Mental Capacity Law Newsletter November 2015: Issue 60

Compendium

Introduction

Welcome to the November 2015 Newsletters. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Newsletter, a decision about deprivation of liberty in hospital and the meaning of state detention under the Coroners and Justice Act 2009, and the final instalment in the Rochdale deprivation of liberty saga;
(2) In the Capacity Outside the CoP newsletter, an introduction to the work of the new National Mental Capacity Forum from its Chair, Baroness Finlay;
(3) In the Practice and Procedure Newsletter, an update on the regionalisation of the Court of Protection;
(4) In the Property and Financial Affairs Newsletter, a number of decisions concerning powers of attorney;
(5) And in the Scotland Newsletter, the annual report of the Mental Welfare Commission for Scotland.

We also take this opportunity to remind readers that where one of the Newsletter editors is instructed in an ongoing case which is summarised, that editor does not play any part in drafting the summary or comment.

And remember, you can now find all our past issues, our case summaries, and much more on our dedicated sub-site here.

Editors
Alex Ruck Keene
Victoria Butler-Cole
Neil Allen
Annabel Lee
Anna Bicarregui
Simon Edwards (P&A)

Guest contributor
Beverley Taylor

Scottish contributors
Adrian Ward
Jill Stavert

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

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Summary

Maria Ferreira suffered from Down's syndrome, severe learning disability, limited mobility and required 24 hour care which was provided principally by her sister, LF. Maria died while in intensive care in hospital. She was aged 45 at the time of death.

Maria was admitted to hospital with a working diagnosis of pericarditis, pneumonia and possible pulmonary oedema. She had a strong dislike of hospitals and found the procedure frightening. Her condition worsened so she was heavily sedated and transferred to the hospital's intensive care unit ("ICU"). Over the following days, she remained sedated and on a mechanical ventilator as a life-saving treatment intervention. While in ICU, the nursing staff put mittens on Maria's hands to prevent her from reflexively grabbing at and disconnecting the endotracheal tube. A few days later, Maria dislodged the tube. Despite prompt attempts at resuscitation, Maria went into cardiac arrest and died.

An inquest was to be held into Maria's death. The Senior Coroner held that Maria was not deprived of her liberty for the purposes of Article 5 and was therefore not in "state detention" at the time of her death within the meaning in sections 7(2)(a) and 48(1) of the Coroners and Justice Act 2009 ("CJA 2009"). There was thus no

mandatory requirement to summon a jury. Maria's sister sought judicial review of this decision.

Whilst recognising that it was difficult to distinguish the meaning of "deprivation of liberty" under Article 5 ECHR from "state detention" under the CJA 2009, the Court held that the Coroner had been entitled to conclude Maria was not in "state detention" in the ICU at the time of her death, rather, she was there to receive life-saving treatment.

The starting point for the court was the language of the CJA 2009, "in state detention" and "compulsorily detained" should be given a readily understood, natural and ordinary meaning. Lord Justice Gross elaborated on the meaning of such terms by stating at paragraph 69:

> *"Accordingly, as a matter of language and context but without reference to the jurisprudence relating to Art. 5 ECHR, I would construe the wording "in state detention" and "compulsorily detained" as meaning a confinement imposed by a public authority, overriding the relevant person's freedom of choice; in short, detention properly so called, by the state, in whatever form."*

Lord Justice Gross recognised at paragraph 73 that it was difficult to distinguish the meaning of "state detention" from "deprivation of liberty" in Article 5 in this context:

> *"…I have come to the view that "state detention" as defined in the CJA 2009 and deprivation of liberty under Art. 5 have essentially similar, if not necessarily identical, meanings. That conclusion does not preclude the possibility that there may be some situations constituting deprivation of liberty, as interpreted by Cheshire West, which do not necessarily amount to "state detention" under the CJA 2009. However, that is not this case and, in the present context, I am unable to accept that the answer is to be found by distinguishing "state detention" as defined in the CJA 2009 from deprivation of liberty under Art. 5"*

Lord Justice Gross gave four reasons why *Cheshire West* did not require treating all patients in an ICU (and other hospital settings) who lacked capacity to consent to treatment for more than a very brief period as subject to a deprivation of liberty:

> 1. It would not draw any distinction between patients with and those without any previous mental incapacity.
>
> 2. It would break new ground in that the cases in Strasbourg have not addressed treatment for physical disorders unconnected with the patient's mental disorder.
>
> 3. The practical consequences would be significant. The Court acknowledged the two main practical effects for coroners if a person died while in "state detention": (i) an inquest must be held, if the cause of death had been established and found to be natural; and (ii) the inquest must be held with a jury if there was reason to suspect that the death was violent or unnatural or of unknown cause.
>
> 4. Any wholesale extension would overlook the fact that a person who lacks capacity to

> consent to a particular treatment can be treated on a best interests basis (under section 5 MCA) without being deprived of his liberty or compulsorily obtained.

Applying those principles to the facts of this case, Lord Justice Gross was satisfied that the Coroner had been entitled to conclude that Maria had not been "detained" or "compulsorily detained." As a matter of ordinarily language, it was wholly artificial to say that Maria was kept in custody or confined by the state. The reality was that Maria remained in the ICU, not because she had been deprived of her liberty but because, for pressing medical reasons and treatment, she was unable to be elsewhere. In reaching its decision, the Court made clear that the lawfulness of the detention was not relevant; what mattered was whether or not at the time of death the deceased was in state detention.

Charles J, on the other hand, held that the use of the word "compulsorily" in the definition of "state detention" was significant. In his view, that word limited detentions to those imposed so as to override the individual's freedom of consent. On Charles J's reasoning, it was wholly artificial to say that at the time of her death, Maria was *compulsorily* detained as her freedom of choice had not been overridden in any sense and nothing had been unilaterally imposed on her.

Further, and in agreement with Lord Justice Goss, Charles J held that the principles in *Cheshire West* should not be applied without modification to the different situation of a patient who is in hospital for care and treatment for physical disorders. Rather, a fact sensitive approach should be applied taking into account the length of time that the relevant care and treatment has lasted, changes in it and the impact of any pre-existing lack of capacity. At first blush, this approach appears to run counter to the "acid test" in *Cheshire West*, namely being under continuous supervision and control and not free to leave, which was formulated on the express basis that the purpose, reason and benevolence underlying a placement was irrelevant.

Both Lord Justice Goss and Charles J considered that it was unnecessary to ask the question whether the hospital staff would have refused to allow Maria to leave if the Claimant had pressed the issue, not least because, factually speaking, it was "fanciful" to suggest that the Claimant would have sought to remove Maria in circumstances where she was receiving life-sustaining treatment. This is a divergent approach from that contained within the Law Society Practical Guide which suggests that, in considering whether there was a deprivation of liberty in the context of a hospital setting, practitioners should consider what actions hospital staff would take if, for example, family members sought to remove the patient from the hospital.

Significantly for practitioners, Charles J concluded that there was no need for an inquest having to be held in every case where an elderly person died from natural causes in a care home if their care package amounted to a deprivation of liberty to which they did not have the capacity to consent, or about which they had no real choice.

Comment

This is an important decision which will have practical ramifications for all hospitals as well as hospices and other medical settings. Whilst Lord Justice Gross and Mr Justice Charles were clear

in their conclusion that Maria was not "compulsorily detained" or "in state detention" whilst in the ICU before she died, the reasons for their conclusions are not consistent. It is difficult to discern precisely why Maria was not considered to be "in state detention" at the time of her death and future cases will need to be considered on a very fact-sensitive basis.

The approach taken by Charles J is at odds with the Chief Coroner's Guidance on Deprivation of Liberty Safeguards of 5 December 2014 (and the Law Commission's view) which advises that any person subject to an authorised deprivation of liberty falls within the CJA 2009's definition of "state detention" and, therefore, the death of any such person should be the subject of a coronial investigation. Of course, the decision of the Court takes precedence over the views expressed by the Chief Coroner or the Law Commission.

Deprivation of liberty and the end of the Rochdale saga

KW (by her litigation friend) v Rochdale MBC [2015] EWCA Civ 1054

Article 5 ECHR

Summary

This is the second appeal to the Court of Appeal from a decision of Mostyn J in this long-running Court of Protection matter. In his first decision, the judge questioned the reasoning and conclusions of the majority in *Cheshire West*. That led to an appeal that was allowed by consent but without a judgment. Mostyn J duly listed the matter for consideration of the effect of the consent order and further directions in relation to the review of KW's deprivation of liberty. In a reserved judgment handed down on 13 March 2015, Mostyn J questioned whether the Court of Appeal had decided whether KW was deprived of her liberty, thereby leaving her in a state of legal "limbo", concluded that the consent order was made ultra vires and that KW was only entitled to a court review if she were to be subjected to "… *bodily restraint comparable to that which obtained in P v Cheshire West and Cheshire Council*…".

