Mental Health Law Update

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MENTAL HEALTH LAW

TRIBUNAL PROCEDURE

Jurisdiction

A decision to refuse permission to appeal is an 'excluded decision' (under s.11 Tribunal Courts and Enforcement Act 2007) and is therefore not susceptible to appeal under that section. That does not affect the right to appeal, subject to permission, against the original decision (*AH v West London Mental Health Trust and Secretary of State for Justice* [2010] UKUT 264 (AAC), at [13]).

An interlocutory decision remains a 'decision' (within s.11) and is therefore capable of appeal. The Upper Tribunal is particularly well suited to providing guidance on such procedural issues and has accepted jurisdiction in cases involving interlocutory orders on a number of previous occasions (*AH v West London Mental Health Trust and Secretary of State for Justice* [2010] UKUT 264 (AAC), at [14]).

The Tribunal's jurisdiction continues where a patient who is detained when an appeal is lodged is subsequently placed on a community treatment order (*AA v Cheshire and Wirral Partnership NHS Trust* [2009] UKUT 195 (AAC)). The appeal will continue as though it is a challenge to the CTO. The Upper Tribunal emphasised the need for co-operation between the parties in these circumstances [61].

The Upper Tribunal is not necessarily restricted to the matters upon which leave is granted (*DL-H v Devon Partnership NHS Trust v Secretary of State for Justice* [2010] UKUT 102 (AAC) at [3]). In part that is appropriate because liberty may be in issue [4]. The Tribunal can, however, control the issues considered [3].

Public or private hearing

In *AH v West London Mental Health Trust and Secretary of State for Justice* [2010] UKUT 264 (AAC) the Upper Tribunal held:

- The presumption in favour of private hearings in cases of mental health is compatible with article 6 as it is in the interests of justice that private hearings be held to protect the interests of mental health patients [20,25]. This is reflected in Rule 38 of the First-tier Tribunal Rules 2008, Schedule 5 paragraph 7 TCEA 2007, s.78 MHA 1983, and CPR Part 39.2;
- The decision whether to direct a public hearing is a matter for the First-tier Tribunal and the Upper Tribunal will only interfere to correct an error of law [40];
- The Upper Tribunal can remit the case to the First-tier Tribunal for reconsideration, or make its own decision [40];
- The First-tier Tribunal erred in law in failing to:
    - Direct attention to article 6 and the fact that open justice is a right [41-42];
    - Recognise, therefore, that the exceptions to open justice must be justified, not vice-versa [42];
    - Pay sufficient regard to the effect of the proceedings on the future mental health of the patient [43].
- The principal issues for a tribunal considering an application for an open hearing are:
    - Is it consistent with the subjective and informed wishes of the applicant (assuming he is competent to make an informed choice)?
    - Will it have an adverse effect on his mental health in the short or long term, taking account of the views of those treating him and any other expert views?
    - Are there any other special factors for or against a public hearing?
    - Can practical arrangements be made for an open hearing without disproportionate burden on the authority? [29,44]
- The decision of the First-tier Tribunal not to grant a public hearing should be set aside to allow a further hearing to consider:
    - The practicalities and potential cost of providing a public hearing (including by use of video facilities);
    - How often public hearings have been applied for in the last five years, the number of occasions on which they have in practice been held, and how they have been managed;

- Practices elsewhere in the United Kingdom, in Europe, and in other common law countries. [53]

Expert medical evidence, inequality of arms and article 6

In *MD v Nottinghamshire Health Care NHS Trust* [2010] UKUT 59 (AAC) the appellant complained about the lack of equality of arms with respect to independent experts' access to a patient and the clinicians of the hospital. The respondent contended that the practice with respect to experts should be the same as in the family and civil courts so that it was clear on what basis an independent expert had been instructed, and the information with which they had been provided.

The Upper Tribunal refused to provide any guidance, observing that the parties had a duty to co-operate and to further the overriding objective. Thus, the parties must make their experts available to comply with any directions given. Further, the right to a fair hearing under article 6 was facilitated by the medical examination by the independent medical member of the tribunal and the fact that the panel was an expert one. That ensured the necessary equality of arms and reduced the need for parties to have their own expert evidence, although they were entitled to obtain it.

Reconsideration of original decision

In *LC v Secretary of State for Justice & DHIC (CHL) & CUK* [2010] UKUT 319 (AAC) the First-tier Tribunal ordered a deferred conditional discharge and informed the appellate that it would reconvene to review the decision and its implementation. On review, the tribunal ordered that the appellate should not be discharged. The appellant submitted that there was no change in his condition or any fresh evidence subsequent to the original decision such that the tribunal could have lawfully reconsidered this decision. The Upper Tribunal held that:

- There was no evidence of any change in his condition or evidence relating to his behaviour or similar factors that could have by itself led to the decision being revisited;
- Despite this, the tribunal was entitled or obliged to see whether it was possible to put in place the necessary arrangements and to monitor progress towards this, and to change the decision once it was satisfied that this could not be done within a reasonable time [19].

Refusal of permission to appeal from a decision of the First-tier Tribunal

In *LC v Secretary of State for Justice & DHIC (CHL) & CUK* [2010] UKUT 319 (AAC), the refusal of permission to appeal contained ten bullet points of fact justifying the final decision of the tribunal, many of which had not been referred to in the reasons given for the actual decision. The Upper Tribunal held that it was inappropriate for a refusal of permission to appeal to be based on an expanded statement of facts [14].

First-tier Tribunal's power to review decisions

In *R (RB) v First-tier Tribunal (Review)* [2010] UKUT 160 (AAC), under Rule 49 of the First-tier Tribunal Rules, the Regional Tribunal Judge set aside the decision of the First-tier Tribunal and ordered a fresh hearing. The Regional Tribunal Judge considered the point of law in the case to be clear and therefore refused permission to appeal against his own decision. The Upper Tribunal, reversing the Regional Tribunal Judge's decision and granting permission to appeal, held that:

- The Regional Tribunal Judge had erroneously decided a contentious point of law by way of review under Rule 49;
- That use of Rule 49 was a usurpation of the Upper Tribunal's function;
- Such an approach could result in multiple views of the law from different First-tier Tribunals [24];
- Only where there is a clear error of law should the First-tier Tribunal use the power of review under Rule 49 to set aside a decision and remit it to a fresh First-tier Tribunal.

The effect of change of status under the MHA 1983 following a reference to the First-tier Tribunal

In *KF v Birmingham and Solihull Mental Health NHS Foundation Trust* [2010] UKUT 185 (AAC) the Upper Tribunal held that:

- Change of status does not affect the continuing validity of an extant and undetermined application or reference to the First-tier Tribunal [59];
- The application or reference will be decided based on the patient's status as the time of the actual hearing [59];
- If the First-tier Tribunal is asked to review a tribunal decision on a section 2 application and concludes that there exists an error of law, the First-tier Tribunal should set aside the

substantive decision and re-list the case for hearing with any existing section 3 application [30];

- Where a section 2 application is relisted with a section 3 application, the First-tier Tribunal can consent to a patient withdrawing the section 3 application so as to be able to make a later application within the first 6 months of detention under section 3 [38]. A number of factors will be relevant when exercising this discretion:
    - Whether the initial section 3 application was made without the benefit of legal advice;
    - Change in the patient's mental health over time [38].

Consideration of appeals where the patient's status has changed

In *KF v Birmingham and Solihull Mental Health NHS Foundation Trust* [2010] UKUT 185 (AAC) the Upper Tribunal held that:

- Where the patient has been released from detention before the appeal/application is decided, there will often be no purpose in continuing proceedings, even where the First-tier Tribunal decision may be suspect/probably unlawful [41];
- This creates a presumption against a review/permission to appeal in such circumstances [41];
- However, there may be cases where it is appropriate to for there to be further scrutiny after the patient has been released given that these cases concern the liberty of the subject. This may be the case where a future decision-maker may rely on the flawed decision or the legal principles involved are in need of clarification [41].

