

## The challenges of undertaking mental health advocacy (R (YZ) v Oxleas NHS Foundation Trust)

03/05/2017

**Local Government analysis:** Discussing the Court of Appeal's judgment in R (YZ) v Oxleas NHS Foundation Trust, Sheree Green, senior associate at Anthony Collins Solicitors, suggests that mental health practitioners will read this case with interest, but may decline to read too closely into its implications just yet.

### Original news

*R (on the application of YZ) v Oxleas NHS Foundation Trust & another* [\[2017\] EWCA Civ 203](#)

### What key issues did this case raise?

The Court of Appeal considered a challenge by YZ by way of judicial review to the decision made by a psychiatrist (at a medium secure unit for psychiatric patients operated by Oxleas NHS Foundation Trust (Oxleas)) to apply to transfer YZ to Broadmoor Hospital, and the decision of Broadmoor to accept him.

By way of background, YZ had been convicted of an offence of causing grievous bodily harm, committed when he was 15 years old, against a 12-year-old boy. On 1 October 2010, he was sentenced to a hospital order with restrictions under [sections 37](#) and [41](#) of the Mental Health Act 1983 ([MHA 1983](#)) in the light of his complex mental health issues, including diagnoses of paranoid schizophrenia, emotionally unstable personality disorder and anti-social personality disorder. In the same year YZ, who was born female, was also diagnosed with gender dysphoria and, following specialist advice, was supported in his desire to live his life as a man. YZ was detained and treated in conditions of medium security, but continued to pose a significant risk of harm to others, with aggressive and violent behaviours, resulting in significant injuries to staff. There was ongoing concern regarding the ability to manage YZ safely in conditions of medium security, and YZ was ultimately accepted as meeting the threshold for admission to Broadmoor, when assessed for a third time by the High Security hospital. On 3 June 2015, YZ was admitted to Broadmoor.

YZ had challenged the decision to transfer him to Broadmoor on the basis that it was unlawful and had failed to take into account his rights under Articles 3 and 8 of the European Convention on Human Rights (ECHR). He asserted that the treating clinician's refusal to prescribe clozapine was irrational, and further, that Oxleas had failed him in not expediting treatment for his gender dysphoria. He contended that he should have been transferred to a different medium secure unit.

In July 2015, McGowan J found clear evidence that the decisions by Oxleas were entirely lawful and carefully taken. Further, she held that the reasoning of the Broadmoor Appeal Panel was clear and entirely rational—it was not susceptible to judicial review.

On appealing the 2015 decision, YZ argued, among other things, that the judge had 'not performed a review of sufficient intensity'. She had failed to consider Article 3 ECHR issues, was wrong in her conclusion that the reference of the case to the appeals panel was lawful and also was wrong in her conclusion that the reasons provided by the Broadmoor appeals panel were adequate.

### What did the Court of Appeal decide, and to what extent does the court's judgment clarify the law in this area?

It is worth noting that in the period since the 2015 decision, YZ had been convicted of another offence in the Crown Court, in relation to an assault on a fellow patient, and a further order was made under [MHA 1983, ss 37](#) and [41](#), requiring detention and treatment at Broadmoor.

More positively, he had responded well to his treatment regime at Broadmoor and indeed had already commenced testosterone treatment by mid-July 2015. By October 2015, YZ's mental health had stabilised to the extent that his treating clinician at Broadmoor gave evidence to the effect that he was fit for transfer back to a medium secure unit.

The documents considered by the Court of Appeal were such as to clearly demonstrate that ‘the transfer to Broadmoor had plainly been the right decision both in the interests of the public and the claimant’. The claim failed completely on the facts, as McGowan J had rightly held back in 2015. The conditions in Broadmoor could not and did not amount to inhuman or degrading treatment, such as to breach Article 3 ECHR, and the restrictions were both necessary and proportionate for the purposes of Article 8 ECHR. The reasons given by the Broadmoor Appeals Panel were plainly clear and sufficient

### **The judge directed that a copy of the judgment be sent to the Chief Executive of the Legal Aid Agency—why was this?**

The judge highlighted the legal costs of the respective parties (in the region of £200,000 in total) in his introduction and summary, commenting that in his view, the proceedings should not have been pursued. In his view, this level of expenditure on claims of this nature was a ‘highly detrimental distraction to the proper operation of the National Health Service’ and would be better spent on the treatment of patients.