The Master of the Rolls gave the judgment of the court. Firstly, whilst the consent order did not explicitly state that there was a deprivation of liberty, it was "*clearly*" not correct to interpret it as meaning KW was not deprived of her liberty when read in context. Paragraph 1 of the consent order provided that the appeal was allowed. The only ground of appeal was that the judge had wrongly concluded that KE was not deprived of her liberty. Further, the other provisions of the consent order provided for annual reviews of KW's deprivation of her liberty. Read in context, the consent order could not be interpreted as meaning there was no deprivation of liberty. That said, the court disapproved the "Model Re X Order" preferring "*P is deprived of his liberty but the same is lawful*" over "*To the extent that P is deprived of his liberty it is lawful*".

In relation to whether the consent order was made ultra vires the Master of the Rolls said that it was "… *futile and, in our view, inappropriate for a judge, who is called upon to give effect to an order of a higher court which is binding on him, to seek to undermine that order by complaining that it was ultra views or wrong for any other reason*…".

In any event, the consent order was not ultra vires as it was made by a permissible route on a proper interpretation of para 6.4 of PD 52A. In a decision which will have wider application it was held that Rule 52.10 and PD52A gives the appeal court a discretion to allow an appeal by consent on the papers without determining the merits at a hearing where it is satisfied that there are good and sufficient reasons for doing so. What those reasons are will depend on the circumstances of the case but guidance was given to the effect that where the appeal court is satisfied that (i) the parties' consent to the allowing of the appeal is based on apparently competent legal advice, and (ii) the parties advance plausible reasons to show that the decision of the lower court is wrong, it is likely to make an order allowing the appeal on the papers and without determining the merits.

Finally, reference was made to the unfortunate history of this litigation which had led to considerable unnecessary costs to the public purse and that it was Mostyn J's "… *tenacious adherence to his jurisprudential analysis leading to the conclusion that Cheshire West was wrongly decided that has been the root of this*…". For this reason (and in addition to allowing the appeal) it was ordered that the review of KW's deprivation of liberty should be conducted by a different judge.

Comment

Whilst this case is mainly of interest in relation to the Court of Appeal's powers to set aside or vary an order of a lower court without determining the merits, it also decisively brings to an end the attempts by Mostyn J (at least within these proceedings) to have Cheshire West reconsidered by the Supreme Court. It is also of interest to the extent that the Court of Appeal considered that the use of the phrase " to the extent to which P is deprived of his liberty it is in is best interests and lawful" contained with the 'Re X model order' should be replaced with a more affirmative statement that "P is deprived of his liberty but the same is in his best interests and is lawful".

Deprivation of liberty in a children's home

*A Local Authority v D and others [*2015] EWHC 3125 (Fam)

Article 5 ECHR – deprivation of liberty – inherent jurisdiction

Summary

A 14-year-old boy, AB, was residing in a children's home under an interim care order, having previously been accommodated under s.20 of the Children Act 1989 and made subject to a child protection plan on the basis of neglect. He had moderate to severe learning disability, attention deficit hyperactivity disorder, a statement of special educational needs, attended a special school, and was under the care of the child and adolescent mental health services. He was happy, settled, and wished to remain in the children's home but lacked capacity to make the decision.

His care regime provided for the following:

- There were three staff members on duty during the day, and two at night, for the three child residents.
- AB was not on one-to-one supervision within the unit and could be left unsupervised for short periods. But his behaviour plan stated:

"*Staff must be aware of where AB is at all times. AB should be checked regularly. Staff must be authorised to work alone with AB. AB must never be left alone with another resident*." He was under 15-minute observations.

- Took medication for ADHD under supervision.
- He was not allowed to leave the unit (eg to go to school) unaccompanied and was closely supervised when out of the unit.
- He was only taken on public transport if calm and settled, with a staff member sat beside or behind him.
- If he behaved negatively when out and, despite warnings, he continued, he would be immediately returned to the placement.
- If he were to leave the placement unaccompanied, staff would call social services and the police to assist with his return.
- The front door was locked at night and if he left his room, staff must redirect him back unless he wanted a drink or the toilet.

According to his social worker:

> "*AB is under the continuous supervision of staff, who are aware of his whereabouts at all times. AB is residing in a care setting, where he is not free to leave unsupervised. He is also not able to contact his family independently. All behaviour that is perceived to be challenging is managed with verbal redirection. AB is also on an ongoing prescription of sedative medication which alters his behaviour and is a form of chemical restraint.*"

Keehan J agreed with the parties that, applying *Cheshire West*, the circumstances amounted to continuous supervision and control and he was not free to leave. The focus was whether there was valid consent from those with parental responsibility. His Lordship had previously considered this issue in *Re D* [2015] EWHC 922 (Fam) but in a different context, namely where parents were held to be able to consent to their 15-year-old child being admitted to and kept in a psychiatric hospital:

> "26. *Do the same considerations apply when a child is accommodated by a local authority pursuant to s.20 of the Children Act 1989? The only possible answer is they may do. It will all depend on the facts of the individual case. At one extreme, an agreed reception into care of a child, that is beneficial and for a short-lived period, where the parent and the local authority are working together co-operatively in the best interests of the child, may be an appropriate exercise of parental responsibility. Thus it would be appropriate for that parent to consent to the child residing in a place (for example, a hospital) for a period and in circumstances which amount to a deprivation of liberty.*
>
> *27. At the other extreme, there will be cases where children have been removed from their parents' care pursuant to a s.20 agreement as a prelude to the issue of care proceedings and where the local authority contend the threshold criteria of s.31(2) of the Children Act 1989 are satisfied. In such an event, I find it difficult to conceive of a set of circumstances where it could properly be said that a parent's consent to what, otherwise, would amount to a deprivation of liberty, would fall within the zone of parental responsibility of that parent. This parent's past exercise of parental responsibility will, perforce of circumstances, have been seriously called into question and it would not be right or appropriate within the spirit of the conclusion of the Supreme Court in*

Cheshire West *to permit such a parent to so consent.*

28. Where a child or young person is in the care of a local authority and is subject to interim or care orders, the reasoning in paragraph 27 applies with even greater force, especially when one considers the effect of an interim care order, which includes the power of the local authority to restrict "the extent to which a parent may meet his parental responsibility for the child" (s.33(3)(b) Children Act 1989).

29. Where a child is in the care of a local authority and subject to an interim care, or a care, order, may the local authority in the exercise of its statutory parental responsibility (see s.33(3)(a) of the Children Act 1989) consent to what would otherwise amount to a deprivation of liberty? The answer, in my judgment, is an emphatic "no". In taking a child into care and instituting care proceedings, the local authority is acting as an organ of the state. To permit a local authority in such circumstances to consent to the deprivation of liberty of a child would (1) breach Article 5 of the Convention, which provides "no one should be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law", (2) would not afford the "proper safeguards which will secure the legal justifications for the constraints under which they are made out", and (3) would not meet the need for a periodic independent check on whether the arrangements made for them are in their best interests (per Lady Hale in Cheshire West *at paragraphs 56 and 57)*."

Importantly, Keehan J rejected the suggestion that an interim/care order could explicitly or implicitly authorise a deprivation of liberty:

> "*36. In my judgment, this is not a viable option. When the court makes a care order it hands over control of the child to the local authority such an authorisation would not, and could not, afford the necessary degree of safeguards and periodic, independent checks required by the provisions of Article 5 of the Convention. For these purposes, the local authority child care review, chaired by an independent reviewing officer, would not, in my judgment, afford the required safeguards and checks, sufficiently independent of the state.*"

This left two options. Keehan J held that secure accommodation orders under s.25 of the Children Act 1989 did not provide an appropriate mechanism. They had a punitive quality, were designed for those looked after children who, by reason of their actions, were likely to abscond and suffer significant harm or injure themselves or others (para 31). In any event, AB did not satisfy the criteria and the children's home for secure accommodation.

The only remaining route to authorisation therefore was the inherent jurisdiction. The criteria for permission, as set out in s.100(4) of the Children Act 1989, were held to be satisfied because the result could not be otherwise achieved and, if the jurisdiction was not exercised, AB was likely to suffer significant harm. This was because his placement would be unlawful, in breach of Article 5, so he would have to move to another establishment against his wishes where he would not be under constant supervision and control. This would not be in his welfare best

interests and significant harm would likely result (para 34). Accordingly the deprivation was authorised for three months.

