Essex CHAMBERS

MENTAL CAPACITY REPORT: COMPENDIUM

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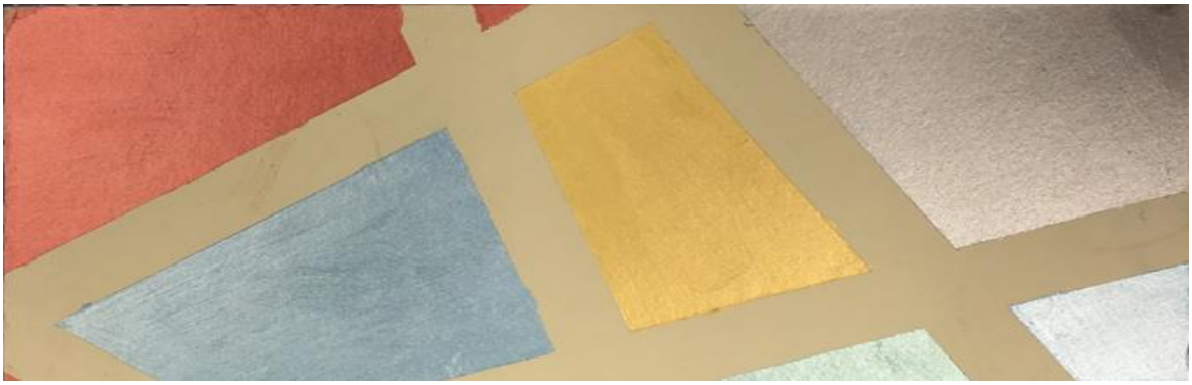

Welcome to the October 2019 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: the Supreme Court pronounces on confinement and 16/17 year olds and two important – and difficult – cases about sex;

(2) In the Property and Affairs Report: attorneys and gifts, and withholding knowledge of an application from P or another person;

(3) In the Practice and Procedure Report: the Court of Protection mediation scheme, and the inherent jurisdiction, necessity and proportionality;

(4) In the Wider Context Report: learning from a complex case about medical treatment for a child, the Irish Bournewood and an important shift from the CRPD Committee in the context of legal capacity;

(5) In the Scotland Report: developments in the context of the MHTS and sentencing in the presence of disability.

You can find all our past issues, our case summaries, and more on our dedicated sub-site here, where you can also find our new guidance note on the inherent jurisdiction.

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.

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In the Matter of D (A Child) [2019] UKSC 42 (Supreme Court (Hale, Carnwath, Black, Lloyd-Jones and Arden SCJJ))

Deprivation of liberty – children and young persons

Summary

The Supreme Court has held (by a majority) where a 16 or 17 year old lacks capacity to give their own consent to circumstances satisfying the 'acid test' in *Cheshire West*, and if state either knows or ought to know of the circumstances, then the child is to be seen as deprived of their liberty for purposes of Article 5 European Convention of Human Rights, and requires the protections afforded by that Article. That is so whether or not their parent(s) are either seeking to consent to those arrangements if imposed by others or directly implementing them themselves.

Background

D was diagnosed with attention deficit hyperactivity disorder at the age of four, Asperger's syndrome at seven, and Tourette's syndrome at eight. He also had a mild learning disability. His parents struggled for many years to look after him in the family home, despite the many difficulties presented by his challenging behaviour.

In October 2013 when he was 14, he was informally admitted to a psychiatric hospital for multi-disciplinary assessment and treatment. He lived in a unit in the hospital grounds and attended a school which was integral to the unit. The external door to the unit was locked and D was checked on by staff every half hour. He could only leave if accompanied by staff on a one to one basis and his visits home were supervised at all times. The Hospital Trust recognised that D was confined, and sought authority for that confinement from the High Court under its inherent jurisdiction. Keehan J held that D was confined but the fact that his parents were consenting to the confinement meant that he was not deprived of liberty: *Re D (A Child) (Deprivation of Liberty)* [2015] EWHC 922 (Fam).

Now 16 years old, D was discharged from hospital and accommodated in a residential placement ('Placement B') with his parents' agreement under section 20 of the Children Act 1989. It was a large house set in its own grounds, with 12 residential units, each with its own fenced garden. He lived with three other young people in a house whose external doors were locked. D was not allowed to leave except for a planned activity (eg attending school on site, swimming and leisure activities). He received one to one support during waking hours and staff were in constant attendance overnight.

In a case brought by Birmingham City Council, as responsible for his placement, Keehan J held [2016] EWCOP 8 that D's parents' continuing consent to the arrangements could not be relied upon after he turned 16 to prevent his circumstances being seen as a deprivation of liberty for purposes of Article 5 ECHR. The Court of Appeal overturned his decision ([2017] EWCA Civ 1695). The Supreme Court has now allowed the Official Solicitor's appeal (on behalf of D), declaring that D was at the material times to be seen as deprived of his liberty for purposes of Article 5 ECHR.

The issue

As Lady Hale, in the majority, identified, the case was about:

> 3. […] *the interplay between the liberty of the subject and the responsibilities of parents, between the rights and values protected by article 5 and the rights and values protected by article 8, and between the relationship of parent and child at common law and the Convention rights. The principal issue can be simply stated: is it within the scope of parental responsibility to consent to living arrangements for a 16 or 17-year-old child which would otherwise amount to a deprivation of liberty within the meaning of article 5?*

Reasoning: the majority

Lady Hale founded her decision ultimately upon her analysis of Article 5 ECHR, although she acknowledged the force of the analysis of Lady Black to the effect that, even at common law, a parent does not have power to bring about a confinement of their child. Article 5 contains three limbs (sometimes called the *Stork* criteria after the Strasbourg case in which they were first identified): (a) the objective component of confinement in a particular restricted place for a not negligible length of time; (b) the subjective component of lack of valid consent; and (c) the attribution of responsibility to the State.

Lady Hale considered the crux of the issue under Article 5 to be:

> 39. […] *whether the restrictions fall within normal parental control for a child of this age or do they not? If they do, they will not fall within the scope of article 5; but if they go beyond the normal parental control, article 5 will apply (subject to the question of whether parental consent negates limb (b) of the Storck criteria* […]*).*

In contrast to the Court of Appeal, she found that "*quite clearly*,"

> *the degree of supervision and control to which D was subject while in Placement B and Placement C was not normal for a child of 16 or 17 years old. It would have amounted to a deprivation of liberty in the case of a child of that age who did not lack capacity. The question then arises what difference, if any, does D's mental disability make?*

Looking back to the discussion of Lord Kerr in *Cheshire West* as to the application of Article 5 to children at different ages, and consistent with the approach of the majority in that decision, Lady Hale found

that D's mental disability made no difference: "*a mentally disabled child who is subject to a level of control beyond that which is normal for a* [non-disabled] *child of his age has been confined within the meaning of article 5.*"

Lady Hale found, further, that there was no support in Strasbourg case-law for a parent (or anyone else) to give substituted consent so as to take a confinement out of the scope of Article 5 ECHR. She considered that, in cases where it was said that valid consent had been given, "*it is because the evidence showed that the person concerned was willing to stay where he or she was and was capable of expressing that view*" (para 42).

Birmingham had, at an earlier stage, argued that the fact that D was placed subject to the agreement of his parents (recorded under s.20 Children Act 1989) meant that the confinement to which he was subject was not imputable to the state. Before the Supreme Court, Birmingham abandoned that argument, "*rightly so*," according to Lady Hale:

> *43* […] *Not only was the State actively involved in making and funding the arrangements, it had assumed statutory responsibilities - albeit not parental responsibility - towards D by accommodating him under section 20 of the Children Act 1989, thereby making him a "looked after child". Even without all this, it is clear that the first sentence of article 5 imposes a positive obligation on the State to protect a person from interferences with liberty carried out by private persons, at least if it knew or ought to have known of this: see, for example Storck, para 89.*

On the face of it, therefore, all three requirements for a deprivation of liberty had been met, a conclusion Lady Hale considered to be:

> *45* […] *consistent with the whole thrust of Convention jurisprudence on article 5, which was examined in great detail in Cheshire West. But it is reinforced by the consideration that it is also consistent with the principle of non-discrimination in article 2.1 of the United Nations Convention on the Rights of the Child, which requires that the rights set out in the Convention be accorded without discrimination on the ground of, inter alia, disability, read together with article 37(b), which requires that no child shall be deprived of his liberty unlawfully or arbitrarily, and article 37(d), which requires the right to challenge its legality. It is also consistent with article 7.1 of the United Nations Convention on the Rights of Persons with Disabilities, which requires all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children.*

Lady Hale, however, had to return back to the concept of parental responsibility to ask whether there was any scope for the operation of parental responsibility to authorise what would otherwise be a deprivation of liberty? There were two contexts in which this might arise, she considered:

1. Where the parent is the detainer or uses some other private person to detain the child. However, as Lady Hale observed, "*in both Nielsen and Storck it was recognised that the state has a positive obligation to protect individuals from being deprived of their liberty by private persons, which would be engaged in such circumstances.*"

2. Where the parent seeks to authorise the state to do the detaining. However, Lady Hale considered it would be a "*startling proposition that it lies within the scope of parental responsibility for a parent to license the state to violate the most fundamental human rights of a child*." Even if that proposition might not hold good for all the Convention rights, in particular the qualified rights which may be restricted in certain circumstances, "*it must hold good for the most fundamental rights - to life, to be free from torture or ill-treatment, and to liberty. In any event, the state could not do that which it is under a positive obligation to prevent others from doing*."

Accordingly, Lady Hale held that it was:

> *49* [….] *not within the scope of parental responsibility for D's parents to consent to a placement which deprived him of his liberty. Although there is no doubt that they, and indeed everyone else involved, had D's best interests at heart, we cannot ignore the possibility, nay even the probability, that this will not always be the case. That is why there are safeguards required by article 5. Without such safeguards, there is no way of ensuring that those with parental responsibility exercise it in the best interests of the child, as the Secretaries of State acknowledge that they must.*

Lady Black agreed with Lady Hale's reasoning and conclusion, and devoted her judgment:

1. To a detailed historical exegesis of the common law, which led her (at paragraph 90) to conclude that "*as a matter of common law, parental responsibility for a child of 16 or 17 years of age does not extend to authorising the confinement of a child in circumstances which would otherwise amount to a deprivation of liberty*;" and

2. To a detailed analysis of the relevance of s.25 Children Act 1989, which the court had of its own motion raised after the hearing, and which has separately been troubling the appellate courts. Although ultimately Lady Black was careful to make clear that she had not reached a concluded view, which would have to await the appropriate case, she noted (at paragraph 113) in observations which had the support of Lady Hale and Lady Arden that "[t]*he exercise in which we have engaged has, however, been sufficient to persuade us that section 25 is not intended to be widely interpreted, so as to catch all children whose care needs are being met in accommodation where there is a degree of restriction of their liberty, even amounting to a deprivation of liberty*," and that "[t]*here is much force in the argument that it is upon the accommodation itself that the spotlight should be turned, when determining whether particular accommodation is secure accommodation, rather than upon the attributes of the care of the child in question*."