As YZ’s claim was funded by legal aid, the judge wanted to alert the Legal Aid Agency to the need to carefully consider whether it should agree funding to allow such cases to be pursued in the future.

### **What did the judge have to say about the case being pursued in order to highlight the treatment of transgender dysphoria in such persons detained in a psychiatric hospital in similar circumstances to the claimant? In the court's view, was the claimant's mental condition partly attributable to his sexual identity issues?**

The Court of Appeal determined that YZ’s mental condition was not attributable to any failure to treat his gender dysphoria. YZ had an established diagnosis of personality disorder, with psychotic episodes and possibly also schizophrenia. The court agreed with the treating clinicians that the appropriate first step was to treat his mental illness to work towards a period of stability, which would better enable the gender dysphoria treatment to proceed.

The judge did not accept the claimant’s argument in relation to a declaration being appropriate to highlight transgender issues. Albeit administrative mistakes had been made in relation to a follow up appointment, the doctors at both medium and high secure hospitals supported the treatment, as soon as ‘some stability had been achieved in his mental state and behaviour’.

### **What are the practical and/or wider implications of the judgment?**

The facts of this case may have been its particular downfall, notably in the light of the significant change in YZ’s presentation and circumstances since the 2015 judgment. Coincidentally, YZ was well enough to be transferred back to a medium secure unit in the Midlands on the first day of this Court of Appeal hearing. The court appeared to take the view that whatever limited merit they may have been in the application disappeared completely following the hearing in the Crown Court in September 2015 and the resulting hospital order.

More widely in relation to such challenges going forward, the judge confirmed that the court would pay ‘the highest regard to the bona fide professional judgement of the responsible clinician’. Where there is such bona fide evidence, as there was in this case, compelling evidence would be needed to question that judgment. Further, applications for judicial review in respect of hospital transfers should in any event be very rare, in light of the powers given by Parliament to the Secretary of State and the First-tier Tribunal to undertake reviews of detention under [MHA 1983](#).

Quoting Richards J in *R (P) v Mersey NHS Trust* [2003] EWHC 994 (Admin), the judge considered who should be the appropriate decision-maker in assessing the risk posed by a patient when considering transfer to and from medium and high security:

‘The decision must lie with those in whom Parliament has vested the statutory powers and who are thereby made responsible for forming the necessary judgments upon which the exercise of the statutory powers is necessarily based.’

## What should practitioners take away from this case, especially in terms of advising clients and 'best practice'?

The judge accused YZ's solicitors of demonstrating a 'distinct lack of the professional objectivity' in pursuing the case. Is this fair comment?

The same solicitors also represented YZ before the First-tier Tribunal. Undertaking mental health advocacy can be extremely challenging. The Law Society's Guidance, '[Representation before mental health tribunals](#)' from 27 May 2016 states:

'If you conclude that your client has the capacity to instruct you, you must take instructions from them and must act in accordance with those instructions, even where they are inconsistent, unhelpful to the case or vary during the preparation of the case, or during the hearing itself.'

An advocate must refuse to advance an argument that is not 'properly arguable'. However, a submission may be said to be 'properly arguable' even if it has few, if any, prospects of success (*Buxton v Mills-Owen* [\[2010\] EWCA Civ 122](#), [\[2010\] All ER \(D\) 242 \(Feb\)](#), para [43]).

It is worth noting that the case did successfully overcome a number of hurdles en route to the Court of Appeal. Permission for judicial review was granted by the single Lord Justice on 14 January 2016, who held that the grounds set out were reasonably arguable. Legal aid was granted to the claimant, presumably on the back of a satisfactory merits argument.

It is fair to say that transgender issues have only recently been debated in the public arena, and that there is still work to be done in researching how mental health issues may impact on individuals who identify as transgender. It is certainly a relatively new issue as far as reported challenges to detention under [MHA 1983](#) are concerned.

YZ's solicitors faced a number of challenges in taking this case through relatively uncharted waters. Mental health practitioners will read this case with interest, but may decline to be among the first to throw stones.

Sheree Green leads the firm's Court of Protection (CoP) team, which specialises in property and finance, and health and welfare CoP work, as well as mental health. She is a Law Society approved mental health practitioner and Chair of the Law Society Mental Health and Disability Committee.

*Interviewed by Kate Beaumont.*

*This article was first published on Lexis®PSL Local Government on 3 May 2017. Click for a free trial of [Lexis®PSL](#).*

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