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Thirty Nine Essex Street Court of Protection Newsletter: June 2011

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Editors

Introduction

Welcome to the June 2011 edition of the 39 Essex Street Court of Protection Newsletter. There has been a flurry of interesting and important decisions in recent weeks which are summarised. The Court of Protection has also published guidance on applying to the court for declarations in respect of the signing of tenancy agreements. We have circulated the guidance with the newsletter.

We are grateful to the Official Solicitor's office, Irwin Mitchell, Maxwell Gillott, Langleys and the Ministry of Justice for alerting us to items in this month's edition.

Cases

All cases discussed below can be found on www.mentalhealthlaw.co.uk if not otherwise available.

London Borough of Hillingdon v Steven Neary and ors [2011] EWHC 1377 (COP)

Summary

This well-publicised judgment addresses the responsibilities of public authorities who decide that incapacitated adults should be removed from their families. The London Borough of Hillingdon had determined that Steven Neary, a young autistic man, should not be returned to the care of his father from a respite service. Steven initially went to a respite facility a little earlier than planned because his father was unwell and exhausted from caring for Steven over the Christmas period. His father wanted him to stay for a couple of days, but agreed to an extension of a couple of weeks; however, he expected that Steven would then return home. In fact, the local authority started a process of assessment of Steven's needs and decided that he needed to stay in the unit for longer, apparently primarily based on concern as to whether Steven's needs could be met at home even with support due to his behaviour, and on the fact that he had gained a considerable amount of weight while in the care of his father, most likely due to the use of food as a mechanism for managing Steven's behaviour.

The evidence before the court was that the local authority did not properly discuss its concerns or its plans for Steven with his father, and that Steven himself expressed a consistent desire to return home.

No DOLS authorisations were granted until some four months after Steven had been kept at the respite unit. The DOLS process was triggered because Steven wandered out of the unit and was involved in an incident with a member of public. The first DOLS best interests assessment determined that it was in Steven's best interests to remain at the respite unit but did not look in any detail at the possibility of a return home, nor did it suggest as a condition of the

authorisation that an application be made to the Court of Protection.

The court found that Hillingdon had breached Steven Neary's rights under Article 8 ECHR by preventing him from living with his father, and had breached his rights under Article 5(1) ECHR by unlawfully depriving him of his liberty, even during periods where there was a standard authorisation in place under Schedule A1. Hillingdon further breached Steven Neary's rights under Article 5(4) by failing to bring the dispute to court, failing to appoint an IMCA at a suitable juncture, and failing to conduct an effective review of the DOLS best interests assessments under Part 8 of Schedule A1.

The judge, Mr Justice Peter Jackson, identified three areas of practical guidance to practitioners:

(1) <u>The purpose of DOL authorisations and of the Court of Protection</u>

Significant welfare issues that cannot be resolved by discussion should be placed before the Court of Protection, where decisions can be taken as a matter of urgency where necessary. The DOL scheme is an important safeguard against arbitrary detention. Where stringent conditions are met, it allows a managing authority to deprive a person of liberty at a particular place. It is <u>not</u> to be used by a local authority as a means of getting its own way on the question of whether it is in the person's best interests to be in the place at all. Using the DOL regime in that way turns the spirit of the Mental Capacity Act 2005 on its head, with a code designed to protect the liberty of vulnerable people being used instead as an instrument of confinement. In this case, far from being a safeguard, the way in which the DOL process was used masked the real deprivation of liberty, which was the refusal to allow Steven to go home.

(2) <u>Decision-making</u>

Poor decision-making processes often lead to bad decisions. Where a local authority wears a number of hats, it should be clear about who is responsible for its direction. Here, one sub-department of Hillingdon's adult social services provides social work support and another is responsible for running facilities such as the support unit. At the same time, senior social workers represent the supervisory body that determines whether or not a DOL authorisation should be granted. In that situation, welfare planning should be directed by the team to which the allocated social worker belongs, although there will of course be the closest liaison with those who run the support facilities. The tail of service provision, however expert and specialised, should not wag the dog of welfare planning.

(3) <u>The responsibilities of the supervisory body</u>

The granting of DOL standard authorisations is a matter for the local authority in its role as a supervisory body. The responsibilities of a supervisory body, correctly understood, require it to scrutinise the assessment it receives with independence and a degree of care that is appropriate to the seriousness of the decision and to the circumstances of the individual case that are or should be known to it. Where, as here, a supervisory body grants authorisations on the basis of perfunctory scrutiny of superficial best interests assessments, it cannot expect the authorisations to be legally valid.

