Essex CHAMBERS

MENTAL CAPACITY REPORT: COMPENDIUM

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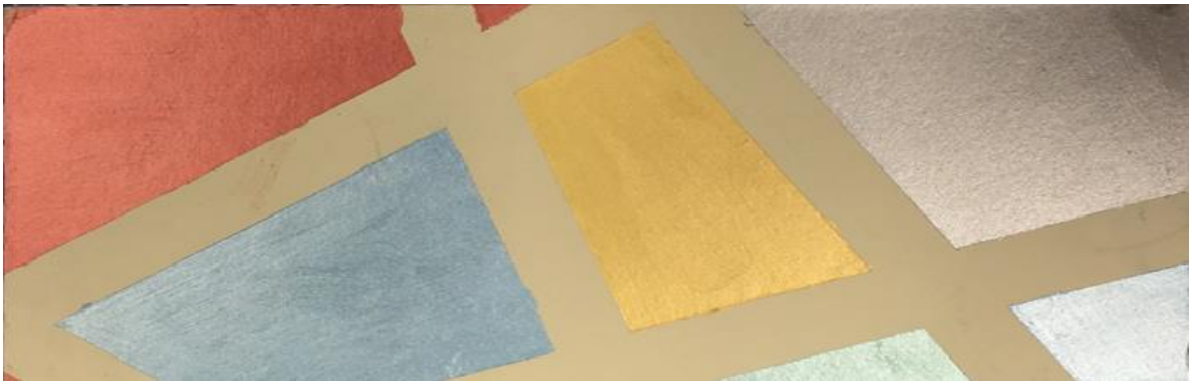

Welcome to the March 2019 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: an update on the Mental Capacity (Amendment) Bill; capacity and social media; the limits of the inherent jurisdiction (again); and best interests at the end of life;

(2) In the Practice and Procedure Report: an important decision on when it is legitimate summarily to dispose of s.21A applications; litigation capacity in the Court of Protection, Brexit contingency planning; and the launch of the Court of Protection Bar Association;

(3) In the Wider Context Report: CQC guidance on sexuality, litigation friends in the immigration tribunal; Strasbourg on the obligations towards voluntary psychiatric patients; and the Special Rapporteur on the Rights of Persons with Disabilities on ending disability-based deprivation of liberty.

We do not have a Property and Affairs report this month as there are insufficient developments to warrant a standalone report (but see the Practice and Procedure report for an update on the OPG's mediation pilot). Nor do we have a Scotland report, in part because we are disappointingly unable so far to report further progress on reform of the Adults with Incapacity (Scotland) Act 2000.

You can find all our past issues, our case summaries, and more on our dedicated sub-site here. You can also find here an updated version of our capacity assessment guide, with the best interests guide also due a refresh in the near future.

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The picture at the top, "*Colourful*," is by Geoffrey Files, a young man with autism. We are very grateful to him and his family for permission to use his artwork.

Contents

HEALTH, WELFARE AND DEPRIVATION OF LIBERTY

Mental Capacity (Amendment) Bill update

The Mental Capacity (Amendment) Bill returned to the Lords on 26 February. The majority of the amendments introduced by the Government in the Commons were accepted (for an explanation of their rationale, see here). However, the Government's proposed statutory definition of deprivation of liberty was not accepted, and the Lords instead voted for the following definition advanced by Baroness Tyler.

> *"4ZA Meaning of deprivation of liberty*
>
> *(1) A person is deprived of liberty if the circumstances described in subsection (2) apply to them.*
> *(2) A person is deprived of liberty if they—*
> *(a) are subject to confinement in a particular place for more than a negligible period of time; and*
> *(b) have not given valid consent to their confinement; and*
> *(c) the arrangements are due to an action of a person or body responsible to the state.*
> *(3) For the purpose of subsection (2)(a), a person is subject to confinement where they—*
> *(a) are prevented from removing themselves permanently from the place in which they are required to reside, in order to live where and with whom they choose; and*
> *(b) are subject to continuous supervision and control."*

The Lords also voted for a cross-bench amendment proposed by Baroness Watkins to require responsible bodies to keep a record of the decision and justification if an authorisation record is not given to the person (and others) within 72 hours, and a review thereafter.

During the course of the debate, Baroness Blackwood (for the Government) made an important clarification of the extent of 'portability' of authorisations under the LPS, confirming that the Government's intention is that:

> *An authorisation can apply to different settings so that it can travel with a person but cannot be varied to apply to completely new settings once it has been made, as this would undermine Article 5.*

The Bill now returns to the Commons for consideration of the amendments proposed by the Lords.

Capacity, social media and the internet

Re A (Capacity: Social Media and Internet Use: Best Interests [2019] EWCOP 2 and *Re B(Capacity: Social Media: Care and Contact)* [2019] EWCOP 3 (Cobb J)

Mental capacity – assessing capacity – social media – contact – residence

Summary[1]

In two linked judgments, Cobb J has outlined the relevant, and irrelevant, information for purposes of deciding whether a person has capacity to make decisions about internet and social media use.

The importance of the internet and social media

Cobb J started his judgment in *Re A* by emphasising the central importance of internet and the social media to those with disabilities, including by reference to the CRPD. He also identified the potential for risks online, including, in particular, those with learning disabilities (and, in passing, noted that "[t]*hose who press for a change in the legislation* [to make it a crime to incite hatred because of disability] *have a compelling case*."

The nature of the decision

Cobb J was asked, first, to consider whether, in undertaking a capacity assessment, internet and social media use should form a sub-set of a person's ability to make a decision about either 'contact' or 'care'. He came to the clear conclusion that it was a different question, not least because "[t]*here is a risk that if social media use and/or internet use were to be swept up in the context of care or contact, it would lead to the inappropriate removal or reduction of personal autonomy in an area which I recognise is extremely important to those with disabilities*." Further

> *26. It seems to me that there are particular and unique characteristics of social media networking and internet use which distinguish it from other forms of contact and care; as I described above (see [4]), in the online environment there is significant scope for harassment, bullying, exposure to harmful content, sexual grooming, exploitation (in its many forms), encouragement of self-harm, access to dangerous individuals and/or information – all of which may not be so readily apparent if contact was in person. The use of the internet and the use of social media are inextricably linked; the internet is the communication platform on which social media operates. For present purposes, it does not make sense in my judgment to treat them as different things. It would, in my judgment, be impractical and unnecessary to assess capacity separately in relation to using the internet for social communications as to using it for entertainment, education, relaxation, and/or for gathering information.*

The relevant information

Having identified the decision, Cobb J reminded himself of the need to be careful not to overload the test for the information relevant to it, but to limit it to the "salient" factors (per *LBL v RYJ* [2010] EWHC 2664 (Fam) at [24], and *CC v KK & STCC* [2012] EWCOP 2136 at [69]). "*In applying that discipline*," he continued, "*I am conscious that a determination that a person lacks capacity to access and use the internet imposes a significant restriction upon his or her freedom*."

[1] Tor having acted for the local authority in *Re A*, and Neil for A's parents, neither have contributed to this report.

Against that backdrop, he held that: 'relevant information' which P needs to be able to understand, retain, and use and weigh, is as follows:

> *28.*
> *i) Information and images (including videos) which you share on the internet or through social media could be shared more widely, including with people you don't know , without you knowing or being able to stop it;*
>
> *ii) It is possible to limit the sharing of personal information or images (and videos) by using 'privacy and location settings' on some internet and social media sites; [see paragraph below];*
>
> *iii) If you place material or images (including videos) on social media sites which are rude or offensive, or share those images, other people might be upset or offended; [see paragraph below];*
>
> *iv) Some people you meet or communicate with ('talk to') online, who you don't otherwise know, may not be who they say they are ('they may disguise, or lie about, themselves'); someone who calls themselves a 'friend' on social media may not be friendly;*
>
> *v) Some people you meet or communicate with ('talk to') on the internet or through social media, who you don't otherwise know, may pose a risk to you; they may lie to you, or exploit or take advantage of you sexually, financially, emotionally and/or physically; they may want to cause you harm;*
>
> *vi) If you look at or share extremely rude or offensive images, messages or videos online you may get into trouble with the police, because you may have committed a crime; [see paragraph below].*
>
> *29. With regard to the test above, I would like to add the following points to assist in its interpretation and application:*
>
> *i) In relation to (ii) in [28] above, I do not envisage that the precise details or mechanisms of the privacy settings need to be understood but P should be capable of understanding that they exist, and be able to decide (with support) whether to apply them;*
>
> *ii) In relation to (iii) and (vi) in [28] above, I use the term 'share' in this context as it is used in the 2018 Government Guidance: 'Indecent Images of Children: Guidance for Young people': that is to say, "sending on an email, offering on a file sharing platform, uploading to a site that other people have access to, and possessing with a view to distribute";*
>
> *iii) In relation to (iii) and (vi) in [28] above, I have chosen the words 'rude or offensive' – as these words may be easily understood by those with learning disabilities as including not only the insulting and abusive, but also the sexually explicit, indecent or pornographic;*
>
> *iv) In relation to (vi) in [28] above, this is not intended to represent a statement of the criminal law, but is designed to reflect the importance, which a capacitous person would understand, of not searching for such material, as it may have criminal content, and/or steering away from such material if accidentally encountered, rather than investigating further and/or disseminating such*

