who experience abuse even in places that are supposed to protect us.

*There are many non-disabled people who would benefit from medical treatment, but it is only us who could be forced to undergo the treatment we do not want. On the other hand we often have to fight for the help and support that we really need and that would really help us.*

We need support and sometimes protection, that increase our choice and promotes our freedom, but we get protection and care that forces us to accept things we don't want.

People with learning difficulties are subjected to unbelievable levels of scrutiny. Take parents with learning difficulties, who have to prove they are good parents and battle for support, when non-disabled parents have to do something seriously wrong before anyone gets involved.

Many of us have to battle hard to have relationships or live where we want, while non-disabled people take it as normal part of life.

And the Human Rights Act allows all this.

And of course the Mental Capacity Act with all its protections and presumption of capacity still allows others to make decisions for us, override our wishes and decide what is good for us. In reality people are not supported to make decisions, they are not given accessible information or real choices, what they get to choose from depends on what information they get given, time is not taken to see and understand what they want. Moreover, since many individuals need support their choices are often limited by decisions made by local authorities or CCGs about their support packages. Supporting people to make decisions requires time, commitment, skill and the right attitude. In a day-to-day life it is much easier and cheaper to just make decisions for them.

*There is a huge imbalance of power in our lives; we often depend on people who make decisions for us. And when we disagree, the onus is on us to dispute through the Court of Protection... the very system we cannot access.*

*It feels like when the system was designed, no one really thought it through from our point of view. How is it supposed to work in practice for every person and every decision? How would it work for a friend of mine who was told by a care home manager they cannot have a relationship? Many of us need support to get support, not everyone has relatives who will fight for us, not everyone has an advocate. Most people would not know where to start and what to do. The process is so complex and inaccessible even for non-disabled people and it is just an illusion that we can challenge decisions about our capacity or best interests. We can only challenge when others around us are prepared to help us.*

*Decision makers and legal systems don't have credibility with people with learning difficulties as the promises they have made, and make again, especially after scandals such as Winterbourne View and more recently Whorlton Hall, are never followed through.*

*The Court of Protection feels more like a place where other people argue what is good for us, often without us. I was shocked that the law and the lawyers call us "P". I know it is legal language, but there is a life, a real person, Joe, Sarah, whose life is on the cards, not just a P. I was also shocked to find out the lawyers who represent us will not always argue what we want. They will argue what they think is best for us. So who is there to represent our voice? It would be scandalous if something like this was happening to non-disabled people.*

*The advocacy that people with learning difficulties set up for themselves, and still use, needs to be accepted by the legal system – advocates recognised by the legal system such as barristers and lawyers are not always 'our' advocates.*

*The whole system is not fit for the XXI Century. It needs to be accessible, it needs to hear our voice and give us a real opportunity to exercise our rights.*

***The change we need***

There are international human rights standards like the UN Convention on the Rights of Persons with Disabilities. Which talks about supported decision-making, it prohibits detention on the basis of disability and calls for respect for integrity of every disabled person. It requires support to be put in place in community to ensure we have choice and control in our lives. These standards challenge ways of thinking and working and this is why there is still a lot of scepticism among the professionals. It is worth remembering that UNCRPD is probably the only document which was developed with such extensive and meaningful input from disabled people. We therefore ask everyone to accept these standards, aspire to achieve them and focus on what to do to make it happen, rather than thinking and talking why it is impossible to achieve this.

We need support to make decisions ourselves. We need our wishes and views to be heard and respected in decision-making processes. We need supporters and allies who would help us advance our human rights and who would support and enable us to speak out for ourselves be it in court or when bigger policies are developed by the government.

Last year, when the Mental Capacity Amendment Act was going through Parliament we spoke to many people with learning difficulties about the Mental Capacity law and UNCRPD. We published a report which highlights some important issues for us. You can read the report [here](#).

### DoLS statistics

The DoLS statistics for 2018-9 have been published by NHS Digital. Headline points are that:

- There were 240,455 applications for DoLS received during 2018-19, relating to 200,225 people. The number of applications has increased by an average of 15.0% each year since 2014-15.
- The number of applications completed in 2018-19 was 216,005. The number of completed applications has also increased each year, by an average of 36.3% each year since 2014-15.
- The reported number of cases that were not completed as at year end was 131,350. This is higher than in previous years, however the gap between the volume of applications and those completed within each year has narrowed from 54.5% in 2014-15 to 10.2% in 2018-19.
- The proportion of completed applications in 2018-19 that were not granted was 45.9%. The main reason was given as change in circumstances, at 58.1% of all not granted cases; in 31,130 cases, the application was not granted because the person had died.
- The proportion of standard applications completed within the statutory timeframe of 21 days was 22.0% in 2018-19. The average length of time for all completed applications was 147 days.

## The first 100 issues: Tor's thoughts

You might remember that 2010 was the year of the Conservative/Liberal Democrat coalition government, the election of Ed Miliband as Labour leader rather than his brother, and, even more significantly, the publication of the first formal 39 Essex (St) Mental Capacity Newsletter.

Back in 2010, we had about 50 people who were sent our case summaries by email every three months or so. The first formal edition, in August 2010, covered the familiar topics including deprivation of liberty and the appointment of welfare deputies. It was a mere 13 pages long, with only 2 editors, and no photos. Nor were there any neutral COP citations for the cases.

Fast forward to the 100<sup>th</sup> edition, and we have 8 editors, 2 Scottish contributors, reports that sometimes seem more like short books than newsletters, and, at the last count, 11,390 individual subscribers! It is a huge task to pull the report together each month, and Alex bears the brunt of it. But we are all committed to continuing the report, as we know how useful people find it – not just lawyers, but social workers, health professionals and others with an interest in this area of the law. Here's to the next 100 editions!

## The first 100 issues: Alex's thoughts

At the risk of sounding like an Oscar's speech, I am going to use my slot to give thanks:

- That Tor had the thought to start this off almost 10 years ago rather than 10 weeks ago, so that it has been possible to build a database of cases and materials gradually, rather than attempt the impossible task of starting now from scratch;
- To those who read, comment and send in materials to us, not just from England, Wales and Scotland, but increasingly from the other two jurisdictions within these islands, and from the wider world;
- To the marketing team in Chambers who have over many years cheerfully and patiently supported a project that – if it works – frequently works to ensure that situations do not get to the point where barristers within Chambers have to be asked to advise or represent people or bodies; and, above all
- To the members of the editorial team for their hard work in keeping up contributions month after month. They never fail to respond to the monthly email from me asking for volunteers, and from the times that the emails are sent in response I know how often their work is being done on top of a very demanding day job.

Who knows where we will be in another 100 issues' time? Reporting upon a 'fused' mental capacity and mental health law? Reporting upon separate Welsh mental capacity legislation? Reporting upon

a law that moves entirely beyond mental capacity? We can, though, promise that we will continue to keep up reporting developments as and when they occur.

## PROPERTY AND AFFAIRS

### Deputyship refunds

Refunds are being offered to those who were charged more than necessary for certain deputyship services for any period between 1 April 2008 and 31 March 2015. Current deputies acting for existing clients do not need to apply for the refund, as the Office of the Public Guardian for England and Wales will be in touch with them. However, where a deputyship has ended, either because the vulnerable person has died or is now able to make their own decisions either themselves or via an attorney, the refund will need to be applied for. The refund can be applied for [online](#) and there is also a dedicated refunds helpline on [0300 456 0300](tel:03004560300). The scheme will be open until 4 October 2022; the OPG estimates that most refunds will be less than £200 (together with 0.5% interest).

### Senior Judge Hilder interview

Senior Judge Hilder recently took questions at the BABICM (British Association of Brain Injury Case Managers) 2019 annual conference in Birmingham. They have been reported in [NR Times](#), a neurorehabilitation magazine.

The questions included one about delays. The Senior Judge accepted that the time it takes for some applications to be dealt with is not acceptable. She pointed, however, to the fact that CoP now had deputy district judges who had been deployed to help clear up a backlog and that there was funding to increase authorised court officers from 5 to 8. She also said that CoP was not to be part of the court reform programme, which was a mixed blessing as that would have carried with it investment but at least there would be stability. This means that CoP will not be getting online filling.

She was asked about difficulties faced by lay deputies. She acknowledged the complexity of the application process and pointed to the existence of the telephone enquiries team and the slowly growing list of accredited legal representatives who can be asked for help.

She was asked about the potential effect of the new Liberty Protection Safeguards (due 2020) on CoP workload. She was cautiously optimistic pointing to the fact that apocalyptic predictions of work following Cheshire West had never quite materialised.

Lastly, she was asked about “private DoLs” and the apparent unwillingness of local authorities to apply for authorisations when their attention is drawn to them (especially when P is in the community rather than in a residential home). She made it clear that she considers that local authorities should be the applicant (unless, perhaps, where damages have been awarded to include the cost of making the DoL application) and gave examples of cases where the deputy had ended up making the application, in which she had put the relevant local authority on the spot by requiring the relevant local authority to explain why it should not be substituted for this applicant. So far, she indicated, they had always

accepted that they should be, although she recognised that there were cost implications. PRACTICE AND PROCEDURE

### Administration of appeals

The Vice-President of the Court of Protection, Hayden J, sent a letter on 26 November 2019 to other judges of the Court of Protection, reproduced [here](#), in which he noted that:

*One of my most surprising discoveries on becoming V.P. was that the Court of Protection did not have a clearly structured system for administration of appeals. The route by which cases came to be heard on appeal was haphazard and inconsistent. Some appeals simply got lost and others took an unconscionable time to reach a hearing.*

The letter sets out the internal procedure for appeals, in particular, for appeals from Tier 2 (i.e. Circuit Judges) to Tier 3 (High Court judges).

The Practice Direction governing appeals, PD20A, can be found [here](#).

