MENTAL CAPACITY REPORT: THE WIDER CONTEXT

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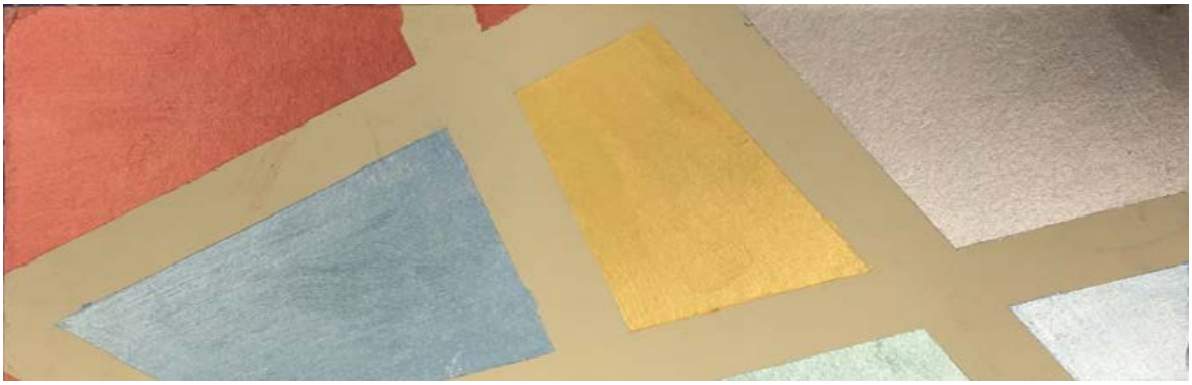

Welcome to the November 2023 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: reasonably adjusting to disability in the context of dialysis and identifying will and preferences across a spectrum of difficult medical cases;

(2) In the Property and Affairs Report: the Law Commission's further consultation on wills;

(3) In the Practice and Procedure Report: two sets of 'Ps' and the costs of welfare appeals;

(4) In the Wider Context Report: the CQC's State of Care report, deprivation of liberty and those under 18, litigation capacity and access to court, and the inherent jurisdiction in Ireland;

(5) In the Scotland Report: bureaucracy vs justice and a tribute to Adrian upon his retirement from one of his posts.

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

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

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Short note: State of Care Report

The CQC published on 20 October 2023 its most recent State of Care report. Even by the standards of recent such reports, it is profoundly depressing, detailing how the health and care system in England is at, or in some cases, well past breaking point in almost every area. In relation to DoLS, the CQC note their concern about the delay to implementation of LPS, and:

> *what this means for people being potentially deprived of their liberty unlawfully, for their family and friends, and for providers and local authorities. Disabled people and older people are more likely to require the safeguards offered by DoLS and will therefore be disproportionately affected by the decision to delay LPS.*

The CQC note that:

> *Faced with increasing volumes of applications, local authorities are having to triage assessments. A member of our Expert Advisory Group from a local authority explained having to make "decisions you should never have to when it comes to prioritising one person above another". A recent survey by the Association of Directors of Adult Social Services (ADASS) found 50% of directors of adult social care services in local authorities lack confidence in meeting their statutory duties relating to DoLS. When asked about all statutory duties, DoLS was identified as the third highest concern.*

Whilst the DoLS section does an excellent job of highlighting the current problems relating to DoLS, what is frankly somewhat frustrating is that CQC does not actually say what those providing care are actually supposed to do. For instance, they note that '[p]*roviders are not always clear on how to navigate the difficult legal situation of caring for people who are waiting for an assessment*" in situations where the urgent authorisation has run. Fine. But does CQC want providers simply to discharge people so that they are not unlawfully deprived of their liberty? Presumably not.

In similar vein, the CQC note that:

> *The legal framework around deprivation of liberty is particularly complex in certain hospital settings, such as urgent and emergency care. Delays in the wider health and care system mean people are spending longer in an emergency department. A member of our Expert Advisory Group told us they are particularly concerned about the number of people in emergency departments who are waiting for a bed on a ward. These people may lack the mental capacity to consent to their care arrangements but be prevented from leaving because of potential risks to their physical health. If people spend significant periods in an emergency department, staff treating them may be unsure about whether the person is being deprived of their liberty and whether the safeguards apply. This puts people at risk of being unlawfully deprived of their liberty.*

Again, so far so good, and so true (in particular in the context of those who are awaiting assessment under the MHA 1983 and / or a bed to become available). But again, what is worse: unlawful deprivation of liberty or a breach of the operational duty to secure life under Article 2 ECHR?

