Mental Capacity Law Newsletter June 2015: Issue 57

Compendium: Screen-Friendly

Introduction

Welcome to the June 2015 Newsletters. Highlights this month

(1) In the Health, Welfare and Deprivation of Liberty Newsletter: two more decisions about the vexed interaction between the MHA/MCA, revocation of a health and welfare deputyship and updated SCIE guidance on DOLS;

(2) In the Property and Affairs Newsletter: an important case on complex provisions in LPAs, calibration of risk, and new guidance from the OPG for attorneys;

(3) In the Practice and Procedure Newsletter: Schedule 3 under the spotlight, costs on appeal, and the possibility of damages for breach of the right to autonomy;

(4) In the Capacity outside the COP Newsletter: a very useful perspective from Singapore on undue influence and the MCA, and case-law and legislative developments impacting upon capacity issues;

(5) In the Scotland Newsletter: an important judicial review in the context of compliance with mental health obligations which sheds light on equivalent obligations under the 2000 Act, a useful case upon habitual residence, statistics from the OPG, and an update on relevant legislative developments.

Remember you can now find all our past issues, our case summaries, and much more on our dedicated sub-site here. We are also delighted to announce that, as of later this month, tailored summaries of key cases will be available on the SCIE website to assist front-line professionals access case-law updates.

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For all our mental capacity resources, click here. Transcripts not available at time of writing are likely to be soon at www.mentalhealthlaw.co.uk.

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Stop press:

As we went to press, we learnt that:

(1) The *Re X* decision should be handed down on 16 June, and we will send round a newsflash addressing the decision as soon as we can thereafter;

(2) The Law Commission consultation paper on deprivation of liberty will be published on 7 July, and we hope to have an article by Tim Spencer-Lane, the lawyer leading the project at the Commission, in the next issue of the Newsletter.

An unholy mess – s.17 leave and treatment for physical disorder

A Local Health Board v AB [2015] EWCOP 31 (HHJ Isabel Parry (sitting as a judge nominated under s.9(1) Senior Courts Act 1981))

Article 5 ECHR – DOLS ineligibility – interface with MCA

Summary

If there ever had been reason to doubt that Schedule 1A to the MCA 2005 is irredeemably flawed, this case is it. The facts of the case are tragic, the outcome – substantively – is entirely correct, but the hoops through which it was necessary for the parties to go were ludicrous.

AB, a 34 year old woman, had a serious and life threatening cardiac condition, the recommended treatment for which was surgery. She was detained under s.3 MHA 1983 at a low secure private hospital, her diagnoses including mild/borderline learning disability, a working diagnosis of autism, and a schizophrenic illness with prominent persecutory thinking. In consequence, she lacked the capacity to make decisions as to her medical treatment (and to conduct proceedings in relation to her medical treatment).

The local health board made an application to the Court of Protection for declarations and decisions in relation to AB's capacity and best interests as regards heart surgery, as well as (prior) dental surgery to remove her lower teeth. The intention was that AB would be granted leave under s.17 MHA 1983 by her Responsible Clinician to attend at the general hospital for purposes of undergoing both treatments.

The assessment by the court of the evidence before it as to AB's capacity and best interests was scrupulous, as were the attempts made to engage AB in the process (attempts which ultimately did not involve her speaking to the judge because AB's anxiety at the number of professionals who had been to see her led her to decline to see anyone further, even if that was the judge who was to make the decision). It is particularly noteworthy that the judge made entirely clear:

> *"64. The fact that AB suffers with serious psychological difficulties and has been subject to in-patient treatment compulsorily under the MHA so that it may be considered by some that she does not have an equivalent quality of life to a person with capacity and without her difficulties should be excluded from the court's consideration. Otherwise a person in need of a protective decision would be at risk of being treated less favourably than any other person."*

HHJ Parry recognised that "*imposing two unwanted surgical procedures on AB, one of which is serious and accompanied by risks in itself undermines her personal autonomy over her own body and is therefore a very serious step and only to be taken where it is necessary in her own interests. This is not a case in which the proposed course of medical treatment is merely desirable or would make AB's day to day life easier. She is at risk of dying if she does not undergo this particular cardiac surgery and the necessary pre – operation dental extractions*." However, taking all the evidence into account, including the steps that could be taken to reduce and manage identified risk factors, HHJ Parry concluded that it was in AB's best interests to undergo both medical procedures.

Were it not for the discussion as to deprivation of liberty, we would have noted this case in passing as a Short Note, emphasising the passage at paragraph 64 set out above. However, the judge was required to grapple with the implications of the fact that AB was detained under the Mental Health Act 1983, and her conclusions there are (a) of sufficiently wide ramifications; and (b) (to us) sufficiently concerning, that they require further analysis.

HHJ Parry concluded, on the basis of an agreed statement of the law, that:

1. Both before and during the procedures, AB would be subject to restraints amounting to a deprivation of her liberty. This would be a further deprivation of liberty to that to which she was subjected as a result of her detention under the MNA 1983, for which separate authority was required (applying *Munjaz v United Kingdom* [2012] ECHR 1704);

2. AB was either within Case A or Case B of Schedule 1A to the MCA 2005 because either:

    a. She would be detained at the general hospital 'under the mental health regime' if conditions were attached to the s.17 MHA 1983 leave requiring her to stay at the hospital; or

    b. If no conditions were attached to the s.17 MHA 1983 leave, she would be within Case B.

3. In either case, the Court of Protection could not exercise its powers so as to authorise the deprivation of her liberty (and hence to make an effective welfare order):

    a. If AB was in Case A, this would be so simply by virtue of the operation of Case A (as in *Dr A*'s case [2013] EWHC 2442 (Fam);

    b. If AB was in Case B, this would be because of the wording of paragraph 3(2) of Schedule 1A, which provides that unless the proposed treatment is in accordance which the relevant regime (i.e. here the hospital treatment regime) imposes, she would be ineligible;

4. It was therefore necessary, as in *Dr A's* case, for relief (including declarations and decisions as to AB's best interests as well as authority for the deprivation of liberty that would arise in consequence of the medical procedures) to be granted under the inherent jurisdiction of the High Court (applying, by analogy, the s.4 MCA checklist).

Comment

The substantive outcome of this case is clearly correct, and it represents a textbook analysis of both capacity and best interests in a difficult clinical dilemma.

The case is also important because it represents the first discussion (at least in a reported case) of the Strasbourg court's identification in *Munjaz* of the concept of residual liberty – i.e. the fact that a person is lawfully deprived of their liberty under one statutory regime does not mean that consideration must not be given to whether they are subject to an additional deprivation of their liberty requiring justification. Curiously, whilst this was, in fact, in issue in *Dr A*'s case, it appears that the case was not cited to Baker J.

We must, however, with due respect to those involved, register a considerable note of caution as to the correctness of the legal analysis adopted to reach the conclusion that AB would be ineligible to be deprived of her liberty at the general hospital.

If the analysis is correct, it means that where a responsible clinician grants s.17 leave from a psychiatric to a general hospital with conditions that amount to a deprivation of residual liberty, the MCA cannot be used to authorise it because P will be ineligible. Either the conditions must be relaxed so as to avoid the acid test being satisfied or if, as is very likely, this is not possible, an application to the High Court under the inherent jurisdiction will be required (or, possibly, s.17(3) MHA 1983 should be invoked).

The conventional approach, and that reflected in the Code of Practice to the DOLS safeguards, has always been understood to be the following:

Case A

1. This applies where the person is currently subject to and detained under one of the stated sections of the MHA. It is the managers of the psychiatric hospital named in the application/order/direction that are authorised to detain the patient (see MHA ss 34, 6(2)).

2. A person is not subject to Case A if they are given s.17 MHA 1983 leave from a psychiatric hospital to receive treatment for a physical disorder in a general hospital. They continue to be 'liable to be detained' by the psychiatric hospital managers but are not detained under the stated section. See paragraphs 4.41 and 4.51 of the DoLS Code of Practice, in particular the latter, which provides that "[p]eople on leave of absence from detention under the Mental Health Act 1983 […] are, however, eligible for the deprivation of liberty safeguards if they require treatment in hospital for a physical disorder." See also paragraphs 31.8-3.11 of the new Mental Health Act Code of Practice.

3. A residence condition imposed by an RC under s.17 is not, itself, sufficient to give rise to a deprivation of liberty, confinement for these purposes requiring both continuous supervision and control and a

lack of freedom to leave. See, by analogy, the UT decision in *NL v Hampshire County Council* [2014] UKUT 475 (AAC) in relation to guardianship.

Case B

4. In the case of an individual who is subject to the hospital treatment regime (i.e. here, s.3 MHA 1983) but not detained under that regime, Case B applies and the MHA and the MCA can operate in parallel. Here, the patient continues to be 'liable to be detained' in the psychiatric hospital whilst on leave to the general hospital but is not detained under the hospital treatment regime.

5. The effect of paragraph 3(2) of Schedule 1A is to ensure that decisions taken under the MHA (including residence conditions under s.17 MHA 1983 – see paragraph 3(3)) take primacy. In other words, one could not have a standard authorisation authorising the deprivation of an individual's liberty at hospital A if the patient's RC had imposed a residence condition under s.17 requiring them to be at hospital B.

6. In a case such as that of AB, decisions as to treatment for physical disorder could not be taken under the MHA 1983. The MHA 1983 only gives authority – under Part IV – for decisions to be taken in respect of treatment for mental disorder. Decisions as to physical treatment could either be taken on the basis that the clinicians were able to rely upon the defence in s.5 MCA 2005 or – as in AB's case – on the basis that authority was required by way of an order from a court. A decision as to purely physical treatment could therefore never be a "*requirement imposed by the mental health regime*" for the purposes of paragraph 3(2) of Schedule 1A;

7. As a matter of logic, therefore, in the context of the delivery of treatment for physical disorder, assuming that any s.17 leave granted was to the hospital at which the proposed treatment was to be given, it is difficult to envisage there being a conflict between the course of action that would be authorised by an order of the Court of Protection under s.16(2)(a) MCA and "*a requirement imposed by the mental health regime*."

We should note, finally, that s.17(3) MHA 1983 (which was not discussed by HHJ Parry) enables patients to be kept in the custody of staff or person authorised by the hospital managers, including the staff of another hospital. We do not understand it routinely to be used in the 'transfer treatment' cases of the kind considered in AB, its function (as identified by Richard Jones) being primarily to confirm that immediate powers of restraint can be used in the event of an attempt to abscond by a high risk patient (see also s.137(1) and (2) MHA 1983). Precisely how it is intended to fit into the operation of Schedule 1A is not clear. We note that the definition of 'hospital treatment regime' in Schedule 1A is exhaustive and does not include s.17, such that even if the individual is deprived of their liberty pursuant to the operation of s.17(3) MHA 1983, they are not 'detained in a hospital under [the hospital treatment] regime' (emphasis added). It would therefore appear that, even if s.17(3) MHA 1983 is invoked, it would not give rise to a Case A situation, but a situation where either (1) there is no need to invoke the MCA at all because it provides the necessary authority for the additional deprivation of liberty attendant upon the arrangements made for the

treatment for the physical disorder (which does not appear to have been in the contemplation of DH when drawing up either Code of Practice, and which we would doubt); or (2) a Case B situation, requiring authorisation to be sought under the MCA.

Whilst the issues relating to the operation of s.17 leave set out above were not addressed in terms in *NHS Trust v FG* [2014] EWCOP 30, we would note that Keehan J appears (rightly) to have been entirely content to exercise the jurisdiction of the Court of Protection so as to provide for the lawful deprivation of liberty of a woman detained under s.3 MHA 1983 who was to be granted leave under s.17 MHA 1983 to a general hospital for purposes of undergoing a Caesarian section.[1] Indeed, the tenor of the guidance given by Keehan J was to the effect that, where an application to the Court of Protection was not required (because the procedure would not amount to serious medical treatment), the key consideration was that there was proper coordination between the two hospitals so as to ensure that any necessary standard authorisation was in place prior to the woman being transferred to the maternity unit at the general hospital (see paragraph 101).

We hesitate to raise the difficulties outlined above because, on one view, they could be characterised as lawyerly dancing on the heads of a pin. However, if *AB* is correct, then this suggests that very many more applications in relation to psychiatric patients requiring procedures for physical disorders will be required to the High Court (not the Court of Protection) in cases where the sole reason for so doing is to obtain authority for deprivation of liberty.

Given that – albeit in stellarly badly drafted form – Parliament has provided a mechanism for the MHA and the MCA to operate in parallel without recourse to the courts, we look with interest to whether this issue is revisited in due course.

