Prisons – self-determination – private life – provision of food – duty to protect life

R. (on the application of JJ) v Spectrum Community Health CIC [2022] EWCA 2440 (Admin)

Administrative Court

The facts and the decision of the High Court

The claimant, a prisoner, was quadriplegic and required 24-hour care, including the need to be fed by a team employed by the defendant. It was accepted that eating any food posed a risk of death or serious injury by choking or aspiration, but that some foods posed a more significant risk than others. On the advice of a doctor and speech language therapist, the defendant refused to feed the prisoner food deemed to pose a more elevated risk, and the prisoner, who was an adult with full capacity, went on hunger strike stating that he wished to eat the food of his choice. The court was required to determine whether the defendant's refusal to feed a prisoner the food he wished to eat was unlawful, in circumstances where certain foods posed a risk of death or serious injury.

Giving judgment for the defendant, the High Court held that it was not unlawful for the defendant to refuse a prisoner who required feeding certain foods which it believed were contra-indicated and adverse to his clinical needs because they posed an increased risk of death or serious injury by choking or aspiration. The High Court held that although the defendant was interfering with his right to private life under Article 8 of the European Convention, the interference was lawful, proportionate and justified under Article 8(2) for the protection of health and the rights and freedoms of others.

With respect to the prisoner's autonomy, the High Court held that it was not unlawful for the defendant to refuse the prisoner certain foods as it was not fanciful to postulate that the defendant might be subject to criminal and/or regulatory action if the prisoner were to suffer serious or fatal injury as a consequence of being fed foods that posed a higher risk; the prospect of a prosecution for manslaughter being not negligible. The question of whether the prisoner validly consented to eating such food was an evidential question that would have to be resolved by a jury, and the reviewing court would not declare that it was lawful for the defendant to comply with the prisoner's wishes regarding diet. Thus, it would be wrong to make a declaration which purported to decide an issue of criminal liability for future events, the circumstances of which could not be known. So too, the Court found that he defendant's assessment of the risk to the prisoner was not irrational; it could not rely on empirical evidence about the prisoner's current ability to take food because he had eaten almost nothing, having been on hunger strike, and it acted rationally in relying on the opinion of suitably qualified experts to assess the current risk (paras 58-61).

With respect to the claim under Article 8 of the Convention, the Court found that as the prisoner was so grievously disabled, his autonomy was extremely limited and that his autonomy about what to eat formed a significant proportion of his capability as a person. Although his right to choose from the food available at prison engaged his right to private life and self-determination, the defendant's interference with that right was lawful, proportionate and justified for the protection of health, and for the protection of the rights and freedoms of others, namely the defendant himself and the defendant’s staff. Finally, with respect to the prisoner’s claim under the Equality Act 2010, the court found that the

defendant's practice of providing the prisoner with a special diet put him at a substantial disadvantage in comparison with persons who were not disabled, thus engaging s.20(3) of the Act. However, the prisoner had not persuaded the court that the defendant had failed to make reasonable adjustments to avoid any such disadvantage.

In conclusion, therefore, the court found that the claimant's medical condition had rendered him reliant upon others to feed him. Consequently, even though the claimant has capacity to make choices – even unwise ones – about what he wishes to eat, the defendant is not required to execute those wishes. That is because it has reasonably formed the view that giving the claimant those foods is adverse to his clinical needs and because it is possible that, were the defendant to comply with the claimant's requests, the claimant might suffer serious or even fatal consequences and the defendant and its employees might be open to prosecution or regulatory action.

Commentary

This type of case poses a difficult dilemma for prison and other authorities, and indeed the courts: how can we balance the right of prisoners to exercise their right to self-determination (including their right to take or risk their own life) with the authority's duty to protect and preserve the lives of those in their charge. This latter duty is owed both under common law and authorities also owe a positive duty under Article 2 of the European Convention on Human Rights to ensure that they take reasonable measures to safeguard every inmate's right to life. In addition, the authorities may face criminal liability for endangering an inmate's life.

Certainly, liability can be engaged under Article 2 where the prisoner takes his own life (*Keenan* v *United Kingdom* (2001) 33 EHRR 38; *Orange v Chief Constable of West Yorkshire* [2001] 3 WLR 736.). That is because the authorities owe a duty of care to prevent a suicide that is foreseeable and where the prisoner is a clear suicide risk. The authorities are not liable for every suicide in their jurisdiction, as there has to be a breach of duty in cases where there is a clear and immediate risk of suicide. Thus, in *Trubnikov v Russia* (Judgment of the European Court 6 July 2005), there had been no violation of article 2 when a prisoner with a record of suicide attempts had committed suicide in his cell. The Court held that despite his history, and the fact that the authorities were partly responsible for the fact that he had access to alcohol and should have known that his state posed risks to him whilst he was serving a disciplinary punishment in segregation, he had not *at the time* posed an immediate risk of suicide so as to engage the liability of the state.