We entirely appreciate that the CQC has to call matters out, but, as with the Local Government and Social Care Ombudsman's challenges to 'triaging' of DoLS applications, it might be thought that there are diminishing returns to simply telling people to do their job when it is impossible. Might it not be better, perhaps, to give people tools to work out how to break the law in the least bad way possible pending some mythical time when the law might be changed?

DHSC's response to the *Worcestershire* judgment

DHSC has announced that consideration of ordinary residence disputes which had similar issues to those in the Worcestershire case, and that had previously been stayed, will now be progressed. DHSC notes that:

> *As we have several stayed cases to work through, we ask for your patience as we make determinations on these in a reasonable time considering all the relevant circumstances. We will be working through previously stayed cases in the order in which they were stayed.*
>
> *If in light of the judgment in the Worcestershire case, you feel that a determination on a stayed case is no longer needed, contact* ordinaryresidencereferrals@dhsc.gov.uk *as soon as possible.*
>
> *We will continue to accept new referrals in line with the Care and Support (Disputes between Local Authorities) Regulations 2014/2829 while we work through previously stayed cases.*

Law Commission Social Care for Disabled Children

The Law Commission has launched a project to review the framework governing social care for

disabled children in England.

The project was recommended in the 2022 Independent Review of Children's Social Care, which heard from families of disabled children struggling to understand what support they are entitled to and how to access it.

The terms of reference are as follows:

- To review the laws relating to the provision of support and services for disabled children in England, and the wider legal frameworks in which they are contained; with a view to making recommendations aimed at simplifying and modernising them, and at promoting clarity and consistency of understanding as to entitlements.
- The review will focus on the provision of support and services in the context of familybased care. In particular, it will not extend to deprivation of liberty [1] or secure accommodation of disabled children.
- The review will consider whether existing duties (specifically the inclusion of disabled children as children in need under section 17 of the Children Act 1989) and accompanying statutory guidance sufficiently meet the specific needs of disabled children and their families.
- In carrying out this review, the Law Commission will have regard to the Government's wider work on children's social care, and how the legislation relating to disabled children aligns with other parts of the statute book concerning social care, support for Special Educational Needs and children's rights more generally.

Deprivation of liberty and those under 18

EBY (A Child) (Deprivation of Liberty Order: Jurisdiction) (17-year-old) [2023] EWHC 2494 (Fam) is a judgment of some technical interest, in which Paul Bowen KC (sitting as a Deputy High Court Judge) confirmed that it is possible for the High Court to exercise its inherent jurisdiction so as to authorise the deprivation of liberty of a competent, non-consenting, 17 year old accommodated under s.20 Children Act 1989. We do not set out the route by which Paul Bowen KC reached his conclusion, save to note that we entirely agree with it. The only observation that we make is in relation to paragraph 33, identifying potential sources of an Article 5 ECHR compliant procedure for a deprivation of liberty (footnotes omitted):

> *Three such sources of legal authority may be available for children of 16 and 17 who have mental capacity for the purposes of the 2005 Act such as EBY, leaving aside the short-term powers of detention under s 44 and 46 of the 1989 Act. First, a Gillick competent child may consent to restrictions placed upon them, in which case the second component of a deprivation of liberty (a lack of valid consent) is not present, although in such a case the Court will have to give careful consideration to whether the consent is real and the risk that it might be withdrawn: Re. T, [162]. As EBY does not consent to her current placement, this option is not available. Second, a secure accommodation order under s 25 of the 1989 Act may authorise the detention of 'looked after'*

[1] Although, editorially, we note that it is difficult to avoid deprivation of liberty in this context – see, for instance, the report of the Nuffield Family Justice Observatory in relation to the 'pilot' year of the national DoL court between July 2022-July 2023, showing that 'disability' was the primary reason for 22.2% of applications heard in the first two months, further broken down as "the child's severe learning disabilities, physical health problems (e.g. epilepsy, incontinence, mobility difficulties) and/or severe autism."

> *children and certain other categories of children, including children aged 16 and 17 (Re. LS, [33]), for periods of up to six months at a time. Section 25 is not satisfied in EBY's case, so this provision is not relied upon by the Local Authority. Third, the High Court may authorise the deprivation of liberty in its inherent jurisdiction*.

