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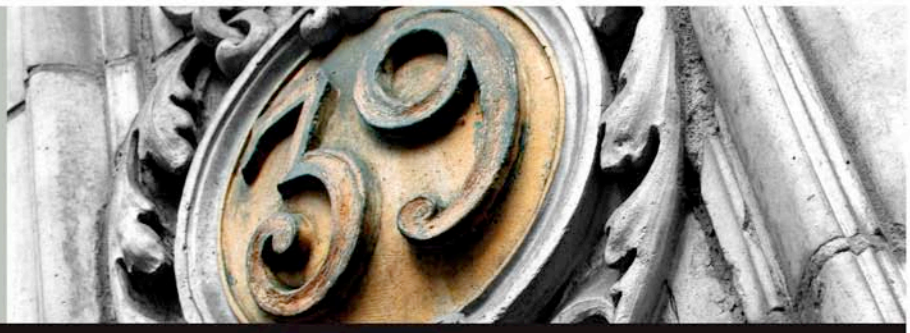

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Court of Protection update

Thirty Nine Essex Street Court of Protection Newsletter: August 2012

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Editors

Introduction

Welcome to the August 2012 issue, which features judgments concerning the concept of 'residual liberty' for Article 5 ECHR purposes, the interface between the Court of Protection and the inherent jurisdiction, the interplay between welfare and personal injury proceedings, and a treatment withdrawal decision concerning baby X.

With this issue we also include a Note by Simon Edwards which focuses upon the what should happen when personal injury claims have to be made for the funding of P's future care and rehabilitation alongside Court of Protection proceedings.

As a reminder, our COP Cases Online database can be reached on:

www.39essex.com/court_of_protection.

or even more simply at

www.copcasesonline.com

As ever transcripts are to be found on www.mentalhealthlaw.co.uk if not otherwise available.

Munjaz v United Kingdom (Application no. 2913/06) ECtHR (17.7.12)

"Deprivation of liberty" – residual liberty

Summary

Colonel Munjaz challenged the legality of Ashworth Hospital's seclusion policy – which departed from the Mental Health Act's Code of Practice by reducing the number and frequency of medical reviews – on the grounds that it violated Articles 3, 5, 8 and 14 ECHR. The House of Lords had previously held by a majority that the Code could be departed from if there were cogent reasons for doing so and rejected the human rights arguments.

Article 3
The European Court of Human Rights ('ECtHR') found no evidence to support the argument that the less intensive frequency of medical reviews placed the patient at real risk of ill-treatment.

Article 5
Already detained under the Mental Health Act 1983, Munjaz contended that his seclusion amounted to a further deprivation of liberty that was not prescribed by law, with no right of review or appeal to an independent body. Significantly, the Court held that whether there was a further deprivation in respect of someone who was already detained would depend on the circumstances (paragraph 65). The criteria for determining their concrete situation (eg the

measures' type, duration, effects, and manner of implementation) "*must apply with greater force*" when the person was already detained (paragraph 67).

However, on the facts there was no further deprivation of liberty because:

(a) Munjaz was a long-term patient in a high security hospital: even when he was not in seclusion, he was already subjected to greater restrictions on his liberty than would normally be the case for a mental health patient.
(b) Seclusion, though coercive, was not imposed as a punishment but to contain severely disturbed behaviour likely to harm others.
(c) While its duration, notably of 9, 14 and 18 days, would point towards a further deprivation of liberty, duration alone was not determinative and the length of seclusion was foremost a matter of clinical judgment.
(d) The manner of implementing the seclusion policy carried the greatest weight: the hospital's approach was to allow secluded patients the most liberal regime that was compatible with their presentation, and seclusion was being flexibly applied.

Article 8

The patient argued that the policy also interfered with his Article 8 rights and was not in accordance with the law as it lacked the necessary foreseeability and procedural safeguards. The ECtHR reiterated the presumption that those deprived of their liberty continue to enjoy all of the other fundamental rights and freedoms guaranteed by the Convention. Disagreeing with the House of Lords, it held that compulsory seclusion did interfere with his right to respect for private life:

> *"80. … Moreover, the importance of the notion of personal autonomy to Article 8 and the need for a practical and effective interpretation of private life demand that, when a person's personal autonomy is already restricted, greater scrutiny be given to measures which remove the little personal autonomy that is left."*

However, on the facts the seclusion policy was adequately accessible and sufficiently foreseeable as to be in accordance with the law and the discretion enjoyed by the hospital was exercised with sufficient clarity to protect Munjaz against arbitrary interference with his Article 8 rights.