Lady Arden agreed with Lady Hale, but also highlighted that there will be:

> *120* […] *cases where a person loses their liberty but the acid test in Cheshire West, as Lady Hale describes it, does not apply. That conclusion is shown by observing that D's case is about living arrangements. It is not about a child, or anyone else, needing life-saving emergency medical treatment. For the reasons which the Court of Appeal (McFarlane LJ, Sir Ross Cranston and myself) gave in R (Ferreira) v Inner South London Senior Coroner [2018] QB 487, the situation where a person*

> *is taken into (in that case) an intensive care unit for the purpose of life-saving treatment and is unable to give their consent to their consequent loss of liberty, does not result in a deprivation of liberty for article 5 purposes so long as the loss of liberty is due to the need to provide care for them on an urgent basis because of their serious medical condition, is necessary and unavoidable, and results from circumstances beyond the state's control (para 89).*

Reasoning: minority

Lord Carnwath, with whom Lord Lloyd-Jones agreed, dissented, associating himself (in essence) with the reasoning of the former President, Sir James Munby, in the Court of Appeal below, and analysing *Nielsen* as a decision which "*provide*[d] *amply sufficient support Strasbourg case law for the President's reliance on equivalent domestic law principles to determine the present case*."

Interestingly, however, Lord Carnwath, in addressing Lady Black's judgment, noted that, "[f]*or the moment I remain unconvinced that the earlier cases can be relied on to limit the scope of the judgments in Gillick in the way she proposes, or that the President's conclusions is undermined*," but that he "*acknowledge*[d] *that this approach, if correct, may have advantages for the certainty and coherence of the law, particularly if taken with another important point which emerges from her review of the earlier cases. That is the willingness of the courts since the 19th century to take guidance from the legislature as to where to draw the lines in relation to the limits of parental responsibilities (see para 60, citing Cockburn CJ in R v Howes (1860) 3 El & El 332). In the present case there is the added consideration that, as noted above (para 8), the exclusion of those under 16 from the new legislative scheme appears at least in part to be a reflection of the legislature's understanding of the law following Keehan J's judgment, which to that extent may be seen as having the implicit endorsement of Parliament.*"

Points not addressed

The majority were careful to make clear that they were not pronouncing upon the operation of parental responsibility in relation to other areas in respect of children under 18, leaving open the potential for (for instance) medical treatment decisions in relation to 16/17 year olds lacking capacity to be considered either by reference to the best interests decision-making process under the MCA 2005 or by the provision of a substituted consent by a parent exercising parental responsibility. Lady Black was, however, at pains, to emphasise that: "*nothing that I have said is intended to cast any doubt on the powers of the courts, recognised in the early cases to which I have referred, and still available today in both the parens patriae jurisdiction and under statute, notably the Children Act 1989, to make orders in the best interests of children up to the age of majority, with due regard to their wishes and those of their parents, but not dictated by them*" (paragraph 90, Lady Hale expressly associating herself with these observations).

Lady Hale recognised that the conclusion that she reached in relation to those over 16 would "logically" also apply to a younger child whose liberty was restricted to an extent which was not normal for a child of his age." However, the question did not arise in the case, and she preferred to expressed no view upon it (paragraph 50). Lady Black, equally, expressed a desire to leave this separate question "entirely

open" to be decided in a case in which it arises. Lord Carnwath noted Lady Hale's observation about the logical application of her conclusion "with concern," and sought to emphasise that, for the time being, Keehan J's conclusion that parental agreement can operate to prevent a confinement being a deprivation of liberty in relation to those under 16 remains good law (paragraph 159).

Comment

Implications

The legal and practical implications of this judgment are dramatic. The judgment acknowledges the 'nuancing' of the acid test that Lord Kerr had proposed in relation to younger children in *Cheshire West* but its tenor is very much to the effect that there is little or no material nuancing to undertake in relation to those aged 16 or 17. In other words, the acid test is likely to apply without modification to a 16/17 year old, subject only to the 'carve-out' for everyone identified in *Ferreira* and clarified by Lady Arden in this judgment in relation to life-sustaining emergency medical treatment.

The case focuses of course upon those of lack the relevant capacity to decide on their confinement. Logically, if the 16/17 year old has such capacity and agrees to their own care arrangements then no deprivation of liberty would arise. But what if they have capacity but object? Again logically, that would amount to a deprivation and one of the procedures detailed below will be required to ensure it is lawful.

The judgment acknowledges the 'nuancing' of the acid test that Lord Kerr had proposed in relation to younger children in *Cheshire West* but its tenor is very much to the effect that there is little or no material nuancing to undertake in relation to those aged 16 or 17. In other words, the acid test is likely to apply without modification to a 16/17 year old, subject only to the 'carve-out' for everyone identified in *Ferreira* and clarified by Lady Arden in this judgment in relation to life-sustaining emergency medical treatment.

Public authorities will need to consider the circumstances of 16/17 year olds for whom they have responsibility, whether that be under the Children Act 1989, the Social Services and Well-Being Act (Wales) Act 2014, the Children and Families Act 2014, the NHS Act, or otherwise. If the circumstances of a 16/17 year old meet the 'acid test' and they cannot (or do not) consent to their confinement, then if either those circumstances cannot be changed, or they cannot be supported to consent (freely) to them, lawful authority will be required to deprive them of their liberty (precisely who will need that authority will depend upon the facts of the case). Public authorities will also need to be alert to situations where 'private' confinements may be under way in relation to 16/17 year olds in their own homes, or in private schools/colleges, because (as Lady Hale has re-confirmed) state imputability arises where the state knows or ought to know of such private confinements.

Prior to the coming into force of the LPS in October 2020, the only "procedure prescribed by law" that can operate to provide the necessary lawful authority are:

1. The MHA 1983 where applicable. This judgment may lead to an increase in the use of the 1983 Act because the degree or intensity of arrangements in most psychiatric hospitals/units is likely

to give rise to confinement. As a result, it is most unlikely that there will be any place for informal admission for incapacitated 16/17 year olds on the basis of parental consent;

2. Section 25 Children Act 1989, where relevant, and bearing in mind the detailed observations by Lady Black about its scope;

3. An order of the court. Whether this court will be the Court of Protection or the High Court under its inherent jurisdiction will depend upon the facts of the case, but as a general rule it is more likely that the right court will be the Court of Protection (by a so-called *Re X* COP DOL11 application – for guidance, see here). If the right court is the High Court, then the procedure will be as set down by Sir James Munby P in *Re A-F (Children) (No 2)* [2018] EWHC 2129 (Fam), although note that the judgment does not discuss that there are two potential grounds upon which deprivation could be justified, Article 5(1)(d) and Article 5(1)(e). We suggest that it is necessary for the application to be clear as to which is relied upon, as this will dictate the evidence required, and the nature of the test to be applied by the court. In the case of those children who do not lack capacity (or, if relevant competence) we anticipate that public bodies and the courts will be dusting off copies of *In Re K (A Child) (Secure Accommodation Order: Right to Liberty)* [2001] Fam 377 to examine the scope of Article 5(1)(d) to justify deprivation of liberty "of a minor by lawful order for the purpose of educational supervision."

Looking ahead, the consequences of the judgment are perhaps less dramatic than they would have been had the question of the scope of parental responsibility in this area not been so thoroughly canvassed in the Law Commission's Mental Capacity and Deprivation of Liberty report leading, ultimately, to the inclusion of many 16/17 year olds within the Liberty Protection Safeguards. We say 'many' because LPS will only be available for those who lack the relevant capacity and have a mental disorder. The Supreme Court did not expressly address whether there may remain a cohort of 16/17 year olds who have capacity to consent to confinement but lack *Gillick* competence. Moreover, LPS will not be available for 16-17 year olds who have capacity/competence and object to their confinement. The judgment certainly reinforces the need for children's services in local authorities and NHS bodies with responsibility for under 18s to undertake the necessary work to prepare for LPS.

Other issues

The decision also gives rise to a number of other issues which will no doubt be examined in cases to come.

For example, what is the legal position regarding confinement of those under 16? There is clear disagreement in the judgment but it was not necessary to determine it.

Secondly, to what extent does *Gillick* competence apply to 16/17 year olds? Lady Black at paragraph 71 did not accept the Official Solicitor's argument that the MCA provides a complete decision-making framework in relation to acts of care and treatment because there is clear overlap with the Children

Act 1989 up to the age of 18, but Lady Hale and Lady Arden did not address this. Those working on the revised version of Code of Practice to the MCA 2005 – and, in all likelihood the courts – will have to grapple with the issue that decision-making in relation to medical treatment applying the MCA 2005 and decision-making relying upon parental consent cannot be guaranteed to reach an identical answer in every case.

Thirdly, all parties agreed that a local authority with parental responsibility by virtue of an interim or final care order, or with any other statutory responsibilities for a child, could not supply a valid consent to a child's confinement. Lady Hale doubted the basis for such agreement (paragraph 18) as the Children Act 1989 makes no distinction between the holders of parental responsibility. This may therefore be revisited in relation to those under 16.

Fourthly, for Article 5(1)(e) ECHR geeks, we note in passing Lady Hale's comment at paragraph 30 that that Article 5 ECHR "*applies to people who lack the capacity to make decisions for themselves is made clear by article 5(1)(e) which permits "the lawful detention of … persons of unsound mind*"". Whether "*unsound mind*" equates to "mental disorder" or "mental incapacity" has been a long-running issue.

Finally, there is the vexed question of the scope for using s.25 Children Act 1989 secure accommodation orders, Lady Black noting at paragraph 109 that this section "*extends well beyond local authority homes, and undoubtedly encompasses secure accommodation which does not have to be approved by the Secretary of State*".

Entirely separately, this decision also allows us to note the fund-raising being undertaken by the First 100 Years campaign to create the first Supreme Court artwork to feature women from the legal profession. The artwork, by the Turner Prize nominated artist Catherine Yass, will celebrate the centenary of the 1919 Sex Disqualification (Removal) Act which paved the way for women to practice law. It will be displayed in courtroom two where the first majority-female court – three out of five justices – sat in October 2018 on D's case.

Sex, capacity and the need for the other's consent

A Local Authority v JB [2019] EWCOP 39 (Roberts J)

Mental capacity – sexual relations

Summary

This case was concerned with whether the presumption that a man had capacity to consent to sexual relations had been rebutted. In particular there was a dispute as to whether the "information relevant to the decision" within s.(31) MCA 2005 includes the fact that the other person engaged in sexual activity with P, must be able to, and does in fact, from their words and conduct, consent to such activity.

JB was a 36 year old man with a diagnosis of autism combined with impaired cognition. JB lived in a supported residential placement where he was subject to a comprehensive care plan which imposed

significant restrictions on his ability to socialise freely with whomever he chooses. These were imposed primarily in order to prevent him from behaving in a sexually inappropriate manner towards women. JB had been assessed as a moderate risk of sexual offending to women. In particular the risk was of JB "*sexually touching these women without consent. In terms of vulnerable women who do not have the capacity to consent to sexual relations, there is a risk of [JB] not recognising or respecting this fact, resulting in the potential for rape to occur.*"

The single joint expert instructed by the parties was of the view that JB had the ability to consent to sexual relations albeit that he does not understand or weigh "*highly pertinent factors in ensuring he engages in lawful sexual activity*."

JB objected to the restrictions, wanting desperately to find a girlfriend and to have a sexual relationship.

The local authority argued that an understanding that sexual activity is a consensual act on the part of any potential partner is necessary in order to protect JB from committing criminal acts and so being imprisoned or hospitalised pursuant to the Mental Health Act "*in circumstances where, due to his mental impairment, he cannot comprehend or acknowledge the concept of consent.*"

The Official Solicitor argued that as a matter of public policy the MCA should not be used as the means of imposing on a protected party restrictions which are designed either to avoid the risk of criminal offending or for the protection of the public at large. Further, the local authority's approach amounted to an impermissible attempt to include within the text for capacity to consent to sexual relations a requirement to understand, retain use and weigh potentially sophisticated aspects of domestic criminal law thus raising the bar from the deliberately low level at which it has been set in order to avoid discriminating against vulnerable adults with learning disabilities and other cognitive challenges who, despite those challenges, should be entitled nevertheless to exercise one of the most basic and instinctive functions of a human existence.

