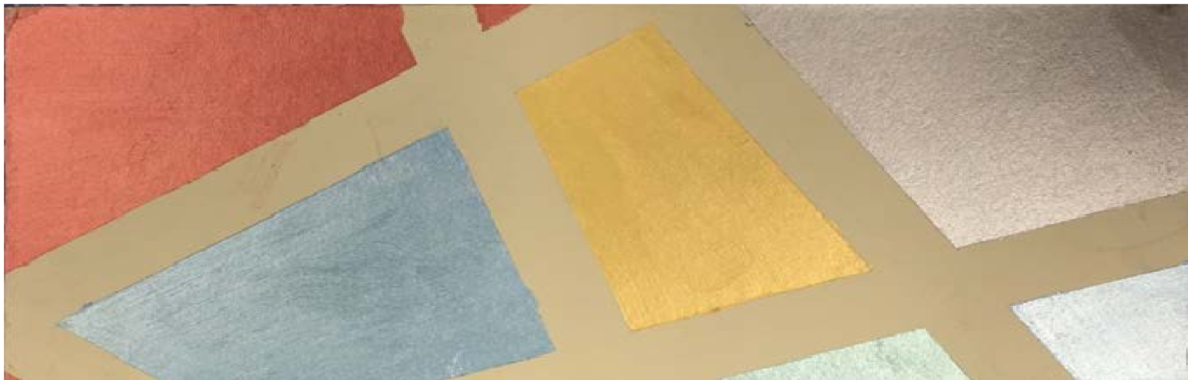

Welcome to the February 2023 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: is depriving a person of their phone depriving them of their liberty, a reminder that the court is the ultimate arbiter of best interests and an Ombudsman comes belatedly to the rescue;

(2) In the Property and Affairs Report: a reminder of the new process for applying for deputyship and how the Powers of Attorney Bill would amend the MCA 2005;

(3) In the Practice and Procedure Report: the Vice-President intervenes on s.49 reports and new contempt rules;

(4) In the Wider Context Report: Parliamentary consideration of the draft Mental Health Bill, a toolkit for supporting decision-making, and confidentiality and common sense;

(5) In the Scotland Report: the Supreme Court dismisses an appeal against assessment for services and an opposed application for guardianship.

You can find our past issues, our case summaries, and more on our dedicated sub-site here, where you can also sign up to the Mental Capacity Report.

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The picture at the top, "*Colourful*," is by Geoffrey Files, a young autistic man. We are very grateful to him and his family for permission to use his artwork.

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HEALTH, WELFARE AND DEPRIVATION OF LIBERTY

Is depriving a person of their mobile phone depriving them of their liberty?

Manchester City Council v CP & Ors [2022] EWHC 133 (Fam) (MacDonald J)

Article 5 – deprivation of liberty – children and young persons

Summary

Is depriving a person of their mobile phone depriving them of their liberty? That was the very 21st century question confronting MacDonald J in *Manchester City Council v CP & Ors* [2023] EWHC 133 (Fam). Whilst his analysis concerned the position of a 16 year old, his conclusions apply equally to adults.

It was common ground between the local authority and the Guardian that the significant restrictions to be placed upon the ability of the 16 year old in question, P, to use a mobile phone and other devices gave rise to a state imposed confinement to which she did not consent, and hence a deprivation of her liberty, which the High Court could authorise by exercise of its inherent jurisdiction. MacDonald J, however, whilst acknowledging that this had been the practice to date (including by himself), decided that it was necessary to consider the question in more detail, and reached the opposite conclusion.

Importantly, and identifying a point which is sometimes missed, MacDonald J made clear at paragraph 26 that the caselaw confirmed that "*in this context, and historically, the concept of liberty under Art 5(1) of the ECHR contemplates individual liberty in its classic sense, that is to say the physical liberty of the person*," and that the reference to "security" in Article 5 "*serves simply to emphasise that the requirement that a person's liberty may not be deprived in an arbitrary fashion*." He noted that rule 11(b) of the UN Rules for the Protection of Juveniles Deprived of their Liberty also emphasised the concept of physical liberty,[1] defining deprivation of liberty as "*any form of detention or imprisonment or the*

[1] In passing, he could equally have noted that the interpretation of deprivation of liberty for purposes of these Rules derived from the interpretation of the concept for purposes of Article 9 of the International Covenant on Civil and Political Rights. The Human Rights Committee's General Comment 35 on Article 9 makes clear in paragraph 3 that "[l]*iberty of person concerns freedom from confinement of the body, not a general freedom of action*."

placement of a person in another public or private setting from which this person is not permitted to leave at will, by order of any judicial, administrative or other public authority."

MacDonald J further identified at paragraph 37 that restrictions upon on access to, or the use of, telephones were most commonly considered by the ECtHR in the context of the Article 8 ECHR right to respect for private and family life, rather than under Art 5(1).

Applying these principles, MacDonald J recognised that:

> 45. [...] *for P, in common with many other young people of her age, her mobile phone and other devices constitute a powerful analogue for freedom, particularly in circumstances where she is at present confined physically to her placement. Within this context, I accept that the possession and use of her mobile phone, tablet and laptop, and her concomitant access to social media, is likely to equate in P's mind to "liberty" broadly defined as the state or condition of being free.*

However, MacDonald J continued:

> *However, this court is concerned with the meaning of liberty under Art 5(1) of the ECHR. Whilst I recognise that the Convention is a living instrument, which must be interpreted in the light of present-day conditions (see Tyrer v United Kingdom (1978) 2 EHRR 1 at [31]), over an extended period of time the Commission and the ECtHR have repeatedly made clear that Art 5(1) is concerned with individual liberty in its classic sense of the physical liberty of the person, with its aim being to ensure that no one is dispossessed of their physical liberty in an arbitrary fashion. The Supreme Court proceeded on that formulation of the proper scope of Art 5(1) in Cheshire West.*

That meant, in turn, that:

> 46. [...] *in my judgment the removal of, or the placing of restrictions on the use of, P's mobile phone, tablet and laptop and her use of social media do not by themselves amount to a restriction of her liberty for the purposes of Art 5(1). On the evidence currently before the court those restrictions do not act to deprive P of her physical liberty, but rather act to restrict her communication, so as to ensure her physical and emotional safety. The evidence set out earlier in this judgment demonstrates that the effect of those restrictions is to limit P's communications with peers who might encourage her to engage in bad behaviour, with strangers who may present a risk to her and with family and friends when she is in a heightened emotional state. Within this context, the restrictions on the use of P's devices for which the local authority seek authorisation do not, in my judgment, by themselves constitute an objective component of confinement of P in a particular restricted place for a not negligible length of time. In the circumstances, whilst they are steps at times taken without P's consent and are imputable to the State, those restrictions do not, by themselves, meet the first Storck criterion.*

The local authority argued that the restrictions upon her devices formed an integral element of the confinement to which P was subject (in circumstances where she was under other, more obvious restrictions such as supervision and physical restraint to protect from harm). Whilst MacDonald J accepted that they might, at time, be said to form part of a regime of continuous supervision and control, he reiterate that they did not act to restrict her *physical* liberty. Rather, their effect was:

> 65 [...] *to prevent P broadcasting online indiscriminately, to prevent contact from those advising her*

> *how to frustrate steps the placement takes to stop her from harming herself and others and to prevent her sharing details online with those who may pose a risk to her and restricting contact with those against whom she has alleged abuse. There is no suggestion in the evidence currently before the court that those restrictions constitute a necessary element of the deprivation of P's physical liberty or of the manner of implementation of that deprivation of liberty. For example, the evidence before the court does not suggest that the restrictions on the use of P's mobile phone, tablet and laptop and use of social media are required to ensure the effectiveness of the current measures that do operate to prevent her from leaving the placement, or that without those restrictions the current measures that operate to prevent her from leaving the placement would be rendered ineffective. In these circumstances, in my judgment the restrictions in respect of P's phone, tablet and laptop and on the use of social media do not, even when considered in the context of the other elements of the other restrictions for which authorisation is sought, constitute an objective component of confinement of P in a particular restricted place for a not negligible length of time. Accordingly, it would in my judgment be wrong to authorise them under the auspices of a DOLS order[2] simply because they form part of the total regime to which P is currently subject in her placement.*

Some might be wondering by this stage why MacDonald J was quite so keen to make clear that the restrictions on P's devices did not give rise to a deprivation of her liberty. The answer he gave at paragraph 50 was an important one:

> *The difference between deprivation of and restriction upon liberty is one of degree or intensity and not one of nature or substance. But there is nonetheless a difference and that difference can have consequences. As I have noted above, restrictions of the type being imposed on P with respect to the use of her mobile phone, tablet and laptop, and concomitant limitations on her access to social media, are most naturally characterised as an interference with her Art 8 right to respect for private and family life. When considering them as such, before a court could endorse that interference it would have to be satisfied that that interference was necessary and proportionate, pursuant to Art 8(2). If however, those steps were instead to be considered and endorsed by the court by reference to Art 5(1), the exercise under Art 8(2) would be bypassed in respect of steps that constitute an interference in an Art 8(1) right. It is important that the court be careful not to allow its jurisdiction to make orders authorising the deprivation of a child's liberty by reference to Art 5(1) to spill over into authorising steps that do not constitute a deprivation of liberty for the purposes of Art 5(1), particularly where those steps might constitute breaches of different rights, which breaches fall to be evaluated under different criteria. It may well be that one of the reasons for ECtHR adopting the narrow interpretation of word 'liberty' under Art 5(1) in cases such as Engel v Netherlands, limiting it to the classic concept of physical liberty, was to reduce risk of the Art 5 exceptions resulting in a de facto interference with other rights, without proper reference to the content of those other rights.* (emphasis added).

MacDonald J's conclusion meant that it was necessary to find an alternative route to authorise the restrictions (assuming that such restrictions were justified). This alternative route, he found, lay in the operation of parental responsibility (in P's case, by the local authority under its shared parental responsibility under s.33(3)(b) of the Children Act 1989, P being the subject of a final care order.

[2] As a plaintive and probably forlorn plea, it would be really helpful if practitioners and the courts could stop referring to inherent jurisdiction orders as "DoLS orders" as it perpetuates confusion with 'actual' DoLS, i.e. administrative authorisation under the Deprivation of Liberty Safeguards in relation to adults in care homes/hospitals.

MacDonald J found that, ordinarily, a local authority relying upon s.33(3)(b) Children Act 1989 to impose restrictions on the use of devices to protect a child from a risk of serious harm would not require the sanction of the court, he did accept at paragraph 60 that:

> *circumstances that contemplate the use of physical restraint or other force to remove a mobile phone or other device from a 16 year old adolescent, even in order to prevent significant harm, is a grave step that would require sanction by the court, rather than simply the exercise by the local authority of its power under s.33(3)(b) of the 1989 Act, not least because such actions would likely constitute an assault. I am further satisfied that, in an appropriate case and where an order under Part II of the Children Act 1989 would not be available where a child is subject to a final care order, it would be open to the court to grant the local authority permission to apply for an order under the inherent jurisdiction, separate to any order authorising deprivation of liberty, that declares lawful the steps required to effect by restraint or other reasonable force the removal from a child of his or her devices, provided it is demonstrated that their continued use is causing, or risks causing, significant harm and provided that the force or restraint used is the minimum degree of force or restraint required.*

MacDonald J emphasised that the threshold for making such an order – separate from the order authorising deprivation of liberty – would be a high one, requiring "*cogent evidence that the child is likely to suffer significant harm if an order under the inherent jurisdiction in that regard were not to be made*" (paragraph 71).

