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Thirty Nine Essex Street Court of Protection Newsletter: October/November 2011

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Editors

Introduction

Welcome to the October/November 2011 edition of the 39 Essex Street Court of Protection Newsletter. Decisions are now flooding out of the Court again after the summer lull; the veritable rush of decisions together with the arrival for one of the authors of the littlest member of the CoP team means that we have decided to do a bumper double edition for October and November; normal service will be resumed next month.

We are particularly glad to be able to welcome both as commentator on the *Re GM* case and as a new addition to the editorial team Neil Allen, who has recently joined 39 Essex Street, practising in Manchester, and who brings with him a wealth of academic expertise upon all things mental health and mental capacity related.

All cases should be available on www.mentalhealthlaw.co.uk if not otherwise available.

Cases

D v R (Deputy of S) and S [2010] EWHC 3748 (COP)

Summary

We start with a decision from last year which has only just been made publicly available. It is a (still relatively rare) example of a costs judgment, in this case following on from the important decision of Henderson J reported in an earlier edition of this newsletter upon the capacity of an elderly man, S, to bring proceedings in the Chancery division[1] for recovery of monies allegedly given to his former legal secretary following the exercise of undue influence on part. In that judgment, Henderson J had a number of critical comments to make about the expert evidence, and, in particular, as to the basis upon which D had instructed an expert to report upon S's capacity.

Upon judgment, the Deputy sought that D pay all of the costs upon an indemnity basis; D sought that the usual rule in property and affairs

[1] [2010] EWHC 2405 (CoP).

proceedings be followed and that the costs of both parties be paid out of the estate of Mr S. Henderson J conducted an analysis of the statutory provisions (in particular of Rule 159, setting down the 'usual rule'), and of the pre-MCA authorities,[2] which he noted could be of only limited assistance in light of the new statutory regime (paragraph 9). That statutory regime contained as a central rule the general rule, which "*is the starting point and a good case has to be made out for departing from it. It is not the case that the court has an entirely unfettered discretion. On the contrary, there is a prescribed starting point and a discretion to depart from it in appropriate circumstances*" (paragraph 9).

On the facts, Henderson J decided that the general rule should apply down to and including a hearing which took place before him on 8 December 2009, but that D should bear all of her own costs from 9 December 2009 onwards and should also pay 75% of the costs of the Deputy for the same period, on the standard basis. In coming to this conclusion, he placed particular emphasis upon the deficiencies in approach adopted to the obtaining of expert evidence, an approach which made the final hearing substantially longer and more complicated than it need have been.

Comment

Reported decisions considering costs in property and affairs cases are still rare; whilst the result of this case is entirely fact specific, the case is still of importance for (1) emphasising the centrality of the general rule; and (2) the risks run by professional advisers when they do not properly address their minds to the preparation of expert evidence.

Sharma and Judkins v Hunters [2011] EWHC 2546 (COP)

Summary

Following on the decision above, the matter returned to Court in a different guise. Mr S died in late 2010; the Deputy (the first Applicant) and her solicitor (Mr Judkins) then made an application to the Court for a wasted costs order against Mrs Duke's[3] solicitors, Hunters, in respect of the period after 8 December 2009 (i.e. the period in which Henderson J had found that the general rule no longer applied). The solicitor with conduct of the matter on Mrs Duke's behalf were unable to disclose any privileged information to the Court, as she had not waived her legal professional privilege. Two objections were taken by Counsel for Hunters: (1) the application was made too later; and (2) the terms of a consent order entered into the Chancery proceedings brought by the Deputy precluded the application being made.

Henderson J started by analysing the applicable principles which he confirmed were (by virtue of Rule 160(1) of the Rules) in practice the same as in the High Court. This meant that the relevant rules were to be found in CPR r.48.7 and Paragraph 53 of the Costs Practice Direction,[4] as amplified by a number of standard authorities.[5] Given the fact that Mrs Duke had not waived her privilege, the effect of *Medcalf v Mardell* is that:

> "*it is only in extremely rare cases that a wasted costs order should be made against a legal representative who is prevented by legal professional privilege from giving his full answer to the application. The court should make an order only if, proceeding "with extreme care", it is satisfied that there is nothing (my emphasis) the practitioner could say to resist the order, had privileged been waived, and, in addition, that it is in all the circumstances fair to make the order. As Lord Hobhouse put it, the lawyer must be given the benefit of every reasonably conceivable doubt that might be raised by privileged material which might possibly exist. The House also emphasised the need to prevent the jurisdiction from generating "a new*

[2] *In re* Cathcart [1892] 1 Ch 549; *in re William Frederick Windham* (1862) 4 D. F. & J. 53.

