

Court of Protection and Human Rights

1. The Human Rights Act 1998, s. 7(1) provides:

7.— Proceedings.

(1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may—

(a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or

(b) rely on the Convention right or rights concerned in any legal proceedings, but only if he is (or would be) a victim of the unlawful act.

[emphasis added]

2. The Court of Protection ('CoP') can determine whether there have been breaches of P's Convention rights, and the rights of P's family. In ***YA(F) and a Local Authority and others*** [2010] EW COP 2770, Charles J considered whether the CoP could determine a human rights claim brought within proceedings by a relative of P. At [24] of his judgment, Charles J stated:

"Can it therefore be said that Parliament was intending that if a set of events occurs that impact the Article 8 rights of the members of the family of a person who lacks capacity, and those events are properly described as being an act or acts done in relation to the person who lacks capacity (P), the Court of Protection should not have jurisdiction to make declarations as to the lawfulness of such acts by reference to the Convention rights of, and on the application of, there's members of the family? To my mind the answer to that question [is] 'No', and that consideration of this question indicates that an ability (and thus a jurisdiction) to deal with such issues is within a secondary purpose of the legislation."

3. Charles J continued, at [30]:

"That analysis and reasoning leads me to the conclusion that, as a matter of construction and application of the Mental Capacity Act, the Court of Protection has jurisdiction (a) to hear argument behalf of the mother that acts done 'in relation to that person (i.e. the son)' constitute breaches of her Convention rights, and (b) to make declarations as to the lawfulness of those acts on her application and in respect of breaches of her Convention rights as a result of such acts (i.e. acts done in relation to the son)."

[emphasis added]

4. However, not all Convention rights claims will be entertained by the CoP; the CoP has a discretion to refuse to hear such claims, leaving claimants to issue proceedings elsewhere. In **Re TL** [2017] EWCOP 1 the appellant had applied, within CoP proceedings, for a declaration that the local authority had acted in breach of an order providing for contact between the him and his daughter, P. The appellant sought, inter alia, a declaration that the local authority had breached his rights under Articles 8 and 14 of the Convention and also his daughter's rights under arts. 5, 8 and 14 of the Convention, and damages for the alleged breaches.
5. The welfare issues within the case were resolved and orders made by consent. That led the local authority to contend that the Convention rights claim fell outside the category of cases considered by Charles J in **YA(F)**, where Charles J had pointed to the desirability of hearing the Convention rights claims within CoP proceedings because there was a high risk of overlap between the events which are relevant to the Convention claims and the facts and matters which the court must consider to make a best interests decision.
6. Baker J refused permission to appeal. Baker J held that the appellant could not pursue a claim on behalf of P when P continued to be represented by the Official Solicitor. As for the appellant's own Convention rights claim, Baker J said the Judge had been entitled to conclude that the matter should not proceed within the already long running, and difficult, CoP proceedings.
7. It is also open to a party to contend that an order sought from the CoP *would* breach Convention rights. The CoP is a public authority under the 1998 Act. Therefore, the court is prohibited from acting in a way which is incompatible with Convention rights. Section 7(1) provides for proceedings / reliance on Convention rights in anticipation of a breach.
8. In **Re MM** [2007] EWHC 2003 (Fam) at [166] Munby J, as he then was, said:

"the court is required to act in the best interests of the vulnerable adult and must not – is forbidden by s 6 of the Human Rights Act 1998 to – endorse a plan which in its view involves a breach of Art 8."

How should the CoP approach a claim that proposed measures will breach Convention rights?

9. If a prospective Convention rights breach is raised, the question of a likely breach should (on the current authorities) be considered after the best interests analysis.

10. In **K v LBX & Ors** [2012] EWCA Civ 79 at [35] Thorpe LJ said:

I conclude that the safe approach of the trial judge in Mental Capacity Act cases is to ascertain the best interests of the incapacitated adult on the application of the section 4 checklist. The judge should then ask whether the resulting conclusion amounts to a violation of Article 8 rights and whether that violation is nonetheless necessary and proportionate.

