

# Social Care Law

T O D A Y



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## CHILDREN & FAMILIES

### CRIMINAL PROCEEDINGS

#### **R v P – weak evidence as to retinal haemorrhaging meant that trial judge correctly halted a 'shaken baby' prosecution**

It looks suspicious if an infant collapses while in a carer's sole charge. Levels of suspicion are likely to rise further if the child is also found to have the triad of injuries that tend to be associated with violent shaking. That suspicion, however, is not proof to the criminal standard that the carer injured the child. Cases that rely solely on medical evidence ought not to succeed if the evidence is insufficient to exclude an unknown cause. That is what happened in this case. In fact, the new CPS guidance on 'shaken baby' prosecutions (see below at p.X) suggests that, nowadays, a prosecution would not even be brought in a case based on similar evidence.

#### **What happened?**

A 4 month baby boy was left for 20 minutes in the sole charge of his grandfather. He suffered a fit and went limp. He was taken to hospital where it was discovered that he had suffered a significant brain injury. To clinicians' surprise, the boy survived but he was left severely brain damaged and blind.

It was perhaps not surprising that the finger of suspicion was pointed at the grandfather. He was charged with causing grievous bodily harm with intent. The prosecution's case was that the baby's injuries were caused by the grandfather having violently shaken him.

#### **The 'triad' of symptoms**

The suspicion that a baby's death or serious injury was caused by violent shaking is usually prompted by the existence of what have come to referred to as the following 'triad' of symptoms:

- (i) widespread bilateral retinal haemorrhages (bleeding into the lining of the eyes),
- (ii) thin film subdural haemorrhage, that is rupture of the small veins which bridge the gap between the dura and the cortical surface of the brain. The leaking blood accumulates over several hours and usually tracks extensively as a thin film over the surface of the brain;
- (iii) encephalopathy / brain damage.

#### **The case against the grandfather**

Medical evidence suggested that the triad of symptoms/injuries was present in this case. The prosecution case was that the injuries must have been caused by the grandfather having violently shaken the child.

But that was the only prosecution evidence against the grandfather (apart from the fact that the baby was in his sole charge when he collapsed). So there was no additional supporting evidence of the type that is sometimes seen such as bruising or grip marks, a history of non-accidental injury, other features of poor parenting or a parental pre-disposition to lose control. On the contrary, the baby's mother intended to give evidence that the grandfather (her father) had always been loving and attentive towards the baby and his other grandchildren.

At this point, it is worth mentioning that, in the light of the new CPS guidance on shaken baby prosecutions considered below, it is unlikely that, if the material features of this case were repeated today, a prosecution would follow. This is because the guidance cautions against bringing a prosecution where the only evidence against a suspect is the presence of the triad of injuries. That was the only evidence in this case and, further, some of it was relatively weak.

#### **The course of the criminal trial**

At the end of the prosecution case, the judge directed that the grandfather had no case to answer. The jury were discharged and a formal verdict of not guilty was entered. The prosecution appealed to the Court of Appeal against the judge's decision.

#### **Why was the Crown Court's decision to halt the trial justified?**

The prosecution's appeal was rejected. The prosecution's case against the grandfather depended entirely on medical evidence. However, the medical evidence was weaker than in many 'shaken baby' cases. In particular, the retinal haemorrhaging was unusual in that there had been recovery in one eye. A consultant ophthalmologist said that he could only be confident that violent shaking was the cause of retinal haemorrhaging where it was severe. But this was a case of moderate haemorrhaging.

The trial judge decided that, given the equivocal medical evidence, there was not a logical route to conviction for the jury to take. The Court of Appeal upheld this decision. Given the weakness of the medical evidence and the absence of any other evidence against the grandfather, it was not open to the jury to conclude beyond reasonable doubt that the grandfather violently shook the baby.

The Court of Appeal (Criminal Division) gave its decision in R v P on 11 November 2010: [2010] EWCA Crim 2895. The Court was comprised of Pitchford LJ, Henriques J and HHL Milford QC.





## New CPS guidance on NAHI / shaken baby prosecutions: on its own, the triad is unlikely to justify a prosecution

The Crown Prosecution Service has updated its guidance to prosecutors on handling cases where a carer is suspected of having violently shaken a baby thereby causing injury or death. The new guidance is entitled *Non Accidental Head Injury Cases (NAHI, formerly referred to as Shaken Baby Syndrome): Prosecution Approach*. The guidance says it deliberately refrains from using the "emotive" term Shaken Baby Syndrome but it is clear that it is about the challenges in securing a conviction where a carer is suspected of having violently shaken an infant or applied some other mechanical trauma resulting in rapid head movements. The guidance does not address other types of non-accidental head injury, such as direct trauma to the head.

These are particularly difficult cases to handle, especially where there is no external evidence or injury. What could be called the typical case is where a child collapses in the sole charge of a individual about whom there were no previous child protection suspicions and subsequent medical evidence shows internal brain injuries (the triad of injuries referred to in the case discussed above).

### The main points in the guidance

The main points in the CPS guidance are as follows:

- (i) The CPS recognise that existence of the triad is suggestive of a baby having been violently shaken. However, it goes on to say that supporting evidence is usually required to prove beyond reasonable doubt that a carer perpetrated a violent shaking episode. So, the CPS' general approach is that, where there is no other physical evidence such as trauma marks, the presence of the triad may be considered a necessary, but not in itself a sufficient criterion, for bringing a prosecution;
- (ii) The CPS guidance gives a list of the types of additional factors which, when combined with existence of the triad, are suggestive of deliberate injury. For example, previous parental conviction for violence, conflicting accounts of time of death, presence of atypical fractures or bruising;
- (iii) The CPS will continue to challenge a defence which relies on what is known as the 'unified hypothesis'. This is an alternative explanation (alternative to violent shaking) for the presence of the triad of injuries. It postulates that certain medical conditions could explain the existence of the triad of symptoms, namely apnoea (cessation of breathing), raised intracranial pressure, or infection. In *R v Harris, Rock, Cherry & Faulder* [2005] EWCA Crim 1980 the Court of Appeal concluded that the unified hypothesis could no longer be considered as a credible or alternative cause to the triad hypothesis.
- (iv) The need to ensure that medical experts can truly be described as experts and the importance of experts meeting pre-trial in order to narrow the issues.