Guardianship and DOLS – the role of the FTT

KD v Walsall MBC & Ors [2015] UKUT 0251 (AAC) (Upper Tribunal (AAC) (Charles J))

Article 5 ECHR – DOLS ineligibility – interface with MCA

Summary

KD had Korsakov's Syndrome and, following his detention under the Mental Health Act 1983, had been subject to guardianship since 2012. He was required to reside in a care home with 24 hour supervision and support where he was not free to leave and not permitted to go out unless accompanied by a member of the care staff, with access to the community is limited by their non-availability. He sought to be discharged

[1] There is a glancing reference in the relief sought by the Trust (at paragraph 17) to the inherent jurisdiction as an alternative basis for authority for the deprivation of FG's liberty, but Keehan J approached matters squarely on the basis that he was exercising his jurisdiction as a Court of Protection judge to make the substantive declarations and decisions: see paragraph 33. Applying the logic of *Dr A's* case and *AB*'s case, he would not have been entitled to do so if he considered that FG was ineligible to be deprived of her liberty under the MCA 2005.

from the guardianship order on the basis that it was not necessary because DoLS was less restrictive and guardianship could not authorise his deprivation of liberty.

This is a significant decision for those involved in guardianships cases that this mere summary cannot do justice to. But some of the passages apply to DoLS cases, irrespective of whether the person is under guardianship. The following points are particularly noteworthy:

1. The concept of "deprivation of liberty" in breach of Article 5 is wider or arguably wider that that of "detention" under the MHA (para 29).

2. The guardian's power to return the person to his place of residence has the effect of a requirement or an injunction preventing him from leaving (para 30). And such a power is a more readily available, effective and sensible means of enforcing the result that the person lives there than an injunction against that person from the Court of Protection (para 31).

3. A deprivation of liberty during guardianship should be authorised under the MCA (where applicable).

4. A standard authorisation under DoLS can provide for it to come into force at a time after the time at which it is given. And the Court of Protection can authorise any deprivation from a date in the future (para 43).

5. The reasoning in *C v Blackburn and Darwen Borough Council* [2011] EWHC 3321 (COP) was developed in terms of what should happen where there is a dispute over residence with a guardian (paras 45-54).

6. A useful checklist was designed for tribunals to approach similar guardianship / Mental Capacity Act 2005 cases.

Comment

This decision illustrates how investigatory the role of the First-Tier Tribunal (Mental Health) can be with regards to the interface with the 2005 Act. The inference that the effect of guardianship powers is to prevent the person from leaving their place of residence is of particular interest as the issue has been the subject of much debate over recent years.

SCIE DOLS Resources

SCIE has recently updated its DOLS resources. Available here are:

1. *At a glance – The Deprivation of Liberty Safeguards*. This updated document includes guidance on what deprivation of liberty is and how it is authorised under the DoL safeguards. It also discusses urgent authorisations, the safeguards for people who may be deprived of their liberty and when DoLS cannot be used.

2. *Report: Deprivation of Liberty Safeguards: putting them into practice*: This resource describes good practice in the management and implementation of the Deprivation of Liberty Safeguards. It includes the roles of clinical commissioning groups (CCGs) and wider local authority governance.

3. *Guide – IMCA and paid relevant person's representative roles in the Mental Capacity Act Deprivation of Liberty Safeguards*: This practice guidance describes the role of IMCAs and paid representatives in DOLS.

Also available is a video (featuring Alex in a cameo appearance) discussing DOLS in light of *Cheshire West*.

Discharging the errant health and welfare deputy

AY v (1) Hertfordshire Partnership NHS Foundation Trust & Ors [2015] EWCOP 36 (DJ Hilder)

Deputies – Welfare matters

Summary

This case concerned the best interests of X in relation to his diet/treatment and a welfare deputyship. The application was brought by his mother, AY.

X was a young man of 25 years old who lived in a care home. He suffered from autistic spectrum disorder and had moderate to severe learning disabilities. He was fully dependent on carers to meet all his personal care needs, food and fluid intake and lacked capacity to make decisions about where to live, how he is cared for and the treatment he received.

AY considered that X's autism had been acquired after birth and related to his receiving the MMR vaccination. AY's view was that X's behavioral challenges were reflective of a bowel condition which often left him "impacted" and in pain which he could not otherwise express. She believed that this bowel condition could and should be treated by means of excluding certain food types (gluten, casein and lactose) from his diet, and by giving him nutritional supplements.

AY also considered that she was best placed to make decisions about the welfare of X and as his mother she understood him best and had always acted in his best interests. Accordingly, AY contended that her authority as welfare deputy, which had been temporarily suspended, should be reinstated.

The local authority contended that AY took an unconventional approach to X's care and treatment, and sought to impose her own views to the detriment of X's wellbeing. Instead, the local authority maintained that X should have an unrestricted diet and medical treatment as advised by the responsible clinicians. The local authority sought revocation of AY's welfare deputyship as it was it placing strain on those responsible for X's day to day care. The OS was broadly supportive of the local authority's position.

The Court made extensive findings of fact in order to reach decisions as to X's best interests. Ultimately, the court found that when X's diet was restricted and he was taking supplements, he remained autistic. When he had access to previously restricted foodstuffs and an unrestricted diet, there was no noted deterioration in his behaviour or the condition of his bowels. The Court held that restriction of X's diet was an infringement of his freedoms and the requirement to take nutritional supplements was an imposition, neither of which were in X's best interests.

The Court also held that AY's views ran counter to the generally accepted approach in respect of treatment for autism. AY would continue to seek testing and administration of nutritional supplements. The Court was satisfied that it would not be in X's best interests for AY alone to have authority to make such decisions for X.

Comment

This decision makes an interesting counterpart to that in *A Local Authority v M & Ors* [2014] EWCOP 33, in which Baker J was faced with a mother who was a health and welfare deputy and held equally fixed views in relation to the role played by the MMR vaccine in the development of her son's autism. In that case, Baker J did not – at least at the reported stage – go as far as removing the mother as her son's deputy, but indicated that such a course was very much on the cards in the event that she was unable to demonstrate a fundamental change in attitude.

In the instant case, the Court had no doubt that AY was devoted to X and dedicated to promoting his wellbeing as she saw it. However, the Court was struck by the rigidity of her views and her refusal to accept professional medical advice. Rather, AY continued to pursue her views which worked against X's best interests and therefore her appointment as welfare deputy was revoked.

The revocation of AY's welfare deputyship meant that she alone would not have authority to make these decisions for AY. However, the Court emphasised that AY was not excluded from the decision making process. The revocation of the deputyship merely restored AY to the usual position for the parent of an incapacitated (adult) child where her views would be taken into account in making any decision in X's best interests. The Court championed the usual approach of collaborative decision making and in the circumstances agreed with the OS that there was no need to appoint anyone else as replacement welfare deputy.

We would emphasise that there will be very many cases in which the appointment of a parent as the health and welfare deputy for a child with profound disabilities is entirely appropriate and correct so as to secure a privileged voice in decision-making. It often comes as a huge – and very unwelcome – shock to parents in such a position to discover that they cease to have any formal role at all in such circumstances when their child turns 18, and appointment as a health and welfare deputy can be very important. This case, though (as with *A Local Authority v M*) demonstrates the boundaries of the authority that a parent deputy can exercise.

Deprivation of Liberty Statistics

The Health and Social Care Information Centre has now released the DOLS statistics from 1 January to 31 March 2015, updated figures for the preceding three quarters. We therefore have the figures for the entire year since the Cheshire West decision for the 116 out of 152 councils (76%) which have submitted figures for all 4 quarters. Those show that those councils received 113,300 DOLS applications in the period compared to 10,900 in previous year. In a dramatic change to the position prior to the Supreme Court decision, a majority (54%) of applications had not been signed off (or had been withdrawn – presumably because the person had been discharged or died), compared to 3% previously. 36% of applications were granted, and 10% rejected.

Complex does not (necessarily) mean ineffective

XY v Public Guardian [2015] EWCOP 35 Senior Judge Lush

Lasting powers of attorney – objection

Summary

In this case the Senior Judge was faced with the Public Guardian's refusal to register a LPA because of the conditions that the donor had imposed to regulate its use. The donor, who retained capacity, applied for its registration.

The conditions, which were intricate (and reproduced in the Schedule to the judgment), had the aim of ensuring that decisions could only be made pursuant to the power when the donor clearly lacked capacity.

The Public Guardian objected on the basis that within the meaning of paragraph 11 of schedule 1 of the MCA, the provisions in question would be ineffective as part of a LPA and would prevent the instrument from operating as a valid LPA.

The provisions required (amongst other matters) 2 psychiatrists' opinions and the approval of a Protector before the power could be used.

The Senior Judge dismissed the Public Guardian's concerns holding at paragraph 39 that the Public Guardian could only refuse to register a LPA if the provision could not take effect according to its legal terms as part of a LPA, for example a term giving voting rights to the attorney.

If the term could take effect legally, then the Public Guardian had to register the power, if not, he had to apply to court under s.23 MCA 2005 for the court to determine the issue (see paragraph 41).

This was so even if the term made the power of much more limited practicality and the Senior Judge pointed out that in the new form, in effect 1 July 2015, below the tick box that allows the donor to specify that the power is only exercisable when the donor lacks capacity to make the decision, there is a warning that adopting that course might make the power less useful because of the potential need to prove incapacity when it is used.

Comment

As Senior Judge Lush noted at the outset, this was a judgment for which permission would not normally be given for publication, but although he could not imagine "*that the general public would have the slightest interest in this judgment, but its publication may be of interest to professionals who specialise in this area of the law and draft LPAs on a regular basis, and also to people who are considering making an LPA themselves, and for this reason I shall permit its publication.*"

The judgment is, indeed, of interest because the OPG can only refuse to register a LPA if, properly analysed, it is truly ineffective. If individuals wish to set in place complex arrangements to secure compliance with their wishes, this judgment confirms that they can do so.

Short Note: deputyship and the calibration of risk

In *L v NG* [2015] EWCOP 34, District Judge Eldergill heard an application by NG's sister to be appointed his deputy on the basis that he lacked capacity to make decisions about the sale of his home.

NG did not lack litigation capacity but it appears that the District Judge accepted that he lacked capacity to make decisions regarding the sale of his home and that there was a danger that he might be exploited by a third party during a period of illness, he was schizophrenic.

NG objected to the appointment of a deputy and his sister in particular. The District Judge held that the least restrictive course would be to order that the applicant be authorised to enter a restriction on the title to the property at the Land Registry to the effect that there could be no dealings with the property without the approval of the Court of Protection.

In that way NG was protected but his self-esteem and independence preserved.

Guidance to attorneys

The Office of the Public Guardian has issued guidance to attorneys in respect of property and affairs.

The document is short and clear and entitled "Getting started as an attorney: Property and financial affairs"

It is aimed at the lay person and is a handy checklist of what to do and not to do as an attorney.

Stress-testing Schedule 3: cross-border placements and the Court of Protection

Health Services Executive of Ireland v PA, PB and PC [2015] EWCOP 38 (Baker J)

Article 5 ECHR – Deprivation of liberty – International jurisdiction of the Court of Protection – Recognition and enforcement

Summary

This case concerns the jurisdiction of the Court of Protection to recognise and enforce foreign protective measures under Schedule 3 to the MCA 2005. That Schedule represents the implementation in English law of obligations contained within the 2000 Hague Convention on the International Protection of Adults ('the Convention') ((which the United Kingdom has ratified in respect of Scotland, but not England).

It is a long and complex judgment, representing by some measure the most comprehensive analysis of these provisions since the Act came into force.

The background concerns three young Irish individuals with complex mental health needs, all of whom were considered by the Irish Health Services Executive and the Irish High Court to require treatment in England because suitable treatment was not available in the Republic of Ireland. The Irish High Court made orders under its inherent jurisdiction in relation to each of the individuals providing for their detention, care and treatment at facilities run by St Andrew's Healthcare. Whilst each of the individuals were, in principle, detainable under the provisions of the MHA 1983, the Irish High Court considered in each case that they wished to retain jurisdiction over the individuals so as to be able to ensure that the key decisions in relation the care planning for 'its' citizens could be made in Ireland, rather than in England.

All three individuals were initially placed in England under arrangements made under Council Regulation 2201/2003 ('Brussels IIR'), which (inter alia) provides a mechanism for cross-border placements in relation to children (as to which see our comment on the case of *HSE Ireland v SF* [2012] EWHC 1640 (Fam)). When they turned 18, however, this mechanism ceased to be effective, and the HSE therefore sought recognition and enforcement of further Irish High Court orders under the provisions of Schedule 3 to the MCA 2005. Such orders have been sought and made previously, including in the reported case of *Re M* [2011] EWHC 3590 (COP), but never on a contested basis. Indeed, in PC's case, the Court of Protection had already recognised and declared enforceable the initial relevant Irish order in December 2012, and recognised and declared enforceable an order providing for his transfer from one facility run by St Andrew's to another in early 2015.