### Recognising and responding to the needs of vulnerable parties

*Re N (A Child)* [2019] EWCA Civ 1997 (Court of Appeal (King, Asplin and Rafferty LJJ))

*Other proceedings – family (public law)*

In this decision (mysteriously, and wrongly, not on Bailii), the Court of Appeal was concerned with the participation of the mother of the child in care proceedings, who had a mild learning disability, and took the opportunity to review the operation of Part 3A and PD3AA of the Family Procedure Rules 2010, introduced in November 2017, and which make provision for “Vulnerable Persons: Participation in Proceedings and Giving Evidence.” As King LJ noted, having reviewed the background to and development of these provisions:

*Part 3A and its accompanying Practice Direction provide a specific structure designed to give effective access to the court, and to ensure a fair trial for those people who fall into the category of vulnerable witness. A wholesale failure to apply the Part 3 procedure to a vulnerable witness must, in my mind, make it highly likely that the resulting trial will be judged to have been unfair.*

In the course of the care proceedings, the judge held ground rules hearings in respect of two of the litigants in person who had been identified as vulnerable and requiring an intermediary. They were then, in compliance with Part 3A, secured the assistance of one Intermediary. Their Article 6 ECHR rights were therefore both engaged and protected. However:

*53. Given that the mother's (then) legal team did not identify the mother's difficulties, no participation directions were given, and there was no ground rules hearing in relation to her. The mother was therefore deprived of the protection due to her as a vulnerable witness. A ground rules hearing would*

*have put in place special measures which would have allowed her to give her best evidence in a carefully considered and bespoke form, the structure of which would have been facilitated by the reports of Dr Parsons and the Intermediary assessments.*

*54. It is most unfortunate that those then representing the mother did not recognise the extent of her difficulties, such that they could have at least sought a psychological assessment of her, although in fairness to that legal team, Toolkit 4 specifically sets out that people with borderline learning disability “may not have been formally diagnosed and may be difficult to identify”. It is nevertheless worth highlighting the duty under PD3AA 1.3 for legal representatives actively to consider whether their client may be a vulnerable witness. This is particularly so following the Working Group having observed (at Paragraph 10. Footnote 12) that, as of 2008, 72% of mothers in a sample in a Case Profiling Study by Masson et al experienced one or more difficulties with mental illness, learning difficulties, substance abuse and domestic abuse.*

*55. The judge could not have been expected to have identified the mother as a vulnerable witness prior to her going into the witness box. I have no doubt that once her concerns as to the quality of the mother’s evidence were raised, she did all that she could to ameliorate the inevitable difficulties. I accept completely that the judge would have adjourned the case had she felt that her interventions and case management (breaks etc) during the trial were insufficient in order to allow the mother to do herself justice in the witness box. With the benefit of hindsight, despite the delay, it would, in my judgment, have been better, once the mother started giving evidence and her difficulties were exposed, if the judge had listened to the ‘grey thoughts’ she had had during the course of the evidence and which she subsequently expressed in her judgment and had stopped, or adjourned, the trial in order to have a cognitive assessment of the mother carried out.*

At the end of the day, King LJ concluded (at paragraph 56):

*the judge’s efforts were not enough to enable the mother to give her best evidence, as is apparent from the reports of Dr Parsons and the Intermediaries. As a consequence, the mother did not have a fair trial.*

Although King LJ held that it would “go too far to say that a rehearing is inevitable in all cases where there has been a failure to identify a party as vulnerable, with the consequence that no ground rules have been put in place in preparation for their giving evidence and no Intermediary or other special measures provided for their assistance,” in the instant case, and applying the dicta of the European Court of Human Rights in *P,C and S v UK* [2002] ECHR 604, there had “undoubtedly [been] a fundamental breach of the mother’s Article 6 rights and she was denied a fair trial”:

*62. One knows not whether Mr Shaw is correct in his assertion that the outcome will ultimately be the same, but in the circumstances of this case, it matters not. This mother was denied the very protection which has been put in place to ensure that she, as a woman with learning difficulties, has a fair trial. The stakes could not be higher; she faces the permanent loss of her two infant children. In my judgment, the fact that the mother will have the assistance she requires for the balance of the*

*proceedings cannot make up for the fact that she was without that help in the crucial hearing, the findings from which will form the basis for all future welfare decision in respect of these two children.*

## Comment

Although there is not, yet, a formal structure in the Court of Protection Rules akin to that of Part 3A FPR, the fundamental principles underpinning Part 3A applying equally in the Court of Protection – above all, perhaps, the obligations upon representatives to recognise the potential needs of their clients. Prior to the completion of the work of the ad hoc Court of Protection Rules Committee in relation to vulnerable witnesses and participation, we remind practitioners of the practical guidance issued in November 2016 by the former Vice-President of the Court of Protection, Charles J, on facilitating the participation of ‘P’ and vulnerable persons in Court of Protection proceedings, available [here](#).

## President’s Working Group on Medical Experts

The President of the Family Division, Sir Andrew McFarlane, set up a working group to address the concerns he had received from his nationwide progress around the family courts following his appointment in July 2018, to address the relative scarcity of medical expert witnesses willing to participate in family cases involving children. While not strictly relevant to cases in the Court of Protection, the problems caused by the delay in finding appropriate medical experts to report timeously will be all too familiar to COP practitioners. Given the obvious similarities between the two jurisdictions (not least because many of the same Judges decide both types of cases) any change in culture in the family courts is likely to impact on the COP.

The working group survey undertook a survey of the medial and legal professions to investigate the extent of the problem, perceptions of causes and potential solutions and then held a symposium to discuss the survey results. The draft report which can be found [here](#) sets out a number of draft recommendations arising from this work, for consultation. The final Report is to be presented to the President in Spring 2020.

The results of the survey of the medical and legal professionals makes fascinating reading for COP practitioners. 709 individuals (412 medical + 297 legal) responded to it, and the report notes that this was across a good geographical and specialisation spectrum. The key findings were:

- That difficulties in securing expert witnesses were experienced across the country and in a wide range of specialisms.
- The impact of the shortages was principally in creating delay although there were also concerns about the quality of some expert evidence which were likely to be linked to the shortages. The working group were satisfied that the shortage of experts was likely in some cases to be harmful to children.

- Certain specialisms were identified as giving rise to particular shortages;
- The main factors which were identified as barriers or disincentives for medics being prepared to work as experts were:
  - Remuneration linked (the most commonly expressed barrier amongst both groups is the Legal Aid Agency prescribed rate, other elements of concern about finances included delays in payment, the payment system (multiple invoices) and the tax/pension implications)
  - Court processes (385 of healthcare professionals identified inflexibility in court timetabling (including scheduling witnesses) as an issue and 37% the volume of material)
  - Lack of support and training (35% of healthcare professionals identified lack of support from NHS Trusts)
  - Perceived criticism by lawyers, Judiciary and press (58% of medics cited this as a barrier)

The responses from the medical consultees to what has been termed the Court processes is highly relevant to those that practice in the COP. The committee noted that *'It was repeatedly noted that lack of appropriate organisation i.e. late provision of bundles and last minute cancellation of court attendance has implications on the time that health professionals have to dedicate to expert witness work.'* Other issues highlighted were: the failure to provide only relevant material to the experts requiring them to spend time reading through reams of irrelevant material,

- the failure to provide the expert with the outcome of the case, thus failing to recognise their motivation in being an expert witness i.e. to improve outcomes for children and young people, and
- the failure on the part of lawyers to understand the limited time the medics had to devote to expert work.
- 25% of the respondees felt that the treatment they received in Court during hostile cross-examination (being barracked and interrupted) was responsible for a shortage.

The group made 22 recommendations, the key ones being:

- Action by the Royal Colleges to create online resources to support expert witness work and to increase awareness of existing training in the field
- The Royal Colleges to engage with commissioners and or trusts to promote a more supportive environment to medical professionals who wish to undertake expert witness work
- The Royal Colleges and the working group to engage with NHS England and Clinical Commissioning Groups to seek changes to contracting arrangements to enable healthcare professionals to undertake expert witness work within the parameters of their employment contracts

- Amending the Legal Aid Agency's guidance in respect of the granting of prior authority and payment to experts to simplify the process to enable an expert to render one invoice
- Seeking changes to the rates of remuneration for certain experts and the prescribed number of hours in respect of some categories of assessments to more properly reflect the amount of work involved
- Ensuring legal professionals including Judiciary adhere to the provisions of FPR Part 25 in relation to expert instructions
- Ensuring that the instruction to experts was more efficiently undertaken to ensure only the necessary paperwork was sent to the expert to consider and a unified point of contact to ensure more effective and efficient communication
- Ensuring that experts were only required to give evidence where the court was satisfied an issue existed in relation to their report, to guarantee if their participation was required that it was fixed and not susceptible to last-minute change and to enable experts to attend by video link where appropriate
- Ensuring that experts are treated appropriately during court hearings, within judgments and thereafter to support constructive engagement and feedback
- Creating a subcommittee of the Family Justice Council (FJC) to support and maintain the implementation of the recommendations
- Creating regional committees based on Family Division circuits to promote interdisciplinary cooperation, training and feedback.
- To create greater training opportunities for medical professionals including mini pupillages with judges, cross disciplinary training courses with healthcare and legal professionals, and mentoring, peer review and feedback opportunities
- To promote greater awareness within legal professionals including by means of training, of best practice in relation to expert witnesses

Additional recommendations which if implemented are likely to impact on COP practitioners are:

- Where a judge proposes to name an expert in their publicly available judgment, the expert should be entitled to see a draft of the judgment in advance of publication and have the opportunity to make representations to the judge.
- To provide a bespoke expert's bundle culled from the main bundle, including the full index and updating that bundle as further relevant material is provided. That should be an e-bundle in an accessible format which can then stand as the witness bundle for the expert at trial. Local

Authorities to create e-bundles from which the experts Core Bundle can be created. (It should be noted however that this requirement exists already in practice direction 25 of the Family Procedure Rules where it does not in the equivalent part in the COP Rules (see part 15)).