### Interplay between criminal and care proceedings

#### *Criminal acquittals or a decision not to prosecute*

A child's injury or death can lead to legal proceedings in two quite different arenas, the criminal courts and the care courts. These courts operate very differently, with different rules about standards of proof and the admission of evidence. As is well-known, the standard of proof in criminal proceedings is 'beyond reasonable doubt'. In care proceedings, however, the standard is 'more likely than not'. Put simply, then, it is easier to prove your cases in care proceedings than it is in criminal proceedings. This means that the absence or failure of criminal proceedings does not prevent a local authority from seeking to prove that the defendant/suspect did certain acts. In the current context, this has two consequences in particular:

- (i) an acquittal in criminal proceedings does not prevent a local authority from seeking in care proceedings to prove the acts such as violent shaking which, in the criminal court, could not be proved beyond reasonable doubt;
- (ii) the CPS's advice to its prosecutors that, generally, a prosecution should not be brought where the only evidence is the triad does not bind a local authority. So in principle an authority may in care proceedings seek to prove, on the basis simply of the triad and a carer's presence when a child collapsed, that a carer's violence was the cause of the child's injuries. The fact that the CPS might have decided not to prosecute does not prevent care proceedings from being brought.

#### *Use of the CPS guidance in care decision-making*

While the CPS guidance is not binding on local authorities, it is helpful in identifying points of strength or weakness in a local authority's case in care proceedings. The CPS guidance lists supporting factors which, when combined with the triad, can justify a decision to prosecute. If a local authority that seeks to prove NAHI / shaken baby injuries can identify these factors in the evidence it adduces in care proceedings, its case is likely to be strengthened. Here, then, are the supporting factors listed in the CPS guidance as those which "could support NAHI":

- History of violence towards children;
- Previous atypical hospital visits of the deceased child or siblings;
- Appearance of atypical bruises or fractures;
- Inconsistent accounts;





- Mental health issues;
- History of domestic, alcohol or drug abuse;
- Deceased or sibling on child protection plan / known to children's social services;
- Previous (or subsequent) death of sibling;
- Drugs present in deceased e.g. as revealed through toxicology or analysis of hair samples;
- Conflicting accounts for time of death;
- Previous convictions on the part of suspects, particularly for offences of violence and/ or domestic abuse.

### *A criminal finding that a person caused a child's injuries*

A positive finding in criminal proceedings that a particular person injured or killed a child will have been made to the criminal standard of proof (beyond reasonable doubt). Therefore, it is generally considered decisive for the purpose of care proceedings where the standard of proof is lower – more likely than not. The legal position is explained as follows in the Law Society guide *Related Family and Criminal Proceedings*:

"In a civil (family) court, a conviction for an offence, once formally proved by the relevant documentation, establishes the commission of that offence unless the defendant proves that he or she did not commit the offence. The burden of disproving the conviction would be on the defendant, and would be on a balance of probabilities. In practice, however, a conviction is usually decisive".

The Law Society's guide is available at [www.family-justice-council.org.uk/docs/RelatedFamCrimPro.pdf](http://www.family-justice-council.org.uk/docs/RelatedFamCrimPro.pdf). It also gives guidance about sharing information where care and criminal proceedings are running concurrently.

It is possible for care proceedings to conclude before criminal proceedings. This may result in the care findings being called into doubt by the subsequent findings in the criminal proceedings. This is what happened in *R v Akinrele* [2010] EWCA Crim 2972. Following a baby's death, care proceedings were instituted in respect of a sibling. The judge in the care proceedings was unable to decide whether mother or father inflicted the baby's fatal injury. Subsequently, the father was convicted of the baby's murder. The mother applied to the care proceedings judge for the care findings of fact to be modified. The High Court judge hearing the care proceedings (Parker J) decided that she was bound by the jury's finding in the criminal proceedings that the father killed the child. Accordingly, the factual findings were modified (so as to depart from the earlier finding that it could not be determined which parent killed the baby and substitute a finding that the father killed the baby).

Links – [www.cps.gov.uk/legal/i\\_to\\_o/non\\_accidental\\_head\\_injury\\_cases/](http://www.cps.gov.uk/legal/i_to_o/non_accidental_head_injury_cases/) - the new CPS guidance is available here.

## LOOKED AFTER CHILDREN

### **R (AH) v Cornwall Council – local authority lawfully refused to accommodate 17 year old because they rationally concluded that he could live with his mother**

A 17 year old boy's lawyers argued that he was a child in need entitled to accommodation under s.20(1) of the Children Act 1989. In order for such an entitlement to arise, a child in need must appear to a local authority to "require" accommodation for a reason specified in s.20(1). The boy's lawyers asserted that a specified reason did apply, namely that the person who had been caring for him (his mother) was prevented from providing him with suitable accommodation or care. The factual basis for this assertion was that the relationship between the boy and his mother had broken down.

Previous section 20 decisions have recognised that the breakdown of the relationship between a 16 or 17 year old and a parent can lead to the child requiring accommodation for a s.20(1) reason. For example, in *R(M) v Hammersmith and Fulham LBC* [2008] 1 WLR 535 the House of Lords approved the following passage from the decision of the High Court in *R(S) v Sutton LBC* 2007 2 FLR 849:

"..... 'prevention' undoubtedly involves an objective test. It is not satisfied if the factor only that the child does not want to live with someone who is willing to provide suitable accommodation. But circumstances do arise where people are so incompatible that they simply cannot live together"

However, it remains the case that it is for a local authority to decide whether, in the context of parent-child relationship difficulties, a young person appears to require accommodation as a result of a parental carer's inability to provide suitable accommodation or care. In the present case, Cornwall council decided that the boy's mother was not prevented from providing him with suitable accommodation or care and that this was in fact a case of a young person wanting, largely of his own volition, to live independently. The council decided that this was not therefore a case of a young person requiring accommodation for a s.20(1) reason, that is as a result of a parental carer being unable to provide suitable accommodation. The High Court upheld that decision. There was a rational evidential basis for the council's conclusions and so its decision was lawful.

The High Court (HHJ Seys Llewellyn, sitting as a Deputy High Court Judge) gave its decision in *R (AH) v Cornwall Council* on 3 December 2010: [2010] EWHC 3192 (Admin).





## AGE ASSESSMENTS

### R (Fz) v Croydon LBC – Court of Appeal gives guidance on the fair conduct of age assessment interviews

Accurately assessing age is a notoriously difficult task in the absence of reliable birth documentation. But this is something that many councils have to do on a regular basis in order to decide whether a young person from abroad is entitled to Children Act accommodation and support. In this case, the Court of Appeal considered the age assessment decision-making process. Its decision stresses the need for a fair process in making a decision the outcome of which has very significant implications for a young person.

#### What happened?

A young Iranian male arrived in the UK and claimed asylum. He said that he was 17. If that were true, he was entitled to local authority-provided accommodation and support under the Children Act 1989. But, if it were not true, he would face what is generally considered to be a less attractive option, UK Borders Agency accommodation.

The relevant local authority were Croydon council. They carried out an age assessment and concluded that the individual was 19 when he entered the UK. The main part of the age assessment was an interview with social workers. The individual was dissatisfied with the conduct of the interview for two reasons. First, no appropriate adult was present. Second, he said that he was not given an opportunity to correct what he considered to be factual mistakes made by the social workers.

