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MENTAL CAPACITY REPORT: COMPENDIUM

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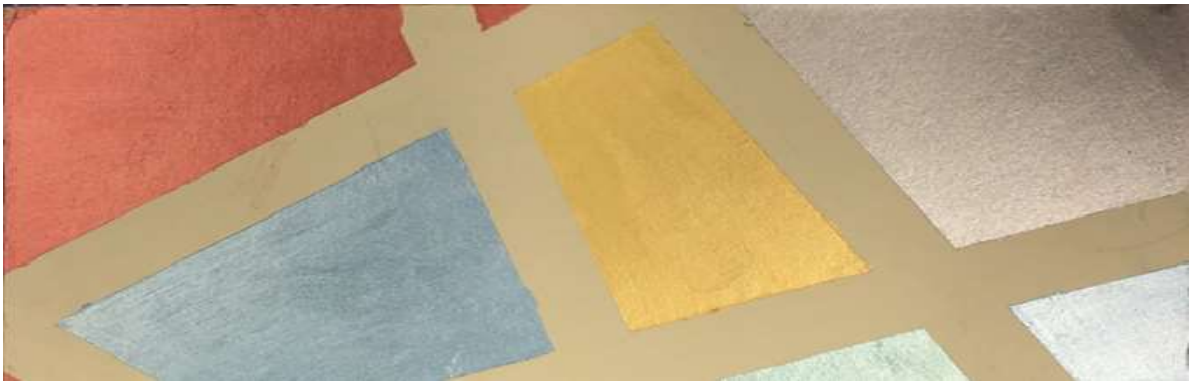

Welcome to the November 2020 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: updated DHSC MCA/DoLS COVID-19 guidance, an important LPS update, and the judicial eye of Sauron descends on new areas to consider (ir)relevant information;

(2) In the Property and Affairs Report: a complex case about when the settlement of an inheritance;

(3) In the Practice and Procedure Report: for how long does a Court of Protection judgment remain binding, and helpful guidance for experts reporting upon capacity;

(4) In the Wider Context Report: challenging reports about the disproportionate effect of COVID-19 upon those with learning disability, young people with learning disability and autism under detention, and capacity and public hearings before the Mental Health Tribunal;

(5) In the Scotland Report: discharge from hospital without proper consideration of ECHR rights.

You can find our past issues, our case summaries, and more on our dedicated sub-site here, where you can also find updated versions of both our capacity and best interests guides. We have taken a deliberate decision not to cover all the host of COVID-19 related matters that might have a tangential impact upon mental capacity in the Report. Chambers has created a dedicated COVID-19 page with resources, seminars, and more, here; Alex maintains a resources page for MCA and COVID-19 here, and Neil a page here. If you want more information on the Convention on the Rights of Persons with Disabilities, which we frequently refer to in this Report, we suggest you go to the Small Places website run by Lucy Series of Cardiff University.

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

Contents

HEALTH, WELFARE AND DEPRIVATION OF LIBERTY

DHSC Emergency MCA/DoLS guidance and vaccination

Although the latest iteration of the guidance does not address the January 2021 English lockdown (which Alex has covered here), it does cover vaccination. We have also published a guidance note (into its second update), available here. We note also, very briefly, the decision of MacDonald J in *M v H (Private Law Vaccination)* [2020] EWFC 93 concerning a dispute between parents as to the administration of each of the vaccines on the NHS vaccination schedule, in which he noted (at paragraph 4):

> *very difficult to foresee a situation in which a vaccination against COVID-19 approved for use in children would not be endorsed by the court as being in a child's best interests, absent peer-reviewed research evidence indicating significant concern for the efficacy and/or safety of one or more of the COVID-19 vaccines or a well evidenced contraindication specific to that subject child. However, given a degree of uncertainty that remains as to the precise position of children with respect to one or more of the COVID-19 vaccines consequent upon the dispute in this case having arisen at a point very early in the COVID-19 vaccination programme, I am satisfied it would be premature to determine the dispute that has arisen in this case regarding that vaccine.*

Treatment withdrawal – exploring the limits of the courts

Z v University Hospitals Plymouth NHS Trust & Ors [2020] EWCOP 69; *B v University Hospitals Plymouth NHS Trust & Anor* [2020] EWCA Civ 1772; *University Hospitals Plymouth NHS Trust v RS & Anor* [2020] EWCOP 70; *Z v University Hospitals Plymouth NHS Trust (No 2)* [2021] EWCA Civ 22

Best interests – medical treatment

On 6 November 2020, a middle-aged man referred to as RS suffered a heart attack and was without oxygen for at least 45 minutes. He was taken to hospital and, sadly but unsurprisingly, was found to have sustained severe hypoxic brain damage. The prognosis was bleak – at best progress to being in

a minimally conscious state at the lower end of the spectrum. The treating doctors determined that it was in his best interests for treatment to be withdrawn, and his wife agreed. RS came from a Polish Catholic family and members of his wider family still lived in Poland. He had not had much contact with his wider family, even those members who lived in England, but they were of the view that treatment should not be withdrawn. Cohen J heard the case, including an opinion from an independent expert instructed by the Official Solicitor, and decided that it was not in RS's best interests for treatment to be continued. He rejected the view that as RS was Catholic he would inevitably have wanted treatment to continue, and accepted the evidence of RS's wife, finding that he would not have wanted to be kept alive in a state which provided him with no capacity to obtain any pleasure and which was so upsetting to his wife and children. RS's wife understandably found giving evidence and being cross-examined very traumatic, and so her evidence was truncated. She later sent a letter to the judge with further information which she did not want to be shared with the wider family.

RS's wider family sought permission to appeal on the basis that the court failed to make sufficient enquiry into what RS's views would have been. In particular, the views of the Catholic Church should have been explored, and more time should have been spent on resolving the tension between RS's religious views and the view that he would not want further treatment. Further, the family submitted that the Judge breached natural justice and Art. 6 ECHR by prohibiting cross-examination of RS's wife on the grounds that she was distressed and/or by permitting her to communicate additional evidence by a confidential letter to the Judge which was not disclosed to the parties.

Permission to appeal was refused ([2020] EWCA Civ 1772). The Court of Appeal held that wider family had been represented by leading counsel at the hearing and no issue had been taken about various matters raised on appeal. There was nothing that could usefully have been achieved by postponing a decision. While it would have been better if the judge had made it clear that any further communication would probably need to be shown to ally parties, and had afterwards expressly confirmed that he would place no weight on any matter not disclosed, it was already known that RS had made choices in his personal life that were not in complete harmony with his religious obligations, so the letter could not plausibly be said to have played a part in the decision.

Treatment had been withdrawn following the first instance decision and restarted when the Court of Appeal application was lodged. Following the Court of Appeal's decision it was withdrawn, but again restarted when the family and the Polish Government submitted an application for interim relief to the European Court of Human Rights. While that application was pending, the family brought the matter back before Cohen J and sought permission to rely on expert evidence which they said showed that RS's diagnosis was better than had been thought and that he was already in a minimally conscious state.

Cohen rejected their application in forceful terms [2020] EWCOP 70. The evidence had been obtained in an '*underhand way*' that was '*arguably unlawful and in breach of the rights of both RS and the Trust'.* The expert, who was a priest and neurologist, had prepared a report despite not having read the medical

records, not having seen the reports of other doctors prepared for the proceedings, not having spoken to any member of the treating team, and not having read any of the court judgments. He had not kept notes of any of his conversations about the case, and was not a '*satisfactory witness*' .

Following the second hearing before Cohen J, the ECtHR rejected the applications before it as inadmissible. Treatment was withdrawn for a third time. A further, substantive, application was made by the birth family to the ECtHR, being ruled inadmissible a week late; on the same date a second application for interim relief was made by the birth family. A stay of the order of Cohen J therefore expired, and CANH was withdrawn. Three days later an out of hours application was made to the Court of Appeal for a further appeal on the basis that there had been a change in medical opinion. A stay was granted overnight and two judges of the Court of Appeal heard the case, dismissing the application for permission to appeal.

King LJ and Peter Jackson LJ had little hesitation in dismissing the appeal. They both noted the concern of the effect of the proceedings upon RS's care and treatment – four weeks after it had been found that continuation of CANH was not in RS's best interests, it had had to be reinstated three times. As King LJ noted, the order made by Cohen J on 15 December had provided that:

> *All care and palliative treatment given shall be provided in such a way as to ensure that, as far as practicable, the First Respondent retains the greatest dignity and suffers the least discomfort until such time as his life comes to an end.*

However, she continued:

> *It is difficult to imagine a greater assault upon the dignity of this man, who was until a matter of weeks ago a fit and healthy family man, to have had CANH withdrawn and reinstated on three separate occasions. Each reinstatement has required invasive treatment and the most recent one took place at a time when he was perceived by the medical team to be close to death, a situation that was seen by the birth family to justify an application for a stay in the middle of the night without notice to the Trust or the Official Solicitor.*

The court was also very concerned at the distress caused to RS's wife and children by the sequence of events.

King LJ made clear that the court will, if appropriate, review an earlier best interests determination: As Francis J put it *in Great Ormond Street Hospital v Yates (No 2)*, [2017] 4 WLR 131 at para.11, such a reconsideration will be undertaken *"on the grounds of compelling new evidence*" but not on "*partially informed or ill-informed opinion*." King LJ considered that the nature of the evidence that the birth family had sought to rely upon was to be characterised as being partially- or ill-informed.

One particular point of wider importance is the Court of Appeal's rejection of the argument that it was incompatible with Article 2 ECHR to withdraw food and fluids from a person capable, or possibly capable, of feeling pain and of suffering. Peter Jackson LJ held that:

> *The welfare principle applies to all decisions, whatever the diagnosis. Mr Bogle founded his submission that it is incompatible with Article 2 ECHR to withdraw food and fluids from a person capable of feeling pain and of suffering with reference to statements from Airedale NHS Trust v Bland [1993] AC 789, which of course concerned a person in a vegetative state. However, there is no lack of well-established domestic authority to the effect that CANH can be lawfully withdrawn from persons who are not in a vegetative state* [which he then cited]

Peter Jackson LJ also held that Cohen J had been "*plainly entitled*" to reach the conclusion that it was not in RS's interests to be transferred to Poland, not least in circumstances where (contrary to the submission advanced by the birth family) his wife and children were against the move. As Peter Jackson LJ noted, their approach suggested that they had lost track of the fact for 17 years RS's real life had not been with them but with his own family in the UK.

With reluctance, the Court of Appeal granted a very short stay whilst the birth family made a further application to the ECtHR. The ECtHR dismissed that application as inadmissible, and the stay on the original order of Cohen J has therefore expired. We also understand that an application has been made by a Polish legal foundation to the Committee on the Rights of Persons with Disabilities for it to make a request for the UK to take interim measures to prevent the withdrawal of treatment pending consideration of its complaint under the Optional Protocol. A similar application was made in the case of the French national, Vincent Lambert; the CRPD made such a request, which received a very dusty reaction from the French courts. We anticipate that a similar reaction may well be given to any such request here (if, indeed, any is made).

Comment

While disputes about withdrawal of treatment between family members are fortunately rare, they are particularly distressing. Since RS's heart attack, his immediate family have had to come to terms with his brain injury, bring themselves to agree that treatment should be withdrawn, prepare for his death after treatment was withdrawn, more than once, and be taken through repeated court processes. All this in circumstances where the court has followed the caselaw and the requirements of the MCA 2005 and – critically – established that RS himself would not have wanted treatment to be continued. It is also difficult, we suggest, to escape the feeling that in this case RS's case has been taken up by those who wish to advance a cause as opposed to thinking about (from a domestic perspective) his best interests, or (from a CRPD perspective) the best interpretation of his will and preferences.

The case serves as a sad reminder of the importance of writing down your wishes in advance or appointing a lasting power of attorney. It also serves to remind why there are rules about the admission of expert evidence and obtaining the court's permission for it in advance.

Unusual sexual practices and capacity

AA (Court of Protection: Capacity to Consent to Sexual Practices) [2020] EWCOP 66 (Keehan J)

Mental capacity – sexual relations

Summary[1]

This case concerned AA, a 19 year old man, who had been diagnosed as having autism and Asperger's Syndrome. He had interests relating to certain sexual practices including autoerotic asphyxiation ('AEA'). He had posted material about himself on the dark web, advertising his wish to be a submissive partner and his desire to be kidnapped and raped. Having been the subject of a care order prior to his majority, he was now the subject of an application before the Court of Protection for (in effect) an adult care order. He was subject to (or in receipt of) 24/7 support at his supported living placement, giving rise to a deprivation of his liberty.

Keehan J had to consider (1) AA's capacity to conduct proceedings and make decisions regarding AEA, internet and social media, consent to sexual relations and contact with others; (2) AA's best interests in those domains where he lacked capacity to decide; and (3) whether he should authorise AA's deprivation of liberty.

An expert psychologist, Dr Burchess, considered that AA had capacity in all material domains, and that AEA should be addressed as a specific decision in a domain different to engagement in sexual relations. An expert psychiatrist, Dr Ince, was instructed to report on AA's capacity to make decisions regarding AEA and to make decisions about the use of the internet and social media in the context of his contact with others whom he meets online.

The two experts agreed that the information relevant to making decisions regarding AED included: (1) the concept of AEA; (2) the manner in which AA engaged in AEA; (3) the range of risks and harm associated with the practice of AEA and their likelihood; and (iv) knowledge and use of safety strategies and their effectiveness (recognising that AEA is an inherently dangerous practice and potentially life threatening). Dr Burgess also included knowledge and experience of other strategies for obtaining sexual gratification. Dr Ince agreed but considered this was more complicated for AA because of issues relating to his diagnosis of ASD which were currently unassessed.

Dr Ince considered that AA lacked capacity to make decisions regarding AEA because (1) he had no knowledge of the risk of partial hypoxia and acquired brain injury;(2) he was unable to cross-transfer skills and knowledge because of his autism; (3) although he had a basic understanding of the risks in relation to plastic bags, he cannot transfer this knowledge to other similar mechanisms; and (4) AA could not retain information related to specific breathing techniques and similar information provided to him with the educative work undertaken with him.

In relation to the use of internet and social media, Dr Ince considered that, whilst AA was able to understand and retain the relevant information, he was unable to weigh this information and could not transfer the information from one specific scenario to another. Of particular relevance, Dr Ince

[1] Note, Neil having been involved in the case, he has not contributed to this summary.

identified that "[AA] *demonstrates knowledge for scenarios upon which he has been taught, but cannot transfer these to current or future scenarios – [AA], as a consequence of his ASD is, through necessity, an experiential learner, however in this area, such actions may cause him and others significant harm*."

In the course of his oral evidence, Dr Ince noted that AA had not undergone a sensory profile assessment. As Keehan J noted at paragraph 24

> *He considered this was a crucial assessment which would enable a much clearer understanding of the impact of ASD on AA's life and his capacity to make decisions: it was key to his whole life. A particular focus in Dr Ince's evidence was whether AA's engagement in AEA was a feature of his ASD or a personal preference to achieve sexual gratification. In the absence of a sensory profile, Dr Ince tended to the view that it was a manifestation of his ASD and, in any event, his inability to weigh the relevant information regarding AEA and his inability to cross-transfer skills and knowledge resulted from his ASD.*

In light of Dr Ince's conclusions followed that AA would lack capacity to have contact with others online, at least, in respect of his sexual interests.

