ThirtyNine
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Court of Protection update

Thirty Nine Essex Street Court of Protection Newsletter: December 2012

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Editors

Introduction

Welcome to the December 2012 newsletter. This edition is somewhat shorter than last month's, but so that you are not unduly deprived of reading matter, we include with it a note on the inherent jurisdiction prepared by Alex.

In this newsletter, we discuss costs as against public authorities, litigation capacity, the removal of attorneys, the proper form of reporting restriction orders, the proper interpretation of s.44 MCA 2005, a further case from Strasbourg upon deprivation of liberty, and also report upon amendments to the MCA (both in force and prospective).

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

We are delighted to announce that, with effect from next month, the Editorial Board will be swelled by the addition of Michelle Pratley, late of 4-5 Gray's Inn Square. As some of you may be aware, we have recently taken on a considerable number of tenants from 4-5, including a number of excellent COP practitioners. You will no doubt be hearing more in due course, both of this development and from Michelle.

Finally in this introductory section, we would like to pay tribute to Mr Justice Hedley, who is retiring at the end of this term. Regular readers of this newsletter will have noted quite how frequently we have reported his judgments, and how frequently we have held them up as examples of the approach that Courts should take to some of the most difficult issues raised by the MCA. Perhaps most importantly, and as we have always been reminded when we have heard him speak at seminars, Hedley J has never allowed himself to be distracted from the central fact that at heart of all COP proceedings are those who are amongst the most vulnerable in society but who are, above all, individuals whose particularities and idiosyncrasies are properly worthy of respect. We wish him very well in his retirement.

WBC v CP [2012] EWHC 1944 (Fam)

COP jurisdiction and powers - Costs

Summary

With thanks to Sam Karim of Kings Chambers for bringing this to our attention, this costs decision relates to the case of *Re C* [2011] EWHC 1539 (Admin), which readers may recall involved the use of a 'blue room' to restrain a young man who displayed challenging

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

behaviour. The Court of Protection and judicial review proceedings resulted in the local authority admitting to have breached its community care obligations in respect of C, and declarations that C's rights under Articles 3, 5 and 8 had been violated. Ryder J gave important guidance about the use of seclusion in residential schools.

C's brother, who became a party to the proceedings shortly after they were instituted, sought an order that the local authority responsible for C should pay his costs. Granting C's brother the order sought, Ryder J relied on the local authority's misconduct, the fact that, had the local authority complied with the MCA 2005, C's brother would not have needed to play such an extensive role in the proceedings, and the fact that C's brother had made a useful contribution to the proceedings. Ryder J concluded that a departure from the usual rule that there be no order for costs in Court of Protection proceedings was appropriate, since:

a. the local authority's actions were tainted with illegality;

b. the local authority's decision making was impoverished and disorganised;

c. the local authority was responsible for the delay in referring C's circumstances to the Court of Protection and/or the High Court in its children and inherent jurisdictions;

d. the local authority could have arrived at the position concluded by the court many months earlier.

Comment

This decision reaffirms that adverse costs orders may well be made in welfare proceedings where public bodies have failed to comply with their statutory responsibilities, even where there has been no bad faith, and that public bodies who do not accept the strength of the case against them and make appropriate concessions and apologies at an early stage cannot rely on the general rule as to costs in welfare proceedings. It can therefore be read alongside *VA v Hertfordshire PCT and Others* [2011] EWHC 3524 (COP) as a health warning for public authorities.

Re Harcourt; The Public Guardian v A (unreported, 31.7.12)

Lasting Powers of Attorney – best interests – revocation

Summary

Two months after her husband passed away, Mrs Harcourt appointed her younger daughter ('donee') to manage her property and financial affairs under a Lasting Power of Attorney ('LPA'). Care home arrears, questionable borrowing, unaccountable financial transfers, and frequent cash withdrawals resulted in an investigation being conducted by the Office of the Public Guardian ('OPG').

For those unfamiliar, the functions of the Public Guardian are contained in s.58(1) of the Mental Capacity Act 2005 and include:

- establishing and maintaining a register of LPAs;
- directing a Court of Protection Visitor to visit the donee;
- directing a Court of Protection Visitor to visit the person granting the power of attorney;
- receiving reports from donees;
- reporting to the Court of Protection on such matters relating to proceedings under the Act as the court requires; and
- dealing with representations (including complaints) about the way in which a donee is exercising his powers.

By virtue of Regulation 46 of the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007 (SI 2007 No. 1253), the OPG is able to require the donee to provide information and produce documents where there are circumstances suggesting that the donee may be behaving in contravention of

his authority or not in the donor's best interests or has failed to comply with a court order or directions. However, the OPG has no powers of enforcement: in order to freeze the donor's accounts or suspend the attorney's powers, or revoke the LPA, it must apply to the Court of Protection for an order.

With their inquiries into Mrs Harcourt's financial affairs having been impeded by her daughter, the Public Guardian therefore had to apply to have the LPA revoked. Senior Judge Lush noted:

> "*39. Essentially, the Lasting Powers of Attorney scheme is based on trust and envisages minimal intervention by public authorities. Even where a donor lacks the capacity to ask the attorney to provide accounts and records, the court would not normally exercise its supervisory powers under section 23, unless it had reason to do so, possibly because of concerns raised by the OPG. The court's powers in this respect simply duplicate those of a capable donor.*"

Mrs Harcourt had chronic schizophrenia and probable vascular dementia. By the time of the hearing she was unable to explain her income, thought the care home manager was managing her money, and was unaware of her expenses. She did not know whether she had any savings or what a power of attorney was, and was unaware that she had given the power to her daughter. With the benefit of reports from a Court of Protection Visitor and a Consultant Psychiatrist, Senior Judge Lush concluded that she lacked capacity to give directions to the attorney with regard to the production of reports, accounts, records and any other information relating to the management of her property and financial affairs (paragraph 50). She also lacked the capacity to examine or instruct others to examine any financial records and raise requisitions on them (paragraph 51). Hence, the court had a discretion to intervene on her behalf.