The individual wanted to claim judicial review of Croydon's decision. But the High Court refused him permission to bring a claim. The matter then came before the Court of Appeal. The Court of Appeal held that the individual's judicial review claim would be allowed to proceed. In so doing, the Court of Appeal gave a wide-ranging decision about the process for challenging age assessment decisions.

#### What is the threshold for bringing an age assessment judicial review?

In England and Wales, there is no automatic right to bring a claim for judicial review. The High Court's leave (or permission) is required. The Court of Appeal first considered the threshold that must be met in order for an individual to be entitled to claim judicial review of an age assessment decision.

Previously, the threshold test was identified by the High Court in *R (F) v Lewisham London Borough Council* [2010] 2 FCR 292; [2009] EWHC 3542 (Admin) as being whether there is a realistic prospect or arguable case that the court would reach a conclusion that the claimant was of a younger age than that assessed by the local authority. That test has been routinely applied.

In the present case, the Court of Appeal said that it was "wary" of "muddying the waters" by setting out a different formulation to that given in *Lewisham*. But it proceeded to do so. The Court said that permission to bring a claim should be refused where a claimant's factual case "taken at its highest" "could not properly succeed in a contested factual hearing".

If anything, this seems to lower the threshold. It does not require a claimant to show that his/her case meets the standard of being 'realistic' or 'arguable'. It simply looks at the state of the claimant's case and asks whether it could succeed at trial. So, in the present case the Court of Appeal allowed the individual's case to proceed simply because there were no "glaring inconsistencies" in the historical account he gave in support of his claim to be a child.

But it should also be remembered that at the permission stage the High Court is exercising a discretion. So the 'could succeed' test, even if met, does not guarantee that permission to claim judicial review will be granted. As the Court of Appeal acknowledged, factors such as delay or the claim having become academic might justify refusing to grant permission.

#### Providing young people with an opportunity to counter a provisional conclusion that they are lying

The High Court's age assessment decision in *R (B) v Merton LBC* [2003] EWHC 1689 (Admin), [2003] 4 All ER 280 is well-known. It gave rise to the term 'Merton-compliant' age assessment. In *Merton*, the Court set out the requirements of a fair age assessment process one aspect of which is that a young person should be given the opportunity to counter a provisional conclusion that s/he is an adult. If this is not done, the local authority must show that it would have made no difference. That approach was upheld by the Court of Appeal in the present case which said that "it is axiomatic that an applicant should be given a fair and proper opportunity, at a stage when a possible adverse decision is no more than provisional, to deal with important points adverse to his age case which may weigh against him" (para. 21 of the Court's decision).

#### KEY POINTS

- The test for deciding whether to allow an age assessment judicial review to proceed is whether a claim taken at its highest 'could not properly succeed'
- A judicial review claim was allowed to proceed where a young person's account did not contain 'glaring inconsistencies'
- Young people must be given an effective opportunity to counter a provisional conclusion that they are aged 18 or over
- Normally, an appropriate adult should be present during a young person's age assessment interview
- In order to reduce the pressures faced by the High Court, the Court of Appeal transferred the judicial review claim to the Upper Tribunal





The Court also discussed the manner in which provisional adverse age assessment conclusions should be put to young people. It referred to a High Court decision which upheld an approach in which adverse provisional conclusions were put to a young person during the course of an age assessment interview (*R (AW) v London Borough of Croydon* [2009] EWHC 3090 (Admin)). The Court of Appeal in the present case did not endorse that approach:

"21...It is theoretically possible that a series of questions appropriately expressed during the course of the initial interview might fairly and successfully put the main adverse points which trouble the interviewing social workers. But that would be a haphazard way of doing it and one which would be intrinsically likely to lead to subsequent controversy in the absence of an expensive transcript of the interview."

However, the Court of Appeal declined to fix a procedure to be followed in all cases. The Court accepted that a council could discharge the duty to act fairly by, following the age assessment interview, sending a 'minded to' letter to a young person setting out provisional adverse conclusions. But a council could also adopt the following approach:

"39...fairness could be achieved in this respect if the interviewing social workers were to withdraw from the interview room at the end of the initial interview to discuss their provisional conclusions. They could record these with brief reasons in writing on a form by means of which, upon returning to the interview, they could put the adverse points which trouble them to the person whose age they are assessing, thereby giving him the opportunity to deal with them. The young person may be able to deal points then and there or he may say he needs more time, for example to obtain more documents. Either way, the interviewers could then withdraw again to consider his answers and reach their decision".

While there are a number of ways of ensuring that a young person has the opportunity fairly to address provisional adverse conclusions, the approach taken in the present case was flawed. The young person was simply presented with the assessing social workers' conclusions shortly after the end of the age assessment interview. Further, the conclusions, which were expressed in broad, imprecise terms, given did not reveal all of the findings relied upon to conclude that the young person was an adult. Accordingly, he was not given a fair opportunity to rebut provisional adverse conclusions.

### Presence of appropriate adults at age assessment interviews

When this case was before the High Court, it held, as we saw in the previous issue, that the council did not act unlawfully by failing to give the young person an opportunity for an appropriate adult to be present at the age assessment interview. The absence of an appropriate adult was counteracted by the fact that the interpreter had a good relationship with the young person. That finding was overturned by the Court of Appeal and so the case referred to in the previous issue should not be relied on.

Beginning its analysis of this aspect of the case, the Court of Appeal observed that "it is generally accepted in a variety of contexts that, where children or other vulnerable people are to be interviewed, they should have the opportunity to have an appropriate adult present". While the Court did not rule that in all age assessment cases an appropriate adult must be available, it did hold that an appropriate adult should have been present during this young person's age assessment interview. In so finding, the Court referred to the young person's accepted mental illness. Clearly, it will take an unusual case to justify failing to supply an appropriate adult for the benefit of a young person during a formal age assessment interview.

### Age assessments: relieving the burden on the High Court

Age assessment claims for judicial review are somewhat unusual. Where the claim challenges a council's factual conclusion that the young person is an adult, the High Court is required to come to its own view as to the young person's age. The Court does not simply consider whether the council's factual conclusion was one which was open to it on the evidence (see *R(A) v Croydon LBC* [2009] UKSC 8 (issue 70)). This differs from the more usual approach on a judicial review claim which is that the Court will not interfere with a public authority's factual conclusion unless it was one which was not open to it on the evidence.