Comment

MacDonald J's decision is a very useful reminder of the limit of the concept of deprivation of liberty: in this context, liberty, importantly, is not another word for autonomy. As Lady Hale put it in *Secretary of State for the Home Department v JJ* [2007] UKHL 45 (at paragraph 57):

> *My Lords, what does it mean to be deprived of one's liberty? Not, we are all agreed, to be deprived of the freedom to live one's life as one pleases. It means to be deprived of one's physical liberty* […] *And what does this mean? It must mean being forced or obliged to be at a particular place where one does not choose to be:* […] *But even that is not always enough, because merely being required to live at a particular address or to keep within a particular geographical area does not, without more, amount to a deprivation of liberty. There must be a greater degree of control over one's physical liberty than that.*

In passing, it might be thought to be of interest that Lady Hale was clear in 2007 that deprivation of liberty included an element of overbearing of the person's will, but by 2014 considered in Cheshire West that a lack of MCA-capacity to consent to confinement was sufficient, even if the person appears to be content. If you want to follow that rabbit hole, you might find this paper of interest.

It is interesting, and reassuring, to note that MacDonald J reached the same conclusions as to the human rights allocation of restrictions upon devices as was reached some years ago in the Court of Protection context by Mostyn J in *J Council v GU & Ors* [2012] EWCOP 3531. That the judgment did not refer to this case is likely down to the fact that (for better, or, we venture to suggest, worse) parallel furrows seem to be being ploughed by those concerned with deprivation of liberty in the context of

children and adults.[3]

Be that as it may, MacDonald J's observations about the need to be clear about which rights are in play, and what considerations need then to be taken into account in identifying who can determine and on what basis whether or not the interference is lawful are trenchant. They are also equally relevant in DoLS land in relation to adults. They reinforce the fact that restrictions which are not specifically directed at restricting the physical liberty of the person are not restrictions which can be authorised under DoLS. Such restrictions, whether they be upon devices, or upon contact, either need to be justified by reference to the (thin) legal cover available here under s.5 MCA 2005, or – more likely – need to be put before the Court of Protection so that the court can determine whether (a) such restrictions are in the best interests of the person; and (b) whether they are necessary and proportionate so as to satisfy Article 8(2) ECHR.

Presuming a presumption of capacity

NHS Surrey Heartlands Integrated Care Board v JH [2023] EWCOP 2 (Hayden J)

Medical treatment – advance decisions

Summary

In this case, Hayden J was asked to consider whether an advance decision to refuse invasive tests or treatments (including life-sustaining treatments) was valid, not at a point when those tests or treatments were sought to be carried out, but in contemplation of the potential that they might be. As Hayden J identified at paragraph 9, the offence of s.2(1) Suicide Act 1961 (aiding, abetting, counselling or procuring another to take their own life):

> *is a challenging backdrop to the facts of cases like this one and, no doubt in part, the reason that the ICB seek their second declaration i.e., "that a person does not, therefore, incur liability for the consequences of withholding such tests or treatment from JH". It is important to emphasise, however, that there is no obligation on a patient, who has decision-making capacity, to accept life-saving treatment. Doctors are not obliged to provide treatment and, perhaps more importantly, are not entitled to do so in the face of a patient's resistance. This reflects a mature understanding of the importance of individual autonomy and respect for human dignity.*

JH, diagnosed with what would now be recognised as Autism Spectrum Disorder as a teenager, had had very extensive investigations into gastroenterological problems as a child, necessitating 'incessant' hospital involvement, leaving him profoundly anxious and unprepared to attend hospital, as well as deeply resistant to any form of invasive medical treatment. An encounter in 2017 concerning his diet

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[3] An issue identified by Sir James Munby in 2018, discussing in a speech for Legal Action Group the case of *D* at the point between his decision in the Court of Appeal and the decision of the Supreme Court, noting that *"these cases lie at the intersection of three different bodies of domestic law – mental health law, mental capacity law and family law – where judicial decision-making is spread over a variety of courts and tribunals which, by and large, are served by different sections of the legal professions too few of whom are familiar with all three bodies of law. The existence of these institutional and professional silos has bedevilled this area of the law at least since the earliest days of the Bournewood litigation. One day, someone will write a critical, analytical history of all this – and it will not, I fear, present an altogether reassuring picture."*

at a meeting for which he did not feel had been fully briefed or prepared led him to want to prepare an advance decision setting out which tests and / or treatments he would be prepared to consent to. Hayden J described the advance decision, prepared on a template form from Compassion in Dying,[4] as "*manifestly carefully constructed* and [...] *pellucidly clear*."

At the time (in 2017) a capacity assessment undertaken concluded that JH had capacity (although it is not entirely clear from the judgment as to whether this was an assessment in relation to making an ADRT, or in relation to some other decision(s)). Later, however, clincians "wavered" about the correctness of that assessment.

In light of the possible doubts about whether the ADRT had been created capacitously, and in light of the fact that JH was identified by his treating ICB as being at immediate and obvious risk to life because of his very restricted diet and very low BMI, an application was brought to confirm the status of the ADRT, and also for a confirmation that no liability would be incurred if tests / treatments were withheld from JH. JH had capacity to conduct the proceedings, and both attended (by telephone) and spoke to the judge; however, it is not entirely clear whether the case was proceeding on the basis that JH currently had capacity to make decisions about tests / treatment, or whether he lacked capacity. It appears from the discussion of JH's best interests that it was the latter. In any event, even if JH currently **had** capacity, it is understandable why the confirmation in relation to the ADRT was being sought: there must have been on the material before the court a real possibility that he would lose, at which point the ADRT would become very relevant indeed.

On the facts of the case, Hayden J had no hesitation in finding that JH had had capacity in 2017 to make the ADRT. Separately, he also made it clear that, even if he had not, he could not have contemplated a situation in which the clinically indicated investigations could have been forced upon him:

> *23.* [...] *The strength of his feelings, the consistency with which they have been held, for so many years, and his obvious distress at the contemplation of such an intrusive investigative process would, in my judgement, be brutally corrosive of JH's autonomy. It would both compromise his dignity and cause him great personal trauma. It could not be reconciled with any concept of "best interests" in the manner required by the MCA. As Miss Sutton reminds me, JH told Dr W* [his GP] *that if the court determined that it was in his best interests to have further investigations, "he would not undergo them willingly and would have to be physically restrained". He also told Dr W that "undergoing investigations such as a colonoscopy would make him feel violated and it is not something he could tolerate". I emphasise that Dr W does not consider that any further investigations should be undertaken against JH's will due to the distress it would cause him. I agree.*

Comment

It is entirely understandable why this case was brought, and Hayden J was at pains to explain the importance of his essentially confirmatory role in relation to the ADRT. One point, however, is not addressed in the judgment (which may be down to the fact that the application was clearly made and determined at some speed). Hayden J proceeded on the basis that he was bound by the presumption

[4] See now Mydecisions.org.uk for an updated version of the template.

of capacity in terms of the determination of the position of 2017. However, Alex at least would respectfully suggest that this is not, in fact, obviously the case. Rather, Alex suggest that the position in relation to retrospective determinations of capacity is as set out in the draft updated Code of Practice to the MCA 2005:

> *4.104 Where a person's capacity to make a decision is being assessed retrospectively, the approach to be taken is different to assessing capacity 'in real time'. For example, it is clearly not now possible to seek to support the person to make the decision. It will be necessary to gather as much evidence as possible from surrounding documents and circumstances to establish whether or not the person had capacity at the time.*
>
> *4.105 Importantly, the presumption of capacity works differently where the person's capacity is being determined retrospectively. Where proper reasons are put forward to suggest the person did not have capacity, anyone who relies on the fact the person did have capacity will need to be able to show, on the balance of probabilities, that this was the case.[5] Who might need to show this depends on the circumstances. It might be the attorney where a power of attorney is questioned. It might also be the person themselves (or someone acting on their behalf) where an advance decision to refuse treatment is questioned.*

Albeit without detailed analysis, this was the approach taken by Peter Jackson J (as he then was) in *A Local Authority v E* [2012] EWHC 1639 (COP), which does not appear to have been referred to Hayden J.

What is set out above is not intended to cast doubt on the correctness of Hayden J's decision. However, it is important to note that – in a different case – the mechanical operation of the presumption could mean that medical practitioners would be required to abide by the advance decision notwithstanding the presence of a legitimate doubt as to the person's capacity. That would be a problematic outcome, not least in terms of the state's obligations to secure life under Article 2 ECHR. Rather, Alex would suggest, the proper approach would be to test whether proper reasons had been advanced to cast doubt upon the person's capacity to make the ADRT and, if they had, then to require whoever is relying on the person's capacity at the time to make the case.

Best interests: the court as final arbiter

Re AH (Re Best Interests) [2023] EWCOP 1 (HHJ Burrows)

Best interests – residence

Summary

Following on from his earlier judgment ([2022] EWCOP 45), HHJ Burrows returned to this matter to consider AH's best interests with respect to her residence and care.

AH was 46 years old and had a diagnosis of type 1 diabetes. HHJ Burrows summarised the risks that this condition posed to hear at paragraph 1: "*If her diabetes is properly managed, she is able to be fit and*

[5] I.e. in line with the position (at common law) in relation to testamentary capacity or lifetime gifts. See, e.g.,Gorjat v Gorjat [2010] EWHC 1537(Ch), and this discussion paper.

healthy. If it is not, she can rapidly become seriously unwell, and could *die. In the past she has not been able to engage with those professionals who are responsible for her diabetes care. That led to her becoming seriously ill with ketoacidosis. She required hospital treatment. She was fortunate not to die.*" HHJ Burrows also noted the 'cycle' she had experienced while living in the community of "*non-engagement, illness, hospitalisation and then a dispute as to her destination upon discharge - if she does not die first*" (paragraph 23).

After concluding in its earlier judgment that AH lacked capacity to make decisions as to her residence and care, HHJ Burrows went on to consider AH's best interests in these domains. He did not hear from live witnesses, though did speak with AH herself. Her representatives (though her ALR) did not seek to challenge evidence from professionals.

HHJ Burrows was asked to approve a care plan which would deprive AH of her liberty at 'Placement 1,' a care home which would admit her for a period of assessment (and where she had been residing since March 2022 on an interim basis). However, in reality, AH's stay there would likely be of indeterminate length. The placement would take responsibility for overseeing her administration of insulin. She would not be free to leave the placement for visits to her flat without the permission of staff, and would be obliged to return to the placement. At the time of the judgment, AH was visiting her flat for one overnight stay per week, but this would likely come to an end in March 2023 when her housing benefit came to an end and she would be obliged to give up her flat.