Section 22 of the MCA enabled the court to revoke Mrs Harcourt's LPA if she lacked capacity to do so and, inter alia, her daughter was behaving in a way that either contravened her authority or was not in her mother's best interests. Senior Judge Lush noted that applying the statutory checklist in cases of this kind was "*never particularly easy*" (paragraph 53). In considering the s.4 factors, the court took into account the fact that the daughter was an auditor, whose job involves checking the accuracy of financial records: so it would be reasonable to expect a higher standard of care from her in terms of an awareness of her fiduciary duties and the need for exactitude in presenting accounts and promptness in delivering them (paragraph 59). Moreover, her mother's finances were relatively straightforward. Senior Judge Lush continued:

> "*60. The factor of magnetic importance in determining what is in Mrs Harcourt's best interests is that her property and financial affairs should be managed competently, honestly and for her benefit.*"

It was clear that her daughter had not managed the finances well and her refusal to co-operate with the court and the OPG meant she was not behaving in her best interests.

After making reference to the Article 6 ECHR rights of both mother and daughter, Senior Judge Lush went on to consider their Article 8 rights:

> "*71. In the absence of appropriate safeguards, the revocation by the court of a Lasting Power of Attorney, which a donor executed when they had capacity and in which they chose a family member to be their attorney, would be a violation of their Article 8 rights. For this reason the Mental Capacity Act has been drafted in a labyrinthine manner to ensure that any decision by the court to revoke an LPA cannot be taken lightly.*
>
> *72. In this case, I believe that the revocation of the LPA in order to facilitate the appointment of a*

> *deputy is a necessary and proportionate response for the protection of Mrs Harcourt's right to have her financial affairs managed competently, honestly and for her benefit, and for the possible prevention of crime.*"

Accordingly, the LPA was revoked and a deputy appointed.

Comment

This decision is of particular interest for three reasons.

First, the court's power to revoke an LPA under s.22 contains no explicit reference to best interests, unlike s.16 MCA. A literal reading might suggest that if P lacks capacity to revoke it, the court may do so if simply satisfied that, inter alia, the donee has not acted in P's best interests. However, this judgment makes it clear that the court's decision to revoke must in any event be in P's best interests. In that way, s.22 is supplemented by s.4. In this regard, the judgment is entirely consistent with the earlier decision of HHJ Marshall QC in *Re J* (to which Senior Judge Lush did not refer), in which HHJ Marshall considered the question of what conduct of the attorney would be of relevance to the question of revocation, holding (at paragraph 13) that:

> *"on a proper construction of s 22(3), the Court can consider any past behaviour or apparent prospective behaviour by the attorney,* [and]*, depending on the circumstances and apparent gravity of any offending behaviour found, it can then take whatever steps it regards as appropriate in P's best interests (this only arises if P lacks capacity), to deal with the situation, whether by revoking the power or by taking some other course."*

Secondly, any revocation of an LPA will interfere with Article 8 ECHR. Appointment of a non-family member will presumably engage "*private life*;" appointment of a family member will additionally engage "*family life*." And both the donor and the donee's Article 8 rights have been expressly acknowledged.

Finally, this is another example of the Court's increasing willingness to recognise the right to a fair trial of those involved in proceedings. Although the relevance of Article 6 is obvious (and has been emphasised in recent Strasbourg jurisprudence relating to decisions depriving individuals of capacity – see further the case of *Sýkora* below), in Court of Protection terms it is still somewhat uncharted territory. In this case it was referred to in the context of the donee having opportunities to respond to court directions, hearings, and the need to avoid undue delay (para 58). Its potential application in other cases remains to be seen.

Ligaya Nursing v R [2012] EWCA Crim 2521

Criminal offences - Ill treatment / wilful neglect

Summary

With thanks to Jonny Landau of Ridouts for bringing this decision to our attention, the Court of Appeal has very recently handed down a further significant case upon the vexed question of the interpretation of s.44 MCA 2005.

The appellant was a trained mental health nurse who, with her husband, ran a care home for many years until it closed in the early 1990s. Ms Gill, an elderly lady with significant learning disabilities, was resident in the care home from 1987 until it closed. She then went on to live at a property owned by the Nursings where she was provided with care by the appellant. The Court of Appeal found that Mrs Gill's learning disabilities meant that she functioned at or around the level of a 7 year old child, although (at paragraph 4), the Court of Appeal noted that:

> "*It is perhaps important at the outset to underline that Miss Gill was never in a vegetative state, and she was certainly able to make simple choices, for example, about what she wished to wear. At the same time she did not understand the need to keep her clothes clean, and although she could, for example, bath herself, she needed*

> *encouragement to wash regularly. Without assistance she would inevitably neglect herself. In effect someone was needed to prompt her to do the things that she could manage for herself and to carry out the tasks which she could not. She had a number of problems with communication, but she was well able to convey her wishes and preferences. Special measures were needed for her evidence to be given at trial through an intermediary, but it emerged that for some periods during her evidence, at any rate, she was able to speak for herself.*"

After a police investigation into the quality of the care given by the appellant to Ms Gill, she was charged under s.44 MCA 2005, the relevant course of conduct said to constitute neglect taking several different forms (see paragraph 5):

> *Thus, the lack of adequate care included inattention to Miss Gill's personal hygiene and failing to maintain her rooms in a clean condition and replace dirty bed linen. It also extended to failing to administer medication correctly and at the right time, or to the provision of food and a balanced diet and making sure that Miss Gill's personal habits did not create problems with food hygiene. In relation to many of these issues the appellant maintained that she would try and help Miss Gill who would sometimes refuse to accept her help, and in circumstances like these, she felt it was wrong to override her wishes. By way of practical example, Miss Gill expressed a strong dislike for having her toe nails cut until the point they became painful*

At the close of the prosecution, a submission was made that there was no case to answer, based upon the contention that the provisions in the MCA 2005 were complex, and in the context of the criminal offence created in s.44 of the Act, irremediably uncertain in their ambit. The submission was rejected, and she appealed to the Court of Appeal.