Adopting a mildly critical tone, the Court of Appeal expressed the view that when the Supreme Court gave its decision in *Croydon* it did not take into account the difficulties that the High Court would be likely to face in having to determine large numbers of age assessment factual disputes. To lessen those difficulties, the Court of Appeal pointed out that age assessment judicial review claims may be transferred to the Upper Tribunal:

"31. The Administrative Court does not habitually decide questions of fact on contested evidence and is not generally equipped to do so. Oral evidence is not normally a feature of judicial review proceedings or statutory appeals. We would therefore draw attention to the power which there now is to transfer age assessment cases where permission is given for the factual determination of the claimant's age to the Upper Tribunal under section 31A(3) of the Senior Courts Act 1981, as inserted by section 19 of the Tribunals, Courts and Enforcement Act 2007. The Upper Tribunal has a sufficient judicial review jurisdiction for this purpose under section 15 of the 2007 Act and by article 11(c)(ii) of the First-tier Tribunal and Upper Tribunal (Chambers) Order 2010, SI 2010 No. 2655. Transfer to the Upper Tribunal is appropriate because the judges there have experience of assessing the ages of children from abroad in the context of disputed asylum claims. If an age assessment judicial review claim is started in the Administrative Court, the Administrative Court will normally decide whether permission should be granted before considering whether to transfer the claim to the Upper Tribunal. The matter could be transferred for permission also to be considered, but the Administrative Court should not give directions for the future conduct of the case after transfer, and in particular should not direct a rolled-up hearing in the Upper Tribunal.





32. It should be noted that transfer cannot at present be made if the claim calls in question any decision made under the Immigration Acts or the British Nationality Act 1981, but the present is not such a case. It is suitable for transfer. We shall accordingly order transfer of the present claim to the Upper Tribunal at Field House, 15 Breems Buildings, London EC4A 1DX, which will give further directions".

While transfers to the Upper Tribunal may relieve the burden on the High Court, they pose new challenges for legal advisers who are not familiar with proceedings before the Upper Tribunal. They will have to become familiar with the procedural rules which govern the conduct of proceedings before the Upper Tribunal. The consolidated (as amended) Tribunal Procedure (Upper Tribunal) Rules 2008 are available at [www.tribunals.gov.uk/Tribunals/Rules/rules.htm#utr](http://www.tribunals.gov.uk/Tribunals/Rules/rules.htm#utr).

The Court of Appeal gave its decision in *R (Fz) v London Borough of Croydon* on 1 February 2011: [2011] EWCA Civ 59. The Court was comprised of the President of the Queen's Bench Division, Smith and Aikens LJ.

## **R (CJ) v Cardiff CC – burden of proof lies on young person on age assessment judicial review**

Typically, an age assessment case requires evaluation of a range of evidence. In this case, the weight of evidence was against a young male from Iran's claim to be a child. In particular, his suspect account of how he arrived in the UK was held against him. While this did not mean he was also lying about his age, it certainly imposed a difficult evidential obstacle which he was unable to surmount.

### **What happened?**

A young male from Iran, CJ, claimed to be 14 when he entered the UK in 2008. CJ was in the Cardiff area and so it fell to Cardiff council to decide whether he was entitled to accommodation and support under the Children Act 1989. Cardiff council originally accommodated CJ under the Children Act 1989 (in foster care) on the basis that he was a child.

Cardiff council then changed their mind. They decided that CJ was at least 18 when he arrived in the UK. CJ claimed judicial review in the High Court of the council's age assessment decision.

### **Why did the Court agree that the young person was an adult?**

The Court agreed with the council and decided that CJ was an adult when he arrived in the UK. For a number of reasons, the Court did not accept CJ's claim to be a child:

- (i) CJ's general credibility was not good. He gave an inconsistent and suspect account of his arrival in the UK. For example, CJ said he earned \$1,000 in 3 months shining shoes on a Turkish street which was inherently unlikely.
- (ii) A number of professionals had considered that CJ was aged well over 18. These included his foster carer, social worker and doctor.
- (iii) A purported Iranian residence card with a date of birth showing CJ to be a child could not definitively be accepted as authentic in the absence of reliable expert evidence as to how such documents were produced in Iran. The card proffered by CJ was produced using an ink-jet printer.
- (iv) Evidence given in CJ's support by a worker from the Welsh Refugee Council was of little value. The worker's views, stated in court, about the UK's treatment of unaccompanied asylum-seeking children raised doubts as to his objectivity.

### **The nature of age assessment judicial review claims**

As was pointed out in the previous article, age assessment claims for judicial review are somewhat unusual. This is because the High Court is required to come to its own view as to the young person's age. It does not simply consider whether a council's factual conclusion was lawful on the basis that it was one which was open to it on the evidence.

But a judicial review claim remains an adversarial process with one party (the young person) putting forward a contention with which the other party (the local authority) disagrees. It is not a process in which the High Court carries out its own investigation.

In the present case, the High Court addressed the relationship between these two aspects of the Court's function on an age assessment judicial review and what it means for the parties. It concluded as follows:

- (i) The Court is not restricted to deciding which party's argument is correct:

"81... the decision is not necessarily fixed by the positions of the competing parties, one of which must be chosen as correct; the fact finding role permits the Court to come to its own view which may differ from both parties' contentions, subject to procedural fairness".

#### **KEY POINTS**

- An incredible account of arrival in the UK might justify a conclusion that a person is also lying about his/her age
- Without expert evidence about its production, an Iranian residence card did not have to be taken at face value
- Refugee worker's views about UK's treatment of child refugees raised doubts as to the objectivity of his evidence about a young person's age
- The burden of proof lies on the young person on age assessment judicial review
- This means that, in some cases, a judicial review claim will fail simply because the young person fails to persuade the Court that s/he is under 18





(ii) In some cases, however, it might not be possible for the Court to arrive at a conclusion as to a young person's age which differs from that suggested by the parties. The Court said that this may be the case where "serious issues" arise concerning credibility and potentially false documentation. In such cases, the Court may have to rely on the burden of proof to resolve a claim.

(iii) The location of the burden of proof therefore becomes important. It lies on the claimant, as the High Court explained:

"127...it is for the Claimant to show that he is or was under 18 at the time that he asserts a duty was owed to him as a child. First, in judicial review proceedings it is for the Claimant to show that the public authority has erred in its duties. Second, but obviously related, it is the Claimant who is asserting that the duty is owed; the authority is not asserting a power to do something. It is not crucial but supportive nonetheless that the readier means of knowledge lies with the Claimant on this issue".

(iv) Is the location of the burden of proof a technicality which would not make any difference in practice? It is true that the courts are reluctant to resolve a legal dispute by recourse to the burden of proof. However, in finely balanced cases it can be determinative. This was such a case and, as a result, the young person's challenge failed. This is how the High Court put it:

"126. In reality, if I ask: has the Council shown the Claimant to be an adult aged over 18 now and on arrival, I would answer nearly but not quite. If I ask: has the Claimant shown himself to be under 21 now, the answer is no and he is some way short of doing so".

The High Court (Ouseley J) gave its decision in *CJ v Cardiff County Council* on 17 January 2011: [2011] EWHC 23 (Admin).

