ThirtyNine
ESSEX STREET

ISSUE 29 JANUARY 2013

Court of Protection update

Thirty Nine Essex Street Court of Protection Newsletter: January 2013

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Introduction

Welcome to the January 2013 newsletter. In this newsletter, we discuss an important COP case upon Article 8 and deprivation of liberty, as well as a rare example of a Court declaring that force-feeding is not in P's best interests. We also discuss a number of recent judicial review decisions which shed light (directly or indirectly) upon the approach that public bodies and the Courts should take to decisions relating to care and support for the incapacitated, as well as the important decision of the Supreme Court in *Re A* on disclosure.

As per usual, we include not only hyperlinks to publicly accessible transcripts of the judgments where they are available at the time of publication,[1] but also a QR code at the end which can be scanned to take you directly to the COP Cases Online section of our website, which contains all of our previous case comments.

The New Year brings with it a number of changes, together with resolutions. At the end of this newsletter, we set out our COP resolutions for the year. At its outset, we mark with due congratulations the appointment of Lord Justice Munby as President of the Family Division and (in consequence) of the Court of Protection. We are confident he will continue to maintain his keen interest in matters MCA-related, and very much hope that as part of his remit he will continue to press for the introduction of the reforms accepted by his predecessor but one so as so ensure that the COP can work as smoothly as possible.

[1] As a general rule, those which are not so accessible will be in short order at www.mentalhealthlaw.co.uk.

The NHS Trust v L and others [2012] EWHC 2741 (COP)

Medical treatment – Mental capacity - Treatment withdrawal

Summary

Ms L was a highly intelligent 29 year old who, because of severe anorexia nervosa, had spent 90% of her previous 16 years in inpatient units, often under the Mental Health Act 1983. She also suffered from severe obsessive compulsive disorder. In January 2012, her detention under s.3 of the Act was rescinded after all treatment options had been exhausted and compulsory treatment had been shown only to reinforce her mental disorder and to increase her disability. The NHS Trust sought a declaration that it was not in her best interests to be the subject of forcible feeding or medical treatment, notwithstanding that she would inevitably die without it.

In early 2012, Ms L had hoped to move to a nursing home,

> "*… but, for reasons no one has been able to fathom, (but seem likely to relate to the nursing home having second thoughts as to whether they were willing to accept the responsibility of looking after Ms L), the nursing home in question withdrew their offer of a bed. Ms L was devastated and reacted by reducing her food intake; this resulted in her becoming profoundly and dangerously hypoglycaemic.*"

Having been transferred to a different hospital in March 2012 for emergency treatment, a 'do not resuscitate' decision was taken and attempts to engage Ms L in a re-feeding programme continued. Her struggling attempts to engage with the naso-gastric tube and liquid nutrients are vividly detailed at paragraphs 26-27 of the judgment.

Defying the odds, but still critically ill, by mid-July 2012 she was refusing all food by mouth and wanted to make an advance decision to refuse treatment for hypoglycaemia, although it was felt she lacked capacity. She told her mother that she did not want to die and still hoped to become strong enough to move to a nursing home. Her wish to move was also recorded in writing and if funding was in place she felt she would then have the motivation to move forward. She said:

> "*I feel the best option for me to successfully do this would be to get stronger on the NG tube. Currently I feel an oral diet would be too much for me and also create too much anxiety for me. The NG tube could be short term to get me back on my feet and in a stronger position to move forward. Thank you for taking time to read my wishes. I appreciate your acknowledging my wishes/thoughts.*"

By the time of the hearing in August 2012, Ms L was willing to receive 25mls per hour of nutrients by naso-gastric tube, but not a millilitre more (see paragraphs 37-41). This dramatically reduced the number of hypoglaemic episodes but at least 30mls was necessary for her to put on weight. Weighing about 3 stone, with a body mass index (BMI) of around 7.7, her liver function was impaired, she had end stage organ damage and MRSA, her bone marrow was completely compromised and she was in significant pain from serious pressure sores. She had weeks to live. According to the expert opinion, she would have to be sedated to be forcibly fed by naso-gastric tube or PEG feeding with close to a 100% likelihood of death. No patient with this BMI was reported to have survived such an enforced re-feeding regime. Thus, the only remote possibility of survival would be if she agreed to increase her calorific intake, although even this would be too late to save her given the organ damage.