For our part, we would not have referred to *Gillick* competence here for two reasons:

(1) the Supreme Court in *Re D* proceeded on the basis that the test for the ability to consent to confinement in the case of a someone aged 16 or over is that set out in the MCA 2005:

(2) Such an approach appears to add a further layer on top of MCA capacity for a 16 or 17 year old: i.e. they need **both** to have the MCA capacity to consent **and** to be *Gillick* competent to consent to confinement. What, we might ask rhetorically, could be required in addition to the MCA capacity to be able to understand, retain, use and weigh the relevant information, and to be able to communicate the decision to consent?

In the context of deprivation of liberty and those under 18, we note two recent developments announced by the President of the Family Division, Sir Andrew McFarlane:

1. Following the conclusion of the initial pilot scheme in July 2023 and the extensive consultation with judges and other stakeholders which followed, the organisation and listing of DoL orders relating to children under the inherent jurisdiction is being revised. The National DoL Court will no longer operate under that title. In future, all initial applications will be dealt with as part of the National DoL List, which will continue to be overseen as part of the work of the Family Division. More details can be found here;

2. The 2019 Practice Guidance: Placements in unregistered children's homes in England or unregistered care home services in Wales, and the 2020 Addendum has been withdrawn, and the courts will no longer take an active role in monitoring the steps being taken by the provider in question to obtain regulation. Rather, revised guidance issued in September 2023 provides that the courts when considering a DoL application should enquire into whether the proposed placement is registered or unregistered. If it is unregistered it should enquire as to why the local authority considers an unregistered placement is in the best interests of the child. Further, the guidance provides that the court may order the local authority to inform Ofsted/CIW within 7 days if it is placing a child in an unregistered placement.

Consultation on clinical guidelines for alcohol treatment

A consultation has been launched seeking views on views on the draft of the first ever UK clinical guidelines for alcohol treatment. The consultation closes at 11:59pm on 8 December 2023. Of particular interest is the material relating to assessing capacity, especially in relation to alcohol related brain damage.

Fitness to plead

The Government has responded (finally) to the Law Commission's report on **Unfitness to Plead**, published in 2016. The unfitness to plead framework addresses what should happen in criminal courts where a defendant lacks sufficient capability or capacity to effectively participate in their trial, including understanding the charges against them and deciding how to

plead.

The government has accepted the majority of the Law Commission's recommendations, which will modernise the unfitness to plead procedure. The government "*will look to bring forward legislation to implement these recommendations when Parliamentary time allows*."

The Law Commission[2] proposes that the test for unfitness to plead be reformulated as the test of capacity to participate effectively in trial. This recommendation is accepted, as are the following recommendations:

- That the court in applying the test, to take into account the assistance available to the accused in the proceedings.
- That the test should specify a list of relevant abilities and that the court be entitled to consider "any other ability that appears to the court to be relevant in the particular case".
- That the test should be structured so that the defendant will be considered to lack capacity where his or her relevant abilities are not, taken together, sufficient to enable the accused to participate effectively in the proceedings.
- That the ability to understand the charges should require the defendant to have an understanding of what the charge means, its nature, and also an understanding of the evidence on which the prosecution rely to establish the charge in the particular case.
- That the test include an ability to understand the trial process and the consequences of being convicted.
- That the ability to exercise the defendant's right to challenge a juror should not be a specified factor in the test.
- That the ability to give instructions to a legal representative should be included within the statutory test.
- That the statutory test include the ability to "follow the proceedings in court".
- The inclusion of the ability to give evidence as part of the statutory test.
- The test should include as relevant abilities: the ability to make a decision about whether to plead guilty or not guilty, the ability to make a decision about whether to give evidence, and (where relevant) the ability to make a decision about whether to elect Crown Court trial.
- That the test should include as a relevant ability the ability of the defendant to make "any other decision that might need to be made by the defendant in connection with the trial".
- That ability to make decisions should be defined in the test by specific reference to the Mental Capacity Act criteria, but without the inclusion of a diagnostic threshold as part of the legal test.

Short note: litigation capacity and the fundamental right of access to court

In *Galo v Bombardier Aerospace UK* [2023] NICA 50, the Northern Ireland Court of Appeal made a number of very trenchant observations about the importance both of identifying where a person may lack capacity to conduct proceedings, and of an appropriate system to support the

[2] Which considered the UNCRPD in its report at 3.163-3.178.

provision of litigation friends for those unable to do so The judgment relates to the position in Northern Ireland and the NI Court of Appeal were at pains to point out that they were considering the NI legislation and approach,[3] but the wider observation at paragraph 59 is one that rings true in England & Wales.