> *material. Counsel in this case cited from the Government Guidance on 'Indecent Images of Children' (see (ii) above). Whilst the Guidance does not refer to 'looking at' illegal images as such, a person should know that entering into this territory is extremely risky and may easily lead a person into a form of offending. This piece of information (in [28](vi)) is obviously more directly relevant to general internet use rather than communications by social media, but it is relevant to social media use as well.*

The irrelevant information

Importantly, Cobb J also considered whether to include in the list of relevant information that internet use may have a psychologically harmful impact on the user:

> *It is widely known that internet-use can be addictive; accessing legal but extreme pornography, radicalisation or sites displaying inter-personal violence, for instance, could cause the viewer to develop distorted views of healthy human relationships, and can be compulsive. Such sites could cause the viewer distress. I take the view that many capacitous internet users do not specifically consider this risk, or if they do, they are indifferent to this risk. I do not therefore regard it as appropriate to include this in the list of information relevant to the decision on a test of capacity under section 3 MCA 2005 .*

The application of the tests

Cobb J held, as a final declaration in *Mr A*'s case, and on an interim basis pending the taking practicable help to enable the gaining of capacity in *Ms B*'s case, that both lacked the material decision-making capacity.

Wider matters

In *Ms B's* case, Cobb J also usefully reiterated the tests (and relevant information) in relation to residence, care, contact and sexual relations. He also (earlier in his judgment) offered these interesting general observations:

> *19. General observations : In reviewing the capacity questions engaged here, I have reminded myself of the importance of establishing the causative nexus between the impairment of mind and the inability to make decisions. In this regard, counsel has rightly focused, when testing the evidence and making submissions, on the extent to which Miss B is influenced in her decision making by others – notably her father and/or Mr. C. Undoubtedly both men do exercise an influence over her; I was told (though make no finding) that her father can be abusive to her, verbally, and imposes boundaries on her which she finds unwelcome, whereas Mr C is persistent, and it may be thought controlling through his continual communications with her via social media (generally WhatsApp). I am satisfied that influence is a factor, but I share the view of Dr. Rippon that it is not actually operative on her decision making, and is in any event not more significant than the clearer evidence about impairment of the mind (Parker J in NCC v PB & TB [2014] EWCOP 14 at [86]).*

> *20. While there is some logicality to the strict decision-specific approach* […]*, there is also some artificiality around the results. This case has revealed for me, once again, some of the anomalies of the required and disciplined approach in cases concerning capacity: thus, it will be shown that Miss B will be assessed as having capacity to decide on residence, but not her care (even if her proposed favoured residence is with someone who palpably will not care appropriately for her); she may have capacity to consent to sexual relations, but not have capacity to decide with whom to have those relations, or indeed any form of contact. That is the law which I must apply.*

Comment

These cases make absolutely clear how capacity assessment can be determined not just by application of the 'functional' test in the MCA, but by the two precursor steps of identifying the decision and the (ir)relevant information to that decision. Those two choices can make a radical difference in the process of determining whether, ultimately, the individual's choices are going to be afforded legal respect. In this case, it is of no little interest or importance that Cobb J reminded himself in *Re A* at the outset of the gravity of this task, and, in so doing, directed himself by reference by the CRPD, giving in the process a useful summary of the 'state of the art' in relation to the correct approach to take:

> *While the UNCRPD remains currently an undomesticated international instrument, and therefore of no direct effect (see Lord Bingham in A v Secretary of State for the Home Department [2005] UKHL 71; [2006] 2 AC 221 at [27]), it nonetheless provides a useful framework to address the rights of persons with disabilities. By ratifying the UNCRPD (as the UK has done) this jurisdiction has undertaken that, wherever possible, its laws will conform to the norms and values which the UNCRPD enshrines: AH v West London MHT [2011] UKUT 74 (AAC); [16] (See R(Davey) v Oxfordshire CC & others [2017] EWCA Civ 1308 at [62], and Mathieson v SS for Work and Pensions [2015] UKSC 47, [2015] 1 WLR 3250 at [32]). I am satisfied that I should interpret and apply the domestic mental capacity legislation in a way which is consistent with the obligations undertaken by the UK under the UNCRPD.*

Cobb J was acutely aware of the balance that he was seeking to strike by his choice of the relevant information (and irrelevant information) going into the mix in relation to the assessment of capacity to make decisions about social media and the internet. Even if one may take a different view of the information to put into the mix, the transparent process by which he reached and accounted for his decision is both of practical importance to front-line practitioners seeking to grapple with these cases, and also to allow wider society to understand the basis upon which such decisions are reached.

Where does the inherent jurisdiction end (2)?

Southend-on-Sea Borough Council v Meyers [2019] EWHC 399 (Fam) (Hayden J)

Article 5 – deprivation of liberty – CoP jurisdiction and powers – interaction with inherent jurisdiction

Summary[2]

This is the follow up to the permission decision of Baker LJ reported as *Re BF*, and represents the substantive hearing of the application before Hayden J for declarations from the local authority that they had discharged their obligations to the man in question, now identified as Ronald Meyers, under the Care Act 2014 and Human Rights Act 1998.

The factual background to the case can be found in our previous report, but in short terms the dilemma before the court was what, if anything, could be done to secure the interests of a 97 year old man with physical disabilities who was determined to live with his son in deeply squalid conditions in the father's home.

Hayden J was satisfied that Mr Meyers "*was entirely capable of and has the capacity (within the definition of the Mental Capacity Act 2005) for determining where he wishes to reside and with whom*." Hayden J also made clear that he did not consider that Mr Meyers was vulnerable so as to bring him within the ambit of the inherent jurisdiction merely because he was blind, and he was clear that Mr Meyers did not satisfy the criteria of being of "unsound mind" so as to bring him within the scope of Article 5(1)(e) were his circumstances to amount to a deprivation of his liberty.

Normally, this set of conclusions would suggest that no court could intervene, and that any choices that Mr Meyers made, no matter how apparently unwise, would have to be respected. Hayden J, however, considered that Mr Meyers' son, KF:

> *41* [..]*… is needy, irrational, frequently out of control as well as manifestly emotionally dependent on a father who, despite the alarming history of this case, he obviously loves. KF's influence on his father is insidious and pervasive. It triggers Mr Meyers's sense of duty, guilt, love and responsibility. These, in my assessment, are pronounced facets of Mr Meyers's character, reflected in a different way in his sense of duty, love for his country and pride in his medals. In this particular context however, these admirable features of his personality have become confused and distorted in a relationship in which the two men have become so enmeshed that the autonomy of each has been compromised. In reality, KF exerts an influence over his father which is malign in its effect if not in its intention. The consequence is to disable Mr Meyers from making a truly informed decision which impacts directly on his health and survival.*
>
> *42. I am profoundly sympathetic not only to Mr Meyers's challenging circumstances but to his eloquent assertion of his right to take his own decisions, even though objectively they may be regarded as foolhardy. As I emphasised in Redbridge London Borough Council v SNA* [2015] EWHC 2140 (Fam)], *I instinctively recoil from intervening in the decision making of a capacitious adult. However well motivated the State may be in seeking, paternalistically, to protect people from their own unwise decisions, it is a dangerous course which has the potential to threaten fundamental rights and freedoms. Again, as I said in Redbridge London Borough Council v A, the inherent jurisdiction is not ubiquitous and should be utilised sparingly. Here Mr Meyers' life requires to be protected and I*

[2] Katie having been acted for the local authority, she has not contributed to this report.

