

IN THE COURT OF PROTECTION

Case No: 12371457

IN THE MATTER OF THE MENTAL CAPACITY ACT 2005

Between;

UF  
(By her Litigation Friend AF)

Applicant

-AND-

(1) A Local Authority  
(2) AS  
(3) Director of Legal Aid Casework  
(4) Ministry of Justice

Respondents

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NOTE

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### Representation

For Applicant – Nicholas O’Brien [Coram Chambers] (who did not appear before DJ Mort) instructed by Creighton and Partners Ltd

For the Local Authority – Martin Downs [1 Crown Office Row] instructed by the LA solicitor.

For DLAC and Ministry of Justice – Fiona Scolding [Hardwicke Chambers] instructed by Central Legal Team, Legal Aid Agency.

### Facts

UF is an elderly resident in a residential care home. She is said to lack capacity. She was deprived of her liberty. This was authorised by a standard authorisation granted by the local authority as supervisory body.

UF applied to the COP under s21A MCA 2005.

On 30.8.13 DJ Mort made an order under s16(2)(a) MCA 2005 authorising a deprivation of liberty as the standard authorisation would expire before the next hearing. This was in accordance with the practice established by Charles J in *Re HA [2012] EWHC 1068 (CoP)*.

On the expiry of the standard authorisation the Legal Aid Agency indicated to UF's solicitors that UF would need to complete a means assessment for her public funding. This was in accordance with the current regulations. The effect for UF was that she would no longer qualify for funding. However, (because of her personal circumstances) she could not access the funds to pursue her application.

UF applied to vary the order – to bring the s16(2)(a) order to an end, with the expectation that a new standard authorisation would be put in place. DJ Mort transferred the application to Charles J and joined the Director of Legal Aid Casework. At a directions hearing Charles J joined the Ministry of Justice.

### The funding regulations

At the time of *Re HA* the rules were that funding was available without a means test as follows:

*“Legal representation of a person (or of a representative of that person), in respect of whom an authorisation **has been made** under para.2 of Sch.A1 to the Mental Capacity Act 2005.”*

The regulations were changed under LASPO 2012. The current regulations came into force on 1.4.2013:

*Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013, Regn 5* provides for exemptions to means testing including

*"(g)legal representation in relation to a matter described in paragraph 5(1)(c) (mental capacity) of Part 1 of Schedule 1 to the Act to the extent that –*  
*(i)the legal representation is in proceedings in the Court of Protection under section 21A of the Mental Capacity Act 2005; and*  
*(ii) the individual to whom legal representation may be provided is –*  
*(aa)the individual in respect of whom **an authorisation is in force** under paragraph 2 of Schedule A1 to the Mental Capacity Act 2005;*  
*or*  
*(bb)a representative of that individual appointed as such in accordance with Part 10 of that Schedule;"*

### The ruling

On 21 November 2013 Charles J ruled that in addition to the power under s16(2)(a) described in *Re HA* in the vast majority of cases the Court could:

- (a) Exercise its powers under s21A(3)(a) to vary the standard authorisation;
- (b) extend an extant authorisation pursuant to section 21A (2) (b) MCA 2005

The DLAC and Ministry of Justice assured Charles J that if a Court adopted the courses in (a) or (b) or the course adopted in the present case, it would not treat the orders as contrivances and refuse public funding for that reason when applying the merits test for public funding.

The judge also indicated that where the Court varied the standard authorisation by extending it, the Court may need to consider making an order under s21A(6) MCA 2005 exonerating the supervisory body from liability for the extended period as the Court would have assumed the responsibility.

In this case, as the SA had expired whilst the Court had exercised its powers under section 16, Charles J limited the order of DJ Mort, giving 3 weeks to the Local authority to substitute a new standard authorisation which, if such a decision was made, the Court proposed to extend it until further order during the currency of these proceedings.

#### Litigation Friend

The judge additionally discharged AF (UF's daughter) as litigation friend and appointed the Official Solicitor in her place. The judge indicated that AF as a person with strong feelings on her mother's care with which siblings disagreed, was not able to objectively evaluate the option's for P's care and was not able to "fairly and competently conduct proceedings on behalf of [P]" [COP Rule 140(1)(a)].

A full judgment will be published when the transcript has been perfected. The judge recognised the importance of the issue involving public funding and authorised publication of an outline note.