> *59. As the foregoing brief reflection demonstrates, the affordability of justice, the availability of legal representation and the provision of support measures such as a litigation friend are closely related subjects, all of them inextricably linked to every litigant's fundamental rights of access to a court and to a fair hearing. An assessment in any given case that alitigant is entitled to the support of a litigation friend is a matter of enormous importance to the person concerned. Its value must not be underestimated. The need for a simple, accessible, expeditious and cheap framework to give effect to the assessment that any litigant should have the benefit of a litigation friend is incontestable. In the absence of this - coupled with the necessary related public funding - the pioneering decisions in AM (Afghanistan) will be set to nought and our legal system will find itself paying mere lip service to the hallowed common law right to a fair hearing.*

CPS updated prosecution guidance on homicide

The CPS has updated its prosecution guidance on homicide, following public consultation. Of particular relevance is the section on 'mercy kilings.' The guidance states that generally, prosecution is "almost certainly required in the public interest," and that "*In particular, a prosecution is likely to be required if any of the following factors are present….The victim did not have the capacity (as defined by the Mental Capacity Act 2005) to reach an informed decision to request another to end their life*." Influence or coercion are similarly likely to mean a prosecution is required. In contrast, a prosecution is "*less likely to be required if…The victim had reached a voluntary, clear, settled and informed decision that they wished for their life to end. They must have the freedom and capacity to make such a decision.*"

Nuffield Council project to explore public views on assisted dying

On 30 October 2023, the Nuffield Council on Bioethics formally launched their project to design, facilitate, and organise a series of surveys and a Citizens' Jury. Together, these activities will enable the Council to explore and best reflect how people living in England think and feel about assisted dying including the underlying ethical, social, and practical complexities.

In this context, some might find of interest the evidence led on by Alex for the Complex Life and Death Decisions Group submitted to the Health and Social Care Select Committee's inquiry into assisted dying, highlighting matters relating to the approach to mental capacity in this context.

Short Note: capacity is not a status

In *Dudley Metropolitan Council v Mailley* [2023] EWCA Civ 1246, the Court of Appeal has

[3] There were in this regard some slightly curious statements about English law, including that the MCA 2005 "created" a presumption of capacity to litigate applicable to every adult, a presumption apparently inapplicable in Northern Ireland. The presumption of capacity to litigate was not created by the MCA 2005, but was rather identified at common law, and such a presumption must surely have existed at common law in Ireland, not least given the NICA's endorsement of *Masterman-Lister* in which the presumption is roundly endorsed (at paragraph 17).

reiterated in ringing terms that 'mental capacity' is not a status for purposes of considering discrimination under the ECHR. The question arose in the context of succession to and assignment of secure tenancies in the Housing Act 1985, and specifically in circumstances where the appellant's case was that, if her case is that if her mother had not had to move permanently into a care home and had remained living at the property in question until her death, she would have been entitled to succeed to the secure tenancy as a family member living with her, under section 87(b) HA 1985. Equally, if her mother had assigned the tenancy to her before she lost capacity to do so (pursuant to section 91(3) HA 1985), she could have succeeded to it on that basis. Neither of these eventualities occurred however.

The Court of Appeal had previously identified the problem with asserting mental capacity as a status in *MOC (by his litigation friend, MG) v Secretary of State* [2022] EWCA Civ 1. In dismissing the appeal, Simler LJ noted in material part that:

> *34. While I accept, as Mr Stark submits, that the ratio of MOC is not that capacity can never form part of a status, it seems to me that the uncertainty which Singh LJ regarded as fatal in MOC applies equally to the capacity element of the status as advanced by the appellant below. This is not a mere question of having to answer legal and factual questions as Mr Stark submits. The Mental Capacity Act 2005 makes clear, capacity is assumed, and further, proof of loss of capacity is to be judged by reference to a person's capacity to take particular kinds of decision at a particular time. Treating capacity as an important element of status leads to potentially significant conceptual uncertainty just as it did in MOC. In both cases the capacity issue was decision-specific – here in relation to a permanent assignment of a secure tenancy and in MOC, decisions (no doubt with potentially serious consequences) in relation to care and medical treatment; both related to a specific capacity at a material time (here when Mrs Mailley left the Property permanently), and in MOC "for the time being"; and in both cases capacity formed only one aspect of the status contended for. The context in which status linked to capacity is being considered in this case is one in which reasonable certainty is required given that at stake is the ability to make a permanent assignment of a protected (or secure) tenancy. I therefore reject Mr Stark's attempts to distinguish the facts in MOC from the facts in this case.*
>
> *35. Although in the appellant's particular case, once her mother lost capacity as a result of her vascular dementia, she was extremely unlikely ever to regain it, that will not always be the case, and we are concerned in this case with legislation that has a wide application. Capacity can be impaired by head injury, psychiatric diseases, delirium, depression, and dementia. The impact of such a variety of different events on the proper functioning of the mind or brain can vary in terms of severity and duration. Mental capacity can change over the short and long term, and loss of capacity might be fully or partially reversed (depending on its cause), leading to the capacity to take certain decisions being regained. It is possible to envisage situations where a temporary deterioration in symptoms leads to loss of capacity at a particular time, which is subsequently regained, and this might also give rise to the risk of manipulation. Coma cases where the patient comes out of the coma with some (or full) capacity are another example. These are not technical or merely theoretical possibilities, as Mr Stark submits. They are real and*