> *consider that, ultimately, the State has an obligation to do so. Additionally, it is important to recognise that the treatment of Mr Meyers has not merely been neglectful but abusive and corrosive of his dignity. To the extent that the Court's decision encroaches on Mr Meyers' personal autonomy it is, I believe, a justified and proportionate intervention. The preservation of a human life will always weigh heavily when evaluating issues of this kind.*

Hayden J therefore required an order to be drawn up to reflect the objective that:

> *45.* […] *Mr Meyers be prevented from living with his son, either in the bungalow* or *in alternative accommodation. I do not compel him to reside in any other place or otherwise limit with whom he should live. For the avoidance of any doubt, Mr Meyers may live in his own bungalow, with an appropriate package of supportive care, conditional upon his son's exclusion from the property. This, to my mind, is the desirable outcome to this case. In this way I restrict Mr Meyers's autonomy only to the degree that is necessary to protect him, a measure which I have concluded is a proportionate interference with his Article 8 rights. As I have analysed above, it is the dysfunctional relationship between Mr Meyers and his son that serves to occlude his decision-making processes, concerning where and with whom he should live. The real issue is whether the framework of an order, giving effect to this, constitutes a deprivation of liberty at all. I am clear it does not.*

Although Counsel for the parties had agreed in the hearing with this proposition, they had both reconsidered and had subsequently contended such an order would give rise to a deprivation of Mr Meyer's liberty. Hayden J, however, held that:

> *56. Properly analysed, the ambition here is not to confine Mr Meyers to the Care Home, but to protect him from the grave danger that living in the bungalow with his son has already been demonstrated to represent. To safeguard him, by invoking the inherent jurisdiction of the High Court, it is necessary to restrict the scope and ambit of his choices, not his liberty. It is important to highlight that there remain a range of options open to him. The impact of the Court's intervention is to limit Mr Meyers's accommodation options but it does not deprive of his physical liberty which is the essence of the right guaranteed by Article 5.*
>
> *57. It is also necessary to restrict the extent of Mr Meyers's contact with his son in order to keep him safe. I am bound to say that I do not see that this should represent an insuperable challenge, even anticipating, as I do, that Mr Meyers may not cooperate. To the extent that this interferes with his Article 8 rights it is, again as I have indicated above, a necessary and proportionate intervention. I propose that the Order should be drafted in terms which provide for these restrictions.*

Hayden J refused to make the declarations sought by the local authority that it had discharged its responsibilities towards Mr Meyers. He did not then prescribe what the local authority should do, although noted that he considered that the ideal solution would be "*for Mr Meyers to return to his bungalow with a suitable package of support, his son having been excluded from the property. I should hope that the Local Authority will endeavour, within the framework of appropriate injunctive relief, to make provision for contact between Mr Meyers and his son.*"

Comment

All the comments that we made in relation to the *BF* judgment stand in relation to the final judgment in this case, although (on its face) the judgment looks even more like a case of 'be careful what you wish for' in relation to disability-neutral approaches to intervention predicated upon vulnerability. In practical terms:

- The judgment is a stark reminder that reliance upon the presumption of capacity and the "right" of individuals to make unwise decisions[3] cannot, in and of itself, discharge public bodies of their safeguarding obligations, especially where they may be charged with the positive duty under Article 2 ECHR to take practicable steps to secure that person's life;
- Further than that, the judgment is a reminder that, especially where life is at risk, local authorities are under an obligation not merely to investigate, but also to take action, which may include seeking the authority of the court to carry out draconian interventions;
- Although intended to be facilitative, rather than dictatorial, in its approach, the great safety net of the inherent jurisdiction is capable of "facilitating" a vulnerable adult to move in one direction, by removing all other available choices; and
- Necessity and proportionality seem to be the guiding principles in the exercise of this jurisdictional hinterland, rather than any pretense of best interests or will and preferences.

As to Article 5 ECHR, we presume that Hayden J took the view that there was no deprivation of liberty whereas Baker LJ had proceeded on the basis that there had been because the order as it stood before Baker LJ had required Mr Meyers to live at the care home, whereas Hayden J was seeking to bring about a restriction in the choices available to Mr Meyers rather that confining him to a particular location. We note that, had this case come before Sir James Munby, he might have taken a somewhat different view as to whether Mr Meyers would be deprived of his liberty by virtue of the order to be made by Hayden J. In *JE v DE* [2006] EWHC 3459 (Fam), in the long ago days of 2006, he observed in relation to a submission that a local authority:

> *"… [had] no objection in principle to DE living elsewhere than at the Y home, for instance either with his daughter or in some other residential establishment. That may be, but it wholly fails to meet the charge that he is being "deprived of his liberty" by being prevented from returning to live where he wants and with those he chooses to live with, in other words at home and with JE."*

Finally, those following the Government's intention to introduce a domestic abuse bill may want to test the facts of this case against the scope of that bill, because it would, on its face, potentially fall within them (the bill, importantly, making clear that domestic abuse can be perpetrated by adult children upon

[3] There is no such right, at least to be spelled out of the MCA: the MCA, rather, provides a person cannot be taken to be unable to make a decision merely because they make an unwise decision. That the decision is unwise may well be a trigger to investigating whether, in fact, they have capacity to do so.

their parents as they are 'personally connected'). It is perhaps striking, one may think, that there is no suggestion in the context of that bill that orders could ever be made against the victim of abuse, as opposed to the perpetrator.

Ceilings of care and best interests

University Hospitals Birmingham NHS Foundation Trust v HB [2018] EWCOP 39 (Keehan J)

Best interests – medical treatment

Summary[4]

HB, a 61-year-old mother of 8 with a significant history of diabetes and chronic kidney disease suffered a cardiac arrest in July 2018. Six weeks after her collapse, the treating Hospital trust brought an application to court, in essence, for confirmation that their proposed ceiling of care was lawful and in HB's best interests.

HB had suffered an irreversible brain injury and was diagnosed as being in a vegetative state, but not a persistent vegetative state given the shortness of time since her injury. The applicant Hospital Trust proposed downsizing her tracheotomy, removing her arterial and intravenous lines, transferring her to a respiratory ward and providing her with ongoing nursing care including the administration of nutrition hydration and medication via NG tube: "Part 1" of the treatment. It sought a declaration, however, that the proposed "Part 2" of her treatment plan, being more active resuscitative care in the form of CPR, renal replacement therapy, vasoactive drugs, ventilation and a potential transfer back to ITU, would not in HB's best interests.

HB's 8 children, represented by her daughter and attorney FB and the Official Solicitor on HB's behalf, agreed with Part 1, but opposed the declaration sought in relation to Part 2.

Keehan J heard telephone evidence from, among others, Dr Chris Danbury, a consultant intensivist as expert instructed by the Official Solicitor, and from HB's daughter FB. Keehan J heard that HB's husband had died of a heart attack 12 years previously and that his death had had a significant impact on HB and her children. Further, he heard that that FB had been appointed as HB's attorney for health and welfare and that she and her mother had discussed HB's wishes and feeling in the context of a previous hospital admission. FB gave evidence that HB was a practising Muslim and would wish all possible steps to be taken to keep her alive.

Dr Danbury gave evidence to the effect that it was simply too early to tell what HB's prognosis might be. He noted that she had suffered a very serious brain injury and her prognosis was poor but that if ten patients were placed before him with the same injury in the same timeframe, he would be unable to predict which of them would make no recovery whatsoever and which of them would make some

[4] Note, this decision was reached in October 2018, but did not appear on Bailii until February 2019.

recovery from their current condition. Dr Danbury did not support the Trust's application in relation to Part 2.