## **R (G) v Newham LBC – physical appearance may be taken into account when assessing age**

The many age assessment judicial reviews over recent years tell us that a young person's physical characteristics are often a poor guide to his/her true age. They are not, however, irrelevant as this case confirms.

### **What happened?**

An Afghan male entered the UK in 2009 and claimed asylum. He claimed to be 16. If the individual's claim were correct, he would be entitled to accommodation from his local council. He could also rely on any period as an accommodated child in order to secure a subsequent entitlement to leaving care services. The council, however, decided that the individual was an adult when he entered the UK. In fact, the council considered that he was now aged between 21 and 25. The individual sought permission from the High Court to claim judicial review of Newham's decision.

### **What did the Court decide?**

The Court refused to allow the claim for judicial review to proceed. The Court considered that the individual did not have a realistic or arguable case of success if the claim proceeded to a full hearing (note, using the old permission test, rather than the newer formulation set out by the Court of Appeal in the *Croydon* case considered above).

The individual's counsel argued that Newham's age assessors had been wrong to take into account the individual's appearance. The High Court disagreed:

"though not determinative, they plainly have a very substantial role to play. In any age assessment they must indeed be the starting point for any consideration of the age of a child, if only by reference to the most obvious of them, in terms of height and physical development".

The individual's counsel also argued that Newham were wrong not to accept at face-value an Afghan vaccination certificate which stated that the individual would have been 16 when he arrived in the UK. The High Court disagreed. An Afghan vaccination certificate is not an official record of date of birth.

The High Court (Burton J) gave its decision in *R (G) v Newham LBC* on 9 December 2010: [2010] EWHC 3515 (Admin).

## **HOUSING**

### **Richmond council guilty of maladministration for failing to accept a homelessness application from a homeless pregnant young woman**

Homeless persons do not have to apply for help to their 'home' authority. So a council cannot refuse to consider an application because it thinks a homeless person ought to be helped by another authority. That was the mistake made by the council in this Local Government Ombudsman case.

### **What happened?**

20 year old Ms D was living at home with her parents in Wandsworth when she became pregnant. The parents disapproved of Ms D's pregnancy and asked her to leave. Ms D went to stay with her sister who lived, with her young child, in a 1 bedroom flat in Richmond.





After a matter of weeks, the sister asked Ms D to leave due to the overcrowding that her presence caused. Ms D approached Richmond's Housing Department seeking accommodation under the homelessness legislation (contained in Part VII of the Housing Act 1996). Richmond's housing officers refused to take an application from Ms D. They said that she should approach Wandsworth council because she had a local connection with that area.

Ms D then approached Wandsworth council who duly accepted that they were obliged to accommodate her under the homelessness legislation. But Ms D really wanted to live in Richmond to be near her sister. She made a complaint to Richmond council about the way in which they had dealt with her application. The council denied any wrongdoing. Ms D then complained to the Local Government Ombudsman.

### Why were the council wrong to send the applicant to a different authority?

Upholding the complaint, the Ombudsman found Richmond council guilty of maladministration. Richmond's housing officers failed to appreciate that the homelessness legislation did not permit them to refuse to take an application from Ms D on the basis that they believed her to have a local connection elsewhere.

Richmond should have accepted Ms D's application and immediately considered whether she was entitled to interim accommodation on the basis of an apparent priority need. There is provision in the homelessness legislation for referral of an applicant to a different authority. But that only applies once an application has been accepted and a decision made that the person is owed the full housing duty under the homelessness legislation (s.198 Housing Act 1996). The legislation does not permit an application to be ignored, as was Ms D's, on the basis of a possible local connection elsewhere.

### The outcome

The Ombudsman recommended that Richmond pay Ms D £500 which they agreed to do. Richmond also undertook to nominate Ms D for a social housing tenancy in Richmond and pay £500 of her removal expenses.

The Ombudsman also made the following recommendations for changes in the working practices of Richmond's housing department:

"the Council should ensure officers understand the threshold for taking a homelessness application and making enquiries. Officers should have a firm grasp of the law relating to local connection and the stage at which it is appropriate to consider this issue when dealing with homelessness applications. Officers must also recognise the need to keep accurate and comprehensive records of their contact with people who attend its Housing Options service. Finally, the Council should monitor and track the progress of housing complaints to ensure timely responses are sent to complainants and their advisers".

One of the Local Government Ombudsmen for England (Dr Jane Martin) gave the decision on complaint no. 10 009 069 against the London Borough of Richmond upon Thames on 10 February 2011.

## COMMUNITY CARE

### FUNDING

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 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.

## 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

#### 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





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: [2009] UKEAT 0220\_08\_3010.

The Court of Appeal gave its decision in *X v Mid Sussex Citizens Advice Bureau* on 26 January 2011: [2011] EWCA Civ 28. The Court was comprised of Rix, Elias and Tomlinson LJ.

## MENTAL HEALTH & MENTAL CAPACITY

### COMPULSORY TREATMENT

#### *TTM v Hackney LBC & East London NHS Foundation Trust* – local authority liable for patient's unlawful detention caused by AMHP's flawed application for admission

The Mental Health Act 1983 recognises the dramatic nature of an enforced admission to hospital by distributing roles in relation to an application for admission amongst a number of parties, Approved Mental Health Professionals, clinicians and nearest relatives, and requiring a range of other conditions to be met. It is inevitable that in some cases applications are not made in accordance with all these requirements. This case considered whether that renders a patient's resultant detention unlawful.

Initially, the High Court rejected the patient's claim. On appeal, however, the patient succeeded. The Court of Appeal held that the patient had been unlawfully detained due to a serious defect in the admission procedure. The Court went on to consider, for the purposes of awarding damages, who was responsible for that unlawful detention. It held that it was not the managers of the hospital in which the patient was detained. They had acted in accordance with their legal obligations throughout. The responsibility was that of the local authority which employed the Approved Mental Health Professional who made the defective application for admission. This is a newly-recognised category of legal liability in this field, account of which should be taken by local authorities. They should check their insurance policies to see whether, given its novelty, it falls within the categories of insured liability.

#### KEY POINTS

- An application for admission did not comply with the Mental Health Act 1983 because the Approved Mental Health Professional (AMHP) did not appreciate that the nearest relative objected
- This meant that the patient's detention was unlawful
- The hospital managers were not liable for the unlawful detention; the local authority which employed the AMHP was liable
- The local authority's statutory protection from civil proceedings was considered not to apply in order to give effect to the patient's human right to compensation for unlawful detention
- In the circumstances, it was not practicable for either of the supporting clinical recommendations to be given by a clinician who had a previous acquaintance with the patient
- The hospital managers' obligation to scrutinise an application for fundamental flaws arises after a patient's admission
- The civil claim was correctly brought against an AMHP's employing local authority, rather than against the AMHP personally
- An AMHP, in discharging his/her statutory functions, owes a patient an actionable duty of care





## What led to this case?

Mr T had a history of obsessive interest in women and some doctors involved with him have diagnosed erotomania. An Approved Mental Health Professional (AMHP) was considering whether to make an application for Mr T's detention for treatment under section 3 of the Mental Health Act 1983 (MHA 1983). By virtue of section 10(4) of that Act, such an application "may not" be made if the patient's nearest relative has informed the AMHP that s/he objects. The AMHP took the view that Mr T's nearest relative, his brother, did not object, and an application for s.3 admission was made and accepted by the managers of a hospital. Mr T was then compulsorily admitted to the hospital for treatment.