[3] The 'D' of the previous decision.

[4] Itself applicable in the Court of Protection by virtue of Practice Direction A supplementing Part 19 of the Court of Protection Rules.

[5] *Ridehalgh v Horsefield* [1994] Ch. 205; *Medcalf v Mardell* [2002] UKHL 27, [2003] 1 AC 120.

> *and costly form of satellite litigation", and the need for an application against the lawyers acting for an opposing party to be apt for summary determination at a hearing the length of which should be measured in hours rather than days.*" (paragraph 20)

For reasons that are immaterial for purposes of this Newsletter, Henderson J found that the second objection taken by Hunters (relating to the consent order) was not made out, but that the first objection (timing) was valid. He went on, obiter, to make a number of comments about the conduct of the solicitors in the instruction of the expert whose evidence was the subject of such criticism in the substantive judgment. Whilst he was critical of the approach taken, he found that the stringent test set down in *Medcalf v Mardell* was not met, such that he would not have made a wasted costs order against Hunters given that they were unable to respond properly to the application.

Comment

Again, although this judgment is fact specific, it is of some wider importance for confirming (if confirmation were needed) the direct read-across of the principles applicable in wasted costs matters from the High Court to the Court of Protection.

FP v GM and A Health Board [2011] EWHC 2778 (COP)

Summary[6]

Although this case was decided at the start of this year, it has only just been made available for wider circulation.

GM was a 79 year-old man with mixed vascular dementia provoked by alcohol damage who lived with his partner, FP, and her son. Having been detained for assessment under section 2 of the Mental Health Act 1983, FP used her nearest relative powers to trigger his discharge. Before the necessary 72 hours written notice had expired, GM was discharged from section and made subject to an urgent, followed by a standard, DOLS authorisation which FP then challenged. Whilst expert evidence was being obtained, the authorisation expired and was replaced by a Court Order. By the time of the hearing, GM was ready for discharge but lacked residential capacity. So the central issue before the Court was whether he should return home on a trial basis or whether he should be, in effect permanently, admitted into EMI care.

In an extempore judgment, the starting point for Mr Justice Hedley was that GM should not be deprived of the opportunity to return home unless it was so contrary to his interests that the Court must not even seriously contemplate it (paragraph 25). This reflected GM's right not to be deprived of family life unless such deprivation could be justified under Article 8(2) of the ECHR. His health and care needs, as well as his need for physical care and consistency were amongst the factors relevant to the best interests balancing exercise but:

> "*21. … There is, of course, more to human life than that, there is fundamentally the emotional dimension, the importance of relationships, the importance of a sense of belonging in the place in which you are living, and the sense of belonging to a specific group in respect of which you are a particularly important person."*

On the one hand, EMI care would attend to all his physical and medical needs. But GM would be one of perhaps many residents, possibly cared for by transitory staff, where the emotional component could not begin to be met in the same way as in a family setting. On the other hand, a family placement would result in a lesser quality of physical care because of the enormous caring demands, with the attendant risk of breakdown and conflict. However:

> *"24. … such a placement contains a formidable emotional component which GM for over 20 years has clearly regarded as being of profound importance to him. These are the single most important relationships in his life.*

[6] Summary and commentary kindly provided by Neil Allen.

> *This is the place where he belongs, and where he matters in a sense that he could never matter in an institutional care setting*."

In the context of trying to compare apples with pears, the Court had to strike the best interests balance "with as broad a view of those interests as it is possible to do". GM was thought to have one or two years of life left to him and, where possible, people should be allowed "to spend their end time within the family rather than in an institution, even if there are shortcomings in terms of care which an institution could address" (paragraph 34). Moreover:

> "*33. If there is a placement in a care home, we will probably never know whether that was right or not. If there is a placement at home, we most certainly will discover whether it was right or wrong, and I specifically acknowledge that the court may be shown to have been wrong in the decision that it takes.*"

In all the circumstances, the Court order was discontinued and GM was returned home on a conditional basis.

