ThirtyNine
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Court of Protection update

Thirty Nine Essex Street Court of Protection Newsletter: November 2012

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Editors

Introduction

Welcome to the November 2012 newsletter. It is a bumper edition, which covers a range of topics, including medical treatment, significant cases from Strasbourg upon deprivation of liberty, restraint in hospitals and the role of the Official Solicitor, cautionary tales about misconduct in the Court of Protection, and an important case about capacity to enter into marriage (the first such reported case since the enactment of the MCA 2005). It also includes a judgment recently brought to our attention giving practical guidance as to the approach that the Court is likely to take to the order of preference that will apply to the appointment of deputies.

This month, we include not only hyperlinks to publicly accessible transcripts of the judgments where they are available at the time of publication,[1] but also a QR code at the end which can be scanned to take you directly to the COP Cases Online section of our website, which contains all of our previous case comments.

At the end of the newsletter, we also solicit your assistance by way of fundraising for two different charities; one giving you the potential reward of a one-page guide as to when to make an application to the Court of Protection, and the other the chance to see a photograph of Alex sporting a moustache for a good cause.

[1] As a general rule, those which are not so accessible will be in short order at www.mentalhealthlaw.co.uk.

NYC v PC and NC (unreported, 20.7.12)

Capacity – Contact

Summary

This case concerned a 48 year old woman with mild learning disabilities called PC. She lived independently in the community, and had previously formed a relationship with NC. NC was then convicted and imprisoned for sexual offences. While he was in prison, PC and NC married. PC did not accept that NC was guilty of the offences for which he was convicted and wanted him to live with her on his release. As NC's release date approached, the local authority applied to the court for a declaration that it was in PC's best interests that she resumed her married life with NC when he was released from prison, on the basis that the risk he posed to her was outweighed by the likely distress that would be caused were they to be prevented from continuing their relationship. The court was asked to determine whether PC had capacity to decide to have contact with NC and to live with him, and if she did not, whether it was in her best interests to resume her married life with him.

Hedley J was confronted with legal submissions as to whether a decision about contact should be viewed as person-specific or not – perhaps PC lacked capacity to decide whether to spend time with NC, but had capacity to make

decisions about contact with other people. Hedley J set out his approach to the issue in the following way:

"*19. There has been considerable debate as to whether the issue of capacity to decide on contact should or should not be person specific, that is to say whether it should or should not in this case focus on NC. This is in part derived from the terms of section 17 of the Act. However, it seems to me that what the statute requires is the fixing of attention upon the actual decision in hand. It is the capacity to take a specific decision, or a decision of a specific nature, with which the Act is concerned. Sometimes that will most certainly be generic. Can this person make any decision as to residence or contact or care by reason of, for example, their dementia? Or does this person have any capacity to consent to sexual relations by reason of an impairment of mind which appears to withdraw all the usual restraints that are in place? Such generic assessments will often be necessary in order to devise effective protective measures for the benefit of the protected person, but it will not always be so. There will be cases, for example, in relation to medical treatment where attention is centred not only on a specific treatment or action but on the specific circumstances prevailing at the time of the person whose decision making capacity is in question. The hysteric resisting treatment in the course of delivering a child is an example from my own experience. Accordingly, I see no reason why in the construction of the statute in any particular case the question of capacity should not arise in relation to an individual or in relation to specific decision making relating to a specific person. In my judgment, given the presumption of capacity in section 1(2) this may indeed be very necessary to prevent the powers of the Court of Protection, which can be both invasive and draconian, being defined or exercised more widely than is strictly necessary in each particular case.*

20. It follows that in my judgment, rather than making a general finding about whether the question to be considered should or should not involve in it any particular individual, my task, as I understand it, is to articulate the question actually under discussion in the case and to apply the statutory capacity test to that decision. The question in this case surely is this: should PC take up married life with NC now that, in terms of imprisonment and licence, he is free to do so? It is a decision which any wife in her position would be required to take and it is a decision that does not admit only of one answer. Thus, the question of capacity is important. All the other issues raised, care, residence and contact, are peripheral, save insofar as they bear on the question of the resumption of the long interrupted cohabitation of PC and NC. Although that is a narrow issue it is, in my judgment, a seriously justiciable issue to which the court should give its proper attention and make a decision."

Applying that approach, the court concluded that PC lacked capacity to make the relevant decision. Because of her mental impairment, she was "*unable to weigh the information underpinning that potential risk so as to determine whether or not such a risk either exists or should be run, and should, therefore, be part of her decision to resume cohabitatio*n."

PC's social worker considered that, notwithstanding the risks that NC posed to PC in light of his offending history, it was in PC's best interests for them to resume their married life. The alternative, of restraining PC from seeing NC, would have been seriously distressing for PC.

The court agreed, observing that it would be impractical and effectively unenforceable because of PC's strongly held wishes. Hedley J

expressed the view that "*faithfulness to the policy behind section 4(4), and potentially behind section 4(6), is that it may be necessary from time to time to leave open to the protected person the option of taking an unwise decision which others, who are fully capacitous in her position, may themselves have taken*."

Comment

This is an illuminating and instructive judgment which, in our view sets out in clear terms the correct approach to the assessment of capacity under the MCA. Capacity is decision-specific, not issue-specific, situation-specific or person-specific, although factors such as the situation in which a decision falls to be made, and the identity of people involved in the decision may well be relevant. It must be correct that a person could have capacity to decide to see A but not B where the information relevant to each decision is different because of the different risks posed by A and B, provided that the reason why the person cannot understand or weigh that information is their mental impairment.

The acceptance by the court that it can be in P's best interests for an unwise or risky decision to be made is similarly welcome, and could usefully be applied to decisions about the return home of elderly people whose physical care needs would be better met in a residential setting, but who have a strong desire to live in their own homes.

A, B and C v X, Y and Z [2012] EWHC 2400 (COP)

Mental capacity – marriage – finance – litigation

Summary

In this important case, Hedley J was required in respect of an elderly gentleman called X to consider his capacity to: (1) marry; (2) make a will; (3) revoke or grant an enduring or lasting power of attorney; (4) manage his affairs; (5) litigate; and (6) litigate. Hedley J was also required to consider whether he had capacity to decide with whom he had contact, although that last issue was not for immediate determination.

Whilst the judgment is of importance for the approach taken to the questions of capacity, they can only properly be understood against the (Tolstoyan) background set out by Hedley J.

The first of two key events in the case occurred in April 2008, when X's former wife died. They had been married for 56 years. It is clear that her death was not only a great shock to X and to the whole family, but it forced into the open a state of affairs which had hitherto been managed within the family. The immediate family consisted of three adult children known as A, B and C, all of whom were themselves married with children. Hedley J found that, even making all allowances for family loyalty and respect, it was quite clear that this was a close and trusting family, in which X held a revered role as a loved and respected husband, parent and grandfather. It is also the case that he was a man of significant means deriving from the family business. X was clearly a skilled and highly intelligent man. However, he was bored by, and therefore not very effective at, routine business administration, which he usually entrusted to others, whether a secretary, a professional or a family member. However, by 2007, the family were becoming anxious because of X's increasing tendency to forget things and to get lost; so much so that, in November 2007, Mrs B took over the running of his affairs. However, personal relations within the family appeared to be unaffected by these matters. In May 2008, after the death of his wife, X was diagnosed with dementia. In September 2008, he executed lasting powers of attorney in favour of A, B and C.

In 2010, Z came on the scene. Hedley J found that this marked the second key shift in events in this case. In July 2010, she was employed as a full-time carer. In October 2010, X said that he would like to marry Z. From that point on, relationships within the family deteriorated badly quite rapidly and ultimately found expression in litigation brought by A, B and C.

Hedley J was quite satisfied that all three of A, B and C were wholly honourable in their intentions towards X, and sought his best interests in all matters. Unfortunately, that had not always been recognised by X. He was also satisfied that Z was honourably disposed towards X;

however, she was "a persistent, effective and somewhat strident woman with a style that the others have come to resent. She and A were designed to clash, and clash they did; a clash made more toxic by each entertaining serious doubts about the good faith of the other towards X.

X was therefore put in an impossible position. He clearly believed himself to be in love with Z, and indeed they were cohabiting. He looked to her to help him, and became (in Hedley J's view) highly influenced by her and increasingly dependent upon her, taking in consequence her side on many issues. In consequence of a conflict which he could neither understand nor control, he apparently became estranged from his children (albeit, in the absence of Z, Hedley J accepted that he enjoyed a warm and close relationship with his family, as he did with Z in the absence of A, B and C; "[r]e*move the conflict and you remove many of X's problems*" (para 15).

Hedley J had medical evidence before him from three experts, one instructed by each of the sides, and the other (whose instruction had been recommended by the other two) jointly instructed. Hedley J expressed his regret that (in part because of the differences in the practice of the two psychiatrists), "*each appeared as one instructed by the side whose views they supported*" (para 16), albeit that he emphasised that he recognised that this was not in fact so. He had no such reservations about the impression given by the evidence of the neuropsychiatrist. He made clear, however, that in reaching his views, he had not relied upon the conclusions expressed by the experts, but "*only on the steps of reasoning and the factual basis which led them to their views*" (para 20).

Having analysed the evidence in some detail, Hedley J declared himself satisfied – by way of general background – that *"in respect of some issues of capacity the areas of complex thought abilities may play a more significant role than in others. Moreover, I am satisfied that in some respects X's capacity may fluctuate. That explains differences in experience that are, as I find, accurately reported and assessed by the three forensic experts*" (para 27).

Hedley J then turned to the specific issues in respect of which he had to determine X's capacity to take decisions, and found thus:

Marriage

As regards the capacity to marry, Hedley J expressed himself in complete and respectful agreement with the approach taken by Munby J (as he then was) in the (pre MCA 2005) case of Sheffield City Council v E & Anr [2005] 2 WLR 953, and specifically associated himself with the final observation made by Munby J (at paragraph 144) that:

> "*There are many people in our society who may be of limited or borderline capacity but whose lives are immensely enriched by marriage. We must be careful not to set the test of capacity to marry too high, lest it operate as an unfair, unnecessary and indeed discriminatory bar against the mentally disabled*."