Non-disclosure in tribunal proceedings

In *RM v St Andrew's Healthcare* [2010] UKUT 119 (AAC) the Upper Tribunal considered Rule 14 of the First-tier Tribunal Rules, which allows the tribunal to prohibit disclosure of a document or information if it would be likely to cause serious harm to the person from whom it is withheld or some other person, or it is proportionate to refuse disclosure having regard to the interests of justice. The patient had been denied disclosure of his covert medication on the grounds that disclosure would make him suspicious and would severely impact on his physical and mental health. As result of this non-disclosure, his case before the tribunal was based on a false premise. The Upper Tribunal held that:

- Although appeals of case management decisions are to be discouraged to ensure that the tribunal process was not delayed or disrupted, a non-disclosure order is more susceptible to scrutiny than most other orders;
- Whilst full disclosure should usually be made, a patient's article 6 right to a fair hearing does not mean that the patient has an absolute or unqualified right to see every document;
- The key issue is whether or not the patient can effectively challenge his/her detention without knowing that he is being covertly medicated [26];
- The patient's lawyers could not obtain relevant instructions from the patient without disclosure to the patient and therefore could not participate effectively in the process [32]. This was despite the fact that the covert medication had been disclosed to the patient's legal team;
- Withholding this information would undermine the patient's right to a fair trial as required by article 6 because the patient would only be able to participate in a pretence of a process [32];
- The fact that disclosure will result in some immediate adverse effects upon the patient's condition does not justify non-disclosure;
- Non-disclosure orders should be framed in terms of 'information relating to…', not by reference to whole documents, in order to minimise the amount of withheld information [36].

Upper Tribunal treatment of First-tier Tribunal's reasoning

Where the Upper Tribunal re-makes a decision, it must exercise the judgement afresh, taking appropriate account of the way it was exercised by the First-tier tribunal and of the expertise of the panel, unless the exercise of the first-tier tribunal was defective. As a general rule the Upper Tribunal must treat the First Tier's reasoning with respect. The extent of the respect will reflect the context of the decision. As liberty is in issue, respect is only appropriate in a 'close call' or finely balanced case (*DL-H v Devon Partnership NHS Trust v Secretary of State* [2010] UKUT 102 (AAC) at [28]).

The role of the representative appointed by the tribunal

A representative appointed by the First Tier Tribunal under Rule 11 of the First-Tier Tribunal Rules must act on the client's valid instructions, where the client is able to give such instructions (*AA v Cheshire and Wirral Partnership NHS Trust* [2009] UKUT 195 (AAC)). Where the client lacks the

capacity to provide valid instructions, the representative must first attempt to ascertain the client's wishes and inform the tribunal of these wishes, and must then use his/her judgement to advance any arguments which he/she considers to be in the client's 'best interests'. The representative may argue that the client should remain in detention [18]. Irrespective of whether the client has capacity to give valid instructions, a solicitor is entitled, and may be required, to raise matters that appear to be in the patient's best interests and which the Tribunal might otherwise overlook. This applies particularly to points of law. It is not expected that a solicitor will fully argue a matter to which he/she has drawn the Tribunal's attention [20]. Once such a matter is raised the onus is on the Tribunal to ensure it is adequately considered; the Tribunal can determine whether oral argument from solicitors/counsel is required [23].

REASONS

Adequacy of First-tier Tribunal's reasons

In *LC v Secretary of State for Justice & DHIC (CHL) & CUK* [2010] UKUT 319 (AAC) the First-tier Tribunal ordered a deferred conditional discharge and informed the appellate that it would reconvene to review the decision and its implementation. On review, the tribunal ordered that the appellate should not be discharged. The reasoning of the First-tier Tribunal was held to be inadequate on the grounds that the tribunal had:

- Considered matters in its review decision that were not considered in the original decision;
- Identified risk factors in its review decision that were not identified in the original decision, with no explanation as to why these were now considered to be risk factors;
- Failed to explain why it was necessary to retain the support of the MHA 1983 'for the time being' [12,20].

In *DL-H v Devon Partnership NHS Trust v Secretary of State* [2010] UKUT 102 (AAC) the Upper Tribunal held that:

- The reasoning of the First-tier Tribunal is inadequate if it fails to deal with key issues [21];
- The reasons provided must at the very least explain what points the tribunal considered decisive;
- The First-tier Tribunal's reasons should be self-explanatory and should not require lengthy justification by way of submissions on appeal.

In *BB v South London & Maudesley NHS Trust and the Ministry of Justice* [2009] UKUT 157 (AAC), the Upper Tribunal held that:

- The First-tier Tribunal should provide reasons which enable the parties and any appellate tribunal to readily analyse the reasoning essential to the decision [6];
- The First-tier Tribunal should provide an explanation as to why it has accepted the evidence of one expert and rejected that of another [6];
- If the First-tier Tribunal disagreed with an independent expert it needed to state with clarity how and why it disagreed [18];
- It is insufficient for the tribunal to merely set out the competing opinions of different experts and state that it prefers the evidence of one over another – it is necessary to explain why it has found one more persuasive.

The case of *BB v South London & Maudesley NHS Trust and the Ministry of Justice* makes clear that the duty to give adequate reasons requires the tribunal to explain why it does not agree with the case that it has rejected in coming to its conclusion. The tribunal will have provided inadequate reasons for detention if it simply describes the disorder in question and the risks it involves, and then jumps to the conclusion that the criteria for detention are met. The tribunal must ask itself why the mental disorder and its risks cannot be managed otherwise than by detention.

Adequacy of First-tier Tribunals' reasons/Applications to remove restriction orders

The issue of the First-tier Tribunal's reasons was also considered in *RH v South London & Maudesley NHS Foundation Trust* [2010] UKUT 32 (AAC), in the context of an application for absolute discharge from a restriction order. The Upper Tribunal held that:

- The question of whether a restriction order should remain in force depends on an assessment of risk having regard to, among other things, the patient's prognosis as regards the nature and gravity of any mental disorder from which he might suffer in the future [22], following *R (SC) v (1) Mental Health Review Tribunal (2) Secretary of State for Health and Secretary of State for the Home Department (interested party)* [2005] EWHC 17 (Admin);
- When assessing risk, it is relevant for the tribunal to consider the gravity of the index offence as it may be relevant the risk and likelihood of reoffending and the degree of harm to the public if the patient did reoffend;
- The tribunal is required to consider possible long term result of lifting the restriction order;

- The tribunal is not bound to deduce from a period of stability under conditional discharge that the risk would continue to be low if the restriction was lifted entirely.

It is very difficult for a patient to challenge a restriction order, even following a long period of stability on conditional discharge, where the tribunal assesses a risk of future violence, however remote that risk. The First-tier Tribunal has a wide discretion on whether to lift a restriction order.

DEPRIVATION OF LIBERTY

The test for continued detention

There is no test of proportionality to be imported into the test for deciding whether it is necessary to continue a patient's detention (*DL-H v Devon Partnership NHS Trust v Secretary of State for Justice* [2010] UKUT 102 (AAC)).

Conditional discharge and deprivation of liberty

In *R (RB) v First-tier Tribunal (Review)* [2010] UKUT 160 (AAC), the Upper Tribunal addressed whether or not a conditional discharge granted to a restricted patient was unlawful because its effect was to deprive the patient of his liberty. The discharge granted by the tribunal required the patient to remain at a named care home and that only leave the grounds with supervision. The Upper Tribunal held that it was arguable on the facts of RB that the restrictions imposed did not amount to a deprivation of liberty because;

- The degree of restraint was not as great as in two previous cases where restrictions did amount to a deprivation of liberty (*R (G) v Mental Health Review Tribunal* [2004] EWHC 2193 (Admin) and *R (Secretary of State for the Home Department) v Mental Health Review Tribunal* [2004] EWHC 2194 (Admin));
- The patient consented to the conditions, displayed by his willingness to abide by conditions in circumstances where there is some element of practical choice [45];
- Where the designated place of discharge is not a hospital, restrictions that in a hospital context would constitute a deprivation of liberty may not necessarily be incompatible with conditional discharge.

The relationship between MHA 1983 detention and the deprivation of liberty safeguards

In GJ v The Foundation Trust and others [2009] EWHC 2972 (Fam), the relationship between detention under the MHA 1983 and deprivation of liberty under the DoLS was examined. Schedule 1A of the MCA 2007 provides that a person will be ineligible for the DoLS if already detained under the MHA 1983 or if 'within the scope' of the MHA 1983. A person will be 'within the scope' of the MHA 1983, and therefore ineligible for the DoLS, where he/she objects to being accommodated in a hospital for the purpose of being given medical treatment for mental disorder. Where this is the case, a person will be admittable under the MHA 1983 (subject to the MHA 1983 admissions criteria) and therefore will not be eligible for the DoLS. In effect, the MHA 1983 takes precedence and the decision-maker should first consider detention under the MHA 1983, on the assumption that the DoLS are not available. The DoLS should only be considered if the person cannot be admitted under the MHA 1983.

