Neutral Citation Number: [2013] EWCA Civ 69

Case No: B3/2012/0896

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE CENTRAL LONDON COUNTY COURT
SIR ROBERT NELSON
9CL02483

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/02/2013

Before:

THE MASTER OF THE ROLLS
LORD JUSTICE RICHARDS
and
LADY JUSTICE BLACK

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Between:

The Commissioner of Police for the Metropolis	**Appellant**
- and –	
ZH (A protected party, by GH, his litigation friend)	**Respondent**
Liberty	**First Intervener**
Equality and Human Rights Commission	**Second Intervener**

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Ms Anne Studd QC and Mr Elliot Gold (instructed by **The Commissioner of Police for the Metropolis**) for the **Appellant**
Ms Heather Williams QC (instructed by **Bhatt Murphy**) for the **Respondent**
Ms Karon Monaghan QC (instructed by Liberty) for the **First Intervener**
Mr Jason Coppel (instructed by The Equality and Human Rights Commission) for the **Second Intervener**

Hearing dates: 22 & 23 January 2013

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Approved Judgment

Master of the Rolls:

Introduction

1. The claimant, ZH, is a severely autistic and epileptic young man who suffers from learning disabilities and cannot communicate by speech. On 23 September 2008, he was taken by his carers from his specialist day school, the Sybil Elgar School, to the local swimming baths in Acton. He was 16 years of age at the time. During the visit, he made his way to the poolside where he became fixated by the water and did not move. This is a common reaction to water of those who suffer from autism. After about 30 minutes, police were called by the pool manager, Mr Hartland. When Metropolitan police officers arrived, ZH was still standing by the side of the pool.

2. Within the next few minutes, in circumstances that I shall describe later, the officers had caused ZH to jump into the pool. He was removed from the water by lifeguards and police officers. He was then forcibly restrained on his back by the side of the pool by five (subsequently seven) officers. After he was placed in handcuffs and leg restraints, he was taken to a police van and detained in the cage at the back of the van. He remained there until he was released to one of his carers. The restraint and detention lasted about 40 minutes.

3. The experience was intensely frightening and distressing for ZH. As a result of his autism, he has an aversion to being touched in an unfamiliar way and would not have understood what was happening to him. The agreed medical evidence was that he experienced an acute level of psychological suffering and as a result of the incident suffered from post traumatic stress syndrome and an exacerbation of his epilepsy.

4. The defendant accepted that officers had used force on ZH and that ZH had been imprisoned (for the purposes of the tort of false imprisonment). The burden therefore fell on the defendant to justify the officers' conduct. He contended that they had acted in ZH's "best interests" within the meaning of the Mental Capacity Act 2005 ("MCA") and that accordingly he was not liable in tort for their actions.

5. The defendant accepted that the officers had not, at any stage of the incident, sought advice from the school carers who were present as to how to deal with ZH in the light of his condition. It was ZH's case that the officers had unwittingly exacerbated the situation by physically restraining him. It was also his case that the police had failed to comply with the duty to make "reasonable adjustments" to the application of their usual control and restraint policies in order to accommodate his disabilities and had thereby unlawfully discriminated against him contrary to the Disability Discrimination Act 1995 ("DDA"). Finally, the claimant also contended that his detention and restraint amounted to breaches of articles 3, 5 and 8 of the European Convention on Human Rights ("the Convention").

6. Sir Robert Nelson upheld all these claims and awarded £28,250 in damages. In summary, he rejected the MCA "best interests" defence and held that the officers had failed to make reasonable adjustments to their usual policy/practices within the meaning of the DDA, as they had omitted to take reasonable steps to obtain relevant information from the carers both before and during their restraint of ZH, which was

itself avoidable and disproportionate. The judge rejected the defendant's case that the circumstances were so urgent that it was impracticable and unreasonable to obtain this information.

7. The defendant appeals against all of the judge's findings on liability. He does not, however, seek to challenge the amount of the award of damages. Before I come to the issues and the law, I need to set out the facts as found by the judge in more detail.

The facts

8. On 23 September 2008, a group comprising five students including ZH and three carers (Ms Namballa, Mr Badugu and another classroom assistant) went to Acton Swimming Baths on a "familiarisation" visit. It was not intended that any of the students would swim. The group watched from the viewing gallery above the pool. When they left the gallery, ZH broke away and made his way to the poolside. He became fixated by the water. The carers knew that he had an aversion to being touched and would be likely to react adversely if he was touched.

9. Ms Namballa took the other students back to school, leaving Mr Badugu with ZH. Before she left, she told Ms Burton, one of the lifeguards, that she must not touch ZH because he was autistic and that, if she touched him, he would jump into the pool. Ms Burton called Mr Hartland, as ZH was still standing by the side of the pool. Mr Hartland came but did not succeed in persuading him to move.

10. At 15.24 hrs, Mr Hartland called the police saying "we have a disabled male trying to get in the pool…..the carer is trying to stop him and he is getting aggressive". In fact, ZH was not behaving aggressively.

11. At about 15.30 hrs, PC Colley and PC McKelvie arrived. They walked along a corridor that led to the poolside. Mr Badugu was standing in the corridor within sight and sound of ZH. The judge found that the police were faced with what he described as "a difficult and unusual situation". He made detailed findings of fact in relation to four discrete stages of the entire incident at paras 69 to 112 of his judgment. These stages were (i) ZH's entry into the pool after the arrival of the police; (ii) the time when he was in the pool; (iii) when he was removed from the pool and restrained at the poolside; and (iv) when he was in the police van. What follows is a summary of the judge's findings in relation to each stage.

ZH's entry into the pool

12. By the time of the arrival of the police, ZH had been standing by the side of the pool for at least 40 minutes. His behaviour was described by witnesses in various ways, but at para 12 the judge said: "whatever the precise manner of his behaviour was, it was clear to those who observed him that he was disabled". PC McKelvie spoke to Mr Hartland but not to one of the carers. It was probable that Mr Hartland told PC McKelvie that ZH had been standing there for "a significant amount of time". There remained the risk that ZH would jump into the water at any time, but his presence and demeanour by the pool did not suggest that he was going to do so imminently (para 70). PC Colley spoke to Mr Badugu in the corridor. He told her that ZH was autistic. The officer said that she could not stand there talking to the carer whilst someone might injure himself and possibly die. She felt that she and PC McKelvie had to go

and help as there was an immediate risk to ZH and nobody was taking control of the situation. She said that she would have asked more questions if she felt that there had been time, but thought that it was more important to deal with ZH before talking to the carers any further. The police officers could see from the corridor that there were several lifeguards who would have been able to look after ZH's safety if he had entered the water. He was standing by the poolside towards the shallow end of the pool.

13. PC McKelvie went up to ZH and said "Hello Z, I'm Hayley" and touched him gently on his back to see if he would respond. He then moved closer to the pool and she thought that he was going to jump in. She therefore took hold of his jacket just as he began to gather forward momentum towards the water; and PC Colley also took hold of his jacket at the same time. But they were unable to prevent him from jumping into the water.

14. The judge found (paras 79 and 80) that, if PC McKelvie had not touched ZH, there was no reason to believe that he would have entered the water when he did. Neither his movements nor his position indicated that he was about to jump in. Quite apart from the touching, the presence of two uniformed officers coming up towards him and standing close, one on either side, was probably in itself sufficient to cause him to jump into the pool.

The time when ZH was in the water

15. ZH was not able to swim. He was fully clothed and the water came up to the level of his chest. He started to move towards the deep end, but the two lifeguards prevented him from going further in that direction by forming a cordon. The lifeguards and Mr Hartland grabbed him by the arms and legs and moved him further towards the shallow end. While this was going on, at 15.36 hrs PC McKelvie called for police support. Her radio message stated "Male is now in the pool. Not in danger/drowning….1 more unit".

