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Court of Protection update

Thirty Nine Essex Street Court of Protection Newsletter: March 2012

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Editors

Introduction

Welcome to the March 2012 issue. There are rather fewer cases to report than last month, but amongst them is included the extremely important decision of the Court of Appeal in *K v LBX* regarding the (non)existence of a starting point for consideration of best interests regarding residence.

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

K v LBX & Ors [2012] EWCA Civ 79

Summary

The Court of Appeal was asked to determine whether ECHR Art 8 respect for family life requires the court in determining issues under the inherent jurisdiction or the Mental Capacity Act 2005 to afford a priority to placement of an incapacitated adult in their family or whether family life is simply one of "*all the relevant circumstances*" which under MCA 2005 S4 the court must consider. The question arose in the context of a case in which the local authority, supported by the Official Solicitor, considered that it was in the best interests of a learning disabled young adult to move for a trial period into supported living. The father strongly objected to the proposal (despite agreeing that independent living was a goal for the future) and argued that since there was no issue of neglect, abuse or other harm, the existing family life which L shared with his father and brother should not be disrupted.

The father relied on the oft-quoted comments of Munby J (as he then was) in the case of *Re S* [2003] 1FLR 292, as demonstrating that the court's starting point should be that L would be better off remaining with his family:

> "*48. I am not saying that there is in law any presumption that mentally incapacitated adults are better off with their families: often they will be; sometimes they will not be. But respect for our human condition, regard for the realities of our society and the common sense to which Lord Oliver of Aylemerton referred in In re KD, surely indicate that the starting point should be the normal assumption that mentally incapacitated adults will be better off if they live with a family rather than in an institution – however benign and enlightened the institution may be, and however well integrated into the community – and that mentally incapacitated adults who have been looked after within their family will be better off if they continue to be looked after within the family rather than by the State.*
>
> *49. We have to be conscious of the*

limited ability of public authorities to improve on nature. We need to be careful, as Mr Wallwork correctly cautions me, not to embark upon 'social engineering'. And I agree with him when he submits that we should not lightly interfere with family life. If the State – typically, as here, in the guise of a local authority – is to say that it is the more appropriate person to look after a mentally incapacitated adult than his own family, it assumes, as it seems to me, the burden – not the legal burden but the practical and evidential burden – of establishing that this is indeed so. And common sense surely indicates that the longer the family have looked after their mentally incapacitated relative without the State having perceived the need for its intervention the more carefully must any proposals for intervention be scrutinised and the more cautious the court should be before accepting too readily the assertion that the State can do better than the family. Other things being equal, the parent, if he is willing and able, is the most appropriate person to look after a mentally incapacitated adult; not some public authority, however well meaning and seemingly well equipped to do so. Moreover, the devoted parent who – like DS here – has spent years caring for a disabled child is likely to be much better able to 'read' his child, to understand his personality and to interpret the wishes and feelings which he lacks the ability to express. This is not to ignore or devalue the welfare principle; this common sense approach is in no way inconsistent with proper adherence to the unqualified principle that the welfare of the incapacitated person is, from beginning to end, the paramount consideration."

The local authority and Official Solicitor argued that there was no starting point or other gloss on the clear words of the MCA 2005 which simply required decision-makers, including the court, to assess all relevant considerations.

The Court of Appeal (Thorpe, Black and Davis LLJ) rejected the father's appeal. Thorpe LJ observed (para 31) that "*whether in cases involving children or cases involving vulnerable adults principles and generalisation can rarely be stated since each case is so much fact dependent*." The right approach under the MCA 2005 was to "*acertain the best interests of the incapacitated adult on the application of the section 4 checklist. The judge should then ask whether the resulting conclusion amounts to a violation of Article 8 rights and whether that violation is nonetheless necessary and proportionate*." Black LJ pointed out that giving priority to family life under Article 8 by way of a starting point or assumption "*risks deflecting the decision maker's attention from one aspect of Article 8 (private life) by focussing his attention on another (family life)...there is a danger that it contains within it an inherent conflict, for elements of private life, such as the right to personal development and the right to establish relationships with other human beings and the outside world, may not always be entirely compatible with existing family life and particularly not with family life in the sense of continuing to live within the existing family home*."

Comment

This important decision clarifies the role of the court in MCA proceedings and confirms that starting points or other generalised approaches are not appropriate. In every case the particular facts must be scrutinised with care, and proper regard given to considerations under Article 8 ECHR. It remains the case that if any person proposes to interfere with a person's family life, they will need to show good reason for doing so, but decision-making should not be fettered by the adoption of assumptions which are not reflected in the MCA.