<u>Capacity</u>

Mrs Justice Eleanor King first had to determine the extent to which Ms L was capable of deciding for herself. Intellectually, Ms L knew that she was close to death but showed an *"inappropriate indifference to matters of life and death and it seems as if it has not entirely hit home*." She wanted to go to a second nursing home that had agreed to take her if she was well enough:

> "*50 …* [I] *n the past it may have been hoped that the prospect may have provided the incentive she needs to start putting on weight but, as Dr Glover points out, her illness won't even let her increase her intake by 1ml an hour in order to help her towards that goal. Even if there was a 1% chance of her agreeing to increase her input, Dr Glover is of the view that there is a 0.1% chance of her being able to stick to it and consistently to work to her recovery.*"

She could not contemplate any calorific increase until she was walking around and able to "*use some of them up.*" Moreover, her fear of gaining weight increased as her BMI fell. She was held to lack capacity to make decisions in relation to serious medical treatment, in particular nutrition and hydration and the administration of dextrose for hypoglycaemic episodes, because her profound and illogical fear of weight gain

prevented her from being able to weigh up the risks and benefits. However, she had capacity to decide on antibiotic treatment and analgesia and treatment for pressures sores. These treatments were not calorific *"so she is able to make a perfectly rational decisions that she needs antibiotics to fight off the infection which would otherwise, in all likelihood, kill her*" (paragraph 54).

Best interests

The Judge noted that Ms L's seemingly rational desire to get stronger and to move to a nursing home was "*completely overwhelmed by her terror of gaining weight and by her fear of 'calories'*" (paragraph 59). Her mother did not consider compulsory feeding to be in her best interests. And the expert concluded, "*…there comes a point in the treatment of any patient where, regardless of the diagnosis, the slavish pursuit of life at any cost becomes unconscionable. I believe, sadly, that this point has been reached in Ms L's treatment*." After noted that the strong presumption to preserve life is not absolute, her Ladyship held:

> "*68. In my judgment this is one of those few cases where the only possible treatment, namely force feeding under sedation, is not to be countenanced in Ms L's best interests: to do so would be futile, carrying with it a near certainty that it would cause her death in any event. Such a course would be overly burdensome in that every calorie that enters her body is an enemy to Ms L.*
>
> *69. Ms L would I am satisfied be appallingly distressed and resistant to any suggestion that she was to be force fed and to what purpose? Her poor body is closing down, organ failure has begun, she can no longer resist infection and she is, at all times in imminent danger of cardiac arrest. Even if she could, by some miracle, agree to some miniscule increase in her nutrient intake her organ failure is nevertheless irreversible and her anorexia so severe and deep rooted that there could be no real possibility of her maintaining her co-operation. Ms L on occasion shows some small spark of insight – she said on the 1st August that she was frightened as she cannot help herself from 'messing with the tube'.*"

In the circumstances, the Court declared (to paraphrase) that it was in Ms L's best interests for clinicians (a) to provide nutrition, hydration and medical treatment where she complied with its administration; (b) to administer dextrose to immediately save life, with minimal force if necessary; (c) not to provide nutrition and hydration if she resisted after all reasonable steps had been taken to gain her co-operation; and (d) to provide palliative care should she enter the terminal stage of her illness.

Comment

This decision is of interest, not because it provides any new legal principle, but simply because it is one of the exceptionally rare occasions when the Courts have sanctioned the possible withdrawal of nutrition and hydration from a patient with anorexia nervosa. Here there was believed to be a virtually 0% prospect of recovery. This can be contrasted with *A Local Authority v E and others* [2012] EWHC 1639, in which enforced re-feeding was authorised where the prospects were considered to be 20%. Clearly there does come a point where the sanctity of life must give way to the concept of dignity; where Article 2 ECHR gives way to Articles 3 and 8. That point is evidently fact-specific but, now that Jane Nicklinson has been granted permission to appeal the decision in *R (Nicklinson) v Ministry of Justice* [2012] EWHC 2381 (Admin), the forthcoming decision(s) of the appellate Court(s) on the "right to die" will no doubt explore the "give way" point further.

J Council v GU & Ors [2012] EWHC 3531 (COP)

Article 5 – Deprivation of Liberty – Article 8 – Contact

Summary

This judgment considers the right to respect for private life in the context of a deprivation of liberty. Although the final order in the case was agreed between the parties, the court was invited to make an unambiguous declaration that the relevant restrictions were compliant with Article 8 ECHR.

"George" suffered from a number of mental disorders, including paedophilia. One of the ways this was manifested was through compulsive letter writing about his fantasies of sex with children. Some of these letters had been left in public places. All parties agreed that it was in George's best interests to remain living in a privately-owned care home and to be subjected to restrictions including strip-searching and monitoring of his correspondence and telephone conversations. There was no dispute that he was deprived of his liberty.

Mostyn J held that the restrictions amounted to an interference with George's private life. He went on to consider the requirements of Article 8 (at paragraphs 11-12) and, in particular, the need for the interference to have a basis in national law. Mostyn J lamented the absence of detailed procedures and safeguards for persons detained pursuant to the MCA, in contrast to the primary and secondary legislation that governs restrictions on those detained under the Mental Health Act 1983 (paragraphs 13-14).

The Official Solicitor raised concerns as to whether the restrictions in this case were compliant with Article 8 on the basis that they were insufficiently prescriptive, carried insufficient safeguards, and lacked validation and oversight by a public body. To address these concerns the parties agreed a 52-page policy document that included specific policies governing searches of George and his room, as well as monitoring of his telephone calls and correspondence.

