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Court of Protection update

Thirty Nine Essex Street Court of Protection Newsletter: March 2013

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Introduction

Welcome to the March 2013 newsletter. We cover in this case a number of important cases, including the decision of the Court of Appeal in *Commr of the Police for the Metropolis v ZH*, as well as decisions upon capacity to marry and capacity to consent to admission as an informal psychiatric patient in conditions amounting to a deprivation of liberty. We also cover practice points arising from recent cases decided in the Family Division; guidance from the Lord Chancellor as to the operation of the new legal aid regime with effect from 1.4.13; the DoH's Fifth Annual Report upon the IMCA service; and the Third Annual Report on the UK's National Preventative Mechanism (a body we suspect all of you are intimately familiar with!). Last, but very much not least, we provide a link to Tor's recently-published and invaluable[1] guide to the CoP for litigants in person, as well as a snapshot of the CoP's work over the past four years.

With grateful thanks to the Official Solicitor, we include with this newsletter an important updated note upon acceptance of invitations to act as Litigation Friend. The note is of particular importance as regards steps which can be taken to maximise the chances that the OS will be able to accept such an instruction (in an appropriate case) without delay. We should note that the waiting list described in the note applies only to health and welfare applications, as opposed to those relating to P's property and affairs.

As per usual, we include not only hyperlinks to publicly accessible transcripts of the judgments where they are available at the time of publication,[2] 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.

Aintree University Hospitals NHS Foundation Trust v David James & Ors [2013] EWCA Civ 65

Best interests – Medical treatment

We start with a brief note on a judgment of the Court of Appeal handed down on 1.1.13, by which the Court gave reasons for allowing (on 21.12.12) the Trust's appeal against the decision of Peter Jackson J to refuse to grant declarations that subject to the agreement of his clinical team, it would be lawful, being in his best interests, for the specific treatment (including CPR) to be withheld in the event of a clinical deterioration, and refusing permission to the hospital to place a "DNACPR" notice in DJ's records.

The judgment of Sir Alan Ward (with whom Laws

[1] In the view of her co-editors.

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

LJ) agreed, is extremely important for its consideration of the concept of 'futility,' as well as other aspects of the application of the best interests doctrine to medical treatment. We will bring you a full summary and – we hope – guest commentary in the next issue.

A Local Authority v AK & Ors CoP No 11950943 Bailii Citation [2012] EWHC B29 (COP)

Mental capacity – marriage

Summary

This case concerned the issue of capacity to marry. AK had sustained brain injuries which caused him to have severe memory problems. At the time of the hearing, he was married to BK, who had been his girlfriend prior to his second head injury. BK said that although they had split up shortly before the second head injury, AK had subsequently expressed a wish to marry her. BK did not get on with AK's family, and disagreed with the views of professionals that AK lacked capacity to decide to marry. She arranged to marry AK in secret, taking him out of the care home where he resided in order to do so. The registrars did not identify any difficulties with AK's mental capacity, and the ceremony took place without incident.

The court was asked to determine whether AK had had capacity to marry at the time of the ceremony. The local authority and AK's brother, supported by the Official Solicitor, argued that he did not. BK argued that he did.

Bodey J affirmed the pre-MCA approach to capacity to marry set out in *Sheffield City Council v E & Another* [2005] 2 WLR 9 as being consistent with the MCA 2005, and found that AK failed the final aspect of the functional test – the ability to use and weigh information. The judge noted (at para 19) that: "*because for most people, marriage is to be regarded as a fairly straightforward concept (compared for example with litigating, or with many medical procedures) one would not normally need to spend too much time on assessing an individual's ability to 'understand, retain, use and weigh' the information about marriage which is referred to in Sheffield. Nevertheless, there will occasionally be cases where the degree and/or nature of the individual's impairments does make it necessary to do so, because for him or her a decision about marrying is not actually a simple one. This is one such case.*"

The judge annexed to the judgment revealing extracts from conversations with AK in which he was asked whether he was married, and if so to whom, which clearly demonstrated that he had no consistent understanding of his marital status, or the nature of his relationship with BK. The court held (at para 51) that:

"*Even if, and accepting, that* [AK] *understood on an intellectual level the concept of a marriage and the status of being husband and wife (which is in any event doubtful) he was, in my judgment, disabled from adequately using or weighing that information (a) by the fact that the choice would not have been put to him neutrally and (b) by his inability, as shown by subsequent interviews (his condition having remained much the same throughout) to know or remember, except for extremely short periods of time, his own marital status and/or the identity of his spouse. The reference to the retention of information for 'a short period' in S3(3) of the Act cannot seriously be interpreted to mean, in the context of the lifetime commitment of marriage, for so short a period as AK is able to recall whether he is married at all, or reliably (when he does remember) to whom. That evidence from interviews with AK to which I have just referred, admittedly relates to after the marriage; but it is clearly also a reliable indicator of AK's ability to retain information before it. Further, as Miss Butler-Cole submits, AK's thinking was distorted by false beliefs about marriage (for example about his getting 'holiday pay' and being 'able to control' his money) such that any weighing up by him of his wishes about marriage is likely to have been on false premises.*"

By way of coda, the judge also noted (at para 53) that there was no guidance in the Registrars' Handbook regarding the MCA 2005 and assessment of mental capacity, and said: "[i]*t may be that those responsible for the handbook would wish to consider the advisability of incorporating a paragraph on this, perhaps*

referring to the basic s.3 requirements and summarising the information necessary to be understood and weighed up, with a note on what to do where an individual's mental capacity to marry may be in real doubt."

Comment

This is, to the authors' knowledge, the first reported case, post-MCA 2005, in which an individual has been deemed to lack capacity after a marriage has occurred (outside the context of arranged and/or forced marriages). It is of particular interest for its confirmation that the ability to use and weigh information remains a relevant part of the test for capacity in marriage cases, notwithstanding the comments of Munby J (as he then was) in the *Sheffield* case, which could be read as suggesting that this element of the test was not relevant.

This decision stands together with the decision in *A, B and C v X and Z* [2012] EWHC 2400 (CoP), in which Hedley J also associated himself with the approach of Munby J in *Sheffield*, but reached the conclusion that the parties seeking to establish that P lacked capacity to marry had not made out their case. Permission was granted to the children of P in that case to appeal that decision; as at the time of writing no further details are available of the progress of that appeal.

A PCT v LDV, CC and B Healthcare Group [2013] EWHC 272 (Fam)[3]

Article 5 – deprivation of liberty – DOLS ineligibility – medical treatment – deprivation of liberty – mental capacity – assessing capacity

Summary

L was a former Winterbourne View patient. She was 33 years old and suffered from a mild learning disability and emotionally unstable personality disorder. On 25 May 2012, a tribunal had ordered her discharge from detention under s.3 of the Mental Health Act 1983 ('MHA') to take effect on 28 September 2012. It held that she needed a residential establishment in the community rather than the medium-secure unit. Identifying a suitable community placement was underway and, as a preliminary step, L was moved to a hospital closer to home ('WH') in early September 2012.

At around the same time, doctors from medium-secure unit provided two medical recommendations that she be re-detained under MHA s.3. However, with no material change in circumstances since the tribunal's decision in May, the Approved Mental Health Professional ('AMHP') concluded that such re-detention would be unlawful, following *R v East London NHS Trust, ex part Count Von Brandenburg* [2004] 2 AC 280, and declined to make the s.3 application. As a result, the deferred discharge took effect on 28 September 2012. But L remained in WH; now on an informal basis.

During her assessment, the AMHP identified that the restrictions in L's care plan seemed to constitute a deprivation of liberty and advised the Primary Care Trust ('PCT') and the hospital trust that an authorisation should be sought through a court order. On 12 October 2012 an urgent authorisation under Schedule A1 of the Mental Capacity Act 2005 ('MCA') was granted, and a request for a standard authorisation was made. The best interests assessor concluded that there was indeed a deprivation of liberty but L was ineligible to be deprived of her liberty because she was within the scope of the MHA. On 23 October 2012, the PCT therefore made an urgent application to the Court of Protection.

At this stage of the proceedings, Baker J. was called upon to consider (1) whether L's circumstances amounted to a deprivation of liberty; and (2) the relevant information when assessing her capacity to consent to the deprivation of liberty at WH.

Deprivation of liberty?

With the conjoined appeals in *Cheshire West* and *P and Q* being heard by the Supreme Court this Autumn, and having considered the current state of the law in depth in *CC v KK* [2012] EWHC 2136 (COP) at [76]-[96], his Lordship provided the following brief summary, which we

3 Note, as this case is still ongoing, Alex has played no part in the editorial team's summary or commentary upon it.

set out in full to assist practitioners:

"*13. When determining whether there is a 'deprivation of liberty' within the meaning of Article 5, three conditions must be satisfied, (a) an objective element of a person's confinement in a certain limited space for a not negligible time; (b) a subjective element, namely that the person has not validly consented to the confinement in question, and (c) the deprivation of liberty must be one for which the State is responsible: see Storck v Germany, supra*

14. When determining whether the circumstances amount objectively to a deprivation of liberty, as opposed to a mere restriction of liberty, the court looks first at the concrete situation in which the individual finds herself, taking account of a whole range of criteria, including the type, duration, effects and manner of implementation of the measure in question, bearing in mind that the difference between deprivation, and restriction upon liberty is merely one of degree or intensity and not one of nature or substance. As Munby LJ observed in Cheshire West, supra, at paragraphs 34-35 and 102, 'account must be taken of the individual's whole situation…the context is crucial'.