The question for the court in the present case, however, is of a different order: can and should the authorities respect the prisoner's right of self-determination when to do so would increase the likelihood of the prisoner's death, for which the authorities may then be liable under its duty to protect life? In other words, can the authorities refuse a prisoner's wishes on what treatment they want, or not want to receive, when that request conflicts with a possible duty to preserve the prisoner's life?

That question has been considered in the context of force-feeding of prisoners and whether that would be in breach of Articles 3 and 8 of the Convention, guaranteeing, respectively, freedom from inhuman and degrading treatment and the right to respect for private life. In *X* v *FRG* (1985) 7 EHRR 152 the European Commission of Human Rights held that force-feeding involves a degrading element which in certain circumstances is in violation of Article 3, and in *Herczegfalvy* v *Austria*, ((1992) 15 EHRR 437), the European Court held that the medical necessity for such treatment must be convincingly shown to exist. However,

the practice does not appear to be in breach of article 3 *per se*. For example, in *Naumenko v Ukraine*, (Decision of the European Court 10 February 2004), it was held that there had been no violation of article 3 when the applicant had been subjected to therapeutic therapy. On the facts there was insufficient evidence that the applicant had not consented to the treatment, but in any case, article 3 did not prohibit such treatment in appropriate cases and here the applicant was suffering from serious mental disorders.

The issue was considered by the UK domestic courts in *R* v *Collins, ex parte Brady,* [2000] Lloyd's Rep Med 355 a case decided before the Human Rights Act 1998 came into operation, and one concerned with persons detained under mental health legislation. The prisoner had decided to starve himself to death and had been force-fed by the authorities when his health deteriorated. It was held that force-feeding was 'medical treatment' given to him for the mental disorder from which he is suffering as prescribed by s.63 of the Mental Health Act 1983. It was, thus, lawful provided there was sufficient evidence that the applicant's desire to starve himself was connected with his mental illness. The court accepted expert medical opinion that although the applicant had made a conscious decision to starve himself, his decision was a symptom of his mental illness. Accordingly, the authorities were entitled to treat that illness and to force-feed the applicant.

Notwithstanding the decision in *Brady*, the force-feeding, of even a mental health prisoner without very strong medical or other reasons will be contrary to Article 3 of the Convention (*Nevmerzhitsky v Ukraine*, decision of the European Court 5 April 2005, where the European Court made a finding of torture). This matter was considered in the context of compulsory treatment of mental health detainees by the Court of Appeal in *R (Wilkinson)* v *Broadmoor Hospital and Others* [2001] 1 WLR 419. The applicant had sought to challenge his forcible subjection to anti-psychotic medication on the grounds that such treatment was contrary to Articles 2, 3, 8 and 14 of the European Convention. The Court of Appeal held that it was for the court to consider whether the applicant was capable of consenting to the treatment, and whether the treatment would constitute a violation of the applicant's right to life, private life, and the right not to be subjected to inhuman or degrading treatment. Thus, the courts would need to be satisfied that there were extreme and urgent reasons justifying any such compulsory treatment. The Court of Appeal also opined that if the applicant *did* have the capacity to consent, it would be difficult to suppose that he should be forced to accept it; the impact on his rights to autonomy and bodily inviolability were immense and the prospective benefits of the treatment appeared speculative.

Although the courts condoned such a practice in the old case of *Leigh* v *Gladstone*, ((1909) 26 TLR 139) concerning the force feeding of protesting suffragettes, modern authority suggests that force-feeding would be unlawful provided the prisoner remained in control of his mental faculties. Thus, in *Secretary of State for the Home Department* v *Robb (*[1995] 1 All ER 677), the Court of Appeal made a declaration that the prison authorities had no duty to interfere with a prisoner's decision to go on hunger strike and stated that despite incarceration prisoners retained the basic right of self-determination. This position was confirmed in *Re W (Adult: Refusal of Treatment) (The Independent* 17 June 2002), where it was held that a prisoner with mental capacity had the right to refuse treatment to a self-inflicted condition that was potentially life threatening.