> *perfectly likely to occur. Unlike death (which is certain in terms of its occurrence and timing), there is a penumbra of uncertainty surrounding capacity and its loss that risks people moving in and out of capacity, and contributes to the uncertainty regarded as fatal in MOC.*

The appellant's attempt to introduce a different formulation of status on appeal as being (in essence) disabled so as to lack capacity to assign the tenancy equally failed.

> *46. Capacity and disability are distinct and different concepts: section 6 of the Equality Act 2010 defines disability by reference to a physical or mental impairment that has a "substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities"; capacity relates to a "material time" and may be temporary: see section 2(1) and (2) of the Mental Capacity Act 2005. The reasoning in Jwanczuk relied on by Mr Stark does not apply or meet the factually different situation in this case. Jwanczuk concerned a lifelong disability and inability to work (viewed in retrospect), where the potential for fluctuation in condition, significant change over time, and potential recovery were not realistically present. As Underhill VP explained, the uncertainty regarded as fatal in MOC was the conceptual uncertainty arising from the fact that under the Mental Capacity Act 2005, capacity has to be judged by reference to the capacity to take particular kinds of decision at a particular time; but the claimant's case in Jwanczuk required the application of the single criterion of whether the disabled person was unable to work at any point in her working life: if she was able to work for some part of the period but not others, that would cause no difficulty because the criterion was binary and she would fall outside the group. The same is not true here.*

IRELAND[4]

In the Matter of KK (No 2) [2023] IEHC 565

Background

On the 6th of October 2023, the Irish High Court published its second judgment in *In the Matter of KK*. We discussed the first judgment in KK in the September issue of the Wider Context Capacity Report. To recap, in *In the Matter of KK* [2023] IEHC 306, the High Court considered the legal basis for making a new detention order for KK, a ward of court, following the implementation of the Assisted Decision-Making (Capacity) Act 2015 ('ADMCA'). In the first judgment the court found that new detention orders could only be made under its inherent jurisdiction, and not the transitional provisions in section 56(2) of the ADMCA.

KK, born in 2003 with mild intellectual disability and a history of self-harm, had been a ward of court since July 2020. Initially under detention orders, these were discharged in July 2021, but concerns resurfaced in December 2021 leading to new orders in June 2022 based on Dr. M's evidence. An application to reinstate the detention orders was refused in February 2023 due to lack of fresh evidence, and although Dr. M advocated for their reinstatement in April 2023, the court determined the application had to be made under its inherent jurisdiction due to the commencement of the ADMCA. While the court in *In the Matter of KK (No 2)* refused to hear the inherent jurisdiction application in the context of the wardship proceedings the court found that "*it is appropriate to specify the types of proofs that*

[4] Prepared by one of our Irish correspondents, Emma Slattery BL.

are likely to be required in any such application". Thus, the judgment is one which does not determine an application for detention orders, but which sets out the necessary proofs.

Application for Detention

In its review of the court's inherent jurisdiction to make such orders, the court referred to the decisions in *Health Services Executive v JO'B* [2011] and *Health Services Executive v VE* [2012] to establish its authority to detain adults lacking capacity in limited or rare cases where legislative gaps exist. Consequently, *In the Matter of KK (No 2)*, the court concluded that "*because the legislature has not legislated to provide for the detention of persons lacking capacity, it falls to the judiciary to identify the circumstances in which its inherent jurisdiction should be invoked in order to detain such people*." Ms. Justice Hyland added that she hoped the legislature would act on this important issue "*sooner rather than later*."