15. At a more practical level, guidance as to the objective element is given in the Deprivation of Liberty Safeguards Code of Practice 2008. Chapter 2 of the Code is entitled: "What is a deprivation of liberty?" At paragraph 2.5, there is what is described as a 'non-exhaustive' list of factors pointing towards there being a deprivation of liberty, namely where:

(1) restraint is used, including sedation to admit a person to an institution where that person is resisting admission;

(2) staff exercise complete and effective control over the care and movement of a person for significant periods;

(3) staff exercise control over assessments, treatments, contacts and residence;

(4) a decision has been taken by the institution that the person would not be released into the care of others, or permitted to live elsewhere, unless the staff in the institution consider it appropriate;

(5) a request by carers for a person to be discharged to their care is refused;

(6) the person is unable to maintain social contacts because risk of restrictions placed on their access to other people;

(7) the person loses autonomy because they are under continuous supervision and control.

16. The court must also have regard to the following factors identified in the recent case law:

(1) whether the person objects to their confinement: see paragraph 25 of the judgment of Wilson LJ (as he then was) in P and Q v Surrey County Council (supra);

(2) the relative normality of the person's life: see paragraph 28 of the judgment of Wilson LJ in P and Q (supra);

(3) the relevant comparator, having regard to the particular

capabilities of the person concerned: see paragraphs 38, 39 and 102 (viii) to (xii) of the judgment of Munby LJ (as he then was) in the Cheshire West case, (supra);

(4) as part of the overall assessment, the purpose for the placement: see judgment of Munby LJ at paragraphs 60 – 77 and 102 (vi) and (vii) in the Cheshire West case, as qualified for the reasons set out in CC v KK, supra, at paragraphs 94-96;

(5) the extent to which it can be said that the managers of the establishment, in this case WH, exercise complete and effective control over the person in his treatment, care, residence and movement: see the judgments of the European Court in DD v Lithuania (supra), at paragraph 146 and Kedzior v Poland, (supra) at paragraph 57."

On the particular facts, L was subject to the following restrictions:

(1) WH is locked to visitors and its patients;

(2) L must seek the permission of nursing staff if she wishes to leave;

(3) in the community, L is supervised 1:1;

(4) staff would prevent her leaving WH and entering the community if she is assessed to be at risk;

(5) should L seek to leave WH, staff would seek to dissuade her from doing so using de-escalation techniques;

(6) if she were to abscond from WH or staff, the police would be alerted;

(7) there are restrictions of movement within the unit;

(8) the level of observations of L are variable, ranging from level 3 (every 15 minutes) to level 2 (line of sight) to level 1 (i.e. 1:1 close). And observations are increased or decreased according to the assessed level of risk;

(9) restraint is used where there is an assessed and immediate risk to herself or others;

(10) staff may seek to remove L from the area to de-escalate the situation;

(11) personal property may be searched when staff assess there to be a clear indicator or risk (e.g. ligatures, hoarding of medication, instruments for use to self-harm);

(12) personal searches may also be conducted according to indicators of risk;

(13) if required, sedative medication may be administered, if necessary intramuscular injection;

(14) L's contact with her mother is to be supervised by staff in the community according to assessed need or risk;

(15) no contact is permitted with her mother in the hospital.

Baker J rejected the seemingly tentative submission that the restrictions would need to be the same wherever L was placed and therefore, applying the tests of relative normality and the relevant comparator, there was no deprivation. Rather, his Lordship held that L was deprived of her liberty and that it was not necessary for every factor in paragraph 2.5 of the DOLS Code of Practice to be present before Article 5 was engaged:

"*25. The plain fact is that in this case the care and movement of L is subject to the complete and effective control of the staff at WH. That control extends to treatment, contacts and residence. The treatment includes medication. It has been decided that she will not be released into the care of others*

or to live elsewhere, unless staff consider it appropriate. Her social contacts are subject to a degree of control.

26. *I accept Mr. Ruck Keene's submission that the appropriate comparator is a person properly placed in a residential placement in the community, and that WH does not amount to such a placement. In any event, the concept of relative normality and relevant comparator were not intended by the Court of Appeal to be used to exclude cases such as this from the safeguards introduced into the MCA 2005 as a result of the decision in HL v United Kingdom. In Cheshire West, Munby LJ makes it crystal clear by his reference to the decision in HL v United Kingdom that such circumstances will continue to be seen as amounting to deprivation of liberty.*

27. *The restrictions included in the care plan, as summarised by Ms Goodall in the analysis set out above, are on any view at the more severe end of the spectrum. To my mind, this is, objectively, a plain case of deprivation of liberty*."

Mental Capacity

Turning to the subjective element of the Article 5 equation, had L validly consented to the confinement in question? His Lordship had to first identify the decision in respect of which L's capacity would be assessed:

"*29. … Although the court is not, strictly speaking, bound by the provisions of Schedule A1 when deciding whether or not to make an order depriving a person of their liberty, I accept the submission made on behalf of the Official Solicitor by Mr Ruck Keene that the appropriate course in these circumstances is for the court to approach the question as if it was considering the "mental capacity requirement" under paragraph 15*."

The crux of the issue, therefore, was this: what were the salient details relevant to deciding whether to be accommodated in a hospital for the purpose of being given relevant care or treatment? Noting the complexity of the capacity evaluation process, his Lordship considered it undesirable for the Court to identify in advance as a matter of routine the precise information necessary for making such a decision. This would lead "*to an alarming amount of satellite litigation at great and unnecessary cost*". The better course was "*for the clinician to consider the concrete situation and assess the level of the person's understanding about that situation*". The Court would then consider whether practicable steps had been taken to help the person decide whether or not to give consent and whether, on a balance of probabilities, the person lacks capacity (para 37).

Turning to the particular facts, and expressly stating *"I am not seeking to set any sort of precedent, either as to the process to be followed or as to the type of information which is likely to be relevant in such cases*" (para 38), his Lordship identified the following salient details as being relevant to L's decision:

(1) that she is in hospital to receive care and treatment for a mental disorder;
(2) that the care and treatment will include varying levels of supervision (including supervision in the community), use of physical restraint and the prescription and administration of medication to control her mood;
(3) that staff at the hospital will be entitled to carry out property and personal searches;
(4) that she must seek permission of the nursing staff to leave the hospital, and, until the staff at the hospital decide otherwise, will only be allowed to leave under supervision;
(5) that if she left the hospital without permission and without supervision, the staff would take steps to find and return her,

including contacting the police.

Finally, the Court added:

> "*40. Whilst I accept Mr. Mant's submission that the specific consent under consideration is to the 'deprivation of liberty' and not to the care or treatment as such, it seems to me that the information which must be understood, retained, used and weighed extends to some information about the context in which the deprivation is being imposed.*"

Comment

Most of us will no doubt breathe a sigh of relief that such an intensive set of restrictive measures in a psychiatric setting designed for compulsory detention amounted to a deprivation of liberty. Indeed, the concrete situation appears to be more restrictive than the *Bournewood* case. Pending the Supreme Court's decision in the conjoined appeals, listed for 22-24 October 2013, Baker J. has very helpfully delivered two summaries of the current law: a comprehensive version at paragraphs 76-96 of *CC v KK*, and a bite-size version in paragraphs 13-16 of *LDV*.

Since the Court of Appeal's decisions in *P and Q* and *Cheshire West* there has been much discussion surrounding the weight to be accorded to the concept of relative normality and the benchmarking comparator. Are they trump cards? That is, "these circumstances are relatively normal for someone like X and therefore there is no deprivation of liberty". Or are the merely factors to take into account, along with all of the other circumstances? Paragraph 16 of this judgment identifies them as two "factors" amongst many.

This judgment shied away from identifying, in generic terms, the information relevant to deciding on an informal hospital admission, whether in liberty-depriving circumstances or otherwise. The fear that this might generate an alarming amount of satellite litigation is of course entirely understandable. Similarly alarming, perhaps, is the general lack of precedent or guidance relating to the salient details of an informal admission. The 1993 Code of Practice to the Mental Health Act 1983 essentially described an informal patient as "*one who has understood and accepted the offer of a bed, and who has freely appeared on the ward and who has co-operated in the admission procedure*": see R. Brown, 'The Revised Code of Practice to the Mental Health Act 1983: Some Initial Thoughts' (1999) *Journal of Mental Health Law* 48, at 51. However, this has been removed from the Code, with nothing meaningful in its place.

