Special (and Particular) Regard

3J Briefing Document 2

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10 Sept., 2015

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Arts & Humanities Research Council

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I. "Respect for Rights, Will and Preferences" in CRPD Art 12.4, and in the MCA.

One of the central challenges in achieving full compliance with the Convention on the Rights of Persons with Disabilities (CRPD) is to devise a legal framework that satisfies the safeguarding requirements of CRPD Art. 12.4.

Art. 12.4 requires states parties to adopt safeguards in matters pertaining to the exercise of legal capacity by persons with disabilities. One particular safeguarding requirement has been the topic of extensive discussion and debate: the requirement for safeguards that "shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person."

Here is the relevant passage from the Convention:

> *States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that* ***measures relating to the exercise of legal capacity respect the rights, will and preferences of the person****, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests. (CRPD, Art. 12.4; emphasis added)*

In their 2014 General Comment on Article 12, the UN Committee on the Rights of Persons with Disability held that compliance with Art 12 requires states parties to abolish "substitute decision-making" and reliance on "the best-interests paradigm."

> *States parties' obligation to replace substitute decision-making regimes by supported decision-making requires both the abolition of substitute decision-making regimes and the development of supported decision-making alternatives. The development of supported decision-making systems in parallel with the maintenance of substitute decision-making regimes is not sufficient to comply with article 12 of the Convention.* (GC1, para. 28)
>
> *The 'will and preference' paradigm must replace the 'best interests' paradigm to ensure that persons with disabilities enjoy the right to legal capacity on an equal basis with others.* (GC1, para. 21)

Following a round of consultations in 2014, the EAP research team contested these conclusions, arguing that a regime of substituted decision-making and use of the best-interests paradigm could in principle comply with CRPD requirements. In order to achieve compliance, however, any such statutory regime would have to ensure that

sufficient safeguards were in place to ensure respect for the rights, will and preferences of disabled persons in matters pertaining to the exercise of legal capacity.[1]

The EAP's 2014 report went on to argue that The Mental Capacity Act of England and Wales (MCA) does not in its present form satisfy this requirement. Under the best-interests decision-making procedure established in MCA sec. 4, a best-interests decision-maker must *consider* (insofar as they are reasonably ascertainable) the wishes and feelings, beliefs and values of the person on behalf of whom a best-interests decision is being made. But a requirement to *consider* falls short of a requirement to *respect*.[2]

One further conclusion of the EAP's 2014 report is worth repeating here. Whatever form is taken by the relevant safeguards, they must not establish a principle of unqualified deference to the will and preferences of a disabled person under all circumstances. This is not the place to reiterate the full set of arguments which support this conclusion. It is perhaps enough to keep in mind that unqualified deference to will and preferences is impossible in circumstances where a person's will conflicts with her preferences, or where there are conflicts among the preferences themselves. Furthermore, any comprehensive system of safeguards must allow for circumstances where protection of a disabled person's other CRPD rights might require actions contrary to that person's known will and preferences.[3]

If the foregoing conclusions are accepted, it follows that CRPD-compliant safeguards regarding the rights, will and preferences of disabled persons must occupy the middle ground between a mere requirement that will and preferences be *considered* and any requirement of unqualified *deference* to will and preferences.

II. "Special Regard" in the Best-Interests Decision-Making Provisions of the NI Mental Capacity Bill

The Northern Ireland Mental Capacity Bill (2015) exhibits a number of fundamental similarities to the MCA. In the early version of the Bill that was distributed for public comment, sec. 6 specified a best-interest procedure that closely echoed the approach and language of the MCA. For present purposes, the crucial passage came in sec. 6.6 (emphasis added):

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[1] Martin, Michalowski, Jütten and Burch, *Achieving CRPD Compliance: Is the Mental Capacity Act of England and Wales Compatible with the UN Convention on the Rights of Persons with Disabilities? If Not, What Next?* http://autonomy.essex.ac.uk/uncrpd-report.

[2] *ibid*., see in particular §9.

[3] It is worth emphasizing that the safeguards required by CRPD Art 12.4 are themselves plural and diverse. In addition to the requirement for safeguards with respect to the rights, will and preferences of a disabled person, Art 12.4 requires safeguards to ensure that measures relating to the exercise of legal capacity are "free of conflict of interest and undue influence." Arguably, then, even Art 12.4 taken alone creates the potential to generate rights that would be flouted if a principle of absolute deference to will and preferences were adopted. We shall return to the topic of conflict of interest and undue influence in a subsequent 3J EAP Briefing Document.