16. The judge made detailed findings at paras 83 to 87 as to what happened while ZH was in the pool. He found that ZH was enjoying himself in the water and, for that reason and because he disliked being touched, he resisted attempts by the lifeguards to move him towards the shallow end; but he was not aggressive and was not lashing out. He was in the pool for between 5 and 10 minutes.

17. Three more officers, PC Tither, PC Sooch and PC Hunter arrived. While ZH was in the pool, there were now 5 officers at the poolside by the shallow end. Ms Namballa had returned and she, Mr Badugu and a third carer were also at the poolside by the shallow end. The carers were trying to encourage ZH to come out. The judge said (para 90) that he was satisfied that there was "ample opportunity for the police to have sought the advice and assistance of the carers as to the best way of safely removing ZH" from the pool. But they did not do so. And the carers did not volunteer any advice to the police. The police had a brief discussion and decided that the lifeguards should move ZH to the shallow end and lift him out with the assistance of the officers if necessary. The judge said (para 82) that, even when ZH was in the deep end, the danger he was in was "not substantial, though still present" and that, with the lifeguards present in the pool, there was "no appreciable risk" of drowning and the

risk to his safety "significantly diminished in the shallow end with the lifeguards preventing him from accessing the deep end".

18. After he had been brought to the shallow end, ZH was lifted out of the pool by the lifeguards with two of the officers standing on the poolside taking hold of his arms. ZH was struggling or wriggling as he was lifted out. The judge found (para 102) that there was an opportunity for ZH to be released by the lifeguards in the shallow end so that he could stand in the vicinity of the steps. The lifeguards could have formed a cordon just as they had done in order to prevent him from going to the deep end. There was no danger to ZH since he was standing in the water (the water came up to between his knees and thighs), there were three lifeguards present in the water, the pool had been cleared of other swimmers and there were three carers by the poolside at the shallow end.

Restraint following the removal of ZH from the pool

19. Once the officers lifted ZH from the water, he was immediately placed on his back and restrained by several officers applying force to his body, holding him down and shouting loud commands which ZH did not understand. The judge was not satisfied that any attempt was made to calm him down before he was restrained. Neither ZH nor any of the officers suffered any physical injury. As the judge said (para 105), this suggested that the restraint was applied without excessive force and that ZH's struggling was effectively restrained, or that he was not violent in his struggling. The carers tried to calm ZH down by showing him a banana and a lollipop, but the police told them to move away. They urged the police not to restrain him in this way, saying that he was autistic and epileptic. PS Wallace and PC Murray arrived and assisted in maintaining the physical restraint. It was only when handcuffs and leg restraints were placed on ZH that the application of force ceased. During the course of the restraint, ZH lost control of his bowels. This period of restraint lasted about 15 minutes.

Restraint in the police van

20. ZH was then taken out of the building to a police van which was parked in the car park. He was placed alone in the cage in the rear of the van, still in handcuffs and leg restraints. He was soaking wet, very agitated and distressed. While he was in the police van, another carer, Ms Harley, arrived at the scene. She was not allowed to get into the caged area of the van, but was able to calm ZH by speaking to him through the open rear door. At about 16.20 hrs, the police removed the handcuffs and leg restraints. After he had been examined by the London Ambulance Service, he was permitted to leave with his carers. He remained highly distressed and was too upset to change his clothes. He had been in the van for about 25 minutes.

21. He suffered psychological trauma as a result of his experience and an exacerbation of his epileptic seizures. The agreed medical evidence was that he was likely to have suffered from an acute level of psychological suffering during the incident, would not have understood what was happening and was likely to have perceived the restraint as an unwarranted attack on his person. The use of considerable restraint would have been particularly distressing for him. The judge awarded £10,000 damages for post traumatic stress disorder and £12,500 for the exacerbation of his epilepsy.

MCA ISSUES

Legal framework

22. The MCA sanctions certain acts done in connection with the care or treatment of another person, including restraint (in narrowly prescribed circumstances), where the acts are done in the "best interests" of a person who lacks capacity (or where the person doing the acts reasonably believes that the person lacks capacity). So far as material, the MCA provides:

> "4 (1) In determining for the purposes of this Act what is in a person's best interests, the person making the determination must not make it merely on the basis of–
>
> (a) the person's age or appearance, or
>
> (b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about what might be in his best interests.
>
> (2) The person making the determination must consider all the relevant circumstances and, in particular, take the following steps.
>
> (3) He must consider–
>
> (a) whether it is likely that the person will at some time have capacity in relation to the matter in question, and
>
> (b) if it appears likely that he will, when that is likely to be.
>
> (4) He must, so far as reasonably practicable, permit and encourage the person to participate, or to improve his ability to participate, as fully as possible in any act done for him and any decision affecting him.
>
> (5) Where the determination relates to life-sustaining treatment he must not, in considering whether the treatment is in the best interests of the person concerned, be motivated by a desire to bring about his death.
>
> (6) He must consider, so far as is reasonably ascertainable–
>
> (a) the person's past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity),
>
> (b) the beliefs and values that would be likely to influence his decision if he had capacity, and
>
> (c) the other factors that he would be likely to consider if he were able to do so.

> (7) He must take into account, if it is practicable and appropriate to consult them, the views of–
>
> > (a) anyone named by the person as someone to be consulted on the matter in question or on matters of that kind,
> >
> > (b) anyone engaged in caring for the person or interested in his welfare,
> >
> > (c) any donee of a lasting power of attorney granted by the person, and
> >
> > (d) any deputy appointed for the person by the court,
>
> as to what would be in the person's best interests and, in particular, as to the matters mentioned in subsection (6).
>
> (8) The duties imposed by subsections (1) to (7) also apply in relation to the exercise of any powers which–
>
> > (a) are exercisable under a lasting power of attorney, or
> >
> > (b) are exercisable by a person under this Act where he reasonably believes that another person lacks capacity.
>
> (9) In the case of an act done, or a decision made, by a person other than the court, there is sufficient compliance with this section if (having complied with the requirements of subsections (1) to (7)) he reasonably believes that what he does or decides is in the best interests of the person concerned.
>
> (10) "Life-sustaining treatment" means treatment which in the view of a person providing health care for the person concerned is necessary to sustain life.
>
> (11) "Relevant circumstances" are those–
>
> > (a) of which the person making the determination is aware, and
> >
> > (b) which it would be reasonable to regard as relevant."

23. Section 5, so far as material provides:

> "5. (1) If a person ("D") does an act in connection with the care or treatment of another person ("P"), the act is one to which this section applies if–
>
> > (a) before doing the act, D takes reasonable steps to establish whether P lacks capacity in relation to the matter in question, and

> (b) when doing the act, D reasonably believes–
>
> (i) that P lacks capacity in relation to the matter, and
>
> (ii) that it will be in P's best interests for the act to be done.
>
> (2) D does not incur any liability in relation to the act that he would not have incurred if P–
>
> (a) had had capacity to consent in relation to the matter, and
>
> (b) had consented to D's doing the act."

24. So far as material, the version of section 6 that was in force at the time of the events with which we are concerned provided:

> "6. (1) If D does an act that is intended to restrain P, it is not an act to which section 5 applies unless two further conditions are satisfied.
>
> (2) The first condition is that D reasonably believes that it is necessary to do the act in order to prevent harm to P.
>
> (3) The second is that the act is a proportionate response to–
>
> (a) the likelihood of P's suffering harm, and
>
> (b) the seriousness of that harm.
>
> (4) For the purposes of this section D restrains P if he–
>
> (a) uses, or threatens to use, force to secure the doing of an act which P resists, or
>
> (b) restricts P's liberty of movement, whether or not P resists.
>
> (5) But D does more than merely restrain P if he deprives P of his liberty within the meaning of Article 5(1) of the Human Rights Convention (whether or not D is a public authority)."