Finally, eligibility anoraks will have spotted that this case raises a "fascinating" interface issue. In particular, given the tribunal's discharge decision and *von Brandenburg,* "could" an application have been made under MHA ss 2 or 3 and "could" L have been detained in pursuance of such an application, were one made?: MCA Schedule 1A para 12. Clearly the DOLS eligibility assessor thought so and, by virtue of MCA s.16A, "*If a person is ineligible to be deprived of liberty by this Act, the court may not include a welfare order provision which authorises the person to be deprived of his liberty*". It appears, however, that the application "could not" have been made because there was no information not previously known to the tribunal which put a significantly different complexion on the case. To re-detain under MHA s.3 would therefore have been unlawful by virtue of the *von Brandenburg* ruling.

If it therefore follows that L was in fact eligible for DOLS (or a MCA s.16 court order), should we be concerned? Such a line of reasoning would lead to a somewhat bizarre result (to put it mildly). For it would mean that a person "discharged" from detention under the MHA could continue to be detained in hospital under the MCA – even for psychiatric treatment – if there were no material change in circumstances. We will eagerly await, "LDV the sequel"….

Commissioner of the Police for the Metropolis [2013] EWCA Civ 69

Article 5 – deprivation of liberty

Summary

This was the unsuccessful appeal by the Metropolitan Police against the decision of Sir Robert Nelson ([2012] EWHC 604 (Admin)), awarding substantial damages to reflect their breaches of common law and the Disability Discrimination Act 1995. By way of a very quick refresher upon the facts, ZH was a severely autistic, epileptic nineteen year old young man who suffered from learning disabilities and could not communicate by speech. In September 2008, he was taken by the specialist school he attended to a swimming pool for a familiarisation visit. Matters went very badly awry during the course of that visit, in particular following the decision of the manager of the pool to ring the Police when difficulties were experienced in persuading ZH to move away from the side of the pool. The arrival of the police gave rise to an escalating series of events which culminated in ZH first jumping into the pool, being forcibly removed from it, being handcuffed, put in leg restraints and placed in a cage in the back of a police van for a period of around 40 minutes. As a result of this, ZH suffered consequential psychological trauma and an exacerbation of his epileptic seizures.

Sir Robert Nelson found that the police had not only committed the torts of trespass and false imprisonment, but had also breached ZH's rights under Articles 3, 5 and 8 ECHR and also the DDA 1995.

The Metropolitan Police appealed. The Court of Appeal had no hesitation in dismissing the appeal, the sole – very strong – judgment being given by the Master of the Rolls, Lord Dyson, with whom Richards and Black LJJ agreed.

MCA 2005

As regards the conclusions reached by Sir Robert Nelson upon the MCA 2005 issues, the primary basis of the appeal was that the judge had failed to have regard to the "fact that the reasonableness of the officers' conduct and beliefs fell to be assessed by reference to a fast moving situation in which swift decisions had to be taken. In short, he failed to take account of the need to accord to the police a reasonable degree of operational discretion. She goes so far as to say that the judge's decision makes it impossible to conduct practical policing in emergency situations which involve persons who suffer from incapacity" (para 35).

Lord Dyson MR started with some general observations about the MCA 2005 with particular reference to the acts done by police officers directed at the care of a person who lacks capacity, thus:

> *"39. I start with a few general observations about the MCA with particular reference to the acts done by police officers directed at the care of a person who lacks capacity. Where such acts would otherwise attract liability for the torts of assault and false imprisonment, they will not do so if (i) the officers reasonably believed that the person lacked capacity (having taken reasonable steps to establish whether that was so (section 5(1)(a)and (b)(i)); (ii) they reasonably believed that those acts were done in the person's best interests (section 5(1)(b)(ii)); and (iii) in the case of a restraint, they reasonably believed that they were necessary in order to prevent harm to the person and that it was a proportionate response (section 6(2) and (3)). I have set out the provisions relating to "best interests" at para 22 above.*
>
> *40. A striking feature of the statutory defence is the extent to which it is pervaded by the concepts of reasonableness, practicability and appropriateness. Strict liability has no place here. Of particular relevance to the present case is the fact that D is under no liability to P in tort for an act done in*

connection with the care or treatment of P, if he reasonably believes that it will be in P's best interests for the act to be done; and (in the case of restraint) if he reasonably believes that it is necessary to do the act in order to prevent harm to P; and he is obliged to take into account the views of, amongst others, anyone caring for P, but only if it is practicable and appropriate to consult the carer.

41. *We heard submissions on behalf of Liberty and the Equality and Human Rights Commission as to the meaning and effect of the MCA. For example, Mr Coppel [on behalf of the EHRC] submitted that, where a best interests decision has been taken which does not comply with the requirements of section 4, the section 5 defence which relies on that decision is not available: a reasonable belief defence cannot be founded on an invalid best interests determination. Another way of making the same point is to say that, if section 4 has not been complied with, the belief asserted by the defendant under section 5(1)(b)(ii) cannot be a reasonable belief. There is force in this submission. But I do not find it necessary to express a concluded view about it for the resolution of this appeal."*

Reliance was also placed by the EHRC on the MCA Code of Practice, but as it was not relied upon at first instance, Lord Dyson found (para 42) that it would not be appropriate to determine the appeal by relation to it.

Lord Dyson then went on to dissect Sir Robert Nelson's analysis of the various stages of the police intervention. He found to be unassailable Sir Robert's conclusions that the police officers reasonably believed that ZH lacked capacity before any touching took place, and that they had no reasonable belief that there was in fact an emergency which required them to act before speaking to his carers (paras 46 and 49). Nor did he consider it unrealistic for Sir Robert to have concluded that it was practicable and appropriate for the officers to consult the carers before approaching and touching ZH (para 49). Perhaps importantly, he noted in the same paragraph that:

> "*the MCA does not impose impossible demands on those who do acts in connection with the care or treatment of others. It requires no more than what is reasonable, practicable and appropriate. What that entails depends on all the circumstances of the case. As the judge recognised, what is reasonable, practicable and appropriate where there is time to reflect and take measured action may be quite different in an emergency or what is reasonably believed to be an emergency.*"

It was therefore open to the judge to hold, as he did, that the officers had not acted in ZH's best interests (para 50). For essentially similar reasons, Lord Dyson found to be ill-founded the challenges to Sir Robert's conclusions in respect of the time that ZH was in the water and after he was lifted out of the pool (paras 52; 55-7).

The DDA

Lord Dyson summarised his conclusions thus at paragraph 67:

> *"67. I do not find it necessary to make detailed observations as to the scope of the duty to make reasonable adjustments. What is reasonable will depend on the facts of the particular case. Section 21E(2) states in terms that it is the duty of the authority to take such steps as it is reasonable in all the circumstances of the case to have to make to change the practice, policy or procedure so that (relevantly for the present case) it no longer has detrimental effect. I accept that police officers*

are not required to make medical diagnoses. They are not doctors. But the important feature of the present case is that, even before they restrained ZH, they knew that he was autistic and epileptic. They knew (or ought to have known) that autistic persons are vulnerable and have limited understanding. Further, I see no basis for holding that the duty to make reasonable adjustments is not a continuing duty. In my view, the judge was entitled to reach the conclusion that he did on this issue. It was a decision on the particular facts of this case. I reject the submission that his decision makes practical policing unduly difficult or impossible."

Article 3

In finding that the judge had not erred in his conclusion that the treatment meted out to ZH reached the requisite minimum level of severity, Lord Dyson noted that:

"76 […] The following features of the present case are important. ZH was a very vulnerable young man. He suffered from autism and was an epileptic. He was only 16 years of age at the time. The episode lasted about 40 minutes. He would not have understood what was going on and why he was being forcibly restrained by a number of officers by the poolside and later in the police van. He was restrained by handcuffs and leg restraints. He was wet and lost control of his bowels. His carer was not permitted to get into the cage to comfort him. He had done nothing wrong and he was extremely distressed and crying. The consequence of the experience was that he suffered (i) post traumatic stress disorder from which he was only recovering by the time of the trial (more than two years after the event); and (ii) a significant exacerbation of his epilepsy for about two years. On the other hand, it is also relevant that the officers did not intend to humiliate or debase him, although this is not a conclusive factor.

77. I acknowledge that a court should not lightly find a violation of article 3. The ECtHR has repeated many times that a minimum degree of severity of treatment is required. Whether that degree of severity is established on the facts of a particular case involves a question of judgment. The judge was better equipped than this court to be able to evaluate the seriousness of the treatment, taking all the circumstances of the case into account. In my view, we should only interfere if we consider that it is plain that the judge made the wrong assessment. It is clear from para 144 of his judgment that he took into account all the essential relevant factors. Although the police officers were acting in what they thought to be the best interests of ZH, on the judge's findings they made serious errors which led them to treat this vulnerable young man in a way which caused him great distress and anguish. In my judgment, the judge was entitled to find that the threshold of article 3 had been crossed on the particular facts of this case."

Article 5

At paragraph 83, Lord Dyson MR rejected a submission (founded upon the decision of the ECtHR in *Gillan v UK* (2010) EHRR 45) that Strasbourg would usually view a detention of less than 30 minutes as not coming within the scope of Article 5. He went on in the same paragraph to note that the restraint of ZH was "closely analogous to the classic of paradigm case of detention in a prison or police cell. In

particular, it is difficult to see any difference in kind between being detained in the caged area at the back of a police van and being detained in a police cell. In fact, ZH was deprived of movement throughout the entire period of the restraint. The restraint was intense in nature and lasted for approximately 40 minutes and its effects on ZH were serious."