The judge found that the local authority had never carried out a proper best interests assessment which gave proper regard to the importance of living with one's family:

Nowhere in their very full records of Steven's year in care is there any mention of the supposition that he should be at home, other things being equal, or the disadvantages to him of living away from his family, still less an attempt to weigh those disadvantages against the supposed advantages of care elsewhere. No acknowledgement ever appears of the unique bond between Steven and his father, or of the priceless importance to a dependent person of the personal element in care by a parent rather than a stranger, however committed. No attempt was made at the outset to carry out a genuinely

balanced best interests assessment, nor was one attempted subsequently.

The importance of the best interests assessments carried out under the DOLS system was highlighted:

> *Although the framework of the Act requires the supervising body to commission a number of paper assessments before granting a standard authorisation, the best interests assessment is anything but a routine piece of paperwork. Properly viewed, it should be seen as a cornerstone of the protection that the DOL safeguards offer to people facing deprivation of liberty if they are to be effective as safeguards at all.*
>
> *The corollary of this, in my view, is that the supervisory body that receives the best interests assessment must actively supervise the process by scrutinising the assessment with independence and with a degree of care that is appropriate to the seriousness of the decision and the circumstances of the individual case that are or should be known to it.*

The judge found that even if the BI assessment is positive, and even though Schedule A1 says that the supervisory body MUST grant an authorisation if all the assessments are positive, the situation is not so clear cut:

> *This obligation must be read in the light of the overall scheme of the schedule, which cannot be to require the supervisory body to grant an authorisation where it is not or should not be satisfied that the best interests assessment is a thorough piece of work that adequately analyses the four necessary conditions.*
>
> *... where a supervisory body knows or ought to know that a best interests assessment is inadequate, it is not obliged to follow the recommendation. On the contrary it is obliged to take all necessary steps to remedy the inadequacy, and if necessary bring the deprivation of liberty to an end, including by conducting a review under Part 8 or by applying to the court.*
>
> *... A standard authorisation has the same effect as a court order and there is no reason why it should receive lesser scrutiny.*

In relation to Article 5(4) – the right to speedy review of any deprivation of liberty – the court found that there had been an unwarranted violation of Steven's rights:

> *Lastly, I have already indicated that the protracted delay in applying to court in this case was highly unfortunate. There are repeated references, particularly by the service manager, to the burden being on Mr Neary to take the matter to court if he wished to challenge what was happening. That approach cannot be right. I have already referred to the decision in Re S, which rightly observes that the practical and evidential burden is on a local authority to demonstrate that its arrangements are better than those that can be achieved within the family. It will discharge the practical burden by ensuring that there is a proper forum for decision. It will not do so by allowing the situation it has brought about to continue by default. Nor is it an answer to say, as Hillingdon has done, that Mr Neary could always have gone to court himself, and that it had told him so. It was Steven's rights, and not those of his father, that were in issue. Moreover, local authorities have the advantage over individuals both in terms of experience and, even nowadays, depth of pocket. The fact that an individual does not bring a matter to court does not relieve the local authority of the obligation to act, it redoubles it.*
>
> *Taking these three matters together – no IMCA, no effective review, and no timely issue of proceedings – I agree with the Official Solicitor and with the team manager that had these steps being taken in a timely way, it is more likely than not that Steven would have returned home very much earlier than he did.*

Furthermore:

> *... there is an obligation on the State to ensure that a person deprived of liberty is*

not only entitled but enabled to have the lawfulness of his detention reviewed speedily by a court. The nature of the obligation will depend upon the circumstances, which may not readily be transferable from one context to another.

Comment

This decision answers a number of crucial questions about the operation of DOLS and the correlation between a breach of Schedule A1 and a breach of Articles 5 and 8 ECHR.

