Mental Capacity Law Newsletter July 2014: Issue 48

Compendium Issue

Introduction

Welcome to the July issue of the Mental Capacity Law Newsletter family. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Newsletter: a difficult case on the line between the MHA/the MCA, safeguarding gone wrong, and updates on post-*Cheshire West* developments;

(2) In the Property and Affairs Newsletter: cases on deputies, undue influence and the COP and the duty of attorneys in continuing healthcare disputes;

(3) In the Practice and Procedure Newsletter: a focus on different aspects of access by the media to the court;

(4) In the Capacity outside the COP newsletter: an update on DNACPR notices, a case on charging in relation to monies managed by a Deputy, and updates on the Government's response to the House of Lords Select Committee's post-legislative scrutiny of the MCA 2005;

(5) In the Scotland Newsletter: an update on the legal consequences of delaying reporting by MHOs in welfare guardianship applications, a case on the proper duration of guardianship and an update on the Mental Health Bill.

In this issue, we also introduce two changes. The first is that we are delighted to introduce Simon Edwards as our Property and Affairs editor. The second is that, to reflect that many more decisions are now being reported pursuant to the President's Transparency Practice Guidance, we are introducing 'Short Notes' on cases which do not merit reporting in full here but where one or more short points of wider interest appear. As ever, we welcome feedback to the editors.

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Hyperlinks are included to judgments; if inactive, the judgment is likely to appear soon at www.mentalhealthlaw.co.uk.

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Summary

ML was 25 years of age with severe learning disability, developmental disorder, autism, epilepsy and diabetes. Save for one hospital admission, he had lived and been cared for in the family home for all of his life. He attended the National Autistic Society Day Centre. The Applicants sought declarations that it was in his best interests to reside and undergo treatment at Bestwood Hospital until he could be discharged to a suitable assisted living package in the community. The Official Solicitor supported the declarations; his parents opposed.

Mr Justice Hayden ultimately concluded that it was in ML's best interests to move to the independent hospital. However, there was an eligibility issue. All accepted that autism amounted to a mental disorder within the meaning of the MHA. And all accepted that ML would be deprived of liberty. Three options were therefore identified:

1. Firstly, to conclude that ML was ineligible to be deprived of his liberty under the Mental Capacity Act 2005, but nonetheless to declare that it was lawful and in his best interest to reside at Bestwood Hospital and to receive treatment there (without authorising the

deprivation of liberty) and to leave the question of authorisation of deprivation of liberty to sections 2 and 3 of the Mental Health Act 1983;

2. Secondly, to make orders and declarations under the MCA, to declare that it was in ML's best interest to reside at and receive care from Bestwood Hospital, to authorise the deprivation of his liberty and any further treatment, seclusion and restraint under the aegis of that Act;

3. Thirdly, to invoke the inherent jurisdiction of the High Court to authorise the deprivation of ML's liberty pursuant to the Court's conclusion that he should reside and receive care at Bestwood Hospital.

The Court agreed with the Official Solicitor that the MHA was the only framework in which ML could properly be detained in the hospital as he was ineligible for a Court of Protection order under MCA s.16A. However, this left a number of uncertainties. The necessary treatment was envisaged to last between 18 and 24 months, making an application under MHA s.3 both apposite and honest. As ML's nearest relative his mother, who was resistant to what was proposed, could object to the s.3 admission and could apply to discharge him from detention which, the Court believed, would have catastrophic consequences for his welfare. His Lordship noted:

> "*75. In my judgment, it can make no difference at all to ML whether his detention is authorised under the MCA, the MHA or the inherent jurisdiction, each contain rigorous safeguards to review his detention or in the case of the inherent jurisdiction can easily be adapted to do so.*
>
> *76. Having considered the case law and the statutory provision it is clear that the magnetic north when contemplating the deprivation of liberty of those who fall within Case E is and is likely to remain the Mental Health Act.*"

After referring to the decisions in *J v The Foundation Trust* [2010] Fam 70, *DN v Northumberland and Wear NHS Foundation Trust* [2011] UKUT 327, and *AM v South London and Maudsley NHS Trust* [2013] UKUT 365 (AAC), his Lordship observed:

> "*79. I am not persuaded by the suggestion, implicit in the DOH letter, that detention under M.C.A for the incapacitous is in someway discriminatory (if in equivalent circumstances the capacitous would be detained under the M.H.A) given that both regimes afford equally rigorous structures and either one might potentially be suitable on the facts. Nor can I easily contemplate the factual situation that would likely test the hypothesis.*
>
> *80. I am however quite sure that there is a pressing need for clarity and predictability at the interface of these two complex regimes, Charles J's interpretation assists in that. Most importantly however he makes the point that the rationale of the legislation drives one to the M.H.A where the M.H.A 1983 is being considered by those who could make an application, predicated on the relevant recommendations under S2 or S3. They like the decision maker under the M.C.A should assume that the treatment referred to in S3 (2) cannot be provided under the M.C.A.*"

Given that the MHA was the proper vehicle, his Lordship took an unusual course. Any application to displace the nearest relative would be reserved to him and the judgment was to be released to the President of the First Tier Tribunal with an invitation to him to allocate a judge of the First Tier to hear any applications to ensure judicial continuity.

Comment

These proceedings illustrate that the MHA has primacy when it applies. Thus, when a person could be detained under the MHA and is an objecting mental health patient, the MHA is the applicable regime. Having heard evidence and the submissions in detail, the Court was clearly concerned about the key decisions being taken by others under the MHA. Registered medical practitioners would need to determine whether the criteria for detention under s.3 MHA were in fact met. An approved mental health professional would have to consider whether such an application ought to be made. The nearest relative would be able to object or apply to discharge, subject to displacement proceedings. And clearly reserving the matter to his Lordship signals the likely futility of exercising such an objection or right to discharge.

It is suggested, however, that recognising the applicability of the MHA was the right decision in this case. The Court of Protection is limited to doing for the patient what he could do for himself if of full capacity, and can go no further. And the powers and safeguards of the MHA have been carefully calibrated, based on over two hundred years of statutory experience, which must not be subverted save by the will of Parliament.

Finally, at the end of the judgment, his Lordship noted by way of a plea: "*Those who practice within the Court of Protection must understand that it is part of the responsibility of the lawyers to ensure that there are realistic time estimates given to the court. The instinct to underestimate the timescale of a case in order that it might be heard more expeditiously is misconceived as this case certainly has proved.*"

Safeguarding and the CoP – a difficult mix

Milton Keynes Council v RR & Ors [2014] EWCOP B19 (District Judge Mort)[1]

Article 5 ECHR – DOLS authorisations

Summary

This case concerned an elderly lady with dementia who had been removed from her home by Milton Keynes Council in October 2012 following safeguarding concerns about her welfare, which included bruising to her face, over the previous few months. RR was taken from her home, which she was said to have left 'willingly' and placed in a care home. Her son, SS, was not present at home at the time and was not told for another 19 days where his mother was. There had been no safeguarding investigation into the concerns that had been raised. The Council did not seek the court's authorisation for the removal and placement in the care home. A standard authorisation was sought but not put in place for two weeks after removal. The Council applied to the Court of Protection 15 days after RR was removed from her home, and interim declarations were subsequently made in respect of RR's continued residence at the care home. During the court proceedings, many allegations were made against SS, who denied them. The Council subsequently decided not to pursue the allegations. By this stage, it was some 16 months after RR had been removed from her home. The Council then determined that it would not fund a package of care at home for RR, and that it would not provide direct payments to RR via SS. The proceedings were resolved by consent, with final declarations that RR lacked capacity to litigate, to

[1] Note: Alex did not contribute to this case comment, having had involvement with this case at one stage.

decide where to live, and to make decisions about care and contact with others, and that it was in her best interests to reside at the care home and to have contact with SS, substantially in accordance with the general rules on visiting that the care home operated for all families.

District Judge Mort held that:

> *"23. The initial failure of MKC to investigate the safeguarding concerns was deplorable as was their failure to apply to the Court of Protection for authority to remove RR from her home. The 19 day delay in applying to the court compounds their failure as does their failure to advise SS of his mother's whereabouts for the same period. Furthermore the safeguarding investigation was not completed until 12/9/13 with the result that contact between RR and her son was subject to restrictions for longer than was necessary. There can be no excuse for MKC's initial failure to investigate the safeguarding alerts. The way they have dealt with this case has been woefully inadequate from the start. It has resulted in avoidable and unlawful interference in respect of RR's Art. 5 right to liberty and security of person and her Art. 8 right to respect for her private and family life and her home. Those rights are not invalidated, nor are the unlawful interferences with those rights rendered any less serious by virtue of RR's incapacity."*

Thus, a declaration was granted that RR was unlawfully deprived of her liberty when she was removed from her home, and until the standard authorisation was granted. There was also a breach of RR's Article 8 rights consequent upon her removal from her home. The Council was to send written apologies to RR and SS.

Comment

This case is another illustration of the failure to have embedded the MCA and the Deprivation of Liberty safeguards into everyday practice that was identified by the House of Lords Select Committee. It is surprising that in late 2012, a local authority was not aware of the need to obtain advance authorisation for the removal of an incapacitated adult from their home, and alarming that safeguarding incidents were not investigated swiftly (or at all) despite RR's obvious vulnerability to harm. The declarations and apology do not appear likely to have much meaning to RR, given her advanced cognitive impairment, but the Court's decision on costs (yet to be handed down) and the naming of the Council in this judgment may assist in reinforcing the need to pay attention to the requirements of the MCA.

Deprivations of Liberty post-*Cheshire West*: A Thank You and Emerging Findings

To assist the President in streamlining the process for court applications to deprive liberty (judgment has yet to be handed down), ADASS undertook a survey of local authorities in England and we issued a newsletter plea for relevant data. The response for both was overwhelming and we would particularly like to thank the large number of people and organisations that contacted us. Here we will outline the headlines, with kind permission from ADASS.

ADASS emerging findings

Projected number of referrals/requests

Table 1: Actual and projected referrals for assessments under DoLS (MCA Schedule A1)

	Responding authorities Total number	Grossed estimate for 152 authorities[2] Total number	
2013/14	10,151	13,719	
2014/15	94,561	138,165	
2015/16		108,830	175,916

Base (all respondents): 108 in 2013/14, 103 in 2014/15, 93 in 2015/16

Table 2: Actual and projected requests for non-MCA Schedule A1 settings (eg supported living, shared lives, education settings)

	Responding authorities Total number	Grossed estimate for 152 authorities[3] Total number
2013/14	134	212
2014/15	18,267	28,605
2015/16	18,035	31,470

Base (all respondents): 91 in 2013/14, 96 in 2014/15, 86 in 2015/16

Funding shortfall

Estimated shortfall between the DoLS activity 2014-5 and the Department of Health DoLS grant allocation for the 82 local authorities that responded was £43.97 million. If this is representative of those that were not able to respond, the estimated grossed total would be £87.63 million.

Newsletter readers' concerns

- Shortfall in the number of trained best interests assessors; takes time to train more.

[2] Grossed figure calculated by taking the mean figure for each type of responding authority and applying it to non-responding authorities of the same type.

[3] Grossed figure calculated by taking the mean figure for each type of responding authority and applying it to non-responding authorities of the same type.

- Shortfall in the need for additional mental health assessors.
- Pressing need to increase the statutory deadline for urgent authorisations from 7 days to 21 days.
- DoLS not designed for short-term detention; allow an urgent authorisation without a standard authorisation.
- Urgent applications to the Court need to be quicker and less resource intensive, whilst avoiding a tick box exercise.
- Further clarity required as to what amounts to continuous supervision and control.
- Increased workload and financial implications for supervisory bodies.
- Impact on case managing, ability to effectively review authorisations.
- Significant disparity between cost of a DoLS authorisation and a court authorisation.
- Likely increase in section 117 funding for satisfying the acid test in psychiatric wards (particularly dementia and learning disability).
- Guidance required relating to 16-19 year olds, particularly in residential schools.
- Repetitive form filling.

Deprivations of Liberty – statutory reform?

In the Government's response to the Select Committee's post-legislative scrutiny report, available here, a significant element related to the provisions of Schedule A1, which were heavily criticised in that report. The following are our understanding from the Government's response of the concrete steps that will be taken:

Short to medium term

- ADASS (the Association of Directors of Adult Social Services) will lead a time-limited task group to assist local authorities and work through the implications of the Supreme Court judgment. The task group will contain key partners (including CQC, NHS England, DH, and representation from local authority solicitors) and will aim to publish an initial read-out of its findings by the end of August 2014. Its work will be informed by input from the care provider sector. To this end, the Care Provider Alliance has agreed to lead an event where care providers can put forward and discuss their concerns following on from the Supreme Court judgment;

- The Government will commission a project to consider the value of each of the DOLS forms and to redraft them (or redesign from scratch) with a view to creating a new set that better balances the need to robustly protect and enhance an individual's rights with the need for a more streamlined and less burdensome system. The project will complete by the end of November 2014;

- The Government will commission up to-date guidance on deprivation of liberty case law – to be published by the end of 2014;

- The revised Code of Practice to the MHA 1983 will include a specific chapter on the interface between deprivation of liberty under the MCA (including DoLS) and the Mental Health Act 1983 and the determination of which regime should be used in particular circumstances. The draft revised Code of Practice will go out to public consultation this summer;

Long term

- The Government has asked the Law Commission to undertake a review as part of the Commission's forthcoming work programme (to be agreed shortly with the Lord Chancellor) that will consult on and then potentially draft a new legal framework to allow for the authorisation of a best interests deprivation of liberty in supported living arrangements. We shall agree precise terms of reference with the Law Commission in due course but the new system shall be rooted firmly in the MCA. We are clear that this work must include wide stakeholder consultation and careful consideration of the many issues at play. "This work will not complete for a few years."