- A direction should be made, at the conclusion of any hearing where an expert has been instructed and has provided evidence to the court whether by way of written report or oral evidence, directing the lead solicitor for the instruction to send a copy of the judgment to the expert.

The report poses 23 consultation questions at annex 1 and invites consultees to provide answers to those questions and the recommendations made by 31 January 2020. We shall report on the final report when it is published next year.

### Short Note: when to terminate the appointment of a litigation friend?

*R (Raqeeb) v Barts Health NHS Trust et al* [2019] EWHC 2976 (Admin), which recently appeared on Bailii, concerns an application by the NHS Trust to terminate the appointment of Tafida Raqeeb's litigation friend days before the final hearing of the judicial review proceedings ([2019] EWHC 2531 (Admin) and [2019] EWHC 2530 (Fam)). The issue in those substantive proceedings was whether the Trust's decision not to permit Tafida to be transferred to the Gaslini hospital in Italy was unlawful. The Trust argued that XX should be removed as litigation friend because as a family member she loved Tafida, held – in the context of the tenets of her strong Islamic faith – a clear and settled view of where Tafida's best interests lay, and had lodged a position statement in the Children Act proceedings opposing the withdrawal of life-sustaining treatment.

MacDonald J dismissed the application and made a costs order against the Trust. The court stressed that the litigation friend was only appointed to act in the judicial review proceedings, not the Children Act / best interests proceedings, where Tafida was represented by the Children's Guardian. The application therefore had to be determined in that context. Akin to the Court of Protection Rules, a litigation friend must (1) be able fairly and competently to conduct proceedings and (2) have no interest adverse to that of the person.

#### (1) *Fairly and competently conduct proceedings*

His Lordship analysed the authorities and emphasised the central role of legal advice in the discharge of the duties. A litigation friend who did not act on proper advice may (not must) be removed. Furthermore, whilst the litigation friend is required to act on legal advice, he or she must be able to exercise some independent judgment on the legal advice received. In doing this, the litigation friend must approach the litigation with objectivity:

*26 ... Thus, in conducting these proceedings fairly and competently XX is required to take all measures she sees fit for the benefit of Tafida, supplementing the want of capacity and judgement of Tafida, her function being to guard or safeguard the interests of the Tafida for the purposes of the litigation. The discharge of that duty involves the assumption by XX of the obligation to acquaint herself with*

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*the nature of the action and, under proper legal advice and with the necessary objectivity, to take all due steps to further the interests of Tafida.*

(2) *No adverse interest*

Obvious examples included a social worker acting as litigation friend in a claim relating to the provision of services by a local authority employing that social worker. Or a relative with a financial interest in the outcome of a case. But having a deep affection for the person was not an adverse interest provided the litigation friend can “*take a balanced and even-handed approach to the relevant issues.*”

Crucially, in the context of the litigation friend’s role in the judicial review proceedings, XX’s views about the religious probity of withdrawing treatment from Tafida were not relevant. The question for the court was one of law and fact, namely whether the Trust’s decision not to permit her to go to Italy for treatment was contrary to her EU rights.

His Lordship noted:

*37... a solicitor who is acting for child or protected party is likely under an obligation to inform the court of any concern that the litigation friend is not acting properly. In such circumstances, the court must be entitled to rely on the assessment of the legal team when considering the extent to which it can be established that the litigation friend has or is pursuing an interest adverse to that of the child.*

In this case there was nothing from her legal team to suggest that XX was acting otherwise. This decision thus provides a useful summary of some of the main authorities on issues which bear upon the role of litigation friend in Court of Protection proceedings.

## Costs – striking the right balance

*Barts NHS Foundation Trust v Begum and Raqeeb, and Raqeeb (by her children’s guardian)* [2019] EWHC 3322 (Fam) (MacDonald J)

*Other proceedings – Family (public law) – Judicial review*

### Summary<sup>1</sup>

This is the costs decision in the case concerning the medical treatment and best interests of Tafida Raqeeb, a five year old girl (“Tafida”). We reported on the substantive proceedings in an earlier report, but to recap, the court had before it two sets of proceedings in the substantive application:

- (i) An application by Tafida for judicial review of the decision by the Trust not to agree to her being transferred to a hospital in Italy for continued medical treatment pending the determination of an

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<sup>1</sup> Nicola having been involved in the case, she has not contributed to this case comment.

application to the High Court for a declaration regarding her best interests. The Court held that that the decision of the Trust was unlawful but declined to grant relief to Tafida.

- (ii) An application by the Trust for a specific issue order pursuant to s. 8 Children Act 1989, and an application for a declaration pursuant to the inherent jurisdiction of the High Court, that it was in Tafida's best interests for her current life-sustaining treatment to be withdrawn, a course of action that would lead inevitably to her death. That application was dismissed.

Following the handing down of judgment, the court had to determine the following costs applications on the papers:

- (i) That the Trust should pay Tafida's costs of the judicial review proceedings on the basis that as a successful claimant costs should follow the event. Tafida's representatives also relied on the conduct of the Trust during the proceedings in support of her application for costs, including that it was unreasonable of the Trust to argue that it had not made a decision that was susceptible to judicial review.
- (ii) That the Trust should pay Tafida's costs in the Children Act 1989 proceedings.
- (iii) The parents sought their costs in the Children Act proceedings only, on the basis that the proceedings engaged the core Article 8 rights of the parents, and so there would be an unacceptable inequality of arms (a core principle of Article 6) as between the parents and the State if the parents did not recover their costs in circumstances where:
  - a. the parents were required to respond to the proceedings instituted by the Trust, and
  - b. where the proceedings concerned the life of their child and there was no non-means tested public funding available (unlike for parents on public law family proceedings).

The parents also relied on the conduct of the Trust during the proceedings as a further reason why their application for costs should be granted, including that it was unreasonable on the part of the Trust to assert that the parents had at some point consented to the withdrawal of Tafida's treatment.

The Trust's position was that in each set of proceedings the parties should bear their own costs. The Trust submitted that:

- (i) Tafida's application for judicial review was part of a calculated campaign seeking an anterior procedural ruling to obviate the need for any decision by the Family Division as to her wider best interests or to defer such a decision until Tafida was a patient in the hospital in Italy.
- (ii) Tafida could not be considered to be the successful party in the judicial review proceedings as she had not avoided the need for a best interests decision being made by the Court and she had not been granted a remedy in the judicial review proceedings.

- (iii) There were important policy reasons why the usual order for costs in welfare proceedings is no order for costs, including that:
- a. Trusts will be deterred from making applications of this nature by the inevitable tension that will arise (in already difficult circumstances) between their safeguarding obligations in relation children who are not deriving benefit from life sustaining treatment and the duty to fund the treatment needs of all patients.
  - b. To grant such an application would have a chilling effect in that those children most in need of a judicial determination of their finely balanced best interests will be the children in respect of whom a Trust will be reticent about risking the cost consequences of a best interests application before the court.

The Trust also noted that the parents' legal costs were funded by a Gofundme campaign, and that they had been properly represented before the court, thus the Trust submitted, as a matter of fact, there was no inequality of arms.

MacDonald J held that Tafida was the successful party in the judicial review proceedings despite not being granted a remedy. He therefore saw no reason for disapplying the ordinary rule that the unsuccessful party should pay the successful parties costs. Accordingly, he awarded Tafida 80% of her costs. The 20% discount was to take account of the unsuccessful argument she ran concerning article 5 of the ECHR.

MacDonald J declined however to make an order in favour of the parents in relation to their costs of the Children Act proceedings. Despite acknowledging that the parents had succeeded in persuading the court to adopt a conclusion consistent with their articulation of what was in Tafida's best interests, he found that the refusal to make a costs order in the parents favour would not result in unacceptable inequality of arms as between the parents and the State in breach of Article 6 of the ECHR even where the proceedings engaged the core Article 8 rights of the parents.

Of considerable significance in this conclusion was that, as a matter of fact, there had been no inequality of arms in the proceedings. The parents had the benefit of a highly experienced team of solicitors and were represented by specialist leading and junior counsel throughout the hearing. The time for making this argument, the judge held, would have been *'before the final hearing, supported by evidence that the parents would not have the benefit of legal representation unless a species of costs funding order was to be made.'* The judge noted that even then, such an application would have faced considerable hurdles.

MacDonald J acknowledged the apparent inconsistency in the approach to public funding as between a parent who is facing care proceedings concerning the welfare of their child brought by the State, in the guise of the local authority, and a parent who is facing proceedings brought by the State, in the guise of an NHS Trust, but stated, rightly, that this is a matter for Parliament:

*To make an order for costs against a public body simply to remedy the fact that Parliament has not provided for public funding in the circumstances in question would be impermissible unless such a costs order is justified on ordinary principles in the particular circumstances of the case. It is not for the court to fill a lacuna by making a costs order against an NHS Trust where there is otherwise no principled basis for such an order on ordinary principles.*

Applying ordinary principles, MacDonald J concluded that:

- (i) The trust had no option but to bring the proceedings for a best interests determination by the court in light of the disagreement between the parents and the clinicians.
- (ii) The consequence of making a costs order in favour of the parents would be to deter Trusts from bringing applications in the future and give rise to the risk of situations, where the parents have secured private funding for all treatment, to depart from medical opinion and to prefer the fully funded position of the parents, which preference avoids the costs risk. The consequences of these risks being that they would affect *"the children most in need of a judicial determination of their best interests, namely those where the decision is a finely balanced one and therefore where the 'litigation risk' presented by proceedings that put the Trust at risk of costs concomitantly higher."*
- (iii) Lastly the fact that the parents had raised a considerable sum of money for their legal costs made the court still less inclined to risk the disadvantages of departing from the ordinary approach.