Asking himself whether A, B and C had satisfied him that X lacked the capacity to marry (i.e. to give effect to the presumption of capacity in s.1(2) MCA 2005), he found that they had not:

> "*32. … Although I accept that X has suffered a significant decline in executive function, he retains many aspects of his intelligence in the fundamental level and it is at that point that it is important to have in mind that the requirements of capacity to marry are comparatively modest. I actually think it highly probable that he retains an understanding of the marriage contract and that his 56 years of beneficent experience of marriage has firmly etched upon his understanding the duties and responsibilities that go with it. Certainly I am not satisfied to the reverse and I decline to make any declaration that he lacks capacity to marry. I add only this, inevitably. Whether any decision that he might take to marry is wise or unwise, whether it leads to happiness or regret,*

is simply none of my business and I am simply unable to take into account any specific plans he might have in that direction."

Capacity to make a will

Turning to X's capacity to make a will, Hedley J reminded himself that the law was long-established, derived from the decision in *Banks v Goodfellow* [1870] LR 5 QB 549. Applying the principles to the facts before him, he confessed that he had found answering the question whether the Applicants had discharged the burden upon them "*quite difficult*." He continued:

"*36. On the one hand, if one looks at X's statement, he demonstrates an understanding of his obligations and makes perfectly sensible and proper proposals as to what should be in his will. On the other hand, I am impressed by the medical evidence, which points out a dramatic decline in executing functioning in the context of further inevitable deterioration, and that seems to me to raise serious concerns as X's own affairs are relatively complicated. I have also borne in mind the differing impressions of the doctors in relation to this question of testamentary capacity and the factors that I set out earlier in this judgment which may have the affect of retarding on the one hand or accelerating on the other the deteriorating progress of this disease.*

Hedley J came to the conclusion that he could not make a general declaration that X lacks testamentary capacity, "*but that* [conclusion] *needs to be strongly qualified*. "*There will undoubtedly be times when he does lack testamentary capacity. There will be many times when he does not do so. The times when he does lack such capacity are likely to become more frequent. It follows that, in my judgment, any will now made by X, if unaccompanied by contemporary medical evidence asserting capacity, may be seriously open to challenge. I draw attention, if I may, to a helpful passage in Heywood & Massey, provided by Counsel for the Applicants, at paragraph 4046, which deals with borderline capacity. It seems to me that the advice contained in that is very much applicable to this case*" (para 37).

Capacity to revoke or create enduring or lasting powers of attorney

Hedley J found with relative ease that the Applicants had not satisfied him that X lacked capacity to revoke a power of attorney in their favour (if, indeed, that was a live issue as the revocation had been accepted and the registration cancelled). The question of whether X had the power to create an EPA much more difficult for the same reasons as applied in relation to testamentary capacity. Unsurprisingly, perhaps, he reached the same conclusion, namely that he could not make a general declaration that X lacked the capacity, but that this was qualified "*the exercise of such a power, unless accompanied by contemporary medical evidence of capacity, would give rise to a serious risk of challenge or of refusal to register. It seems to me, for exactly the same reasons as I endeavoured to set out in relation to testamentary capacity, that X's capacity is likely to diminish in the future and there will be times when undoubtedly he lacks capacity, just as there will be times when he retains it*" (para 38)

The management of affairs

Applying, in particular, the approached adopted by Kennedy LJ in *Masterman-Lister v Brutton & Co & Ors* [2003] 1 WLR 1511 (paragraph 18-20), Hedley J found (on the basis of the evidence of the neuropsychiatrist) that, on balance, X lacked the capacity to manage his own affairs. However,

"*41… In so finding, I acknowledge, as I have done in relation to the other matters, that there would be times when a snapshot of his condition would reveal an ability to manage his affairs, but the general concept of managing affairs is an ongoing act and, therefore, quite unlike the specific act of making a will or making an enduring power of attorney. The*

> *management of affairs relates to a continuous state of affairs whose demands may be unpredictable and may occasionally be urgent. In the context of the evidence that I have, I am not satisfied that he has capacity to manage his affairs.*"

Litigation capacity

Hedley J identified the heart of the test as being that formulated by Chadwick LJ in *Masterman-Lister* at paragraph 75, as being whether:

> *"… the party to the legal proceedings is capable of understanding, with the assistance of proper explanation from legal advisers and experts in other disciplines as the case may require, the issues on which his consent or decision is likely to be necessary in the course of those proceedings. If he has capacity to understand that which he needs to understand in order to pursue or defend a claim, I can see no reason why the law – whether substantive or procedural – should require the interposition of a next friend."*

Importantly, Hedley J noted that, whilst the question of capacity to litigate "*inevitably follows closely*" on the question of the management of one's own affairs, it required (at least on the facts of the case before him) separate consideration because "*it does operate in a separate and more restricted time frame, but a time frame quite different to the decision to make a will or to grant a power of attorney*" (para 44).

Hedley J noted, but discounted, X's hearing difficulties, because they were irrelevant to the question of capacity (the hearing difficulties having been addressed and X in consequence having been able to "*hear the essence of what has gone on in this hearing*" (para 44). However, he found that, on balance, and looked at in the round, X lacked the capacity to conduct the litigation, made in light of the factors identified already in the judgment.

Hedley J noted that he would not have wished to make any decision upon X's capacity to decide with whom he should have contact if a finding had been sought, emphasising that "[t]*he idea that this distinguished elderly gentleman's life should be circumscribed by contact provisions as though he was a child in a separated family is, I have to say, deeply unattractive. I believe that, on reflection, the parties may be inclined to think so too*" (para 46). He concluded with an injunction to the parties to take stock of the fact that the greatest gift that anyone could bestow upon X would be to bring the conflict between them to an end so as to allow the time that was left to X to be one that could be enjoyed by family old and "*if circumstances so decide*" new as well (para 48).

Practice points

At the outset of his judgment (para 3), Hedley J identified two case management lessons which he believed the case taught: "[t]*he first is the need in the Court of Protection for a much greater emphasis on the importance of judicial continuity and, secondly, for the need for a pre-hearing review in respect of any case which is estimated to last three days or more. Either or both of those matters may have had the effect of avoiding the rather bruising experience of the first afternoon, when it seemed at least to me, rightly or wrongly, that there was a lack of clear direction in terms of the trial*." In the event, the parties conducted themselves in such a way that it was possible to overcome the difficulties caused by late filing of quite substantial amounts of evidence and bring about a focused and relatively expeditious hearing.

Comment

It is slightly ironic that we have reported previously the judgment of Hedley J in *LB Haringey v FG & Ors (No. 1)* [2011] EWHC 3932 (COP) in which he decried undue citation of first instance judgments upon questions of capacity, because (at the risk of sounding unduly deferential), the judgments given in both this case and that of *NYC v PC and NC* (discussed elsewhere in this newsletter) represent paradigms of the approaches that should be taken to the assessment of capacity. It is, further, of particular significance for the following reasons:

(1) Its confirmation that the approach adopted by Munby J in Sheffield *City Council v E* to the capacity to consent to marry remains the right one, and its endorsement of the clear principle that the bar must not be set too high (to similar effect in the latter regard, see also the judgment of Baker J in *PH v A Local Authority and Z Limited and another* [2011] EWHC 1704;

(2) The 'qualified' declarations made by Hedley J regarding X's capacity both to make a will and to create an EPA. Such declarations (which really amount to declarations which must be read together with the accompanying passage of the judgment) may not find an express place in the scheme of the MCA 2005, but they represent a way in which the immensely complicated questions of borderline/fluctuating capacity can pragmatically be answered in such a way as to preserve P's autonomy to the maximum extent possible compatible with the protection of their interests;

(3) The approach taken to the question of managing X's affairs, and the distinction drawn there between an ongoing state of affairs and the doing of a specific act (or acts). We might also suggest that this distinction could appropriately be drawn in respect of other ongoing states of affairs – for instance, as to whom X wishes to have living in their house – where, at times, a snapshot of their condition would suggest that they had the capacity to take the decision, but otherwise they lacked the capacity to do so. As such, it potentially provides a further way in which to cut the otherwise philosophically Gordian knot of fluctuating capacity;

(4) The approach to the expert evidence, and the (re)emphasis upon the point – made also by Baker J in *PH* and *CC v KK* [2012] EWHC 2136 (COP) – that it is for the Court, and not for the experts, to determine whether the individual in question has the material capacity;

(5) The case management points made at the outset of the judgment – lack of judicial continuity, in particular, being a matter which plagues applications before the Court of Protection given the length of time they can take to resolve. Whether Hedley J's plea for greater emphasis to be placed upon such continuity will be capable of being addressed remains to be seen.

An NHS Trust v (1) K and (2) Another Foundation Trust [2012] EWHC 2922 (COP)

Best interests – medical treatment

Summary

K had cancer of the uterus. She could be cured by a potentially life-saving operation. However, because of other co-morbidities (in particular her obesity) and other factors there was a considerable risk that she could die during the operation or in the post-operative recovery period. Because of chronic and long-standing mental illness, she lacked the capacity to make an informed decision, denying that she had cancer at all. She opposed and was resistant to the operation. The medical team at the hospital considered that she would benefit from the operation and would like to perform it. K's three adult sons (who were not formally represented, but from the Court heard) all strongly desired that she should have the operation and felt that the potential benefit outweighs the risk. The Official Solicitor, relying upon the evidence of an independent intensivist/anaesthetic expert, considered that the operation was too risky because of the risk that she would die during the overall operative period, in particular during the recovery phase, a risk that the expert placed at some 40-50%.

Holman J was therefore asked to determine whether it was in K's overall best interests to have the operation or not. Having set out in detail the evidence as to risk during the post-operative period, he noted (paragraph 36) that the operation had previously been scheduled for a date in July 2012, but on that occasion she had become so agitated and resistant while in the ward prior to anaesthesia that it had to be

abandoned (this being the event that triggered the application to the Court of Protection). This raised the "*very serious issue and concern as to how, even if the court determines that the operation is in her best interests, it can actually be achieved without her pre-operative compliance…*" Holman J accepted that it would be objectively in K's best interests to be "*less than frank*" with her so as to achieve her admission to hospital; and that whilst such a course of action "*might appear to offend the legal requirement of section 4(4) of the Mental Capacity Act 2005* [that the person be permitted and encouraged to participate in the relevant decision/act] *but that is qualified by the words 'so far as reasonably practicable*" (paragraph 37). However,

"*38. Greater difficulties arise… once she is at the hospital and the operation is scheduled to begin. She must be told in sympathetic and straightforward language what is proposed. Mr. J himself would not be willing to operate without having first told her. The sons and others predict, however, that no sooner is she told this than, just as in July, she would become physically resistant. This has led to much discussion during the evidence and the hearing as to the legality, ethics and medical impact of the use at that point of physical restraint so that she could be sedated and later anaesthetised.*

39. I can, however, cut through it. There is medical evidence, to which I have already referred, to the effect that it could be very risky to apply physical restraint to Mrs. K in view, in particular, of her prolonged QT interval. It would be particularly risky immediately prior to anaesthesia. No one now advocates the use of physical restraint and it would not be employed at any stage pre-operatively.