It highlights the importance of a comprehensive best interests assessment (whether or not within the context of a DOLS authorisation) and the need for public bodies to have regard to all relevant information when forming a view as to best interests. It repeats the court's often-expressed view that removing an incapacitated adult from his or her family home is a major step and not one that can be justified on the basis of generalised assumptions about, for example, the benefits of independent living or the provision of care by skilled professionals rather than family members. The judge said that '*The burden is always on the State to show that an incapacitated person's welfare cannot be sustained by living with and being looked after by his or her family, with or without outside support*.' There is an interesting question whether this approach is in conflict with some aspects of current social care (including DH guidance) which appears, to the authors, to take a different starting point; namely that learning disabled and autistic adults should be assisted to live independently, as their non-disabled counterparts generally do.

The case will cast a certain amount of fear into the hearts of local authorities who, in the authors' experience, commonly adopt without further consideration the recommendations of Best Interest Assessors in their decision to grant a standard authorisation. This practice illustrates the problems caused by the dual role played by local authorities under DOLS, of both independent assessor, and decision-maker, and reflects the inherent tension caused by appointing the body ultimately responsible for a deprivation of liberty as the body able to authorise it. Following this judgment, local authorities will have to do better at separating their assessment functions from their decision-making functions, and can no longer assume that reliance on the views of a Best Interest Assessor is sufficient. This is likely to be particularly so where, for example, a relative or P himself seeks to criticise or have reviewed a DOLS authorisation, thereby putting the local authority on notice that the decision already reached may not be the right one.

Best Interests Assessors will also need to beware of the overuse of 'cut and paste', and the need to justify periods of detention that are proposed, as being lawful and proportionate, rather than for reasons of administrative practicality.

The judgment does not, in the view of the authors, settle the question whether a breach of Schedule A1 necessarily gives rise to a breach of Article 5. The court found that since the best interests decisions about Steven were made with 'insufficient scrutiny of inadequate information', the resulting DOLS authorisations were not lawful, even though the processes envisaged by Schedule A1 had been followed. It is not clear whether the court found that there had been a breach of Article 5 on procedural grounds (such as a failure to complete a lawful best interests assessment), or on substantive grounds (that since the deprivation of Steven's liberty was not in fact in his best interests and/or proportionate, it was therefore unlawful). The distinction was probably irrelevant in this case, as Hillingdon appeared to have violated both aspects, but in other cases, where there is a real issue as to whether the deprivation of liberty is in P's best interests (for example because there is no alternative placement available, even though the existing placement is far from ideal), it could be very important. The judgment at the very least suggests that even where the best interests issue is not clear cut, there may nevertheless be violations of Article 5 if the processes followed, including information-gathering, are deficient.

Cheshire West and Chester Council v P and M [2011] EWHC 1330 (Fam)

Summary

P was a 38-year-old man, born with cerebral palsy and Down's syndrome with a history of cerebral vascular dementia. Throughout his life he had been cared for by his mother, M. But with her health deteriorating, the local authority brought proceedings in the Court of Protection to authorise an alternative placement. Since November 2009 P has been living in a large, spacious bungalow ('Z House') with other residents, receiving a high level of care. The central issue related to Article 5 of the ECHR. The local authority contended that P's liberty was restricted; M and the Official Solicitor on behalf of P submitted that it was deprived. No human rights violation was alleged.

After outlining the well-known legal principles, Mr Justice Baker referred to the guidance given in *P and Q v Surrey County Council* [2011] EWCA Civ 190. There the Court of Appeal had recognised sedative medication, relative normality, and objections to confinement as being characteristic of the objective element of a deprivation of liberty. The specific factors identified by the parties as relevant to the restriction/deprivation dilemma were listed at paras 54-56. His Lordship accepted that the local authority had taken '*very great care to ensure that P's lif*e [was] *as normal as possible*'. The bungalow was not designed for compulsory detention. P was encouraged to have regular contact with his family, attended a day centre every weekday and had a good social life. These features 'help to give his life a strong degree of normality' (para 58). However, his life was completely under the control of the staff as he could not go anywhere or do anything without their support and assistance. In particular, P's occasionally aggressive behaviour and habit of touching and eating his incontinence products required a range of measures, including physical intervention at times.

The Court concluded that the steps required to deal with P's challenging behaviour, looked at overall, amounted to a deprivation of liberty. Mr Justice Baker went on to hold at para 61:

"*In my judgment, it is almost inevitable that, even after he has been supplied with a bodysuit, P will on occasions gain access to his pads and seek to ingest pieces of padding and faeces in a manner that will call for urgent and firm intervention. Those actions will be in his best interests and therefore justifiable, but they will, as a matter of concrete fact and legal principle, involve a deprivation of his liberty*." (emphasis added)

The consequences were twofold. First, 'those working with P are under a clear obligation to ensure that the measures taken are the least interventionist possible'. This required regular reassessments to consider alternative management strategies, such as the bodysuit and educating P not to behave in ways that required restraint (para 62). Secondly, the Court would have to conduct regular reviews, which the local authority had requested in any event (para 63).