### Comment

Insofar as to it relates to the inherent jurisdiction proceedings, this decision will no doubt be very welcome news to Trusts up and down the country as budgetary pressures get ever more significant. While this case is not concerned with proceedings in the Court of Protection, the analysis of the costs application in the Children Act proceedings are equally relevant to cases brought in the Court of Protection in relation to adults. The observations that MacDonald J made about the responsibility lying with the public body to bring proceedings in the case of dispute are equally applicable to cases involving medical treatment in relation to those (potentially) lacking capacity for purposes of the MCA 2005.

### Fact-finding guidance

*Re A No.2 (Children: Findings of Fact)* [2019] EWCA Civ 1947 (Court of Appeal (Underhill, Peter Jackson and Newey LJ))

*Other proceedings – Family (public law)*

### Summary

The Court of Appeal has given important guidance, applicable by analogy, as to the approach to take to fact-finding hearings.

The case concerned a second fact-finding hearing into the death of a 10-year-old girl, S, found dead in her bedroom with genital injuries and signs consistent with strangulation in the winter of 2016; a death which Hayden J in a judgment in June 2019 concluded was caused by S's mother after an attempt at female genital mutilation (FGM) followed by strangulation, hidden through collusion with S's father.

Fact-finding necessitated by care proceedings brought by the local authority with regard to S's siblings. The fact-finding proceedings concerned which if any of S's family, specifically her parents and elder siblings were involved in her death. Her family in turn denied any wrong-doing and argued that S had died as a result of entanglement in netting on her bunk bed or in the alternative that she had been attacked by an intruder.

An initial fact-finding by Francis J over 15 days in November 2017 resulted in proceedings being dismissed as a result of what he described as serious deficiencies in the police investigation and in police disclosure. He found on the balance of probabilities that the local authority had not proved that S's injuries had been inflicted by a third party as opposed to accidentally.

The local authority appealed. The Court of Appeal in *A (Children)* [2018] EWCA Civ 1718 concluded that Francis J had not correctly approached the burden of proof in that he had not looked at the whole picture, effectively analysed the expert evidence about S's injuries or taken them into account when considering the manner of death. Accordingly, the appeal succeeded and a retrial was ordered before Hayden J.

The retrial took place over 18 days between 21 January and 22 March 2019. According to the Court of Appeal's judgment, FGM featured 'only briefly' in the evidence before the court, occupying only 1 page in the thousand page trial transcript. This fact notwithstanding, Hayden J concluded that S's death was as a result of an attempt at FGM followed by strangulation, both committed by her mother.

The parents and S's elder brothers appealed on a number of grounds, essentially arguing that Hayden J wholly failed to look at the totality of the evidence. Instead, they argued, he developed a theory of his own and strained to fit the facts of the case into it. The family further argued that, the judge gave "*undue prominence to their origins and assessed their religious and cultural identity in an unbalanced way. The wider canvas showed no relevant family pathology, no mental illness or personality disturbance, and no relevant substance abuse. These matters were treated in a manner that was discriminatory in terms of Art. 14 as applied to Arts. 6 and 8.*" (para 80).

Following *Re B (A Child)* [2013] UKSC 33 and noting at paragraph 92 that an appeal court will rarely even contemplate reversing a trial judge's findings of primary fact unless a finding is insupportable on any objective analysis it will be immune from review, the Court of Appeal held:

*The judge has had the opportunity to make a comprehensive assessment of all the information – written, verbal, non-verbal and visual – when reaching a conclusion. This court should therefore only interfere with findings of fact in limited circumstances, for example where there has been a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a*

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*demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence: Henderson v Foxworth Investments Ltd* [2014] UKSC 41; [2014] 1 WLR 2600, per Lord Reed at [67]. Without such error, an appeal can only succeed if the appeal court is satisfied that the decision cannot reasonably be explained or justified and is one that no reasonable judge could have reached: *ibid* at [62, 67].

The Court of Appeal then set out at paras 93 to 99 a useful précis of the principles of fact-finding.

- At the outset, a judge should give himself a conventional self-direction in relation to fact-finding and to matters such as the possible significance of lies;
- The starting point remains that the facts must be proved on the simple balance of probability. Neither the seriousness of the allegations nor the seriousness of the consequences makes a difference. The inherent probabilities are simply something to take into account in deciding where the truth lies – see Baroness Hale in *Re B (Minors)* [2008] UKHL 35; [2009] 1 AC 11 at para 70;
- Findings of fact must be based on evidence, including inferences that can properly be drawn from the evidence, and not on suspicion or speculation: *A (A Child) (No 2)* [2011] EWCA Civ 12; [2011] 1 FLR 1817;
- The court is not bound by the cases put forward by the parties, but may adopt an alternative solution of its own: *Re S (A Child)* [2015] UKSC 20 at para 20. Judges are entitled, where the evidence justifies it, to make findings of fact that have not been sought by the parties, but they should be cautious when considering doing so: *Re G and B (Fact-Finding Hearing)* [2009] EWCA Civ 10; [2009] 1 FLR 1145;
- As in *B (A Child)* [2018] EWCA Civ 2127, "15. It is an elementary feature of a fair hearing that an adverse finding can only be made where the person in question knows of the allegation and the substance of the supporting evidence and has had a reasonable opportunity to respond. With effective case-management, the definition of the issues will make clear what findings are being sought and the opportunity to respond will arise in the course of the evidence, both written and oral."
- As per MacFarlane LJ in *Re W (A Child)* [2016] EWCA Civ 1140; [2017] 1 WLR 2415, "95. Where, during the course of a hearing, it becomes clear to the parties and/or the judge that adverse findings of significance outside the known parameters of the case may be made against a party or a witness consideration should be given to the following:
  - Ensuring that the case in support of such adverse findings is adequately 'put' to the relevant witness(es), if necessary by recalling them to give further evidence;
  - Prior to the case being put in cross examination, providing disclosure of relevant court documents or other material to the witness and allowing sufficient time for the witness to reflect on the material;

- *Investigating the need for, and if there is a need the provision of, adequate legal advice, support in court and/or representation for the witness."*
- With regard to the assessment of abuse,
  - "... evidence cannot be evaluated and assessed in separate compartments. A judge in these difficult cases has to have regard to the relevance of each piece of evidence to other evidence and to exercise an overview of the totality of the evidence in order to come to the conclusion whether the case put forward by the local authority has been made out to the appropriate standard of proof." Dame Elizabeth Butler-Sloss P in *Re T (Abuse: Standard of Proof)* [2004] EWCA Civ 558; [2004] 2 FLR 838 at para 33.

Considering Hayden J's conclusions in this case, Peter Jackson LJ concluded:

*"107. [...] that once all [the] questions [of what, when, where, who, how and why the deceased had come by her death] had been considered, it was the court's task to decide what facts emerged and to consider whether they satisfied the threshold for making public law orders. In undertaking this task, the judge was operating within the framework of a sophisticated forensic process. There had been a police investigation, for all its faults. A large amount of information had been gathered in the course of two trials. The local authority had framed its case meticulously. The court had the benefit of expert opinion of the highest calibre and very experienced legal representation, all co-operating to assist the court to reach a sound conclusion.*

*108. It was against this background that the judge developed his own case theory. In such a vexed case, he was bound to consider all the possibilities but, as he himself said, there must be parameters. In particular, a judge who believes he alone may have discovered a path that has not been revealed to other experienced professionals is bound to reflect on why that might be so. The situation in this case fell squarely within the sound guidance found in *Re G and B* – cited at [75] above – which bears repeating:*

*"Where, as here, the local authority had prepared its Schedule of proposed findings with some care, and where the fact finding hearing had itself been the subject of a directions appointment at which the parents had agreed not to apply for various witnesses to attend for cross-examination, it requires very good reasons, in my judgment, for the judge to depart from the schedule of proposed findings. Furthermore, if the judge is, as it were, to go "off piste", and to make findings of fact which are not sought by the local authority or not contained in its Schedule, then he or she must be astute to ensure; (a) that any additional or different findings made are securely founded in the evidence; and (b) that the fairness of the fact finding process is not compromised."*

*In my judgment, the judge did not heed this guidance.'*

The Court of Appeal did not accede to the family's submissions that the case should not, in the very unique circumstances, conclude without fact-finding: the case has been remitted for a second retrial.

## Comment

Fact-finding hearings will be necessary in the Court of Protection in the circumstances set down in Re AG [2015] EWCOP 78. When they are necessary, the same principles will apply as in relation to those fact-finding hearings held in care proceedings. The guidance and observations of the Court of Appeal are therefore as applicable to judges hearing cases in the Court of Protection as they are to those hearing care cases.

## THE WIDER CONTEXT

### Short note: secure accommodation and deprivation of liberty

On the heels of the Supreme Court's deprivation of liberty ruling in *Re D (A Child)* [2019] UKSC 42, *A Local Authority v B's father et al* [2019] EWCA Civ 2025 is an important decision in childcare law. It concerned an application for a secure accommodation order under s.25 of the Children Act 1989 in respect of a 15-year-old girl. The judgment is given in the context of a notable crisis in the provision of secure accommodation in England and Wales, with a significant shortfall in the availability of approved secure accommodation. This is coupled with a growing number of children now viewed as deprived of liberty following the *Re D* decision.

The issues and conclusions were as follows:

1. What is the meaning of "secure accommodation" in s.25? It means "*accommodation designed for, or having as its primary purpose, the restriction of liberty... [and] premises which are not designed as secure accommodation may become secure accommodation because of the use to which they are put in the particular circumstances of the individual case.*" (para 59)
2. What are the relevant criteria for making a secure accommodation order under s.25? The criteria are not limited to the conditions in s.25(1) and include whether the proposed placement would safeguard and promote the child's welfare.
3. What part does the evaluation of welfare play in the court's decision? Their welfare is not paramount but is an important element in the criteria (para 72).
4. When considering an application for an order under s.25, is the court obliged, under Articles 5 and 8 of the ECHR, to carry out an evaluation of proportionality? Yes, it is one of the relevant criteria which must be satisfied before a secure accommodation order is made (paras 88, 93).