Having held (at para 84) that Sir Robert Nelson had correctly had regard to the particular facts of the case and made an assessment of the "type, duration, effects and manner of implementation of the measure in question," and was entitled to reach the conclusion that he did for the reasons that he gave, Lord Dyson discussed the question of the relevance (or otherwise) of purpose, thus:

"85. We heard argument as to whether the fact that, as the judge found, the purpose and intention of the police was at least in part to protect ZH's safety was relevant to whether there was a breach of article 5. The judge thought that it was, but nevertheless held that there had been a breach. The case of Austin v Metropolitan Police Commissioner [2009] UKHL 5, [2009] 1 AC 564 is relevant here. At para 44, Lord Walker said: "the purpose of confinement which may arguably amount to deprivation of liberty is in general relevant, not to whether the threshold is crossed, but to whether that confinement can be justified under article 5(1)(a) to (f)".

86. This approach was endorsed by the ECtHR in Austin v United Kingdom 92012) 55 EHRR 14 at para 58. But the court said at para 59:

'However, the Court is of the view that the requirement to take account of the "type" and "manner of implementation" of the measure in question enables it to have regard to the specific context and circumstances surrounding types of restriction other than the paradigm of confinement in a cell. Indeed, the context in which action is taken is an important factor to be taken into account, since situations commonly occur in modern society where the public may be called on to endure restrictions on freedom of movement or liberty in the interests of the common good. As the judges in the Court of Appeal and House of Lords observed, members of the public generally accept that temporary restrictions may be placed on their freedom of movement in certain contexts, such as travel by public transport or on the motorway, or attendance at a football match. The Court does not consider that such commonly occurring restrictions on movement, so long as they are rendered unavoidable as a result of circumstances beyond the control of the authorities and are necessary to avert a real risk of serious injury or damage, and are kept to the minimum required for that purpose, can properly be described as "deprivations of liberty" within the meaning of art.5(1).'

87. To this extent and in such circumstances, therefore, the purpose and intention of the person applying the restraint may be relevant to whether there is a breach of article 5. It is not necessary to explore this further since, as Mr Coppel points out, this reasoning could not apply in the present context. Quite apart from the fact that this is very close to being a paradigm case, there is nothing common or usual about what happened to ZH and no general acceptance by members of the public that they are liable to be treated as ZH was treated."

Article 8

The police having conceded that their appeal upon the judge's findings in respect of Article 8 stood or fell with their appeals against the findings in respect of Articles 3 and 5, Lord Dyson MR held that the appeal fell in this respect as well.

Conclusions

At paragraph 90, Lord Dyson concluded with an important general observation:

> *"90. As I have said, I reject Ms Studd's submission that this decision unreasonably interferes with the operational discretion of the police or that it makes practical policing impossible. I accept that operational discretion is important to the police. This was recognised by the judge. It has been recognised by the ECtHR (see Austin at para 56). And I have kept it well in mind in writing this judgment. But operational discretion is not sacrosanct. It cannot be invoked by the police in order to give them immunity from liability for everything that they do. I doubt whether Ms Studd intended to go so far as to suggest that it can. Each case must be carefully considered on its facts. I do not believe that anything said by the judge or by me in this judgment should make it impossible to carry out policing responsibly. One is bound to have some sympathy for the police in this case. They were intent on securing the best interests of everyone, not least ZH. But as the judge said, they behaved as if they were faced with an emergency when there was no emergency; and PC Colley and PC McKelvie did not in fact believe that there was an emergency. Had they consulted the carers, the likelihood is that ZH would not have jumped into the pool in the first place. The police should also have consulted the carers before lifting ZH from the pool. Had they done that, it is likely that with their help, the need to restrain him would have been avoided. Finally and most seriously of all, nothing could justify the manner in which they restrained ZH."*

Comment

That the Court of Appeal dismissed the police's appeal against the judgment of Sir Robert Nelson was not a foregone conclusion; that it did so in such robust terms was even more of a surprise. For all (not just the police) who are confronted with fast-moving situations involving those who appear to lack the capacity to make relevant decisions, the critical lesson is that it is necessary to calibrate the measures taken to the circumstances, and (if at all possible) for a step back to be taken to assess whether the situation is really a true emergency, or whether it is one where it is possible to seek input from others who may be able to assist in defusing the situation.

As to the wider issues of the interpretation of the MCA 2005, it would appear that in light of Lord Dyson's indication that he found force in the submission that absent a valid best interests decision s.5 MCA 2005 cannot be relied upon, it is prudent to proceed on the basis that as many as possible of the steps required by s.4 MCA 2005 should be complied with before proceeding under both s.5 and s.6 MCA 2005. That statement should, though, be read in light of the overarching observation of Lord Dyson that what the MCA 2005 requires is reasonableness, practicability and appropriateness: the requirement to comply with s.4 will clearly be more pressing: (1) the more draconian/invasive the step; and (2) the more time there is available in which to consult etc before the step is required.

More difficult, perhaps, is the question of whether, where the MCA 2005 applies, the common law defence of necessity is not available. The conclusions of Sir Robert

Nelson in this regard (at paragraph 44) were strictly obiter dicta; they were not discussed by Lord Dyson in his judgment. That having been said: (1) the tenor of Lord Dyson's judgment was such that it could be said to have represented an endorsement of the entirety of Sir Robert's judgment – including this paragraph; and (2) the conclusions of Sir Robert Nelson are entirely consistent with those of the Divisional Court in *Sessay* regarding the (non-existence) of the defence of necessity where the MHA 1983 applies. However, given the conclusions of Lord Dyson upon the question of whether ZH was deprived of his liberty, and given the wording of the MCA 2005 as it now stands, this does give rise to a difficult practical question where an emergency situation arises in respect of an adult who would appear not have to capacity to take decisions regarding their welfare but whom is not the subject of any form of Court order or DOLS authorisation. To understand the problem, it is necessary to have regard to the wording of both ss.4A and 4B (both inserted by the MHA 2007):

"*4A Restriction on deprivation of liberty*

(1) This Act does not authorise any person ("D") to deprive any other person ("P") of his liberty.

(2) But that is subject to–

(a) the following provisions of this section, and
(b) section 4B.

(3) D may deprive P of his liberty if, by doing so, D is giving effect to a relevant decision of the court.

(4) A relevant decision of the court is a decision made by an order under section 16(2)(a) in relation to a matter concerning P's personal welfare.

(5) D may deprive P of his liberty if the deprivation is authorised by Schedule A1 (hospital and care home residents: deprivation of liberty).

4B Deprivation of liberty necessary for life-sustaining treatment etc

(1) If the following conditions are met, D is authorised to deprive P of his liberty while a decision as respects any relevant issue is sought from the court.

(2) The first condition is that there is a question about whether D is authorised to deprive P of his liberty under section 4A.

(3) The second condition is that the deprivation of liberty–

(a) is wholly or partly for the purpose of–
(i) giving P life-sustaining treatment, or
(ii) doing any vital act, or

(b) consists wholly or partly of–
(i) giving P life-sustaining treatment, or
(ii) doing any vital act.

(4) The third condition is that the deprivation of liberty is necessary in order to–

(a) give the life-sustaining treatment, or
(b) do the vital act.

(5) *A vital act is any act which the person doing it reasonably believes to be necessary to prevent a serious deterioration in P's condition*."

In light of the decision in ZH it is clear that a person can be subjected to a deprivation of liberty which may only last a relatively short period of time (the restraint whilst he was at the pool-side lasted about 15 minutes, the restraint in the police van lasted about 25 minutes). The wheels of the COP administration can move very swiftly (for instance in the case of medical treatment cases involving the necessity for blood transfusion during labour) but not that swiftly. However, in the case of a true emergency where the deprivation of liberty to which the adult is subjected in response arises immediately and is of very short duration (say no more than 30 minutes), but is severe, even if it could be said that the first condition in s.4B is met (i.e. that any

deprivation of liberty to which the individual was subjected would be capable of being authorised – most likely by a court order under s.16(2)(a)), it will somewhat likely be straining the language of s.4B to say that the deprivation of liberty is taking place while a decision respecting that issue is sought from the Court. The Court of Appeal did not have to grapple with this question in ZH, not least as the case arose out of events which took place in 2008. Even if an interpretation was placed upon s.4B that it applies even if the most minimal steps have been taken to seek a decision from the Court, perhaps by way of initial telephone contact to get before the Urgent Applications judge, the fact remains that it is likely that there will – even with suitable diligence on the part of the relevant authorities – be circumstances under which s.4B simply cannot be said to offer protection from liability.