Having set out the provisions of ss.1-3 MCA 2005, the Lord Chief Justice (giving the judgment of the Court of Appeal) noted at paragraph 13 that:

> "*the context of the criminal offence created by s.44 of the Act, this is difficult legislation. Lack of capacity in s.44 is defined by reference to s.2, and this definition is supplemented in s.3 which provides a complicated series of tests which identify the circumstances in which an individual is to be found to be unable to make decisions for himself.*"

The Lord Chief Justice expressly endorsed the the analysis by HHJ Marshall QC in *Re S* [2010] 1 WLR 1082 (at paragraph 51 ff) of the purpose of the MCA 2005 and of the "*singular feature*" of the MCA, namely the:

> *"… official recognition that capacity is not a blunt "all or nothing" condition, but is more complex, and is to be treated as being issue-specific. A person may not have sufficient capacity to be able to make complex, refined or major decisions but may still have the capacity to make simpler or less momentous ones, or to hold genuine views as to what he wants to be the outcome of more complex decisions or situations*" (*Re S* at paragraph 53)

This feature, the Lord Chief Justice held, provided an "apposite summary" (paragraph 14) of the situation in which Ms Gill found herself and the ambit of the statutory regime in which those responsible for her care were required to act, continuing that "no one doubts that the purpose of s.44 of the Act is to provide those in need of care with protection against ill-treatment or wilful neglect by those responsible for caring for them." The problem lay in the complexity of the way in which lack of capacity fell to be analysed for purposes of s.44.

The essence of the submissions made on behalf of the appellant was that "*in an Act which covered both criminal and civil proceedings relating to those who lacked capacity, yet without making any apparent distinction between them in that context, the absence of capacity in*

respect of one area of decision could not be used to found an assessment of general lack of capacity at the same time, or indeed for the future" (paragraph 15) and (at paragraph 16) "[r]*hetorically, Miss Jones asked, by whom and how is capacity to be established for it to be proper for criminal liability to flow from a failure by the defendant to act to an extent which amounts to neglect? And how is the defendant who comes to a different conclusion about a person's capacity to protect herself from potential liability on the one hand for an invasion of autonomy and on the other against a potential prosecution for neglect? This is all much too uncertain. Indeed she relies on the observation in R v Hopkins and Priest [2011] EWCA Crim. 1513:*

> *'Unconstrained by authority this court would be minded to accept the submission made on behalf of the appellants. Section 44(1)(a), read together with s.2(1) of the Mental Capacity Act 2005 is so vague that it failed the test of sufficient certainty at common law and under Article 7.1'"*

At paragraph 17, the Lord Chief Justice acknowledged the force of the submissions made on behalf of the appellant, underlining as they did "some of the difficulties facing those with caring responsibilities," although he continued "[a]l*though the principles governing offences of ill-treatment and wilful neglect are identical, cases involving alleged ill-treatment do not appear to raise quite the same difficulties as cases of alleged wilful neglect, perhaps not least because evidence of ill-treatment is generally less elusive than evidence purporting to establish wilful neglect.*"

However, the Court of Appeal nonetheless went on to hold that s.44 was not improperly vague, concluding at paragraph 18 that:

> "*The purpose of s.44 of the Act is clear. Those who are in need of care are entitled to protection against ill-treatment or wilful neglect. The question whether they have been so neglected must be examined in the context of the statutory provisions which provide that, to the greatest extent possible, their autonomy should be respected. The evidential difficulties which may arise when this offence is charged do not make it legally uncertain within the principles in Mirsa [2005] 1 Cr. App. R 328 and R v Rimmington: R v Goldstein [2006] 1 AC 459. On analysis, the offence created by s.44 is not vague. It makes it an offence for an individual responsible for the care of someone who lacks the capacity to care for himself to ill-treat or wilfully to neglect that person. Those in care who still enjoy some level of capacity for making their own decisions are entitled to be protected from wilful neglect which impacts on the areas of their lives over which they lack capacity. However s.44 did not create an absolute offence. Therefore, actions or omissions, or a combination of both, which reflect or are believed to reflect the protected autonomy of the individual needing care do not constitute wilful neglect. Within these clear principles, the issue in an individual prosecution is fact specific.*"

The Court did, however, go on to find that the appeal had to succeed because of a material misdirection by the trial judge, to the effect that, if the appellant had been motivated by the autonomy principle, then any neglect which was proved "*would not… necessarily have been proved to be wilful*." At paragraph 20, the Lord Chief Justice noted that it seemed to the Court that "*if the jury were to conclude that the defendant may have been motivated by the wish or sense of obligation to respect Miss Gill's autonomy any area of apparent neglect so motivated would not be wilful for the purposes of this offence*" (emphasis added) and that this misdirection undermined the safety of the conviction.

Comment

Section 44 is, on any view, not a well-drafted provision; if it were, it would not already have been the subject of three 'technical' appeals to the Court of Appeal, including two determined by a constitution of the Court of Appeal presided over by the Lord Chief Justice. This decision,

however, especially given the constitution of the Court of Appeal which delivered it, would seem to stand as an indication that further appeals based upon its poor drafting are unlikely to succeed.

The purposive interpretation of s.44 MCA 2005 given at paragraph 18 of the judgment is undoubtedly helpful albeit – as Jonny Landau notes (and we agree) – the phrase "*capacity to care for himself*" used therein is problematic. Many people lack the capacity to care for themselves in the sense that they are unable to do so, but the Court of Appeal presumably – in fact – intended to confine this otherwise very broad category to those who lack the capacity to take decisions regarding their care arrangements, a very much narrower class of individuals. This would be consistent with the ratio of *R v Dunn* [2010] EWCA Crim 2395 (by a constitution of the Court of Appeal also including the Lord Chief Judge), which the Divisional Court in *Hopkins and Priest* held to have been to the effect "*the matter in respect of which capacity was required to be lacking for the purposes of Section 44 was the person's ability to make decisions concerning his or her own care*" (paragraph 43 of *Hopkins*, citing paragraph 22 of *Dunn*).

Joanne Dunhill (A Protected Party by her Litigation Friend, Paul Tasker) v Shaun Burgin [2012] EWHC 3163 (QB)

Mental capacity – litigation

Summary

This case represents the third in a series of judgments arising out of the attempts by a Claimant to have put aside a compromise agreement into which she had entered on the basis that she lacked litigation capacity at the time that it was entered into.