Comment

This judgment represents a master class in best interests decision-making. Determining the residence issue through an Article 8 lens ensured that the significant emotional component of the best interests analysis was not overshadowed by its physical counterpart. Indeed, the need to recognise the strength of family ties is a consistent judicial message being relayed by the Court of Protection. Notable, also, is the fact that the Court did not have any regard for the welfare of FP or her son, except insofar as it impacted upon GM's welfare. This was because they had capacity to make (un)wise decisions in relation to the risks GM presented upon his return home.

The proceedings themselves demonstrate what can be achieved: expert evidence was obtained and a determination of the Court was reached within 8 weeks of the initial application having been filed. A life-changing decision had to be made on the basis of the best available evidence; the same task routinely expected of DOLS best interests assessors. His Lordship recognised the pressure upon the Court system and observed:

> "*12. … [I]t seems to me that it is absolutely essential that the Court of Protection establishes a practice that these interim cases must be dealt with quickly, and having regard to the demands on the system generally, proportionately, that is to say almost certainly without detailed oral evidence…*"

The conditional nature of the Order also illustrates one of the many advantages of using the judicial process, particularly where there has been a history of non-engagement with social care services. In this case, GM's return home was conditional upon his family accepting four one-hour calls per day and regular reviews, with FP also being expected to seek help promptly if necessary, comply with medical advice, and recognise that any failure to co-operate may result in the placement ending (paragraph 31).

A further point of interest, albeit one that did not fall for determination on the facts of this particular case (as the Court did not need to consider the legality of the steps taken in this regard[7]) is the tension between para 1.14 of the DOLS Code of Practice and *A County Council v MB & Ors* [2010] EWHC 2508 (COP). The former says:

> "*Deprivation of liberty should not be extended due to delays in moving people between care or treatment settings, for example when somebody awaits discharge after completing a period of hospital treatment.*"

In the latter, Mr Justice Charles stated at paragraph 96:

[7] There was a further potential issue of ineligibility given that GM had been detained under s.2 MHA 1983; the *DN* decision discussed further below may be of relevance in this regard.

> *"Further, in my view, like the court, the best interests assessors should be considering available alternatives and thus solutions that are, or might in practice become or be made available. This will involve a consideration of the impact, difficulties and timings involved in a move and/or a change by reference to the actual alternatives available if P can no longer be lawfully deprived of his liberty at his existing placement …"*

This tension will no doubt fall for further consideration in an appropriate case.

LG v DK [2011] EWHC 2453 (Fam)

Summary

This case provides at least a partial answer to a question that will rarely arise[8] but poses some acute dilemmas when it does: if a person lacks capacity to decide whether to consent to a test to determine whether they are another's parent, what can (and should) the Court do?

LG was the Property and Affairs Deputy for an elderly man, DK. During the course of looking after his affairs, she came across a reference to a daughter. She therefore made an application to the Court of Protection for a decision whether or not it would be in DK's best interests to provide a bodily sample for DNA purposes in order to decide whether or not the woman, BJ, was his daughter. Her reason for so doing was primarily because DK was intestate, such that the Deputy considered it important to determine whether BJ was DK's biological daughter: if she was, his estate would go to her, but it would not do otherwise. DK in correspondence with BJ prior to his loss of capacity had made it clear that he did not wish to undergo a DNA test to establish whether he was her father.

The matter came before the President because it had become clear that it raised a number of difficult issues; by the time of the hearing before him, the most difficult of them had crystallised as being the jurisdictional basis for the Court. Ultimately, the parties were agreed, and the President endorsed the position that – unusually – the power of the Court of Protection to consent to a test being carried out on P's behalf does not derive from ss.15-6 MCA 2005, but rather from the provisions of ss.20-1 Family Law Reform Act 1969.[9] In exercising that power, however, the President held that the Court would approach the matter by reference to whether the course of action was in P's best interests.[10] Whilst, in the case of children, it is necessary that there be proceedings on foot in which the parentage of that child has to be determined for the Court to have any power under ss.20-1 of the 1969 Act[11] the President considered that, as a matter of jurisdiction, the Court of Protection did have the power to give the requisite consent on a 'free-standing' basis.[12]

As the matter had also been raised by the Official Solicitor, the President also (obiter) made it clear[13] that he considered that 'standalone' parentage decisions where the putative parent lacks the capacity to participate should be sought by way of an application to the Court of Protection, rather than (as is the case with the capacitous) by way of an application under s. 55A of the Family Law Act 1986, which allowed any person to apply to the High Court, a county court or a magistrates' court (but not to the COP) for a declaration as to whether or not a person named in the application is or was the parent of another person so named.