That person [i.e., a person who must determine what is in the best interests of another person] *must* ***take into account****, so far as they are reasonably ascertainable*/

> *(a) P's past and present wishes and feelings (and, in particular, any relevant written statement made by P when P had capacity);*
>
> *(b) the beliefs and values that would be likely to influence P's decision if P had capacity; and*
>
> *(c) the other factors that P would be likely to consider if able to do so.*

Following a period of public consultation, this section of the Northern Ireland Bill was altered. In the version of the Bill that was ultimately introduced to the Northern Ireland Assembly, sec 7.6 reads as follows (emphasis added):

That person [i.e., a person who must determine what is in the best interests of another person] must ***have special regard to*** *(so far as they are reasonably ascertainable)—*

> *(a) P's past and present wishes and feelings (and, in particular, any relevant written statement made by P when P had capacity);*
>
> *(b) the beliefs and values that would be likely to influence P's decision if P had capacity; and*
>
> *(c) the other factors that P would be likely to consider if able to do so.*

Two questions arise.

1) The first concerns the meaning of this provision. What exactly does it mean to have "special regard for" wishes and feelings? How, if at all, would such a requirement differ from a requirement that such matters be "considered" (as in the MCA) or "taken into account" (as in the original language in the draft NI Bill)?

2) Once that first question has been answered, the further question is whether such a statutory provision satisfies the requirements of CRPD Art 12.4 as regards respect for the rights, will and preferences of disabled persons.

III. "Special Regard" and "Particular Regard" in Existing Legislation

It is not the purpose of this briefing document to answer the questions just enumerated. These are matters for discussion at the EAP/AHRC Consultation Roundtable on 15 Sept., 2015 in Belfast. However in preparation for that discussion, it may be useful to have at hand some other examples of similar language from other statutes in the UK.

The expressions "special regard" and "particular regard" has been used in at least twenty-five pieces of legislation in the UK.[4] Five indicative examples help suggest the range of uses.

A. The Video Recording Act 1984 (rev. 1993).

Section 4 of the VRA 1984 pertains to the classification system (i.e., ratings) for video recordings. VRA 4.1.a pertains to the specific question about which recordings should be issued with classifications. It specifies that in making a determination as to whether a classification certificate should be issued, *special regard* should be given to the likelihood of the video works in question being viewed in the home.

Here is the relevant extract from the statute (emphasis added):

4 Authority to determine suitability of video works for classification.

(1) The Secretary of State may by notice under this section designate any person as the authority responsible for making arrangements—

> *(a) for determining for the purposes of this Act whether or not video works are suitable for classification certificates to be issued in respect of them, having* ***special regard*** *to the likelihood of video works in respect of which such certificates have been issued being viewed in the home,*
>
> *(b) in the case of works which are determined in accordance with the arrangements to be so suitable—*
>
> - *for assigning a unique title to each video work in respect of which a classification certificate is to be issued*
> - *for making such other determinations as are required for the issue of classification certificates, and*
> - *for issuing such certificates, and*
>
> *(c) for maintaining a record of such determinations (whether determinations made in pursuance of arrangements made by that person or by any person previously designated under this section)*

B. The Broadcasting Act 1990

Section 7 of the Broadcasting Act (1990) concerns the obligations of the Independent Television Commission in creating a code with guidance to broadcasters concerning programming that includes violence.

Here is the relevant extract from the statute (emphasis added):

(1) The Commission shall draw up, and from time to time review, a code giving guidance—

> *(a) as to the rules to be observed with respect to the showing of violence, or the inclusion of sounds suggestive of violence, in programmes included in licensed services, particularly when large numbers of children and young persons may be expected to be watching the programmes; …*

[4] I am grateful to Alison McCaffrey for her assistance in identifying these examples.

and the Commission shall do all that they can to secure that the provisions of the code are observed in the provision of licensed services.