HHJ Burrows heard from AH, who was clear that she did not want to go to Placement 1, and wished to go home. He noted that AH had lived an independent life in her flat for 17 years with support through the week, and medical oversight by the district nurses. HHJ Burrows also noted that AH was generally able to meet her social care needs, and could come and go as she saw fit. However, he also identified that AH disengaged (or inconsistently engaged) with her treatment, leading to potentially dire consequences for her.

HHJ Burrows surveyed relevant authorities, including those which considered the position of those who wished to spend their 'end time' in their homes, and courts affirming that such a course would be in their best interests (such as *P v M (Vulnerable Adult)* [2011] 2 FLR 1375). However, HHJ Burrows identified that, in distinction to such cases:

> *34. […] AH is relatively young. She will constantly be exposed to the risks of disengagement and the consequences that follow for decades. Her life could be shortened by many years. Her years could be blighted by ill health and hospital stays. She would not be happy in those circumstances. Or she could live in a place she does not want to be for decades in good health. She would not be happy in those circumstances, either.*

HHJ Burrows refused the uncontested application that AH should move to Placement 1, though found that the matter was finely balanced. It considered carefully that AH 'hated' Placement 1 and valued her independence. It noted that her flat remained available to her, and that a community care package could be organised for her. The court highlighted the potentially fatal risks to AH of disengaging with her care, and concluded that despite her stated intentions to engage, there was "*a reasonable prospect that AH will eventually cease to engage consistently, perhaps at all. At that point, it is inevitable that the Applicants*

may have to adopt a similar approach to the one they have adopted here by seeking the approval of the Court for the use of coercive powers that restrict AH's liberty or deprive her of it" (paragraph 45). The court also noted the benefits of Placement 1 being in AH's home area, which allowed her to continue her social contacts; if she had to move on an urgent basis in the future, there would be no guarantee she might remain local.

HHJ Burrows summarised his conclusions thus: conclusions:

> *63. I have balanced all the matters I have discussed above. This is a finely balanced case. I have concluded that it is not in her best interests to remain at Placement 1. Whilst the benefits are clear and obvious, and the risk of going home is real and very serious, I do not consider it to be necessary to require her to reside at Placement 1, where she does not wish to be when she could move back to her own home.*
>
> *64. In her own home she will receive social care and will be able to access the community with or without support. District Nurses will be able to provide AH with diabetes care. It is uncertain whether she will engage with them and whether she will be able to keep herself well. There is a risk she will not be able to do this. There is a real risk she will suffer a decline- gradual or sudden. There is a risk she will find herself back in hospital and then in care afterwards again. There is a risk she will die.*
>
> *65. However, in my judgment she has the right to her liberty and to remove it from her would be a devastating blow to her and would not properly recognise her right as a disabled person to be afforded respect and dignity for the way she wishes to live her life.*
>
> *66. I therefore make the declarations I indicated above. It is likely there will need to be a short period to enable the package of care at home to be restarted- I will defer the effect of this order until that is in place.*
>
> *67. I also add some comments on the professionals who provide AH with care, some of whom were instrumental in bringing these proceedings. Bringing this application was entirely right and justified. It was an expression of genuine and legitimate concerns over AH's health. Although the phrase "medical best interests" is often used, as any medical professional will immediately say, even medical best interests takes into account the wider issues that affect their patients. I have no doubt that the professionals in this case brought the application for AH as a person, not just as a difficult diabetes patient.*

Comment

The judgment is notable for its rejection of the apparently uncontested position of the parties that AH should move to Placement 1. The court gave heavy weight to AH's wishes and feelings, and found the effects of a move which likely would have done much to safeguard her health would be 'devastating' for her. While the case turned very much on its own facts and has limited value as precedent, it is of interest for its careful consideration of the harms which would be caused by overriding AH's autonomy.

Vaccination and mental capacity

We have updated our vaccination and mental capacity guide to take account of recent caselaw. It can be found here.

Deprivation of liberty - an Ombudsman to the (belated) rescue

In decision 21 018 408 of 15 November 2022, the Local Government and Social Care Ombudsman (LGSCO) found fault by the London Borough of Sutton due to considerable delays in authorising the deprivation of liberty of 'Mr Y. The complaint was brought by Mr Y's mother, 'Ms X'. Ms X stated that Mr Y, who lived in a care home, "*lived in a locked bare room, was inappropriately medicated and did not have any activities*" (paragraph 1). Ms X also sought to effect a change of placement for Mr Y and the decision to grant the standard authorisation at the placement, but the LGSCO declined to investigate this, noting Ms X's right to bring these issues before the Court of Protection.

Mr Y was an adult with autism and learning disabilities; he was considered to lack capacity to make decisions about his care. His deprivation of liberty at a care home (in which he lived in a separate flat linked to the main building of the care home) had been authorised by way of a standard authorisation which expired on 3 January 2022. That authorisation had been for a period of six months, as a result of the assessor's recommending a review of the care arrangements in the home.

The care home sought a fresh authorisation on 13 January 2022; this was granted on 14 April 2022, and set to expire on 26 May 2022. This appears to have been largely due to a number of concerns raised in the best interests assessment, including that:

- Mr Y had not had a medication review since 2020;
- "Ms X objected to the placement in July 2021 and said staff did not have the expertise in dealing with Mr Y's complex needs. And she raised safeguarding concerns in 2022" (paragraph 26);
- Inconsistent statements were given regarding whether or not Mr Y was on continuous 1:1 support;
- Mr Y's room was bare (it was stated that this was for his safety); and
- Mr Y had been locked out of having access to the main building of the care home (though the manager removed the lock at the request of the BIA).

The BIA recommended a short authorisation, with a full review of Mr Y's placement to take place by the local authority learning disability team, to include Mr Y's family.

Ms X brought the complaint in relation to delays in authorising Mr Y's deprivation of liberty in February 2022. The Council stated that there had been "*human error in screening the* [DOLS] *paperwork which caused a delay in allocating the case to assessors to complete a renewal authorisation. It had changed screening processes to reduce the risk of recurrence.*" It further submitted that Mr Y had not experienced any distress in the DOLS assessment process, and had undertaken to review his placement and care.

The LGSCO found that "[t]*here was fault by the Council because between 3 January and 14 April 2022, there was no standard authorisation in place for Mr Y. This means there was no legal basis for his detention for almost three and a half months. The failure to follow the DOLS process and the lack of legal checks means there was no regard to Mr Y's Article 5 rights during that period*" (paragraph 31). The LGSCO found that both the local authority and care home were obliged to keep track of when the standard authorisation was to expire, and ensure its renewal. The Ombudsman further found that "[t]he

failure to have in place an effective system to manage the expiry date was not in line with Paragraphs 24 or 123 of Schedule A1 to the Mental Capacity Act and was fault" (paragraph 31).

The LGSCO went on to find that the delay had caused injustice:

> *34. I note the professionals' view that Mr Y would likely not be adversely affected by being detained. While his mental health may not have been impacted, I consider there was a missed opportunity to see if Mr Y's care could be delivered in a less restrictive way. So there is avoidable uncertainty for Ms X about whether changes to the care plan might have taken place sooner had the renewal authorisation been completed at the correct time.*
>
> *35. I note also the BIA recommended removal of the internal locks and that this was actioned immediately. The presence of an internal lock isolated Mr Y and prevented him from interacting with staff and residents in the home and was considered to be disproportionate. However, there is not enough evidence for me to conclude that removal of the lock/key-pad would have happened in January had the authorisation process been completed in time. This is because there is insufficient information about the level of risk at the time.*
>
> *36. Although there is not enough evidence to conclude any distress to Mr Y, I consider Ms X to have suffered avoidable distress and time and trouble complaining about Mr Y's care.*

The agreed actions were that:

- the Council was to apologise to Ms X and pay her £150 in recognition of her time and distress;
- *"Ensure a further standard authorisation is place if appropriate and provide me with a copy of relevant DOLS paperwork."*
- *Provide me with a copy of the review of screening processes in the DOLS team, highlighting the changes made to the previous process and explaining how the amendments reduce the risk of recurrence*" (paragraph 37)

Comment

This is far from the first time the LGSCO has found fault as a result of delays in considering standard authorisations (see, e.g., its findings in relation to severe and systemic delays in Staffordshire, including failing to consider many applications at all, and delays in assessments in Kent which separated an elderly couple). In this matter, the BIA appeared to find a number of concerns about the placement, and restrictions which appeared to be unnecessary (including Mr Y's exclusion from the main building), highlighting the need for a full review. The decision highlights the purpose of a standard authorisation as a safeguarding feature (in accordance with the DOLS name), and finds fault when this safeguard is not applied in a timely fashion. It is also notable for finding an obligation on local authorities to ensure effective monitoring of the expiration of deprivations of liberty in care home placements.

2022 – a year in (mostly) Court of Protection cases shedinar

Alex has recorded a shedinar covering key MCA cases from 2022, available here.

PROPERTY AND AFFAIRS

Reminder – all change for property and affairs deputyships

With effect from 1 January 2013, Practice Direction 9H set out a new mechanism for applying for property and affairs deputyships. The major change is to move the notification procedure upfront. Applicants should notify 3 people who know the person affected by the application, for example, relatives, a social worker or doctor. They should then gather the responses before submitting their application. Applicants should send responses and all recordings of notifications to the court with their application. There are new forms to use for upfront notifications, the COP14PADep and COP15PADep. These forms are both notification and acknowledgement forms combined. The forms should be returned to the applicant or agent within 14 days of notification where possible. The applicant should then send/upload all acknowledgement forms whilst making the application to the court. After 14 days from notification, the court will assume agreement to the order being made if no acknowledgement form is returned to the applicant and no COP5 is filed by those notified.

From 1 February 2023, property and affairs deputyship applications that do not follow the new upfront notification process will be returned to the applicant.

HMCTS held a drop in session on Monday 19 December 2022 to explain the new process for making property and affairs deputyship applications: a recording of the session is available to watch on the HMCTS YouTube channel.

LPA applications continue to rise

The most recent statistics from the Ministry of Justice show that from July to September 2022, there were 201,121 LPAs registered, up 19% compared to the equivalent quarter in 2021.

Power of Attorney Bill – how would it change the MCA? (and walkthrough)

In May 2022, the Ministry of Justice indicated in its response to the Modernising Lasting Powers of Attorney consultation that it intended to bring forward primary legislation to amend the MCA 2005 to reform a number of key provisions relating to LPAs. Stephen Metcalfe MP introduced in December a Private Members' Bill, the Powers of Attorney Bill 2022, which has government support, and has progressed beyond second reading.

Despite the helpful Explanatory Notes, the Bill is not an easy piece of legislation to read on a standalone basis. Alex has therefore prepared an entirely unofficial version of Schedule 1 to the Mental Capacity Act 2005 (providing for formalities relating to LPAs) as it would stand if it were amended by the Powers of Attorney Bill.

Alex has also done a short walkthrough of the Bill and some of the key changes it is proposing (as well as one key one which is not been proposed).