As was common ground that the application was not to be pursued before the President in the form it had been issued, but was to be pursued in the context of an application (to be issued) for a statutory will, the President did not decide whether to authorise the taking of a sample,

[8] It would appear that the question had only arisen once previously since 2007: see paragraph 35.

[9] The reason for this being that the President had previously determined that the High Court's inherent jurisdiction to order such tests in the case of children had been removed by the enactment of these provisions: *(Re O (A Minor) (Blood Tests: Constraint)* [2000] Fam 139), which provided a complete statutory code for such tests. The same logic applied by analogy to adults without capacity: paragraph 38.

[10] Paragraph 26. He also made it clear that it was necessary to have regard to whether the purpose for which the test is needed can be as effectively achieved in a way that is less restrictive of P's rights and freedom of action.

[11] *Re E (A Minor) (Parental Responsibility)* [1994] 2 FCR 709.

[12] Paragraph 43.

[13] Paragraph 53.

reserving the decision for a future occasion. He did comment, however, that it would "*require unusual facts for DK's best interests to depart from the ascertainment of the truth or the interests of justice*."[14]

Comment

This case is interesting at a number of levels, not least because of the 'trumping' of the apparently untrammelled powers of the Court under ss.15-6 MCA 2005 by the pre-existing provisions of s.20-1 of the 1969 Act. It also raises (albeit does not determine) the fascinating question of the extent to which pre-existing wishes as to parentage tests are to be honoured when there is no realistic prospect that P will regain capacity and there are clear and compelling grounds upon which to justify the carrying out of such a test by reference to the best interests of the putative child.

The case is also of note for providing confirmation (if such is needed) of a point which had never previously been determined squarely, namely that proceedings before the Court of Protection are civil proceedings.[15]

A Local Authority v PB and P [2011] EWHC EWHC 2675 (CoP)

Summary

This case is the sequel to the decision of Charles J[16] reported in an earlier edition, in which he addressed both general case management decisions in the CoP and the powers of the CoP to address public law decisions taken by local authorities. This decision is of particular interest for the comments made upon the question of deprivation of liberty, which are sufficiently important to reproduce in full:

> "*63. I had the benefit of hearing helpful argument on the problems posed for courts and decision makers under DOLS (a) in respect of the determination of the question whether there is or is not a deprivation of liberty or likely to be one if certain events provided for in a regime of care were to arise, and (b) by the decision of the Court of Appeal in P & Q v Surrey CC & Others [2011] EWCA Civ 190, which the arguments before me demonstrated causes as many problems as it solves. During that argument I was told that the Court of Appeal was reconsidering the issue in an appeal from the decision of Baker J in Cheshire West and Cheshire Council v P & M [2011] EWHC 1330 (COP). That appeal has been heard and judgment is awaited.*
>
> *64. In those circumstances, I have concluded that it is not necessary or appropriate for me to address this issue in this judgment on a basis that may well be overtaken by the reserved judgment of the Court of Appeal, because:*
>
> *i) I am quite satisfied that the proposed care plan and regime for D promotes his best interests and such aspects, if any, of it that mean that he is being deprived of his liberty by its implementation should be authorised. Correctly, in my view, no less restrictive regime was suggested.*
>
> *ii) There is to be a review and until then I consider that a continuation of the present regime, that is an order under s. 16(2)(a) MCA that insofar as there is a deprivation of D's liberty under the present care plan/regime it is authorised in his best interests is appropriate in this case because of its history, the position now reached in it and the state of flux in the authorities. (In other cases, and to the same effect, orders authorised any deprivation of P's liberty under an identified care plan as being in P's best interests).*

[14] Paragraph 54.
[15] Paragraph 36.
[16] [2011] EWHC 501 (CoP).

