

Intimate relations and the CoP – assessing the implications of the judgment in Secretary of State for Justice v A Local Authority & Ors [2021]

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6 November 2023

Secretary of State for Justice v A local authority, C, a CCG, and others [2021] EWCA Civ 1527

First instance decision: care workers would not commit a criminal offence under s39 of the Sexual Offences Act 2003 were they to make practical arrangements for a 27 year old man, C, to visit a sex worker, where he had capacity to consent to sexual relations, but not to make arrangements himself

The Court of Appeal allowed the Secretary of State's appeal of that decision

Section 39 of the Sexual Offences Act 2003

39 Care Workers: causing or inciting sexual activity

A person (A) commits an offence if:

- He intentionally causes or incites another person (B) to engage in an activity
- The activity is sexual
- B has a mental disorder
- A knows or could reasonably be expected to know that B has a mental disorder
- A is involved in B's care in a way that falls within section 42

Section 42 of the Sexual Offences Act 2003

A person (A) is involved in the care of another person (B) in a way that falls within this section if any of subsections (2) to (4) applies:

(2) If B is accommodated in a care home (or similar)

(3) If B is a patient for whom services are provided by an NHS body or an independent medical facility

(4) If A is, whether or not in the course of employment, a provider of care, assistance or services to B in connection with B's mental disorder

(for each of the above) A has regular face to face contact with B

The 2003 Act

- It brought about a complete revision of the criminal law relating to sexual offences
- Section 79 adopts the definition of mental disorder found in s1 of the MHA 1983
- Intention was the protection of the vulnerable

The **Decision** of Hayden J

- Care workers would not commit a criminal offence under s39 of the Sexual Offences Act 2003 were they to make arrangements for a 27 year old man, C, where he had capacity to consent to sexual relations, but not to make arrangements himself
- Hayden J was not invited to make a BI decision, but rather to express a view on the application of s39 of the SOA to a hypothetical set of facts
- After judgment he was invited to make a declaration but declined to do so

The Grounds of Appeal

1. That Hayden J misinterpreted section 39 by reading into it that the Defendant was intending to repress the autonomy of those with a mental disorder in the sphere of sexual relations
2. That to sanction the use of a sex worker was contrary to public policy
3. The judge erred in concluding that articles 8 and 14 of the European Convention on Human Rights required his favourable interpretation

Judgment of Lord Burnett LCJ

S15 MCA and declarations about lawful conduct

- Lord Burnett LCJ emphasized the general approach of the law is that issues of a person's future conduct, and whether that conduct is criminal or not, are best decided in criminal not civil courts
- For a civil court to depart from that usual pathway required a cogent and exceptional reason – not found to be present in this case

Judgment of Lord Burnett LCJ

Meaning of “cause or incite” (paragraph 49)

- The term “**cause or incite**” should be given its criminal law ordinary meaning, which should not be restricted by reading into it more than that, which is what the Secretary of State contended was done by Hayden J
- Applying criminal law jurisprudence to the meaning of “**cause or incite**” establishes that the conduct in question does not need to be the sole cause, indeed all that is required is that its effect is more than negligible

Judgment of Lord Burnett LCJ

Meaning of “cause or incite” (paragraph 49)

*“ The litmus test for causation is that identified in the authorities. Do the acts in question create the circumstances in which something might happen, or do they cause it in a legal sense. Applying the approach of the Supreme Court in Hughes the care workers would be clearly at risk of committing a criminal offence contrary to s39. **By contrast care workers who arrange contact between a mentally disordered person and a spouse or partner aware that sexual activity may take place would more naturally be creating the circumstances for that activity rather than creating it in a legal sense”***

Judgment of Lord Burnett LCJ

Meaning of “cause or incite” (paragraph 49)

- The LCJ referred to the case of *R v Hughes* [2013] UKSC 56 where D was driving (with no insurance or license) but otherwise normally, when an oncoming vehicle swerved across the road and into collision with D causing the death of the oncoming driver
- D was prosecuted for causing the death of another without having a license or insurance
- The Supreme Court referred to the fact that apart from being on the road at the time D had done nothing. Though D had created the opportunity for the accident, the court held that for the offence to be committed D must be shown to have done something other than simply putting his vehicle on the road

Judgment of Lord Burnett LCJ

The Convention rights - Articles 8 and 14 (paragraph 51)

- Right to a private life – Article 8
- The right not to be discriminated against by reason of disability (mental disorder) – Article 14
- C and the local authority argued that section 39 of the 2003 Act interferes with C's private life under article 8 of the Convention
- Article 14 argument:
 - C treated differently from a person without a mental disability who can make his own arrangements or
 - C suffers discrimination by reason of his mental disability by comparison with those without

Judgment of Lord Burnett LCJ

The Convention rights - Article 8

- No positive obligation of the state to recognize a human right to purchase the services of a prostitute or to be provided with such a service by the state (paragraph 59)
- As such there was no human right that was breached and thus requirement to consider issues of compatibility
- In any event, s39 of the 2003 Act would satisfy article 8.2 were it necessary to do so