Thus, the Court of Appeal concluded that in determining whether the "relevant criteria" under s.25(3) and (4) for a secure accommodation order are satisfied, a court must ask the following questions:

1. Is the child being "looked after" by a local authority, or, alternatively, does he or she fall within one of the other categories specified in regulation 7?
2. Is the accommodation where the local authority proposes to place the child "secure accommodation", i.e. is it designed for or have as its primary purpose the restriction of liberty?
3. Is the court satisfied (a) that (i) the child has a history of absconding and is likely to abscond from any other description of accommodation, and (ii) if he/she absconds, he/she is likely to suffer significant harm or (b) that if kept in any other description of accommodation, he/she is likely to injure himself or other persons?

4. If the local authority is proposing to place the child in a secure children's home in England, has the accommodation been approved by the Secretary of State for use as secure accommodation? If the local authority is proposing to place the child in a children's home in Scotland, is the accommodation provided by a service which has been approved by the Scottish Ministers?
5. Does the proposed order safeguard and promote the child's welfare?
6. Is the order proportionate, i.e. do the benefits of the proposed placement outweigh the infringement of rights?

(In the rare circumstances of the child being aged under 13, Regulation 4 of the 1991 Regulations require that the placement must also be approved by the Secretary of State.)

It was noted that s.25 does not cover all the circumstances in which it may be necessary to deprive a child of their liberty and that a judge exercising the inherent jurisdiction of the court has the power to authorise detention. Thus:

*101 ... Where the local authority cannot apply under s.25 because one or more of the relevant criteria are not satisfied, it may be able to apply for leave to apply for an order depriving the child of liberty under the inherent jurisdiction if there is reasonable cause to believe that the child is likely to suffer significant harm if the order is not granted: s.100(4) Children Act. As I have already noted, the use of the inherent jurisdiction for such a purpose has recently been approved by this court in *Re T (A Child) (ALC Intervening)* [2018] EWCA Civ 2136. In *Re A-F (Children) (Restrictions on Liberty)* [2018] EWHC 138 (Fam), Sir James Munby P, in a series of test cases, set out the principles to be applied. It is unnecessary for the purposes of this appeal to revisit those principles in this judgment. Last week, Sir Andrew McFarlane, President of the Family Division, published guidance, focusing in particular on the placement under the inherent jurisdiction of children in unregistered children's homes in England and unregistered care home services in Wales.*

*102. Where, however, the local authority applies under s.25 and all the relevant criteria for keeping a child in "secure accommodation" under the section are satisfied, the court is required, by s.25(4), to make an order under that section authorising the child to be kept in such accommodation. To exercise the inherent jurisdiction in such circumstances would cut across the statutory scheme."*

This decision clarifies the relevant criteria for secure accommodation orders and recognises the hinterland of the inherent jurisdiction for authorising detention where those criteria are not met. The relevance of proportionality was very much a key issue in this case, in particular whether proportionality is a part of Article 5 ECHR. It may be worth noting that in *Re D*, to which considerable reference was made by the Court of Appeal, the Supreme Court was considering proportionality in a slightly different context. In that case, the question of proportionality was being looked at primarily through the prism of whether it was acceptable to limit the scope of Article 5 ECHR so as to secure the legitimate aim of upholding the Article 8 rights of parents. In *Re D*, Lady Arden made clear that the answer was no: "*Article 5 is not a qualified right and there is no scope for holding that the denial of a person's liberty engages Article 5 but does not amount to a violation because it serves a legitimate aim and is proportionate and necessary in a democratic society.*" But as the current case confirms, any court considering whether

circumstances that amount to a deprivation of liberty is justified must consider whether that deprivation of liberty is a proportionate response to the circumstances.

### Short note: assisted dying before the courts again

On 19 November 2019 the Divisional Court refused permission at an oral renewal hearing for an application for judicial review seeking to challenge the criminalisation of assisted suicide. A written judgment was handed down, presumably because of the importance of the issues: *R (Newby) v Secretary of State for Justice* [2019] EWHC 3118 (Admin).

The Claimant sought a declaration of incompatibility under s.4(2) of the Human Rights Act 1998 that s.2(1) Suicide Act 1961 (which makes it a criminal offence to assist or encourage a person to commit suicide) on the basis of a conflict with Articles 2 and Article 8 ECHR.

As readers will be aware, there have been a number of cases in recent years in which the courts have considered the extent to which s.2(1) Suicide Act 1961 is compatible with human rights legislation: *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38; *R (Conway) v Secretary of State for Justice* [2018] and *R (T) v Secretary of State for Justice* [2018] EWHC 2615 (Admin). In short, the Claimant relied on the following:

- (a) In *Nicklinson*, a majority of the Supreme Court found that there was no institutional bar on the courts making the declaration of incompatibility sought, but that it was inappropriate to do so at that time because Parliament was giving active consideration to the issue via Lord Falconer's Assisted Dying Bill (however, such consideration had since stopped without any resulting reform of the law);
- (b) *Conway* could be distinguished because in that case the Claimant's prognosis left him with only six months to live, whereas Mr Newby's life expectancy is longer and, because he is not receiving non-invasive ventilation, he cannot request the legal withdrawal of his treatment (unlike Mr Conway);
- (c) An application for the court to hear evidence of the "legislative facts", understood as the mixed ethical, moral and social policy issues which have a bearing on a proportionality assessment under Article 8. Such material had not previously been considered by the court and in *Nicklinson* the lack of evidence was one of the reasons given for not making the declaration of incompatibility sought.

The Divisional Court rejected these arguments, and declined to distinguish *Conway* on the basis of the "minor" factual differences identified. More fundamentally, it restated the orthodox view that while the courts cannot shirk the responsibility of considering applications for declarations of incompatibility in difficult cases, in such cases the views of Parliament will weigh heavily in the human rights justification balance. Applying those principles here at:

*40. In the context of repeated and recent parliamentary debate, where there is an absence of significant change in societal attitude expressed through Parliament, and where the courts lack legitimacy and expertise on moral (as opposed to legal) questions, in our judgment the courts are not the venue for arguments which have failed to convince Parliament.*

Further, Article 2 was not found to assist the Claimant's case given that, even if it was engaged in the circumstances, the considerations which would need to be taken into account in any balancing exercise are the same as those applicable to Article 8.

### Short note: Article 2 obligations and informal patients

In *R(Lee) v HM Assistant Coroner for the City of Sunderland* [2019] EWHC 3227 (Admin), HHJ Mark Raeside QC has held that a Coroner has to consider whether the operational duties that arise under Article 2 ECHR apply to the factual circumstances of a young woman who was an outpatient under the care of an NHS Trust at the point when she took her own life. In so doing, he considered that the Coroner not only needed to consider the question of the degree of control over the woman the Trust might have been exercising, but also her vulnerability and risk. He also recognised that this potentially represented a (significant) extension of the duties imposed by Article 2 ECHR, as most recently discussed in *Fernandes de Olivera v Portugal* [2019] ECHR 106.

### Short note: resisting criminal behaviour

In *Humphreys v CPS* [2019] EWHC 2794 (Admin), Stuart-Smith J had to consider when it is appropriate to make a Criminal Behaviour Order in the face of evidence that a person may not be capable of understanding or complying with its terms. A CBO may be made under Section 22 Antisocial Behaviour Crime and Policing Act 2014, where a person is convicted of an offence, and where:

- (1) The court is satisfied beyond reasonable doubt that the offender has engaged in behaviour that caused or was likely to cause harassment, alarm or distress to any person;
- (2) The court considers that making the order will help in preventing the offender from engaging in such behaviour.

Stuart-Smith J, having considered authorities from related areas, held that:

*25. [...] when deciding whether making the proposed CBO will help in preventing the offender from engaging in such behaviour, a finding of fact that the offender is incapable of understanding or complying with the terms of the order, so that the only effect of the order will be to criminalise behaviour over which he has no control, will indicate that the order will not be helpful and will not satisfy the second condition.*

*26. The authorities have not expressly considered the question where a person's condition may mean that an order would generally be helpful, but that there might be occasions when, because of his condition, he is incapable of complying with the terms of the order. In my judgment the question in*

*such a case remains: is the second statutory condition satisfied on the facts of the particular case? In other words, on the facts of the particular case, can it be said that making order will help in preventing the offender from engaging in such behaviour, even though it is anticipated that he might engage in it on one of more occasions, because he is at that time incapable of complying with it?*

*27. In principle, the answer to that question will depend upon the precise factual circumstances and prognosis of the case in hand, and no a priori answer can be given. If the conclusion is that making an order would be helpful, despite the complexities of the factual findings, protection for the offender may, in such circumstances, be provided by the opening words of Section 30, which provide that the breaching behaviour will be an offence if it is done 'without reasonable excuse'. In my judgment if a person does or fails to do something in breach of a CBO, because they are incapable of complying, the proper conclusion should be that their incapacity is a reasonable excuse within the meaning of Section 31.*

## Northern Ireland Mental Capacity legislation now partially in force

After an abortive attempt in October, Northern Ireland's Mental Capacity Act has come partially into force, on 2 December, to address deprivation of liberty. More details can be found [here](#).

## Best interests in Jersey

In *In the matter of B (Medical)* [2019] JRC 158, a decision in August 2019, the Royal Court in Jersey had cause to consider for the first time the provisions of the Capacity and Self-Determination (Jersey) Law 2016 in the medical treatment context. This legislation, bearing a strong resemblance to the MCA 2005, came into force on 1 October 2018.

The case concerned a 29 year old man with substantial cognitive and physical impairments. The question before the court was whether he had capacity to consent to the fitting of a PEG feeding tube, and, if he lacked that capacity, whether it was in his best interests to do so. The Minister for Health and Social Services, who brought the application, submitted that the procedure was in B's best interests; his parents agreed that he lacked capacity, but submitted that the procedure was not in his best interests.