Roberts J ultimately agreed with the arguments of the Official Solicitor on the basis that:

(1) To argue that a full and complete understanding of consent (in terms recognised by the criminal law) is an essential component of capacity to have sexual relations is to confuse the *nature* or *character* of a sexual act with its lawfulness. It is therefore inappropriate to increase the bar for the potentially incapacitous and potentially deprive them of a fundamental and basic human right to participate in sexual relations merely because the raising of that bar might provide protection for either P himself or for any victim of non-consensual sex when those consequences are viewed through the prism of the criminal law.

(2) To hold otherwise is to fail to recognise the distinction between the concept of having the mental capacity to consent to sexual relations and exercising that capacity. Roberts J considered that Section 3 MCA 2005 does not look to outcome or to the fact that the absence of consent from a sexual partner may expose P to the rigours of the criminal justice system.

It was agreed between the parties that "*whilst it is permissible to weigh the risk of P entering the criminal justice system and/or being the target of some form of vigilante violence as part of a best interests analysis, what is not permissible is the imposition of a restriction on his liberty in order to prevent the possibility of offending insofar as it purely risked harm to those other than P. In this context the protection of others falls squarely within the Mental Health Act 1983 as opposed to the MCA 2005*."

Comment

This case raises highly sensitive and difficult issues of, on the one hand, public protection and on the other, fundamental rights. Such decisions are rooted in public policy as the Court of Appeal accepted in *IM v LM and Others* [2014] EWCA Civ 37.

While it is clear that the court's primary concern was not to raise the bar on the test for capacity to consent to sexual relations impermissibly high so as to discriminate against JB (consistent with the Court of Appeal decision in *IM*), the consequence of the judgment is to strike from the test as relevant information a foreseeable consequence of JB having sexual relations (namely exposure to criminal sanctions or detention under the MHA as a result of his lack of understanding of the need for his partner to consent to the act). This approach is arguably inconsistent with the Court of Appeal decision in *B v A Local Authority* [2019] EWCA Civ 913 in which the Court of Appeal emphasised that P's ability to understand, retain, use and weigh the reasonably foreseeable consequences of the decision at hand is at the heart of the MCA test.

A further difficulty can be seen from paragraph 80, in which Roberts J observed that:

> *Distilled into its essence, it seems to me that P's own choice, and his appreciation of that choice and the opportunity to refuse to consent, is an integral element of the capacity decision itself. Knowledge of the other party's consent to the proposed sexual activity is certainly relevant to the choice which then confronts P as to whether or not he (or she) goes ahead with that activity and thus its essentially lawful or unlawful nature.*

But, if JB had no understanding – and hence arguably no ability to 'know' – either the need for or the fact of a prospective partner's consent, then how could he be said to be exercising a capacitous choice whether to engage in sexual relations?

Perhaps one way of trying to unpick this legal and ethical quagmire is to focus in on the decision that P is being asked to make. If the question is – can P consent to sexual relations (and it is worth noting that this is the way the 'matter' is defined in s. 27 MCA 2005 where the prohibition on consenting on P's behalf to certain family relationships lies) – it is easier to understand why an understanding of the other parties' need to consent is not relevant. Articulating the question in this way suggests that P is a recipient of sexual advances on the part of a willing and consenting individual. All P needs to do is consent to the act on his/her own behalf. To hold otherwise in the case of a person such as JB whose deficit is said to be understanding the need for consent from the other partner would be to mean that the person wishing to have sexual relations with P would be committing an offence even though both

of them were in fact consenting to the act.

But describe the 'matter' in a different way – whether P can make decisions about sexual relations – and change the scenario (in the case of JB to the more realistic one of JB being, for want of a better term, the aggressor, seeking out sexual partners), then the decision arguably shifts from looking at the matter simply through the lens of P's consent, to encompass the partner's consent as well, given the reasonably foreseeable consequences to a P who commits a sexual offence.

We suspect that this judgment is not the last word on this knotty subject and our analysis raises the fascinating possibility that if the 'matter' is articulated in the wider way as capacity to make decisions about sexual relations, that a best interest decision could be made in respect of P as it is not prohibited by s. 27 MCA 2005.

Facilitating sexual activity – how far does the duty extend?

Lincolnshire County Council v Mr AB [2019] EWCOP 43 (Keehan J)

Best interests – contact

Summary[1]

Mr AB was a 51-year-old man with a diagnosis of moderate learning disabilities, autistic spectrum disorder, harmful use of alcohol and psychosis due to solvent abuse.

Mr AB had, as a result of a friendship with a sex worker, developed a fascination with female sex workers. He had since lived at a number of residential properties and during this time the local authority had been facilitating his access to sex workers both in the UK and in the Netherlands.

Having reversed this decision and concluded that they would no longer facilitate Mr AB's visits to sex workers, Lincolnshire County Council made an application for the court to determine P's capacity and best interests, specifically with regard to contact with sex workers.

An independently instructed psychiatrist concluded that Mr AB lacked the capacity to make a wide range of decisions including having contact with sex workers and managing his property and affairs. He was however assessed as having the capacity to consent to sexual relations. Keehan J was informed by Mr AB's litigation friend that Mr AB had a high sex drive and found the lack of access to sex workers frustrating. He wished to continue his past conduct of having and being permitted to have sexual relations with sex workers, in the UK and in the Netherlands.

The question for Keehan J was whether to endorse the decision not to facilitate Mr AB's access to sex workers made by the local authority.

Keehan J concluded that the local authority's decision was correct for a number of reasons, first

[1] Nicola having been involved in the case, she has not contributed to this report.

because the court was of the view that:

> *a care worker who causes or incites sexual activity by an individual for payment, with another person, commits a criminal offence, pursuant to ss. 39,42 and 53A of the Sexual Offences Act 2003.' Thus any care worker supporting P, and making arrangements for him to travel to the Netherlands for the purposes of having sexual activity with a woman for payment, would be at risk of being prosecuted for a breach of the Sexual Offences Act 2003.*
>
> *(i) Secondly, it would be wholly contrary to public policy for the court and for the local authority, to endorse and sanction P having sexual relations with a woman for payment.*
>
> *(ii) Thirdly, notwithstanding P's clearly expressed wishes and his clear desires to continue to meet prostitutes for sexual activity, it is not in his best interests to do so. The evidence before the Court is clear. Mr AB 'does not understand all of the implications of having sexual relations with a woman for payment. He puts himself at risk to his health, his welfare and his safety and he puts himself at risk of exploitation: none of which he accepts or understands.'*

Comment

Keehan J's support for the local authority's decision as to the right course of action is unsurprising given the evidence before it. It is however worth unpicking the conclusion that '*a care worker who causes or incites sexual activity by an individual for payment, with another person, commits a criminal offence, pursuant to ss. 39,42 and 53A of the Sexual Offences Act 2003'.* This part of what is a very short judgment conflates two separate offences under the SOA, s. 39 and s. 53A. They are however quite distinct.

Section 39 of the SOA makes it an offence to incite or cause an individual with a mental disorder to engage in sexual activity. There is of course potential for a care worker to be guilty of an offence pursuant to section 39 where they arrange, and take P to have sex with a third party. Whether such an offence would be engaged is going to be very fact-specific, depending (we suggest) upon the extent to which the care worker could be seen to be 'driving' the sexual activity, or providing support where a person themselves is seeking to initiate sexual activity with another. Although not relevant on the facts of this case, we suggest that it is doubtful that a care worker facilitating a P who has capacity to consent to sexual relations, to take up a sexual relationship with their partner could be said to be committing an offence under section 39. This is because the care worker's actions would not be to incite or cause the sexual relationship, but to facilitate it.

Section 53A on the other hand is a strict liability offence (which applies world-wide). Payment for sexual services is not per se illegal; however, the operation of s.53A means that a person (A) is guilty of an offence if he:

- makes or promises a payment for the sexual services of a prostitute (person B)
- where person C has engaged in exploitative conduct of a kind likely to induce or encourage B to provide the sexual services for which A has made or promised payment, and C engaged in that

conduct for or in the expectation of gain for C or another person (apart from A or B) – in other words where person C has exploited B.

Mr AB was assessed as lacking capacity to manage his property and affairs. It is likely therefore that the care worker taking him to visit the sex worker would be the person making the payment to the sex worker. The first part of the offence is therefore likely to be made out (although this is not made explicit in the judgment).

As to whether the offence is completed will depend on whether the sex worker had been exploited. Thus, unless the care agency or local authority were able to investigate whether the sex worker they were engaging for Mr AB had been exploited by a third person, there remains a real risk that an offence would be being committed pursuant to section 53A. The judge may well therefore have been right to conclude that offences pursuant to section 53A would be committed on the facts of this case.

Whilst one can understand why Keehan J took the approach that he did, especially given the potential implications for the care workers, it is perhaps just worth remembering that:

(1) It may be morally wrong, but it is not illegal (outside the scope of s.53A) to pay for sex. As has been said in another context, the onset (or here, the fact of) mental incapacity "*is not an opportunity for moral correction*" (*Re Peter Jones* [2014] EWCOP 59);

(2) It is not immediately obvious how one filters questions of public policy through the best interests framework. Parker J, it should be noted, decided that she had to have recourse to the inherent jurisdiction in *XCC v AA* to discharge a pure public policy function arising out of P's circumstances (in that case, to grant a declaration of 'non-recognition' in relation to a marriage contracted overseas where P lacked capacity to enter into it).

Deprivation of liberty application statistics

The most recent statistics from the Ministry of Justice (for April to June 2019) have been published. They show an increase in number of applications and orders made in relation to deprivation of liberty. There were 1,372 applications relating to deprivation of liberty made in the most recent quarter, up 18% on the number made in April to June 2018. Orders made for deprivation of liberty increased by 17% to 651 over the same period, despite a decrease since the end of 2018.

The statistics show that for the first quarter of 2019 (i.e. the period before these), the 1,326 Deprivation of Liberty applications made then were broken down as follows: 85 for Section 16, 313 for Section 21A and 928 for the *Re X* process (i.e. community deprivation of liberty). We do not have the breakdown for the statistics for the second quarter, but the trend appears clearly to be upwards in terms of community deprivation of liberty applications (the quarter previously having seen 663 applications).

Separately, the statistics show that there were 8,110 applications made under the MCA 2005, up 9% on the equivalent quarter in 2018. 44% related to applications for appointment of a property and affairs

deputy. In comparison, there were 11,814 orders made under the MCA 2005, 31% more than the same quarter in 2018. The MoJ explains that the increase is largely due to a 72% increase in orders by an existing deputy or registered attorney, which accounted for 36% of all orders made under the MCA.

PROPERTY AND AFFAIRS

Attorneys and gifts

M and H v P [2019] EWCOP 42 (Senior Judge Hilder)

Lasting power of attorneys – gifts

Summary

In this case the Public Guardian brought to the court various LPAs that had been submitted for registration but in respect of which there were concerns as to the effectiveness and lawfulness of some of the provisions.

In essence, the concerns related to provisions in the LPAs that either mandated or stated a desire that the donee should benefit people other than the donor including in one case the donee himself. The question was, could such provisions be included in a valid LPA or should they be severed?