Additional layers of scrutiny were also agreed between the parties, including provision for the NHS Trust to periodically review each separate policy and receive monthly reports, and for the CQC to seek expert advice as to the care of George and specifically case track George during the course of any compliance review.

The Official Solicitor submitted that the agreed policies and procedures put beyond doubt any question of compliance with Article 8. The care home, which was said to have agreed the policies out of benign concern for George, argued that the policies were not in fact necessary to legitimise the restrictions. This was not accepted by Mostyn J, who held (at paragraphs 20-21):

> *"... not every case where there is some interference with Art 8 rights in the context of a deprivation of liberty authorised under the 2005 Act needs to have in place detailed policies with oversight by a public authority. Sometimes, particularly where the issue is one-off (such as authorising an operation), an order from the Court of Protection will suffice and will provide a sufficient basis in law. But where there is going to be a long-term restrictive regime accompanied by invasive monitoring of the kind with which I am concerned, it seems to me that policies overseen by the applicable NHS Trust and the CQC akin to those which have been agreed here are likely to be necessary if serious doubts as to Article 8 compliance are to be avoided.*
>
> *21. Of course all this debate would become empty were Parliament or the Executive or the CQC to promulgate rules or guidance to cover the situation which I have here. It is hard to understand why there are detailed statutory provisions relating to personal searches and telephone and correspondence monitoring for high security mental hospitals but*

none at all for private care homes."

On a separate note, Mostyn J described the standard practice of referring to parties by their initials as confusing and dehumanising. In light of the general rule that proceedings are to be heard in private, he opined that all court documents should bear the parties' actual names and that anonymised names should only be used when the court's judgment is published.

Comment

This is, in some ways, an unexpected development in the case-law on restrictions associated with deprivation of liberty. Whilst the relatively intrusive restrictions in this case go well beyond those in many other cases, it is likely that an interference with the right to respect for private life may be found in many (if not all) cases where an individual is deprived of their liberty.

The wide implications of this judgment mean that it was perhaps unfortunate that Mostyn J was not required to adjudicate (at least at this stage) upon the extent to which Schedule A1 provides authorisation for restrictions upon contact/private life ancillary to the deprivation of liberty to which it is addressed. The question of the extent to which standard authorisations can serve as a proper basis to restrict contact arrangements is a vexed one:

1. if restrictions upon private life (including contact arrangements) are seen as a factor going to establish whether a person is deprived of their liberty, then it does not strain logic or principle to suggest that they can then be authorised by virtue of a standard authorisation. If this is so, then the grant of a standard authorisation together with sufficiently detailed requirements covering contract restrictions would have served to meet the concerns raised by the Official Solicitor in the case before Mostyn J, and there would have been no need for the elaborate overlay of 'ownership' requirements endorsed by the Court;

2. if, however, the question of the additional restrictions upon private life upon those deprived of their liberty are to be viewed separately to the question of whether they are deprived of their liberty (an approach which finds support not just in the cases cited by Mostyn J but also in the decision of the Strasbourg Court in *Munjaz v United Kingdom* (Application No. 2913/06, decision of 17.7.12)), then as a matter of logic, it becomes difficult to say that a standard authorisation can serve as sufficient authority to impose restrictions upon those 'surviving' Article 8 rights. These must find a basis in accordance with the law from some other source.

It is perhaps not going to be possible to untangle the complications set out immediately above until the Supreme Court has decided precisely how one is to approach the definition of 'deprivation of liberty,' but the decision in *GU* adds a further layer of complexity.

In light of the implications of the judgment, it is also perhaps unfortunate that Mostyn J was not required to determine precisely what Article 8 demanded in the circumstances that arose in the case before him. This is particularly so because the logic of his conclusion is not confined to the position where a person is deprived of their liberty, because any interference with Article 8 rights can only be justified if it satisfies the criteria contained within Article 8(2). There are likely to be many who are subject to such interferences by way of restrictions upon contact who are not subject to a deprivation of liberty (especially given its currently circumscribed definition). Is a policy 'owned' by a public authority required in each such case? And what is required before it can have the requisite qualities of accessibility, foreseeability and predictability?

Finally, it is perhaps unfortunate that there is a degree of ambiguity in the judgment as to the circumstances under which a judicial imprimatur is necessary before an ongoing interference with Article 8 in a care home (or hospital) can be said to be in accordance with the law. The tenor of the judgment was undoubtedly to the effect that the primary consideration was the 'ownership' by a public authority of a policy governing the interference. However, the material policy in the

case before Mostyn J had been placed before the Court, and would be reviewed again by the Court at least once more (and possibly on an ongoing annual basis). Mostyn J did not, in terms, identify whether – absent this review – he would have been satisfied that doubts as to Article 8 compliance would not have arisen.

As Mostyn J identified, none of the complexities in the case before him would have arisen had rules or guidance been promulgated from a suitably authoritative source governing monitoring and searching in private care homes. We suspect that the prospect of such rules/guidance being forthcoming in the near future is unfortunately remote, as welcome as they would be to provide certainty for both providers and individuals.