Keehan J's conclusions bear setting out in full:

> *32. When considering what is in HB's best interests, I take account of the fact that the balance of medical evidence would support the view that the treatment set out in the second part of the treatment plan would bring about no significant improvement in HB's underlying condition and, to that end, they might be seen as futile. I accept that those treatments set out in part 2 of the treatment plan numbers (1) to (6) would be burdensome treatments for her to receive because they are either invasive or, in the case of cardiopulmonary resuscitation, it is a violent treatment.*
>
> *33. Against that, I have to balance the very clear wishes, expressed by HB to her daughter, that she would want all steps taken to preserve her life and, as Professor of Critical Care Medicine mentioned at the best interests meeting, even if that meant that further continued physical incapacity, or indeed a lack of mental capacity.*
>
> *34. I am satisfied, within the meaning of the 2005 Act, that HB does not have the capacity to make decisions about her medical treatment. I accept that the quality of the care given by the Trust staff, both clinicians and nursing staff, has been of an excellent quality. I accept that the Trust, the clinical team, have taken all proper steps in their analysis of HB's needs and, indeed, seeking second opinions from Professor of Intensive Care Medical and Professor of Neurology. However, I accept the evidence of Dr Danbury that it is too early at this stage, just six weeks and two days post the cardiac arrest, to be clear as to whether HB will achieve any improvement in her neurological condition or not.*
>
> *35. Where it is not clear whether HB will make an improvement in her neurological condition, it is, in my judgment, contrary to her best interests and premature to rule out the treatments set out in Part 2 of the updated treatment plan, numbers (2) to (6). In relation to number (1), that is cardiopulmonary resuscitation, this, Mr McKendrick QC tells me on behalf of the Trust, is the particular treatment that causes most concern to the medical staff. I have carefully reflected and considered whether it would be in her best interests for her not to receive CPR should she suffer a collapse or further cardiac arrest. Mr McKendrick submits that it would not be in HB's best interests that the potentially last moments of her life were lived with her undergoing the violent and invasive procedures necessary in providing CPR, that it would be a traumatic scene for her children to witness in her final moments.*
>
> *36. I entirely accept those submissions and the force in them, but key to the decision must be the wishes and feelings of HB and it is plain that administering CPR in the event of a further collapse and giving her, albeit a very, very small chance of life, is what she would wish. In my judgment, at the moment, it remains in her best interests for that treatment to be provided to her. I entirely accept that there will undoubtedly come a time when such treatments would no longer be in her best interests but I am entirely satisfied that that stage has not been reached yet.*

Comment

Keehan J's judgment does appear at first blush significantly to privilege the view of P over a more

objective assessment of medical opinion but the facts of this case appear very much to have been driven by the shortness of time since HB's injury and the evidence of Dr Danbury as to what her prognosis might be.

In its emphasis upon what HB would have wanted, the case is a powerful example of the post-*Aintree* approach to best interests decision-making in the medical field. One suspects that the clinicians may have felt more than a little discomforted at the conclusion that administering CPR would be in HB's best interests on the facts of the case. It is crucial to be clear, however, that they were not being ordered to provide it (and nor could they be: see *Aintree* at para 18). They had come to court to ask it to confirm that certain treatments were in HB's best interests, and certain treatments were not: that approach, in and of itself, gave rise to the possibility that the decision-maker (the court) would take a different view.

Short note: treatment withdrawal and the courts post *NHS Trust v Y*

In *SS v CCG & Anor* [2018] EWCOP 40, decided in October 2018, but not appearing on Bailii until March 2019, Newton J had to consider whether CANH should be withdrawn from a Muslim woman in a PVS. As Newton J noted:

> *There is a broad consensus that it is no longer in B's best interests for CANH to be continued, but nonetheless, I should and will review those issues later in this judgment. The application is supported by B's husband. It is supported by the treating doctors and the nursing staff. There has been some equivocation in respect of some family members, although that position was clarified as recently as 17 October by B's husband. There is in fact no active objection before the court. In those circumstances, it seemed to me as a matter of kindness and dignity that I should decide the case on submissions. No-one sought for evidence to be called and none was necessary. The circumstances are desperately sad.*

Decided after *NHS Trust v Y*, which made clear that applications are not required where a robust best interests decision-making process (following the relevant guidance[5]) leads to a clear agreement as to where the person's best interests lie, this is a good example of a case in which there was not sufficient unanimity, at least the outset, warranting an application to secure P's rights. It also shows how it is possible for such applications to be resolved on submissions alone without the need for evidence.

[5] Now the BMA/RCP guidance (endorsed by the GMC) available here.

PRACTICE AND PROCEDURE

Brexit contingency planning in the Court of Protection

At the time of writing, we are days away from "exit day" which is currently set for 29 March 2019.

In preparation, and in the event of "no deal Brexit", a draft statutory instrument in the form of the Family Procedure Rules 2010 and Court of Protection Rules 2017 (Amendment) (EU Exit) Regulations 2019 has been prepared to make amendments to provisions in the FPR and COPR which relates to powers, processes and ordered under EU instruments or international agreement which will no longer be applicable after exit day.

The vast majority of the amendments are to the FPR in which EU instruments (such as Brussels IIa) feature more heavily than in the COPR. The amendments to the COPR 2017 are contained in Part 3 of Regulations and are rather more limited. Essentially, the provisions in the COPR relating to service of documents and taking of evidence under the Service Regulation (Council Regulation (EC) No. 1393/2007) and Taking of Evidence Regulation (Council Regulation (EC) No. 1206/2001) respectively will no longer apply. Certain transitional and saving provisions are made for documents were the relevant process was commended but not completed by exit day.

Beyond exit day, and whatever happens in relation to the EU, the general provisions in the COPR 2017 for service of a document outside of the jurisdiction (COPR 2017 rule 6.14) and taking evidence outside of the jurisdiction (COPR 2017 rule 14.23) will continue to apply. Furthermore, the practice and procedure under other international instruments, particularly the Hague Convention on the International Protection of Adults 2000, as incorporated into domestic law in Schedule 3 of the Mental Capacity Act 2005, will remain unaffected.

The need for careful scrutiny – summary disposal of s.21A applications

CB v Medway Council & Anor [2019 EWCOP 5 (Hayden J)

Article 5 – DoLS authorisations

Summary

This unusual appeal against dismissal of a s.21A application clarifies the (very limited) circumstances under which it could ever been appropriate to dismiss such applications on a summary basis.

The underlying case concerned a 91 year old woman CB who did not like living in a care home and wished to return to her own home with a package of care. This was an arrangement that had been tried previously, including by way of 24-hour live-in care, but which had broken down. A s.49 report was prepared during the proceedings which concluded that CB lacked capacity by reason of dementia to make the relevant decisions about where she lived and what care she received. The consultant

psychiatrist also opined, not having been asked nor having been provided with all the relevant evidence, that CB required 24 hour care which was likely to be best provided in a care home.

HHJ Backhouse had previously made typical directions requiring the local authority to file evidence about the likely package of care at home that could be put in place - CB having assets in the region of £2.5million and thus being able to afford substantially more care than the standard 4 daily visits usually offered by a statutory body. At a round table meeting before the hearing in respect of which the appeal was brought, the local authority and CB's representatives agreed that further investigations about the potential home care package would be made and a proper best interests analysis carried out by the local authority. An application was made to vacate the hearing so that these agreed steps could be taken. The court refused to adjourn the hearing, the judge wanting to hear from CB's nephew (who had not been party to the agreed plan) and raising a query about some of the further evidence that was to be obtained.

At the hearing, HHJ Backhouse heard directly from CM, who described the serious problems that had arisen the last time care at home had been attempted. Despite not having indicated to the parties that the judge was considering summary disposal, during an ex tempore judgment, HHJ Backhouse decided that the application would be dismissed, saying:

> *The Official Solicitor is saying that as part of a belt and braces exercise, the court ought to see if it is possible for CB to go home as she would like to and in that sense, it would be in her best interests. It might be a less restrictive environment, although she would still have to be subject to restrictions on her liberty to prevent her wandering. 19. However, this is not the usual case which the court often sees where a return home with a live-in care package has not previously been tried and needs to be explored. In this case, such a privately funded package has been tried. If she returns home, there is a real risk the she will again not be properly cared for and will become aggressive or agitated, which carers will find very difficult to manage. ….22. All the evidence is that the care home is appropriate to meet her needs, and, indeed, CM says it is a very caring environment for her. Therefore, while I hear what the official solicitor says , I do not think that it is proportionate to make this Local Authority spend the time and cost of going through a balancing exercise which will tell me what I already know in terms of the difficulties, risks and cost of a package of care at home. In my judgment, the evidence is already there to show that the risks of returning home outweigh the benefits to CB of such a return. It is in CB's best interests to remain where she is, properly looked after and safe.*

The Official Solicitor appealed on behalf of CB. The local authority took a neutral stance. Hayden J allowed the appeal, deciding that:

1. The judge had been right not to vacate the hearing. CB had been in the care home for some 14 months.

> *I cannot see how the timescales taken to address these issues can possibly be reconciled with CB's own timescales. It is axiomatic that at 91 years of age CB does not have time on her side. Moreover, I feel constrained to say, that which I have already stated in several cases, delay is invariably inimical to P's welfare. Timetabling and case management must focus on a sensible*

> *and proportionate evaluation of P's interests and not become driven by the exigencies of the litigation. Whilst the Mental Capacity Act does not have incorporated in to it the imperative to avoid delay in the way that the Children Act 1989 does, the principle is nonetheless embraced by the Court of Protection Rules, which require the application of the "overriding objective". In any event the avoidance of delay is a facet of CB's Article 6 and Article 8 rights."*

2. In some cases, the possibility of giving summary judgment was a useful power that could avoid harm to P. However, notwithstanding these considerations, in CB's case HHJ Backhouse had gone beyond what was permissible. While it was theoretically possible that summary disposal might be appropriate in a case engaging Article 5, it was difficult to think of a factual scenario in which that would apply. In CB's case, "*what began as vigorous and robust case management tipped over...into summary disposal that* [was] *essentially unfair*." In particular, there had been no oral evidence and no opportunity for the Official Solicitor to cross-examine the author of the s.49 report or the attorney. "*Scepticism and 'doubt'* [about the prospects of success of a home care package] *is not sufficient to discount a proper enquiry in to such a fundamental issue of individual liberty*." Further, "*curtailing, restricting or depriving any adult of such a fundamental freedom will always require cogent evidence and proper enquiry. I cannot envisage any circumstances where it would be right to determine such issues on the basis of speculation and general experience in other cases*."

