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Thirty Nine Essex Street Court of Protection Newsletter: February 2012

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Editors

Introduction

Welcome to the February 2012 issue, in which we report important cases on the capacity to consent to sexual relations, on the international jurisdiction of the Court and on the scope for taking into account tax planning in making gifts, as well as the significant decision of the Grand Chamber of the ECtHR in *Stanev* on deprivation of liberty. We also cover the *DM* judicial review decision upon s.21 National Assistance Act 1948 and the precise scope of the powers granted by/duties imposed by Schedule A1 to the MCA 2005; a further iteration in the *Hertfordshire* costs litigation; and, finally, a case upon the test for the appointment of deputies which sheds a further ray of light upon this difficult issue.

As ever (and with the one exception noted at the end), transcripts are to be found on www.mentalhealthlaw.co.uk if not otherwise available.

The Official Solicitor and health and welfare cases

We start, however, with a development of very considerable significance for those concerned with health and welfare matters.[1]

The Official Solicitor wrote to the President of the Court of Protection on 15 December 2011 to inform him that he had reached the limit of his resources with regard to Court of Protection healthcare and welfare cases.

As a result of this development, we understand that the Official Solicitor's position is that he is unable to accept invitations to act in any except the most urgent cases, namely serious medical treatment cases and section 21A appeals, other than those brought by the relevant person's representative. Section 21A appeals may be subject to a delay until a lawyer/case manager becomes available.

All other cases, even where his acceptance criteria are met, are being placed on a waiting list. These cases will be accepted in accordance with the best estimate that can be given to their

[1] We are grateful to the Official Solicitor's office for permission to report this development.

weighting and priority when a case manager becomes available to manage the case.

We further understand that this policy will remain in place until the volume of new cases reduces, or the Official Solicitor's resources for Court of Protection healthcare and welfare cases can be increased, or both, to enable him to revert to the previous acceptance policy.

A Local Authority v H [2012] EWHC 49 (COP)[2]

Summary

H was 29 years old and had mild learning difficulties and atypical autism. She attended special school from aged 5 to 17, Community College until aged 19 and then led an itinerant lifestyle until admitted to a psychiatric hospital (initially as an informal patient) in 2009. H's history demonstrated both a very early and a very deep degree of sexualisation. She was highly vulnerable and exhibited dis-inhibition including a willingness to engage in sexual activities with strangers. By the time of her admission to hospital in 2009, at least one man had been convicted of a sexual offence against her. H's admission to hospital became compulsory under s.3 Mental Health Act 1983 on 20 November 2009 and thereafter authorisation was renewed until her ultimate discharge in August 2011. Her behaviour in hospital often displayed highly sexualised and bizarre features. Attempts were made both to ascertain what she understood about sexual relations and to give some education in issues of self-protection. Proceedings were started in the Court of Protection on 16 October 2010. The Official Solicitor acted as H's litigation friend throughout those proceedings.

On 15 December 2011, Hedley J made a number of orders that were uncontroversial on the evidence. Namely, that H lacked capacity to litigate, to determine her residence, her care and support arrangements, contact and her finances.

Hedley J also held that H lacked capacity to consent to sexual relations. In light of this finding he made a consequential order in her best interests authorising a restrictive regime, including 1:1 supervision at all times - a regime which was expressly designed to prevent H from engaging in sexual relations which she would otherwise willingly do. Hedley J noted that this regime undoubtedly amounted to a deprivation of her liberty but that the parties accepted that in light of Hedley J's finding as to H's capacity to consent to sexual relations, the best interests judgment was sound.

In reaching his judgment on this issue, Hedley J noted that on the facts of the case, given that H had no difficulty communicating, the question of her capacity to consent to sexual relations turned on the factors set out in section 3 (1) (a) – (c) MCA 2005. He was referred by the parties to five reported decisions:

i) *XCC v MB, NB & MAB* [2006] 2 FLR 968 (Munby J);

ii) *Local Authority X v MM* [2007] EWHC 2003 Fam (Munby J);

iii) *R v C* [2009] UKHL 42;

iv) *DCC v LS* [2010] EWHC 1544 Fam (Roderick Wood J);

v) *DBC v AB* [2011] EWHC 101 COP (Mostyn J).

Hedley J held that none of these decisions were binding on the High Court (as it related to the Sexual Offences Act 2003, the decision of the House of Lords in *R v C* was obiter) and recorded that it was accepted by all counsel that the decisions could not be reconciled with one another. The Judge indicated that rather than subject each decision to critical analysis, his approach was to acknowledge those decisions, and then attempt an analysis of his own from first principles, guided by the statute, and then (and only then) to compare (and no doubt contrast) his conclusions with those reached in the five cases.

At paragraphs 20 to 21 of his judgment Hedley J

[2] We are very grateful to Morris Hill at Weightmans (instructed by the Applicant Local Authority) for providing us with the transcript for this judgment hot off the press.

held that a sexual act between humans is a complex process which has "*not just a physical but an emotional and moral component as well*." He further emphasised that it is "*important to remember that possession of capacity is quite distinct from the exercise of it by the giving or withholding of consent. Experience in the family courts tend to suggest that in the exercise of capacity humanity is all too often capable of misguided decision making and even downright folly. That of itself tells one nothing of capacity itself which requires a quite separate consideration*." Hedley J noted that whilst these issues arise both under the criminal and the civil law, and it would be desirable for there to be no unnecessary inconsistency in approach, capacity does arise in different contexts and, in a case such as the present, capacity has to be decided in isolation from any specific circumstances of sexual activity as the purpose of the capacity enquiry is to justify the prevention of any such circumstances arising.