The Law Commission Wills project restarts

The Law Commission has announced that the Wills project, paused since 2019, has come back to life. Interestingly, in making the announcement, the Law Commission notes that:

> *In view of the passage of time since our original consultation, and the impact of the Covid-19 pandemic on making a will, we will be further engaging with stakeholders as we develop our final policy. We intend to publish a supplementary consultation paper on discrete issues on which we think there might be a shift in views among consultees, in the light of developments since our 2017 consultation. We aim to publish the supplementary consultation paper in September 2023.*

PRACTICE AND PROCEDURE

Section 49 reports – the Vice-President intervenes

The Vice-President of the Court of Protection, Hayden J, has published a letter (dated 16 December 2022) in relation to s.49 reports, following a meeting between him, Senior Judge Hilder and NHS Mental Health Directors. In relevant part, it reads as follows:

> *Concern had been expressed about the scope and ambit of Section 49 reports. There was a strong feeling that some of the Section 49 requests are disproportionate, overly burdensome, and wrongly authorised. There are obvious reasons (i.e., costs) why a Section 49 report might be preferred where what is truly required is an independent expert report.*
>
> *Section 49 reports are, paradigmatically, appropriate where the NHS body (typically a Mental Health Trust) has a patient within their care, who is known to them. This ought to enable the clinician to draw quickly on his knowledge of the patient and respond concisely to the identified questions, which will be directed to the issues clearly set out in the Practice Direction. Importantly, it avoids the patient having to meet with a further professional with whom, he or she, has no existing relationship.*
>
> *Instructions under Section 49 should be clearly focused with tight identification of the issues. It should be expected that the reports will be concise and will not require extensive analysis across a wider range of questions than those contemplated in the Practice Direction. Reports requiring that kind of response should be addressed to an independent expert.*
>
> *I have taken this opportunity to re-circulate the Practice Direction which requires no gloss or embellishment. However, I have highlighted those paragraphs which I consider need to be restated.*

Contempt

Those considering contempt applications in the Court of Protection should be aware that a new part 21 was brought into effect from 1 January 2023 by The Court of Protection (Amendment) Rules 2022. These new provisions were considered by Poole J in the case of *Sunderland City Council v Macpherson* [2023] EWCOP 3. This was an application to commit the defendant Ms Macpherson to prison for contempt of court for breaches of injunctions preventing her from publishing material about her daughter FP, the subject matter of the COP proceedings. The defendant admitted five breaches of the injunctions, namely having posted audio and video recordings of FP on multiple social media platforms including twitter, as well as posting information about the COP proceedings.

Poole J had at the first hearing of the committal application made an order that the defendant should not be named, as there was a concern that this might lead to the identification of FP. At the sentencing hearing, Poole J re-considered this decision and in so doing, examined the new COPR 21.8 holding:

- COPR 21.8(4) provides that all committal proceedings in the COP must be listed in public unless the provisions of COPR 21.8(4) apply (for example, if the court determined that a private hearing was necessary to protect the interests of P and that it was necessary to sit in private to secure the proper administration of justice.)

- If the court directs that the contempt proceedings be heard in private, COPR r 4.2 applies which allows the Court to make an order imposing restrictions on the publication of the identity of (amongst others), parties, witnesses and P. In such cases the Court held that "*the general power under r4.2 to impose restrictions on the publication of the identity of any party is circumscribed by r 21.8(5) in relation to contempt of court proceedings*."
- The contempt proceedings in this case were held in public (so COPR 4.2 did not apply). Thus the court was concerned with the interpretation of 21.8(5), which restricts the court's ability to withhold the identity of a party or witness' identity to circumstances in which it considers non-disclosure necessary to secure the proper administration of justice and in order to protect the interest of that party or witness. Thus Poole J held at paragraph 38 that the new COPR 21.5 "*does not appear to allow the court to restrict the disclosure of the identity of the Defendant if necessary to secure the administration of justice and to protect the interest of P (here FP). I can envisage cases in which it might be considered that the only way effectively to protect the interest of P is to restrict the disclosure of the identity of another party – the defendant to committal proceedings. However, the new rules do not appear to allow the court to act on that basis*."

The defendant was named.

As for the contempt proceedings themselves, Poole J held (at paragraph 49) that:

> *As for the five alleged breaches set out above, I am satisfied that they were deliberate, the Defendant knew she was breaching clear court orders when she committed those breaches, and the breaches were serious. They were serious in that the Defendant's conduct was contumelious and they were serious in relation to the impact and the potential impact on FP. They involved a significant invasion of her privacy and they involved manipulation of a vulnerable person who is the subject of Court of Protection proceedings.*

Poole J found himself on sentencing in an invidious position because the defendant was a carer for her disabled husband and was reliant on benefits (thus not someone for whom it would be appropriate to fine), and she had "*almost dared the court to send her to prison because she believes it will bring attention to her bizarre views.*"

Poole J summed it up in this way at paragraph 59:

> *If she is imprisoned for her deliberate and repeated breaches of court orders designed to protect her daughter, the fact of the imprisonment may well cause distress to the very person the court has sought to protect. A sanction other than imprisonment risks sending a signal to the Defendant and to others that the court will tolerate deliberate breaches of its orders.*

The route through this was to hand down a sentence of imprisonment ('*the only sentence that is appropriate*'), of 28 days for each of the five admitted breaches, to run concurrently, but to suspend them for 12 months, on condition that the Defendant does not during those 12 months, conduct herself in any court proceedings in such a way as to be found in contempt of court.

Joint Practice Note: Cafcass and Official Solicitor – urgent out of hours applications in relation to medical treatment concerning children

Cafcass and the Official Solicitor have published a joint practice note dated January 2023 "*intended to assist the judiciary and legal representatives when dealing with urgent out of hours applications for orders in relation to medical treatment concerning children*." In particular, the Practice Note makes clear that "[i]*n medical treatment cases concerning children* […], *it is Cafcass and not the Official Solicitor who should be approached to provide representation for the child*."

It is important to note that this Practice Note relates to applications under the Children Act 1989 (for a specific issue order) or the inherent jurisdiction of the High Court. If the proceedings were brought under the Mental Capacity Act 2005 (as they could be in relation to a 16/17 year old lacking the relevant decision-making capacity), then it would be the Official Solicitor rather than Cafcass who should be approached.

Court of Protection statistics

The most recent statistics published by the Ministry of Justice covering July to September 2022 show that:

- There has been a 3% increase in applications relating to deprivation of liberty compared to the same quarter in 2021. However, there was a decrease by 36% in the orders made for deprivation of liberty over the same period from 988 to 637.
- There was however a decrease of 8% in applications made compared to the same period the year before. Of these applications, 39% related to applications for appointment of a property and affairs deputy.
- There was also a reduction in the number of orders made during the quarter when compared to the same period the year before. Of those, 41% related to orders by an existing deputy or registered attorney.

OPG simplified process for notification of death

Rather than having to send a death certificate, the OPG has now simplified its process and verifies deaths using the Post Office Life Event Verification system. The guidance states that the OPG needs to be notified following the death of:

- A donor of a registered Enduring or Lasting Power or Attorney
- An attorney acting under a registered Enduring or Lasting Power of Attorney
- A replacement attorney
- A deputy appointed by the Court of Protection
- Someone for whom the Court of Protection has appointed a deputy

- A High Court-appointed guardian or missing person

The process for so doing is kept as simple as possible:

- Notify the OPG of a death by email, telephone or letter
- Return the original LPA or EPA to us so that we can process any updates or cancellations
- The OPG will use the Life Event Verification system to verify the death and then write to the relevant person to acknowledge this
- The OPG will confidentially dispose of any cancelled LPA or EPA
- If a court appointed deputy or guardian passes away, the OPG will advise what action should be taken next. If a new deputy is needed, the OPG will let the relevant local authority know so they take appropriate action.

Be careful of applying criminal concepts in Court of Protection cases

In *A & Anor v B & Ors* [2022] EWHC 3089 (Fam), Knowles J considered how the family court should approach the issue of consent and the complainant's sexual history, and specifically the question of whether criminal conceptions of rape apply in family proceedings. Her analysis is equally applicable in the context of proceedings before the Court of Protection.

The case concerned two appeals each of which involves allegations of domestic abuse, specifically rape and sexual assault by one parent against another. The propositions on which Knowles J sought submissions in the case were as follows:

a. **Proposition 1:** Whether the family court should apply a consistent definition of (i) rape, (ii) sexual assault or (iii) consent, making clear the difference between consent and submission;

b. **Proposition 2:** Whether the failure to have a consistent approach to these issues was in breach of the Article 6, 8 and 14 rights of the appellant mothers;

c. **Proposition 3:** Whether the definitions of rape, sexual assault and consent used in the criminal justice system should be either a starting or finishing point for judges in the family court;

d. **Proposition 4:** What the approach of the family court should be to a complainant's sexual history when determining allegations of rape or sexual assault; and

e. **Proposition 5:** Whether, when determining allegations of rape and/or sexual assault, judges in the family court should give themselves a warning about rape myths. Generally, such myths concern themselves with the behaviour or experiences of a complainant.

Prior to considering each individual proposition, [Knowles J reviewed the role of the appellate court and concluded at paragraph 12 that she was not precluded from providing guidance as to the appropriate approach to be taken in the family court to managing evidential issues in such cases.

Legal Context

The propositions listed above were considered against the well-established rule that it is "*fundamentally wrong*" for the family court to be drawn into an analysis of factual evidence based upon criminal law principles and concepts as per McFarlane LJ (as he then was) in *Re R (Children) (Care Proceedings: Fact-finding Hearing)* [2018] EWCA Civ 198 ("*Re R*") at paragraph 82.

Knowles J considered Proposition 1 and 3 together and held at paragraph 23 that the correct starting point is that the family court must not import criminal definitions as an aid to fact-finding. Rather, she held, the focus of the family court is to determine how the parents of a child behaved towards each other so as to be able properly to assess risk and determine the welfare issues in each case. For the family courts to characterise or establish behaviour as meeting a particular definition runs the risk of the court becoming "*unnecessarily bogged down in legal technicality*" (see paragraph 29 of the decision of Cobb J in *F v M (Appeal: Finding of Fact)* [2019] EWHC 3177 (Fam)). Knowles J therefore rejected at paragraph 32 "*the need for the family court to apply consistent definitions of rape, sexual assault, and consent. I also hold that the definitions of rape, sexual assault, and consent used in the criminal justice system should have no place in the family court."*

Proposition 2 considered whether a failure to take a consistent approach was in breach of the Article 6, 8 and 14 rights of the appellant mothers Knowles J found (at paragraphs 33-43) that this proposition was not established.

Proposition 4 considered the approach to be taken to the complainant's sexual history. In considering this question Knowles J identified the family court's discretion to control evidence set out at FPR r.22.1 and the need to be mindful of the overriding objective at r.1.1. Knowles J stated that there are two steps to be taken. First, to consider the admissibility of the evidence in question considering fact, degree and proportionality (paragraph 48). Second, to undertake a balancing exercise in the case that a party objects to the admission of otherwise relevant evidence as held (paragraph 50).