Departing from the general rule, the Court ordered the local authority to pay a proportion of the other parties' costs because an employee, who was subsequently dismissed, had misled the Court and tampered with P's daily care records. Such misconduct was also held to justify the naming of the local authority, after the Court balanced the Article 10 public interest considerations with the Article 8 right to respect for privacy of P and others.

Comment

This is the first reported decision to apply *P and Q v Surrey County Council* [2011] EWCA Civ 190 in the context of a supported living arrangement. There was no breach of Article 5 as the Court had authorised the placement. Given that the circumstances are not particularly unique for those presenting with P's significant level of physical and learning disabilities, the current implications of the decision are far-reaching. Similar community living arrangements with liberty restrictions of analogous intensity or degree will have to be authorised by the Court of Protection.

The effects of the judgment may also be felt in

other settings where urgent and firm intrusive intervention is used in respect of those lacking capacity to consent. For the time being, using restraint to insert fingers into an incapacitated person's mouth in their best interests is a deprivation of their liberty if imputable to the state. Such a procedure is unlikely to be a rare occurrence in some hospitals and care homes (or even NHS dental surgeries). Other similar forms of bodily intrusion may also fall within the scope of Article 5, using restraint to anaesthetise a person lacking capacity to administer electro-convulsive therapy being but one example. Indeed, many life-saving medical interventions require proportionate restraint in urgent circumstances where the person lacks capacity.

A Council v X (by her Litigation Friend the Official Solicitor), Y and Z [2011] EWHC B10 (COP)

Summary

This decision is the sequel to that reported as *HBCC v LG (by her Litigation Friend the Official Solicitor), JG and SG* [2010] EWHC 1527 (Fam), concerning the best interests of an elderly lady (now referred to as X) who suffered advanced dementia. At that earlier hearing, Eleanor King J had determined inter alia that it was in X's best interests that she reside at a care home ('QM') and that contact between X and her daughter, now known as Y, be limited and supervised. The judge had accepted that there had been problems with the contact between X and Y and that it often led to X becoming distressed. However, the judge expressed the hope that contact would improve.

Y had continued to attend QM for supervised contact visits with X. In July 2010, there was a further incident during the course of one such visit in which it was contended that Y had become physically abusive to staff. The police were required to attend as Y refused to leave the premises. This incident led the Council to inform Y that contact was suspended and to ban her from attending QM. The Council then made an application that a declaration that contact between X and Z, was no longer in X's best interests. An interim declaration was made by the Court in August 2010 that contact was not in X's best interests but the Council were required to consider what contact could take place away from QM. A further expert report was prepared directly addressing the issue of contact.

Y was unrepresented at the contact hearing but was assisted by a McKenzie friend. Y refused to cross-examine the Council's witnesses, and when giving evidence herself, responded consistently with "no comment". Eleanor King J noted that although it was regrettable that the evidence of the Council was untested, having heard the witnesses and seen the documentation concerning the contact visits, she accepted it. X was now immobile and no longer recognised Y, her dementia had advanced and moving her to a location other than QM would be potentially confusing and distressing aside from posing significant physical difficulties. The Local Authority had been unable to identify any other location where contact could take place, either because the venue itself was unsuitable or because they had declined to have Y on the premises due to her behaviour. Eleanor King J held that if she believed X could make the journey or that contact was otherwise in her best interests, she would not have let the practicalities deter her and would have held the matter over for other options to be explored by the Local Authority.

As noted above, the Judge had the benefit of an expert report prepared by a Miss S expressly to consider the question of contact. Miss S had concluded on the basis of Y's behaviour that direct contact was not in X's best interests. Eleanor King J was not satisfied that if the person supervising contact were to be altered, Y's behaviour would change. In reaching her conclusion, she made it clear that she had considered the Article 8 rights of both Y and X.