In terms of the analysis to be carried out under section 3(1) MCA 2005, at paragraphs 23-26, Hedley J held the following:

"*23. First comes the question of understanding the relevant information, but what is that? Clearly a person must have a basic understanding of the mechanics of the physical act and clearly must have an understanding that vaginal intercourse may lead to pregnancy. Moreover it seems to me that capacity requires some grasp of issues of sexual health. However, given that that is linked to the knowledge of developments in medicine, it seems to me that the knowledge required is fairly rudimentary. In my view it should suffice if a person understands that sexual relations may lead to significant ill-health and that those risks can be reduced by precautions like a condom. I do not think more can be required.*

24. The greater problem for me is whether capacity needs in some way to reflect or encompass the moral and emotional aspect of human sexual relationships. I have reflected long and carefully on this given Miss Jenni Richards Q.C.'s challenge to formulate and articulate a workable test. In relation to the moral aspect, I do not think it can be done. Of itself that does not alarm me for two reasons: first, I think the standard for capacity would be very modest not really going beyond an awareness of 'right' and 'wrong' behaviour as factors in making a choice; and secondly, the truly amoral human is a rarity and other issues would then come into play. Accordingly, although in my judgment it is an important component in sexual relations it can have no specific role in a test of capacity.

25. And so one turns to the emotional component. It remains in my view an important, some might argue the most important, component; certainly it is the source of the greatest damage when sexual relations are abused. The act of intercourse is often understood as having an element of self-giving qualitatively different from any other human contact. Nevertheless, the challenge remains: can it be articulated into a workable test? Again I have thought long and hard about this and acknowledge the difficulty inherent in the task. In my judgment one can do no more than this: does the person whose capacity is in question understand that they do have a choice and that they can refuse? That seems to me an important aspect of capacity and is as far as it is really possible to go over and above an understanding of the physical component.

26. That then would be my analysis of the requirements for capacity to consent to sexual relations. Whilst I accept of course that human sexual relations are particularly person as well as situation specific, I would be disposed to view that in terms of whether any specific consent was (or in these circumstances) could be given. The difficulty in the Court of Protection is the need to determine capacity apart from specific persons or situations: H is in one sense a classic illustration of the problem. On the other hand one can see as a criminal lawyer the difficulties raised by a general finding in relation to a person who without knowledge of it embarks on what

he thinks is consensual sexual activity. The focus of the criminal law must inevitably be both act and person and situation sensitive; the essential protective jurisdiction of this Court, however, has to be effective to work on a wider canvas. It is in those circumstances that I find myself closer to the views expressed by Munby J. (as he then was) and Mostyn J. although I have reached that position by a more tortuous route."

On the facts, Hedley J considered that H lacked capacity to consent to sexual relations on two specific bases: first, that she did not understand the health implications of sexual relations, a matter made more serious in this case by her history of multiple partners indiscriminately accommodated; and secondly, that she could not deploy the information she had effectively into the decision making process. Those matters were evidenced both by the history of the case and the expert psychiatric assessment that had been undertaken.

Two further issues fell for consideration:

i. H's capacity to marry; and

ii. H's capacity in relation to contraception.

As to H's capacity to marry, Hedley J noted that this raised more complex issues than capacity to consent to sexual relations but for so long as marriage requires sexual intercourse for its consummation, it must follow that the person who lacks capacity to consent to sexual relations (as H did) must lack capacity to marry. However, as H showed no present disposition to marry there was no purpose in making a formal declaration as to her capacity in this regard.

Hedley J also considered it premature to make a declaration as to H's capacity in respect of contraception but noted that she had some basic understanding and could learn more. He therefore considered that the present focus should be on improving her education in this regard.

Guest Commentary by Jenni Richards QC[3]

The uncertainty over the correct legal test for capacity to consent to sexual relations continues. In *A Local Authority v H* both the applicant local authority and the Official Solicitor agreed that the correct approach was that set out by, amongst others, Mostyn J in *DBC v AB* [2011] EWHC 101 COP, namely that the capacity to consent to sex remains act-specific and requires an understanding and awareness (1) of the mechanics of the act, (2) that there are health risks involved, particularly the acquisition of sexually transmitted and sexually transmissible infections and (3) that sex between a man and a woman may result in the woman becoming pregnant.

The parties acknowledged, however, that neither the decision of Mostyn J nor any of the other authorities addressing this issue were binding on a High Court Judge sitting as a nominated judge of the Court of Protection. It was Hedley J who identified for debate at the hearing the question of whether the test for capacity should encompass an emotional and/or moral component. Both the local authority and the Official Solicitor argued against this proposition, and contended that a workable test encompassing the moral and/or emotional elements of human sexual relationships could not be formulated.