In this context, in the case of *GJ v The Foundation Trust and others* [2009] EWHC 2972 (Fam), the court held that:

- When considering whether a person is detainable under the MHA 1983, and whether they are therefore ineligible under the DoLS, the judge identified a 'but-for' approach that should be employed by the decision-maker.
- This test involved the following steps:
    - Ascertain what treatment the patient is receiving in hospital for physical illnesses unconnected to mental disorder;
    - Ascertain what treatment the patient is receiving in hospital for mental disorders and physical illnesses connected to mental disorders;
    - Decision-maker should ask, 'but for the need for physical treatment, would the patient need to be detained in circumstances that amount to deprivation of liberty? [87];
    - If the answer is no, the decision-maker should ask, 'is the only reason that the patient should be detained in hospital is his need for physical treatment?' [87];
    - If the answer is yes, the patient is not 'within the scope' of the MHA 1983.

Similar issues arose in *W Primary Care Trust v TB and others* [2009] EWHC 1737 (Fam). The court considered whether the patient was 'within the scope' of the MHA 1983, and therefore ineligible for the DoLS, and held that:

- Because the patient was held in a residential unit and not a hospital, the patient could not be a 'mental health patient' (under para 16 Schedule 1A MCA 2007), and therefore her objection to treatment did not make her eligible for the MHA 1983.
- Instead, deprivation of her liberty could only be authorised under the DoLS.

NEAREST RELATIVE

Consultation with nearest relative

In habeus corpus proceedings, judges in the Administrative Court will scrutinise closely the actions of an approved mental health profession who has failed to consult a nearest relative before making an application for detention under s.3 MHA 1983 (*R (V) v South London & Maudsley NHS Foundation Trust and Croydon LBC* [2010] EWHC 742 (Admin)). This rigorous scrutiny of the failure to contact the nearest relative will include the following elements:

- The court will look beyond a mere review of the documentation provided by the AMHP;
- A detailed examination of the credibility of the AHMP's account, including what he/she did and when he/she did it;
- The burden is on the AHMP and the detaining authority to demonstrate that the statutory safeguards have been fully complied with;
- The AHMP is expected to use the full 72 hour period available to him/her in making reasonable efforts to contact the nearest relative [36-37]. There will only be exceptions to this requirement where pressing considerations exist and mere delay for the AHMP does not constitute such a 'pressing consideration';
- An application made without contacting the nearest relative or using the full available time in attempting to do so will constitute an unlawful decision;
- Consultation with a nearest relative was a necessary safeguard, and it was impermissible for an AMHP to make assumptions as to the likely result of a consultation.

Previous cases have demonstrated a similarly rigorous scrutiny in habeus corpus proceedings (B*B v Cygnet Health Care and Lewisham LBC (interested party)* [2008] EWHC 1259 (Admin), *GD v (1) The Hospital Managers of the Edgware Community Hospital (2) Barnet LBC* [2008] EWHC 3572 (Admin)).

Displacement of nearest relative

In *AMHP v PD and DK, Reading County Court*, HHJ McIntyre, 21st January 2010, an AMHP made an urgent application for the displacement of the nearest relative (mother) of the applicant in *R v Secretary of State for the Home Department, ex parte DK* [2010] EWHC 82 (Admin) on the grounds that she had unreasonably objected to her son being placed under s.3 of the MHA. The court held that:

- The AHMP had been entitled to issue the proceedings but the application had been hopelessly misconceived and would be dismissed;
- DK had been detained without justification and there was no evidence that any treatment was now available and would be likely to be of benefit to him;
- The First Defendant's objection to the further detention of her son was reasonable. The AMHP had not discussed the medical issues with her, and she knew little of the reasons why the hospital wished to keep her son detained.

AVAILABILITY OF TREATMENT

The requirement that appropriate treatment is available was considered first in *MD v Nottinghamshire NHS Trust* [2010] UKUT 59 (AAC). The court held that:

- There is a fundamental distinction in our law between containment (which is a matter for prisons) and treatment (which is a matter for hospitals) [30];
- The definition of 'medical treatment' (s.145 MHA 1983) is inclusive of what may constitute medical treatment, rather than being exhaustive;
- The test for medical treatment is its purpose, which for mental disorder is 'to alleviate, or prevent a worsening of, the disorder or one or more of its symptoms or manifestations';
- Detention without the possibility of risk reduction is not containment because the definition of 'medical treatment for mental disorder' (s.145(4) MHA 1983) is so broad that it expressly envisages treatment which is designed solely to prevent deterioration of the patient's conditions, and which is therefore not aimed at reducing risk [34];
- If there was a prospect of the patient progressing beyond 'milieu' therapy (see definition at paragraph 6.16 of the MHA *Code of Practice*), there might come a point where treatment was no longer appropriate [35];
- The issue of whether it is appropriate for a patient to be detained is separate from the issue of whether appropriate treatment is available [37];

- The definitions of 'available' and 'appropriate', and the boundary between containment and treatment were not for the Upper Tribunal to set out [48];
- The appropriateness of treatment is ultimately a question of fact for the Tribunal [48].

This issue was reviewed again in *DL-H v Devon Partnership NHS Trust v Secretary of State* [2010] UKUT 102 (AAC). As in *MD v Nottinghamshire NHS Trust*, the Upper Tribunal did not attempt to provide its own definition of 'appropriate treatment' or set out a test to be applied when the availability of appropriate treatment is in issue. The Upper Tribunal held that:

- A failure or refusal by a patient to engage with treatment could properly lead a tribunal to conclude that appropriate treatment is not available;
- The danger where no appropriate treatment is available is that the patient may be contained for public safety rather than being detained for treatment because s.145 MHA 1983 defines 'medical treatment for mental disorder' so widely [32]
- In order to make an individualised assessment of the particular patient, the tribunal needs to ask itself specific questions:
    - What precisely is the treatment that can be provided?
    - What discernible benefit may it have on this patient?
    - Is that benefit related to the patient's mental disorder or to some unrelated problem?
    - Is the patient truly resistant to engagement? [33]

The issue of appropriate treatment and the use of pro formas was considered in *R (SP) v Secretary of State for Justice* [2010] EWHC 1124 (Admin) where one of the two medical practitioners used the incorrect, antiquated pro forma. The court held that the medical practitioner who had used the antiquated pro forma by inference clearly supported the view that there was appropriate treatment for P's mental disorder at the hospital. The medical evidence before the Secretary of State was therefore sufficient for him to draw the conclusion that there was appropriate treatment for P's mental disorder at the hospital to which he was transferred.

ADEQUACY OF EVIDENCE FOR MAKING A TRANSFER DIRECTION

The issue in *R (SP) v Secretary of State for Justice* [2010] EWHC 1124 (Admin) was whether the criteria for a lawful transfer under s.47 MHA 1983 had been satisfied following reports to the Secretary of State from at least two doctors. The Administrative Court held that:

- In making the decision under s.47, the Secretary of State was not restricted to the materials in the two written medical recommendations [22];
- The court should ask itself:
    - Did the decision-maker actually apply his/her mind to the statutory criteria?
    - Was the material before the decision-maker sufficient to sustain the eventual conclusion [22]? In determining this question, the court considered that the correct approach was to ask whether the reports from the two doctors provided a 'sound foundation' for the conclusion that appropriate medical treatment was available [23].
- Where evidence is before the decision-maker that treatment is available that is likely to alleviate or prevent deterioration and a bed is available which will enable the provision of that treatment, this will satisfy the 'sound foundation' requirement.

In *R v Secretary of State for the Home Department, ex parte DK* [2010] EWHC 82 (Admin), the applicant was transferred on the basis of three registered medical practitioners, although only two were required. Of the three written reports from doctors, none of them dealt explicitly on the pro formas with whether or not the applicant was treatable. In the transfer paperwork there was no explicit indication from two doctors that the applicant was treatable or that he would benefit from treatment. The court held that:

- The issue of treatability was of fundamental importance, particularly as the matter related to liberty;
- Medical reports would be manifestly unreliable if on their face they did not address the relevant statutory criteria;
- The necessary preconditions for transfer leading to detention must be met;
- The preconditions will not be met where none of the doctors explicitly consider the issue of treatability in their report.