Paragraph 38 of the judgment provides some general observations in respect of children in need and looked after children which we set out in full:

> *"(1) Local authorities are under a duty to consider whether any children in need, or looked-after children, are, especially those in foster care or in a residential placement, subject to restrictions amounting to a deprivation of liberty.*
> *(2) The* Cheshire West *criteria must be rigorously applied to the individual circumstances of each case.*
> *(3) The comparison to be made is not with another child of the same age placed in foster care or in a residential home, but simply with another child of the same age.*
> *(4) A deprivation of liberty will be lawful if warranted under statute; for example, under s.25 of the Children Act 1989 or the Mental Health Act 1983 or under the remand provisions of LASPO 2012 or if a child has received a custodial sentence under the PCCSA 2000.*
> *(5) Where a child is not looked after, then an apparent deprivation of liberty may not in fact be a deprivation at all if it falls within the zone of parental responsibility exercised by his parents (see Re D). The exercise of parental responsibility may amount to a valid consent, with the consequence that the second limb of* Cheshire West *is not met. In those circumstances, the court will not need to make any declaration as to the lawfulness of the child's deprivation of liberty.*
> *(6) Where a child is a looked-after child, different considerations may apply, regardless of whether the parents consent to the deprivation of liberty.*
> *(7) Where a child is the subject of an interim care order or a care order, it is extremely unlikely that a parent could consent to what would otherwise amount to a deprivation of liberty. In those circumstances, a local authority cannot consent to a deprivation of liberty.*
> *(8) The local authority must first consider whether s.25 of the Children Act is applicable or appropriate in the circumstances of the individual case. This will require an analysis of (1) whether any of the regulations disapply s.25, (2) whether the intended placement is accommodation provided for the purposes of restricting liberty and, thus, secure accommodation within s.25 and (3) whether the test set out in s.25.1(a) or (b) is met.*
> *(9) If it is not, then the s.100(4) leave hurdle is likely to be crossed on the basis that any unlawful deprivation of liberty is likely to constitute significant harm.*
> *(10) Irrespective of the means by which the court authorises the deprivation of a child's liberty, whether under s.25 or the inherent jurisdiction, the local authority should cease to impose such deprivation as soon as (1) the s.25 criteria are not met, or (2) the reasons justifying the deprivation of liberty no longer subsist. Authorisation is permissive and not prescriptive."* (emphasis added)

Comment

The fact that MIG and MEG were held by the Supreme Court majority to be deprived of their liberty meant significant implications for child

and transition services which we are now being felt. After all, MEG was 17 years old and subject to a care order. Her mother and the local authority, sharing parental responsibility, consented to her placement. But she was still held to be deprived. It was therefore clear that parental responsibility could not be relied upon as valid consent to a care regime for her that would otherwise engage Article 5. The issues ever since have related to: (a) When are children and young people deprived of liberty? (b) Is there any age below which parental consent would avoid Article 5? And (c) how can a deprivation be authorised?

(a) The nuanced acid test

We suggest that the Supreme Court has clearly set out the different considerations that apply in respect of those under 18 and refer readers to chapter 9, paras 9.5 to 9.10, of the Law Society guidance. The difficulty is in determining what amounts to a universal degree of age-appropriate constraint in a multicultural society, discussed at paras 9.11 to 9.15. Rather than comparing AB "with another child of the same age", we would respectfully suggest that, to entirely accord with para 79 of the *Cheshire West* judgment, the comparator would be "another child of the same age and relative maturity who is free from disability".

(b) Parental consent

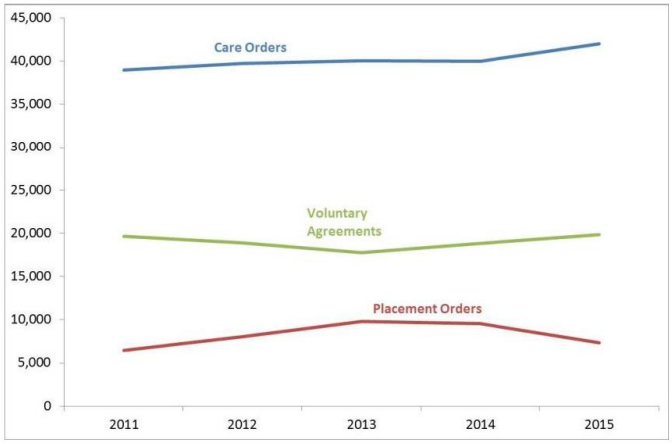
In *Re D* it was held that the parents of a 15-year-old boy could consent to his psychiatric placement so as not to bring it within Article 5. The present case suggests that the same "may" be true in relation to those "voluntarily" accommodated under s.20 of the Children Act 1989, depending upon whether it is "an appropriate exercise of parental responsibility". We anticipate that different considerations may apply to those aged 16 and over. However, it is now clear that, for anyone under the age of 18, the same is emphatically not true for those subject to interim/care orders.

The stark reality therefore for those working in child and transition services is that if a child or young person is under an interim/care order and satisfies the nuanced acid test, that deprivation of liberty will have to be separately authorised: the care order will not cover it.

(c) Authorisation to deprive

As the judge indicated, secure accommodation orders are likely to be inappropriate for the kind of placements under discussion where welfare best interests are the paramount consideration. The inherent jurisdiction will instead have to be used and this judgment helpfully suggests that getting permission to invoke it is unlikely to be difficult where Article 5 is engaged. The Supreme Court has created the child-equivalent of the 'Bournewood' gap – what we have previously termed, 'Baby Bournewood' – and in the absence of a legislative procedure to authorise such deprivations of liberty, it falls once again upon the inherent jurisdiction to plug that gap.

According to the latest figures, as at 31 March 2015, there were 69,540 looked after children in England, of which 42,030 were under an interim/care order. A further 19,850 were under a s.20 agreement.



The potential number of those lacking the relevant capacity who satisfy the nuanced acid test is likely to be sizeable. To implement *Cheshire West* by invoking the inherent jurisdiction in such cases may well prove to be a challenge. Moreover, the judges of the High Court will need to provide the necessary procedural safeguards to satisfy Article 5, including reviews. In the present case, a three-month authorisation period was granted. But it seems likely that similar issues facing judicial adult authorisations, discussed for example in *Re X* and *Re NRA*, may well head towards judicial child authorisations.

Deprivation of liberty in the USA

Government of the United States of America v Roger Alan Giese [2015] EWHC 2733 (Admin)

Article 5 ECHR – definition of unsound mind

The Government of the United States of America (the 'Government') appealed a decision of DJ Coleman of 21 April 2015 pursuant to section 105 of the Extradition Act 2004 ('The EA') refusing a request for the extradition of the Respondent, Mr Alan Giese ('Mr Giese').

Background

In 2004, the State of California charged Mr Giese with a number of sexual offences, allegedly committed against a boy, who was under the age of 14 at the time, between 1998 and 2002. Mr Giese subsequently left the USA and came to the UK. He remained undetected by US authorities for many years. On 12 February 2014, the US government issued a request that Mr Giese, who it believed to be living at an address in Hampshire, be arrested and extradited to stand trial in California. The extradition request was duly certified and Mr Giese was arrested on 4 June 2014.

California is one of 20 states in the USA that has a system of 'civil commitment'. This is a form of indeterminate confinement in a secure facility which may be imposed in civil proceedings against a person who has been convicted of, and who has served his sentence for, certain types of sexual offences and who is deemed to be mentally ill and dangerous

It was argued before DJ Coleman, sitting at Westminster Magistrates' Court that, in accordance with s.87 EA 2003, Mr Giese's extradition would be incompatible with his rights under the European Convention on Human Rights (ECHR), and that he should be discharged, on two grounds:

- Prison conditions would violate his rights under Article 3 ECHR.
- There would be a 'real risk' that Mr Giese would be subject to civil commitment in California and that his rights under Article 5(1) ECHR would therefore be violated.

DJ Coleman found that extradition was compatible with Article 3 ECHR but incompatible with Article 5(1) ECHR. With respect to Article 5 ECHR, the test that DJ Coleman set was whether civil commitment would constitute 'a flagrant breach of Mr Giese's Article 5 rights'. She held that, if the requirements in California for civil commitment require that the individual be of 'unsound mind', within the meaning of Article 5(1)(e) of the ECHR then any detention under such an order would not amount to a breach of Article 5 ECHR.