Dr Burchess did not change his opinion in light of Dr Ince's evidence, but agreed that a sensory profile assessment was important.

In light of the evidence of Dr Burchess, there was agreement between the local authority and the Official Solicitor, and Keehan J agreed, that AA now had capacity to conduct the proceedings, and to make decisions about his residence, care and to have sexual relations. The issues in dispute were therefore whether AA had capacity to make decisions about his engagement in AEA and in relation to his contact with people he meets online.

Keehan J accepted that the issues in question "*engage*[d] *the most private and personal of AA's Article 8 rights and that the State should be very slow and cautious to interfere with the same"* (paragraph 45), and that:

> *46. Capacitous individuals engage in AEA notwithstanding that it is an inherently dangerous practice which carries a very real risk of acquired brain damage or unintentional death. Many capacitous individuals engage in contact with strangers on the internet or on social media which puts, or may put them, at risk of physical, sexual, emotional or psychological harm. They are entitled to make an unwise decision.*

Keehan J also accepted that he "*must not adopt an approach based on a moral judgment about AEA or on contacting strangers on the internet or social media. Nor must I adopt a protective stance towards a person when determining whether they have capacity to make a decision to engage in AEA notwithstanding that they are very likely to make an unwise or risky decision*" (paragraph 47).

Keehan J accepted that the relevant information for AA to make a decision in respect of AEA was as set out above. He noted that he had considered whether the impact on others (e.g. close family

members) in the case of acquired brain injury or death as a result of engaging in AEA is a relevant factor. However, "*I have concluded it is not. I accept it would set the bar too high in comparison to capacitous adults who engage in the practice of AEA*" (paragraph 49).

At paragraph 50, Keehan J accepted Dr Ince's evidence and conclusions that, on the current evidence, there was reason to believe that AA's engagement was a manifestation of his ASD and that he was unable to weigh information about the practice or cross-transfer information because of his ASD. He noted, and was particularly concerned by, Dr Ince's opinion that (1) AA potentially has a high threshold to sensory stimulus and thus may require a higher level of stimulus to achieve the same outcome; and (2) AA's 'addiction' and intrinsic compulsion to engage in AEA, and other restrictive and circumscribed interests, are likely to render it difficult to change his behaviour. This meant, Keehan J identified, that "in my judgment AA is at high risk of being unable to regulate his engagement with AEA and therefore at greater risk of serious harm or death" (paragraph 51).

Keehan J also preferred and accepted the evidence of Dr Ince that AA does not have capacity in relation to contact with those people he meets online because of his ASD and because of his inability to weigh information and to cross-transfer information (paragraph 52). He noted that the issue of whether AA had capacity to consent to support when engaged in AEA was a difficult one upon which neither expert felt able to offer an opinion; he therefore proposed to 'park' it and return to it at a later stage if clear and cogent evidence is available to enable me him determine this issue.

On its face oddly, but no doubt representing the fact that Keehan J was intending to return to the issue, the declaration relating to AA's capacity to make decisions about AEA and contact with others he may meet online was made on an interim (s.48) basis, rather than a final (s.15) basis. However, he declined to make any best interests decision in relation to his engagement in it (both parties, for different reasons, having submitted that none fell to be made) "*because it would be contrary to s.27(1)(b)* [which prevents the court consenting to sexual relations] *or, at least, the philosophy of this provision for the court to make a decision in respect of AEA on AA's behalf*" (paragraph 55).

Keehan J agreed that a care plan in relation to contact should be drafted for the court's approval which developed a best interests framework which (1) enabled the professionals and the court to be better informed about the impact of AA's ASD on his life and his functioning; (2) enabled the professionals and the court to better understand how AA could be supported to gain capacity to make decisions about these two issues; and (3) permitted AA sufficient autonomy of decision making and respected his right to a private life whilst balancing the need to protect him from harm.

Unsurprisingly in light of the evidence received, Keehan J held that it was "crucial" that a sensory assessment of AA was undertaken as soon as possible, and that, with the benefit of that plan, the local authority provided him with an education programme to enable him to understand alternative means of obtaining sexual gratification other than by engaging in AEA and enable him to contact others online safely and securely or, at least, to be able to weigh and understand the risks at which he places himself by this activity. He also considered it was essential therapy was made available to AA to AA to deal

with his past experiences and to explore how his ASD had an impact on his day-to-day life. Perhaps optimistically, Keehan J considered that he had "*no doubt that AA will readily engage with this therapeutic process*" (paragraph 61).

Keehan J concluded at paragraph 61 by holding that:

> *AA is subject to very invasive restrictions. At the moment they are necessary to protect him and to ensure his life is not unnecessarily endangered. I would hope that the local authority and the care provider will give anxious consideration to the degree, if at all, to which some of the restrictions may be reduced, pending the outcome of the assessments, education and therapy referred to above. Such reductions if safely achievable will recognise AA's right to a private life and will increase his autonomy.*

It appears from this concluding observation that Keehan J may have authorised the deprivation of liberty, although quite how he could have done in light of the finding that AA had capacity to make decisions about his residence and care arrangements is not immediately obvious. It is to be hoped that any further judgment might shed light upon this.

Comment

This case clearly troubled both the experts and the court, and rightly. It is a paradigm example of how complex an exercise respecting rights, will and preferences (to use the language of Article 12 CRPD is). Some may feel it plain wrong that the state was even intruding into such a private area for AA. Others may feel that the state is under a positive obligation to do so – not just by reference to Article 2 ECHR but also by reference to Article 10 CRPD (as to the rather underdeveloped commentary on this positive obligation, see here).

Whatever one feels about the decision reached in this case, it is perhaps significant to note the expressly provisional basis upon which Keehan J did so and the clearly identified steps that he set out to enable him to reconsider the balance in due course. Such might be thought to recognise the balance between humility and confidence identified as so important by Sir Mark Hedley in his observations about the judicial process.

More broadly, the situation where a person is an "experiential learner" is one that poses real and important challenges to the operation of the MCA 2005, and, in particular, for situations where the very experience in question (as here) is potentially dangerous.

Finally, it may be thought that Keehan J was wise not to pin his colours to the legal mast as regards the question of the operation of s.27(2)(b) MCA 2005. Not just because it was clear that everyone accepted that AEA is conceptually different for capacity purposes to sexual relations, it is far from obvious that s.27(2)(b) MCA 2005 actually covers situations where there is no other sexual partner involved. Whether its philosophy prevents best interests decisions being made in this regard may be a question to which Keehan J will have to return in the event that the work he has envisaged does not lead to a result whereby either (1) AEA gains capacity in this domain; or (2) ceases to express a wish

to engage in it.

What does Article 8 add to best interests?

Re CVF [2020] EWCOP 65 (Lieven J)

Deputies – welfare matters

Summary

In this case, Lieven J was concerned with the capacity and best interests of a 29 year old woman, CVF, with diagnoses of diabetes, learning disability, emotionally unstable personality disorder, low self-esteem and feelings of abandonment. Her mother had made a personal personal welfare application in January 2018. The application stated that "*CVF is a vulnerable women whose capacity to consent to sex, to make decisions in respect of contact with unknown men and to make decisions in respect of her care is in dispute*" and that it "*would benefit CVF for there to be clarity in relation to her capacity and whether any best interest decisions need to be made. At present … there is a high level of police intervention and numerous safeguarding referrals due to there being no agreed position on CVF's capacity*". The local authority had, by order of the court, substituted as applicant, and the proceedings transferred to a Tier 3 (i.e. High Court) judge.

As so often, the proceedings had had a long backstory, and they had also taken a considerable number of twists and turns before their final resolution. Before Lieven J at the final hearing, questions of capacity in the relevant domains having been resolved, there were three issues, addressed in turn below.

Level of care

JF, representing herself, submitted that her daughter required 24/7 care. Lieven J observed that CVF did not wish such care, considering it to be intrusive and stopping her being independent. As Lieven J observed at paragraph 20, "[s]he wants more autonomy, and, in my view, she has a right to more autonomy." Lieven J, however, "fully appreciated," her mother's concerns:

> *20.* […] *I suspect that CVF's history of cyclical behaviour has something to do with relationships, often with boyfriends. In my assessment, JF is both a protective factor for CVF, the ultimate safety net, but also has not managed to allow CVF to gain greater independence and autonomy. This is a tension in many parent-child relationships, but it is magnified enormously in CVF's case because of her diagnosis, behaviour and the family history. It is very important to make clear that when I say 8 hours of care a day is appropriate, that does not fix that level forever and is completely subject to review and CVF's behaviour. The care plan unusually builds in a 3 month review process, due to CVF's fluctuations and also and an automatic review if CVF's relationship with J* [a former carer] *should fail, as that is clearly a risk factor. Those review provisions support a reduction of care and provide for a safety net now and in the future.*

Lieven J's reasons for holding that the reduction in care was in CVF's best interests were crisp:

> *In summary, firstly, the reduction in care accords with CVF's wishes and feelings under section 4(6) MCA 2005. Secondly, it is the least restrictive option under section 1(6) MCA 2005. Thirdly it is proportionate under Article 8 ECHR. Fourthly, it accords with CVF's best interests as in my view it is positively detrimental for CVF to have 24/7 care at the moment as all it serves to do is to make her feel undermined, triggers disruptive behaviours and reduces her motivation to become more independent and to improve functional abilities. Fifthly, to reduce the care in this way reflects the reality what CVF is currently receiving.*

She also referred to the well-known passage from the decision of Munby J in *Local Authority X v MM & Anor* [2007] EWHC 2003 (Fam) and the importance of understanding that those who lack capacity, must, to a proportionate degree, be allowed to take risks and to test out their own capabilities. It is not the function of the Court of Protection to remove all possible risk and protect the individual at the expense of a proportionate balance. As Munby J identified, "[w]*hat good is it making someone safer if it merely makes them miserable?*"

Whether the local authority should be substituted for JF as CVF's deputy for property and affairs

Lieven J had little hesitation in acceding to this position:

> *26. CVF's wishes are very clear. She does not wish for her mother to continue as her deputy. She feels that her mother is using this as a way to control her via the money. In my view, this is a very clear-cut situation because JF's role is leading to conflict between CVF and JF and is undermining the prospects of them having a better relationship. I can see no disadvantage to the Local Authority becoming property and affairs deputy and so clearing the way so that JF and CVF can try in the near future to regain a relationship. Such a change is plainly in CVF's best interests and accords with her wishes and feelings. I have no hesitation in making the order sought by the Local Authority.*

Whether JF should be appointed as CVF's personal welfare deputy

JF's application was made on the basis that she considered "*that the Local Authority and NHS Trust have failed to keep CVF safe, that they have underestimated the risks she is facing and are too amenable to accepting what she says despite the history of behavioural risks. JF feels that the Local Authority and the Trust have allowed CVF to be exploited over the last few months*" (paragraph 27).

Lieven J directed herself by reference to the decision of Hayden J in *Re Lawson, Mottram and Hopton (Appointment of Personal Welfare Deputies)* [2019] EWCOP 22, and in particular his observation that the structure of the MCA 2005 and, in particular, the factors which fall to be considered pursuant to the best interests test in s.4 may well mean that the most likely conclusion in the majority of cases will be that it is not in the best interests of P for the court to appoint a personal welfare deputy.

Lieven J agreed with the local authority that, on the facts of the case, it was not in CVF's best interests for her mother to be appointed as her personal welfare deputy:

31. Firstly, the application is not limited in scope and would give very wide-ranging power to JF over CVF's life. That could be remedied in an order being limited, but (secondly) CVF is strongly opposed to her mother having a deputyship order over her so such an order would be contrary to CVF's wishes and feelings. As I hope is clear from the earlier part of this judgment, although lacking capacity, CVF is very articulate and able to express her views. I therefore place a great deal of weight on her wishes and feelings and I would consider this to be the critical factor. That leads to the third point. Given her strong opposition to her mother having this power, it would be highly contrary to CVF's best interests for this application to be allowed. CVF has made exceptional progress over the last 9 months, largely because she has been able to exercise more independence and autonomy, in part because of lockdown, and the pandemic has forced a situation where she has had less contact with her family.

32. I do appreciate the risks, but the reality is that there has been a positive experience for CVF over the last 9 months. If I were to appoint JF as a personal welfare deputy, that would be deeply upsetting and contrary to CVF's emotional well-being. It also appears to be the case that over the last 9 months many of the things that have gone so well for CVF and enhanced her independence (travelling to Spain, work, engaging in relationships) are precisely the things her mother would think she should not allow as they are too risky. Therefore, the third reason is that such an order would be contrary to CVF's best interests. Fourthly, to grant the application would be an unnecessary and disproportionate interference in her Article 8 ECHR rights and there is no justification for such an interference on the facts of this case. CVF must be allowed to retain and develop autonomy and take risks within the safety net from the Local Authority. I therefore refuse JF's application.

Comment

Lieven J's judgments in this domain are often marked by a particular and close attention to the requirements of the ECHR alongside those of the MCA (see, for instance, *Re KR* [2019] EWHC 2498 (Fam)). This is no exception. This case shows why it is both necessary (as the Court of Appeal has previously held) and helpful to stress-test matters not just by the best interests criteria set down in s.4 MCA but the ECHR requirement to consider the necessity and proportionality of the relevant interference with the right to autonomy enshrined as an aspect of the right to respect to private life protected by Article 8(1) ECHR). Looking at matters through this prism, and in particular having close regard to the autonomy right of CVF, made clear the correct outcome of both the decisions in relation to the level of care she required and in relation to both deputyship applications.

Family care and lockdown regulations

NG v Hertfordshire County Council & Ors [2021] EWCOP 2 (Lieven J)

Best interests – contact

Summary

The (surprisingly) small body of reported cases relating to COVID-19 (representing the tip of a rather larger iceberg) has been added to in this important decision by Lieven J, concerning a 30 year old man, NG, with moderate to severe autism, mild learning disability and severe communication difficulties.

For many years, NG had had a care package arranged by his mother and step-father, funded by direct payments made by Hertfordshire County Council. At all material times, NG had lived in his own flat with carers coming there; he required 24 hour supervision and care. A dispute which started in 2017 relating to contact between NG and his step-father was resolved by the Court of Protection in June 2018; following his judgment, a third person, HG, was appointed as deputy for health, welfare, property and affairs. On 23 March 2020, in light of the lockdown, HG suspended all contact with NG except for his carers (in circumstances where those carers had said that if family visits were to continue they would have to withdraw care as this would expose their care staff and their client to unnecessary risk). Between then and September 2020, his parents had no contact with him, and his care was provided entirely by paid carers.

