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COMMUNITY CARE – GENERAL ISSUES

RIGHT TO CONTROL

The pilot Right to Control Regulations for England: an analysis

It is now clear that the coalition government is pursuing personalisation of care services in England with as much, if not more, enthusiasm than the previous administration. For this reason, the recently made regulations governing pilot personalisation schemes will be of interest to readers even if they are not in one of the pilot areas. This is because they identify a possible future for the provision of care services in England generally (but not in Wales since the Welsh Assembly Government has no plans to pursue its own parallel personalisation initiative).

The pilot regulations, whose full title is the Disabled People's Right to Control (Pilot Scheme) (England) Regulations 2010, apply to a limited number of authorities in England. Their commencement is also staggered. The Regulations came into force on 13 December 2010 in relation to Barnet, Epsom & Ewell Essex, Leicester, Newham, Reigate & Banstead and on 1 March 2011 in relation to Barnsley and Sheffield councils. On 1 April 2011, they will come into force in relation to Bury, Manchester, Oldham, Stockport and Trafford councils. The pilot regulations are accompanied by detailed statutory guidance.

KEY POINTS

- The pilot Regulations establish a new system for delivering Supporting People, disability work support and Disabled Facilities Grants
- Separately, changes are made to the Independent Living Fund and community care rules to allow for co-ordination across the range of services for disabled persons
- The pilot Regulations allow individuals to receive direct payments instead of direct provision of a Supporting People service
- The pilot Regulations cease to have effect in December 2012

In summary, how do the Regulations work?

In summary, the Regulations work as follows:

- (ii) They apply largely in relation to what they call a "qualifying service". Essentially, qualifying services are *Supporting People* (housing-related) support services and the *Access to Work* and *Work Choice Specialist Disability Employment Programme* work-support schemes.
- (iii) The Regulations are about the manner of delivering qualifying services to individuals in a pilot area. Accordingly, they need to identify a link between a qualifying service, an individual and a council. Generally, the link is established by a residency criterion and a service entitlement criterion. Where that link is established, the duties under the Regulations apply.
- (iv) The right to control duties are a set of entitlements and linked local authority duties in connection with the delivery of a qualifying service. The overall purpose is to give right to control beneficiary more control over the delivery of the services to which they are entitled. Most significantly, the Regulations provide for service users in certain circumstances to receive a direct payment, instead of the direct provision of a service, which they are then to use themselves to purchase care services.
- (v) Alongside the Regulations, central government have exercised separate powers in relation to other care services to allow for co-ordination of a range of care services. Most notably, this has been done in relation to services under the community care legislation and payments under the *Independently Living Fund*.
- (vi) The Regulations also modify the legislation which governs the making of *Disabled Facilities Grants* so that grants may be provided according to *Right to Control* principles.

What are qualifying services?

The definition of local authority "qualifying service" is contained in regulation 4. It is structured as follows:

- (i) For lawyers experienced in dealing with the law relating to public bodies, the definition begins strangely. It states that qualifying services must be in the form of "non-statutory assistance". This is odd because one of the basic principles of public law is that a statutory body such as a local authority must have statutory authority for everything that it does. Strictly speaking, therefore, it makes no legal sense to refer to a local authority providing non-statutory assistance. But an attempt must be made to construe the Regulations in a workable fashion. If that is done, then it seems clear that what the Regulations intend to refer to is assistance whose statutory basis is a discretionarily-established statutory grant scheme rather than a mandatory legislative provision.
- (ii) The assistance must be given for the purpose of "enabling people aged 18 or over to overcome barriers to participation in society associated with their disability".
- (iii) The assistance must satisfy two further criteria. It must be "given for the purpose of developing and sustaining people's capacity to live more independently in their accommodation" and when it is first provided it must appear to the authority likely that it is going to be needed for more than 2 years. So, what the Regulations are really identifying is a long-term need for assistance to live independently in the community.
- (iv) Certain assistance is excluded and so cannot be a qualifying service. The first exclusion is community care services (for which a separate direct payments scheme already exists). The second exclusion is assistance in the form of a grant of a tenancy or the provision of accommodation. So this excludes the allocation of social housing or assistance under the homelessness legislation in the *Housing Act 1996*.





It can be seen that the definition is not without complexity. However, the guidance states that what the definition in fact intends to capture is the Supporting People scheme (housing-related support services) to the extent that it provides services falling within the above description.

There are two other qualifying services which are not provided by local authorities. They are assistance under the centrally-funded *Access to Work* and the *Work Choice Specialist Disability Employment Programme* schemes. These are both projects which aim to help disabled person obtain and maintain employment.

What is the difference between a qualifying service and a Right to Control service?

Under the Regulations, qualifying services are also Right to Control services. However, there are additional Right to Control services that are not also qualifying services. These additional services are: (i) community care services, (ii) Disabled Facilities Grants, and (iii) payments from the Independent Living Fund.

The Regulations only make substantive provision about Disabled Facilities Grants. However, they do facilitate co-ordinated provision of the full range of Right to Control services. In this respect, the Explanatory Memorandum to the Regulations states as follows:

"The ability to simplify procedures for the disabled person across all six publicly funded services is an important requirement for the Right to Control to be delivered efficiently and effectively. These regulations will allow relevant authorities to disclose relevant information to each other for certain specified purposes such as determining eligibility for Right to Control services, monitoring direct payments and developing support plans".

Detailed guidance about information sharing is contained in Chapter 6 of the statutory guidance.

Additionally, Chapters 4 and 5 of the guidance describe (as the introduction to the guidance puts it) "how flexibilities equivalent to those provided by the Right to Control Regulations can be delivered for the other Right to Control services, namely the Independent Living Fund and community care services, in order to provide a seamless service for disabled people". In the case of the Independent Living Fund, the 'flexibilities' are achieved by amending the Trust Deed which governs the operation of the Fund. In the case of community care services, the flexibilities are achieved as a result of directions given by the Secretary of State to local authorities, the Community Care Services: Disabled People's Choice and Control (Pilot Scheme) (England) Directions 2010.

Further, the guidance provides that the provision of qualifying services should be co-ordinated with the provision of other Right to Control services. For example, para. 5.10 of the guidance states:

"Where a disabled person has been deemed eligible for community care services, the [Community Care] Choice and Control Directions direct Trailblazer local authorities to work in partnership with other authorities who provide Right to Control services to ensure that the disabled person receives a seamless delivery of services as far as possible. This may include the combining of a community care support plan with any other plan developed for a Right to Control service where appropriate, to ensure that all information about an individual's package of support can be found in one place and to show how different services can work together to meet that individual's desired outcomes".

How do the Regulations identify persons with the Right to Control a qualifying service?

Under reg.5, the following conditions must be met in order for a service user to have the Right to Control under the Regulations:

- (i) the service user must be aged over 18 and resident in the area of a pilot authority;
- (ii) an authority responsible for the delivery of a qualifying service must have decided that the service user is entitled to receive a qualifying service or that it "will" provide, or arrange for the provision of a qualifying service.

It should be noted that the responsible authority could either be a local authority or (in the case of the disability-related employment assistance schemes) the Secretary of State for Work & Pensions. It should also be noted that persons who were already receiving a qualifying service when the Regulations came into force are not automatically given the Right to Control. Both the person and the responsible authority must agree that the Right to Control is to be given to the person (reg. 6(4)).

It can be seen therefore that the Regulations do not operate at the prior stage of a local authority deciding whether a person is entitled to a qualifying service. Accordingly, they do not disturb eligibility criteria for qualifying services (such as Supporting People services).

What is the Right to Control?

The Right to Control is effectively a set of obligations and entitlements about the mode of delivering a qualifying service. These are set out in regulations 7 to 20, the main features of which are as follows:

- (i) There are duties to provide information (reg.7). For example, P (the person entitled to services) must be told of his/her "rights and choices" under the Regulations as well as the "likely value" of the qualifying service for which s/he is eligible.
- (ii) Under reg.8 the responsible authority must "work with" P to develop a support plan (but there is no substantive definition of "support plan" in the Regulations). In relation to the Supporting People-type qualifying services, a support plan must be produced even if P is unco-operative. A copy of any plan must be given to P and the plan may also be combined with a plan for any other Right to Control service, which is most likely to be a community care plan. The guidance states that a support plan for a qualifying service may be combined with a support plan for another Right to Control service, such as community care services.





- (iii) Regulation 9 provides an alternative system for approving support plans in cases where P does not have the mental capacity to approve a support plan.
- (iv) The contents of a support plan are prescribed by regulation 10. For example, a plan must include "the level of funding to which P is entitled" and the services to be provided for P or which P is to purchase using a direct payment.
- (v) Regulation 11 is significant because gives P real, although qualified, control over the provision of services. Regulation 11 applies where P and the responsible authority have agreed support outcomes. In such a case, the authority must "in preparing the support plan give effect to any request by P as to the manner in which any services are to be provided for the purpose of securing those outcomes". So, once outcomes have been agreed, P has the right to decide how they are to be met. But this is by no means an absolute right. Reg.11(2) allows an authority to refuse to give effect to P's wishes in the following cases:
 - (a) where it is not reasonably practicable to provide the services in the manner requested by P;
 - (b) where the provision of the services in the manner requested by P would not secure the agreed outcomes;
 - (c) where the level of funding specified in the plan is not sufficient to give effect to the request.
- (vi) An authority's refusal to provide services in accordance with P's wishes must be explained to P. Reg. 11(3) requires a written statement of the reasons for refusal to be provided. Also, reg. 19 allows P to insist that the decision refusing to provide services is reviewed by the authority. The right to a review also applies to a range of other decisions under the Regulations, for example a decision to refuse direct payments.
- (vii) Where the support plan specifies that services are to be provided in a particular way, or commissioned, by the authority, the authority is under an absolute duty to provide or commission the services in that way (reg. 12).
- (viii) As we have seen, one option for P is to direct the authority as to how services are to be provided. Another option is the direct payment. If a direct payment is opted for, P is obliged to use it to purchase services to meet the support plan outcomes. However, this is not an option if P is a person described in Schedule 1 to the Regulations that is persons subject to certain drug- or alcohol- related criminal sentences.
- (ix) The statutory guidance states that the pilot regulations' direct payments provisions are modelled on the existing community care direct payments legislation (which is contained in the Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2009). The structure is certainly very similar but under the pilot regulations there are more opportunities to deny direct payments. In the following three cases, which are not found in the community care direct payments legislation, an authority is permitted to refuse a request for direct payments:
 - (a) where "the making of direct payments would in the circumstances place an unreasonable financial burden on the authority",
 - (b) where "the making of direct payments would have an adverse effect on the provision of qualifying services to or for the benefit of other persons", or
 - (c) where "for any other reason relating to the disabled person or to the qualifying service the making of direct payments is not reasonably practicable in all the circumstances".
- (x) As with the community care direct payments legislation, the Right to Control Regulations contain a scheme which allows a Right to Control direct payment to be made to a third party in cases where P lacks the mental capacity to receive and handle direct payments.
- (xi) Provision is made for certain of a council's Right to Control functions to be delegated to third parties, such as a user-led organisation. Detailed advice about delegation is contained in the statutory guidance, at paragraph 2.118 onwards.