Comment

This case is of interest as a rare example of the court deciding that a total prohibition on direct contact was in P's best interests, due in large part to the conduct of a relative. In the authors' experience, the courts will go to great lengths to attempt to preserve contact even where statutory bodies and care providers have long since given up. The total breakdown in

relationships in this case, and the apparently inability of Y to behave appropriately not just with X but generally, was sufficient for the court to accept that further attempts to resolve the impasse had no prospect of success.

KY v DD [2011] EWHC 1277 (Fam)

Summary

In this important case (in the Family Division), Theis J gave guidance on the principles practitioners should adhere to when making without notice applications.

Theis J had been the Applications Judge in the Family Division who had dealt with a without notice application in April 2011 in relation to prospective wardship proceedings concerning a five year old child residing with his mother. The mother sought an order that the child be made a ward of the Court, that the Father be prohibited from removing the ward of the Court from her care, that a passport order be imposed on the father and that an inter partes hearing be listed in two weeks time. The Child's mother had provided a sworn affidavit in support of her application stating that 9 weeks earlier the Defendant father had threatened to take the child away from her. When questioned as to why the application was proceeding on a without notice basis, Counsel for the plaintiff had informed the Judge that he had been instructed that there had been further threats by the Defendant Father in the past week that he would remove the child from the jurisdiction. On this basis, Theis J granted the Order in the terms sought. Counsel for the plaintiff subsequently contacted the Judge indicating that there had, in fact, been no subsequent threats to remove the child from the jurisdiction and that the Passport Order could not be justified. The instructions which Counsel had relayed to the Court in fact related to another matter. The Passport Order was not made. When the matter came back before Theis J in May 2011, she made a prohibited steps order and discharged the wardship.

Theis J endorsed the guidance on without notice applications previously given by Munby J in *Re W (Ex Parte Orders)* [2000] 2 FLR 927 and *Re S (Ex Parte Orders)* [2001] 1 FLR 308 and by Mr Justice Charles in *B Borough Council v S & Anor [2006] EWHC 2584 (Fam)*, emphasising the duties on applicants to give full and frank disclosure. She made the following additional comments:

(1) If information is put before the court to substantiate a without notice order, it should be the subject of the closest scrutiny and, if the applicant is not present in person to verify it, be substantiated by production of a contemporaneous note of the instructions. If that is not available, there may need to be a short adjournment to enable steps to be taken to verify the information relied upon.

(2) If additional information is put before the court orally, there must be a direction for the filing of sworn evidence to confirm the information within a very short period of time. If that direction had not been made in this case, the passport order would have been executed when the grounds for obtaining it were simply not there. That would have involved a gross breach of the defendant's rights, quite apart from the court having been given misleading information.

(3) Lastly, leaving the scrutiny that the court should give to without notice applications to one side, it is incumbent on those advising whether such an application is justified to consider rigorously whether an application is justified and be clear as to the evidential basis for it.

Comment

This case is a useful reminder of the obligations on all legal representatives when making without notice applications and in particular the requirement that applicants effectively summarise the likely case that they would have to meet had the application been opposed, and the requirement that a contemporaneous note of the applicant's instructions should be produced.

SMBC, WMP, RC and GG (by their Litigation Friend the Official Solicitor) v HSG, SK and SKG [2011] EWHC B13 (COP)

Summary

HHJ Cardinal was asked to consider an

application by the Local Authority for a declaration as to the capacity of HSG to marry and to make complex financial decisions. HSG sought a declaration that he be discharged from the proceedings on the grounds that he was not appropriately before the Court of Protection in the absence of the diagnostic functional tests under the 2005 Mental Capacity Act being met. It was his second such application, the first having been refused in December 2010.

The background to the proceedings was that in the autumn of 2010, HHJ Cardinal had been asked by the police to grant forced marriage injunctions in respect of three brothers in the G family, of which HSG was one. All three were said to have varying degrees of learning difficulty and had been or were under threat, it was said, of forced marriage. The cases were subsequently transferred to the Court of Protection and listed together.

HSG was married in 2007 and was seeking a divorce. The decree nisi had been stayed pending the outcome of the proceedings, one question being whether HSG had had the capacity to enter in to a contract of marriage. The expert psychiatrist instructed to consider HSG's case, Dr X, was unable to reach a diagnostic conclusion on the grounds that in order to do so he required further investigations and the disclosure of past records. HSG was refusing to undertake further tests, and contended vigorously before the Court (supported in this by his mother, SK) that the evidence before the Court was such it did not justify the case proceeding any further. The argument was also advanced to the Court that in such circumstances it would be a "serious breach" of HSG's common law right to confidentiality were disclosure of "deeply personal and sensitive documents" to be ordered.