However, DJ Coleman concluded, having heard evidence of how the law is applied in California, that the number of people who may potentially fall within the category of 'unsound mind', and therefore be subject to civil commitment would be large, because the 'net is cast widely, and those with a mental diagnosis which falls far short of 'unsound mind' (within the meaning of Article 5) are likely to be committed' and therefore, Mr Giese's detention amounted to a 'flagrant' breach of Article 5 ECHR.

In the absence of assurances by US authorities that a civil commitment order would not be sought, Mr Giese was discharged from extradition proceedings.
The US government appealed against District Judge Coleman's decision.

Two questions were raised on appeal:

i. Whether, first, there was a 'real risk' of Mr Giese being subject to civil commitment in California.
ii. If so, whether there was a 'real risk' that such an order would be a 'flagrant breach' of Mr Giese's rights under Article 5(1) ECHR, applying *R (Ullah) v Special Adjudicator* [2004] 2 AC 323

The High Court judges concluded that DJ Coleman was correct to conclude that there was a 'real risk' that Mr Giese, if extradited, would be made subject to an order for civil commitment. The District Judge was also correct in concluding that if he were made subject to a civil commitment order, that would be a 'flagrant' denial ' of his Article 5 rights.

Finally, the District Judge was correct in concluding that the extradition of Mr Guises would be inconsistent with his Convention rights, so that, in accordance with s. 87(2) of the EA he must be discharged.

The US government was initially provided with 14 days in which to offer a satisfactory assurance that, should Mr Giese be found guilty, that there will be no attempt to make him the subject of a civil commitment order. On 21 October 2015, the High Court granted an extension to 30 October 2015, for assurances to be provided. If no such assurances were received within the time limit the appeal would stand dismissed.

Comment

Article 5(1) guarantees that no one shall be deprived of their liberty, save in the exceptions that are specifically identified in sub-paragraphs (a)-(e). If there is a real risk that someone can be detained in circumstances that do not fall within those exceptions, then, there must be a real risk that that person will be subject to arbitrary detention in the sense that it is not in accordance with Article 5. The Government argued that the detention of Mr Giese under a civil commitment order came within the exceptions set out in article 5(1)(a), (b) or (e) of the ECHR. The District Judge had concentrated on (e). The appeal judges took as their starting point the ECtHR's interpretation of 'unsound

mind ' in Article 5(1)(e) considering the effect of *Winterwerp, Varbanov v Bulgaria* and *Stanev v Bulgaria* [48]. They then considered whether the Californian system, as set out in the legislation and as put into practice, was compatible with the interpretation, which the ECtHR has given to Article 5(1)(e). In this case the judges took the view, applying the narrow definition of 'unsound mind' in *Winterwerp v The Netherlands* (1979) 2 EHRR 387, that the exception in Article 5(1)(e) would not apply, because the wording of the statutory definition of 'diagnosed mental disorder' contained in the California Welfare and Institution Code (WIC) § 6600 (d) and how the wording was applied in practice, was too broad and imprecise.

'[60] …the definition of 'diagnosed mental disorder' in WIC 6600(d), in the way it is put into practice as indicated by the evidence in this case, is incompatible with the exception of ' unsound mind' in Article 5(1)(e) of the ECHR. It has been clear since Winterwerp that 'unsound mind', being a concept in one of the exceptions to the general rule in Article 5(1) must be given a narrow interpretation. By comparison, 'diagnosed mental disorder' in the WIC is a broad and imprecise concept and it is open to an interpretation that would apply to many person whose 'diagnosis' is no more than the type of disorder common in child sex offenders found within the prison system of either the UK or the USA.'

Beverley Taylor

Deprivation of liberty in a general hospital for a detained MHA patient

Hot off the press is Mostyn J's decision in *An NHS Trust v A* [2015] EWCOP 71, a case concerning treatment for physical illness in respect of a teenage boy who was detained under s.3 MHA 1983. Contrary to an earlier decision on this point, *Re AB* [2015] EWCOP 31, Mostyn J held that in such cases, any deprivation of liberty arising as a result of the treatment for physical illness could be authorized by the Court of Protection as P was not ineligible under Schedule 1A MCA 2005. Mostyn J advised that in future, any scrutiny of the *Re AB* decision should proceed on the basis that it inadvertently omitted a negative and therefore reached the wrong conclusion on this technical matter.

New Health and Social Care Information Centre statistics

New HSCIC figures released in October showed that detentions under the Mental Health Act have risen by almost 10% in England in the past year. Over 25,000 patients were subject to the act – an increase of 6.7% from 2014 – of whom nearly 20,000 were detained in hospitals. The figures also reveal that black and black British people, and Asian people are much more likely to be detained than white British people.

Department of Health update on deprivation of liberty

The latest circular letter from Niall Fry at the Department of Health is addressed to MCA-DoLS leads in local authorities and the NHS but is relevant to all professionals working across the health and care system. Key points to note are that:

- The Department has published an update on progress across the health and care system since the House of Lords report on the MCA. Access it at www.scie.org.uk/mca-directory/keygovernmentdocuments.asp.
- The Government has confirmed its intention to establish a new National Mental Capacity Forum and has appointed Baroness Ilora Finlay as the new independent Chair. We are very pleased to have a special feature from Baroness Finlay in this month's newsletter.
- The MCA Directory continues to be the "go-to" place for MCA support materials, including case summaries produced by 39 Essex Chambers. It is available at www.scie.org.uk/mca-directory
- The DOLS consultation has generated a high level of engagement across the country. The Department has made no decision yet on the need for and nature of legislative change but the Department's advice and guidance is helpfully summaries in one place in an annex to the letter.

Provision for replacement attorneys

Miles and Beattie v The Public Guardian [2015] EWHC 2960 (Ch)

Lasting power of attorney – replacement attorneys

Summary

This is the reported decision of Nugee J in relation to an appeal from a decision of Senior Judge Lush. There was a short note in relation to this decision in the July 2015 Newsletter and the Senior Judge's decision at [2014] EWCOP 40.

The donors of the LPAs in question had wanted to achieve the result that they appointed joint deputies but on the death or inability to continue of one, the survivor was reappointed to act alone. The LPAs were not happily drafted and the Senior Judge held in any event that the current regime precluded such an appointment and severed those parts of the LPAs that attempted to provide for survivorship.

The donors appealed and Nugee J held that there was nothing in the MCA that prevented a donor, as had been attempted here, from appointing A and B jointly or jointly in respect of some matters and severally in respect of others providing that on the death or inability of one, the survivor should be reappointed under section 10(8) (b) MCA, see paragraphs 20 and 21 of the judgment.

At paragraph 24, Nugee J set out a form of words that would achieve that result and provide for a replacement when both A and B could not act. In the result, the court allowed the appeal and the registration of the powers with some unnecessary and confusing words being excised.

At paragraph 41, Nugee J stated that a difficulty would arise if the replacement attorney is simply described by his office (eg senior partner in X firm of solicitors). In relation to an appointment made there and then it would be possible for that person to be identified and complete the appropriate parts of the form, but that is not so in relation to a replacement attorney as who might be in that office at the time when the replacement takes effect is not known when the LPA is made.

LPA revoked but attorney appointed as deputy

RE AMH; The Public Guardian v ALH and KEH [2015] EWCOP 70

Lasting powers of attorney – identity of attorney

Summary

In this case Senior Judge Lush was confronted with an application by the Public Guardian in the first instance to require a property and affairs attorney under a LPA to provide an account of dealings and if such an account was not provided for an order revoking the power and appointing a panel deputy.

The investigation revealed that the attorney did not really understand the duties of an attorney and in some respects had fallen short of what is required (by failing properly to deal with P's main asset, her former home, and making unnecessary purchases on P's behalf).

The Senior Judge thus concluded that the LPA should be revoked but, unusually (and at the

suggestion of the Public Guardian) appointed the attorney as deputy.

He did this as he felt that with the supervision and assistance that would go with the deputyship, the best interests of P would be properly served and that in that way P's expression of her wish that the attorney should look after her property and affairs would be respected.

As often is the case, the Senior Judge referred to the United Nations Convention on the Rights of Persons with Disabilities (CRPD) and to Baroness Hale's emphasis of its importance in *Cheshire West* at paragraph 36.