When does the pilot scheme end?

The Regulations cease to have effect on 13 December 2012. However, there are limited exceptions to allow a Right to Control beneficiary to retain the Right to Control until the next support plan review following 13 December 2012.

What about Disabled Facilities Grants?

The Regulations make separate provision about the operation of the Disabled Facilities Grants legislation in the pilot areas (save that in Essex only certain districts are included). These provisions modify that legislation (Part 1 of the Housing Grants, Construction & Regeneration Act 1996) so as to create a system which is similar to the general Right to Control system described above. The modified legislation applies once an application for a DFG has been granted. For example the "disabled occupant" has a qualified right to have the grant paid to him/her rather than to the building contractor or the applicant for the grant.

Detailed guidance about the modified DFG legislation is contained in Chapter 3 of the statutory guidance.

Links www.legislation.gov.uk/ukxi/2010/2862/contents/made - the Regulations are available here.
<http://odi.dwp.gov.uk/docs/wor/rtc/rtc-stat-guide.pdf> - the statutory guidance which accompanies the Regulations is available here.





INDEPENDENT LIVING

IB v Birmingham CC – overnight carers' bedroom restrictions compatible with Human Rights Act 1998 but new legislation will soon reverse this ruling

Housing benefit is not unrestricted. To control public expenditure, limits are placed on the amount of rent met by benefit. For the next few weeks, this will continue to cause difficulty for severely disabled housing benefit recipients who need an overnight carer. Their housing benefit will not meet the full costs of renting a property with an extra room as sleeping accommodation for such a carer. Those rules were recently been upheld by the Upper Tribunal. However, the Government has independently decided to relax the rules in the very near future.

KEY POINTS

- Rules preventing overnight carer's bedroom from being taken into account when quantifying housing benefit are compatible with human rights legislation
- The rules will in any event change on 1 April 2011
- The new rules will allow a carer's overnight accommodation to be counted where a care needs condition and an overnight presence condition are met

What happened?

Due to his spinal and muscular dystrophy, a disabled student was able to claim housing benefit (normally, students cannot claim housing benefit). The operation of the housing benefit rules meant that the student's award was calculated on the basis that he needed a property with only one bedroom.

In reality, the student needed a two bedroom property which included sleeping accommodation for night-time paid carers. The student took a tenancy of a 2 bedroom property but his housing benefit award did not cover the full rent. This was because his paid professional carers could not be considered "occupiers" of his home for housing benefit purposes. When the matter subsequently came before the Upper Tribunal, it concluded that this was the correct result on a strict application of the Housing Benefit Regulations 2006, on the following basis:

"9...while the claimant as a severely disabled person in receipt of the highest rates of both components of disability living allowance (which he was, and is) was not restricted to the single room shared accommodation rate (as a non-disabled single person of his own age would be: regulation 13D(2)(a)), nor was he excluded from housing benefit altogether (as a non-disabled single person of his own age would be while a full-time student: regulation 56), he was the only resident occupier of his flat; and the regulations simply did not provide for him to be given any extra allowance for his additional bedroom, any more than they did for the extra rent of a more costly flat with special access or adaptations".

The student claimed that this amounted to unlawful discrimination, contrary to the European Convention on Human Rights. The matter came before the Upper Tribunal (which makes binding rulings about welfare benefits law).

What did the Upper Tribunal decide?

The Upper Tribunal rejected the student's argument. He could not claim to have been discriminated against contrary to the European Convention on Human Rights. In fact, he was provided with extra housing assistance by the State because of his disability. If he had not been disabled, as a student he would not have been entitled to housing benefit at all. His housing benefit award was also higher than normal due to his disability.

Imminent legislative developments

The UK Government has decided to relax the rules about the calculation of housing benefit where a disabled person requires sleeping accommodation for a paid carer. This has been achieved by adding new provisions to the Housing Benefit Regulations 2006(a). Under the amended Regulations, in order for an additional carer's room to be taken into account, the claimant or the claimant's partner must be a "person who requires overnight care". This is defined in reg. 2 of the 2006 Regulations. The definition has two elements, a care needs condition and a condition requiring overnight presence of a carer. In more detail:

- (i) The care needs condition is automatically met in the case of a person who is in receipt of DLA care component at the middle rate or above or in receipt of Attendance Allowance. But it can also be satisfied by a person (P) who is not in receipt of either of those benefits. This is where the claimant "has provided the relevant authority with such certificates, documents, information or evidence as are sufficient to satisfy the authority that P requires overnight care".
- (ii) The overnight presence condition has a number of elements, all of which must be met. In more detail, it requires the council to whom a claim is made to be satisfied that the person (a) reasonably requires, and (b) has actually arranged for one or more people (the carers) who do not occupy the dwelling as their home to:
 - be engaged in providing overnight care for P; and
 - regularly stay overnight at the dwelling for that purpose; and
 - be provided with the use of a bedroom in that dwelling additional to those used by the persons who occupy the dwelling as their home.

The Department for Work & Pensions have issued guidance to local authorities about implementing the change in the Regulations. This estimates that some 10,000 disabled persons will benefit. The guidance is available at www.dwp.gov.uk/docs/a3-2011.pdf.

(a) The provisions were added by the Housing Benefit (Amendment) Regulations 2010 (S.I. 2010/2835).

The Upper Tribunal (Judge Howell) gave its decision in *IB v Birmingham City Council* on 13 January 2011: [2011] UKUT 23 (AAC).





FUNDING

R (M) v Hammersmith & Fulham LBC; Sutton LBC – service user's 'sectioning' under the Mental Health Act 1983 led to a switch in community care funding responsibilities

This case will cause concern amongst local authorities in whose areas service users from other areas tend frequently to be placed. Funding responsibility under the community care legislation shifted simply because the service user had a mental breakdown and was detained in hospital for treatment for a period of months.

What happened?

These were the relevant events in this case:

- (i) 61 year old M had a history of serious alcohol abuse, which led to cognitive impairment and the amnesiac mental disorder Korsakoff's syndrome.
- (ii) For many years M was ordinarily resident in the area of Hammersmith & Fulham LBC. Accordingly, any duties owed to him under the community care legislation were owed by Hammersmith & Fulham LBC.
- (iii) In December 2006, M was seriously injured in an accident. This led to him becoming entitled to residential accommodation under s.21 of the National Assistance Act 1948 (what is often called Part III accommodation). By reference to the s.21 statutory criteria, Hammersmith & Fulham LBC must have decided that he was in need of care and attention and that need could not be met without the provision of residential accommodation.
- (iv) Hammersmith & Fulham LBC placed M in a care home in the Sutton area. This had no bearing on responsibility for M under the community care legislation because s.24(5) of the 1948 Act deemed M to remain ordinarily resident in Hammersmith & Fulham.
- (v) In January 2008, M was compulsorily admitted to Sutton hospital for 28 days' assessment under s.2 of the Mental Health Act 1983. He was discharged back to the Sutton care home. Hammersmith & Fulham did not contend that this admission led to them ceasing to be responsible for accommodating M under s.21 of the 1948 Act. Accordingly, they continued to fund his place at the Sutton care home.
- (vi) In April 2008, M was again compulsorily admitted to Sutton hospital. This time, however, he was admitted for treatment under s.3 of the Mental Health Act 1983. The fact that M was admitted under s.3 was highly relevant to the key issue in this case because it activated a new duty to provide him with services in the community upon his discharge from hospital, that duty arising under s.117 of the Mental Health Act 1983. By contrast, M's admission under s.2 of the 1983 Act did not activate the s.117 duty.
- (vii) In March 2009, M was discharged from the Sutton hospital to a placement in the area of Ealing LBC. A dispute arose between Hammersmith & Fulham LBC and Sutton LBC as to which of them was responsible for funding the Ealing placement. The dispute could not be resolved and so the matter came before the High Court on a claim for judicial review.

The legal framework

As mentioned above, Hammersmith & Fulham's placement of M in the Sutton area did not alter his ordinary residence for the purposes of the National Assistance Act 1948. He was deemed to remain ordinarily resident in Hammersmith & Fulham.

Upon M's discharge from Sutton hospital, however, M became entitled to aftercare services under s.117 of the Mental Health Act 1983. That entitlement arose because M had been detained for treatment under s.3 of the 1983 Act.