In such circumstances, it is suggested that there does remain a place for the common law defence of necessity because there is a true lacuna. It is of note in this regard that:

a. s.4A provides solely for the ability of an individual to deprive another of their liberty under the provisions of the MCA 2005 – it does not purport to exclude the deprivation of liberty of an incapacitated adult outside the provisions of the MCA 2005;

b. it would appear that the inherent jurisdiction would still seem to extend to authorising the deprivation of a liberty of an adult falling outside the scope of the MCA 2005: see *Re A and C (Equality and Human Rights Commission Intervening)* [2010] EWHC 978 (Fam) [2010] COPLR Con Vol 10 per Munby LJ:

> *"74 … There is no longer any room for doubt that a judge exercising the inherent jurisdiction of the High Court (whether the inherent jurisdiction of the court with respect to children or the inherent jurisdiction with respect to incapacitated or vulnerable adults) has power to direct that the child or adult in question shall be placed at and remain in a specified institution such as, for example, a hospital, residential unit, care home or secure unit. And the High Court's powers extend to authorising that person's detention in such a place and the use of reasonable force (if necessary) to detain him and ensure that he remains there: see Re PS (Incapacitated or Vulnerable Adult) [2007] EWHC 623 (Fam), [2007] 2 FLR 1083 at para [16]. But if a local authority is to resort to such measures it must, unless it can bring itself within the new 'deprivation of liberty' amendments to the Mental Capacity Act 2005 effected by the Mental Health Act 2007 (the new ss 4A, 4B and 16A and the new Sch A1 and 1A), first enlist the assistance of the court and do so before it embarks upon such measures: see Re PS (Incapacitated or Vulnerable Adult, at para [23], and A Primary Care Trust and P v AH and A Local Authority [2008] EWHC 1403 (Fam), [2008] COPLR Con Vol 179, [2008] 2 FLR 1196 at paras [29], [41]." (emphasis added).*

c. whilst Munby LJ in *Re A and C* made it clear that enlisting the assistance of the Court is a pre-requisite to the local authority being able to obtain an order under the inherent jurisdiction, he was not concerned with the emergency situation that we are considering here: for our purposes, what is important is that he did not hold that the MCA 2005 (as now amended by the MHA 2007) now provided the complete code for the authorisation of the deprivation of liberty that (for instance) the MHA 1983 does in respect of those whom it is proposed to admit for purposes of assessment and treatment.

It is suggested, however, that the common law defence of necessity will only avail a person who is able to show that they were confronted with the need to deprive the incapacitated adult of their liberty in a true emergency position where:

a. it was not possible to seek the assistance of the Court either before or during the currency of that deprivation of liberty;

b. no other statutory power existed upon which reliance could be placed (for instance s.17 PACE 1984 or s.135 MHA 1983); and

c. where it was necessary so to do to preserve them from serious harm.

An interesting question which may still fall for consideration upon another day is whether there is an equivalent lacuna in the statutory law so as to allow for the common law defence of necessity to survive where the deprivation of liberty takes place, not for purposes of safeguarding the life and limb of the incapacitated adult, but that of a third party (the MCA 2005 being focussed solely on the best interests of adult rather than those of anyone else). At common law, the defence of necessity may be pleaded where the detention takes place so as to prevent a danger to another (see *R v Bournewood Community and Mental Health N.H.S. Trust, Ex parte L* [1999] 1 A.C. 458 at 490 per Lord Goff: "*the common law permit*[s] *the detention of those who were a danger, or potential danger, to themselves or others, in so far as this was shown to be necessary*.") For purposes of the ECHR, any deprivation of liberty attributable to the State would have to be such as to fall within one of the permitted bases for so doing under Article 5(1), but it is clear that a deprivation of liberty on the basis of mental disorder can be justified on the basis that a person constitutes a danger to others (and that in the event of emergency, the normal requirements as regards the obtaining of medical evidence objectively establishing a mental disorder can be dispensed with: see *Winterwerp v The Netherlands* (1979) 2 EHRR 387 at para 39 and *X v United Kingdom* (Application No 7215/75, decision of 5.11.81) at paras 41 and 45).

Again, however, it is likely that any attempt by a public authority to rely upon the common law defence of necessity in such a case will be scrutinised very narrowly by the Courts so as to ensure that it only survives where there is a true lacuna (and so that does not offend against the provisions of Article 5 ECHR).

Finally, the comments of Lord Dyson MR as regards the relevance (or otherwise) of purpose to the question of whether or not a person is deprived of their liberty are of no little interest to the debate that will be had before the Supreme Court in October 2013, not least as they support the contention that the somewhat ambiguous comments of the Grand Chamber in *Austin* were made in a context far removed both from those of ZH and, indeed, those in care homes/hospitals.

A Local Authority v K & Ors [2013] EWHC 242 (COP)

Best interests – Medical treatment

Summary

K was 21 years old and suffered from Down's syndrome with associated learning difficulties. K's parents became increasingly concerned about the risks of her engaging in sexual activity and the potential detrimental impact to K's well-being should she become pregnant in the future. They formed the view that it would be in K's best interests for her to undergo a sterilisation procedure. K was reviewed by a Consultant Obstetrician and Gynaecologist who agreed to the procedure. However, when a further opinion was sought, a second Consultant reached the opposite conclusion as to the appropriateness of proceeding with sterilisation, primarily on the grounds that an alternative (non-permanent) form of contraception could be provided. K's parents then indicated that they were considering removing K from the jurisdiction for the purpose of her undergoing a sterilisation procedure. In light of this threat, the Local Authority issued proceedings for declarations as to K's best interests as regards contraception/sterilisation.

The Local Authority and the Official Solicitor

jointly commissioned an expert report from a Dr Rowlands. He concluded that it would not be in K's best interests to take contraception and that it would not be in her best interests to undergo sterilisation as a less restrictive option was available. By the time of the hearing, K's parents were no longer supporting sterilisation at the present time but did not accept that it was not the "least restrictive option." Whilst the issues between the parties had narrowed, there, remained therefore, a narrow issue as to the appropriateness of sterilisation at some future point. Mr Justice Cobb expressed the view that it was in K's best interests that the matter was resolved so far as possible at this stage and that the issues should only be revisited in the future should there be a significant change in circumstances.

In reliance on the report of Dr Rowlands, Cobb J concluded that sterilisation would be a disproportionate (and not the least restrictive) step to achieve contraception for K in the future (absent significant change in her circumstances). In reaching this conclusion he attached particular weight to the permanent nature of a sterilisation procedure and considered that risk management (i.e. supervision) would be better than invasive treatment as it is less restrictive. Further, he was persuaded by Dr Rowlands that there were less restrictive methods of achieving the purpose of contraception than sterilisation, and that in the event of a need for contraception, these ought to be attempted.

At the request of the parties, Mr Justice Cobb went on to give guidance as to the practice and procedure that should be followed in cases involving non-therapeutic sterilisation:

"*36. Referral to the Court of Protection in a case such as this could and should always be considered at the earliest moment in accordance with the Rules (see in particular Practice Direction* 9E *to the Court of Protection Rules 2007, and* Para.6.18 *and Paras.8.18-8.29* of the *Mental Capacity Act 2005 Code of Practice*). *I take this opportunity to remind medical (and, where relevant, legal) practitioners of the Court of Protection's role in considering a question of non-therapeutic sterilisation. Such a treatment decision is so serious that the Court has to make it. In particular I advise that particular note is made of the process as follows:*

*(a) The decision of whether someone who lacks capacity to consent should have a non-therapeutic sterilisation is a question involving "serious medical treatment" (see Practice Direction E (PD9E) – Applications relating to serious medical treatment). Non-therapeutic sterilisation is specifically identified in this category (*see *Paragraph 5(c)*);

(b) A question concerning non-therapeutic sterilisation of a person who lacks capacity to give consent "should be brought to the court" (Para.5 ibid.);

(c) Where a question arises as to non-therapeutic sterilisation of a person who lacks capacity to consent, the proposed applicant (whether it be carer, local authority or trust), can (indeed I suggest should) usefully discuss the application with the Official Solicitor's department before the application is made (see PD9E para.8): such cases should be addressed to a family and medical litigation lawyer at the Office of the Official Solicitor;

(d) The organisation which is, or will be, responsible for providing clinical or caring services to P should usually be named as a respondent in the application form (where it is not

already the applicant in the proceedings);

(e) *Proceedings of this kind must be conducted by a judge of the Court of Protection who has been nominated as such by virtue of section 46(2)(a) to (c) of the Act (i.e. the President of the Family Division, the Chancellor or a puisne judge of the High Court) (Para.12 PD9E);*

(f) *At the first hearing of the application the Court will consider:*

i) whether P should be joined as party to the proceedings, and give directions to that effect;

ii) if P is to be joined as a party to the proceedings, decide whether the Official Solicitor should be invited to act as a litigation friend or whether some other person should be appointed as a litigation friend;

iii) identify anyone else who has been notified of the proceedings and who has filed an acknowledgment and applied to be joined as a party to proceedings, and consider that application; and

iv) set a timetable for the proceedings including, where possible, a date for the final hearing.

(g) *Note that the hearing will generally be in public, given the nature of the application, although the Court will ordinarily make an order pursuant to* Rule 92 *that restrictions be imposed in relation to publication of information about the proceedings.*

37. *Where a declaration is needed, the order sought should be in the following or similar terms:*

(a) That P lacks capacity to make a decision in relation to the [proposed medical treatment or procedure]. e.g. 'That P lacks capacity to make a decision in relation to sterilisation by [named procedure]'; and

(b) That, having regard to the best interests of P, it is lawful for the [proposed medical treatment or procedure] to be carried out by [proposed healthcare provider];

or

(c) That it is not in the best interests of P to undergo [the proposed medical treatment or procedure]."