A challenge to the decision was heard in June 2020, HHJ Vavrecka upholding the deputy's decision. In his judgment HHJ Vavrecka held that whilst when NG was with his step-father he was being provided with care, "*this was an arrangement for contact and has to be seen in the context of there being a care package which provided 24/7 care for NG. The Deputy quite properly in my view come to the conclusion that the parents did not need to 'provide care and assistance' given the care package (with adjustments) would ensure all of NG's care needs were met*." Further, HHJ Vavrecka held that "[i]*n looking at paragraph 6 of the Regulations, and whether NDG needs to 'provide care' within the terms of regulation 6, the factual position and the legal framework are both relevant. The decision of HG and the restrictions placed on contact by deputy and Home Instead were in my judgment appropriate and proper, and reflect a reasonable reading of the regulations and the contact order of HHJ Waller. The view that direct contact between NG and NDG is prevented by the "lockdown" rules in my judgment properly interprets the wording of the regulation as well as its spirit. I do not accept the submission that the Deputy has misinterpreted the regulations."*

The Official Solicitor appealed to Lieven J. As she identified, the principal issue turned upon the interpretation of the lockdown regulations. However, she had little hesitation in concluding that HHJ Vavrecka had been wrong to find that NG's parents were not providing care to him when they were spending time with him, the factual position being that his parents had bene providing him with a significant part of his care throughout his life, and in particular since he became an adult. She noted that there was *"so far as I am aware, no magic in the words 'shared care,' it is merely a reflection the reality of the care that is being provided*" (paragraph 43).

Turning to the exercise in statutory interpretation, Lieven J was concerned with the first lockdown restrictions (the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, but her conclusions are equally applicable to those applicable at the time her judgment was delivered (The Health Protection (Coronavirus, Restrictions) (All Tiers) (England) Regulations 2020, as amended by The Health Protection (Coronavirus, Restrictions) (No. 3) and (All Tiers) (England) (Amendment) Regulations 2021: as to which, see here). The critical wording was in relation to the definition of "reasonable excuse" for leaving home as including having "*the need* […] *to provide care or assistance, including relevant personal care within the meaning of paragraph 7(3B) of Schedule 4 to the Safeguarding of Vulnerable Groups Act 2006, to a vulnerable person, or to provide emergency assistance*" (contained, in the

first Regulations, in Regulation 6; in the current Regulations in relation to Tier 4 areas – i.e. as at January 2021 – everywhere in England, in materially similar form in paragraph 5(c) of Schedule 3A to the All Tiers Regulations).[2]

Lieven J noted that the word "need" in the Regulations varied according to the different reasonable excuse limbs, although in each case there had to be a need as opposed to simply a subjective desire. As she noted:

> *47. There can be no possible doubt that in enacting the first restrictions Regulations the Government was placing a very great emphasis on the importance of people staying at home and not mixing unnecessarily and without very good reason. However, it is equally clear that the Government intended to ensure that those who needed to leave their home to provide care or assistance to a vulnerable person should be allowed to do so. In this context it is important to have in mind that there are an enormous number of family carers providing care to persons outside their household. It is essential that care can continue to be provided throughout the course of the pandemic. The fact that it would be theoretically possible, or indeed practically possible, for that unpaid family care to be replaced by paid care does not mean that the family care is not meeting a need.*

Lieven J then put herself in the shoes of NG himself to ask what his needs were:

> *48. If one considers the need for the care from NG's perspective then, in my view, it is clear that he needs parental care as well as paid care. His physical needs can be met by 24/7 paid care, but his emotional needs and best interests are met by having a mix of family and paid care. It is wrong in my view to focus simply on the fact that his physical needs can be met by paid care. As NDG and the OS submitted, NG's best interests must be relevant to meeting his needs and those best interests include being cared for, at times, by his parents.*

By definition, she found, the fact that person is delivering care pursuant to a court order to a family member must amount to a reasonable excuse to leave the home (paragraph 49). Conscious, perhaps, that the number of situations in which this might be relevant was only the tip of a much greater iceberg, Lieven J looked at the broader issues in play in interpreting the regulation:

> *50.* […] *it is also important to have regard to article 8 ECHR and the protection of family life, subject to the justifications in article 8(2). A ban on family members being able to provide care to loved ones, in any circumstances where paid care is available, would be a very serious interference with the right to family life. That does not mean that such an interference would be incapable of justification, but it does in my view mean that a court should be very careful before reaching an interpretation which would give such precedence to paid over family care. There is nothing in the first restrictions Regulations, Guidance, or any Government document which would suggest the Government intended to prioritise paid over family care in this way or to interfere with article 8 rights in such a broad manner.*

[2] The differences being that the definition expressly includes to provide assistance to a person with a disability, and does not make reference to emergency assistance.

The effect of the approach that had been taken below and that was being urged upon her, however, would create the effect of giving a priority to paid care:

> *51.* […] *NG's physical needs can undoubtedly be met by his paid carers, but his wider emotional and psychological need is to see and be cared for by his parents. Further, care from a loving family is not a one way street in which the focus is only on the person being cared for. Both NDG and AG plainly feel that they "need", in the sense that it is important both to them and to NG, to provide NG with care. The very nature of this bond is undermined by the somewhat mechanistic approach of considering that there is no need for the parents to provide care because someone else can be paid to do so.*

Finally, Lieven J found that her interpretation was supported by the principle against doubtful penalisation. In circumstances where breaching the requirement not to leave home without a reasonable excuse would give rise to a criminal offence, Lieven J held that "[i]*f the care had to be essential, or there was a priority given to paid over unpaid care, then the first restrictions Regulations needed to make that clear. The wording of regulation 6(2)(d) is broad and unspecific in respect to the nature of the care. It would therefore be wrong to create a criminal offence for someone providing care in the circumstances of AG and NDG*" (paragraph 52).

Comment

What is perhaps a little odd about this judgment at first reading is that it focuses so much on the lawfulness (or otherwise) of the actions of NG's parents, when NG's deputy had stopped contact on the basis of their analysis of NG's best interests (see paragraph 10). However, on the basis of the summary of the judgment of HHJ Vavrecka given by Lieven J it appears that the deputy also then took the view that such contact would give rise to criminal offences on the part of his parents. On one view, it is not obvious that the deputy could properly have taken that factor into account save and unless it could have been said not to be in NG's best interests for his parents to be subject to (potential) prosecution in leaving their home to come and have contact with him. The deputy might, perhaps, have been thinking that the option of his parents coming to see him was simply not an available option – but that does not seem to have been the reasoning that they employed, although there is a hint in paragraph 10 of the judgment that they had in mind something rather different, namely that, if the parents came to see NG, the care provider would withdraw care.

Be all that as it may, the fact that HHJ Vavrecka then founded himself (in part) upon the fact that direct contact was prevented by the lockdown rules mean that Lieven J had to ask herself the question of whether this conclusion was in fact correct.

Lieven J's interpretation of the relevant provisions in the lockdown regulations is clearly correct, although it is equally important to emphasise her observations at paragraph 47 as to the underlying purpose of the regulations (a purpose equally, if not more, relevant in January 2021 than it was in relation to those in play in March 2020).

Although Lieven J only touches upon this in passing, her interpretation is also then relevant to the other

side of the coin in both the first lockdown regulations and the January 2021 iteration – i.e. the ban upon indoor gatherings subject to exceptions. If NG's parents have a reasonable excuse to be away from the place where they live to care for him, they could equally not be subject to a direction under (now) Regulation 9(3) of the All Tiers Regulations requiring them to stop gathering indoors with him to provide care to him.

On one view, all Lieven J's judgment does is to clear the decks to answer a question which was not asked on the face of the judgment – namely whether, even if it were lawful for his parents to visit, such visits would actually be in NG's best interests. Notwithstanding the obvious benefits identified by Lieven J to such visits in terms of providing NG with the emotional components of care, the care provider had previously indicated that it would withdraw care if they did so because of the risk to their staff (and to NG himself). That Lieven J did not have to grapple with the difficult consequences of this (including as to the potential obligations of the local authority) rather suggests that the care provider must have changed its stance.

Finally and more broadly, the observations made by Lieven J at paragraphs 48 and 51 about the different components of care are ones that are of much wider resonance and a welcome reminder of the importance of looking at the whole picture.

Fluctuating capacity and deprivation of liberty

A County Council v KK & Ors [2020] EWCOP 68 (Lieven J)

Article 5 – deprivation of liberty

Summary

In this case, Lieven J considered whether a "community DoL" order that had been in place in respect of an 18 year old woman ("JK") since January 2020 should be continued.

JK had been diagnosed with diabetes in 2008; and over the years had had many problems managing her diabetes and her mental health, which resulted in frequent stays in hospital. Those stays culminated in an admission to Intensive Care in January 2020, as a result of having four seizures as a result of not controlling her diabetes. HHJ Scarratt then issued an order depriving JK her of liberty at the regional hospital because she did not meet the threshold for being detained under the Mental Health Act 1983.

In April, JK had been assessed as lacking capacity to make decisions concerning her care and treatment. Over time, JK became more accepting of the restrictions in place at the hospital and she was eventually discharged to an independent placement on 5 October 2020, following a transition period. On 28 October 2020, JK was again admitted to hospital for an overnight stay as a result of high ketone levels, but otherwise she had been doing well and had managed to obtain a place on a university course.

A further assessment regarding her capacity concluded that:

1. JK had capacity to make decisions about the care and treatment of her diabetes, except when she was under considerable distress and had overwhelming emotions;
2. During those times JK was unable to weigh information about the management of her diabetes condition and during those periods she lacked capacity to manage her diabetes;
3. Developing skills to cope with her extreme emotion would help JK to develop her capacity.

In determining whether to continue the deprivation of liberty order, Lieven J had to consider three issues:

1. Whether JK lacked capacity in any material respects;
2. Whether the order now sought amounted to a deprivation of liberty within the meaning of Article 5; and,
3. Whether the order was in JK's best interests.

Given the most recent assessment, Lieven considered the authority of *DN v Wakefield MDC* [2019] EWHC 2306 (Fam), in respect of fluctuating capacity or potential future loss of capacity. She determined that when JK was upset or in a heightened state she lost the ability to weigh up relevant information and therefore *"she may prospectively lose capacity"* (para 26).

Applying the test in *Storck v Germany* (2005) 43 EHRR 6, Lieven J was far from convinced that the restrictions sought by the local authority constituted a deprivation of liberty: JK had capacity to decide where she lived, and the local authority sought only the court's authorisation to (i) transport JK to a place of safety in the event of a medical emergency (and could use reasonable force) and (ii) take steps to prevent her from leaving the hospital for the purpose of medical treatment (and could use reasonable force). Lieven J determined, however, that given the order was anticipatory in nature, rather than having the concrete facts before her, it was appropriate for her to assume that there would be a deprivation.

As to JK's best interests, Lieven J took into account JK's strongly held wishes and feelings that she did not want the deprivation of liberty to continue for two reasons: (1) she wanted her autonomy and (2) the order prevented her from pursuing her desired career with the police. She acknowledged the significant risks posed to JK, but cited Munby J in *Local Authority X v MM & Anor* [2007] EWHC 2003 (Fam) at [120] regarding the importance of understanding that those who lack capacity, must, to a proportionate degree, be allowed to take risks and to test out their own capabilities:

> *A great judge once said, "all life is an experiment," adding that "every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge" (see Holmes J in Abrams v United States (1919) 250 US 616 at pages 624, 630). The fact is that all life involves risk, and the*

> *young, the elderly and the vulnerable, are exposed to additional risks and to risks they are less well equipped than others to cope with. But just as wise parents resist the temptation to keep their children metaphorically wrapped up in cotton wool, so too we must avoid the temptation always to put the physical health and safety of the elderly and the vulnerable before everything else. Often it will be appropriate to do so, but not always. Physical health and safety can sometimes be bought at too high a price in happiness and emotional welfare. The emphasis must be on sensible risk appraisal, not striving to avoid all risk, whatever the price, but instead seeking a proper balance and being willing to tolerate manageable or acceptable risks as the price appropriately to be paid in order to achieve some other good – in particular to achieve the vital good of the elderly or vulnerable person's happiness. What good is it making someone safer if it merely makes them miserable?*

She determined that JK had reached a stage where she needed to be trusted to make her own decision; and that a deprivation of liberty order would cause her great stress. Lieven J therefore declined to continue the deprivation of liberty order.

Comment

The concept of fluctuating capacity can cause difficulties for many practitioners – Lieven J's reframing that concept as a "*potential future loss of capacity*" is a helpful way of thinking about it, particularly when considered alongside the often permissive (rather than definitive nature) of orders made in respect of an individual with fluctuating capacity.

Furthermore, Lieven J's observation of the distinction between the approach of the Court of Protection and that of Strasbourg to deprivation of liberty is important. The court is often faced with future restrictions on P's liberty and in the abstract a decision needs to be taken as to whether those restrictions might amount to a deprivation of liberty. That differs significantly to the position facing the Strasbourg court, which, in most cases, considers whether concrete facts do constitute a deprivation of liberty.

The judgment, though, does need to be read alongside that of Hayden J in *GSTT v R* [2020] EWCOP 4 where he held that the Court of Protection cannot make anticipatory decisions under s.16 MCA 2005 where the subject of the proceedings currently has capacity. Whilst the court can make declarations of lawfulness on a 'contingency' basis under s.15(1)(c), Hayden J was clear in *GSTT* that to the extent that the effect of the relief being granted by the court gives rise to a deprivation of liberty, any such deprivation of liberty can only be authorised under the inherent jurisdiction of the High Court. As Lieven J brought the order to an end, these rather knotty jurisdictional questions did not – thankfully – have to confront her.

Mid-year (partial) DoLS Statistics for England

Because of the unprecedented situation in this 2020-2021 data reporting year, NHS Digital have released adult social care activity data for the 1 April 2020 to 30 September 2020 period, to which 81% of local authorities contributed. During that period, compared to the year before 3.3% fewer DoLS

applications were received by local authorities (102,595) and 16.5% fewer applications were completed (79,030). In addition, the data shows that the number of people receiving long-term social care support is reducing and there has been a 4% increase in the number of safeguarding concerns.

When to go to court to challenge a DoLS authorisation

With thanks to Irwin Mitchell, a more graphically refined version of the flowchart Tor did some years ago to summarise the effect of the judgment of Baker J in *RD* is now available here. As a reminder, this judgment sets out a decision-tree to identify when (1) the person themselves has capacity to bring the challenge; and (2) if they do not have capacity, when such a challenge should be brought, either as of right or on a best interests basis.

PROPERTY AND AFFAIRS

Attorneys and irreconcilable differences

Re KC [2020] EWCOP 62 (HHJ Sarah Richardson)

Lasting Powers of Attorney – best interests – revocation

Summary

In this case, the applicant, one of P's daughters sought an order that powers of attorney for property and affairs and welfare be not registered. The powers were in joint and several in favour of the applicant and her 3 sisters. The applicant had refused to execute the powers as she was at loggerheads with her sisters and did not believe that the 4 of them could make decisions in their mother's best interests. The matter was complicated by the fact that P, who had Alzheimer's lived with the applicant.