Because the cases of PA and PB raised very similar issues (and it was recognised that the same issues of principle were engaged in PC's case), Baker J listed all three cases to be considered at the same time. The Official Solicitor acted as Advocate to the Court in all three cases and PA and PB were represented (directly)

by solicitors and Counsel (PC was neither represented nor present). The 'stress-testing' that Schedule 3 to the MCA 2005 underwent in consequence was considerable.

In a detailed judgment, Baker J made a number of key findings/observations in relation to Schedule 3, set out in the paragraphs that follow (nb, these re-order slightly the paragraphs of the judgment so as to move from the general to the specific).

Schedule 3 implements, as a matter of domestic law, obligations in respect of the recognition, enforcement and implementation of "protective measures" imposed by a foreign Court regardless of whether that Court is located in a Convention country (paragraph 39).

In consequence, it is not permissible to apply one rule for Convention states and another for non-Convention states. In other words, the Courts of England and Wales should note automatically adopt a more cautious approach when asked to recognise and enforce an order of a non-Convention state. Each case will turn on its own facts, to which the Court of Protection must apply the provisions of the Schedule, in particular the provisions as to recognition in paragraph 19 including the grounds on which recognition may be refused. Plainly the Courts of England and Wales will have proper regard to the general principles of comity in all cases, although a greater degree of caution may be required when considering orders made by certain countries (paragraph 39).

There is an important difference between the persons who fall within the general jurisdiction of the Court of Protection under the MCA and those in respect of whom protective measures taken by a foreign Court may be recognised and enforced by the Court. The Court of Protection's general jurisdiction exists in respect of persons who lack capacity within the meaning of s.2(1) MCA 2005; the jurisdiction of the Court of Protection under Schedule 3 arises in relation to 'adults' – defined for those purposes in paragraph 4(1) as a person over 16 who, as a result of an impairment or insufficiency of his personal faculties, cannot protect his interests (and who is not subject to either the 1996 Hague Child Protection Convention or Brussels IIR). The scheme of the Convention, reflected in the Schedule, is to focus on the factual description of the adult rather than any legal test as to capacity. In each case, the Court must look at the order and judgment of the foreign Court – and if it thinks it necessary to do so, and insofar as it is permissible to do so under paragraph 24, the evidence before the foreign Court – to establish whether the foreign Court has made a finding which is binding or, if not, whether the individual comes within the meaning of "adult" under paragraph 4(1) of Schedule 3 (paragraphs 43-4).

The scheme of the Convention which underpins Schedule 3 is to facilitate the recognition and enforcement of protective measures taken by foreign Courts save in the circumstances set out in paragraphs 19(3) and (4). The measure "is to be recognised" if taken on the grounds that the individual was habitually resident in the country where the order containing the measure was made. The grounds on which a measure may be challenged may be procedural (paragraph 19(3) or substantive (paragraph 19 (4)). By reason of paragraph 21, however, provides that for the purposes of paragraphs 19 and 20 any finding of fact relied on when the measure was taken is conclusive, there is no power to challenge the finding made in the foreign Court that the individual is habitually resident in that country. Accordingly, a finding of a foreign Court that the

individual concerned was habitually resident in that country cannot be challenged in any process to recognise or enforce a measure in this country, although the process by which the measure was ordered may be challenged (for example, if the individual was not given an opportunity to be heard) and the measure itself may be challenged (for example, if inconsistent with a mandatory provision of law of this country) (paragraph 52).

Paragraph 19(3) of Schedule 3 gives the Court a discretionary power to refuse to recognise a protective measure if certain procedural safeguards are not met. It is plain from the way in which Schedule 3 paragraph 19(3) is drafted that the Court only has a discretion to decline to recognise a foreign order if it thinks that the case in which the measure was taken was not urgent and the adult was not given the opportunity to be heard and that omission amounted to a breach of natural justice ('thinks' for these purposes meaning 'concludes on the balance of probabilities) (paragraph 55).

Paragraph 19(4) of Schedule 3 gives the Court a further discretionary power to decline to recognise a measure in a foreign order in certain circumstances spelt out in the sub-paragraph. In contrast to sub-paragraph (3), these grounds upon which an application for recognition may be refused are separate rather than cumulative. Thus, the Court may refuse recognition if it thinks that (a) recognition would be manifestly contrary to public policy; or (b) the measure would be inconsistent with a mandatory provision of the law of England and Wales; or (c) the measure is inconsistent with one subsequently taken or recognised, in England and Wales in relation to the adult. As Mostyn J had identified in *Re M* 19(4) (a) and (b) appear to be two sides of the same coin (paragraph 62).

By including Schedule 3 in the MCA, Parliament authorised a system of recognition and enforcement of foreign orders notwithstanding the fact that the approach of the foreign courts and laws to these issues may be different to that of the domestic court. These differences may extend not only to the way in which the individual is treated but also to questions of jurisprudence and capacity. Thus the fact that there are provisions within the Act that appear to conflict with the laws and procedures of the foreign state should not by itself lead to a refusal to recognise or enforce the foreign order. Given that Parliament has included s. 63 and Schedule 3 within the MCA, clearly intending to facilitate recognition and enforcement in such circumstances, it cannot be the case that those other provisions within the Act that seemingly conflict with the laws and procedures of the foreign state are mandatory provisions of the laws of England and Wales so as to justify the English Court refusing to recognise the foreign order on grounds of such inconsistency. In such circumstances, it is only where the Court concludes that recognition of the foreign measure would be manifestly contrary to public policy that the discretionary ground to refuse recognition will arise. Furthermore, in conducting the public policy review, the Court must always bear in mind, in the words of Munby LJ in *Re L (A Child) (Recognition of Foreign Order)* [2012] EWCA Civ 1157 that "*the test is stringent, the bar is … set high*." (paragraph 91).

There is likely to be a wide variety in the decisions made under foreign laws that are put forward for recognition under Schedule 3. Inevitably there may be concerns about some of the foreign jurisdictions from which orders might come. But as the Ministry of Justice observed in a letter sent to the Court, taking account of such concerns is surely the purpose of the public policy review. Although no wide ranging review

as to the merits of the foreign measure is either necessary or appropriate, a limited review will always be required as indicated by the European Court in *Pellegrini v Italy* (2002) EHRR 2. That will be sufficient to identify any cases where the content and form of the foreign measure, and the processes by which it was taken, are objectionable. The circumstances in which Schedule 3 is likely to be invoked, and the number of countries whose orders are presented for recognition, are likely to be limited. If applications were to be made from countries such as North Korea (which are unlikely, at least in the foreseeable future), the public policy review would surely lead swiftly to identifying grounds on which recognition would be refused. It is much more likely that the orders presented for recognition will be those of foreign countries whose legal systems, laws and procedures are closely aligned to our own. Concerns of this nature can be addressed by admitting evidence of the process by which the foreign protective measures were made and general evidence relating to the legal system of the state that made the order (paragraph 92).

The Court of Protection (being bound to act compatibly with the ECHR as a mandatory provision of the law of England and Wales by its incorporation into the HRA) should on any application for recognition and enforcement conduct a limited review to satisfy itself that foreign orders presented for recognition and enforcement comply with the ECHR. In so doing, the Court should strive to achieve a combined and harmonious application of the provisions of the ECHR and the Convention (paragraph 96).

By including Schedule 3 in the MCA, Parliament must be assumed to have permitted orders to be recognised that did not comply with other laws and procedures under the statute. As the definition of "adult" in Schedule 3 paragraph 4 plainly extends to persons who may not be incapacitated within the meaning of s.2 MCA 2005, it follows that the Court will be obliged to recognise and enforce orders of a foreign court in terms that could not be included in an order made under the domestic jurisdiction under the MCA. This is subject, however, to its discretion to refuse recognition and enforcement where that would be manifestly contrary to public policy. Baker J agreed with and endorsed Hedley J's conclusion in *Re MN* that a decision to recognise under paragraph 19(1) or to enforce under paragraph 22(2) is not a decision governed by the best interests of the individual so that those paragraphs are not disapplied by paragraph 19(4)(b) and section 1(5) of the Act. Thus it follows that the Court will be obliged to recognise and enforce a measure in a foreign court order even where applying a best interests test it would not be included in an order made under the domestic jurisdiction under the MCA. Again, however, this is subject, however, to its discretion to refuse recognition and enforcement where that would be manifestly contrary to public policy (paragraph 98).

It would not be open to the Court of Protection to refuse recognition and enforcement of a foreign order simply because the individual may have the relevant decision-making capacity and objects to the order being recognised and enforced. Such an approach would undermine the whole purpose of Schedule 3 (paragraph 101).

Specifically in the context of a foreign order compulsorily placing an individual in a psychiatric hospital in England and Wales for treatment:

1. The limited review required should encompass the Court being satisfied that (1) the *Winterwerp* criteria are met and (2) that the individual's right to challenge the detention under Article 5(4) is effective (i.e. that they have a right to take proceedings to challenge the detention and the right to regular reviews thereafter) (paragraph 96);

2. (Agreeing with Mostyn J in *Re M*), an order recognising and enforcing a foreign measure under Schedule 3 is not a welfare order as defined in section 16A(4)(b). The rules as to ineligibility in section 16A therefore do not apply. This means that the Court will be obliged to recognise and enforce orders of a foreign court depriving an individual of his liberty in circumstances in which it would not able to do so under the domestic jurisdiction under the MCA on the grounds that the individual is being treated or is treatable under the MHA as defined in Schedule 1A of the MCA. Once again, however, this is subject, however, to its discretion to refuse recognition and enforcement where that would be manifestly contrary to public policy (paragraph 98);

3. The "conditions of implementation" provided for in paragraph 12 of Schedule 3 (which are governed by English law), are that the requirements of the ECHR are met, in particular the *Winterwerp* criteria and reviews of sufficient regularity to satisfy Article 5(4) (paragraph 102);

4. Most such orders presented for recognition are likely to be of short duration, and/or in respect of persons whose capacity may fluctuate, and/or who are in receipt of a progressive form of treatment. As a result, in such cases there is likely to be repeated requests to scrutinise a succession of orders. Recognition and enforcement is likely to require close co-operation, not only between the medical and social care authorities of the two countries, but also between the Courts and legal systems. The Convention provides a mechanism using the Central Authorities but, pending ratification of the Convention, there may well be the need for direct communication between judges of the two jurisdictions (paragraph 93).

On the facts of the cases before him, Baker J considered that (1) each of the individuals: was an "adult" within the meaning of Schedule 3; (2) that each was habitually resident in the Republic of Ireland; (3) in each case that the individual was given a proper opportunity to be heard for the purposes of paragraph 19(3)(b); (4) that in each case the individual satisfies the criteria for detention under Article 5(1)(e), namely the *Winterwerp* criteria; (4) that the orders of the Irish Court demonstrate that each will be afforded a regular right of review of his or her detention so as to comply with the ongoing requirements of Article 5(4); (5) that as a result recognising and enforcing the orders will not contravene the ECHR; (6) that the measures in each case are not inconsistent with any other mandatory provision of the law of England and Wales; and (7) that the measures cannot be said to be manifestly contrary to public policy. Baker J therefore made orders providing that protective measures in the Irish orders were to be recognised in England and Wales and enforced in this jurisdiction.

Baker J also used the opportunity:

1. To express the hope that the Court of Protection Rules will in due course be amended to incorporate comprehensive rules to support Schedule 3 as soon as possible, including rules as to allocation of applications under the Schedule;

2. To provide that, pending the introduction of such rules, any application under Schedule 3 at this stage should be listed for a full High Court Judge in the first instance, and thereafter, all further hearings in connection with that application, and any further applications under the Schedule in respect of the same individual, should be listed before the same judge (if available) unless expressly released by him or her to another judge;

3. To note that one issue that requires clarification by the ad hoc Rules Committee is whether a litigation friend should be appointed in cases such as those before him. Baker J expressed the preliminary view that a litigation friend should be appointed to act for individuals who are the subject of applications for recognition and enforcement under Schedule 3 (unless, of course, that individual has capacity to conduct proceedings applying the provisions of the MCA).