Mostly, the provisions had been inserted in the "instructions" section on the form but some had been in the "preferences" section.

This is one example.

> *At section 7 of the instrument under the heading 'Preferences' the donor entered the words "The needs of [LS] before anyone else.' Under the heading 'Instructions', she entered the words "The attorney [SS] must ensure that the needs of my daughter [LS] are taken care of…"*

At paragraph 69, the court expressed general conclusions. They can be summarised as follows.

1. A donor cannot authorise a gift within the meaning of s.12 MCA 2005 so as to extend the attorney's powers to make gifts in circumstances covered by that section.
2. Provisions that authorise the benefitting of another are not rendered valid simply by reason of the fact that the donor owes a legal obligation towards that other for that other's maintenance.
3. A provision that provides for the donee to use the donor's funds to benefit another person may be valid so long as it is a precatory provision. If it is mandatory, it is ineffective.
4. A provision that authorises the benefitting of the donee is not invalid simply because the donee is in a fiduciary position viz a viz the donor.
5. Such a provision is also not invalid simply because of a conflict of interests as such has been authorised by the donor and in any event the donee is obliged to act in the donor's best interests.

On the way to these conclusions, there was substantial discussion of what constituted a gift within the

meaning of section 12. Section 12 provides.

> *12 Scope of lasting powers of attorney: gifts*
>
> *(1) Where a lasting power of attorney confers authority to make decisions about P's property and affairs, it does not authorise a donee (or, if more than one, any of them) to dispose of the donor's property by making gifts except to the extent permitted by subsection (2).*
>
> *(2) The donee may make gifts –*
>
> *a. on customary occasion to persons (including himself) who are related to or connected with the donor, or*
>
> *b. to any charity to whom the donor made or might have been expected to make gifts,*
>
> *if the value of each such gift is not unreasonable having regard to all the circumstances and, in particular, the size of the donor's estate.*
>
> *(3) 'Customary occasion' means –*
>
> *a. the occasion or anniversary of a birth, a marriage or the formation of a civil partnership, or*
>
> *b. any other occasion on which presents are customarily given within families or among friends or associates.*
>
> *(4) Subsection (2) is subject to any conditions or restrictions in the instrument.*

The court held that the only voluntary dispositions of the donor's estate that come within this section are those made on a "customary occasion" or where the donor is not under a degree of obligation in respect of the disposition (see paragraph 54). This departs from the previously held view, including by former Senior Judge Lush, that there had to be some element of need in the disponee that is satisfied by the disposition.

As regards the actual provisions, the court reminded itself that the fact that the term was in the "instructions" or "preferences" section was not determinative. The court then went on to construe each provision. Most were held mandatory and therefore invalid because they would inhibit the attorney from making decisions in the donor's best interests so, in the example given above the decision was:

> *At section 7 of the instrument under the heading 'Preferences' the donor entered the words "The needs of [LS] before anyone else.' Under the heading 'Instructions', she entered the words "The attorney [SS] must ensure that the needs of my daughter [LS] are taken care of…*
>
> *The first of these provisions is an expression of wishes. It does not contravene the Act. It is not*

> *ineffective as part of the lasting power of attorney, and it would not prevent the instrument from operating as a valid lasting power of attorney. Its inclusion in the instrument is not a problem.*
>
> *The second of these provisions is in mandatory terms. As a condition of authority, it would prevent the attorney from properly making a best interests decision. It is therefore ineffective as part of a lasting power of attorney. If severed, the instrument can operate as a valid lasting power of attorney.*
>
> *I sever the second provision and direct the Public Guardian to register the instrument with a note to that effect attached.*

At paragraph 68, the court gave guidance as to the circumstances where an attorney should seek the court's consent to a proposed disposition:

> *A proportionate approach has to be taken to considerations of conflict of interest, balancing the risk of abuse against the objective of facilitating autonomous decision making. In my judgment, where the donor whilst he had capacity used his own funds to benefit another (including the attorney) in the way contemplated, or where there is an express statement in the instrument of the donor's wish that his funds be used in the way contemplated, there should be no requirement for the attorney to seek prior authority from the court to use the donor's funds to benefit another, even if the attorney is in a position of conflict of interest. However, in the absence of either capacitous demonstration of such beliefs and values, or express statement of wishes in the instrument, where the use of funds under contemplation gives rise to a conflict of interest on the part of the attorney, the attorney should make an application to the court for prior authority pursuant to section 23(2) of the Act.*

Comment

The guidance given in the paragraph immediately above only applies to dispositions that are not gifts covered by s.12 MCA 2005 (as explained above). In respect of such gifts, if they are not authorised by section 12, then the attorney must seek permission from the court.

This decision extends somewhat the class of voluntary dispositions that are not gifts within s. 12 MCA 2005 beyond those dispositions that cater for a person's needs to those where there is some sense of obligation on the part of the donor of the LPA towards the person being benefitted (provided that the disposition is not on a "customary occasion").

The decision also makes it clear that where a disposition is mandated by the LPA, the provision will be ineffective and severed whereas, in general, precatory words will be allowed.

Unusually, but helpfully, Senior Judge Hilder, noting that her conclusions will be "applied in the day to day context of lay people making arrangements for management of their funds and acting as attorney," summarised them in the form of a 'decision tree' attached to this judgment.

Withholding knowledge of an application (1) from P

DXW v PXL [2019] EWHC 2579 (QB) (High Court (Pushpainder Saini J)

CoP jurisdiction and powers – interface with civil proceedings

Summary

In this case P suffered serious brain injuries whilst at work. These left him with severe cognitive and executive impairments. Apart from lacking litigation capacity, the evidence was clear that he lacked the capacity to manage his property and affairs. His claim for damages was settled for £6.6million and the court approved that settlement making the usual anonymity orders.

Those responsible for P's care and his property and affairs deputy considered that P would be at risk of significant harm if he knew the size of the award. There was evidence that P's rehabilitation would be prejudiced, that he would become upset and confused and would be rendered more vulnerable.

The court in *EXB v FDZ* [2018] EWHC 3456 (QB) (2019) PIQR P7 had considered this issue and granted an order that it was in P's best interest not to be told the size of the award and this case is an illustration of when such orders are justified and considers a factor that was not present in *EXB*.

In *EXB*, P had been informed that P's views had been sought bearing in mind the requirement in s.4(6) MCA 2005 when applying the best interest test to consider so far as reasonably practicable P's wishes and feelings and the principles of non-discrimination and autonomy enshrined in the CRPD.

In this case P had not been told of the application. The judge was concerned about this, see paragraph's 9-11, stating that in the ordinary case P's views should be sought and that strict justification based on evidence of real necessity would be required to displace that starting point.

Ultimately, the court was so persuaded principally on the grounds that P's rehabilitation would be impeded if he knew even that the application was being made (paragraph 16).

Comment

Applications to this effect will be unusual as they represent a serious invasion of P's right to know and the principles of autonomy and non-discrimination. Even rarer will the case here that P is not told of the application itself. The effect of the decision in this regard is that the court has made a decision for P that P should not be told of an application being made in respect of P's property and affairs in circumstances where he could express a view so that ascertainment of his wishes and feelings is reasonably practicable. This is directly contrary to s.4(6) MCA 2005 which **requires** (through the use of the word "must") consideration of such wishes and feelings.

Withholding knowledge of an application (2): from another person

M and H v P [2019] EWCOP 42 (Senior Judge Hilder)

Practice and procedure (Court of Protection) – without notice applications

Summary

In this case the court was considering an application that the court should authorise the making of a statutory will on P's behalf and the issue arose of whether P's son, a beneficiary in an earlier will should be joined or notified.

P was a successful businessman and had suffered a stroke. He had a will but the change of circumstances following his stroke, involving the need for substantial care, together with evidence that before his stroke, he was considering a change, prompted those interested in his care to consider that a new will was in P's best interests.

The initial proposed will adversely affected P's son's interests so pursuant to PD9, he was a mandatory respondent. By the time of the hearing, though, the proposed will had been modified so that the requirement was for notification of the proceedings only.

The applicants and the OS, who was appointed as litigation friend on P's behalf in the usual way, considered that P's son should not be joined or notified because he had behaved in a threatening and demanding way towards P in the past and had been sent to prison for breach of a restraining order and they feared that if he was notified, similar behaviour would ensue such that if he was to be notified, the applicants would withdraw the application.

The judge refereed to the guidance given by former Senior Judge Lush in *I v D* [2016] EWCOP 35 concerning dispensation with service. She held that where dispensation was in relation to notification only as the person's interests were not materially adversely affected, the balancing exercise was differently weighted to the situation where the person should ordinarily be made a respondent. At paragraph 38, she said this:

> *Where a person is not likely to be materially or adversely affected by an application, the balancing exercise of procedural fairness in excluding him from the proceedings is differently weighted:*
>
> *a. Against such exclusion there is still the disadvantage that the court may have to determine the substantive application without all relevant material – X's account will not be available. There is too the ultimate risk that, after P's death when the fact of the statutory will inevitably becomes known to X, his exclusion from proceedings will foster a sense of resentment which actually aggravates the risk of the Applicants' fears being realised.*
>
> *b. However in favour of such an approach, it is more likely that an application which those with responsibility for managing P's financial affairs consider to be appropriate will be heard at all; and P's own representatives in the substantive application support this approach. In so far as X may feel aggrieved at having been deprived of opportunity to contribute to proceedings, the opportunity will have been lost because of his own (unlawful) actions.*

In the circumstances, the court acceded to the application that P's son be not notified of the application.

Comment

The balancing exercise carried out in this case is of particular interest in showing how the factors will differ depend upon whether the relevant individual's interests will be directly affected by the substantive order under contemplation.

PRACTICE AND PROCEDURE

Launch of the Court of Protection Mediation Scheme

We are delighted to announce the launch of the Court of Protection Mediation Scheme.

The scheme has been designed by a group of practitioners, including one of our editors Katie Scott, to provide those who wish to mediate issued court of protection cases with an appropriately qualified mediator, who will mediate at the legal aid rate. The scheme provides participants with information to ensure that they are properly prepared for a mediation so as to give it the best chance of success, a step by step guide as to what is required throughout the process, and provides detailed information about some of the more challenging aspects of mediating a Court of Protection case, including how to best ensure P's participation. One of the most exciting aspects of the scheme is the opportunity to participate in the research into the effectiveness of mediation being undertaken by Dr Lindsay from the University of Essex. If you are interested in becoming a mediator on the scheme, or mediating within the scheme, please visit www.courtofprotectionmediation.uk or contact ks@39essex.com.

Necessity, proportionality and the inherent jurisdiction

Mayor and Burgesses of the London Borough of Croydon v (1) KR and (2) ST [2019] EWHC 2498 (Fam) (High Court (Lieven J))

Inherent jurisdiction

Summary[2]

The local authority, Croydon, brought proceedings under the inherent jurisdiction where they had become concerned about a husband (KR) living in his wife (ST) in what could be characterised as highly dysfunctional circumstances. KR was a 59-year-old man, who was seriously disabled having suffered a life changing brain injury in 2004 after an attack. He had right sided hemiplegia, brain injury and epilepsy. He was unable to self-mobilise, was confined to a wheelchair and only has movement in one arm. He was in need of fairly constant care and is completely dependent on those who care for him. KR had been assessed as having capacity to make decisions about residence and care; which was never in issue throughout the proceedings. The couple had a history of domestic violence (the husband had once attacked his wife with a knife) and KR had previously been addicted to heroin. KR had been diagnosed with bipolar affective disorder and emotionally unstable personality disorder. It was alleged that KR had a long and ongoing problem with alcohol misuse. They lived together in a one bedroom flat (with KR sleeping on the sofa) and the local authority provided regular care visits. Professionals became increasingly concerned: carers could not always access the property for care visits, ST was sometimes said to leave KR by himself in the property and there were concerns that the couple were

[2] With thanks to Alexis Hearnden and Stephanie David for permission to draw upon their summary of the case for a seminar given in Chambers.

being preyed upon by local criminals/drug users. The local authority were concerned that not only could ST not keep KR safe, but that she exposed him to harm (e.g. by allegedly being drunk when pushing his wheelchair to the shops).