The powers were executed in August 2017 and the first reason why the applicant objected to their registration was that P had lacked capacity to execute the powers. However, the applicant then conceded that P had capacity in August 2017 so this ground fell away. It was, however, common ground that she had lost capacity to make a number of decisions, including to revoke the purported powers. HHJ Richardson therefore court went on to consider the alternative reason for refusing to register, namely pursuant to s.22(3)(b)(ii) MCA 2005 that the donee (or any of them if more than one) proposes to behave in a way that would contravene his authority or would not be in P's best interests. At paragraph 28 the court considered what HHJ Marshall held:

> *In Re J [2011] COPLR Con Vol 716 Her Honour Judge Hazel Marshall QC considered the statutory construction of s.22 and in particular the approach that should be taken if an attorney or proposed attorney is considered to be unsuitable:*
>
> > *"It appears to me that the general thrust of s.22(3)(b) is that the court can revoke an LPA if it is satisfied that the attorney cannot be trusted to act in the matter and for the purpose for which the LPA was conferred upon him/her… Further, if there is sufficient evidence that the attorney is behaving in contrary to P's best interests, even in a different context, then it seems to me that that might quite reasonably provide a sufficient reason to revoke an LPA, perhaps because of conflict of interest." [73]*
>
> *In my judgment, the key to giving proper effect to the distinction between an attorney's behaviour as attorney and his behaviour in any other capacity lies in considering the matter in stages. First, one must identify the allegedly offending behaviour or prospective behaviour. Second, one looks at all the circumstances and context and decides whether, taking everything into account, it really does amount to behaviour which is not in P's best interests, or can fairly be characterised as such. Finally, one must decide whether, taking everything into account including the fact that it is behaviour in some other capacity, it also gives good reason to take the very serious step of revoking the LPA." [75]*

Taking that staged approach, the judge found that there was no prospect of the sisters being able to

work together for their mother's benefit. She expressly refused to apportion blame for that state of affairs.

She also noted that, as the applicant did not execute the powers, P's wishes to have all 4 daughters as attorneys could not be achieved.

She held that, in those circumstances of irreconcilable conflict, it was in P's best interests that the powers were not registered and so ordered. She appointed a panel deputy for property and affairs only.

Comment

This is an unusual case of a pre-emptive refusal to register a power on the grounds of irreconcilable differences. The notes to the Court of Protection Practice were cited at paragraph 29 as follows:

> *The notes to the Court of Protection Practice state that no case has yet been brought before the courts on the ground of the future behaviour of a donee or donees and state that "an application to revoke a lasting power of attorney on such grounds requires a high standard of proof to show why the behaviour of the attorney is not in the donor's best interests." Insofar as this comment requires the court to undertake a proper analysis of the available evidence, looking at factors such as the context of any evidence, the overall evidential picture and the inherent probabilities (or improbabilities) of the evidence as it relates to the past behaviour of the donee and, applying this analysis, to what it establishes about the likely future behaviour of the donee(s)and whether this is likely to be in P's best interests, I agree. Insofar as this comment suggests that there is somehow a higher standard of proof, or that the seriousness of the matters or the seriousness of the consequences should make any difference to the standard of proof, I respectfully disagree. In the present case, as with any case before this civil court, the standard of proof is to a balance of probabilities.*

Child Trust Funds

There has been some progress in England in relation to Child Trust Funds, the Government announcing on 1 December 2020 that parents or guardians of children who lack mental capacity to manage their money can ask for court fees to be waived when seeking access to a Child Trust Fund. It should be noted that this does not apply in Scotland.

PRACTICE AND PROCEDURE

Party status and restricting the provision of information

KK v Leeds City Council) [2020] EWCOP 64 (Cobb J)

Court of Protection jurisdiction and powers – costs

Summary

In this case, Cobb J had to consider whether P's maternal aunt should be joined to welfare proceedings. The aunt, KK, had been P's main carer for almost all of her childhood; they had last lived together 3 years previously, and they currently had contact with each other. At first instance, HHJ Hayes QC had refused KK's application for party status; KK sought permission to appeal this decision to Cobb J.

KK's application had been (and continued to be) resisted by both the applicant local authority and the Official Solicitor on her niece, DK's, behalf. At the hearing below, they presented and sought to rely upon, information which, although acknowledged to be relevant to the issue before the court, they wished to keep confidential from KK. HHJ Hayes QC received this documentary confidential material, and read it. Neither KK nor her lawyers were given access to this material. HHJ Hayes QC gave a separate shorter judgment in which he expressed his view about this confidential material, and its significance to the decision. A preliminary issue arose before Cobb J as to whether he, too, should read the material. No party argued that he should not, but Counsel for KK drew his attention to the guidance given by Lord Neuberger in *Bank Mellat v HM Treasury (No.2)* [2013] UKSC 38 as to the potential difficulties that would arise. Cobb J directed himself that it was necessary for him to read the material and the supplementary judgment.

There was no dispute between the parties (and Cobb J was satisfied) that HHJ Hayes QC had identified and applied the relevant test on joinder and party status, set out in COPR 2017 rr. 9.13 and 9.15. Cobb J noted at paragraph 31 that endorsed his approach that in considering the desirability" test in COPR r.9.13(2), the "sufficient interest" of the applicant for party status is likely to be relevant. Crucially, HHJ Hayes QC had reached the conclusion that (1) revealing to KK what the confidential evidence was would mean that DK would be likely to disengage from her engagement both with professionals and with these proceedings; (2) joining KK to the proceedings notwithstanding that written evidence would lead to the same consequences; and (3) this would undermine the process of ensuring DK's participation in the proceedings. HHJ Hayes QC found that he could not resolve the problem by joining KK as a party and then exercising the court's power to limit or redact disclosure, as the very fact of joinder would be to bring about the adverse consequences he was seeking to avoid.

As Cobb J identified, therefore, the real dispute in this appeal focused on HHJ Hayes QC's management and deployment of the confidential material and its impact on his decision.

There was "*an appropriately accepted premise by all counsel in this case that it is contrary to the principle of open justice for a judge to read or hear evidence, or receive argument, in private; they rightly and unanimously accept that open justice is fundamental to the dispensation of justice in a modern, democratic society (per Lord Neuberger in Bank Mellat v HMT at §2/§3). It follows that generally, every party has a right to know the full case against him, and the right to test and challenge that case fully. I say 'generally' because there are, as counsel in this case properly recognised, exceptions to this*."

There is, however, nothing in the MCA 2005 nor in the COPR 2017 which specifically govern the correct approach to managing sensitive material which is the subject of an application for non-disclosure. After a careful analysis both of the underlying judgment of HHJ Hayes QC and the competing arguments put before him on appeal, Cobb J drew the threads together as follows at paragraph 41:

> *it seems to me that a judge faced with the situation faced by HHJ Hayes QC at the hearing of the application for party status should consider the following points:*
>
> *i) The general obligation of open justice applies in the Court of Protection as in other jurisdictions* […]*;*
>
> *ii) A judge faced with a request to withhold relevant but sensitive information/evidence from an aspirant for party status, must satisfy him/herself that the request is validly made* […]*;*
>
> *iii) The best interests of P, alternatively the "interests and position" of P, should occupy a central place in any decision to provide or withhold sensitive information/evidence to an applicant (section 4 MCA 2005 when read with rule 1.1(3)(b) COPR 2017); the greater the risk of harm or adverse consequences to P (and/or the legal process, and specifically P's participation in that process) by disclosure of the sensitive information, the stronger the imperative for withholding the same* […]*;*
>
> *iv) The expectation of an "equal footing" (rule 1.1(3)(d) COPR 2017) for the parties should be considered as one of the factors* […]*;*
>
> *v) While the principles of natural justice are always engaged, the obligation to give full disclosure of all information (including sensitive information) to someone who is not a partyis unlikely to be as great as it would be to an existing party* […]*;*
>
> *vi) Any decision to withhold information from an aspirant for party status can only be justified on the grounds of necessity* […]*;*
> *vii) In such a situation the Article 6 and Article 8 rights of P and the aspirant for party status are engaged; where they conflict, the rights of P must prevail* […]*;*
>
> *viii) The judge should always consider whether a step can be taken (one of the 'procedural mitigations' referred to at [26] above) to acquaint the aspirant with the essence of sensitive/withheld material; by providing a 'gist' of the material, or disclosing it to the applicant's lawyers; I suggest that a closed material hearing would rarely be appropriate in these*

circumstances.

On the facts of the case, Cobb J was satisfied that HHJ Hayes QC rightly prioritised (so far as was reasonably practicable), the need to permit and encourage DK to participate in the proceedings which concern her, and/or to improve her ability to participate, as fully as possible in any act done for her and any decision affecting her (MCA 2005, s.4(4)). On the specific facts of the case, HHJ Hayes QC was not wrong to conclude that the very act of joining K would be to bring about adverse consequences for DK and to defeat the very purpose of the proceedings. Although unusual, the process by which HHJ Hayes QC had reached this conclusion was not fundamentally unjust. Cobb J also held that he had been correct to prepare a short supplementary judgment setting out his conclusions relevant to the confidential material, if for no reason because it enabled the appellate court to assess the extent to which, if at all, the confidential material has had a bearing on the overall outcome.

At paragraph 48, Cobb J concluded with two short points in dismissing the appeal.

> *i) It will, I suspect, be relatively uncommon for someone in the position of KK – a former primary carer of P (particularly where P is still a young adult) who wishes party status in proceedings under the MCA 2005– to be denied joinder to the proceedings, and be denied the chance to contribute to the decision-making in this welfare-based jurisdiction. That said, and adopting Bodey J's comments from Re SK […]) for this case, it will always be necessary to balance "the pros and cons of the particular joinder sought in the particular circumstances of the case";*
> *ii) The Judge's decision, and the dismissal of this appeal, does not detract from the obligation on the Local Authority to consult with KK (section 4(7) MCA 2005) as practicable and appropriate on welfare-based issues concerning DK.*

Comment

As Cobb J notes, it is very unusual for a person who has played – and appeared to play – so important a part in P's life not to be joined as a party to proceedings where they wish to be joined. A function of the nature of the proceedings is that, whilst two judges were clear that KK should not have been on the facts of the case, others cannot know why this was the case. Any case in which reliance has to be made upon confidential material arises deep concern, as was clearly caused to both HHJ Hayes QC and Cobb J, and the outcome can never feel entirely satisfactory. Nonetheless, it is clear that both judges, applying, in turn, a line of case-law which emphasised the rigour with which any limitation upon disclosure of information to either a party or putative party has to be considered, gave the position very anxious scrutiny.

It is unlikely that the position that HHJ Hayes QC encountered will crop again often in the future, but at least there is now a clear route-map for parties / putative parties and the court to follow.

The police and the Court of Protection – whose interests?

AB (Court of Protection: Police Disclosure) [2019] EWCOP 66 (Keehan J)

Court of Protection jurisdiction and powers – interaction with criminal proceedings

Summary

In a decision handed down in October 2019, but which for some reason did not appear on Bailii until December 2020, Keehan J considered an application for disclosure of psychological reports in relation to the subject of Court of Protection proceedings. The Official Solicitor on his behalf opposed the application and submitted that only very limited information should be provided to the police in relation to the reports.

The background can be described shortly. There were three reports, two relating to litigation capacity and capacity to make decisions about residence, the third addressing the issue of AB's capacity in relation to access to the internet and social media. For purposes of preparing this report, AB underwent an education programme in relation to decision-making relating to accessing the internet and social media. After he had had undergone that programme that the psychologist prepared her third and final report in which she concluded that at that time AB had capacity to access the internet and social media. The police were undertaking an investigation into offences said to have been committed by AB in between one and two years earlier relating to category C images of children. Subject to the issue of disclosure of the report sought by the police, this investigation was concluded. Keehan J was told by Counsel for the police that if the expert had concluded that AB lacked capacity to access the internet and social media, it was likely the criminal proceedings would be discontinued against AB. Furthermore, if the court declined the police's application for disclosure, then the police would instruct their own expert to undertake a capacity assessment of AB.

The parties were agreed on the legal principles that should be applied. Rule 5.9 of the Court of Protection Rules 2017 provides for an application to be made by a person who is or was not a party to proceedings in the Court of Protection to inspect any other documents in the court records or to obtain a copy of such documents or extracts from such documents. It was submitted by the Official Solicitor (without dissent) that there was no existing authority on the principles to be applied in relation to such a request for disclosure under Rule 5.9, but it was agreed that the test to be applied was not a best interests test, but rather the test set down in *Re C (A Minor) (Care Proceedings: Disclosure)* [1997] 2 WLR 322, with appropriate modifications. This test contains ten points, as follows:

> *1. The welfare and interests of the child or children concerned in the care proceedings. If the child is likely to be adversely affected by the order in any serious way, this will be a very important factor;*
>
> *2. The welfare and interests of other children generally;*
>
> *3. The maintenance of confidentiality in children cases;*
>
> *4. The importance of encouraging frankness in children's cases. All parties to this appeal agree that this is a very important factor and is likely to be of particular importance in a case to which section 98(2) applies...;*

5. The public interest in the administration of justice. Barriers should not be erected between one branch of the judicature and another because this may be inimical to the overall interests of justice;

6. The public interest in the prosecution of serious crime and punishment of offenders, including the public interest in convicting those who have been guilty of violent or sexual offences against children. There is a strong public interest in making available material to the police which is relevant to a criminal trial. In many cases, this is likely to be a very important factor;

7. The gravity of the alleged offence and the relevance of the evidence to it. If the evidence has little or no bearing on the investigation or the trial, this will militate against a disclosure order;

8. The desirability of cooperation between various agencies concerned with the welfare of children, including the social services departments, the police service, medical practitioners, health visitors, schools, etc. This is particularly important in cases concerning children;

9. In the case to which Section 98(2) applies, the terms of the section itself, namely that the witness was not excused from answering incriminating questions, and that any statement of admission would not be admissible against him in criminal proceedings. Fairness to the person who has incriminated himself and any others affected by the incriminating statement and any danger of oppression would also be relevant considerations;

10. Any other material disclosure which has already taken place.

Keehan J agreed that he should apply those principles with the necessary changes for purposes of the Court of Protection. At paragraph 8, he noted:

and take account of the fact that AB does not wish these reports to be disclosed to the police. I take account and give considerable weight to the public interest in the administration of justice, the public interest in the prosecution of serious crime, and the public interest in convicting those who have been guilty of violent or sexual offences against children. Those are plainly important factors which ordinarily carry considerable and even determinative weight in applications for disclosure. In this case, however, I attach particular weight to issue 7:

> *"The gravity of the alleged offence and [more importantly] the relevance of the evidence to it..."*

It was only the third report which was of interest to the police in the case, but it did not deal with the question of whether he had had capacity in the period covered by the index offences with which AB was charged. Keehan J therefore held that the report contained nothing of relevance to the police investigation other than for the police to know that: (a) prior to coming to a conclusion, the expert had arranged for AB to undergo educative work; and (b) that her assessment that, in May 2019, AB had the capacity to access the internet and social media, was limited to that time and in the context of the educative work undertaken with him.

Keehan J was fortified in coming to his conclusion by also taking into account:

> *11. […] the singular importance in cases before the Court of Protection of those who are the subject of the proceedings being frank in their discussions and their cooperation with professionals. It is vital that those who are the subject of proceedings in the Court of Protection have confidence in the confidentiality of the proceedings and, in particular, the confidentiality of assessments undertaken of them for the purposes of determining whether or not they have capacity in the various relevant domains.*
>
> *12. It is, in my judgment, supremely important that those who are the subject of the Court of Protection are as frank as they possibly can be to those who are seeking to assess them and, accordingly, I would only consider disclosing the expert's report to the police if the weight to be given to the public interest was so great as to outweigh the consideration of frankness by AB in the Court of Protection proceedings. As it is, I have come to the conclusion that the expert's reports are not relevant to the issue that the police have to determine for the purposes of the prosecution of AB, namely between 2017 and 2018, did AB have capacity to access the internet and social media? As I have already said, the expert does not address that issue in any of her reports. Accordingly, the application is refused.*

Comment

Given the obvious irrelevance of the reports in question – even the report relating to capacity to access internet or social media – it is not surprising that Keehan J drew the conclusion that he did, although the judgment is a helpful reminder of the time-specificity of capacity.