Article 14

Whether permitting each hospital to seclude according to its own procedures resulted in unjustifiable discriminatory treatment was not an argument previously raised in domestic proceedings and was not therefore entertained by the ECtHR.

Comment

English law has hitherto rejected the concept of 'residual liberty', that is the idea that there can be a prison within a prison: *R v Deputy Governor of Parkhurst Prison, ex parte Hague and Weldon* [1992] 1 AC 58. Whether or not it can exist in law is significant: if it does, and a detained person is deprived of their residual liberty, arguably such a residual deprivation must also be in accordance with a prescribed legal procedure and on lawful grounds. Lord Steyn dissented when *Munjaz* was before the Law Lords and described the majority as "wrong to assume that under the jurisprudence of the ECHR residual liberty is not protected", and their decision as "a set-back for a modern and just mental health law".

The ECtHR's confirmation that there can be a further deprivation of one's liberty for Article 5 purposes is clearly significant. As a matter of legal principle, there is no obvious reason why the concept should not be equally recognized in respect of deprivations of liberty occurring in settings other than prison and high security hospitals. For example, it is not unknown for detained care home residents to be compulsorily kept in their own room to manage their disturbed behaviour.

It is also worth noting that, in considering whether there was a deprivation of liberty, the ECtHR took into account both the context of Munjaz's circumstances (paragraph 69) and, perhaps contrary to *Austin v United Kingdom*, the purpose and aim of the seclusion measures (paragraph 70). The relevance of these factors

to the 'DOL question' will no doubt feature in the conjoined appeals in *Cheshire West* and *P and Q* which are now heading to the Supreme Court with permission to appeal having been given.

Finally, the Munjaz decision illustrates how Article 8 protects what might be referred to as 'residual privacy'. The decision recognises that the Article 8 interference that results from being deprived of liberty by the State is distinct from any further interferences with one's right to respect for private life. Indeed, moving from a 'familial care' setting into a 'public care' setting may have a bearing on a person's personal autonomy. But their right to respect for private life remains and, following Munjaz, a greater degree of scrutiny must be given to measures taken by public authorities which impact upon one's residual privacy.

XCC v AA and others [2012] EWHC 2183 (COP)

Interface with the inherent jurisdiction – Forced marriage – Sexual relations

Summary

DD, a British citizen, had severe learning disabilities, little language, very little comprehension of anything other than simple matters, and required assistance with almost every aspect of daily living. In 2003 she entered into an arranged marriage in Bangladesh with her cousin, AA. During the ceremony she was slumped in a chair, almost comatose and barely able to repeat the words of consent to marriage; words which she did not understand. The marriage would not have taken place were it not for the fact that AA wanted to live and work in England, gaining immigration entry clearance in reliance upon it.

Owing to very significant concerns surrounding DD's welfare, the police obtained a Forced Marriage Protection order pending an application being made to the Court of Protection. Interim declarations of incapacity were made to protect DD. Her husband was warned that sexual relations with his wife were likely to be criminal and he was not permitted to live or have any contact with her.

The main issue for Parker J. was whether she had the power to declare that the marriage was not recognised in this jurisdiction. A gap in the law arose because a person's invalid consent to marriage rendered it voidable, rather than void, under s.12(c) of the Matrimonial Causes Act 1973 and s.58(5) of the Family Law Act 1986 prevented the Court from declaring it to be void from its inception. All parties initially opposed a declaration of non-recognition. With interim declarations made and undertakings by the parties given, neither the local authority nor the Official Solicitor considered it to be in DD's interests to end the marriage. Her parents and husband also asserted that non-recognition would shame the family in the community.

In relation to the Court of Protection's statutory jurisdiction, Parker J. accepted that the power to make declarations were expressly limited by MCA s.15 and the Court could not develop its "own inherent jurisdiction" which went beyond its statutory powers (paragraph 49). Thus, for example, under the MCA the Court could declare that it was unlawful for DD to be married in this jurisdiction but not that it was unlawful for her to be married in Bangladesh. But, in any event, the MCA did not confer any jurisdiction to make a non-recognition declaration as this was not a personal welfare decision for, or on behalf of, DD.

