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Secretary of State for Justice v A Local Authority and others: disability and access to sex workers

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ABSTRACT

This is a commentary on *Secretary of State for Justice v A Local Authority and others*, where the decision of the Court of Protection has been overturned by the Court of Appeal. The judgment has implications for (i) the article 8 and article 14 rights of those who lack capacity to arrange lawful sexual services; (ii) the criminal liability of their carers who are enlisted to assist with such arrangements; and, potentially, (iii) the ban on payment for sexual services in Northern Ireland.

Keywords: sex worker; mental capacity; care worker; human rights; statutory interpretation; Sexual Offences Act 2003; Sexual Offences (Northern Ireland) Order 2008.

INTRODUCTION

In *A Local Authority v C and others*,[1] the Court of Protection in England and Wales held that an individual who lacks capacity to organise services from a sex worker could, in theory, enlist the help of their care workers to make the necessary arrangements, without the latter facing criminal liability under section 39 of the Sexual Offences Act 2003 (the offence of care workers causing or inciting sexual activity). The Court of Appeal rejected the lower court's interpretation of section 39 in the context of the circumstances envisaged in the case.[2] The judgment has implications for article 8 (right to privacy) and article 14 (prohibition of discrimination)[3] for those lacking capacity, in matters of arranging sexual services that are lawfully available to those who do not require

1 [2021] EWCOP 25.
2 [2021] EWCA Civ 1527.
3 European Convention for the Protection of Human Rights and Fundamental Freedoms 1950.

such assistance. The case also has potentially wider implications on the general prohibition in Northern Ireland on paying for sexual services.

BACKGROUND

The case before the Court related to C, a young man who wished to engage in sexual activity with a sex worker. He had been diagnosed with a genetic disorder, Klinefelter syndrome (XXY syndrome), which manifested by the age of two, in the form of developmental delay and communication difficulties. At the age of four, he was diagnosed with autistic spectrum disorder. Subsequently, C's behaviour became sometimes challenging and aggressive, and he was required to move out of the family home. The result is that C needs significant assistance with independent living and the support requires the deprivation of his liberty. This has been authorised by the Court of Protection since 2017, prior to which (from 2014–2017), C was detained in hospital under the Mental Health Act 1983. Due to progress in C's treatment, it was possible to discharge him to his current home, which is a house suitable for three occupants and their carers. An agency provides a support package to meet C's needs. In August 2018, C told AB, his litigation friend, that he wanted to be able to have sex, but did not think he had much prospect of finding a girlfriend. He wanted to know if his carers would assist him in making contact with a sex worker. It was agreed by all parties that C had the capacity to engage in sexual activity and to decide to do so with a sex worker, but lacked the ability to contact a sex worker for himself. The local authority commenced proceedings to address the lawfulness of C's carers assisting him in accessing sexual services.[4]

The issues before the court were: 'whether a care plan to facilitate C's contact with a sex worker could be implemented without the commission of an offence under the Sexual Offences Act 2003'; 'if not, whether the Sexual Offences Act 2003 can be read compatibly with the European Convention on Human Rights, or whether the court should make a declaration of incompatibility'; and 'if a care plan facilitating such contact is lawful, whether such a plan would be in C's best interests'.[5]

COURT OF PROTECTION DECISION

Hayden J considered the legal framework, specifically section 39 on care workers inciting sexual activity and the definition of the former.[6] It was undisputed that C had a mental disorder and that those who

4 [2021] EWCOP 25, [1]–[5].
5 Ibid [6].
6 Sexual Offences Act 2003, s 42(4).

would potentially assist C were care workers. Offences relating to soliciting[7] and paying for sex from someone subject to force[8] were not considered relevant as it was not intended to procure sexual services in these circumstances. There followed an examination of the section 39 offence and the mischief it was intended to address, noting that paying for sex itself is not an offence.[9] Counsel for C argued that the sort of assistance envisaged in making the practical arrangements for an encounter with a sex worker fell outside the scope of section 39 and would not incur criminal liability. By contrast, the Secretary of State argued that such an interpretation would amount to a change in the law and undermine parliamentary sovereignty.[10]

There was expert testimony from Professor Claire De Than, a legal academic, who is involved with The Outsiders Trust charity incorporating the TLC Trust, which provides support for individuals with disabilities, in the matter of sexual and intimate services. This highlighted the therapeutic value of facilitating a transition towards personal sexual relationships,[11] whilst detailing the rules and policies in place to protect both service providers and users.[12]

It was held that: facilitation of C's contact with a sex worker would not constitute an offence under section 39 of the Sexual Offences Act 2003, when interpreted as intended by Parliament, giving the words their natural and obvious meaning; it was not necessary to invoke section 3 of the Human Rights Act 1998 in order to construe section 39 as being compatible with the Convention because the natural meaning of the words, and the purpose of the statute as a whole, would not infringe C's article 8 rights; whether the proposed plan was in C's best interests would be considered at a later date, following a risk assessment.