ARTICLE 2

In *Savage v South Essex Partnership NHS Foundation Trust* [2010] EWHC 865 the court held that:

- The threshold for finding a real and immediate risk to life sufficient to trigger the duty under article 2 was high, and depended not only on what the relevant authority knew, but also what it ought to have known (*Van Colle v Chief Constable of Hertfordshire* [2009] 1 AC 225 applied);

- Whether the state had done all that reasonably could have been expected of it could only be answered in the light of all the circumstances of the case;
- The claimant only needs to show that a substantial chance of survival was lost as a result of the state's actions/omissions (*Osman v United Kingdom* (23452/94) [1999] 1 FLR 193 ECHR; *Opuz v Turkey* (33401/02) [2010] 50 EHRR 28 ECHR; *Van Colle v Chief Constable of Hertfordshire* applied).

These issues were further considered in *Richard Rabone (In his own right & as personal representative of the estate of Melanie Rabone (Deceased) v Gillian Rabone, and Pennine Care NHS Trust* [2010] EWCA Civ 698. The court held that:

- The operational obligation towards persons who were at real and immediate risk of death did not apply to all.
- Trusts did not have an article 2 obligation to voluntary patients, even where there was a real and immediate risk of death.
- There had to be an element in addition to the real and immediate risk such as police knowledge with respect to a criminal likely to commit murder or where an individual is detained by the state.

ELIGIBILITY FOR WELFARE BENEFITS OF CONVICTED PRISONERS SERVING PART OF THEIR SENTENCES IN PSYCHIATRIC HOSPITAL

In *R (RD) v Secretary of State for Work and Pensions* [2010] EWCA Civ 18, the Court of Appeal held:

- The relevant difference was between patients who were prisoners and those who were not;
- The secretary of state had decided as a matter of policy that while a prisoner was deprived of his liberty in consequence of a sentence of imprisonment, he should be treated for benefits purposes in exactly the same way wherever he happened to be detained;
- The question was not whether a patient was being punished at any given moment but whether he remained subject to the sentence of the court. It was therefore not relevant that a patient was in a psychiatric hospital because were it not for the mental disorder, the person concerned would be in prison serving the sentence imposed by the court;
- The distinction made between convicted prisoners serving part of their sentences in psychiatric hospital and non-prisoners in respect of eligibility for welfare benefits was justifiable.

AFTERCARE

The case of *R (M) v (1) Hammersmith & Fulham LBC (2) Sutton LBC and R (Hertfordshire CC) v Hammersmith & Fulham LBC* [2010] EWHC 562 (Admin) considered which local authority was the responsible aftercare authority under s.117 MHA 1983. The applicant had originally resided in Hammersmith & Fulham but had then been moved to a hostel in Sutton, before being admitted to Sutton Hospital. The court held that:

- The terms 'resident' and 'ordinarily resident' were to be given their ordinary English meaning, and there was little, if any, real difference between them;
- The deeming provision under s.24(5) NAA 1948 was not determinative of the identity of the responsible authority under s.117 MHA 1983;
- The correct approach was to consider how the patient would have responded to the question 'where do you now reside?' at the moment before he/she was admitted to hospital (following *R v Mental Health Review Tribunal ad others ex p Hall* [1999] 3 All ER 132).

In *R v Greenwich London Borough Council and Bromley London Borough Council, ex parte Michael Mwanza* (2010) [2010] EWHC 1462 (Admin) the court held that:

- A local authority's duty to provide aftercare was limited to the services necessary to meet a need arising from a person's mental disorder;
- Whilst a former patient might have financial problems or become homeless, thereby increasing the chance of their mental health deteriorating, that would not lead to a duty under s.117 to provide employment or housing;
- If housing was unavailable under s.117, s.21 NAA would assist former patients to obtain ordinary housing;
- The duty to provide accommodation under s.21 NAA was conditional upon a person being in need of care and attention which was 'not otherwise available to him';
- Where there were 'care and attention' needs, they could be met as a matter of law and in practice by the applicant's relatives.

PROVISION OF ACCOMMODATION UNDER NAA 1948

In *R (Nassery) v Brent LBC* [2010] EWHC 2326 (Admin) the court held that:

- The applicant's needs did not amount to a need for care and attention within the meaning of s.21(1)(a) NAA 1948 (*R (M) v Slough BC* [2008] 1 W.L.R. 1808 followed);
- Despite recorded mental health problems and previous instances of self-harm and suicide attempts, the applicant had not disclosed recent incidents of self-harm to the local authority experts nor to any other medical service, and there were no marks on him to indicate any further self-harm;
- Therefore, the local authority was entitled to conclude that the risk posed to the applicant of future self-harm did not justify a conclusion that he was a person in need of care and attention.

COMPENSATION FOR DEPRIVATION OF LIBERTY

In *R v Hackney London Borough Council and East London NHS Foundation Trust and the Secretary of State for Health, ex parte TTM* [2010] EWHC 1349 (Admin) the court held that:

- If an AMHP was negligent in believing there had been no objection to detention, or acted in bad faith, there should be liability to compensate for the loss of liberty which resulted. This was recognised by s.139 of the MHA 1983. Absent negligence or bad faith, an honest mistake does not permit compensation;
- With respect to the claim under s.7 HRA 1998, as Parliament required an element of fault on behalf of the professionals, although the detention was unlawful, habeas provided sufficient recompense via a swift right to challenge the detention and obtain discharge upon non-compliance with the MHA 1983.

COURT OF PROTECTION/FAMILY DIVISION

DEPRIVATION OF LIBERTY AND ARTICLE 5

In *G v E & A Local Authority & F* [2010] EWHC 621 (Fam), the CoP held that there is no rigid threshold for deprivation of liberty in cases under the inherent protective jurisdiction. The mental disorder will be of a kind that 'warrants compulsory confinement' if there is 'evidence establishing at least a prima facie case that the individual lacks capacity and that confinement of the nature proposed is appropriate'. The proposed deprivation of liberty is to be assessed as part of the best interests analysis. In the absence of either an authorisation under the DoLS procedure in Schedule A1 of the MCA or an order of the Court under s.16 and s.48, the removal of an individual will constitute a violation of article 5.

On appeal, in *G v E (by his Litigation Friend the Official Solicitor), A local authority, and F* [2010] EWCA Civ 822, the Court of Appeal held that:

- The safeguards against arbitrary detention contained in article 5 applied to persons lacking capacity, and the MCA provided a 'procedure prescribed by law' for depriving such persons of their liberty;
- There were no threshold conditions under article 5 which had to be satisfied before a best interests assessment under the DOLS provisions within the MCA could be carried out;
- Article 5 does not require psychiatric evidence as a threshold in order lawfully to deprive a person of their liberty;
- Provided there was credible expert evidence upon which the court could be satisfied that the individual concerned lacked capacity, that was sufficient for a lawful deprivation of liberty under article 5(1)(e);
- In a CoP case, detention under the MCA was not justified by medical practitioners, but by the Court in the best interests of the person who was the subject of a proposed detention;
- When determining the person's best interests the court was required to comply with article 5.

In *Re MIG and MEG* [2010] EWHC 785 (Fam), the CoP held that:

- The test for deprivation of liberty is whether the restrictions are of such a degree and intensity that the person is objectively deprived of their liberty;

- A deprivation of liberty requires a significant element of confinement and/or restriction (*Secretary of State of the Home Department v JJ and others* [2008] 1 AC 385 applied);
- It is unlikely that the objective requirement of confinement will be met where someone is living what for them is a normal life in a family home, and would not have lived a different life in any other setting;
- Relevant factors when determining whether a deprivation of liberty has taken place will include, *inter alia*:
    - Absence of restraint or medication;
    - No stated desire to leave and no evidence of unhappiness;
    - Absence of an alternative home;
    - Carers have not taken a decision that the individual cannot leave;
    - Lack of freedom and autonomy is caused by disability, not the imposition of restrictions;
    - The purpose of continuous supervision and control by carers is to meet care needs, not to restrain, which is only used to ensure safety;
    - Absence of a locked environment;
    - Absence of deprivation of social contacts except by court order;
    - No relatives actively object to the placements or care regime;
    - Absence of challenge to court with respect to the placements;
    - No deprivation of liberty authorisation sought.
- Any deprivation of liberty effected by an independent contractor will remain imputable to the state given that the courts and the local authority are central to the control exerted over the individual;
- A person can be deprived of their liberty in their own home.