- As part of this work, the Government will ask the Law Commission, to consider "the learning points" that can be applied to DoLS and any improvements that can be made in light of its work (and indeed any changes that will need to be made to DoLS to take account of the new supported living provisions). "Any changes to DoLS would seek to address those recommendations made by the House of Lords: namely to ensure the provisions are in keeping with the ethos of the Mental Capacity Act (any improved DoLS would continue to be part of the MCA), that they are clearly drafted and easily understood, that consideration is taken as to how to strengthen the role of the Relevant Person's Representative and that the effective oversight of the supervisory body be ensured."

Not on the agenda

The Government has made it clear that it does not propose to take forward:

- Any legislative proposal to close the new Bournewood Gap identified by the House of Lords following on the decision in *Dr A*. The Government does not consider that there is a new Gap. "*If necessary, the inherent jurisdiction of the High Court could provide any further authorisation that may be required to deprive a patient detained under the Mental Health Act 1983 of their liberty for medical treatment unrelated to the patient's mental disorder. Given the small number of cases in which this will arise, we do not propose to introduce legislative amendments.*

- Any major work in relation to the DoLS Code of Practice until the Law Commission has reported its finding. However, if "*following the work of the ADASS-led task group, minor amendments to the Code would seem valuable, the Government will consult and take a decision on this through the DH-led MCA Steering Group.*"

Deprivations of Liberty – resources

By way of brief reminder, Alex has continued to maintain his resources page on his website dedicated to post-*Cheshire West* guidance; the most recent addition is an excellent paper written from a psychiatric perspective by Julie Chalmers, Specialist Advisor in Mental Health Law to the Royal College of Psychiatrists. He is still very much in receive mode for further useful guidance!

Short Note: Wishes, feelings and the appointment of deputies

Re BM; JB v AG [2014] EWCOP B20 Senior Judge Lush

Deputies – Financial and property affairs

In the context of a dispute as to who should be appointed BM's deputy for property and affairs, Senior Judge Lush restated the approach as to who should be appointed as deputy thus:

> *"46. No one has an automatic right to be appointed as deputy. The Court of Protection has a discretion as to whom it appoints and, as I have said before in other judgments, traditionally the court has preferred to appoint a relative or friend as deputy (if it is satisfied that it is in P's best interests to do so), rather than appoint a complete stranger.*
>
> *47. This is because a relative or friend is usually familiar with P's affairs and aware of their wishes and feelings. Someone with a close personal knowledge of P is also likely to be in a better position to meet the obligation of a deputy to consult with P, and to permit and encourage them to participate, or to improve their ability to participate, as fully as possible in any act or decision affecting them. And, because professionals charge for their services, the appointment of a relative or friend is preferred for reasons of economy.*
>
> *48. There are, however, cases in which the court wouldn't contemplate appointing a particular family member or friend as deputy. These include situations where:*
>
> *(a) the proposed deputy has physically, psychologically, financially or emotionally abused P;*
> *(b) there is a need to investigate dealings with P's assets prior to the matter being brought to the court's attention, and the proposed deputy's conduct is the subject of that investigation;*
> *(c) there is a real conflict of interests;*
> *(d) the proposed deputy has an unsatisfactory track record in managing his or her own financial affairs; and*
> *(e) there is ongoing friction between various family members, which is likely to interfere with the proper administration of P's affairs.*
>
> *49. For a completely different set of reasons, which need not concern us here, the court generally prefers to appoint an independent, professional deputy, rather than a family member, in cases where P has been awarded substantial compensation for personal injury or clinical negligence."*

On the facts of the case before him, Senior Judge Lush held that he was left with a straight choice between two candidates, essentially the polarisation being "*between two different 'support networks' or 'circles of support': BM's church, on the one hand, and his family, friends and neighbours on the other hand*" (paragraph 53). He held that

> *"55… the factor of magnetic importance is not BM's very deep faith (though I am sure that his faith is, indeed, very deep), but the fact that AG is the candidate proposed by a support network of friends and neighbours, who represent the status quo in terms of being the persons in whom BM had placed trust and confidence immediately before he became incapacitated."*

One of those in the support group was EO, whom BM had appointed to be his sole executrix in his last will dated 23 October 2008. In an entirely 'CRPD-compliant' construction of s.4 MCA 2005, Senior Judge Lush noted that:

> *"58. Although it has been said that there is no hierarchy of factors in the checklist in section 4 of the Mental Capacity Act, I attach weight to EO's views, because section 4(6)(a) refers 'in particular' (my emphasis) to 'any relevant written statement made by him when he had capacity.' There are few written statements more relevant than a will and EO is adamant that it would be in BM's best interests to appoint AG to be his deputy."*

The CRPD, undue influence and the COP

Re GW; LB Haringey v CM [2014] EWCOP B23
Senior Judge Lush

Deputies – Financial and property affairs

Summary

This case concerns an objection by a family member to the appointment of a local authority as property and affairs deputy. It is of note for being the first time in which the General Comment on Article 12 to the Convention on the Rights of Persons with Disabilities ('CRPD') has been prayed in aid in a judgment. In short terms, GW, who had served in the RAF in the Second World War, and then worked as a bricklayer, had been diagnosed with late onset Alzheimer's dementia in 2009. He was sectioned under the MHA 1983 before ultimately being placed in a residential care home. Whilst still in hospital, a safeguarding alert was raised on the basis of disclosures made by GW about his finances, which suggested that his niece, CM, was withdrawing monies from his bank account without his consent. In June 2013, GW purported to make a will, CW being the sole beneficiary; at that point he was unaware that he had made a previous will, shortly after receiving a formal diagnosis that he had Alzheimer's, in which he had left his estate to all his nephews and nieces in equal shares. In October 2013, the LB Haringey applied to be appointed GW's property and affairs deputy. CM objected, and sought herself to be appointed as the deputy. Directions were made for the listing of a hearing and, in advance, the preparation of a report by a Special Visitor, who confirmed (inter alia) that GM had not had testamentary capacity in June 2013, lacked capacity to make decisions as to his property and affairs, did not wish his niece to act as deputy because he did not trust her, but was also opposed to the idea of the Court of Protection appointing an independent deputy. The Special Visitor concluded, however, that GW would be likely to be reconciled gradually to the idea of the appointment of an independent deputy should the court decide this course of action, especially if matters are explained to him clearly and where he is given the assurance that he can have ready cash at his disposal. The matter came on for determination by Senior Judge Lush. He did not reiterate the law relating to the appointment of a deputy, that he had recently set out in *Re BM*, but noted that

> "*29. There is, however, one matter I did not mention in Re BM, and this regards the need to ensure that P is not subjected to undue influence.*
>
> *30. On 13 December 2006 the United Nations General Assembly adopted the Convention on the Rights of Persons with Disabilities ('CRPD'). This convention came into force on 3 May 2008 and it was ratified by the United Kingdom on 8 June 2009. Although it does not form part of our domestic law, it may have an interpretative influence, particularly in cases affecting the rights of a person with a disability. Any application for the appointment of a deputy affects P's rights.*
>
> *31. Article 12.4 of the CRPD requires that:*

> *'States Parties … shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, [and] are free of conflict of interest and undue influence.'*

> *32. In its General Comment No 1 (2014), published on 11 April 2014, the Committee on the Rights of Persons with Disabilities stated, at paragraph 18, that:*
>
> > *'All people risk being subject to 'undue influence' yet this may be exacerbated for those who rely on the supports of others to make decisions. Undue influence is characterized where the quality of the interaction between the support person and the person being supported includes signs of fear, aggression, threat, deception or manipulation. Safeguards for the exercise of legal capacity must include protection against undue influence – however the protection must also respect the rights, will and preferences of the person, including the right to take risks and make mistakes.'"*

Senior Judge Lush held that the factor of magnetic importance was GW's statement that he did not want CM to manage his property and financial affairs. Senior Judge Lush quoted a number of extracts from the interview with the Special Visitor, including one where GW described her as being "*like a witch to* [him]" Senior Judge acknowledged that "*GW's views are neither reliable nor consistent, but having regard to the strength of feeling he displayed in his interview with Dr Fagin, I would be reluctant, unless it were absolutely necessary (which it is not), to override his rights and his expressed will and preference that CM should not be appointed as his deputy*" (paragraph 42). Further, quite apart from GW's present wishes and feelings, or his rights, will and preferences, Senior Judge Lush noted that he "*would be wary of appointing CM as his deputy in circumstances which by no stretch of the imagination can be described as free of conflict of interest and undue influence, whereas I have no such reservations about appointing Haringey Council*."

Importantly, in line with the recommendation of the Special Visitor, Senior Judge Lush granted the deputyship order on the understanding that it was in GW's best interests, and less restrictive of his rights and freedom of action, for him to retain control over his own expenditure to a limit of £200 a week.

As to costs, whilst Senior Judge Lush expressed his surprise that CM persisted with her application to manage her uncle's property and finances after he had expressed such trenchant opposition to her in his interview with the Special Visitor, noting that "[m]*ost people would have thrown in the towel at that stage*." However, he noted that GW's views had not always been consistent and this matter was listed for an attended hearing on 22 May 2014, anyway. In the circumstances, he saw no reason to depart from the usual order for costs in property and affairs cases as set out in rule 156 of the Court of Protection Rules 2007, i.e. that the costs should be paid by P or charged to his estate.

Comment

Even though the CRPD is not incorporated into English law, it is nonetheless being referred to with increasing frequency in decisions up to and including that of the Supreme Court (in *Cheshire West*). The weight placed upon GW's wishes in this case determining the application is also undoubtedly 'CPRD-friendly.' This, though, is the first time that the General Comment upon Article 12 to the Convention has been relied upon in a judgment, and it is of particular interest to note in

this context that Senior Judge Lush alighted upon the discussion in the General Comment in relation to undue influence as opposed to the (relatively) more familiar ground of the importance of the promotion of the individual's will and preferences. It is, in this context, a useful reminder that the CRPD seeks to balance a number of rights including (under Article 16) the right to be free (inter alia) from exploitation and abuse. The Government's response to the House of Lords Select Committee's post-legislative scrutiny report under the MCA 2005 notes "the work that Government is undertaking as it continues to assess the compatibility of the Mental Capacity Act with the Convention. The Committee on the Rights of Persons with Disabilities will be reviewing the compatibility of both the MCA 2005 and the Adults with Incapacity (Scotland) Act 2000 with the CRPD next year, and it is fair to say that there are very significant grounds to doubt whether the MCA 2005 is compliant with the CPRD, especially given the interpretation given to Article 12 in the General Comment issued by the Committee (see this detailed and extremely helpful discussion paper).

Short Note: attorneys and continuing healthcare disputes

On a successful application by the Public Guardian to revoke and cancel the registration of a property and affairs LPA, Senior Judge Lush noted – in the context of holding that an attorney had not acted in the donor's best interests by refusing to pay care home fees on her behalf – that:

> *"40. It is the Public Guardian's view, with which I fully agree, that in a dispute regarding NHS Continuing Healthcare, an attorney acting on behalf of an incapacitated donor has a duty to pursue all the standard dispute resolution procedures and, if need be, have the matter referred to the Parliamentary and Health Service Ombudsman. The Ombudsman's role is to investigate complaints that individuals have been treated unfairly or have received poor service from government departments and other public organisations, including the NHS. Whilst these attempts to resolve the dispute are taking place, the attorney should continue to pay the donor's care fees. If it transpires that the donor qualifies for NHS Continuing Healthcare, and has been eligible for some time, the NHS will refund any overpayment of care fees."*

Costs, the CoP and the media

Re G (Adult) (Costs) [2014] EWCOP 5

CoP jurisdiction and powers – costs

Summary

We have covered the previous episodes in this rather depressing story in earlier issues of our newsletter. In very summary form, the London Borough of Redbridge sought to take steps to investigate and obtain relief to protect an elderly lady, G. The web in which G described herself as being caught in then extended from her carer and her carer's husband to include the press, Associated Newspapers Limited ('ANL') the publisher of the *Daily Mail*) seeking to be joined to the proceedings. That application was dismissed by the President on 1 May 2014 [2014] EWCOP 1361, the President describing the application (para 47) as "*misconceived*" and that in relation to one suggested basis of participation saying that ANL would be (para 54) "*a mere interloper, an officious busybody seeking to intrude in matters that are of no proper concern to it, seemingly on the basis that it can argue someone else's case better or more effectively than they can themselves*."

Both the local authority and the Official Solicitor, as G's litigation friend, sought an order that ANL pay their costs of the application. Inclusive of VAT, the local authority claimed costs in the sum of £13,242. The Official Solicitor did not quantify his costs. ANL resisted both applications and said that there should be no order as to costs. The applications were made and determined on the papers.

A preliminary question for determination was whether the application was governed by the ordinary costs rules in the COP which – in the case of welfare applications – is COPR r. 157 (i.e. the general rule being no as to costs) or whether it was regulated, pursuant to COPR r. 9 by CPR r. 44.3(2), (4) and (5) – i.e. that the unsuccessful party will be ordered to pay the costs of the successful party. As the President noted at para 5, "i*n each case (see CoPR 2007 rule 159 and CPR 1998 rule 44.3(2)(b) respectively) the court 'may' make a different order, having regard to all the circumstances, including in the one case those referred to in rule 159 and in the other those referred to in the very similarly expressed rules 44.3(4) and (5). So the essential difference is in the 'starting point' or 'default position'*.

The Official Solicitor submitted that rule 157 applies only to "*that part of the proceedings*" that concerned G's personal welfare; that ANL's application for joinder was not one to which sections 1(5) and 4 of the Mental Capacity Act 2005 applied (see by way of analogy *Re AB* [2013] EWCOP B39, para 63, and, to the same effect, *Re PO, JO v GO and others* [2013] EWCOP 3932, para 34) and therefore did not concern G's welfare; and that accordingly the question of costs is regulated not by CoPR 2007 but by CPR 1998.

ANL submitted that the purpose of ANL's application was to enable it to engage in the process of determining issues concerning G's personal welfare – relating to her contacts with ANL journalists – and that the "proceedings", as that word is used in rule 157, plainly *did* concern G's personal welfare.

