ALBA/HRLA Event, 24/05/22

**When does Article 8 make a difference in community care / health cases?**

Case Note

*R (McDonald) v RB Kensington and Chelsea* [2011] UKSC 33

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 EHRR 241 , paras 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 The Netherlands (2003) 7 CCLR 400 , 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 (Application No 14462/03 (unreported) 4 January 2005 , p 13) and Molka v Poland (Application No 56550/00 (unreported) 11 April 2006 , p 17). Really one only has to consider the basic facts of those three cases to recognise the hopelessness of the article 8 argument in the present case…

19. There is, of course, a positive obligation under article 8 to respect a person's private life. But it cannot plausibly be argued that such respect was not afforded here. As already indicated, the respondents went to great lengths both to consult the appellant and Mr McLeish about the appellant's needs and the possible ways of meeting them and to try to reach agreement with her upon them. In doing so they sought to respect as far as possible her personal feelings and desires, at the same time taking account of her safety, her independence and their own responsibilities towards all their other clients. They respected the appellant's human dignity and autonomy, allowing her to choose the details of her care package within their overall assessment of her needs: for example, the particular hours of care attendance, whether to receive direct payments in order to employ her own care assistant, and the possibility of other options like extra care sheltered housing. These matters are all fully covered in paras 5, 42 and 66 of Rix LJ's judgment below. Like him, I too have the greatest sympathy for the appellant's misfortunes and a real understanding of her deep antipathy towards the notion of using incontinence pads. But I also share Rix LJ's view that the appellant cannot establish an interference here by the respondents with her article 8 rights. I add only that, even if such an interference were established, it would be clearly justified under article 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.

*McDonald v UK* (2015) 60 E.H.R.R. 1

﻿47. In Pretty the Court held that the very essence of the Convention was respect for human dignity and human freedom; indeed, it was under Article 8 that notions of the quality of life took on significance because, in an era of growing medical sophistication combined with longer life expectancies, many people were concerned that they should not be forced to linger on in old age or in states of advanced physical or mental decrepitude which conflicted with their strongly held ideas of self and personal identity ( Pretty v. the United Kingdom , cited above, § 65). Although the facts of the present case differ significantly from those of Pretty , insofar as the present applicant believed that the level of care offered by the local authority would have undignified and distressing consequences, she too was faced with the possibility of living in a manner which “conflicted with [her] strongly held ideas of self and personal identity”. In the Supreme Court, Baroness Hale, in her dissenting opinion, appeared to accept that considerations of human dignity were engaged when someone who could control her bodily functions was obliged to behave as if she could not (see paragraph 25 above). The Court agrees with this general assessment of the applicant's situation and it does not exclude that the particular measure complained of by the applicant in the present case was capable of having an impact on her enjoyment of her right to respect for private life as guaranteed under Article 8 § 1 of the Convention. It therefore finds that the contested measure reducing the level of her healthcare falls within the scope of Article 8.

(b) Positive obligation or interference with a right?

48. The Court has previously considered a number of earlier cases concerning funding for care and medical treatment as falling within the sphere of possible positive obligations because the applicants complained in substance not of action but of a lack of action by the respondent States (see, for example, Sentges v. the Netherlands and Pentiacova v. Moldova , both cited above). Those cases concerned the refusal by the State to provide funding for medical equipment and/or treatment. In the present case, however, the local authority had initially provided the applicant with a night-time carer, albeit, in the description of the Supreme Court, as a “concession” granted on a “temporary basis” (see paragraph 11 above). The applicant is therefore complaining not of a lack of action but rather of the decision of the local authority to reduce the care package that it had hitherto been making available to her. As such, a more appropriate comparator would be the case of Watts v. The United Kingdom (dec.), no. 53586/09 of 4 May 2010 , in which the Court was content to proceed on the basis that a decision to close the care home where the elderly applicant was resident and to transfer her to another home constituted an interference with her rights under Article 8 .

49. The Court is likewise prepared to approach the present case as one involving an interference with the applicant's right to respect for her private life, without entering into the question whether or not Article 8 § 1 imposes a positive obligation on the Contracting States to put in place a level of entitlement to care equivalent to that claimed by the applicant.

(c) Compliance with Article 8 § 2

50. Such an interference will be in breach of Article 8 of the Convention unless it can be justified under paragraph 2 of Article 8 as being “in accordance with the law”, pursuing one or more of the legitimate aims listed therein, and being “necessary in a democratic society” in order to achieve the aim or aims concerned.