In the same cases (*Re MIG and MEG* [2010] EWHC 785 (Fam)), the CoP went onto discuss article 5, holding that:

- For a violation of article 5 three elements have to be present (*JE v DE (by his litigation friend the Official Solicitor), Surrey County Council and EW* [2006] EWHC 3459 (Fam) considered):
    i. an objective element of confinement in a particular restricted space for a not negligible length of time;
    ii. a subjective element of lack of valid consent; and
    iii. that the deprivation of liberty be imputable to the state.

- Although it is impermissible to consider the intention or purpose behind a deprivation of liberty in considering whether, objectively, there is one (*Austin v Commissioner of Police of the Metropolis* [2009] UKHL 5 considered), it is permissible to look at the reasons why someone is living in a particularly placement.

NB The case of *Re MIG and MEG* [2010] EWHC 785 (Fam) has been appealed by the Official Solicitor and will be heard by the Court of Appeal in November 2010.

In the earlier case of *LBH v GP & MP; LBH v GP (Re MP)*, Family Division, 8th April 2010 [2009], the court held that the relevant test for deprivation of liberty was made up of an objective element (actual confinement) and a subjective element (whether there was a lack of valid consent to the deprivation of liberty). Where the individual lacked the capacity to give valid consent, his/her views had to be given considerable weight in any decision about residence.

'Best interests' and deprivation of liberty safeguards

In *DH NHS Foundation Trust v PS (By her Litigation Friend the Official Solicitor)* [2010] EWHC 1217 (Fam) the court held that it was in a patient's best interests to undergo surgery against her will. Following the operation, it would be necessary to detain the patient for the purposes of post-operative recovery. This detention was plainly in her best interests and so it was unnecessary to invoke the DoLS under Schedule A1 MHA 2005.

Use of force to effect a vulnerable/incapacitated adult's removal by police

In *LBH v GP & MP; LBH v GP (Re MP)*, Family Division, 8th April 2010 (2009), the court issued the following guidance, which was approved by the President of the Family Division and CoP:

- The applicant seeking authorisation to remove should, in advance of the hearing of the application, discuss with the police and if possible agree the way in which the removal will be effected, including consideration of the extent to which restraint and/or force was likely to be necessary, and the nature of any such restraint (e.g. the use of handcuffs);
- The applicant should ensure that this information is provided to the court and to the litigation friend (if one exists) prior to the court authorising removal;

- Where the Applicant and the Police disagree about the mechanics of the removal, the Court should give consideration to inviting/directing the Police to attend the hearing of the application so that it may determine how removal would best be effected.

ARTICLE 8

In *G v E & A Local Authority & F* [2010] EWHC 621 (Fam), the CoP held that in cases concerning incapacitated adults, families involved are entitled to substantive protection against any inappropriate interference with their family life and significant procedural safeguards. These include the requirement that families have been involved in the decision-making process, seen as a whole, to a degree sufficient to provide them with the requisite protection of their interests. If they have not, there will have been a failure to respect their family life and the interference resulting from the decision will not be capable of being regarded as 'necessary'.

In *G v E & A Local Authority & F*, a number of failures resulted in a breach of article 8. These included failing to:

- Undertake a balancing exercise which considered the impact of the disruption to family life and its effect on close relationships;
- Arrange any contact for several months between the incapacitated adult and his family;
- Ask family members their views and involve them in decisions.

CAPACITY

In *A local authority v Mrs. A (By the Official Solicitor as her Litigation Friend) and Mr. A* [2010] EWHC 1549 (Fam) the court considered the test for capacity in the context of a woman with severe learning disability who ceased to use contraception. The court held that:

- The test for capacity would require a woman to be able to understand and weigh up the immediate medical issues surrounding contraceptive treatment and an understanding of the advantages and disadvantages of each type of contraception;
- The test did not require a woman to be able to foresee the realities of parenthood, which would be fact-specific;
- It was not a relevant consideration whether any child would be likely to be removed from her care.

The concept of capacity was also considered in *D County Council v LS* [2010] EWHC 1544 (Fam), where the CoP held that:

- To have capacity, a person must not only understand the relevant information, but also have the ability to retain it and to weigh it in the balance. Thus, capacity to consent to sexual relations was both person and situation specific (*R v C (Gary Anthony)* [2009] 1 WLR 1786 applied);
- When considering capacity, the statutory scheme under the MCA should be applied in preference to the previous civil case law. Resort should only be had to the inherent jurisdiction where there was a lacuna in the statutory framework.

A later case also considered capacity under the MCA. In *RT v LT and A Local Authority* [2010] EWHC 1910 (Fam) the CoP held that:

- If an individual lacked any one of the capacities in s.3(1)(a)-(d) MCA, they would lack the requisite capacity in relation to that decision;
- Where an individual was incapable of using or weighing the information as part of the process of making a decision that person would lack capacity under the MCA;
- Reference to authority was otiose, and more generally (with an example exception being the issue of sexual relations), pre- and post-MCA case law on capacity was of little assistance. When deciding capacity, wherever possible, the plain words of the MCA should be applied in all cases.

HEARSAY EVIDENCE

In *London Borough of Enfield v SA, FA, and KA* [2010] EWHC 196 (Admin) the court held that:

- CoP proceedings fell within the wide definition of civil proceedings under s.11 of the Civil Evidence Act 1995, which meant that the strict rules of evidence would apply;
- Section 5 of the 1995 Act precluded factual hearsay evidence originally made by an incompetent person;
- Rule 95(d) of the Court of Protection Rules 2007 gave the Court wide powers, including the power to admit hearsay evidence which originated from a person who was not competent as a witness and which would otherwise be inadmissible under s.5 of the 1995 Act.

This point was also made in *G v E & A Local Authority & F* [2010] EWHC 621 (Fam).

MEDIA REPORTING

In *Independent News and Media Ltd and Others v A* [2010] EWCA Civ 343 the Court of Appeal held that Hearings in the Court of Protection would normally be in private but in certain circumstances the media could be authorised to report them. The Court of Appeal stated that before making an order permitting the presence of a non-party, a two-stage process was required. First, the court must decide whether there is good reason to make an order and second, if there is, the court must decide whether the balancing exercise justifies the making of the order. The correct approach to the judge's decision was identified in *Madingley v Associated Newspapers Ltd* [2008] QB 103, at [45].

MCKENZIE FRIENDS

In *HBCC v LG* [2010] EWHC 1527 (Fam) the court held that McKenzie Friends could provide support, take notes, give quiet advice on the law or procedure, issues or questions for cross-examination, and assist with case papers. McKenzie Friends cannot not act as the litigant's agent or advocate and are not permitted to become actively involved in the case, or to give oral evidence. A McKenzie Friend could be a person in the public arena and could hold strong views. However, their role required them to abide by the *Guidance on McKenzie Friends* [2008] 2 FLR 110 and accept the duty of confidentiality.

ABDUCTED VULNERABLE ADULTS

In *Re HM; PM v KH and HM (By the Official Solicitor) and the States of Guernsey* [2010] EWHC 870 (Fam) the court held that it had exactly the same powers to make orders concerning vulnerable adults lacking capacity as it did in relation to children, including the powers to locate the whereabouts of a missing or abducted person [36-39,41,45].

IMMIGRATION LAW

PRODECURE

In *Anam v Secretary of State for the Home Department* [2010] EWCA Civ 1140 (see below for facts) the Court of Appeal held that the court had to assume the role of primary decision-maker when considering the lawfulness of detention rather than simply reviewing the decision of the secretary of state along traditional public law lines [77].