The court rejected assertions that the issue had been determined previously,[13] in *Lincolnshire County Council v AB*,[14] but acknowledged that a clarification of conflicting interpretations of section 39 was merited, lest the court's interpretation conferred a seal of approval on prostitution, contrary to public policy. Due to the potential conflict between general policy considerations in relation to prostitution and the proper interpretation of section 39 in the instant case, the court granted the Secretary of State permission to appeal. Hayden J emphasised that this was specifically not on the basis of there being

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7 Ibid s 51A.
8 Ibid s 53A.
9 [2021] EWCOP 25, [16]–[22].
10 Ibid [37].
11 Ibid [27].
12 Ibid [30]–[36].
13 Ibid [23].
14 [2019] EWCOP 43.

any 'real prospect of success',[15] but solely because the interpretation of 'intentionally causes or incites'[16] fell within the category of cases where there was 'some other compelling reason for the appeal to be heard'.[17] Hayden J's pronouncement on the prospects of the appeal proved to be a hostage to fortune.

COURT OF APPEAL DECISION AND COMMENTARY

In delivering his judgment in a unanimous decision, Lord Burnett CJ highlighted the essence of the reasoning at first instance, namely that the words in section 39 were aimed at those in a position of authority and trust, who sought to undermine the sexual autonomy of those with a mental disorder.[18] Concerns were expressed regarding the hypothetical nature of the situation, since no 'order' was being appealed and that, whilst declarations on the legality of a care plan are permitted,[19] this should be confined to exceptional circumstances, where potential transgressions of the criminal law are concerned.[20] Focusing on section 39, Lord Burnett CJ was clear that the arrangements proposed would constitute legal causation of the sexual activity, rather than merely creating the circumstances in which this could occur. The latter would be characterised by arranging contact between an individual and their spouse/partner, during which sexual activity might more 'naturally' take place.[21] In this sense, the court was of the view that Hayden J had erred in his interpretation of 'causes or incites', favouring instead the decision in *Lincolnshire County Council v AB*.[22]

On the European Convention on Human Rights (ECHR) aspects, the court was equally unambiguous in determining that there was no positive obligation on the state, under article 8, to permit care workers to arrange for sexual contact with prostitutes,[23] and that, even if there were any interference with individual rights, this would be justified under article 8.2.[24] Lord Burnett CJ was unsympathetic to article 14 arguments, stating that the discriminatory effect of section 39 is justified on the grounds that Parliament's considered intention was to provide a 'cloak of protection' for vulnerable individuals.[25]

15 CPR 52.6 (1)(a).
16 Sexual Offences Act 2003, s 39(1)(a).
17 CPR 52.6 (1)(b).
18 [2021] EWCA Civ 1527, [23].
19 Mental Capacity Act 2005, s 15.
20 [2021] EWCA Civ 1527, [30].
21 Ibid [49].
22 See n 14 above.
23 [2021] EWCA Civ 1527, [53].
24 Ibid [60].
25 Ibid [64].

The Court of Appeal has taken a cautious approach in this case, in furtherance of the uncontentious and, indeed, laudable goal of protecting the vulnerable. It is argued, however, that there are problems with the approach taken, not least in the realm of personal autonomy and the role of the 2005 Act[26] in promoting such. The judgment also appears to allude obliquely to the morality of specific types of sexual relationship, in the context of differentiating between causing versus creating the circumstances for an encounter, for example, King LJ refers to 'less extreme and benign situations' and to the circumstances being different for 'a long married couple'.[27] This hints at a certain unacceptability of a relationship that is purely sexual (including in the transactional sense, as in C's case).

Interestingly, the court did not permit the Secretary of State to amend the grounds of appeal to include the stipulation that for the courts 'to sanction the use of a sex worker is contrary to public policy'.[28] Furthermore, Baker LJ, whilst concurring with the Lord Chief Justice and Lady Justice on the issue of the circumstances under which facilitation of a sexual encounter could be permissible, emphasised that the court was concerned only with the judge's decision in C's case and that a declaration under section 15 in relation to a care plan will turn ultimately on the specific, detailed facts.