After KR was admitted to hospital the local authority made a without notice application to the High Court under the inherent jurisdiction for an order preventing ST from removing him from hospital. A week later, KR agreed to move to CP, a nursing home, for a period of respite. At the same time, Williams J discharged the order made by Cohen J (to prevent removal from hospital) and replaced it with an order that ST was not remove KR from CP, and that her contact with him be limited, including it being supervised at all times.

The application came on for a final hearing before Lieven J. The local authority's primary position was to ask for an order that KR could not live with ST; but that in the alternative he would seek protective orders against ST. On the first day of the hearing the local authority witnesses gave evidence which by the day's end (a) revealed that the evidence could not sustain the picture painted by the local authority that carers could rarely access the property and (b) included evidence from a social worker that KR's will was not "overborne" by external factors. On the second day, the local authority applied for permission to withdraw the case, and Lieven J granted their application. However, she went on to give a detailed judgment to address the question of whether making the order sought would have been justified.

In order to do so, Lieven J identified that she needed to address the following questions:

(a) Did KR fall within the inherent jurisdiction as set out in *SA (Vulnerable Adult with Capacity: Marriage)* [2006] 1 FLR 867?

(b) If yes, were the terms of the order justified under article 8(2)?

(c) In answering (b) were there less intrusive means which would achieve the legitimate aim of protection of KR's health under article 8(2)?

As to (a), Lieven J found that KR was undoubtedly vulnerable in the sense that he was severely disabled and very much within the physical control of his carers. However, he had capacity, and although he had some communication problems he appeared to fully understand what was going on around him, and was able to express his views clearly and forcefully. Lieven J observed (at para 60) that: "[t]*he fact that he is physically vulnerable cannot possibly be sufficient to incur the use of the inherent jurisdiction*." As Lieven J noted "[t]h*ere is some evidence that KR's views as to where he wants to live fluctuate, and may change when he is with or has just been with ST. However, it is important to be careful to distinguish between the entirely natural and common influence that one close family member will have over another, and the "undue influence" or "coercion" identified in SA and DL. If a dysfunctional family relationship is to fall within these principles then the evidence has to show that the vulnerable individual is incapable of making their own decision."*

Whilst Lieven J found that it was possible that KR fell within the scope of the inherent jurisdiction when the initial application was made, by the time the matter came before her KR had been living away from ST for a period of almost 6 months. His evidence was clear in his two witness statements that he wanted to leave the care home and live with ST. The witness statements suggested that he had carefully weighed up the pros and cons of living with ST, and come up with a well thought out position. As Lieven J noted:

> *63* […]*This might fall within what the Mental Capacity Act calls an unwise decision, but if an adult without capacity is allowed to make an unwise decision so too must someone facing an application under the inherent jurisdiction. I do not reject the possibility that in extremely exceptional cases the inherent jurisdiction might be used for long term or permanent orders forcing the vulnerable adult not to live with the person(s) he wants to, as was the case in Meyers. However, that must be a truly exceptional case. As was contemplated by Macur J in LBL, and apparently supported by McFarlane LJ in DL at [67], the normal use of the inherent jurisdiction is to secure for the individual, who is subject to the alleged coercion or undue influence, a space in which their true decision making can be re-established. If the inherent jurisdiction is used beyond this then the level of interference in the individual's article 8 rights will become increasingly difficult to justify.*
>
> *64. The Local Authority relied on Meyers, where it was equally clear that Mr Meyers had capacity and had strongly expressed his wish to go home and live with his son, yet the final order was still made. In my view there are two key differences from Meyers, which I will consider through the analytical framework of article 8. Firstly, there is the scale of the interference in stopping a couple, who have been married for 40 years and both of whom have capacity, from living together. It is hard to imagine the State interfering more intrusively in a person's private life. Secondly, on the article 8(2) justification, Hayden J was very clear in Meyers that if Mr Meyers returned home then he would be likely to die because of the conditions he was living in and his son's refusal to allow carers to look after him. It is therefore possible to analyse the case as one where the State had a positive obligation under article 2 to intervene to preserve life. In any event, Meyers was a truly exceptional case, where the evidence that the local authority had taken every possible step to protect Mr Meyers, including trying to control the actions of his son, was overwhelming. That is not the case here, as I will explain below.*

Lieven J therefore found that, by the time that the matter came before her, the evidence did not support a conclusion that KR fell within the scope of the inherent jurisdiction as a vulnerable adult or that KR remained under the undue influence of ST to a degree which would justify the use of the inherent jurisdiction.

Lieven J nonetheless went on to consider the question of whether, even had KR fallen within the scope of the inherent jurisdiction, any order should have been made. She had set out the framework earlier in the judgment, starting at paragraph 45, at which she had noted that:

> *45. The parties in this case appear to have focused primarily on article 5 (the right to liberty), perhaps because that is necessarily the critical article in cases concerning Deprivation of Liberty orders. However, it appears to me that the answer to this case, and the correct analytical framework arises*

> *much more clearly under article 8. In order for article 5 to be in play the orders sought would have to be restricting KR's liberty. However, the LA do not seek KR to be required to live at CP, they merely require him not to live with ST. Although in practice KR given his condition would have little or no choice certainly in the short run, but to live at CP if the order was made, the order itself would not be a removal of his liberty. As such I do not think that this is a case where article 5 is in truth the issue. This entirely accords with Cobb J's judgment in PR [2019] EWHC 2305 (Fam).*

Turning to Article 8 ECHR, and relying upon *Hokkannen v Finland* (19823/92), Lieven J noted that "*the protection of the individual's autonomy against interference by the State is absolutely central to the present case*," and that the proposed interference with the Article 8 rights of KR and his wife in a marriage of 40 years was colossal. "*That does not mean that the State can never separate a married couple*," she continued, "*but it must do so with full consideration of the scale of interference in that couples' rights*."

The question was therefore whether that interference was justified. This turned on whether the interference in KR's rights was on the facts of the case necessary and proportionate. As she noted "[i]*n any case involving an interference with an article 8 right it will be necessary for the Court to consider whether the State has properly had regard to the potential for "less intrusive measures". Plainly the greater the interference the more closely less intrusive means will need to be scrutinised*" (para 51).

On the facts of KR's case, she found that the Article 8(2) balance came down against making an order:

> *68. In terms of risk to KR from ST, I accept that this is a couple with a history of domestic violence. Historically KR accepts that he did hit ST, but it is obvious now that given his physical disability he is more at risk from ST. There was some evidence from bruising that ST may have assaulted KR but this is certainly not clear. In any event it would only be in the most exceptional case that the State would seek to forcibly prevent a couple from living together where there was a history of domestic violence, in circumstances where both genuinely said they wanted to live together.*
>
> *69. Further, this is again a point where the LA have plainly failed to properly consider less intrusive means to mitigate the alleged risk. The couple live in a one bedroom flat and due to KR's disability ST has been having to sleep on a sofa in the living room ever since KR returned home in 2015. ST is obviously under extreme strain living in these circumstances and being KR's primary carer. I asked what steps had been made to find them more suitable accommodation, but Ms Bamfield told me there were no supported flats available, and they were simply on the LA's waiting list for a two bedroom flat. It is obvious to me that before seeking a highly draconian order and making such a colossal interference in this couple's article 8 rights it was incumbent on the LA to ensure that they had suitable accommodation. That simply has not been done.*
>
> *70. In conclusion I therefore find that the risks on the facts of this case do not justify the interference under article 8(2). Further I find that the LA has not properly considered whether there are less intrusive means by which KR could be properly protected. In these circumstances I find that making the order sought would not have been necessary or proportionate.*

Comment

In the absence of any governing statute, it is extremely difficult for both practitioners and the courts to identify what is, and is not, permissible even to ask for under the inherent jurisdiction. This is therefore an important and helpful case in terms of developing a framework through which decisions can be made as to when to bring applications under the inherent jurisdiction and what orders can appropriately be sought.

We have sought to provide further guidance, and to draw together the strands from recent case-law, in our guidance note on the inherent jurisdiction available here.

Separately, and as a practice point, it is important to highlight Lieven J's concerns with the way in which the application was presented to court. Three working days before the trial, 1400 pages of background documents were sent to the lawyers for KR and ST. As Lieven J noted:

> *17. There are a number of points of concern to me about these documents. Firstly, it is not acceptable that they were only disclosed, at least in this form, so shortly before trial. The hearing date had been set down since 21 May 2019, and the late disclosure meant the bundles were both unmanageable, and in reality, unreadable. Secondly, the disclosure appears to have been in the form of simply putting all these documents in the court bundle without any attempt to agree the bundle. Again, this is not acceptable, at the least attempts must be made to agree a bundle, and the bundle should be limited to documents which will be necessary for the judge to consider.*
>
> *18. Thirdly, and most importantly, I am seriously concerned about the discrepancies between what some of these background documents show and what was said in the evidence to the court, particularly in the first witness statement of Ms Jones, which was the basis of the without notice order. This case commenced with an application for an injunction without notice. It continued through a series of interim injunctions where the judges necessarily had very limited time to examine background documents, even if they had been exhibited, which in key instances they were not. It is trite law that when a without notice injunction is applied for there is a duty of full and frank disclosure and there is in any event a duty on any claimant not to mislead the court. This is just as true in proceedings like this as in the Commercial Court or Queen's Bench. Indeed it is relevant, and I will return to this below, that the injunction sought was not just draconian it was deeply intrusive into the private lives of two adults with capacity. I will refer below to the European and domestic caselaw on the importance of the State not interfering into individuals' marriage. In those circumstances the obligation for full and frank disclosure is as important if not more important, than in any other form of litigation. I appreciate local authorities are hard pressed, and poorly resourced, however the importance of ensuring the Court is possession of all the relevant facts at a without notice injunction application cannot be overstated.*

In this context, it may be of assistance for readers also to note our guide to without notice applications in the Court of Protection (equally applicable to applications under the inherent jurisdiction), available here.