Comment

Although these cases are unusual, the analysis by Baker J of Schedule 3 has ramifications going far beyond the context of compulsory placements for psychiatric treatment. Of particular importance for practitioners are the following points:

1. Confirmation that – as in cases involving children under Brussels and Hague instruments – when we come to consider cross-border cases involving recognition and enforcement of measures taken in relation to adults with impairments, the English courts are operating in a very different sphere to purely domestic cases. In the context of recognition and enforcement, the Court of Protection:

    a. Will not be applying the test of capacity contained in s.2(1) MCA 2005 (save in considering whether the adult has litigation capacity); and

    b. Will not be applying the best interests test contained in s.1(5) and s.4 MCA 2005 (save in relation to implementation of the measures).

    In other words, the Court of Protection, and those appearing before it, has mentally to undertake a very significant gear shift in such cases. Such a gear shift is one that many family practitioners and judges still find difficult in relation to cross-border cases involving children; it will perhaps be even more difficult in relation to adults where we are still taking baby steps in the identification of common themes and common practices across borders (and where we have yet in England and Wales to ratify the Convention…);

2. Confirmation, further, that the ability of the Court of Protection to refuse to recognise and declare enforceable foreign protective measures is very limited;

3. Confirmation that, for purposes of applications for recognition and enforcement, the Court of Protection is effectively bound by the decisions of the foreign court as to the habitual residence of the individual (as to habitual residence more generally, see also the note by Adrian on the decision in *AG v RN* [2015] UKSC 35 in the Scotland Newsletter);

4. Confirmation that by passing Schedule 3 in the form that it did, Parliament opened the door to applications for recognition and enforcement to be made from any country in the world, with no 'filter' specific to non-Convention countries (save for the limited filter in relation to cross-border placements between Convention countries in paragraphs 19(4) and 26 which will only become relevant when the Convention in ratified in respect of England and Wales).

Cross-border matters are now part of the daily reality of very many practitioners (not least because, for these purposes, Scotland is a foreign country…). Cases with a cross-border element will, we predict, come before the Court of Protection with ever more frequency. And, in due course, we anticipate that much the same will be said in relation to the Convention and to such cases as has been said by Sir James Munby P in relation to the earlier Hague Conventions applicable to children and their European counterparts:

> "*They have exposed us, often if only in translation, to what our judicial colleagues in other jurisdictions are doing in a wide range of family cases. They have taught us the sins of insularity. They have taught us that there are other equally effective ways of doing things which once upon a time we assumed could only be done as we were accustomed to doing them. They have taught us that, beneath all the apparent differences in language and legal system, family judges around the world are daily engaged on very much the same task, using very much the same tools and applying the same insights and approaches as those we are familiar with. Most important of all they have taught that we can, as we must, both respect and trust our judicial colleagues abroad.*" *Re E (A Child)* [2014] EWHC 6 (Fam)

All this, of course, suggests that everyone should:

1. Rush out and purchase *The International Protection of Adults*, the only work which seeks to map out both the Convention and the frameworks for decision-making in relation to those with impairments in core jurisdictions around the world;

2. Identify to Alex and the co-authors of the book any jurisdictions which should be included and volunteer to produce the necessary information for a chapter to be included in the next edition.

Costs, discretion and the CPR

In the matter of G (An Adult) by her litigation friend, the Official Solicitor [2015] EWCA Civ 446 (Court of Appeal (Sullivan and Ryder LJJ and Dame Janet Smith))

COP jurisdiction and powers – Costs

Summary

This case is the latest episode in the notorious Redbridge saga and concerns the issue of costs.

The Official Solicitor (OS) appealed against a costs order made by the President of the Court of Protection requiring Associated Newspapers Limited (ANL) to pay 30% of G's cost and 30% of the costs of London Borough of Redbridge. The costs order was made following an unsuccessful application by ANL to be joined as a party to the proceedings. London Borough of Redbridge did not appeal but the OS appealed on behalf of G.

ANL had made its application following a decision that it was not in G's best interests to have media contact. The OS had contended that the terms of the order also prohibited social visits. The President held that ANL's application to be joined as a party to the COP proceedings was misconceived and failed completely. However, that did not mean that ANL should necessarily have to pay all the costs and there were three factors which limited the costs order to 30%: (1) the public importance of the issues; (2) the standard adopted beforehand by the OS; and (3) that ANL should not have to pay two sets of cost for both the OS and local authority.

The OS relied on two grounds of appeal: (1) The President erred in holding that the Court of Protection Rules applied. The application fell to be determined in accordance with the Civil Procedure Rules (CPR) where the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party. (2) The President had erred in the exercise of his discretion in the proportionate costs order that he made.

The Court of Appeal rejected both grounds of appeal and upheld the President's decision on costs. As to the OS's first submission, the Court of Appeal called this "a device to suggest that the costs presumption should be reversed." As to the second, the Court of Appeal considered that whilst the OS had succeeded on the application, he had lost on a point of principle. ANL had lost the application but had achieved clarity in relation to a point of principle.

Comment

Three points arise from this judgment.

First, the confirmation by the Court of Appeal that applications to be joined as a party to proceedings before the Court of Protection are covered by the COPR, not the CPR.

Second, the Court of Appeal was at pains to emphasise the public importance of the media's general role. Echoing the President's comments, the Court of Appeal described the OS's mindset as failing to recognise the "*vitally important role of the media and the valuable service the media provides*." The importance of the public interest raised by the media and the response of the OS were of significance to the cost decision made.

Third, the Court of Appeal's decision is another example of just how difficult it is to overturn a costs judgment on appeal. As Lord Justice Ryder said, "[a]*n appeal against the exercise by a judge of his discretion faces a high hurdle*." Citing the case of *Burchell and Ballard* [2005] EWCA Civ 358, the court reminded readers that appeals against orders for costs are notoriously difficult to sustain as the trial judge has a wide discretion which the Court Appeal will only interfere with if the judge has exceeded the generous ambit of his discretion.

Mackenzie Friends and conduct

In the matter of Nigel Baggaley(aka Nigel Quinlan) [2015] EWHC 1496 (Fam) (Family Division (Sir James Munby P))

Other proceedings – Family

Summary

This case concerns the very unfortunate behavior of a McKenzie Friend.

Mr Baggaley had acted as a McKenzie Friend on behalf of a father (in one case) and on behalf of a mother (in another case) in family proceedings in the county court. He was a former bouncer and involved with two companies that provided legal advice and legal services: McKenzie Friends 4U Limited and Diy Law Shop Limited.

In the first set of proceedings, he was found to have said to the Chairman of the Bench "*you are pathetic*." He had also behaved in a loud and aggressive manner towards the usher in the corridor of the court.

In the second set of proceedings, Mr Baggaley had been aggressive and confrontational towards the father's barrister. The barrister's clerk had also received a threatening telephone call from Mr Baggaley. A legal executive at the firm acting for the father reported that Mr Baggaley had been verbally abuse to her and the firm's receptionist.

The President of the Family Division commented that Mr Baggaley had repeatedly acted in ways that undermined the efficient administration of justice. The President felt that Mr Baggaley's misbehaviour as a McKenzie Friend had to be controlled. The only way that it could be adequately and appropriately done was by extending a civil restraint order indefinitely.

Comment

Certain activities, referred to as "*reserved legal activities*" are regulated by Legal Services Act 2007. These include exercising a right of audience and the conduct of litigation. Acting as a McKenzie Friend is not a "*regulated activity*." Rather, the activities of McKenzie Friends are governed by a rather more nebulous set of principles summarised in the *Practice Guidance: McKenzie Friends (Civil and Family Courts*. Whether

that Guidance in fact applies in the Court of Protection is a moot point; in any event, its principles certainly do.

McKenzie Friends can provide an invaluable service to litigants in person. However, as in this case, those without a clear understanding of the proper role of a McKenzie Friend can do a huge disservice to the litigant in person as well as the court. This judgment helps also make clear when courts should be prepared to step in to prevent abuse.

Litigants in Person: Guidelines for Lawyers

The Bar Council, the Law Society, and the Chartered Institute of Legal Executives have recently issued joint guidelines in response to the rising numbers of people representing themselves in court without a lawyer as a result of cuts to legal aid. The guidelines discuss how far lawyers can help unrepresented people without this conflicting with their duties to their own clients. There are also some useful accompanying notes for litigants in persons, and a selection of relevant cases. All can be found here.

Short Note: determining factual allegations

In a brief judgment, *Re F (Proof of facts)* [2015] EWFC 41**,** Peter Jackson J summarised the principles that apply when factual allegations are determined by family courts. These principles apply with equal force in the context of proceedings before the Court of Protection.

The essential question for the court is whether, on the balance of probabilities, a particular event happened. Suggestions that evidence must be particularly cogent where serious allegations are made, or reliance on the general probability or improbability of an event, are not appropriate. Even what might be called the Sherlock Holmes principle is dismissed: if there are three possibilities, possibility C is not proved just because neither A nor B is proved, or because C is more likely than A or B. The court also lists a helpful summary of risk factors and protective factors in relation to child abuse:

Risk factors

- Physical or mental disability in children that may increase caregiver burden
- Social isolation of families
- Parents' lack of understanding of children's needs and child development
- Parents' history of domestic abuse
- History of physical or sexual abuse (as a child)
- Past physical or sexual abuse of a child
- Poverty and other socioeconomic disadvantage
- Family disorganization, dissolution, and violence, including intimate partner violence
- Lack of family cohesion
- Substance abuse in family
- Parental immaturity

- Single or non-biological parents
- Poor parent-child relationships and negative interactions
- Parental thoughts and emotions supporting maltreatment behaviours
- Parental stress and distress, including depression or other mental health conditions
- Community violence

Protective factors

- Supportive family environment
- Nurturing parenting skills
- Stable family relationships
- Household rules and monitoring of the child
- Adequate parental finances
- Adequate housing
- Access to health care and social services
- Caring adults who can serve as role models or mentors
- Community support

Short Note – damages for loss of personal autonomy?

Almost lost in the gory details of phone-hacking at the Mirror Group of Newspapers analysed in *Gulati & Ors v MGN Limited* [2015] 1482 (Ch) are some observations as to the availability of damages in relation to breaches of Article 8 ECHR that are – or may be – of rather wider application.

At issue in the relevant part of the case is the question of what the claimants could and should be compensated for:

1. The claimants sought compensation with several elements: (1) compensation for loss of privacy or autonomy resulting from the hacking or blagging that went on; (2) compensation for injury to feelings (including distress); and (3) compensation for "damage or affront to dignity or standing".

2. The defendant submitted that all that could be compensated for was distress or injury to feelings.

In a detailed discussion of the case-law, Mann J identified the following key points:

1. It was not clear why distress (or some similar emotion), which would admittedly be a likely consequence of an invasion of privacy, should be the only touchstone for damages. *"While the law is used to awarding damages for injured feelings, there is no reason in principle, in my view, why it should not also make an award to reflect infringements of the right itself, if the situation warrants it. The fact that the loss is not scientifically calculable is no more a bar to recovering damages for 'loss of personal autonomy' or damage to standing than it is to a damages for distress. If one has lost 'the*

right to control the dissemination of information about one's private life' then I fail to see why that, of itself, should not attract a degree of compensation, in an appropriate case. A right has been infringed, and loss of a kind recognised by the court as wrongful has been caused. It would seem to me to be contrary to principle not to recognise that as a potential route to damages. Mr Nicklin acknowledges the rights or values, and accepts that an injunction can be granted to protect those interests. In my view that would make it all the more anomalous, as a matter of principle, were damages to be unavailable for them. Of course, in a great number of cases the emphasis will be on the distress caused, both because it will be that distress which motivates an action in the first place and because it will be the most focused on result of the infringement when it is discovered. Distress will often be the consequence of the infringement to such a degree as to subsume any potential separate award for the infringement itself; but where appropriate the stated values ought of themselves to be protectable with an award of damages" (paragraph 111);

2. Such an approach was consonant with the stated requirements of the ECHR in *Armonienè v Lithuania* [2009] EMLR 7. At paragraph 38 the court referred to the margin of appreciation allowed to the contracting parties in determining what remedies should be available to protect Article 8 rights, but added: "[t]*he Court nonetheless recalls that art 8, like any other provision of the Convention or its Protocols, must be interpreted in such a way as to guarantee not rights that are theoretical or illusory but rights that are practical and effective…*" (paragraph 112). "[a] *regime in which damages were confined to damages for distress would render the rights (to a degree) 'illusory' (to use the word used by the ECHR) and would, to a degree, fail to provide an effective remedy*" (paragraph 113);

3. An approach was required which provides compensation for an infringement of the values protected by the right and it avoids the undesirable consequences of using distress as some sort of measure of the seriousness of the wrong, for which purpose it is highly imperfect. "*It leaves distress where it should be - one of the consequences (perhaps in many cases the prime consequence) of the wrong, for which compensation should be given, but not necessarily the sole determinant of compensation elements for which it is an imperfect measure*." Reflecting, where necessary, the nature and seriousness of the infringements and reflecting them in compensation was the correct way to proceed, and was not ruled out by authority (paragraph 135). In particular, it was not ruled out by the (complex) holding of the Supreme Court in *R (Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245 that vindicatory damages are not available either under the ECHR or in compensation for torts, because the approach was properly compensatory for the fact of the infringement of the right (paragraph 132);

4. Compensation can be given for things other than distress, and in particular can be given for the commission of the wrong itself so far as that commission impacts on the values protected by the right (paragraph 144).