It is, though, with respect, not entirely obvious that the importance of frankness upon which such weight was placed by Keehan J quite plays out in the same way as it does in relation to children. The *C* case was not concerned so much with potential incrimination by the child themselves, as by those who might potentially have committed offences against the child. There may, perhaps, be some more links required in the logical chain before the position in relation to the subject of proceedings before the Court of Protection is reached. Perhaps another, more satisfactory way, of framing this would have been to identify that the Court of Protection would be substantially hindered in its ability to discharge its inquisitorial functions if it were deprived of its ability to obtain the best information in relation to the subject of proceedings. The decision does, however, set up an interesting – and unresolved – tension as between the Court of Protection's functions in considering the best interests of the person, and the wider societal interest in determining both whether that person has committed an offence and, if they have, their responsibility. It is not impossible to imagine a case in which this tension cannot be avoided on the basis of the irrelevance of the information being sought by the police.

Court of Protection costs – the position of litigants in person

JH v CH & SAP (Costs: the Chorley principle, Litigants in person) [2020] EWCOP 63 (HHJ Evans-Gordon)

Court of Protection jurisdiction and powers – costs

Summary

In this case, the court had to decide what costs a litigant in person is entitled to in the Court of Protection.

The first point that was argued was made by SAP, who was a party to the application because she was a nominated attorney under a disputed LPA. She was also an employed solicitor.

She argued that as an employed solicitor she was entitled to costs on the *Chorley* principle. This derives from *London Scottish Benefit Society v Chorley* [1884] 13 QBD 872. Its modern formulation can be found in *Halborg v EMW Law LLP* [2017] EWCA Civ 793, extended by *Robinson v EMW LLP* [2018] EWHC 1757. Its effect is that where a solicitor is party to litigation and instructs the firm of which he is partner, member or employee/consultant to represent him, the party can recover costs to include the solicitor's profit costs of the party's own time to the extent that that time would be time another solicitor would otherwise have spent on the case.

The court held that that principle applied in the Court of Protection (see paragraph 33) but held that it did not apply in this case as SAP had, throughout, asserted that she was acting in person (see paragraph 15, 25 and 32).

There then fell to be considered whether SAP was entitled to litigant in person costs. CPR r.46(5), which deals with litigant in person costs, is disapplied in the Court of Protection. It was argued that that meant that SAP was not entitled to any costs (save disbursements). The court held otherwise at paragraphs 35-38 as follows:

> *35. It follows that the only inter partes costs the second respondent can recover are those that any litigant in person could recover and those are the disbursements/court fees and any time costs recoverable on a detailed assessment. I appreciate that in considering that SAP is entitled to her time costs as a litigant in person I am differing from DJ Eldergill in London Borough of Hounslow v A Father & A Mother Case No. 13020924. I was provided with this case the day before I handed down judgment. Having considered it, and with great respect, I am not persuaded that the effect of the disapplication of CPR 46.5 or the fact that the Court of Protection is not a Senior Court for the purposes of the Litigants in Person (Costs and Expenses) Act 1975 necessarily results in a litigant in person being unable to recover time costs.*
>
> *36. In my judgment, the disapplication of CPR 46.5 simply gives the Court of Protection wider discretion to deal with costs justly and proportionately in every case. In a large estate where a litigant has necessarily been required to carry out a lot of work, it may be proportionate to allow him some or all of his time costs at a rate that the costs assessor deems fit in the circumstances of the case. That may result in no time costs being allowed or the rate being limited. A blanket ban on the recovery of time costs would mean that a litigant in person could be severely disadvantaged. As DJ Eldergill noted, this would be an extremely unfair outcome, particularly in cases where a litigant in person must undertake considerable work to defend themselves against, say, an allegation of fraud. In my judgment, such a blanket ban, if intended, would have been set out clearly in the rules.*
>
> *37. The fact that the Court of Protection is not a Senior Court for the purposes of the Litigants in*

> *Person (Costs and Expenses) Act 1975 is of no assistance. The Court of Protection did not exist in 1975 and there is no material before me which would indicate that a deliberate decision was made to disapply the 1975 Act in the creation of the Court of Protection with a view to preventing litigants in person from recovering any time costs – that is a leap too far. The rules applicable to deputies are not, in my judgment analogous to inter partes costs in litigation. Part of, if not the primary, reason for the rules regarding deputies is to prevent conflicts of interest arising and/or to avoid a fiduciary profiting from their position. Only the court can allow a deputy remuneration for time spent discharging their duties and, as far as I am aware, this power is only used in cases involving professional deputies.*
>
> *38. Notwithstanding its disapplication, in my judgment CPR 46.5 and/or the 1975 Act may, nonetheless, be helpful to a costs' judge in formulating his or her approach to the quantification of SAP's costs. This is a relatively large estate and the costs involved are relatively low once one disregards the client/solicitor costs and any deputy/client costs. It seems to me that SAP is obliged to reimburse KSN for disbursements under the common law therefore they are recoverable.*

Comment

This judgment clarifies that a solicitor party in the COP is entitled to charge for their time as a solicitor pursuant to *Chorley* principles and what such a solicitor needs to do to be able to do so.

It also holds that, in default, a litigant in person in COP is entitled to some costs for their time with CPR r.46(5) as a guide without its being of direct application. In so ruling, as the judge acknowledged, the court was departing from the view taken by DJ Eldergill. The common law position is that a person who does not engage a solicitor to act for him cannot (outside of *Chorley* principles) get costs for his time he can only recover expenses. The Litigants in Person (Costs and Expenses) Act 1975 was passed to reverse that rule but it only applies where the Act or an Order made thereunder so provides. By its terms, the Act is not applied to the COP as the COP is not a Senior Court and it has not been added to the list by an Order. The fact that the COP was not a court in 1975 is not especially helpful as the Act has been amended since the COP became a court without including the COP in the courts to which it applies.

Short note: contempt, court orders and P's confidentiality – an update

The Court of Appeal has had little hesitation dismissing ([2020] EWCA Civ 1675) the appeal by Dahlia Griffith against her conviction and sentence of imprisonment for contempt, on which we reported here. Having applied out of time to appeal and for a stay of the order, which had been refused, Ms Griffith did not appear – indeed, as at the day of the hearing, she had not been found and taken into custody.

Peter Jackson LJ held as follows:

> *14. The first matter to consider is the Appellant's absence at this appeal hearing. I am satisfied that she has had every opportunity to be represented and that, having chosen to represent herself, there*

> *is no good reason why she could not have attended. Her absence is unfortunately of a piece with her overall attitude to the court process. There is no good reason why her appeal should not be determined today.*
>
> *15. As to that, I conclude that the Judge dealt with these committal proceedings in a way that is beyond criticism. His approach is a model of the careful and balanced assessment that is necessary in a case of this kind. His finding that the Appellant is in contempt was supported by compelling reasoning, indeed the conclusion was inevitable. His approach to the sentencing exercise cannot be faulted. A sentence of this length is a long one, but it is unfortunately necessary in circumstances where the appellant has shown no acceptance, remorse or apology for the deliberate forgery of a court order.*
>
> *16. I would therefore dismiss this appeal. In doing so, I draw attention – and the Appellant's attention in particular – to the opportunity that is given to all contemnors to seek to purge their contempt by making an application to the trial court. In circumstances of this kind, the sentence of a contemnor who accepts their contempt and makes a genuine apology for their behaviour will always be carefully reviewed.*

Coulson LJ, agreeing with Peter Jackson LJ, noted that, "[A]*lthough the recent changes to CPR Part 81 will do much to make the contempt procedure less cumbersome and complex, there will still be many contempt cases in which a judge will have to roll up his or her sleeves and address in detail not only the facts and the law, but all the many balancing factors necessary to achieve a just outcome*." Sadly, for these purposes, CPR Part 81 does not, in fact, apply to the Court of Protection, its contempt procedures being governed by Part 21 of the Court of Protection Rules 2017, which have yet to be updated in line with the CPR changes which took effect on 1 October 2020.

Birth arrangements and delays in bringing proceedings

A London NHS Trust v KB and A London Local Authority [2020] EWCOP 59 (Poole J)

Best interests – medical treatment – deprivation of liberty

Summary

The Court was asked to determine whether a Caesarean section was in the best interests of KB who suffered a hypoxic brain injury at birth which left her with microcephaly, epilepsy and moderate to severe learning disability meaning that her IQ is no higher than between 35 and 49. Her communication was largely non-verbal, confined to a very few words. Final declarations were previously made that she lacked capacity to conduct the proceedings and to make decisions in relation to her antenatal care, the manner and location of the delivery of her baby, long term contraception, including sterilisation, and deciding to engage in sexual relations. As the Judge remarked:

> *11. It is indeed disturbing that KB, a very vulnerable woman who is unable to consent to sexual relations, and who was or ought to have been constantly supervised, has had intercourse. Not only*

> *that, but no-one caring for her realised that she was pregnant until the GP's involvement when she was already five months pregnant.*

Orders were made in that regard for disclosure to the police and for samples to be taken to assist in the identification of the perpetrator of the sexual assault.

It was not possible to ascertain her past or present wishes and feelings, or the beliefs and values that would be likely to influence her decision about mode of delivery. But Poole J was sure that, if she had capacity, KB's priority would be to do the best for her unborn baby. All those involved – both family and professionals – supported the plan and the elective Caesarean section was considered to be in her best interests. She would be brought to the hospital, undergo a generalised anaesthesia, and authority was sought to use reasonable and proportionate measures, including the use of physical or medical restraint, to facilitate the transfers between home and the maternity unit. The resulting deprivation of liberty was authorised, although the evidence to date was that she had been entirely compliant so measures amounting to deprivation might not not ultimately be required.

Whether a non-therapeutic sterilisation was in her best interests was parked for now. As the Judge remarked:

> *36. An order for the non-therapeutic sterilisation of a person with learning difficulties would be a draconian step and one only rarely authorised by the court. In this case, decisions about contraception, including sterilisation, are entwined with issues concerning KB's care and safeguarding. As has been noted by the allocated social worker, if KB were in a safe environment she would not need contraception. The current position is that the perpetrator of the sexual assault on KB has yet to be identified. His identification will inform decisions about safeguarding, residence, and care in the future. Depending upon those arrangements, the need for this court to make any decision on contraception may resolve itself.*

As a welcome footnote, the judgment relates that the Caesarean went ahead as planned and mother and baby were well.

Comment

Given the consensus, and the alignment of the Caesarean section with what KB would have wanted, the best interests decision was not surprising. The application was necessary under the guidance at [2020] EWCOP 2 because (i) it involved an issue of non-therapeutic sterilisation, and (ii) the proposed treatment may have required a degree of restraint. Given the concerns expressed elsewhere in the judgment, the case also illustrates the importance of promptly involving the Official Solicitor in such applications, and of avoiding delay.

Short note: a judgment on transparency

There have been very few judgments on the operation of the transparency provisions of the Court of

Protection. One has recently appeared on Bailii (although decided last year): *Re P (Court of Protection: Transparency)* [2019] EWCOP 67. The case concerned a young man with a mild learning disability, autistic spectrum disorder and attention deficit hyperactivity disorder. He had recently been convicted of sexual offences, and was likely to face further prosecutions for further offences.

When the Court of Protection proceedings concerning (it appears) P's residence and care arrangements came before Keehan J, he questioned why an order had initially been made for the proceedings to be in private.

As he noted:

> *7. The usual approach is that hearings are heard in public and a transparency order will be made (see paragraph 2.1). The background to the "usual approach" was a desire to ensure that the Court of Protection, which has the power to make a wide range of orders involving those who lack capacity including medical treatment and deprivation of liberty orders, avoided the label of "the secret court". This label had been adopted by numerous press organisations. The concept of a "secret court" had the potential to undermine the confidence of the important work of the Court of Protection.*
>
> *8. Private hearings reinforce the concept of the secret court. The concerns about unwarranted and intrusive reporting could be addressed by an order which prevented the identification of information that could lead to the identification of the subject of the application and other parties.*

The concerns in the instant case, asserted by the local authority and/or National Probation Service, related to the potential for P (who had already been photographed by the press and been the subject of articles as a result of his conviction and sentencing at the Crown Court) to be identified, putting him and the residents at his placement at risk of abuse or harm.

Keehan J accepted that "[w]*hen considering the factors set out in PD 4C* [going to whether to have a public hearing], *the need to protect P is a very powerful factor in favour of holding the proceedings in private. The sanction for a breach of a transparency order is contempt proceedings. If the order is breached, however, the information which the order sought to protect may already be in the public domain and the harm to P and/or his placement may have already occurred*" (paragraph 15). However, the "*importance of public justice*, […] *is a central tenet of the Court of Protection. It should only be overridden when the circumstances of the case compellingly, and on the basis of cogent evidence, require the proceedings to be heard in private*" (paragraph 16). Keehan J considered that the balance could best be struck by: (1) excluding members of the public from attending future hearings; (2) permitting accredited members of the press and broadcast media to attend; and (3) making a transparency order which allowed the hearings to proceed in public but subject to reporting restrictions.

THE WIDER CONTEXT

DNACPR decision-making under further scrutiny

The widespread concerns about decision-making in relation to DNACPR recommendations during the pandemic have prompted both a CQC inquiry, the interim report from which (3 December) found that a combination of increasing pressures and rapidly developing guidance may have contributed to inappropriate advance care decisions as well as detailed work from the British Institute of Human Rights, including, to date, a report (20 December) entitled "Scared, Angry, Discriminatory, Out of my Control: DNAR Decision-Making in 2020"

For those wanting an easy guide to trying to get advance care planning right, Alex's shedinar may be a good start.

The JCHR and COVID-19

The Government has published its response to the Joint Committee on Human Rights Report on the response to Covid-19.

The JCHR published its Report in September 2020. The Report found (unsurprisingly) that the response to Covid-19 had had wide-ranging impacts on human rights. In particular, readers of these newsletters may recall in particular findings that:

- There was evidence DNACPR notices were being applied in blanket fashion by some care providers without involving individuals or their families, amounting to a systematic violation of Article 2 and 8 ECHR;
- There were concerns that decisions in relation to hospital admissions (in particular critical care) had discriminated against older people and disabled people;
- The very high levels of deaths in care homes engaged Article 2 ECHR and a thorough investigation would be required to meet the state's procedural obligations under Art 2;
- Blanket restrictions on visiting in care homes and other residential settings breached the Article 8 rights of residents and their families;
- It is very likely an inquiry will be needed to investigate structural issues affecting Covid deaths, including deaths in care homes and those where a person had been denied access to critical care.

The Government's response addresses these points, emphasising some of the guidance which has been published (for instance in relation to care home visits). Other key areas, however – in particular – the recommendation to provide clear policies governing prioritization of healthcare, are hardly addressed.

In relation to DNACPR notices, the Government identifies that the CQC has been tasked with reviewing how DNACPR decisions were made during the pandemic, with a full report expected early this year (as noted above, the CQC's interim report in December 2020 found that a combination of the unprecented pressures caused by the pandemic and lack of clarity around guidance may have led to inappropriate decision making). It also refers to work being done by NHSE to produce accessible public facing guidance on the issue. However, the response stops short of committing to producing a national DNACPR policy.