Limits to the powers of an attorney

Northamptonshire County Council v RG and others [2015] EWCOP 66

Enduring power of attorney – best interests

In this case the Senior Judge revoked an EPA. On the way, at paragraph 39 he repeated what Lewison J held in *Re P (Statutory Will)* [2009] EWHC (Ch); [2009] COPLR Con Vol 906, at paragraph 42, namely;
"I would add that, although the fact that P makes an unwise decision does not on its own give rise to any inference of incapacity (s. 1(4)), once the decision-making power shifts to a third party (whether carer, deputy or the court) I cannot see that it would be a proper exercise for a third party decision-maker consciously to make an unwise decision merely because P would have done so. A consciously unwise decision will rarely, if ever, be made in P's best interests."

And at paragraph 43 he reminded us that;
"Attorneys cannot usually delegate their authority to someone else. They must carry out their duties personally. Of course, they may seek professional or expert advice when appropriate (for example, investment advice from a financial adviser or legal advice from a solicitor), but they cannot as a rule allow someone else to make a decision that they have been appointed to make."

Problems with a fact-finding hearing

Re M-B (Children) [2015] EWCA Civ 1027
Procedure – fact-finding

Summary

This appeal arose from a fact finding exercise in a family case involving the death of a 10 month old baby, A. The cause of A's death could not be ascertained but during post mortem examination, at least 7 fractures were discovered which had occurred prior to the date of his death, affecting all four long bones and in 5 distinct locations. At the time of his death he was living with his mother (EB) and her partner (FB). He also visited his father (CM. As a result of the post mortem findings, EB's 4 other children were taken into care.

The local authority sought to appeal the fact finding judgment on the basis that the judge was wrong not to make findings on the evidence that the fractures were the result of non-accidental injury and to identify the probable perpetrator, or otherwise the pool of possible perpetrators.

The appeal was allowed. The Court of Appeal held that the judge's fact finding exercise was 'fatally flawed in all matters relating to the central and significant issue of A's injuries, and the judgment rendered unreliable' and incapable of forming the basis of any future welfare evaluation of the children's needs. The flaws included: confused and partial reliance on the 'unequivocal' medical evidence; an incorrect assumption that the local authority's reliance on a lack of a satisfactory explanation necessarily indicated a reversal in the burden of proof (given the medical evidence); contradictory findings; and a 'bewildering, confused and, in the absence of a finding of culpable harm, unnecessary attempt at attribution of fault'.

Despite the local authority's request, it would not be appropriate for the Court of Appeal to substitute its own findings of fact in place of the first instance judge in circumstances where it had not heard the evidence and evaluated the witnesses. The hearing would be conducted de novo.

Comment

For those drafting a schedule of facts for local authorities in COP cases, the judgment contains a clear (and stern) warning that such schedules should focus on the substantive issue and should not descend into trivia. In a case where the local authority was asking the court to make a finding that a child had suffered serious, non-accidental injuries, '*the local authority prepared a schedule of numerous findings they asked the court to make, which descended to the fact that the mother smoked in the family home […] the unnecessary distraction created does not assist the parties, case management or the efficacious use of valuable court time*'.

Issuing proceedings in medical treatment cases involving children

Re JM (A Child) [2015] EWHC 2832 (Fam)

Best interests – children – medical treatment - procedure

In this case, Mr Justice Mostyn has clarified that where final declarations are sought in respect of medical treatment to which a child's parents do not consent, the court proceedings should be framed as a combination of an application for a specific issue order under s.8 Children Act 1989 and declaratory relief under the inherent jurisdiction of the High Court. The application

should be issued in the High Court and would be listed before a full-time High Court Judge.

Publicity

Aidiniantz v Riley and others [2015] EWCOP 65

Anonymisation – best interests

In this case Peter Jackson J had to determine several issues concerning Mrs Aidiniantz who had become the centre of a bitter family dispute that had been litigated in the Chancery Division, the Family Division and the Court of Protection. The protagonists were her children and they had sought publicity and one set of proceedings (in the Chancery Division) had taken place in public. The press had published details.

The question arose as to whether these, CoP, proceedings should receive publicity and whether there should be anonymity. The judge decided that the decision should be reported without any anonymity because there already had been publicity and so any attempt at anonymity would be futile. He further held that it was in the public interest to learn of the case as a deterrent to warring families as the result was that in relation to these proceedings alone the two factions had each spent about £100,000 and they were each ordered to bear their own costs. So far as Mrs Aidiniantz's rights to privacy were concerned, he held that due to previous publicity there would be little further intrusion into her private life and in any event there was nothing in the judgment in any way critical of her.

Jigsaw identification

H v A (No. 2) [2015] EWHC 2630 (Fam)

Anonymisation – jigsaw identification

This case raised the issue of 'jigsaw identification' in family cases where there had been prior press reporting of related criminal proceedings. In this case the court was alerted by a reporter that the anonymised family proceedings case contained facts which allowed him to identify the family due to wide reporting of the previous criminal case (where the father had eventually been given a discretionary life sentence following attempts to do grievous harm to the mother and the children). The mother then brought an application seeking that the judgment not be reported or only reported in a heavily redacted format. The mother also sought a restricted reporting order prohibiting the publication of the identity and whereabouts of the mother and children and any information likely to identify them or their whereabouts without the standard 'public domain' proviso.

The judge decided that his judgment should be published in its original format (without further redaction). He also decided that there should be a reporting restriction order prohibiting the names of the children and their current whereabouts being reported (whether or not in the public domain) but that all other facts be subject to the public domain proviso.

The judgment sets out in detail the balancing exercise carried out between the children and mother's Article 2 and Article 8 rights and the right to freedom of expression (Article 10).

The judge concluded that 'jigsaw identification' would arise more frequently in the Internet age where information remained accessible over

time but stated that the risk of 'jigsaw identification' was not a reason in itself to withhold the publication of a judgment. The question in each case was whether, having regard to the evidence before the court and all the circumstances of the case, the interference in the Article 8 rights constituted by the 'jigsaw identification' arising out of publication outweighed the interference in the Article 10 right of freedom of expression constituted by withholding publication. Whilst this had not been an easy case, the judge considered that the mother and children's rights in this case did not outweigh the right to freedom of expression.

The judge made clear that he considered that the decision whether or not to publish a judgment in a suitably anonymised form should be a simple case management decision to be taken at the conclusion of the judgment. Neither the fact that it may be possible to identify the family by conducting an internet search using key facts from a judgment, nor the possibility of 'jigsaw identification' necessarily meant that the decision to publish needed to be subjected to the level of scrutiny of the present judgment.

Court of Protection Regional Hubs: an update

Court of Protection work is issued in First Avenue House, London, which has long been the single administrative centre for England and Wales. Over the years arrangements have evolved which has led to some of this work being sent to the regions across England and Wales for case management and hearings.

With a continued rise in Court of Protection work HMCTS has introduced a standardised process to ensure workload is allocated out to the regions efficiently. The aim of this is to improve the administration process and turnaround times for Court of Protection work in the regions.

To achieve this designated regional hubs for Court of Protection work have been appointed and they are responsible for:

- allocating cases that are received from First Avenue House to the relevant local hearing centre within their region, and
- case managing and administering the case until the final hearing.

The regional hubs are in Birmingham, Bristol, Cardiff, Leeds, Newcastle, Manchester and Reading.

The number of judiciary able to deal with Court of Protection work has increased and a Regional Lead Judge, responsible for the allocation of Court of Protection work, has been appointed in each region. They will be supported by one or more District Judges experienced in Court of Protection work who will act as gatekeepers.

What do these changes mean for court users?

Overall the aim of these changes is to improve the level of service provided to court users with a more efficient process delivering a quicker turnaround of work and reducing delays in the system.

Court of Protection applications will continue to be issued at First Avenue House, but if suitable will be transferred to the relevant regional hub for hearing. As the number of judiciary able to deal with Court of Protection work has increased this means that there will be more venues available for hearings to take place. To ensure an

application is allocated at the correct venue the application form will be changed to include a box where you can state the preferred local hearing venue. In the meantime users can indicate the preferred venue in a covering note.

Once transferred to the regional hub, all future queries and documentation should be directed there. Details of the regional hub will be provided with the hearing notice.

If you have any questions in respect of the above you can email the Court of Protection team at: regional.courts@hmcts.gsi.gov.uk

https://www.gov.uk/courts-tribunals/court-of-protection

We are grateful to James Batey and Emma Petty at the Ministry of Justice for this update.

NICE quality standard on 'behaviour that challenges'

The National Institute for Health and Clinical Excellence has published a 'quality standard' for "Learning disabilities: challenging behavior" available here. As well as providing guidance to commissioners, the 12 "quality statements" are likely to be valuable in assessing whether appropriate care is in place for people with challenging behavior who are subject to restrictive interventions:

Statement 1. People with a learning disability have a comprehensive annual health assessment from their GP.