Joanne Dunhill was struck by a motor cycle ridden by the Defendant as she crossed a dual carriageway on foot. She sustained a fractured skull. Proceedings were issued in her name in 2002. Both parties were represented by Counsel and the Claimant was accompanied by a Mental Health Advocate. The matter was settled in the sum of £12,500 outside Court on 7 January 2003. Subsequently doubts emerged as to whether the Claimant had capacity to enter in to the compromise agreement and, by her litigation friend, she issued proceedings in negligence against her legal representatives. Further, the Claimant (again by her litigation friend) issued an application in the original 2002 proceedings seeking a declaration that she did not have capacity at the time of the purported settlement of her claim on 7th January 2003 and, on that basis, applying for the 2003 order to be set aside and directions given for the future conduct of the claim.

The issue of the Claimant's litigation capacity was resolved (for the time being) by the Court of Appeal on 3.4.12 (Ward and Lewison LJJ and Sir Mark Potter) [2012] EWCA 397; [2012] PIQR P15 when the court granted "*a declaration that the claimant did not have capacity at the time of the purported settlement on 7 January 2003.*" The claim was referred back to the High Court for 'case management.' The preliminary issue that came before Bean J was formulated as follows:

> "*The Court having declared that the Claimant lacked capacity to enter into the compromise agreement of 7th January 2003 and the Defendant declining to ask this Court to approve the compromise retrospectively, does CPR Part 21.10 have any application where the Claimant brought a claim in contravention of CPR Part 21.2 so that in the eyes of the Defendant and the Court she appeared to be asserting that she was not under a disability?*"

In material part, CPR Part [in fact, Rule] 21.10 provides that

> *"Where a claim is made –*
>
> *(a) by or on behalf of a …. protected party; or*
> *(b) against a ……protected party,*
>
> *no settlement, compromise or payment…..and no acceptance of money paid into court shall be valid, so far as it*

> *relates to the claim by, on behalf of or against the…. protected party, without the approval of the court.*"

In his judgment, Bean J first considered whether there was any binding precedent on the issue before him. In particular, he considered the Court of Appeal decisions in *Masterman-Lister v Brutton and Co* [2003] 1 WLR 1511 and *Bailey v Warren* [2005] PIQR P15, both of which referred to the principle established in *Imperial Loan Co v Stone* [1892] 1 QB 599, namely that when a person enters into a contract, and afterwards alleges and proves that he was so insane at the time that he did not know what he was doing, the contract is as binding on him in every respect, whether it is executory or executed, as if he had been sane when he made it, unless he can prove further that the person with whom he contracted knew him to be so insane as not to be capable of understanding what he was about.

In *Masterman-Lister*, the Court of Appeal upheld a decision that the Claimant had not lacked capacity at the time when he compromised a personal injury claim and therefore, the effect of any lack of capacity on the validity of the settlement did not need to be decided. Nevertheless, Chadwick LJ held obiter that it was not self-evident that the protection offered to Claimants lacking capacity (then under rules rr 10 and 12 OSC Ord 80) have any application where the Claimant brings a claim in contravention of the procedural rules (r.2) which provided that that a person under disability might not bring proceedings except by his next friend and might not defend proceedings except by his guardian ad litem.

In *Warren v Bailey,* the Claimant was found to have lacked capacity when entering an agreement compromising liability at 50/50. Arden LJ and Ward LJ reached the opposite conclusion to that expressed by Chadwick LJ. Arden LJ reasoned (again obiter) that the starting point was that a compromise of proceedings is not valid unless approved by the Court and there was nothing in the CPR which suggested that this should be disapplied by virtue of the fact that the Defendant was not aware of the Claimant's lack of capacity at the material time.

Bean J held that none of these cases had decided the issue before him in the present proceedings. Nevertheless, he considered it highly significant that obiter dicta of the Court of Appeal in one case were fully considered, and disapproved, by the obiter dicta of a majority in a later case.

Bean J went on to conclude that, on the basis of statutory interpretation alone, CPR Part 21 applies to invalidate a consent judgment involving a protected party reached without the appointment of a litigation friend and the approval of the court, even where the individual's lack of capacity was unknown to anyone acting for either party at the time of the compromise. In reaching this conclusion he held (paragraph 28) that:

> "*It is significant that CPR 21.10 applies to claims made 'by' as well as 'on behalf of' a protected party; and that 'protected party' is defined by CPR 21.1(2) as 'a party, or an intended party, who lacks capacity to conduct the proceedings.' In other words, a party who in fact lacks capacity to conduct the proceedings is protected (or, in 2003 terminology, was a patient) even though he or she has not been officially declared to be such and is not acting by a litigation friend. It should also be noted that the rule applies whether or not the party in question is legally represented.*"

The Judge went on to hold that policy considerations would support the same conclusion. Whilst there is a public interest in certainty and finality in litigation, he noted that there is also a public interest in the protection of vulnerable people who lack the mental capacity to conduct litigation, holding (at paragraph 30) that:

> "*If Chadwick LJ's Imperial Loan point is right it must apply equally to unrepresented parties, of whom there are likely to be more in the future. It is not difficult to imagine the case of a claimant who is capable of signing and posting an acceptance form sent by a*

loss adjuster, but who (unknown to the defendant or the loss adjuster) is incapable of managing his affairs. It would be disturbing if the 'compromise' reached by such a person could not be reopened."

Comment

We have noted both the previous decisions in this case in previous issues of our newsletters. Bean J has followed the robust approach adopted by Ward LJ in the Court of Appeal and this judgment further emphasises the need to provide direct redress to the Claimant although she could (and indeed has) issued proceedings against her legal representatives in negligence. This decision is therefore highly relevant to both Court of Protection and also Personal Injury Practitioners and underscores the need to consider the issue of capacity when entering in to any consent order, particularly if the proposed settlement appears to be under value.

The decision is not, however, the final word, as the Supreme Court will be hearing in due course the Defendant's appeal against both the decision of the Court of Appeal as to Ms Burgin's capacity to enter into the compromise agreement and (thanks to the grant of permission by Bean J for a 'leapfrog' appeal) the appeal against Bean J's conclusions as to the effect of CPR 21.10.