iii) *I have reached this conclusion notwithstanding that my present view is that if the DOLS regime applies, or would apply if there was a deprivation of liberty, it should be used in preference to authorisation and review by the court. That view is based on the points made below.*

iv) *At present, it seems to me that in the exercise of the welfare jurisdiction and approach under the MCA the most important issue is whether consent or authorisation should be given to a care regime on behalf of a person who does not have the capacity to give consent himself. That question is not determined by whether or not the person is being deprived of his liberty but by an assessment of whether the care regime is in his best interests. This will necessarily include a determination of whether a less restrictive regime would promote P's best interests and when reviews should take place.*

v) *I naturally acknowledge that the DOLS regime is predicated on there being a detained resident and thus a person who is "being deprived of his liberty" (paragraph 6 of Schedule A1 to the MCA) and that for other reasons under the MCA the determination of that question is or can be said to be relevant or something that should be decided. But the approach of s. 4A (3) and (4) which refer to "giving effect to an order made under s. 16(2)(a)" recognises that the crucial issue is the best interests issue and not the question whether there is, or is not, a deprivation of liberty.*

vi) *Absent argument and knowledge of the approach that the Court of Appeal will take in its reserved judgment in the Cheshire case it seems to me at present that:*

a) *there will always be borderline cases on the question whether a person is being deprived of his liberty, and cases in which there will be a deprivation of liberty if identified contingency planning is implemented (involving say restraint) but until this occurs P will not be being deprived of his liberty,*

b) *in those cases it would be prudent and in accordance with a best interests approach for P, a self interest approach for the care provider and an approach that has regard to the relevant Convention rights to ensure that (i) there is no breach of Article 5, and (ii) the regime of care is reviewed to check that it remains in P's best interests and is the least restrictive available regime to bring about that result,*

c) *the DOLS regime can be applied in such cases of doubt and thus to cover those cases and so the "what if situation" that a court may differ from the view of the relevant assessors on the application of Article 5 and thus whether there is a deprivation of liberty*

and there was a need to apply the DOLS regime. Section 3 of the HRA 1998 supports that view,

d) *all the qualifying requirements in the DOLS regime (see paragraph 12 of Schedule A1 to the MCA) would be appropriate, or at least not inappropriate or preliminary, matters to consider in a best interests consideration and review of a doubtful or "what if" case, or one in which if certain events occur in an emergency there would be a deprivation of liberty,*

e) *those requirements, and a best interests consideration within or outside them, will necessarily include a need to consider that the least restrictive available regime is put in place, and they are much easier concepts for assessors and the courts to apply, and*

f) *those requirements can be applied without the assessor or the court getting tied down in the difficult, time consuming and essentially unnecessary task of deciding whether or not (and if so when) the implementation of the care regime constitutes a deprivation of liberty,*

and so

vii) there is much to be said for an approach under DOLS and by the court that focuses on best interests and the other qualifying requirements and provides authorisation of a (or any) deprivation liberty under an identified care regime that is so identified as the least restrictive available regime to best promote P's best interests."

Comment

The arguments referred to by Charles J ran for the best part of two days; that he chose not then to come to a concluded view as to whether D was deprived of his liberty is an indication, perhaps, of a degree of judicial frustration at the extent to which questions of deprivation of liberty are being addressed before the Courts with an every finer degree of refinement without – sadly – an equivalent degree of clarity. It is also a useful reminder that one must not in debates regarding deprivation of liberty lose sight of the twin – linked – questions of whether circumstances are the least restrictive possible and in P's best interests. It is, however, of note that the logical (if not necessarily unwelcome, albeit costly) consequence of this decision is that very many more individuals should be made subject to the DOLS regime on a 'precautionary' basis.

R (Sessay) v SLAM and Commissioner of the Police for the Metropolis [2011] EWHC 2617 (QB)

Summary

This decision of the Divisional Court is of importance as (1) a rare decision upon the scope of ss.5-6 MCA 2005; and (2) the first decision as to the power of Trusts to detain the mentally disordered pending their admission under the MHA 1983, where the individual in question lacks the capacity to decide whether to remain at hospital pending the completion of the admission process.

On 7 August 2010 two police officers entered the private accommodation of, the Claimant, following a complaint from a neighbour that the Claimant had not been caring properly for her child. The officers formed the view that the Claimant was mentally disordered and were concerned for her welfare and that of her child.

The officers reasonably formed the view that it was in the Claimant's best interests that she be taken to hospital for the purposes of being assessed and receiving help in relation to her mental health. They drove the Claimant and her child to Peckham police station, where the child was taken into police protection. Then they drove the Claimant on to the Maudsley Hospital, where she was admitted to the Hospital's 's.136 suite.'