40. A separate and discrete issue is, however, whether she might first be lightly sedated before being told, so that, it is hoped, she is compliant and not resistant as in July. This, too, has been the subject of considerable discussion and evidence. In the upshot, the declaration which the applicant Trust invite me to make on this issue (if I consider that the operation as a whole may take place) is that 'it shall be lawful for sedation to be administered by, and thereafter continuously monitored by, a qualified anaesthetist before Mrs. K is informed that it is proposed to carry out the [proposed] surgery and anaesthesia'.

41. Again, the sons have pressed upon me the logical argument that if it is in her overall best interests to have the operation, it must be in her best interests to have the sedation, unless medically contraindicated at the time, to enable the operation to take place. If I do decide to make an order permissive of the operation, the Official Solicitor does not oppose a consequential declaration in the above terms.

42. As to the lawfulness of doing so, my attention has been drawn to a decision of Sir Nicholas Wall, President, in DH NHS Foundation Trust v PS [2010] EWHC 1217 (Fam). In that case a hysterectomy was in the best interests of a patient who had agreed on previous occasions to undergo the operation, but had been overcome on the day by fear and needle phobia. The President made an order which approved a plan which included provision for covert sedation at the patient's home with a sedative drug mixed with a soft drink such as Ribena. (In that case there was provision also for the use of force if necessary to sedate her and convey her to hospital - see paragraph 19 of the judgment - but there were not the medical risks associated with co-morbidities that there are in this case.)

43. Although there are many factual differences between that case and this one, that authority does satisfy me that

if it is in Mrs. K's overall best interests to have the operation, it can be lawful, and in her best interests, to sedate her to enable it to take place, and lawful to do so before she is told, after sedation but before anaesthesia, what is planned. There must be a qualified anaesthetist (not necessarily at that stage Dr. VB herself) throughout.

44. I do consider that an ethical issue may arise as to the degree of sedation and whether the surgeon can ethically proceed to operate unless he has given to the patient an adequate account of what he proposes to do while she retains sufficient awareness to hear it and take it in. But that is an ethical matter for him. I am satisfied that a declaration in the terms I have just quoted would, on the issue of sedation, be in her best interests and is lawful."

Turning to the question of K's overall best interests, Holman J found that the only really significant countervailing factor to place in the balance sheet against the benefits of carrying out the operation was the risk of death in the overall operative period. Having reviewed the evidence on this point, he concluded (paragraph 50) that, viewing the evidence as a whole, the independent expert whose views were relied upon by the Official Solicitor "*may have been unduly pessimistic. The evidence as a whole supports that the actual risk of mortality peri-operatively for this patient, if there is no attempt at lymphnodectomy, is closer to 5% than to 40 or 50%. Even if the risk is of the order not of 5% but of 10%, it seems to me to be a risk worth taking. I differ, therefore, from the Official Solicitor not because I would regard a 40 to 50% risk as acceptable, but because it seems to me, on all the available evidence, that although the risk of post-operative mortality is high, it is not so high as the assessment and position of the Official Solicitor assumes*." Given the considerably more speculative benefit to be derived from a lymphnodectomy, the Trust was ultimately not pressing for a declaration to extend to authorising such a procedure.

Holman J then turned to who should have a power of 'veto,' discussing the question thus:

"*52. No one, nor any court, can order or require any doctor to take any step. The court can only permit it. It follows, of course, as I wish to make crystal clear, that my intended order will permit and render lawful the procedures described, notwithstanding the lack of consent of the patient. Right up to the last moment, however, it must remain a matter for the individual professional judgement of Dr. VB* [the consultant anaesthetist] *and Mr. J* [the consultant gynaecological surgeon] *whether they think it justifiable to embark on the sedation, the anaesthesia and the surgery. Each of them has, therefore, a practical power of veto. I intend, nevertheless, to make it express on the face of the order that the proposed declaration ceases until further order to be of any effect if at any stage prior to the actual sedation, anaesthesia or surgery either Dr. VB or Mr. J notifies her/his colleagues that she/he considers it should not take place.*"

Given the particular nature of Mrs K's case and of her multiple co-morbidities, together with the high risks of post-operative complications and of post-operative mortality Holman J considered that a temporary power of veto should also extend to Dr W, the intensivist (paragraph 54) if she considered that the risk of post-operative mortality had simply become too great; because of her particular psychiatric complications and needs, he also considered that the professor of psychological medicine who would be in charge of her psychological wellbeing whilst she was at the hospital should also be given an effective power of veto (paragraph 55). Turning to the position of the sons, Holman J had this to say:

"*56. I wish to stress very clearly that the power and duty to make the best interests decision and consequential declarations is vested in the court alone. It is my duty to take responsibility for my decision, and*

although it is a heavy burden I, and I alone, do so. But in reaching that decision I have paid considerable regard to the position and views of the three sons, which I respect. They are not doctors but they know their mother well and each of them would be heavily involved during her recovery and convalescence. I do not make the declarations because they ask me to do so; but I might well have refused to make the declarations if they had raised any reasoned opposition to them.

57. *Circumstances may change. They may reassess issues, such as the mental state of their mother or her likely post-operative compliance. For that reason, although the operation does not require their consent, there must be a temporary brake upon it if any of them notifies the doctors, making reference to the relevant part of the court order, that he no longer considers that the operation should take place. I stress that all these powers of veto or brakes are temporary, not absolute. They would halt the process but would not preclude further consideration by the court (myself if possible) in the light of the changed circumstances.*"

Comment

This case could properly stand as a case study of a medical treatment application in the COP, because it shows the careful application of the provisions of the MCA 2005 to the very particular facts before the Court, and, in particular, the close analysis of the evidence of the risks that would present themselves if the operation went ahead. Section 4 does not prescribe an outcome in any given case, but s.4 (and the 'balance sheet' approach) allows the Court to take a structured approach to identifying what outcome can properly be said to be in P's best interests.

That having been said, it would be interesting to learn the basis upon which the NHS Trust had not sought the authorisation of the Court prior to making the abortive attempt to undertake the operation in July 2012. Whilst Holman J made no criticism at all of the Trust in this regard, it would seem from the face of the judgment to have been a case in which the Practice Direction 9E would have mandated an application to be made, not least given the fine balance between the benefits to Mrs K of the operation and the burdens and risks that it was likely to entail.

An NHS Trust v Mr and Mrs H & Ors [2012] EWHC B18 (Fam)

Medical treatment – treatment withdrawal

Summary

In these proceedings the Court was asked to consider an application by an NHS Trust for best interests declarations approving a medical treatment plan relating to KH.

KH was a three and a half year old boy. When he was just over a month old he contracted a Herpes virus infection which caused viral encephalitis. As a result, he sustained a serious brain injury and now functions below the level of a new born baby. He had a number of complex additional medical complications, is unable to communicate and was entirely dependent on his foster carer.

The medical treatment plan at issue provided that life sustaining treatment should be withheld from KH when (as inevitably it would), his medical condition deteriorated on the basis that it would not be in his best interests aggressively to treat him in those circumstances. The plan was supported by the Trust and his foster carer. His parents lacked capacity to make decisions about his medical treatment and were represented in the proceedings by the Official Solicitor. They were unable to support the plan fully. The plan was opposed by the Children's Guardian and the Local Authority who were unable to support a medical treatment plan which proposed to withhold life sustaining treatment.

The NHS Trust invited the Court to declare that it was lawful and in KH's best interests "*to have medical treatment withheld in the circumstances*

as described in the attached Advanced Care Plan."

In his judgment, Peter Jackson J summarised the state of the law in relation to the withdrawal of or withholding of medical treatment from children, endorsing in so doing the guidance produced by the Royal College of Paediatrics and Child Health upon "Withholding or Withdrawing Life Sustaining Treatment in Children: A Framework for Practice" (Second Edition) May 2004. He also indicated that he found some guidance as to how best to approach the question of the "best interests" test applicable by reference to s.4 MCA 2005 (although it had no legal application with regard to the Court's inherent jurisdiction in this regard).

As regards the fact that KH's parents lacked litigation capacity, he had this to say:

> *"10. In this case, KH's parents have been found to lack litigation capacity and it is understood that they are to be represented by the Official Solicitor as next friend. In these circumstances it is submitted that to be consistent with the Mental Capacity Act 2005 as amended, and in particular section 4(6) of that Act, regard should be had to the parents' wishes and feelings, but only to the extent that these relate to KH's best interests, which are for the Court to assess objectively. As stated by Holman J at 8x) above, 'Their own wishes, however understandable in human terms, are wholly irrelevant to consideration of the objective best interests of the child save to the extent in any given case that they may illuminate the quality and value to the child of the child/parent relationship'. A fortiori, this caveat must apply more forcefully to the views or wishes of parents without capacity who are not themselves looking after the child in question. The Official Solicitor, acting as litigation friend for KH's parents, should of course seek to advance a position in the 'best interests' of KH's parents rather than KH himself. It is important to note, therefore, that whilst the Official Solicitor's views in this regard may well elide with the 'best interests' of KH, there is this distinction to be made. This contrasts with the Official Solicitor's usual role in Court of Protection proceedings, where he seeks to advance P's best interests (rather than those of other Respondents to such proceedings).*
>
> […]
>
> *16. My only other comment relates to the statement in paragraph 10 of Mr Hallin's summary that: 'A fortiori, this caveat [i.e. the irrelevance of the wishes of others, save to the extent that they cast light on objective best interests] must apply more forcefully to the views or wishes of parents without capacity who are not themselves looking after the child in question.' I readily accept that an involved and capacitous parent may be better placed to express views that assist in assessing best interests than one who is less involved or capacitous, but that is a matter of evidence and not one of principle. Parents who lack capacity may still make telling points about welfare and it would be wrong to discount the weight to be attached to their views simply because of incapacity. It is the validity of the views that matter, not the capacity of the person that holds them. In the present case, I have not discounted the views of the mother on the ground that she is represented by a litigation friend (the Official Solicitor) who does not oppose the declarations sought by the Trust, but have tried to approach her views on their merits."*

Peter Jackson J held that it was appropriate that the matter had been brought to Court whilst KH was in relatively good health such that the issues could be fully explored in a way which would not have been possible if the parties had waited until he had deteriorated and been forced to make an urgent application. However, the

corollary of that approach was that the medical issues had not fully crystallised. He went on to hold that there were difficulties with the request that the Trust had made, as the Court's function was to make decisions about specific issues on the basis of a factual substrata. Accordingly, open ended declarations should be avoided by Judges as they might need to be revisited in the future: *Wyatt v Portsmouth Hospital NHS Trust* [2005] EWCA Civ 1181 at paragraphs 117 and 188 per Wall LJ. Accordingly, his approach was to identify the treatment issues that needed to be determined and that were not likely to change over time and in respect of which declarations can be made.