The judge's decision on liability in relation to the MCA issues

25. The judge found the police liable in assault and battery for (i) PC McKelvie's touching of ZH and both officers' holding of his jacket before he jumped into the water; (ii) the force applied to him in lifting him out of the pool and restraining him; and (iii) the force applied to him when he was out of the water by the poolside. He rejected the "best interests" defence based on the MCA. He also found the police liable for the false imprisonment of ZH from the time when he was restrained by the poolside until he was released from the police van. Here too, he rejected the "best

interests" defence. The following is a summary of the judge's detailed reasoning on the MCA issues.

26. In relation to the period up to the time when ZH went into the water, the judge found (para 116) that PC McKelvie and PC Colley reasonably believed before PC McKelvie touched him that he was suffering from a lack of capacity. He said that the evidence was clear that his lack of capacity would have been apparent to anyone who was observing and hearing ZH at the poolside. He held that the defence had failed to satisfy the preconditions under the MCA, adding:

> "119……[The officers'] task was without doubt a difficult one; they arrived at the pool in the expectation from the message that they had received that they were to be faced with an aggressive disabled male; they were in fact faced with a disabled young man looking as if he might enter the pool fully clothed at any moment with no carer apparently taking control of the situation. But these first impressions were not in fact true. ZH was not and had not at any stage been aggressive before he went into the pool; he had been present beside the pool for some 40 minutes without jumping in and had become "stuck" there as can occur in the case of autistic children; the carer was several feet away for a reason, namely to ensure that ZH was not crowded into jumping into the pool.
>
> 120. What was needed from the police on their arrival was a calm assessment of the situation so as to ensure that they were as fully informed as the circumstances permitted before taking action. Had they been so informed, as they could have been by speaking to Mr Badugu, they would have learned that they must not touch ZH or go right up to him as these actions would be the most likely to bring about that which they sought to avoid, namely ZH jumping into the pool."

27. At para 121, he said that it was both "practicable and appropriate" to consult Mr Badugu and the failure to do so at all (in the case of PC McKelvie) or adequately (in the case of PC Colley) "resulted in the very thing which they were trying to prevent, namely ZH jumping into the pool".

28. The judge made important findings as to whether there was in fact an emergency and whether the officers believed that there was an emergency such that they had to act before consulting Mr Badugu. He said:

> "77. PC McKelvie said that she did not see the carers, and clearly also felt that the police had to take control of the situation. When giving evidence she said in cross-examination that when police were called they had to be seen to be doing something. Having heard the evidence I am quite satisfied that it was this belief of PC Colley and PC McKelvie, that no-one was taking control and that the

> police had to do so, and be seen to be doing so, which was the catalyst for them moving towards ZH and acting as they did. I fully accept that both PC Colley and PC McKelvie genuinely believed that ZH was in potential danger but I do not accept that they considered the risk of him jumping in to be so imminent, and such an emergency, that they had to act, in PC McKelvie's case before speaking to the carer, and in PC Colley's case before seeking to obtain fuller information from him. It was the need for the police to take control of the situation and be seen to be doing so which was uppermost in their minds."

29. He returned to the point later:

> "122. I am entirely satisfied that both PC McKelvie and PC Colley considered that ZH was in potential danger and that they were, in part, acting to protect him. I am not however satisfied that any belief that there was an emergency which required them to act before consulting the carers was a reasonable belief. PC Colley considered that no-one was taking control of the situation and PC McKelvie said that once called the officers had to be seen to being doing something. There is no evidence to suggest that ZH was any more likely to jump into the pool at that moment than he had been for the previous 40 minutes until he was approached and touched by PC McKelvie. It was that action which caused the emergency which PC McKelvie and PC Colley then tried to prevent by grabbing him to stop him from entering the pool. A calm discussion with Mr Badugu would have informed them of the particular problems relating to autistic children, that to touch him or go right up to him were strongly inadvisable and help from qualified school staff was on its way."

30. He therefore concluded that, however genuine their action, neither of the two officers "could reasonably have believed that they were acting in ZH's best interests when the matter is judged objectively. Nor were their actions a proportionate response to the likelihood of ZH suffering harm and the seriousness of that harm at the time that they acted" (para 123).

31. In relation to the time when ZH was in the water, the judge said that the officers were by now aware that he was epileptic and autistic. Physical removal from the pool followed by foreseeable physical restraint should therefore have been a last resort. The failure to consult the carers while ZH was in the pool was unreasonable. The judge was not satisfied that the defence had established that the officers reasonably believed that it was in ZH's best interests to remove him from the pool when they did, or in the manner that they did (para 126). Such action, without full information and consultation with the carers, was neither necessary nor proportionate.

32. In relation to the period when ZH was being restrained by the poolside, the judge said:

> "128. Once the police were locked into the physical removal of ZH from the pool carrying with it the probability of struggle and restraint the options available to them were limited. Even then however they could have stepped back, one by one, to give the carers the opportunity to calm him and help him. The carers were making it clear that the degree of force being used was wholly wrong and had consultation with the carers taken place either before he went into the pool or whilst he was in the pool, the police would have discovered that such forcible physical restraint would have been potentially damaging to him given his condition of autism and epilepsy.
>
> 129. I am not satisfied on the evidence that the police believed at this stage that the restraint was for the benefit of ZH. They were simply caught up in a process which they had started, continued to be involved in and felt unable to stop or control. In any event even if the police believed it was in ZH's best interests to be out of the water; and not able to return to it, thereby requiring or justifying the use of forcible restraint as Miss Studd submits, it cannot have been a reasonable belief that that level of force was in ZH's best interests. The dangers he faced of escape and re-entering the pool were not, given the number of lifeguards and carers present, severe, compared with the risk of injury by such forcible restraint to an autistic and epileptic young man; the risk of restraint causing stress is admitted by the Defence, but the police should have known of the risks of such restraint to an epileptic from immediate seizure, even if not from exacerbation of an existing condition of epilepsy. Nor were the actions of the police proportionate in the circumstances, given that as an alternative to such restraint ZH could have been permitted to leave the pool by himself from the shallow end or when on the poolside have been immediately released for his carers to deal with."

33. Finally, the judge recorded (para 131) that the defendant conceded that, subject to the MCA best interests defence, the police had committed the tort of false imprisonment during the entire period from when ZH was restrained by the poolside until he was released from the police van. In relation to this defence, the judge said that the officers gave no consideration to placing ZH in one of the rooms that might have been available at the pool where he would have been warmer and more comfortable: there would have been no greater risk of him running free from a room in the pool premises than from the police van. In the light of these findings and his earlier finding in relation to the restraint by the poolside, it seems clear that the judge was not satisfied that the restraint of ZH in the police van was motivated by a reasonable belief that restraint was necessary to prevent harm to him or was proportionate.

The challenge to the judge's findings on the MCA issues

34. The following is a summary of the submissions of Ms Studd QC. She accepts that the MCA was engaged. In other words, the acts of the police were acts "in connection with the care or treatment of another person" within the meaning of section 5(1) of the MCA. She accepts therefore that, in order to avail himself of the section 5 defence, the defendant would have to establish that the officers took reasonable steps to establish whether ZH lacked capacity and that when doing the various acts of which complaint is made, they reasonably believed that ZH lacked capacity and that it would be in his best interests for the acts to be done. She also accepts in relation to the acts of restraint that the section 5 defence was not available unless the officers reasonably believed that it was necessary to do the acts in order to prevent harm to ZH and that the acts were a proportionate response to the likelihood of ZH's suffering harm and the seriousness of that harm.

35. Her overarching submission is that the judge failed to have regard to the fact that the reasonableness of the officers' conduct and beliefs fell to be assessed by reference to a fast moving situation in which swift decisions had to be taken. In short, he failed to take account of the need to accord to the police a reasonable degree of operational discretion. She goes so far as to say that the judge's decision makes it impossible to conduct practical policing in emergency situations which involve persons who suffer from incapacity.