The decision is to be welcomed for a number of reasons. It should ensure that proper recognition is given to the right to private life of adults who lack capacity. Concepts of autonomy and self-determination have not, for obvious reasons, featured strongly in cases involving children, and there can be a tendency to rely on the approach taken in family proceedings even though the MCA concerns adults. Promoting

autonomy and self-determination are clearly of much greater significance in relation to incapacitated adults. While there are no doubt similarities between the functions of a judge in family proceedings and in MCA welfare proceedings, adults are not children, and caution is required in drawing analogies between the two groups, or assuming that approaches relevant to one group can be translated to the other.

Wychavon District Council v EM [2012] UKUT 12 (AAC) – re-deciding [2011] UKUT 144 (AAC)

Summary

Avid housing benefit lawyers will recall that this case concerned a 20 year old woman, with profound physical and mental disabilities from birth, whose parents had converted an annex to their property in order to provide a specially constructed dwelling to meet her complex needs. This included round the clock sleep-in carers. An indefinite tenancy agreement was signed by her father as landlord and, in place of her signature as the tenant was written "profoundly disabled and cannot communicate at all". Indeed, she had no knowledge or understanding of the purported basis of her living arrangements. The parents' understanding was that these arrangements would enable her to get housing benefit. Rent was therefore charged at £694.98 per month to cover the cost of the additional mortgage and a claim for housing benefit was made.

The 2011 decision had held that, regardless of her capacity to consent, the daughter could not and did not communicate any agreement to the tenancy. So there was no agreement and no liability to pay rent and therefore no housing benefit payable. However, it soon became apparent that both the parties and the Upper Tribunal had overlooked the law relating to necessaries and this omission justified a review of that previous decision. Section 7 MCA 2005 provides:

> *"(1) If necessary goods or services are supplied to a person who lacks capacity to contract for the supply, he must pay a reasonable price for them.*
>
> *(2) 'Necessary' means suitable to a person's condition in life and to his actual requirements when the goods or services are supplied."*

This time round the Upper Tribunal stuck to its guns in holding that there was a manifest absence of agreement:

> "*11. I conclude therefore that she had no liability to pay rent by reason of a document to which she was not a party and of which she had no knowledge or means of knowledge, any more than a person of full mental capacity would be bound by such a document.*"

However, departing from its earlier decision, she was liable to pay because the accommodation was necessary for her and the obligation arose either by implication at common law or under s.7 MCA 2005:

> "*28. I am in some doubt whether "services" in section 7 of the Mental Capacity Act 2005 is wide enough to cover the provision of accommodation, but I have no doubt that insofar as it is not wide enough, the common law rules as to necessaries survive and that the provision of accommodation is an obvious necessary.*"

Comment

This second attempt to deal with what is clearly a difficult issue remains problematic. It departs from what has previously been suggested by Social Security Commissioner Mesher (CH/2121/2006) that:

> "*My provisional understanding of the authorities on the law of England and Wales is that even if a party to a contract does lack sufficient understanding to have capacity and the other party knows that, the contract is not void, but is merely voidable at the option of the affected party.*"

It would then follow that the contract in the present case between father and daughter

should have been voidable (as the tribunal at first instance originally held). This is also the position taken in the Explanatory Notes to section 7 of the 2005 Act which state:

> "*In general, a contract entered into by a person who lacks capacity to contract is voidable if the other person knew or must be taken to have known of the lack of capacity.*"

The Court of Protection issued guidance in 2011 on tenancy agreements to enable single orders to be made to sign the agreement for those lacking capacity. Whether the agreement was void or voidable, admirers of *Street v Mountford* [1985] 1 AC 809 will have spotted that there was no tenancy in law because the daughter did not have exclusive possession of the dwelling. Her complex needs required carers throughout the day and night whom, it seems clear, would have required unrestricted access to her.

In relation to the law of necessaries, the Explanatory Notes confirm that delivering milk can be a "necessary" good or service under section 7. Thus a milkman can expect to be paid for delivering to the house of someone with progressive dementia (see also MCA Code of Practice at paras 6.56-6.66). The fact that the provision of accommodation may also arise under s.7, and in any event certainly at the common law, adds an interesting perspective to the decision in *DM v Doncaster MBC and Secretary of State for Health* [2011] EWHC 3652 which we covered last month. If a person lacking capacity is able to be accommodated under s.7 MCA 2005 that would mean that they would not be accommodated under Part 3 of the National Assistance Act 1948 and the charging requirement in section 22 would not bite. However, whilst the route may differ, the destination may remain the same given that s.7 MCA 2005 requires a reasonable sum to be paid. Thus, it would seem, those deprived of their liberty may still have to pay.