The President agreed with ANL, holding that:

> "*9. The overall scheme of rules 156-157 is, first, the drawing of a distinction between proceedings which "concern P's property and affairs" and those which "concern P's personal welfare" and, secondly, the principle that, where the proceedings concern both, the costs*

should be apportioned between "that part of the proceedings that concerns" the one and "that part of the proceedings that concerns" the other. It is for this reason, and not as suggested by Mr Patel, that rule 157 contains the words upon which he relies. The key word in each of rules 156, 157 and 158 is "proceedings" and not, it may be noted, some other word, for example, "application". The use of the word "proceedings" invites two questions: What are the proceedings? Do they concern property and affairs or personal welfare? In the present case there can only be one answer: the "proceedings" concern G's personal welfare. The fact that G's best interests are not determinative of this particular application does not bear on the fact that the application was, as Mr Wolanski correctly submits, an application made in personal welfare proceedings and made for the purpose of enabling ANL to participate in personal welfare proceedings."

The President therefore held that the application fell to be determined in accordance with COPR r 157 and 159.

Turning to the determination of the application itself, Sir James Munby P endorsed the approach adopted in *AH and others v Hertfordshire Partnership NHS Foundation Trust and others* [2011] EWCOP 3524, paras 11-12, where Peter Jackson J said:

"*Where there is a general rule from which the court can depart where the circumstances justify, it adds nothing to say that a case must be exceptional or atypical for costs to be ordered … Each application for costs must be considered on its own merit or lack of merit with the clear appreciation that there must be a good reason before the court will contemplate departure from the general rule.*"

The President was:

"*18.* […] *troubled by the suggestion that ANL's conduct during the proceedings should be visited in an adverse costs order, as also by the contention (even if factually accurate) that ANL's application was self-serving and mounted for its own gain. This might be thought to reflect a mindset, also exemplified by the letters referred to above, which fails to recognise the vitally important role of the media and the valuable service the media provides, however uncomfortable this may sometimes feel to those steeped in the traditional cultures of the Family Court and the Court of Protection, in shining much-needed light on the workings of these necessarily powerful tribunals. Let it be assumed for the sake of argument – I make no findings on the point – that ANL's reporting of the proceedings merited every word of Cobb J's criticisms. What has that got to do with the question of costs with which I am alone concerned? With all respect to those who may think otherwise, nothing at all. Orders for costs are not to be made as a back-door method of punishing inaccurate or even tendentious reporting. The very suggestion is deeply unprincipled. Were the idea to gain acceptance it would inevitably have a chilling effect. At present, and for reasons which require no elaboration here, the Family Court and the Court of Protection need more transparency, more scrutiny by the media, more reporting – all vital if there is to be more public awareness and understanding – not less.*"

However,

"*19. Stripped of all rhetoric, the essential point here is very simple: it is that ANL made an application, to be joined in proceedings in which it had no legally recognised interest, which was seemingly unprecedented (para 52 of my previous judgment), which was, as I said, misconceived and which failed completely. The question at the end of the day is whether in all the circumstances, and having regard in particular to the matters referred to in CoPR*

2007 rule 159, it is right to depart from the general rule in rule 157. In my judgment it is, given the way in which I have characterised ANL's application and the reasons why it failed. But that does not mean that ANL should necessarily have to pay all the costs, and I have concluded that that would be to go too far. There are, in my judgment, three factors which, taken in combination, justify this conclusion: first, the public importance of the issues; secondly, the stance adopted beforehand in particular by the Official Solicitor; and, thirdly, the fact that I do not see why ANL should be required to pay two sets of costs. Doing the best I can, and readily acknowledging that any figure is to an extent arbitrary, my conclusion is that ANL should be ordered to pay 30% of the costs of the local authority and 30% of the costs of the Official Solicitor (including his costs of instructing two counsel). The costs, if they cannot be agreed, will have to be the subject of detailed assessment.

20. In concluding I wish to make one thing absolutely clear. The essential factor driving the order for costs I have made in this case was, in addition to the fact it failed, the nature of the application, namely an application to be joined as a party. It should not be assumed that the same approach would have been appropriate if the dispute had been, as it usually is in cases involving the media, a dispute as to the need for or the ambit of a reporting restriction order. Very different considerations arise in such cases. Conventionally, there is often no order for costs, whatever the outcome. Nothing I have said here is intended to have any application in such cases."

Comment

The decision on the preliminary point is of particular interest for confirming the wide definition to be given to the definition of "*personal welfare proceedings*" for purposes of COPR r 157 (the same will apply by analogy to COPR r 156 in relation to property and affairs proceedings). An interesting question that will fall for resolution in an appropriate case is whether the provisions of the CPR can and should be imported in a case where an HRA damages claim has been brought within the scope of COP proceedings. It is not obvious that the ratio of the decision in this case would also apply to prevent – in a proper case – that CPR r.44 should be applied (by COPR r9) so as to provide that the costs of that claim should follow the event.

It is unsurprising, perhaps, that the President should place such emphasis upon the specific reasons that he gave for making a partial departure from the normal costs rules so that his judgment cannot be elevated into one of more general significance in terms of media applications.

The CoP and post-mortem confidentiality

Press Association v Newcastle Upon Tyne Hospitals Foundation Trust [2014] EWCOP 6

Media – anonymity

Summary

This is the follow up to a decision of Peter Jackson J [2014] EWCOP 454 relating to the question of whether it was lawful to withhold blood transfusions from a gravely ill Jehovah's Witness. For reasons discussed in our previous case note, he decided at an urgent hearing that it was; the woman, then identified solely as LM, died before he handed down his judgment.

The hearing had taken place – in part – by videolink to open court in London where it was attended by a member of the Press Association.

LM's treating NHS Trust had applied for a Reporting Restriction Order ('RRO'); the RRO was made at the hearing but the final version was not approved and sealed until shortly after LM died.

In his judgment in the substantive hearing, Peter Jackson J noted that "interesting questions" were raised *about the court's jurisdiction to restrict the reporting after a person's death of information gathered during proceedings that took place during her lifetime"* (paragraph 26). He had invited legal submissions upon the question, Peter Jackson J took at that stage the pragmatic step of making "*an order that preserves the situation until the time comes when someone seeks to present full argument on the question. I will say no more than that for the present*" (paragraph 27). He therefore granted a RRO on materially identical terms (it would appear) to that which he would have granted had LM still been alive.

The Press Association then applied for a variation of the RRO. The PA did not challenge the order in relation to the medical and care staff, but sought the removal of the embargo on naming LM. The PA also wished to approach the two Jehovah's Witnesses to ask if they would wish to comment about the case. Peter Jackson J noted that, in fact, the order did not contain a 'doorstepping provision' preventing such a request being made to the Witnesses, but they had made clear through the Trust that they did not want to be named or approached.

Written submissions were exchanged with the Trust and Peter Jackson J determined the application on the papers.

The law

Peter Jackson J noted that the power to restrict the publication of identifying information may arise in two ways: (i)following an application under the Human Rights Act to secure the protection of Article 8 rights; (ii) In Court of Protection proceedings, by an order under Part 13 of the Court of Protection Rules 2007. Whatever the basis for the application, the court would take a consistent approach.

Where issues arise during the lifetime of the protected person, the existence of the jurisdiction and the basis on which it is exercised are well understood. Decisions must be made for good reason, applying the discipline of the Human Rights Act in balancing rights arising under Articles 8 and 10, as described by Lord Steyn in *Re S (A child) (Identification: Restrictions on Publication)* [2005] 1 AC 593.

> "*First, neither article has as such precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test.*"

Peter Jackson J set out the relevant provisions of Part 13 of the COPR, and noted that the accompanying Practice Direction (PD13A) implied (at paragraph 15) that a RRO would not extend beyond the death of the protected party unless the interests of others require it, but that the PD was not addressing the issue now under consideration.

Peter Jackson J considered two previous authorities:

1. *Re C (Adult Patient: Restriction of Publicity After Death)* [1996] 1 FCR 605, where a non-

time limited order under s.11 Contempt of Court Act 1981 had been made alongside an order authorising withdrawal of treatment from a young man in PVS. Soon after the young man's death, the parties sought confirmation that the order remained effective so that the identity of his family and his doctors and carers could not be published. Sir Stephen Brown P held that the order remained in force, the factors underpinning his decision being (i) the position of the doctors and carers, (ii) the position of the family, (iii) the issue of medical confidentiality, and (iv) the interests of justice in similar cases. Sir Stephen Brown expressly noted that the application was unopposed by the press and said that the outcome might be different had he been asked to carry out a balancing exercise;

2. *Re Meek* [2014] EWCOP 1. In that case, the subject of COP proceedings that had taken place in private concerning her property and affairs died between the date of the hearing and publication of the judgment. It had been intended that her anonymity should endure during her lifetime; the issue was whether the judgment should remain anonymised after her death. In deciding that it should not, Judge Hodge QC had said at paragraph 104:

> "*I accept that the death of the protected person (P) will not automatically render it appropriate to authorise the publication of any relevant Court of Protection judgment in unanonymised form; but it is clearly a relevant consideration. P's death means that P no longer has any need for the special protection afforded by anonymity. However, as Sir Stephen Brown recognised in Re C (cited above), the court must consider the potential effect on P's relatives and other family members, on clinicians treating P, and on persons caring for P, if they knew that on P's death, their anonymity might be lost.*" (emphasis added)

As Peter Jackson J noted (at paragraph 22): "[o]*n one reading, the emphasised sentence begs the question with which I am faced, namely whether the protected person herself has any claim to anonymity after death.*"

It was common ground between the parties that the Court of Protection had the power to make an order preventing the reporting of the deceased's name in order to uphold the rights of others, such as medical or care staff or family members. Peter Jackson J held in this regard (at paragraph 33) that "[t]*his principle was upheld by Sir Stephen Brown in Re C and in my opinion his analysis remains convincing following the implementation of the Human Rights Act, which changed the analytical approach to these cases, rather than transforming the court's response to them: see Re S at 605G-606A.*"

What was in dispute was the existence of any independent right to protection for the deceased person herself. As Peter Jackson J noted at paragraph 34 "[t]*his comes into sharp focus in LM's case, because she had no known family or friends. In consequence, she cannot be kept anonymous for the sake of others, as was, at least in part, the case in Re C.*"

That was, though, not the end of the matter. The balance between the competing interests of maintaining the confidentiality of personal information admitted to the Court and the public need to understand and have confidence in the way in which decisions, both generally and in individual cases, have been reached were (he held at paragraph 35) "*normally reconciled by the publication of an anonymised judgment, a*

convention most recently reflected in the Practice Guidance: "Transparency in the Court of Protection", issued by the President on 16 January 2014" [Nb, guidance which – rather ironically – seems to have disappeared in the transfer across to the new Judiciary website, a matter that we have raised with those responsible; it is in any event available on Bailii].

Peter Jackson J compared the approaches taken where hearings had been held in public (as would usually be the case in applications relating to serious medical treatment) and in private. Whilst he noted that the making of an RRO is a step beyond the issuing of an anonymised judgment, the same principles are in play: "*If the court has sought to protect private information in an anonymised judgment, the case for protecting it by a RRO may be a strong one*" (paragraph 38). He therefore held that he would:

> "[39] *… approach the rights of those whose cases have been heard in private and those whose cases have been heard in public on an equal footing. Once one reaches the balancing exercise, the right to report may weigh particularly heavily in cases heard in public. But that does not mean that the existence of the power to limit reporting should depend upon whether the case is heard in public or in private or that, following the death of the subject of the proceedings, a balancing exercise is to be performed in one case but not in the other.*"

Whilst, as he noted, in very many circumstances, legal rights will end with death, the situation that Peter Jackson J was confronted with was different to – say – libel proceedings, because it was "self-evident" that "*the information that is said to deserve protection was gathered during the lifetime of the protected person in the course of proceedings that existed in order to protect her welfare. In my judgment there is no good reason to conclude that the person's death should lead automatically to all protection being lost. On the contrary, there are very good reasons why the court should retain the power to restrict where necessary the information that can be published, particularly where the information may only have come to wider attention as a result of its own proceedings*" (paragraph 41).

Peter Jackson J therefore held that

> "*[42]… where a court has restricted the publication of information during proceedings that were in existence during a person's lifetime, it has not only the right but the duty to consider, when requested to do so, whether that information should continue to be protected following the person's death, and to balance the factors that arise in the particular case.*"

Peter Jackson J agreed with the observation of HHJ Hodge QC in *Re Meek* (at paragraph 104) that "*P's death means that P no longer has any need for the special protection afforded by anonymity*" to the extent that it conveys that, at least in the eyes of the law, a dead person cannot be affected by what is said about them. However:

> "[43] *I do not take this to mean that protection required in life is automatically lost upon death, and I therefore disagree with Mr Dodd's submission that 'Once an individual is dead the rules must cease to apply in relation to that person, because they are no longer necessary, the dead having no interests or rights which can be protected or affected by the action of any human agency' There are a number of considerations that may make it necessary and proportionate to continue to uphold after death the privacy that existed in lifetime. Two of these are referred to in Re C: (i) medical confidentiality, where the death of the patient does not entitle the doctor to publish her medical records: on the contrary, the doctor may only do that in prescribed circumstances;*

(ii) the interests of justice, which require that people should not be deterred from approaching the court out of fear that any privacy will automatically lapse on death. To these considerations, I would add the need, referred to above, to treat the rights of those who are subject to public and private hearings with consistency. The COP Rules must be read conformably with the court's obligations under the Human Rights Act and any other approach would not do this.

44. Lastly, I do not consider that the fact [relied upon on behalf of the PA] that the automatic anonymity of rape victims [granted by the provisions of Sexual Offences (Amendment) Acts 1976 and 1992] ends on death takes the matter further.. That is a specific statutory provision in a different context and it is even possible to envisage a situation where the court, acting independently of statute, could preserve the anonymity of a rape victim after death."