The police purported to use ss.5 MCA 2005 as their justification for taking the Claimant from her home to the hospital. Before the matter came to a hearing, the police conceded that in so doing they had acted unlawfully, and the Claimant and the police agreed the following declaration (subsequently endorsed by the court):

> *"1. Sections 135 and 136 of the Mental Health Act 1983 are the exclusive powers available to police officers to remove persons who appear to be mentally disordered to a place of safety. Sections 5 and 6 of the Mental Capacity Act 2005 do not confer on police officers authority to remove persons to hospital or other places of safety for the purposes set out in sections 135 and 136 of the Mental Health Act 1983.*
>
> *2. The Claimant's removal to hospital by the Second Defendant's officers on 7th August 2010 was unlawful and breached her rights under Article 5 and Article 8 ECHR."*

The Claimant arrived at the hospital at 09.20 on 7 August 2010. The application to admit her under s.2 MHA was not received by the Hospital Managers until 22.20, thirteen hours later. The Claimant's case was that her treatment in the hospital amounted to detention and/or deprivation of liberty, which was not lawful and in breach of Article 5 ECHR. Further the Claimant sought a declaration that the general practice and policy of the Trust for holding persons awaiting assessment for admission for up to eight hours (or longer) is unlawful.

The Trust contended that there was a lacuna in the MHA 1983, such that what would otherwise be false imprisonment at common law and/or – potentially[17] – a deprivation of liberty for purposes of Article 5 ECHR required justification, such justification being found in the doctrine of necessity.

The Divisional Court concluded that there was no lacuna, and that the MHA 1983 provided a complete statutory code for six reasons:[18]

1. Part II MHA contains a procedure for compulsory hospital admissions;

2. Parliament has expressly provided (in s.4 MHA 1983) for the situation where the application is one of urgent necessity;

3. The Code of Practice provides guidance in relation to emergency applications under s.4, and also that local social services authorities are responsible for ensuring that sufficient AMHPs are available to carry out their roles under the Act, including assessing patients to decide whether an application for detention should be made, a responsibility giving rise to a requirement that a service be available 24 hours a day.

4. The Trust's own policy provided for the use of s.4, and there was no evidence of any time delays when applications were made under s.4;

5. if a patient evidences an intention to leave the hospital before the s.4 application is completed, hospital staff may contact the police who have the power to detain the patient under s.136. The Court clarified (a point that had previously been unclear) that the Accident & Emergency Department of a hospital is a place to which the public have access and accordingly it is a public place for the purposes of s.136.

[17] The Trust also argued that the Article 5 jurisprudence allowed a principled conclusion that there was in fact no deprivation of liberty at all, relying in particular upon the line of cases summarised in *Foka v Turkey* (Application No.28940/95; decision of 26 January 2009). See paragraph 51 of the judgment. Submissions were also made as to the extent to which purpose is relevant in this regard; see further below in the comment section.

[18] Paragraphs 35-40.

6. The decision of the House of Lords in *B v Forsey* [1988] SLT 572 was authority for the proposition that the powers available to hospitals under MHA may not be supplemented by reliance on the common law, and could not be distinguished.

The Court also found[19] that, if the MHA was supplemented by the common law, the same problem would arise as had arisen in the *Bournewood* case of ensuring that there were sufficient safeguards in place to comply with Article 5 ECHR.

However, the Divisional Court then went on to conclude that, whilst:

> *"*[e]*ach case necessarily turns on its own facts... in our view it is unlikely in the ordinary case that there will be a false imprisonment at common law or deprivation of liberty for the purposes of Article 5(1) ECHR if there is no undue delay during the processing of an application under ss.2 or 4 MHA for admission.*"[20]

On the facts of the case, the Divisional Court concluded that the detention of the Claimant could not be justified, in large part because the Trust staff had proceeded on the (mistaken) impression that she had been brought in under s.135 MHA 1983. The Divisional Court did, however, upheld the Trust's policy as lawful,[21] largely upon the basis of the reasoning in the paragraph cited above.

Comment

It is perhaps odd that no one had ever thought to ask what powers hospitals had in the circumstances prevailing on 7 August 2010. Even if there may be question marks as to the steps by which it they were reached, the wider conclusion of the Court is, it is suggested, entirely correct, not least because of the chaos that would otherwise ensue if hospitals were unable to take steps to require mentally disordered people who had arrived at their premises to remain their pending assessment and admission under the MHA 1983.

The Court's decision is also important for the clear endorsement of the limited scope of s.5 MCA 2005 and the fact that it cannot be used to justify steps amounting to a deprivation of liberty, no matter how well meaning those steps.