Re X & Y (Children) [2012] EWCA Civ 1500

Media – private hearings

Summary

This case merits brief mention because, although it is not a COP case, it sheds light by analogy upon the approach that should be taken to the reporting of sensitive information relating to the subject of proceedings. It also contains important obiter dicta as to the form of words that should be used in reporting restrictions orders.

The Court of Appeal was asked to consider the appropriate balance between Article 8 and Article 10 ECHR in the context of a local authority's duties to redact a report that it had prepared pursuant to its statutory duties under the Children Act 2004 and the Local Safeguarding Children Boards (Wales) Regulations 2006.

A parent had been convicted of a serious offence relating to X. The local authority had prepared an overview report and Executive Summary. The Executive Summary would, in accordance with Guidance published by the Welsh Assembly Government, be available publicly. However, it referred to the criminal proceedings in such a way that the family was readily identifiable. Further, it referred to matters relevant to Y which had not be disclosed as part of the criminal proceedings and which had not previously been in the public domain. An order imposing reporting restrictions in respect of the Executive Summary had been granted and the Local Authority applied for a variation. At first instance, Peter Jackson J had referred to the balance between Article 8 and Article 10 but allowed publication of the Executive Summary (with the local authority's proposed redactions).

On appeal, the Court of Appeal criticised the approach taken to the balancing of the competing Article 8 and Article 10 ECHR rights in play. Munby LJ (giving the lead judgment) reiterated that the rights and welfare of the child are of particular importance and must be protected (*In re S (A Child) (Identification: Restrictions on Publication*) [2005] 1 AC 593; *ZH (Tanzania) v Secretary of State for the Home* Department [2011] 2 AC 166 considered). He noted that the statutory scheme at issue expressly envisaged a balancing act between Article 8 and 10 as, whilst there was a presumption of publication, it was subject to a requirement that any report was anonymised as necessary. There could in principle be situations in which the necessary form of anonymisation was such that no publication could be allowed.

On the facts of these proceedings, Munby LJ held that the redactions proposed by the Local Authority (names, ages and gender of X and Y) were not sufficient to meet the objective of protecting their identities and thus, whilst Peter Jackson J had correctly identified the relevant law, he had not grappled with this fundamental

issue. A more drastic form of redaction than that approved by the judge was "necessary" in the Strasbourg sense if the balance between the public interest in the publication of the Executive Summary and the private interests of the children were to be struck properly and appropriately.

Munby LJ also made obiter comments in relation to the shortcomings of the wording of the reporting restrictions order which it held was insufficiently clear as to enable a layman to readily ascertain which documents might lawfully be published. The comments that he made were intended to be of wider import, and the principles apply equally to COP proceedings. They therefore merit setting out in (almost) full:

"*60. …The relevant paragraph for present purposes provided, by way of exception to the injunctions contained in the order, that:*

> *Nothing in this Order shall prevent any person from … publishing the anonymised Executive Summary of the Serious Case Review carried out in relation to [name] and dated July 2012 (this Court having secured assurances from the [local authority] in relation to the form of the Summary and its date of publication)*

61. It is an elementary principle of justice and fairness that no order will be enforced by committal unless it is expressed in clear, certain and unambiguous language. So far as this is possible, the person affected should know with complete precision what it is that he is required to do or to abstain from doing. The authorities setting out this sometimes overlooked principle are legion. In Harris v Harris, Attorney-General v Harris [2001] EWHC 231 (Fam), [2001] 2 FLR 895, [288], I set out what I said was a no doubt selective anthology. Here I can content myself with what Lord Westbury LC said in Low v Innes (1864) 4 DeGJ&S 286, 295–296: the order must:

> *'lay down a clear and definite rule … The Court … should, in granting an injunction, see that the language of its order is such as to render quite plain what it permits and what it prohibits.'*

The principle has been endlessly repeated down the years since.

62. A related principle is that an order should not require the person to whom it is addressed to cross-refer to other material in order to ascertain his precise obligation. In Ellerman Lines Ltd v Read [1928] 2 KB 144, 157, Atkin LJ said:

> *'That judgment when drawn up, instead of reciting what the order of the Court was and what the defendants were restrained from doing, only refers to continuing an injunction granted by Rowlatt J, varied by Roche J, and continued by Greer J, without stating what it is that the Court was ordering the defendants to abstain from doing. That appears to me to be very bad practice … It is a matter of very great importance that the orders of the Court … should make it quite clear what the Court is ordering to be done. There is considerable laxity in this matter … Practitioners and the officers of the Court should see that orders are not passed unless they are in proper form.'*

In Rudkin-Jones v Trustee of the Property of the Bankrupt (1965) 109 Sol Jo 334 the order as drawn read "It is ordered that an injunction be granted

in the terms of Notice of Motion for Injunction". Lord Upjohn said:

> *'I do want to protest as strongly as I can at the granting of injunctions in that form. It means then that the person against whom the injunction is granted … has to look at another document in order to see what it is that he is enjoined from doing … It cannot be too clearly understood … that a person is entitled to look and look only at the order to see what it is that he is enjoined from doing. He looks at that order and finds out from the four walls of it and from no other document exactly what it is that he must not do.'*

63. *In the present case matters were even worse. When we inquired of counsel which was the authentic text of the document referred to in the order they were unable to give us any very confident response…*

64. *I appreciate that all this was happening on the last day of term, but the upshot is that even now, even the lawyers immersed in the litigation are unable to state with confidence what precisely it is that is permitted by the order. It is, in my judgment, a wholly unacceptable state of affairs. It is intolerable that a layman who risks imprisonment – a reporter, perhaps, or a newspaper editor wishing to publish some document which he may think is of public interest and importance – should be left to decipher an order of the court in this way, especially if, when seeking enlightenment, he turns to the local authority who obtained it only to be told that even they are not sure.*

65. *There is a perfectly simple remedy. If the order, having referred to the document, then contains words to the following effect*

> *'being the document entitled [etc] marked 'X' and initialled by the judge a copy of which is annexed to this order'*
>
> *there will be no doubt as to what it is that the order prohibits and permits. Nor, importantly, will there be any doubt that the document annexed to the order is indeed in the form approved by the judge.*"

Comment

The judgment highlights the centrality of children's welfare in the assessment of whether a document can be sufficiently anonymised for publication to proceed. Given the emphasis placed by the Court on the fragility and vulnerability of X and Y, the approach of the Court of Appeal is potentially relevant to vulnerable adults.