In the matter of A (a child) [2012] UKSC 60

Practice and procedure – other

Summary

The Supreme Court considered an appeal against the decision of the Court of Appeal ([2012] EWCA Civ 1204) in which McFarlane, Thorpe and Hallett LJJ had held that the identity of an individual (X), the mother of a little girl (A), who had made serious allegations of sexual abuse against A's father and the records relating to those allegations should be disclosed to A's mother, A's father and A's children's guardian. The question of disclosure arose in the context of family proceedings concerning contact between A and A's father which had been suspended in light of the allegations made by X. The Local Authority claimed Public Interest Immunity in respect of the records at issue and disclosure was further resisted by X.

Unlike the Court of Appeal and the High Court, the Supreme Court did not have sight of the records at issue. X continued to resist disclosure on the grounds that it would violate her Article 3 ECHR rights as further exposure to psychological stress risked causing her medical complications. Alternatively, she contended that disclosure would amount to a disproportionate invasion in to her private life. The mother, father and A's children's guardian supported disclosure and the Local Authority adopted a neutral stance.

The Supreme Court (Lady Hale giving the lead judgment) reviewed the common law principles relating to PII as claimed by the Local Authority and noted that immunity is not absolute in nature; where appropriate, the Court must strike the balance between the right to a fair trial and the interest in maintaining confidentiality. Whilst the existing authorities did not address the question at issue, namely the circumstances in which disclosure could be refused in the interests of a third party (X), were this a case in which common law principles alone fell to be considered, Lady Hale noted that it was clear that the public interest would weigh in favour of disclosure. The allegations could not be properly investigated in the absence of disclosure being granted.

Lady Hale went on to consider the effect of the Human Rights Act 1998. In relation to the submission that disclosure would amount to a violation of X's Article 3 rights, the Supreme Court accepted that it was possible in principle that the revelation of an individual's identity could have a sufficiently detrimental impact on their well-being so as to amount to inhuman or degrading treatment. However, the legitimate interests of the State in subjecting an individual to such treatment are also relevant and on the facts of the particular case, X was receiving specialist treatment which would mitigate the severity of the impact upon her. Accordingly, the claim based on Article 3 failed.

As to the question of X's right to privacy and the submission (advanced on behalf of X) that the material could be handled through some closed procedure, the inroads in to the rights to a fair trial and to a family life of the parties to the proceedings that would ensue were such that X's rights were not sufficient justification for refusing disclosure. In reaching this conclusion, the Supreme Court emphasised the difficulties associated with a ruling that a closed procedure could be adopted in this type of proceedings and the deficiencies that would be associated with evaluating the closed material on the specific facts.

The Court went on to hold that whilst it would uphold the decision of the Court of Appeal to grant disclosure, this did not equate to ruling that X would be required to give evidence in person. It would only be sensible in a case such as this to proceed one step at a time. In the event that a party wished to call X to give oral evidence, it would be necessary to assess the competing rights at they evolved. It would be very unlikely that it would ever be appropriate for the father to question X if he remained a litigant in person.

Comment

This decision confirms the approach adopted by the Court of Appeal in favour of disclosure of allegations of abuse notwithstanding the potentially serious impact of such disclosure on the third party (alleged) victim.

The issues that arose in this case have clear parallels with issues that arise not infrequently in welfare proceedings in the COP. We would welcome the emphasis on the need to ensure that a proper investigation of such allegations can been undertaken and the recognition that there is a strong link between the adequacy of such an investigation and the extent to which the parties concerned have been informed of the case they must meet.

Equally, the conclusion that it is necessary to separate the question of disclosure from the question of whether the alleged victim should be required to give oral evidence is to be welcomed, as is the explicit recognition that the balance of competing rights can and often will evolve and it may not be appropriate to resolve the two issues simultaneously. Finally, the decision stands as a clear endorsement of the cardinal importance of judges only determining cases upon the basis of evidence which has been seen by all parties. This is a factor which carries particular weight, we might suggest, in the context of Court of Protection in the face of the continuing (if unjustified) charge that it is a 'secret' Court.

R (ET) v (1) Islington LBC (2) Essex CC [2012] EWHC 3228 (Admin)

COP jurisdiction and powers – interface with public law jurisdiction

Summary

This judicial review decision in the context of the assessment of a risk posed to children by a sexual offender merits brief mention as shedding a light (by analogy) upon the approach that the Administrative Court might take in relation to similar issues in respect of incapacitated adults.