Finally, the Court's decision is of note because it would appear to allow back in purpose in determining whether there is a deprivation of liberty: the Court cited[22] with apparent approval the dicta of Lord Hope to this end in *Austin v Metropolitan Police Commissioner* [2009] AC 564, and then in reaching the general conclusion cited above as to when there will be a deprivation of liberty referred back to this citation. There will no doubt be argument upon another day as to the extent to which this decision (and, indeed, *Austin*) can be squared with *P and Q v Surrey County Council* [2011] EWCA Civ 190.[23]

DN v Northumberland Tyne and Wear NHS Foundation Trust [2011] UKUT 327 (AAC)

Summary

This case was briefly mentioned in the last edition; as promised it is now the subject of fuller consideration.

The Upper Tribunal considered what the approach should be of a First Tier Tribunal presented with an application for the discharge of a patient into the community where it was anticipated that he would be cared for under the auspices of a DOLS standard authorisation. The Upper Tribunal was required to examine whether there was any reason that such an arrangement could not be looked at as a possibility, in light of the comments made by Charles J in *GJ v The Foundation Trust* [2010] Fam 70 as to the primacy of the MHA over the MCA.

[19] Paragraph 45.
[20] Paragraph 57.
[21] Paragraph 58.
[22] Paragraph 52.
[23] Indeed, we understand that the Court of Appeal in the pending *Cheshire West and Chester* decision is likely to consider the relevance of a reason for a measure in determining whether there is a deprivation of liberty.

The Upper Tribunal held that the case did not fall within the category of persons ineligible to be deprived of their liberty under Schedule 1A which had been the subject of Mr Justice Charles' decision, and accepted the approach set out by the Department of Health in a letter to the Tribunal which said the following (which serves as a sufficiently important guide to the DoH's general thinking we think it should be set out in full):

> *In general, the possibility that a person's needs for care and treatment could be met by relying on the MCA – with or without an authorisation under the MCA DOLS – relevant to decisions that have to be made under the MHA in the same way as all alternative possibilities.*
>
> *Decision-makers under the MHA must, inevitably, consider what other options are available when deciding whether it is right for compulsory measures under the MHA to be used, or continue to be used. The use of the MCA (with or without an authorisation under MCA DOLS) may be one of those options.*
>
> *All such alternative options must be considered on their merits. The fact that someone could be deprived of their liberty and given treatment under the MCA does not automatically mean that it is inappropriate to detain them under the MHA, any more than (say) the possibility that someone with capacity may consent to continuing treatment for their mental disorder automatically makes their continued detention under the MHA improper.*
>
> *There are, however, specific circumstances in which the fact that someone is, or could be made, subject to compulsory measures under the MHA means that they cannot also be deprived of their liberty under the MCA.*
>
> *Those circumstances are set out in the "eligibility requirement" in paragraph 17 of Schedule A1 to the MCA, the meaning of which is defined by Schedule 1A to the same Act. A person who is ineligible as determined in accordance with Schedule 1A cannot be deprived of their liberty under the MCA and therefore cannot be the subject of any authorisation under the MCA DOLS. Schedule 1A sets out five cases in which a person is ineligible.*
>
> *Case A is (in summary) where a person is currently detained in hospital under the MHA. That person cannot simultaneously be subject to an authorisation under the MCA depriving them of their liberty either in that hospital or anywhere else.*
>
> *However, that is not to say that a person cannot (in effect) be discharged from one regime to the other. There is nothing to prevent a prospective application being made for an MCA DOLS authorisation in anticipation of, or the expectation that, the person concerned will be discharged from detention under the MHA. Paragraph 12(3) of Schedule A1 to the MCA says, in effect, that when deciding whether the qualifying requirements for an authorisation are met, it is the circumstances which are expected to apply at the time the authorisation is expected to come into effect which are to be considered.*
>
> *The main effect of Cases B, C and D is that a person who is subject to compulsory measures under the MHA which fall short of actual detention cannot be deprived of their liberty under the MCA if that would conflict with a requirement imposed on them under the MHA. So, a person who is on leave of absence from detention in hospital under the MHA can, in general, be the subject of an MCA DOLS authorisation – but not if (for example) that authorisation envisages them living in one care home when it is a condition of their leave of absence that they live in a different care home.*

Cases B and C also, in effect, prevent people being made the subject of a MCA DOLS authorisation detaining them in a hospital for the purpose of mental health treatment where the same could be achieved by recalling them to hospital from leave of absence, supervised community treatment or conditional discharge under the MHA (as the case may be).