36. In relation to the period up to when ZH entered the water, Ms Studd makes two principal submissions. First, she says that the gentle touching of ZH to gain his attention was not capable of being a battery at all: *Collins v Wilcox* [1984] 1 WLR 1172 at p 1177F-G. Secondly, the judge's conclusion that it was reasonable and appropriate for the officers to consult Mr Badugu in the first instance was plainly wrong. The officers were entitled to accept the information that they had been given at face value and treat the situation to which they had been summoned as an emergency. Nobody had provided information to PC McKelvie about ZH's lack of capacity. She says that the judge's finding that it was clear that ZH was "disabled" did not enable the officers to make a proper assessment of his capacity. Disability and incapacity are different concepts and only incapacity is relevant to the MCA defence. In short, the judge should have found that PC McKelvie was faced with an emergency; she had not been able to assess ZH's capacity; it was reasonable for her to seek to engage ZH (by gently touching him) in order to assess his capacity; and in these circumstances, the finding that it was practicable and appropriate to consult Mr Badugu before touching ZH was plainly wrong. It is true that it can properly be said, with the benefit of hindsight, that ZH did lack capacity and that Mr Badugu could have told PC McKelvie this and warned her of the dangers of touching him. But hindsight has no part to play here.

37. In relation to the time when ZH was in the water, Ms Studd says that there was no dispute that it was in the best interests of ZH to remove him from the water. She points out that the judge held that the lifeguards dealt with the incident in a "proper manner" (para 146), and submits that they were in control of ZH while he was in the water and were best placed to ask the carers what they should do. There was no evidence that the officers were directing operations at this stage such as would warrant finding that the police were liable and the lifeguards were not. She further submits that the judge's conclusion that the officers should have consulted the carers

while ZH was in the pool was made with the benefit of hindsight. In so far as the judge held that the police should have consulted the carers once ZH had been brought to the shallow end, Ms Studd submits that it was neither practicable nor appropriate to consult them at that stage, thereby delaying the removal from the water.

38. In relation to the restraint of ZH by the poolside and subsequently in the police van, Ms Studd accepts that by the time that ZH was in the water the officers were aware that he was autistic and epileptic. They did not, however, know that he had an aversion to being touched and, Ms Studd submits, it was this feature of his condition that caused him to struggle violently when he was removed from the pool and compelled the police to restrain him with reasonable force. She contends that the findings of the judge in relation to the restraint both by the poolside and in the police van were wrong because they were based on the unwarranted finding that it was practicable and appropriate for the police to consult and take account of the views of the carers before removing ZH from the pool in the first place.

Discussion

General

39. I start with a few general observations about the MCA with particular reference to the acts done by police officers directed at the care of a person who lacks capacity. Where such acts would otherwise attract liability for the torts of assault and false imprisonment, they will not do so if (i) the officers reasonably believed that the person lacked capacity (having taken reasonable steps to establish whether that was so (section 5(1)(a)and (b)(i)); (ii) they reasonably believed that those acts were done in the person's best interests (section 5(1)(b)(ii)); and (iii) in the case of a restraint, they reasonably believed that they were necessary in order to prevent harm to the person and that it was a proportionate response (section 6(2) and (3)). I have set out the provisions relating to "best interests" at para 22 above.

40. A striking feature of the statutory defence is the extent to which it is pervaded by the concepts of reasonableness, practicability and appropriateness. Strict liability has no place here. Of particular relevance to the present case is the fact that D is under no liability to P in tort for an act done in connection with the care or treatment of P, if he *reasonably* believes that it will be in P's best interests for the act to be done; and (in the case of restraint) if he *reasonably* believes that it is necessary to do the act in order to prevent harm to P; and he is obliged to take into account the views of, amongst others, anyone caring for P, but only if it is *practicable and appropriate* to consult the carer.

41. We heard submissions on behalf of Liberty and the Equality and Human Rights Commission as to the meaning and effect of the MCA. For example, Mr Coppel submitted that, where a best interests decision has been taken which does not comply with the requirements of section 4, the section 5 defence which relies on that decision is not available: a reasonable belief defence cannot be founded on an invalid best interests determination. Another way of making the same point is to say that, if section 4 has not been complied with, the belief asserted by the defendant under section 5(1)(b)(ii) cannot be a reasonable belief. There is force in this submission. But I do not find it necessary to express a concluded view about it for the resolution of this appeal.

42. We also heard submissions about the relevance and application of the Mental Capacity Act 2005 Code of Practice (2007) which provides guidance on the issue of "best interests". The Code has been issued under section 42(5) of the MCA which provides: "if it appears to a court….conducting any….civil proceedings that—(a) a provision of a code or (b) a failure to comply with a code is relevant to a question arising in the proceedings, the provision or failure must be taken into account in deciding the question". Mr Coppel drew our attention to various provisions of the Code which were of potential relevance to the present case. But since the Code was not relied on by either party before the judge, it would not be right to determine this appeal by reference to it. It is right to record that neither Ms Studd nor Ms Williams suggested otherwise.

ZH's entry into the pool

43. I turn to deal with the challenge to the judge's findings in relation to the entry into the water. It is now too late to permit Ms Studd to advance the argument that the touching of ZH by PC McKelvie was not capable of being a battery as a matter of law. This point was not taken in the court below. Ms Williams QC submits that, if it had been raised at trial, the precise nature of the contact would have been explored more fully in evidence and the judge would have made specific findings, for example, as to the degree to which the officers took hold of ZH and the force they used on him. In these circumstances, she argues, it would be unfair to allow the defendant to take this point on appeal. I accept this submission. Whether a touching amounts to a battery is a fact-sensitive question and raises questions of degree which it would be wrong for this court to seek to determine without the benefit of any findings by the judge on the point.

44. The fundamental difficulty facing Ms Studd is that the judge made findings adverse to her case in a careful and thorough judgment after hearing evidence from no fewer than 13 witnesses, all of whom were subjected to cross-examination. The trial lasted 7 days. The judge was well placed to make findings of primary fact and to make assessments of what was reasonable, practicable and appropriate in all the circumstances of the case. At para 67 of his judgment, he said that he was aware of the need to avoid hindsight and the emotive nature of the case. He was aware that the police were faced with a difficult and unusual situation in which a disabled young man was in a position of potential danger. He said that their responses to what became a fast moving situation must be judged accordingly. He said at para 68 that he bore these (and other) matters in mind. Ms Studd submits that the judge lost sight of this impeccable self-direction when he came to address the particular issues that arose in the case. It is, of course, perfectly possible that this is what happened. But in scrutinising the judge's findings, it should be borne in mind that his initial approach to the exercise on which he was engaged was correct.

45. On a point of detail, I do not accept the submission of Ms Studd that the judge focused on disability rather than incapacity (para 36 above). At para 116, he said in terms that the officers believed that ZH lacked capacity and that he was suffering from a lack of capacity at the material time.

46. More importantly, the judge made clear findings that (i) PC McKelvie and PC Colley reasonably believed that ZH lacked capacity before any touching took place (para 116); (ii) the officers considered ZH to be in *potential* danger and were, in part, acting

to protect him (para 122); (iii) there was *in fact* no emergency which required them to act (para 119); (iv) the officers did not consider the risk of ZH's jumping into the pool to be so imminent and such an emergency that they had to act before (in the case of PC McKelvie) speaking to Mr Badugu and (in the case of PC Colley) seeking fuller information from him (para 77); and (v) he was not satisfied that any belief that the officers had that there was an emergency which required them to act before consulting the carers was a reasonable belief (para 122).

47. Unless these findings (in particular findings (i), and (iii) to (v)) can be shown to be flawed in law, they are fatal to the defendant's attempt to invoke section 5 as a defence to the claim in relation to the period before ZH entered the water. Ms Studd does not dispute this. She submits that the findings are perverse. I reject this submission.