In a characteristically thoughtful judgment Hedley J concluded that the moral dimension, although an important component in sexual relations, can have no specific role in assessing capacity. Likewise he acknowledged the difficulty in articulating a workable test that could embrace the emotional consequences of human sexual relations. However, his judgment identifies an important additional factor, namely that P must be able to understand that they have a choice and that they can refuse. Whether this additional factor will lead to different outcomes than would be obtained from simply applying the three criteria identified in Mostyn J's judgment remains to be seen.

Hedley J's judgment usefully addresses the

[3] Counsel for H.

extent of understanding of the health risks of sexual relations that is required in order for P to have capacity. To expect P to have an understanding of the precise health risks associated with different forms of sexual activity and different sexually transmitted diseases might require more of P than many adults without any impairment of, or disturbance in the functioning of, the mind or brain. Sensibly Hedley J has concluded that the knowledge required is fairly rudimentary. It should suffice if the person understands that sexual relations may lead to significant ill-health and that those risks can be reduced by precautions like a condom.

Ultimately, however, Hedley J's judgment reinforces the need for this issue to be considered at appellate level. Otherwise it is inevitable that in every case involving sexual capacity the Court of Protection Judge will have to consider the competing arguments and authorities and form their own view of the correct approach, thereby adding to the abundance of conflicting High Court authority on the point.

Re M [2011] EWHC 3590 (COP)

Summary

As presaged in last month's edition, Mostyn J determined just before Christmas an unprecedented application under Schedule 3 MCA 2005 for recognition and enforcement of an Order of the High Court of the Irish Republic placing a young man, NM, in an English psychiatric institution. The application (in which Alex appeared on behalf of the applicant Irish Health Services Executive) raised a number of stark issues. The Irish order in question (made under the inherent jurisdiction of the High Court in the ROI) required the transport to and treatment of NM at an English psychiatric institution in circumstances where: (1) such would be overwhelmingly likely to amount to a deprivation of his liberty; and (2) he satisfied the clinical criteria for detention under the MHA 1983. A significant question for the Court, therefore, was whether it was barred from recognising and declaring to be enforceable the order of the Irish High Court by virtue of the prohibitions in s.16A of and Schedule 1A to the MCA 2005. Mostyn J had little hesitation in holding that it was not, at paragraph 6 noting that:

> "*Mr. Ruck Keene in his skeleton argument has responsibly drawn my attention to the fact that under s. 16A of the Mental Capacity Act, the court may not include in a welfare order a provision which authorises the person to be deprived of his liberty* [if he is ineligible to be deprived of his liberty by virtue of Schedule 1A]*. The reference to a welfare order is to an order under s. 16(2)(a). However, an order made by me under paragraph 19 of Schedule 3 is not a welfare order under s. 16(2)(a). The whole point of s. 16A is to ensure that courts do not outflank the mandatory provisions of s. 4A and Schedule A1 by making, in effect, deprivation of liberty orders under s. 16(2)(a), but that is not connected at all to the freestanding power to recognise a foreign order of this nature under paragraph 19 of Schedule 3, and so whilst Mr. Ruck Keene has fairly and responsibly drawn my attention to that, it is not something that impacts on any possible exercise of discretion under paragraph 19(4).*"

It is perhaps to be noted, as it is not immediately obvious from the judgment, that the terms of the Irish Order sought to provide NM with safeguards to ensure his position was kept under appropriate review, not least by including within it provisions mirroring, to the greatest extent possible, those of the MHA 1983.

Comment

Schedule 3 to the MCA 2005 is an extremely powerful piece of legislation. Quite whether Parliament understood how powerful it would be is an interesting question, especially given the frankly curious decision to enact it in such a way as to implement in English law the provisions of the 2000 Hague Convention on the International Protection of Adults on a unilateral basis. That it is a very powerful piece of legislation has only been reinforced both by this decision and by the decision of Hedley J in *Re MN* [2010] EWHC 1926 (Fam); [2010] COPLR Con Vol 893. The former decision confirmed that the Court in

deciding whether to recognise and enforce a foreign protective measure was not required to consider whether such was in the person's best interests;[4] this decision confirms that the Court can recognise and enforce a foreign order detaining a person habitually resident overseas in an English psychiatric institution, and that the threshold for declining such recognition and enforcement will be a high one.

Whilst this decision may raise eyebrows it is perhaps to be noted that the framers of the 2000 Hague Convention had had specifically in mind cross-border psychiatric placements,[5] including those without the consent of the individual in question and against their will. Whether those drafting Schedule 3 had in mind either these deliberations or that English Courts would be asked to recognise and declare enforceable applications of the nature brought before Mostyn J is, again, a nice question. However, we suggest that the approach adopted by Mostyn J both to the nature of the exercise required under Paragraphs 19 and 20 and to the interaction of s.16A, Schedule 1A and Schedule 3 is plainly correct. The fact that this gives rise to difficult questions as to how to ensure that the Article 5 ECHR rights of the individual in question (in particular their Article 5(4) rights) are secured is a consequence of the framing of Schedule 3, rather than standing as a necessary bar to recognition and enforcement of an order which complies with the (rather minimalist) requirements of the Schedule.