Concerns around potentially discriminatory hospital admissions is dealt with very shortly, with the response simply recording that the Government does not accept the premise. The JCHR's recommendations are not addressed. This is (put politely) a little unfortunate: even if the premise is not accepted, there is an appreciable risk that the number of patients requiring hospital admission outstrips capacity. This is especially the case in light of the increased transmissibility of the new variant, but even at the time the response was published (14 December 2020) a second national lockdown had been required for the month of November. There was a foreseeable risk of further peaks over the winter leading to large numbers of hospital admissions. It is difficult to see what burdens would have been imposed to ensure clear policies governing prioritization of healthcare were in place to guard against the risk of unlawful discrimination, as recommended. The Government's failure to engage with this recommendation may come to seem unnecessarily short-sighted.

Reference is made to the Adult Social Care Winter Plan, in response to the recommendation that the government ensure that local authorities and care providers are able to meet increased care and support needs during and resulting from the pandemic. This committed to providing £546 million through the Infection Control Fund to help restrict the transmission of the virus by staff moving between care homes, and a commitment to provide free PPE to care homes and domiciliary care providers until March 2021. We note however that the Adult Social Care Winter Plan was published in September, at a time when very assumptions as to the facts were operative. The response itself was published in December, prior to the current national lockdown: it may therefore be that additional considerations needs to be given – or is being given – to whether the change circumstances require additional support.

In relation to care homes, the response reiterates the commitment made by the Prime Minister on 15 July 2020 to establishing an independent inquiry 'at the appropriate time' (though the response does not shed any further light on when this might be). The issue of visits during national lockdowns was addressed by way of the introduction of guidance in November. That guidance (available here, and last updated on 12 January 2021) sets out as a 'default position' that visits should be supported and enabled wherever it is safe to do so. Visits for residents who are approaching the end of life should always be supported whatever the circumstances, with a recognition that this means supporting visits in the months and weeks leading up to this and not merely days and hours.

The introduction of Liberty Protection Safeguards is addressed: in response to the recommendation

that it is essential that LPS is introduced by April 2020, the Government notes that 'we are making good progress towards a public consultation in Spring 2021 and are aiming for full implementation by April 2022'. It remains to be seen whether this timetable will hold.

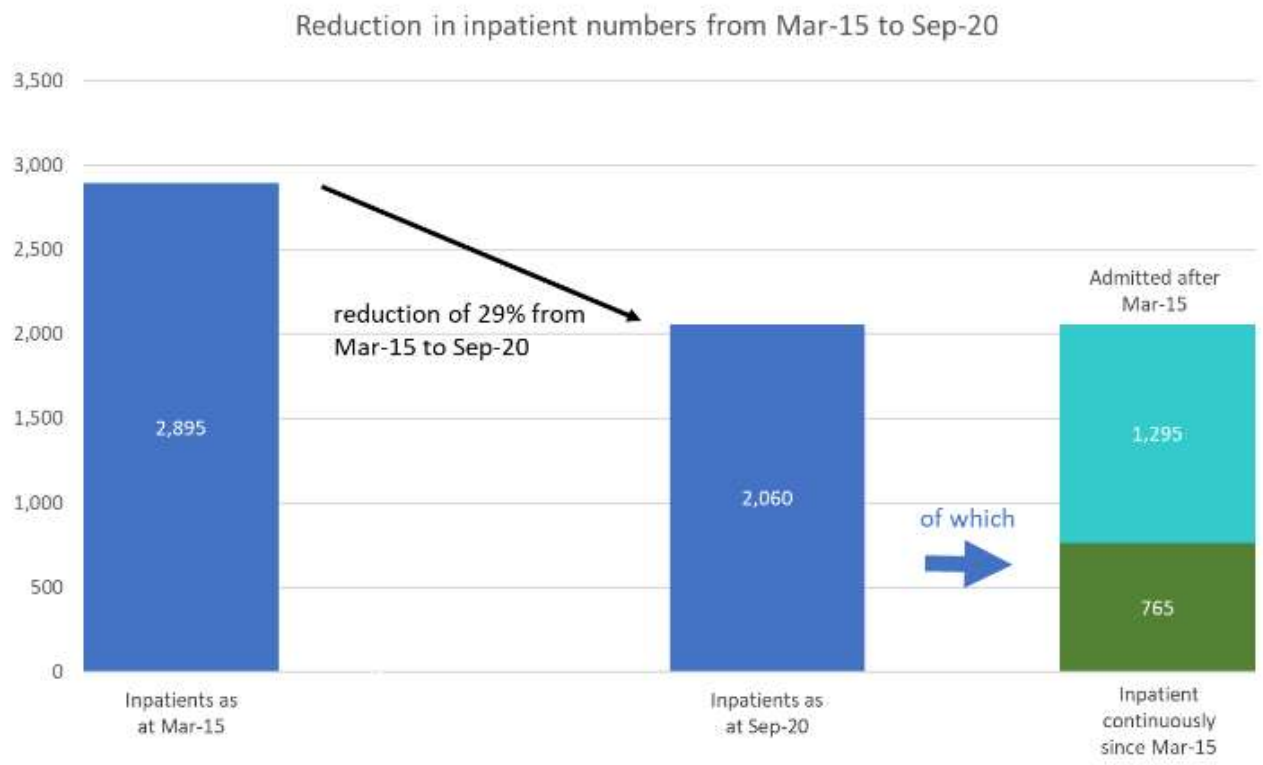
Safeguarding and the MCA – a review of SARs

The first national analysis of Safeguarding Adult Reviews (SARs) in England (between April 2017 and March 2019) has now been published. Funded by the Care and Health Improvement Programme, supported by the Local Government Association (LGA) and the Association of Directors of Adult Social Services (ADASS), its purpose was to identify priorities for sector-led improvement. Building on published regional thematic reviews and analyses focusing on specific types of abuse and neglect, the analysis fills a significant gap in the knowledge base about adult safeguarding across all types of abuse and neglect.

The report is detailed and wide-ranging, but for present purposes we single out its discussion of mental capacity. As the authors, Michael Preston-Shoot, Suzy Braye, Oli Preston, Karen Allen and Kate Spreadbury, note "[a]ttention to mental capacity was one of the most frequently noted deficiencies in direct practice in the SARs in this analysis, with concerns about how assessment, best interests and deprivation of liberty were addressed. The concerns are identified under the following headings: (1) failure to assess; (2) the assumption of capacity: (3) shortcomings in capacity assessment: (4) record-keeping; (5) staff understanding and confidence in applying the MCA; (6) best interests decisions: (7) deprivation of liberty; (8) the (non) involvement of the Court of Protection; and (9) capacity outside the MCA.

Transforming Care Programme Update

The most recent Transforming Care Update has now been published. Focusing on adults with autism and/or learning disability in inpatient mental health hospitals, the update shows that of the 44 Transforming Care Partnerships in England, 10 have met their March 2020 target (no more than 37 per 1 million adults), and 8 have met their March 2024 target (no more than 30 per 1 million adults). In practice, this means that 70% (2040) of the original 2895 people with autism and/or learning disability are no longer in inpatient care. Over 9,300 individuals have had a stay in hospital at some point between March 2015 and September 2020. But there remained 765 people in hospital on 30 September 2020 that had been there since March 2015, 360 of which are restricted patients under the MHA 1983.



Data source: Assuring Transformation (AT) dataset

The same report shows that, as at the end of September 2020, the LeDeR programme had been told about 9,200 people with a learning disability who had died. All reviews should be completed within 6 months of a death being reported. Of the 7,240 reviews that should have been completed 5,235 had been done. 2,005 reviews still needed to be completed.

Sir James Munby, 'Whither the inherent jurisdiction?'

In his lecture to the Court of Protection Bar Association on 10 December 2020 (available here), Sir James provided a fascinating analysis of the historical development and re-invention of the inherent jurisdiction. The paper describes the three jurisdictional strands, namely (1) under 18s; (2) adults who lack capacity; and (3) capacitous but vulnerable adults. It explains how the family judges had created the second strand – a full-blown welfare-based *parens patriae* jurisdiction – and plugged the Bournewood gap, by the time the MCA 2005 came into force. And how the third strand was developed in 2004-5.

Of particular current interest is Sir James' exploration of the more controversial third strand, which unlike the older two branches, is founded on vulnerability (as opposed to age and incapacity). Read alongside David Lock's paper, 'Decision making, mental capacity and undue influence: do hard cases make bad – or least fuzzy-edged law?' [2020] Fam Law 1624, one gets an excellent sense of the debate at hand.

In light of *Mazhar v Birmingham Community Healthcare Foundation NHS Trust and others* [2020] EWCA Civ 1377, one pressing issue is the extent to which the third strand can be used to deprive a vulnerable (capacitous) person of their liberty. Only two decisions have done so: *Hertfordshire County Council v AB* [2018] EWHC 3103 (Fam) and *Southend-On-Sea Borough Council v Meyers* [2019] EWHC 399 (Fam). Both, Sir James argues, were wrongly decided and:

> *There is, however, an even more fundamental objection to the approach in Meyers. In seeking to control the life choices of the vulnerable person one is necessarily limiting and controlling rather than facilitating the exercise of his autonomy and, moreover, in a manner breaching his rights under Article 8.*

For the third strand, Sir James suggested that the court cannot either (a) grant an injunction preventing the vulnerable adult from doing anything which would otherwise be lawful, or (b) make an order depriving him of his liberty. Instead, "[t]*he only scope for this branch of the inherent jurisdiction is to protect someone who is vulnerable from improper or other vitiating influences with a view to establishing that his apparent wishes are indeed his true wishes.*" Injunctive relief against the abuser (i) must be confined to what is necessary to protect the vulnerable adult from the improper pressure (see *FS v RS and another* [2020] EWFC 63); and (ii) must not be such as to breach the vulnerable adult's own rights, in particular those protected by Article 8:

> *Let me spell it out. Niemietz v Germany surely means that if Mr Meyers's capacitous wish was that KF no longer live with him (as it was in October 2018), then it would have been permissible, if appropriate, to grant an injunction against KF requiring him to leave; but if Mr Meyer's capacitous wish (as it was in February 2019) was that KF live with him, then it was no longer permissible to grant such an injunction.*

Like his judgments, Sir James' paper is rich in legal content and, as well as analysing the present debates around the role and scope of this jurisdiction, some predictions are made about its future development including: (a) the availability of damages/compensation; (b) possession orders; and (c) property matters more generally, where a vulnerable adult is being inappropriately influenced by others. The paper will no doubt inform skeleton arguments for years to come.

Short note: police powers of entry in situations of concern

In Nassinde v Chester Magistrates Court [2020] EWHC 3329 (Admin) the Divisional Court has helpfully reconfirmed the scope (and the limits upon) of the ability of a police officer to enter a private property where they have concerns for the person's welfare, including their mental state. The case arose out of an appeal by a woman convicted of assault upon two constables who had entered her flat after having been called by neighbours having heard sounds of shouting. When the police arrived at the scene the neighbour had been fearful of leaving their own flat to grant access to the police officers. There was shouting in the Appellant's flat to such an extent that it was believed that there was more than one person involved. On entering the flat the police officers observed the Appellant's behaviour to

be bizarre in the extreme, and aggressive. She appeared to be in a psychotic state. After her arrest, the officers' suspicions that the Appellant was under the influence of drugs were confirmed. She was taken from the police station to the hospital for assessment in restraints, and her behaviour once again became aggressive and provocative. At paragraph 12, Macur LJ had:

> *no hesitation in re-iterating the fundamental principles, however archaically expressed in the authorities, that an individual may resist trespass onto his/her property by the police regardless of their genuine 'welfare concerns' for the occupants therein. That is, a police officer may enter on reasonable suspicion to investigate danger to physical health, but must depart in the absence of evidence that there is a risk of imminent serious bodily harm save if the occupant acquiesces to his/her continued presence, in which case the police officer remains as invitee and not "in the execution of his/her duty". The evidence of the threat of harm may be equivocal and the police officer may well find themselves on the 'horns of a dilemma', "damned if they do [act] and damned if they do not" as Collins J said in Syed, but there is no question that their 'good intentions' to secure best welfare outcome will provide relief from challenge, such as made by this Appellant; nor should a court allow any sympathies for a police officer's dilemma in such a situation to distract it from a robust scrutiny of the facts. Therefore, in this case the mere fact that a police officer thought it would be "neglectful" or "inappropriate" to leave the Appellant in the flat alone would not, taken in isolation, be sufficient to cross the high threshold.*

On the facts of the case, the court found that the Magistrates had been entitled to conclude that the appellant reasonably and genuinely believed that the Appellant posed a danger of serious harm to herself, which meant that the constables were lawfully present in her flat, and her conviction for assault would therefore stand.

Short note: children - competence, access to justice and the CRPD in the domestic courts

In *Z (Interim Care Order)* [2020] EWCA Civ 1755, the Court of Appeal were considering the situation where the court had placed a 15 year old boy, Z, in the interim care of the local authority on the basis of a care plan which provided that he should be removed from his father's home and placed with foster carers as a bridging placement with a view to placing him in due course in the care of his mother. The Court of Appeal granted the father's appeal; the majority of its reasoning is not directly relevant, but of particular interest is the court's concern with the way in which the boy's wishes had (or had not) been before the court. The court was firstly concerned with the approach taken to Z's competence to give instructions. Baker LJ gave a convenient summary of the principles at paragraph 45, and found that, on the facts of the case that the court should not have relied upon an assessment of competence prepared in July 2020 at the interim care hearing in November 2020, not least because Baker LJ considered that – applying a decision-specific approach – Z's understanding of the primary issue in relation to removal from his father (at stake in November 2020) might be materially different to his understanding of the issues relating to contact with his mother (at stake in July 2020).

Most relevantly for our purposes, Baker LJ noted that:

> *47. There is a further reason for concern in this case to which I alluded during the hearing. Z has a diagnosis of autistic spectrum disorder. In those circumstances, he falls within the protection of the UN Convention on the Rights of Persons with Disabilities 2006. Under Article 13 (1) of the Convention:*
>
> > *"States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages."*
>
> *48. The application of this provision in the context of rules relating to representation in care proceedings was not considered in submissions before us. But it seems to me that there are strong arguments for saying that, in a case where a 15-year-old boy without disabilities would be able to participate directly in court proceedings, it is incumbent on the court and professionals working with a disabled 15-year-old boy to take such steps as may be necessary to facilitate his participation in the proceedings, particularly where the proceedings involve a fundamental question such as his removal from the family home.*

Short note: the price of getting responsibility for care wrong

Surrey County Council v NHS Lincolnshire CCG [2020] EWHC 3550 (QB) was a novel claim brought by a LA in restitution against a CCG in respect of sums paid by the LA for the costs of accommodation and care of a young man with an autism spectrum disorder in circumstances where the predecessor, primary care trust, had made a public law error and declined to assess whether P was eligible for NHS care. Thornton J considered that a claim for unjust enrichment could be brought against the CCG by the LA – the inflexible procedural divide between public and private law claims no longer applied. The LA had discharged a liability to P which would have been owed by the CCG. Thus, the CCG was enriched to the extent of the cost of the care fees paid by the LA to the care home and was freed to spend an equivalent sum on other patients. It was open to the CCG to raise the defence of change of position but on the facts that defence was not made out.