The Court of Protection had attempted to reinforce and assert the autonomy of individuals who, whilst lacking capacity to make the practical arrangements necessary to receive sexual services, face no such impediment in expressing their wish to receive those services. To deny such individuals access to lawful sexual services is a form of discrimination based on disability and a violation of their article 8 and article 14 rights. The Court of Appeal's view is that this is either not the case or justified, respectively.

If the rights of C are to be upheld, this inevitably leads to a determination as to the potential liability of C's care workers in facilitating those rights. The court at first instance was unambiguously of the view that the intention of Parliament is clear when the 2003 Act is read in its entirety and the words given their literal meaning.[29] Furthermore, the 'mischief'[30] that Parliament intended to suppress focuses on the sexual exploitation of the vulnerable, including situations where there is a breach of a relationship of care, as detailed

26 Mental Capacity Act 2005.
27 [2021] EWCA Civ 1527, [71], [75] (Baker LJ).
28 Ibid [5].
29 [2021] EWCOP 25, [44]; *Fisher v Bell* [1960] 3 All ER 731.
30 *Pepper v Hart* [1993] AC 593.

in the White Paper[31] preceding the introduction of the Sexual Offences Bill in November 2002.

Notwithstanding the Court of Appeal judgment, it is asserted that, whichever rule of statutory interpretation is preferable, the words 'intentionally causes or incites' mean just that. In this regard, it would appear to be C, rather than his care workers, who is doing the 'causing' and 'inciting', therefore the actions of the latter in facilitating C's wishes should fall outside the scope of the legislation. The situation would be entirely different had the proposition been instigated by the care worker, in which case they would clearly fall foul of section 39; that is not what occurred in this case (indeed, nothing occurred). Taking the 2003 Act as a whole, it is clear that the words at issue refer to activity of an exploitative character. It also seems clear that frustrating the desire of an individual to engage in sexual activity was not Parliament's intention when enacting the legislation. Rather, the legislation, and the White Paper that preceded it, represent a concerted effort to tackle the sexual exploitation of the vulnerable, which is rightly viewed as an area for legislative action.

The hypothetical nature of C's case (since no care plan had yet been put in place by the court) probably did not help at appeal. Nevertheless, the judgment raises questions about what sort of assistance would constitute legal causation. In the aftermath of the judgment, commentary from Junior Counsel for C seems apposite, particularly in relation to what would constitute 'causing', in practical terms, for example: setting aside money so that an individual can access a sex worker; helping an individual into bed in advance of the arrival of a sexual partner; making best interests' decisions whereby a prospective relationship is anticipated to be sexual?[32]

WIDER IMPLICATIONS FOR THE LAW IN NORTHERN IRELAND

At first sight, the judgment would appear to close down further debate in the Northern Ireland context. If a similar request were to be made by a person who resides in that jurisdiction, the courts would determine that paying for in-person sexual services is a criminal offence under article 64A of the Sexual Offences (Northern Ireland) Order 2008, whatever the circumstances. This means that the equivalent of C would face potential criminal liability, as well as the carers. The court

31 Home Office, *Protecting the Public: Strengthening Protection Against Sex Offenders and Reforming the Law on Sexual Offences* (Cm 5668, 2002).

32 Ben McCormack, 'Re C – the Court of Appeal's view' (Garden Court North Chambers, 22 October 2021).

in *A Local Authority v C and others* stated that its decision was based on the fact that paying for sex is not *per se* illegal in England and Wales; however, it is not too much of a stretch of the jurisprudential imagination to envisage that, prior to the Court of Appeal judgment, the case might have inspired a challenge to the broader prohibition found in Northern Ireland. Such a case would likely involve recognising that some individuals with disabilities may decide that the only realistic opportunity for having a sexual relationship with another adult is to pay for it and that the law should not prohibit them from doing so where someone is willing to provide such a service. The Court of Appeal judgment may have, for the time being, neutralised this question from a judicial perspective, however, the issue is unlikely to evaporate and, as outlined above, the decision raises further questions regarding what would be permissible in practice.

Studies from several jurisdictions have shown that demand for access to sexual services amongst disabled people exists.[33] In some countries where sex work is legal, a distinct profession is developing called sexual assistants. These are men or women 'of any sexual orientation who, after professional training, can engage in sexual activity with persons with any type of disability'.[34] In the UK, the TLC Trust, provides online listings of sex workers in Great Britain who provide services to those with disabilities. The mission of the charity is

> that disabled people can use sexual and intimate services to help them learn about physical pleasure and may enable them to move forward towards personal sexual relationships. Where this is not possible, we would like to ensure that all disabled people have access to sexual, sensual and intimate experiences.[35]