HHJ Cardinal considered the law applicable to the question of capacity under the MCA 2005 and held the following:

- The presumption is that a person has capacity unless the contrary is shown (section 1 (2) of the MCA 2005).
- It was only right that HSG be assessed when in the best state to be so assessed.
- The Court could not make the declaration sought by the Council unless he was satisfied that the diagnostic and functional tests were met.
- The test for granting an interim order under section 48 of the MCA is lower than that required for a declaration that a person lacks capacity under section 15 of the MCA: What is required is "*simply evidence to justify a reasonable belief that* [the individual] *may lack capacity in the relevant regard*." *Re F* [2010] 2 FLR 28 per Marshall J cited with approval.
- Likewise, when determining capacity, what is necessary is for the person being reviewed to comprehend and weigh up the salient details relevant to the decision to be made. *LBL v RYJ and others* [2010] EWHC 2664 per Macur J. In the instant case, the salient details were those going to the factors identified as relevant to the question of capacity to marry by Munby J [as he then was] in *Sheffield CC v E & S* [2004] EWHC 2808 (Fam)

On the facts, HHJ Cardinal found that the information available as yet to the court established the Court's jurisdiction. There was a substantial body of evidence which gave good cause to believe that HSG may lack capacity - the test for making interim orders was accordingly made out. It would be irresponsible and premature for the court to discharge HSG when the inquiries of Dr X were not complete in circumstances where at least some of his inquiries could be completed without forcing HSG to undergo tests he was declining to undertake.

The case is of some importance because of a number of procedural difficulties that arose during the course of the application, not least the fact that a social worker employed by the Council (acting without taking legal advice) when invited to file a further statement addressing HSG's capacity to marry chose to re-interview HSG at Court and then by telephone without

consulting HSG's solicitor. As a result, HHJ Cardinal identified at paragraph 57 of the judgment the following lessons that he considered should be learnt from the "difficult" application:

"*i. An expert as a matter of good practice ought in my judgement to seek clarifications and raise questions under Rule 129 Court of Protection Rules 2007 before completing a report referring to lacunae in the information before him.*

ii. A social worker investigating capacity ought to keep a party's solicitor informed of his intention to interview that party and not just proceed.

iii. It is right to conclude that a party may lack capacity [and thus the test in Re F is met] if there are significant and important gaps in the history and therefore the knowledge of the expert examining that party and there is evidence which may well point to incapacity in the relevant regard.

iv. It is unhelpful for a doctor [in this case a GP] to descend to vague expressions such as mental health issues in a report he/she knows is to go to the court.

v. It is not in my judgement an improper interference with the human or common law rights of a party for a medical expert to be provided with educational health and other records to enable him to complete his inquiries.

vi. I do not accept that psychometric testing is so intrusive as to be an improper test to apply to someone on the borderline of capacity even where he is reluctant to undertake them.

vii. If a solicitor acting for the Official Solicitor discusses the case with a joint expert orally or in writing the instructing parties should be provided with a copy of that communication or attendance note of that conversation."

Comment

This case is of interest because it suggests that the threshold for making an interim declaration as to lack of capacity under s.48 MCA 2005 is very low, notwithstanding the presumption in favour of capacity contained in s.1 MCA 2005. In this case, HSG's experienced solicitor considered that his client had capacity, and the test in question (capacity to consent to marriage) was a very low one. Yet, having been seized of the matter, the court was reluctant to forego jurisdiction until the expert evidence was complete.

R(C) v A Local Authority and Ors [2011] EWHC 1539 (Admin)

Summary

Ryder J has recently handed down judgment in a judicial review claim and Court of Protection proceedings that were being heard together. The judgment focuses in large part on the reasoning behind the very detailed best interest declarations that the Court made regulating the deprivation of C's liberty including his seclusion in a residential school.

C is an 18 year old boy who had been resident in a school for some years. He has autism and severe learning disability with extremely challenging behaviour. His behaviour was managed in large part by the use of a padded blue room in which he was secluded when he exhibited challenging behaviour. He had developed a number of behaviours that were particularly prevalent when in the 'blue room' including defecating, smearing and eating his own urine and faeces, and stripping naked. He was prevented from leaving the blue room for reasons of aggression and nakedness. The blue room was also used as a room to which C had been encouraged to withdraw as a safe place.