(i) The period from 21 November 2008 to 4 November 2009

51. The Supreme Court (see paragraph 24 above), upholding the Court of Appeal (see paragraph 19 above), held that the local authority had been in breach of its statutory duty to provide care to the applicant in accordance with its own assessment of her need for care (namely a need for assistance to use a commode during the night) between 21 November 2008 (the date of the letter from the local authority withdrawing night-time care – see paragraph 12 above) and 4 November 2009 (the date of the authority's first care plan review – see paragraph 16 above). In light of this finding, the Government have accepted (see paragraph 43 above) that during this period any interference with the applicant's right to respect for her private life was not “in accordance with the law” as required by paragraph 2 of Article 8 .

52. The Court cannot but find that from 21 November 2008 to 4 November 2009 the interference with the applicant's right to respect for her private life was in breach of Article 8 of the Convention on this ground.

*R (Bernard) v Enfield LBC* [2002] EWHC 2282 (Admin)

31. In the absence of any evidence from the defendant as to the availability or non-availability of suitable properties, I conclude on the balance of probability that the claimants had to remain in manifestly unsuitable accommodation for some 20 months longer than would have been the case if the defendant had discharged its statutory duty towards them reasonably promptly. I acknowledge that the case under Art.3 is finely balanced. Deplorable though the conditions were in Shrubbery Road for those 20 months, I do not consider that they crossed the necessary threshold of severity so as to amount to a breach of the claimants' rights under Art.3.

Article 8

By contrast, the case under Article 8 is not finely balanced…

32. I accept the defendant's submission that not every breach of duty under s.21 of the 1948 Act will result in a breach of Art.8. Respect for private and family life does not require the state to provide every one of its citizens with a house: see the decision of Jackson J. in Morris v London Borough of Newham [2002] EWHC Admin 1262, paras 59–62 . However, those entitled to care under s.21 are a particularly vulnerable group. Positive measures have to be taken (by way of community care facilities) to enable them to enjoy, so far as possible, a normal private and family life. In Morris , Jackson J. was concerned with an unlawful failure to provide accommodation under Part VII of the Housing Act 1996, but the same approach is equally applicable to the duty to provide suitably adapted accommodation under the 1948 Act. Whether the breach of statutory duty has also resulted in an infringement of the claimants' Art.8 rights will depend upon all the circumstances of the case. Just what was the effect of the breach in practical terms on the claimants' family and private life?

33. Following the assessments in September 2000 the defendant was under an obligation not merely to refrain from unwarranted interference in the claimants' family life, but also to take positive steps, including the provision of suitably adapted accommodation, to enable the claimants and their children to lead as normal a family life as possible, bearing in mind the second claimant's severe disabilities. Suitably adapted accommodation would not merely have facilitated the normal incidents of family life; for example, the second claimant would have been able to move around her home to some extent and would have been able to play some part, together with the first claimant, in looking after their children. It would also have secured her “physical and psychological integrity”. She would no longer have been housebound, confined to a shower chair for most of the day, lacking privacy in the most undignified of circumstances, but would have been able to operate again as part of her family and as a person in her own right, rather than being a burden, wholly dependent upon the rest of her family. In short, it would have restored her dignity as a human being.

34. The Council's failure to act on the September 2000 assessments showed a singular lack of respect for the claimants' private and family life. It condemned the claimants to living conditions which made it virtually impossible for them to have any meaningful private or family life for the purposes of Art.8. Accordingly, I have no doubt that the defendant was not merely in breach of its statutory duty under the 1948 Act. Its failure to act on the September 2000 assessments over a period of 20 months was also incompatible with the claimants' rights under Art.8 of the Convention.

*Anufrijeva v Southwark LBC* [2003] EWCA Civ 1406

43. Neither Mr Sales nor Mr Swirsky, who appeared for the defendant in Anufrijeva challenged the decision of Sullivan J in Bernard's case, either in principle or on the facts. Our conclusion is that Sullivan J was correct to accept that article 8 is capable of imposing on a state a positive obligation to provide support. We find it hard to conceive, however, of a situation in which the predicament of an individual will be such that article 8 requires him to be provided with welfare support, where his predicament is not sufficiently severe to engage article 3. Article 8 may more readily be engaged where a family unit is involved. Where the welfare of children is at stake, article 8 may require the provision of welfare support in a manner which enables family life to continue. Thus, in R (J) v Enfield London Borough Council [2002] EWHC 735 (Admin) , where the claimant was homeless and faced separation from her child, it was common ground that, if this occurred, article 8(1) would be infringed. Family life was seriously inhibited by the hideous conditions prevailing in the claimants' home in Bernard and we consider that it was open to Sullivan J to find that article 8 was infringed on the facts of that case.