Assuming that Mann J's approach is upheld by the Court of Appeal in the – likely – scenario that the case ends up there, then we suggest that the approach is equally valid for claims arising out of breaches of Article 8 in the context of those lacking decision-making capacity. Why should not – we ask – rhetorically,

damages be awarded where the actions of a public body have substantially interfered with the individual's right to autonomy and/or their right to family life even where they are (because of their particular disability) unable to manifest distress in terms conventionally identifiable? Indeed, not to adopt such an approach would not just be anomalous but would arguably be discriminatory.

Singapore, the MCAs and undue influence

Re BKR [2015] SGCA 26 (Singapore Court of Appeal)

Mental Capacity – Assessing Capacity

Summary

This case, brought to our attention by Terence Seah of Virtus Law and David Lock QC of Landmark Chambers, sheds very interesting light upon the vexed question of the interaction between impairment and undue influence.

The case was decided by the Court of Appeal of Singapore, which ordinarily would mean that it would merit only a very passing mention. However, the Singaporean Mental Capacity Act ('SMCA') is identical – in material regards – to the MCA 2005; further, the Court of Appeal embarked upon a detailed examination of English case-law in order to resolve the questions that arose before it under the SMCA.

The judgment is very lengthy, but much of it is concerned with a detailed examination of the evidence. In short summary, the question before the court was whether BKR, an extremely wealthy elderly lady, had capacity for purposes of the SMCA to make decisions regarding her property and affairs, and whether deputies should be appointed to make all decisions relating to her property and affairs on her behalf.

The application for a declaration that BKR lacked capacity (and for consequential appointment of deputies) was brought by two of BKR's sisters, supported by a number of their siblings and two of BKR's three children. It was opposed by BKR herself, BKR's youngest daughter, and that daughter's husband. All were in agreement that the functioning of her mind was impaired in some way, but there was no agreement as to the nature or degree or extent of that impairment. Those contending that she lacked capacity (who were for reasons that need not detain us the appellants before the Court of Appeal) considered that she had dementia; BKR and the other respondents contended that she had Mild Cognitive Impairment, affecting her memory but not depriving her of the material decision-making capacity. There were also significant allegations and counter-allegations of undue influence and ulterior motives.

For our purposes, the key passages of the Court of Appeal's judgment are to be found at paragraphs 88ff, where the Court of Appeal analysed the question of whether the court ought *"in SMCA proceedings where there is interaction between mental impairment and undue influence, to take into account P's actual circumstances or to adopt a more theoretical analysis that disregards those circumstances*." As the Court noted, "[i]*n truth, this confluence of mental impairment and undue influence is not all that unusual; there are a number of English cases in which such a confluence features*," and the Court then looked to those cases for guidance.

The Court of Appeal identified two decisions in which the Court of Protection had held that it should have regard to P's actual circumstances when examining the issue of P's mental capacity:

1. *Re A (Capacity: Refusal of Contraception)* [2011] Fam 61, in which Bodey J had held that that Mrs A's decision not to continue taking contraception was "*not the product of her own free will*". He went on to say that Mrs A "*was unable to weigh up the pros and cons of contraception because of the coercive pressure under which she has been placed both intentionally and unconsciously by Mr A*". Such coercive pressure was the product of a number of factors, including the learning disabilities of both Mr and Mrs A, Mrs A's dependence on Mr A and fear of rejection, Mrs A's suggestibility and wish to please her husband, and Mr A's own wish to start a family. "*For these reasons*", which the Court of Appeal considered included reasons that related to Mrs A's actual situation in life, Bodey J was in no doubt that Mrs A "*lack*[ed] *capacity to take a decision for herself about contraception*." The Court of Appeal noted that there had been subsequent discussion in the case-law as to whether *Re A* was, in fact, an inherent jurisdiction case, but considered that, properly analysed, none of the subsequent cases had re-categorised it thus;

2. *The London Borough of Redbridge v G and others* [2014] EWHC 485 (COP), which we have discussed in detail here. The Court of Appeal highlighted those parts of the judgment of Russell J in which the judge took account both of the impairment in the functioning of G's mind and of the influence C and F had over her in coming to the conclusion that G lacked capacity to take the material decisions for purposes of the MCA 2005.

The Court of Appeal considered that:

> *"98. It is apparent that in examining P's mental capacity, the courts in Re A and Redbridge have had regard to their actual circumstances, in particular whether other persons were exerting pressure on P such as would make it more difficult for P to make the decisions in question. It was not even considered as a possibility that the court should divorce P from her actual circumstances and apply a theoretical analysis assuming P's emancipation from all external pressure and influence."*

The Court of Appeal noted, however, that there are three, possibly inter-related, strands of argument for the proposition that the court should apply a theoretical analysis that assumes that P is getting the best appropriate assistance, even if this is not in fact the case."

1. The first strand relied upon s.3(3) SMCA, which is identical to s.1(3) MCA 2005, and provides that P "is *not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success*". The Court of Appeal noted that it was argued that this provision postulates an assessment of capacity based on an ideal or theoretical set of circumstances in which all such practicable steps are being taken, and it was said that such an approach is supported by the first instance decision of the Court of Protection in *Wandsworth Clinical Commissioning Group v IA and another* [2014] EWHC 990 (COP)

2. The second strand identified by the Court of Appeal depends on the legislative history of the UK MCA, as described by the English Court of Appeal in Re L. What this discloses, the Court of Appeal noted, is that a conscious decision was taken not to extend the MCA 2005 to adults who are "vulnerable" to

undue pressure, which means that the MCA was not meant to address cases of undue influence. It follows, it might be argued, that allegations of undue influence – and, more generally, P's actual circumstances – are not relevant to an assessment of mental capacity.

3. The third strand identified had to do with the causative nexus required to be shown between P's mental impairment and his inability to make decisions. This causal requirement is embedded in s 4(1) of the MCA, in the operative words "because of": P will be declared to lack capacity under the MCA only where he is unable to make decisions *because of* a mental impairment. The Court of Appeal noted that, in this regard it might be contended that the English Court of Appeal case of *York City Council v C and another* [2014] 2 WLR 1 establishes the need for a very strong nexus so that, if P's inability to make a decision is the result not only of his mental impairment but also his actual circumstances in which he comes under undue influence and pressure, that situation would fall outside the MCA.

The Court of Appeal analysed each strand in turn.

Section 3(3) SMCA/s.1(3) MCA 2005

The Court of Appeal discussed the (very brief) comments upon support in *Redbridge* and the *Wandsworth* case but found that in both cases the court had, in fact, focused on P's actual circumstances. They further noted that:

> *"105. Moreover, there is the plain language of s 3(3) of the MCA: it speaks of "practicable" steps to help P. It directs us to look not at fanciful possibilities but at sensible ones. Hence, if P needs extremes of assistance which he could not realistically expect to receive in order to be able to make decisions, it would not be right to say that he possesses the ability to make decisions. By the same token, if in P's actual circumstances there exists some positive impediment to his receiving assistance, it cannot be said that P has capacity just because he might theoretically be able to make decisions in some other imaginary set of circumstances in which that assistance might be forthcoming.*
>
> *106. We are led to conclude that s 3(3) of the MCA does not suggest that a theoretical analysis is to be applied which assumes that P is able to obtain and is in fact obtaining assistance in making decisions, however removed such an assumption may be from P's actual circumstances. We accept that in some situations, s 3(3) may oblige the court to look beyond P's actual circumstances. But on no basis can it said that, when P's actual circumstances are such that there is little realistic prospect of him getting the assistance he needs, the court is at liberty or is obliged to disregard those actual circumstances by reason of s 3(3)."*

Legislative history of the MCA 2005

The argument advanced by the respondents – based upon the legislative history of the MCA and the decision in *Re L* – was that the court [in England, the Court of Protection] has no power to enter upon a dispute where what is being alleged is that P is unable to make decisions by reason of undue influence or unacceptable pressure, as opposed to an impairment of the mind. As the Court of Appeal noted, a related argument (though not one put forward in these terms by the respondents) was that, since the MCA was not designed to deal with cases concerning undue influence or pressure, when the court assesses mental

capacity, it ought to disregard such allegations and, in effect, apply a theoretical analysis assuming that P is free from such influence or pressure.

The Court of Appeal found this line of argument to be wholly misconceived:

1. At most, the legislative history and *Re L* showed that the MCA was not designed to deal with cases in which P is "vulnerable" but not at all as a result of mental impairment. An example of such a case would be a wife of ordinary mind who is vulnerable to her husband's influence by reason of her emotional and economic dependence on him. Such a case, the Court held, would not come within the scope of the MCA because it requires a functional inability arising because of a mental impairment;

2. Furthermore, the Court noted at paragraph 110, "*there may be situations in which the whole reason that P is susceptible to undue influence is that he is labouring under an impairment of the mind – for instance, when P's poor memory permits another person to plant falsehoods in his mind, or when the effect of the impairment is that P is unable even to conceive of the possibility that another person may be manipulating him. In these situations, it is inconceivable in our judgment that the court is to disregard P's actual circumstances.*"

Causative nexus between mental impairment and inability to make decisions

The Court of Appeal noted that it was argued that on the strength of the *York* case that the mental impairment must be the effective cause of the inability to make decisions. It followed, the argument then ran, that the causal requirement was not met if the inability to make decisions was also caused by factors other than mental impairment, such as undue influence. The consequence of the argument is that the court must find that P's inability to make decisions is inherent to the mental impairment and wholly divorced from P's actual circumstances. If that is accepted, it would seem to follow that *York* suggested the application of a theoretical analysis that divorces P from those actual circumstances.

The Court of Appeal did not think that this was how York should be read. The Court of Appeal found that the court's stress on the strength of the causative nexus was laid in a context where Hedley J had found PC to lack capacity in relation to co-habitation when it was agreed that she had capacity in relation to all other matters, including marriage. It therefore did not consider that the English Court of Appeal had meant to prescribe any particular approach in a situation where the evidence indicates that P's inability to make a decision is a result of multiple causes of which P's mental impairment is one.

The Court of Appeal noted that:

> *115 The court in York CC emphasised the words "because of" in the MCA. In our view, those words most naturally suggest nothing more stringent than a "but for" connection. More crucially, those words do not suggest that there can be no other cause of P's inability to make decisions besides mental impairment; we do not think that those words indicate that the MCA was intended to exclude situations in which the inability to decide was caused by both mental impairment and P's actual circumstances.*
>
> *…*

> *116 In our judgment, York CC is consistent with the notion that P's inability to make decisions may be the product of a number of effective causes and that the MCA will apply so long as one of those causes is P's mental impairment.*"

The importance of the actual circumstances

Returning to the *York* decision, the Court of Appeal considered that the decision underscored the importance of an analytical approach that does have regard to P's actual circumstances. The Court of Appeal noted the observation in York that removing the specific factual context from some decisions "*leaves nothing for the evaluation of capacity to bite upon*," and that:

> "*118 The importance of that observation in York CC is that when P makes decisions in relation to other people, such as a decision to give away property to person X, it surely cannot be argued that P has capacity so long as she can understand the nature and consequences of giving away property to some theoretical or hypothetical person. On the contrary, part of the package of information relevant to the decision, which P must be able to retain, understand and use, is information about X and in particular whether X is the person to whom P wishes to make the gift. Should P be unable to retain, understand or use information relevant to that decision because of a mental impairment, P will be found to lack capacity under the MCA."*

The Court of Appeal noted, finally, the discussion in *R v Cooper* [2009] 1 WLR 1786 as to the Law Commission report informing the MCA 2005, and the observation of Baroness Hale (at paragraph 13) that the report envisaged that the MCA 2005 would cover those who could understand the nature and effects of a decision to be made but who were prevented by mental disability from using that information in the decision-making process. As the Court of Appeal noted "[o]*ne of the examples given by the Law Commission was a person whose mental disability 'meant that he or she was 'unable to exert their will against some stronger person who wishes to influence their decisions…'. Thus it was recognised that mental impairment may in some instances affect decision-making ability only in conjunction with P's actual circumstances*."