4 Albeit that implementation would require such consideration by virtue of the operation of Paragraph 12 of Schedule 3. For a further discussion of *Re MN*, see the case note prepared by Alex and Josie in *Trusts & Trustees*, Vol. 17, No. 10, November 2011, pp. 959–962 and, as regards Schedule 3 more widely, Alex's article, *An International Can of Worms: Schedule 3 to the Mental Capacity Act 2005* (2011) 1 Elder Law Journal 77.

5 See, in particular, the Explanatory Report which accompanies the Convention, available at http://www.hcch.net/upload/expl35e.pdf. Such placements were, of course, envisaged as between Convention countries, and subject to the procedures thereunder for consultation with the authorities in the receiving state.

Re JDS (no neutral citation: COP No: 10334473, 19.1.12)

Summary

Senior Judge Lush has recently handed down an important decision upon an application for a gift to be made to the parents of a young man awarded damages for clinical negligence for purposes of reducing the amount of Inheritance Tax that they may have to pay on his death.

The young man in question, born in 1991, had a life expectancy of another 20-25 years (at which point his parents would be in their mid to late 60s). He had been awarded a very significant sum by way of damages for clinical negligence arising out of the circumstances of his birth. His (professional) deputy submitted an application which (in the form that ultimately came before the Court for consideration) was for:

> "*Permission to transfer £325,000 of the patient's funds into a flexible power of appointment trust with the intent that substantial Inheritance Tax will be saved (at today's rates £130,000) provided he lives 7 years*."

As noted above, the intent was that the trust would be for the benefit of the young man's parents. The Official Solicitor opposed the application.

Senior Judge Lush (whilst noting that he had had some reservations in the past as to its utility in all property and affairs cases[6]) applied the balance-sheet analysis derived from *Re A*. His consideration of the various factors identified 9 in favour and 14 against, but noted that this was not necessarily conclusive before discussing whether there was any factor of 'magnetic importance'. At paragraphs 34 ff, he noted as follows:

> "*34. In paragraph 22 of her skeleton argument Georgia Bedworth, counsel for the applicant, stated that 'there is no statutory or other justification for the presumption that the court should not direct*

6 Paragraph 30.

a settlement where P's capital derives from a damages award.' I agree that there is no such presumption, but, in my judgment, in most cases where an individual's assets derive exclusively from a damages award for personal injury, when determining whether making an inter vivos gift is in his or her best interests, the factor of magnetic importance is likely to be the purpose for which the compensation was awarded and the assumptions upon which it was based. This is not confined to the multiplicands and multipliers that have been applied in a specific case, but extends to the fundamental principles that underlie personal injury and clinical negligence litigation generally.

…

36. In very simple terms, if the calculation for James's future care costs was correct back in 2001 when his claim settled, then, on the last day of his life, he should be in the process of spending the last pound of that head of damages. There should be nothing left over after his death. If the sum awarded runs out before then, it could be said that his parents and his deputy have been extravagant and imprudent. Conversely, if there are substantial funds left over, it could be argued that they have been parsimonious and may have denied him the care, attention and quality of life to which he was entitled.

…

39. As I have said, the court is generally sympathetic towards family members who take on a caring role and dedicate their lives to looking after an injured relative. It seeks to support them so far as is possible and practicable and in the best interests of the person concerned, and it does so in a variety of ways. However, it is not the function of the court to anticipate, ring-fence or maximise any potential inheritance for the benefit of family members on the death of a protected party, because this is not the purpose for which the compensation for personal injury was intended. The position would be different, of course, if the individual concerned had substantial funds surplus to his requirements that were derived from another source, such as an inheritance or a lottery win. For the sake of the record, each year between 300 and 400 claimants who have been awarded damages for personal injury or clinical negligence come within the court's jurisdiction. Speaking from personal experience, over the last fifteen years the number of applications of this kind does not extend into double figures."

Senior Judge Lush therefore dismissed the application as not being in JDS's best interests, having regard to all the circumstances including the purpose for which the damages were awarded and the preponderance of disadvantages over benefits. Noting that his parents were *de facto*, if not *de jure*, the applicants and that they were more or less entirely dependent on his damages award, he declined to depart from the general rule regarding costs in property and affairs cases by ordering them to pay the costs of the proceedings personally.

Comment

This is the second important decision on the approach to be taken to compensation received by way of damages for personal injury to have been handed down recently,[7] and is of particular importance in emphasising the – relatively – limited room for manoeuvre before the Court of Protection as regards the management of the property and affairs of the recipients of such awards.

[7] The first being that of *Re HM (SM v HM)* Case No 11875043/01, discussed in our two preceding issues.

Stanev v Bulgaria (Application No: 36760/06, judgment 17.1.12)

Summary

Deprivation of liberty cases before the ECtHR which shed any light upon the considerations applying under the DOLS regime are very rare, and the recent decision of the Grand Chamber in *Stanev* is therefore of some considerable importance (albeit that it arose in the context of a rather different regime for the provision of residential care, as will become apparent). We therefore make no apology for including significant extracts from the judgment of the Court in our note upon the case.