Aftercare services may take the form of residential accommodation, if that is called for by a person's particular needs (*Clunis v Camden and Islington Health Authority* [1998] QB 978). And it is clear that a decision was taken in this case that M required residential accommodation as an aftercare service. The key issue therefore was who was responsible for funding the s.117 residential placement for M. Section 117 says that the duties it imposes in respect of a particular patient are duties of:

- (i) the council in whose area the person "is resident". This means the council in whose area the person resided before being admitted to hospital: *R v Mental Health Review Tribunal and others ex parte Hall* [1999] 3 All ER 132; or
- (ii) if no council can be identified as that in which the patient resided pre-admission, the council for the area to which the patient is sent on discharge.

What did the Court decide?

The High Court began its analysis by considering where M was "resident" before he was admitted to hospital under s.3 of the Mental Health Act 1983. It said that the task here was to consider the area in which M had a "settled presence" adopted without compulsion. The Court held that, on that test, it was clear that M was resident in Sutton before he was admitted to hospital under s.3 of the 1983 Act:

"M was unquestionably resident at [R House in Sutton] when he was admitted to Sutton Hospital under section 3 of the 1983 Act. He had lived there for about a year, apart from the period when he was admitted to Sutton Hospital for five or so weeks under section 2 of the 1983 Act. He had abandoned his tenancy of the one bedroomed flat in Hammersmith. He had nowhere to live in Hammersmith. If anyone had asked him the question, and he had been capable of giving a rational answer to it, "where do you





now reside?" on 9th April 2008, his answer could only have been "in [R House]". If he had been asked "do you reside in Hammersmith and Fulham?" he might have said "I wish I did", but he could not sensibly have said "I do".

So, applying common sense, it was clear that M was resident in Sutton before his admission to hospital. Accordingly, Sutton had to try and persuade the High Court that the ordinary residence deeming provision in the 1948 Act intervened to prevent that common sense result from fixing them with responsibility for M under s.117 of the Mental Health Act 1983. Sutton failed in that endeavour. The deeming condition in the 1948 Act applies only for the purposes of that Act. It has no part to play in deciding where, as a matter of fact, someone is "resident" for the purposes of another piece of legislation such as s.117 of the Mental Health Act 1983. In the Court's words:

"Section 24(5) [of the 1948 Act] expressly provides that a person provided with residential accommodation is only to be deemed "for the purposes of this Act" to continue to be ordinarily resident in the area in which he was ordinarily resident immediately before the accommodation was provided for him. Those words are unequivocal. What is deemed to occur for the purpose of the 1948 Act cannot be transposed into the 1983 Act".

The Court acknowledged that this result may cause difficulty for local authorities which, following a service user's mental health crisis, suddenly find themselves responsible for 'out of area' service users. That, however, could not change the clear meaning of the statutory provisions:

"that construction creates considerable practical problems for those charged with the management of discharged patients. I acknowledge that it does, but the fact that it does cannot lead to a construction of primary legislation which the wording of the legislation does not bear... If there is an anomaly it is for Parliament to correct".

The High Court's conclusion was recently challenged before the Court of Appeal. But the challenge was unsuccessful and the High Court's decision upheld.

What about the intra-local authority ordinary residence agreement?

In 1988 the Association of Metropolitan Councils and the Association of County Councils entered into an agreement entitled *Services for mentally ill and mentally handicapped people responsibility for costs of accommodation and day care services*. As the High Court said, applying those rules would have fixed Hammersmith and Fulham with responsibility for funding M's placement following his discharge from hospital. Sutton argued that they had a public law 'legitimate expectation' that those rules would be followed by Hammersmith & Fulham. The High Court held that Sutton had not made good their case on legitimate expectation

"It may be that there is material which, if put before a court, would persuade a judge that the agreement has been universally and consistently fulfilled over the years, so as to give rise to that legitimate expectation, but the material which I have simply does not permit me to reach that conclusion".

This argument could also have been criticised on the basis that it conflicts with the will of Parliament, as expressed in s.117 of the Mental Health Act 1983. On the analysis of the High Court in this case, Hammersmith & Fulham were not simply being awkward, they actually had no power to provide s.117 services to M because he was neither resident in their area prior to hospital admission nor was he sent to their area on discharge. And no one can have a legitimate expectation that a public body will act outside its powers. A similar point was made by the Court of Appeal when it recently heard an appeal against the High Court's decision in this case:

"53...If on a true reading of the statute [a council] is legally responsible for the after-care of a patient, I do not see how a non-statutory agreement, even with the assistance of the doctrine of legitimate expectation, can enable it to evade that responsibility".

The High Court (Mitting J) gave its decision in *R (M) v Hammersmith & Fulham LBC & Sutton LBC; R (Hertfordshire CC) v Hammersmith & Fulham LBC* on 3 March 2010: [2010] EWHC 562 (Admin).

The Court of Appeal gave its decision in *R (Hertfordshire CC) v London Borough of Hammersmith & Fulham* (interested party: JM) on 15 February 2011: [2011] EWCA Civ 77. The Court was comprised of Carnwath, Rimer and Sullivan LJJ.





CARE HOMES

FEES

West Sussex CC v Amberley (UK) Ltd – council did not agree to pay increased fees simply by keeping its residents in an independent care home

This was a more complex care home fee dispute than many because it was entangled with the difficult legislation that abolished preserved rights to higher rates of income support. In terms of general principles, however, the main message is that the courts will be slow to infer that a council has agreed to pay increased fees simply because it has not removed its residents from a care home. The fact that a care home provider feels extremely aggrieved about the fee levels that a council is willing to pay and styles requests for increased fees as 'demands' does not necessarily translate into any sort of legal obligation to pay increased fees.

The case initially came before the High Court and has recently been considered by the Court of Appeal. This article identifies the key practical findings of both Courts.

Background to the dispute

This is what lay behind this rather complex dispute:

- (i) The story began when income support still met the fees of some care home residents. Known as preserved rights cases, these individuals were resident in care homes in 1993 when local authorities became generally responsible for funding care home places for individuals lacking in funds. But preserved rights residents were not then transferred to local authority responsibility. They remained on higher rates of income support and those higher rates continued to meet their care home fees.
- (ii) A number of the residents of the present care home were preserved rights cases. As often happened, the care home providers thought that preserved rights levels were too low and did not meet their running costs. Higher fees were not, however, demanded from the residents nor were they required to leave the home.
- (iii) Preserved rights were abolished in April 2002 when section 50 of the Health and Social Care Act 2001 came into force. In place of income support, the intention was for fees to be met by local authorities acting under Part III of the National Assistance Act 1948. The relevant local authority in the present case was West Sussex CC ("the council").
- (iv) The care home providers expected the council to pay more than the previous income support rates, but they were to be disappointed. The council refused to pay more than their ordinary maximum rate for residential accommodation.
- (v) Over the next six years, the care home providers issued annual 'demands' to the council for fees that were higher than the council's maximum rate. The council ignored them and continued to pay no more than their maximum rate. The care home providers did not, however, require their former preserved rights residents to leave the home.
- (vi) Part of the relevant context was a degree of uncertainty as to the responsible funding authority. This led to the care home provider actually receiving a double payment for one resident. West Sussex council had assumed that they were responsible for this resident's fees when in fact they were the responsibility of, and also being paid by, Windsor & Maidenhead council.
- (vii) The care home provider was aware of the double payment for the Windsor resident. It did not exactly conceal that fact from the council because its annual invoices referred to an 'overpayment' (the payment made by the council for the Windsor resident). But what the provider did not do was refuse the council's payments for the Windsor resident. This was because the provider considered that the extra payment compensated for the unrealistically low payments made by the council for the other former preserved rights residents.
- (viii) In total, the council paid £64,000 in fees for the Windsor resident.
- (ix) That was not the only excess payment made by the council. Upon becoming responsible for the preserved rights residents, the council assessed the finances of two of them and decided that they should pay some of their welfare benefits to the care home provider as a contribution towards their fees. Over time, the residents' welfare benefits income increased (they became entitled to new benefits) and so the amount they paid over to the provider increased. However, the council assumed the welfare benefits income remain fixed. Effectively, therefore, the council were paying too much for these residents. The care home provider was receiving fees from the council based on an incorrect assumption that the residents were receiving a low level of benefits.
- (x) The care home provider was open with the council about the increased contributions from these residents. Monthly invoices specified accurately the amount being taken from their welfare benefits income. If the council had read the invoices carefully, they would have realised that the contribution had gone up and they could have reduced the fee they paid to the care home provider. But, as the High Court itself said, the invoices were simply "consigned to the waste paper bin".

KEY POINTS

- A care home was liable to repay an accidental double payment of a resident's fees
- A fee review clause in a residency contract did not permit a care home unilaterally to increase fees
- A local authority had not contractually agreed to pay increased fees simply by leaving its residents at a home
- A care home was entitled to be paid a 'reasonable sum' for residents whose placements were not covered by contracts
- The 'reasonable sum' was not higher than an authority's standard maximum rate
- A care home provider was not obliged to inform a local authority that its residents' welfare benefits income had increased





Was the care home provider liable to repay the double payment received for the Windsor resident?

We shall begin by considering the legal consequences of the £64,000 double payment for the Windsor resident. The High Court held that, in principle, the home were liable to repay this sum. Those monies were paid by mistake which meant that, under general legal principles, the care home providers were liable to return them. In general terms, this was accepted by the care home provider. But, as we will see, the provider went on to argue that he could 'set off' against that liability sums owed to him by the council because of the low rates he had been paid.

How did the transfer of responsibility for preserved rights cases take place?