On the facts of KH's case, those treatment issues were clear as his condition was well understood, the scope for improvement was almost nil, and the prospect and manner of deterioration was inevitable. Had there been a major issue over which there was uncertainty, it would not have been possible to resolve it in theory ahead of it crystallising in reality.

Comment

This case provides a useful overview of the current state of the law in relation to withholding life sustaining medical treatment from children, as well as a careful analysis of the approach to be adopted where one or more parent is (because of their own difficulties) unable to act for themselves in such proceedings. As such, it serves as an interesting counterpart to the Strasbourg decision in RP, discussed elsewhere in this newsletter. We would also suggest that the dicta "[i]t is the validity of the views that matter, not the capacity of the person that holds them" are dicta that are of general application, rather than confined to the specific instance of the case before Peter Jackson J.

The case also serves to highlight the difficulties in ensuring an appropriate balance between bringing an application before the Court timeously and waiting until such time as the medical issues have crystallised. In this regard, practitioners should note the approach the Court took to the declarations that were sought and, specifically, the focus on treatment options as opposed to the granting of an open ended declaration.

Re AS (unreported, 7.12.11)

Deputies – financial and property affairs

Summary

With the permission of Senior Judge Lush, we can reproduce here the background to and the material passages from a judgment given in December 2011 upon an objection to the application for the appointment of a panel deputy, to which our attention has recently been drawn.

The Court summarised the background to the application, brought by a solicitor, SH (on the approved panel), that she be appointed property and affairs deputy for an elderly lady suffering from dementia, with specific authority to undertake the sale of a property. AS' niece, LC, objected to the appointment of the solicitor, proposing instead that she be appointed deputy. Before addressing the specific application before it, the Court set out the following as regards the appointment of a deputy:

> "***The law relating to the appointment of a deputy***
>
> *Sections 1, 2, 3 and 4 of the Mental Capacity Act 2005 provide that, once it has been established that a person lacks capacity to make a particular decision at a particular time (such a person is referred to as "P" in the Act), then any act done or decision made by someone else on P's behalf must be done or made in her best interests.*
>
> *The Act does not define "best interests", but section 4 provides a checklist of factors that anyone making the decision must consider when deciding what is in P's best interests. These are:*
>
> - *whether they are likely to have capacity in relation to the matter in question in the future;*
> - *the need to permit and encourage*

them to participate, or to improve their ability to participate in the decision-making process;

- *their past and present wishes and feelings (and, in particular, any relevant written statement they made when they had capacity), the beliefs and values that would be likely to influence their decision, and any other factors they would consider if they were able to do so;*

- *if it is practicable and appropriate to consult them, the views of others, such as family members, carers, and anyone else who has an interest in their welfare; and*

- *whether the purpose for which any act or decision is needed can be as effectively achieved in a manner less restrictive of their freedom of action.*

If a person lacks capacity in relation to a matter or matters concerning his or her property and affairs or personal welfare, the Court of Protection may make any decision on her behalf, or may appoint a deputy to make decisions on her behalf in relation to the matter or matters (section 16(2)).

Section 16(4) provides that, when deciding whether it is in P's best interests to appoint a deputy, the court must have regard to the principles that:

(a) a decision by the court is to be preferred to the appointment of a deputy to make a decision; and

(b) the powers conferred on a deputy should be as limited in scope and duration as is reasonably practicable in the circumstances.

Section 19 contains further provisions relating to the appointment of deputies, concluding at section 19(9) as follows:

'The court may require a deputy –

(a) To give to the Public Guardian such security as the court thinks fit for the due discharge of his functions, and

(b) To submit to the Public Guardians such reports at such times or at such intervals as the court may direct.'

When it appoints a deputy, the Court of Protection exercises its discretion. It has to exercise this discretion judicially, and in P's best interests. Many of the old authorities that used to govern the appointment of a receiver under Part VII of the Mental Health Act 1983 are probably still relevant with regard to the appointment of deputies.

These authorities generally acknowledged that there was an order of preference of persons who might be considered suitable for appointment as a receiver. I have called it an order of preference, rather than an order of priority, to avoid giving an erroneous impression that certain people were in the past automatically entitled to be appointed as receiver, or are automatically entitled now to be appointed as a deputy. They aren't. The Court of Protection has discretion as to whom it appoints. However, in the past, when appointing a receiver, it traditionally preferred relatives to strangers.

Generally speaking, the order of preference is:

- *P's spouse or partner;*
- *any other relative who takes a personal interest in P's affairs*
- *a close friend;*
- *a professional adviser, such as the family's solicitor or accountant;*
- *a local authority's Social Services Department; and finally*
- *a panel deputy, as deputy of last resort.*

To some extent this is borne out by the statistics. The Office of the Public Guardian supervises 34,000 deputies, 99% of whom are deputies for property and affairs. There are only 342 personal welfare deputies. 53% of deputies are family members; 26% are local authorities, and 21% are professional deputies, though not necessarily panel deputies of last resort.

The court prefers to appoint a family member or close friend, if is possible. This is because a relative or friend will already be familiar with P's affairs, and wishes and methods of communication. Someone who already has a close personal knowledge of P is also likely to be better able to meet the obligation of a deputy to consult with P, and to permit and encourage him to participate, or to improve his ability to participate, as fully as possible in any act done for him and any decision affecting him. And, because professionals charge for their services, the appointment of a relative or friend is generally preferred for reasons of economy.

In an unreported case, In the matter of B (No. 11579443), in which I handed down judgment on 15 August 2011, I made the following observations about the idea of deputyship of last resort:

> *'There is, however, another reason why I am allowing this application, which neither side really touched on at the hearing. It involves the whole concept of deputyship of last resort, and in this respect the history of these proceedings is relevant. Originally, IB applied to be appointed as his mother's deputy for property and affairs. His brother JB opposed the application and there were mutual allegations of financial abuse. A hearing date was set, but shortly before the hearing was due to take place, the brothers agreed a compromise and invited the court to appoint a panel deputy - or deputy of last resort – which court eventually did.*
>
> *There is no longer any dispute between IB and JB and, as I understand it, the entire family unanimously supports IB's application to be appointed as deputy in place of Mr C. The question arises, therefore, whether there is still really a need for a deputy of last resort.*
>
> *In Re P [2010] EWHC 1592 (COP) Mr Justice Hedley suggested that 'the court ought to start from the position that, where family members offer themselves as deputies, then, in the absence of family dispute or other evidence that raises queries as to their willingness or capacity to carry out those functions, the court ought to approach such an application with considerable openness and sympathy.' Michael Kirby, the President of the Court of Appeal in New South Wales, said much the same thing in Holt v. The Protective Commissioner (1993) 31 NSWLR 227. His remarks are even more pertinent because, whereas Hedley J was commenting on the court's discretion on an initial application for the appointment of a deputy, Kirby P was considering the somewhat different discretion that arises on an application to remove a deputy.*
>
> *In some Common Law jurisdictions there is even an obligation on a deputy of last resort to seek a less restrictive alternative to his or her own appointment. For example section 744.704 of the 2010 Florida Code, in which the deputy of last resort is referred to as a 'public guardian', provides as follows:*
>
> *(1) A public guardian may serve as a guardian of a person adjudicated incapacitated under this chapter if there is no family member or friend, other person, bank, or corporation*

willing and qualified to serve as guardian. ….

(6) The public guardian, when appointed guardian of an incapacitated person, shall seek a family member or friend, other person, bank, or corporation who is qualified and willing to serve as guardian. Upon determining that there is someone qualified and willing to serve as guardian, either the public guardian or the qualified person shall petition the court for appointment of a successor guardian.

I would not go so far as to suggest that a similar positive obligation arises in English Law, but there is a general principle in section 1(6) of the Mental Capacity Act 2005, which states that:

'Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.'

Generally speaking, from P's point of view, the appointment of a family member as a deputy will be a less restrictive alternative to the appointment of a panel deputy, though the question remains as to whether the appointment of a family member will achieve the desired objective as effectively as the appointment of a panel deputy.

There are, of course, cases in which the court would not countenance appointing a family member as deputy. For example, if there has been financial abuse or some other kind of abuse; if there is a conflict of interests; if the proposed deputy has an unsatisfactory track record in managing his own financial affairs; and if there is ongoing friction between various family members. This list is not exhaustive."

Upon the evidence before the Court, the Court considered that the application of SH would be "*one of last resort, and there is simply no need in this case for an appointment of that nature*," and accordingly appointed LC as AS's property and affairs deputy. As regards the question of costs, the Court did not depart from the general rule laid down in rule 156 of the Court of Protection Rules 2007.

Comment

There is still a paucity of decisions upon the appointment of deputies, and it is therefore very useful to have another indication of how applications are being considered in practice. This judgment is of particular interest as an indication of the order of preference that is likely to be adopted when the Court has decided to appoint a deputy. The question of *whether* to appoint a deputy (discussed in both *G v E* and *SBC v PBA* as well as *Re P*) is quite a different one, and the *total* figure of 342 for health and welfare deputies perhaps speaks for itself.

Re Clarke [2012] EWHC 2256 (COP), [2012] EWHC 2714 (COP), [2012] EWHC 2974 (COP)

Deputies – financial and property affairs – capacity – finance - costs

Summary

These three cases are reported together. They bear note not so much for any principles to be derived from them, but as a (relatively rare) insight into the management by the Court of a contested property and affairs application, an insight granted by virtue (if such is the word) of the fact that, whilst the proceedings took place in private, "*the manner in which* [the applicant] *Mr Michael Clarke has breached his mother's entitlement to privacy has been so comprehensive and long-standing that nothing is now to be gained by delivering the judgments in private for Mrs Clarke's benefit. On the contrary, in the light of Mr Michael Clarke's conduct, it is better that the court's reasons are made known*" (judgment of 9.10.12 at paragraph 4).