DETENTION

Principles

In *Anam v Secretary of State for the Home Department* [2010] EWCA Civ 1140 the SSHD sought to deport a mentally ill foreign prisoner with multiple previous convictions. In doing so the SSHD had failed to apply Chapter 55.10 of the UKBA Enforcement Instructions and Guidance (EIG). The appellant sought judicial review of the decision to deport, but the Administrative Court held that although the secretary of state had unlawfully failed to consider the policy, the appellant's prolific offending and risk of absconding justified his continued detention. On appeal, the Court of Appeal held that:

- The legality of detention was to be determined according to whether the *Hardial Singh* principles had been observed;
- A failure to apply a relevant policy or breach of a policy would not, on its own, establish that the associated detention was unlawful [44,57];
- The detention of an individual was not rendered unlawful unless the unlawful practice, policy or omission was a material cause of the detention [46,52].

There exists no legal requirement that in order to maintain detention the SSHD has to be able to identify a finite time by which, or period within which, removal could reasonably be expected to be effected. If a finite time could be identified, it was likely to have an important effect on the balancing exercise, but there could be a realistic prospect of removal without it being possible to specify or predict the date by which removal could reasonably be expected to occur and without any certainty that removal would occur at all (*R (MH) v Secretary of State for the Home Department* [2010] EWCA Civ 1112).

In *R (WL (Congo)) v Secretary of State for the Home Department* [2010] EWCA Civ 111 the Court of Appeal held that:

- A national law which authorised detention with a view to deportation may be compatible with article 5 even if it imposed a presumption of detention pending deportation, subject to the reasonableness of the period during which detention was lawful (*Hardial Singh*);
- A presumption that those foreign prisoners who had committed serious crimes should be detained was not unlawful, provided it was not in effect a blanket policy and the presumption was applied to the individual facts of each case.

Unreasonable delay in ceasing to detain

In *R (I) v Secretary of State for the Home Department* [2010] EWCA Civ 727 an asylum seeker, his wife and their young children were detained for between 7 and 11 days following the commencement of judicial review proceedings challenging the refusal of their asylum and human rights claims. The Court of Appeal held that:

- The delay in releasing the claimants from detention was unreasonable and amounted to unlawful detention;
- The point at which detention becomes unlawful will be a question of fact to be decided on the evidence and facts in each case;
- In the instant case, the SSHD was entitled to 3 days following commencement of judicial review proceedings in order to consider her position.

Disclosure

In *R (I) v Secretary of State for the Home Department* [2010] EWCA Civ 727 the Court of Appeal also stated that:

- Once permission had been granted to apply for judicial review the SSHD was obliged to make proper disclosure;
- Where liberty was in issue the court should not be left to try and make findings as best it could on inadequate evidence;
- If proper disclosure were not made, the secretary of state could not complain if the court drew adverse inferences;
- If the court were left in that position, some explanation should be forthcoming as to why.

Failure to apply UKBA Enforcement Instructions and Guidance

In *R (T) v Secretary of State for the Home Department* [2010] EWHC 668 (Admin) the appellant suffered from PTSD and severe depression. The appellant challenged his detention pending deportation on the grounds that there were no exceptional circumstances justifying his detention. The court held that:

- The SSHD had failed properly to review the appellant's continued detention, having regard to his mental condition;
- Given that the medical evidence was that the appellant's PTSD was being exacerbated by open-ended detention, 'very exceptional circumstances' would be required to justify his detention, as stated at Chapter 55.10 of the UKBA Enforcement Instructions and Guidance (EIG);
- Such circumstances were not present: the appellant's risk of reoffending was no higher than medium and the risk of absconding was no higher than low to medium.

In *R (AA (Nigeria)) v Secretary of State for the Home Department* [2010] EWHC 2265 (Admin) the appellant suffered from PTSD and severe depression and had attempted suicide on five occasions while in detention. The appellant did not present a high risk of harm to the public and had complied with bail conditions. The court held that:

- The appellant's detention was unlawful and had not been justified. The SSHD had not applied Chapter 55.10 of the UKBA Enforcement Instructions and Guidance (EIG);
- The SSHD's attempt to justify detention by reference to the appellant's own well-being had to fail. The use of immigration detention to protect a person from themselves was an improper purpose;
- It was unnecessary to use immigration detention to protect an individual since there were alternative statutory schemes available under the MHA 1983.

There are numerous other examples of the failure by the SSHD to apply the correct guidance applicable to mentally ill detained persons in the immigration context, applying *Anam* above, e.g. *OM (Algeria) v Secretary of State for the Home Department* [2010] EWHC 65 (Admin).

However, the Court of Appeal made clear in *R (MC (Algeria)) v Secretary of State for the Home Department* [2010] EWCA Civ 347 that a failure to apply Chapter 55.10 of the UKBA Enforcement

Instructions and Guidance (EIG) did not make the continued immigration detention of a failed asylum seeker suffering from mental illness unlawful, given his high risk of absconding and reoffending and the real prospect of his imminent removal.

'Very exceptional circumstances' and mental health

'Very exceptional circumstances' is a high threshold. The presence of mental illness among failed asylum seekers cannot be regarded as very exceptional. Asylum seekers with no families and mental illness cannot be regarded as very exceptional. For a case to be 'very exceptional' the asylum seeker would have to be exceptional within the class of people with mental illness and with no family support (*KH (Afghanistan) v Secretary of State for Home Department* [2009] EWCA Civ 1354).

Unlawful detention under *Hardial Singh*

Applying the principles in *Hardial Singh*, a number of recent cases have identified factors which should be considered in determining whether the detention of an individual has become unlawful, including:

- The SSHD's officials recognise that, because of the difficulty in obtaining travel documentation, there is no realistic prospect of deportation in the foreseeable future (*R (Abdullah) v Secretary of State for the Home Department* [2010] EWHC 259 (Admin));
- The length of detention;
- Obstacles in the path of deportation;
- Diligence and effectiveness of steps taken towards deportation;
- Specific adverse effects on deportee or his family:
- Risk of absconding;
- Likelihood that country of origin would accept the deportee;
- A decision by the Asylum and Immigration Tribunal that continued detention would be lawful (all the above are drawn from (*R (Mohamed) v Secretary of State for the Home Department* [2010] EWHC 1244 (Admin)).

ARTICLE 8 AND MENTAL HEALTH

In *MJ (Angola) v Secretary of State for the Home Department* [2010] EWCA Civ 557, the Secretary of State sought to deport a man who had been given a conditional discharge following a hospital and

restriction order under ss.37 and 41 of the MHA 1983 on the grounds that deportation would be conducive to the public good. The appellant had a number of previous convictions and the Secretary of State stated that it was highly likely he would reoffend. The Court of Appeal held that:

- The SSHD was entitled to make a decision to deport the appellant even though he remained subject to hospital and restriction orders – the Immigration Act powers were not circumscribed by the MHA 1983;
- When exercising his/her powers under the Immigration Act the SSHD had a duty to have regard to a patient's mental disorder and any barriers to securing proper care and treatment in the destination country;
- A patient's Responsible Clinician would be involved in the assessment of the patient's fitness to be discharged and deported;
- The appellant's appeal was successful on article 8 grounds, namely that he had spent the entirety of his adolescence in the UK and most of his offending behaviour occurred when he was under 21 years of age (*Maslov v Austria* [2008] ECHR 546).

EXPERT EVIDENCE

Anxious scrutiny requires that any rejection of expert evidence suggesting mental health problems must be fully reasoned and explained. A blanket criticism that suggestions in expert reports of mental health rely too heavily on an individual's personal account is unlikely to be considered adequate reasoning. The tribunal must make clear findings on diagnosis and the impact of that diagnosis on the tribunal's assessment of credibility (*SM (Iran) v Secretary of State for the Home Department* [2010] EWCA Civ 371).

PRISON LAW

ARTICLE 5(4)

Delay in providing Parole Board hearing

Failure by the Parole Board to provide a hearing to determine the continued detention of a prisoner significantly after his earliest release date may give rise to a breach of article 5(4). The board is required to act with reasonable despatch and whether there has been a speedy determination is fact specific in any given case. Failure by the Board to demonstrate active case management and/or explain the delay are factors to take into account (*Gray v Secretary of State for Justice* [2010] EWHC 2 (Admin); *R (Pennington) v Parole Board* [2009] EWHC 2296 (Admin)). In *Gray v Secretary of State for Justice* the delay giving rise to a violation of article 5(4) was 4 months; in *Pennington* the period had been 3 months.

Challenge at 'reasonable' intervals

It is a matter for the court to determine whether the obligation imposed by article 5(4) that a detained person has to be able to challenge his detention at reasonable intervals has been satisfied (*Gray v Secretary of State for Justice*). This decision will be fact specific.