48. It was the defence case at trial that it would have been appropriate to consult the carers, but the officers did not have time to do so as they perceived an immediate risk that ZH was about to jump into the water (para 69). The judge made some important findings as to what the officers could see and what they were told:

> "70. ZH had in fact been standing by the pool for at least 40 minutes between 14.50 and 15.30 hours when the police arrived. It is probable that Mr Hartland told PC McKelvie in his conversation with her, as he says he did, that ZH had been standing there for a significant period of time. There remained the risk that he would jump into the water at any given time, but his presence and demeanour by the pool did not in itself suggest that he was going to do so imminently at that particular time, any more than he had been in the last 40 minutes. Had Mr Badugu been consulted he would have been able to inform the police that it is not uncommon for an autistic person to become "stuck" in one place for a considerable period of time. That is no doubt why Mr Badugu had told Mr Hartland that "the boy needed time"."
>
> 71. The officers could also see that there were several lifeguards nearby looking after ZH's safety, should he have gone into the pool. He was well within his depth at the point where he was standing.
>
> 72. Mr Badugu was standing in the corridor within sight and sound of ZH. PC Colley was able to speak to Mr Badugu and there is no reason why PC McKelvie should not have done so as well, whilst at the same time, as PC Colley did, maintaining an eye on ZH."

49. In my view, there is no basis for challenging these findings. I do not accept Ms Studd's submission that the judge's conclusion that it was practicable and appropriate for the two officers to consult Mr Badugu before PC McKelvie approached and touched ZH is unrealistic and, if correct, would make policing impossible. As I have said, the MCA does not impose impossible demands on those who do acts in

connection with the care or treatment of others. It requires no more than what is reasonable, practicable and appropriate. What that entails depends on all the circumstances of the case. As the judge recognised, what is reasonable, practicable and appropriate where there is time to reflect and take measured action may be quite different in an emergency or what is reasonably believed to be an emergency.

50. To summarise, the judge concluded that there was no imminent risk of ZH jumping into the water and the two officers did not consider the risk to be such that they had to act before consulting the carer. There is no basis on which these conclusions can be challenged. The judge gave reasons for them at paras 70 to 72, 77 and 122 of his judgment (cited at paras 28, 29 and 48 above). In these circumstances, the judge was entitled to conclude that the officers did not act in the best interests of ZH because (i) they had failed to take into account the views of Mr Badugu when it was practicable and appropriate to consult him (as required by section 4(7)); and (ii) they did not reasonably believe that it was in ZH's best interests to touch ZH and take hold of his jacket before he jumped into the pool. In reaching his conclusion, the judge took into account the fact that the carer did not volunteer to the officers that they should not approach ZH. I do not consider that the fact that the carer did not volunteer to the officers that ZH did not like to be touched compelled the judge to conclude that it was not practicable or appropriate for them to consult Mr Badugu. The silence of the carer did not mean that it was not practicable and appropriate for the officers to consult them.

51. Nor do I accept the submission of Ms Studd that the judge's decision removed from the officers their operational discretion or imposed an obligation on officers to speak to any carer present whatever the circumstances. The answer to the question whether it is practicable and appropriate to consult a carer before taking action will always be fact-sensitive. In another situation, a court might find that officers genuinely and reasonably believed that they were faced with an emergency that gave them no time to consult.

When ZH was in the water

52. Next I consider the position in relation to the time when ZH was in the pool. I can deal with this shortly, because the role of the police at this stage of the incident was limited to their placing their hands on ZH to lift him out of the pool. As I have said, the judge was entitled to hold that it was practicable and appropriate for the officers to consult Mr Badugu before ZH entered the water to elicit ZH's aversion to being touched. It must follow that it was also practicable and appropriate to consult Mr Badugu before any of the subsequent physical contact by the police, including their lifting ZH out of the water. In any event, the judge was entitled to hold that, once he was in the water, the officers could and should have stepped back to give the carers the opportunity to calm him down and help him: see para 128 of the judgment (para 32 above). The judge was, therefore, entitled to hold that the officers did not reasonably believe that their actions were in the best interests of ZH when they proceeded to lift him out of the water.

53. I should also deal with the submission that the judge made inconsistent findings in holding that the lifeguards had dealt with the incident "in a proper manner" but that the officers did not reasonably believe that what they were doing was in the best interests of ZH. As Ms Williams points out, the involvement of the lifeguards was

limited to attempting to take hold of ZH while he was in the water and lifting him out of the water towards the officers who took hold of his arms and lifted him out. The lifeguards were acting under the direction of the police. They were not sued by ZH in respect of this limited action. The court had no reason to examine whether a best interests defence would have been available to the lifeguards if a claim in battery had been made against them. The finding that the lifeguards' response was proper was irrelevant to the claim against the defendant.

Events after ZH was lifted out of the pool

54. As for the restraint of ZH after he had been lifted out of the water, the judge was entitled to hold that restraint was foreseeable when the officers put their hands on ZH to lift him out of the pool. They had seen ZH wriggling and resisting the attempts of the lifeguards to take hold of him whilst he was in the water and when it appeared that he did not want to come out; information as to ZH's dislike of being touched and as to possible alternative strategies could and should have been obtained from Mr Badugu at the outset; and if the carers had been consulted while he was still in the pool, they would have been told that it was certain that ZH would struggle if he was lifted out of the water.

55. In view of his holding that it was practicable and appropriate to consult the carers before lifting ZH out of the pool and that, had they done so, the need to restrain him would probably have been avoided, the judge was entitled to conclude that the officers did not reasonably believe that it was in the best interests of ZH to restrain him.

56. Further and in any event, the section 5 defence to the claim in relation to the restraint was rejected by the judge because, for the reasons he stated at para 129 of his judgment, neither of the two conditions set out in section 6(2) and (3) was satisfied: see para 32 above. He was not satisfied that the officers believed that it was necessary to restrain ZH in order to prevent harm to him, still less that any such belief would have been reasonable. Nor did the judge consider that such restraint was proportionate, in view of the fact that ZH could have been permitted to leave the pool by himself from the shallow end or, when on the poolside, could have been released to his carers for them to deal with him.

57. In my view, these findings are unimpeachable and are fatal to a best interests defence to the claim in relation to the restraint of ZH after he was lifted out of the water.

DDA ISSUES

The legal framework

58. Until its repeal by the Equality Act 2010, section 21B of the DDA made it unlawful for a public authority to discriminate against a disabled person in carrying out its public functions. So far as material, the DDA provides:

> "**21D Meaning of "discrimination" in section 21B**
>
> (1) For the purposes of section 21B(1), a public authority discriminates against a disabled person if—

…

(2) For the purposes of section 21B(1), a public authority also discriminates against a disabled person if--

(a) it fails to comply with a duty imposed on it by section 21E in circumstances in which the effect of that failure is to make it--

…

(ii) unreasonably adverse for the disabled person to experience being subjected to any detriment to which a person is or may be subjected,

by the carrying-out of a function by the authority; and

(b) it cannot show that its failure to comply with that duty is justified under subsection (3), (5) or (7)(c).

(3) Treatment, or a failure to comply with a duty, is justified under this subsection if --

(a) in the opinion of the public authority, one or more of the conditions specified in subsection (4) are satisfied; and

(b) it is reasonable, in all the circumstances of the case, for it to hold that opinion.

(4) The conditions are –

(a) that the treatment, or non-conmpliance with the duty, is necessary in order not to endanger the health or safety of any person (which may include that of the disabled person);

…

(5) Treatment, or failure to comply with a duty, is justified under this subsection if the acts of the public authority which give rise to the treatment or failure are a proportionate means of achieving a legitimate aim.

…

21E Duties for purposes of section 21D(2) to make adjustments

(1) Subsection (2) applies where a public authority has a practice, policy or procedure which makes it--

> (a) impossible or unreasonably difficult for disabled persons to receive any benefit that is or may be conferred, or
>
> (b) unreasonably adverse for disabled persons to experience being subjected to any detriment to which a person is or may be subjected,
>
> by the carrying-out of a function by the authority.
>
> (2) It is the duty of the authority to take such steps as it is reasonable, in all the circumstances of the case, for the authority to have to take in order to change that practice, policy or procedure so that it no longer has that effect."