Mr Clarke sought to discharge the property and affairs deputy appointed on behalf of his mother,

who had received some time previously a substantial sum of damages in compensation for injuries sustained in road traffic accident (including brain injuries). By the time the matter came before the Court, she had one substantial asset, a property in Blackpool, and her remaining free capital had in effect run out; her income consisted of a state pension and DLA, together with payment of a household allowance and living expenses from her capital fund. Her son, with whom she lived for most of the time in Spain in rented accommodation, was receiving c. £60,000 p.a. for care he was providing to her, although this sum was reduced in late 2011 because the current level of expenditure was deemed to be unsustainable by the Deputy. This led (Peter Jackson J drily noted) to an 'escalation' in the internet campaign that Mr Clarke had started to wage against the Deputy, the Office of the Public Guardian and the Court of Protection, and (it appears). Subsequent to the issue of proceedings, Mr Clarke's activities had escalated to the point where the Deputy had obtained an injunction restraining him from further harassment of the Deputy or his firm. The application to discharge the Deputy was resisted by Mr Clarke's other children on the basis that if she were not protected, he would spend her money on himself. He filed counter allegations against his siblings and the Deputy.

Expert evidence was directed by way of a s.49 MCA 2005 report as to Mrs Clarke's capacity (inter alia) to (1) manage her benefits; (2) make a will; and (3) decide whether to retain or sell the property in Blackpool. That evidence tallied with earlier evidence obtained (it is not clear by whom) by a consultant clinical psychologist to the effect that Mrs Clarke had the ability to make a will; there was apparent divergence on other matters.

At the hearing in July 2012, Peter Jackson J declined to embark upon a wide-ranging investigation of the issues between the family members or between Mr Clarke and the Deputy as being inconsistent with the overriding objective in Rule 3 COPR 2007. He also declined to embark an attempt to narrow the issues in dispute between the doctors by way of requiring a meeting between them and/or putting further questions to them; rather, he moved straight to a consideration of whether Mrs Clarke had the capacity to take the three decisions which arose at that stage.

At paragraph 35 of his July judgment, Peter Jackson J declined to find whether or not Mrs Clarke had capacity to manage her benefits, because he considered that it was in any event clear that it was in her best interests that they be managed on her behalf by her carer, who happened to be Mr Clarke. He found that she did have capacity to make a will, albeit that (as with the s.49 expert) he could "*not exclude the possibility that Michael Clarke exerts influence on Mrs Clarke, but I do not find that this currently invalidates her general testamentary capacity. Whether any particular will that she may make could subsequently be challenged is not a matter for this court at this time*" (paragraph 36). He found, by contrast, that she lacked the ability to weigh up the financial and welfare risks involved in each of the courses of action implicit in the decision whether or not to sell the property in Blackpool (paragraph 38). He found that he could not decide at that point whether to order a sale of the property in Blackpool because he did not have sufficient information before him. He therefore directed further evidence to be filed upon Mrs Clarke's best interests as regards the sale of the property and how her future income and housing needs were to be met.

Peter Jackson J considered the matter further in early October 2012. In the interim, a will had been prepared which (as he noted at paragraph 21) "[bore] *the hallmarks of having been prepared by Mr Michael Clarke*," contained provisions "*designed to prevent the sale of the property during Mrs Clarke's lifetime and to ensure that it comes into the hands of Mr Michael Clarke upon her death*" (paragraph 21). The Deputy and the other children wished the property to be sold (placing reliance upon observations made by Senior Judge Lush in *Re JDS* to the effect that it is not the function of the Court to "*anticipate, ring fence or maximise any potential inheritance for the benefit of family members upon the death of the protected party*." Mr Clarke firmly opposed the sale of the property.

Peter Jackson J noted that there was no

satisfactory solution to the present situation, in which "*the difficulty of identifying where Mrs Clarke's best interests lie is compounded by the family situation. For better or for worse, Mrs Clarke's future is inextricably bound up with Mr Michael Clarke, whose strident voice threatens to drown out all others*" (paragraph 30). He noted that, if it were a purely financial question, the case for the sale of the property would be unanswerable. However, because the property was not merely an asset but was also (even if for only part of the time) a home for Mrs Clarke and Mr Clarke, as her carer, a sale would lead to the loss of their home. That outcome could not be justified from Mrs Clarke's perspective unless it was apparent that her daily needs were not in fact being met. Whilst Peter Jackson J found that the figures before him were not encouraging as regards the making up of a gap between her income and her outgoings, he did not consider that it was right at the present time to order her to sell her home to make up an income shortfall which could be made up in other ways. He noted that Mr Clarke would have the opportunity to manage her finances and to support her, but that if her way of life were to be deteriorating unacceptably as a result of inadequate income, a fresh application could be made for the sale of the property. He noted, though, that:

> *"38. Whatever the side-effects of my decision, it is no part of my purpose to 'anticipate, ring-fence or maximise any potential inheritance for the benefit of family members'. Not can my decision be influenced by the dismay of the other family members that Mr Michael Clarke's questionable sense of entitlement to his mother's property has, at least at this stage, prevailed. I have been guided only by my assessment of Mrs Clarke's best interests at the present time."*

In light of his conclusion as to Mrs Clarke's best interests, Peter Jackson J directed that the Blackpool property not be sold or charged during her lifetime without an order of the Court; the deputyship being redundant in the circumstances, he therefore discharged it.

The family members other than Mr Clarke and the Deputy then made an application that their costs be charged to Mrs Clarke's estate. Mr Clarke asked the court to postpone a decision and in the interim to make orders for disclosure and for the production of further accounts by the Deputy and the Office of the Public Guardian. He opposed the other parties' applications.

Declining to depart from the general rule in property and affairs cases (Rule 156), Peter Jackson J noted that:

> "*5. In this case there is no basis for departure from the general rule. My overall conclusions in relation to Mrs Clarke's capacity did not favour any party. While a sale of the Blackpool property has not been ordered at this time, the manner in which Mr Michael Clarke has conducted the proceedings more than wipes out any weight that might be attached to that factor. I identify his use of his mother's case as a vehicle for his political views, his aggressive disrespect towards anyone with whom he disagrees, and his complete lack of regard for his mother and family's right to privacy.*
>
> *6. In contrast, the conduct of the proceedings by the family members and the Deputy has been entirely reasonable in trying circumstances. Their costs shall be charged to Mrs Clarke's estate and become payable upon her death.*"

Comment

As noted above, this case is of interest not because of its outcome, but rather as an insight into the management of an application which (regrettably) is not entirely unusual in either the issues raised or in the attitude adopted by a litigant in person. Reading between the lines of the three judgments, it is clear that this was a case in which the patience of the Court was sorely tried, and that it was not without a very considerable degree of reluctance that Peter Jackson J came to the conclusion that he did as

to where Mrs Clarke's best interests lay as regards the sale of the property in Blackpool.

One minor point to note in passing is that Peter Jackson J presumably did not approach questions of the management of Mrs Clarke's benefits on the basis that he had any jurisdiction to decide who should be her appointee to receive them on her behalf. Contrary to something of an urban myth, the Court of Protection has no jurisdiction to make such a decision, which lies solely in the gift of the DWP (whose guidance upon the question of appointeeship can be found at: http://www.dwp.gov.uk/docs/part-05.pdf).

SCC v JM & Ors (unreported, 31.8.12)

COP jurisdiction and powers – contempt of court

Summary

To the best of our knowledge, this case is the first judgment in the public domain recording the sentencing of someone to prison for breaches of orders made by the Court of Protection (*PM v KH and HM* [2010] EWHC 2739 concerning breaches of orders made under the inherent jurisdiction).

The facts of the underlying case are not relevant to the contempt proceedings; suffice it to say that they related to the residence of JM, an elderly man suffering from Alzheimers and a degree of vascular dementia. The conduct of one of JM's children, WM, had given rise to substantial concern on the part of the Court during the course of the proceedings, albeit that HHJ Cardinal was at pains to point out (paragraph 2) that the way in which she had behaved in that litigation was in no way reflected in the judgment to which he came upon the committal application.

In 2011, injunctive relief had been granted by first a District Judge and then HHJ Cardinal:

a. to the effect that the respondents should not encourage JM to leave or to ask to leave his placement, or discuss with him the possibility of moving back home, or remove him from the jurisdiction of the court. The reason why that order was made was because there was a history on one occasion of JM being removed from the care home where he was situated and, indeed, taken to Turkey for a short period;

b. restraining WM from using or threatening violence against her father or any employee of the applicant or the AH home, or instructing, encouraging or in any way suggesting any other person should do so. She was further forbidden from intimidating, harassing or pestering her father or any employee of the applicant Local Authority or the AH home.

Notwithstanding these injunctions, which had been served upon WM (who had attended nearly every hearing), WM took the following steps which HHJ Cardinal found to constitute contempt of court:

a. WM and IM (her brother) took JM to see a solicitor in Birmingham to discuss his placement. They did so by WM persuading or causing IM and his partner to collect JM for what was initially reportedly a contact visit and to bring him from the Local Authority home to Birmingham to see a solicitor;

b. WM produced and distributed a leaflet prior to and during the final hearing giving details of the case, containing a photograph of her father and other information so as to identify him and that is in breach of rule 90/91 of the Court of Protection Rules;

c. speaking to her father on numerous occasions about the proceedings, even though she has been told that in doing so she has caused him distress. She also gave her father a wooden cross at a visit, saying that he should keep it with him at all times to prevent the evil in the home hurting him;

d. abusing and threatening Ms LW (the practice lead social worker of the older person's mental health team for the local authority), contrary to the court's orders (the abuse including abusive emails and

voicemails);

e. bringing her father to Court on the day of the judgment upon the welfare application, a journey of some 50-60 miles, in circumstances where it was necessary for the clerk to HHJ Cardinal and court security to be involved to remove JM from her and IM, and where it was found that JM was unwell upon his return to the care home "*thanks in no small part to the stress involved in attending court unnecessarily*" (paragraph 3).