Munby LJ's obiter comments regarding the RRO are also an important reminder of the need for clarity in any order restricting publication of documents, particularly in circumstances where there is a penal notice attached.

Sýkora v Czech Republic [2012] ECHR 1960 (Application no. 23419/07)

Article 5 ECHR - deprivation of liberty – practice and procedure – other

Summary

This case – rightly described by the Mental Disability Advocacy Centre as 'Kafkaesque' – concerned inter alia: (1) the removal of the applicant's legal capacity; and (2) his detention in a psychiatric hospital. It merits mention in both regards.

Detention

The applicant – who had previously (but without his knowledge) been deprived of his legal capacity – was confined to a psychiatric hospital for 20 days without his consent. After 5 days, his confinement was confirmed by his guardian,

the City of Brno. Relying on *Stanev v Bulgaria*, *DD v Lithuania* and *Shtukaturov v. Russia*, the Court found that the entirety of the period (unsurprisingly) constituted a deprivation of liberty within the meaning of Article 5(1) (paragraph 47), such that the question for the Court was whether the deprivation of liberty was lawful.

Whilst the Court accepted that there was sufficient medical evidence of the applicant's mental disorder to satisfy the first *Winterwerp* criteria, the Court found that the detention could not be considered lawful because there were insufficient safeguards against arbitrariness. The relevant Czech law deemed his admission to be voluntary as his guardian had consented, such that none of the protections against involuntary hospitalisation applied. In the circumstances, the Court observed that

> *"the only possible safeguard against arbitrariness in respect of the applicant's detention was the requirement that his guardian, which was the City of Brno, consent to the detention. However, the guardian consented to the applicant's detention without ever meeting or even consulting the applicant. Moreover, it has never been explained why it would have been impossible or inappropriate for the guardian to consult the applicant before taking this decision, as referred to in the relevant international standards (see Principle 9* [of Recommendation No. R (99) 4 of the Committee of Ministers of the Council of Europe on principles concerning the legal protection of incapable adults (adopted on 23 February 1999)]*. Accordingly, the guardian's consent did not constitute a sufficient safeguard against arbitrariness.*" (paragraph 68).

The Court went on to find that the applicant's rights under Article 5(4) ECHR had been breached because (by virtue of the relevant Czech law) the domestic courts could not intervene in his confinement as he was deemed to be present there voluntarily given the consent given by his guardian.

Determination of incapacity

The applicant complained that the total removal of his legal capacity had interfered with his right to private and family life and that the proceedings depriving him of legal capacity suffered from procedural deficiencies. He relied on Articles 6 and 8 of the ECHR. The Court considered the complaint under Article 8, noting that it was common ground that the deprivation of his legal capacity constituted an interference with his private life within the meaning of Article 8 (paragraph 101).

The Court went on to set out the principles that governed the determination of mental capacity, thus:

> "*102. In such a complex matter as determining somebody's mental capacity the authorities should enjoy a wide margin of appreciation. This is mostly explained by the fact that the national authorities have the benefit of direct contact with those concerned, and are therefore particularly well placed to determine such issues. However, whilst Article 8 of the Convention contains no explicit procedural requirements, the decision-making process involved in measures of interference must be fair and such as to ensure due respect of the interests safeguarded by Article 8. The extent of the State's margin of appreciation thus depends on the quality of the decision-making process. If the procedure was seriously deficient in some respect, the conclusions of the domestic authorities are more open to criticism (see Shtukaturov, cited above, § 87-89). Regarding the procedural guarantees, the Court considers that there is a close affinity between the principles established under Articles 5 § 1 (e), 5 § 4, 6, and 8 of the Convention (see Shtukaturov, cited above, §§ 66 and 91).*
>
> *103. Any deprivation or limitation of legal capacity must be based on*

sufficiently reliable and conclusive evidence. An expert medical report should explain what kind of actions the applicant is unable to understand or control and what the consequences of his illness are for his social life, health, pecuniary interests, and so on. The degree of the applicant's incapacity should be addressed in sufficient detail by the medical reports (see Shtukaturov, cited above, §§ 93-94).

The Court held that the removal of the applicant's capacity was disproportionate to the legitimate aim invoked by the Government (paragraph 104), but for our purposes, more relevant are the views expressed by the Court as to the procedure adopted, thus:

"*107. The Court observes that the Municipal Court did not hear the applicant, either in the first round or the second round of proceedings, and indeed he was not even notified formally that the proceedings had been instituted (see Shtukaturov, cited above, §§ 69-73 and 91). The Court does not accept the Government's argument that the applicant's place of residence was unknown to the authorities and therefore it was difficult to deliver official mail to him. Nowhere in the case file is there anything to indicate that the Municipal Court made an attempt to inform the applicant of the proceedings and summon him to the hearings. In such circumstances it cannot be said that the judge had "had the benefit of direct contact with those concerned", which would normally call for judicial restraint on the part of this Court. The judge had no personal contact with the applicant (see X and Y v. Croatia, no. 5193/09, § 84, 3 November 2011).*

108. As to the way in which the applicant was represented in the legal capacity proceedings, the Court is of the opinion that given what was at stake for him proper legal representation, including contact between the representative and the applicant, was necessary or even crucial in order to ensure that the proceedings would be really adversarial and the applicant's legitimate interests protected (see D.D. v. Lithuania, cited above, § 122; Salontaji-Drobnjak v. Serbia, no. 36500/05, §§ 127 and 144, 13 October 2009; and Beiere v. Latvia, no. 30954/05, § 52, 29 November 2011). In the present case, however, the representative never met the applicant, did not make any submissions on his behalf and did not even participate at the hearings. She effectively took no part in the proceedings.

109. Moreover, the judgments were not served on the applicant (see X and Y v. Croatia, cited above, § 89). The judgments expressly stated that they would not be delivered to the applicant, with a simple reference to the opinion of the court-appointed expert, even though in her second report the expert in fact stated that a judgment could be sent to the applicant. Even at the hearing she did not give any warnings about adverse effects if the applicant received the judgment, but merely recommended not sending it because he would not understand it.