The right to form relationships including consensual sexual relations with other human beings is recognised within the concept of private life under article 8.[36] The broad prohibition on paying for sex found in Northern Ireland is arguably a breach of that right as it criminalises all forms of sex work, including the work of sexual assistants. The disproportionate impact on those with disabilities also potentially brings into play article 14, which requires that the rights set out in the Convention are protected and applied without discrimination. Such reasoning could lead to the conclusion that, in legislating to prohibit

33 G R Gammino, E Faccio and S Cipolletta, 'Sexual assistance in Italy: an explorative study on the opinions of people with disabilities and would-be assistants' (2016) 34(2) Sexuality and Disability 157; M Girard, M T M Sastre and E Mullet, 'Mapping French people's views regarding sexual assistance to people with physical disabilities' (2019) 37(1) Sexuality and Disability 109.

34 Gammino et al (n 33 above) 157.

35 The TLC Trust, 'What is TLC?'.

36 *Pretty v UK* (App no 2346/02) ECHR 2002, para 61.

the payment for sexual services in all circumstances, the Northern Ireland Assembly acted in contravention of the ECHR and in doing so acted *ultra vires*, therefore leading to the striking down of article 64A. A previous challenge by a sex worker against the legislation in Northern Ireland was given permission by the High Court to proceed to a judicial review, but the proceedings were dropped when the applicant died prior to the full hearing.[37] Laura Lee, the sex worker in question, had spoken about the importance she attached to the role of providing sexual fulfilment to clients with disabilities.[38]

Any decision by the courts to find a right to sexual services would be controversial. Some disabled people might view such as a decision as promoting the stigmatising myth that the only sexual fulfilment that those with disabilities can have is by paying for it. However, accepting the reality that a significant proportion of disabled people face sexual marginalisation is not to argue that this is true of all disabled people.[39] Meanwhile, those who favour the criminalisation of sex work would also naturally find any recognition of a right to access such services deeply problematic. Julie Bindel, academic and commentator, whilst agreeing that the first instance decision may have acted as a springboard to the recognition of a right to access sexual services for those with disabilities, warns that such a path would be a dangerous one to go down.[40] She argues that it risks 'disabled people being held up as a handy smokescreen for pimps and exploiters' whereupon such jurisprudence would ultimately lead to recognition of a general right for all adults to access sexual services.[41] In light of the Court of Appeal's decision, these concerns may now be allayed.

Opponents of recognition of a right to sexual services for those with disabilities will rely on article 8 being a qualified rather than an absolute right. If a challenge as suggested above was brought before the courts in Northern Ireland, the parties defending article 64A would presumably argue that a broad prohibition on the paying for sexual services is in accordance with the law, furthers the legitimate aims of the prevention of crime, the protection of health or morals, or the protection of the rights and freedoms of others and is necessary and proportionate in achieving that aim. A counter to such arguments is that

37 H McDonald, 'Irish sex worker and campaigner for rights of prostitutes dies, aged 39' *The Guardian* (London, 9 February 2018).

38 M McGrath, '"We bring happiness into their lives" – meet the sex workers providing services for clients with disabilities' *Irish Independent* (Dublin, 12 September 2016).

39 S Esmail, K Darry, A Walter and H Knupp, 'Attitudes and perceptions towards disability and sexuality' (2010) 32(14) Disability and Rehabilitation 1148.

40 J Bindel, 'Disabled men don't have a "right" to buy sex' *The Spectator* (30 April 2021).

41 Ibid.

the broadness of the Northern Ireland prohibition is disproportionate to the legislation's stated aim of protecting vulnerable individuals from sexual exploitation.[42] Indeed, the Northern Ireland legislation has been criticised as counterproductive in that sex work continues, but with sex workers at greater risk of harm by forcing them and those who pay for their services underground and out of sight from the protection of the authorities.[43] Therefore, a more proportionate and effective approach to achieving the aim of protecting the vulnerable would be to criminalise those who pay for the services of controlled or coerced sex workers as is the case in England and Wales.[44] Such a decision, whilst controversial, would arguably provide a better balance of the competing interests of the need to respect sexual autonomy and protection from sexual exploitation.

The Court of Appeal decision, whilst unambiguous on the meaning of 'causing' in section 39, has prompted further questions about determining the source of this in cases such as C's; the issues remain unresolved, in terms of certainty around the potential criminal liability of care workers.

42 G Ellison, 'Criminalizing the payment for sex in Northern Ireland: sketching the contours of a moral panic' (2017) 57(1) British Journal of Criminology 194.

43 G. Ellison, C Ní Dhónaill and E Early, 'A Review of the criminalisation of paying for sexual services in Northern Ireland' (Department of Justice 2019).

44 Sexual Offences Act 2003, s 53A.