The amount of the set-off contended for by the care home providers was the aggregate difference between (a) the amounts actually paid by the council for the preserved rights residents and (b) the amount 'demanded' by the care home. In order to put this aspect of the case in context, we need to identify the legal relationship between the council and the care home. And this calls for us to look more closely at how the Health and Social Care Act 2001 operated in April 2002 to transfer responsibility for preserved rights cases to local authorities. There were two possibilities:

- (i) Where local authorities had become involved in good time before the 2001 Act's implementation date, for example where they had carried out a community care needs assessment in advance, they would become responsible for funding preserved rights placements in the same way that placements of other residents in independent care homes are funded (s.50(3) of the 2001 Act). In other words, in the typical case, authorities would accept that they were under a duty to secure residential accommodation under s.21 of the National Assistance Act 1948, make arrangements with an independent provider to provide accommodation to meet that duty and, when that occurred, a resident's existing liability towards a care home provider would cease.
- (ii) The 2001 Act anticipated that some authorities would not be ready in time to make a decision to provide accommodation under s.21 of the 1948 Act. This might be because, by the implementation date, the authorities had not carried out a community care needs assessment. To prevent a patient being in limbo in such cases, s.50(6) of the Health and Social Care Act 2001 provided that, on the implementation date of the 2001 Act, the resident's liability to pay care home fees would become a liability of the local authority. Accordingly, in such cases, there was a contractual switch. The resident's liability became a liability of the local authority until such time as the authority decided that they were obliged to accommodate the resident under s.21 of the 1948 Act. At that point, the placement would become funded in the standard way that all other placements are funded where a local authority makes arrangements with a third party provider for it to provide accommodation.

In the present case, all the care home residents fell within the second group. In other words, the contracts which they had originally entered into with the care home provider were transferred to the council so that their liabilities to pay fees under the contracts became liabilities of the council.

Was the care home entitled to additional payments for the residents whose contractual liabilities the council inherited?

The issue here turned on the nature of the contracts between the residents and the care home provider. These were the contracts inherited by the council under s.50(6) of the Health and Social Care Act 2001 (as just described) and so the council's obligations under the contracts were the same as the resident's obligations had been.

The contracts said that "the level of fees is subject to review as costs increase". The care home provider argued that this entitled them unilaterally to increase fees which they had done. The council's failure to pay the increase was, argued the provider, a breach of contract that the increased fees could be set off against the provider's liability to repay the double payment for the Windsor resident.

This argument was rejected by the High Court because it found that the contract did not give the provider a unilateral power to raise fees. While it is possible under general contractual principles to include such a contractual provision, it is relatively unusual and so the court would normally expect to see the power spelt out clearly: *Esso Petroleum Company Limited v David and Christine Addison & Ors* [2003] EWHC 1730 (Comm). It was not spelt out clearly in this case. The Court of Appeal upheld this finding on appeal, making the following ruling about the nature of the contractual review clause:

"There is nothing in the term, either in itself or in conjunction with the other terms of the contract, which gives Amberley Ltd an express right unilaterally to declare an increase in the fee and then enforce it upon the other party to the contract".

The High Court went on to find that the contractual provision relied on by the provider worked as follows:

- (i) it allowed the provider to increase the weekly fee,
- (ii) a resident had the right to choose whether or not to accept the increase or move to alternative accommodation.

When the contract was transferred to the council, the provision therefore operated so that the council were free to accept or reject the increases 'demanded'. The council's refusal to pay the increases would have entitled the care home provider to require the residents to leave the home. But it did not indicate that the contract had been modified so as to bind the council to pay the increased fee demanded by the care home providers.

What about residents without contractually regulated fees?

There were also a small number of residents in respect of whom it appeared that there were no written contracts in place when preserved rights ceased. The High Court said that, if there were no contractual arrangements in place to govern the fees to be paid, the care home provider was entitled to be paid a "reasonable sum" for the accommodation provided. This right was either derived from application of the common law *quantum meruit* principle (a reasonable rate for the services provided) or s.15 of the Supply of Goods and Services Act 1982 (which provides that, where a contract does not specify the price to be paid for a service, it is implied that the party contracting with the supplier will pay a "reasonable charge").





The High Court held that the amount paid by the council (the amount pegged to the old preserved rights rate) was reasonable and so no set-off was due to the provider on this alternative basis. The Court observed that the provider's evidence in support of his argument that preserved rights rate were unreasonable was "thin" and seemed to be solely based on the fact that other councils were willing to pay higher fees than this council. That did not make this council's fees unreasonable. In fact, evidence given by council officials convinced the Court that the council had paid a reasonable sum because the fees paid "substantially reflected the state of the care home market in West Sussex and the surrounding area". It is worth noting the evidence that persuaded the Court in this case because this is an issue that arises quite frequently. It was described as follows by the Court:

"39...(i) WSCC had no difficulty securing accommodation and care at its usual maximum rates for all those people assessed as having residential care needs; (ii) the supply of residential care within West Sussex and particularly along the coastal area had resulted in competition between care home proprietors; (iii) WSCC's maximum rates were comparable to the rates paid by other local authorities in the south-east region with a similar care home market; and (iv) East Sussex County Council, Hampshire County Council, Portsmouth City Council and Southampton City Council all had maximum rates for the residential care of people who required care by virtue of past or present mental disorder within £5 (+/-) of WSCC's rate".

Were new more valuable contracts to be inferred from the conduct of the parties?

The care home provider also argued that a new contract between themselves and the council was to be inferred by conduct, in that the council kept its residents at the home knowing that the provider was demanding greater fees for them. This argument was rejected by the High Court as follows:

"42...the contract contended for by Amberley Ltd [the provider] cannot be inferred from the parties' conduct. True it is that Amberley Ltd made it clear what its prices were and conferred a benefit on [the council] by continuing to provide accommodation for the residents but equally, [the council] made it abundantly clear what it was prepared to pay for residential care and Amberley Ltd continued to provide accommodation in the full knowledge thereof. [The council] cannot therefore in my view be treated as having accepted Amberley Ltd's offer to provide accommodation on its terms as to price, particularly since [the council] took no positive steps other than to pay in accordance with its own schedule of rates. In short, Amberley Ltd took the risk that it might not be entitled to charge at its announced rates whilst at the same time earning a return on its capital by receiving the fees paid by [the council]."

The overall result

The above findings meant that the provider had no right to set off any sums against the monies claimed by the council in respect of the double payment for the Windsor resident. Against that, however, the council were unable to recover the additional sums paid towards the fees for the residents whose welfare benefits income increased. This is considered below after the question of whether the residents were accommodated under s.21 of the National Assistance Act 1948 which is the legal basis for the vast majority of care home placements made by local authorities in England and Wales.

Were any of the residents accommodated under s.21 of the National Assistance Act 1948?

An interesting additional point that arose in this case was whether any of the residents had started to become the direct responsibility of the council under s.21 of the National Assistance Act 1948 ("1948 Act"). As we mentioned above, the Health and Social Care Act 2001 anticipated that, over time, the legal basis for local authority funding would migrate. Initially, the authority would simply have a direct contractual obligation under s.50(6) of the Health and Social Care Act 2001, by virtue of the transfer of contractual responsibility in April 2002. Over time, as local authorities made a decision to provide residential accommodation (a form of "community care service"), the transferred contracts would terminate and the residents would be funded on the same legal basis as all other persons entitled to accommodation under s.21 of the 1948 Act.

The trigger for this switch in the statutory basis for funding was the provision for a resident of "any community care service" and the 2001 Act clearly anticipated that the usual form of service would be accommodation under s.21 of the 1948 Act (s.50(5) Health and Social Care Act 2001). The problem in this case, however, was that the council and the care home provider never reached agreement as to rates of payment. According to the High Court's ruling, this absence of consensus meant that the residents had not been provided with accommodation under s.21 of the 1948 Act (*Chief Adjudication Officer v Quinn* [1996] 1 WLR 1184). As a result, the residents had not been provided with a community care service. This meant that the contracts transferred to the council in April 2001, by operation of s.50 of the Health and Social Care Act 2001, still regulated the relationship between the council and the provider. The residents had not therefore migrated to the mainstream statutory system for funding care home placements under Part III of the 1948 Act.

It would not be surprising if there are other instances of preserved rights residents being left accommodated under s.50 contracts, rather than under arrangements under s.21 of the 1948 Act. Does this matter? In theory, it does. It means that the residents are not persons receiving a community care service because the provision of accommodation under a s.50 transferred contract falls outside the definition of community care service contained in s.46 of the NHS and Community Care Act 1990. The fact that a service is a "community care service" means that attached to it is a range of guidance, directions and legislative provisions designed for the benefit of service users. These do not apply where the accommodation is being provided under a s.50 transferred contract. It is also clear that s.50 did not intend for this to happen. S.50(3) imposed a duty on councils to ensure that, where a community care service was not being provided to a preserved rights resident on the implementation date in April 2002, such a service would be provided to them as soon as was reasonably practicable thereafter. As soon as it were provided, the transferred contract would fall away by operation of s.50(3) of the 2001 Act.

Did the council have a claim under s.45(1) of the National Assistance Act 1948?

In respect of the two residents whose welfare benefits income had increased, the council tried to recover the additional fees they had unnecessarily paid by relying on s.45(1) of the National Assistance Act 1948. This was an unusual use of s.45 because it is normally used to recover monies from persons who have hidden details of their finances in order to receive local authority-funded residential care.





This is how section 45(1) works:

- (i) the first stage is to identify whether a person has misrepresented or failed to disclose a "material fact". It is specifically stated in the section that it does not matter whether or not that is done fraudulently;
- (ii) for present purposes, the second stage is to identify whether, as a consequence of the misrepresentation or failure to disclose, a local authority incurred expenditure under the National Assistance Act 1948. This element of the case assumed that the council had incurred expenditure under the 1948 Act although, as we saw above, most of the residents were not funded under that Act but by virtue of section 50(6) of the Health and Social Care Act 2001 contractually obliging the council to pay the fees of the preserved rights residents;
- (iii) if both of those things are identified, a council is entitled to recover the amount of the expenditure from the person who misrepresented or failed to disclose a material fact.