The Royal Court undertook a review of relevant case-law from England & Wales, indicating it to be "very helpful" (paragraph 18) in the application of the 2016 law. It then undertook a detailed consideration of the evidence before it relating to B's capacity and best interests, concluding that there:

*in this case there is one feature which is of "magnetic importance" in influencing or determining the outcome. This was the expression adopted by Thorpe LJ, where he contrasted peripheral factors in the case from the central factor or factors. The central or magnetic feature is that the overall risk, while it is there and exists, is small compared with both the risks of continuing indefinitely with the NG tube and the substantial gain to be achieved if the procedure is successful as the medical authorities predict, a gain which will be reflected in a marked improvement in the First Respondent's*

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*quality of life. Accordingly, we make the determination requested by the Minister that the insertion of a PEG is in the best interests of the First Respondent.*

The judgment is also of no little interest for the fact that the Royal Court felt it necessary to highlight its criticisms of the process adopted by the Minister, noting that:

*52. [...] the medical authorities did not follow closely the guidance which the 2016 Law sets out, nor did they have regard to the guidance which is to be found in English case law on similar statutory provisions. Indeed, Dr Gibson [in charge of B's care for the previous 5 years] had not read the 2016 Law. The impression we are left with is that the professionals made a best interests decision on objectively rational best interests grounds, without having sufficient regard to the wishes of the patient. They knew best what was good for him - so they might, but that is not what the 2016 Law requires. An important part of ascertaining the patient's wishes was to identify the views of the parents. Unfortunately, we are left with the impression that there was a tick-box approach to obtaining the parents' views, perhaps in the knowledge that the parents would be unlikely to acquiesce in what was proposed. We understand that possibly the mother had expressed her reservations about a PEG process during the closing months of 2018, and indeed there was some difficulty from time to time between her and the medical staff in the hospital when she expressed her views, perhaps rather forcefully, in relation to the treatment which her son was getting. It seems to us that it would have been better if the parents had been invited to the best interests decision meeting. It would have enabled the medical authorities to express carefully the reasons for their recommendations, and it would have enabled the parents to have expressed carefully their objections including both the medical and emotional points which they wished to raise. It would seem from the paperwork that for all practical purposes the best interests decision had been taken several weeks before, and it was then simply a question of completing the paperwork.*

*53. In making these criticisms, we do wish to make it clear that we are not advancing any professional criticism in terms of the rationality of the decision or indeed of the advice and care for the patient which lay beneath it. Indeed, if we had any such concerns, we would not have authorised the procedure in question. The issue is more one of internal hospital administration and process so that it is consistent with the letter and the spirit of the legislation which requires the views of the patient to be identified where possible, which almost certainly will involve identifying and respecting the views of the immediate family. Proceeding in that way does not necessarily mean that the best interests decision will reach a different conclusion, but it should mean first of all that the family is better placed to understand what is being proposed and secondly that at least in some cases the medically based best decision will not in fact turn out to be the best decision in the interests of the patient in accordance with the 2016 Law. This is very difficult territory, but we earnestly recommend that the hospital authorities give some further thought to these comments for use in the future.*

Whilst these comments are, on one view, Jersey-specific, it would be remiss not to ask whether they may not equally be applicable in many situations in England & Wales, some 12 years after the MCA 2005 came into force.

## The 4<sup>th</sup> Asian International Congress on Adult Guardianship

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Having ceased practising three years ago frees me up to accept invitations to participate in events overseas. At the 5<sup>th</sup> World Congress on Adult Guardianship in Seoul, Korea, in October 2018, I was approached by Professor Li Xia of the East China University of Political Science and Law, well known to me as the most prominent representative of the People's Republic of China at previous international events. She was responsible for organising the 4<sup>th</sup> Asian International Congress on Adult Guardianship ("ACAG 2019") in Shanghai on 28<sup>th</sup> – 30<sup>th</sup> November 2019. She invited me to attend and contribute. I did so.

ACAG 2019 was combined with the 3<sup>rd</sup> Chinese Seminar on Guardianship Law, and adopted the title theme "From Guardianship to Supported Decision-making: Inclusive Asia". Unusually but in my view helpfully, all sessions were conducted in plenary session, averting the need to make difficult choices among parallel breakout sessions. After an initial introductory session, Session 1 was entitled "Legal capacity of persons with disabilities in CRPD 12"; Session 2 addressed "Supported decision-making: exploration, experience and challenges"; Session 3 was on "The role of courts and social organisations in adult guardianship and supported decision-making"; Session 4(1) on "Enabling citizens to plan for future incapacity"; and Session 4(2) on "Other issues". Professor Li Xia herself then spoke at the closing session. The main participating nations, which also provided most of the speakers, were China, Japan, Singapore and South Korea. Speakers from beyond those countries were Daniel Rosch from Switzerland, and Professor David English and Tina Minkowitz from the United States, who all spoke in Session 2. I made a short contribution to the opening session; then spoke in Session 1 on "What Article 12 of the Disability Convention actually requires is support for the exercise of legal capacity", drawing in particular on all that I learned when participating in the Essex Autonomy Three Jurisdictions Project; and in Session 4(1), in which my own title deliberately dropped the word "future" which appeared in the session title, so that I spoke on "Enabling citizens to plan for incapacity: the European experience and developments", obviously drawing on my work for Council of Europe reviewing implementation of the Council's Ministerial Recommendation (2009)<sup>11</sup> on principles concerning powers of attorney and advance directives for incapacity, and subsequent developments – though I did manage to conclude by "pushing" the need for more countries to ratify Hague Convention 35 on the International Protection of Adults.

Unsurprisingly, I was "captured" for many other involvements, most of them relatively informal, though they included a half-day lecture session at Shanghai University of Political Science and Law, hosted by Professor Wang Kang of that university.

Some current trends in the People's Republic of China were of particular general interest. The foregoing account demonstrates the considerable interest in achieving compliance with UN CRPD and in developing supported decision-making. A second main area of development, about which I learned only when I was in China, was that China has independently developed a concept equating to enduring powers of attorney, falling within the definition of "continuing powers of attorney" in Recommendation (2009)<sup>11</sup>, but the significance of which is somewhat masked by the adoption of the English-language descriptions of "independent guardianship" or "self-determined guardianship" (the latter being in my

view more appropriate). Put simply, this is an arrangement under which, in anticipation of impairment (or further impairment) of their capabilities, people can enter a contract with a prospective guardian to become guardian in the event that guardianship is required.

A third area of innovation, also about which I learned only when in China, is the development of use of trusts for provision, including family provision, in cases of impairment of relevant capabilities. My presentation in Session 4(1) of ACAG 2019 was immediately followed by Dr Yuanlong Li on “Exploration of the guardianship trust service development in China”. This led to follow-up discussions with representatives of Citic Trust Co, Limited (a state-owned enterprise) which took me back to the days when Gordon Ashton and I developed various styles of trust deed and associated documentation, which were published in our book “Mental Handicap and the Law” (Sweet & Maxwell, 1992). My secretary emailed to me in China some styles of document as developed into my final years in practice. In follow-up discussions they were received and discussed, clause by clause, with considerable interest.

Finally, at least at the academic level, China is assessing the possibility of ratifying Hague Convention 35 on the International Protection of Adults. Quinyu Liu, a doctoral student of Private International Law at East China University of Political Science and Law, spoke in Session 4(2) on “Research on law application of foreign-related voluntary guardianship”. As the title indicates, this also picked up on the development of what amount to continuing powers of attorney, and had already drawn this researcher into the difficulties, well known in Europe, posed by the status of powers of representation under Hague 35. Interestingly, her work so far appears to have focused mainly on the “internal relationship” (as it is termed particularly in Germanic nations) between granter (donor) and attorney (donee), and the consequences of that relationship straddling borders, rather than – yet – the “external relationship” with third parties.

*Adrian D Ward*

### RESEARCH CORNER

We highlight here recent research articles of interest to practitioners. If you want your article highlighted in a future edition, do please let us know – the only criterion is that it must be open access, both because many readers will not have access to material hidden behind paywalls, and on principle.

We highlight this month a recent article published in the International Journal of Law and Psychiatry by Janet Weston, “*Managing mental incapacity in the 20th century: A history of the Court of Protection of England & Wales*” provides an interesting and comprehensive overview of the courts have historically dealt with making financial and welfare decisions on behalf of those deemed incapable of doing so themselves. Starting with the laws of ‘lunacy’ in the early 1880s (a term which was later prohibited from any statutory enactment by the Medical Treatment Act 1930), the article traces the development of the Court of Protection through to the modern day under the Mental Capacity Act

2005. The article provides an insightful read for those wishing to better understand the background and origins of today's mental capacity jurisdiction.

### The MCA: values, practice and policy

For those wanting something to watch, rather than read, relating to capacity, Alex recently recorded an interview with Co-Produce Care about mental capacity and the MCA 2005, available on Youtube [here](#).

## SCOTLAND

### Guardianship, deprivation of liberty, and human rights competence

The Judgment of Sheriff Janys M Scott QC, sitting at Jedburgh, in *Scottish Borders Council v AB*, an application for a welfare guardianship order opposed by the adult AB, in one sense could be seen as turning upon the unusually extreme level of risk to which the adult was exposed, but on the other hand addresses points of such fundamental significance to Scotland's adult guardianship regime in the modern human rights context as to be required reading for all practitioners in the field.