ZH's pleaded DDA claim

59. The pleaded case was that the use of force on ZH and the detention of him, "if undertaken by reference to the officers' usual training, procedures and practices as to control and restraint via the escalation model, would be unreasonably adverse for him to experience because of his disabilities" (para 32 of the amended particulars of claim). In these circumstances, the officers were under a duty pursuant to section 21E(2) of the DDA to take such steps as were reasonable in all the circumstances to change their usual practice or procedure so that ZH would not suffer this effect (para 32). At para 33, it was pleaded that the following changes were reasonable adjustments for the officers to have made:

> "(i) Identifying, or at least taking reasonable steps to try and identify, with the Claimant's carers the best means of communicating with the Claimant before attempting to do so and as the situation developed, then adjusting their usual means of communication accordingly;
>
> (ii) Identifying, or at least taking reasonable steps to try and identify, with the Claimant's carers before approaching him, a plan to best address the situation and then taking reasonable steps to implement that plan;
>
> (iii) Allowing the Claimant opportunities to communicate with his carers and receive reassurance from them, in particular when he had just come out of the pool and when he was shut alone in the police van;
>
> (iv) At the outset, allowing the Claimant an opportunity to move away from the poolside at his own pace. He had not entered the water despite standing unrestrained near the edge for at least 30 minutes prior to the officers' attendance. Following their arrival and excessive intervention he jumped into the water within minutes;

> (v) Recognising that in the circumstances use of any force on the Claimant was an option of very last resort only to be deployed if all other options had been tried and failed and only then at the minimum level possible and in circumstances that were not unduly oppressive for the Claimant;
>
> (vi) Seeking, listening to and responding to advice from the Claimant's carers as the situation developed and keeping their approach to it under careful review, for example after it became readily apparent that using force on the Claimant only served to frighten and distress him and escalate the situation further;
>
> (vii) Adopting alternative strategies to afford protection for the Claimant's safety (if and in so far as there was any risk to the same, which is not accepted), for example by the officers present forming a cordon to prevent him from re-entering the pool;
>
> (viii) Prioritising the adoption of a calm, controlled and patient approach at all times in their dealings with the Claimant."

60. By the time of the trial, the defendant admitted that there had been a duty to make reasonable adjustments to the officers' normal practice, policy and procedure, but denied that any of the pleaded adjustments were available or reasonable. The defendant also relied on the defence of justification under sections 21D(3) (4) and (5). His case was that the officers' actions were necessary in order not to endanger the health or safety of any person, including ZH, and that their acts were a proportionate means of achieving this legitimate aim.

The judge's decision

61. The judge first dealt with the reasonable adjustments pleaded at para 33 (i), (ii) and (vi) which all related to consulting the carers. He concluded that it was "practicable and appropriate, indeed essential, that the police informed themselves properly before taking any action which led to the application of force on [ZH]" (para 134). In effect, he repeated what he had said earlier in relation to the MCA issues. Importantly, he rejected the defence submission that (i) there was no evidence that the police intended to restrain ZH in advance of his coming out of the water and (ii) it was not reasonable to expect the officers to consult the carers beforehand (para 135). He said:

> "The duty to consult the carers arose from the outset, and the duty to make reasonable adjustments was a continuing obligation throughout. In any event, as I have found, the police did decide, by means of a very brief discussion, to lift ZH from the water to the poolside leading as was entirely foreseeable, to virtually immediate restraint."

62. The judge also accepted ZH's case on each of the other pleaded reasonable adjustments and rejected in its entirety the plea of justification. As regards justification, he held that it was not necessary in order to avoid endangering the health or safety of anyone (including ZH) to have carried on without seeking information and advice from the carers.

The challenge

63. Ms Studd submits that the judge's conclusion was wrong because (i) the duty to make reasonable adjustments only arises at the point when the practice or procedure to be adjusted "is going to be or may be utilised" (skeleton argument para 58); (ii) there was no evidence that any officer foresaw that it would be necessary to restrain ZH until he started struggling as he was being lifted out of the water; (iii) the judge was wrong to hold that the duty to consult the carers arose from the outset and that the duty to make reasonable adjustments was a continuing duty; and (iv) he conflated the MCA duties with the DDA duties. Ms Studd summarised the effect of this conflation at para 65 of her skeleton argument as being to impose

> "a proactive duty on police officers to consider in advance what practices or procedures may be required and adopt a modification to them in what has been described by the court as a fast moving situation. Such a finding in relation to spontaneous policing decisions is unworkable in practice and wrong in principle."

Conclusion on the DDA issues

64. I have found the position taken by the defendant in relation to these issues during the litigation difficult to follow. In response to a request for further information, he stated that he accepted that the police officers owed a duty to make reasonable adjustments and that they had discharged this duty. He denied that the adjustments pleaded at para 33 of the amended particulars of claim were reasonable and stated that the steps that the officers had taken were sufficient to discharge the duty to make reasonable adjustments. The issue for the judge was clear enough. The duty to make reasonable adjustments was conceded. The question was what did that duty entail on the facts of this case? The defendant did, however, raise the issue of foresight in counsel's closing submissions. The judge dealt with it at para 135 as I have stated above.

65. The background to the duty to make adjustments was that the defendant's policy on control and restraint envisages an escalating series of steps via the Conflict Management Model. This permits officers to use force equal to the level of resistance perceived by them, so that if they cannot deal with the situation at a particular level (eg by verbal communication), they may go to a higher level, which may entail the use of force. The duty to make reasonable adjustments to this policy arose because of the relative disadvantage of its application to a severely autistic person who cannot understand or respond to an officer's attempts to communicate and is thus vulnerable to an escalation of police response.

66. We heard wide-ranging submissions as to what the duty to make reasonable adjustments entails in relation to autistic persons. Ms Studd submits that it is unreasonable to expect police officers to be trained to make medical diagnoses. Ms

Monaghan QC and Mr Coppel submit that the police should have in place arrangements for securing the protection of disabled persons who are at risk. These arrangements will vary according to the disability at issue. Autism is not so unusual that it would be unreasonable for a public authority to make adjustments in advance.

67. I do not find it necessary to make detailed observations as to the scope of the duty to make reasonable adjustments. What is reasonable will depend on the facts of the particular case. Section 21E(2) states in terms that it is the duty of the authority to take such steps as it is reasonable *in all the circumstances of the case* to have to make to change the practice, policy or procedure so that (relevantly for the present case) it no longer has detrimental effect. I accept that police officers are not required to make medical diagnoses. They are not doctors. But the important feature of the present case is that, even before they restrained ZH, they knew that he was autistic and epileptic. They knew (or ought to have known) that autistic persons are vulnerable and have limited understanding. Further, I see no basis for holding that the duty to make reasonable adjustments is not a continuing duty. In my view, the judge was entitled to reach the conclusion that he did on this issue. It was a decision on the particular facts of this case. I reject the submission that his decision makes practical policing unduly difficult or impossible.

THE CONVENTION ISSUES

Article 3

68. Article 3 of the Convention provides: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment". The judge held:

> "144. When the duration of the force and restraint, injury sustained, and age, health and vulnerability of ZH are taken into account I am satisfied that there has been a breach of Article 3. The minimum level of severity has been attained when the whole period of restraint is taken into account. It is not just the application of handcuffs and leg restraints which has to be considered but the whole time when restraint on the poolside and in the van occurred which has to be considered. It is clear that there was no intended humiliation in this case as there was in *Archip* but nevertheless the treatment of ZH amounts to inhuman or degrading treatment."