The Court of Appeal therefore held that *"the court must take into account P's circumstances in assessing his mental capacity. That is what the English cases do, and in this regard, we consider that theirs is a path that we also must take"* (paragraph 120, emphasis in original).

The Court of Appeal further held in cases where there is interaction between mental incapacity and undue influence that it is only where there is no material question of any mental impairment causing the alleged mental incapacity that a court ought properly to find it has no jurisdiction under the SMCA.

The Court of Appeal also found that the lower court had been wrong to set aside findings of undue influence made by the Senior District Judge who had first considered the case. As the Court of Appeal noted, the proven or potential presence of undue influence is relevant to the issue of mental capacity in at least three ways:

1. The first is that it then becomes material whether P is able to retain, understand or use the information that relates to whether there might be undue influence being applied, for instance whether P can understand that a third person may have interests opposed to his; and if not, whether that inability is caused by mental impairment.

2. The second is that it must be considered whether P's susceptibility to undue influence is caused by mental impairment; if so, and if the result of such undue influence is that P's will is so overborne that he is unable to use and weigh information relevant to the decision in question, P would be unable to make decisions "because of" mental impairment.

3. The third way in which undue influence is relevant is that it might mean that P cannot realistically hope to obtain assistance in making decisions. In such a situation, P may be found to lack capacity because of a mental impairment operating together with that lack of assistance.

In this last regard, the Court of Appeal noted that there were times when the appellants and their associates expressed the view under cross-examination that BKR would be able to make decisions for herself so long as she was taken out of the influence of the first and second respondents. In submissions, this was seized upon by counsel for the third respondent who argued that it is illogical to say that P lacks capacity when P is in the company of X but does not lack capacity when P is with Y. However, as the Court of Appeal noted at paragraph 127: "[a]*ttractive as this contention might sound at first blush, we do not regard it as well-founded. This is because it fails to give due regard to the idea that capacity under the MCA is a highly context-dependent enquiry. It is "decision-specific" (York CC at [35]) and, as we have said, it must take into account P's actual circumstances. If P is unable to retain, understand or use information relevant to a decision because of a combination of mental impairment and the circumstances he finds himself in, the statutory test for incapacity will be met, and it is no answer then to say that P's mental impairment would not necessarily rob him of decision-making ability in a different set of circumstances*."

On the facts of the case, the Court of Appeal found that BKR lacked the material decision-making capacity because of a combination of mental impairment and the circumstances in which she lives. Therefore the statutory test for lack of capacity under the MCA was met in her case.

Comment

Alex, in particular, is something of an evangelist for the merits of comparative studies in the field of mental capacity law and it is perhaps unsurprising that he fell upon this judgment with delight as evidence as to its benefits. The judgment of the Court of Appeal grapples with one of the areas that causes most difficulty in practice (and one that is – as the Court noted – far from uncommon), and does so in with an extraordinary rigour of approach. We strongly suspect that it will not be long before it is referred to by judges before the Court of Protection (or indeed by sheriffs in Scotland). We also suspect that the discussion therein as to the approach to adopt will be likely to be of no little influence.

We would perhaps want to put three glosses upon the judgment:

1. Given the thoroughness of the tour d'horizon embarked upon by the court, it is perhaps a little surprising that it did not refer to *NCC v PB and TB* [2014] EWCOP 14 (although we are grateful to David Lock for confirming to us that it was, in fact, referred to the court in argument). In that case, Parker J considered, first, the meaning of 'because of' in (for English purposes) s.2(1) MCA 2005. She concluded that the "*true question is whether the impairment/disturbance of mind is an effective, material or operative cause. Does it cause the incapacity, even if other factors come into play? This is a purposive construction.*" Parker J also had cause to consider the interaction between impairment and overbearing of the will, dismissing the argument that the impairment must be the sole cause of the inability to make the decision for the individual to fall within s.2(1) MCA 2005. The analysis in *NCC* is entirely consistent with that in *Re BKR*, although rather more shortly taken;

2. Whilst we entirely agree that it is necessary to place the primary focus on P's actual situation when deciding whether they have the capacity to make a specific decision or decisions, we would nonetheless emphasise that consideration must still be given as to whether there exist practicable steps that can be taken to support P to take the decision. Those steps are not just steps that can be taken by the others in P's life, but also include steps for which the court may have responsibility. A good example of this can be seen in *An NHS Trust v DE and Others* [2013] EWHC 2562 (Fam), in which the court adjourned determination of whether an individual had capacity to consent to sexual relations for work to be done with him by a clinical psychologist – with the result that he was assisted to acquire that capacity. The importance of ensuring that there is a proper examination of whether practicable steps can be taken is only highlighted by the continuing debate as to the impact of the CRPD on practice here and elsewhere;

3. In the case where P is truly suspended between capacity and incapacity depending on whether they are within the orbit of a third party, we remain of the view that there may be proper grounds to adopt the approach taken by Bennett J in *Re G* [2004] EWHC 2222 Fam. In that case, readers with a long memory will recall, the judge found that he had jurisdiction to make decisions as to residence and contact arrangements for a young woman who had regained capacity to make those decisions as a result of the protective arrangements put in place for her by the court, in circumstances where it was clear that it they were lifted, then the combination of her organic impairments and the baleful influence of her father would lead to a worsening of her condition and a consequential lack of capacity. Because this case was decided before the enactment of the MCA, it was determined under the High Court's inherent jurisdiction (and was noted – and approved – as the exercise of such in *Re L*), but it would appear clear that Bennett J considered he had jurisdiction based upon G's lack of capacity to take the material decisions, rather than upon her vulnerability. *Re G* has never – to our knowledge – been properly considered in a reported case since the MCA 2005 came into force. However, in such a Schrodinger's cat case, it may still be that the Court of Protection (rather than the High Court) can properly have jurisdiction to implement a long term regime for the promotion of the autonomy of the individual on the basis of a holistic (or should that be social) interpretation of their capacity.

Capacity and s.20 Children Act arrangements

In two cases reported in very quick succession, family judges have emphasised the vital importance of ensuring that any parental consent to arrangements being made under s.20 Children Act 1989 is obtained from a parent with the capacity to do so. Guidance as to the importance of this was given by Hedley J in *Coventry City Council v C, B, CA and CH* [2012] EWHC 2190 (Fam):

1. every social worker obtaining consent to accommodation of a child from a parent (with parental responsibility) is under a personal duty to be satisfied that the person giving consent does not lack the required capacity;
2. the social worker must actively address the issue of capacity, take into account all the prevailing circumstances and must consider the questions raised by s.3 MCA 2005 and in particular the mother's capacity to use and weigh all the relevant information;

3. if the social worker has doubts about capacity, no further attempt should be made to obtain consent on that occasion. Advice should be sought from the social work team leader or management.

In *Newcastle City Council v WM* [2015] EWFC 42 Cobb J and in *Medway City Council v AP* [2015] EWFC B66 HHJ Lazarus were both extremely critical of the failure of the relevant social services authorities to take appropriate steps to ensure that the mother from whom purported consent was obtained in fact had capacity to do so.

In *WM*, Cobb J made it clear that the failure to take this step meant that the children in question had for a significant period of time been accommodated unlawfully. Further, there were considerable repercussions from the delay in bringing the necessary proceedings:

> *"47.* […] *The children have been in limbo, living with a foster carer for such a significant time that they have formed positive attachments to her, but she cannot care for them in the long-term. On any view, the children need to move. For a lengthy period, the children lost contact with their extended maternal family, who now (through SM) advance an entirely respectable case to care for them. Precious time in the lives of these children has been spent, I would say* ***wasted****, while the Local Authority has failed to progress any meaningful form of care planning.*" (emphasis in original)

In *Medway City Council*, HHJ Lazarus made clear that, had it been properly recognised that s.20 1989 should not have been and proceedings had been issued at an earlier stage, "*it is likely that arguments about appropriate placements and assessments would have been raised by the parents' legal representatives, and an inappropriate placement and lack of assessment and ultimately early separation of baby A from his parents may well have all been avoided*." HHJ Lazarus noted the difficulties that:

> "76. *Several difficulties arise for vulnerable adults in these circumstances. They are unlikely to want to appear to be difficult or obstructive and so they may well agree to section 20 arrangements that are not necessarily appropriate. Once they have agreed to such arrangements, and are in a mother and baby foster placement as in this case for example, there is a natural impetus to remain with the child and so be locked into a continued*

agreement to the arrangement. Most significantly, the use of section 20 agreements results in vulnerable adults coping with such circumstances without legal advice or representation."

In the case before her, HHJ Lazarus noted at paragraph 77, "[t]*his was compounded by there being no referral to adult services and no input from social workers experienced in working with vulnerable adults and who are not focussing simply on child protection issues, but are able to bring their knowledge and experience to bear on the case*."

Short Note: capacity to decide to disclose serious medical condition

The very sad case of *ABC v St George's Healthcare NHS Trust & Ors* [2015] EWHC 1394 (QB) concerned a woman whose father was diagnosed with Huntingdon's disease, but who refused permission to his doctors to inform his daughter of the diagnosis. He was, at the time, a detained mental health patient, having been convicted of murdering his wife. His daughter took part in family therapy which brought her into contact with the detaining hospital. She was subsequently informed of her father's diagnosis by mistake, and was later diagnosed with the disease herself. She had been pregnant at the time her father was diagnosed. She brought a claim against the various health bodies involved, arguing that they had been negligent in failing to inform her of her father's diagnosis, and that her Article 8 rights had been infringed. She said that had she been informed, she would have undergone pre-natal testing, and would have had a termination if the result was positive for the disease. The claim was struck out, there being no basis for contending that a duty of care was owed to the daughter, and no arguable infringement of her Article 8 rights. In the course of the judgment, the court noted that the claimant asserted that no sufficient steps were taken to investigate whether her father had capacity to make decisions about the release of his confidential medical information. The court noted that capacity was presumed, and noted that there was no assertion that, had the father's capacity been assessed, he would have been found to lack capacity to instruct the doctors to withhold the information from his daughter.

Mental Health Service Interventions for Rough Sleepers: Tools and Guidance

The second edition of these valuable tools and guidance has been brought together by statutory and voluntary sector representatives across various disciplines. They are designed to help those working with street homeless people – and those working in mental health services – to better assess and help those who are doubly social excluded both by homelessness and by serious mental illness.

A central feature of this guidance is to how to use the Mental Capacity Act 2005 to assess the mental state of someone making decisions involving sleeping on the street. It is aimed at outreach workers, approved mental health professionals, doctors, police and ambulance staff. In summary, the document includes:

- Guidance on assessing the risks associated with rough sleeping
- Guidance on the use of the Mental Capacity Act – whether the individual is really making an informed decision to sleep on the streets
- Guidance on the use of the Mental Health Act and developing a hospital admission plan
- Guidance on raising safeguarding adults alerts

The tools and guidance are a useful means of breaking down the complicated issues associated with homelessness and mental health. A key theme that has emerged from the evidence is that homeless people have been excluded from mental health services because it is thought that sleeping rough is a lifestyle choice. It is hoped that the use of these tools and guidance will lead to better assessment and decision making.

Serious Crime Act 2015

The concept of 'best interests' crops up in this new Act, in the context of a new offence called 'controlling or coercive behaviour in an intimate or family relationship'. The relevant provision (for which no commencement date has been given) includes a limited defence based on best interests. The Explanatory Notes reveal that this defence applies '*where the accused believes he or she was acting in the best interests of the victim and can show that in the particular circumstances their behaviour was objectively reasonable. The defence would not be available where a victim has been caused to fear violence (as opposed to being seriously alarmed or distressed). This defence is intended to cover, for example, circumstances where a person was a carer for a mentally ill spouse, and by virtue of his or her medical condition, he or she had to be kept at home or compelled to take medication, for his or her own protection or in his or her own best interests. In this context, the person's behaviour might be considered controlling, but would be reasonable under the circumstances*.'

Campaigners have criticised this as being unlikely adequately to protect disabled adults. Notably, the provisions of the Act do not include any reference to the victim's capacity, so the defence would arguably apply even where the victim had capacity to make his or her own decisions about care and treatment. It is also unclear whether the term 'best interests' is intended to bear the same meaning as in the MCA (or whether this is – yet another – use of the term in a context where it will need to have its own definition).