The High Court rejected the council's claim that they had a right to recover under s.45(1). The care home providers accepted that the increase in welfare benefits income was a material fact. However, they went on to argue that a person can only fail to disclose a material fact if s/he is under a duty to disclose it. While not mentioned by the High Court, this is exactly the way in which an identically worded provision to s.45(1) concerning recovery of social security benefits has been interpreted by the Court of Appeal (see *B v the Secretary of State for Work and Pensions* [2005] EWCA Civ 929). Unsurprisingly, therefore, the High Court accepted that the care home providers had to be under duty to disclose in order for them to have failed to disclose a material fact for the purposes of s.45(1).

The High Court held that there was no duty on the care home providers to disclose the residents' increased welfare benefits income to the council. The council had not asked the care home providers to provide such information to them and it would have been simple enough for the council to have discovered for itself whether there had been an increase in welfare benefits income. As there was no duty to disclose, there could be no liability for failure to disclose under s.45(1). This aspect of the council's claim was rejected.

The High Court (Field J) gave its decision in *West Sussex CC v Amberley (UK) Ltd and Ronald Green* on 31 March 2010: [2010] EWHC 651 (QB).

The Court of Appeal gave its decision in *Amberley (UK) Ltd v West Sussex CC* on 20 January 2011: [2011] EWCA Civ 11. The Court was comprised of Mummery, Richards and Aiken LJ.

COURT OF PROTECTION & MENTAL CAPACITY

PROPERTY & AFFAIRS

In the Matter of G (TJ) – in deciding what is in a person's best interests, the Court of Protection may take into account the decision that the person would have made if s/he had capacity

The Mental Capacity Act 2005 (MCA 05) is concerned with two areas of life, personal welfare (on the one hand) and property and affairs (on the other). But the Act creates a unified jurisdiction with common rules applying to both personal welfare and property and affairs matters. One of these is the best interests requirement: that decisions taken for and on behalf of an adult should be in the adult's best interests. This is a concept that was developed under the High Court's jurisdiction in relation to the welfare of vulnerable adults and its relevance in relation to welfare matters is clear. But conceptual difficulties have been encountered in applying the best interests requirement to property and affairs matters, especially where the underlying dispute is really about the interests of the incapacitated adults' relatives. This is the latest reported decision of the Court to grapple with the operation of the best interests requirement in such cases.

KEY POINTS

- It may be in a person's best interests to take a decision which has no effect on their well-being
- In deciding what is in a person's best interests, it can be legitimate to take into account the decision that the person would have taken if s/he had capacity
- The principle that it is in a person's best interests to be seen to do the right thing might not be of universal application
- A Deputy's powers cease if the person for whom s/he was appointed to act dies

What was the issue?

Court of Protection proceedings concerned the property and affairs of an older woman. The parties had agreed an order which would direct the woman's Deputy to make regular maintenance payments to her adult daughter. But the Court had to approve the order.

The issue for the Court was whether the proposed payments were in the woman's best interests. If they were not, the Court had no power to make the order: the Court may only act in what it considers to be a person's best interests (s.16(3) MCA 05). It was clear that the woman's mental condition was such that, if the payments were made, it would have no effect on her well-being. She would simply be oblivious to them. How, then, could the payments be said to be in her best interests?

It should be noted that there was no possibility that the proposed maintenance payments would reduce the cash available for the woman to such an extent that her own needs could not be met. In effect, the sums would be paid out of what the Court referred to as the woman's surplus funds. Therefore, the proposed payments could not be objected to on the basis that they would or might harm the woman's physical well-being.

May the Court of Protection make an order which does not affect the well-being of the person lacking capacity?

The Court of Protection decided that the concept of a person's best interests is wider than simply a person's self-interest. If the test was self-





interest, it was unlikely that the Court would have had the power to make the maintenance payments order sought in this case. Given the mother's level of cognitive functioning, the payments would mean nothing to her. They would have no affect on her emotional well-being because, as the Court put it, she would have "no reaction" to the payments. But, as the Court decided, best interests is a wider concept than self-interest.

The Court went on to conclude that, in principle, it has the power to decide that an order which would have no affect on a person's physical or mental well-being is nevertheless in the adult's best interests. The Court noted that the MCA 05 makes express reference to gifts being made on behalf a person who lacks the mental capacity to make a gift. This shows that Parliament anticipated that under the Act things would be done on behalf of an incapacitated person even though those things provide the person with no benefit. This is how the judge put it:

"These various references to gifts, lifetime and testamentary, and settlements for the benefit of others, suggest to me that the word "interests" in the phrase "best interests" is not confined to matters of self interest or, putting it another way, a court could conclude in an appropriate case that it is in the interests of P for P to act altruistically".

Best interests and substituted judgement

Section 4 of the MCA 05 sets out matters that must be taken into account when the Court of Protection (or anyone else) is deciding under the MCA 05 what course of action would be in a person's best interests. These include "the beliefs and values that would be likely to influence his decision if he had capacity" (s.4(6)(b)) and "the other factors that he would be likely to consider if he were able to do so" (s.4(6)(c)). So, in applying these provisions the Court identifies the factors that would operate on the mind of the person if s/he were able to make the decision. In carrying out that process, the Court may well identify the decision that the person would have taken if s/he had capacity. The issue for the Court of Protection was whether it may take account of the decision that the person would have made when deciding what course of action would be in the person's best interests.

The Court recognised that it could not adopt an automatic rule of giving effect to the decision that the incapacitated person would have made (if they had capacity). That would be a return to the substituted judgement approach that was taken in relation to property and affairs matters prior to the enactment of the 2005 Act and which that Act deliberately avoided re-enacting. The "ultimate question" is always what is in a person's best interests. But in "an appropriate case", a court could conclude that it is in a person's best for the court to make the decision that the person would made, if s/he had capacity. As we see below, this was such a case.

What did the Court decide?

The Court decided that it was in the mother's best interests for maintenance payments to be made to her daughter from her estate. An important factor relied on by the Court ("the principal justification") was that, if the mother had capacity, she would have decided to make such payments.

'Doing the right thing'

As this case, shows the MCA 05 poses a conundrum in property and affairs (financial) cases in particular. For example, a decision is sought on a topic which the person lacking capacity never considered so no guidance is available in the form of previous wishes and feelings. In addition, the person's mental functioning is so impaired that neither making, nor declining to make, the decision will have any affect on their immediate well-being. But the moral claims of the person seeking a decision may be clear. How is that to be recognised as part of the MCA 05 decision-making process?

Previously, Court of Protection judges have found the guidance they were seeking by recognising that for a person to be seen to have 'done the right thing' after the person's death is in his/her best interests. This was first seen in Lewison J's decision in the case of *In Re P* [2009] 2 All ER 1198, (see issue 57) where he said:

"what will live on after P's death is his memory; and for many people it is in their best interests that they be remembered with affection by their family and as having done 'the right thing' by their will. In my judgment the decision-maker is entitled to take into account, in assessing what is in P's best interests, how he will be remembered after his death".

This was endorsed by Munby J in *In re M* [2010] 3 All ER 682. In the present case, however, Morgan J agreed with counsel that this factor is an imprecise guide in cases of family discord or where there is reasonable disagreement about what is the 'right thing' to do:

"53...Some families do not agree. Some gifts or statutory wills are made as a result of a direction of the Court of Protection where the court has had to prefer some family members to other family members. Some family members will think that the court has done the right thing and some will think that the court has done the wrong thing".

What this shows, it is suggested, is that the 'doing the right thing' principle carries more weight in some cases than in others. It is likely to carry more weight in cases where all reasonable-minded persons would consider a particular course of action as being likely to generate post-mortem affection towards the deceased on the part of family and friends. It is also likely to carry more weight in cases where family members agree on the approach that the Court of Protection ought to take.

Doing the right thing and present well-being

However, there is another way of analysing how the 'do the right thing' principle which is to locate it in the present rather than take the conceptually difficult and arguably artificial course of relating present best interests to the way in which a person will be remembered after death. If a decision which has no direct effect on an incapacitated individual's well-being nevertheless benefits a particular individual it may be legitimate to conclude that it is likely to have an indirect positive effect on the incapacitated person's well-being. To take the facts of the present case, the daughter's receipt of maintenance payments from her mother's might generate a sense of gratitude which causes her to take a closer interest in her care, for example by monitoring the activities of care home staff and ensuring that satisfactory care is provided.





Powers of deputy following a person's death

In the present case, Morgan J also considered the issue of whether a Deputy's powers persist following the incapacitated person's death. By analogy with pre-2005 Act case law, the judge decided that they do not:

"Indeed, speaking generally, where a Deputy is appointed in relation to P and P then dies, the powers of the Deputy cease. The Deputy does not continue as the Deputy of the now deceased person. This is in accordance with earlier decisions on the legislation in this area which preceded the 2005 Act: ee *In re Bennett* [1913] 2 Ch 318, *In re Wheater* [1928] 1 Ch 223 and *In re Davey* [1981] 1 WLR 164 at 172".

The Court of Protection (Morgan J) gave its decision in *In the Matter of G (TJ)* on 19 November 2010: [2010] EWHC 3005 (COP).

In the matter of Re D (Statutory Will) – Court of Protection may execute a statutory Will despite background family dispute over the validity of an existing Will

The Court of Protection may be less reluctant to execute statutory Wills as a result of this decision. A nominated circuit judge of the Court decided that a background family dispute as to the validity of an older person's existing Wills did not bar it from ordering a statutory Will. That statutory Will would effectively replace any earlier Will and so avoid the possibility of post-death dispute between family members. The Court considered that to be in the older person's best interests and so ordered the execution of a statutory Will.

What appears to have played an influential role in the Court's decision was the existence of a Will executed in 1994 when the woman undeniably did have testamentary capacity. The Court of Protection's statutory Will was for the most part a mirror of the 1994 Will. While there is no rule, generally the Court is going to be more likely to execute a statutory Will where it has an earlier reliable Will to use as a guide.