Comment

As the then-President, Sir Nicholas Wall, had observed in 2011 upon being invited summarily to dispose of a s.21 application that appeared on its face to be hopeless:

> *the Act has laid down stringent conditions for the deprivation of liberty, and that the court cannot simply act as a rubber stamp, however beneficial the arrangements may appear to be for the individual concerned. In the instant case, A wishes to challenge the authorisation, which deprives him of his liberty. Parliament has decreed that he should be entitled to do so, and has created safeguards to protect those deprived of their liberty against arbitrary action.*
>
> *A v A Local Authority* [2011] EWCOP 727 at para 15

For those who had forgotten this key message, this new case is a very helpful illustration of the seriousness with which Article 5 rights must be considered by the Court of Protection. It is common for P to seek less restrictive care arrangements or a return home even though the professional advice does not support P's wishes. Even where there have been failed attempts in the past, it does not follow automatically that further attempts should not be made, and it is not appropriate for parties or the court to deal with matters on a summary basis without full and proper investigation and consideration of the options.

All this should, however, be carried out in a timescale that is proportionate – where P objectd to the arrangements for his or her care or treatment, it cannot be right that 14 months later the court was still

not in a position to determine matters. The reasons for the delay in this case are not apparent from the report, but was no doubt comprised of one or more of the following familiar features:

1. the initial DOLS authorisation being granted for a short period of say one or two months to allow alternative care planning to take place and the issue to be reconsidered;
2. when that does not result in any change to P's circumstances, a delay in applying to the court (particularly if the RPR is a person who supports the deprivation of liberty;
3. 8 weeks or more elapsing from the date of application to the obtaining of a s.49 report;
4. long delays in getting adequate alternative care plans prepared by the local authority, particularly where P is self-funding and so options other than a standard domiciliary care package can and should be investigated.

Short note: s.49 reports

We routinely get inquiries (often of the distinctively aggrieved variety) from public bodies, especially NHS trusts, asking whether they have to comply with directions for s.49 reports. The short answer is:

1. Yes, they do: see the decision in *RS v LCC & Ors* [2015] EWCOP 56, in which DJ Bellamy rejected on the facts of that case a number of the conventional reasons advanced not to comply with a request; but
2. Those seeking s.49 reports, and the court, should comply with the s.49 reports Practice Direction (14E), which is intended to make sure that appropriate requests are appropriately directed; and
3. Systemic "over-use" of s.49 in relation to any given NHS Trust is exactly the sort of thing which should be raised with the regional hub lead judge.

The inquiries that we receive really reflect the spreading thin of resource around the system now it is very much more difficult to instruct an independent expert, so the cost is being moved from the Legal Aid Agency to NHS bodies. In this context, we found it difficult not to raise our eyebrows when we read in the impact assessment accompanying the LPS that the expectation is that GPs will provide medical assessments for purposes of LPS authorisations without charge: see here at p11, para 8.6.

A delicate line – litigation friends and P asserting litigation capacity

DM v Dorset County Council [2019 EWCOP 4 (Roberts J)

Mental capacity – litigation

Summary[6]

[6] Simon having acted for Dorset, he has not contributed to this report.

This is a (relatively) rare decision about capacity to conduct proceedings. It concerns an application for permission to appeal a determination of HHJ Dancey that a man, DM, lacked capacity to conduct proceedings as to whether a property and affairs deputy should be appointed for him. Having heard evidence from a special visitor who had reported pursuant to s.49 MCA 2005, HHJ Dancey had declared himself satisfied that DM:

> *2.* […] *lacked capacity to litigate on his own account in the context of these ongoing proceedings because he was suffering from an impairment of, or disturbance in, the functioning of his mind or brain arising out of a persistent delusional disorder, as diagnosed by Dr Barker. The judge's principal concern, as explained in his judgment, was DM's inability to use and weigh information in the context of decision-making. The judge specifically identified what he perceived as an incapacity to engage in the overall decision-making process inherent in the litigation in terms of DM's lack of ability to see the various aspects of the arguments and to relate the one to the other in a rational and considered manner.*

The rather complex procedural history of the case reveals one important feature noted by Counsel then acting (via his litigation friend) for DM at the hearing before HHJ Dancey:

> *The appointment of a litigation friend where P asserts that he has capacity to conduct proceedings and no final determination of litigation capacity has been made is unusual, and the role of that litigation friend at a hearing which will determine that sole issue is therefore complex.*

At the hearing at which the court determined that DM lacked capacity to conduct the proceedings, his litigation friend had made clear that he:

> [Has] *come to the conclusion that he cannot advance that positive case [i.e. that DM has capacity to conduct these proceedings without the imposition of a litigation friend]; does not consider that he can or should advance a positive case contrary to the one which [DM] wishes: if his appointment is upheld, he will have an ongoing duty to present [DM's] case fairly and it will as a practical matter be harder to secure any engagement with [DM] if he feels those acting for him have already acted against him over this issue."*

Not least as DM then sought to bring his own appeal, acting in person, against the determination that he lacked litigation capacity, his litigation friend then felt sufficiently compromised that he did not wish to continue in the role. Although he had not formally been removed from the court record, the Official Solicitor was then invited to take over the role. The Official Solicitor made a similar evaluation of the position to the former litigation friend, and confirmed that no positive case could be advanced on DM's behalf in support of DM's application.

On the facts of the case, Roberts J had little hesitation in finding that there was no prospect of overturning the decision of HHJ Dancey (and indeed certifying the application as entirely without merit). Although DM was a highly intelligent and articulate individual, who had for many years had a successful practice as a solicitor in a London law form, it was clear (for reasons that we do not

reproduce here as we see no reason to share more details of his life than necessary) that he suffered from persistent delusional disorder rendering him incapable of using and weighing the information necessary to conducting proceedings.

Comment

Roberts J did not directly comment upon the approach that was taken by DM's litigation friend and then the Official Solicitor, but appears implicitly to have endorsed it. We suggest that this must be the only appropriate approach that can be adopted where the individual concerned wishes to maintain that they have capacity to conduct proceedings, but the litigation friend genuinely believes that they do not.[7]

On a nerdy procedural point, it is not obvious on the face of the judgment why Roberts J felt that she was governed by the CPR in terms of the test to apply for permission to appeal or the making of anonymity orders, as both of these are matters covered within the Court of Protection Rules 2017 (in the case of the former, COPR r.20.8).

OPG Mediation Pilot

The OPG issued an update on their mediation pilot scheme which can be seen here.

The pilot is for use in cases where there is an LPA or an EPA in place. OPG investigators initiate the mediation in disputes which have not reached the court. The OPG is bearing the cost of the mediation (including the cost of the independent mediator).

The rationale for the pilot is to investigate whether mediation can:

1. ensure issues are addressed in the best interests of the vulnerable person;
2. be potentially cheaper than going to the court of protection;
3. help ensure the current attorney or deputy can retain their responsibilities
4. offer more flexibility to OPG investigators or
5. prevent further concerns coming to OPG

The aim is to test if an OPG mediation service can reduce any risks to donors resulting from poor family dynamics

[7] See, for further discussion of what litigation friends can and should do, the article by Alex, Neil and Peter Bartlett on Litigation Friends or Foes? Representation of 'P' before the Court of Protection.