Comment

This case highlights the importance of ensuring that medical practitioners are aware when it is appropriate (and in some cases necessary) to refer matters to the CoP. Indeed, the general guidance was given by Cobb J explicitly because he was concerned that the first Consultant who had reviewed K had seemingly been unaware of the need to do so in this instance.

This case stands in interesting contrast to that of *An NHS Trust v Mr and Mrs H & Ors* [2012] EWHC B18 (Fam), in which Peter Jackson J was invited to endorse an advance care plan in respect of a young child whose medical situation at that present was not yet – but would in due course inevitably – be very serious. In that

case, whilst Peter Jackson J noted 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 for an declaration that that it was in KH's best interests to have medical treatment withheld in the circumstances described in the care plan, as the Court's function was to make decisions about specific issues on the basis of a factual substrata. Accordingly, he held that open ended declarations should be avoided by Judges as they might need to be revisited in the future, relying in so doing upon *Wyatt v Portsmouth Hospital NHS Trust* [2005] EWCA Civ 1181 at paragraphs 117 and 188 per Wall LJ. Accordingly, he took the approach of identifying the treatment issues that needed to be determined and that were not likely to change over time and in respect of which declarations could be made. In such a case as that before Cobb J, where the declaration was that it was not in P's best interests for a particular non-therapeutic procedure to be undertaken, the scales are perhaps rather more easily tipped in favour of certainty at an earlier stage.

Children's Rights Alliance for England v SS for Justice [2013] EWCA Civ 34

Summary

This case concerned an application for judicial review of the refusal of the Secretary of State to provide information about the illegal use of restraint techniques on children who had been detained in Secure Training Centres. Previous cases had clearly established that the use of restraint in these centres had been wrongly thought to be lawful by the government and by the private companies running the centres. There are undoubtedly many children who were detained who were also subject to unlawful physical restraint, and who do not realise that is the case: the Claimants wanted to be given information about these children in order that they could seek redress in their particular cases. The Court of Appeal refused to declare that the Secretary of State was under a duty at common law or under the ECHR to hand over that information, expressing concern that this would amount to saying that in some circumstances, the State, as a potential defendant to a civil suit must declare itself as such. This would be 'discordant with the common law's adversarial system of justice' and was not appropriate where the Secretary of State was not responsible for the trainees' ignorance of their rights and had not tried to impede their access to justice. Not inviting people to sue you was rather different from hindering their attempts to do so. While the Secretary of State might have a duty to tell people who asked for details of when and where they were detained, there was no duty to tell them about the 'legal quality' of the acts done to them.

Comment

The case is of interest to practitioners in the Court of Protection because of its potential application where there have been failures to comply, for example, with the deprivation of liberty safeguards. It suggests that there may not be a duty on statutory bodies to inform people that their Article 5 rights have been violated. This could be of particular relevance when the Supreme Court gives judgment in the *Cheshire West* and *P and Q* cases later this year, if the approach set out by the Court of Appeal in those cases is not followed.

Recent practice points from the Family Division

Five recent cases from the Family Division are worthy of brief mention in this edition on the basis that they shed light, by analogy, on issues that are also likely to arise in the Court of Protection: the need for a fact-finding hearing, the right to a fair hearing, the recognition of alternative means of dispute resolution and the circumstances in which a judge can lawfully reverse a previous decision.

Findings of fact/appeals against case management decisions in welfare decisions

In *Re H (A Child)* [2013] EWCA Civ 72 a mother appealed against interim decision to relax contact arrangements between her son and his father without having first held a finding of fact to determine allegations that his father had assaulted him. The Court of Appeal (LJ Arden, LJ Elias, LJ Black) held that the judge was not required to hold a fact-finding hearing under the applicable rules governing family law proceedings, although was required to determine as soon as possible whether such a hearing is necessary (at paragraph 52).

The Court opined that it was proper for the judge to deal with the issue on the basis of submissions and that the absence of live evidence would not invalidate a decision provided that the available written evidence, taken together with the submissions, is sufficient to make a proper welfare decision (at paragraph 63). Significantly, the Court extended the test for appellate interference in case management decisions to appeals against welfare decisions. In *Re TG (A Child)* [2013] EWCA Civ 5 the Court of Appeal confirmed it will only interfere with robust but fair case management directions where it is "*satisfied that the judge erred in principle, took into account irrelevant matters, failed to take into account relevant matters, or came to a decision so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to the judge*." The Court in *Re H* considered that this applied equally to welfare decisions in recognition of the broad discretion enjoyed by the judge at first instance in that arena (at paragraph 42). In our view the Court of Appeal's clear reluctance to interfere with interim welfare orders and its understanding of the pressures facing judges at first instance is a guide to how these issues are likely to be treated on appeals from the Court of Protection.

Adjournment where legal representation withdrawn before hearing

Two recent cases from the Court of Appeal on the application of the right to a fair hearing in the family law context demonstrate how highly fact specific this analysis will be. In *Re L (A Child)* (1 February 2013) the Court of Appeal (Thorpe LJ**,** Lloyd Jones LJ**,** Warren J) gave an ex tempore judgment (a summary alone of which is currently available on Lawtel) in which it found that the refusal of the judge at first instance to grant an adjournment to an unrepresented litigant violated Article 6. The father in the proceedings was seeking contact with his daughter and had his legal representation withdrawn by his solicitors very shortly before the final hearing. The Court relied in part upon the decision of the ECtHR in *P v United Kingdom* (2002) 12 EHRR 619, finding that although that case was based on different facts, there was a strong possibility that the general principle identified therein (namely that parties in family proceedings should have representation) would lead the ECtHR to find there had been a breach in this case. However, those seeking to use this case should bear in mind that the facts were highly sympathetic to the father. In particular, the final order that was made had severe consequences for him, prohibiting him from making further applications for contact until his daughter was 16. In addition, on appeal the father adduced evidence from his psychiatrist confirming that he suffered from a paranoid personality disorder and was not able to represent himself in any useful way in the court process, which was likely to exacerbate his feelings of paranoia and persecution. The Court of Appeal held if this evidence had been available to the judge, he would have recognised that the father was a vulnerable applicant, disadvantaged by his disorder and unfit to litigate without representation. The scope of Article 6 is likely to be tested increasingly often in the Court of Protection with the changes to legal aid (outlined below) due to take effect in April.

The Court of Appeal reached the opposite conclusion on the facts of *Re GB* (7 February 2013). In that case the Court of Appeal (Rix LJ, Lloyd LJ and McFarlane LJ) gave an ex tempore judgment (again, available in summary alone on Lawtel at the moment) in which it found that there was no breach of Article 6 when an application for an adjournment made by a mother in care proceedings was refused. The mother and father had initially been jointly represented but shortly before the final hearing they both sought an adjournment to find

alternative legal representation. When this was refused, the mother proceeded as a litigant in person and the father withdrew. Special guardianship orders were made for two children and a third was placed in foster care. There was evidence that the mother has psychological issues but the Court held that the judge had been conspicuously helpful in ensuring the parties were on an equal footing, assisting the mother with what witnesses to call, allowing her free reign when she questioned witnesses, intervening on her behalf when the local authority were questioning witnesses and encouraging her to re-instruct her legal team. The Court was clear that Article 6 ECHR would not be breached in every case where a litigant in person was refused an opportunity to adjourn to obtain legal representation.

Alternative Dispute Resolution

In a sign that the family courts are increasingly willing to recognise the role to be played by alternative means of dispute resolution, in *Re Al and MT* [2013] EWHC 100 (Fam) Baker J: (1) acceded to a request from the parties to stay matrimonial proceedings to allow for a non-binding arbitration to be conducted by a senior rabbi of the New York Beth Din, in recognition of the parties' devout religious beliefs and their wish to resolve the dispute through the rabbinical court; and (2) endorsed the outcome of that process concerning both children and financial arrangements. The case is of some importance because it was the first time in which such a step had been taken by the Family Division; it is also of significance by way of analogy in CoP proceedings because, in both, the Court's obligation to have regard to the welfare of the child/the best interests of the adult is an obligation which cannot be ousted by agreement. The Court can – and in very many cases will – endorse an agreed consent order, but must be satisfied that the outcome is one that accords with the welfare of the child/best interests of the adult. This case therefore provides strong support by way of analogy for the use of appropriate ADR in CoP proceedings as well as in proceedings involving children. We should note in this regard that we hope to be bringing you a note on mediation/ADR in the Court of Protection with our next issue, which will no doubt explore this case in further detail.