(2) In considering what other matters ought to be included in the code in pursuance of subsection (1)(c), the Commission shall have ***special regard*** *to programmes included in licensed services in circumstances such that large numbers of children and young persons may be expected to be watching the programmes. …*

C. The Children Act 2004

Section 2 of the CA 2004 pertains to the general functions of the Children's Commissioner. Subsections 4 and 6 pertain to the Commissioner's involving of children (and of organisations that represent them) in the exercise of certain functions. CA sec. 2.6 requires the Commissioner to have *particular regard* to groups of children who do not have other adequate means for making their views known.

Here is the relevant extract from the statute (emphasis added):

2. General Function [of the Children's Commissioner]

(4) The Children's Commissioner must take reasonable steps to involve children in the discharge of his function under this section, and in particular to—

> *(a) ensure that children are made aware of his function and how they may communicate with him; and*
>
> *(b) consult children, and organisations working with children, on the matters he proposes to consider or research under subsection (2)(c) or (d).*

(5) Where the Children's Commissioner publishes a report under this section he must, if and to the extent that he considers it appropriate, also publish the report in a version which is suitable for children (or, if the report relates to a particular group of children, for those children).

(6) The Children's Commissioner must for the purposes of subsection (4) have ***particular regard*** *to groups of children who do not have other adequate means by which they can make their views known.*

D. Planning (Listed Buildings and Conservation Areas) Act 1990

Section 66 of the Planning Act 1990 pertains to applications for planning permission which may affect a listed building. The statute requires the local planning authority, in consideration of such applications, to have *special regard* to the desirability of preservation of listed buildings.

Here is the relevant extract from the statute (emphasis added):

66 General duty as respects listed buildings in exercise of planning functions.

> *(1) In considering whether to grant planning permission for development which affects a listed building or its setting, the local planning authority or, as the case may be, the Secretary of State shall have* ***special regard*** *to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses.*

Similar language appears in Section 91 of the Planning Act (Northern Ireland) 2011:

> *In considering whether to grant planning permission for development which affects a listed building or its setting, and in considering whether to grant listed building consent for any works, a council or, as the case may be, the Department must have **special regard** to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses.*

E. Planning Act 2008

Section 10 of the PA 2008 pertains to the powers of the Secretary of State to issue and review national policy statements. Section 10 of the Act requires the issuance and review of national policy statements to be undertaken with the aim of "contributing to the achievement of sustainable development." PA section 10.3 further specifies that acting with such an aim requires having regard *in particular* to the climate change and "good design."

Here is the relevant extract from the statute (emphasis added):

10 Sustainable development

(1) This section applies to the Secretary of State's functions under sections 5 and 6.

(2) The Secretary of State must, in exercising those functions, do so with the objective of contributing to the achievement of sustainable development.

*(3) For the purposes of subsection (2) the Secretary of State **must (in particular) have regard** to the desirability of—*

> *(a) mitigating, and adapting to, climate change;*
>
> *(b) achieving good design.*

IV. Guidance for Operationalising "Special Regard"

The reliance on the notions of "special regard" or "particular regard" introduces a degree of vagueness into the foregoing statutes. Frontline practitioners require guidance in determining exactly what the requirement prescribes as regards particular cases.

As regards existing legislation, this guidance has sometimes been provided by government bodies in Codes of Practice and Guidance Books.

For example, in the case of Planning (Listed Buildings and Conservation Areas) Act 1990, guidance has been provided by the Department of Communities and Local Government, in *Planning Policy Statement 5: Planning for the Historic Environment* (also known as the PPS5 Guidance Book). The PPS5 Guidance book offers the following guidance as regards the requirement of special regard:

> *There should be a **presumption** in favour of the conservation of designated heritage assets and the more significant the designated heritage asset, the greater the presumption in favour of its conservation should be.... Substantial harm to or loss of a grade II listed building,*

> *park or garden should be **exceptional**. Substantial harm to or loss of designated heritage assets of the highest significance, including scheduled monuments ....grade I and II* listed buildings and grade I and II* registered parks and gardens....should be **wholly exceptional**.* (PPS5 Guidance Book, Policy HE9.1; emphasis added)

As regards the possibility of discharging this presumption, the Guidance Book advises that:

> *Where a proposal has a harmful impact on the significance of a designated heritage asset which is less than substantial harm, in all cases local planning authorities should:*
>
> *(i) weigh the public benefit of the proposal (for example, that it helps to secure the optimum viable use of the heritage asset in the interests of its long-term conservation) against the harm; and*
>
> *(ii) recognise that the greater the harm to the significance of the heritage asset the greater the justification will be needed for any loss.* (PPS5 Guidance Book, Policy HE9.4)