Use of restraint by hospital security staff

On 5 May 2015, the Daily Mail reported the results of a Freedom of Information Act request concerning the use of security guards in hospitals:

> *The Mail used Freedom of Information requests to ask all 160 NHS hospital trusts in England how many times security were called to restrain patients in 2012/13 and 2013/14.*
> *Of the 76 trusts that responded, just four said they banned security from restraining patients under any circumstances. And of the 42 trusts that admitted using security staff to deal with patients, 17 admitted calling security to control those with dementia.*
>
> *Others used security staff to restrain patients who were under the influence of alcohol and drugs, or who had mental health or medical problems influencing their behaviour. Worryingly, 13 of the trusts that admitted using security guards to cope with patients did not routinely record why they had been called.*
> *In total, security guards restrained hospital patients 5,722 times across the 42 trusts in two years – more than seven incidents a day. Of these, 320 were recorded as being dementia or Alzheimer's patients.'*

The DoH guidance on restraint of adults, Positive and Proactive Care: reducing the need for restrictive interventions, specifically states that it will be of relevance to security staff working in health and social care settings. Perhaps the next FOIA request should enquire whether such staff have received specialised training in the use of restrictive interventions, as the guidance requires, and also in respect of the MCA 2005.

Advance planning

A recently published survey by the Dying Matters coalition has found that only 7% of people have discussed what sort of care they might want if they are unable to make their own decisions. Further efforts to increase the use of advance decisions to refuse treatment, health and welfare LPAs, and advance statements of wishes are clearly needed, throughout the health and social care system.

New Mental Health, Ethics & Law MSc at King's College London

In a frankly shameless advertorial, justified on the basis that Alex will be contributing to it, we note here a new MSc which will be launching at KCL in September 2015.

In KCL's own words:

> *Consider in-depth and integrated clinical, philosophical and legal analysis of key issues in the field of mental health.*
>
> *This exciting new MSc is for everyone concerned with mental health who wishes to study the clinical, ethical and legal thinking behind current law, policy and clinical practice. It has been designed for professionals and postgraduates who are keen to consider the key questions raised by mental ill health and society's response. Students will study alongside others from a wide range of academic and professional disciplines at the heart of London's legal and psychiatric world.*
>
> *For further info and to apply, please visit our website*

LS v Scottish Ministers (Judicial Review)

This decision of Lord Turnbull issued on 21st May 2015 concerns compliance by Scottish Ministers with obligations under the Mental Health (Care and Treatment) (Scotland) Act 2003 ("the 2003 Act") but is likely to be of interest in relation to provisions and proposed provisions of the Adults with Incapacity (Scotland) Act 2000 ("the 2000 Act") and relevant provisions of the European Convention on Human Rights ("ECHR"). Causes for concern include the failure of Scottish Ministers to prescribe under section 7(1) of the 2000 Act the form and content of registers relating to powers of attorney under section 6(2)(b) of that Act, and the widespread failures (see the Newsletters of April 2015 and July, August, October and November 2014) of local authorities to comply with the time limit for preparation of mental health officer reports under section 57(4) of the 2000 Act. The extent of matters which potentially engage Article 5 of ECHR is an ongoing concern, particularly in the light of the recent Report by the Scottish Law Commission on Deprivation of Liberty. The extent to which the non-discrimination provisions of Article 14 of ECHR are engaged by matters within the scope of Article 5 is also of particular interest.

The petitioner *LS* had been in Rowanbank Clinic, a medium secure in-patient psychiatric treatment facility, since May 2012, for most of that time under compulsory treatment orders. It had already been established in *RM v Scottish Ministers* 2013 SC (UKSC) 139 that the failure by Scottish Ministers to draft and lay before Scottish Parliament regulations in terms of section 268 of the 2003 Act was and is unlawful. Section 268 is designed to give to "qualifying patients" who are detained in a "qualifying hospital" a right to apply to the Mental Health Tribunal to challenge the level of security under which they are detained, similar to the right of patients in the State Hospital to make similar challenge under section 264 of the 2003 Act. However, while the right under section 264 has been available since that section was brought into force on 1st May 2006, the right under section 268 is not yet available. That is because to become operative "qualifying patients" and "qualifying hospital" require to be defined in regulations by the Scottish Ministers, and such regulations have not been made. *LS* therefore claimed (a) that his own detention was unlawful ("the common law case"), (b) that it violated Article 5, and (c) that it violated Article 14 when taken with Article 5. He sought declarator to that effect, and an order ordaining Scottish Ministers to draft and lay before the Scottish Parliament the required regulations under section 268 of the 2003 Act within 28 days or such other period as the court considered appropriate.

(a) The common law case

It was common ground that the failure of the Scottish Ministers remained unlawful in terms of the decision in *RM*, though it was noted that Scottish Ministers could only have been aware of that from 28th November 2012 when the Supreme Court issued its decision, reversing the earlier decisions at first instance and before the Inner House. It was also undisputed that the Executive does not obey the law as a matter of grace and is under the same duty of obedience to the law as it stands at any given time as any citizen – see *R (Evans) v Attorney General* [2015] UKSC 21, *Alleyne v Attorney General of Trinidad and Tobago* [2015] UKPC 3, *M v Home Office* [1994] 1 AC 377. The court however has a discretion whether or not to grant orders sought in such cases – see *McGeoch v Lord President of the Council* 2014 SC (UKSC) 25 (per Lord Mance at paragraph 39) and *Walton v Scottish Ministers* 2013 SC (UKSC) 67 (at paragraphs 95, 131 to 133

and 156). It was explained to the court on behalf of the respondents by the Dean of Faculty, James Wolffe QC, that instead of making regulations under the 2003 Act, Scottish Ministers had decided instead to address the matter by primary legislation under the Mental Health Bill (see item at page 7 below) that the Bill contained relevant provisions, and that draft regulations proposed to be made under the amended provisions contained in the Bill had been presented to the Health and Sport Committee of the Scottish Parliament on 24th April 2014. Jonathan Mitchell QC for the petitioner pointed out that although Scottish Ministers had stated to Parliament on 27th March 2014 that: "this is a very technical and complex matter and it is important that sufficient and full consideration is given to precisely how the regulations are shaped", the draft regulations eventually submitted were brief and simple, and equivalent regulations could easily have been made under the existing provisions of the 2003 Act long ago. It was however pointed out for the respondents that the lawful duty of Scottish Ministers could not be said to go further than drawing and laying regulations. It was for the Scottish Parliament to determine the final provisions of the Mental Health Bill. The Health and Sport Committee might decline to approve any such regulations, given that the Bill was before the Parliament, or might remit matters to the Delegated Powers Committee. The Delegated Powers Committee would be unlikely to approve by way of subordinate legislation the change proposed in the Bill that an application under section 268 should in future be supported by a medical certificate. The Bill would be heard at Stage 3 Debate on 16th and 17th June 2015. It was anticipated that the Act would receive the Royal Assent in the summer, and that the new regulations would be made after the summer recess. The Dean of Faculty submitted that in practical terms the order sought by the petitioner would be of no advantage.

Lord Turnbull noted that: "in the context of what steps the court can, or should, take in order to enforce compliance with the law, the analogy between steps to be required of an individual and those to be required of government is perhaps of limited value. The Scottish Ministers have responsibility for the development of policy and, in the context of making legislation, require to respect the relationship between government and Parliament". He held that: "The question of whether there is any proper purpose to be served by granting the orders which the petitioner seeks therefore has to be considered in light of the circumstances as they presently stand. There is no purpose to be served by declaring again that the respondents' failure to draft and lay regulations under the 2003 Act is unlawful. Counsel for the petitioner recognised this. A parliamentary process has been initiated by the respondents with the purpose of addressing the deficiency identified in *RM*. It is true that no undertaking has been given as to the timescale within which this will be achieved nor, strictly speaking, is the matter within the complete control of the respondents. They have however outlined their anticipation of how matters will proceed. As set against that, the petitioner's suggested remedy carries no greater certainty of outcome or of timescale. As Mr Mitchell acknowledged, all that the court can do is to order that suitable regulations be drafted and placed before the Health and Sport Committee of the Scottish Parliament within a certain time period. Neither the court, the petitioner nor the respondents can control what happens thereafter".

On this aspect of the case, Lord Turnbull held that he had no basis for concluding, or assuming, that an order as sought by *LS* would be of any advantage or serve any proper purpose. He held that in the whole circumstances it was neither necessary nor appropriate to make any order in favour of *LS* arising out of his arguments based on common law.

(b) Article 5

In relation to ECHR aspects, Equality and Human Rights Commission had been permitted to intervene and had made written submissions. Although the petitioner's argument in relation to Article 5 of ECHR was "something in the nature of a fall-back position" and was not the subject of submission for the petitioner, Mr Mitchell asked the court to take account of the written submissions by the Commission. The written submissions had referred to the "traditional approach" to Article 5, which limited the application of Article 5 to questions of the legality of the detention itself, excluding issues relating to the conditions of detention. The Commission suggested that such a rigid demarcation was inappropriate. Lord Turnbull referred to the decision of Lady Justice Hale (as she then was) in *R (Munjaz) v Mersey Care NHS Trust* [2004] QB 395 that the issues under Article 5 are whether deprivation of liberty is properly imposed, whether its lawfulness is open to challenge so that a person unlawfully detained may be set free, and that the place of detention conforms to the purpose for which detention is imposed. She had explained that beyond these points Article 5 was not concerned with the conditions of detention. Those views had been supported when the case reached the House of Lords ([2006] 2 AC 148). This appeared to be consistent with the view of the European Court of Human Rights in *Ashingdane v United Kingdom* (1985) 7 EHRR 528 and the footnote references to that case in *Stanev v Bulgaria* (2012) 55 EHRR 22.

Lord Turnbull noted that the written submissions making what he saw as "challenging and contentious" observations that the law had moved on took account of concepts of arbitrariness and proportionality, but relied on cases which do not concern the detention of patients in appropriate and authorised psychiatric institutions. There appeared to be no authority for the proposition that a patient lawfully detained in a mental health facility could be wrongfully deprived of his liberty on account of being placed in more restrictive conditions.

(c) Article 14 (read with Article 5)

The petitioner did insist on the argument that his Article 14 rights had been infringed. His argument was that the application of Article 14 does not depend upon the violation of one of the substantive rights guaranteed by the Convention, but only that the facts of the case fell within the ambit of one of those rights – in this case, Article 5. The petitioner founded upon *Hode and Abdi v United Kingdom* (2013) 56 EHRR 27, *Adami v Malta* (2007) 44 EHRR 3. Lord Turnbull described as "attractive" the argument that patients detained in one psychiatric hospital should have the same rights of access to the Tribunal as possessed by patients detained in another. As regards patients in medium secure facilities, that is what the Bill sets out to achieve. Lord Turnbull noted the tentative view of Lord Stewart in *Sherrit v NHS Greater Glasgow and Clyde Health Board* 2011 SLT 480 that Article 5(1)(e) might be engaged in the case of a person detained under the 2003 Act. However, Lord Stewart had concluded that the case as pled before him was, for other reasons, unfounded in law and that it was accordingly unnecessary to develop his tentative conclusions any further. Lord Turnbull accepted the Dean of Faculty's submission that Article 5 "was simply not engaged to any extent" because the petitioner's case addressed questions of conditions of detention and procedures for addressing those conditions, not the fact of detention.

Conclusion

Lord Turnbull accordingly rejected all three branches of the petitioner's case. On the first, the common law case, it seems doubtful whether the arguments on behalf of the Scottish Ministers would be sustainable in relation to the failure to make regulations under section 6(2)(b) of the 2000 Act. On the second, the Article 5 case, it is perhaps a little surprising that Lord Turnbull was not addressed on any bearing which the decision of the Supreme Court in *Cheshire West* might have had upon the matter.

Adrian D Ward

AR v RN (Habitual Residence)

The Judgment of the UK Supreme Court issued on 22nd May 2015 in *AR v RN* [2015] UKSC 35 concerns determination of the habitual residence of two children then aged 4 years and a little under 2 years in an issue arising under Article 3 of the 1980 Hague Convention on the Civil Aspects of International Child Abduction, as incorporated into UK law by the Child Abduction and Custody Act 1985. The general approach adopted by the Supreme Court is nevertheless likely to be considered relevant to the determination of the habitual residence of adults whose capacity to make relevant decisions for themselves is impaired.