Judgment of Lord Burnett LCJ

The Convention rights – Article 14

- Clear that the effect of section 39 of the 2003 Act places C in a different position from others being looked after by care workers because of his mental disorder
- However, the decisive issue was that of justification. The judgement of the legislature would be accepted unless it was manifestly unreasonable
- The discriminatory effect of section 39 cannot be stigmatised as being manifestly without reasonable foundation. The statutory provision is clearly justified (paragraph 64)

Paragraph 64

“Section 39 of the SOA is concerned with sensitive moral and ethical issues in the field of penal policy. One of its purposes is to throw a cloak of protection around a large number of vulnerable people in society with a view to reducing the risk of harm to them. To the extent that the provision discriminates against a person in C’s position by comparison with others in the care of the state (or more broadly) it represents the considered view of Parliament striking balances in these difficult areas”

Lady Justice King

- Achieving autonomy for an incapacitated adult lies at the heart of the Mental Capacity Act 2005
- It is not however the role of the Court of Protection to endorse an act which would be unlawful

“There are, however, many less extreme and benign situations which day in and day out touch on the lives of people up and down the country; Baker LJ gives the example of a care worker arranging private time for a long married couple which she knows is likely to include sexual activity in those circumstances. Such a case is wholly different from that of C and the question of whether it is appropriate to make a declaration under s15 of the 2005 Act in such cases is something to be left open for argument in the appropriate case” (paragraph 71)

Lord Justice Baker

- The powers invested in the Court of Protection under the Mental Capacity Act 2005 do not include the power to "decide" whether or not a proposed course of action is criminal
- A court has to balance three principles (paragraph 73):
 - The principle of autonomy
 - The principle that vulnerable people in society must be protected and
 - The wider system of law and justice

“Where Parliament has expressly decided that certain conduct should be a criminal offence, it is no part of the Court of Protection’s role to declare that it is lawful”

Lord Justice Baker

Baker LJ, however, emphasizes that the case was a decision on its own facts (paragraph 75)

*“I recognize that there are situations where care workers are asked to assist people for example Where a young person wishes to meet people of their own age and make friends ... one consequence may be that the incapacitated adult engages in sexual relations. **I envisage that it might be appropriate in those circumstances for the Court of Protection to endorse a care plan under which care workers facilitate or support such contact and to make a declaration under s15 of the MCA that the care plan is both lawful and in P’s best interest”***”

Legal test for **capacity** to engage in sexual relations

In the case of *A Local Authority v JB* [2021] UKSC 52, the Supreme Court held that the relevant information that a person must be able to understand, retain and use or weigh, to have capacity to engage in sexual relations may include:

- The sexual nature and character of the act of sexual intercourse, including the mechanics of the act
- The fact that the other person must be able to consent to the sexual activity and must in fact consent before and throughout the sexual activity
- The fact that P can say yes or no to having sexual relations and is able to decide whether to give or withhold consent
- That a reasonably foreseeable consequence of sexual intercourse between a man and woman is that the woman will become pregnant
- That there are health risks involved, particularly the acquisition of sexually transmitted and transmissible infections, and that the risk of sexually transmitted infection can be reduced by taking precautions such as the use of a condom

Conclusions/thoughts

- A care worker arranging sex with sex worker is likely to put the care worker at risk of committing a criminal offence
- Some thing which merely creates the circumstances in which sexual relations happen is not in the legal sense a cause (*R v Hughes*), and therefore would not be a criminal offence
- For example, making arrangements for young people to meet in circumstances when sexual relations may happen are more likely to be seen as lawful
- Where money will change hands then, as both Lord Burnett (at paragraph 34) and Baker LJ (at paragraph 72) identified, P – and potentially also their carers – would be at risk of prosecution for the strict liability offence under s.53A of paying for sexual services of a prostitute who had been exploited

Conclusions/thoughts

Developing the case law:

- C's case was determined on its own specific facts
- In other cases, need to consider the specific facts of a case and seek legal advice on whether or not there might be scope to make an application to the COP
- Comments of LJ Baker & LJ King leave the door open for future cases on different facts
- Could be circumstances where the Court of Protection might endorse a care plan.

**Consider the need for a contingency pot for such applications in personal injury claims*

Conclusions/thoughts

- Role of a deputy: Could the Deputy be caught by section 42 SOA?
 - If so, when does help become “causing”?
- How much help does P need? Could carers take practical steps to hoist P into position in a bed, prior to P’s sexual partner visiting? Is that just physically supporting P? Or something beyond that?
- Can arrangements be made by someone falling not within s42?

Conclusions/thoughts

Practical effect on P

- Risks of increased behaviours
- Risks of criminal activity / prosecution
- Care arrangements (including DoL)
- MDT input

Any questions?



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