69. The significance of the reference to *Archip v Romania* (Application no 49608/08) (27 September 2011) is that in that case the ECtHR reiterated at para 52 that the use of handcuffs or other instruments of restraint does not normally give rise to an issue under article 3 "where the measure has been imposed in connection with lawful detention and does not entail the use of force or public exposure exceeding what is reasonably considered necessary". Ms Studd relies on this general statement of principle. The court added that the manner in which the applicant is subjected to the restraint should not go beyond the threshold of a minimum level of severity envisaged by the court's case-law under article 3. The facts in that case were that the manner in which the applicant had been handcuffed to a tree in the courtyard of the police station (visible to the public) was liable to arouse in him feelings of anguish and

inferiority that were capable of humiliating him beyond what was reasonable. Also relevant was the fact that he was suffering from a debilitating medical condition of which the police were aware and that being kept handcuffed outdoors worsened his medical condition. In these circumstances, despite the general statement of principle, the court found a violation of article 3. Ms Studd seeks to distinguish *Archip* on the grounds that what she describes as the exceptional circumstances present in that case were not present here. In particular, ZH was not in public view and there is no evidence that he suffered any physical injury or that the use of handcuffs aggravated his disability as it did in *Archip.* But it is important to note that the judge did not base his conclusion only on the fact that ZH had been in handcuffs and leg restraints.

70. Ms Studd submits that the judge was wrong to conclude that the treatment of ZH by the police reached the minimum level of severity required before a breach of article 3 can be established. She seeks to distinguish the present case from cases such as *Price v United Kingdom* (2002) 34 EHRR 53 and *MS v United Kingdom* (2012) 55 EHRR 23 in both of which the ECtHR held that a violation of article 3 was established. In *Price,* the court said:

> "24. The Court recalls that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum level of severity is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim.
>
> In considering whether treatment is "degrading" within the meaning of Article 3, one of the factors which the Court will take into account is the question whether its object was to humiliate and debase the person concerned, although the absence of any such purpose cannot conclusively rule out a finding of violation of Article 3."

71. In that case, the applicant, who was a thalidomide victim with numerous health problems, committed a contempt of court and was ordered by a judge to be detained for seven days (although she was detained in fact for three nights and four days). She suffered various indignities and humiliations while she was detained. The court noted at para 30 that there was no intention on the part of the authorities to humiliate her. But they said that to detain a severely disabled person in conditions where she is dangerously cold, risks developing bed sores because her bed is too hard or unreachable, and is unable to go to the toilet or keep clean without the greatest difficulty constitutes treatment contrary to article 3. Ms Studd relies on this authority for the proposition that one of the factors which the court will take into account is whether the object of the treatment is to humiliate and debase and the judge in the present case found that there was no intention on the part of the police to humiliate or debase ZH. But as the ECtHR made clear, the absence of an intention to humiliate cannot conclusively rule out a finding of violation of article 3.

72. In *MS,* the applicant was detained in a police station. He was found to be suffering from a mental illness which warranted detention in a hospital. He remained in the police station for about three days. He was extremely agitated and his behaviour was

very disturbed. He complained that his treatment in the police station violated article 3. The importance of this case is what the court said as to the relevance of the applicant's mental disability:

> "39. At the heart of this case is the applicant's severe mental illness at the time in question. As the Court has stated in its case law under this provision of the Convention, the mentally ill are in a position of particular vulnerability, and clear issues of respect for their fundamental human dignity arise whenever such persons are detained by the authorities. The issue is whether the authorities fulfilled their obligation to protect the applicant from treatment contrary to art.3."

73. The court said at para 45 that, although there was no intention to humiliate or debase the applicant, the conditions which he was required to endure were an affront to human dignity and reached the threshold of degrading treatment for the purposes of article 3.

74. More recently, in *ZH v Hungary* (Application No 28973/11), 8 November 2012, the ECtHR had occasion to consider the application of article 3 to individuals suffering from disabilities. The applicant was deaf and dumb, had medium-grade intellectual disability and was illiterate. He was detained on remand in prison. The court said:

> "29. Moreover, where the authorities decide to detain a person with disabilities, they should demonstrate special care in guaranteeing such conditions as correspond to the person's individual needs resulting from his disability (see mutandis *Jasinskis v. Latvia*, no. 45744/08, §59, 21 December 2010; *Price v. the United Kingdom*, op.cit., § 30). States have an obligation to take particular measures which provide effective protection of vulnerable persons and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge (see *Z and Others v. the United Kingdom* [GC], no. 29392/95, §73, ECHR 2001-V). Any interference with the rights of persons belonging to particularly vulnerable groups – such as those with mental disorders – is required to be subject to strict scrutiny, and only very weighty reasons could justify any restriction (see *Alajos Kiss v. Hungary*, no. 38832/06, § 42, 20 May 2010)."

75. At para 32, the court said that it considered:

> "in particular that the inevitable feeling of isolation and helplessness flowing from the applicant's disabilities, coupled with the presumable lack of comprehension of his own situation and of that of the prison order, must have caused the applicant to experience anguish and inferiority attaining the threshold of inhuman and degrading treatment, especially in the face of the fact that he had been severed from the only person (his mother) with whom he could effectively communicate".

76. How should this jurisprudence have been applied to the facts of the present case? There is limited value in comparing the facts of different cases. Instead, the emphasis should be on statements of principle. Whether treatment reaches the requisite minimum level of severity depends on all the circumstances of the case. The following features of the present case are important. ZH was a very vulnerable young man. He suffered from autism and was an epileptic. He was only 16 years of age at the time. The episode lasted about 40 minutes. He would not have understood what was going on and why he was being forcibly restrained by a number of officers by the poolside and later in the police van. He was restrained by handcuffs and leg restraints. He was wet and lost control of his bowels. His carer was not permitted to get into the cage to comfort him. He had done nothing wrong and he was extremely distressed and crying. The consequence of the experience was that he suffered (i) post traumatic stress disorder from which he was only recovering by the time of the trial (more than two years after the event); and (ii) a significant exacerbation of his epilepsy for about two years. On the other hand, it is also relevant that the officers did not intend to humiliate or debase him, although this is not a conclusive factor.

77. I acknowledge that a court should not lightly find a violation of article 3. The ECtHR has repeated many times that a minimum degree of severity of treatment is required. Whether that degree of severity is established on the facts of a particular case involves a question of judgment. The judge was better equipped than this court to be able to evaluate the seriousness of the treatment, taking all the circumstances of the case into account. In my view, we should only interfere if we consider that it is plain that the judge made the wrong assessment. It is clear from para 144 of his judgment that he took into account all the essential relevant factors. Although the police officers were acting in what they thought to be the best interests of ZH, on the judge's findings they made serious errors which led them to treat this vulnerable young man in a way which caused him great distress and anguish. In my judgment, the judge was entitled to find that the threshold of article 3 had been crossed on the particular facts of this case.

Article 5

78. Article 5(1) of the Convention provides that "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases…." It is not suggested that any of the cases specified in article 5(1)(a) to (f) applies to the facts of this case. The issue was simply whether ZH was deprived of his liberty by the police officers. The judge found that he was. He said:

> "145. The nature and duration of the restraint lead me to the conclusion that there was a deprivation of liberty, not merely a restriction on movement on the facts of this case. Furthermore, even though I am of the view that the purpose and intention of the police (namely at least in part to protect ZH's safety) is relevant to the consideration of the application of Article 5, I am nevertheless satisfied that even when that is taken into account, a deprivation of liberty has occurred. The actions of the police were in general well intentioned but they involved the application of forcible restraint for a significant period of time of an autistic epileptic young man when such restraint was in the

> circumstances hasty, ill-informed and damaging to ZH. I have found that the restraint was neither lawful nor justified. Even though the period may have been shorter than that in *Gillan v United Kingdom* 2010 APP No 4158/05, it was in my judgment sufficient in the circumstances to amount to a deprivation of liberty under Article 5."