HHJ Cardinal found, perhaps not surprisingly, there had been a considerable number of breaches, and that WM had no intention, "unless restrained by a severe measure by this court, of obeying the orders herself" (paragraph 12). He also found that she had been seeking to evade service of the application for committal for contempt and in the circumstances considered it appropriate to proceed to sentence her in her absence. In light of the paucity of consideration by the Court of contempt applications, the relevant paragraphs of his judgment merit setting out in full:

"*15. … I look at the terms of punishment. Miss Khalique has properly reminded me that the court's purpose is not to express outrage, but simply to express the court's concern as to breach of its orders and not in fact to punish unnecessarily, it is not a criminal court. I bear in mind the guidance given by the leading case of Hale v Tanner [[2000] 1 W.L.R. 2377], but in the circumstances it seems to me that there is no alternative other than to commit this lady to prison. I realise, of course, that in doing so I would be punishing JM to a degree because in some small way he still appreciates visits from his daughter, although she seems to ruin part or all of most of the visits and telephone calls, but the court cannot allow this situation to continue whereby she abuses LW, she abuses staff at AH Home and she defies the court order by bringing her father to court. She is causing him very considerable grief. In those circumstances it seems to be only right she should go to prison.*

16. I have thought very carefully about the punishment. Last time I proposed imprisonment for five months. There have been other incidents, but I am satisfied that those incidents took place simply because she had not appreciated that I was going to send her to prison for breaches and she just continued her behaviour. I do not think it is a case for increasing the punishment so in the circumstances for each and every one of the breaches I will send her to prison for a further period of five months to be served concurrently. I am not sure I have said so clearly, but I make it clear that the telephone calls by WM have been not just to LW, but, of course, also to staff at AH Home and I want to make it clear that this order is made to protect them just as much as it is to protect staff of the Local Authority direct."

Comment

It is, unfortunately, not uncommon for those before the Court of Protection to show themselves (by word or deed) reluctant to heed the declarations or decisions of the Court; this judgment is helpful confirmation that the standard principles applicable to contempt in civil proceedings will apply if and when their reluctance reaches the level of contempt.

R (Sunderland City Council) v South Tyneside Council [2012] EWCA Civ 1232

Mental Health Act 1983 - Interface with MCA

Summary

Although this concerns the free after-care provisions of s.117 of the Mental Health Act 1983, it provides an opportunity to mention the ordinary residence provisions surrounding the identity of the relevant supervisory body for

DOLS.

The main issue for the Court of Appeal was whether patient SF was "resident" in a Sunderland hall of residence or a South Tyneside hospital for the purposes of determining which authority was responsible for paying for her after-care services. The parties agreed that SF was resident in Sunderland at the time when she was informally admitted to the South Tyneside hospital on 7 October 2009 having attempted suicide. She suffered from atypical Asperger's and a borderline personality disorder and consented to the admission, "but it is likely that if she had not given her consent, compulsory powers would have been used" (para 6). However, just over two weeks into her two-month informal hospital stay, her licence to live in the Sunderland hall of residence was terminated, along with her college placement. After absconding from the hospital on 9 December 2009, she was detained for assessment and then for treatment under the Mental Health Act.

At first instance, Langstaff J had applied the test for ordinary residence in *R (Shah) v Barnet LBC* [1983] 2 AC 309 (adopting a place voluntarily and for settled purposes as part of the regular order of one's life for the time being), and noted that the informal admission was not a voluntary surrender: it was closely analogous to a compulsory admission, with the powers to detain in the background. Moreover it was not for a settled purpose; nor was it part of the regular order of her life. Accordingly SF remained resident in Sunderland.

Allowing the appeal, the Court of Appeal held that *Shah* was not a helpful guide and *Mohamed v Hammersmith and Fulham LBC* [2001] UKHL 57 was to be preferred. Although the period of hospital *detention* must be disregarded, regard could be had to the preceding two-month informal stay. The question "is not only that of physical presence" and "it may be relevant to consider why the person is where he or she is, and to what extent his or her presence there is voluntary" (para 31). Crucially, once the Sunderland hall of residence had ceased to be available to her, there was no place where SF could be said to be "resident" other than the hospital. It followed that South Tyneside was responsible for her after-care.

Comment

It is important to emphasise that where someone "resides" for MHA 1983 s.117 purposes involves a different test to deciding where they "ordinarily reside" for the purposes of the National Assistance Act 1948. Section 117 is freestanding and contains none of the deeming provisions referred to in the 1948 Act. When identifying which supervisory body is responsible for dealing with a DOLS application, the Mental Capacity Act 2005 relies upon the "ordinarily resident" approach of the 1948 Act, and not the "resident" approach of the 1983 Act. Thus, the fact that a person can be said to "reside" in hospital for s.117 purposes, between losing their community placement and being detained under the MHA, may not impact greatly in non-MHA situations.

No mention is made in the judgment of SF's capacity to consent to the informal admission and the deprivation of liberty safeguards were not used. However, let us imagine an incapacitated person is ordinarily resident in area A where they are accommodated by local authority A under Part 3 of the National Assistance Act 1948. If they are placed in a care home in local authority B, s.24(5) of the 1948 Act deems that person to still be "ordinarily resident" in area A. Thus, local authority A remains the supervisory body for any DOLS application.

If the person is admitted to hospital in area B under a DOLS authorisation, s.24(6) of the 1948 Act similarly deems them to be "ordinarily resident" in area A and so the Primary Care Trust in area A will be the supervisory body. If, however, they were detained in that hospital under MHA s.3, PCT B and local authority B will be responsible for their s.117 after-care because area B is where they were "resident" prior to the detention. That was the position prior to this decision and does not appear to be altered by it.

What remains to be seen is the extent to which the *Shah* test will continue to be used when determining ordinary residence for the purposes of the 1948 Act (and therefore DOLS). Indeed,

clause 32 of the draft Care and Support Bill retains the term "ordinarily resident" so the issue seems set to continue.

Kedzior v Poland [2012] ECHR 1809, Application No. 45026/07)

Article 5 ECHR - Deprivation of liberty

Summary

The (relative) flurry of decisions from Strasbourg upon deprivation of liberty in the context of care homes continues apace.

This case (as with *Stanev v Bulgaria* and *DD v Lithuania*) concerned the placement of a person in 'an adult social care home.' Mr K's brother, in his role as Court-appointed guardian, asked that he be placed in a social care home, where he remained for a decade from 2002. It would appear that, under Polish law, his admission was considered voluntary and did not require approval by a court. He made repeated attempts both to challenge the lawfulness of his detention, and also to have his capacity restored, the latter it would seem primarily so that he would be allowed to leave the home. His attempts proving fruitless, he made an application to Strasbourg. Upon the application, the ECtHR had cause to consider the following:

(1) whether he was deprived of his liberty at the care home;

(2) if so, whether the deprivation of his liberty was lawful for purposes of Article 5(1)(e) ECHR;

(3) whether he had at his disposal a procedure complying with the requirements of Article 5(4) ECHR to challenge the necessity for his continued stay in the social care home and to obtain his release;

(4) whether his right of access to a court had been breached contrary to Article 6(1) ECHR.

The application also raised an issue under Article 8, but the Court did not consider it separately.

We address each of the four main issues in turn.

Whether Mr K deprived of his liberty

The submissions of the parties (including an intervention from the admirable Mental Disability Advocacy Centre) took a form that is now familiar, in particular in the reliance by the Polish Government upon the decision in *HM v Switzerland* ((2002) 38 E.H.R.R. 314).

At paragraphs 54-6, the Court noted the general principles at play in a form very similar to that set out in *DD*, noting that it had in that case and in *Stanev* "*had the opportunity to examine placements in social care homes of mentally incapacitated individuals, and to find that it amounted to deprivation of liberty within the meaning of Article 5 § 1 of the Convention.*" Applying those principles, the Court held thus as regards the objective element:

> "*57. As concerns the circumstances of the present case, the Court considers that the key factor in determining whether Article 5 § 1 applies to the applicant's situation is whether the care home's management has exercised complete and effective control over his treatment, care, residence and movement from February 2002, when he was admitted to that institution, to the present day (see paragraph 44 above and D.D. v. Lithuania, cited above, § 149). The applicant was not free to leave the institution without the management's permission. Nor could the applicant himself request leave of absence from the home, as such requests had to be made by the applicant's official guardian. Accordingly, and as in the Stanev case, although the applicant was able to undertake certain journeys and to spend time with his family the factors mentioned above lead the Court to consider that the applicant was under constant supervision and was not free to leave the home without permission whenever he*

wished (see Stanev, cited above, § 128). Moreover the Court notes that it would appear that the applicant's extended visits to his family were only authorised during the last few years of his stay in the Ruda Różaniecka Home.

Finally, the management of the care home controlled the remaining 30% of the applicant's disability pension. The Court observes in this respect that the facts of the applicant's situation at the home were largely undisputed."

As regards the subjective element, the Court adopted a similar approach to that in *Stanev* and *DD*, concluding that:

"58 … In sum, even though the applicant had been deprived of his legal capacity, he was still able to express an opinion on his situation, and in the present circumstances the Court finds that the applicant had never agreed to being placed in the social care home."

The Court found that, although the applicant's admission was requested by his guardian, a private individual, it was implemented by a state-run institution (the care home), and hence the responsibility of the authorities for the situation complained of was engaged; and that he was deprived of his liberty for purposes of Article 5(1) with effect from February 2002 (paragraph 60).

Whether deprivation of liberty lawful for purposes of Article 5(1)(e)

Taking a very similar approach to that adopted in *DD*, the Court reiterated the need to go beyond a mere compliance with formal compatibility with the procedural requirements of the domestic law in question to examine whether those procedures provided sufficient guarantees against arbitrariness. The Court therefore examined the procedures in Poland to see whether they complied with the criteria set down in *Winterwerp v Netherlands* (1979) 2 E.H.R.R. 387 at 39. It reiterated in so doing that the mental condition of a person must have been established at the time of the deprivation of liberty (paragraph 66); in the case before it, an assessment conducted a little over a month previously could be considered sufficiently current (paragraph 67). However, the Court found that the assessment had been solely for purpose of determining the issue of his legal protection, rather than to decide whether his state of health required his detention, such that it could not stand as evidence that the mental disorder in question warranted detention (paragraph 68), and that there had been a "*total lack*" of continued assessment of his disorder (paragraph 71), such that his placement in the home was not ordered in compliance with a procedure prescribed by law and was hence not justified by reference to Article 5(1)(e)(ibid).