Short note: the inherent jurisdiction and deprivation of liberty

The Court of Appeal ([2019] EWCA Civ 1558) has granted permission (out of time) for Mr Mazhar to appeal an (on its face) somewhat startling order made by Mostyn J in 2016. In the Court of Appeal's summary:

> *5. Mr Mazhar suffers from severe physical disabilities for which he requires 24-hour care, including ventilation. He has mental capacity in all material respects, including in respect of decisions about his care. At the material time his care was provided by carers at his home.*
>
> *6. On 22 April 2016, Birmingham Community Healthcare NHS Foundation Trust ("the NHS Trust") made an urgent out-of-hours application, by telephone, for an order authorising the use of reasonable and proportionate force to remove Mr Mazhar from his home to Queen Elizabeth Hospital in Birmingham (paras. 1-3 of Mostyn J's order), and to detain him in hospital for medical care (para. 4 of that order) on the basis that no carers were available to attend his home at the weekend, and no agreement had been reached between the NHS Trust and his family that would have met his care needs. Para. 5 of Mostyn J's order required that the matter be listed for an urgent hearing as soon as possible on or after 25 April 2016.*

Mr Mazhar contended that the order was based on misrepresentations made to Mostyn J by the NHS Trust. He also contended that, even on the evidence that was before Mostyn J, the order could not and should not have been made because there was no evidence that he was a person "of unsound mind", to use the phrase in Article 5(1)(e) of the ECHR. He did not seek to appeal the order, but initiated proceedings against both the NHS Trust and the Lord Chancellor, seeking a declaration that both had violated his Article 5, 6 and/or 8 rights under the ECHR. He also sought damages. He settled his claim against the NHS trust by accepting a Part 36 offer, and then sought a declaration only against the Lord Chancellor.

After a rather complex procedural journey, and for reasons that need not detain us here, the Court of Appeal found that, in fact, the appropriate remedy was for Mr Mazhar to seek to appeal Mostyn J's order, and granted him permission (substantially out of time) to do so. In doing so, the Court of Appeal held that the appeal would have a real prospect of success, recording the submission of Counsel for Mr Mazhart that "*as a matter of law, Mostyn J's order should never have been made because there was no evidence before him that Mr Mazhar was a person "of unsound mind" (the phrase used in Article 5(1)(e) of the ECHR).*"

It will be interesting to see whether in defending the appeal, the Lord Chancellor maintains the position that was advanced at first instance, to the effect that:

> *The Lord Chancellor concedes that Mr Mazhar was deprived of his liberty when he was removed from his home and taken to hospital and accepts that he was not a person of unsound mind within the meaning of article 5(1)(e) at the date of the order. He does not however accept that the broader proposition that the inherent jurisdiction is limited in the way suggested on behalf of Mr Mazhar and*

in particular that it can only be used to facilitate the re-establishment of autonomy. He argues that its use to detain and remove a person who has mental capacity to make decisions about his care (but who is a vulnerable adult) to a safe place such as a hospital is a well recognised jurisdiction which acts as a safety net to protect persons who fall outside the scope of the Mental Capacity Act 2005. He contends that use of the jurisdiction to detain is neither arbitrary nor unlawful because there are procedural safeguards ie it is a procedure prescribed by law, governed by Rules of Court, Practice Directions and Guidance. It is clearly established by case law which is sufficiently accessible and foreseeable with advice and the jurisdiction's flexibility is reasoned and justified so that, for example, where detention is permitted there are rigorous safeguards that include regular review.

Deputyship fees refund

The Ministry of Justice has launched its scheme to refund overpayments of deputyship fees paid between 1 April 2008 and 31 March 2015.

Where the deputyship is still in place, there is no need for an application and the PGO will be in touch with the deputy to organise the refund.

If, however, the deputyship has ceased, either because P has died or because P has recovered capacity, then an application for a refund has to be made respectively by those representing P's estate or by P himself.

For more details, see here.

THE WIDER CONTEXT

ENGLAND, WALES AND NORTHERN IRELAND

SRA Guidance: Representing people who lack mental capacity

Ahead of the coming into force of the new SRA Code of Conduct on 25 November, the Solicitors Regulation Authority has issued new guidance on representing people who lack mental capacity, to be found here.

Short note: children, medical treatment and lessons to be learned

MacDonald J has considered in considerable detail ([2019] EWHC 2530 (Fam) the medical treatment and best interests of Tafida Raqeeb ('Tafida'), a five year old girl and loved member of a close Muslim family. A few months before her fifth birthday she suffered bleeding on her brain caused by a ruptured arteriovenous malformation (AVM), a rare condition which was undetected and asymptomatic in her. The ruptured AVM resulted in extensive and irreversible damage to Tafida's brain. At the point the matter was before the Court, Tafida was in hospital being provided with artificial ventilation, without which she would die. The Trust had concluded that it was in Tafida's best interests for that life-sustaining treatment to be withdrawn. The family did not agree and had secured an offer from a hospital in Italy to continue to treat Tafida. The Trust had refused to transfer Tafida to the Italian Hospital.

The court had before it two sets of proceedings:

(i) The first set of proceedings, concerned an application by Tafida for judicial review of the decision by the Trust not to agree to Tafida being transferred to a hospital in Italy for continued medical treatment pending the determination of an application to the High Court for a declaration regarding her best interests.

(ii) The second set of proceedings concerned the application by the Trust for a specific issue order pursuant to s. 8 Children Act 1989, and an application for a declaration pursuant to the inherent jurisdiction of the High Court, that it was in Tafida's best interests for her current life-sustaining treatment now to be withdrawn, a course of action that would lead inevitably to her death.

Perhaps the most interesting issues emerged from the application for judicial review:

(i) The judge had no difficulty finding that the decision of the Trust not to allow Tafida's parents to remove her from their hospital and take her to Italy was a public law decision that is amenable to judicial review;

(ii) The judge equally had little difficulty rejecting the submissions made to him that in taking this decision the Trust discriminated against Tafida pursuant to the Equalities Act 2010 (holding that the Trust did not apply a provision, criterion or practice which is discriminatory in relation to a

relevant protected characteristic of Tafida or her parents) and that they failed to have regard to, or contravened the NHS Constitution;

(iii) However the judge held that the decision was on its face unlawful because in taking it the Trust did not give any consideration to whether that decision would interfere with Tafida's EU directly effective rights under Art 56 of the Treaty for the Functioning of the European Union (TFEU).[3]

The Judge however went on to conclude that had the Trust considered Tafida's Art 56 rights when making its decision not to agree to Tafida being transferred to the Italian Hospital, the Trust would have reached the same decision in any event:

(i) The decision of the Trust made it impossible for Tafida to benefit from her directly effective EU rights under Art 56 to receive medical treatment in another Member State and so was a plain interference with her directly enforceable article 56 rights;

(ii) However Regulation 2201/2003 ('Brussels IIa') confers jurisdiction for the use of the established national procedure in this jurisdiction for determining disputes between parents and doctors over whether a child should or should not continue to receive life-sustaining treatment (i.e. an application to the court). The Trust issued proceedings in the court (thus invoking the established national procedure).

(iii) Had the Trust considered Tafida's directly enforceable EU rights, the Trust would have come to the conclusion that the interference in Tafida's EU rights constituted by its decision was justified on public policy grounds and that the national procedure it chose to follow constitutes a justified derogation from Tafida's rights under Art 56.

Accordingly, MacDonald J refused to quash the Trust's decision as to do so would cause unacceptable delay and serve no purpose given the conclusion the court had reached that, even if made lawfully, the Trust would have come to the same result.

MacDonald J then went on to consider the Trust's application as to whether it was in Tafida's best interests to withdraw life-sustaining treatment. He went through a very careful and detailed analysis of all the evidence before it and concluded that he would not grant the application. Cases concerned with the withdrawal of medical treatment are of course hugely fact specific, and this is no exception, accordingly we do not set out any detail of that analysis. What is interesting however about the best interest analysis conducted by the judge is that the matters weighed in the balance were essentially identical to those that would be weighed pursuant to an MCA decision for an adult, despite Tafida's very young age. The judgment is also of interest for the depth of the engagement with the fact that

[3] The argument being run by Tafida and her parents (and accepted by the Court) was that article 56 of the TFEU protected the freedom to provide services and the corollary of that is the freedom to receive those services in another Member State, and the provision of intensive care, palliative care and end of life care by a hospital in another EU Member State constitute services for the purposes of Art 56 of TFEU read with EU Directive 2011/24

Tafida and her family were Muslim.

This case raises, by analogy two important issues for practitioners in the Court of Protection:

(1) They need to be aware as to when their decision making interferes with directly enforceable EU rights (at least for so long as they remain relevant). If such a right is engaged, the impact on the right will need to form part of the reasoning of the decision to ensure its lawfulness in public law terms.

(2) They need to be aware as to when they are making public law decisions which are amenable to judicial review, and when they are making best interests decision which are justiciable in the Court of Protection. In the medical treatment arena, the decision of the doctor to identify which treatments are clinically indicated for a patient and so can be offered to them is a public law decision. The choosing between those clinically indicated treatments by the doctor as the decision maker for an incapacitated patient is a best interests decision.

NHS Community Mental Health Framework

NHS England and the National Collaborating Centre for Mental Health have published a Community Mental Health Framework for Adults and Older Adults, seeking to

> *drive a renewed focus on people living in their communities with a range of long-term severe mental illnesses, and a new focus on people whose needs are deemed too severe for Improving Access to Psychological Therapies (IAPT) services but not severe enough to meet secondary care "thresholds", including, for example, eating disorders and complex mental health difficulties associated with a diagnosis of "personality disorder".*

Capabilities Statement for Social Work with Autistic Adults

The British Association of Social Workers have published a Capabilities Statement for Social Work with Autistic Adults. Commissioned by the Department of Health and Social Care, the Statement is supported by a set of resources.

CQC State of Care report

Making thoroughly depressing reading, the CQC's latest State of Care report was published on 15 October. Of particular concern were the findings in relation to mental health care, the CQC noting that

> *Some people are struggling to get access to the mental health services they need, when they need them.*
>
> *This can mean that people reach a level of 'crisis' that requires immediate and costly intervention before getting the care they need, or that they end up in inappropriate parts of the system.*

Some people are detained in mental health services when this might have been avoided if they had been helped sooner, and then find themselves spending too long in services that are not suitable for them.

Too many people with a learning disability or autism are in hospital because of a lack of local, intensive community services.

We have concerns about the quality of inpatient wards that should be providing longer-term and highly specialised care for people.

We have shone a spotlight this year on the prolonged use of segregation for people with severe and complex problems – who should instead be receiving specialist care from staff with highly specialised skills, and in a setting that is fully tailored to their needs.

Since October 2018, we have rated as inadequate 14 independent mental health hospitals that admit people with a learning disability and/or autism, and put them into special measures.

This is an unacceptable situation. A better system of care is needed for people with a learning disability or autism who are, or are at risk of, being hospitalised, segregated and placed in overly restrictive environments. We must all work together to make this happen.

We also know that people with the most severe and enduring mental ill-health do not always have access to local, comprehensive rehabilitation services and are often in inappropriate placements far from home. This weakens support networks and the ability of family and commissioners to stay in close contact, sometimes with devastating consequences.

We are seeing issues with the availability of care. There has been a 14% fall in the number of mental health beds between 2014/15 and 2018/19. While this is in line with the national policy commitment to support people in the community, it is vital that people in crisis can access support when needed.

All of this is underpinned by significant issues around staffing and workforce.

Our inspectors are seeing too many mental health and learning disability services with people who lack the skills, training, experience or clinical support to care for patients with complex needs. In the majority of mental health inpatient services rated as inadequate or requires improvement since October 2018, the inspection reports identified a lack of appropriately skilled staff as an issue.

DoLS delayed in Northern Ireland

In a setback both for rights protection and for fusion enthusiasts, it has been announced that the deprivation of liberty provisions in the Mental Capacity Act (Northern Ireland) 2016 has been delayed from 1 October until 2 December 2019 (the commencement date for research provisions remains 1 October).

In what might be seen as a warning for England & Wales ahead of the implementation of LPS on 1

October 2020, we understand that the reason for the delay was that the relevant processes and personnel within the HSC Trusts (the combined health and social care bodies) could not be put in place.