KEY POINTS

- There should be no presumptions as to the cases in which the Court of Protection should or should not execute a statutory Will
- A statutory Will may be executed despite a background dispute as to the validity of an existing Will
- A Will executed by a person with testamentary capacity is a relevant written statement of their wishes and feelings for the purposes of subsequent Court of Protection proceedings

What lay behind this case?

This case was about whether the Court of Protection should order the execution of a Will for a woman who no longer possessed testamentary capacity (i.e. what is commonly known as a statutory Will). The background to the case was as follows:

- An older woman had advanced dementia. The Court of Protection subsequently decided that she lacked testamentary capacity to create a valid Will.
- Suspicious dealings had affected the woman's estate. In 2007, for example, a registered enduring power of attorney in favour of the woman's son was revoked by the Court of Protection on the basis that it was clearly a forgery.
- The woman's last Will was home-made in 2006. It caused family discord because it left her entire estate to two of her three children. There were clear doubts as to whether the woman had testamentary capacity in 2006. Those doubts could well have been transformed, upon the woman's death, into a legal contest over the validity of the Will.
- The 2006 Will departed from the terms of an earlier Will which left the woman's estate to all her children in equal shares. There was seemingly strong evidence that the earlier Will was made at a time when the woman did have testamentary capacity.
- A dispute about the 2006 Will's validity could be avoided by the Court of Protection executing a statutory Will on the woman's behalf. As the woman's last valid Will, that would prevail over any earlier Will. In effect, earlier Wills would be cancelled out.
- The woman's daughter (who was left out of the 2006 will) applied to the Court of Protection for an order for a statutory will to be executed (leaving the woman's estate to all her children in equal shares)(a). The application was in fact supported by the woman's two siblings who had become keen to avoid a legal dispute over the validity of the 2006 will.
- A nominated District Judge of the Court of Protection declined to order execution of a statutory will because "it is not the role of this Court to adjudicate on disputes as to the validity of Wills" and the Court should avoid becoming "embroiled in a family dispute". The matter then came before a nominated circuit judge of the Court of Protection.

Is there a presumption against the Court of Protection executing a statutory Will where family members dispute the validity of an existing Will?

The Circuit Judge disagreed with the District Judge. There is no presumption against a statutory Will in certain cases such as where there is a background family dispute as to the validity of an existing Will. The Mental Capacity Act 2005 (MCA 05) gives the Court of Protection power to execute a Will on behalf of an individual if it considers that to be in the individual's best interests. The identification of best interests is issue-specific. To adopt a presumption against exercising the Court's powers in certain cases conflicts with the issue-specific nature of best interests decisions. While the Circuit Judge acknowledged that the concerns of the District Judge were "clearly relevant factors", they could not be transformed into a rule against exercising the power to execute a statutory Will in certain circumstances.





Why did the Court decide to execute a Statutory Will?

The next task for the Circuit Judge was to identify whether it was in the woman's best interests to execute a statutory Will on her behalf. In making that decision, the Judge had to apply the provisions of s.4 of the MCA 05. Those provisions required the Court to consider the woman's "past and present wishes and feelings (and, in particular, any relevant written statement made by [her] when [she] had capacity)" (s.4(6)(a)). The woman made a will in 1995, leaving her estate to her children in equal shares. This was a relevant written statement which the Judge described as "a clear, coherent, rational, sensible, responsible and realisable expression of her then wishes". It seems to have been particularly influential in this case.

The Judge then turned to consider the Wills purportedly made by the woman since 1995, in 2004 and 2006. While it is not the function of the Court of Protection to decide whether a Will is valid (*In re M* [2010] 3 All ER 682), the Judge was satisfied that the Court may take into account doubts as to validity of a Will when deciding whether it is in a person's best interests to execute a statutory Will. The Judge, placing particular reliance on the earlier attempt to register a forged Enduring Power of Attorney and that both Wills were executed after the woman had a stroke, concluded that there were genuine doubts as to the validity of the woman's earlier Wills. This justified making a Statutory Will which reflected the terms of the original 1995 Will. The Judge explained his decision as follows:

"21...Sufficient doubts have been raised as to the validity of each of those Wills to lead me to conclude, on the specific facts of this case, that the best interests of Mrs D dictate that I should, here and now, set to rest all concerns about her true testamentary wishes by ordering the execution of a statutory will, rather than leaving her estate to be eroded by the costs of litigation after her death, and her memory to be tainted by the bitterness of a contested probate dispute between her children (which may extend to members of the next generation)."

(a) A person's deputy has no power to execute a statutory will of his/her initiative. It can only be done if directed by the Court of Protection: see s.20(3)(b) of the Mental Capacity Act 2005.

The Court of Protection (HHJ Hodge QC) gave its decision in *In the matter of Re D (Statutory Will)* on 16 August 2010 [2010] EWHC 2159 (Ch).

MEDICAL TREATMENT

AVS v A NHS Foundation Trust – Court of Protection will not order a clinician to carry out treatment which s/he has refused to provide for conscientious medical reasons, rules Court of Appeal

Typically, Court of Protection medical cases involve applications by health bodies who wish to perform a particular medical procedure. For whatever reason, clinicians seek the legal comfort of a declaration from the Court that what they propose is in a patient's best interests and thus lawful (rather than relying on the general protection from liability for certain acts in connection with care and treatment contained in s.5 of the Mental Capacity Act 2005(a)).

In this case, by contrast, the aim was to encourage clinicians to carry out a particular treatment. The Court of Appeal decided that the Court of Protection was not an appropriate venue to pursue such an aim. The topic is effectively off-limits for the Court. Showing a marked reluctance to take the initiative and interfere with professional medical judgement, the Court of Appeal said that the Court of Protection "will not order medical treatment to be carried out if the treating physician/surgeon is unwilling to offer that treatment for clinical reasons conscientiously held by that medical practitioner".

KEY POINTS

- The Court of Protection should not be used to try and compel a clinician to carry out treatment which the clinician does not consider to be medically justified
- The Court of Protection does have the power to make an 'unless' order
- A litigation friend's lack of objectivity does not necessarily mean that s/he should be replaced, especially if counsel is also instructed

The medical issue at the centre of these proceedings

This case was about two brothers. One, the patient, had the brain condition Creutzfeldt Jakob disease (CJD). The other was striving to secure any possible means of prolonging his brother's life.

The patient's brother became aware that some scientific studies had shown intraventricular infusion (directly into the brain cavity) of a chemical called Pentosan Polysulphate (PPS) to slow down the progress of CJD. In June 2008, the brother persuaded a NHS hospital at which the patient was being treated surgically to insert a pump into his brother's body which administered PPS directly into his brain. The brother remained alive even though soon after his diagnosis in 2008 it was thought that he might only have a matter of weeks to live.

In the summer of 2010 the pump failed and the PPS infusion ceased. The brother requested that the patient's doctors carry out surgery to replace the pump so that infusion of PPS could recommence. The doctors refused. They considered that such a procedure, while relatively simple, was futile as the patient's condition was now so poor.

The brother located a NHS consultant who was willing to admit the patient to his care if the PPS pump was replaced. What the brother could not locate, however, was a surgeon who was willing to carry out the pump replacement operation.

The brother, acting as the patient's next friend, applied to the Court of Protection for a declaration that it was in the patient's best interests for the pump to be replaced. The patient himself could offer no view on the topic. His doctors considered that he was very close to being in a vegetative state and he clearly did not have the mental capacity to consent to a procedure to replace the pump.





How did the case develop in the Court of Protection?

Given this case's significance, it was listed before the President of the Court of Protection, Wall LJ. Initially, the only evidence from the clinician who was willing to take over the patient's care was a short letter. Wall LJ directed that, unless the brother filed and served a report from the clinician, the application was to be dismissed. The report was to state (a) that the clinician was willing to take over the patient's care, and (b) that he considered it in the patient's best interests to continue to receive PPS.

Wall LJ took this course on the basis that "absent a clinical opinion that the continued administration of PPS would be in the best interests of the patient, therefore, it seems to me that the current proceedings would be doomed to failure". In other words, it would not be possible for the Court lawfully to conclude that a particular medical procedure was in the patient's best interests unless there was some supporting medical evidence upon which it could rely in arriving at that conclusion.

No report was filed and served within the time-limit. As a result, the application stood dismissed. The brother appealed to the Court of Appeal.

Why did the Court of Appeal agree that the application should be dismissed?

The Court did not whole-heartedly endorse the approach taken by Wall LJ. The Court of Appeal accepted that the Court of Protection could make an 'unless' order in an "exceptional case". However, it was not convinced that this was an exceptional case. While the brother's case might have been weak, the Court of Appeal said that it saw the "force" of the argument that, in principle, there was enough of a division of medical opinion on the evidence before Wall LJ to justify the case proceeding to an urgent final hearing to determine where lay the patient's best interests.

Despite the Court of Appeal's reservations about the Wall LJ's approach, it did not allow the appeal. The Court refused permission to appeal on another basis which was that the proceedings were "doomed to failure". The Court reasoned as follows:

- (i) The brother sought a declaration that it was in the patient's best interests for the PPS pump to be replaced and, thereafter, for PPS infusion to continue.
- (ii) However, the reality was that there was no surgeon who was proposing to carry out surgery to replace the pump.
- (iii) In those circumstances, the declaration sought was pointless. This was because "the court will not order medical treatment to be carried out if the treating physician/surgeon is unwilling to offer that treatment for clinical reasons conscientiously held by that medical practitioner".
- (iv) The brother was trying to identify a surgeon who would be willing to replace the pump. His current clinicians were not obstructing him in that endeavour. As the Court of Appeal said:

"36...The fact that the respondent hospital does not believe that the placement of the pump and the continuation of infusion are in the patient's best interest simply does not matter if a medical practitioner who takes the other view will accept responsibility for the patient. The transfer of the patient to another's care would take place co-operatively and no approval from the court is required to enable that transfer to take place".