In what circumstances does maladministration constitute breach of article 8?...

*R (MIV) v Newham LBC* [2018] EWHC 3298 ( Admin)

92. It would, in my view, be inconsistent with the Court of Appeal's judgment in Anufrijeva to accept Mr Jacob's submission that a positive obligation to provide welfare support may arise pursuant to article 8 , if the individual is particularly vulnerable by reason of disability, even though the individual's predicament is not sufficiently severe to engage article 3 .

93. However, an individual's particular vulnerability by reason of their disability will be an important factor in considering whether their predicament was sufficiently severe to engage article 3 .

94. I also consider that there are circumstances where an individual's predicament may be sufficiently severe to engage article 3 , and to give rise to a positive obligation under article 8 , even though the court is not prepared to go so far as to say that article 3 has been breached. Bernard is an example of such a case. The deplorable conditions in which the second claimant lived for those 20 months could properly be said to have been so severe that article 3 was engaged, albeit Sullivan J held that there was no breach of that Convention right because the living conditions were not deliberately inflicted upon her by the defendant and there had been no intention to humiliate or debase her.

95. It also follows from Anufrijeva that the Court should not find an infringement of article 8 unless:

i) There has been a failure to provide the claimant with some form of benefit or advantage to which the claimant was entitled as a matter of public law (see [44]);

ii) There are grounds for criticising the failure to act, such that there is an element of culpability (see [45]); and

iii) The impact on private or family life of the public law failure is serious and has caused substantial prejudice to the claimant (see [45] and [46]).

[Comment – these paragraphs refer to the section of the judgment in Anufrijeva in which the Court of Appeal was discussing when maladministration can breach Article 8]

*R (Condliff) v North Staffordshire PCT* [2011] EWCA Civ 910

36. Private and family life are very broad concepts. There is no doubt that Mr Condliff's state of health is having a seriously adverse effect on his private and family life in the most basic ways, which without bariatric surgery will continue and is likely to become worse. However, harsh as this must seem to Mr Condliff, I do not see that the application of the IFR policy involves a lack of respect for Mr Condliff's private and family life. The policy of allocating scarce medical resources on a basis of the comparative assessment of clinical needs is intentionally non-discriminatory. The statutory function of the PCT is to use the limited resources provided to it for the purposes of the provision of health care, ie services in connection with the prevention, diagnosis and treatment of illness. To perform that function by allocating those resources strictly according to the PCT's assessment of medical need, ie an assessment based on clinical factors, is to do no more than to apply the resources for the purpose for which they are provided without giving preferential treatment to one patient over another on non-medical grounds.

*R (Tracey) v Cambridge University Hospitals NHS Foundation Trust* [2014] EWCA Civ 822

32. In my judgment, however, none of Mr Sachdeva's submissions justifies the conclusion that article 8 is not engaged by a decision to impose a DNACPR notice. A decision as to how to pass the closing days and moments of one's life and how one manages one's death touches in the most immediate and obvious way a patient's personal autonomy, integrity, dignity and quality of life. If there were any doubt as to that, it has been settled by the decision in Pretty.

…

42. The question whether article 8 is engaged should not be confused with the separate question of whether it is breached in the circumstances of any particular case. It is not necessary for the purpose of deciding the issues that arise in this case to decide the full reach of article 8 in relation to the withholding of medical treatment. Mr Havers confines himself to submitting that article 8 is engaged whenever a DNACPR order is in contemplation because, if an order is made, it is likely directly to affect how the patient will end his or her life. DNACPR decisions should be distinguished from other decisions to withhold life-saving treatment because they are taken in advance and therefore they present an opportunity for discussion with patients and their family members.

*R (B) v Chief Constable of Derbyshire Constabulary* [2011] EWHC 2362 (Admin)

48. So far as concerns the procedural aspect of Article 8 , long-established Strasbourg jurisprudence, articulated by the court as long ago as 1988 and constantly repeated ever since, requires that, where Article 8 is engaged, a public authority's decision-making process must be such as to secure that the views and interests of those who will be adversely affected by its decision are made known to and duly taken into account by the authority, and such as to enable them to exercise in due time any remedies available to them: see W v United Kingdom (1988) 10 EHRR 29 , paras [63]-[64]. The question, according to the court, is whether, having regard to the particular circumstances of the case and the serious nature of the decisions to be taken, those affected 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. The procedural protection must be “practical and effective”: see for example Turek v Slovakia (2006) 44 EHRR 861 , para [113].

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