Relying upon *KC v City of Westminster* [2008] EWCA Civ 198, her Ladyship held that the High Court could exercise its inherent jurisdiction of its own motion to refuse to recognise a marriage where one party was unable to consent. This jurisdiction was flexible and able to respond to social needs and, in this instance, was able to fill the gap left behind by the lack of statutory power to grant a declaration of non-recognition. Insofar as the interface between the two jurisdictions is concerned:

> *"54… The protection or intervention of the inherent jurisdiction of the High Court is available to those lacking capacity within the meaning of the MCA 2005 as it is to capacitous but vulnerable adults who have had their will overborne, and on the same basis, where the remedy sought does not fall within the*

repertoire of remedies provided for in the MCA 2005. It would be unjustifiable and discriminatory not to grant the same relief to incapacitated adults who cannot consent as to capacitous adults whose will has been overborne.

…

85… I am satisfied that once a matter is before the Court of Protection, the High Court may make orders of its own motion, particularly if such orders are ancillary to, or in support of, orders made on application. Since the inherent jurisdiction of the High Court in relation to adults is an aspect of the parens patriae jurisdiction, the court has particularly wide powers to act on its own motion."

In broad terms, the Court held that the MCA provisions were not to be imported into the inherent jurisdiction evaluation of non-welfare matters. Hence, DD's beliefs and values did not have to be taken into account. Nor did the attitudes, wishes and beliefs of her family. Although it was appropriate, on general principles, to consider whether a declaration was necessary and proportionate, the Court did not have to apply the principle of least restriction in MCA s.1(6). Welfare considerations may be relevant to the Court's decision as to whether to make the declaration, but not in the present case.

Public policy considerations were relevant and "*In my view a marriage with an incapacitated person who is unable to consent is a forced marriage within the meaning of the Forced Marriage Act 2007…"*. Citing her earlier judgment, "*"Force" in the context of a person who lacks capacity must include inducing or arranging for a person who lacks capacity to undergo a ceremony of marriage, even if no compulsion or coercion is required as it would be with a person with capacity"* (paragraph 30). Such a marriage was a gross interference with the incapacitated person's autonomy:

"72… Its concomitants, sexual relations and, as a foreseeable consequence, pregnancy, constitute not only a breach of autonomy but also bodily integrity, perhaps one of the most severe that can be imagined, and the consequences may be lifelong. Marriage creates status from which many consequences flow which affect third parties and the public at large including the admission of persons who would not otherwise be entitled to admission. Thus questions of public policy generally as well as those that affect the individual concerned are relevant. There is also a public policy interest in the Court stating openly that such marriages should not be recognised."

In conclusion, invoking the inherent jurisdiction, the Court declared that the marriage celebrated in and valid according to the law of Bangladesh was not recognised as a valid marriage in this jurisdiction. Using the statutory jurisdiction, Parker J. declared that it was in DD's best interests for an application to be made to annul the marriage and for the Official Solicitor to be authorised to act as litigation friend to do so. As a postscript, stark guidance to health and social care professionals was repeated from the earlier judgment:

"184… in my view it is the duty of a doctor or other health or social work professional who becomes aware that an incapacitated person may undergo a marriage abroad, to notify the learning disabilities team of Social Services and/or the Forced Marriage Unit if information comes to light that there are plans for an overseas marriage of a patient who has or may lack capacity. The communities where this is likely to happen also need to be told, loud and clear, that if a person, whether male or female, enters into a marriage when they do not have the capacity to understand what marriage is, its nature and duties, or its consequences, or to understand sexual relations, that that marriage may not be recognised, that sexual relations will constitute a criminal offence, and that the courts have the power to intervene."

Comment

This judgment contains a useful and detailed discussion of the interface between the Court of Protection's MCA jurisdiction and the High Court's inherent jurisdiction. It serves as a reminder of the limitations imposed by Parliament and the corresponding flexibility afforded by the parens patriae powers. Although it is apparent that the judiciary has little

hesitation in reverting to 'the great safety net' to fill legislative gaps, the principles which guide the exercise of those powers in this jurisdictional hinterland may well come under increasing scrutiny as the law develops. Although the approach should be facilitative rather than dictatorial, it is interesting to note the Court's rejection of the MCA considerations, particularly those relating to the person's own wishes and feelings, merely requiring orders to be "necessary and proportionate".

Describing the arranging of a marriage between an incapacitated person, who is unable to consent, and another as a "forced marriage" for the purposes of the 2007 Act is noteworthy, particularly in an era when the Government are in the process of criminalising forced marriages from 2013. Although it was referred to in the context of an arranged marriage abroad, time will tell whether these comments have a broader application to domestic incapacitated marriages: they certainly serve to reinforce the importance of assessing marital capacity. Indeed, it is reported that 50 English Councils are due to issue guidance to raise awareness of the issues and to identify potential victims.