In conclusion at paragraph 58, Knowles J described a procedural framework to be followed in such circumstances:

a. If a party wishes to adduce evidence about a complainant's sexual history with a third party, a written application should be made in advance for permission to do so, supported by a witness statement;

b. It is for the party making such an application to persuade the court of the relevance and necessity of such material to the specific factual issues which the court is required to determine.

c. Any such application will require the court's adjudication preferably at a case management hearing.

d. The court should apply the approach set out above;

e. If a party wishes to rely on evidence about sexual history between partners, they do not need to make a specific application to do so unless reliance is also placed on intimate images. In those circumstances, the party must issue an application in accordance with the guidance at paragraphs 77-78 of *Re M (Intimate Images*);

f. If a party objects to evidence of sexual history between parents/parties being filed, it should make

an application to the court in advance, supported by a witness statement explaining why this material is either irrelevant or should not be admitted;

g. Any such application will require the court's adjudication preferably at a case management hearing;

h. The court should apply the approach set out above.

Proposition 5 considered whether family courts warn themselves about rape myths, and commended the *Equal Treatment Bench Book July 2022 revision* and *Rape and Sexual Offences - Annex A: Tackling Rape Myths and Stereotypes | The Crown Prosecution Service* as assistive in helping to approach the issues of stereotyping and rape myths.

On the facts, one appeal was dismissed, and the other allowed.

THE WIDER CONTEXT

The draft Mental Health Bill scrutinised by Parliament

The Joint Committee on the Draft Mental Health Bill published its pre-legislative scrutiny report on the draft Bill on 19 January 2013. It is an extensive and detailed report, concluding thus:

> *During this inquiry we have heard concerns about how the reforms proposed in the draft Bill will play out in practice. We have heard again and again about the importance of proper implementation, resourcing, access to community alternatives to hospital and the need to take account of possible unintended consequences. These concerns should not take away from the broadly positive response to the draft Bill or the sense of urgency about introducing some of its reforms. Our recommendations are intended to strengthen the draft Bill, to address some of those unintended consequences and to ensure transparency and accountability about implementation. If the Government is willing to strengthen the draft Bill in the ways we have suggested it can make an important and necessary contribution to addressing the problems that the Independent Review was established to consider.*

Alex has done a walkthrough of the conclusions and recommendations available here.

Autism and learning disability: seeking to stem the tide of unnecessary hospital admissions

On 25 January 2023 NHS England announced a new policy, the snappily named Dynamic Support Register and Care (Education) and Treatment Review[6], aimed at preventing unnecessary hospital admissions of autistic people or those with a learning disability, both children and adults. The new guidance is aimed at exploring alternatives to hospital admission for people facing care crises and will be implemented on 1 May 2023. It is part of the NHS Long Term Plan commitment to reduce autistic people or those with learning disability in mental health inpatient services, avoid inappropriate admissions and develop what are referred to as "responsive, person-centred services in the community".

The report comes as the latest available statistics published in December 2022 show 2,030 autistic people and/or those with a learning disability were hospital inpatients at the end of the month, an increase from 2,005 the month before : over 50% of that number had a total length of stay over 2 years.

The Dynamic Support Register and Care (Education) and Treatment Review aims to use DSRs and C(E)TRs as means of helping avoid inpatient admissions. Any autistic person, or person with a learning disability at risk of hospital admission must be included on a DSR; inclusion on a DSR is then a trigger for a C(E)TR to take place. A review is contingent on patient consent: where informed consent is not available, the guidance specifically points readers to the MCA and the existing statutory guidance. Accountability for DSRs rests with ICBs – albeit that they can delegate this responsibility to partner organisations such as local authorities or relevant NHS Trusts. Nonetheless, each ICB should have a named lead person with responsibility for the maintenance of the DSR – usually its chief nurse or

[6] Care and Treatment Reviews apply to adults; Care, Education and Treatment Reviews include an educational element and apply only to children and young people. The term Care (Education) and Treatment Reviews (C(E)TR) is used when both approaches are being referred to.

executive director for commissioning.

At a minimum, DSRs must (among other things) identify young autistic people and adults with or those with a learning disability awho are at immediate risk of admission to a mental health hospital and ensure a clear link between their DSR and C(E)TR so that those at risk are offered a community C(E)TR in line with the policy. The policy also identifies the minimum data which must be recorded.

Supported decision-making toolkit

In preparation for the recent National Mental Capacity Forum webinar "Speech and Language Therapy and the Second Principle of the MCA," the Royal College of Speech & Language Therapists Mental Capacity Clinical Excellence Network developed a very useful three page toolkit. The toolkit is available here, along with a recording of the webinar, the slides used (and all the previous webinars).

Formal support needs of disabled adult victim survivors of sexual violence

A detailed and challenging report commissioned by the Ministry of Justice (but independently authored[7]) has been published seeking to address the following questions:

Q1: What do disabled sexual violence victim-survivors want from victim support services?

Q2: What do they consider to be effective in helping them (a) engage with the criminal justice process and (b) cope and recover from the crime?

Q3: How can sexual violence victim support services become more inclusive?

Those whom the researchers questioned included not just those with physical but also cognitive impairments, and Chapter 5 of the Report makes very helpful reading in terms of trying actually to redress the problems identified in the earlier chapters.

Confidentiality and common sense

The problems of inadequate social care or mental health support in the community will be sadly familiar to readers. The exclusion of family is also a common concern, including where the view is taken that the individual has capacity to refuse to permit family to be involved. Whilst we do not know the precise details, it would appear that this issue may have arisen in the case of Laura Winham.

In one ongoing case before the Court of Protection, proceedings were issued by P's mother seeking declarations as to P's capacity to share information with her mother and make decisions about her care, including to refuse support. On investigation by the court and an independent psychiatrist, the decision was taken that P needed to be detained under the MHA 1983 to receive in-patient treatment. Family members concerned about the welfare of someone living with severe mental health problems in the community may be able to ensure that scrutiny of decisions about their capacity and care arrangements takes place by bringing cases before the court, even if they have limited direct

[7] By Dr Andrea Hollomotz, University of Leeds, Dr Leah Burch, Liverpool Hope University and University of Leeds; and Ruth Bashall, Stay Safe East.

involvement.

And whilst Ms Winham's case does not on the face of press reports appear to be one of suicide, this is also our opportunity to remind practitioners of the DHSC-led consensus statement for information sharing and suicide prevention and the accompanying guidance from the Zero Suicide Alliance, both seeking to reinforce the message that (crudely) the duty confidentiality is there to help, not harm, the interests of those to whom it may be owed.

Book review

Looking after Miss Alexander: Care, Mental Capacity, and the Court of Protection in Mid-Twentieth-Century England (Janet Weston, McGill-Queens University Press, 2023, and free ebook available here)

The best books encompass worlds within their pages. This book, by Dr Janet Weston, Assistant Professor at the London School of Hygiene and Tropical Medicine, encompasses both lives and worlds within its 193 pages. Taking a detailed, sensitive, and generous approach to what we know of the life of Miss Beatrice Alexander, one of roughly 30,000 people whose affairs were managed by the Court of Protection in mid 20th century England and Wales, Weston examines how and why a 59 year old woman with no prior history of mental disorder was declared incapable, and how her life was changed in consequence – and remained changed for the next thirty years.

Weston uses Miss Alexander's story to illustrate the wider complexities of mental capacity law as it stood at the time, and to reflect upon what her story tells us about debates in relation to mental capacity now. A real strength of the book is the way in which Weston openly acknowledges both the gaps in the historical record and the leaps that she has had to make to recreate the decision-making in play, and also the dangerous temptation to project present-day assumptions upon people in the past. Whilst I do not want to give away too much of Miss Alexander's story – as a particular delight of the book is the way in which it is unfolded, in often surprising ways – particularly interesting to me as a present-day Court of Protection lawyer was the way in which her case encapsulated one of the most difficult dilemmas faced in practice: what to do where a person appears (potentially) to be under the influence of others who (seemingly) do not necessarily have their interests at heart?

Some might think that a book about a court which no longer exists (the Court of Protection described in the book is not the same as that established under the Mental Capacity Act 2005) can – at best – be of historical interest. That is emphatically not the case here, and on almost all of its pages can be found the working out of challenges that remain just as live today as they did in 1939, when Miss Alexander came under the aegis of the Court of Protection. Whilst Weston makes clear her own – changing – perspectives on how those challenges were met in Miss Alexander's case, she provides ample evidence and intellectual space for other views to be taken, and, in consequence, this splendid book could just as easily serve as a focus for a practice discussion by contemporary social workers as it can for anyone wanting a fascinating trip into the pre-history of the Mental Capacity Act 2005.

The icing on the cake is that, as this book stems from a Wellcome-funded project, Managing mental capacity: a history, it is available for free as an ebook. The project's website also includes archival material and two fascinating short films, one about Miss Alexander, and another about Miss Jean Carr,

another person determined incapable of managing her own affairs.

To hear Janet Weston and I talking about the book and the underlying project, see here.

[Full disclosure, Janet Weston and I were in correspondence in the course of writing her book about some modern day aspects of mental capacity law]

Alex Ruck Keene

Systemically failing the human rights of children: the President of the Family Division shouts as loudly as he can

Re X (Secure Accommodation: Lack of Provision) [2022] EWHC 129 (Fam) (Sir Andrew MacFarlane)

Article 5 – deprivation of liberty – children and young persons

Summary

It is exceptionally unusual for a judge, let alone a very senior judge, actively to invite a claim to be brought against the State for systemic human rights breaches, but that could be said to be the effect of the judgment of the President of the Family Division, Sir Andrew McFarlane, in the latest of the grim series of cases arising out of the lack of suitable secure provision for children. In *Re X (Secure Accommodation: Lack of Provision)* [2022] EWHC 129 (Fam), Sir Andrew gave a judgment designed to "*shout as loud as* [the court] *can*" about the shortfall in provision "*in the hope that those in Parliament, Government and the wider media will take the issue up*" (paragraph 1).