The Applicant in this case had a diagnosis of schizophrenia and had been living in the community. None of his relatives were willing to act as his guardian, and he therefore met the domestic criteria for admission to a social care home. The authorities decided he should be moved to a care home and he was taken then without any explanation or advance warning and placed under partial guardianship, or trusteeship. His state benefits were paid to the care home. The care home was in an isolated area, 8km from the nearest village. It housed 73 residents with differing degrees of mental illness. The Applicant shared a small room with four other residents. The physical conditions of the home were poor and there was little access to the community or to activities.

The Applicant argued that he had been deprived of his liberty under Article 5:

1. ... the applicant submitted that living in a social care home in a remote mountain location amounted to physical isolation from society. He could not have chosen to leave on his own initiative since, having no identity papers or money, he would soon have faced the risk of being stopped by the police for a routine check, a widespread practice in Bulgaria.

2. Absences from the social care home were subject to permission. The distance of approximately 420 km between the institution and his home town and the fact that he had no access to his invalidity pension had made it impossible for him to travel to Ruse any more than three times. The applicant further submitted that he had been denied permission to travel on many other occasions by the home's management. He added that, in accordance with a practice with no legal basis, residents who left the premises for longer than the authorised period were treated as fugitives and were searched for by the police. He stated in that connection that on one occasion the police had arrested him in Ruse and that, although they had not taken him back to the home, the fact that the director had asked for him to be located and transferred back had amounted to a decisive restriction on his right to personal liberty. He stated that he had been arrested and detained by the police pending the arrival of staff from the home to collect him, without having been informed of the grounds for depriving him of his liberty. Since he had been transferred back under duress, it was immaterial that those involved had been employees of the home.

3. The applicant further noted that his placement in the home had already lasted more than eight years and that his hopes of leaving one day were futile, as the decision had to be approved by his guardian.

4. As to the consequences of his placement, the applicant highlighted the severity of the regime to which he was subject. His occupational activities, treatment and movements had been subject to thorough and practical supervision by the home's employees. He had been required to follow a strict daily routine, getting up, going to bed and eating at set times. He had had no free choice as to his clothing, the preparation of his meals, participation in cultural events or the development of relations with other people, including intimate relationships as the home's residents were all men. He had been allowed to watch television in the morning only. Accordingly, his stay in the home had caused a perceptible

deterioration in his well-being and the onset of institutionalisation syndrome, in other words the inability to reintegrate into the community and lead a normal life.

The Government argued that "*the applicant's placement in the home was simply a protective measure taken in his interests alone and constituted an appropriate response to a social and medical emergency*."

The Court held that the national authorities had been responsible for the Applicant's removal to the care home and that he had been deprived of his liberty:

5. With regard to the objective aspect, the Court observes that the applicant was housed in a block which he was able to leave, but emphasises that the question whether the building was locked is not decisive.... While it is true that the applicant was able to go to the nearest village, he needed express permission to do so. Moreover, the time he spent away from the home and the places where he could go were always subject to controls and restrictions.

6. The Court further notes that between 2002 and 2009 the applicant was granted leave of absence for three short visits (of about ten days) to Ruse. It cannot speculate as to whether he could have made more frequent visits had he asked to do so. Nevertheless, it observes that such leave of absence was entirely at the discretion of the home's management, who kept the applicant's identity papers and administered his finances, including transport costs. Furthermore, it would appear to the Court that the home's location in a mountain region far away from Ruse (some 400 km) made any journey difficult and expensive for the applicant in view of his income and his ability to make his own travel arrangements.

7. The Court considers that this system of leave of absence and the fact that the management kept the applicant's identity papers placed significant restrictions on his personal liberty.

8. Moreover, it is not disputed that when the applicant did not return from leave of absence in 2006, the home's management asked the Ruse police to search for and return him. The Court can accept that such steps form part of the responsibilities assumed by the management of a home for people with mental disorders towards its residents. It further notes that the police did not escort the applicant back and that he has not proved that he was arrested pending the arrival of staff from the home. Nevertheless, since his authorised period of leave had expired, the staff returned him to the home without regard for his wishes.

9. Accordingly, although the applicant was able to undertake certain journeys, the factors outlined above lead the Court to consider that, contrary to what the Government maintained, he was under constant supervision and was not free to leave the home without permission whenever he wished. With reference to the Dodov case (cited above)[8]*, the Government maintained that the restrictions in issue had been necessary in view of the authorities' positive obligations to protect the applicant's life and health. The Court notes that in the above-mentioned case, the applicant's mother suffered from Alzheimer's disease and that, as a result, her memory and other mental capacities had progressively deteriorated, to the extent that the nursing home staff had been instructed not to leave her unattended. In the present case, however, the Government have not shown that the applicant's state of health was such as to put him at immediate risk, or to require the imposition of any special restrictions to protect his life and limb.*

10. As regards the duration of the measure, the Court observes that it was not specified and was thus indefinite since the

[8] *Dodov v. Bulgaria* (Application No. 59548/00, 17 January 2008)

applicant was listed in the municipal registers as having his permanent address at the home, where he still remains (having lived there for more than eight years). This period is sufficiently lengthy for him to have felt the full adverse effects of the restrictions imposed on him.