It was common ground that the DOLS regime under the MCA does not apply to residential schools. It was also common ground that when C was secluded in the blue room he had been deprived of his liberty. The court gave detailed consideration to these matters. The judgment can be summarised as follows:

(i) Since at least C's 16th birthday the

approach of the MCA 2005 was more relevant to his situation than the Children Act 1989, but this approach was not applied to C.

(ii) As the DOLS code of practice and schedule A1 of the MCA did not apply to C, an application should have been made to the COP before any deprivation of liberty occurred. In this case the application should have been made on C's 16th birthday.

(iii) Since at least C's 16th birthday there has been no lawful authority to deprive C of his liberty.

(iv) The Court was unable to make even interim declarations as to whether the conditions in which C was being deprived of his liberty were in his best interests until it had heard oral evidence from a number of those caring for C and from instructed experts.

(v) The application of good practice in the COP in any determination of best interests will of necessity have regard to the same material as that contained in the DOLS Code of Practice because inter alia the DOLS Code of Practice is overtly informed by decisions of this Court and the ECHR.

(vi) The Mental Health Code of Practice 1983 reflects best practice in relation to seclusion. It applies to the care, treatment, and in particular seclusion and restraint of C, who is a severely learning disabled child who is resident in a special school and whose condition prima facie falls within the definition of mental disorder in the MHA.

(vii) While the issue of whether the MHA Code of Practice would apply to children and young persons in children's homes but whose learning disability does not fall within the definition of a mental disorder was not argued, but the Judge held that it should be applied as a matter of good practice.

The court gave detailed consideration to the situations in which secluding C was lawful and in his best interests. The Court's view was that it could be used as follows:

(i) When used to control aggressive behaviour, but only so long as was necessary and proportionate and it had to be the least restrictive option. It had to be exercised in accordance with an intervention and prevention plan designed to safeguard C's psychological and physical health. That plan, together with guidance for use of the blue room, had to be written up into a protocol forming C's care plan and all staff had to be trained in a manner that was specific to C.

(ii) It was not lawful to seclude C used solely for nakedness, such seclusion is little more than an amateur attempt at behaviour modification which is not proportionate to any risk or the least restrictive option. Staff must be aware of and be trained in strategies to allow C to be naked.

(iii) It was not lawful to seclude C as a punishment, as part of behaviour management plan.

(iv) It was not lawful to seclude C solely for reason of him self-harming. It could be used where C's self-harm was coupled with aggressive behaviour which of itself necessitated the use of seclusion.

Guest Comment from Katie Scott (Counsel for C)

This judgment will have wide repercussions for those who care for young people with challenging behaviour for two reasons:

First it makes it clear that where a young person of 16 is to be deprived of their liberty within a children's home or residential school, an application for lawful authority must be made prior to the deprivation of liberty taking place. While the DOLS code of practice does not strictly apply to deprivations outside schedule A1, the guidance will be applied by the Courts in such situations.

Secondly it makes it clear that where the young person has a mental disorder within the meaning of the MHA 1983 then the MHA Code of Practice

applies to their seclusion. Even where a young person does not have a mental disorder within the meaning of the MHA as a matter of good practice the MHA Code of Practice should be applied.

The procedure adopted by the Court for the taking of expert evidence is also worthy of note. The Court heard oral evidence from 9 expert witnesses. Seven of them were sworn in together and taken through a list of issues, giving their views and commenting on the views of others as each issue was addressed in turn. In this way the Court was able to hear evidence from 8 of the 9 witnesses in one afternoon.

R v Hopkins; R v Priest [2011] EWCA 1513

Summary

This case provides further clarification as to the constituent elements of the offence of wilful neglect of a person lacking capacity created by s.44 MCA 2005; as such, it provides a useful sequel to the earlier decision of *R v Dunn* [2010] EWCA Crim 2395, reported in our May issue.