Reversal of decision upon perfection of judgment

The final case in this round-up from the Family Division comes from the Supreme Court and concerns judicial tergiversation (or, more plainly phrased, the circumstances in which a judge may reverse a previous decision!). In the matter of *L and B (Children)* [2013] UKSC 8 the judge at first instance gave an oral judgment on 15 December 2011 in which she held that the father was the sole perpetrator of non-accidental injuries to a child. The judgment was partially transcribed and was not sealed until 28 February 2012. However, on 15 February 2012, shortly before the final hearing, the judge delivered a "perfected judgment" in which she expanded upon her oral judgment of 15 December 2011 and, critically, concluded that the injuries could have been inflicted by either parent.

The Supreme Court accepted that there is jurisdiction for a judge to change his or her mind up until the time that an order is perfected; pursuant to CPR rule 40.2(2)(b), this is when the orders is sealed. The question that arose on appeal was whether the judge was right to exercise that power. The Supreme Court rejected the test of "exceptional circumstances" applied by the Court of Appeal, stating instead that the overriding objective must be to deal with the case justly and a carefully considered change of mind may be sufficient (at paragraph 27). One relevant factor will be whether any party has acted upon the decision to his detriment. The Supreme Court was satisfied on the facts of this case that the judgment of 15 February 2012 should stand. It considered but ultimately declined to decide the difficult question of whether a judge in care proceedings may reverse a previous decision *after* the order has been sealed.

Guidance upon Civil Legal Aid subsequent to 1.4.13[4]

As many of our readers will be very well aware, the legal aid landscape is set to become substantially bleaker with effect from 1.4.13 when the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ('LASPO') and the associated Regulations take effect.[5] Somewhat astonishingly, perhaps, not all the necessary Regulations have yet to be laid before Parliament, the most important missing piece being Regulations to be made under s.21 LASPO which will set out eligibility for public funding and means-testing. Nor are all the necessary forms yet available.

In – very – summary form, as regards COP work, LASPO essentially preserves the current position that advocacy before the COP will not as a general rule be funded except in cases concerning:

a. a person's right to life,
b. a person's liberty or physical safety,
c. a person's medical treatment (within the meaning of the MHA 1983),
d. a person's capacity to marry, to enter into a civil partnership or to enter into sexual relations, or
e. a person's right to family life,

Moreover, and again as a general rule, no legal aid (of any kind) will be available in respect of the creation of LPAs or the making of advance decisions, although it will be available in relation to determinations and declarations by a court under the MCA 2005 as to the validity, meaning, effect or applicability of a LPA that has been created or an advance decision that has been made.

In all cases which are within scope, legal aid will be subject to both eligibility and merits criteria. The merits criteria have now been set out (in the Civil Legal Aid (Merits Criteria) Regulations 2013 (SI 2013/104)); as noted above, the eligibility critera have not. The Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013 are apparently to be laid before Parliament 'imminently.' Our best intelligence is that:

a. the major change is likely to be that clients currently in receipt of income based benefits e.g. Pension Credit or Income Support who are 'passported' on their means for legal aid will now have their capital taken into account; but

b. the MOJ have confirmed that applications for Legal Representation in proceedings under s21A MCA 2005 will continue to be exempt from a means test where the applicant for funding is either the subject of the authorisation under Sch.A1 of the Act or his/herrepresentative appointed under Pt 10 of that Schedule.

The Lord Chancellor published on 26.2.13 Guidance on Civil Legal Aid and Guidance on Exceptional Funding (in both Inquests and non-Inquests). All the guidance is available here. It is directed in the first instance to the Director of the new Legal Aid Agency which will take over the functions of the LSC from 1.4.13, but is in practice addressed to the caseworkers who will discharge the Director's functions.

The relevant section from the Guidance relating to Court of Protection work is reproduced below (references to "the Merits Regulation" are to the Civil Legal Aid (Merits Criteria) Regulations 2013 (SI 2013/104) and "the Procedure Regulations" are to the Civil Legal Aid (Procedure) Regulations 2012 (SI 2012/3098) noted in the paragraph above):

> "***Mental Capacity Act (Merits Regulation 52)***

4 With thanks to Nicola Mackintosh and Sophy Miles for their invaluable input upon this extremely complex and fast-moving area.

5 Subject to two 'motions of regret' tabled in the House of Lords in respect of the Civil Legal Aid (Procedure) Regulations 2012 (SI 2012/3098) by Baroness Scotland of Asthal with specific reference to the extent to which the Regulations (fail to) deliver adequate protection to victims of domestic violence, and by Baroness Tanni Grey-Thompson with specific reference to the impact of the 'gateway' requirement in the regulations upon disabled individuals.

General

9.7 Where legal services are required for eligible clients in relation to issues under the Mental Capacity Act 2005, Legal help will be the normal vehicle for funding such advice and assistance as the client requires. Legal help in relation to the 2005 Act is funded as Mental Health non-Tribunal work under the rules contained in the 2010 Standard Civil Contract Specification.

9.8 For cases where an application to the Court of Protection may be necessary, the relative accessibility of the Court in reaching a decision in many cases will make a grant of Legal Representation unnecessary as support will be available when needed through legal help. Similarly legal help may be used to settle potential disputes through negotiation, mediation or other settlement (Merits Regulation 52(2)).

9.9 However there will be some cases before the Court of Protection that raise fundamental issues for the client which will require legal representation at an oral hearing. For example, important cases concerning decisions over the giving or withholding of medical treatment in respect of people who lack capacity to consent to that treatment. The criteria for funding legal representation in these circumstances are set out in regulation 52 of the Merits Regulations. Legal aid for advocacy is only permitted for proceedings in the Court of Protection which are set out in paragraph 4 of Part 3 of Schedule 1 to the Act.

9.10 If legal representation is required for an individual case before the Court of Protection where proceedings do not fall within paragraph 4, Part 3, Schedule 1 to the Act, an application can be made for Exceptional Case Funding.

Merits Criteria

9.11 There are two important considerations when determining applications under Regulation 52 in order that legal representation before the Court of Protection can be made available. The first is to consider whether the case falls within the ambit of Regulation 52(3) in relation to the person (referred to in the guidance below as —P//) who is the subject of the proceedings. This will be the person who lacks or is alleged to lack capacity to make important decisions on their own behalf. The second test is whether the Court of Protection has ordered, or is likely to order, an oral hearing. #

9.12 Many welfare cases concern accommodation issues for which advocacy may not be available in accordance with Part 3 of Schedule 1 to the Act. However accommodation cases will be within scope if they concern P's family life (Merits Regulation 52(3)(e)). This is likely to be the case where either the issue is whether or not P should remain with his or her family or where a change of accommodation would have a serious impact on contact between P and his or her family. However, the cost benefit criteria will of course need to be applied (Merits Regulation 52(1)(a)).

9.13 The second consideration is that it is necessary for the individual to be provided with full representation in the proceedings (Merits Regulation 52(2). The Court has the discretion as to whether to hold an oral hearing to decide the application before it and will give directions on whether an oral hearing is required during proceedings. In the most urgent and important cases Legal Representation may be granted before the Court has made any determination on whether to direct an oral hearing, whilst in other cases it may be appropriate to await what directions the Court makes before a decision on the need for representation is made.

However in practice many cases will be those for which an oral hearing is likely to be directed by the Court. If legal representation was granted but the Court subsequently directed that an oral hearing was not required consideration would be given to withdrawal of the determination

9.14 In general the Legal Aid Agency will only grant legal representation if the applicant wishes to put forward a new and significant argument which would not otherwise be advanced. Generally there should not be more parties separately represented before the Court than there are either cases to put or desired outcomes (Merits Regulation 39 (e)).

9.15 Cases that fall to be considered under Regulation 52 must still satisfy all relevant merits criteria in Regulations 39, 41 (a) and (b), 42 and 43. The most important criteria will often be prospects of success. Many (but not all) of the cases described under Regulation 52 also fall within the test of 'Overwhelming Importance to the Client' as defined in Regulation 2 and the cost benefit test in Merits Regulation 42(3) will be appropriate. For cases of overwhelming importance to the client the requirement is to have at least borderline prospects of achieving the outcome desired by the applicant (Merits Regulation 43(b)(ii)). For this purpose in relation to applications on behalf of the family of P the issues will be treated as of overwhelming importance to the applicant if they are of overwhelming importance to P (Merits Regulation 2).

9.16 Cost benefit will be an important consideration in many cases before the Court of Protection. All costs will be subject to the reasonable private paying individual test at Regulation 7. Cost benefit is unlikely to be an issue in medical treatment cases (Merits Regulation 42(3)), especially for P. It is recognised that parties other than P may well have no direct and tangible interest or benefit other than the desire to secure the best outcome for P. This interest will be taken into account under the reasonable private paying individual test but in all cases the likely costs must be proportionate to the importance of the issues to the applicant (Merits Regulation 7).

Lasting Power of Attorney/Advance Decisions

9.17 The Legal Aid Sentencing and Punishment of Offenders Act 2012 makes it clear at paragraph 5 (3) of Part 1, Schedule 1 that the creation of lasting powers of attorney (LPAs) and the making of advance decisions (ADs) under the Mental Capacity Act 2005 are not within the scope of Civil Legal Aid. However, services provided in relation to determinations and declarations by a court as to the validity, effect or applicability of LPAs and ADs are within the scope of the scheme (paragraph 5(1) of Part 1, Schedule 1).