The problem in the present case, of course, was not that the prisoner objected to feeding in itself, but rather that he wanted the authorities to feed him a particular diet, when to do so would, because of his medical condition, increase the likelihood of his dying. That action

would, therefore, engage their potential liability under Article 2 of the Convention, and, more specifically open them up to a charge of criminal manslaughter.

In this case, the judge noted that the effect of the declarations, if granted, would be to absolve the defendant's practitioners from exercising clinical judgment in relation to what the claimant eats; the intended effect being to relieve the defendant's staff from potential future criminal liability in connection with the feeding of the claimant. In his judgment, therefore, it would be quite improper of the court to seek to tie the hands of a future criminal court by making a declaration that purports to have effect notwithstanding what circumstances might surround the harm that comes to the claimant. The judge also stressed that in the particular circumstances of the case the defendant had an obligation at common law to nourish the claimant in any event, and to keep the claimant alive (para 67, citing *R (Burke) v General Medical Council* [2005] EWCA Civ 1003*,* at 35).

Whilst the defendant accepts an obligation to nourish and to take reasonable steps to keep the claimant alive, this does not confer upon the claimant the right to demand or insist upon the provision of certain types of treatment in fulfilment of the defendant's duty towards him. Autonomy and the right to self-determination do not entitle the defendant to insist on receiving a particular medical treatment regardless of the nature of the treatment (*R (Burke) v General Medical Council* [2005] EWCA Civ 1003*,* at 31). The source of the duty of care towards the claimant in this case does not exist simply on the basis that the claimant demands (a certain type of) nourishment, with fulfilment of such a duty only being satisfied through acquiescing to those demands. The common law duty described above arises from the circumstances of the claimant being in the defendant's care and is satisfied through taking reasonable steps to keep the patient alive and provide treatment so long as it prolongs the patient's life (*Burke,* at 40).

It is for the clinical team in charge of the claimant's care, in exercise of their judgement, to determine what treatment options are clinically indicated to discharge their duty towards him. Those options are then offered to the claimant along with an explanation of all risks that the patient, or a reasonable person in the patient's position is likely to attach significance to (*Montgomery v Lanarkshire Health Board* [2015] UKSC 11). In the case of a competent patient such as the claimant, they can express their wishes through a decision whether to accept any of the treatment options offered. The claimant is free to accept or refuse the treatment on whatever basis he sees fit. This right for a competent patient to refuse a treatment option, creates the illusion that the claimant and others who may find themselves in his position, have the positive option to seek an alternative treatment. However if the clinical team determine that a course of treatment proposed by the claimant is not clinically indicated, they are under no legal obligation to provide such treatment to him (*Re J (A Minor)* [1993] Fam 15, at 26H).

Lord Phillips MR in *Burke* indicates that in circumstances where there is disagreement between the clinical team and the patient as to appropriate treatment options, a second opinion should be sought. Furthermore, at paragraph 40, there was an indication that the doctor in charge of Burke's care '*must either comply with his wish to be given ANH* (artificial nutrition and hydration) *or arrange for another doctor to do so.* However, this does not equate to a duty to find another doctor who is willing to administer treatment according to the patient's wishes, where such a treatment is clinically contra-indicated. Such a duty may arise in the circumstances of *Burke* as the ANH was and would likely continue to be clinically indicated until Burke's death either from the disease he was suffering (spino-cerebellar ataxia) or some other circumstances. However, *Burke* is distinguishable in this

regard from the present case, as the diet that the claimant sought was never clinically indicated.

The practical effect of the defendant's refusal to either administer the claimant's chosen diet or find someone else willing to administer it, is that the claimant's death may be brought about more quickly due to malnourishment because of the hunger strike. However, this is as a consequence of the 'choice' that the claimant has made to refuse any food other his preferred diet, rather than as a consequence of any failure to fulfil their common law obligations on the part of the defendant.

On the question of whether his Article 8 rights had been violated, although the judge considered that the claimant's right to choose his diet was, by reason of the extraordinary circumstances of this case, sufficiently important to merit the protection of Article 8, the countervailing concerns of the defendant amply justified the defendant's interference with the claimant's right to choose. Given the claimant's current condition, the justification for interference with the claimant's rights is all the stronger. Thus, even where fundamental rights of private life and self-determination are engaged, those rights might have to take second place to more general public policy aspects; in this case that the defendants comply with their civil, criminal and human rights obligations to treat the individual and keep him alive.

Rebecca Gladwin-Geoghegan and Dr Steve Foster, Coventry Law School