The balancing exercise in LM's case

In light of his conclusion that he was obliged as a matter of law to consider whether the RRO should be continued so as to continue to protect LM's identity, Peter Jackson J went on to conduct the requisite balancing exercise required by *Re S*. On the specific facts of her case, he concluded that the balance in this case fell in favour of discharging that part of the order that conferred anonymity on LM. He emphasised, however, that "*there is a balance to be struck, and in other cases the conclusion might be different*" (paragraph 48).

The order was not disturbed insofar as it related to the doctors/carers and the Jehovah's Witnesses, Peter Jackson J noting in respect of the latter that "*the Witnesses acted to assist the court in an emergency and should not be exposed to unwanted publicity as a result*" (paragraph 49).

[LM's name is now – properly – available on the internet. In light of Peter Jackson J's observation that LM was a private person who would not have wanted her private information to be made public, we have chosen not to give it here].

Comment

This case is of significant interest for two particular reasons. First, it is the first contested case of which we are aware in the question of the survival of confidentiality after death has been considered (the pre-HRA case of *Re C* was not contested, as Peter Jackson J noted). We would suggest that the conclusion reached was the only correct one, allowing as it does for – and indeed requiring that – a balancing exercise to be carried out on the facts of the individual case.

Second, the case is of interest for the way in which Peter Jackson J sought to downplay the differences between cases heard in public and cases heard in private as regards rights that might arise as to the confidentiality of personal information relating to P. It is undoubtedly correct that, in light of the Transparency Guidance, the information that makes its way into the public domain as to (for instance) the names of the public authorities in question is now – in general – likely to similar in relation to both types of case (the Guidance providing that "public authorities and expert witnesses should be named in the judgment approved for publication, unless there are compelling reasons why they should not be so named (paragraph 20(i))." However, there is one very significant difference: a hearing that has taken place in public will, by definition, be one members of the media will have been able to attend, whereas they will not be able to attend a hearing that has taken place in private. Members of the media will therefore be able to hear (often contextual) details of the case that do not make their way into the judgment; by contrast (and in

the immortal words of Donald Rumsfeld) information that does not appear in an anonymised judgment will be an unknown unknown to the media. The principles that apply in relation to decisions as to anonymisation and the granting of a RRO may therefore be the same, but they take place against a very different backdrop.

In light of this last observation, it will be of particular interest to see whether there is a drive (whether through the mechanism of the newly constituted ad hoc Rules Committee, or otherwise) to pick up on the President's oft-repeated desire to align practice in the Court of Protection to that in the family courts where, since the reforms introduced in April 2009, is that accredited journalists have a right to attend most family court hearings (including hearings of cases dealing with what in the Court of Protection would be called personal welfare) unless proper grounds for excluding them can be established on narrowly defined grounds.

Miscreants beware – protecting the identity of a wrong-doer

Re DP; The Public Guardian v JM [2014] EWCOP 7

Media – anonymity

Summary

In this appeal from one aspect of the decision of Senior Judge Lush in *Re DP* [2014] EWCOP B4 (the first decision reported under the new Practice Guidance on Transparency), Sir James Munby P has provided important clarification as to the approach he intends should prevail as regards the identification of P.

In his decision to revoke the power of attorney granted by DP to JM, Senior Judge Lush had drawn specific attention to the facts (i) that JM had sold DP's house for £165,000 and placed the net proceeds of sale in an account in his name (subsequently arranging to put the account in DP's name when he became aware that the OPG was investigating), (ii) that JM had attempted (unsuccessfully) to persuade Aviva to transfer DP's investment bond into an account in his own name, (iii) that JM had made a gift to himself of £38,000 from DP's monies (this being a breach of section 12 of the Act), (iv) that JM was unable to account for drawings from DP's monies totalling £10,020, and (v) that JM had paid himself a 'salary' totalling £8,340 (a claim that the Senior Judge described as an "*inherent artificiality*" and in any event a breach of the terms of the lasting power of attorney). As the Senior Judge recorded in his judgment, JM had asked why he was still being investigated by the OPG when the police, following an investigation, had concluded that he had no case to answer. As the Senior Judge commented drily (para 44): "*The decision not to prosecute him simply means that the CPS was not totally confident that it would be able to prove JM's guilt so as to ensure a conviction. It does not imply that his behaviour has been impeccable*."

The Senior Judge did not name JM in his judgment. He did not explain why (nor, indeed, was there anything in his judgment to show that this was a matter to which he expressly directed his mind). As the President noted "[p]*ossibly bearing on the point are certain matters to which he did refer: the fact that JM lives in the Dartford postcode area, that he had known DP since 2006 and been her gardener when she lived in Orpington, and that DP is now living in a residential care home in the London Borough of Bromley*."

The *Daily Mail* then ran two stories reporting upon the case and criticising in strong terms both the facts that JM had not been named or charged.

ANL (the publishers of the *Daily Mail*) applied to the court for an order permitting the identification of JM in reports of the case.

The application was listed before the President on 18 June 2014 (at which, inter alia, JM was present in person); he granted the application and reserved his reasons.

In his judgment, Sir James Munby was at pains to emphasise that he was – and could not – be concerned with the tenor of JM's complaint that ANL was using him as a scapegoat by using the case to make a political point to get the law changed. However, Sir James Munby P held, it was clear that

> *"17. If JM is being defamed or treated unfairly by a newspaper he has remedies elsewhere. But they are not matters for this court. I venture to repeat what I said in Re P (Enforced Caesarean: Reporting Restrictions) [2013] EWHC 4048 (Fam), [2014] FLR forthcoming, para 26:*
>
> > *'So far as concerns the relationship between the media and the court I … merely repeat … , so as to emphasise, three key principles (Re J (Reporting Restriction: Internet: Video) [2013] EWHC 2694 (Fam), [2014] 1 FLR 523, paras 37-39). First, that 'It is not the role of the judge to seek to exercise any kind of editorial control over the manner in which the media reports information which it is entitled to publish'. Second, that 'Comment and criticism may be ill-informed and based, it may be, on misunderstanding or misrepresentation of the facts [but the] fear of such criticism, however justified that fear may be, and however unjustified the criticism, is … not of itself a justification for prior restraint by injunction of the kind being sought here, even if the criticism is expressed in vigorous, trenchant or outspoken terms … or even in language which is crude, insulting and vulgar'. Third, that 'It is no part of the function of the court exercising the jurisdiction I am being asked to apply to prevent the dissemination of material because it is defamatory … If what is published is defamatory, the remedy is an action for defamation, not an application in the Family Division for an injunction.'*
>
> *Exactly the same goes, in my judgment, for the Court of Protection."*

Rather, all the President could be concerned with was whether JM should be identified, a matter to be determined in accordance with well-established principles equally applicable in the Court of Protection as in the Family Court (in cases including *In re S (A Child) (Identification: Restrictions on Publication)* [2004] UKHL 47, [2005] 1 AC 593, *Re Webster; Norfolk County Council v Webster and Others* [2006] EWHC 2733 (Fam), [2007] 1 FLR 1146, sub nom *Re Webster (A Child)* [2007] EMLR 7, and *Independent News and Media Ltd and others v A* [2010] EWCA Civ 343, [2010] 1 WLR 2262).

Sir James Munby P placed particular attention to paragraphs 63-64 of the judgment Lord Rodger of Earlsferry JSC, giving the judgment of the Supreme Court, in *In re Guardian News and Media Ltd and others* [2010] UKSC 1, [2010] 2 AC 697. Whilst he noted that the passage is well-known, at least in some quarters, he noted that it merited quotation

in full for the benefit of those practising or sitting in the Court of Protection:

> *"63 What's in a name? 'A lot', the press would answer. This is because stories about particular individuals are simply much more attractive to readers than stories about unidentified people. It is just human nature. And this is why, of course, even when reporting major disasters, journalists usually look for a story about how particular individuals are affected. Writing stories which capture the attention of readers is a matter of reporting technique, and the European court holds that article 10 protects not only the substance of ideas and information but also the form in which they are conveyed … This is not just a matter of deference to editorial independence. The judges are recognising that editors know best how to present material in a way that will interest the readers of their particular publication and so help them to absorb the information. A requirement to report it in some austere, abstract form, devoid of much of its human interest, could well mean that the report would not be read and the information would not be passed on. Ultimately, such an approach could threaten the viability of newspapers and magazines, which can only inform the public if they attract enough readers and make enough money to survive.*
>
> *64 Lord Steyn put the point succinctly in In re S [2005] 1 AC 593, 608, para 34, when he stressed the importance of bearing in mind that*
>
> > *'from a newspaper's point of view a report of a sensational trial without revealing the identity of the defendant would be a very much disembodied trial. If the newspapers choose not to contest such an injunction, they are less likely to give prominence to reports of the trial. Certainly, readers will be less interested and editors will act accordingly. Informed debate about criminal justice will suffer.'*
>
> *Mutatis mutandis, the same applies in the present cases. A report of the proceedings challenging the freezing orders which did not reveal the identities of the appellants would be disembodied. Certainly, readers would be less interested and, realising that, editors would tend to give the report a lower priority. In that way informed debate about freezing orders would suffer."*

In the balancing exercise in the instant case, the rights in play were identified as being:

1. The rights under Article 10 enjoyed by both ANL and its readers;
2. JM's Article 8 rights;
3. DP's Article 8 rights.

Sir James Munby P considered that the impact on DP if JM were to be identified was likely to be minimal. *"Quite apart from DP's current state of health,"* he held at paragraph 22, *"the reality is that few if any additional people will be able to link JM to DP if he is now identified. Almost all, in my assessment, are already 'in the know', either because they were already aware of what was happening or because, having read the Daily Mail articles, they have been able to make the link."*

As to JM's Article 8 rights, the issue was ultimately very simple:

> *"27. Why should JM be protected from the normal consequence of a judicial finding of misconduct, namely the identification of the wrongdoer in a published judgment? Nothing JM has said, or which could sensibly be put forward on his behalf, provides any reason why, looked at from his perspective, he should be spared the consequences of his misbehaviour.*

> *If publication of his identity and re-publication of the Senior Judge's findings, lowers JM in the estimation of right-thinking readers of the Daily Mail or other organs of the media, then so be it. He has only himself to blame. Why should JM be any more entitled to anonymity, just because the only judicial finding thus far has been made by the Court of Protection, than he would be if his self-same conduct was being considered in the Chancery Division or the Crown Court?*
>
> *28. The only possible argument to the contrary is dependent upon the impact, if any, on DP. But the reality, as I have already concluded, is that any impact on DP is likely to be minimal."*

The President therefore held that "*the balance comes down heavily and decisively in favour of the public being told who JM is; in favour of the Daily Mail and others being free to identify him as the person referred to by the Senior Judge in his judgment*." ANL were therefore granted the order they sought.

Comment

What the President took away from ANL with one hand in the *Re G* case he gave to ANL in this case. Indeed, the reasons for his very different conclusions indicate precisely the balancing exercises that need to be struck in this jurisdiction. In *Re G*, ANL were robustly refused permission to become a party for purposes of joining in the instruction of a psychiatrist to report upon G's capacity to communicate with the press; in *Re DP*, the President had little hesitation in finding that JM could be named and not thereby be protected from the consequences of his misconduct by the mere fact that the proceedings had taken place in the Court of Protection. There are very delicate exercises to be conducted in the (entirely laudable) pursuit of opening up the workings of the Court as far as possible to reporting, and these judgments (combined with the judgment in the *Press Association v Newcastle upon Tyne Hospitals Foundation Trust*) indicate some of the ways in which they will be struck in future.

Short Note: Restricting rights to apply to the CoP

A Local Authority v B, F and G [2014] EWCOP B21 HHJ Cardinal

Practice and Procedure – Other

Short Note

This is the second reported judgment in these proceedings. The first involved the imposition of a Hadkinson Order on B's father. The judge made final determinations in the case. The case is of note because the judge was asked in the context of injunctions imposing stringent restrictions on contact between B and her father and grandmother to impose a 5 year period where there could be no application to the court (for example seeking direct contact and varying the injunction on contact) save with the leave of a Judge of the Court of Protection. This was intended to provide a '5 year carapace of peace for B'.

The father and grandmother did not attend the hearing (the father would have been likely to be arrested if he attended and the grandmother was the subject of a future contempt application – see the Short Note.

Short Note: Contempt again

Derbyshire County Council v Kathleen Danby [2014] EWCOP B22 (Fam) (HHJ Cardinal)

Practice and Procedure – Other

Short Note

This is the third reported case in these proceedings. The first involved the imposition of a Hadkinson Order on B's father and the second the imposition of a 4 year period where an application could not be made to discharge injunctions on contact without permission (see immediately above).

This was an application by the local authority that B's grandmother had breached several elements of an injunction against her having contact with her granddaughter.

The judge first satisfied himself that the technical requirements for a committal application had been complied with and then reviewed the evidence that the grandmother had breached the injunction order (including CCTV which showed that she had arranged to meet and had met her granddaughter in breach of the injunction). He held that he was satisfied to the criminal standard of proof that the breaches of the injunction complained of by the local authority were all made out.

The judge sentenced the grandmother to three months' imprisonment concurrently. He issued a warrant for her arrest and listed the matter for review in two months' time. At the review hearing, the grandmother was invited to attend court, mitigate and try to persuade the judge to take a different view.