Practical implications for doctors

This was a relatively unusual medical case for the Court of Protection and, thereafter, the Court of Appeal. Typically, Court of Protection medical cases involve clinicians who want to carry out a particular medical procedure and seek legal protection for doing so. The ultimate aim in this case, however, was to induce a clinician to carry out the pump replacement procedure. The message is that the Court of Protection should not be used to try and engender clinicians responsible for an adult lacking in capacity to alter their treatment plans.

This patient's brother did not spell out how he hoped that his application to the Court of Protection would result in replacement of the pump. He simply sought a declaration that it was in his brother's best interests to have the PPS pump replaced. He does not appear to have sought related directions or an order requiring that procedure to be carried out. The brother may have hoped, therefore, that the mere existence of such a declaration would have induced a change of heart on the part of his existing clinicians.

However, the Court of Appeal looked beyond any declaration to its implementation. It clearly stated that the Court would not entertain the application for a declaration because "the court will not order medical treatment to be carried out if the treating physician/surgeon is unwilling to offer that treatment for clinical reasons conscientiously held by that medical practitioner". It seems that, as there was no prospect of the Court ordering implementation of a declaration, the application for a declaration was flawed. A similar stance was taken by the President of the Court of Protection, Wall LJ, when giving the first instance ruling in this case where he said that "it strikes me as unlikely in the extreme that the court would order a clinician to undertake a medical intervention which he, the clinician, did not believe to be in the best interests of the patient". The President was not as equivocal as the Court of Appeal as he left open the possibility of such an order. But, as we have seen, the Court of Appeal, which sits above the Court of Protection in the judicial hierarchy, took a stricter approach.

Should the brother have been replaced as the patient's litigation friend?

When the case was before Wall LJ, he expressed concern that the patient's brother did not retain the objectivity necessary for the proper conduct of proceedings as litigation friend. For that reason, Wall LJ concluded that the patient needed a different litigation friend and invited the Official Solicitor to fill that role, which he agreed to do with the brother then being joined as a respondent to the proceedings.

Rule 140 of the Court of Protection Rules sets out the criteria that a person must meet in order to be appointed as a party's litigation friend in Court of Protection proceedings. These are:

- (i) that the person "can fairly and competently conduct proceedings on behalf of" a person who lacks the capacity to conduct proceedings; and





(ii) the person has no interests adverse to those of the party.

In the present case, it seems that Wall LJ decided that condition 1 was not met on the basis that the brother's perceived lack of objectivity meant that he could not 'fairly and competently' conduct proceedings. Before the Court of Appeal, the brother challenged that conclusion. He pointed out that he was pursuing the course that he genuinely believed the patient would want to be pursued. Why, asked the brother, could that be unfair? In addition, he was not a litigant in person; he had counsel. Why, asked the brother, were proceedings being conducted incompetently?

The Court of Appeal said that there was "force" in the brother's argument that Wall LJ had been wrong to bring his appointment as litigation friend to an end. While the Court did not need to rule on the point (because it disposed of the proceedings on other grounds as explained above), the Court of Appeal's doubts about whether Wall LJ took the correct course should be noted. Where a litigation friend is simply advocating what s/he considers to be in a Court of Protection party's best interests and counsel is also instructed, the Court should be certain that removal of the litigation friend is really necessary in order to ensure fair and competent conduct of the proceedings.

(a) Section 5 provides as follows:

"(1) If a person ("D") does an act in connection with the care or treatment of another person ("P"), the act is one to which this section applies if—

(a) before doing the act, D takes reasonable steps to establish whether P lacks capacity in relation to the matter in question, and

(b) when doing the act, D reasonably believes—

(i) that P lacks capacity in relation to the matter, and

(ii) that it will be in P's best interests for the act to be done.

(2) D does not incur any liability in relation to the act that he would not have incurred if P—

(a) had had capacity to consent in relation to the matter, and

(b) had consented to D's doing the act.

(3) Nothing in this section excludes a person's civil liability for loss or damage, or his criminal liability, resulting from his negligence in doing the act.

(4) Nothing in this section affects the operation of sections 24 to 26 (advance decisions to refuse treatment)."

The Court of Appeal gave its decision in *AVS (by his litigation friend, CS) v A NHS Foundation Trust & the B PCT* on 17 January 2011: [2011] EWCA Civ 7. The Court was comprised of Ward, Patten and Black LJ. Ward LJ gave the only reasoned judgment with which the others agreed.

An NHS Foundation Trust v D – patient's delusional beliefs about medical profession meant that she could not decide whether to have surgery

A complex and potentially dangerous medical procedure was authorised by the Court of Protection in this case. In this respect, it was a more typical Court of Protection medical case than the case considered above. It involved clinicians who thought particular medical treatment should be carried out but this was objected to by, in this case, the patient. The Court decided that the patient could not in law make a decision as to whether or not to undergo the procedure. It went on to endorse a sophisticated care plan for the management of the operation and its connected procedures. This gave clinicians the ultimate authority for deciding whether to proceed with the operation without having to return to the Court for further declarations as the medical process moved through its various stages.

The patient's circumstances

The background to this case was as follows:

- (i) The patient was a 69 year old woman with a 30 year diagnosis of schizophrenia. She was living in the community under a Community Treatment Order.
- (ii) The patient had a third degree prolapsed uterus which her doctors considered needed surgical repair to ease discomfort and prevent more serious conditions from developing.
- (iii) The woman refused to give consent to the operation. This was a manifestation of her delusional belief that the medical profession were conspiring to carry out medical experiments on her.
- (iv) The NHS Foundation Trust responsible for the woman's care applied to the Court of Protection for a declaration that it would be in her best interests to have surgery on her prolapsed uterus.
- (v) Necessary pre-operative procedures could not be carried out without the patient's compliance. As a result, the Trust also sought a declaration that it would be in the patient's best interests to sedate her for 3 days to allow these procedures effectively to be carried out. Sedation would have to be achieved by injection as the patient would be unlikely to accept a drink from medical staff in which a sedative had surreptitiously been dissolved.

KEY POINTS

- Delusional beliefs about the medical profession meant that a patient with schizophrenia was incapable of deciding whether to have surgery to repair a prolapsed uterus
- Uncertainty as to the patient's response to pre-surgery procedures meant that the Court could not definitively declare that surgery was in the patient's best interests
- Instead, the Court gave a declaration which endorsed a contingent care plan under which surgery might not go ahead if the patient responded badly at the pre-operative stage
- A patient's wishes and feelings were given little weight as they were bound up with her delusional beliefs





Delusional beliefs about medics rendered the patient incapable of deciding whether to have the operation

The first question for the Court of Protection was whether the woman was able to make a decision as to whether or not to have the surgery. The Court decided that she was incapable of making that decision under the Mental Capacity Act 2005. Accordingly, the Court had jurisdiction to decide whether the proposed procedure was in the woman's best interests.

In arriving at its capacity conclusion, the Court accepted expert evidence from an independent Consultant Psychiatrist that "the delusional beliefs which are a symptom of D's schizophrenia impair her capacity to make decisions about her medical treatment". In particular, those delusional beliefs prevented the patient from being able to "use or weigh" the information relevant to the decision whether she should have the operation (s.3(1)(c) Mental Capacity Act 2005).

The operation was in the woman's best interests

The next question for the Court was whether it was in the woman's best interests to have the procedure recommended by the NHS Foundation Trust.

If the complications presented by the woman's mental health problems were ignored, the Court found that it was clearly in the woman's best interests to have surgery to remedy her prolapsed uterus. The risks associated with the surgery were minimal when compared with the benefits it would provide.

But the woman's mental health problems complicated matters. Her probable resistance to medical intervention meant that the procedure would involve a number of stages. At the outset, the balance between the benefits and disadvantages of the latter stages was inherently uncertain. Clinicians could not be sure that, once the process had begun with restrained administration of sedative, it ought inevitably to proceed to the operation and then post-operative continued administration of sedative. The woman's reaction to the initial stages would determine whether it was in her best interests to proceed to subsequent stages. For example, her reaction, if one of extreme distress, might mean that the risks to the woman's life were such that it was not in her best interests to proceed with the operation.

For the above reason, the Trust developed a strategy which recognised that the woman would not automatically proceed through all the stages of the medical process but that careful assessment would be required throughout. The Court endorsed this approach which, it will be noted, does not require clinicians to return to Court for a fresh declaration as the proposed medical procedure proceeds through its various stages. This is what the Court said:

"I am satisfied that the Care Plan is the best that can be devised. Her clinicians must be given the greatest possible flexibility consistent with delivering the best care to D and must therefore be free to exercise their professional clinical judgement for optimal strategy throughout all procedures dependant upon D's response. To do otherwise would require the NHS Trust applicant to return to Court for sanction at each stage. I determine it is undesirable and without the best interests of D to require them to do so".

Other findings of interest

The Court of Protection also made the following rulings of interest:

- (i) S.4 of the Mental Capacity Act 2005 required the Court to consider the woman's wishes and feelings when deciding if it was in her best interests to undergo the medical procedure. Those wishes and feelings were strongly against having the procedure. However, the Court appears to have given them little weight because "they are completely bound up with her delusional beliefs".
- (ii) The Court stressed that those involved in the woman's care should continue to seek a consensual medical procedure. They should not give up trying to persuade the woman to comply with the medical procedure simply because they now have their Court of Protection declaration.
- (iii) We saw above how the Court endorsed a flexible care plan under which clinicians would decide whether the woman could proceed from one stage of the medical procedure to another. However, there were some detailed aspects of the procedure which the Court decided that it should regulate. It decided that the woman should not be 'duped' into thinking that her initial sedative injection was in fact her regular psychotropic medication. That would be wrong because it would "fuel D's paranoid beliefs". The Court also said that members of the care team with whom D had a particularly good relationship should "remain distant from those procedures which will be likely to damage future relationships with D".