110. The Court, however, considers that being aware of a judgment depriving oneself of legal capacity is essential for effective access to remedies against such a serious interference with private life. Whilst there may be circumstances in which it is appropriate not to serve a judgment on the person whose capacity is being limited or removed, no such reasons were given in the present case and, indeed, in the present case, when the applicant was aware of the judgment and was able to appeal, his appeal was successful.

Therefore, had the Municipal Court respected the applicant's right to receive the judgments, the interference would not have happened at all as the judgments would not have become final.

111. *Finally, the Court observes that the 2004 decision was based only on the opinion of an expert who last examined the applicant in 1998 (see paragraph 9 above). In this context the Court cannot lose sight of the fact that development takes place in mental illness, as is also evidenced in the present case by the expert report on the applicant drawn up in 2007, on the basis of which the request to deprive the applicant of legal capacity was refused. Consequently, relying to a considerable extent on the medical examination of the applicant conducted six years earlier cannot form sufficiently reliable and conclusive evidence justifying such a serious interference with the applicant's rights (see, mutatis mutandis, Stanev, cited above, § 156). The Court notes that the expert attempted to examine the applicant between 2002 and 2004, but he refused to cooperate. Nevertheless, in the absence of strong countervailing considerations, this fact alone is not enough to dispense with a recent medical report involving direct contact with the person concerned.*

112. *Overall, the Court considers that the procedure on the basis of which the Municipal Court deprived the applicant of legal capacity suffered from serious deficiencies, and that the evidence on which the decision was based was not sufficiently reliable and conclusive."*

Comment

Deprivation of liberty

This case is perhaps of some assistance in teasing out the implications of a curious remark made by the European Court of Human Rights in the judgment in *Stanev* where the Grand Chamber – considering the subjective element of deprivation of liberty – noted (at paragraph 110) that "*there are situations where the wishes of a person with impaired mental faculties may validly be replaced by those of another person acting in the context of a protective measure and that it is sometimes difficult to ascertain the true wishes or preferences of the person concerned*."

In its June 2012 discussion paper upon closing the Bournewood gap in Scotland, the Scottish Law Commission alighted upon this sentence:

"*6.73 The relevance of consent to whether there is a deprivation of liberty at all has not featured to a great extent in any decision of the European Court. But the Court has commented on the possible role of a substitute decision-maker in this context:*

> *'The Court observes in this connection that there are situations where the wishes of a person with impaired mental faculties may validly be replaced by those of another person acting in the context of a protective measure and that it is sometimes difficult to ascertain the true wishes or preferences of the person concerned'.*

It would appear that 'valid replacement' of the wishes of the person with incapacity would prevent the regime under which he or she is living from being a deprivation of liberty at all. It may therefore be that Scots law could make specific provision for the giving of consent by substitute decision-makers to care of a person with incapacity in conditions

which, absent such consent, would amount to deprivation of liberty."

This suggestion is – frankly – somewhat alarming, not least because it would remove from the protection of Article 5 (and Article 5(4)) whole categories of people who are, objectively, deprived of their liberty. Whilst there is no equivalent move to introduce such a step into the MCA 2005 in England and Wales, we are aware of judicial mooting of the question of whether Courts could give such 'substituted' consent. The decision in *Sýkora* does not sit easily with the proposition that any substituted consent can serve to remove a deprivation of liberty from the scope of Article 5(1): if it had done so, the Court would have been considering the exercise by the guardian of their consent by reference to the question of whether there was a deprivation of liberty at all, rather than whether it could be justified.

The decision also shows that the exercise of any such substituted consent (whether exercised by a public body or, we would suggest, by a Court) would have to be surrounded by procedural safeguards to secure against the risk of arbitrariness.

Determination of incapacity

There have now been a series of cases (summarised in the extracts set out above) in which the Strasbourg Court has emphasised the importance of hearing from P in the context of determination of incapacity. All the cases have been decided in the context of legislative systems in which capacity is status based, rather than (as under the MCA) functional.[2] The consequences of a declaration of partial or complete incapacity by a Court are therefore sweeping. However, the reality is that the consequence of a declaration by the Court of Protection that P lacks capacity to take one or more decisions establishes the basis for potentially serious (if justified) interferences with P's autonomy. In the circumstances, it may well be that the Courts should consider hearing from P not just on an "occasional" basis (as Baker J recorded the position in *CC v KK and STCC* [2012] EWHC 2136 (COP), but whenever P's capacity to take material decisions or to litigate is in issue.

Changes to the MCA (1) Debt relief orders

In a development that we did not have space to report upon in the last issue, the MCA was amended with effect from 1.10.12 (with transitional provisions) by paragraph 53 of Schedule 2 to the Tribunals, Courts and Enforcement Act 2007 (Consequential Amendments) Order SI 2012/2404. The material effect of the amendments is:

a. to provide for a further exclusion from the category of persons eligible to be donors of lasting powers of attorney those made subject to a debt relief order under Part 7A of the Insolvency Act 1986: s.10(2).

b. if P is made subject to such an order, then this will revoke an LPA so far as it relates to his property and affairs (although it will only suspend it if the order is an interim one): ss.13(3) and (4).

c. likewise, the making of a debt relief order in respect of a donee of a power of attorney will terminate his appointment and revoke the power in so far as it relates to P's property and affairs (or suspend it if the order is an interim one): ss.13(6) and (8);

References to debt relief orders within the Act also include references to debt relief restrictions orders: s.64(3A).

As explained in the Explanatory Memorandum accompanying SI 2012/2404 The Tribunals, Courts and Enforcement Act 2007 introduced debt relief orders and debt relief restrictions orders into the Insolvency Act 1986. There are strict qualifying conditions placed on a debtor before he/she can enter into a debt relief order and they include having total debts of less than £15,000, minimal assets and disposable income

[2] The decision in *RP v United Kingdom* [2012] ECHR 1796, reported in our November 2012 issue, whilst it concerned the role of the Official Solicitor, did not address directly the question of the determination of lack of capacity to litigate, not least as it would appear that the issue had not been raised at first instance in the domestic Courts.

of less than £50 per calendar month. Once he/she has entered into a debt relief order, the debtor is subject to a number of restrictions that are similar to those imposed on persons who have entered bankruptcy.