Statement 2. People with a learning disability and behaviour that challenges have an initial assessment to identify possible triggers, environmental factors and function of the behaviour.

Statement 3. People with a learning disability and behaviour that challenges have a designated person responsible for coordinating the behaviour support plan and ensuring that it is reviewed.

Statement 4. People with a learning disability and behaviour that challenges take part in personalised daily activities.

Statement 5. People with a learning disability and behaviour that challenges have a documented review every time a restrictive intervention is used.

Statement 6. People with a learning disability and behaviour that challenges only receive antipsychotic medication as part of treatment that includes psychosocial interventions.

Statement 7. People with a learning disability and behaviour that challenges have a multidisciplinary review of their antipsychotic medication 12 weeks after starting treatment and then at least every 6 months.

Statement 8. Parents or carers of children aged under 12 years with a learning disability and behaviour that challenges are offered a parent-training programme.

Learning resources: Mental Capacity Act 2005 (MCA) in social work

The new CPD curriculum guide, together with the "Mental Capacity Act 2005 in Practice", published by the Department of Health, is targeted at social workers and aims to improve the practical application of the Mental Capacity Act 2005. The curriculum guide, written by Anna Beddow, Mark Cooper and Lisa Morriss (University of Manchester), focuses on identifying and meeting learning development needs to equip social workers to implement the MCA effectively in practice. It is well-referenced to supporting guidance and online resources, and serves as a useful point of reference for anyone delivering or receiving MCA training.

A step towards Rule 3A accredited legal representatives

Recruitment is now live for the roles of chief assessor and assessors for the Mental Health (Welfare) Accreditation. Recruitment for the chief assessor closes on 30 November 2015. Recruitment for assessors closes on 7 December 2015.

First words from the new Chair of the National Mental Capacity Forum

We are delighted that Baroness Finlay, the newly appointed Chair of the Mental Capacity Forum, has agreed to write a few words for us setting out her agenda as she takes up her position

The 2005 Mental Capacity Act was a pioneering piece of legislation, aimed at empowering and supporting those who had been inadequately involved in decisions that affected them. It was hailed as embodying best practice and should have made sure that the string of complaints that "no one listened" became a thing of the past.

So perhaps it is worth reflecting on why the aspirations are not easily realised and why the post-legislative scrutiny committee had so much to say about the failings in implementation.

One fundamental difficulty that is often encountered is when law – which of necessity is as black and white as the words written on a page – is applied across a whole population to complex clinical decisions about individuals whose needs and desires fluctuate and are subject to multiple influences - a multi-coloured spectrum of decisions. In the clinical scenario this becomes even more difficult; there may be many apparently small decisions whose cumulative effect seriously alters the short and long term outcome for a person.

A second difficulty is that the language of the law is poorly understood by most people. Ask a group of people on a bus if they know what 'an advance decision to refuse treatment' is; you will probably get the answer 'I'm not sure about one of them' but ask what 'a refusal' and even those with basic English language skills will be able to tell you 'I don't want it'. Similarly for 'advance statement of wishes' – it evokes 'I don't know what that is' but all are clear about what a 'wish' is.

The term 'advance care plan' is tautology – after all, who has made a plan for their holiday last year? So to make the Act's working more accessible we must simplify the language for clarity and encourage a national conversation around people want to refuse, their wishes and their plans.

Many people in our society are vulnerable, whether over material possessions (particularly financial fraud) or over the integrity of their whole being, when decisions are to be made about their mental and physical wellbeing. And sadly, many people and their families are finding the very processes put in place to protect are, of themselves, cumbersome.

Following the post-legislative scrutiny report from the House of Lords, the Government decided to set up the National Mental Capacity Forum. It faces many challenges, but has the opportunity to make a difference and change processes to improve outcomes. Those on the receiving end must not feel they are 'being done unto' but must feel they are empowered and valued; as Cicely Saunders said 'dignity is having a sense of personal worth'.

Hence the first task of the Forum is to listen, listen to voices of those who do not feel their difficulties have been understood, who feel they have solutions to offer that could improve things, and harness those lessons.

The Forum must be outward facing to people, clients and service-users, who are affected by the Act. Then those responsible for implementation of the legislation can ensure the processes are those needed to free up time to care and to improve outcomes for individuals. The quality of life of those we care for can and must be enhanced by the legislation designed to do just that.

Ilora Finlay
Baroness Finlay of Llandaff, chair of National Mental Capacity Forum

Damages for unlawful violations of Articles 6 and 8 in care proceedings

Medway Council v (1) M (2) T (by her Children's Guardian) [2015] EWFC B164

Summary

This case concerned the unlawful removal of a child from her mother in the context of care proceedings. The mother and daughter brought a claim under the Human Rights Act 1998 for declarations and damages.

The mother was detained in hospital with a serious mental disorder. In the absence of anyone else with parental responsibility, the local authority put the daughter (who was five years old at the time) in emergency foster care. The mother did not have capacity to give consent under section 20 of the Children Act 1989.

The local authority purported to obtain written consent from the mother despite the social worker expressing doubts about her ability to understand the meaning of it. A capacity assessment was not carried out. At the time, the local authority decided that there was no need to bring care proceedings and that it could rely on the mother's consent under section 20.

Care proceedings were finally issued more than two years after the daughter had been in care. The local authority argued that it had lawfully discharged its duty and that the absence of the mother's consent was irrelevant; what mattered was that the mother had not objected to the arrangements.

The court rejected the local authority's argument and held that without the mother's informed, capacitous and freely-given consent, the local authority had no lawful basis on which the accommodate her daughter without obtaining a court order. There was nothing in section 20 which made provision for any "emergency" or "discretionary" powers over a child. In an emergency situation, it might be reasonable to wait a day or two before issuing care proceedings (to review the parent's progress in hospital) but the period should be less than 72 hours. Proceedings must be brought as immediately as possible. In this case, the daughter had been unlawfully accommodated by the local authority for 2 years and 3 months before it issued proceedings, the longest in any reported case to date.

The court concluded that the daughter was unlawfully removed and that there had been serious violations of the mother and daughter's rights under articles 6 and 8 ECHR. It awarded £20,000 each to the mother and child.

Comment

In a decision which is highly critical of the local authority's procedures, the issues raised are similar to those often before the Court of Protection concerning unlawful deprivations of liberty. In this case, the initial removal of the child was unlawful as was as the continuation of the placement in that the local authority failed to bring this matter to court within "a day or two."

The case also demonstrates the importance and need for social workers to consider mental capacity in all areas of local authority work. In this case, the mother suffered an extremely serious episode of depression with psychotic features in early 2013 which resulted in her detention in hospital. Her mental health deteriorated again after the birth of another child. A consultant psychologist reported that the mother's intellectual functioning was so low as to satisfy a diagnosis of learning disability and, given the global low functioning, the expert considered that even with an improvement in the mother's mental state any consequent improvement in her cognitive functioning would be minimal. It was likely on the evidence that the mother had been subject to traumatic experiences. Although various social workers had alluded to the mother's lack of understanding, her inability to make informed decisions and give consent, no capacity assessment was undertaken until it was ordered by the court in the context of proceedings. Further, there were no records of any discussions having taken place with the mother about her child's whereabouts and care until after she was discharged from hospital. The court's judgment is damning: *"What is betrayed is the most shocking misunderstanding of the law by both social work and legal teams at Medway Council, and of the proper limitations of their exercise of power over this family…"*

It is interesting to note that the court, having made the declarations sought and having assessed the quantum of damages to be awarded, deferred making the order for payment and costs to a later date. This was done pursuant to a request made by the Official Solicitor who was investigating the most appropriate way to manage an award for a protected party where the mother was in receipt of non-means and non-merits tested legal aid, but there were concerns that the Legal Aid Agency might take steps to claim the costs of the mother's representation from the award. This is directly analogous with unlawful detention claims within the context of section 21A proceedings in the Court of Protection. P is also entitled to non-means and non-merits tested legal aid but in many situations, a damages award for unlawful detention may have no tangible benefit for P if the Legal Aid Agency seeks to recover its costs from any such award.

Ordinary residence and people without capacity to decide where to live

R (Cornwall Council) v Secretary of State for Health & Anor [2015] UKSC 46

Ordinary residence - incapacity

Summary

This case concerned the ordinary residence of P, who has severe physical and learning disabilities and lacks the capacity to decide where to live.

