

## Systemic failure or medical negligence?

Lord Burnett handed down Judgement at the RCJ on 10 June 2020 of the following case which is the latest in a line of authorities to explore the engagement of Article 2 at Inquests concerning medical care/treatment, reaffirming the point that such cases will not ordinarily trigger the need for an Article 2 inquest.

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Maguire, R (on the application of) v HM Senior Coroner for Blackpool & Fylde & Ors [2020] EWCA Civ 738 (10 June 2020).

### Facts

J was a vulnerable adult with complex needs and disabilities. She had been living in a residential care home since 1993 and was deprived of her liberty by way of a standard authorisation.

In late February 2017, J became increasingly ill and an ambulance was called. Paramedics advised conveyance to hospital but J refused to attend hospital. An OOHs GP was called who advised that if J would not co-operate she should stay in the care home and be monitored overnight. The following morning, J collapsed and was taken to hospital. She was found severely dehydrated, with kidney failure and metabolic acidosis. J sadly died on 22 February 2017.

### Coroner's Inquest

At inquest, J's family were critical of the care provided and stated they felt there should have been a protocol in place for conveying J to hospital even if she refused. At the end of the inquest evidence, HM Coroner determined that Article 2 was not engaged.

### Judicial Review Proceedings

#### Divisional Court Judgment

HM Coroner's decision was challenged but the Divisional court rejected the challenge by upholding HM Coroner's decision that he had correctly used the guidance in R. (Parkinson) v HM Senior Coroner for Kent [2018] EWHC 1501 (Admin) [2018] 4 W.L.R. 106 and that Article 2 was not engaged.

#### Court of Appeal

The Divisional Court judgment was appealed on the basis that:

- The operational duty under Article 2 applied
- Even if the Parkinson case was followed, HM Coroner should have regarded the absence of a protocol for conveyance to hospital as a systemic failure engaging Article 2
- The lower court did not take into account the wider context of premature deaths in those with learning disabilities

The Court of Appeal dismissed the appeal and found:

- The operational duty was not automatically owed to vulnerable individuals living in care homes; it must be considered on a case by case basis
- For the operational duty to be engaged there must be state responsibility rather than an individual judgement
- An individual judgement at a place that the state knew to be ‘appalling’ and potentially life threatening could trigger the operational duty (Nancheva v Bulgaria (App No 48606/06)) – this could extend to the state not acting on shortcomings identified through regulatory inspections.
- J’s circumstances were not analogous with a psychiatric patient who was in hospital to guard against suicide (i.e. a Rabone-style patient). J was in the care home as she could not look after herself rather than for medical treatment (which if needed was sought in the usual way)
- Her position would not have been different had she been able to continue to live independently or be cared for by her family with a package of care (and subject to a court approved deprivation of liberty)
- There was nothing before the court that suggested widespread difficulty with conveying individuals to hospital when it is in their interests to do so and as such the criticism regarding the absence of a protocol for hospital conveyance was individual to J rather than systemic
- That the Learning Disabilities Review provided by the appellant did not add weight to the suggestion the operational duty was owed
- The case did not fall into the four cumulative Lopes de Sousa Fernandes v Portugal (2018) 66 EHRR 28 exceptions which, if present, may engage the operational duty even in a ‘medical case’. These are:
  - That the actions went beyond ‘mere negligence’
  - The dysfunction complained of was systemic rather than individual
  - The dysfunction must be linked to the harm suffered
  - The dysfunction must have resulted from the failure of the state to meet its obligations to provide a regulatory framework

## Conclusion

The Court of Appeal judgment maintains the position that the engagement of the operational duty should occur rarely in ‘medical inquests’ and that a high threshold is set in that regard. It also clearly states that this threshold must be high for those residing in care homes who may receive potentially negligent medical treatment.

It also reaffirms that the state must effect a regulatory framework for the protection of patient’s lives and take preventative measures in the face of a real and immediate risk to life. The reference to ‘regulatory inspections’ poses the potential for there to be greater focus on CQC inspections at inquests especially in respect of Article 2 arguments.

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