It is notable (and unsurprising following the furore which attached to the same judge due to the Wanda Maddocks case) that HHJ Cardinal expressly addressed the issue of whether the Practice Guidance issued by the President and the then Lord Chief Justice of 3 May 2013 had been complied with. He considered that it had: it was a public hearing with proper notice being placed outside the court and downstairs in the court's reception area in compliance with the Practice Direction of 4 June 2013. Reference to the guidance having been complied with did not deter the Daily Mail (http://www.dailymail.co.uk/news/article-2653442/Secret-court-jails-gran-hugged-granddaughter-Pensioner-sentenced-three-months-disobeying-order-not-teenager.html). The Mail made cryptic reference to "lawyers […] debating whether, by failing to give any information about why Mrs Danby is banned from seeing her granddaughter, Judge Cardinal had met the full requirements brought in after the Maddocks case". Given that the first part of the judgment deals with the reasons for the injunction and the precise terms of the injunction (imposed by Her Honour Judge Thomas in the Court of Protection) the debate is likely to have been short.

Wishes, feelings and the pregnant child

In the matter of X (A Child) [2014] EWHC 1871 (Fam) (Munby J)

Practice and Procedure – Other

Summary

This was an urgent application relating to a 13 year old girl who was subject to ongoing care proceedings. At the time of the hearing she was approximately 14 weeks pregnant. The issue before the court was whether or not the pregnancy should be terminated.

The President first highlighted the tension between the need for the judgment to be given in public and the requirement that X's identity should not be revealed. In this case the judge held that there was a compelling need to ensure that nothing was published that might lead, even if only

on a 'jigsaw' basis, to the identification of X. Consequently, only the advocates were named.

The judge began by setting out the function of the court in such a case. He adopted the approach of Holman J in *Re SB; A Patient; Capacity to Consent to Termination [2013] EWCOP 1417* (which related to an adult who lacked capacity, the same general principles applying)*:*

> "*there is no question in this case, or indeed in any case, of a court, by order, requiring any doctor to perform an abortion or termination. An abortion will only happen in this case if, as s 1 of the Abortion Act 1967 requires, two registered medical practitioners are of the opinion, formed in good faith, that the pregnancy has not exceeded its twenty-fourth week and that the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman. Further, it will only happen if a doctor or doctors, in the exercise of their own professional judgment, voluntarily decide to perform the abortion.*"

In such a case, the first question was for the doctors: are the conditions in section 1 of the 1967 Act met. If they are not, then that is the end of the matter. The court cannot authorise (and certainly could not direct) the doctors to act unlawfully. If the conditions of section 1 of the 1967 Act are satisfied then the role of the court is to supply, on behalf of the mother, the consent which is a prerequisite to the lawful performance of the procedure. The 'ultimate determinant' in cases concerned with a child or an incapacitated adult is the mother's best interests.

In addressing the question of the mother's best interests, the court is entitled to proceed on the basis that if there is to be a termination, the conditions in s.1 of the 1967 Act are satisfied. This allows the court to proceed on the basis firstly that the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, to the life of the pregnant woman or of injury to her physical or mental health or that the termination is necessary to prevent grave permanent injury to her physical or mental health. Secondly, if any of the conditions are satisfied the court was already in a position where on the face of it, the interests of the mother may well best be served by the court authorising the termination.

Another vitally important factor and one which may well end up being determinative (and which in this case was determinative) is the wishes and feelings of the mother:

> "*A child or incapacitated adult may, in strict law, lack autonomy. But the court must surely attach very considerable weight indeed to the albeit qualified autonomy of a mother who in relation to a matter as personal, intimate and sensitive as pregnancy is expressing clear wishes and feelings, whichever way, as to whether or not she wants a termination.*"

The evidence was clear that X lacked *Gillick* capacity. X was initially against having an abortion. Save for X's initial wishes and feelings, the preponderance of evidence was that it would be in her best interests to have a termination. One factor which was important to take into account was the likelihood of X being able to keep her baby if there was no termination. The judge expressed the view that there was 'very little chance' that X would be able to keep her baby if it was born. Having given that view, the judge considered that he should not be further involved in the care proceedings and he recused himself.

By the end of the hearing, X's views had changed and she was in favour of a termination. Given that

X's expressed wishes accorded with the judge's assessment of her best interests it was appropriate to supply the necessary consent to enable the termination to proceed.

Comment

This case is a useful reminder of just how determinative the child or incapacitated adult's wishes and feelings are in cases where the court is providing consent for the termination of a pregnancy. Only the most powerful and compelling factors could displace expressed wishes and feelings on such a personal and intimate matter.

Less central to the case (but interesting for parallels in the COP) is the application of the *Practice Guidance on Transparency in the Family Courts*. The need to protect X's privacy in this case provided a compelling reason why only the advocates names were published as it may otherwise have been possible to piece various elements together to identify X.

Short Note: Good practice in habitual residence cases

Re F (A Child) [2014] EWCA Civ 789 (Court of Appeal (Sir James Munby P, Ryder LJ and Bodey J))

Practice and Procedure – Other

Sir James Munby P, sitting in the Court of Appeal, has set out some basic propositions that apply in relation to the determination of habitual residence in cases involving children. Whilst they were stated in the context of the application of Council Regulation 2201/2203 (known as Brussels II revised (BIIR)), they are of wider application and it suggested that (with one exception highlighted below) the core procedural aspects apply equally to the determination of habitual residence by the Court of Protection:

> "11.
> […]
> *i)* *Where BIIR applies, the courts of England and Wales do not have jurisdiction merely because the child is present within England and Wales. The basic principle, set out in Article 8(1), is that jurisdiction under BIIR is dependent upon habitual residence. It is well established by both European and domestic case-law that BIIR applies to care proceedings. It follows that the courts of England and Wales do not have jurisdiction to make a care order merely because the child is present within England and Wales. The starting point in every such case where there is a foreign dimension is, therefore, an inquiry as to where the child is habitually resident.*
>
> ii) […]
>
> *iii)* *Jurisdiction under Article 8(1) depends upon where the child is habitually resident 'at the time the court is seised.'* [note, in cases under Schedule 3 to the MCA 2005, jurisdiction under the MCA 2005 depends upon where the individual is habitually resident at the point when the court determines the question of habitual residence: Re PO; JO v GO [2013] EWHC 3932 (COP) at paragraph 21]
>
> *iv)* *Since the point goes to jurisdiction it is imperative that the issue is addressed at the outset. In every care case with a foreign dimension jurisdiction must be considered at the earliest opportunity, that is, when the proceedings are issued and at the Case Management Hearing: see Nottingham City Council v LM and others [2014] EWCA Civ 152, paras 47, 58.*

v) *Good practice requires that in every care case with a foreign dimension the court sets out explicitly, both in its judgment and in its order, the basis upon which, in accordance with the relevant provisions of BIIR, it has either accepted or rejected jurisdiction. This is necessary to demonstrate that the court has actually addressed the issue and to identify, so there is no room for argument, the precise basis upon which the court has proceeded: see Re E, paras 35, 36.*

vi) *Judges must be astute to raise the issue of jurisdiction even if it has been overlooked by the parties: Re E, para 36.*

There is a further point to which it is convenient to draw attention. If it is, as it is, imperative that the issue of jurisdiction is addressed at the outset of the proceedings, it is also imperative that it is dealt with in a procedurally appropriate manner:

i) *The form of the order is important. While it is now possible to make an interim declaration, a declaration made on a 'without notice' application is valueless, potentially misleading and should accordingly never be granted: see St George's Healthcare NHS Trust v S, R v Collins and Others ex p S [1999] Fam 26. If it is necessary to address the issue before there has been time for proper investigation and determination, the order should contain a recital along the lines of 'Upon it provisionally appearing that the child is habitually resident …' Once the matter has been finally determined the order can contain either a declaration ('It is declared that …') or a recital ('Upon the court being satisfied that …') as to the child's habitual residence.*

ii) *The court cannot come to any final determination as to habitual residence until a proper opportunity has been given to all relevant parties to adduce evidence and make submissions. If they choose not to avail themselves of the opportunity then that, of course, is a matter for them, though it is important to bear in mind that a declaration cannot be made by default, concession or agreement, but only if the court is satisfied by evidence: see Wallersteiner v Moir [1974] 1 WLR 991."*

Short Note: Challenge to Exceptional Case Funding succeeds

Gudanaviciene & Ors v Director of Legal Aid Casework & Anor [2014] EWHC 1840 (Admin) (Collins J)

Practice and Procedure – Other

In this judicial review, Collins J scrutinised the approach adopted by the Director of Legal Aid Casework to applications for Exceptional Case Funding (in which only 1% of non-inquest applications have succeeded since 1 April 2013). Collins J held that the guidance issued by the Lord Chancellor on ECF set too high a threshold when stating that the test was whether the withholding of legal aid would make assertion of the claim practically impossible or lead to obvious unfairness. Importantly, he considered matters both by reference to Article 6 ECHR and by reference to the procedural requirements in Article 8 ECHR which may apply even where Article 6 ECHR is not strictly in play:

"28. It seems to me to be clear that the key considerations are that there must be effective access to a court and that there must be overall fairness in order that the requirements of Article 6 are met. One aspect of effective access must be the

> *ability of a party to present all necessary evidence to make his case and to understand and be able to engage with the process. So much is apparent from AK & L v Croatia [n.b. it appears that this is actually X v Croatia Application No 11223/04 concerning the procedural aspects of Article 8 ECHR]. It must be borne in mind that both before a tribunal and a court the process is adversarial. Thus the tribunal cannot obtain evidence where there are gaps in what an applicant has been able to produce. Equally, it may have difficulties if there is defective written material put before it in appreciating whether there is any substance to a claim or even if any particular human rights claim is properly raised. I think the words 'practically impossible' do set the standard at too high a level, but, as Chadwick LJ indicated [in Perotti v Collyer-Bristow [2003] EWCA Civ 1521], the threshold is relatively high. No doubt it would generally be better if an appellant were represented, but that is not the test. Nevertheless, the Director should not be too ready to assume that the tribunal's experience in having to deal with litigants in person and, where, as will often be the case, the party's knowledge of English is non-existent or poor, the provision of an interpreter will enable justice to be done."*

Whilst these dicta are from the immigration context, they have a wider significance including in the Court of Protection.

Short Note: Varying substantive decisions

TF v PJ [2014] EWHC 1840 (Admin) (Mostyn J)

Practice and Procedure – Other

On an application to revoke an order made under the 1980 Hague Child Abduction Convention, Mostyn J has held that the reference in the Family Procedure Rules 2010 r.4.1(6) to the court having a power to vary or revoke an order made under the rules was not confined to procedural or case management orders. Rather, it could apply equally to final orders such that (for instance) a High Court judge may vary or revoke a substantive final order made by another High Court judge. Applying dicta from the Court of Appeal in civil cases (*Tibbles v SIG Plc* [2012] EWCA Civ 518, [2012] 1 WLR 2591 and *Mitchell v News Group Newspapers* [2013] EWCA Civ 1537, [2014] 1 WLR 795, Mostyn J held that the only circumstances where the rule could be invoked were where there had been non-disclosure or a significant change of circumstances.

It is suggested that this approach holds equally true under the provisions of rule 25(6) of COPR 2007 which provides – in identical terms to FPR 2010 r 4.1(6) that "*A power of the court under these Rules to make an order includes a power to vary or revoke the order*."

Short Note: The pressures on the Official Solicitor

Re DE (A Child) [2014] EWFC 6 (Baker J)

Practice and Procedure – Other

On an appeal as to how the court should determine an application by parents for an injunction under the Human Rights Act 1998 to prevent a local authority removing their child who is living at home under a care order, Baker J made concluding observations of wider relevance about participation in proceedings:

> *"51. Finally, this case has highlighted a further major problem. These parents face the prospect of losing their son permanently. If this prospect had arisen in the context of care proceedings, they would be entitled as of right*

to non-means tested legal aid. It is difficult to see why similar automatic public funding should not be available where the local authority proposes the removal of a child living at home under a care order and the parents apply to discharge that order and for an interim injunction under s.8 HRA. The justification for automatic public funding in care proceedings is the draconian nature of the order being claimed by the local authority. Where a local authority seeks to remove a child placed at home under a care order, the outcome of the discharge application may be equally draconian. Because this father is working, and earns a very low wage from which he has contributed to the support of his family, he, and possibly the mother, are disqualified from legal aid. Miss Fottrell and Miss Sprinz and their solicitors are at present acting pro bono. It is unfair that legal representation in these vital cases is only available if the lawyers agree to work for nothing.

52. This problem is compounded in this case because of the learning difficulties of the parties and in particular the father. I have made observations in other cases about the obligation on all professionals in the family justice system to address the particular difficulties experienced by parents suffering from learning difficulties – see Kent CC v A Mother and others [2011] EWHC 402 (Fam) and Wiltshire Council v N [2013] EWHC 3502 (Fam). A parent with learning difficulties who is not entitled to legal aid is at a very great disadvantage when seeking to stop a local authority removing his child.

53. On the basis of evidence at present available, it seems plain that the father lacks capacity to conduct litigation and therefore needs to be represented by a litigation friend. Such are the demands on the Official Solicitor's time and resources that there is inevitably a delay in his deciding whether or not to accept instructions, and the fact that the father is not entitled to public funding adds to the complications. In this case, I hope that the Official Solicitor will give urgent consideration to accepting the invitation to act as litigation friend. The current system in which so much of the responsibility for representing parents who lack capacity falls on the shoulders and inadequate resources of the Official Solicitor is nearing breaking point.

54. I have drawn these concerns to the attention of the President of the Family Division. It may be that he considers that they are of sufficient importance to bring to the attention of the Family Justice Board and others responsible for the family justice system."

A new Ad Hoc Rules Committee

One of the few concrete commitments given in the Government's response to the Select Committee's post-legislative scrutiny report, available here, related to amending the Court of Protection Rules:

> *"9.2 The Government has committed to taking forward the revision of the Court of Protection Rules and had previously agreed with the President of the Court of Protection that we would await the outcomes from the House of Lords Report prior to commencing the work. Following the publication of the Report, the President has written to the Lord Chancellor regarding the formation of the Rules Committee. It is our intention to have the new Rules in place by April 2015."*

That Committee is now in the process of formation and beginning its work; we will keep you abreast of developments as and when we can.

DNACPR Notices – when is consultation necessary?