He lived with his parents in Wiltshire until he was four years old. At that time his parents asked Wiltshire Council to arrange his accommodation and P was placed with foster-carers in South Gloustershire, pursuant to section 20 of the Children Act 1989 ("**CA 1989**"). P lived with his foster-carers in South Gloustershire for the next 14 years, until he reached majority in 2004. After he turned 18 he lived with his former foster-carers for approximately one month before moving to live in two different care homes in Somerset.

P's parents moved to Cornwall around the time that P was placed into foster-care but they remained closely involved in decisions affecting his care. They visited him four or five times a year and he occasionally went to stay with them in Cornwall.

The Secretary of State was asked to determine a dispute between Wiltshire, South Gloustershire and Cornwall as to P's ordinary residence when he turned 18. The local authorities agreed that this was the relevant date because P's need for accommodation under section 21 of the National Assistance Act 1948 ("**NAA 1948**") arose on that date. Accommodation provided under section 21 was excluded from consideration for the purpose of determining ordinary residence by section 24(5) of the NAA 1948, which provided that "*Where a person is provided with residential accommodation under this Part of this Act, he shall be deemed for the purposes of this Act to continue to be ordinarily resident in the area in which he was ordinarily resident immediately before the residential accommodation was provided for him*." A similar provision is found in section 105(6) of the CA 1989, which states that "*In determining the 'ordinary residence' of a child for any purpose of this Act, there shall be disregarded any period in which he lives in any place … while he is being provided with accommodation by or on behalf of a local authority*."

The Secretary of State took into account the entirety of the relationship between P and his natural parents and determined that P's 'base' and place of ordinary residence was with them in Cornwall when he turned 18. In doing so the Secretary of State applied his "*Guidance on the Identification of the Ordinary Residence of People in Need of Community Care Services*", which set out two tests from *R v Waltham Forest London Borough Council, ex Parte Vale* (1985) Times 25 February. The first test in the Guidance from *Vale*, so-called "Test one", treated a mentally disabled person in the same way as "*a small child who was unable to choose where to live*", with the consequence that they have the same ordinary residence as their parent or guardian. The second test in the Guidance from *Vale*, "Test two", involved considering a person's ordinary residence as if they had capacity and provided that: "*All the facts of the person's case should be considered, including physical presence in a particular place and the nature and purpose of that presence …*"

Beatson J upheld the Secretary of State's determination and Cornwall appealed to the Court of Appeal. Elias LJ, with whom the rest of the Court of Appeal agreed, held that the Secretary of State had misdirected himself in law and that the first test in *Vale* ought not to be followed. He was critical of the use of the term 'base' and went on to say that, even if that was a helpful concept, Cornwall could not properly be so described as it was simply a place that P visited occasionally for holidays. Elias LJ also thought Wiltshire was out of the question as P had ceased to have any connection with it at all. He held that South Gloustershire was therefore

the only conclusion properly open to the Secretary of State.

The majority of the Supreme Court disagreed. Lord Carnwath, with whom Lady Hale, Lord Hughes and Lord Toulson agreed, held that P was ordinarily resident in the area of Wiltshire. Lord Carnwath undertook a detailed review of the authorities on ordinary residence, including the leading modern authority on ordinary residence, *R v Barnet LBC, Ex p Shah* [1983] AC 309, and *In re P (GE) (An Infant)* [1965] Ch 568, the source of the word 'base' used in *Vale* and the Secretary of State's guidance. Lord Carnwath considered that Lord Denning did not intend in that latter case to separate the idea of a base from a need for physical residence of some kind.

Lord Carnwath also reviewed the facts of *Vale*, where Taylor J was asked to decide the ordinary residence of a young woman, Judith, mentally incapable of forming a settled intention of where to live, who had been living in Ireland for 20 years and returned to live with her parents in England for a few weeks while a suitable residential placement was found for her. Taylor J held that the extent of her disabilities was such that she was totally dependent upon her parents: "*She is in the same position as a small child. Her ordinary residence is that of her parents because that is her 'base' …*" Taylor J went on to hold that if Judith was treated as if she had capacity, the same result would follow as her residence with her parents had all the attributes necessary to constitute ordinary residence.

Lord Carnwath was clear that Taylor J's two approaches should not be treated as separate legal tests. He said (at para 47):

> *"[Taylor J's two approaches] were complementary, common-sense approaches to the application of the Shah test to a person unable to make decisions for herself; that is, to the single question whether her period of actual residence with her parents was sufficiently "settled" to amount to ordinary residence."*

Lord Carnwath considered that under the language of the NAA 1948, "*it is the residence of the subject, and the nature of that residence, which provide the essential criterion*". He went on to say (at para 51):

> *"In so far as Vale is relied on to substitute an alternative test, based on 'the seat of (his) decision-making', or otherwise on his relationship with his parents and their home, it depends on a misunderstanding of that judgment. The seat of the decision-making power in relation to a mentally disabled adult is the authority making the placement (subject to any contrary determination by the Court of Protection), not the parents. For the same reason, the weight put by the decision-maker on the so-called Vale tests 1 and 2, both in the guidance and in the decision-determination, was in my view misplaced."*

Having determined that P had not therefore been ordinarily resident in Cornwall, Lord Carnwath then examined the case for P to be ordinarily resident in either of the two remaining local authorities. He said that applying the *Shah* test without qualification it was easy to see why the Court of Appeal chose South Gloustershire, where P had lived happily for 14 years. Lord Carnwath was explicit about his reasons for rejecting this, despite it being the obvious

answer (at paras 53-55):

> *"… [A]lthough the choice of South Gloucestershire may fit the language of the statute, it runs directly counter to its policy. The present residence in Somerset is ignored because there is no connection with that county other than a placement under the 1948 Act. By the same policy reasoning, South Gloucestershire's case for exclusion would seem even stronger. There is no present connection of any kind with that county, the only connection being a historic placement under a statute which specifically excluded it from consideration as the place of ordinary residence for the purposes of that Act.*
> *The question therefore arises whether, despite the broad similarity and obvious underlying purpose of these provisions (namely that an authority should not be able to export its responsibility for providing the necessary accommodation by exporting the person who is in need of it), there is a hiatus in the legislation such that a person who was placed by X in the area of Y under the 1989 Act, and remained until his 18th birthday ordinarily resident in the area of X under the 1989 Act, is to be regarded on reaching that age as ordinarily resident in the area of Y for the purposes of the 1948 Act, with the result that responsibility for his care as an adult is then transferred to Y as a result of X having arranged for his accommodation as a child in the area of Y.*
>
> *It is highly undesirable that this should be so. It would run counter to the policy discernable in both Acts that the ordinary residence of a person provided with accommodation should not be affected for the purposes of an authority's responsibilities by the location of that person's placement. It would also have potentially adverse consequences. For some needy children with particular disabilities the most suitable placement may be outside the boundaries of their local authority, and the people who are cared for in some specialist settings may come from all over the country. It would be highly regrettable if those who provide specialist care under the auspices of a local authority were constrained in their willingness to receive children from the area of another authority through considerations of the long term financial burden which would potentially follow."*

Unlike the Court of Appeal, Lord Carnwath considered that comparable expressions, including 'normal residence' and 'habitual residence', were a doubtful guide.

Lord Carnwath held that the statutory context was critical in construing the relevant words in section 24 of the NAA 1948. In light of the purpose of the provision, which he considered concerned only the allocation of fiscal responsibility as between local authorities, it would be artificial to ignore the nature of P's placement under the CA 1989, a parallel statutory context. Lord Carnwath said (at paras 59-60):

> *"… [I]t would be wrong to interpret section 24 of the 1948 Act so as to regard PH as having been ordinarily resident in South Gloucestershire by reason of a form of residence whose legal characteristics are to be found in the provisions of the 1989 Act. Since one of the characteristics of that placement is that it did not affect*

> *his ordinary residence under the statutory scheme, it would create an unnecessary and avoidable mismatch to treat the placement as having had that effect when it came to the transition in his care arrangements on his 18th birthday.*
>
> *On this analysis it follows that PH's placement in South Gloucestershire by Wiltshire is not to be regarded as bringing about a change in his ordinary residence. Throughout the period until he reached 18 he remained continuously where he was placed by Wiltshire, under an arrangement made and paid for by them. For fiscal and administrative purposes his ordinary residence continued to be in their area, regardless of where they determined that he should live."*

In his dissenting judgment Lord Wilson agreed with the Court of Appeal. He acknowledged the strong reasons of public policy which militated in favour of the conclusion reached by the majority. At the same time, he was clear that this was not the result which the law, as it stands, compels, saying "*I am not a legislator. Nor, with respect, are my colleagues*."