Proofs in an application for a Detention Order pursuant to the Inherent Jurisdiction of the High Court

a. Establish a lack of capacity - assessed functionally and to be decision specific

The court found that the initial step in a detention application for someone purportedly lacking capacity is a decision-specific assessment aligned with the ADMCA. The ADMCA requires a functional approach, evaluating an individual's ability to understand, retain, use, and communicate relevant information for a specific decision rather than a global capacity assessment.

b. Establish that the person's detention is necessary to defend and vindicate their constitutional rights – the balancing exercise

The court determined that if KK is found to lack capacity for romantic and sexual relations, the court must undertake a balancing exercise to justify her detention. This involves weighing factors like the nature of the restrictions on her liberty, impacted constitutional rights, and the rights to be protected, to ascertain the proportionality of the measure. Constitutional rights to liberty, autonomy, and self-determination must be balanced against the right to life and bodily integrity. Detention will be deemed necessary only if it defends and vindicates the individual's constitutional rights. Additionally, Ms. Justice Hyland noted that the Constitution, interpreted in light of current legislation including the ADMCA, now gives greater weight to an individual's right to autonomy. Thus, it is "*appropriate for a court to take into account the enhanced legislative weight that has been given to the autonomy of such persons*".

c. Establish that the type of detention proposed is the least restrictive and most proportionate way of vindicating the constitutional rights to be protected

The court found that once the court has decided which rights are to prevail i.e., whether the person is to be detained or not, it is necessary to consider the nature of the detention proposed and to decide whether it is the least restrictive and most proportionate way of vindicating the constitutional rights requiring protection. The court must assess the least restrictive and most proportionate form of detention to safeguard those rights, considering a spectrum of detention types that can vary in restrictiveness, as exemplified in cases such as one where leaving an institution would require permission from its director, and understand that even a "light" form of detention significantly impinges on an individual's liberty.

Safeguards which must be afforded to the person the subject of an application for a Detention Order pursuant to the Inherent Jurisdiction of the High

Court

In addition to the necessary proofs for a detention application under the inherent jurisdiction, parties must also consider the safeguards mandated by both the Constitution and the ECHR, guided by cases that outline the required protections for detaining individuals who lack capacity.

a. Medical Evidence from the Applicant as to a) the person's capacity and b) the necessity of the proposed measures

In applications to detain a person lacking capacity, all parties *In the Matter of KK (No 2)* agreed that the court must have medical evidence regarding the person's capacity and the necessity of the proposed restrictive measures. Essentially, this is the evidence as to capacity presented by the applicant. The court commented at par. 39 that "*the Court must have medical evidence in relation to (a) the capacity of the person and the decisions in respect of which the person lacks capacity (unless that has already been provided to the Court in the context of wardship and the Court is satisfied with same) and (b) the necessity of the restrictive measures proposed. Where an application is brought to detain a person, the applicant for the detention orders will be required to put forward such evidence*."

b. Independent Medical Evidence as to a) the person's capacity and b) the necessity of the proposed measures

Ms. Justice Hyland found at par. 41 that "*for a court to accede to a detention application on the basis of inherent jurisdiction, I am of the opinion that the Court should generally have medical evidence from at least two separate sources i.e., from the body seeking the detention Order and from one other source*". This was, like the first judgment in KK, rooted in considerations of the procedures under Part 10 of the ADMCA. Though the court declined (at par. 45) to "*establish immutable rules in the context of inherent jurisdiction given the flexibility of the jurisdiction*". Ultimately, the court found that the optimum is "*that a court would usually be presented with medical evidence from two separate sources in respect of any application to detain*."

c. Regular Reviews

While it was not dealt with substantively in the case, Ms. Justice Hyland noted at par. 44 that "*the parties all accept that where a person is detained pursuant to the inherent jurisdiction, it will be necessary to have regular reviews of that detention*."

d. Representation *and* Hearing the Views of the Person

Ms. Justice Hyland noted that the ADMCA modernises the approach to persons lacking capacity, reinforcing their right to be heard in legal processes. The court reviewed the provisions of section 8(7) of the ADMCA which mandates that the intervener must, where practicable, facilitate the full participation of the relevant person in the intervention, respect their past and present will and preferences, and consider their beliefs, values, and other factors they would likely consider if able. The court commented that the manner in which a person's views are heard in court varies by circumstance; the pandemic has enabled greater participation through remote methods like video links, as exemplified in the case of KK, who actively participated via video. Ultimately, the court found expressed the view at par. 56 that "*it is desirable that a similar approach will be taken in any application made by CFA under the inherent jurisdiction*".

