Deprivation of liberty, death and Article 2

written by Meelis Magland | 22 June 2020

***R (on the application of Maguire) v HM Senior Coroner for Blackpool & Fylde* [2020] EWCA Civ 738**

The Court of Appeal has ruled that the state's investigative obligations under Article 2 ECHR do not arise where someone lacking capacity and deprived of their liberty dies of natural causes. The state's obligations under Article 2 had not been triggered in this case by the mere fact of vulnerability and that the deceased was deprived of her liberty in a care home pursuant to a standard authorisation under DOLS[1].

Facts

Jackie, who had Down's syndrome and learning disabilities, and so was unable to care for herself, had fallen ill at her care home in the days before her death. The care home provided only personal (not medical) care but, when Jackie's condition worsened, she had refused to go to hospital and had been permitted to remain at the home overnight. Jackie's condition worsened further and she was eventually taken to hospital where she died as a result of a perforated gastric ulcer, peritonitis and pneumonia. At her inquest her family criticised (inter alia) the lack of a protocol at the care home for admitting Jackie to hospital in spite of her refusal. However, the Coroner ruled at the close of evidence that Article 2 ECHR was not engaged, such that the "how" question for the jury to answer under section 5(2) of the Coroners & Justice Act 2009 had its narrower meaning of "by what means" instead of "by what means and in what circumstances".

The jury who were not permitted to consider any failings on the part of those caring for Jackie returned a conclusion of natural causes. Jackie's mother sought judicial review of the coroner's decision, when that application failed she appealed.

Was a duty owed? Positive duties under Article 2

The Court of Appeal considered the bases on which the procedural obligation under Article 2, which "requires the state to initiate an investigation into a death for which it may bear responsibility"[11], might have been engaged.

The European Court of Human Rights in Strasbourg has given two, relatively recent, decisions in medical cases concerning the state's substantive positive obligations to protect life, often sub-divided into "systemic" and "operational" duties.

Lopes de Sousa Fernandez v Portugal (2018) 66 EHRR 28 (see our earlier blog here) concerned the denial of access to medical treatment. A 40 year old man died after routine surgery to remove nasal polyps. His widow argued that his death was the result of a hospital-acquired infection and post-operative negligence. The Grand Chamber held that in cases involving alleged medical negligence, the state's positive obligations were regulatory, "including necessary measures to ensure implementation, including supervision and enforcement" (para. 189). Only in "very exceptional circumstances" will the state be responsible under the substantive limb of Article 2, as follows:

1. First: "a specific situation where an individual patient's life is knowingly put in danger by denial of access to life-saving emergency treatment. It does not extend to circumstances where a patient is considered to have received deficient, incorrect or delayed treatment" (para. 191,

emphasis added).
2. Second: "where a systemic or structural dysfunction in hospital services results in a patient being deprived of access to life-saving treatment and the authorities knew or ought to have known about the risk and failed to undertake the necessary measures to prevent the risk from materialising, thus putting the patients' lives, including the life of the particular patient concerned, in danger" (para. 192, emphasis added).

The Grand Chamber devised a test to determine whether "exceptional circumstances" were present in any given case, comprising four cumulative factors (emphasis added):

1. The acts or omissions of the health care providers "must go beyond mere error or medical negligence, in so far as the health care professionals, in breach of their professional obligations, deny a patient emergency medical treatment despite being fully aware that the person's life is at risk if that treatment is not given" (para. 194);
2. The dysfunction "must be objectively and genuinely identifiable as systemic or structural in order to be attributable to the state authorities, and must not merely comprise individual instances where something may have been dysfunctional in the sense of going wrong or functioning badly" (para. 195);
3. There must be "a link between the dysfunction complained of and the harm which the patient sustained" (para. 196); and
4. "The dysfunction in issue must have resulted from the failure of the state to meet its obligations to provide a regulatory framework …" (para. 196).

Fernandez de Oliveira v Portugal (2019) 69 EHRR 8 concerned a voluntary psychiatric patient at risk of suicide. The man had a history of mental illness and alcohol addiction, had previously attempted suicide, and had been a voluntary inpatient on 8 occasions. After a period of home leave he was taken by his mother to the emergency department of a local hospital having consumed a lot of alcohol. He returned to the psychiatric hospital under the same regime but absconded shortly afterwards and threw himself in front of a train.

The Grand Chamber observed that either of the two substantive positive obligations developed by the Strasbourg Court might be engaged, namely:

1. the systemic obligation, discussed in *Lopes de Sousa*: to put in place a regulatory framework compelling hospitals to adopt suitable measures to protect lives; and
2. the operational obligation, derived from *Osman v UK* (2000) 29 EHRR 245, to take preventative operational measures to protect an individual from another individual or himself, where the state authority knew or ought to have known of the existence of a "real and immediate" risk to life and failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.

The Grand Chamber confirmed that the operational duty to protect a psychiatric patient against suicide applied to voluntary (not just involuntary) patients, however the "specific measures required will depend on the particular circumstances of the case" and in the case of patients involuntarily hospitalised, the Court "may apply a stricter standard of scrutiny" (at [24]). On the facts of *Fernandez de Oliveira*, there had been no violation of Article 2: it had not been established that the authorities knew or ought to have known of an immediate risk to life, nor was there any deficiency in the regulatory framework.