79. Ms Studd submits that this conclusion was wrong. She says that, by restraining ZH, the officers restricted his freedom of movement for a short period; but they did not deprive him of his liberty. She submits that the purpose of the restraint was, in part at least, to protect and safeguard ZH; the period of restraint was no more than approximately 15 minutes by the poolside and 25 minutes in the police van; and if the officers had not kept ZH in the back of the police van, they would have had to restrain him within the confines of a room until they were able to hand him over to his carers. Ms Studd goes so far as to submit that, if this type of restraint amounts to a breach of article 5, then *any* restraint by the police would be a breach.

80. This last submission is plainly wrong as the jurisprudence demonstrates. The general principles were clearly stated by the ECtHR in *Guzzardi v Italy* (1980) 3 EHRR 333 in these terms:

> "92. The Court recalls that in proclaiming the 'right to liberty' paragraph 1 of Article 5 is contemplating the physical liberty of the person; its aim is to ensure that no one should be dispossessed of this liberty in an arbitrary fashion. As was pointed out by those appearing before the Court, the paragraph is not concerned with mere restrictions on liberty of movement; such restrictions are governed by Article 2 of Protocol No. 4 which has not been ratified by Italy. In order to determine whether someone has been 'deprived of his liberty' within the meaning of Article 5, the starting point must be his concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question.
>
> 93. The difference between deprivation of and restriction upon liberty is nonetheless merely one of degree or intensity, and not one of nature or substance. Although the process of classification into one or other of these categories sometimes proves to be no easy task in that some borderline cases are a matter of pure opinion, the Court cannot avoid making the selection upon which the applicability or inapplicability of Article 5 depends."

81. Thus deprivation of liberty can take many forms other than "the classic detention in prison or strict arrest" (*Guzzardi* para 95). But the paradigm case of deprivation of liberty is detention in the custody of a gaoler: see, for example, *Secretary of State for the Home Department v JJ* [2007] UKHL 45, [2008] 1 AC 385 para 36 per Lord Hoffmann. Where there is detention in such a paradigm case, even a short duration is sufficient to amount to a deprivation of liberty. It is then for the state to justify the

detention as falling within one of the cases specified in article 5(1). There should be nothing surprising about that. The ECtHR has consistently emphasised that it is one of the fundamental principles of a democratic society that the state must strictly adhere to the rule of law when interfering with the right to personal liberty: *Engel v Netherlands* (1976) 1 EHRR 647 at para 69.

82. In the "stop and search" case of *Gillan and Quinton v United Kingdom* (2010) 50 EHRR 45, the court said at para 57:

> "The court observes that although the length of time during which each applicant was stopped and search (sic) did not in either case exceed 30 minutes, during this period the applicants were entirely deprived of any freedom of movement. They were obliged to remain where they were and submit to the search and if they had refused they would have been liable to arrest, detention at a police station and criminal charges. This element of coercion is indicative of a deprivation of liberty within the meaning of art 5(1)."

83. I do not accept the submission of Ms Studd that the court in that case implied that detention of 30 minutes would not usually give rise to a breach of article 5. Although the court did not find it necessary finally to determine whether there had been a breach of article 5 on the facts of that case, it gave a clear indication of its views. Perhaps of greater importance is the fact that *Gillan* was in any event not a paradigm detention case. On the other hand, the restraint of ZH was closely analogous to the classic or paradigm case of detention in prison or a police cell. In particular, it is difficult to see any difference in kind between being detained in the caged area at the back of a police van and being detained in a police cell. In fact, ZH was deprived of movement throughout the entire period of the restraint. The restraint was intense in nature and lasted for approximately 40 minutes and its effects on ZH were serious.

84. The judge correctly had regard to the particular facts of the case and made an assessment of the "type, duration, effects and manner of implementation of the measure in question." In my view, he was entitled to reach the conclusion that he did for the reasons that he gave.

85. We heard argument as to whether the fact that, as the judge found, the purpose and intention of the police was at least in part to protect ZH's safety was relevant to whether there was a breach of article 5. The judge thought that it was, but nevertheless held that there had been a breach. The case of *Austin v Metropolitan Police Commissioner* [2009] UKHL 5, [2009] 1 AC 564 is relevant here. At para 44, Lord Walker said: "the purpose of confinement which may arguably amount to deprivation of liberty is in general relevant, not to whether the threshold is crossed, but to whether that confinement can be justified under article 5(1)(a) to (f)".

86. This approach was endorsed by the ECtHR in *Austin v United Kingdom* 92012) 55 EHRR 14 at para 58. But the court said at para 59:

> "However, the Court is of the view that the requirement to take account of the "type" and "manner of implementation" of the measure in question enables it to have regard to the specific

> context and circumstances surrounding types of restriction other than the paradigm of confinement in a cell. Indeed, the context in which action is taken is an important factor to be taken into account, since situations commonly occur in modern society where the public may be called on to endure restrictions on freedom of movement or liberty in the interests of the common good. As the judges in the Court of Appeal and House of Lords observed, members of the public generally accept that temporary restrictions may be placed on their freedom of movement in certain contexts, such as travel by public transport or on the motorway, or attendance at a football match. The Court does not consider that such commonly occurring restrictions on movement, so long as they are rendered unavoidable as a result of circumstances beyond the control of the authorities and are necessary to avert a real risk of serious injury or damage, and are kept to the minimum required for that purpose, can properly be described as "deprivations of liberty" within the meaning of art.5(1)."

87. To this extent and in such circumstances, therefore, the purpose and intention of the person applying the restraint may be relevant to whether there is a breach of article 5. It is not necessary to explore this further since, as Mr Coppel points out, this reasoning could not apply in the present context. Quite apart from the fact that this is very close to being a paradigm case, there is nothing common or usual about what happened to ZH and no general acceptance by members of the public that they are liable to be treated as ZH was treated.

Article 8

88. The judge held that there was an interference with ZH's right to respect for his private life which was not justified under article 8(2). Ms Studd rightly accepts that, if her challenge to the judge's findings in relation to articles 3 and 5 are rejected, then so too must her challenge to his conclusion in relation to article 8. It follows from what I have said earlier in this judgment that the judge was entitled to find a breach of article 8.

Overall conclusion

89. For all these reasons, I would uphold each of the judge's findings and dismiss this appeal. He examined the issues with meticulous care and reached a conclusion which he was entitled to reach. He said at the end of his judgment that what was called for when the officers first arrived on the scene was for one of them to take charge and inform herself of the situation. This did not happen. The officers' responses were "over-hasty and ill-informed". After ZH had gone into the pool, matters escalated to the point where "a wholly inappropriate restraint of an epileptic autistic boy took place". The officers did not consult properly with the carer who was present when the officers arrived, even if the carer was not as pro-active as he might have been in informing them of what was happening. He added that, although the case against the police was established, he was satisfied that no-one involved was at any time acting in an ill intentioned way towards a disabled person. I would endorse the judge's summary.

90. As I have said, I reject Ms Studd's submission that this decision unreasonably interferes with the operational discretion of the police or that it makes practical policing impossible. I accept that operational discretion is important to the police. This was recognised by the judge. It has been recognised by the ECtHR (see *Austin* at para 56). And I have kept it well in mind in writing this judgment. But operational discretion is not sacrosanct. It cannot be invoked by the police in order to give them immunity from liability for everything that they do. I doubt whether Ms Studd intended to go so far as to suggest that it can. Each case must be carefully considered on its facts. I do not believe that anything said by the judge or by me in this judgment should make it impossible to carry out policing responsibly. One is bound to have some sympathy for the police in this case. They were intent on securing the best interests of everyone, not least ZH. But as the judge said, they behaved as if they were faced with an emergency when there was no emergency; and PC Colley and PC McKelvie did not in fact believe that there was an emergency. Had they consulted the carers, the likelihood is that ZH would not have jumped into the pool in the first place. The police should also have consulted the carers before lifting ZH from the pool. Had they done that, it is likely that with their help, the need to restrain him would have been avoided. Finally and most seriously of all, nothing could justify the manner in which they restrained ZH.

Lord Justice Richards:

91. I agree.

Lady Justice Black:

92. I also agree.