So far 20 cases have been sent for mediation. The pilot is to be extended until the summer of 2019. If the results of the evaluation suggest that the OPG could offer a meaningful mediation service, they would look to procure a long-term service.

Updated precedent orders

Ahead of the publication of the third edition of the LAG Court of Protection Handbook, and with the assistance (very gratefully received by Alex!) of Hannah Nicholas of Hill Dickinson, the precedent orders on the Court of Protection Handbook website have had a spring-clean, and are now entirely up-to-date as regards references to the Court of Protection Rules 2017. In some cases, notably the transparency order, they are more up-to-date than the model order on the Judiciary website, which still refers (wrongly) to the transparency pilot.

Short note: missing persons guardianship

We had understood that the Court of Protection would be charged with responsibility for appointing guardians for missing persons under the Guardianship (Missing Persons) Act 2017. In fact, Lord Chancellor, following the required statutory consultation with the Lord Chief Justice, has confirmed that applications are to be made to the High Court – for the details as given in Parliament on 12 February 2019, see here.

Understanding Courts

On 25 January 2019 JUSTICE, the law reform and human rights NGO launched its latest report, *Understanding Courts*, produced by a working party chaired by Sir Nicholas Blake.

The problem

In circumstances where many lay users of courts and tribunals find themselves unrepresented as a result of cuts to legal aid, there is mounting evidence of a "*disconnection between professionals and lay users in court, with the at-times chaotic nature of proceedings creating a culture that marginalises the public using our courts*." Put more strongly, "*there are repeated examples of lay people being confused, distressed and overwhelmed by how our justice system operates*."

The Report makes a compelling argument that this problem undermines the rule of law:

> [a]*ny… legal system may only claim to be effective, and thereby legitimate, if it is designed in a way which allows for the participation of lay people, whether they are victim, witness, juror, defendant or litigant, or someone attending court to observe. A lay person must be able to understand the court processes and the language and questioning of the legal professionals working within it.*

As such, the Report examines ways in which lay users of the courts can be relocated to the centre of the process and therefore feel, even if they disagree with the substantive outcome, that the system has treated them fairly and allowed them to have their say.

Vulnerability of users

In order to identify ways in which court users could be better supported, the Report first considers users' vulnerabilities. Importantly, the Report identifies as a starting point that "*everyone is inherently vulnerable when faced with a legal problem, whether represented or not*." The Report goes to identify more specific – but not uncommon – vulnerabilities such as unrepresented people left to navigate the legal system alone when their opponent is a lawyer. Further difficulties arise for those with a disabilities. While, the disabled already benefit from protection under the Equality Act 2010, in theory at least, it is clear that much more could be done to support this group.

The Report also stresses that court users are not limited to the parties themselves. Rather, witnesses and observers also need to be catered for. In the authors' experience this is especially relevant in Court of Protection matters where often it is not only P that has additional vulnerabilities but also P's family and friends. Clearly, for justice to be served it is vital that careful consideration is given to facilitating the participation and understanding of all of these court users, not just P.

The recommendations

The Report acknowledges that significant attempts have been made in recent years to demystify the court process. Nonetheless, these efforts are said to be piecemeal and targeted at certain categories of lay users. Instead, the Report argues that "*a change in approach is required by HMCTS, lawmakers and court professionals to place all lay users at the heart of legal process, so that every effort is taken to enable lay people – according to their role – to understand and take part in legal process*."

In an effort to achieve this the Report makes 41 recommendations structured around three broad themes:

1. Understanding the process at courts and tribunals: before, during and after a hearing and the way that hearings are organised, managed and conducted by professional court users;

2. Communicating effectively with lay users, in the language court professionals adopt, the manner of evidence taking, and by adjusting legal professional culture through training and self-regulation; and

3. Providing consistent support and making reasonable adjustments to enable lay users to give their best evidence and make their arguments.

To achieve this the Report advises: informing lay people about what will happen at their hearing through advance information provided in different modes; court professionals adapting their approach to recognise that lay people should be their main focus; case management that checks for and assists understanding; the use of plain English instead of legal jargon and confusing modes of address; a change in culture that is more inclusive, appropriate adaptations to facilitate participation for children and those with disabilities; and, support for all users who need it.

As the report acknowledges, some of these much needed changes can come about by way of conscientious effort by legal professionals and the judiciary. A good example of this is recommendation 16 (which many practitioners would no doubt argue represents best practice in any event):

> *Advocates in all jurisdictions should make sufficient time for introductions to significant witnesses and lay parties, as this is an important way of facilitating participation. Similarly, judges should introduce themselves to significant witnesses, particularly where they are or may be vulnerable, in order to get a sense of the vulnerabilities that may exist and how they can best to accommodated*

In contrast, other recommendations are more ambitious since they require direction and funding from Government. For example, recommendation 2 would prove particularly helpful but, one fears, is unlikely to be implemented for the foreseeable future:

> *HMCTS should provide one central source, promoted to appear as the top result when a user types key words, such as 'going to court', into a search engine. The source may be hosted on gov.uk webpages also built according to Government Digital Service principles, which aim to provide user-centric platforms. However, it should have a different look and feel to emphasise constitutional independence from Government departments against which people are bringing or defending claims.*

Conclusion

While the Report undoubtedly constitutes valuable research and real efforts should be made, by practitioners and Government, to implement its recommendations, there is no escaping the fact that cuts to legal aid are responsible for a great number of the difficulties faced by vulnerable lay people trying to navigate our court system. While improved provision of information and court support will mitigate some of these problems, they are not a panacea. The reality is that access to justice, particularly for those with additional vulnerabilities, requires legal representation.

THE WIDER CONTEXT

Capacity, minors and presumptions

R (on the application of JS, SJ, SS and NL) v Secretary of State for the Home [2019] UKUT 64 (IAC) Upper Tribunal (IAC) (Lane J, Upper Tribunal Judge Rintoul, Upper Tribunal Judge Rimington)

Litigation friend - other

Summary

The applicants in this case were all minors who had issued applications for judicial review in the Upper Tribunal. The absence of any provisions in the Tribunal Procedure (Upper Tribunal) Rules 2008 and practice directions regarding the use of litigation friends in judicial review proceedings before the Upper Tribunal meant that there was a degree of uncertainty when an application for immigration judicial review was made in respect of a child without a litigation friend. The Lord Chancellor was joined as an interested party so that the Tribunal could give general guidance on whether a litigation friend should be appointed.

The Tribunal recognised that "[i]*t is now firmly established that the Upper Tribunal has power to appoint a litigation friend and that, in certain circumstances, not to do so will amount to a breach of the common law principles of fairness and access to justice*" (para 70). Although the issue arose in the context of immigration judicial review proceedings, the Tribunal's general guidance is also relevant to statutory appeals in the Immigration and Asylum Chambers of both the First-tier Tribunal and the Upper Tribunal.

The Upper Tribunal gave general guidance as follows:

> *(1) Although all cases are fact-specific, the following general guidance represents the approach the Upper Tribunal is likely to adopt in deciding whether a child applicant in immigration judicial review proceedings requires a litigation friend to conduct proceedings on the child's behalf:*
>
> *(a) As a general matter, applicants aged 16 or 17 years, without any attendant vulnerability or special educational need or other characteristic denoting difficulty, will be presumed to have capacity and so be able to conduct proceedings in their own right. They will generally not require a litigation friend. This is the position even if they are not legally represented.*
>
> *(b) The appointment of litigation friends for applicants between the ages of 12 years and 15 years inclusive (i.e. 12 and over but younger than 16) needs to be considered on a case-by-case basis and the circumstances which should be considered, but which are not exhaustive, are:*
>
> *(i) whether the applicant is legally represented;*
>
> *(ii) whether there is an assisting parent;*
>
> *(iii) whether there is a local authority involved; and*

(iv) whether the applicant has any type of vulnerability.

(c) If an applicant in this age group is legally represented, the Tribunal will expect the representative specifically to address in writing the issue of whether, in the representative's view, a litigation friend is necessary, having regard to capacity and the position of any parent.

(d) Applicants under the age of 12 will normally require a litigation friend.

(2) The above approach is one that, as a general matter, should also be followed in appeal proceedings, whether in the First-tier Tribunal or the Upper Tribunal.

(3) In deciding who is to be a litigation friend in a particular case, the guiding principles, derived from the Civil Procedure Rules, are:

(a) can he or she fairly and competently conduct proceedings on behalf of the child?

(b) does he or she have an interest adverse to that of the child?