11. As to the subjective aspect of the measure, it should be noted that, contrary to the requirements of domestic law, the applicant was not asked to give his opinion on his placement in the home and never explicitly consented to it. Instead, he was taken to Pastra by ambulance and placed in the home without being informed of the reasons for or duration of that measure, which had been taken by his officially assigned guardian. The Court observes in this connection that there are situations where the wishes of a person with impaired mental faculties may validly be replaced by those of another person acting in the context of a protective measure and that it is sometimes difficult to ascertain the true wishes or preferences of the person concerned. However, the Court has already held that the fact that a person lacks legal capacity does not necessarily mean that he is unable to comprehend his situation. In the present case, domestic law attached a certain weight to the applicant's wishes and it appears that he was well aware of his situation. The Court notes that, at least from 2004, the applicant explicitly expressed his desire to leave the Pastra social care home, both to psychiatrists and through his applications to the authorities to have his legal capacity restored and to be released from guardianship.

12. These factors set the present case apart from H.M. v. Switzerland (cited above), in which the Court found that there had been no deprivation of liberty as the applicant had been placed in a nursing home purely in her own interests and, after her arrival there, had agreed to stay. In that connection the Government have not shown that in the present case, on arrival at the Pastra social care home or at any later date, the applicant agreed to stay there. That being so, the Court is not convinced that the applicant consented to the placement or accepted it tacitly at a later stage and throughout his stay.

13. Having regard to the particular circumstances of the present case, especially the involvement of the authorities in the decision to place the applicant in the home and its implementation, the rules on leave of absence, the duration of the placement and the applicant's lack of consent, the Court concludes that the situation under examination amounts to a deprivation of liberty within the meaning of Article 5 § 1 of the Convention. Accordingly, that provision is applicable.

The Court found that the deprivation of liberty was unlawful because there was no proper evidence that the *Winterwerp* criteria[9] were satisfied, which meant that Article 5(1)(e) could not be relied on. The court reiterated (at paragraph) that "[a]*s regards the deprivation of liberty of mentally disordered persons, an individual cannot be deprived of his liberty as being of 'unsound mind' unless the following three minimum conditions are satisfied: firstly, he must reliably be shown to be of unsound mind; secondly, the mental disorder must be of a kind or degree warranting compulsory confinement; thirdly, the validity of continued confinement depends upon the persistence of such a disorder*."

The Court also concluded that there had also been a breach of Article 5(4) (review by a court), Article 5(5) (right to compensation), Article 3 (inhuman and degrading treatment by virtue of the poor living conditions in the home) and Article 6. The Applicant was awarded EUR15,000 in damages.

Comment

Frustratingly, although there were considerable hopes that this case would shed some useful light on the extremely vexed question of precisely what is and is not a deprivation of

[9] *Winterwerp v. the Netherlands*, 24 October 1979, § 39, Series A no. 33.

liberty, this decision promised much but ultimately offered rather less.

The ECtHR clearly rejected the idea that doing something in someone's best interests means that it cannot be a deprivation of liberty, but accepted that measures demonstrated to be necessary to protect life and limb (as in the *Dodov* case) may not amount to a deprivation of liberty. Both concepts seem consistent with the recent judgment of the Court of Appeal in *Cheshire West*; how easy they are to apply in practice is another question.

However, what is underlined by the judgment in *Stanev* is the crucial importance of having regard to the wishes of a person who is deemed to lack capacity. While the court's comments on this issue were made in the context of a system where a person can be deemed to lack 'legal capacity' (rather than one where capacity decisions are made on an issue-specific basis as under the MCA 2005), they do highlight the need to appreciate what P wants, and the heavy burden that is placed on anyone seeking to go against P's wishes.

The judgment is also of interest because of its clear statement that the *Winterwerp* criteria must be met for a deprivation of liberty under s.5(1)(e) to be lawful, and the application of this established principle in the context of detention in a care home rather than a psychiatric institution. It is not obvious to the authors that this decision is consistent with the decision of the Court of Appeal in *G v E* [2010] EWCA Civ 822, in which the court stated '*we do not think that ECHR Article 5 imposes any threshold conditions which have to be satisfied before a best interests assessment under DOLS can be carried out*.'

DM v Doncaster MBC and Secretary of State for Health [2011] EWHC 3652 (Admin)

Summary

This case is not a Court of Protection case, but is of importance because of the detailed analysis conducted by Langstaff J of the provisions of the MCA 2005 relating to deprivation of liberty.

Both husband (FM) and wife (DM) were in their 80s and had been married for 63 years. He had dementia and was being detained in a care home pursuant to a DOLS authorisation; she wanted him back home. The care home fees were being paid out of his limited income and their joint savings. His wife brought a claim to recover the fees, drawing an analogy with *R (on the application of Stennett) v Manchester City Council* [2002] 2 AC 1127 and by relying upon human rights arguments. In summary, Langstaff J held:

1. The MCA 2005 did not create either a duty or power to accommodate FM.

2. FM fell within the terms of s.21 of the National Assistance Act 1948 and was not excluded from its scope by the operation of s.21(8).

3. Section 3 of the Human Rights Act 1998 gave no reason to read down s.21(8) to reach any other conclusion.

4. FM's accommodation at the care home therefore had to be paid for by him or on his behalf, in accordance with s.22 of the National Assistance Act 1948 and regulations made under it.