For more detail (and also the Code accompanying the DoL provisions, weighing in at a slimline 90 or so pages of core Code), see the Northern Ireland Department of Health dedicated MCA website here.

INTERNATIONAL DEVELOPMENTS

The Irish Bournewood?

In *AC v Patricia Hickey General Solicitor and Ors & AC v Fitzpatrick and Ors* [2019] IESC 73, the Irish Supreme Court has grappled (inter alia) with what deprivation of liberty means in the Irish context in relation to an elderly lady with dementia prevented from leaving hospital. The case makes fascinating reading for those steeped in the English debates, who may read the sentence (at para 330) that "'[d]*eprivation of liberty' is not a particularly complex concept*" with something of a hollow laugh. They may also be interested to see that the Irish Supreme Court were invited by the Irish statutory authorities to distinguish *Cheshire West* on the basis that "*it is inconsistent with and goes further than the Convention approach because it applies an "acid test" designed to avoid the need to consider the details of the factual situation*" (para 115).

Giving the judgment of the court, O'Malley J declined this invitation:

> *333. On the assumption, for the purposes of this part of the discussion, that Mrs. C. wanted to leave and had capacity, I think it would be impossible to conclude that she was not deprived of her liberty in that she was physically prevented from acting on that wish. She was not free to leave. The President commented that the position of the hospital was clear – they would discharge her only if satisfied with the care arrangements. Accordingly, whether one applies the Dunne v Clinton analysis* [case-law from Ireland]*, the Guzzardi/Stanev criteria or the Cheshire West "acid test", she was not free to leave. The measures taken involved restraint, pursuant to which she was kept in the hospital for an indefinite period under the control and supervision of those caring for her.*
>
> *334. The next question is whether that finding – that Mrs. C. was in fact detained – is in any way altered if it is assumed that she did not have capacity. In my view it cannot be, for the reasons identified in the ECtHR jurisprudence and by the UK Supreme Court in Cheshire West (and indeed, in some of the comments made by members of the House of Lords in HL). Firstly, I consider that the constitutional guarantee of the right to liberty protects mentally impaired persons to the same extent as everyone else – deprivation of liberty must in all cases be in accordance with law. To hold that persons cannot be found to be "detained" if they are not capable of making a valid decision to leave for themselves, or if they are not aware of or able to object to their situation, would not simply permit restrictions on their freedom of movement for their own protection. It would also have the far-reaching consequence of denying to vulnerable persons in this category the benefit of the constitutional guarantee that they will not be deprived of their liberty otherwise than in accordance with law. It is possible for a person of full capacity to be detained without necessarily being conscious of that situation, and, equally, it is possible in the case of a person with impaired capacity. Both are*

entitled to legal protection.

335. For the same reason, a benevolent or protective motivation or purpose for whatever measures have been taken cannot be considered to alter the legal fact of detention. I agree with the doubts expressed by Lord Nolan in HL and the analysis of Lady Hale in Cheshire West in this regard. If benevolent intentions meant that there was no deprivation of liberty, and therefore no grounds for inquiry into the legality of deprivation of liberty, there would be no legal basis upon which the courts could ask whether the measures taken were justified and were in fact in the individual's best interests. This would, in fact, leave vulnerable people without legal protection against arbitrary or unnecessary detention. The persons or institution that takes charge of them would thereby appoint themselves as a substitute decision-maker without legal process. Neither the Convention nor the Constitution permit of this result.

Interestingly, however, O'Malley J then went on to grapple with the question of what a hospital is to do in the context of discharge where it appears that such would put the person at risk (in the instant case, it was feared, from the actions of her son). These issues, she considered, demonstrated:

344 […] *an essential difference between the cases involving police detention under statutory power and the issues that may arise in the context of discharge from hospital. In the former, the issue is binary – the person has been either lawfully or unlawfully arrested and detained. Consent is generally irrelevant to the lawfulness of an arrest (as opposed to some of the examples found in the cases of voluntary attendance for questioning), and therefore the validity or effect of consent does not arise as an issue. However, in a healthcare system founded on the principles of voluntarism and the duty of care, hospitals will frequently have to deal with far more complex and nuanced situations. The problem in this case was how to reconcile those two fundamental principles.*

Her conclusions, explained in detail in the paragraphs that follow, were then summarised as follows:

391. In the course of my analysis I have concluded that a hospital faced with a situation such as the one that arose in this case, giving rise to a concern for the welfare of a patient, should take the following steps.

392. The first question is whether the patient truly wants to leave, or is in reality being removed by third parties in circumstances where there is a real risk to her health and welfare. If it is a case of removal, rather than a wish to depart, the hospital's duty of care extends to protecting her against such third parties. If she does indeed wish to go, and has capacity to make that decision, all that the hospital can do is attempt to persuade her that it is in her own interests to stay.

393. If, however, the hospital is concerned that the patient lacks capacity to make the decision, that issue must be addressed. Persuasion will not necessarily be the appropriate legal solution, since the lack of capacity implies an inability to process the information provided and to make decisions upon it. The hospital is entitled to take some brief period of time to make its assessment of capacity. It may be helpful if some person can be found who has not been involved in any dispute concerning the patient and who can act as her intermediary or advocate. If it is concluded that the patient has capacity, no further issue arises. If she lacks capacity, the hospital must bear in mind that it has no

general power of detention and no general right to make itself a substitute decision-maker. It must therefore seek the assistance of the courts, if it is felt that the patient is at risk. In my view, the doctrine of necessity permits the hospital to detain the patient, in the interests of her personal safety, provided that such detention lasts no longer than is necessary to take appropriate legal steps. It is essential to bear in mind that compliance on the part of a patient who lacks capacity will not on its own amount to justification, since if the patient cannot give a valid consent then some other lawful authority is necessary if other persons are to make decisions for her.

394. From the courts' point of view also, it must be borne in mind that a patient's lack of capacity to make a decision is not, in itself, an answer to a complaint of unlawful deprivation of liberty. People with impaired mental abilities are protected by the same constitutional guarantee as any other person – that they will not be deprived of liberty otherwise than in accordance with law. Similarly, the fact that the measures taken by the hospital are in the best interests of the patient is a matter that goes to the justification of deprivation of liberty, and not to the question whether there is detention in fact. In determining whether a person has been unlawfully deprived of liberty, in breach of the constitutional guarantee, the court must start with the factual circumstances and ask whether the individual has in fact been deprived of liberty. In this case, that question is answered by the finding that Mrs. C. (if she wanted to leave) was physically prevented from so doing and was subjected to complete control and supervision.

395. The second part of the court's analysis will then focus on the justification offered for the deprivation of liberty. If the hospital has acted in accordance with the process I suggest, then there will in my view have been no unlawful deprivation of liberty. It will then be for the court to determine whether the situation requires protective orders, in the best interests of the patient, which affect the right to liberty. Such orders must, of course, respect the substantive and fair procedure rights of the individual.

The judgment also contained detailed – and critical – considerations of the operation of the wardship jurisdiction in Ireland, which will (within the foreseeable future) be swept away by the Assisted Decision-Making (Capacity) Act 2015.

It is curious, one might think, that the Supreme Court placed reliance upon the doctrine of necessity as a lawful basis for deprivation of liberty in the context with which they were concerned, rather than examining what was (on the face of it) the rather more obvious question of whether the confinement to which the person in question would be subject would cross the line into being for a 'non-negligible' period of time. If it did not, then, at least through the prism of Article 5 ECHR, there would be no issue. It is particularly curious that the Supreme Court relied upon necessity on the basis that it had been approved by Strasbourg in *HL* (at para 349) as grounding a lawful deprivation of liberty, at least in the context of short-term detention. The plain reading of *HL* does not appear to support this, Strasbourg making clear that did not suffice to avoid arbitrariness (see para 119), making no distinction between short-term and long-term detention.

The dilemmas that are exposed in the passages set out above apply equally in England & Wales, where the legal basis for preventing a person leaving in emergency situations is, at present, questionable (see

the discussion in our guidance note on deprivation of liberty in the hospital setting). The law will become much clearer as of 1 October 2020 with the introduction of the new s.4B Mental Capacity Act 2005, allowing for deprivation of liberty in the emergency context. The Irish Government is still wrestling with its own legislative solution to the whole issue of deprivation of liberty (see the discussion of the Department of Health's public consultation report on its legislative proposals in our July report). In that, they are grappling with the implications of the Convention on the Rights of Persons with Disabilities – it is striking that the Supreme Court in *AC*'s case makes essentially no reference to it, and none to the bar that the Committee assert exists to deprivation of liberty in the presence of mental impairment. It would be particularly interesting to know what the Committee would consider would be the appropriate response to the dilemmas outlined in the case.

The CRPD Committee and legal capacity – a step forwards?

The CPRD Committee issued its most recent concluding observations in September 2019 on Albania, Australia, Ecuador, El Salvador, Greece, India, Iraq, Kuwait, and Myanmar. For those wanting a primer about the CRPD and the role of the Committee, see here; for those who have been following the debate over the past few years in relation to precisely what Article 12 CRPD means, the concluding observations upon the second report of Australia upon its compliance with the CRPD make very interesting reading indeed. In material part, the concluding observations read as follows:

> *Equal recognition before the law (art. 12)*
>
> *23. Despite the recommendations of the Australian Law Reform Commission, the Committee is concerned about the lack of progress to abolish the guardianship system and substituted decision-making regime, particularly in decisions concerning forced psychiatric treatment, and at the lack of a timeframe to completely replace that regime with supported decision-making systems.*
>
> *24. Recalling its general comment No. 1 (2014), on equal recognition before the law, the Committee recommends that the State party:*
>
> *(a) Repeal any laws and policies, and end practices or customs, which have the purpose or effect of denying or diminishing the recognition of any person with disabilities as a person before the law;*
>
> *(b) Implement a nationally consistent supported decision-making framework, as recommended in the Australian Law Reform Commission's 2014 report, "Equality, Capacity and Disability in Commonwealth Laws".*

What is particularly interesting about this is that the Australian Law Reform Commission's report does not recommend supported decision-making in the form set out in General Comment 1. Paragraph 27 of General Comment 1 (in the corrected form issued in 2018) provides that:

> *27.Substitute decision-making regimes can take many different forms, including plenary guardianship, judicial interdiction and partial guardianship. However, these regimes have certain*

common characteristics: they can be defined as systems where: (a) legal capacity is removed from a person, even if this is in respect of a single decision; (b) a substitute decision maker can be appointed by someone other than the person concerned, and this can be done against his or her will; or (c) any decision made by a substitute decision maker is based on what is believed to be in the objective "best interests" of the person concerned, as opposed to being based on the person's own will and preferences.

The ALRC report advocates a model that moves to respect for rights, will and preferences, but ultimately does allow for (1) a decision-maker to be appointed by another, and to take that decision on their behalf; and (2) allows overriding of a person's will and preferences. The Commission proposes four National Decision-Making Principles and Guidelines to guide reform of the legal framework:

Principle 1: The equal right to make decisions

All adults have an equal right to make decisions that affect their lives and to have those decisions respected.

Principle 2: Support

Persons who require support in decision-making must be provided with access to the support necessary for them to make, communicate and participate in decisions that affect their lives.

Principle 3: Will, preferences and rights

The will, preferences and rights of persons who may require decision-making support must direct decisions that affect their lives.

Principle 4: Safeguards

Laws and legal frameworks must contain appropriate and effective safeguards in relation to interventions for persons who may require decision-making support, including to prevent abuse and undue influence.