The effective owner and manager, respectively, of a care home appealed against convictions returned in June 2010. During the course of the trial before the Crown Court, the two had sought to argue that s.44(1)(a) (providing that s.44 applies if D has the care of a person who lacks, or D reasonably believes to lack) capacity was so vague that no prosecution could hope to succeed. This was repeated as a ground of appeal. The Court of Appeal made it clear that they had substantial doubts as to what it was that the matter in respect of which a judgment of capacity had to be made, such that, unconstrained by authority, they would have been minded to accede to the submission that s.44(1)(a) (read together with s.2(1)) MCA 2005) was so vague as to fail the test of sufficient certainty at common law and under Article 7(1) ECHR. However, and whilst expressing some reservations about the judgment in *Dunn*, they considered that the ratio of the earlier decision was conclusive as to the question of the relevant capacity – i.e. namely the person's ability to make decisions concerning his or her own care. They therefore found that this ground of appeal was not made out.

The Court then went on to consider the interaction between s.44 and s.2(4) MCA 2005; and held (importantly) that s.2(4) – providing that the question of capacity in proceedings is to be determined on the balance of probability – was binding even in criminal cases, such that the prosecution must prove (1) to the criminal standard that the defendant ill treated or wilfully neglected a person in his care, and (2) that on a balance of probability that person was a person who at the material time lacked capacity.

Finally, the Court turned to the question of the judge's handling of the issues of willful neglect. They made it clear that they considered that, given the wording of s.44 MCA 2005, the critical requirement is that each juror is sure that during the indictment period the defendant was guilty of wilful neglect; it did not matter whether they were agreed upon each failure of care relied upon by the prosecution. The Court had some, frankly, withering remarks to make as to the adequacy of the judge's summing up of the evidence and of the issues, which, cumulatively, led them to the conclusion that the verdicts could not be sustained. Those remarks were specific to the cases before the Court; for present purposes, it suffices to note that the Court did identify that, where the defendants were persons whose primary responsibility was supervision and management, "[t]*he jury needed to ask in respect of each [alleged failing on their part] (1) are we sure lack of care is proved?; (2) if so, are we sure that it amounted to neglect?; (3) if so, are we sure either (i) that the defendant knew of the lack of care and deliberately or recklessly neglected to act, or (ii) that the defendant was unaware of the lack of care and deliberately or recklessly closed her mind to the obvious?*" (paragraph 58).

Comment

It is perhaps not facetious to suggest that it is fortunate for the Government that the appeal in *Dunn* was heard before the appeals in *Hopkins* and *Priest*, because it is quite clear that, but for the earlier decision, this panel of the Court of Appeal would have had little hesitation in holding

that s.44 was sufficiently poorly worded that it cannot ground an offence. Section 44 did, though, survive, and the clarification given as to the requisite standard of proof regarding the vulnerable adult's lack of capacity is an important one. Had the bar been set to the criminal standard, it would have rendered it substantially more difficult to bring prosecutions – especially where, as is frequently the case, the adult has died before the matter actually comes to Court.

Ministry of Justice consultations: (1) European Regulation on mutual recognition of protection measures in civil matters

The Ministry of Justice is inviting views on a proposal for a European Regulation on mutual recognition of protection measures in civil matters. The Regulation aims to ensure that a protection measure (for example a non-molestation order) provided to a person in one Member State is recognised and maintained when that person travels or moves to another Member State. The United Kingdom has three months to decide whether or not to "opt in" to negotiations on the proposal. The Ministry of Justice is gathering evidence from interested parties and the deadline for responses is Friday **8 July 2011**. Details of the consultation (including the address for responses) have been circulated with this newsletter.

The consultation is particularly pertinent to the making of orders restricting or prohibiting contact between parties and the cross-border enforcement of such orders.

Consultation: (1) some COP decisions to be taken by authorised court officers

The MOJ has just published a consultation paper on proposals for decisions on some straightforward applications to the Court of Protection to be taken by "authorised" court officers.

The consultation runs until 20 September 2011 and can be found at:

http://www.justice.gov.uk/consultations/decisions-court-protection.htm

New SCIE guidance on IMCA/RPR roles

The Social Care Institute for Excellence has just published (with ADASS endorsement) new guidance on "*IMCA and paid relevant person's representative roles in the Mental Capacity Act Deprivation of Liberty Safeguards*," available at http://www.scie.org.uk/publications/guides/guide41/

Our next update should be out in July 2011, unless any major decisions are handed down before then which merit urgent dissemination. Please email us with any judgments and/or other items which you would like to be included: full credit is always given.

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