Re SK [2012] EWHC 1990

Interface between welfare and personal injury proceedings

Summary

This decision of Mr Justice Bodey concerned the interface between welfare proceedings in the Court of Protection and concurrent personal injury proceedings. SK had suffered a brain injury in an accident and was represented in a personal injury claim through his brother CK as litigation friend. Part of his claim related to the future costs of his care. At the same time, welfare proceedings were underway in the Court of Protection, concerning the validity of SK's marriage and his care and place of residence, where the Official Solicitor acted as his litigation friend. The expert in neuro-rehabilitation instructed for the purposes of the personal injury claim had recommended different arrangements for SK's care and residence than the joint expert in the Court of Protection proceedings. SK's wife wished to put forward the recommendations of the 'personal injury expert', but the local authority and PCT had already refused to commission that option because they considered it would not meet SK's assessed needs, and was likely to be more expensive.

Various reports from the 'personal injury expert' had already been disclosed to the parties in the Court of Protection proceedings, but not the reports obtained by the Defendants in the personal injury proceedings.

An application was issued by the solicitors acting for SK in his personal injury claim which sought, in various alternative formulations, to allow them to represent SK in the Court of Protection to put forward the views of the 'personal injury expert'. As a result, the Defendants in the personal injury proceedings also applied to have the two sets of proceedings consolidated, so that the court would have the benefit of all the relevant expert views, and so that the Defendants would not effectively be prevented from arguing subsequently that the option favoured by the 'personal injury expert' was unreasonable, in the event that the Court of Protection declared that option to be in SK's best interests.

The Official Solicitor opposed both applications, arguing that SK could only have one voice in the Court of Protection, and that Defendant insurance companies had no right to be involved in best interests decisions.

At the hearing, the original application was altered so that it became an application for SK's brother CK (his litigation friend in the personal injury proceedings) to be joined as a party. That application was not opposed by the Official Solicitor.

The court determined that CK should be joined as a party, and refused the Defendants permission to play any role in the best interests decision, while directing that there should be a joint meeting between the single joint expert in the Court of Protection proceedings and the 'personal injury expert'. The court held:

(a) The tests to be decided in each court were different – 'best interests' was not the same as

whether a particular form of care was a 'reasonable need'.

(b) The Defendants in the personal injury proceedings, and the Queen's Bench Division judge, would not be bound by any declaration made in the Court of Protection.

(c) The Defendants did not have 'sufficient interest' in the words of COP Rule 75 to be joined as a party. Their financial liability would not be determined by the Court of Protection proceedings. A commercial interest in the outcome was not enough.

The judge also noted that where possible and unless otherwise contra-indicated, it would generally make sense to have the same litigation friend in concurrent Court of Protection and personal injury proceedings to avoid some of the problems that had arisen in this case, where two different representatives of SK had adopted different positions on the same issue.

The earlier applications made by SK's solicitors in the personal injury proceedings would have been refused, since it was not possible for SK himself to have two sets of representatives in one set of proceedings.

Comment

This decision is likely to be of interest to personal injury solicitors involved in cases where the claimant lacks capacity and where best interests decisions need to be taken which may overlap with decisions about the quantum of future care. It is of interest for the general statement of principle that Defendants who have a commercial interest in best interests decisions are not thereby able to satisfy the test of sufficient interest to be joined as a party to Court of Protection proceedings. No doubt Defendant insurance companies will be sceptical about the suggestion that a declaration of the Court of Protection that option X is in P's best interests does not close the door to an argument that option X is not a reasonable need. On the other hand, as the judge observed, there are plenty of public policy arguments against allowing those with a purely commercial interest a role in Court of Protection proceedings and best interests decision making generally.

NHS Trust v Baby X and others [2012] EWHC 2188 (Fam)

Withdrawal of medical treatment

Summary and comment

Following a catastrophic accident which resulted in chronic, profound and irreversible brain damage, baby X was incapable of breathing on his own and was ventilated and fed by nasal gastric tube. The Trust sought a declaration that it was in his best interests to be removed from the ventilator and treated with palliative care during the minutes, or at best hours, that would remain. His parents opposed this on the basis that their son should be given every chance to improve, however unlikely that presently looked; they believed they saw discernible signs of improvement; and the tenets of their faith prevented them consenting.