The Claimants (three children) challenged an assessment of the risk posed to them by a man about to be released from imprisonment for sexual offending. The claim failed, but for present purposes, the relevant part of the judgment is that in which Cranston J analysed the approach that he was required to take to assessing the lawfulness of the risk assessment. At paragraphs 24 ff he noted as follows:

> "*24. In community care cases the Wednesbury test is normally applicable (see R (Ireneschild) v Lambeth LBC [2007] EWCA Civ 234, (2007) 10 CCLR 234 and Pulhofer v Hillingdon LBC [1986] AC 484). R (L) v Leeds City Council [2010] EWHC 3324 was a community care case involving the needs of a 14-year-old girl suffering from cystic fibrosis. The council had refused a request to provide a treatment room in her home. Langstaff J held that the intensity of review in that case, given the profoundness of the impact, would be judged objectively and would be heightened.*
>
> *25. That approach was recently adopted by the Supreme Court in R (KM) v Cambridgeshire County Council, National Autistic Society and others intervening [2012] UKSC 23 [2012] PTSR 1189. That was a community care case where the issues were the local authority's method of calculating the claimant's personal budget under the Chronically Sick and Disabled Persons Act 1970 and whether the council's reasoning in reaching its conclusion was sound. In the course of the judgment, Lord*

Wilson (with whom Lords Phillips, Walker, Brown, Kerr and Dyson agreed) said this:

> *'36. I return at last to the appellant's twin challenges to the lawfulness of Cambridgeshire's determination to offer him £85k. I agree with Langstaff J in R (L) v Leeds City Council, [2010] EWHC 3324 (Admin), at para 59, that in community care cases the intensity of review will depend on the profundity of the impact of the determination. By reference to that yardstick, the necessary intensity of review in a case of this sort is high. Mr Wise also validly suggests that a local authority's failure to meet eligible needs may prove to be far less visible in circumstances in which it has provided the service-user with a global sum of money than in those in Page 15 which it has provided him with services in kind. That point fortifies the need for close scrutiny of the lawfulness of a monetary offer. On the other hand respect must be afforded to the distance between the functions of the decision-maker and of the reviewing court; and some regard must be had to the court's ignorance of the effect upon the ability of an authority to perform its other functions of any exacting demands made in relation to the manner of its presentation of its determination in a particular type of case. So the court has to strike a difficult, judicious, balance.'*

26. In my view, the intensity of Wednesbury review is also heightened under the Children Act 1989 in circumstances like the present, where the consequences of the council falling into error is the possible sexual abuse of children and young people. The profundity of the impact, to use that phrase, is equivalent, indeed potentially greater, than in community care cases such as R (KM) v Cambridgeshire County Council. In my view, a notion of heightened review does not undermine the Wednesbury test. The court is simply saying that the public authority must exercise its discretion with a due appreciation of its responsibilities. In effect, given the context, the public authority must tread more carefully than usual. Heightened review calibrates Wednesbury unreasonableness to the matter at issue."

Comment

The precise delineation between the Court of Protection and the Administrative Court remains difficult. As *ET* makes clear, there is no rule that merely because the individual at the heart of the challenge is a child the Court will exercise a heightened degree of scrutiny. The same applies in respect of incapacitated adults. However, because (as with children, albeit not necessarily for the same reasons) incapacitated adults are likely to be particularly vulnerable to the consequences of decisions taken by authorities in the discharge of their public law obligations, it may very well be – at least in situations analogous to those arising in *ET* – the Administrative Court will be open to arguments that the gravity of the consequences give rise to a heightened standard of review as to whether the authority in question has acted lawfully.

R (Chatting) v (1) Viridian Housing (2) LB Wandsworth [2012] EWHC 3595 (Admin)

COP jurisdiction and powers – interface with public law jurisdiction

Summary

This community care judicial review is of considerable importance for the very clear statement it contains as to the interaction

between the MCA 2005 and public law.

An elderly lady suffered from a number of physical and mental impediments which, together with her age, put her in need of care. Viridian Housing, the charity which owned the premises, reorganised the arrangements for the provision of care to residents of the building in which the woman lived. The woman and her niece were anxious about the effect of the reorganisation upon the woman's continued occupation of her flat in the building. Her niece as her litigation friend brought a claim for judicial review.

The Claimant sought declarations that in transferring responsibility for her care to another organisation Viridian were in breach of a compromise agreement made in earlier litigation and had infringed Article 8 EHCR. She also sought a declaration that Wandsworth Borough Council had acted unlawfully in its management of the transfer of her care, in that it had failed to ensure that care was provided to her in a way that meets her assessed needs and takes into account her best interests.

The claim failed. However, for our purposes, the case is of importance because of the emphasis placed at the hearing upon the contention that the Council had failed to act in the Claimant's best interests contrary to s.4 MCA 2005. The Claimant contended that the Council was under duties, both as part of the discharge of their duties under the National Assistance Act and pursuant to binding guidance issued under the Mental Capacity Act 2005, to meet her community care needs and to take into account her best interests as a mentally incapacitated person. Specifically, the contention was advanced (paragraph 91) that the Council acted unlawfully in not taking the Claimant's best interests into account; faced with a report from an ISW saying that accommodation in a residential unit of one was consistent with her best interests, the Council ought to have taken a decision according to where her best interests lay. The Council disputed the suggestion that the Claimant's best interests were not regarded as a material consideration, but submitted that they were not the yardstick by which it fell to the Council to take decisions about her.

