

Capacity, decisions to end one's own life, and the Terminally Ill Adults (End of Life) Bill

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Two key questions

- (1) When can a person have capacity to decide to end their own life?
- (2) What obligations are imposed upon the state in relation to a person who has expressed an intent to end their life?

Capacity to decide to end one's own life

- In the abstract, it is clear that the English courts accept that a person can have the capacity to decide to end their own life:
 - Refusing either the starting or the continuing of life-saving treatment (see, for instance [Kings College Hospital NHS Foundation Trust v C & Anor](#) [2015] EWCOP 80),
 - Or the taking of active steps to bring about their own death (*A Local Authority v Z* [\[2004\] EWHC 2817 \(Fam\)](#) – capacity to take the decision to go to Dignitas).
- The European Court of Human Rights, similarly, accepts that a person can have this capacity. In *Haas v Switzerland* [\[2011\] ECHR 2422](#), for instance, it held that “*an individual's right to decide by what means and at what point his or her life will end, provided he or she is capable of freely reaching a decision on this question and acting in consequence, is one of the aspects of the right to respect for private life within the meaning of Article 8 of the Convention.*”

Capacity to take one's own life (2)

- BUT: *Haas v Switzerland* [\[2011\] ECHR 2422](#) goes on to say that regard has to be had:
“in the context of examining a possible violation of Article 8, to Article 2 of the Convention, which creates for the authorities a duty to protect vulnerable persons, even against actions by which they endanger their own lives [...]. For the Court, this latter Article obliges the national authorities to prevent an individual from taking his or her own life if the decision has not been taken freely and with full understanding of what is involved.”

The Article 2 duty broken down (1)

R (Morahan) v HM Assistant Coroner for West London [\[2021\] EWHC 1603 \(Admin\)](#)

38. The positive operational duty arises where the state agency knows or ought reasonably to know of a real and immediate risk to an individual's life, and requires it to take such measures as could reasonably be expected of it to avoid such risk (*Osman* [v UK [\[1998\] 29 EHRR 245](#)] paras 115, 116). In this context:

(1) *Risk* means a significant or substantial risk, rather than a remote or fanciful one. In *Rabone* the risk in question was one of suicide and was quantified as being 5%, 10% and 20% on successive days, which was held to be sufficient (see paras 35-38).

(2) An *immediate* risk to life means one that is "present and continuing" as opposed to "imminent" (*Rabone* para 39).

(3) The relevant risk must be to life rather than of harm, even serious harm (*G4S Care and Justices Services Ltd v Kent County Council* [\[2019\] EWHC 1648 \(QB\)](#), paras 74-75 and *R (Kent County Council) v HM Coroner for the county of Kent* [\[2012\] EWHC 2768 \(Admin\)](#) at paras 44-47).

(4) *Real* focuses on what was known or ought to have been known at the time, because of the dangers of hindsight (*Van Colle* [v Chief Constable of the Hertfordshire Police [\[2009\] 1 AC 225](#)] at para 32).

The Article 2 duty broken down (2)

(5) Overall, in the light of the foregoing considerations viewed cumulatively, the test is a stringent one (see *Van Colle*, per Lord Brown of Eaton-under Heywood at para 15; and *G4S*, paras 71-73). It will be harder to establish than mere negligence, but that is not because reasonableness here has a different quality to that involved in establishing negligence; rather it is because it is sufficient for negligence that the risk of damage be reasonably foreseeable, whereas the operational duty requires the risk to be real and immediate: see *Rabone* at paras 36-37.

39. It is also clear that the existence and scope of the duty must not impose an impossible or disproportionate burden on state agencies in carrying out their necessary state functions and must take into account the individual's rights to liberty (article 5) and private life (article 8): see *Osman* at para 116, *Rabone* at 104 and *Fernandes de Oliveira [v Portugal (Application No 78103/14) (2019) 69 EHRR 8, EctHR (GC)]* at paras 111, 125, 131.

Digging into the capacity test

- What is the relevant information? *Re Z* didn't say
- And a conceptual problem (with thanks to Professor Gareth Owen)
- In capacity assessments we *predefine* the relevant information as a set of options and we disclose that information as part of assessing understanding, retaining and using or weighing.
e.g. Treatment A vs. Treatment B; Residence X vs. Residence Y
- However, with the decision *ending one's own life* there is an anomaly with respect to relevant information.
 - The basic information disclosure is: Living vs. Not living
 - But 'Not living' is not experiential – it is not an event in life
- So, cognitively relevant information cannot be disclosed in the usual way $\Rightarrow$ the abilities cannot be assessed in the usual way.

Implications

- It is already very challenging talking about capacity in the suicide prevention zone – and often a red herring given the existence of the Mental Health Act 1983: see [Suicide and the \(mis\)use of capacity – in conversation with Dr Chloe Beale – Mental Capacity Law and Policy](#)
- The TIA Bill expressly frames the capacity question as “capacity to decide to end [one’s] own life” – bringing with it the complexities set out above
- How would a statutory principle of a presumption of capacity and a duty to support a person to have capacity to end their own life fit with obligations imposed by *Haas*? (Spoiler, it is very difficult to see how they could)
- Where does the state’s obligation to protect life end, and the obligations to support access under the TIA Bill start? Parliament needs to be crystal clear...

More resources

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- [Mental Health & Justice | \(mhj.org.uk\)](#)
- [Mental Capacity Law and Policy](#)
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