The Judgment of Sheriff Scott is available [here](#). The extreme risks included the death of the adult if she resumed contact with former associates and they resumed injecting her with drugs at a level which she had previously been accustomed to, after she had not taken drugs for six months. The points of general significance addressed with clarity and care in the Judgment include these:

- Whereas the reporting mental health officer considered that the powers sought in the application were “protective, rather than a deprivation of liberty”, the sheriff recognised that exercise of such powers would amount to a deprivation of liberty in terms of Article 5 of ECHR, and took care to ensure that the order that she granted complied with the requirements of Article 5.
- The sheriff recognised the significance of AB's assertions of her right to self-determination; took account of the relevance of the United Nations Convention on the Rights of Persons with Disabilities; and in particular considered the adult's rights under Article 19 of CRPD of her right to choose her place of residence and where and with whom to live, on an equal basis with others, and not to be obliged to live in a particular living arrangement.
- The sheriff rejected the applicants' submission with reference to the definition of “incapable” in section 1(6) of the Adults with Incapacity (Scotland) Act 2000, that the adult was incapable of acting. Upon careful assessment of the evidence, the sheriff held that the adult was capable of making decisions and communicating decisions, but that “the problem is that she cannot understand the consequences of her decisions”.
- The sheriff emphasised that her finding of incapacity did not of itself justify overriding the expressed wishes of the adult.
- The sheriff considered carefully whether the adult's welfare could, in terms of section 58 of the 2000 Act, be adequately safeguarded or promoted by means other than a guardianship order.
- The sheriff considered rigorously all of the powers sought and rejected most of them as being unnecessary.

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- While the sheriff did not expressly refer to the requirement of Article 12.4 of CRPD that measures relating to the exercise of legal capacity should apply for the shortest time possible, she was in fact careful to comply with that requirement.
  - The case addressed circumstances in which protective measures available in relation to children fall away at a particular age (in the present case, the age of 18 being the maximum age to which the jurisdiction of a children's hearing can apply).
  - AB's evidence was given by affidavit, presented by her solicitor Ms Millard. The sheriff noted that "[Ms Millard] had visited AB every three weeks since March and had established a good working relationship with her. This was apparent from the affidavit stating AB's wishes clearly and forcefully." The hearing took place on 9<sup>th</sup> October. Practitioners might find it useful to refer Scottish Legal Aid Board to this part of the Judgment in the event of discussion about the amount of client contact necessary in such cases to ensure that a party's position is adequately understood, expressed and presented so as to achieve human rights requirements for access to justice and fairness.
  - Although the decision does not explicitly refer to the right to protection from abuse under Article 16 of CRPD, the case demonstrates the proper approach to balancing that requirement against principles in other Articles of CRPD.

It is sadly not particularly uncommon for vulnerable young women to be exposed to abuse, including sexual abuse; nor is it particularly unusual for a local authority to apply for a guardianship order for the purpose of safeguarding the adult in such circumstances. We commented [here](#) on the decision of Sheriff Susan A Craig, sitting at Livingston Sheriff Court, in the case of *West Lothian Council v KB*. KB in the Livingston case, like AB in the Jedburgh case, did not recognise that the conduct towards her was exploitative and abusive, and was opposed to the granting of the order sought. The notes appended to the interlocutors in both cases commenced with precisely the same words: "This was an anxious case ....", reflecting the heavy onus upon the sheriff as decision-maker in what is, unusually in Scots law, an inquisitorial jurisdiction with responsibility placed upon the sheriff to comply with the principles in section 1 of the 2000 Act, regardless of what evidence is led and what submissions are made. The difference between these cases is that in *KB* the exploitative relationship was a long-term and stable one with one individual male, whereas AB had been subjected to abuse by several males who frequented AB's flat in "Town X".

In *AB*, the sheriff drew attention to the powers available under the Adult Support and Protection (Scotland) Act 2007. The basic approach of the 2007 Act is to remove risk from an adult, rather than remove an adult from risk; but in *AB* it had to be conceded that even if appropriate orders (under the 2007 Act or otherwise) were made, or sanctions imposed, in respect of past abusers, there was a significant risk that others would prey upon her in similar fashion. I am indebted to Ms Lucy Millard of Millard Law for explaining that point, and for providing clarification beyond that in the Judgment as to AB's relevant background, which was as follows.

There was a background of conflict between AB and AB's mother. In August 2018, AB was charged with vandalism and breach of the peace at her mother's address. The alleged offences were remitted to a children's hearing, which made a compulsory supervision order. A measure for secure accommodation was subsequently made by the children's hearing. She was moved to appropriate accommodation in Town Y. The jurisdiction of the children's hearing terminated upon AB's 18<sup>th</sup> birthday. AB's declared wish was to return to Town X and resume her association with her abusers. The local authority, Scottish Borders Council, obtained an interim guardianship order with power to decide where AB should reside and convey her back to that residence.

On 6<sup>th</sup> February 2019, Scottish Borders Council were granted an antisocial behaviour order banning AB from going within 100 metres of her mother's residence. AB breached the order, appeared before the sheriff, and was secured in specified secure accommodation in terms of an emergency variation to the compulsory supervision order. So far as Ms Millard is aware, there have not been any criminal proceedings against any of the perpetrators of abuse against AB, AB not at any time having sought to make reports of alleged abuse to the police.

As is narrated in the Judgment, AB saw the abusers as friends, and one of them as a partner, notwithstanding that she had been observed to be bruised and cut, with an infected wound, and with cigarette burns inflicted by her "partner". The abusers moved into her flat and took her money. They obstructed contact between her and the social worker allocated to supervise her under the compulsory supervision order, and destroyed the mobile phone which the social worker had provided to her to let her maintain contact. The social worker resorted to standing by the ATM where he knew that AB's "partner" would take her to draw her benefits and hand them over. The abusers used her for sex and gave her drugs.

Evidence before the court suggested that AB had a borderline learning disability. There was reference to an assessment that had been carried out in the summer of 2018 by a consultant clinical psychologist, who did not give evidence. There was no current assessment of learning disability. The sheriff concluded that she could not treat suggested learning disability as the primary source of the problem. Two psychiatrists who gave evidence disagreed as to whether AB had an autistic spectrum disorder. However, both reported symptoms of complex post-traumatic stress disorder. The sheriff accordingly based her Judgment on the agreed diagnosis of complex PTSD. The evidence indicated that the PTSD could be addressed over time, with the potential to resolve AB's mental disorder.

Having concluded that AB suffered from a mental disorder in respect of her PTSD, and that in consequence she was incapable of understanding the consequences of her decisions in relation to the abusers, and having considered possible alternatives, the sheriff concluded that a guardianship order was necessary. However, the sheriff carefully considered all of the powers sought and rejected most of them, granting only power to decide where AB should reside on a temporary or permanent basis, power to return her to that place, and power to open, read, attend to, and as appropriate reply to, any mail or other communications addressed to or received by AB, or to make arrangements to deal with

her mail. That third power was granted upon acknowledgement by AB that she would benefit from help with such communications, including communications intimating medical and other appointments.

The sheriff limited the duration of the order granted to a period of six months, making it clear that she expected that AB would receive treatment for her PTSD during that period, with the prospect that renewal would be unnecessary as successful treatment might enable her to regain insight into the consequences of her decisions. That relatively short duration also ensured that there would be judicial scrutiny of the deprivation of liberty, if it were to be continued.

As noted above, the decision does not explicitly mention AB's right to protection from abuse under Article 16 of CRPD. It was not necessary to mention it, because her need for protection was plainly obvious from the facts narrated. It extended to the need to safeguard her right to life under Article 10 of CRPD. It is sometimes suggested that Article 16 conflicts with the requirements of several other Articles, but that fails to appreciate that, in any document such as CRPD, there is a statement of principles which have to be balanced when addressing the facts of any particular case. Comment on Article 12.4 often focuses on the right for respect for the person's will and preferences, and suggest that this is a requirement to allow expressed will and preferences to prevail in all circumstances. It does not. The requirement in Article 12 is that "measures relating to the exercise of legal capacity" (including, in a Scottish context, guardianship orders) should "respect the rights, will and preferences" of the person. There are often conflicts among those three elements of rights, will and preferences. In AB's case, her "will and preferences" were to return to Town X and to resume association with her abusers. That would most certainly have violated her right to protection from abuse under Article 16, with the added risk that it might well have violated her right to life under Article 10. With reference to the prohibition of discrimination under Article 5, it has long been recognised that to protect, by putting special measures in place, is to discriminate. To apply any "reasonable accommodation" is self-evidently to discriminate, yet denial of reasonable accommodation is explicitly included in the definition of "discrimination on the basis of disability" in Article 2. The case of AB exemplifies an approach which carefully examines the extent to which any compulsion and/or failure to follow expressed "will and preferences" is necessary to ensure that Articles 10 and/or 16 are not violated; and if such measure is by that test necessary, to limit it strictly to the extent unavoidably necessary to achieve that purpose, with full and careful compliance with all of the requirements of Article 12.4.

It is understood that there is to be no appeal.

*Adrian D Ward*

## Appeals against excessive security

[We are very grateful to Colin McKay, Chief Executive of the Mental Welfare Commission for Scotland, for contributing this case comment]

One of the features which has been a source of pride to those involved in Scottish mental health law is the right of detained patients in medium or high secure settings to seek an order from the mental health tribunal requiring that a place at lower security be found for them.

Although the provision has been in effect since the coming into force in 2005 of the Mental Health (Care and Treatment) (Scotland) Act 2003, it has not been clear what remedy the patient has, if the relevant NHS Board fails to offer a place within the timescale set by the tribunal at the final stage of the process. Section 272 of the 2003 Act empowers the Mental Welfare Commission for Scotland to initiate proceedings in the Court of Session for specific performance of the statutory duty 'without prejudice to the rights of any other person', but it does not explicitly state what the patient can do at their own hand.

This right was initially afforded to patients in the high security State Hospital, and was extended to Scotland's three medium secure units by the Mental Health (Scotland) Act 2015. Unfortunately, there is considerable pressure on the low secure estate in Scotland, and some Boards have struggled to find low secure beds whose application has been upheld by the tribunal. These cases are now coming before the courts.