Although this case was decided under the inherent jurisdiction, some of the observations of Mr Justice Hedley may be equally applicable to treatment withdrawal cases in the Court of Protection:

"24. That assessment [of X's welfare] must be the court's independent assessment but it must be one that looks at all relevant issues from the assumed point of view of the patient; a necessary but necessarily artificial exercise in some ways it may be thought. Yet it is rightly so required for X is a human being of unique value: body, mind and spirit expressed in the unique personality that is X. It is important that 'quality of life' judgments are not made through other eyes for 'quality of life' may weigh very differently with different people depending on their individual views and aspirations. A life from which others may recoil can yet be precious.

25. At the same time preservation of life, however important, cannot be everything. No understanding of life is complete unless it has in it a place for death which comes to each and every human with unfailing inevitability. There is unsurprisingly deep in the human psyche a yearning that, when the end comes, it does so as a 'good death'. It is often easier to say what that is not rather than what it is but in this case

the contrast is between a death in the arms and presence of parents and a death wired up to machinery and so isolated from all human contact in the course of futile treatment."

In concluding that X's welfare required his removal from ventilation and that it was lawful to treat him on the basis of palliative care, his Lordship's reasoning was as follows:

"28… First, I recognise the desire to preserve life as the proper starting point to which I add that X is very probably unaware of any burden in his continued existence. Against that, secondly, I have set both his unconsciousness or unawareness of self, others or surroundings and the evidence that any discernible improvement is an unrealistic aspiration. Thirdly, I have acknowledged his ability to continue for some time yet on ventilation but have balanced that with the risk of infection or other deterioration and the desire to avoid death in isolation from human contact. Fourthly, having accepted that treatment serves no purpose in terms of improvement and has no chance of effecting it, I have taken into account its persistent, intense and invasive nature. Fifthly, I have noted the treating consultant's view that X shows no desire to live or capacity to struggle to survive which are the conventional marks of a sick child; although I think that observation as such is correct, I would not want that to have significant let alone decisive weight in this balance."

In passing….

We mention the decision of the Supreme Court in **Re T (children)** [2012] UKSC 36 which considered whether a local authority who had properly brought allegations of abuse before the court in respect of young children should be required to pay the costs of parties or intervenors in circumstances where those allegations were found not proved at a fact-finding hearing. Although the decision relates to costs in proceedings about children, some of the public policy arguments relied on are equally relevant to the Court of Protection. The Supreme Court concluded that in the absence of unreasonable conduct, local authorities should not be liable to pay the costs of 'successful' parties.

Readers may also be interested in the report prepared by Mr Justice Ryder concerning modernisation of the family justice system. Again, some of the issues considered have resonance in the Court of Protection. In particular, the authors suggest that "requiring consideration to be given as to how the voice of the child is heard in family proceedings" is something which could usefully be addressed within the Court of Protection, where it is comparatively rare for P to address the court, or for judges to hear directly from P about the matters in issue. The report is available at http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/ryderj_recommendations_final.pdf

Lastly, we note that the LGO has recently published two reports critical of Kent County Council, which had relied on two unlawful sets of internal guidance – one preventing funding for residential care home placements which were not in Council-owned homes or pre-purchased placements; and the other restricting respite care for adults to Council-run residential homes, rather than allowing users to receive direct payments to choose their own provider. The reports are a helpful reminder that where collateral public law issues such as these crop up within Court of Protection proceedings, the Ombudsman may prove a proportionate and helpful route to resolution.

DOLS Third Report on annual data 2011/12 (England)

On 17 July 2012, the NHS Health and Social Care Information Centre released its third report which looks at DOLS activity in England between 1.4.11 and 31.3.12, with the following highlights:

(1) 27% increase in requests compared with 2010/11 (contrary to Government predictions);
(2) Number of DOLS authorisations have increased every quarter since April 2009, rising to 1,976 in December 2011. However, there was a 16% decrease between the end of December 2011 and March 2012;

(3) 56% of requests led to authorisations;
(4) There continues to be wide regional variations.

Neary Settlement

It is reported that Hillingdon Borough Council have agreed to pay £35,000 in damages to Steven Neary in respect of their illegality in 2010.

Our next update should be out at the start of September 2012, unless any major decisions are handed down before then which merit urgent dissemination. Please email us with any judgments and/or other items which you would like to be included: credit is always given.

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