Changes to the MCA (2) Transfer of supervisory body responsibilities from PCTs to Local Authorities

In a development that our local authority readers will already be aware of, but which has not yet had wide currency, with effect from 1.4.13 with the abolition of Primary Care Trusts in England, local authorities will assume the role of supervisory bodies for those deprived of their liberty in hospital, by virtue of the amendments to MCA 2005 contained in paragraphs 133-136 of Schedule 5 to the Health and Social Care Act 2012. As at the time of writing, no order has been made by the Secretary of State under s.306 of that Act identifying the date of 1.4.13, but the Department of Health has confirmed that this will be the material date. Secondary legislation making further consequential amendments will be laid before Parliament in advance of that date.

The identity of the local authority will be determined in similar fashion to that in respect of care homes, i.e. the local authority for the area in which the person is ordinarily resident or where the hospital is resident.

As explained in a fact sheet issued by the Department of Health, it will be affording limited additional funding to local authorities to support them in the extension of their statutory role, emphasising in so doing that '[h]*ospitals will remain responsible as managing authorities for compliance with the DOLS legislation, for understanding DOLS and knowing when and how to make referrals. Hospitals remain responsible for ensuring that all staff in hospitals are Mental Capacity Act (MCA) compliant. Clinical Commissioning Groups (CCGs) will oversee these responsibilities; and be responsible for training and MCA compliance. All CCGs must have a named MCA lead and MCA policies to support their responsibilities*.' SCIE has also issued detailed guidance upon best practice in the transitional period running up to 1.4.13.

Regulatory review

The Cabinet Office is currently running the so-called 'Red Tape Challenge,' grouping regulations into themes across a wide variety of areas, and putting them on a website for people and businesses to comment on: asking which ones should be kept, improved or scrapped. It would appear that the results are then to be used to challenge departments to get rid of regulations that are not needed, or look for alternatives where appropriate. One of the current themes, open for comment until **11.12.12**, are regulations relating to Quality of Care and Mental Health. A significant number of provisions contained in secondary legislation relating to the MCA 2005 are included for consideration, including (for instance), the Mental Capacity (Deprivation of Liberty: Appointment of Relevant Person's Representative) Regulations 2008, SI 2008/1315. We would suggest that any concerned readers take the opportunity – with some speed – to make any comments upon the wisdom or otherwise of dispensing with all or part of the regulations up for consideration.

Home care and Human Rights

The Equality and Human Rights Commission has published a guide called 'Your Home Care and Human Rights'. It explains the community care and HRA obligations of local authorities and the standards required of care providers very simply and clearly, and will be of great value to advocates and social workers in helping people understand how the system of home care works and what their rights are.

'The state of health care and adult social care in England: An overview of key themes in care in 2011/12' CQC, November 2012

This comprehensive report contains a wealth of facts, figures, analysis, and examples of good and bad practice in health and social care. By way of example, we note:

- More than 400,000 people in England live in residential care, 1.1 million receive care

at home, and around 5 million care for a relative or friend.

- As at 31 March 2012, there were 13,134 residential care homes with 247,824 beds registered in England and 4672 nursing homes with 215,463 beds.

- An estimated 45% of care home places are self-funded.

- 83% of councils have set their threshold for eligibility for state-funded care at 'substantial' (compared to 70% in 2008/9). 2% set it at 'critical'.

The CQC provide a special focus on restrictive practices in mental health and mental capacity from at p.102ff of the report. In relation to the deprivation of liberty safeguards, it states (at p.103) that:

> "*All care homes and hospitals in England must apply for authorisation if they propose to deprive someone of their liberty by, for example: keeping them locked in; physically restraining them; placing them under high levels of supervision; forcibly giving them medicines; or preventing them from seeing relatives and friends.*

A number of concerns about restrictive practices were identified, including:

- Restraint: Inspectors found it difficult to identify from patient records how often, and for how long, restraint was used and what actually happened during the restraint, which raised questions about such decisions are accounted for and monitored.

- Seclusion and segregation: Safeguards were not always implemented and an interesting range of terms was used to describe circumstances in which people might effectively be detained in seclusion: "*Nursed in his room*", "*Placed in the low-stimulus area for a sustained period*" or "*Chose to be in the safe-care suite*."

- Blanket rules: Typically, blanket rules related to access to communal rooms, kitchens, the person's own bedroom (whether locking them out of their bedroom during the day, or insisting on a general and often early bedtime), and gardens and outdoor space. There were also rules in some settings about when a patient or resident might have a drink or a snack, or go for a cigarette. This happened in all types of care setting. In some settings, staff members told people that their takeaway meal, or outing, would not be allowed as a punishment for certain behaviour.

- Lack of understanding of the Mental Health Act 1983: for example, informal or voluntary patients were subject to de facto detention with little consideration whether their deprived was deprived.

ECtHR Guide to Article 5

With thanks to Lucy Series for bringing this to our attention, the research division at the European Court Human of Rights has just produced a guide to Article 5 which summarises the jurisprudence upon Article 5 up to and including the *DD v Lithuania* case.

Tying ourselves into (Gordian) knots article

At the risk of it appearing that the COP Newsletter is imminently to be re-titled the COP Deprivation of Liberty newsletter, those who have not yet got their fill of matters DOL related may care to satiate their appetite by turning to one of the fruits of Alex's sabbatical, the article on the meaning of deprivation of liberty in the context of the MCA 2005 to be found here. That it runs to some 81 pages may – one might possibly think – speak for itself as regards the ongoing debate as to the law in this area is sufficiently accessible to satisfy the requirements of Article 5(1) ECHR…

Movember

Thank you very much indeed to those of you who gave so generously to Alex's Movember fund-raising drive. Unfortunately, the donations fell just short of the total required for a temporary change of photograph, which may well indicate

good taste on the part of the readers.

Our next update will be out in early January 2013 unless any major decisions are handed down before then which merit urgent dissemination. In the meantime, happy holidays!

Please email us with any judgments and/or other items which you would like to be included: credit is always given.

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