The facts of the individual case make grim reading, Sir Andrew deliberately giving the history in some detail in order to personalise (in appropriately anonymised form) the plight of the 15 year old girl in question. What is almost worse is that, as he then continued:

> *21. Those unfamiliar with the circumstance of children like X may be shocked by the extreme behaviour that is described. The truly shocking aspect to the eyes of judges sitting in the Family Court is that X's circumstances are not that unusual. There is a cohort of young people who are in extreme crisis to the same degree as X.*

Sir Andrew then went on to make clear that:

> *22. Although the point has not been argued before this court, it must be the case that the State has duties under the European Convention of Human Rights, Articles 2 and 3, to meet the needs of these children and to protect them from harm. The positive obligation that arises for public authorities under Arts 2 and 3 in cases such as this was explained by Lord Stephens in the Supreme Court in Re T [2021] UKSC 35 at paragraphs 175 and 176. The discharge of this positive obligation is currently being left to the court and to individual local authorities, yet neither of these agencies has access to the necessary resources to meet this obligation, nor, in the case of the court, the knowledge or real expertise to do so. One consequence of the lack of sufficient secure placements is that local authorities turn to the High Court to authorise a DOLS placement in other accommodation, often at very significant additional cost. Frequently, as the reported judgments*

> *describe, and as X's circumstances demonstrate, the accommodation that is authorised via DOLS is not appropriate to meet the young person's needs and is simply chosen as being the 'least worse', and often the only, option that is available.* (emphasis added)

To give a sense of the scale of the issue, Sir Andrew also highlighted the work of the "national DoL court":

> *Since mid-2022 all new DOLS applications have been issued in, and mainly heard in, London. The statistics are still being collated, but it is likely that the annual total number of DOLS applications may exceed 1,000. Whilst some of these cases may be renewed applications with respect to the same child, the number of cases, given the extremity of the behaviour of each young person and their need for a secure placement, is truly shocking. Many of these applications relate to children, like X, who should be in secure accommodation. The data suggesting that it is regularly the case that there will be, on any given day, some 60 or 70 children for whom a formal secure accommodation order has been made under CA 1989, s 25, yet no registered secure placement can be found, is therefore likely to understate the true position in circumstances where, instead of applying for a secure order (because of the lack of secure placements) local authorities simply by-pass the s 25 procedure and apply directly to the High Court for DOLS authorisation.*

He also highlighted the findings of the previous Children's Commissioner, Anne Longfield, in her reports in 2019 and 2020 "'Who are they? Where are they?,'' in which she drew attention to 'invisible' placements outside the statutory scheme. Sir Andrew made clear that:

> *25. The insight gained by the Children's Commissioner is important. Her description of the situation is on all fours with the experience of the judiciary hearing these cases, with the court being obliged to sanction a range of less than satisfactory regimes because there is no available provision for placement in a statutorily approved unit. The report demonstrates that the number of children being placed in 'invisible' placements, outside the statutory scheme, is increasing and may roughly equal those who can be accommodated in a conventional secure home. On the basis of these figures, the current situation, where the scheme provided by the State is failing to meet the needs of half of the young people who need this level of State protection, is deteriorating so that soon, if not already, more than half of the children will be 'invisible' and under the radar.*

At a number of points in the judgment, Sir Andrew sought to spell out things which might be familiar with the system but to outsiders (and, indeed, frankly to everyone) are or should seem very odd indeed. A particularly odd point is that the making of an order under the inherent jurisdiction authorising placement in secure accommodation is not immediately followed by such placement. After all, he noted, if a criminal court passes a criminal sentence or makes a hospital order, the person in question goes straight to prison or hospital:

> *27.* [...] *There is no question of the authorities then having to engage upon a potentially lengthy process to find a placement because there are insufficient prison or hospital places. Neither is there a need for the criminal court to engage with the relevant authorities in establishing and holding on to substitute care arrangements which, because they fall short of 'secure accommodation' are, by definition, inadequate to meet the young person's needs. If there were no prison cells available to house those sent to prison there would be a public outcry; why should the lack of provision of secure units when a court has made a secure accommodation order be any less scandalous.*

Sir Andrew then read into the judgment the rollcall of previous judgments emphasising the problem dating as far back as 2017, concluding at paragraph 42 that:

> *Despite the regular flow of judgments of this nature over recent years, it is, at least from the perspective of the experienced senior judges who regularly deal with these cases, a matter of genuine surprise and real dismay that the issue has, seemingly, not been taken up in any meaningful way in Parliament, in Government or in wider public debate.*

The one small ray of light that might be seen within an otherwise almost entirely bleak situation came from the written submissions of the Secretary of State[8] which, as Sir Andrew MacFarlane observed at paragraph 64, record:

> *it would seem for the first time, an acceptance by the Secretary of State for Education that, nationally, there are significant problems with the availability of sufficient placements and that 'this requires action by His Majesty's Government collectively to support local authorities to meet their statutory needs'. It is to be hoped that this marked change from the approach trailed in the Department's letter of 11 November* ["*to the effect that it was not its problem and was the responsibility of individual local authorities,* [which] *displayed a level of complacency bordering on cynicism*[9]"] *does indeed result in action and that the need for the court to hand down judgments of this nature will be a thing of the past."*

Comment

The fact that the courts are consistently having to "*operate outside the law as it has been made by Parliament*" (judgment, paragraph 63) is hugely problematic – especially in circumstances where "*Parliament has seemingly not even discussed this parlous and most worrying situation*." In part, and as the Nuffield Family Justice Observatory identified in its February 2022 report "What do we know about children and young people deprived of their liberty in England and Wales? An evidence review," this reflects the fact that the size of the secure estate has declined over the past two decades, with the closure of 16 secure children's homes since 2002. However, the NFJO continues:

> *There is some evidence that there is a cohort of children with particularly complex needs who are seen as too 'challenging' to be suitable for a secure children's home. This includes children with very complex mental health needs but who do not meet criteria for detention under the Mental Health Act.*

The consequence is that there has been a significant increase in the use of the inherent jurisdiction of the High Court to deprive children of their liberty in alternative placements. In 2020/21, 579 applications were made under the inherent jurisdiction in England – a 462% increase from 2017/18). In 2020/21, for the first time, applications made under the inherent jurisdiction outnumbered applications under s.25 Children Act 1989.

It is very important to emphasise that the situation being addressed by the President is not merely the

[8] Who initially declined to attend on the basis that this would not be an effective use of public funds, an observation which did not go down well with the President.
[9] Judgment, paragraph 55.

equivalent of the post-*Cheshire West* situation in relation to adults with impaired decision-making capacity. In that 2014 case, the Supreme Court clarified that circumstances which had previously appeared to be entirely routine were in fact legally problematic, leading to a dramatic escalation in applications to seek authority. There may be some cases in which the 2019 decision of the Supreme Court in *Re D* (confirming that 16-17 year olds are deprived of their liberty if they cannot or do not consent to confinement) has led to a recognition that authority is required in previously unanticipated circumstances.[10] However, situations such as that of X are ones which would always have required authorisation – and, indeed, are ones which reflect the end point of an escalating chain of events which will often reflect upon the availability of services prior to that point. As the NFJO identifies:

> *Although there is a lack of research about children's experiences prior to entering secure care, a handful of studies have highlighted a lack of early intervention and support in the community for this group. We know that children in welfare placements tend to enter care late, and once in care, experience the repeated breakdown of arrangements made for their care in the community. There is a clear lack of suitable placements, including specialist foster care and residential provision, that can support children with complex needs both before and after a secure placement.*

In the circumstances, it is even more troubling that, as Sir Andrew MacFarlane identifies, even the accommodation that can be patched together by local authorities and the courts (whether as a substitute for secure accommodation or for a child who is seen as requiring something other than secure accommodation) is so often not appropriate to meet the needs of the children in question. This, in turns, raises very starkly the question of whether the State is discharging its obligations to those children under the ECHR, not just under Articles 2 and 3, but also 5[11] and 8.

Differing approaches to openness

The issue in *R (Maher) v First Tier Tribunal (Mental Health) & Ors* [2023] EWHC 34 (Admin) was whether the First Tier Tribunal (Mental Health) had acted unlawfully with respect to the mother of the victim of a restricted patient who had been granted a conditional discharge. The court held that the FTT should have given the mother a summary of its reasons for the conditional discharge being granted, but had not been required to allow her to make a victim impact statement, nor to permit her to request a review of the conditional discharge decision.

In the course of her judgment, Stacey J considered the "*progress towards openness and transparency*" in the Court of Protection, among other tribunals, as a reason for imposing an obligation on the FTT to share the reasons for its decision, noting that the FTT was "*something of an outlier*" in terms of transparency. The judge observed that "[s]*uspicion and mistrust thrive when accurate information is not made available to the public about matters which affect them*."

Public law duties and waiting times

R (AA) a child, acting by her father and litigation friend) and others) v National Health Service

[10] Leading also to applications for orders from the Court of Protection, as to which, see *Re KL* [2022] EWCOP 24.
[11] In relation to Article 5, a consistent feature of the judgments is that – to my mind problematically – they do not identify what limb of Article 5 is being relied upon. Whether it be under Article 5(1)(d) or Article 5(1)(e), however, the lawfulness of detention is contingent upon the person in question actually receiving some form of appropriate care.

Commissioning Board [2023] EWHC 43 (Admin), Chamberlain J rejected a challenge brought by both child and adult claimants who challenged the lawfulness of extremely long waiting times for gender identity development (GID) services in the NHS.

NHS England (NHSE) has been responsible for commissioning certain services for rare conditions; since 2012, this has included the gender identity development (GID) services for children, adolescents and adults. Demand for these services increased substantially between 2012 and 2017, and supply did not keep up. There are now extremely long wait times for those seeking to access appointments for GID services; the child claimants AA and AK had respectively been waiting 18 months and three years for a first appointment at the Tavistock and Portman NHS Foundation Trust (which is, at present the sole commissioned GID service for children in England). The adult claimants had been waiting two and four years respectively for a first appointment.

NHSE announced a plan in July 2022 to expand children's GID services available nationally by creating a number of regional centres. The judgment notes that Tavistock had struggled to recruit and retain staff even with funding available, and on a review of the service, it was felt that the model of a range of regional centres with links to other services in their areas was more appropriate than a sole provider of care. It is projected that seven or eight such centres (run in partnership with tertiary children's hospitals in the region) will be operational by 2024; these will be directly commissioned and funded by NHSE. There are already seven specialist centres which provide adult gender dysphoria clinics; this followed a process which had been underway since 2015 to address long waiting times in the adult service (which included establishing training programmes for physicians and surgeons able to offer relevant services).

The evidence of NHSE was that the waiting times for patients to see GID services was considerably longer than for other services; by May 2022, a young person waited on average 152 weeks for a first appointment at Tavistock.

There were five grounds of challenge, broadly on the basis that NHSE had breached statutory and regulatory duties to ensure that 92% of patients were seen 18 weeks, and that NHSE acted unreasonably by operating with waiting times so long that children could not access these services prior to puberty. Challenges were also raised under ss.29 and 149 Equality Act 2010, on the basis that the delays in accessing services led to discrimination against people on the basis of the protected characteristic of gender reassignment.

Statutory duties

The claimants argued that regulation 45(3) of the NHS Commissioning Board and Clinical Commissioning Groups (Responsibilities and Standing Rules) Regulations 2012 "*impose*[d] *a 'hard-edged' legal duty to ensure that treatment commences for at least 92% of patients within 18 weeks of referral*," and that this was a "*binding legal obligation*.'" They argued that Tavistock had been in breach of that duty for years, and NHSE had not enforced compliance. It was accepted that NHSE was failing to meet this 18 week target across services offered across the NHS, not just those in relation to children and adult GID services. They argued that even if it is properly characterised as a "target duty", NHSE had not shown that it is doing all it reasonably can to meet the target.