(4) For practical purposes, only one person should normally be nominated as a litigation friend. A parent of a child will often be the obvious choice but not the only option.

The Upper Tribunal also confirmed that the duty of the litigation friend is to (i) to act competently and diligently and (ii) to act in the best interests of (and without conflict with) the party for whom he is conducting proceedings.

Comment

At a practical level, the Upper Tribunal's general guidance is welcome – filling an obvious gap in the Tribunal Rules which make no provision for the appointment of a litigation friend. Although the guidance was only given in respect of minors (as all applicants in the case were under the age of 18), the judgment usefully confirms that the Upper Tribunal (and First-tier Tribunal) has the power to appoint a litigation friend and, we would suggest, there is no reason in principle why this power could not extend to appoint a litigation friend on behalf of an adult who lacked capacity to conduct proceedings. What remains to be seen are the practical consequences of the Tribunal's guidance. In relation to minors, the obvious candidate for litigation friend is the parent but this may not always be possible or appropriate. Drawing on the approach under the Civil Procedure Rules, the Tribunal noted that the Official Solicitor may act on behalf of a child if there is no one else to act. However, where it is sought to appoint the Official Solicitor as the litigation friend, "*provision must be made for payment of his charges*". Quite how the Official Solicitor's costs will be met in such circumstances is unclear, especially if there is a risk of adverse costs and, as ever, resources may well be a limiting factor.

More widely, it is interesting to note that the Upper Tribunal, untrammeled by procedural rules, took the view that they did not accept that a child had to have a litigation friend unless the court or tribunal

ordered otherwise, and was "emboldened" (at para 79) by the presumption of mental capacity in the MCA 2005 in relation to children aged 16 and 17. Indeed, in light of these observations, one might think it was, in fact, anomalous that none of the Civil Procedure Rules, the Court of Protection Rules or the Family Procedure Rules proceed on the basis of a presumption that a child aged 16 or 17 has the mental (and hence legal) capacity to give instructions.

Sexuality and capacity – new CQC guidance

At the end of February the CQC published guidance for care providers on relationships and sexuality in social care which aims to support care providers and their clients with building and maintaining emotional and sexual relationships.

The guidance considers how those who are provided with personal care can lose privacy during the provision of personal care and can become vulnerable. It acknowledges sexual expression as a "positive, natural human need"; that ignoring it can have a negative impact on physical and mental wellbeing. While noting – of course - that best interests decisions regarding sexual relations cannot be made on P's behalf the guidance looks at how those living with disabilities may be provided with support for the practicalities of engaging in an active sex life.

It suggests CQC inspectors should ask organisations whether they have a relationship and sexuality policy and should train staff to support people with their personal relationship needs. The CQC also give guidance as to the approach to adopt to assessing capacity (endorsing the same approach as set down in our capacity guide) drawing, most recently, on *LB Tower Hamlets v TB & Ors* [2014] EWCOP 53 and *LB Southwark v KA (Capacity to Marry)* [2016] EWCOP 20, which includes the requirement that the person can understand, retain, and use and weight the fact that they have the choice whether to have sex and can refuse and that they can change their mind in relation to consent to sex at any time leading up to and during the sexual act.

The second appendix to the report may be of particular interest to some care providers: it lists a number of useful resources aimed at facilitating intimacy and sexuality for those in adult social care.

Consultation on autism and learning disability training for health and social care staff

The Department of Health and Social Care is consulting as to how to ensure that health and social care staff have the right training to understand the needs of people with a learning disability and autistic people, and make reasonable adjustments to support them.

The consultation, which closes on 12 April, considers issues around the training and development staff need to better support people with a learning disability or autistic people.

Chief Coroner's Report

The Chief Coroner's Report to the Lord Chancellor for 2017-18 contains some interesting insights into

the effect of the changes introduced to the Coroners and Justice Act 2009 in 2017. It would appear that there were 3,866 DoLS deaths reported to the coroner in 2017. In other words, the fact that, since 3 April 2017, DoLS deaths are no longer automatically reportable has led to a 18% reduction in the number of inquests compared to 2016, as previously all such deaths required an inquest.

In this regard, some may be interested to note what the independent Review of the MHA 1983 had to say about 'deaths under DoLS':

> [f]*ollowing changes to the CJA introduced in 2017, someone who has died whilst subject to DoLS (or, in future, the Liberty Protection Safeguards) is not considered to have been in state detention for purposes of determining that there should be an investigation by a coroner, which means there is no automatic investigation of their death by the coroner. In many cases, this is entirely appropriate, it is simply wrong to consider the natural death of an elderly person in a care home a death in state detention for these purposes simply because they were subject to a DoLS authorisation. But in the case of those in a psychiatric hospital subject to DoLS (or, in future the LPS), it may be far more appropriate to think of them as being in state detention. We are not recommending further amendments to the CJA, but we do think that it is important that all relevant guidance (including from the Chief Coroner, but also the Mental Health Act Code of Practice) make it clear that in these circumstances it should be presumed that the individual is in state detention for purposes of triggering the duty for an investigation by a coroner.*

Voluntary psychiatric patients, suicide and the duty to protect – Strasbourg pronounces

Fernandes de Olivera v Portugal [2019] ECHR 106 European Court of Human Rights (Grand Chamber)

Article 2 ECHR – CRPD

Summary

The Grand Chamber of the European Court of Human Rights, in a majority decision, has identified the obligations arising under Article 2 ECHR in the context of voluntary patients at risk of suicide, accompanied by a fascinating part-dissent from two judges.

The applicant complained under Article 2 ECHR that her son had been able to take his own life as a result of the negligence of the psychiatric hospital where he had been hospitalised on a voluntary basis. Under Article 6 ECHR she also complained about the length of the civil proceedings she had instigated against the hospital.

As the court observed, this meant that:

> *two distinct albeit related positive obligations under Article 2, already developed in the jurisprudence of the Court, may be engaged. First, there exists a positive obligation on the State to put in place a regulatory framework compelling hospitals to adopt appropriate measures for the protection of patients' lives* […]. *Second, there is a positive obligation to take preventive operational measures to protect an individual from another individual or, in particular circumstances, from himself.*

As the Grand Chamber noted, it had recently pronounced upon the first obligation (those observations being rapidly translated into English law in the *(Parkinson) v HM Senior Coroner for Kent* [2018] EWHC 1501 (Admin), discussed in the July 2018 Mental Capacity report). It found on the facts that the manner in which the regulatory framework was implemented did not give rise to a violation of Article 2 in the circumstances of the present case. It noted, in particular, that the lack of security fences and walls around the hospital was in line with the legislation in place at the time, which:

> *117.* […] *indicated that mental-health care should be provided in the least restrictive environment possible. These general principles mirrored the therapeutic desire to create an open regime where the patient retained the right to move about freely. This approach is in line with the international standards which have been developed in recent years on treating psychiatric patients (see the International Law section above and see also Hiller, cited above, § 54).*

As regards the second, and as it had previously hinted it might (*Reynolds v. the United Kingdom* (Application no. 2694/08, 13 March 2012), the Grand Chamber extended the scope of the 'operational' duty to voluntary psychiatric patients, albeit on a specific basis:

> *124. There is no doubt that as a person with severe mental health problems A.J. was in a vulnerable position. The Court considers that a psychiatric patient is particularly vulnerable even when treated on a voluntary basis. Due to the patient's mental disorder, his or her capacity to take a rational decision to end his or her life may to some degree be impaired. Further, any hospitalisation of a psychiatric patient, whether involuntary or voluntary, inevitably involves a certain level of restraint as a result of the patient's medical condition and the ensuing treatment by medical professionals. In the process of treatment, recourse to further kinds of restraint is often an option. Such restraint may take different forms, including limitation of personal liberty and privacy rights. Taking all of these factors into account, and given the nature and development of the case-law referred to in paragraphs 108-115 above, the Court considers that the authorities do have a general operational duty with respect to a voluntary psychiatric patient to take reasonable measures to protect him or her from a real and immediate risk of suicide. The specific measures required will depend on the particular circumstances of the case, and those specific circumstances will often differ depending on whether the patient is voluntarily or involuntarily hospitalised. Therefore, this duty, namely to take reasonable measures to prevent a person from self-harm, exists with respect to both categories of patient. However, the Court considers that in the case of patients who are hospitalised following a judicial order, and therefore involuntarily, the Court, in its own assessment, may apply a stricter standard of scrutiny.*

In deciding whether the operational duty had arisen and breached in the instant case, the court had regard to the following criteria drawn from previous case-law concerning the assessment of suicide risk:

i) *a history of mental health problems*;

ii) *the gravity of the mental condition;*

iii) *previous attempts to commit suicide or self-harm;*

iv) *suicidal thoughts or threats;*

v) *signs of physical or mental distress* (citations omitted).