Short note – when is capacity not enough?[3]

The judicial review decision in *Bell & Anor v The Tavistock And Portman NHS Foundation Trust* [2020] EWHC 3274 (Admin) relating to prescription of puberty-suppressing drugs ('PBs') to persons under the age of 18 who experience gender dysphoria has caused considerable waves, with much (often rather ill-informed) comment. Not least as it is not yet clear whether this is the final word, we do not address the case in detail here, save to note that, as with the Supreme Court in *Re D*, the Divisional Court found there to be a sharp dividing line between the position of those under and over 16. By way of reminder, the Divisional Court found that

- it would be highly unlikely that a child aged 13 or under would ever be Gillick competent to give

[3] Nicola being involved in this case, she has not contributed to this note.

consent to being treated with PBs; and

- In respect of children aged 14 and 15, the Divisional Court was very doubtful that a child of this age could understand the long-term risks and consequences of treatment in such a way as to have sufficient understanding to give consent. However, plainly the increased maturity of the child meant that there was more possibility of achieving competence at the older age.

The Divisional Court found, however, that the legal position was different in respect of a young person aged 16 or over:

> *146.* […] *In respect of a young person aged 16 or over, the legal position is different. There is a presumption of capacity under section 8 of the Family Law Reform Act 1969. As is explained in Re W, that does not mean that a court cannot protect the child under its inherent jurisdiction if it considers the treatment not to be in the child's best interests. However, so long as the young person has mental capacity and the clinicians consider the treatment is in his/her best interests, then absent a possible dispute with the parents, the court generally has no role. We do not consider that the court can somehow adopt an intrusive jurisdiction in relation to one form of clinical intervention for which no clear legal basis has been established.*

Significantly, however, the Divisional Court indicated that clinicians "may well" consider that it was not appropriate to proceed, even in the case of a capacitous 16/17 year old, without the involvement of the court, observing at paragraph 147 that: "[w]*e consider that it would be appropriate for clinicians to involve the court in any case where there may be any doubt as to whether the long-term best interests of a 16 or 17 year old would be served by the clinical interventions at issue in this case*." The Divisional Court gave three reasons:

1. The clinical interventions involve significant, long-term and, in part, potentially irreversible long-term physical, and psychological consequences for young persons. The treatment involved is truly life changing, going as it does to the very heart of an individual's identity;

2. At present, the court considered it was right to call the treatment experimental or innovative in the sense that there are currently limited studies/evidence of the efficacy or long-term effects of the treatment;

3. Requiring court involvement would not be an intrusion into the young person's autonomy. Whilst:

> *In principle, a young person's autonomy should be protected and supported; however, it is the role of the court to protect children, and particularly a vulnerable child's best interests. The decisions in respect of PBs have lifelong and life-changing consequences for the children. Apart perhaps from life-saving treatment, there will be no more profound medical decisions for children than whether to start on this treatment pathway. In those circumstances we consider that it is appropriate that the court should determine whether it is in the child's best interests to take PBs. There is a real benefit in the court, almost certainly with a child's guardian appointed, having oversight over the decision. In any case, under the inherent jurisdiction concerning medical treatment for those under the age of 18,*

> *there is likely to be a conflict between the support of autonomy and the protective role of the court. As we have explained above, we consider this treatment to be one where the protective role of the court is appropriate* (paragraph 149)

The curious legal grey area occupied by the 16 / 17 year old is also under examination by Sir James Munby from the opposite angle – that of treatment **refusal**, rather than consent. Assuming that it is out by then, we will report upon that judgment in the next issue.

Children and deprivation of liberty

The problem of a lack of suitable accommodation for children with high levels of need continues. The Children's Commissioner for England published her report 'Who are they, where are they' in late November, reporting the numbers of children in secure accommodation and secure mental health units, and investigating the circumstances of the hundreds of children detained pursuant to orders under the inherent jurisdiction. The report found that Black children, especially boys, were more likely to be in youth custody, and that girls are much more likely than boys to be in mental health wards. It notes that there are a significant number of children in placements which are not registered with Ofsted and reports finding children who should have been subject to deprivation of liberty orders but who were not. The Commissioner also expressed concern about the use of physical restraint such as 'safe space' beds and walking harnesses.

Some of the same concerns continue to be identified by the court, including in the case of G, in which Macdonald J has given a number of judgments lamenting the absence of appropriate placements for a child in care with a high level of need, most recently *Lancashire CC v G (No3)(Continuing Unavailability of Secure Accommodation)* [2020] EWHC 3280 (Fam). Notwithstanding the difficulties in finding such accommodation MacDonald J has, separately, at paragraph 32 of *London Borough of Lambeth v L (Unlawful Placement)* [2020] EWHC 3383 (Fam) also reinforced he fact that:

> *"The common law has long protected the liberty of the subject, through the machinery of habeas corpus and the tort of false imprisonment." The inherent gravity of any violation of a child's longstanding right to liberty and security of the person makes it essential that the State adhere to the rule of law when seeking to deprive a child of his or her liberty (see again Brogan v United Kingdom (1988) 11 EHRR 117 at [58]). If the child's right to liberty and security of the person is to be properly protected this approach must be applied with rigor by local authorities notwithstanding the current accepted difficulties in finding appropriate placements for children with complex needs who require their liberty to be restricted. Local authorities are under a duty to consider whether children who are looked after are subject to restrictions amounting to a deprivation of liberty. A local authority will plainly leave itself open to liability in damages, in some cases considerable damages, under the Human Rights Act 1998 if it unlawfully deprives a child of his or her liberty by placing a child in a placement without, where necessary, first applying for an order authorising the deprivation of the child's liberty.*

SCOTLAND

Scott Review Interim Report

On 18th December 2020 the Scottish Mental Health Law Review ("the Scott Review") published its second Interim Report, extending to precisely 100 pages. Here we do not attempt to summarise everything of significant interest in it. Also, our comments are derived from what actually appears in the Report, not what else might have been done or be planned.

Despite the impact of the pandemic, the Review has adhered to its commendable strategy of surveying the landscape, listening and learning, before moving forward to formulate and test out possible proposals and solutions. As is acknowledged in the opening pages of the Interim Report, the pandemic has not helped that process. Interactions with consultees generally have been more difficult; and that applies in particular to many of those with lived experience, and other direct personal experience, for whom even in normal times maximum contact and sympathetic interaction is necessary in order to elicit the full value of what they are able to contribute. The Review has nevertheless persevered, finding ways to accommodate those sensitivities, and as is evident throughout the Interim Report has been able to learn a great deal that is of relevance, but more slowly. While the Review Team have hitherto been careful not to commit to a target date for issue of their Final Report, they had in fact been working towards Spring/Summer of 2022. They now propose to issue their Final Report in September 2022, but there are positive reasons for adopting that timescale, which will give the Review Team, in the words of the Report, "a unique opportunity to test out draft recommendations on an international stage before finalising the Review's Final Report". In particular, it will be possible to take full advantage of the 7th World Congress on Adult Capacity in Edinburgh from 7th to 9th June 2022, which now forms one of three significant international events in June and July 2022, all of which are likely to provide similar opportunities, the others being the UK and Ireland Mental Diversity Law Network Conference and the International Academy of Law and Mental Health XXXVII Congress in Lyon. In the meantime, a further Interim Report is proposed for "in or around June 2021".

The Interim Report confirms that the Review received 264 responses to its Call for Evidence (issued prior to its previous Interim Report dated May 2020): 157 from individuals; 74 from professionals and organisations; and 33 without indication of the capacity in which they were responding. Full information on the responses is available here. The number of Advisory Groups has been increased from two to five. They represent the main workstreams of the Review to date. After discussing the recommendations from the Independent Review of Learning Disability and Autism in the Mental Health Act ("the Rome Review") and briefly noting other relevant current Reviews, the Interim Report proceeds – as its main content – with chapters devoted to each of those workstreams.

Although the Advisory Group on Children and Young People is described as one of the "new" Advisory Groups, it is impressive that the work of that Group has proceeded so far as to be able to produce the comprehensive and valuable survey in the first of these "workstream" chapters. However, although the

dominant issues are better, and more comprehensively and usefully, articulated than hitherto, they are familiar. They include the long-standing failures to resource adequately mental health services for children and young people, resulting in wholly inefficient and unacceptable delays even in commencing necessary treatment. Apart from the human cost, the under-provision is a false economy, because much time and effort is absorbed in coping with the consequences of the delays and, sadly, often over much longer timescales with damage which could have been at least partially averted by treatment within a reasonable timescale. The failure to resource provision for mental health needs to a similar standard to provision in other spheres is an aspect of the endemic and institutionalised disability discrimination, at the level of Government and other authorities, highlighted in relation to the elderly and adults with disabilities in the November Report. Across all of its work, it would be helpful if the Review Team could be explicit as to whether its work is or is not to be circumscribed by acceptance of under-provision of necessary resources. If that is not to be accepted, then Government will require to commence immediately to allocate adequate resources, for the obvious reason that – particularly in the sphere of recruiting and training skilled personnel – they cannot be "switched on" overnight simply by making money available.

The other constant refrain is the lack of coordination among different services, resulting from unduly hierarchical organisation and lack of "lateral" arrangements to ensure coordination and continuity, not only when a combination of services is required, but when people cross particular artificial but rigid age-related thresholds.

Many matters have not yet been addressed by this workstream, including that 16 and 17 year-olds are adults for the purposes of age of legal capacity and adults with incapacity legislation, adding complications as well as additional possibilities; with the further issue that needs to be addressed because human rights documents generally classify persons as children up to age 18, raising questions of whether adult or child provisions should apply to "young people". That is also one element in the need to address the serious doubts and difficulties when children with disabilities are placed across borders, particularly the internal borders of the UK, to receive necessary care and provision, then later transferred back, often having established habitual residence in another jurisdiction and become subject to the regimes in that jurisdiction.

A cause for potential concern about the work of the Review so far, across the range of its remit, is that consultation to date has focused primarily upon the narrow issues of mental illness rather than those of general disabilities as a whole, and has focused upon experience of existing provision rather than consultation on issues that are important but not so visible to those with lived experience, in particular those where there are lacunae or inadequacies in Scots law. It would appear that the Review does now intend to move forward into such areas, and to "take up the slack" on needs to review adult incapacity and adult support and protection legislation – both of which have only brief mention in the Interim Report. Notwithstanding those brief assertions as to what may happen in the future, in the meantime that continues to leave much of the Review's remit unexplored. Even for people with mental health issues it appears to omit relevant issues beyond those arising directly from the care and treatment of

mental illness.

The Communications and Engagement Advisory Group is one of the "original" Groups. That Group has continued to do useful work, but this workstream appears still to suffer from a particularly narrow focus upon mental health/illness, and a consequential medicalised approach, even to the extent of referring to people within the scope of the Review as "patients".

More generally, this latest Interim Report still does not appear to provide adequate reassurance that the Review will extend its work significantly beyond issues of mental illness to address the full range of disabilities likely to impair people's ability to exercise unaided their legal capacity; the experience and needs across the range of provision of all people with a significant interest and potential to contribute; and the whole legal environment relevant to people with such disabilities, not limited to mental health law nor to law which happens to be contained within the three principal Acts. Worryingly, in its introduction, though in relation to consideration of how people's economic, social and cultural rights can be met, is the statement that the relevant Advisory Group "has focused on mental illness, but it will in the next phase also consider the implications for people with learning disability and autism". That excludes people with ageing conditions; those with long-term brain injury; those incapacitated temporarily by illness or injury; those with fluctuating conditions; and many others. Indeed, any diagnosis-based or "label"-based approach is the opposite of a human rights-based approach addressing holistically and inclusively the whole range of relevant disabilities and their legal environment. There are indeed throughout the Interim Report multiple references to limited groups of people, all differing, without any explanation as to why – in each case – some are included and others excluded. Going forward, it would appear to be essential that the Review adopts terminology linked to appropriately inclusive definitions of both the people whose circumstances are addressed and the areas of law comprising the relevant legal environment, and keeps to that terminology except where there are explained reasons for departing from it.

In its findings again, the work of the Communications and Engagement Advisory Group provides impressive articulation of issues already well known and well understood, including lack of involvement of carers, yet again inconsistent coordination among services, inconsistent provision of information, including as to advocacy services, and lack of use of advance statements in the mental health sphere (clearly to be linked by the absence of appropriate provision for advance directives generally in Scots law, even to the extent of not yet implementing the 1995 recommendations of the Scottish Law Commission in that regard.

The Compulsion Advisory Group has done impressive and well structured work learning about people's experience of compulsion within mental health legislation, but that is of course only the tip of the iceberg in the context of compulsion of people with relevant disabilities more generally, and in particular the serious failure of Scots law to fill the gap created by lack of provision generally for situations of deprivation of liberty; now a full six years after Scottish Law Commission offered a regime. Worryingly, even in its section on "What will we do next?", the Group does not signal an intention to

explore the remit of the Review beyond matters narrowly within mental health law (and related criminal law).

The work of the Capacity and Support for Decision-making Advisory Group very obviously requires to go beyond mental health law, and to a significant extent does so, albeit with a primary focus so far on the mental health concept of "SIDMA" (significant Impairment of decision-making ability). So far, the Review has concentrated on a "survey of clinician and practitioner views on capacity/SIDMA assessments" as "an existing baseline"; on relevant human rights treaties; on a literature review; and on consideration of "Values-Based Practice". The reference to a literature review is somewhat tantalising, in that it points to a much broader exploration of the Review's remit than is indicated elsewhere, but the review is not appended to the Interim Report and no link is provided to access it, so the external reader is rather "left guessing" as to the extent of it, the lessons learned from it, and the further consultation that will in consequence be required. Likewise, it is reported that "a working glossary has … been established", but it is not disclosed, nor – as noted above – does any consistent and appropriately inclusive terminology appear to have been adopted generally across the work of the Review.

Practitioners in the adult incapacity sphere will look forward with particular interest to this Group's work as outlined in its: "What will we do next?" section, including the creation of "test scenarios" and consultation; clarification of the concept of "will and preferences"; establishment of a sub-group on "Support for Decision-making" (though not, apparently, on the wider concept under CRPD of support for the exercise of legal capacity, to include the important element in Scots incapacity law of acting as well as deciding (see the definition in section 1(6) of the 2000 Act); continuing communication and linkages with the other Advisory Groups; and the establishment of a "Wider UK and International Reference Group" (though it is to be hoped that this last item will be complemented by full consideration of the development and underlying principles of existing Scots law, including – for example – the prominent place of requirements for support ever since the introduction of a modern form of guardianship into Scots law 35 years ago).

Finally, the Advisory Group on Economic, Social and Cultural Rights has made an important start on its work, highlighting that: "There was a clear message from the evidence we received that, for many people with mental illness, although the provisions of mental health law were very important, economic, social and cultural rights were even more significant". Unsurprisingly, needs identified included a focus on prevention and supportive communities, with better primary care; more and better support; and more holistic support for people with severe and enduring illness. This chapter also addresses the "strong mutually reinforcing relationship between poverty and poor mental health". The chapter asserts that the Review has been tasked with making recommendations which ensure that people's economic, social and cultural rights are reflected in mental health law. Here again, the limitation to mental health law and implied exclusion of all other aspects of the Review's remit causes concern, somewhat allayed by the references in the "What will we do next?" section to "people and organisations with expertise in relation to particular protected equality characteristics (including sex,

race and sexuality), and dementia, learning disability and autism to identify particular rights of importance to them". It will be noted yet again, however, that this is still a list of particular groups by diagnosis, rather than an inclusive list of all relevant disabilities.