10 days after Mr T's admission, however, the High Court granted a writ of *habeus corpus* which required his release from detention. This was because the nearest relative objected to the application for the patient's detention. For further details of the background to this aspect of the case, see our report of the High Court's judgment on the *habeus corpus* application in issue 57. Essentially, however, the AMHP's mistake was as follows:

- (i) on the morning of the day of the application, the nearest relative clearly stated that he objected to admission;
- (ii) that afternoon, the AMHP told the nearest relative in a telephone call that, "subject to your opinion", she would make a s.3 application;
- (iii) the AMHP took the nearest relative's silence to mean that he had withdrawn his objection;
- (iv) this was wrong. The AMHP should have appreciated that the nearest relative, whose first language was not English, was maintaining his objection. What the AMHP should have done, if she wished to persist with an application, was apply for the nearest relative's displacement under s.29 of the MHA 1983.

Mr T then brought a fresh legal claim in which he sought damages from both the managers of the hospital in which he was detained and the local authority by whom the AMHP was employed.

## Issue 1 – Did it matter that neither supporting medical recommendation came from a clinician with a previous acquaintance with the patient?

As we saw above, the s.3 application was made in contravention of the MHA 1983 because the patient's nearest relative objected to it. However, when this case came before the High Court, it was argued that the s.3 application was legally flawed for an additional reason. This concerned the identity of the clinicians who gave the clinical recommendations in support of the application.

This challenge was based on the fact that neither of the clinical recommendations given in support of Mr T's s.3 application came from a clinician with a previous acquaintance with the patient. In other words, it was argued that s.12(2) of the MHA 83 had been breached. In summary, s.12(2) requires at least one of the clinicians to have a previous acquaintance with the patient. That can only be avoided if it is not practicable for at least one of them to have such an acquaintance.

The absence of any clinician with a previous acquaintance was not a mistake; it was a deliberate decision by the hospital managers. Mr T had previously been admitted to hospital as an informal patient and there was a strong difference of opinion between different doctors as to whether or not he met the statutory criteria for s.3 detention. Essentially, this revolved around whether Mr T would pose a risk to the public if in the community. According to the case report, due to this difference of opinion the hospital managers "decided that it would be fairer to go to two independent practitioners both of whom had experience in forensic psychiatry" and were approved under s.12 of the MHA 1983.

The question of law, as identified in para. 32 of the High Court's judgment, was whether it could be "considered on reasonable grounds" to be appropriate to proceed with the application for Mr T's detention despite neither of the supporting medical recommendations having been provided by previous acquaintance clinicians. Stressing the need for this question to be answered with a patient's interests in mind, the Court held that there had been a lawful decision that it was not practicable to include a clinician with a previous acquaintance given the history of clinical disagreement amongst clinicians who did have such an acquaintance:

"33...the decision to use two professionals who came afresh and who, of course, had access to all the hospital notes and could question nurses or other doctors was reasonable and a proper exercise of judgment of what was in the claimant's best interests. Thus there was no breach of s.12(2)."

The patient's appeal against this aspect of the High Court's decision was rejected by the Court of Appeal.

## Issue 2 – Did the flawed application mean that the patient was being unlawfully detained?

When this case was before the High Court, it decided that the patient had not been unlawfully detained. The Court relied on s.6(2) of the MHA 1983 to make this finding. Section 6(2) is what gives hospital managers authority to detain a patient in pursuance of an AMHP's application for their compulsory admission to hospital. Section 6(3) goes on to deal with the fact that we do not live in a perfect world and in some cases there will not be strict compliance with the requirements of the MHA 1983. This is what it says:

"(3) Any application for the admission of a patient under this Part of the Act which appears to be duly made and to be founded on the necessary medical recommendations may be acted upon without further proof of the signature or qualification of the person by whom the application or any such medical recommendation is made or given or of any matter of fact or opinion stated in it."





The High Court held that section 6(3) applied in this case and, as a result, Mr T had not been unlawfully detained.

The Court of Appeal overruled the High Court's finding. It held that it was clear that the patient's detention was unlawful. The AMHP had no power to make the application for admission in the face of the nearest relative's objection. That meant the resultant detention had to be unlawful.

### Issue 3 – who was responsible for the patient's detention?

The physical acts which constituted the state of deprivation of liberty in which the patient found himself were clearly carried out by staff of the hospital in which he was placed. However, that did not make the hospital managers liable for his unlawful detention. The Court of Appeal referred to and relied on a line of case law about circumstances in which person A (in the present case, the hospital managers) detains an individual in reliance on information provided by person B (in the present case, the Approved Mental Health Professional). The principle to be found within the case law was described as follows by the Court of Appeal:

"35. The principle is therefore recognised at common law that there may be false imprisonment by A, although it was B who took the person into custody and B acted lawfully, provided that A directly caused B's act and that A's act was done without lawful justification."

That principle was applicable in this case. It meant that it was the local authority that employed the Approved Mental Health Professional, rather than the hospital managers, who were liable for the patient's unlawful detention. In the Court of Appeal's words:

"39. It follows that, on ordinary principles of common law, M's detention was unlawful inasmuch that it was brought about directly by the conduct of the AMHP for which she had no lawful justification, notwithstanding that she acted in complete good faith".

### Issue 4 – does every flawed application for admission result in an unlawful detention?

The Court of Appeal went on to consider whether every flaw in an application inevitably results in an unlawful detention. Its views were *obiter* (non binding) but as this is an important topic they merit repeating. The Court said that a flaw in an application must be of sufficient seriousness to render the resultant detention unlawful. Flaws are sufficiently seriousness if they go to the jurisdiction of the AMHP to make an application at all. The fact that the nearest relative had objected to the application in the present case was such a flaw. It deprived the AMHP of jurisdiction (or power) to make an application for the patient's admission.

But some other flaws are not sufficient to invalidate an application. The Court said that where a procedural error is "within jurisdiction" it does not invalidate the application. It went on to express the view that if it had in fact been practicable for one of the supporting medical recommendations in this case to come from a doctor with a previous acquaintance of the patient (the point considered in issue 1 above) the decision to proceed without such a recommendation was not an invalidating error. The requirements of s.12 of the Mental Health Act 1983 which contain the practicability condition were described by the Court of Appeal as being of a "different kind" because they "go to the form of the evidence required to support an application".