Crawford & Anor v Suffolk Mental Health Partnership NHS Trust [2012] EWCA Civ 138

Summary and comment

We bring this case to your attention not because it is a COP case (it is a decision of the Court of Appeal in the context of proceedings relating to unfair dismissal), but for two comments made by Elias LJ (endorsed by the other members of the Court of Appeal) which are of relevance to the safeguarding of adults with dementia in institutional settings.

The allegation which led to the dismissal of the two nurses in question was that they had abused patients suffering from dementia. The material allegations were that two nurses had restrained an elderly patient suffering from dementia by way of tying him to a chair which was (in turn) tied to a table. The police had been involved within days of the allegation having been made (by another nurse), but having investigated, confirmed that they would be taking no further action.

In a footnote to his judgment, Elias J commented as follows:

> "*71. This case raises a matter which causes me some concern. It appears to be the almost automatic response of many employers to allegations of this kind to suspend the employees concerned, and to forbid them from contacting anyone, as soon as a complaint is made, and quite irrespective of the likelihood of the complaint being established. As Lady Justice Hale, as she was, pointed out in Gogay v Herfordshire County Council [2000] IRLR 703, even where there is evidence supporting an investigation, that does not mean that suspension is automatically justified. It should not be a knee jerk reaction, and it will be a breach of the duty of trust and confidence towards the employee if it is. I appreciate that suspension is often said to be in the employee's best interests; but many employees would question that, and in my view they would often be right to do so. They will frequently feel belittled and*

demoralised by the total exclusion from work and the enforced removal from their work colleagues, many of whom will be friends. This can be psychologically very damaging. Even if they are subsequently cleared of the charges, the suspicions are likely to linger, not least I suspect because the suspension appears to add credence to them. It would be an interesting piece of social research to discover to what extent those conducting disciplinary hearings subconsciously start from the assumption that the employee suspended in this way is guilty and look for evidence to confirm it. It was partly to correct that danger that the courts have imposed an obligation on the employers to ensure that they focus as much on evidence which exculpates the employee as on that which inculpates him.

72. I am not suggesting that the decision to suspend in this case was a knee jerk reaction. The evidence about it, such as we have, suggests that there was some consideration given to that issue. I do, however, find it difficult to believe that the relevant body could have thought that there was any real risk of treatment of this kind being repeated, given that it had resulted in these charges. Moreover, I would expect the committee to have paid close attention to the unblemished service of the relevant staff when assessing future risk; and perhaps they did.

73. However, whatever the justification for the suspension, I confess that I do find it little short of astonishing that it could ever have been thought appropriate to refer this matter to the police. In my view it almost defies belief that anyone who gave proper consideration to all the circumstances of this case could have thought that they were under any obligation to take that step. I recognise that it is important that hospitals in this situation must be seen to be acting transparently and not concealing wrongdoing; but they also owe duties to their long serving staff, and defensive management responses which focus solely on their own interests do them little credit. Being under the cloud of possible criminal proceedings is a very heavy burden for an employee to face. Employers should not subject employees to that burden without the most careful consideration and a genuine and reasonable belief that the case, if established, might justify the epithet "criminal" being applied to the employee's conduct. I do not think that requirement was satisfied here. No-one suggested that the appellants were acting other than in the best interests of JE and the other patients. The restriction was not essentially different to the physical restraint which had been carried out in the day shift. I can only assume that the relevant committee was influenced, as I suspect Mr Mansfield was, by the fact that technically tying JE to the chair was an assault, with the implication that this is a grave matter. But so is it an assault when nurses physically restrain a patient, or compel him to wear a mask when he is spitting at people, as happened with JE. There was obvious justification for restraining this patient, even if the appropriate procedures for doing so were not employed, and in my view the police should never have been involved."

Comment

The first comment of Elias LJ within this passage which may raise eyebrows is the analysis of the nature of the restraint undertaken upon the patient. As Lucy Series has pointed out, the Court of Appeal did not make any reference at this point to the MCA 2005 or (for instance) to the detailed discussion in *R(C) v a Local Authority* as to the circumstances under which restraint of the incapacitated can be justified (and the requirement that it be in accordance with best practice). The Court of Appeal did not, of course, have to make specific reference to these matters, but the apparently casual dismissal of the matter as a 'technical' nature of the assault might be thought to sit oddly with the approach taken in other jurisdictions.