Chamberlain J accepted the submissions of the defendant that regulation 45 set a 'target duty' which was not owed to a specific individual. 'The obligation is to make arrangements to secure that 92% of the cohort are treated within 18 weeks, not to secure that outcome simpliciter. NHSE is required "*to aim to make the prescribed provision" and the legislative language "does not regard failure to achieve it without more as a breach*'" (paragraph 61). He found that NHSE was "*doing all it can reasonably be expected to do to reduce waiting times, which are the result not of under-funding, but of the many other factors*" relating to the challenges of recruiting and keeping staff, and a changing legal landscape as a result of multiple challenges over the last few years.

Chamberlain J also considered what characteristics might make a duty a 'target duty' rather than one owed to an individual:

a. "*a duty may be framed in terms so open-textured that the legislator must have intended to confer a broad discretion on the public authority, subject only to the constraints of rationality*" (paragraph 87);

b. "*a duty may, on its proper construction, require the person who owes it to act with a view to achieving a particular result, rather than simply to achieve that result*" (paragraph 88);

c. "*a duty may be owed to the population as a whole rather than to any individual*" (paragraph 89).

In considering whether Regulation 45 was a 'target duty,' the court noted that "*the duty imposed by reg. 45 of the 2012 Regulations is a duty to make arrangements to secure that 92% of the cohort commence treatment within 18 weeks. There are precise definitions explaining who is in the cohort and when treatment will be regarded as having commenced. The standard is therefore hard-edged, rather than open-textured. Whether it is being met will be capable of being ascertained precisely*" (paragraph 91). However, *"the duty is not to achieve the standard, but rather to "make arrangements to ensure" that the standard is met*." Chamberlain J further noted that the standard "certainly" applied to the cohort, not to individuals, as "[i]*t would be possible to comply with it even though particular individuals have been waiting more than 18 weeks for treatment. Indeed, because the cohort is comprised of all patients referred to the services under NHSE's responsibility, it would be possible for the standard to be met even if no child or adult referred for gender identity services were treated within 18 weeks*." The court finally noted that the legislative scheme allowed the Secretary of State to give directions to NHSE how to exercise its functions "*and bespoke remedies for individuals whose treatment does not commence within 18 weeks (regs 47-49 of the Regulations). Both these features suggest that the legislator did not intend the duty imposed by reg. 45 to be an absolute duty to achieve the standard, enforceable by individuals*" (paragraph 94).

Chamberlain J further concluded that "*the clearest pointer to the content of the duty imposed by reg. 45 comes from considering the effect of the relief sought by the claimants*." The claimants conceded that a mandatory order to enforce the duty would be inappropriate, and the court considered that such an order might not assist the claimants,' as "*NHSE could comply with the standard set by reg. 45 without treating any gender identity patient within 18 weeks. More importantly, if the court ordered NHSE to comply with the standard set by reg 45 by a particular time, that would impose a legal obligation on NHSE to divert resources from elsewhere. Where would these resources come from? One possibility is that they could be taken away from the ICBs responsible for more mainstream services, but they too are subject to the same*

18-week standard and they too are failing to meet it. More generally, mandatory relief would be inappropriate because it would inevitably result in a diversion of resources from one health service purpose to another. The court is not equipped, in terms of the information available to it or in terms of expertise, to form a judgment about whether such a diversion would be optimal" (paragraph 95). The court also did not find that declaratory relief would be any better, as "*the practical result might be to divert resources from other important health service purposes in circumstances where the court could not gauge whether or not such a diversion would be beneficial overall*" (paragraph 97).

Chamberlain J concluded "*that the duty in reg. 45, on its proper construction, is a duty to make arrangements with a view to ensuring that the 18-week standard is met. As Sedley J put it in Rixon, the regulation does not regard failure to achieve that standard, without more, as a breach*" (paragraph 99). He found that NHSE was taking "*concrete steps…with a view to reducing waiting times for both children and young people's and adults' services*" (paragraph 101) and gave "*a cogent explanation of the reasons why it is expected that these steps will be successful in reducing waiting time, albeit not immediately*." He found it "*impossible to say that NHSE is currently in breach of its duty*" (paragraph 102).

Chamberlain J similarly found no irrationality was occasioned by long waiting times which meant that GID services started after the onset of puberty. The court noted that "*No-one suggests that a consultation at Tavistock is useless after puberty has begun. It is true that, for some patients, its potential utility may decrease as the waiting time increases, but this is true of a great number of NHS services*" (paragraph 109). He further found that where arrangements were underway to reduce waiting times, there was no breach to the target duties imposed by s.3B NHS Act 2006 or s.2 2009 Act (the duty to have regard to the NHS Constitution).

Equality and discrimination grounds

The court considered challenges on the basis of both direct and indirect discrimination under the Equality Act 2010, as well as a challenge under the Public Sector Equality Duty. The court accepted the submissions of the defendant that "*Not every child referred to the children's GID service will have the protected characteristic of gender reassignment…Some of these may present with symptoms of gender-related distress, for which they may in due course receive psychological help. They may not, at the time of referral, have taken any settled decision to undergo any part of a process of changing any attribute of sex (to use the language of the 2010 Act). This is particularly likely to be true in the case of very young children*" (paragraph 132). Children and adults who have taken a "*settled decision to adopt some aspect of the identity of the other gender*" may have a protected status under the Equality Act, but this determination would depend on the facts of the particular case.

It was accepted that the claimants here had such a status. However, Chamberlain J did not conclude that their protected status had been the cause of their experiencing longer waiting times than other specialised NHS services. The court found that waiting times had been caused by a number of factors, including the marked increase in demand for such services, recent controversies surrounding GID treatment and the difficulties in recruiting staff. Chamberlain J found no evidence that other specialist services had this combination of difficulties and "*comparing those referred to GID services with those referred to other specialist services will not be comparing like with like*" (paragraph 145). He did not find that the claimants had established less favourable treatment as a result of their protected

characteristic. Chamberlain J similarly found no breach of NHSE's Public Sector Equality Duties, noting that not all children awaiting an appointment with the GID service would have a protected characteristic (though many will). NHSE had carried out four Equality Impact Assessments, including one shortly prior to this case, and Chamberlain J found that "*no fair reader of that report could conclude that NHSE had failed to inform itself of the effects of long waiting times on those with the protected characteristic of gender reassignment*" (paragraph 170) and that NHSE had complied with the substantive duty.

Comment

The judgment is of some interest in relation to its findings that the possibility or impossibility of relief may define the scope of a public law duty. The broader context of the case set out that GID services were just some of the many services currently in breach of the 18-week target, though they were perhaps one of the most egregious examples of severe waiting times. The court considered carefully that either mandatory or declaratory relief would have the end result of creating a legal obligation to divert resources away from other services, either within the NHSE specialised commissioning framework or from ICBs (with a very high prospect that those other services were also in breach of the 18-week target). The court considered that the impossibility of it making such a judgment about the allocation of resources was germane to the scope of the duty imposed by the statutory framework, an interesting finding which may have broader implications to public law challenges at times of great scarcity. The Good Law Project has announced its intention to appeal this decision, so there may be further discussion of this issue to come.

Entirely separately, we should note that David Lock KC, who represented the claimants, has recently retired from the Bar. We wish him well and happy slow cycling.

The paramountcy of wishes and feelings – the Isle of Man takes on mental capacity

Reminding us always that it is very helpful to look around outside England & Wales, the Capacity Bill 2022 completed its legislative passage in the Isle of Man shortly before Christmas. It awaits Royal Assent, and, if it receives it, should be coming into effect in the spring of 2023.

As with legislation in other surrounding islands, the legislation draws very heavily on the MCA 2005, but differs in some interesting ways. Particular points which leapt off the page to this capacity enthusiast were

- That the 'unwise decisions' principle is subtly modified in s.3(5) of the Capacity Bill to provide that "[a] *person is not to be treated as unable to make a decision merely because that person makes or may make an unwise*" (emphasis added). It still does not mean, we stress, that the fact that the person may make an unwise decision is to be ignored – it should be a trigger to consider capacity.
- That the 'retention' limb of the capacity test (in s.5 of the Capacity Bill) includes express reference to the requirement to be able to retain information for an appropriate period, which includes whether it is "*apt for the purpose for which it is given having regard to whether that purpose is for a single event or state of affairs or a continuing event or state of affairs*."
- That the relevant Department has an express power to make regulations as to the steps to be taken to assist a person to make a decision for themselves

- The best interests tests includes express requirements (in s.6 of the Capacity Bill):
  - To consider whether it is in the person's best interests to postpone making a determination if it is likely that the person will have capacity in the future in relation to the matter;
  - That, where ascertainable, the person's wishes, feelings, beliefs and values (and the other matters contained in, in English law, s.4(6) MCA 2005) are "paramount" in determining what is in the person's best interests.
- That, as with other legislation (for instance in Jersey), the term 'deputy' is not used, instead 'delegate.'
- That there is no provision for deprivation of liberty or advocates, but we understand that this is because these are going to be considered as part of Phase 2.

Council of Europe recommendation on equitable access to medicinal products and medical equipment in a situation of shortage

The Committee of Ministers of the Council of Europe adopted on 1 February 2023 a Recommendation (Recommendation CM/Rec(2023)1) to promote, in the 46 Council of Europe member states (including, for the avoidance of any doubt, the United Kingdom), equitable access to medicinal products and medical equipment in a situation of shortage and to safeguard the fundamental rights of individuals who need them for serious or life-threatening health conditions.

Prepared by the Steering Committee for Human Rights in the fields of Biomedicine and Health in response to the Covid-19 pandemic and to the shortage of medicinal products and medical equipment engendered by the health crisis, the Recommendation sets out both substantive and procedural principles. Of particular note given the fact that no national triage guidelines have ever been promulgated in England & Wales are Articles 5, 6 and 7:

> *Article 5 – Attention to systematically disadvantaged individuals in relation to health*
> *Specific attention should be paid to individuals and groups who are systematically disadvantaged in relation to health, including as a result of economic and social conditions, legal status, disability, chronic disease or age.*
>
> *Article 6 – Prioritisation based on medical criteria*
>
> *1. Decisions on access to medicinal products and medical equipment should be based on an individual medical assessment, taking into account the following elements:*
> *- the severity of the health condition of the individual concerned and the healthcare needs to address it;*
> *- the expected effectiveness of the medicinal product or medical equipment;*
> *- the possible therapeutic alternatives;*
> *- the consequences of the lack of access to the medicinal product or medical equipment for the health of the individual concerned.*
>
> *2. When there is a need for urgent healthcare, priority should be given to minimising the risk of mortality and, subsequently, morbidity.*

Article 7 – Appropriate support and removal of barriers

> *Barriers to accessing medicinal products and medical equipment should be removed and appropriate support should be given to those individuals or groups who may be disadvantaged or exposed to a higher risk of harm to their health.*

The recommendation also recommends ensuring that there is a system in place to prevent and mitigate situations of shortage and to better prepare for such shortages. The Recommendation applies to access to medicinal products and medical equipment certified through an appropriate regulatory process provided for by law, which are needed for patients with serious or life-threatening health conditions. As the Committee of Ministers points out, the principle of equitable access to health care remains valid during a situation of shortage of medicinal products and medical equipment, both in an emergency and during routine clinical practice, whatever the cause of the shortage.