### Issue 5 – should the AMHP have been sued personally?

The patient's claim was brought against the local authority. It was not brought against the AMHP who had unlawfully made the application for his admission. An initial issue in the High Court was whether the claim should have been brought against the AMHP personally rather than against the local authority by whom she was employed.

It is true that an AMHP is an independent statutory decision maker who cannot be dictated to by the authority by whom s/he is approved. However, the Mental Health Act 1983 contains a provision which states that, in the Act, references to an AMHP are to be construed as the AMHP acting on behalf of the local social services authority, unless the context otherwise requires (see s.145 (1AC) of the Act). In the words of the High Court, this makes the local authority "vicariously liable" for the acts of the AMHPs which it employs. Accordingly, the patient's decision to bring his claim against the local authority was not misconceived. Any wrongs of the AMHP were imputed to the authority and so the claim based on the AMHP's negligence was correctly pursued against the employing local authority, Hackney LBC.

### Issue 6 – Did the local authority have a defence under s.139 of the Mental Health Act 1983?

Section 139 of the Mental Health Act 1983 impedes the bringing of civil proceedings in respect of acts purporting to have been done under the Act. Under s.139, generally the act must have been done in bad faith or without reasonable care and leave of the High Court must be obtained in order to bring proceedings.

Those impediments do not apply in the case of NHS bodies (s.139(3) MHA 1983) but they do apply to claims against local authorities. Accordingly, in order for this patient's claim against the local authority to succeed it would seem that he had to establish that the AMHP, in concluding that his nearest relative had not objected to admission, had acted in bad faith or without reasonable care. It was clear that the AMHP had not acted in bad faith, she had not set out to injure the patient, and it seemed unlikely that she had acted without reasonable care (negligently). So, was the claim doomed to fail?

The answer was 'no'. At this point, the requirements of Article 5 of the European Convention on Human Rights need to be considered. Article 5 provides that anyone who is deprived of liberty in contravention of its provisions is entitled to compensation. This patient was deprived of liberty in contravention of Article 5 because his detention was not lawful. In order to give effect to Article 5, the parties in the present case agreed that s.139 of the Mental Health Act 1983 should not be allowed to impede the patient's claim for compensation. In other words, the s.139 conditions should be treated as having been satisfied. The result was described by the Court of Appeal as follows:





"66...Neither counsel for the local authority nor counsel for the Health Secretary disputed M's argument that s139(1) can be read down by virtue of s3 of the Human Rights Act [which requires legislative to be interpreted compatibly with the Convention rights in so far as it is possible to do so] so as to permit a claim by M for compensation from the local authority, and the Health Secretary strongly supported that solution. In those circumstances, I am happy to proceed on the basis that it is open to the court to read s139(1) in that way without further consideration of the matter".

Accordingly, the matter will proceed on the basis that the patient's claim against the local authority has surmounted the s.139 hurdle. That means the patient's claim for compensation will succeed, there being no further legal obstacle that the local authority can place in its path. Compensation will be considered separately.

### Issue 7 – in principle, can the actions of an AMHP give rise to a negligence claim?

A further point of interest from the High Court's decision was its finding that an AMHP owes a patient a legally-recognised 'duty of care'. This is significant because a legally-recognised duty of care is an essential element of any negligence claim. In principle, therefore, an AMHP's actions may, if carelessly performed, give rise to a claim for damages in negligence against the authority responsible for the AMHP's actions. This is what the High Court said on the point:

"36...If there were lack of reasonable care, the question whether a duty of care exists is material. I see no reason in principle why such a duty should not exist. No doubt there is an element of judgment in any decision to be made and the AMHP is a professional, but that does not preclude a duty of care. It is difficult to see why in a case such as this, if Ms Bailey was negligent in believing that there had been no objection, there should be no liability to compensate for the loss of liberty which resulted".

### What happens next?

Unless there is a further appeal to the Supreme Court, the local authority and the patient's representatives will now try to agree an award of compensation for the patient. The Court of Appeal's decision says little about how compensation should be quantified other than to acknowledge that the fact that the AMHP acted in good faith throughout may reduce the compensation that it payable. In conclusion, Toulson LJ stated as follows:

"I have considerable sympathy with the local authority's position. The AMHP was clearly conscientious, and it may be that if she had not been mistaken in supposing that M's brother no longer objected to the application, the ultimate result would have been the same, but by a different route. However, while that may affect the amount of any compensation, it cannot affect the legality of what occurred. Our system of law is rightly scrupulous to ensure that in matters affecting individual liberty the law is strictly applied. It is a hallmark of a constitutional democracy".

The High Court (Collins J) gave its decision in *TTM (by his litigation friend, TM) v Hackney LBC & East London NHS Foundation Trust* on 11 June 2010: [2010] EWHC 1349.

The Court of Appeal gave its decision in *TTM (by his litigation friend, TM) v Hackney LBC & East London NHS Foundation Trust* on 14 January 2011: [2011] EWCA Civ 4. The Court was comprised of the President of the Queen's Bench Division, Toulson and Jackson LJJ.

## 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 LJJ. Ward LJJ 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).

# HOUSING

## HOMELESSNESS

### Yemshaw v Hounslow LBC – domestic violence includes non-physical abusive acts, rules Supreme Court

Domestic abuse can take many forms. The Supreme Court has recognised that fact in deciding that in the homelessness legislation 'domestic violence' includes some types of non-physical mistreatment. It means that a person who would probably be the victim of non-physical domestic violence if s/he continued to live in particular accommodation is automatically treated as 'homeless' under the homelessness legislation. Accordingly, if the person has a priority need, for example on the basis that s/he has a dependent child, s/he will be owed the main housing duty and have to be provided with accommodation (assuming that s/he is not ineligible for assistance on immigration grounds).

#### Who was this case about?

The background to this case was as follows:

- (i) A married woman with two young children left her husband. She said that she was suffering emotional and psychological abuse but she did not allege that she was the victim of physical violence.
- (ii) The woman approached Hounslow council seeking accommodation under the homelessness legislation (contained in the Housing Act 1996).
- (iii) The key issue was whether the woman was "homeless" for the purposes of the homelessness legislation. If she was, it seems that the authority would have been bound to secure long-term accommodation for her under the homelessness legislation (due to her being in priority need – dependent children – and not being intentionally homeless: s.193(1) Housing Act 1996).
- (iv) The woman argued that she should automatically be considered homeless, even though she could return to the family home, because if she stayed there, it was probable that she would suffer "domestic violence".
- (v) The woman was therefore relying on s.177(1) of the Housing Act 1996. S.177(1)'s effect is that, where it is probable that a person's continued occupation of accommodation would lead to domestic violence(a), the person is deemed to be homeless (unless s/he has other accommodation which it is reasonable for him/her to occupy).