R (Tracey) v Cambridge University Hospitals NHS Foundation Trust & Ors [2014] EWCA Civ 822 (Court of Appeal (Lord Dyson MR, Longmore and Ryder LJJ)

Summary

This decision did not concern an incapacitated patient, but is likely to be of relevance to readers insofar as it relates to serious medical treatment decisions at the end of life.

Mrs Tracey had been made the subject of a DNACPR notice shortly after admission to hospital following a car accident. She was suffering from terminal cancer and had a life expectancy of around nine months, leaving aside the effects of the accident. The first DNACPR notice was lifted after Mrs Tracey's family objected to it. Subsequently, at a point when Mrs Tracey lacked capacity to make her own decisions, a second DNACPR notice was imposed. Mrs Tracey died after a further deterioration in her condition. The claim brought by her family against the Trust was that it breached Mrs Tracey's rights under Article 8 of the European Convention on Human Rights ('the Convention') because in imposing the first notice, it failed (i) adequately to consult Mrs Tracey or members of her family; (ii) to notify her of the decision to impose the notice; (iii) to offer her a second opinion; (iv) to make its DNACPR policy available to her; and (v) to have a policy which was clear and unambiguous. The claim against the Secretary of State was that he breached Mrs Tracey's Article 8 rights by failing to publish national guidance to ensure (i) that the process of making DNACPR decisions is sufficiently clear, accessible and foreseeable and (ii) that persons in the position of Mrs Tracey have the right (a) to be involved in discussions and decisions about DNACPR and (b) to be given information to enable them so to be involved, including the right to seek a second opinion.

The claim against the Secretary of State was dismissed, the court stating that 'to hold that Article 8 requires the formulation of a unified policy at national level, rather than having individual policies at local level, is unwarranted and would represent an unjustified intrusion into government healthcare policy.'

The claim against the Trust succeeded but to a relatively limited extent. The Court of Appeal held that there had been an unlawful failure to involve Mrs Tracey in the decision to impose the first DNACPR notice, in breach of Article 8 ECHR for the following reasons:

1. Since a DNACPR decision is one which will potentially deprive the patient of life-saving treatment, there should be a presumption in favour of patient involvement. There needs to be convincing reasons not to involve the patient.

2. It is inappropriate (and therefore not a requirement of Article 8) to involve the patient in the process if the clinician considers that to do so is likely to cause her to suffer physical or psychological harm. Merely causing distress, however, would not be sufficient to obviate the need to involve the patient.

3. Where the clinician's decision is that attempting CPR is futile, there is an obligation to tell the patient that this is the decision. The patient may then be able to seek a second opinion (although if the patient's multi-disciplinary team all agree that attempting CPR would be futile, the team is not obliged to arrange for a further opinion).

In view of the above, and where the court found that the Trust's doctor had not in fact consulted Mrs Tracey about the first DNACPR notice, there was a breach of Article 8.

Comment

This decision is of significance in the context of mental capacity because the duties of consultation and 'involvement' that apply in respect of a capacitated patient such as Mrs Tracey must surely also apply to an incapacitated patient, albeit that such consultation will take place within the framework of s.4 MCA 2005. It also seems likely that the Court of Appeal's decision will lead to a renewed focus on consulting patients about their future wishes for end of life care, which may gradually result in better evidence about P's likely wishes when decisions come to be made on his or her behalf. If consulting a patient about a DNACPR notice, why not also explain other possible treatments at the end of life, and that it is possible to make an advance decision to refuse treatment, or at least to set out in writing one's views, values, beliefs and wishes?

When is the Court of Protection not the Court of Protection?

R (ZYN) v Walsall Metropolitan Borough Council [2014] EWHC 1918 (Admin) (Leggatt J)

COP jurisdiction and powers - Interface with personal injury proceedings

Summary

In this judicial review application, Leggatt J was asked to decide whether the coming into force of the Mental Capacity Act 2005 had altered the way in which funds received from personal injury awards and held by deputies should be treated for the assessment of capital resources when local authorities consider charging for domiciliary services.

The argument centred around the fact that in the labyrinth of regulations and guidance, it was a requirement for capital to be disregarded that the capital must be administered on behalf of P by the Court of Protection.

The local authority argued that the relevant regulations (the Income Support (General) Regulations 1987 (as amended)) referred to the Court of Protection as it existed before the Mental Capacity Act and, therefore, did not refer to the Court of Protection as it now exists. Further, the local authority argued that a deputy administers the capital on behalf of P and it is not administered by the Court of Protection whereas under the previous law the receiver acted as agent of the Court of Protection.

Both these arguments were rejected. In the result, Leggatt J found that the coming into force of the Mental Capacity Act 2005 had made no change to the way in which capital deriving from a personal injury award and administered by the Court of Protection is to be treated (that is to say, disregarded). He noted, in particular that the suggestion that Parliament may when bringing into force the 2005 Act simply have overlooked the reference to the Court of Protection in the relevant paragraph (44) of the Regulations. Leggatt J noted that:

> *"65. That suggestion might have force if ascertaining the intention of Parliament involved a sociological inquiry into what was actually in the minds of individual legislators. However, that would be to mistake the nature of the interpreter's task. When courts identify the intention of Parliament, they do so assuming Parliament to be a rational and informed body pursuing the identifiable*

purposes of the legislation it enacts in a coherent and principled manner. That assumption shows appropriate respect for Parliament, enables Parliament most effectively to achieve its purposes and promotes the integrity of the law. In essence, the courts interpret the language of a statute or statutory instrument as having the meaning which best explains why a rational and informed legislature would have acted as Parliament has. Attributing to Parliament an error or oversight is therefore an interpretation to be adopted only as a last resort.

66. In the absence of any compelling indication to the contrary, it must therefore be assumed that when the 2005 Act was brought into force Parliament left paragraph 44 unchanged advisedly. That could only be because Parliament was proceeding on the basis that the term "Court of Protection" in paragraph 44 remained apposite when the office of the Supreme Court with that name ceased to exist and was replaced by the new Court of Protection. In these circumstances, any ambiguity in paragraph 44 should be resolved by construing it in a way which accords with Parliament's presumed understanding of its meaning and which treats it as having current effect rather than as an empty legacy of an earlier regime which has been left uselessly on the statute book."

Comment

The result is unsurprising. Parliament is very unlikely to have intended, by a side wind, to alter the basis upon which such capital is treated by the reforms to the law introduced by the Mental Capacity Act 2005. The judgment is useful, however, for a resumé of the labyrinth of the guidance and the regulations.

The HoL Select Committee – the Government responds

The response to the Select Committee's post-legislative scrutiny report was published on 10 June and is available here.

We reproduce here the Executive Summary, and will comment further in due course:

2. Executive summary

2.1 On the 13th March 2014, the House of Lords Select Committee on the Mental Capacity Act 2005 published the report of its ten-month investigation. The Government is grateful to the Committee for its invaluable work. We agree with the Committee's overall finding: that while the Mental Capacity Act (MCA) was a 'visionary piece of legislation', the Act has 'suffered from a lack of awareness and a lack of understanding'.

2.2 The Government, together with our partners, have closely considered the 39 recommendations of the House of Lords together with inputs and insights received from our discussions with a wide range of stakeholders. This document presents our response and sets out a system-wide programme of work over the coming year and beyond that we believe will realise a real improvement in implementation of the MCA.

2.3 We intend to ensure that implementation is strengthened and co-ordinated and will consider the case for establishing a new independently chaired Mental Capacity Advisory Board. A national Board and its independent chair could also advocate for and raise awareness of the MCA, gather views on priority MCA issues and opportunities and advise the Government on key priorities for action. The Government will hold implementing partners to account, ensuring they deliver

against their commitments and responsibilities.

2.4 We share the House of Lords' concern at the lack of awareness of the MCA. Everyone has responsibility for raising awareness and every professional who works with individuals who may lack capacity should regard the responsibility to familiarise themselves with the provisions of the MCA as a basic professional duty. The Department of Health will commission a review of current guidance and tools to determine what represents the 'gold standard' that can then be widely disseminated. In 2015, the Government will host a national event to both raise awareness of the Act and to hear the views of professionals and the public as to how we can further develop our programme of work.

2.5 We will take a comprehensive approach to promoting implementation. Professional training is a priority and the Government, together with Health Education England and the Royal College of General Practitioners, have identified immediate actions. NHS England and the Association of Adult Directors of Social Care (ADASS) have committed to lead on work examining the important role that commissioning has to play in encouraging a culture in keeping with the principles of the MCA. The Care Quality Commission (CQC) has prioritised the MCA in the fundamental revision of its regulation and inspection model.

2.6 The Government will ask the Law Commission to consult on and potentially draft a new legislative framework that would allow for the authorisation of a best interests deprivation of liberty in supported living arrangements. In light of this, the Law Commission will consider any improvements that might be made to the Deprivation of Liberty Safeguards (DoLS). In the short term, ADASS will lead a task group to consider the implications of the recent Supreme Court judgment on deprivation of liberty and the Government will commission a revision of the current standard forms that support the DoLS process.

2.7 The Office of the Public Guardian (OPG) is undertaking significant work to increase the level of awareness and understanding of Lasting Powers of Attorneys (LPAs) – working with NHS England to provide guidance for front-line staff and with the CQC to make sure questions on LPAs feature in inspections of health and social care providers. HM Courts and Tribunal Service has committed to increasing the staff complement of the Court of Protection and the Government has committed to the revision of the Court of Protection Rules – with a view to having new rules in place by April 2015.

2.8 The Government believes the MCA is an Act of fundamental importance which we are committed to embedding across our work programmes. We describe early progress in respect of the Care Act 2014, the Prime Minister's Challenge on Dementia and our responses to the failings at Winterbourne View and Mid-Staffordshire NHS Foundation Trust.

2.9 We urge that all those with a role to play in implementing the MCA seize the opportunity provided by the House of Lords report and this Government response. If we maintain recent momentum and implement the programme of work we describe in this report we believe that we can create a culture that values every voice and respects every right of those who may lack capacity."

Delay, insufficient scrutiny, and the unlawful deprivation of liberty

LM v Slovenia Application no. 32863/05 (European Court of Human Rights, Fifth Section)

Article 5 ECHR – deprivation of liberty

Summary

Between July 2005 and January 2006, L.M., who suffered from a psychotic disorder, was admitted to closed and open wards in two psychiatric hospitals. The Strasbourg Court found violations of Article 5(1) with regard to her confinement in the open ward of the Ljubljana Psychiatric Hospital and her involuntary confinement in the closed wards of both hospitals. There were also violations of Articles 5(2), 5(4), 5(4) and 8.

Open ward of the Ljubljana Psychiatric Hospital

L.M. spent four months and sixteen days in the open ward. She had been transferred from the closed ward in hospital pyjamas, with her clothes not being returned to her for ten days thereafter. With the legal proceedings concerning the closed ward admission still ongoing, she was given the impression that she was not allowed to leave or that she might be brought back by force. She had to get permission from staff to leave the ward. But she was able to spend a few hours on leave on 20, 23 24, 27 and 28 October, and 9, 11, 13 and 30 November 2005, during which time her psychiatrists noted that she was disciplined in her outings and always returned to hospital at the designated time. Towards the latter half of her stay, she was able to spend some weekends at her father's home, on condition that he would take her and supervise her medication.

Finding that L.M. had been deprived of her liberty during this period, the Court observed that "that the general setting of control exercised by the hospital staff exceeded considerably the measures required to monitor the applicant's comings and goings". It reiterated that the applicability of Article 5 did not depend solely on whether she was held in a "locked" ward but on whether the healthcare professionals exercised complete and effective control and supervision over her care and movements. Resonating with *HL v United Kingdom*, Article 5(1) was breached for the following reasons:

> "*135. The Court notes that the parties were in agreement as to the absence of any formal procedure for admissions to and medical treatment in open wards of psychiatric hospitals at the material time. There existed no regulatory framework, written or unwritten, which would determine the conditions of the applicant's confinement in the open ward, such as the reasons for which it could be ordered, the medical evidence that should be obtained in this regard, the time-limits of confinement, or which authority was competent to decide thereupon, and nor was there any regulation of the medical treatment administered during confinement. This absence of any legal provision justifying the applicant's confinement was, again, clearly at variance with the requirements of legal certainty and the protection from arbitrariness.*"

Closed wards of both hospitals

Under Slovenian law, hospitals had to inform the local court within forty-eight hours of an involuntary admission. A person was defined as "involuntary" if either they had capacity to express their wishes and were unwilling to consent, or they lacked capacity to express their wishes, or they were a minor or legally incompetent. The local court was then required promptly, but no later than three days after receiving notification, to visit the person and to order their examination by an independent psychiatrist. A decision as to the necessity of the confinement was required without delay, but no later than thirty days after receiving notification.

In essence, moving L.M. from the closed to the open wards had the effect of disrupting the involuntary confinement proceedings. It meant

that the local court did not determine the necessity for confinement and allowed for possible abuses of psychiatric confinement. The lack of adequate safeguards and legal certainty failed to protect her from arbitrariness contrary to Article 5(1).

Article 5(2)

The Court reiterated well-established principles that those deprived of liberty must be told in simple, non-technical language that she can understand, the essential legal and factual grounds in order to be able to make effective use of her right to have the lawfulness of her detention decided speedily. If she is unable to understand her situation, the information about the confinement and its implications should be given to her representative. The Court held that a four-day interval and an eight-day interval between the confinement and the giving of reasons were not sufficiently prompt and in breach of Article 5(2).