11. Cobb J emphasised the need for this two-stage approach in **North Yorkshire County Council & Anor v MAG & Anor** [2016] EWCOP 5. There, at first instance, the Official Solicitor had argued, successfully, that the court should not authorise the deprivation of MAG's liberty because his accommodation breached art. 5. Allowing the local authority's appeal, Cobb J said, at [23]:

'All substantive decisions in the Court of Protection are governed by the best interests test, and yet the judge did not pose such a question for herself. She went straight to consider "whether the elements of the care package which involve a deprivation of liberty are lawful". In my judgment, there was a need to break her decision-making down into two separate questions which required consideration in this case, namely:

i) Whether it is in MAG's best interests to live at the property, noting that although he is deprived of his liberty, there is no alternative available which offers a lesser degree of restriction;

ii) Whether the accommodation provided to MAG was so unsuitable as to be unlawfully so provided, breaching MAG's rights under the ECHR (notably Article 5).'

12. Cobb J held that the two-stage process is equally applicable to deprivation of liberty cases, rejecting the Official Solicitor's submission that art. 5 requires a different approach, see [35] to [37].

13. Where the only Convention right in issue is P's Convention right, the two stage process advocated in **LBX** causes no difficulty. Usually, the best interests analysis will have taken account of the interest of P which falls within the scope of his Convention rights, and the best interests decision

will, usually, provide the justification for any interference with P's Convention rights (if capable of justification).

14. But, what about where a third party's Convention rights are in play? In **LBX** the Court of Appeal said: best interests first, then ask whether the best interests conclusion amounts to an interference with Convention rights and (where applicable) whether that interference is necessary and proportionate. What **LBX** does not assist with is how to resolve a case where the best interests decision is a disproportionate interference with a third party's Convention rights.

Convention rights influencing care plans

15. Where the **K v LBX** two-stage process has been applied, the Convention rights analysis does not often alter the outcome arrived at under the best interests test.

16. In **NCC v WMA, MA** [2013] EWHC 2580 (COP) the local authority sought orders requiring P, at 25 year old man, to move away from living with his mother and requiring P to reside in supported living. The local authority was concerned that P led a very isolated life with his mother, and that the two were too heavily dependent on each other. HHJ Cardinal concluded:

143 Accordingly, and weighing up these and other matters, there is no doubt in my mind it is WMA's best interests to move to B...

144 I must, as Mr. O'Brien rightly reminded me, address again Article 8 and cross-check if the interference with WMA's private and family life is necessary and proportionate...

146 Accordingly, if one looks at WMA's isolation, the refusal to engage with outside agencies, the poor conditions in the home and the absence of friends, save one for MA, of both mother and son and contrasts them with the opportunities for WMA at B then the opportunity for a higher quality private life is clear. The disadvantages in plainly deteriorating circumstances of remaining where he is are palpable.

147 I accept, of course, the local authority must continue to respect private and family life for WMA. He must continue to see MA for regular contact and his best interests must not be prejudiced; yet it is clear his private life will be enhanced by moving. Indeed, the relationship with MA might even improve because there will be an end to that worrying mutuality referred to by Dr. Carpenter. I appreciate that the move may be an interference in MA's private life and family life but it is more than justified in the circumstances.

17. In **PS v LP** [2013] EWCOP 1106 the CoP considered whether the family of P should have contact with her. P had left her family (husband and adult children) in London and moved to the Midlands with her new partner. She reported to the Police that she felt threatened by her family. P wrote a letter of wishes, saying she never wanted to see her family again. P then suffered a severe stroke. P's family sought to have contact with her.

18. HHJ Cardinal concluded that it was not in P's best interests for the family to have contact, stating at [112]:

'First, not without very careful thought, I take the view I cannot direct that contact be immediately restored to husband or family and particularly PS, the Applicant, terribly sad though that is. It appears that LP took the decision that her future was with PP and she wished to break with the past. Accordingly, I declare that at present it is in the best interests of LP not to see her family. I say this with great regret and I hope not without sympathy for the family from whom she was estranged but this is not the time to experiment with contact. Unless things change, her wishes must be respected and the position remains as it is.'