The Claimant contended that the MCA was binding upon the local authority in the exercise of its social services functions by virtue of the operation of s.7(1) Local Authority Social Services Act 1970, which in turn required local authorities to have regard to the SoS's guidance "*Prioritising need in the context of Putting People First: A whole system approach to eligibility for social care.*" This guidance contains reference to the MCA and to the five principles contained in s.1. The Claimant also relied upon the decision of Ouseley J in *R (W) v Croydon BC* [2011] EWHC 696 (Admin), in which a decision was quashed on the basis that there had been inadequate consultation, in circumstances where (the service user lacking capacity), the MCA 2005 was said to have been of "particular importance."

Having set out the rival arguments, Nicholas Paines QC concluded that there had been no unlawfulness in the approach taken by the Council, primarily because he could identify no basis for saying that the Council were under a legal duty, enforceable by way of judicial review, to make arrangements under s.26 NAA 1948 for the Claimant to receive accommodation and care in a residential unit of one person at a specific location. He then addressed the question of the MCA 2005 thus:

> "*99. As regards the Mental Capacity Act 2005 and the Guidance, I have to decide whether the Council made a legal error in failing to decide what arrangements should be made for Miss Chatting by reference to the question of what was in her best interests. I agree with Ms Laing that they did not err in law in this regard. Plainly they would have erred in law if they had regarded Miss Chatting's best interests as an irrelevance, because they would have been in breach of their duty under section 21(2) of the 1948 Act to have regard for her welfare. But the fact that Miss Chatting is mentally incapacitated does not import the test of 'what is in her best*

interests?' as the yardstick by which all care decisions are to be made.

100. Section 1(5) of the Act applies to 'an act done, or decision made ... for or on behalf of a person who lacks capacity'. Its decision-making criteria and procedures are designed to be a substitute for the lack of independent capacity of the person to act or take decisions for him or herself. They come into play in circumstances where a person with capacity would take, or participate in the taking of, a decision. In deciding not to press for the registration of Miss Chatting's flat as a residential home for one person and in deciding (as they appear to have done) to agree to a novation of their section 26 arrangements for Miss Chatting so as to substitute Gold Care for Viridian, Wandsworth Borough Council were taking decisions that fell to them to take, with due regard for her welfare. They could rationally conclude that the decisions were compatible with her welfare. They did not as a matter of law require Miss Chatting's assent to these decisions; no decision, or participation in a decision was involved on her part."

Comment

Paragraphs 99 and 100 of this decision stand as an extremely clear (and we would suggest materially correct) statement of the discharge of the duties imposed upon local authorities by both their statutory community care obligations and the MCA 2005.

We found that an error frequently infects public-law decision-making as regards the incapacitated: whilst a best interests meeting seeking to comply with s.4 MCA 2005 can be an extremely important part of the decision-making process, a decision as to the delivery of community care (or indeed healthcare) is ultimately a decision based upon the assessment of (1) what the person's needs are; and (2) whether what is to be offered properly meets those needs. This is not, strictly, a 'best interests' decision, but rather a public law decision.

The public authority must take into account the person's interests and – crucially – such of their wishes and feelings and/or the views of those properly interested in their welfare as the particular situation requires/allows. However, the views of a capacitous service user will not (in the majority of community care decisions) ultimately be decisive; the person lacking capacity is not put in any better position by virtue of their lack of capacity. By the same token, the Court of Protection cannot then (by taking a decision for on behalf of the person) seek to dictate to the public authority what options should be placed before it for consideration: see *A Local Authority v PB and P* [2011] EWHC 502 (COP) and *Re SK* [2012] EWHC 1990 (COP) as well as the pre-MCA 2005 cases of *A v A Health Authority* [2002] Fam 213, *Re S (Vulnerable Adult)* [2007] 2 FLR 1095 and the Children Act 1989 case of *Holmes-Moorhouse v Richmond-upon-Thames London Borough Council* [2009] 1 WLR 413.

One wrinkle that we should perhaps mention in conclusion in this regard is the position where a person refuses an option advanced by a public authority. Where the person has capacity, it is established that a refusal can discharge the public authority's obligation (at least in respect of the provision of residential accommodation under the provisions of the NAA 1948) so long as the refusal is maintained: *R v Kensington and Chelsea RLBC ex p Kujtim* [1999] 4 All ER 161; *R (Khana) v LB Southwark* [2001] EWCA Civ 999. On the facts of an individual case, a refusal might give rise to three possibilities:

1. the refusal is an unwise but capacitous one, falling within *Kujtim* and *Khana*;

2. the refusal is in fact one made without capacity, but that it is in the person's best interests that they receive the care package in question;

3. the refusal is one made without capacity but it is in fact in the person's best interests notwithstanding its lack of wisdom.

At least where option (3) is concerned, we would anticipate that the public authority would be giving very serious consideration to seeking the endorsement of the Court of Protection to its decision (which would, we note, be a best interests decision, because the authority is not seeking to withhold an option based on any consideration other than those falling within s.4 MCA 2005).