Article 5(4)

After helpfully restating the general principles (paragraphs 152-155), the Court held that Article 5(4) had been breached, principally because the local courts had not determined the legality of L.M.'s confinement following her transfer from the closed to open wards:

> "*158 …* [O]*nce the applicant was no longer considered deprived of her liberty under domestic law, she was unable to obtain a decision on the lawfulness of her earlier confinement. In this regard, the Court reiterates that, even assuming that the applicant was no longer involuntarily confined, she would still be entitled to obtain a decision on the lawfulness of her earlier confinement…*"

Article 8

Noting – importantly – that not actively resisting medication cannot alone be considered as indicative of consent, the Court held that L.M. had clearly expressed an objection to receiving treatment which thereby interfered with Article 8. To be compatible with the rule of law, the forced administration of medication (in this case antipsychotics) required proper legal safeguards against arbitrariness which were found wanting. She had been deprived "*of any effective procedural possibility, judicial or otherwise, of influencing the course of her treatment or having it reviewed by an independent authority*" (see *X v. Finland*, § 220).

Finding also a breach of Article 5(5), L.M. was awarded EUR 10,000 for non-pecuniary damage and costs.

Comment

This Slovenian Bournewoodesque case is of interest in four respects. First, it illustrates how a hospital patient on an open ward can be considered deprived of liberty despite being able to spend hours, sometimes weekends, in the community. We note that L.M.'s inadequately detailed claim that she was *de facto* deprived for four days in the open ward of the Idrija hospital was rejected; the difference perhaps being that the hospital was not intent on preventing her from leaving and she did in fact leave at her own request (paragraph 97-98).

Second, there may be a parallel problem between the Slovenian procedure and s.4B of the Mental Capacity Act 2005. The former required the local court to determine the necessity for confinement within thirty days from being first notified of the confinement. The Strasbourg Court held:

> "*125 … even assuming that the rules of domestic law were complied with, the Court*

> *considers that the legislation allowing for such an extensive amount of time to pass before a decision was made on confinement raises serious concerns under Article 5 § 1, as it implies a lack of procedural safeguards.*
>
> *126 … the Court considers that while the applicant's mental condition might have justifiably been considered by the hospital staff to necessitate urgent hospitalisation, the initial decision made by them to confine her should have been replaced by a decision of the competent authority, that is, the local court, in the shortest possible time.*" (emphasis added)

MCA s.4B authorises a deprivation of liberty if, *inter alia*, it is necessary to prevent a serious deterioration in P's condition while a decision is sought from the Court of Protection. This provides an important breathing space between the deprivation occurring and the decision of the competent authority as to its necessity. However, it contains no time limit. Indeed, it can take weeks – sometimes months – before the Court determines the necessity for a deprivation of liberty, even on an interim basis with sufficient evidence of the relevant matters having been filed. *L.M. v Slovenia* demonstrates that a thirty-day breathing space implies a lack of procedural safeguards and that a more speedy judicial process is required to prevent arbitrariness. Hopefully the anticipated decision of the President will overcome this.

Third, paragraph 158 may serve to assist those who wish to challenge the legality of a MCA Schedule A1 authorisation after it has been terminated. If they are "*entitled to obtain a decision on the lawfulness of* [their] *earlier confinement*", this clearly raises issues regarding regulation 5(g)(ii)(aa) of the Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013 (SI 2013/480) which exempts P or their RPR from means tested legal aid but only if "*an authorisation is in force*" under Schedule A1. Whether this should read "*is or was in force*" may need to be reconsidered in due course.

Finally, building on the decision of *X v Finland*, we note that vulnerability to challenge of s.63 of the Mental Health Act 1983. With some minor exceptions, involuntary hospitalisation of a psychiatric patient for more than 72 hours under the MHA contains an automatic authorisation to treat their mental disorder, even against their capacitous will (aside from electro-convulsive therapy). No consent or second opinion is required. No assessment of capacity or, if found wanting, of best interests is required on a literal reading. This would now clearly appear to be at odds with Article 8. To minimise the risk of such a breach, strict adherence to the MHA Code of Practice paragraphs 23.37 and 23.41 and to the MCA Code of Practice paragraph 13.30 is therefore required.

Short Note: Assisted Suicide cases fail in the Supreme Court

R (on the application of Nicklinson and another) v Ministry of Justice; R (on the application of AM) v The Director of Public Prosecutions [2014] UKSC 38 (Supreme Court (Lord Neuberger (President), Lady Hale (Deputy President), Lords Mance, Kerr, Clarke, Wilson, Sumption, Reed and Hughes))

In the appeal brought by the widow of Tony Nicklinson, the Supreme Court has unanimously held that the question whether the current law on assisted suicide is incompatible with Article 8 lies within the United Kingdom's margin of appreciation, and is therefore a question for the

United Kingdom to decide.[4] Five Justices (Lord Neuberger, Lady Hale, Lord Mance, Lord Kerr and Lord Wilson) held that the court has the constitutional authority to make a declaration that the general prohibition on assisted suicide in Section 2 Suicide Act 1961 is incompatible with Article 8. Of those five, Lord Neuberger, Lord Mance and Lord Wilson declined to grant a declaration of incompatibility in these proceedings, but Lady Hale and Lord Kerr would have done so. Four Justices (Lord Clarke, Lord Sumption, Lord Reed and Lord Hughes) concluded that the question whether the current law on assisting suicide is compatible with Article 8 involved a consideration of issues which Parliament was inherently better qualified than the courts to assess, and that under present circumstances the courts should respect Parliament's assessment.

On the second appeal, the Supreme Court unanimously allowed the DPP's appeal against the Court of Appeal's conclusion that his 2010 Policy for Prosecutors in respect of Cases of Encouraging or Assisting Suicide" setting out his policy in relation to prosecutions under Section 2 was not sufficiently clear in relation to healthcare professionals. The Supreme Court held that the exercise of judgment by the DPP, the variety of relevant factors, and the need to vary the weight to be attached to them according to the circumstances of each individual case were all proper and constitutionally necessary features of the system of prosecution in the public interest. In light of the Supreme Court's conclusion on the second appeal, a cross-appeal brought by AM did not arise.

[4] This is adapted from the official summary; an article on this case, in the context of the current very live Scottish debate upon the subject, will appear in the August issue.

The LGO and capacity

In Knowsley MBC (9 June 2014), the Local Government Ombudsman found the Council to be at fault for failing to have a support plan for a man with autism and severe learning disability requiring 24 hour care and for not carrying out annual and other timely reviews. It also failed to formally assess his capacity to make specific decisions and had not followed the correct procedures for determining his best interests. As a result, he was required to live with a co-resident in supported accommodation which led to a deterioration in his challenging behaviour and significant avoidable distress. The recommendations included the payment of £500 to be spent on Mr X and £500 to his mother for the uncertainty caused.

In South Essex Partnership University Trust and Bedford Borough Council (May 2014), Mr X was a 58 year old man with paranoid schizophrenia who was living in a flat in squalor. His family were concerned about his poor self-care and inadequate diet. He was 2.5 stone underweight, his teeth were rotten and bedclothes had not been washed in months. So concerned were his family at one point that his parents took him to live with them. The Local Government Ombudsman and Parliamentary and Health Service Ombudsman found that the Trust's failure to carry out a proper capacity assessment of his ability to make decisions about managing food and looking after himself was a service failure. There was sufficient evidence to challenge the assumption of capacity, with occupational therapy reports noting he was underweight and that there was no food in his flat. Thus, the presumption of mental capacity resulted in him being malnourished. The Trust

failed to ensure that support workers visited him regularly or encouraged him to attend to his oral health and adopt a healthy lifestyle. The Council had failed to carry out a community care assessment of his needs and there was a delay in seeking appropriate accommodation for him. A joint payment of £2000 for the impact of failing to properly assess his capacity and £500 to his sister for distress and inconvenience was recommended.

Short Note: Guardianship and Deprivation of Liberty in Northern Ireland

JMcA v The Belfast Health and Social Care Trust [2014] NICA 37 (Northern Ireland Court of Appeal (Morgan LCJ, Coghlin LJ and Horner J))

At first instance [2013] NIQB 77, Treacy J held that guardianship contained an implicit power to prevent the person leaving their residence. In our comment on this case (which does not appear in the COP Cases Online Database) we expressed surprise at the tenor of that decision which has now been overturned by the Court of Appeal in Northern Ireland. It held that a guardianship order does not provide any mechanism for the imposition of any restriction on the entitlement of the person to leave the home at which they are residing for incidental social or other purposes. The Court identified a lacuna in the law and, with reference to DOLS, stated, "*It is clear that urgent consideration should now be given to the implementation of similar legislation in this jurisdiction*."

In this regard, it should be noted that the draft Mental Capacity Bill that has just been issued for consultation in Northern Ireland includes provisions for the authorisations of deprivation of liberty in care homes and hospitals in a fashion that is modelled upon Schedule A1 to the MCA 2005, albeit with applications being made to a 3 member panel convened by the relevant Health and Social Care Trust.

Updated autism strategy

The Government has published its updated autism strategy and will be publishing statutory guidance to support the strategy in the next six months.

Criminalisation of forced marriage

Section 121 of the Anti-social Behaviour, Crime and Policing Act 2014 came into force on 16 June 2014, making forced marriage a criminal offence. In relation to individuals who lack capacity to marry, the criminal offence is committed by '*any conduct carried out for the purpose of causing the victim to enter into a marriage (whether or not the conduct amounts to violence, threats, or any other form of coercion)'.* See in this regard also the earlier judgment of Parker J in *XCC v AA & Ors* [2012] EWHC 2183 (COP) and the guidance there as to the obligations and health and social care professionals:

"[184] … in my view it is the duty of a doctor or other health or social work professional who becomes aware that an incapacitated person may undergo a marriage abroad, to notify the learning disabilities team of Social Services and/or the Forced Marriage Unit if information comes to light that there are plans for an overseas marriage of a patient who has or may lack capacity. The communities where this is likely to happen also need to be told, loud and clear, that if a person, whether male or female, enters into a marriage when they do not have the capacity to understand what marriage is, its nature and duties, or its consequences, or to understand sexual relations, that that marriage may not be recognised, that

sexual relations will constitute a criminal offence, and that the courts have the power to intervene

Damaging Illegality of Scottish Social Work Authorities

Section 57(3)(b) of the Adults with Incapacity (Scotland) Act 2000 requires welfare guardianship applications to be accompanied by a report in prescribed form from a mental health officer ("MHO") (or in cases where incapacity is said to result solely from inability to communicate, the chief social work officer). During the legislative process concerns were expressed that it would be unacceptable for applicants to encounter delays in proceeding with applications because of this requirement. It was recognised that there might be workload and resource implications for MHOs and their employing authorities. It was concluded that it was clearly essential either to impose a time limit for submission of reports or to permit an alternative source of reports. The Parliament opted for a time limit. Accordingly, there was inserted in the Act a provision which had not appeared in the draft Incapable Adults Bill proposed by the Scottish Law Commission (annexed to the Commission's Report No 151, September 1995). Section 57(4) of the Act requires applicants, other than the local authority, to give notice to the chief social work officer of intention to apply for welfare guardianship and provides that the required report "shall be prepared by the chief social work officer or, as the case may be, the mental health officer, within 21 days of the date of the notice". That obligation is absolute. It is an essential safeguard for vulnerable people who might otherwise be left unnecessarily in inappropriate accommodation (including blocking beds in hospitals), or otherwise "in limbo" while necessary decisions in relation to their personal welfare (and, in "combined" applications, their property and financial affairs) cannot be made. Not even an interim order can be obtained until an application, accompanied by the necessary reports, has been submitted to court.

Following introduction of Part 6 of the 2000 Act with effect from 1st April 2002, failures by local authorities to comply with their statutory obligations were relatively rare, but were addressed by the courts in *Frank Stork and others*, 2004, SCLR 513. See also *Application in respect of AD*, a decision on appeal by Sheriff Principal Bowen, Glasgow Sheriff Court, 27th June 2005.

Regrettably, since then there has been a creeping disregard by local authorities of their statutory obligations, and the important human rights purpose of those obligations, by several Scottish local authorities. Some authorities have pretended that their obligation is to allocate the matter to an MHO within 21 days of intimation, rather than to produce the report within that period. Even that approach has been subject to slippage. It is reported that one authority generally regarded as amongst the most speedy in this respect nevertheless usually takes around four weeks from intimation to allocate an MHO. Another has introduced yet a further step by initially responding to intimations by advising the name of the person responsible for allocating an MHO. Thereafter, the allocation is still delayed. It is reported that one social work office makes the allocations on the first Friday of each month. Yet another local authority now appears to have standardised and institutionalised its breaches of statutory duty and of human rights by issuing in response to all intimations a standard response including the following: "*Unfortunately, due to the pressure of requests for such reports and limited availability of MHOs available to take on this work, it is not possible to allocate this report request at present. We are currently operating a waiting list for allocation and unfortunately I am unable to advise you at present when it will be possible for the report to be allocated. However I anticipate*

this will be 10-12 weeks from the date of the request unless a review, as undernoted, indicates that the allocation should be prioritised on a risk basis."

While these intimations continue with explanations of the risk assessment process and conclude with an apology, no indication seems to have been given by this or any other authority as to the measures to be taken as a matter of urgent priority to end their failure to comply with statutory obligations and their consequent disregard of the rights, welfare and needs of vulnerable people.

In terms of human rights, the delays impact on the person's right to a fair hearing within "*a reasonable time*" as directed by Article 6(1) ECHR. Moreover, during the period of delay potential deprivation of liberty situations engaging Article 5 ECHR may arise where the person is left exposed without the greater protective framework provided for under the 2000 Act.[5] An individual applying for welfare guardianship in such circumstances may also have the best available knowledge of the person's will and preferences but may be unable to ensure that these are regarded with consequences for that person's right to private and family life (Article 8(1) ECHR).

This is not a sudden or unpredicted emergency. There has been no dramatic and unexpected rise in the number of relevant applications. Local authorities have had years within which to plan for the recruitment and training of adequate numbers of MHOs or, as an alternative, to request Scottish Government to re-consider the alternative of permitting other sources of required reports. That local authorities should presume to decide which statutory duties to perform and which to disregard is an affront to the basic principle of the rule of law, and to the Scottish Parliament. One can only sympathise with existing MHOs themselves, under-resourced and facing competing pressures.