5. This was not discriminatory upon an application of Article 14 ECHR read with Article 1 of Protocol 1. FM was not materially in the same position as those who receive aftercare under the provisions of s.117 of the Mental Health Act 1983 and the State would in any event have offered sufficient justification for the result.

6. Domestic legislation requires this result and it was not suggested that this legislation was incompatible with European obligations.

The claimant contended that, by virtue of the DOLS authorisation, the local authority was under a duty to accommodate him under the MCA 2005 (no power to charge) rather than under s.21 of the National Assistance Act 1948 (duty to charge in s.22, subject to means testing). Rejecting the argument, Langstaff J held that the MCA 2005 did not impose a duty or

power on local authorities to accommodate detained care home residents. As the DOLS supervisory body, they were obliged to ensure that the DOLS assessments were carried out, to check whether the six qualifying requirements were made out and, if they were, to grant the requested standard authorisation. They were not obliged to accommodate the person, to arrange for their accommodation, or to pay for it:

> "*The whole structure of the Act is designed not to provide for the accommodation of those who lack capacity and who are likely to suffer harm if not detained but to ensure that those who do detain such a person are free from liability for doing so.*" (para. 35)

The MCA 2005 authorised detention; it did not require it. As a result, it was lawful to charge incapacitated individuals for their own detention if they fell within the National Assistance Act 1948 s.21. This required local authorities to provide accommodation for those who "*by reason of age, illness, disability or any other circumstances are in need of care and attention which is not otherwise available to them*". The claimant argued that this duty related to those who wanted accommodation to meet their needs, rather than to those who were accommodated through compulsion. But this was rejected: the test was objective and related to whether the person was in "need" of care rather than whether they desired accommodation for their needs:

> "*As a matter of interpretation the scope of section 21 is wide enough to cover those who do not necessarily wish to be accommodated by the local authority or who, as in FM's case, are incapable of deciding for themselves whether they wish it*." (para 47)

Human rights arguments did not avail the claimant. An argument of statutory interpretation, based upon the presumption against the deprivation of property in Article 1 of the First Protocol, was rejected as "contrived and unrealistic" in circumstances where there was no uncertainty about the correct interpretation of the statutes (paras 50-56). Finally, by comparing DOLS residents with other residents receiving free aftercare under s.117 of the Mental Health Act 1983, it was contended that to require the former but not the latter to pay their care home fees was discriminatory, contrary to Article 14 ECHR, and could not be justified. Again, this was rejected:

> "[I]*n my view, those receiving after-care are not in the same material circumstances. They are different, in my view, because all of them necessarily (because of the statutory provision) have been detained earlier under section 3 or other provisions of the Mental Health Act. Those provisions require not only that the detention of the individual is in, and is proportionate to, his own interests in protecting him from harm, as in the case of FM, <u>but also in the public interest as protecting them from harm, which is not the case with FM</u>.*[10] *The public has a distinct interest in the detention of those who have been released into aftercare, under section 117, in a way which it does not in the case of someone whose detention is authorised by the Mental Capacity Act.*" (para 65)

The second material difference, it was said, related to the change of national policy which sought to transfer the treatment of mental patients from institutions into the community. Free aftercare was thereby part of the scheme designed to bridge the gap between the incarcerating institution and an unsupported return to the community (para 66). FM, on the other hand, was not detained under the MHA, was not a danger to others and, given the primacy of the MHA, the MCA was not an alternative choice for a decision maker where the individual came within the scope of the MHA (para 67).

The true comparison to be made was therefore held to be between those with mental capacity and those lacking capacity who were accommodated under National Assistance Act

10 The authors struggle to reconcile this view with the actual wording of the Mental Health Act s.3 whereby detention may be necessary <u>either</u> for the health or safety of the patient <u>or</u> for the protection of other persons.

1948 s.21. The former paid for their fees so there was no disadvantageous difference in treatment if the latter were similarly required to do so.

Finally, Langstaff J held, in the alternative, that even if those receiving free aftercare were the proper comparator, requiring the husband to pay for his fees would have been justified and therefore not contrary to Article 14:

> "*If a person wishes it, it is not unfair that he should pay. If he is incapable of forming a wish whether for or against accommodation then others may have to do that for him. Providing it is in his best interests to be in such a home, it is not unreasonable to suppose that if he had capacity, he would see that for himself and would wish to be in such accommodation. He would be in precisely the same position as the true volunteer. It is not inherently unreasonable for the State, in making its general provisions, to require a charge be paid by such a person.*" (para 72)

Comment

This decision will disappoint those who consider it to be unconscionable for an incapacitated person to be made to pay for their detention by the State. Unlike the National Health Service, accommodation provided under Part 3 of the National Assistance Act 1948 has never been free. A proposed amendment to the Mental Health Bill 2006 would have ensured that the provision of accommodation for detained residents was free of charge but this was abandoned in the face of government opposition. DOLS was about best interests, not punishment, and there was a concern that the safeguards might not be used if the authorities knew that they would have to pay for the person's detention. It might also provide a perverse incentive for relatives to ensure that their incapacitated family member came under DOLS in order to avoid care home fees.