In the case of *Boyle v Greater Glasgow and Clyde Health Board* [2019] SC GLA 89, a patient at Rowanbank medium secure unit in Glasgow sought an order from the tribunal that he be accommodated in a low secure unit. At the first stage, in November 2016, the tribunal determined that he was held in excessive security and directed the Board to find a more suitable hospital within 3 months. They failed to do so, and in March 2017, the tribunal issued a final order directing the Board to find a suitable hospital by 16 June 2017. No such place was found until, finally, the patient was transferred to a low secure hospital on 6 December 2017.

The pursuer claimed damages, founding on an alleged violation of Article 5 of the European Convention of Human Rights, and a breach of the Board's statutory duties under sections 268 and 269 of the 2003 Act.

The sheriff found that there could be a claim for damages for breach of statutory duty under s269, but not s268. He was clear that the duties were framed in a mandatory form. He drew on comments by Lord Reed and Lady Hale in *G v Scottish Ministers* [2013] UKSC 79, to make clear that the tribunal order cannot 'simply be ignored, if no suitable alternative place is available or is likely to become available.' (para 69)

However, a claim for damages did not arise on the breach of the First Order – since the remedy at that stage was to return to the tribunal seeking a Second Order. 'The statutory compromise was that health

boards were to be afforded a period of grace, variable from case to case but not exceeding six months at best, in which to find suitable alternative accommodation for the trapped patient; but, after that period of grace, the boards would face civil proceedings if they failed to comply.' (Para 68)

Therefore, the maximum period in respect of which a claim for damages may apply in this case was the period from 16 June 2017 (expiry of the time limit in the Second Order) to 6 December 2017 (date of move).

Sheriff Reid dealt with the ECHR issue in short order. Drawing on the European Court of Human Rights ruling in *Ashingdane v UK* (1985) A 93, 7 EHRR 528, and the subsequent cases of *Munjaz* [2006] 2 AC 148 and *S v Scottish Ministers* 2015 SLT 362, he distinguished the *legality* of the detention from the *conditions* of the detention. The appeal concerned the latter. Since there was no suggestion that the patient was not lawfully detained, Article 5 was not relevant.

It does not appear that any consideration was given to the (admittedly very recent) Grand Chamber decision in *Rooman v Belgium* (Application no. 18052/11). In that case, the Grand Chamber said (para 208) that 'there exists a close link between the 'lawfulness' of detention of persons suffering from mental disorders and the appropriateness of the treatment provided for their mental condition.' It went on to say (para 210) that 'a specialised psychiatric institution which, by definition, ought to be appropriate may prove incapable of providing the necessary treatment.' It remains to be seen whether this evolving approach influences future cases.

There is little doubt that there will be further cases. The Mental Welfare Commission is aware of several patients who have not been transferred following an order at the second stage by the Tribunal. At least 3 patients have launched judicial reviews in the Court of Session.

In one case involving two patients, the Commission entered proceedings, because of the important issues of principle which were raised. A key concern was the argument that a health board should not be found to have breached their statutory duty if they have done all they can to find a suitable place, but this has proved impossible.

The case came before Lord Pentland on 28<sup>th</sup> November. In the course of the hearing, the health board abandoned its defence, places having been found for the two patients. The case will return to court in the New Year, to ensure that the patients have been moved, and to resolve expenses.

For the moment, therefore, Sheriff Reid's decision in *Boyle*, read alongside the Supreme Court ruling in *G*, is the main judicial authority – and that decision is very clear that Parliament was not 'expressing a mere pious aspiration' but was 'intending to create legal duties in the fullest sense with the intention of conferring upon persons correlative rights to enforce them and to be compensated for non-performance' (para 64).

Colin McKay,  
Mental Welfare Commission for Scotland

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## Operation of “foreign” powers of attorney in England & Wales

Readers of this Scottish section may find it helpful to refer to the [case report and comment](#) on the English case “*re Various Applications Concerning Foreign Representative Powers*” [2019] EWCOP 52. “Foreign representative powers” include Scottish continuing and welfare powers of attorney.

Many times over the years it has been necessary to point out that operation of a power of attorney, when capabilities are impaired, is as much an aid to overcome the consequences of such disabilities as is use of a wheelchair to overcome physical disabilities, and that to create difficulties in providing services to users of either type of aid equally amounts to disability discrimination; where the discrimination could perhaps be said to cross over from disability discrimination to discrimination on grounds – from a Scottish viewpoint – of being Scottish. In practice, difficulties can be encountered in many situations when an attorney first presents the power of attorney document. These can be exacerbated in cross-border situations, even within the United Kingdom.

When an “incoming” English enduring power of attorney is presented in Scotland, the position should be helped by reference to the case of *C, Applicant* (Airdrie Sheriff Court, 2<sup>nd</sup> April 2013, unreported), in which it was held that an English enduring power of attorney has automatic recognition in Scotland under the Adults with Incapacity (Scotland) Act 2000, and had the same effect (in that case) as a Scottish continuing power of attorney. At around the same time, in consequence of such difficulties, and with the intention that it be an interim measure pending resolution of uncertainties regarding “incoming” powers of attorney, the then Public Guardian placed on the website of the Public Guardian a certificate which may be downloaded, in the following terms: “*I, xxx, Public Guardian for Scotland, hereby advise that interpretation of Scottish legislation suggests a non-Scottish power of attorney is automatically valid in Scotland. There is no provision for having a non-Scottish power of attorney endorsed for use in Scotland; this action being unnecessary.*”

Difficulties continue to be encountered in England & Wales, not helped by the continuing failure of England & Wales to ratify Hague Convention 35 on the International Protection of Adults, though even under the Convention there are uncertainties about the status of such “powers of representation”. At that level, the uncertainties are being addressed by the European Commission and by a project by the European Law Institute. In the meantime, many Scottish practitioners taking instructions to prepare a power of attorney, in circumstances where it is foreseeable that it might require to be operated in England, recommend that an English power of attorney be granted at the same time. There is also the option of registering the Scottish power of attorney in the Books of Council and Session, then relying upon section 4 of the Evidence and Powers of Attorney Act 1940, which provides that: “A registered extract from the Books of Council and Session is evidence of the contents of the document, in any part of the United Kingdom, without further proof”. That may or may not prove sufficient.

It is of course absurd that there should be any difficulty in operating in one part of the United Kingdom a power of attorney properly granted and registered in another. It can help to suggest that if

proceedings are necessary, an award of expenses against the obstructive third party will be sought; or to suggest that the third party's conduct amounts to disability discrimination which as such will be referred to the Equality and Human Rights Commission; or – recognising that the underlying fault is lack of clear legislative provision putting matters beyond doubt – that this disability discrimination be referred to the UN Committee on the Rights of Persons with Disabilities under the procedure provided for in the First Protocol to the UN Convention on the Rights of Persons with Disabilities (which has been ratified by the UK).

*Adrian D Ward*

### Lecture – Adrian Ward at 75

Adrian delivered a very well attended and received lecture entitled “Adult incapacity law: visions for the future drawn from the unfinished story of a new subject with a long history” on 13th November 2019 hosted by the Centre for Mental Health and Capacity Law at Edinburgh Napier University. Please see [here](#) to read the lecture in full.

*Jill Stavert*

### Asian Congress on Adult Guardianship 2019

Readers of the Scotland section might also be interested in my account of my visit to the People's Republic of China in November/December 2019 which appears in the “Wider Context” section of this Report.

*Adrian D Ward*

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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](http://www.mentalcapacitylawandpolicy.org.uk). To view full CV click [here](#).



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Victoria regularly appears in the Court of Protection, instructed by the Official Solicitor, family members, and statutory bodies, in welfare, financial and medical cases. Together with Alex, she co-edits the Court of Protection Law Reports for Jordans. She is a contributing editor to Clayton and Tomlinson 'The Law of Human Rights', a contributor to 'Assessment of Mental Capacity' (Law Society/BMA 2009), and a contributor to Heywood and Massey Court of Protection Practice (Sweet and Maxwell). To view full CV click [here](#).



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Neil has particular interests in ECHR/CRPD human rights, mental health and incapacity law and mainly practises in the Court of Protection and Upper Tribunal. Also a Senior Lecturer at Manchester University and Clinical Lead of its Legal Advice Centre, he teaches students in these fields, and trains health, social care and legal professionals. When time permits, Neil publishes in academic books and journals. To view full CV click [here](#).



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Nicola appears regularly in the Court of Protection in health and welfare matters. She is frequently instructed by the Official Solicitor as well as by local authorities, CCGs and care homes. She is a contributor to the 4<sup>th</sup> edition of the *Assessment of Mental Capacity: A Practical Guide for Doctors and Lawyers* (BMA/Law Society 2015). 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. He has been continuously involved in law reform processes. His books include the current standard Scottish texts on the subject. His awards include an MBE for services to the mentally handicapped in Scotland; honorary membership of the Law Society of Scotland; national awards for legal journalism, legal charitable work and legal scholarship; and the lifetime achievement award at the 2014 Scottish Legal Awards.

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Jill Stavert is Professor of Law, Director of the Centre for Mental Health and Capacity Law and Director of Research, The Business School, Edinburgh Napier University. Jill is also a member of the Law Society for Scotland's Mental Health and Disability Sub-Committee. She has undertaken work for the Mental Welfare Commission for Scotland (including its 2015 updated guidance on Deprivation of Liberty). To view full CV click [here](#).

## Conferences

### Conferences at which editors/contributors are speaking

#### Mental Capacity Law Update

Neil is speaking along with Adam Fullwood at a joint seminar with Weightmans in Manchester on 18 November covering topics such as the Liberty Protection Safeguards, the inherent jurisdiction, and sexual relations. For more details, and to book, see [here](#).

### Other conferences of interest

#### Safeguarding and the Care Act 2014 - Self-neglect

Continuing the SALLY (safeguarding and legal literacy) series, this day-long seminar at Keele University on 31 January focuses on self-neglect. For more details, and to book a free ticket, 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.

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Our next edition will be out in February 2020. 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](mailto:marketing@39essex.com).

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[For all our mental capacity resources, click here](#)