Criteria for listing overdue hearings

In the context of overdue hearings, the Parole Board is to consider, firstly, the strength of any compassionate circumstances and then, if it considers those circumstances to be sufficiently strong, it is to go on to consider whether they, together with the strength of the case for release, make the case sufficiently exceptional for it to be prioritised (*R (Hoole) v Parole Board* [2010] EWHC 186 (Admin)).

Remedies for breach of article 5(4)

A monetary award for such delay will not be appropriate where the prisoner would not have been released had the hearing taken place at the correct, earlier date (*Gray v Secretary of State for Justice*,

applying *Wells v Parole Board* [2010] 1 A.C. 553). Where damages are awarded, they should be calculated by reference to past decisions of the ECtHR, not to domestic case law (*R (Pennington) v Parole Board* [2010] EWHC 78 (Admin)).

'Compensation' under article 5(5) is not restricted to monetary compensation and courts should have regard to this when considering the appropriateness of remedies under Section 8 HRA 1998. An apology may be sufficient compensation where the breach of article 5(4) does not extend the period the prisoner would have to spend in custody and there is no evidence of further anxiety caused as a result (*R (Degainis) v Secretary of State for Justice* [2010] EWHC 137 (Admin)).

Oral hearings

Where article 5(4) is engaged and a dispute of fact has arisen, the Board should be predisposed to hold an oral hearing – justice and fairness require such a presumption (*R (Francis) v Parole Board* [2010] EWHC 1428 (Admin)).

Length of hearings

The onus is on the Parole Board to control the timetable of the hearing and ensure that, where necessary, all involved are made aware of any time constraints (*R (Briggs) v Parole Board* [2009] EWHC 2761 (Admin)).

Reasons

Full or appropriate reasons are necessary where the Parole Board chooses to reject the expert evidence available to it. It is insufficient to simply state the conclusion that has been reached (*O'Sullivan v Parole Board* [2009] EWHC 2370 (Admin)).

ARTICLE 8

Licence conditions

Conditions that require an individual to live at approved premises and impose geographical restrictions on movement are proportionate to the stated aim of reducing risk and protecting the

public (*R (Gunn) v Secretary of State for Justice and Nottinghamshire Multi Agency Public Protection Arrangements Board* [2009] EWHC 1812 (Admin)).

Prison conditions

Changes to the regime of a group of category A prisoners requiring them to remain in their unit at all times without contact with other prisoners did not violate article 8 by removing the prisoners from normal association. There was interference with the prisoners' article 8 rights but it was proportionate to the legitimate aim of preventing crime and disorder (*R (Bary and others) v Secretary of State for Justice and Governor of HMP Long Lartin* [2010] EWHC 587).

ARTICLE 3

Prison conditions

Changes to the regime of a group of category A prisoners requiring them to remain in their unit at all times without contact with other prisoners did not violate article 3 on the grounds that it had such an adverse impact on their mental health. While potentially detrimental, other causes also contributed to deterioration in the prisoners' mental health and the regime change could only be said to have had a mild effect (*R (Bary and others) v Secretary of State for Justice and Governor of HMP Long Lartin* [2010] EWHC 587).

ARTICLE 6

In *R (King) v Secretary of State* [2010] EWHC 2522 (Admin) the Divisional Court reached the following conclusions:

- Within the autonomous meaning afforded to civil rights by the European Court, there is a right of association that amounts to a civil right [106]. That is because the right to associate is a residual right that a prisoner retains subject to the lawful exercise of powers permitting the restriction of that right [106];
- The term 'contestation' (as that term is used by the European Court) should not be interpreted too technically [110]. As a consequence, although the purpose of the disciplinary proceedings was not to define a right, the punishment of cellular confinement did render the disciplinary proceedings a contestation over civil rights [111];

- There was no dispute that a prison governor lacked the independence needed to comply with article 6 [115];
- When looking at whether judicial review could ensure compliance with article 6, it was necessary to look at the nature and the subject of the proceedings together with the issues at stake [118]; and
- The governor who will determine the disciplinary proceedings will have no personal knowledge of the charge [120]. They are bound by Prison Service policy to reach an impartial outcome [120]. The maximum penalty that can be imposed is a relatively modest one [121]. The High Court will be able to assess matters such as the proportionality of the punishment [124]. The situation contrasted with that in *Tsfayo v United Kingdom* (2009) 48 EHRR 18 where the adjudicator was directly connected with one of the parties having a financial interest in the outcome of proceedings [125].

PUBLIC LAW

JURISDICTION

Jurisdiction: exclusion of judicial review

In *Wiles v Social Security Commissioner* [2010] EWCA Civ 258, the Secretary of State sought to argue that conventional judicial review principles ought not to apply to the decision of the Social Security Commissioner not to allow an appeal from a decision by the social security appeal tribunal. The Secretary of State submitted that judicial review ought not to apply because of the statutory scheme in place, relying on an analogy with the highly limited availability of judicial review of decisions of the county courts and Lands Tribunal (*R (Sivasubramaniam) v Wandsworth County Court* [2002] EWCA Civ 1738; *R (Sinclair Gardens Investments (Kensington) Ltd) v Lands Tribunal* [2005] EWCA Civ 1305).

The Court of Appeal held that:

- Judicial review was available on conventional public law grounds [43];
- The existence of a consistent line of authority in this area demonstrating that judicial review was available was significant [43];
- The examples relied on by the Secretary of State from other contexts did not apply in a different context [52];
- The social security appellate system is different from the county courts and the Lands Tribunal as it deals with significant legal issues with far-reaching consequences for the individual in the case and for wider legal developments [46].

Exclusion of judicial review was also considered in *R (Cart) v Upper Tribunal; R (U and C) v Special Immigration Appeals Commission* [2010] EWCA Civ 859. The court held that:

- Judicial review was not ousted.
- However, permission would only be granted (save for an exceptional case) where the Tribunal had acted without jurisdiction or denied a party procedural justice.

Cf *Eba v Advocate General for Scotland* 2010 SLT 1047 holding that full grounds for judicial review are available when challenges are brought to the Upper Tribunal.

Jurisdiction: using the 'floodgates' argument

In the context of the Secretary of State's suggestion that ordinary principles of judicial review be restricted in the area of social security, Sedley LJ stated in *Wiles v Social Security Commissioner* [2010] EWCA Civ 258 that:

> *"the time has long gone when the floodgates argument can properly be advanced on jurisdictional issues of public law. I know of no instance in which the courts have accepted jurisdiction…and been overwhelmed by a consequent deluge of litigation…"* [82-83].

Jurisdiction: contractual duty amenable to review

In the context of the management and allocation of social housing, in *R (McIntyre) v Gentoo Group Ltd* [2010] EWHC 5 (Admin) the court held that:

- A contractual duty taken in the exercise of a public function was in principle amenable to review;
- Rights exercised in line with the terms of contract can be invalid on public grounds, e.g. where a public body reaches a decision having failed to understand the scope of its private law obligations that decision will have been reached without regard to a relevant consideration [31-36];
- Decisions made pursuant to such contractual duties may engage article 8 [24];
- It was not necessary to demonstrate an additional public law element in such cases for the decision to be amenable to review [26].

Sufficient interest

In *R v Secretary of State for Justice, ex parte Davison* [2010] All ER (D) 258, The claimant, the Head of the PPMHG (Public Protection and Mental Health Group), brought proceedings seeking judicial review of a decision of the Secretary of State to absolutely discharge H's first order under s.42(2) of the MHA, and sought to quash it on the ground that it was an unlawful decision. If successful, that would have had the effect of reviving the s.41 order and protecting the public. The court held that:

- A decision-maker bringing a claim to quash his own decision should be given leave to apply for judicial review where (i) there was an arguable claim that the decision

was unlawful; (ii) there was no other discretionary bar to leave being granted; and (iii) there was no other obvious remedy available (*R v Monopolies and Mergers Commission, ex p Argyll Group plc* [1986] 2 All ER 257 applied);

- An official exercising his powers on behalf of or on the delegation of an authority, acted as an arm of that government;
- The Secretary of State was the decision-maker and had proper standing and interest in the matter to bring a claim to quash his own decision. The claim had merit and the availability of other remedies or courses of action was not necessarily fatal to the application

PROCEDURE

Delay in making an application for judicial review

An ECJ preliminary ruling in *Uniplex (UK) Ltd v NHS Business Services Authority* C-406/08 considered the Public Contracts Regulations 2006, which implement Directive 89/665/EEC. The ruling held that:

- The limitation period ran from the date on which the claimant knew, or ought to have known, of the alleged infringement of those provisions. Under CPR Part 54 time runs from the date of breach, with knowledge as a highly relevant factor in determining whether to extend time;
- The rule that a claim must be brought promptly and at least within 3 months was impermissible because it left the limitation period in the discretion of the court, and was therefore too uncertain. This view conflicts with case law from the ECtHR on the judicial review time limit (*Lam and others v UK* App No 41671/98; applied in *R (Hardy and others) v Pembrokeshire County Council and others* [2006] Env LR 28).