However, those subject to DOLS are unable to choose to be detained and cannot choose their place of detention.[11] Nor do they choose to spend their income and savings on a place from which they are not free to leave. Being forced to pay in these circumstances must be somewhat unique; it is difficult to conceive of any other situation in which the State can compel a citizen to pay for their own State detention. The claimant's purported analogy with *Stennett* – the judicial bedrock for free MHA aftercare – was therefore interesting in a number of respects. There, Lord Steyn observed:

> "*It can hardly be said that the mentally ill patient freely chooses such accommodation. Charging them in these circumstances may be surprising … If the argument of the authorities is accepted that there is a power to charge these patients such a view of the law would not be testimony to our society attaching a high value to the need to care after the exceptionally vulnerable*."

Indeed, these moral arguments have even more persuasive force in respect of DOLS, not least because the person remains in detention whereas MHA s.117 applies once patients have regained their freedom. However, Lord Steyn's observations, Langstaff J held, were "*not statements of legal principle, however compelling they may be socially and morally*" (para 73).

Insofar as freedom to choose is concerned, the judge's comparison between those with capacity with those without may give cause for concern. After all, a person with capacity who is in need of care and attention not otherwise available to them is entitled to refuse a local authority's attempt to fulfil its s.21 duty. *In R v Kensington and Chelsea RLBC, ex parte Kujtim* [1999] 4 All ER 161 it was held that the duty is discharged if the person:

> "*… Either unreasonably refuses to accept the accommodation provided or if, following its provision, by his conduct he manifests a persistent and unequivocal refusal to observe the reasonable requirements of the*

11 Compare with the National Assistance Act 1948 (Choice of Accommodation) Directions 1992.

local authority in relation to the occupation of such accommodation."

So in *R v Southwark LBC, ex parte Khana and Karim* [2001] EWCA Civ 999, for example, the duty to accommodate would have been discharged for as long as Mrs Khana was unreasonably refusing the offer of a residential care home placement which was considered necessary by the local authority to meet her assessed needs. Those, like FM, who lack capacity are denied that choice and may not therefore be in the same position as "*the true volunteer*"; a person who, provided they have capacity, is entitled to make an unwise residential decision. Had FM appointed his wife under a personal welfare Lasting Power of Attorney whilst he had capacity, she could have refused what was being proposed and prevented the DOLS authorisation taking place, subject to a Court of Protection challenge.

Finally, all parties in this case accepted that if s.21 of the National Assistance Act 1948 applied, the local authority was compelled by s.22 to means test and charge FM for the fees. This rule appears wholly arbitrary with its complete absence of any discretion to waive or disapply the charges. Future challenges may well question whether such an arbitrary legislative rule is compatible in such Article 5 and 8 situations.

VA v Hertfordshire PCT and ors [2011] EWHC 3524 (COP)

Summary

This case is a further judgment on costs from Peter Jackson J, in litigation related to the previously reported case of *AH v Hertfordshire Partnership NHS Foundation Trust* [2011] EWHC 352.

In this case, costs applications had been made by the Official Solicitor as litigation friend to a number of residents of an NHS campus facility who had been the subject of best interests proceedings similar to those in the AH case. The cases other than AH all settled without a hearing as the statutory bodies involved agreed not to pursue their plans to move the residents into community placements. Costs were awarded in favour of the residents against the statutory bodies in varying proportions, and the judge stated:

The conclusion I have reached in this case represents a partial departure from the general rule that there should be no order for costs. It *is a case where there has been no bad faith or flagrant misconduct, but there has been substandard practice and a failure by the public bodies to recognise the weakness of their own cases and the strength of the cases against them. In such circumstances they cannot invoke Rule 157 at the expense of others.*

Comment

As ever, it would be dangerous to try to extract from a fact-specific decision on costs any general principles. However, the judge's comment that the statutory bodies had failed to recognise the strength of the case against them is of some interest, since that is, in the authors' experience, by no means an uncommon feature of litigation in the Court of Protection – expert opinions are often disputed by one or more parties and substantive hearings held where the outcome is predictable. In many cases, the intransigent party is an impecunious litigant in person or is publicly-funded, and so costs orders are rarely sought or made.

SBC v PBA and Others [2011] EWHC 2580 (Fam) [2011] COPLR Con Vol 1095

Summary and comment

Finally, a reason – if you needed one – to purchase the COPLR Consolidated Volume is that that is the only place in which you can find the relevant extracts from the judgment of Roderic Wood J in this case (decided last year) as to the test to apply when the Court is considering whether to appoint a deputy (whether property and affairs or health and welfare). The judgment was only approved for reporting on a partial basis, containing as it did significant amounts of discussion and consideration of matters relating to the specific circumstances of PBA which did not need to be

the subject of wider reporting.

However, in material part (paragraph 67), Roderic Wood J confirmed that the 'unvarnished' words of s.16 MCA 2005 set down the test for appointment of a deputy, and that the Code of Practice (with its reference to 'most difficult' health and welfare cases) did not compel the Court to be satisfied that the circumstances were difficult or unusual before a deputy could be appointed.

Our next update should be out at the start of March 2012, unless any major decisions are handed down before then which merit urgent dissemination. Please email us with any judgments and/or other items which you would like to be included: credit is always given.

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