The second element of the footnote worthy of

comment is the discussion of the circumstances under which it is appropriate to involve the police. Some of our readers may well see the comments of Elias LJ as a welcome dose of common sense; others may well not be quite so sure.

Broadway Care v Caerphilly CBC [2012] EWHC 37 (Admin)

Summary

We note this case (one of a string of recent cases arising out of attempts by local authorities either to cancel or vary the terms of contracts with residential care providers) because of a number of comments made as to the extent to which care home providers are entitled to act on behalf of the residents of their homes when seeking to bring public law challenges.

The claimant care home specialised in the provision of care to sufferers of dementia. It had 23 residents, of whom 19 were funded by the Defendant local authority. By a decision dated 12 December 2011, Caerphilly CBC sought to terminate the framework contract for the provision of care services which the parties had entered in to in 2006 on the basis of concerns as to the quality of the care provision.

Upon the care home's (rolled up) application for judicial review of the decision, HHJ Seys Llewellyn QC held that the Court should be willing to entertain applications for interim relief brought by a care home in a very unusual case, during such period as might be necessary to preserve the status quo until individual residents or their representatives can themselves pursue applications, if at all they choose to do so. Once there is time and opportunity for them to do so, there is plain risk of a conflict of interest between the care home and the residents and insufficient reason why the care home should purportedly act on their behalf.

However, the Judge accepted the defendant's submission that to acquire 'victim' status one must be 'directly affected' by the act or omission.[1] Those "indirectly affected" can only bring proceedings where, exceptionally, it is "impossible" for those directly affected to do so. On the facts, the claimant was precluded from pursuing the proceedings in defence of the Article 8 rights of its residents because it was not the victim of a breach of those rights.

The Judge further rejected the claimant's submission that the defendant was under a public law duty to consult with relatives before terminating the contract and reiterated that in the absence of a right to rely on the residents' article 8 rights, there should be no public law remedy for termination of the contract.

Comment

This case is of note for the restrictive approach that the Court adopted to the circumstances in which a care home could pursue proceedings on behalf of its residents, even where on the facts the residents may be unlikely to bring proceedings in their own right. However, it does leave open the possibility of urgent relief being sought in an appropriate case so as to allow for individual residents to take their own steps to seek to safeguard their position and, as such, recognises the (limited) common cause that care home providers and their residents may have in securing the continuation of placement contracts.

Salisbury Independent Living Ltd v Wirral Metropolitan Borough Council [2012] EWCA Civ 84; [2012] WLR (D) 31

Summary

We note this case for essentially the same reason as the preceding case, by way of indication of the circumstances under which bodies providing accommodation to service users are able to challenge public law decisions affecting those service users.

This case concerned an appeal from the Upper Tribunal in which the central issue was whether Regulation 3 of the Housing Benefit and Council

[1] See e.g. *Klass v Germany* Application 5029/71, 6 September 1978.

Tax Benefit (Decisions and Appeals) Regulations 2001 (SI 2001 No. 1002) exhaustively sets out who are "persons affected" by a decision of a local authority with responsibility for administering housing benefit and are thus entitled to bring an appeal against a housing benefits decision.

Salisbury Independent Living ('SIL') was a provider of supported living accommodation. Wirral MBC ('WMBC') made a number of decisions which affected the quantum of housing benefit awarded to various of SIL's residents. SIL sought to challenge those decisions by bringing proceedings in the First Tier Tribunal on behalf of the residents who were affected. They had no express or apparent authority to do so.

The Upper Tribunal held that SIL was entitled to bring proceeding challenging the housing benefit decisions in their own right as they were a "person affected" within the meaning of regulation 3.

The Court of Appeal allowed WMBC's appeal. Hughes LJ, with whom Kay and Lewison LJJ agreed, held that the ordinary meaning of the legislation was that the Act, in providing a right of appeal to "persons affected", anticipates that the term would be defined in the Regulations. Regulation 3 should be construed as an exhaustive list of who can appeal against a local authority's determination and in what circumstances. Accordingly, SIL had no independent right of appeal.

Comment

The decision brings clarity as to who will be able to bring an appeal against housing benefit decisions. It is also interesting in so far as the Court of Appeal rejected the reasoning of the Upper Tribunal which had focused on the injustice to SIL if no independent right of appeal were found to exist. Although Supported Living providers may encounter practical difficulties in persuading resident to appeal unfavourable decisions, they will require authority from the individual residents to pursue challenges against such decisions on their behalf.

Our next update should be out at the start of April 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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