The Court of Protection (Macur J) gave its decision in *An NHS Foundation Trust v D* (by her litigation friend, the Official Solicitor) on 14 October 2010: [2010] EWHC 2535 (COP).

SUPPORTED & SHELTERED HOUSING

HOUSING BENEFIT

Salisbury Independent Living v Wirral MBC – supported housing providers have an independent right of appeal against decisions on benefits claims made by their residents

Housing benefit awards are crucial to the viability of many supported housing schemes. For this reason, supported housing providers will welcome this decision. The Upper Tribunal decided that providers have their own independent right to appeal against decisions made on their residents' housing benefit claims. They may therefore challenge those decisions themselves rather than having to rely on their residents to mount an appeal.





What happened?

An organisation called Salisbury Independent Living (SIL) provided accommodation and support for a number of vulnerable adults. SIL contended that their accommodation was a form of supported housing that was 'exempt accommodation'. The usual restrictions on the amount of rent that is met by housing benefit do not apply to such accommodation (for further details of the nature of exempt accommodation see issue 47).

Claims for housing benefit were made by approximately 70 residents. The council to which the claims were made, Wirral MBC, did not make the decisions that SIL had hoped for. Wirral did not accept that the accommodation was exempt accommodation and, even if it was, concluded that many of the service charges covered by the rent were ineligible for housing benefit. The dispute has been protracted having lasted for some 8 years. It is also potentially expensive, SIL arguing that some £3 million in housing benefit is owed.

A number of the residents appealed, with SIL's assistance, against the decisions on their housing benefit claims. However about 8 of the residents had moved away and could not be contacted by SIL. Another 2 were dead. The issue was whether SIL had the right to appeal against the decision on these former residents' claims. The matter came before the Upper Tribunal.

What did the Upper Tribunal decide?

The Upper Tribunal decided that SIL did have a right of appeal and so could itself challenge the housing benefit decisions. The Upper Tribunal reasoned as follows:

- (i) Legislation provides that a "person affected" by a housing benefit decision has a right of appeal against the decision to the First-tier Tribunal (Schedule 7, para. 6(3), Child Support, Pensions and Social Security Act 2000).
- (ii) Regulations set out persons who must be considered, for appeal purposes, to be persons affected by a housing benefit decision (reg. 3(1), Housing Benefit and Council Tax Benefit (Decisions and Appeals) Regulations 2001). This did not include SIL.
- (iii) The fact that SIL fell outside the Regulations was not fatal to SIL's case. This was because the Regulations do not contain an exhaustive list of persons affected by a housing benefit decision.
- (iv) The Upper Tribunal decided that SIL was a person affected by the housing benefit decisions on the claims made by the now missing former residents. In so doing, the Tribunal relied on old case law about the importance of supported housing providers having the opportunity themselves to challenge decisions on housing benefit claims made by their residents: *R v Stoke City Council, ex parte Highgate Projects* (1993) 26 H.L.R. 551.

The Upper Tribunal (Judge Rowland) gave its decision in *Salisbury Independent Living v Wirral MBC* on 28 January 2011: [2011] UKUT 44 (AAC).

CP v Aylesbury Vale DC – whether gardening maintenance charges are met under an award of housing benefit for a resident of supported housing

Supported housing projects often have a communal garden. Many councils are reluctant to award housing benefit in respect of services charges for maintenance of such gardens. This decision should cause them to reconsider their approach. Where a supported housing landlord is obliged to maintain a communal garden, it is likely that charges for carrying out that obligation will be eligible for housing benefit.

What happened?

A Housing Association ran a housing project for disabled adults. It was comprised of a block of six flats. The flats had a communal garden. The Association levied a service charge for garden maintenance. The charge was £1.50 per tenant per week. The residents claimed housing benefit in respect of their rent(a).

The council to which the claim was made, Aylesbury Vale DC, decided that the gardening maintenance charge was not eligible for housing benefit. As a result, the residents' housing benefit awards did not include an amount to cover the maintenance charge. The council's decision was upheld on appeal to the First-tier Tribunal. The claimants brought a further appeal to the Upper Tribunal.

What did the Upper Tribunal decide?

The Upper Tribunal allowed the appeal and held that the gardening maintenance charge was eligible for housing benefit. The Tribunal found that none of the criteria which exclude a service charge from housing benefit under the Housing Benefit Regulations 2006 applied in this case. In arriving at that conclusion, the Tribunal placed particular reliance on the fact that the claimants were required to pay the charge under their tenancies and the charge was connected with the provision of adequate accommodation.

(a) It is probable that the accommodation in question fell within the statutory definition of 'exempt accommodation'. Accordingly, the usual rules on quantifying the amount of a housing benefit award did not apply and service charges were, in principle, to be met by the residents' housing benefit awards provided that they were not charges excluded by Regulations. For a more detailed analysis of the exempt accommodation rules, see issue 47.

The Upper Tribunal (Judge Turnbull) gave its decision in *CP & Others v Aylesbury Vale DC* on 10 January 2011: [2011] UKUT 22 (AAC).



DISABILITY DISCRIMINATION

EMPLOYMENT

X v Mid Sussex CAB – employment-based disability discrimination law does not apply to volunteers

Volunteers are not protected by the equality legislation as if they were employees. In this case, brought by a Citizens Advice Bureau volunteer adviser, the Employment Appeal Tribunal held that the employment-based provisions of the Disability Discrimination Act 1995 (DDA) do not apply to voluntary workers. The same result can be expected under the new equality legislation contained in the Equality Act 2010. Whether this is a good or a bad thing is a matter of contention.

Background to this case

Ms X did unpaid voluntary work at a Citizens Advice Bureau. She had studied law and hoped that her CAB experience might help her to secure work as a paid adviser. She signed a 'volunteer agreement' which was described as "*binding in honour only ... and not a contract of employment or legally binding*". The CAB asked Ms X to stop attending as a volunteer. The case report does not say why this decision was taken but it does state that Ms X had missed about 30% of the advice sessions that she had been booked to take.

Ms X was disabled. She brought a claim before the Employment Tribunal which alleged that the CAB had discriminated against her contrary to the Disability Discrimination Act 1995 (DDA). There were two key issues on the claim:

- (i) Are voluntary workers such as Ms X afforded the same rights under the DDA as employees (and voluntary workers with a contract of employment). Ms X argued that this was necessary in order to ensure compliance with the European Directive which the DDA sets out to implement (Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation ("the Framework Directive")).
- (ii) Regardless of whether Ms X was a worker for DDA purposes, she argued that the CAB's voluntary work arrangements were for the purpose of deciding to whom subsequently to offer employment (a decision to which the DDA does apply). Ms X argued that the CAB's termination of her voluntary work agreement was a decision not to offer her employment (which involved discrimination against her because of her disability).

The outcome of the litigation

Ms X's claims were rejected at first instance by an Employment Tribunal. X appealed to the Employment Appeal Tribunal (EAT). The EAT rejected the appeal as follows:

- (i) The Framework Directive does not require disabled voluntary workers without a contract of employment to be protected as if they were disabled workers employed under a contract of employment. Accordingly, there is no need to read the DDA as if it applied to voluntary workers without a contract of employment.
- (ii) When the case was in the Employment Tribunal, it had concluded that, as a matter of fact, there was no preferential treatment given to volunteers when it came to filling paid adviser posts. Accordingly, this CAB's voluntary work arrangements were not part of a process for deciding to whom to offer employment. This finding of fact was open to the Employment Tribunal on the evidence and so could not be challenged on an appeal to the EAT whose jurisdiction is limited to questions of law. The result was that the termination of the voluntary work arrangement was not something which could be controlled or punished under the DDA.

The EAT also observed, in arriving at its conclusions, that official reports had recognised the difficulties that voluntary organisations might face if employment-based discrimination law were extended to volunteers. It quoted from the final Report of the Disability Rights Task Force (December 1999) "*From Exclusion to Inclusion*", which stated as follows:

"[there are a wide] diversity of organisations that engage volunteers, from small local community groups with few resources to large national charities. Volunteers also undertake a wide range of activities from one-off charity collections for a few hours to regular part-time work. We recognised that organisations may have concerns about being held legally responsible for discrimination by one volunteer towards a disabled volunteer, especially given the lack of control over who is engaged as a volunteer and to some extent what they do and the absence of available sanctions. Similarly organisations may feel that the burden of having to understand the law in this area and make reasonable adjustments, for a volunteer working just a few hours, is too onerous."

Ms X appealed to the Court of Appeal. Her appeal was rejected as the Court of Appeal upheld the decision of the EAT.

Application of this finding to other strands of discrimination law

The EAT, it should be noted, confirmed that its conclusion as to the operation of disability discrimination law in relation to volunteers also applied to the operation of the other strands of discrimination law:

"Any construction or interpretation of the DDA upon which [the EAT resolves], as a result of the argument in this case, must also have a similar knock-on effect in relation to all the equivalent sections in other anti-discrimination legislation: so far as s.68 of the DDA is concerned that would mean, for example, the same interpretation, and/or the same disapplication... of the interpretation clauses e.g. in s78 of the Race Relations Act 1976 and s82 of the Sex Discrimination 1975".

Since the events in this case, the Equality Act 2010 has come into force to replace the relevant provisions of the DDA. However, that does not affect the practical conclusion in this case. This is because the definition of "employment" in s.83 of the 2010 continues to exclude voluntary workers without a contract of employment.

The Employment Appeal Tribunal (Burton J) gave its decision in *X v Mid Sussex Citizens Advice Bureau* on 30 October 2009.

KEY POINTS

- Disability Discrimination Act does not have to be read as if it treated volunteer workers in the same way as persons working under contract such as employees
- The same result can be expected in relation to the other strands of discrimination law under the Equality Act 2010
- Voluntary work was not in fact a work test to which discrimination legislation did apply



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