The Court also considered the issue of the representation of the person the subject of the

application for detention, at par. 54, as follows:

"At a minimum, any court hearing an application of this type must be satisfied that a person is represented by a person competent to assist them in responding to the application, whether that be a lawyer or the Committee of the ward where the person is already a Ward of Court or a guardian ad litem, or some other appropriate person. Second, and separately, a court should ensure that the views of the person themselves have been heard. This is not precisely the same as representation. A person whose capacity is in question is often already disadvantaged in their communications with the world and needs a clear pathway in the context of court proceedings to be heard in relation to their wishes and preferences."

Conclusion

While both Order 67A, Rule 19 and High Court Practice Direction HC123 detail the procedure for making an application for detention pursuant to the inherent jurisdiction of the High Court, neither detail the proofs of such an application. Therefore, the guidance provided by Ms. Justice Hyland in this case is welcome guidance to practitioners and clearly draws on the ethos of the ADMCA in putting the rights and views of the person the subject of the application to the fore. How the court's findings in relation to the difference between representation and hearing the views of the person concerned will impact the developing practice and procedure in the Circuit Court is something to keep a keen eye on.

Emma Slattery BL

Editorial comment: from an English perspective, the focus on medical evidence as to capacity is of some interest. It is entirely possible for capacity evidence to be provided, including in cases concerning deprivation of liberty, by someone other than a medical professional; albeit that, in such a case, medical evidence is required to establish that the person is (to use the dated term in Article 5(1)(e) ECHR) of 'unsound mind). The focus on medical evidence of capacity – including in non-detention cases – also finds its way into the Rules of Court for cases under the Assisted Decision-Making (Capacity) Act 2015, and in some ways stands at interesting odds with the fact that (unlike the MCA 2005) the Act does not require any finding that the person is incapable of making the decision in question to be grounded upon a conclusion that the functional incapacity is caused by an impairment or disturbance in the functioning of the person's mind or brain. Put another way, it might be thought that what could be seen as a de-medicalised model of capacity contained in the 2015 Act is very firmly remedicalised by the Rules of Court.

Alex Ruck Keene

Research Corner

In Alex's most recent 'in conversation' with, we talk to Isabel Astrachan and Dr Scott Kim about the paper we recently published together looking at the ways in which the presumption of capacity in the Mental Capacity Act 2005 (and many other equivalent legislative frameworks in other countries) can be misunderstood, and why 'suspending' the presumption in the face of legitimate reason to be concerned about a person's ability to make a decision is not only the legally, but the ethically correct thing to do.

The paper we discuss was published in the Journal of Medical Ethics in September 2023, Questioning our presumptions about the presumption of capacity. (If you are not able to access it, please email Alex at alex.ruckkeene@39essex.com).

Book reviews

Recent book reviews by Alex include:

A Clinician's Brief Guide to Dementia and the Law (Nick Brindle, Michael Kennedy, Christian Walsh and Ben Alderson, Cambridge Medicine, 2023, paperback and ebook, 180 pages, c.£25).

Mason and McCall Smith's Law and Medical Ethics 12th edition (Anne-Maree Farrell and Edward S. Dove, OUP, 2023, paperback, 702 pages, c.£42).

The Future of Mental Health, Disability and Criminal Law (edited by Kay Wilson, Yvette Maker, Piers Gooding and Jamie Walvisch, Routlege, 2023, Hardback and ebook).

Kafka and care homes

In the rather Kafkaesque case of *Calvi and CG v Italy* (app no. 46412/21), [5] the ECtHR has grappled with issues regrettably common to many elderly people in care home across Europe: vulnerability and social isolation. Both issues, it concluded, can lead to breaches of the Article 8 ECHR rights of older citizens.

The case was brought by Mr Calvi, cousin of the elderly CG who had been placed in a nursing home against his wishes in 2020.

CG's difficulties began in 2017 following an application by his sister for a guardianship order "amministratore di sostegno" as a result of his extravagant spending ("prodigalité") and apparent inability to understand the vulnerability of his circumstances. An initial expert examination found no evidence justifying psychiatric treatment; a second assessment however identified a narcissistic personality disorder was considered was likely to affect CG's ability to take responsibility for himself.