A third case was brought to the attention of the Court of Appeal (by Claire Watson, of these Chambers, acting for United Response which managed the care home): *Dumpe v Latvia* (App. No. 71506/13). Although not a decision of the Grand Chamber (but the Fifth Section of the Strasbourg

Court), the case had considerable factual similarities with *Maguire* in that it concerned a man with Down's syndrome who had been in long-term state care prior to developing skin problems and becoming undernourished. He was eventually admitted to hospital but died of heart failure, having suffered from acute hepatitis B, organ dystrophy and extensive psoriasis. His mother complained of a violation of Article 2 on the basis that he had received inadequate medical care (in particular, that the staff at the care home and GP who had last seen him had not reacted to the deterioration in his condition).

Although the Strasbourg Court ultimately concluded that the applicant in *Dumpe* was yet to exhaust her domestic remedies, the Court of Appeal in *Maguire* found its reasoning instructive. The Strasbourg Court had distinguished the facts of *Dumpe* from cases "where the domestic authorities had been aware of appalling conditions that later led to the deaths of young people placed in social care homes or hospitals and had unreasonably put the lives of those people in danger", such as *Nencheva v Bulgaria* (App. No 48606/06) and *Câmpeanu v Romania* [GC] (App. No. 47848/08). By contrast, the complaint in *Dumpe* related to medical negligence. The applicant had not argued that the state had failed to put in place an effective regulatory framework; and the Strasbourg Court did not consider the case fell within the "very exceptional" circumstances outlined in *Lopes de Sousa*.

As for domestic caselaw, the Court of Appeal in *Maguire* considered:

- *Rabone v Pennine Health Care NHS Trust* [2012] 2 AC 72, in which the Supreme Court held that an operational duty had been owed to a voluntary psychiatric patient. Lord Dyson (at paras. 21 et seq) sought to identify the "essential features" of cases where the operational duty had been recognised: where the state had assumed responsibility, e.g. towards prisoners and psychiatric patients; cases of "sufficient vulnerability", such as *Z v UK* (2001) 34 EHRR 79 concerning a known risk of neglect and abuse to children ignored for years by social services; and cases of "exceptional risk", such as *Stoyanovi v Bulgaria* (App. No. 42980/04) in which a soldier died in a parachute accident and *Watts v UK* (2010) 51 EHRR SE 66 (moving elderly people from one home to another).
- *R (Tyrell) v HM Coroner for County Durham & Darlington* [2016] EWHC 1892 (Admin) in which the Divisional Court held that a Coroner had been right not to conduct an Article 2 inquest into the death of a prisoner from cancer. The mere fact that the deceased had been a prisoner had not been enough to engage Article 2, in the absence of any suggested breach of the operational or systemic duties.

Application to Jackie's case

Jackie had been deprived of her liberty for the purposes of Article 5 ECHR, pursuant to a "standard authorisation" under the DoLS scheme of the MCA 2005, Schedule A1.

The Court of Appeal observed (at [68]) that there is a large, and increasing, number of vulnerable adults in a parallel situation to Jackie, by virtue of old age or mental illness, with large numbers living in care homes and subject to DoLS.

The "theme" said to have emerged from the Strasbourg authorities, and Tyrell, was that the Article 2 operational obligation is one of "state responsibility". This supported the conclusion that the procedural obligation does not apply to deaths in custody arising from natural causes. The Strasbourg Court in *Dumpe* had decided that the facts in that case – which were not dissimilar to Jackie's – supported the conclusion that it was a medical case in the sense discussed in *Lopes de Sousa*. The procedural obligation in a medical case is not to conduct a *Middleton*-type investigation (where there is a credible suggestion that the state has breached its substantive obligations under Article 2) but simply to set up an effective judicial system to determine liability (at [75]).

Conclusions

The Court of Appeal ultimately concluded that Jackie's undeniable vulnerability, and the fact that she was subject to a DoLS authorisation, were not enough – in and of themselves – to give rise to a duty to investigate her death under Article 2.

Whilst an operational duty might be owed to vulnerable people under the care of the state in certain circumstances (as in *Nencheva*, *Câmpeanu et seq*), that did not mean that "for all purposes" an operational duty is owed to those in a care home: [98]. *Dumpe* indicated that an operational duty would not be owed to those in such a position seeking "ordinary medical treatment" [99]. Jackie's case was not analogous to that of a psychiatric patient, in hospital to be protected against the risk of suicide: [101]. She was not in the care home to receive medical treatment, but received this from the NHS just as she would have done had she been living in the community [101].

Nor was there any reason to believe the "very exceptional" circumstances, which can give rise to a breach of the operational duty in medical cases, applied (per *Lopes de Sousa*). The criticisms in Jackie's case (that the medics and care home had failed to get her to hospital sooner, and that a protocol should have been in place) did not come close to satisfying the first exception (that the patient's life was knowingly put in danger by denial of access to life-saving treatment) nor did the case reveal any "systemic or structural dysfunction" in medical services resulting in Jackie being denied life-saving treatment: [105-106].

The Coroner had therefore been right to conclude that there was no basis for believing that Jackie's death had been the result of a breach of the operational duty, and the procedural obligation under Article 2 did not arise: [100].

The case confirms that where a person under a DoLS dies in circumstances of alleged medical negligence, this will not be sufficient, without more, to require an Article 2 inquest.

Footnotes

[1] The Deprivation of Liberty Safeguards under scheduler A1 of the Mental Capacity Act 2005.