R (Cornwall Council) v SoS for Health & Ors [2012] EWHC 3379 (Admin)

COP jurisdiction and powers – interface with public law jurisdiction

Summary

This community care case, a judicial review of a decision of the SoS for Health as to the ordinary residence of an adult lacking the capacity to decide where they wished to live, merits a note for its consideration of the test set down in *R v Waltham Forest LBC, ex p. Vale*, 25 February 1985 and the guidance issued by the DoH upon the determination of ordinary residence for purposes of the National Assistance Act 1948. In *Vale*, Taylor J set out two approaches, which are referred to as "test 1" and "test 2" in the Departmental Guidance. "Test 1" applies where the person is so severely handicapped as to be totally dependent upon a parent or guardian. Taylor J had stated that such a person is in the same position as a small child and her ordinary residence is that of her parents or guardian "because that is her base." The second approach, "test 2," considers the question as if the person is of normal mental capacity, taking account of all the facts of the person's case, including physical presence in a particular place and the nature and purpose of that presence as outlined in *Barnet LBC v Shah* [1983] AC 309, but without requiring the person himself or herself to have adopted the residence voluntarily.

The facts of the case are not relevant for present purposes, nor are the grounds of the judicial review challenge other than ground 4, the contention that the approach in *Vale* was inconsistent with House of Lords authority and the approach to mental incapacity set out in the MCA 2005. Cornwall's case was that primacy should be given to physical presence in determining where a person was ordinarily resident for the purposes of the NAA 1948.

Analysing and rejecting the contention, Beatson J held as follows:

1. distinguishing *Barnet LBC v Shah* [1983] AC 309 (in which Lord Scarman formulated the well-known test that residence must be voluntarily adopted for settled purposes), Beatson J noted that a test which accords a central role to the intention of the person whose ordinary residence is to be determined cannot be applied without adaptation when considering the position of a person who does not have capacity to decide where to live (paragraph 68);

2. distinguishing *Mohammed v Hammersmith and Fulham LBC* [2001] UKHL 57, Beatson J noted that this was not a case concerned with a person lacking capacity, and also that it was concerned with "normal" not "ordinary" residence (paragraph 69). In any event, the concept of "normal" residence also accorded an important role to intention, and the approach adopted by the House of Lords to the definition proceeded on the basis that physical presence was insufficient in itself, and that was is required is an underlying attachment (paragraph 71);

3. cases upon the meaning of "resident" in s.117 MHA 1983 were not of assistance in construing the term "ordinary residence" in the NAA 1948 (paragraph 72);

4. the *Vale* case did not set out rules of law, but two approaches to the circumstances of a particular case, both of which involved questions of fact and degree (paragraph 74). It had been the subject of subsequent judicial endorsement, and significant reliance had been placed upon it by central and local government in formulating guidance, such that there needed to be a good reason to

replace it and a satisfactory alternative approach (paragraphs 78-9);

5. whilst Cornwall contended that primacy should be given to physical presence, it was important not to accord insufficient weight to the fact that Parliament chose the concept of "ordinary residence" as opposed to "residence," to the difference between those concepts, and to the other factors which are of relevance in determining ordinary residence (paragraph 79);

6. it was clear from the decided cases (including *Shah* and *Mohamed*) that physical presence is not sufficient to constitute ordinary residence (paragraph 80), and drawing the threads together, "ordinary residence" is a question of fact and degree, and if the SoS gets the law right, the determination of a person's ordinary residence is for the SoS, subject only to *Wednesbury* unreasonableness (paragraph 85).

Applying these principles, Beatson J found (at paragraph 87) that the SoS had been entitled to examine whether there was a real relationship between the adult in question and his natural parents, and whether they were in fact making relevant decisions. As part of that, he was entitled to take account of the time spent by the adult with them in Cornwall. Although he did not expressly rule as to the relationship between the MCA 2005 and the determination of ordinary residence, Beatson J concluded (paragraph 88) that the SoS had taken account of the approach in s.4 MCA 2005, and that, in considering the approach of the adult's family, the SoS had concluded that they viewed contact with the adult in terms of what was in his best interests.

Comment

This case stands as an endorsement both of *Vale* and of the DoH's guidance upon the determination of ordinary residence in the case of those lacking capacity to decide upon questions of residence. It is also suggested that Beatson J was clearly right to reject a test based upon physical presence alone.

However, it is perhaps unfortunate that Beatson J did not pick up the gauntlet laid down by Cornwall and did not consider in any detail how *Vale* now reads in light of the passage of the MCA 2005. Whilst "test 1" in *Vale* undoubtedly serves a pragmatic purpose, viewed in the abstract it does not sit very easily with the principle of autonomy enshrined in the MCA. In its direct equation of the position of an incapacitated adult with that of a small child, it also stands at odds with the clear thrust of COP case-law, which is to the effect that the two can and should be treated as conceptually distinct (note, for instance, the clear rejection by the Court of Appeal in *K v LBX & Ors* [2012] EWCA Civ 79 that there is any presumption when determining the best interests of an incapacitated adult that they should reside at home with their family). "Test 2," by contrast, does not give rise to the same problems.