A year later, CG's sister applied, with CG, for the protective measure to be lifted. By this time however, social services considered the intervention of a legal guardian had become necessary and they successfully resisted the application. It was noted that CG had been living in unsanitary conditions, travelling around by bicycle even though he was almost blind: a further psychiatric assessment was recommended.

In 2020 a guardianship judge overseeing CG's case extended CG's legal guardian's powers further to include all aspects of CG's personal care. Again, conflicting reports suggested on the one hand that CG did not suffer from any psychological pathology and had retained his capacity for judgement; on the other, he was found to have obsessive-compulsive personality disorder such that it was considered essential for him to be placed in a nursing home.

An order was made for CG to be taken to the nursing home with the assistance of the local police – the carabinieri. CG subsequently began to refuse food in protest at his confinement. When a documentary film crew produced a report questioning the legality of CG's placement in the home, the administrator took steps to restrict direct contact between CG and anyone except the mayor of his home town. This decision was subsequently shored up by a decision of the guardianship judge, who determined that no conversation could take place between CG and third parties without his

[5] Available in French only, but with an English summary here.

express agreement.

In January 2021 an application by Mr Calvi and his sister for permission to visit their cousin was refused. Despite CG being visited in the nursing home on several occasions by the National Guarantor of the rights of persons deprived of their liberty, no further investigation of CG's position was carried out; rather, a visitor to the nursing home who had visited CG without the guardian's permission was sentenced to a year in prison.

Mr Calvi subsequently made an application to Strasbourg, with his cousin CG as second applicant, Mr Calvi complaining of his inability to contact CG; CG complaining of his inability to return home or have visitors in the nursing home.

Admissibility

The Italian government contested the case's admissibility on the grounds that Mr Calvi had not produced a power of attorney and did not have standing to bring the case. Interestingly, the court determined Mr Calvi did have sufficient standing on the basis that CG could not have lodged the application himself, having effectively lost that power to the legal guardian.

Merits

The claim was brought under Articles 5 and 8 ECHR but the court determined the substantive issues raised should be examined under Article 8 alone.

The court noted (at paragraph 87) that while the judicial authorities had placed CG in a nursing home for his own protection, to guard him against the risk of impecuniosity and physical and mental danger, they had not put in any measure either to maintain his social relations or to facilitate a return home. The court noted that the decision to place CG in the home and deprive him of his legal capacity was not based on a medical finding of impairment, but on his reckless behaviour "une prodigalité excessive" and the physical and mental weakening from which he had suffered since 2020. Because of this, the Court considered it had greater powers to scrutinise the decisions reached by the national judges than it might otherwise have had – ie the usual margin of appreciation was somewhat narrower.

The court considered, under Article 5 ECHR, that in certain circumstances the welfare of a person suffering from mental disorders could amount to a further factor, in addition to medical considerations, to be taken into account when assessing whether it was necessary to place him or her in an institution. Nevertheless, the objective need to provide an individual with housing and social assistance should not automatically lead to measures depriving him or her of liberty. It also emphasised at paragraph 96 that any protective measure imposed in respect of a person able to express his or her wishes should in so far as possible reflect those wishes.

The court noted there were no effective guarantees in the domestic procedure which prevented potential abuse and no mechanism by which the preferences of CG were taken into account. CG was not given any opportunity to present his case while in the placement. The Court referred to the Convention on the Rights of Persons with Disabilities and at paragraph 106 noted that where substituted decision-making by guardians is put in place, proper training in "decision-making support systems" is vital.

The court noted with concern the hospitalisation of people on grounds of disability without consent albeit that it did not go so far as to analyse this within the context of Article 5. In terms of Article 8, the court found the restrictive measures were neither proportionate nor appropriate, and a breach of CG's article 8 rights

was found.

Comment

The majority of Strasbourg cases concerned with a lack of mental capacity to make decisions about residence or care (and thus engaging Article 5) are concerned with mental illness usually seen (in English terms) through the prism of the MHA 1983, rather than impairments arising out of learning disabilities or cognitive decline such as are frequently encountered in the CoP.

Regrettably the court did not actually delve into the Article 5 implications of CG's case – a missed opportunity in our view. Nonetheless, the implications of the court's findings on article 8 could – and should – be profound. Citizens moved to care homes against their wishes who are socially isolated as a result may well have valid Article 8 ECHR claims arising from the actions of the relevant public authority: all those working in this field should exercise due care to ensure their social networks and familial contacts are preserved as far as possible.

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Conferences

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

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

Advertising conferences and training events

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

Our next edition will be out in December. 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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