The Supreme Court upheld the decision of an Extra Division of the Inner House reported at [2014] CSIH 95; 2014 SLT 1080; [2014] Fam LR 131, overturning a decision of the Lord Ordinary that at the relevant date for the purposes of these proceedings, 20th November 2013, the children had not lost their habitual residence in France. That was the material date because it was the date on which the children's father was served with notice of proceedings in Scotland in which the mother sought a residence order in respect of the children, and interdict against the father removing them from Scotland. The children's father was a French citizen who had lived in France all of his life. Their mother had been born in Canada of a Scottish mother and held both British and Canadian citizenship. The parents had never been married. The family had lived together in France until July 2013, when – with the agreement of the father – the mother and two children came to live in Scotland with the intention that this should be for the duration of her 12 months' maternity leave. It was common ground that the question of whether the children were habitually resident in France immediately before 20th November 2013 should be determined in accordance with the guidance given by the Supreme Court in *A v A and another (Children: Habitual Residence) (Reunite International Child Abduction Centre and others intervening)* [2013] UKSC 60; [2004] AC 1 and *In re L (A Child) (Custody: Habitual Residence) (Reunite International Child Abduction Centre intervening)* [2013] UKSC 75; [2014] AC 1017.

The decision of the Supreme Court was given by Lord Reed: (with whom Lady Hale, Lord Clarke, Lord Wilson and Lord Hughes agreed). He concluded that the Lord Ordinary had erred in taking into account the question of whether the intention of the parents was that the stay of the mother and children in Scotland was to be of a duration limited to the period of her maternity leave, or whether there was a joint intention of the parties "to uproot themselves from France and re-locate permanently to Scotland". Lord Reed explained that parental intentions were a relevant factor but not the only relevant factor: "Nor, contrary to counsel's submission, is an intention to live in a country for a limited period inconsistent with becoming

habitually resident there. As was explained in *A v A*, the important question is whether the residence has the necessary quality of stability, not whether it is necessarily intended to be permanent. The Lord Ordinary's exclusive focus on the latter question led to his failing to consider in his judgment the abundant evidence relating to the stability of the mother's and the children's lives in Scotland, and their integration into their social and family environment there". On the point that the children had been in Scotland for four months, and whether a longer period was required before it could be held that the children's habitual residence had changed, the Supreme Court concluded that no error of approach was indicated by the answer given by the Extra Division that: "For our part, in the whole circumstances we would view four months as sufficient".

Likely to be regarded as of equal relevance to determination of the habitual residence of adults with impairments of relevant capacity is the court's endorsement of the comments of Lady Hale in *A v A* and the court's conclusion that it is: "the stability of the residence that is important, not whether it is of a permanent character". Applied to the present case: "… following the children's move with their mother to Scotland, that was where they lived, albeit for what was intended to be a period of 12 months. Their life there had the necessary quality of stability. For the time being, their home was in Scotland. Their social life was there. Their family life was predominantly there. The longer time went on, the more deeply integrated they had become into their environment in Scotland".

Adrian D Ward

Office of Public Guardian – statistics, and renewed POA campaign

Figures for the year to 31st March 2015 have now been added to the Public Guardian's statistics, to be found here. Guardianship orders have increased every year for the last five, and in 2014/2015 reached an all-time high of 2,500, of which 1,449 included financial powers – also an all-time high. The resource implications for the Office are massive, given that financial guardianships require ongoing supervision, not simply processing of registration at the outset. Guardianship work has increased by 48% over the period since economy measures enforced a 16% reduction in staff.

The remarkable increase in powers of attorney year-on-year ever since Part 2 of the Adults with Incapacity (Scotland) Act 2000 was brought into force on 2nd April 2001 continues. The figures for the last five years are: 2010/2011 - 38,865; 2011/2012 – 40,515; 2012/2013 – 42,528; 2013/2014 – 45,576; and 2014/2015 – 55,527. Latterly, the continuing increase is likely to have been driven partly by the extensive advertising campaign promoted by Glasgow City Council and Greater Glasgow & Clyde Health Board, with expert support from TC Young LLP, which is being run yet again during the first half of June 2015. Coverage will include 58 screenings of television advertisements and extensive posters, including in every station of the Glasgow subway.

Access to funds applications have dwindled somewhat, reducing from a peak of 491 in 2011/2012 in each subsequent year to 351 in 2014/2015. These are still roughly double the annual figures before the current scheme was introduced with effect from 1st April 2008 (replacing the original scheme). The figure is not as high as might be hoped, but nevertheless provides a most useful solution in the cases where it is utilised.

Intervention orders granted were 343, lower than 369 for the preceding year, but higher than figures prior to that. Investigations were 177, compared with a range from 165 to 237 in the four preceding years.

Adrian D Ward

Inquiries into Fatal Accidents and Sudden Deaths (Scotland) Bill

The Inquiries into Fatal Accidents and Sudden Deaths (Scotland) Bill was introduced into the Scottish Parliament on 19 March 2015. It is currently at Stage 1, the lead committee being the Justice Committee, and the call for written evidence has recently ended.

The Bill makes no provision for mandatory fatal accident inquires to be extended to psychiatric patients[2]. As mentioned in the October 2014 newsletter[3], whilst case law is still developing in terms of guidance on the Article 2 ECHR procedural duty it is clear that states must ensure full, effective and independent investigations into deaths of those who are under the care and/or control of the state. It appears that this also includes both psychiatric patients detained under mental health legislation and voluntary psychiatric patients where a real and immediate risk of suicide exists. However, at present, it is unclear that the system for investigation into deaths of psychiatric patients fully meets Article 2 requirements. Whilst there may be some scope for arguing that mandatory inquiries will take place only in cases where deaths of psychiatric patients occur otherwise than through natural causes – and the Mental Welfare Commission, for example, ultimately determining whether this is the case – this is an amendment yet to be proposed. The passage of this Bill – and, indeed, Stage 3 of the Mental Health (Scotland) Bill in case it ultimately contains provisions relating to mandatory inquiries - will therefore be followed with interest.

Jill Stavert

Assisted Suicide (Scotland) Bill

This Bill was last mentioned in the March 2015 issue of this newsletter. It, in fact, subsequently fell following the Stage 1 parliamentary debate on 27 May 2015.

Jill Stavert

Mental Health (Scotland) Bill

The February 2015 issue of the newsletter contained an update on the Mental Health (Scotland) Bill. the Mental Health (Scotland) Bill seeks amendment the Mental Health (Care and Treatment)(Scotland) Act

[2]The Bill provides that fatal accident inquiries are mandatory only in the case of deaths of persons in the course of their employment, of children required to be kept or detained in secure accommodation and of persons held in legal custody (being in prison, in police custody, on court premises or service custody premises) (s.2, Bill).

[3] (2014) "Scottish Government Consultation on proposals to reform Fatal Accident Inquiries legislation", Mental Capacity Law Newsletter Issue 50 (October).

2003 (2003 Act) and to the Criminal Procedure (Scotland) Act 1995. It also proposes the introduction of a victim notification scheme in relation to mentally disordered offenders.

During May, the lead committee (the Health and Sport Committee) considered amendments to the Bill. It would be more appropriate to provide a summary of the Bill's provisions at the conclusion of Stage 3 and this will follow in due course. That being said, Stage 2 amendments providing for the existing 5 working days extension between the end of a short term detention certificate and a Compulsory Treatment Order hearing will remain as will the 12 weeks within which to appeal against an order to transfer a patient to hospital (state or otherwise). The existing default provision in the 2003 Act regarding named persons will also be repealed and prohibited treatment for absconding patients from other jurisdictions will include ECT or neurosurgery. However, the extended excessive security provisions continue to apply to medium secure settings only and have not been amended to include low secure settings although the Scottish Government has produced the long-awaited related draft regulations. The nurse's holding power period will be extended to three hours and assessment orders will be capable of extension by 14 days. Reinforcing the use of advance statements through imposing a statutory duty on medical staff to promote them was not accepted and neither bolstering independent advocacy provision throughout monitoring and investigation nor revision of the definition of 'mental disorder' in the 2003 Act to exclude learning disabilities and autistic spectrum do not appear to be in the latest version of the Bill.

Different expectations of the Bill have been very evident throughout the process. The Scottish Government only effectively intended a tidy up of the 2003 Act but many stakeholders have seen it as an opportunity to endeavour to undertake much more extensive legislative amendments. Its passage through Stage 3 will thus be keenly watched by many.

Jill Stavert

Article 12 CRPD

In addition to the conferences identified in the next section, Jill Stavert will be presenting a paper on 'Meeting the Challenges of the General Comment on Article 12 CRPD: Scottish Incapacity and Mental Health Legislation' at the International Academy of Law and Mental Health 2015 Congress in Vienna in July 2015.

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Conferences at which editors/contributors are speaking

Update Seminar: "Wills and Trusts"

Adrian will be speaking at this seminar on 11th June in Glasgow on "Incapacity Act: Development or Abolition"

Safeguarding Adults with Learning Disabilities – Capacity to Consent to Sexual Relations and Forced Marriage

Jill will be speaking at this Legal Services Agency Conference on 15th June 2015 in Glasgow on 'Recognition of Rights to Sexual Relationships for People with Intellectual Disabilities.'

Social Work Scotland Annual Conference 2015

Jill will be speaking on 'Deprivation of Liberty' at this conference in Crieff on 17th June.

'In Whose Best Interests?' Determining best interests in health and social care

Alex will be giving the keynote speech at this inaugural conference on 2 July, arranged by the University of Worcester in association with the Worcester Medico-Legal Society. For full details, including as to how to submit papers, see here.

Mental Health Lawyers Association Court of Protection Conference

Alex will be discussing the Court of Protection rule changes at the MHLA's Second Annual conference (keynote speaker, Sir James Munby P) on 3 July in London. For full details, including as to how to submit papers, see here.

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 July. 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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Alex been recommended as a leading expert in the field of mental capacity law for several years, appearing in cases involving the MCA 2005 at all levels up to and including the Supreme Court. He also writes extensively about mental capacity law and policy, works to which he has contributed including 'The Court of Protection Handbook' (2014, LAG); 'The International Protection of Adults' (2015, Oxford University Press) and Jordan's 'Court of Protection Practice.' He is the general editor of the fourth edition of 'Assessment of Mental Capacity' (Law Society/BMA, forthcoming). He is an Honorary Research Lecturer at the University of Manchester, and the creator of the website www.mentalcapacitylawandpolicy.org.uk. To view full CV click here.

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Victoria regularly appears in the Court of Protection, instructed by the Official Solicitor, family members, and statutory bodies, in welfare, financial and medical cases. She previously lectured in Medical Ethics at King's College London and was Assistant Director of the Nuffield Council on Bioethics. Together with Alex, she co-edits the Court of Protection Law Reports for Jordans. She is a contributing editor to Clayton and Tomlinson 'The Law of Human Rights', a contributor to 'Assessment of Mental Capacity' (Law Society/BMA 2009), and a contributor to Heywood and Massey Court of Protection Practice (Sweet and Maxwell). To view full CV click here.

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Neil has particular interests in human rights, mental health and incapacity law and mainly practises in the Court of Protection. Also a lecturer at Manchester University, he teaches students in these fields, trains health, social care and legal professionals, and regularly publishes in academic books and journals. Neil is the Deputy Director of the University's Legal Advice Centre and a Trustee for a mental health charity. To view full CV click here.

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Annabel appears frequently in the Court of Protection. Recently, she appeared in a High Court medical treatment case representing the family of a young man in a coma with a rare brain condition. She has also been instructed by local authorities, care homes and individuals in COP proceedings concerning a range of personal welfare and financial matters. Annabel also practices in the related field of human rights. To view full CV click here.

Simon Edwards
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Simon has wide experience of private client work raising capacity issues, including *Day v Harris & Ors* [2013] 3 WLR 1560, centred on the question whether Sir Malcolm Arnold had given manuscripts of his compositions to his children when in a desperate state or later when he was a patient of the Court of Protection. He has also acted in many cases where deputies or attorneys have misused P's assets. To view full CV click here.

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Adrian is a practising Scottish solicitor, a partner of T C Young LLP, who has specialised in and developed adult incapacity law in Scotland over more than three decades. Described in a court judgment as: "*the acknowledged master of this subject, and the person who has done more than any other practitioner in Scotland to advance this area of law*," he is author of *Adult Incapacity*, *Adults with Incapacity Legislation* and several other books on the subject. To view full CV click here.

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Dr Jill Stavert is Reader in Law within the School of Accounting, Financial Services and Law at Edinburgh Napier University and Director of its Centre for Mental Health and Incapacity Law Rights and Policy. Jill is also a member of the Law Society for Scotland's Mental Health and Disability Sub-Committee, Alzheimer Scotland's Human Rights and Public Policy Committee, the South East Scotland Research Ethics Committee 1, and the Scottish Human Rights Commission Research Advisory Group. She has undertaken work for the Mental Welfare Commission for Scotland (including its 2013 updated guidance on Deprivation of Liberty) and is a voluntary legal officer for the Scottish Association for Mental Health. To view full CV click here.