19. Then, at [113]:

'I find that in coming to that conclusion I have not overridden Article 8 rights but, if I have and to the extent that I have, then that overriding is reasonable and proportionate.'

20. In **North Yorkshire County Council v MAG** Cobb J concluded that it was in MAG's best interests to be deprived of his liberty in his current placement, and rejected the Official Solicitor's submission that MAG's living conditions breached art. 5. Cobb J held, inter alia, at [43], that:

- a. art. 5 is concerned with the reasons for detention, not the conditions of detention;
- b. all that is required is that the conditions are appropriate, not that they are the most appropriate for the detained person; and
- c. there would need to be '*serious inappropriateness*' in the conditions of detention to breach art. 5

21. The Official Solicitor's suggestion that art. 3 was breached by MAG's care regime was firmly rejected by Cobb J, stating that '*there was in reality no evidence of torture in this case, nor of inhuman treatment...*,' that '*to have raised it at all was... inflammatory and unhelpful; no doubt it escalated tensions in the litigation, and could have prolonged it*' and that it was '*highly regrettable that it was raised (and repeated) in this litigation.*'

22. There are few cases where Convention rights arguments have secured more / better care. In **R (McDonald) v Royal Borough of Kensington and Chelsea** [2011] UKSC 33 the Appellant claimed that by providing incontinence pads, rather than a carer to help her to the toilet at night, the local authority breached her art. 8 rights. The claim failed. Lord Brown said:

'15 Article 8 is too well known to require citation again here. There is no dispute that in principle it can impose a positive obligation on a state to take measures to provide support and no dispute either that the provision of home-based community care falls within the scope of the article provided the applicant can establish both: (i) "a direct and immediate link between the measures sought by an applicant and the latter's private life"— Botta v Italy (1998) 26 E.H.R.R. 241 at [34] and [35]—and (ii) "a special link between the situation complained of and the particular needs of [the applicant's] private life": Sentges v Netherlands (Admissibility) (27677/02) (2004) 7 C.C.L. Rep. 400 , p.405.

16 Even assuming that these links do exist, however, the clear and consistent jurisprudence of the Strasbourg Court establishes "the wide margin of appreciation enjoyed by states" in striking "the fair balance ... between the competing interests of the individual and of the community as a whole" and "in determining the steps to be taken to ensure compliance with the Convention", and indeed that "this margin of appreciation is even wider when ... the issues involve an assessment of the priorities in the context of the allocation of limited state resources"— Sentges at p.405, Pentiacova v Moldova (Admissibility) (14462/03) (2005) 40 E.H.R.R. SE23 , p.13) and Molka v Poland (56550/00) April 11, 2006, Unreported , p.17). Really one only has to consider the basic facts of those three cases to recognise the hopelessness of the art.8 argument in the present case. Sentges (considered by Rix L.J. at [64] of his judgment) concerned a sufferer from muscular dystrophy complaining of a refusal to supply him with a robotic arm. Without it he depended on others for every single act and so was unable to develop and establish relationships with others; with it, his "severely curtailed level of self-determination would be increased": 7 C.C.L.R. 400, p.404. The applicants in Pentiacova suffered from renal failure and complained of insufficient funding for their haemodialysis treatment. The applicant in Molka was confined to a wheelchair and, for want of positive assistance, was unable to vote in local elections. The complaints in all three cases were unanimously held to be manifestly ill-founded and thus inadmissible.'

23. Then, at [19], Lord Brown added that even if there was an interference with Ms McDonald's art. 8 rights, the interference would be justified:

'... I add only that, even if such an interference were established, it would be clearly justified under art.8(2) —save, of course, for the period prior to the 2009 review when the respondents' proposed care provision was not "in accordance with the law"—on the grounds that it is necessary for the economic well-being of the respondents and the interests of their other

service-users and is a proportionate response to the appellant's needs because it affords her the maximum protection from injury, greater privacy and independence, and results in a substantial costs saving.'