One must conclude, however, by emphasising that this account does not do justice to the full content of the Interim Report or all the work that has been done to take the Review this far in difficult circumstances. It is essential reading.

Adrian D Ward

Registration of powers of attorney

In recent weeks practitioners have once more raised concerns about delays in registering powers of attorney.

There are three factors. Firstly, registrations of powers of attorney have increased year on year ever since the present regime commenced almost 20 years ago (on 2nd April 2001). Over the second of those decades, applications for registration rose from 1,106 in 2011/12 to 2,975 in the complete year 2018/19, then to 3,284 in the nine months April-December of 2019.

Secondly, OPG have a long record of increasing staff and other resources, and of successive innovative improvements in processes and internal working methods, in response to these increases.

Thirdly, both of those long-term trends have been disrupted by the pandemic. On the one hand, applications for registration dropped markedly in the period March-May 2020, but on the other hand not only was the working of OPG substantially impacted, particularly initially, but the timing was awkward in relation to latest agreed recruitment, and improvement to systems, in response to the increase.

I am grateful to Fiona Brown, Public Guardian, for providing in response to my enquiries the information upon which this article is based, and her permission to include the quotation with which it concludes.

Immediately before the pandemic processing time for power of attorney applications already exceeded the target processing time of 30 working days, so that OPG were processing deeds received in early December 2019. This was a direct consequence of the continued increase in applications during 2019, as a result of which Scottish Courts and Tribunal Service had already increased OPG's operational budget, to permit a large number of additional permanent staff to be recruited, and other resources to be deployed as and when required.

Additional permanent staff were recruited early in 2020, but taking up post and then being trained was delayed by the pandemic.

By mid-March, with the pandemic having struck, OPG was closed for a short period, then opened to a very limited number of staff, with some additional staff working from home. Resource levels did not

return to the pre-pandemic numbers until July/August 2020 (when schools and nurseries were permitted to open). This significant operational impact resulted in further delays to POA processing times. By mid-December, OPG was registering deeds received in March/April 2020, but at least the low volume received March-May has permitted a fairly rapid catch-up. If current restrictions are continued, they may impact manual processing, rather than (with staff working from home) electronic processing.

OPG stress that they have continued throughout to offer their expedited registration service (registration within five working days) where genuine emergency is demonstrated. The application form and criteria for expedition are published on OPG's website, and promoted each week in a news article.

The following further information has been provided to us by the Public Guardian:

> *"We appreciate that solicitors and their clients will be frustrated by the further delays. I would like to assure you/them that we are taking various steps to recover the position, namely:*
>
> - *12 Administrative Officers are taking up post (phased between November 2020 and January 2021) with recruitment for a further 5 on-going.*
> - *Throughout 2020-21 SCTS will scope and introduce a new and innovative case management system for the OPG. This new system will provide efficiencies within the current registration process, allowing additional PoA deeds (and other work) to be processed each day.*
> - *The Public Register (of Adults with Incapacity cases) which is maintained by the OPG, will be made available online during 2021, making it easier for parties to search the register themselves to confirm if e.g. an Attorney or Guardian has been appointed, making the process more effective and freeing up OPG resources to tackle PoAs and other critical work.*
> - *Weekend overtime commenced mid-December, and will continue for the foreseeable future.*
>
> *"I hope the above information will reassure your readers that SCTS/OPG remain committed to improving/maintaining performance and will continue to take whatever steps are required to deliver a fast, efficient and reliable service."*
>
> *Adrian D Ward*

Add 176 days - clarification

In the October 2020 Report we explained the effects of the "stop-the-clock" emergency provisions under which 176 days required to be added to the duration of time-limited guardianship orders, after the "clock stopped" on 7th April 2020 and started running again on 30th September 2020. We quoted the relevant statutory provisions and regulations in October, and gave a link to the helpful explanation of the consequences provided by Scottish Government (available here). We are aware of some doubt and confusion about whether the additional 176 days apply to the duration of time-limited guardianship

orders which were not due to expire until on or after 30th September 2020 (as well as those which were otherwise due to expire during the period that the clock was stopped). The clear answer is that the additional 176 days does apply to all guardianship orders current on 7th April 2020, regardless of when they were originally due to expire. We have seen at least one official communication to a solicitor asserting that because a particular guardianship order was not due to expire prior to 30th September 2020, the original expiry date would still apply. That was incorrect. The correct position is clearly explained in the guidance from Scottish Government, and has been confirmed to us by the Public Guardian.

The Public Guardian has explained that OPG's electronic systems do generate warning letters ahead of expiry geared to the original expiry dates, but when these are issued they are accompanied by a leaflet explaining the effect of the "stop-the-clock" provisions and advising guardians to take advice of a solicitor if they require assistance. It is of course possible that the leaflet may become separated from the automatic letter at some point prior to the letter being presented by a lay guardian to a solicitor!

Adrian D Ward

Scottish Government: recent developments

Initiatives from Scottish Government relevant to practitioners in the adult incapacity field have come thick and fast. Some of them are mentioned selectively in this item. It does not attempt to be comprehensive.

An "AWI Emergency Legislation Commencement Consideration Group" has been established with a remit to consider evidence for continued suspension of temporary amendments to adults with incapacity legislation within the Coronavirus Act 2020; to consider the human rights issues that arise should emergency AWI provisions be reinstated or in connection with "ordinary" AWI provisions as they relate to the crisis; to consider issues around physically distant use of existing legislation, with reference to current and future practice; to consider the continued operation of the 2000 Act during the coronavirus pandemic; and to consider issues arising in relation to changes in practice, not necessary specifically requiring legislative change. The Group has met frequently and has been commendably open to practitioner input. (Disappointingly, the equivalent Group established to consider mental health legislation does not include membership representative of, and with direct access to, equivalent practitioner input.)

The National Task Force for Human Rights Leadership has established a "UN CRPD Reference Group" to consider incorporation of the Convention on the Rights of Persons with Disabilities into Scots law. This faces the formidable task of converting human rights principles into law which is not merely aspirational and declaratory, but which is effective law that complements rights with enforceable duties, and a clear and accessible mechanism for enforcing them.

Finally in this quick round-up, following various pressures that have arisen – principally in the context of the pandemic – for at least some updating to the 2000 Act without waiting for yet further years for the outcome of the Scott Review to generate eventual legislative change, there are suggestions that Scottish Government be invited to make a commitment to at least some updating of the 2000 Act in the first parliamentary session following the elections in May 2021. A specific proposal is for a "short-term placement certificate" procedure. That is the subject of discussion, as is the question of what other interim improvements to the legislation could be proposed at the same time.

Adrian D Ward

Disability discrimination in a tribunal process

The definition of "discrimination on the basis of disability" in Article 2 of the UN Convention on the Rights of Persons with Disabilities expressly includes "denial of reasonable accommodation". Article 6 of the European Convention on Human Rights provides that: "In the determination of his civil rights and obligations … everyone is entitled to a fair and public hearing …". Due to conduct during a hearing that Mr Eric Hamilton attributed to "mental health difficulties", a First-tier Tribunal ("FtT") excluded him "from presenting submissions or arguments or questioning witnesses in person at any future hearing". He appealed to the Upper Tribunal. The Upper Tribunal did not refer to the human rights documents quoted above. It dealt with the matter by reference to more detailed provisions to similar effect in the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 (No 328) ("the Regulations"), by which the proceedings were governed.

The case of *Eric Hamilton v The Glasgow Housing Association Limited*, [2020] UT37 UTS/AP/19/0041, FTT Case Reference FTS/HPC/PF/18/3124, was decided by the Upper Tribunal on 8th September 2020. Mr Hamilton raised a claim before the FtT in relation to an alleged breach by the respondents of the Code of Conduct for Property Factors. The FtT hearing took place on 19th March 2019 at the Glasgow Tribunal Centre. Mr Hamilton represented himself. An issue arose about the entitlement of the respondents' solicitor to act as their representative. It took two hours to resolve. The hearing continued for almost another hour before it was adjourned for lunch. By then Mr Hamilton had verbally interrupted proceedings three times. On the third occasion, the FtT Chair warned him against further interruption. The Chair warned that if there were to be any further interruptions the Tribunal would require to consider excluding him from the hearing. Later that day he interrupted again. The FtT noted that he suffered from poor mental health and that he had "endeavoured to control himself but had been unable to do so". It nevertheless decided to exclude him from presenting submissions or presenting arguments or questioning witnesses in person. It stated that the decision would apply to any future hearings. It issued the Interlocutor to that effect. The FtT adjourned the hearing to a date to be fixed to allow him to "find and instruct a representative in light of his exclusion from appearance as a party". He was unable to obtain representation, and reported that to the FtT. He sought leave to make a late appeal to the Upper Tribunal. Leave was refused by the FtT, but was eventually granted by the Upper Tribunal. At that hearing he was accompanied by his brother, Mr Ian Hamilton, who provided support

to him.

The Rules provide (Rule 2(1)) that the overriding objective of the FtT is to deal with proceedings justly *inter alia* by "(c) ensuring, so far as practicable, that the parties are on equal footing procedurally and are able to participate fully in the proceedings, including assisting any party in the presentation of the party's case without advocating the course they should take"; that (Rule 25) the chairing member must take reasonable steps *inter alia* to "(c) ensure that the parties to the hearing – (i) understand; and (ii) can participate in, the proceedings"; and (Rule 34(2)) that in deciding whether to exercise its power of exclusion the FtT must *inter alia* have regard to "(b) in the case of the exclusion of a party or a representative of a party, whether the party will be adequately represented and whether alternative measures could be put in place."

It would appear that the FtT failed to implement those duties. In the Decision Notice of the Upper Tribunal, Sheriff Iain Fleming wrote: "… the decision to exclude a party is one which should be taken with considerable restraint and discretion. While no criticism can be made of the FtT's decision to admonish the appellant about his repeated interruptions, it rather appears that at no time prior to the decision to exclude the appellant was any enquiry made as to whether the appellant would have benefited from regular breaks in proceedings, or whether a supporter for the appellant could be obtained. There does not appear to have been enquiry into whether a short break in proceedings to allow the appellant to marshall his equilibrium such that he could have briefly absented himself before being invited back into the hearing room and enquiry made as to whether the hearing could continue without further interruption. Further, no enquiry appears to have been made as to whether there were any alternative ways in which the appellant could participate. For instance, video or telephone conferencing does not appear to have been considered, nor was the possibility of written submissions in respect of some or all of the issues. In addition, it appears that adjourning the hearing until a later date to allow the appellant to recover his composure was an option that does not appear to have been considered."

It is disappointing that these fundamental failures to deliver justice to a party before a Tribunal should have occurred in the Glasgow Tribunals Centre, which at least in relation to children with additional support needs has world-leading facilities and procedures to maximise their participation despite difficulties far more serious and demanding than Mr Hamilton's inability, due to mental health difficulties, and despite his own efforts, to contain his occasional outbursts during long, uninterrupted sessions. One wonders whether such facilities could have been made available to Mr Hamilton. *Adrian D Ward*

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Victoria regularly appears in the Court of Protection, instructed by the Official Solicitor, family members, and statutory bodies, in welfare, financial and medical cases. Together with Alex, she co-edits the Court of Protection Law Reports for Jordans. She is a contributing editor to Clayton and Tomlinson 'The Law of Human Rights', a contributor to 'Assessment of Mental Capacity' (Law Society/BMA), and a contributor to Heywood and Massey Court of Protection Practice (Sweet and Maxwell). To view full CV click here.

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Neil has particular interests in ECHR/CRPD human rights, mental health and incapacity law and mainly practises in the Court of Protection and Upper Tribunal. Also a Senior Lecturer at Manchester University and Clinical Lead of its Legal Advice Centre, he teaches students in these fields, and trains health, social care and legal professionals. When time permits, Neil publishes in academic books and journals and created the website www.lpslaw.co.uk. To view full CV click here.

Annabel Lee: annabel.lee@39essex.com

Annabel has experience in a wide range of issues before the Court of Protection, including medical treatment, deprivation of liberty, residence, care contact, welfare, property and financial affairs, and has particular expertise in complex cross-border jurisdiction matters. She is a contributing editor to 'Court of Protection Practice' and an editor of the Court of Protection Law Reports. To view full CV click here.

Nicola Kohn: nicola.kohn@39essex.com

Nicola appears regularly in the Court of Protection in health and welfare matters. She is frequently instructed by the Official Solicitor as well as by local authorities, CCGs and care homes. She is a contributor to the 4th edition of the *Assessment of Mental Capacity: A Practical Guide for Doctors and Lawyers* (BMA/Law Society 2015). To view full CV click here.

Katie Scott: katie.scott@39essex.com

Katie advises and represents clients in all things health related, from personal injury and clinical negligence, to community care, mental health and healthcare regulation. The main focus of her practice however is in the Court of Protection where she has a particular interest in the health and welfare of incapacitated adults. She is also a qualified mediator, mediating legal and community disputes. To view full CV click here.

Rachel Sullivan: rachel.sullivan@39essex.com

Rachel has a broad public law and Court of Protection practice, with a particular interest in the fields of health and human rights law. She appears regularly in the Court of Protection and is instructed by the Official Solicitor, NHS bodies, local authorities and families. To view full CV click here.

Stephanie David: stephanie.david@39essex.com

Steph regularly appears in the Court of Protection in health and welfare matters. She has acted for individual family members, the Official Solicitor, Clinical Commissioning Groups and local authorities. She has a broad practice in public and private law, with a particular interest in health and human rights issues. She appeared in the Supreme Court in *PJ v Welsh Ministers* [2019] 2 WLR 82 as to whether the power to impose conditions on a CTO can include a deprivation of liberty. To view full CV click here.

Simon Edwards: simon.edwards@39essex.com

Simon has wide experience of private client work raising capacity issues, including *Day v Harris & Ors* [2013] 3 WLR 1560, centred on the question whether Sir Malcolm Arnold had given manuscripts of his compositions to his children when in a desperate state or later when he was a patient of the Court of Protection. He has also acted in many cases where deputies or attorneys have misused P's assets. To view full CV click here.

Adrian Ward: adw@tcyoung.co.uk

Adrian is a recognised national and international expert in adult incapacity law. He has been continuously involved in law reform processes. His books include the current standard Scottish texts on the subject. His awards include an MBE for services to the mentally handicapped in Scotland; honorary membership of the Law Society of Scotland; national awards for legal journalism, legal charitable work and legal scholarship; and the lifetime achievement award at the 2014 Scottish Legal Awards.

Jill Stavert: j.stavert@napier.ac.uk

Jill Stavert is Professor of Law, Director of the Centre for Mental Health and Capacity Law and Director of Research, The Business School, Edinburgh Napier University. Jill is also a member of the Law Society for Scotland's Mental Health and Disability Sub-Committee. She has undertaken work for the Mental Welfare Commission for Scotland (including its 2015 updated guidance on Deprivation of Liberty). To view full CV click here.

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 February. 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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