#### KEY POINTS

- In the homelessness legislation, 'domestic violence' includes some non-physical acts of abuse
- Accordingly, a person who would probably suffer domestic violence if they lived in the only accommodation available to them is homeless under the homelessness legislation
- Applying the Court's ruling is likely to require difficult distinctions to be drawn between heated relationship breakdown and non-physical domestic violence
- The Court's ruling is likely to be applied to non-domestic violence to benefit, for example, persons who are subject to psychological harassment from neighbours
- The Court's ruling is likely to be applied to the domestic violence ground for possession





## Why did the council decide that the applicant was not homeless?

The council decided that in s.177 of the Housing Act 1996 "domestic violence" refers solely to physical violence (the council applied case law that in s.177 'violence' only includes physical violence: *Danesh v Kensington and Chelsea Royal London Borough Council* [2006] EWCA Civ 1404). As a result, even if the woman's allegations against her husband were true she could not be a victim of domestic violence. Accordingly, she was not automatically deemed homeless. Ultimately, the council's decision came before the Court of Appeal by which it was upheld. The woman appealed to the Supreme Court.

## Domestic violence includes non-physical abuse

The Supreme Court allowed the woman's appeal. The Court held that, within the homelessness legislation, "domestic violence" should have an updated meaning. The Court said that it would achieve the purpose of the legislation if domestic violence were used in the same way as in the family courts(b), where the following wide definition is applied:

"'Domestic violence' includes physical violence, threatening or intimidating behaviour and any other form of abuse which, directly or indirectly, may give rise to the risk of harm."

So, this is a two-stage test. First, it must be probable that a third party would do a particular thing (threatening or intimidating behaviour or other type of abuse). Second, it must be probable that that thing will give rise, directly or indirectly, to the risk of harm. It should be noted that the 'harm' referred to includes psychological harm. As Lord Rodger said, at para. 46 of the decision, "to conclude otherwise would be to play down the serious nature of psychological harm".

## How is this ruling likely to be applied in practice?

Giving this ruling was one thing, applying it will be another. We are likely to see many disputes over drawing the line between heated argument and 'threatening or intimidating behaviour and any other form of abuse which, directly or indirectly, may give rise to the risk of harm'. Some additional guidance on how to apply the ruling was provided by Baroness Hale (with whose decision Lords Hope and Walker agreed in all respects). She said that the question of whether it is probable that a person will suffer domestic violence is not to be answered affirmatively simply because a person says that s/he would be harassed or intimidated if s/he were to live in a particular place:

"36...The test is always the view of the objective outsider but applied to the particular facts, circumstances and personalities of the people involved".

Baroness Hale also made the point that the test is not met simply because someone has been the victim of domestic violence in the past. S.171 of the Housing Act 1996 does not ask whether a person has suffered domestic violence. It is instead, as Baroness Hale put it, about "future risk". She went on:

"34...Isolated or minor acts of physical violence in the past will not necessarily give rise to a probability of their happening again in the future. This is the limiting factor. Sections 177 and 198 are concerned with future risk, not with the past".

## What happens next?

The Supreme Court's decision does not mean that the woman is entitled to accommodation. She has not been adjudged homeless. The matter will go back to the council for it to decide whether the woman was in fact the victim of domestic violence in the wider sense set out by the Supreme Court. Baroness Hale made some observations about the essential nature of the task that will be faced by the local authority when it reconsiders the application:

"36...Was this, in reality, simply a case of marriage breakdown in which the appellant was not genuinely in fear of her husband; or was it a classic case of domestic abuse, in which one spouse puts the other in fear through the constant denial of freedom and of money for essentials, through the denigration of her personality, such that she genuinely fears that he may take her children away from her however unrealistic this may appear to an objective outsider? This is not to apply a subjective test...The test is always the view of the objective outsider but applied to the particular facts, circumstances and personalities of the people involved".

## What about probable victims of non-domestic violence?

The homelessness legislation does not only apply to persons who would probably be the victim of domestic violence if they stayed in particular accommodation. It takes the same approach, in s.177(1) of the Housing Act 1996, in relation to probable victims of simple violence (that is without any domestic element). The question therefore arises whether the wider meaning also applies in these cases. This could be important where a person faces a campaign of non-physical harassment. Prior to this decision, such a person could not claim to be considered automatically homeless, given the ruling of the Court of Appeal in *Danesh v Kensington and Chelsea Royal London Borough Council* [2006] EWCA Civ 1404, [2007] 1 WLR 69 that violence must include some level of physical contact.

The Supreme Court did not rule on this point. However, Baroness Hale, for one, said she "inclined to the view" that 'violence' has the same meaning throughout the homelessness legislation (so as to include non-physical violence). However, she also acknowledged that, generally, in such cases it will be more difficult for a person to show the necessary element of probable harm. This is what she said:





"35...I would incline towards the view that it does. Nor would that be surprising. People who are at risk of intimidating or harmful behaviour from their near neighbours are equally worthy of protection as are those who run the same risk from their relations. But it may be less likely that they will suffer harm as a result of the abusive behaviour of their neighbours than it is in the domestic context. In practice, the threshold of seriousness may be higher".

Also, Lord Rodger expressed the view, at para. 44 of the decision, that "in my view, there is no doubt that violence means the same, whether it comes from a person associated with the victim [i.e. domestic violence] or from a third party".

### What about the domestic violence grounds for possession?

In the case of both secure and assured tenancies, there is a domestic violence ground of possession (ground 14A in the case of assured tenancies, ground 2A in the case of secure tenancies; in both cases this a discretionary ground). This ground for possession simply refers to one partner having left a dwelling house due to violence or threats of violence from another partner (who is a tenant). It is likely that this ground for possession will be construed in line with the Supreme Court's decision in the present case. That is, to include non-physical violence falling within the definition given by Baroness Hale and set out above (but with modification to require some actual harm rather than simply a risk of harm given that the ground for possession is concerned with what has happened rather than, as under the homelessness legislation, what will probably happen).

(a) The violence does not have to be directed at the applicant. It may also be directed at a person who normally resides with the applicant as a member of his/her family (such as a child) or any other person who might reasonably be expected to reside with the applicant.

(b) The definition was taken from *Practice Direction (Residence and Contact Orders: Domestic Violence) (No 2)* [2009] 1 WLR 251.

The Supreme Court gave its decision in *Yemshaw v London Borough of Hounslow* on 26 January 2011: [2011] UKSC 3. The Court was comprised of Lords Hope, Rodger, Walker & Brown and Baroness Hale.

## WELFARE BENEFITS

### HOUSING BENEFIT

#### **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 upheld by the Upper Tribunal. However, the Government has independently decided to relax the rules in the very near future.

#### 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).

#### 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 conditions and an overnight presence condition are met





## 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](http://www.dwp.gov.uk/docs/a3-2011.pdf)





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