The reverberating clang of the prison gates

AG of Trinidad and Tobago v JM [2022] UKPC 54, a case determined by the Privy Council, on appeal from the Court of Appeal in Trinidad and Tobago, concerned a 19-year-old with Prader-Willi Syndrome who had suffered appalling physical and sexual abuse and ill-treatment over a 5-year period in a young offenders institution and psychiatric hospital. He appealed (through his mother) for the restoration of damages that had been awarded at first instance but reduced on appeal.

Although JM had not been arbitrarily detained, his right to security of the person and protection of the law had been breached, contrary to the Trinidad and Tobago Constitution. This was because he had suffered physical or serious psychological harm by reason of the conduct of the State. Importantly, and contrary to the view of the Court of Appeal, it was held that vindicatory damages did not require deliberate misconduct or malice by the State and, on the exceptional facts, were appropriate in this case. Accordingly, the first instance award of $921,200 (Trinidad and Tobago dollars) compensatory damages and $1,000,000 vindicatory damages was restored. The Privy Council also rejected the submission that there should be a tapering down over time of the compensatory award by analogy with the approach taken to per diem awards in cases of false imprisonment (see *Thompson v Comr of Police of the Metropolis* [1998] QB 498). However, Lord Burrows for the Privy Council found that:

> *the two situations are not analogous. No doubt in false imprisonment cases "the clang of the prison gates" can be expected to produce an initial shock to the system that may abate over time. But there is no direct parallel on the facts of this case and the trial judge was entitled to decide that the same per diem rate (of $450 at St Michael's and $700 at St Ann's) was appropriate throughout the time spent in each institution.*

It is depressingly easy to think of many situations in England & Wales where the same logic would apply, and it will be interesting to see whether any brave advocate seeks to argue for a modification of the rule relating to false imprisonment cases in situations akin to that JM.

Research corner

Challenges not just to the application, but the very legitimacy, of the concept of mental capacity over the past 10 years have been spearheaded by the Committee on the Rights of Persons with Disabilities, the treaty body for the UN Convention on the Rights of Persons with Disabilities (CRPD). It is often asserted that this challenge, and the associated challenge to mechanisms to respond to incapacity, have produced a 'paradigm shift' (as an admittedly unscientific data point, a search of 'paradigm shift' AND 'Convention on the Rights of Persons with Disabilities' on Google Scholar produces almost 5,000 results). However, in practice, the challenge has so far made little headway, with courts and legislatures around the world holding to models based on a functional model of mental capacity.

In an article Alex has co-written in the Medical Law Review (with Dr Nuala Kane, Dr Scott Kim and Dr Gareth Owen) as part of the Mental Health & Justice project, they examine why the challenge to the concept of mental capacity has such limited traction in the legal policy arena. They also examine whether the challenge should have greater traction, identifying four critiques of it. Driven by a desire to move forward, rather than endlessly circle around the campfire of hot but often unilluminating argument, they then identify a subtle, but important (and constructive) shift in the position of the Committee towards capacity.

The paper then develops an argument that the true goal, compatible with the CRPD, is the satisfactory determination of whether a person has or lacks mental capacity to make or take a relevant decision. Finally, we outline at the end what we think the true paradigm shift has been (but we won't spoil the surprise here).

If you want to hear Alex talking about the paper, see here.

The Medical Law Review paper accompanies research-based guidance in relation to capacity assessments available here.

SCOTLAND

Supreme Court dismisses appeal against assessment for services

The case of *McCue (as guardian for Andrew McCue) v Glasgow City Council*, on which we have reported previously, was appealed to the Supreme Court by Andrew McCue's guardian. We reported on the case at first instance in the February 2020 Report and upon appeal to the Outer House of the Court of Session in the September 2020 Report. The appeal to the Supreme Court was heard on 18th October 2022. Judgment was given on 11th January 2023, [2023] UKSC 1.

At first instance the court was asked to review the refusal by Glasgow City Council to take into account, in calculating charges to be made, of the full amount of the "disability related expenditure" of Andrew McCue, who has Down's Syndrome and lives with his parents. His mother, Terri McCue, is his carer and guardian. She brought the petition as her son's guardian.

Mr McCue was entitled to community care services from the Council in terms of section 12A of the Social Work (Scotland) Act 1968 and section 5 of the Social Care (Self-Directed Support) (Scotland) Act 2013. The question in the case was whether certain items of regular expenditure incurred by Mr McCue should be taken into account as deductions in calculating his income, in determining whether and to what extent he should pay charges. At first instance, Lady Wolffe concluded that the petitioner had an available alternative remedy in the form of a complaint or application to the Ombudsman. She accordingly sustained the Council's plea of no jurisdiction. On that point, Lady Wolffe was overruled by the Inner House on appeal. However, Lady Wolffe had also given reasons why she would in any event have dismissed the appellant's claim on the merits. She held that the concession by Mr McCue that he did not challenge the appropriateness and sufficiency of the Council support plan undermined his case on the merits. The Inner House dismissed Mr McCue's appeal on the merits.

The Supreme Court dismissed the appeal and held that Mr McCue's claim failed, though not for the same reasons as the Inner House.

On appeal, the appellant continued to base his case on section 15 and section 20 (read with section 21) of the Equality Act 2010. The principal question under section 15 was whether the Council had treated Mr McCue "unfavourably" because of something arising in consequence of his disability (section 15(1)(a)). Under section 20, the issue was whether the Council had failed to make reasonable adjustments when applying its policy to Mr McCue's circumstances.

The Council's policy was based on a policy document agreed by the Convention of Scottish Local Authorities with a view to achieving uniformity of treatment across Scotland. On unfavourable treatment, the Supreme Court held that by reason of his disability Mr McCue was treated more favourably, rather than less favourably. In accordance with the policy, costs that he incurred by reason of his disability were allowed in the calculation of whether, and if so how much, he should contribute towards the cost of his community care services. Where in the course of discussions he had demonstrated that some further costs were attributable to his disability in terms of the policy, they were allowed in addition to the original deductions.

By similar reasoning, the appeal concentrated on the way in which the Council, in following its policy,

had assessed what it would treat as Mr McCue's disability related expenditure when calculating his available means and, in consequence, the charge that he should pay. Neither the Council's policy document nor the COSLA guidance state what substantive policy the Council would apply when deciding what costs it would treat as disability related expenditure for the purpose of applying section 87 of the Social Work (Scotland) Act 1968, under which the test was whether Mr McCue satisfied the Council "that his means are insufficient for it to be reasonably practicable for him to pay for the service the amount of which he would otherwise be obliged to pay for it". The court accepted that the Council was applying a practice according to which items are rejected if they do not relate to disability, or if – while relating to disability – a person receives a benefit to meet the cost in question, or if they represent discretionary spending and are not necessary to meet the disabled person's needs. The question accordingly was whether the Council's practice put Mr McCue, as a disabled person, at a disadvantage (as regards setting charges for services provided by the Council) in comparison with persons who are not disabled. The court held that it clearly did not, "for the simple reason that the practice only applies to disabled people". The policy does not allow any comparison to be made with the treatment of persons who are not disabled. Alternatively one could say that it confers an advantage on disabled persons in comparison with non-disabled persons.

All of the above references are to the judgment of Lord Sales, with which the other participating Supreme Court Justices all agreed.

Adrian D Ward

Opposed renewal of guardianship

On 20th January 2023 Sheriff C Lugton, at Falkirk Sheriff Court, granted to Falkirk Council renewal of a guardianship, in one of an apparently increasing number of cases where a young adult (in this case, an adult born in 1997) opposes renewal of guardianship. The case is Falkirk Council v D, [2023] SC FAL 4.

The sheriff accepted that for the purpose of the Adults with Incapacity (Scotland) Act 2000, D had a mental disorder. He had a diagnosis of Pervasive Developmental Disorder Autism Asperger's Syndrome, and possible Obsessive Compulsive Disorder. He also had a diagnosis of chronic low weight. D's Asperger's Syndrome was an organic, neurodegenerative disorder, resulting from D's brain development since birth. It is permanent. D had executive disfunction, and in consequence had problems with directed behaviour, planning, flexibility and responding to changing environments. The sheriff found that D had capacity in relation to simple matters, such as watching television, but not to understand and act in relation to complex matters. He was underweight in relation to his height and age, had poor diet, and lived with his father in a dirty and cluttered property, though not to the extent of creating a health hazard.

Sheriff Lugton went carefully, and in sequence, through the steps required in order to determine the case. Practitioners are likely to find it useful to read all 52 pages of his judgment, and indeed it is to be welcomed that such a written judgment has been issued – a relative rarity in Scottish practice, compared with the wealth of precedents continuously flowing from the Court of Protection in England & Wales.

This brief report selectively picks out two aspects of interest.

Counsel had submitted that the effect of section 1(3) of the 2000 Act, providing that if an intervention is ordered it should be the least restrictive option in relation to the freedom of the adult, meant that the purpose of the 2000 Act was not to allow intervention on an anticipatory basis: there must be a real need for intervention in an adult's life, and the court should take account of the potential availability of other orders should a future crisis arise. The examples given were compulsory treatment order or an emergency order under the Mental Health (Care and Treatment) (Scotland) Act 2003. However, the sheriff did not accept this argument. He pointed out that the least restrictive option in principle only falls to be applied after it has been decided that an intervention is required. It would not arise if an intervention was not required at the time, and that orders could be sought in future should the need arise. More generally, the sheriff expressed the view "*that the weighing up of risk and probability, together with the assessment of whether a proposed intervention will be beneficial, are inherently fact-sensitive exercises and much must depend on the circumstances of the individual case*".

The other feature of the decision identified for the purposes of this Report as notable is that the sheriff refused to grant a power, sought by the applicant, to determine where D should reside on a permanent or temporary basis. The sheriff noted that D gave evidence that his existing home was his favourite place to be. He also held that he was "*not satisfied that granting the power sought would be a benefit that could not be reasonably achieved without the proposed intervention*". What is surprising, however, is that there appears to have been no mention of the fact that to have granted that crave would have empowered the guardian to deprive D of his liberty. That aspect of the application appeared to be similar in principle to the decision in Scottish Borders Council v AB, [2019] SC JED 85, on which we reported in the December 2019 Report. The sheriff did point out that if a need to determine residence arose, that could be the subject of an application for an intervention order. However, it is not entirely clear that it was recognised that even where power has been conferred to take action amounting to a deprivation of liberty, the actual exercise of that power requires to comply with the requirements of Article 5 of the European Convention on Human Rights.

Notwithstanding those concerns, my general commendation of this decision, and its potential usefulness to practitioners, still stands.

Adrian D Ward

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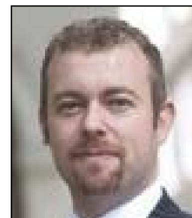

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Conferences

Members of the Court of Protection team are regularly presenting at webinars arranged both by Chambers and by others.

Alex is also doing a regular series of 'shedinars,' including capacity fundamentals and 'in conversation with' those who can bring light to bear upon capacity in practice. They can be found on his website.

Advertising conferences and training events

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

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

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