Taking account of the facts that "*according to the expert evidence, complete prevention of suicide in patients such as A.J. was an impossible task* […] *and that the Coimbra Administrative Court found that A.J.'s suicide was not foreseeable*" and that the *"question of risk* [must be approached] *with a view to assessing whether it is both real and immediate and notes that the positive obligation incumbent on the State must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities*," the court "*conclude*[d] *that it has not been established that the authorities knew or ought to have known that there was an immediate risk to A.J.'s life in the days preceding 27 April 2000.*" The Grand Chamber did not therefore need to go on to decide whether the duty had been breached.

However, and not least as the Portuguese government conceded that the proceedings brought by A.J.'s mother had taken excessively long to conclude, the Grand Chamber found that there had been a violation of the procedural limb of Article 2 ECHR.

In a separate, part-dissenting, and part-concurring judgment, Judge Pinto de Albuquerque (the Portuguese judge), joined by Judge Harutyunyan, attacked what he perceived to be the majority's pursuit of an "*ideologically charged minimalist approach to the State's positive obligations in the sphere of health care to its limits, this time regarding the particularly vulnerable category of psychiatric inpatients under State control. The effect is that of downgrading the level of Convention protection to an inadmissible level of State inertia*." He was particularly scathing of the Grand Chamber's decision to apply a less strict standard of scrutiny to voluntary patients, noting that there had been no justification, in face of the unanimous Chamber view to the contrary:

> *21. The argument that there is an emerging trend to treat persons with mental disorders under an "open door" regime is not decisive* […]. *First, it only shows one side of the coin, because there is also a counter-trend to increase State obligations with regard to suicide prevention, which is totally neglected by the majority* […] *The core of the problem today lies precisely in the inter-relationship between these two different trends of international health law and practice, which the majority do not even seek to consider. Moreover, as put by Judge Iulia Antoanella Motoc, dissenting in Hiller, "the duty to protect the right to life should not be sacrificed in an attempt to comply with the above-mentioned recent trend in healthcare"* […]. *The right to life prevails over the right to liberty, especially when the psychopathological condition of the individual limits his or her capacity for self-determination. It is nothing but pure hypocrisy to argue that the State should leave vulnerable suicidal inpatients in State-run psychiatric hospitals free to put an end to their lives merely in order to respect their right to freedom. At the end of the day, what really drives the majority is not the concern for more or less freedom of psychiatric inpatients interned in public hospitals, but the strict financial interest in safeguarding the hospital authorities from legal challenges to "excessively restrictive measures"* […], *while "bearing in mind the operational choices which must be made in terms of priorities and*

> *resources in providing public healthcare and certain other public services".* […] *Ultimately, this reflects a hidden social-welfare disengagement policy, which aims at the maximum commodification of health-care services and above all at the protection of health professionals in an untouchable legal bubble, shirking State responsibility for health-system and hospital-related death or serious injury under the Convention and consequently limiting the Court's jurisdiction in this area.*

Judge Pinto de Albuquerque also conducted a tour d'horizon of the relevant international law norms in play, noting that it is "*confusing, to say the least, signaling tough ongoing discussions on the matter*."

Comment

For English domestic purposes, voluntary and involuntary psychiatric patients at risk of suicide have been assumed to be essentially interchangeable from the perspective of Article 2 ECHR since the decision of the Supreme Court in *Rabone*. The Grand Chamber's decision shows that Lord Dyson and Lady Hale were largely right to infer in 2012 that the obligations under Article 2 ECHR as applied to detained patients would be applied by Strasbourg to informal patients if the question came before it. However, it is interesting to note the nuanced fashion in which the Strasbourg court approached the question when it actually came for determination before it.

First, the Grand Chamber expressly held that it could apply a higher standard of scrutiny where the detention was involuntary (which would apply equally whether the detention was authorised judicially, as in Portugal, or administratively, as in England and Wales). The potential for such a differential approach attracted the scorn of the dissenters in Strasbourg, but will no doubt need to be translated into domestic jurisprudence in due course here.

Second, and making express reference to the CRPD, the Strasbourg court also took into account "*the therapeutic desire to create an open regime where the patient retained the right to move about freely. This approach is in line with the international standards which have been developed in recent years on treating psychiatric patients*" (paragraph 117). Perhaps because of the facts of the *Rabone* case,[8] and the way in which evidence had been put before it, the Supreme Court's decision in retrospect is conspicuous for the starkness of the binary contrast it set up between keeping Melanie Rabone in hospital (and therefore, by definition, alive[9]) and allowing her to go home and take her own life. One of the (no doubt) inadvertent consequences of this contrast and one that greatly exercised the independent review of the Mental Health Act 1983, has been the potential for increased risk aversion on the part of professionals. The Grand Chamber's decision, as in the earlier (2016) decision in *Hiller v Austria*, arguably points the way towards a better calibration of the positive obligations imposed under Article 2 ECHR in this context.

There are, of course, elephant traps in that calibration exercise. Some might doubt the dissenters'

[8] Including an admission of negligence by the Trust.

[9] Lord Dyson's observations are particularly striking here, holding at para 28 that "[t]*he statutory powers of detention are the means by which the hospital is able to protect the psychiatric patient from the specific risk of suicide*."

suggestion that there is a "*hidden social-welfare disengagement policy*" at play in the thinking of the majority of the Grand Chamber. Not least in light of *Rabone*, it is also not immediately obvious, at least in England & Wales, that healthcare professionals either sit or perceive themselves to sit "*in an untouchable legal bubble*."

However, there is undoubtedly a very real potential danger of social-welfare disengagement, albeit from a slightly different direction to that identified by the dissenters. A key consideration in the 'confidence tests' developed by the MHA review for purposes of determining recommendations for the future direction of travel,[10] was the fear expressed by at least some service users that moving to a capacity-based model would lead to refusal of services on the basis that "*you have capacity, and it's your choice what you do*." This refusal of services could sometimes (as the Review noted) represent "*a reaction from overstretched staff (these examples often came from crisis services or A&E) with a very limited or non-existent choice of alternative services.*" In other words, pushing capacity-based mental health legislation unsupported by state-level obligations to provide alternative services meeting the needs of the individuals in question could very well lead to catastrophic "social-welfare disengagement."

Finally, it is perhaps of note that the Grand Chamber, in full knowledge of the CRPD Committee's views upon mental capacity, had no hesitation in relying upon the concept (at paragraph 127) in founding a conclusion that Article 2 was engaged. The day may well be coming when the Strasbourg court concludes that detention and/or treatment in the face of capacitous refusal cannot stand with the ECHR, but there is no sign from this judgment that it is likely to abandon the validity of the concept of mental capacity as a factor in deciding where the balance lies between protection and autonomy.

Ending disability-based deprivation of liberty?

The report has been published by the UN Special Rapporteur for Persons with Disabilities, Catalina Devandas, on 'Ending the deprivation of liberty on the basis of disability."[11] In it, the Special Rapporteur seeks to outline the scope of the problem of deprivation of liberty on the basis of disability world-wide, its causes, as well as a set of recommendations to end it. The examples she gives of what – on any view – are human rights abuses are compelling, and the call to action loud and clear. For an analysis of the difficult issues that arise because of the (over)reach of the Special Rapporteur's challenge to the justifications advanced for deprivation of liberty, see Alex's website.

'Benevolent coercion'

The German Ethics Council has published a report on "Benevolent Coercion – Tensions between Welfare and Autonomy in Professional Caring Relationships." The full, very detailed, report is available as yet only in German, but an executive summary is available in English here. It makes a particularly interesting counterpart to the two items discussed immediately above.

[10] See pp.213-218.
[11] A version of a report presented at the 40th session of the Human Rights Council, that version being available here.

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Conferences

Conferences at which editors/contributors are speaking

Essex Autonomy Project summer school

Alex will be a speaker at the annual EAP Summer School on 11-13 July, this year's theme being: "All Change Please: New Developments, New Directions, New Standards in Human Rights and the Vocation of Care: Historical, legal, clinical perspectives." For more details, and to book, 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 the dementia charity My Life Films in return for postings for English and Welsh events. For Scottish events, we are inviting donations to Alzheimer Scotland Action on Dementia.

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

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