In this regard (and for the truly nerdy), it is instructive also to have regard to the consideration given by the Court of Protection to the definition of "habitual residence" in *Re MN (Recognition and Enforcement of Foreign Protective Measures)* [2010] EWHC 1926. This question arose in the context of the jurisdictional provisions contained in Schedule 3 to the MCA 2005, which depend upon the concept of 'habitual residence' (a concept contained in the 2000 Hague Convention on the Protection of Adults but deliberately not defined therein). Hedley J held (at paragraph 22) that "[h]*abitual residence is an undefined term and in English authorities it is regarded as a question of fact to be determined in the individual circumstances of the case*." Habitual and ordinary residence contain very strong similarities, and two important consequences of the approach adopted by Hedley J (and encapsulated in test 2 but not test 1 of *Vale*) is that:

1. an incapacitated adult's habitual/ordinary residence is to be assessed primarily through a scrutiny of their position, not that their parents; and

2. an incapacitated adult can change their habitual/ordinary residence even if their parents do not.

The draft Care and Support Bill relies upon the concept of "ordinary residence" but does not in clause 32 address the question of how the phrase is to be interpreted in the context of those without capacity to decide where they wish to live. It may well be, therefore, that the *Cornwall* case is not the final word upon the subject.

Neon Roberts

Many of you will no doubt have been following case of Neon Roberts over the Christmas period. We do not provide a case report upon it here as it falls outside the scope of the newsletter, but we do note that Bodey J followed the approach in *AVS v NHS Foundation Trust* [2011] COPR Con. Vol. 219, holding thus (at paragraph 25 of the judgment upon whether Neon should be given radiotherapy against the wishes of her mother):

> "*25. I have to keep firmly in mind what is required for there to be any realistic prospect of the court's preferring some complementary alternative to the standard mainstream treatment for N's condition. It is not just a question of demonstrating that there is research and experimentation going on out there; nor that there are ideas and possibilities being floated, nor even that there are reported success stories of cures occurring without the use of radiotherapy and / or chemotherapy. What is required is the identification of a clinician experienced in treating children aged about 7 having this kind of brain cancer; a clinician with the access to the necessary equipment and infrastructure to put the suggested treatment into effect and able and willing to take over the medical care of and responsibility for N. As Ward LJ said at paragraph 38 of AVS v NHS Foundation Trust [2011] COPR Con. VOL. 219: "… if there is no one available to undertake the necessary operation, the question of whether or not it would be in the patient's best interests for that to happen is wholly academic...". The treatment proposed by any such clinician would have to be (or should preferably be) properly studied, tested, reported on and peer-reviewed. To have any realistic prospect of becoming selected by the court (and I repeat that this is not a decision to be made by an adult for himself, but for a child) the proposed plan would have to have a prognosis as to probable survival rate not much less than (and preferably equal to) the sort of survival rate achievable through the use of the orthodox treatment universally applied at present by oncologists in this country.*"

Re DJ [2012] EWHC 3524 (COP)

The astute amongst you will no doubt have noted that we have not in this issue covered the decision of Peter Jackson J in this important medical treatment case. This is because the Court of Appeal reversed the decision on the final day of term, but has yet to hand down its reasons in writing. We hope to be able to give you a case report upon this in the next issue, as it represents the first time that the Court of Appeal has grappled with the approach to be taken to the determination of best interests in the medical treatment sphere under the MCA.

Appeals

By way of update, we understand that the following cases that we have covered in our previous newsletters are the subject of appeals (in addition to *Cheshire West/P and Q*), so watch this space:

1. *ZH v Commissioner of the Police for the Metropolis* [2012] EWHC 604 (Admin);
2. *NYC v PC and NC* (unreported, 20.7.12);
3. *A, B and C v X, Y and Z* [2012] EWHC 2400

(COP);

4. *Dunhill v Burgin* [2012] EWCA Civ 397 and – linked [2012] EWHC 3163 (QB)

Any other cases that we have missed which are on their way upstairs, do please let us know.

Advance Decisions

As a final present from Alex before he returns to the harness, we attach to this newsletter a paper containing his thoughts upon the thornier aspects of Advance Decisions.

New Year's Resolutions

Our combined resolutions are as follows:

1. be careful about expert reports on capacity, especially in dementia cases, and remember that it is always for the Court and the expert to decide whether P has or lacks capacity;

2. in cases of fluctuating capacity, consider whether a qualified declaration might offer a pragmatic solution;

3. be aware that the requirements for capacity to marry are comparatively modest and the fact that an individual has a mental disability should not be unduly relied upon to preclude marriage;

4. be open to the possibility that an unwise decision might be in P's best interests if that is what P wants; and

5. do not even try and figure out whether something is a deprivation of liberty until we have heard what the Supreme Court has to say about it.

Our next update will be out in February unless any major decisions are handed down before then which merit urgent dissemination.

Please email us with any judgments and/or other items which you would like to be included: credit is always given.

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