The PPS5 guidance still leaves considerable scope for the exercise of judgement in the concrete application of the "special regard" requirement. But it exemplifies the parameters for what we might call a *special regard schema*. We can analyse its core elements as follows:

a) Where special regard is to be afforded to a particular matter, there exists a legal presumption with regard to that matter;

b) The presumption is not absolute, but can be rebutted in particular circumstances;

c) The circumstances which might suffice for such a rebuttal are specified by indicative example, rather than by exhaustive enumeration;

d) The application of special regard requires application of a proportionality test, weighing benefits against harms, with significant harms being justifiable only exceptionally, on the basis of very significant benefits.

V. Adjudicating "Special Regard" in the Court of Appeal

The proper interpretation and application of the requirement of special regard was the focus of a 2014 ruling in the Court of Appeal.[5] The case centred around a planning application for a set of four wind turbines in the vicinity of "heritage assets" in Northamptonshire.

[5] *Barnwell Manor Wind Energy Ltd v (1) East Northamptonshire District Council (2) English Heritage (3) National Trust* [2014] EWCA Civ 137.

Planning permission had initially been granted, but later quashed on the grounds that the local authority had failed to give special regard to the impact of the wind farm on "heritage assets with significance of the highest magnitude."[6]

This ruling was appealed, with one of the grounds of appeal being that the judge in the lower court had misinterpreted the requirement of "special regard."

The Court of Appeals was presented with two rival interpretations of the requirement.

The judge in the lower court (Lang J), had interpreted the requirement as follows:

> *In order to give effect to the statutory duty under section 66(1), a decision-maker should* ***accord considerable importance and weight*** *to the "desirability of preserving… the setting" of listed buildings when weighing this factor in the balance with other 'material considerations' which have not been given this special statutory status.*[7]

She concluded that the inspector for local authority had failed to meet this standard, as he "*treated the 'harm' to the setting and the wider benefit of the wind farm proposal as if those two factors were of equal importance.*"[8]

On behalf of the appellant, Mr. Nardell QC presented a different interpretation of the requirement of special regard. In his ruling for the Court of Appeal, Lord Justice Sullivan summarised Mr Nardell's interpretation as follows:

> *He* [Mr Nardell] *submitted that section 66(1) did not require the decision-maker to give any particular weight to that factor. It required the decision-maker to ask the right question – would there be some harm to the setting of the listed building – and if the answer to that question was "yes" – to refuse planning permission unless that harm was outweighed by the advantages of the proposed development. When carrying out that balancing exercise the weight to be given to the harm to the setting of the listed building on the one hand and the advantages of the proposal on the other was entirely a matter of planning judgment for the decision-maker.*[9]

The Court of Appeal firmly sided with Lang J, and against Mr Nardell, on this matter.

In support of this conclusion, Lord Justice Sullivan framed the question as follows:

> *Was it Parliament's intention that the decision-maker should consider very carefully whether a proposed development would harm the setting of the listed building (or the character or appearance of the conservation area), and if the conclusion was that there would be some harm, then consider whether that harm was outweighed by the advantages of the proposal, giving that harm such weight as the decision-maker thought*

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[6] *East Northamptonshire District Council and others v Secretary of State for Communities and Local Government and another company* [2013] EWHC 473 (Admin).

[7] *ibid.*; para 27; emphasis added.

[8] *ibid.*; para 46.

[9] *Barnwell Manor Wind Energy Ltd v (1) East Northamptonshire District Council (2) English Heritage (3) National Trust* [2014] EWCA Civ 137; para 13.

> *appropriate; or was it Parliament's intention that when deciding whether the harm to the setting of the listed building was outweighed by the advantages of the proposal, the decision-maker should give particular weight to the desirability of avoiding such harm?*[10]

He answered this question as follows:

> *I agree with Lang J's conclusion that Parliament's intention in enacting section 66(1) was that decision-makers should give "considerable importance and weight" to the desirability of preserving the setting of listed buildings when carrying out the balancing exercise.*[11]

[10] *ibid.*, para 17.

[11] *ibid.*, para 29.