Adrian once found it necessary to apply to a sheriff under s3(3) of the 2000 Act for a direction requiring a local authority to produce an MHO report. He intimated to the local authority that that application had been sent for warranting. Remarkably, the awaited report arrived on his desk in time to withdraw the s3(3) application before it was warranted. Even if they are impervious to other considerations, local authorities might care to consider whether it might not be a better use of resources to ensure compliance with their obligations rather than to face a stream of such s3(3) applications, each no doubt concluding for awards of expenses against the local authority.

Adrian D. Ward
Jill Stavert

Duration of Guardianship

A sheriff is directed to grant a guardianship order initially "*for a period of three years or such other period (including an indefinite period) as, on cause shown, he may determine*" (s58(4) of the Adults with Incapacity (Scotland) Act 2000: all references below are to that Act, except where otherwise stated.)

Sheriff John K Mundy at Falkirk has issued a written judgment addressing more fully than

[5] It is acknowledged that currently there is some debate as to whether welfare guardianship under the 2000 Act, coupled with the powers and procedure under s70 of that Act, can sufficiently remedy a deprivation of liberty situation so as to be compatible with Article 5. However, until such time as this is clarified, it appears to be accepted by the Scottish Courts that it does (*Muldoon, applicant* 2005 SLT (Sh Ct) 52; *M, applicant* 2009 SLT (Sh Ct) 185;*Application in respect of R* 2013 G.W.D. 13-293).

hitherto the considerations relevant to determining duration of a guardianship order, and in particular whether, on the facts of the case before him, it should be granted for less than three years. He addressed the questions of onus; of balancing elements relevant to the principle in s1(3) requiring the least restrictive effective intervention in relation to the adult's freedom; the implication of the "acting" element of the definition of incapacity (s1(6)(a)); and the appropriate focus where there were related child welfare issues.

Falkirk Council applied for a guardianship order appointing their chief social work officer as welfare guardian to S for a period of three years. S opposed, but only as regards the duration of the order, which she contended should be limited to one year. At the time of the hearing in November 2013 she was aged 34. She had a learning disability. She had two children, G and A, to different fathers with both of whom she had had difficult relationships, and by the time of the hearing both children were in local authority care. Her adoptive mother was deceased and her relationship with her adoptive father had deteriorated. On 14th June 2013 the sheriff had granted a Removal Order under s293 of the Mental Health (Care and Treatment) (Scotland) Act 2003 as a result of which S was removed to M Care Centre.

On onus, the sheriff refused to accept that there was any onus on a party proposing a period of less than the three-year "norm": "*It seems to me, bearing in mind the principle of 'the least restrictive option' (on the hypothesis that intervention is justified), that it would be difficult to argue that there was a legal burden on a party who submitted for a lesser period of intervention*." More generally, where issue had been joined as to duration it seemed to the sheriff "*to be unhelpful to think in terms of onus*." The court's task "*must ultimately be to consider what the appropriate period is having regard to the principles contained in the Act*." In applying s1(3), on the one hand a shorter period could be said to be less restrictive, but the sheriff referred to Adrian's comment in relation to s58(4) in "Adults with Incapacity Legislation" that requiring everyone to go through the renewal procedure more frequently than necessary could be contrary to the benefit principle. The potential impact on the adult of a renewal application was relevant. The sheriff referred to the observations of Sheriff Thornton in *Application in respect of the adult JMR* (Kirkcaldy Sheriff Court, 27th February 2013 at para 20). In the present case, he identified as further disadvantage of a shorter period that S's knowledge that the order was only for a year could cause her – as she was reported to have said – to "*keep the head down*" for that period, thus inhibiting the progress of her rehabilitation. She was "*at risk of being taken advantage of*", and it would be "*a slow process in order to ensure her safety in the community without support*." Sheriff Mundy quoted evidence of a consultant psychiatrist that he "*did not think she would work with a one year order even if she agreed with that*."

The importance of the element of "acting", including acting in accordance with otherwise potentially competent decisions, was emphasised by the Mental Welfare Commission in the "*D Report*." In the present case, the sheriff accepted evidence of S's frequent inability to act consistently with decisions. Looking only to her expressed decisions, it might have been doubtful whether she was incapable so as to warrant the order sought.

The sheriff did not feel that he "*could attach a great deal of weight to the proposition that a shorter order would allow S a greater opportunity to play a significant part in A's upbringing*." In "*Two 'adults' in one incapacity case?: thoughts for*

Scotland from an English deprivation of liberty decision", 2013 SLT (News) 239, Adrian suggested that the section 1 principles should be applied to any adult within the wording of s1(1), which might be a "second adult" in addition to the adult regarding whom proceedings had been brought. This view could not apply to a person under 16, and thus not an "adult" in terms of the Act. A parent-child relationship would however be likely to engage the benefit principle (s1(2)), the wishes and feelings of the adult (s1(4)(a)), and the views of the child (s1(4)(d)). Sheriff Mundy did not refer to such considerations. He referred to evidence that the "*concern was S's welfare and safety rather than any issues relating to her child*" and that "*this application was about S, not her child*." Sheriff Mundy accepted, on the basis of evidence adduced, that "*the first concern was to achieve stability for S,*" upon achievement of which "*S's parenting ability in relation to A could be re-assessed*."

The Judgment does not refer to Article 12.4 of the UN Convention on the Rights of Persons with Disabilities of December 13, 2006, which provides that "*measures that relate to the exercise of legal capacity*" should "*apply for the shortest time possible*."

Adrian D. Ward

Mental Health (Scotland) Bill

Introduction

In the Newsletter's April 2014 issue comment was made about the draft Mental Health (Scotland) Bill (amending the Mental Health (Care and Treatment)(Scotland) Act 2003(the 2003 Act)) which the Scottish Government was consulting on. The final Bill was introduced into the Scottish Parliament on 19 June. Whilst detailed discussion is probably more appropriate as it progresses the following are some brief initial comments on the Bill as introduced into the parliament.

By way of a reminder, the draft Bill addressed some, but arguably not enough, of the McManus Review recommendations[6]. Some other matters raised by service users and practitioners in response to the Scottish Government's own consultation on such recommendations were also incorporated[7]. The introduction of a notification scheme for victims of mentally disordered offenders was also introduced[8].

Overall, the final Bill does not depart significantly from the draft.

Issues that remain unaddressed

The advance statements provisions have not been altered to reinforce these important expressions of individual will and preferences, in other words,

[6] Scottish Government, *Limited Review of the Mental Health (Care and Treatment) Act 2003: Report*, 2009 (accessed 26 February 2014) ('the McManus Review'). For the Scottish Government's response to this review see Scottish Government, *Mental Health: Legislation Scottish Government response to the "Limited Review of the Mental Health (Care and Treatment) (Scotland) Act 2003: Report*, 2010 (accessed 26 February 2014).

[7] Scottish Government, *Mental Health: Legislation: Consultation on the Review of the Mental Health (Care and Treatment)(Scotland) Act 2003*, 2009 (accessed 26 February 2014).

[8] Scottish Government, *Consultation : Disclosure of Information to Victims of Mentally Disordered Offenders*, 2010, (accessed 26 February 2010) and Scottish Government, *Disclosure of Information to Victims of Mentally Disordered Offenders: Analysis of Responses to the Consultation*, 2011 (accessed 26 February 2014).

autonomy, despite several consultation responses emphasising their importance. Nor have provisions to bolster independent advocacy been introduced.

It seems that the increased responsibilities for Mental Health Officers remain so important resourcing issues require to be addressed here[9]. Issues such as clarity regarding the use of covert medication and restraint, deaths of psychiatric patients and the ability of substituted decision-makers (in other words, welfare guardians and attorneys) to consent to treatment under the 2003 Act also remain unaddressed.

"New" provisions in the final Draft

It would be unfair to say that the Scottish Government has not taken any matters raised in responses to its consultation into account. Departures from the draft Bill that are relevant for the purposes of this Newsletter can be summarised as follows:

A. Named persons

There is no further clarity, by way of a definition, provided as to precisely what is a 'named person'. It will be recalled that in the April issue it was mentioned that there is a lack of understanding by many service users, named persons and even by professionals about the precise role of named persons[10]. However, the 'default' provision whereby the Mental Health Tribunal may appoint a named person where there is no one so appointed is to be removed although for individuals appearing before the Tribunal under 16 it may substitute another person to act as named person[11].

The draft Bill provided for the removal of the current automatic right of a named person to be involved in Tribunal proceedings and a requirement that leave must be applied for to be involved. These are now gone.

B. Removal of requirement for a second medical report in Compulsory Treatment Order (CTO) applications

The requirement for the second medical report has been retained. This is welcome in light of the consequences CTOs have in terms of an individual's liberty and autonomy.

B. Nurse's holding power under s299, 2003 Act

The Bill retains the provision extending the maximum period for a nurse's holding power[12] from two to three hours. As previously mentioned, no justification was given for this in the consultation document which is disappointing given the implications this has for a patient in terms of their liberty and autonomy and the inability of a patient to challenge this. The comment in the Policy Memorandum[13] accompanying the Bill arguably adds nothing to this either when it states "*This additional time seeks to balance the need for flexibility to arrange for a medical examination with maintaining the need for minimum restriction on patients. This additional time seeks to balance the need for flexibility to arrange for a medical examination*

[9] However, see the comments in paras 168-170 of the Policy Memorandum accompanying the Bill.
[10] This was also noted in Scottish Government, *Limited Review of the Mental Health (Care and Treatment) Act 2003: Report*, 2009.
[11] S.20.
[12] S.299.
[13] Para. 75.

with maintaining the need for minimum restriction on patients."

C. Mental Health Tribunal: timescales for referrals and disposals

The proposal in the draft Bill that the Tribunal "must do its utmost" to comply with timescales within which it must deal with various disposal has been removed. In the April issue it was commented that, given the Articles 5(4) and 6 ECHR obligations on the Tribunal, the requirement on the Tribunal to comply with timescales should be imperative.

D. Victim Notification Scheme

Concern was expressed in the April issue that the proposal in the draft Bill to extend the right for victims to receive information on offenders subject to compulsion orders may lead to discrimination[14]. Offenders subject to compulsion order have often committed only minor offences. The final Bill contains an additional provision that the right to receive information concerning an offender subject to a compulsion order applies only where "an offence has been perpetrated against a natural person"[15]. However, care will nevertheless still have to be taken that the effect of the operation of the VNS is not discriminatory.

E. s268, 2003 Act – detention in conditions of excessive security in non-state hospitals

As was previously mentioned, the necessary regulations or legislative changes needed to be effected to ensure that the right not to be detained in conditions of excessive security can be effectively exercised given that Article 8 ECHR and, potentially, even Article 3 (with corresponding Articles 17, 22 and 15 CRPD) are likely to be engaged. The requirement for this was emphasised in the 2012 Supreme Court ruling in *RM v The Scottish Ministers*[16]. This was a 'wish list' item for inclusion in the Bill in several consultation responses.

The final Bill deals with the matter to some extent but not entirely. It clarifies[17] who may appeal against excessive security for patients detained in a hospital other than in the State Hospital, namely patients detained by virtue of a restriction order, a compulsion order a hospital direction or a transfer treatment direction and provides some clarity regarding the definition of non-state hospitals. Otherwise, this is not progressed further and the regulations that the Supreme Court stressed were vital to make the right a genuine right are still absent.

The Bill also reduces the time in which a relevant Health Board must find suitable alternative accommodation to a maximum of 6 months where the Tribunal has made an order under s.264 that a patient detained in the State Hospital is being detained in conditions of excessive security[18]. Currently, the maximum period is 3 months plus 28 days.

Conclusion

The final Bill remains fairly 'light' in terms of legislative change and leaves unaddressed and unacknowledged several issues raised in the McManus Review and subsequently[19]. It would also appear that the Scottish Government has

[14] Articles 8 and 14 ECHR.
[15] Clause 44, Mental Health(Scotland) Bill.
[16] *RM v The Scottish Ministers* [2012] UKSC 58.
[17] S.11.
[18] S.10(2).
[19] See *Consultation on draft proposals for a Mental Health (Scotland) Bill*, April 2014 issue.

decided on this occasion to body-swerve the issue of the UN Committee on the Rights of Persons with Disabilities' General Comment on Article 12 CRPD (the right to equal recognition before the law) although this will have to be considered in due course. However, as stated, some matters raised during the consultation on the draft Bill have been taken on board.

Jill Stavert

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Conferences at which editors/contributors are speaking

The duty of patient involvement in DNACPR decisions

Tor is speaking at a seminar at 39 Essex Street at the Hall in Gray's Inn at 6pm on 3 July on the implications of the decision in *Tracey*. The seminar is chaired by Fenella Morris QC, and the other speakers are Vikram Sachdeva Professor Penney Lewis of King's College London, and Dr Jerry Nolan, Royal United Hospital, Bath. For more details and to reserve a place, please email beth.williams@39essex.com.

'Taking Stock'

Neil is speaking at the annual 'Taking Stock' Conference on 17 October, jointly promoted by the Approved Mental Health Professionals Association (North West and North Wales) and Cardiff Law School with sponsorship from Irwin Mitchell Solicitors and Thirty Nine Essex Street Barristers Chambers – and with support from Manchester University. Full details are available here.

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Advertising conferences and training events

If you would like your conference or training event to be included in this section in a subsequent issue, please contact one of the editors. Save for those conferences or training events that are run by non-profit bodies, we would invite a donation of £200 to be made to Mind in return for postings for English and Welsh events. For Scottish events, we are inviting donations to Alzheimer Scotland Action on Dementia.

Chambers Details

Our next Newsletter will be out in early August. Please email us with any judgments or other news items which you think should be included. If you do not wish to receive this Newsletter in the future please contact marketing@39essex.com.

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THE QUEEN'S AWARDS FOR ENTERPRISE INTERNATIONAL TRADE 2013

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