Comment

The conclusion that P was ordinarily resident in the area of Wiltshire is likely to have far-reaching consequences for the law governing ordinary residence. It is fair to say that it came as a great surprise. As Lord Wilson pointed out in his dissenting judgment, it is a conclusion for which no party had contended at any stage of the proceedings.

The case is extremely important for anyone practising in this field. Many will applaud, in particular, Lord Carnwath's rejection of a separate, paternalistic *Vale* test for those who lack the capacity to decide where to live. Unfortunately for those who practise in this area, Lord Carnwath's judgment opens up almost as many questions as it answers. It seems highly likely that policy reasons articulated by Lord Carnwath for applying the deeming provisions contained in the CA 1989 when determining ordinary residence for the purpose of the NAA 1948 would apply equally when interpreting ordinary residence in the Care Act 2014. This suggests that considerable caution should be exercised when relying on the commentary on ordinary residence in the Care and Support Statutory Guidance, which was written following the judgment of the Court of Appeal.

Questions also arise about the interpretation of ordinary residence in other statutory contexts. It seems likely, for instance, that the deeming provisions in the CA 1989 would also apply when determining ordinary residence and therefore responsibility for providing after-care services to a young person under section 117 of the Mental Health Act 1983, but definitive resolution of such issues will await further case law. This may well be some time coming, given how infrequently ordinary residence issues reach the courts.

No Voice Unheard - response

As we go to press, the Government has published its response to the consultation No Voice Unheard. The response is available here. Various proposals including new guidance and legislative change are set out, although all are subject to the comprehensive spending review, and some – such as further guidance on the need to ensure there is adequate community

provision – do not seem particularly likely to result in meaningful change without significantly more money being injected into the system. One of the longer term aims is 'further consideration in principle of whether and how the Mental Health Act should apply to people with learning disabilities and/or autism', one of the proposals that overlaps with the current Law Commission consultation and could be overtaken by the legislation the Commission produces next year.

Mental Welfare Commission Annual Report

On 29th October 2015 the Mental Welfare Commission for Scotland published its annual report for 2014-15, available here. Introducing the report, Colin McKay, Chief Executive of the Commission, said:

> *"This was an important year in relation to the lawful and ethical treatment of people with mental health issues, learning disability and dementia.*
>
> *"The Mental Health Bill will bring some positive changes, and we welcome the appointment of Jamie Hepburn as the Scottish Government's first minister to have mental health listed in his title.*
>
> ***"But more than 10 years after mental health and incapacity law was reformed, there are still wide variations in understanding amongst Scottish health care staff of how the law should operate. That can lead to unlawful treatment, and to people not getting the care and support they need."***

The report notes that the Mental Health Bill is the most significant revision of mental health law since 2003. The Commission requested alterations to the Bill related to protecting patients' rights, many of which were accepted by Scottish Government. The Bill will give the Commission new statutory responsibilities related to advance statements, and to advocacy. The Commission believes that both of these will help to promote the rights of patients and of people who use services. It is anticipated that these provisions will come into force in 2016.

During the year 2014-15 the Commission revised its aim, embedding human rights at the core of its work. As part of its commitment to increased transparency, it decided that from February 2016 it will publish all of its local visit reports to hospitals and to care services.

The annual report records that as the only organisation in Scotland which monitors the use of mental health and adults with incapacity legislation, the Commission has published national and local information about how well the legislation is being followed, particularly in circumstances where people are detained in hospital against their will.

In this Newsletter we have highlighted concerns about pressures on mental health officer services resulting in widespread breaches of statutory time limits for submission of mental health officer reports and, last month, the Commission's statistics showing a 105% increase over five years in the number of Part 6 applications under the Incapacity Act requiring mental health officer reports. This annual report emphasises the Commission's concerns about the capacity of mental health officer services to fulfil their statutory roles. It records that despite the massive increase in workload, numbers of mental health officers are actually decreasing.

Adrian D Ward

Where am I? Yet more complication and confusion

In our July 2015 newsletter we reported on revised Scottish Government guidance as to

determination of ordinary residence for purposes of social work responsibilities. We noted that Annex A to the guidance concluded with an assertion that it would be reviewed in the light of the decision of the Supreme Court in the *Cornwall* case. We recorded concern not only at potential differences between definitions of "ordinary residence" between England & Wales and Scotland, but differences between "ordinary residence" for the purposes of social work legislation and "habitual residence" for purposes of adults with incapacity legislation (and, in cross-border situations, the Hague Convention 35 on the International Protection of Adults). Those with the stamina to try to follow these complications will have noted that "ordinary residence" may be different for different purposes, such as social work, tax, or entitlement to a particular state benefit; and they will have wrestled with whether the concept of "living in" – for example in the Care and Support (Cross-Border Placements and Provider Failure: Temporary Duty) (Dispute Resolution) Regulations 2014 - may or may not differ from residing or ordinarily residing somewhere.

The multiplicity of different concepts intended to link a person to a place continues to develop unabated. HM Revenue & Customs has now published final guidance on the new Scottish rate of income tax and the criteria for determining liability to Scottish income tax. It proposes that tax status should be determined by concepts such as a "close connection to Scotland" and "main place of residence". It is appalling that this unco-ordinated multiplicity of concepts and definitions should develop, and particularly so that the confusion should be greatest in relation to vulnerable people with impairments of capacity to make their own choices. It is surely time for a clear decision to be made as to how many categories of linkage – beyond basic concepts of nationality and domicile – are required; to reduce the number of concepts to those which are essential; and to define the required concepts clearly and consistently for all purposes.

Adrian D Ward

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Conferences at which editors/contributors are speaking

Cross-Border Guardianship

Adrian and Jill will be participating in a half-day seminar for CPP Seminars Scotland on 4 December at Brodies LLP in Edinburgh. For further details, and to book, see here.

MBL Court of Protection Conference, London, 11 December

Neil is chairing and speaking at this full-day conference on topics from deprivation of liberty to medical treatment to statutory wills. Further details here.

Advertising conferences and training events

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

Chambers Details

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

David Barnes
Chief Executive and Director of Clerking
david.barnes@39essex.com

Alastair Davidson
Senior Clerk
alastair.davidson@39essex.com

Sheraton Doyle
Practice Manager
sheraton.doyle@39essex.com

Peter Campbell
Practice Manager
peter.campbell@39essex.com

London 39 Essex Street, London WC2R 3AT
Tel: +44 (0)20 7832 1111
Fax: +44 (0)20 7353 3978

Manchester 82 King Street, Manchester M2 4WQ
Tel: +44 (0)161 870 0333
Fax: +44 (0)20 7353 3978

Singapore Maxwell Chambers, 32 Maxwell Road, #02-16,
Singapore 069115
Tel: +(65) 6634 1336

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Alex Ruck Keene: alex.ruckkeene@39essex.com

Alex is recommended as a 'star junior' in Chambers & Partners 2016 for his Court of Protection work. He has in cases involving the MCA 2005 at all levels up to and including the Supreme Court. He also writes extensively about mental capacity law and policy, is an Honorary Research Lecturer at the University of Manchester, and the creator of the website www.mentalcapacitylawandpolicy.org.uk. To view full CV click here.

Victoria Butler-Cole: vb@39essex.com

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

Neil Allen: neil.allen@39essex.com

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

Annabel Lee: annabel.lee@39essex.com

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

Anna Bicarregui: anna.bicarregui@39essex.com

Anna regularly appears in the Court of Protection in cases concerning welfare issues and property and financial affairs. She acts on behalf of local authorities, family members and the Official Solicitor. Anna also provides training in COP related matters. Anna also practices in the fields of education and employment where she has particular expertise in discrimination/human rights issues. To view full CV click here.

Simon Edwards: simon.edwards@39essex.com

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

Adrian Ward adw@tcyoung.co.uk

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

Jill Stavert: J.Stavert@napier.ac.uk

Professor Jill Stavert is Reader in Law within the School of Accounting, Financial Services and Law at Edinburgh Napier University and Director of its Centre for Mental Health and Incapacity Law Rights and Policy. Jill is also a member of the Law Society for Scotland's Mental Health and Disability Sub-Committee, Alzheimer Scotland's Human Rights and Public Policy Committee, the South East Scotland Research Ethics Committee 1, and the Scottish Human Rights Commission Research Advisory Group. She has undertaken work for the Mental Welfare Commission for Scotland (including its 2015 updated guidance on Deprivation of Liberty). To view full CV click here.