What will the CoP do where it considers there is likely to be a Convention rights breach?

24. The CoP will press the public bodies to produce plans which avoid the anticipated breach. In **Re MM** at [163] and [166], Munby J said that:

"If the local authority seeks to impose on MM a regime which in fact involves a breach of her Art 8 rights – and that ... I agree, is the consequence of imposing on MM a regime which in practical terms prevents her continuing her sexual relationship with KM – then the local authority in principle has a choice. It must modify the arrangements so that there is no breach of Art 8. And in the circumstances of the present case it can do this either by abandoning its attempt to prescribe where and with whom MM lives or, if it wishes to exercise that control, by taking appropriate positive steps to enable MM to continue her sexual relationship with KM. If it seeks to do the one without shouldering the burden of doing the other, then its intervention in MM's life is ... disproportionate. And in my judgment it involves a breach of her rights under Art 8."

"In the first instance it is for the local authority to prepare a care plan spelling out in appropriate detail and precision what it proposes to do in order to modify the current arrangements in such a way as to avoid a breach of Art 8 of the European Convention; specifically, if it wishes to pursue its plan for MM to remain at her current placement, what it proposes to do in order to facilitate her sexual relationship with KM. The care plan can then be considered by the court...'

25. If the process of exploring care plans with the public bodies secures little change, the court will have limited options. **Re MN** [2015] EWCA Civ 411, Munby LJ referred to his judgment in **Re MM**, and then observed, at [42] and [43], that:

'I directed [in Re MM] (para 167) that the local authority was to file a care plan and evidence in support setting out its final proposals and directed that the matter was to be restored for further consideration of the care plan.

It will be noted that I did not assert, and I do not assert, any right in the court to compel a local authority to accept the plan which commends itself to the court. If there is an impasse, then the court must select the lesser of the two evils: in a case like MM, endorsing the local authority's plan or dismissing the proceedings.'

26. Arguably, there is a third option open to the CoP.

27. In **ACCG** at [43], Baroness Hale said that case management akin to that taken by King J in that case:

‘does not mean that a care provider or funder can pre-empt the court’s proceedings by refusing to contemplate changes to the care plan. The court can always ask itself what useful purpose continuing the proceedings, or taking a particular step in them, will serve but that is for the court, not the parties, to decide.’

28. Of course, if faced with a care plan which is thought to breach Convention rights, the CoP could conclude that a useful purpose for the proceedings would be to evaluate the plan and declare that it amounts to a breach of Convention rights.

29. Such a declaration would not, itself, compel the public authority to provide a different care plan. If, despite the declaration, the public body maintained the care plan, an order to enforce compliance would be required. Such an order should be available from the CoP; the CoP has the same *‘powers, rights, privileges and authority as the High Court’*, per. s 47(1) of the 2005 Act.

Procedural matters

30. Parties should aim to identify Convention rights issues at the outset, and plead them clearly. The Court of Protection Rules, r. 83(1), provides:

‘(1) A party who seeks to rely upon any provision of or right arising under the Human Rights Act 1998 (“the 1998 Act”) or who seeks a remedy available under that Act must inform the court in the manner set out in the relevant practice direction specifying—

(a) the Convention right (within the meaning of the 1998 Act) which it is alleged has been infringed and details of the alleged infringement; and

(b) the remedy sought and whether this includes a declaration of incompatibility under section 4 of the 1998 Act.’

31. In **Re MN** in the Court of Appeal, the court emphasised, at [85], that any Convention rights argument must be:

‘clearly identified and properly pleaded’,

32. The CoP's Case Management Pilot Practice Direction, para. 4.3(1), provides that when issuing a welfare application, the applicant should provide information including:

'(f) a list of the options for P'

and:

'(n) an indication of whether there is likely to be a public law challenge in the case, and if so, the nature of the challenge which is anticipated'

33. Convention rights disputes are likely to add to the complexity of CoP proceedings. Early identification of the issues is therefore important.

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