For present purposes most materially, recommendation 3(3), the guideline for wills, preferences and rights, contains the following

(2) Representative decision-making

Where a representative is appointed to make decisions for a person who requires decision-making support:

(a) The person's will and preferences must be given effect.

(b) Where the person's current will and preferences cannot be determined, the representative must give effect to what the person would likely want, based on all the information available, including by

consulting with family members, carers and other significant people in their life.

(c) If it is not possible to determine what the person would likely want, the representative must act to promote and uphold the person's human rights and act in the way least restrictive of those rights.

(d) A representative may override the person's will and preferences only where necessary to prevent harm.

The ALRC considers that the last of these reflects the human rights approach, and is

consistent with the CRPD in that, for example, art 17 of the CRPD may require the representative to make a decision that protects the person's 'physical and mental integrity', notwithstanding the decision conflicts with the person's expressed will and preferences. A qualification of this kind tests the limits of autonomy, particularly where the limitation concerns harm to oneself. Examples are seen usually in the context of mental health legislation: to save a patient's life, or to prevent a patient from seriously injuring themselves or others. Safeguards may be included in terms of ensuring that the course of action proposed is the 'least restrictive' option.

The ALRC's report is – by some measure – the most detailed law reform proposal advanced to date to seek to 'operationalise' the CRPD. That the Committee endorses the ALRC's proposals as compliant with the CRPD is a major change in their position (possibly reflecting the fact that there has been a change in its composition since the Committee that promulgated General Comment 1). It is also very helpful in terms of progressing law reform efforts for two reasons:

(1) They are detailed and 'gritty,' and can be contrasted with those reforms which lead to laws asserting full legal capacity but which, on further analysis, offer very much less, for instance because they maintain 'emergency' provisions in 'general health laws' (Peru is a very good example of this);

(2) They represent a set of principles and guidelines which build upon but take forward laws in jurisdictions such as England & Wales in which 'hard cases' are brought before the courts for determination on an almost daily basis. They therefore are capable of 'selling' to policymakers in such jurisdictions on the basis that are providing responses to those hard questions.

Finally, by recommending the implementation of the ALRC proposals, the CPRD Committee might be thought tacitly have to accepted the force of the ALRC's observation (at para 3.48 of its report) that, contrary to the position adopted in General Comment 1:

with appropriate safeguards, and a rights emphasis, there is no 'discriminatory denial of legal capacity' necessarily inherent in a functional test [of decision-making capacity, or 'ability' as the ALRC proposed] *—provided the emphasis is placed principally on the support necessary for decision-making and that any appointment is for the purpose of protecting the person's human rights.*

It is a long way, of course, from law reform proposals to actual law reforms, but it may just be that we

now have some clear endorsement of the path to take.

RESEARCH CORNER

We highlight here recent research articles of interest to practitioners. If you want your article highlighted in a future edition, do please let us know – the only criterion is that it must be open access, both because many readers will not have access to material hidden behind paywalls, and on principle.

This month, we highlight an interesting article on video advance directives by Hui Yun Chan.

SCOTLAND

President of MHTS

Laura Dunlop QC has been appointed President of the Mental Health Tribunal for Scotland with effect from 12th October 2019, thus following without a break upon the retiral on 11th October 2019 of Dr Joe Morrow QC. Laura has had a long and distinguished career as an advocate, and has an unusual breadth of wider experience, including several roles of particular relevance to the task of leading MHTS, and thus following the dauntingly impressive career in that role of Dr Morrow.

Laura graduated LL.B (1st Class Honours) from the University of Edinburgh in 1983. She was called to the Bar in 1989 and took Silk in 2002. She received an honorary doctorate from the University of Stirling in 2015. She has had courtroom experience in the Sheriff Court, Court of Session, House of Lords and European Court of Justice.

A necessarily somewhat random selection of her large number of past and current roles include as a legal member of MHTS (as well as experience of membership of other tribunals). As part-time Commissioner on the Scottish Law Commission from 2009 to 2014 she was primarily responsible for the Commission's Report No 240 on Adults with Incapacity issued in October 2014, addressing issues of deprivation of liberty in Scots law and effectively initiating the widening process of review that has continued since then and is now encompassed by the Scott review. Her period with Scottish Law Commission was followed by convenership of the Law Reform Committee of the Faculty of Advocates from 2015 to date. She is noted for her particular expertise in relation to clinical negligence, from 2000 to 2005 was convener of the Scottish Executive Appeal Body regarding vocational training for general medical practice, and from 2004 to 2005 was a member of the Scottish Consumer Council Civil Justice Review. Earlier (1997 – 1998) she was a member of Lord Coulsfield's working party on reform of personal injury rules in the Court of Session. It will not have escaped her notice that the Law Society of Scotland was responsible for widening proposals for a specialist personal injury court to create enabling powers to establish other specialist courts, a matter of unfinished business in relation to the adults with incapacity jurisdiction. She was familiar with the work of the Mental Health and Disability Sub-Committee of the Law Society of Scotland from her time as a Law Commissioner, and following her appointment as President of MHTS she has already engaged with that committee.

Adrian D Ward

Downgrading of Mental Health Tribunal for Scotland

In our September Report we noted the widespread concerns arising from the significant reduction in status of the role of President of the Mental Health Tribunal for Scotland in the advertisements for a new President to be appointed upon retiral of Dr Joe Morrow, and the inevitable implication of a downgrading of MHTS itself. The downgraded terms have been confirmed in the public announcement of the appointment of Ms Laura Dunlop QC as the new President (see preceding item). It is to be

welcomed that Scottish Government has been able to appoint a new President of the calibre of Ms Dunlop, and it is understood that she was appointed from several impressive applicants. Concerns nevertheless remain at the downgrading of the post, and other aspects of the official announcement. For example, it was made by the Minister for Community Safety rather than the Minister for Mental Health, which could be interpreted as shifting emphasis from safeguarding the rights of particularly vulnerable people towards questions of public safety. Curiously, the official announcement does not mention Ms Dunlop's high human rights profile, exemplified by her work on deprivation of liberty for Scottish Law Commission, or her continuing law reform work thereafter. Ms Dunlop will without doubt bring her qualities and experience to her new role, but those with concerns about these issues will no doubt continue to be alert for signs of downgrading and re-focusing of MHTS – in the eyes of Scottish Government if not those of anyone else – and apparent inconsistencies with the commendable initiatives by the Minister for Mental Health.

The public announcement also confirms that MHTS is listed as one of the tribunals which will move into the First-tier Tribunal for Scotland, and that upon such transfer the Mental Health Chamber will be established and MHTS will be abolished, with the President of MHTS becoming President of the Mental Health Chamber.

Adrian D Ward

Sentencing: the relevance of disability

In *RC against HM Advocate*, [2019] HCJAC 62 HCA/2019/220/XC, the High Court of Justiciary allowed an appeal against a sentence of 20 months' imprisonment imposed at Perth Sheriff Court on 12th February 2019 upon a man with significant physical disabilities who had pled guilty upon indictment to a charge of two contraventions of the Sexual Offences (Scotland) Act 2009, the first being a contravention of sections 31 and 34 of that Act and the second being a contravention of sections 21 and 24 of that Act. The sentence of imprisonment was imposed on 1st May 2019. The opinion of the High Court was delivered by Lady Dorrian, the Lord Justice Clerk, on 2nd October 2019.

The court considered with care the significance of substantial disabilities in the context of criminal sentencing, and received detailed submissions in that regard. Two points should however be noted. Firstly, in this case the appellant had severe physical disabilities, with only marginal reference to their possible effects upon his personality and conduct. Nevertheless, the considerations addressed by the court would in principle have potential relevance in sentencing a person with "mental or intellectual impairments" (in the language of the UN Convention on the Rights of Persons with Disabilities). Secondly, on a fair reading of the decision the principal consideration was a finding that the sentencing sheriff appeared to have concluded that a custodial sentence was necessary without giving adequate consideration to information before him as to the suitability of a community payback order. In a key concluding passage, Lady Dorrian said:

> *How it is that in the face of the clear identification of treatment needs, an available and suitable programme of work to address these, and to reduce the risk of future offending, with conditions designed to ensure suitable management within the community, the sheriff nevertheless was able to conclude that only a custodial sentence would serve is difficult to understand. Moreover, we say that before taking any account of the appellant's physical difficulties. When one takes them into account, and recognises the extent to which imprisonment would constitute a heavier punishment for him than for an offender without his condition (something the sheriff appears not to have acknowledged), the position becomes even clearer.*

On a fair reading of the decision, it appears unlikely that the court would have allowed the appeal by reason of the accused's disabilities alone. The relevant statutory and human rights provisions are reviewed in the decision. It was pointed out that prison authorities, and ultimately Scottish Ministers, have obligations to make reasonable accommodations for prisoners with disabilities and that any alleged failure to meet those obligations would, so far as justiciable, be a matter for the civil courts in the light of the actual circumstances of the prisoner. In relation to Article 3 of the European Convention on Human Rights, the court held that Article 3 requires the State to ensure: (i) that prisoners are detained in conditions compatible with respect for human dignity; (ii) that the manner and execution of the measures do not subject them to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention; and (iii) that, given the practical demands of imprisonment, their health and well-being are adequately secured by, among other things, providing them with the requisite medical assistance. The court must have regard to the provisions of ECHR, but must bear in mind that the primary responsibility for meeting the State's obligations under Article 3, as they relate to prisoners, rests with the State. The court is entitled to take into account the statutory and practical machinery that exists, designed to ensure the State's compliance.

The court quoted with approval the observations of Hughes LJ in *R (Hall) v University College London Hospitals NHS Foundation Trust* [2013] EWHC 198 (Admin) that a sentencing court ought not to concern itself with the adequacy of arrangements to comply with Article 3 obligations except only in a situation where "the mere fact of imprisonment would inevitably expose the prisoner to inhuman or degrading treatment contrary to article 3; in other words, that there cannot be made any arrangement in prison or out of it for his care which will avoid that consequence."

Those obligations are also relevant to the terms of Article 14 of the UN Convention on the Rights of Persons with Disabilities.

The High Court substituted a three-year community payback order with supervision, programme and conduct requirements involving participation in the "Moving Forward: Making Changes" programme, and with conditions that had been specified in a relevant criminal justice social work report. The case was put out by order for discussion of how the appellant's consent to this disposal might be obtained.

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Conferences

Conferences at which editors/contributors are speaking

AWI, guardianship and elder law conference

Adrian is giving the keynote address for the Law Society of Scotland's conference on this subject in Glasgow on 30 October. For more details, and to book, see here.

Adult incapacity law

Adrian is delivering a lecture at Edinburgh Napier University on 13 November on "Adult incapacity law: visions for the future drawn from the unfinished story of a new subject with a long history." For more details, see the website of the Centre for Mental Health and Capacity Law.

Taking Stock

Neil is giving the keynote speech at the annual national conference on 15 November jointly promoted by the Approved Mental Health Professionals Association (North West England and North Wales) and the University of Manchester. For more information, and to book, see here.

Mental Capacity Law Update

Neil is speaking along with Adam Fullwood at a joint seminar with Weightmans in Manchester on 18 November covering topics such as the Liberty Protection Safeguards, the inherent jurisdiction, and sexual relations. For more details, and to book, see here.

Other conferences of interest

The Court of Protection Bar Association will be holding a seminar, open to members of the Association, on 28 October at 39 Essex Chambers in London addressing recent developments in mental capacity law. For more details, see here.

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 November. 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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