9.18 Legal Help may be appropriate in some circumstances in relation to an application or proposed application to the Court of Protection under ss.22 or 23 of the 2005 Act concerning questions about the validity or operation of LPAs. Similarly, it may in some cases be appropriate to provide legal help concerning questions under s.25 of the 2005 Act about the validity and applicability of ADs. Legal help should only be provided, however, where there is sufficient benefit to the client in terms of their financial circumstances or potential decisions concerning medical treatment or other welfare matters (MR 32)."

DoH Fifth Annual Report on IMCA services

With thanks to Caroline Bielanska for bringing this to our attention, the Department of Health published on 18.2.13 its fifth annual report upon the IMCA service. Whilst it merits reading in

full, in particular because of the interesting, illuminating and sometimes concerning reflections from IMCAs which are set out throughout the report and which give real insights into decision-making upon the ground, its key findings are:

a. during the fifth year there was a 9% increase in referrals from the previous year. The numbers have more than doubled in five years. However there are still wide disparities in the rate of IMCA instructions across different local areas which cannot wholly be explained by population differences. There were a total of 11,899 eligible instructions for the IMCA service in England (as compared with 5,266 in the first year of the IMCA service in 2007);

b. those instructions break down thus:

- Accommodation 4,916 (Increase of 6%)
- Serious medical treatment 1,743 (Increase of 5%)
- Safeguarding 1,533 (Decrease of 2%)
- Care reviews 1,032 (Increase of 34%)
- Deprivation of Liberty Safeguards 1,979 (Increase of 18%);

c. Whilst the number of instructions for care reviews has increased (the increase of 34% is the largest percentage increase in type of referral), it continues to be low in absolute numbers, in comparison to accommodation decisions, which raises questions such as:

- Are care reviews being consistently undertaken after moves?
- Where an IMCA has been involved in the decision to move a person, why are three quarters of them not invited to support and represent the person in subsequent reviews?

d. In light of the decision in *CC v KK*, IMCA services should not seek a capacity assessment prior to working with a client.

The DoH made the following recommendations:

"*1. It is recommended that commissioners recognise that the number of people statutorily eligible for the IMCA service continues to increase on a year by year basis.*

2. It is recommended that both local authorities and IMCA organisations consider the implications of the CC v KK case and act according to the Court's guidance.

3. It is recommended that both IMCA organisations and local authorities continue to be alert to possible Deprivations of Liberty (DoL). IMCA organisations should alert local authorities and the NHS for the need either to prevent a DoL by changing the care plan, or to apply the DoL safeguards, if the person is in a care home or hospital. If the possible DOL is the result of a care package in the community, a referral to the Court of Protection is required.

4. It is recommended that local authorities ensure that all those who would benefit from IMCAs in their Reviews all receive one.

5. It is recommended that Mental Capacity Act leads in CCGs monitor compliance with the requirement for making referrals to IMCAs as part of their MCA responsibilities.

6. It is recommended that safeguarding coordinators consider these statistics and that a) all Safeguarding Co-ordinators review the basis on which they

make referrals to IMCAs; and b) that Safeguarding Co-ordinators who work in the areas identified in Appendix A with a star review why referrals to IMCAs are at the level they are.

7. *It is recommended that IMCAs continue to follow Court of Protection advice given in judgements.*"

Third Annual Report on the UK's National Preventative Mechanism

The National Preventative Mechanism ('NPM') consists of 18 organisations – including the CQC – designated to fulfil the UK's obligation under the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)[6] to independently monitor the treatment of and conditions for people in state detention. The purpose of monitoring is to prevent ill-treatment in all places of detention from prisons to children's homes to secure hospitals. The monitoring remit of the NPM includes both those detained under mental health law and those whose deprivation of liberty is authorised under Schedule A1 to the MCA 2005.

The Third Annual Report is very short on detail as regards the monitoring of those under Schedule A1 (although it does include reference to monitoring of the position in Scotland and Northern Ireland of instances of force and restraint in health and social care settings amounting to a deprivation of liberty (p.22-3)). However, it is clear that the question of what constitutes a deprivation of liberty for these purposes is a matter which is rising up the agenda:

> *"Our NPM business meetings provide members with the opportunity to discuss key findings or best practice, apply learning from monitoring one type of detention to another and learn from work in other jurisdictions. At meetings in 2011–12, the members explored the definition of detention. They discussed the difference between a restriction and a deprivation of liberty, the extent to which some people who reside in, for example, hospitals and care homes, may be considered detained if they are prevented from leaving should they choose to do so, and whether there are sufficient safeguards to protect people in these situations. Given the complexity of these issues, the NPM members decided to explore these in more detail in 2012–13 and share information across jurisdictions within the UK about de facto detention.*" (p.11).

The interaction between OPCAT and the MCA 2005 is not something which has yet been explored in the case-law.[7] In the context of the forthcoming appeals in *Cheshire West* and *P and Q*, it is, however, of no little interest to note Articles 1 and 2 of OPCAT, which place a gloss upon 'deprivation of liberty' which may seem familiar from *HL*:

> "*1. Each State Party shall allow visits, in accordance with the present Protocol, by the mechanisms referred to in articles 2 and 3* [i.e. a Subcommittee on the Prevention of Torture etc and national visiting bodies respectively] *to any place under its jurisdiction and control where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence (hereinafter referred to as places of detention). These visits shall be undertaken with a view to strengthening, if necessary, the protection of these persons against torture and other cruel, inhuman or degrading treatment or punishment.*
>
> *2. For the purposes of the present Protocol, deprivation of liberty means*

[6] Which the UK ratified on 10.12.03, the Protocol entering into force on 22.6.06.

[7] OPCAT is discussed further in Alex's paper on the DOLS regime at http://www.39essex.com/resources/article_listing.php?id=748 at para 99.

any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority."

Disabled persons and sexual surrogates

Whilst we do not usually run a "news stories of interest" section, the article by Frances Ryan in the Guardian on 12.2.13 on this subject summarises the issues so well that we could not properly pass it up. We are aware, not least because we have been asked to advise upon different aspects of the issues relating to the law in this area, just how many complexities arise where it is proposed that money be used to purchase sexual surrogacy services. This is especially so where it is thought that the disabled person may lack capacity to consent to sexual relations. In such circumstances, consideration must then be given not just to the MCA 2005 but also to the Sexual Offences Act 2003 and the criminal liability it may impose in respect of those assisting incapacitated adults to purchase such services. We would be very interested to hear of experiences of those on the ground working with disabled persons seeking the use of sexual surrogates in such circumstances.

The CoP for litigants in person

In no way causally linked to the change in legal aid regime addressed above, Tor has written a guide to the CoP, available here. It is mainly for the benefit of litigants in person in contested welfare proceedings. Tor very much welcomes comments upon it.

The CoP's work over the past four years

With grateful thanks to Senior Judge Lush for his permission to reproduce these statistics, we reproduce on the next page a table showing the CoP's work over the past four years, which makes illuminating reading.

Our next update will be out in April 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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Statistics upon the work of the Court of Protection over the past four years (reproduced with permission of Senior Judge Lush)

	2009	2010	2011	2012
Property and affairs applications received	17,068	18,360	18,708	21,479
Property and affairs orders issued	13,641	15,624	19,230	16,669
Property and affairs deputies appointed	9,982	9,437	12,042	12,563
Health and welfare applications received	1,531	1,283	1,060	1,285
Health and welfare orders issued	182	218	589	835
Health and welfare deputies appointed	112	106	136	101
London hearings	473	472	502	909
Regional hearings	783	757	575	643
Enduring Powers of Attorney objections	483	298	225	185
Lasting Powers of Attorney objections	81	98	107	77
Lasting Powers of Attorney severance cases	213	112	412	1,200

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Alex is frequently instructed before the Court of Protection by individuals (including on behalf of the Official Solicitor), NHS bodies and local authorities. Together with Victoria, he co-edits the Court of Protection Law Reports for Jordans. He is a co-author of 'Court of Protection Practice' (Jordans), the second edition of 'Mental Capacity: Law and Practice' (Jordans 2012) and the third edition of 'Assessment of Mental Capacity' (Law Society/BMA 2009). He is one of the few health and welfare specialists before the Court of Protection also to be a member of the Society of Trust and Estates Practitioners.

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Victoria regularly appears in the Court of Protection, instructed by the Official Solicitor, family members, and statutory bodies, in welfare, financial and medical cases. She previously lectured in Medical Ethics at King's College London and was Assistant Director of the Nuffield Council on Bioethics. Together with Alex, she co-edits the Court of Protection Law Reports for Jordans. She is a contributing editor to Clayton and Tomlinson 'The Law of Human Rights', a contributor to 'Assessment of Mental Capacity' (Law Society/BMA 2009), and a contributor to Heywood and Massey Court of Protection Practice (Sweet and Maxwell).

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

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Michelle's experience in MCA 2005 matters includes cases concerning deprivation of liberty, residence and contact arrangements, forced marriage, capacity to consent to marriage and capacity to consent to sexual relations. She is recommended as a "formidable presence" in the Court of Protection in Chambers and Partners 2013.

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