Case E concerns people who are "within the scope" of the MHA, but not so far actually liable to be detained under it. In broad terms (and subject to certain caveats), it means that the MCA cannot be used to deprive someone of their liberty in a hospital for the purposes of mental health treatment if they are objecting to that course of action and they could instead be detained under the MHA.

It is important to note that case E only applies to detention in hospital, and only where the purpose of the proposed deprivation of liberty is treatment for mental disorder within the meaning of the MHA. It is not relevant to deprivation of liberty in other settings (eg care homes) or for other purposes (eg treatment for physical health problems, or for substance dependence by itself separately from treatment for mental disorder with the meaning of the MHA).

The Government's policy intention was that people who lack capacity to consent to being admitted to hospital, but who are clearly objecting to it, should generally be treated like people who have capacity and are refusing to consent to mental health treatment. If it is considered necessary to detain them in hospital, and they would have been detained under the MHA if they had the capacity to refuse treatment, then as a matter of policy it was thought right that the MHA should be used in preference to the MCA.

It was specifically in the context of the interpretation of Case E that Mr Justice Charles talked in J about the MHA having "primacy". Outside that context, the Department does not understand him to have been making a more general statement about the relationship between the two Acts. Indeed, as set out above, the Department does not think it would actually be possible to say, in general, which has primacy over the other."

Comment

This case is of importance because it clarifies that there is no statutory bar under the MCA to, or any other conceptual difficulty with, a currently detained patient moving to a community placement under DOLS. The reasoning in the judgment is somewhat convoluted:[24] the key point, it appears to the authors, is that a person who may be deprived of their liberty in a community placement does not fall within the ineligibility categories in Schedule 1A, so no problem arises about the interplay between the MHA and MCA or whether the patient would be 'within the scope' of the MHA on discharge.

Nothing is said specifically about the timing of the DOLS authorisation in the judgment. In the authors' view, any application to a Tribunal for discharge on the basis of a community placement with a standard authorisation, must of necessity have already obtained the standard authorisation. Otherwise, the Tribunal is being invited to discharge conditional on a decision yet to be taken by the supervisory body whether to grant an authorisation. The potential for disagreement about capacity, best interests, proportionality and the least restrictive option

24 In this regard, it is perhaps fair to point out that the Upper Tribunal noted with regret that there was only one party – the applicant – represented before it (the letter from the Department of Health cited above was provided to assist the Tribunal, but the Department did not formally appear, nor did any of the statutory bodies involved. Had other parties appeared, the Tribunal might well have had cited to it not just J but also the much more relevant case of *W Primary Care Trust v TB* [2009] EWHC 1737 (Fam) which would have made it clear that Schedule 1A Case E could not in any event have been applicable because the proposed placement was in a care home, not a hospital.

between the DOLS assessors, the supervisory body, the patient and the Tribunal is obvious. The authors note that the letter submitted by the Department of Health referred to a 'prospective' DOLS assessment being conducted, prior to the Tribunal decision.

The authors also note that there may be very real questions in any given case about whether the community placement plus DOLS is actually less restrictive than continuing to be detained in hospital. While that may sound counterintuitive, it is not necessarily the case that being in the community is less restrictive if, for example, less skilled behavioural interventions are available, or if additional measures are required to prevent access to harmful situations (for example in Mr N's case access to alcohol) that would not be so frequently encountered in hospital. There is potential for disagreements to arise about capacity, best interests, proportionality and risk between the DOLS assessors, the patient, the supervisory body, and the Tribunal itself.

Other news

Law Commission Consultation

With thanks to Helen Clift of the Official Solicitor's Office for pointing us to this, you may be interested in the most recent consultation paper issued by the Law Commission, upon the reform of the common law offence of kidnapping.

http://www.justice.gov.uk/lawcommission/consultations/1674.htm

The paper includes an interesting discussion of the case of *HM (Vulnerable Adult: Abduction)* [2010] EWHC 870 (Fam); [2010] 2 FLR 1057 in the context of particular problems relating to children and the mentally incapacitated.

Court of Protection administration

We have also been asked by James Batey at the Court of Protection to thanks all those who responded to the questionnaire we circulated earlier this year on his behalf seeking feedback from Court users; we understand that at least one result of the feedback received is likely to be improvements in the information provided at different stages of proceedings. You may also be interested to know that the Court of Protection's move's to the Thomas More Building in the Royal Courts of Justice should be complete by 9 January 2012.

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

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