Article 5(4)

Turning to the applicant's complaint under Article 5(4) ECHR, the Court reiterated the 'mantra' from *DD* as to the relevant principles in the context of those detained as being of unsound mind thus:

"75. Among the principles emerging from the Court's case-law on Article 5 § 4 concerning "persons of unsound mind" are the following:

(a) a person detained for an indefinite or lengthy period is in principle entitled, at any rate where there is no automatic periodic review of a judicial character, to bring proceedings "at reasonable intervals" before a court to put in issue the "lawfulness" – within the meaning of the Convention – of his detention;

(b) Article 5 § 4 requires the procedure followed to have a judicial character and to afford the individual concerned guarantees appropriate to the kind of deprivation of liberty in question; in order to determine whether proceedings provide adequate guarantees, regard must be had to the particular nature of

the circumstances in which they take place;

(c) the judicial proceedings referred to in Article 5 § 4 need not always be attended by the same guarantees as those required under Article 6 § 1 for civil or criminal litigation. Nonetheless, it is essential that the person concerned should have access to a court and the opportunity to be heard either in person or, where necessary, through some form of representation (see Megyeri v. Germany, 12 May 1992, § 22, Series A no. 237-A; see also Stanev, cited above, § 171).

76. This is so in cases where the original detention was initially authorised by a judicial authority (see X v. the United Kingdom, 5 November 1981, § 52, Series A no. 46), and it is all the more true in the circumstances where the applicant's placement in the care home has been instigated by a private individual, namely the applicant's guardian, and decided upon by the municipal and social care authorities without any involvement by the courts (see D.D. v. Lithuania, cited above, § 164)."

The Court noted that the framework in place in Poland fell notably short of the requirements of Article 5(4), in particular because there was no provision for automatic judicial review of the lawfulness of admitting a person to, and keeping him in, an institution such as a social care home, and a review could not be initiated by the person concerned if that person has been deprived of his legal capacity, such that Mr K was prevented from independently pursuing any legal remedy of a judicial nature to challenge his continued involuntary institutionalisation.

Article 6

The Court noted that it had, in *Stanev*, in respect of partially incapacitated individuals, that given the trends emerging in national legislation and the relevant international instruments, Article 6(1) of the Convention must be interpreted as guaranteeing a person, in principle, direct access to a court to seek restoration of his or her legal capacity. It reiterated (paragraph 89) that "*the Court reiterates that the right to ask a court to review a declaration of incapacity is one of the most important rights for the person concerned, since such a procedure, once initiated, will be decisive for the exercise of all the rights and freedoms affected by the declaration of incapacity, not least in relation to any restrictions that may be placed on the person's liberty*." On the facts before it, and in particular given that there had been a judgment from the Polish Constitutional Court to the effect that lower courts should not limit procedural rights of incapacitated adults even before legislation to that end had been completed, a judgment which had been signally ignored prior to the enactment of the legislation in question, the Court concluded that there had been a breach of Article 6(1).

The Court awarded Mr K the sum of €10,000 in respect of non-pecuniary damage to reflect the breaches of his rights under the Convention.

Comment

Even if it could be said previously that the English Courts were required to deduce the relevant principles applicable to the deprivation of liberty of incapacitated adults in care homes from Strasbourg jurisprudence which was not directly on point (for instance, *HL v United Kingdom*, concerned with informal admission to psychiatric hospital), that cannot be the case now. In *Stanev, DD* and now *Kedzior*, we have a trinity of cases which are expressly concerned with the placement of those without the relevant capacity in care homes. Unsurprisingly, perhaps, the approach adopted in each of the cases to the determination of the objective element of the deprivation of liberty is both internally consistent and consistent with that adopted in *HL*. None of the cases (with the possible but ambiguous exception of dicta in *Stanev*) rely upon questions of purpose, reason or motive; none proceed by reference to a comparator in the way adopted by the Court of Appeal in *Cheshire West*.

The divergence between the path adopted in England and Wales and that set down by Strasbourg would seem only to be widening. The need for the Supreme Court to grapple with the question of what constitutes a deprivation of liberty for purposes of the MCA 2005 only becomes more urgent; it is therefore all the more regrettable that we understand that the case is not listed until the autumn of 2013.

Kedzior is also of significance for confirming – if such confirmation was required – that the *Winterwerp* criteria are directly in play when it comes to consideration of those to be deprived of their liberty under the DOLS regime. To that extent, therefore, *Kedzior* (and *DD* before it, which addressed the matter more briefly) therefore answers the Court of Appeal's complaint in *G v E* [2010] EWCA Civ 822 [2010] COPLR Con Vol 431 that the "*European* jurisprudence *derives exclusively from the fact that in the cases which have reached the ECtHR, the issue has involved alleged mental illness and detention in a psychiatric hospital*" (paragraph 59). The steps required to ensure that a person satisfies the mental health requirement of Schedule A1 would appear to meet the requirements set down by Strasbourg, albeit that *Kedzior* does sound as a powerful reminder that it is necessary that (save in the case of emergency) the evidence upon which reliance is placed to justify detention must be (1) current at the point of detention; (2) prepared with a view to identifying why the disorder warrants detention; and (3) kept under regular review.

Bureš v. the Czech Republic [2012] ECHR 1819 (Application No. 37679/08)

Restraint

Summary

The European Court of Human Rights was asked to consider a claim brought against the Government of the Czech Republic alleging that the Applicant (Mr Bureš) had been ill-treated in a sobering-up centre in violation of Article 3 of the Convention and further had been detained in a psychiatric hospital in violation of Article 5 of the Convention.

The applicant had been diagnosed as having a psycho-social disability. He had previously been treated in Italian psychiatric hospitals as a voluntary patient and was using psychiatric medication. On 9 February 2007 he inadvertently overdosed on his medication and left his home wearing only a sweater. He was picked up by a police patrol who took him to a hospital. He was then transferred to a sobering up centre. The precise events which then occurred at the sobering up centre were in dispute. The Applicant's case was that he had been strapped tightly and left unchecked overnight causing a reduction in blood circulation to his arms. The Government alleged that he had been initially restrained for two hours as he was restless but was checked. Subsequently his behaviour had become destructive requiring further restraint.

On 10 February 2007 the applicant was transferred to the Intensive Psychiatric Care Unit where, according to the admission record, he had visible abrasions on the front of his neck, both wrists and both ankles, caused probably by friction against textile, and abrasions of an unspecified different type on his knees. He complained about his treatment in the sobering-up centre to the hospital authorities, but they did not take any action. On 15 February 2007 the applicant was examined by a neurologist, who stated that as a result of the use of straps the applicant suffered severe paresis of the left arm and medium to severe paresis of the right arm. He began a course of intensive treatment at the Rehabilitation Unit. The applicant remained in the hospital involuntarily until released on 13 April 2007. However, because of his two-month hospitalisation, he was confused and was not able to fully take care of himself. He voluntarily returned to the hospital on 14 April 2007 and remained there until 1 July 2007.

The Claimant subsequently made a complaint to the police which was investigated but no prosecution was brought. He challenged his detention in civil proceedings but the Constitutional Court rejected his appeal on the ground that he had not exhausted all remedies

before the Regional Court.

The European Court of Human Rights noted that whilst they had doubts as to the Government's version of events at the sobering up centre, the Applicant's description was also not fully supported by the evidence. Accordingly, they proceeded to consider the claim on the basis that the Government's account was accurate.

The Court nevertheless proceeded to uphold the claims of both a violation of the substantive rights protected by Article 3, and also a violation of the procedural right to an effective investigation. In particular, the Court held the following:

(1) The medical staff in the sobering up centre should be regarded as agents of the State such that their actions could be attributed to the State – the Centre was a public body and the applicant was subject to the complete control of the Centre's staff. Further, the key issue was not the applicant's injury as an unintended negative consequence of medical treatment, as submitted by the Government, but rather the use of the restraints itself. The applicant's injury was only incidental to the intentional treatment. Accordingly, medical negligence case precedent relied upon by the Government was not relevant but cases concerning the use of restraints on persons in detention, which the Court has always considered from the point of view of negative obligations, were;

(2) The Court had previously recognised the special vulnerability of mentally ill persons in its case-law and the assessment of whether the treatment or punishment concerned is incompatible with the standards of Article 3 has, in particular, to take into consideration this vulnerability (see *Keenan v. the United Kingdom*, no. 27229/95, § 111, ECHR 2001 III, *Rohde v. Denmark*, no. 69332/01, § 99, 21 July 2005 and *Renolde v. France*, no. 5608/05, § 120, ECHR 2008 (extracts));

(3) In respect of persons deprived of their liberty, recourse to physical force which has not been made strictly necessary by their own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3 of the Convention (see *Krastanov v. Bulgaria*, no. 50222/99, § 53, 30 September 2004). In the context of detention in a sobering-up centre, it is up to the Government to justify the use of restraints on a detained person. Aggressive behaviour on the part of an intoxicated individual may require recourse to the use of restraining belts, provided of course that checks are periodically carried out on the welfare of the immobilised individual. The application of such restraints must, however, be necessary under the circumstances and its length must not be excessive (see paragraph 86);

(4) The position of inferiority and powerlessness which is typical of patients confined in psychiatric hospitals calls for increased vigilance in reviewing whether the Convention has been complied with. Nevertheless, it is for the medical authorities to decide, on the basis of the recognised rules of medical science, on the therapeutic methods to be used, if necessary by force, to preserve the physical and mental health of patients who are entirely incapable of deciding for themselves and for whom they are therefore responsible. The established principles of medicine are in principle decisive in such cases; as a general rule, a measure which is a therapeutic necessity cannot be regarded as inhuman or degrading. The Court must nevertheless satisfy itself that the medical necessity has been convincingly shown to exist (see *Herczegfalvy v. Austria*, 24 September 1992, § 82, Series A no. 244) (see paragraph 87).

On the facts, the Court found that the strapping of the Applicant reached the minimum degree of severity required to engage Article 3. As to the justification for the use of restraint, in line with domestic and international guidance, the Court found that strapping a patient to a bed for two hours could not be justified by "mere restlessness." Whilst aggressive behaviour could justify restraint in principle, strapping should be a mechanism of last resort. Patients

who are restrained must be kept under close supervision. Further, European and national standards require proper recording of every use of restraints, which, among other things, facilitates any subsequent review of whether their use was justified. In the applicant's case, restraint had been applied as a matter of routine and the Government had not justified its use as proportionate in the circumstances of the case. There was therefore a substantive breach of the Applicant's Article 3 rights. The Court also found that there was a breach of the procedural aspect of Article 3, for reasons which need not detain us here.

The complaints of alleged breaches of Article 5 of the Convention were rejected as inadmissible on the grounds that the Applicant had not exhausted domestic remedies.