In the context of a decision on s.117 aftercare, a judicial review action brought over 2 years after the relevant decision was defeated on the basis that it was out of time. The review of the decision was not held to be of sufficient general public importance to justify the bringing of judicial review proceedings so long afterwards (*R v Sheffield City Council, ex parte Stojak*, Leeds Combined Court, 22nd December 2009).

Disclosure and cross-examination

In *R (Al-Sweady and others) v Secretary of State for Defence* [2009] EWHC 2387 (Admin), the court accepted that the usual procedure in judicial review is for there to be no oral evidence and for factual disputes to be resolved in favour of the defendant. However, the court held that:

- In disputed human rights cases the defendant would always succeed therefore it was necessary to allow cross-examination on hard-edged questions of fact;
- Disclosure would be needed that would allow such cross-examination;
- Public authorities must be aware of their duty to ensure proper disclosure;
- The Secretary of State should ensure that an adequate document retrieval system is in place.

Dispute on evidence in judicial review application

In *R (McVey and others) v Secretary of State for Health* [2010] EWHC 437, the court held that:

- Where there is a dispute of evidence in judicial review, in the absence of cross-examination, the defendant's evidence must be assumed to be correct [35];
- An exception arises where documents show that the defendant's evidence cannot be correct [35];
- Where a claimant wishes to challenge the defendant's evidence the claimant should apply to cross-examine [35].

GROUNDS OF REVIEW

Legality

In *HM Treasury v Ahmed and others* [2010] UKSC 2, the majority of the Supreme Court (Lord Brown dissenting) held that:

- A power conferred by parliament in general terms is not to be taken to authorise the doing of acts by the donee of the power which adversely affect the legal rights of the citizen or the basic principles on which the law of the UK is based unless the statute conferring the power makes it clear that such was the intention of

parliament (following *R v Secretary of State for the Home Department ex p Pierson* [1997] UKHL 37);

- Steps which interfere with such rights and principles must be subject to proper parliamentary scrutiny [186].

Irrationality

In *Houchin v Secretary of State for Justice* [2010] EWHC 454 (QB), the claimant sought judicial review of the decision to return him to closed conditions without notice following a reassessment of his risk, despite no change in circumstances. Proceedings were stayed to allow the Parole Board to make recommendations in the correct path. The defendant refused to accept these recommendations.

The court held that the decision was *Wednesbury* unreasonable because the decision wholly failed to have regard to the exceptional circumstances in which the matter was referred to the Parole Board and the detailed reasons given by the Parole Board. The defendant's consideration of the Parole Board's recommendations was cursory or non-existent [84].

The court refused to merely remit the decision back to the Secretary of State for reconsideration and instead constructed relief to secure transfer of the claimant back to open conditions [103].

Duty to give reasons

In *R (Savva) v Kensignton and Chelsea RLBC* [2010] EWHC 414 (Admin) the claimant challenged the decision not to increase her person budget under the Chronically Sick and Disabled Persons Act 1970 on the ground that the defendant had failed to give reasons. The statutory provisions did not contain a requirement to give reasons. The defendant submitted that the common law rule applied, such that there was no duty to give reasons.

The court held that there was a duty to give reasons because:

- There existed a clear policy to provide service users with information as part of the open process before drawing up an agreed care and support plan [38,41];

- It was significant that the claimant was a vulnerable person in need of social services and could not be assumed to be capable of looking after her own interests [43].

Delay as a ground of review

In *R (McVey and others) v Secretary of State for Health* [2010] EWHC 437, the court held that undue delay by a public authority will only give rise to a remedy in public law when no decision has been taken. Where the decision has been taken the remedy is unnecessary as it is only able to order that the decision be taken [58].

DAMAGES

In *Savage v South Essex Partnership NHS Foundation Trust* [2010] EWHC 865 (QB), a case concerning a violation of the state's positive obligation under article 2 following the suicide of a patient sectioned under s.3 MHA 1983 (applying *Van Colle v Chief Constable of Hertfordshire* (2009) 1 AC 225; *Osman v United Kingdom* (23452/94) (1999) 1 FLR 193 ECHR), the court held that the daughter of the deceased was entitled to bring the claim for damages as a 'victim' under the HRA 1998.

Similar issues were again considered in *Richard Rabone (In his own right and as personal representative of the estate of Melanie Rabone (Deceased) v Gillian Rabone, and Pennine Care NHS Trust* [2010] EWCA Civ 698. The court held that:

- The parents of the deceased were to be treated as 'victims' for the purposes of the HRA 1998 (*Savage v South Essex Partnership NHS Foundation Trust* [2010] EWHC 865 (QB) approved);
- Success in a claim, e.g. in tort, relating to matters which formed the basis of the ECHR claim might deprive someone of the status of victim under article 34 of the Convention;
- All the circumstances of the domestic litigation would have to be considered in order to determine whether effective redress had been obtained for the violation of the ECHR. Whether liability for the offending conduct had been accepted by the state or was found proved by the court, as well as the sufficiency of any compensation, were relevant matters.

CRIMINAL LAW

OFFENCES

Wilful neglect

In *R v Musedig Salisu, R v Enda Evans, R v Sushma Ojha* [2009] EWCA Crim 2702, two care home workers were charged with wilful neglect contrary to s.127(1)(a) MHA 1983 on the basis of evidence suggestive that a care plan had broken down and a patient had died unattended. The court held that for the offence of wilful neglect to be made out, what was required firstly was an act or a failure to act which amounted to neglect – in other words, a breach of duty – and secondly, evidence that the breach of duty was either intentional or reckless (*R v Sheppard* [1981] AC 394 (HL) and *R v G* [2004] 1 AC 1034, [2003] UKHL 50). On the evidence such conclusions were available to the jury.

SENTENCING

In *R v Osker (Donna)* [2010] EWCA Crim 955 the sentencing judge had imposed a hospital order under s.37 MHA 1983 and a restriction order under s.41 MHA 1983 despite no recommendation having been made for the s.41 order and where the medical expert had testified that such an order would have adverse consequences on the patient's treatment plan. The Court of Appeal held that:

- Applying *R v Hurst (Ian Douglas)* [2007] EWCA Crim 3436, there was an insufficient basis from which the sentencing judge could infer from the appellant's antecedents or the facts of the instant offence that a risk existed which would justify a s.41 order;
- However, the judge had not been precluded from making a restriction order merely because it was not thought necessary by any of the psychiatrists whose reports he had read, but on the instant facts a stand-alone s.37 order was the correct sentence.

In *R v Ledgard (Matthew)* [2010] EWCA Crim 1605, a suspended 12-month term of imprisonment for driving offences imposed on a bipolar disorder sufferer was replaced with a community order. The court stated that a custodial sentence was not justified, although it would not be right to say that a custodial sentence could never be justified in such a case. The appellant's use of a car when he was in a manic state was a cause for concern and could be a danger to the public, but the only effective way of protecting the public, and the appellant himself, was to try to ensure that he received treatment as soon as there were signs of a manic phase developing.

In *R v Walton (Andrew Richard)* [2010] EWCA Crim 2255 convictions for two counts of having a bladed article and two counts of failing to surrender to bail were quashed when fresh psychological evidence demonstrated that the offender had been unfit to plead due to his limited intellectual functioning. Findings that the offender suffered from a disability and that he did the acts charged were substituted for the convictions. The s.37 and s.41 orders would continue to be effective, but the appellant was granted have an absolute discharge in relation to the offences.

There have been a number of further cases involving mental health issues in the context of sentencing which have not been included.