Comment

This case provides a useful synopsis of the jurisprudence of the European Court of Human Rights in relation to the treatment of mentally ill patients whilst they are being deprived of their liberty. Whilst the judgment focuses on the use of restraint, which on the facts resulted in a significant and permanent injury to the applicant, it serves equally as a reminder that additional attention should be paid by state authorities to ensure that the Article 3 rights of mentally ill individuals are upheld in hospital settings where they are particularly vulnerable. As such, it serves as a useful parallel to the case of Col Munjaz, discussed in a previous edition of the newsletter, in which the ECtHR emphasised the importance of Article 8 rights to those who are deprived of their liberty and in consequence the greater part of their autonomy.

RP v UK [2012] ECHR 1796 (Application No. 38245/08)

Practice and procedure - other

Summary

This case arose from family proceedings in which the Official Solicitor was appointed to act as litigation friend to a mother who lacked litigation capacity. The points of principle raised upon the application to Strasbourg were identical to those which arise in Court of Protection proceedings, and thus the case merits consideration in some detail.

The mother argued, among other points, that her rights under Article 6 ECHR had been breached because:

(1) There had been no determination by the court of her litigation capacity – the Official Solicitor had accepted an expert report on the issue, and had not put the matter before the court for resolution.

(2) The Official Solicitor had taken the view that he could not challenge the local authority's argument that the mother's children should be taken into care, as the merits of the mother's case were too weak. As a result, the outcome she wished for was not argued.

The Court started its examination of the issue by recalling that the right of access to the courts guaranteed by Article 6(1) was not absolute, but may be subject to limitations. Whilst a certain margin of appreciation was left to member states in this regard, the Court recalled that: (1) the limitations applied must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right was impaired; and (2) a limitation would not be compatible with Article 6(1) if it did not pursue a legitimate aim and if there was not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.

As regards those with disabilities, the Court recalled that it had permitted domestic courts

> "*a certain margin of appreciation to enable them to make the relevant procedural arrangements to secure the good administration of justice and protect the health of the person concerned (see, for example, Shtukaturov v. Russia, no. 44009/05, § 68, 27 March 2008). This is in keeping with the United Nations Convention on the Rights of Persons with Disabilities, which requires States to provide*

> *appropriate accommodation to facilitate the role of disabled persons in legal proceedings. However, the Court has held that such measures should not affect the very essence of an applicant's right to a fair trial as guaranteed by Article 6 § 1 of the Convention. In assessing whether or not a particular measure was necessary, the Court will take into account all relevant factors, including the nature and complexity of the issue before the domestic courts and what was at stake for the applicant (see, for example, Shtukaturov v. Russia, cited above, § 68)*" (paragraph 65).

In the instant case, the Court accepted that the proceedings were of the utmost importance to the mother, who stood to lose both custody of and access to her only child. Moreover, "*while the issue at stake was relatively straightforward - whether or not R.P. had the skills necessary to enable her successfully to parent K.P. - the evidence which would have to be considered before the issue could be addressed was not. In particular, the Court notes the significant quantity of expert reports, including expert medical and psychiatric reports, parenting assessment reports, and reports from contact sessions and observes the obvious difficulty an applicant with a learning disability would have in understanding both the content of these reports and the implications of the experts' findings*" (paragraph 66).

"I*n light of the above*," the Court continued *"and bearing in mind the requirement in the UN Convention that State parties provide appropriate accommodation to facilitate disabled persons' effective role in legal proceedings, the Court considers that it was not only appropriate but also necessary for the United Kingdom to take measures to ensure that R.P.'s best interests were represented in the childcare proceedings. Indeed, in view of its existing case-law the Court considers that a failure to take measures to protect R.P.'s interests might in itself have amounted to a violation of Article 6 § 1 of the Convention (see, mutatis mutandis, T. v. the United Kingdom [GC], no. 24724/94, §§ 79 - 89, 16 December 1999)*" (paragraph 67).

The Court therefore examined the appointment of the OS in the case before it to see whether it was proportionate to the legitimate aim pursued or whether it impaired the very essence of RP's right of access to a court. It found as follows:

(1) The OS was only invited to act following the commissioning of expert evidence from a clinical psychologist as to RP's capacity to conduct the litigation in question, and that, whilst there was no formal review, in practice further assessments were made of her litigation capacity during the course of the proceedings (paragraph 69);

(2) Whilst there was no formal right of appeal against the appointment of the OS, RP was informed of her ability to contact either her solicitor or the Official Solicitor (or a complaint's officer) if she was unhappy with the conduct of the litigation; the OS also gave evidence to the domestic courts that "*R.P. could have applied to the court at any time to have him discharged. Alternatively, he indicated that if it had come to his attention that R.P. was asserting capacity, then he would have invited her to undergo further assessment*." These, the Court considered, constituted an "*appropriate and effective means by which to challenge the appointment or the continued need for the appointment of the Official Solicitor*" (paragraph 70);

(3) It would not have been appropriate for the domestic courts to conduct periodic reviews of RP's litigation capacity, as this would have caused unnecessary delay and would have been prejudicial to the welfare of her daughter. There would also have been no purpose served in encouraging her to seek separate legal advice at this juncture (paragraph 71);

(4) Any means of challenging the appointment of the OS, however effective in theory, would only be effective in practice and thus satisfy the requirements of Article 6(1) of the Convention if the fact of his appointment, the implications of his appointment, the existence of a means of challenging his

appointment and the procedure for exercising it were clearly explained to the protected person in language appropriate to his or her level of understanding. On the facts of the case, her solicitor had taken proper steps to ensure that she was aware of the nature of the involvement of the OS and of his role (and she had only complained some 10 months after his appointment and two days before the final hearing), such that adequate safeguards were in place to explain the nature of proceedings to her and to enable her to challenge the appointment of the OS (paragraphs 72-4);

(5) As regards the conduct by the OS of the proceedings, the Court noted RP's concerns that the OS had focussed 'on what was best' for RP's daughter. However, it accepted that the best interests of the daughter were the touchstone by which the domestic courts would assess the case, such that in determining whether a case was arguable or not, it was necessary for the OS to consider what was in K.P.'s best interests. Bearing in mind what was best for the daughter did not therefore constitute a breach of the mother's Article 6(1) rights (paragraph 76).

Furthermore, and in a passage which will resonate with those appearing before the Court of Protection, the Court noted that it did "*not consider that 'acting in R.P.'s best interests' required the Official Solicitor to advance any argument R.P. wished. On the contrary, it would not have been in R.P.'s - or in any party's - best interests for the Official Solicitor to have delayed proceedings by advancing an unarguable case. Nevertheless, in view of what was at stake for R.P., the Court considers that in order to safeguard her rights under Article 6 § 1 of the Convention, it was imperative that her views regarding K.P.'s future be made known to the domestic court. It is clear that this did, in fact, occur as R.P.'s views were referenced both by the Official Solicitor in his statement to the court and by R.P.'s counsel at the hearing itself*" (paragraph 76).

Noting finally that RP had appealed to the Court of Appeal (refusing the assistance of pro bono Counsel which the OS had secured for her) and that during the course of her appeal she was afforded ample opportunity to put her views before the Court, the Court concluded that the very essence of her right of access to a Court was impaired, and therefore found there to have been no breach of Article 6(1).

The Court further found manifestly ill-founded allegations of breaches of Articles 8 and 13 for reasons which need not trouble us here.

Comment

The outcome in this case is perhaps not hugely surprising. If it had been otherwise, the system of representation in England and Wales for those lacking litigation capacity and who do not otherwise have the benefit of a litigation friend would have collapsed. However, three points of significance arise:

(1) This is only the most recent of the cases involving incapacitated adults discussed in our newsletter in which the Court has construed the ECHR by reference to the UN Convention on the Rights of Disabled Persons;

(2) The Court placed considerable emphasis upon the steps taken to explain to RP the ways in which she could seek to challenge the appointment of the Official Solicitor; it therefore left open the possibility that a failure on the part of the particular individuals appointed to act on the part of the protected party (whether that be P or another party to the litigation) to convey the necessary information in an appropriate form would give rise to a breach of Article 6(1);

(3) The endorsement of the proposition that 'acting in the best interests' of a protected party does not require advancing every argument that party wishes to be relayed to the Court is of assistance, although it is necessary to ensure that where the protected party has a particularly important stake in the outcome of the proceedings that their views are appropriately conveyed to the Court. This is particularly so where the

protected party is P him or herself (rather than, as in *RP*'s case, a protected party other than the subject of the litigation). In such circumstances, it is suggested that, even if not formally advanced by way of argument to the Court, P's views must clearly and fully put before the Court so as to comply the duty to safeguard their rights under Article 6(1) ECHR.

Practice and procedure – liaison with the Home Office

With thanks to Helen Clift at the Official Solicitor's Office for bringing this to our attention, we can confirm that the Home Office's Liaison Office takes the following position as regards liaison with the COP:

1. The Home Office accepts orders from the COP in the same way as it would from the Family Division;

2. The process for liaising with the Home Office during the currency of COP proceedings is the same as that directed in Family Proceedings, i.e. that contained in the President's Guidance of March 2012, *Communicating with the Home Office in Family Proceedings*.[2]

There can on occasion be a need to inquire of the Home Office as to (for instance) a person's immigration status or the consequence of a decision within the COP upon their status, and use of this procedure can therefore be of importance in ensuring that this information is obtained as quickly as possible.

Guide for social workers upon when to consider making an application to the Court of Protection

Tor (with the assistance of Alex) has prepared a handy one-page guide to when consideration should be given to making an application to the Court of Protection, covering the scenarios that we have found to arise most often in practice, and summarising in bullet point form the key information that will be required by the legal department.

This guide can be yours in return for a donation of £25 to Action on Elder Abuse, a charity which does sterling work highlighting abuse, challenging, training, educating and influencing politicians and others. Details of the charity can be found at: http://www.elderabuse.org.uk, and their Justgiving page here: http://www.justgiving.com/elderabuse/Donate/.

Please drop an email either to one of us or to our marketing team if you are interested in receiving a copy of the guide. We will not require proof of donation, rather operating a virtual honesty box.

Movember

As Alex is not in Court in November, he is raising facial hair and money for prostate cancer research by taking part in *Movember*, a sponsored moustache growing exercise. He would very much welcome any donations at http://uk.movember.com/mospace/3756433; if he receives notification of 10 donations as a result of this newsletter, his photograph next month will be suitably altered. He awaits with interest to see whether this serves as a stimulus or a deterrent to donations.

Our next update should be out at the start of December 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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[2] [2012] Fam Law 455; http://www.judiciary.gov.uk/Resources/JCO/Documents/Guidance/communicating-with-ho-in-family-proceedings-revised-guidance-march-2012.pdf.

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