THE MCA: 10 YEARS, 10 CASES

Jenni Richards QC

29 June 2017

2008

In re S and another (Protected Persons)

November 2008

Reported in [2010] 1 WLR 1082

HHJ Hazel Marshall QC

In re S

- Parents executed EPAs appointing their daughters C and V as joint receivers.
- Subsequently, V's application to be sole deputy was granted.
- On reconsideration following application by C and parents, DJ confirmed the order despite the parents having expressed the wish that if both daughters could not act together, neither should do so alone.
- C's appeal against the order appointing V was allowed.

In re S

"What is apparent …[from the MCA] is that there has been a whole sea change in the attitude of the law to persons whose mental capacity is impaired. The former approach was based on a stark division between those who had capacity to manage their own affairs, and those who did not. The former took their own decisions for better or for worse, and the latter fell under a regime in which decisions were made for them, perhaps with a generous, and in some cases patronising, token nod to their feelings by asking them what they wanted and then deciding what was none the less objectively 'best' for them."

In re S

"This is no longer appropriate. The statute now embodies the recognition that it is the basic right of any adult to be free to take and implement decisions affecting his own life and living, and that a person who lacks mental capacity should not be deprived of that right except in so far as is absolutely necessary in his best interests. "

In re S

2 major changes embodied in the MCA:

- official recognition that capacity is not a blunt all or nothing condition but is more complex and is to be treated as issue specific;
- the emphasis throughout the MCA on the actual or likely wishes, views & preferences of P and on involving P in the decision-making process.
  - Inescapable conclusion that the views and wishes of P are to carry great weight
  - *"What, after all, is the point of taking great trouble to ascertain or deduce P's views, and to encourage P to be involved …, unless the objective is to try to achieve the outcome which P wants or prefers …?"*

In re S

- Need for strong and cogent justification for overruling P and *"saving him from himself"*
- DJ erred in failing to give due weight to the wishes of the parents and in giving undue weight to the supposed disadvantages to them attendant on having an independent deputy appointed as being sufficient to override those wishes.
- In considering whether it is in the BI of P for his actual express wishes to be overruled, regard must be had to the sense of frustration, impotence, anger and lack of self-worth which P might then experience.

2009

- Independent News & Media v A
- November 2009
- [2009] EWHC 2858 (Fam)
- Hedley J
- Upheld in Independent News & Media v A [2010] EWCA Civ 343

Independent News & Media v A

- Application by media for permission to attend COP hearings and report the proceedings, including the identification of A
- *"This case provides the court with its first opportunity to reflect on [the problems of privacy and public interest] and the tension between the essentially private nature of the subject matter of the proceedings and the legitimate public interest in the practice and exercise of the powers of the new Court."*
- Real weight must be given to the general rule that these matters are dealt with in private; real value must be given to the concept of good reason before the court acts other than in accordance with the general rule

Independent News & Media v A

- Good reason does not import a concept of exceptionality; is something to be considered on the individual facts of each case; and must address the purposes for which the general rule exists (to protect privacy and encourage frankness in the discussion of private matters)
- Once good reason is established, the balance between Article 8 and Article 10 rights needs to be undertaken
- Good reason established on the facts: the issues are already in the public domain; the court can exercise its powers to preserve privacy; it is in the public interest that there should be understanding of the jurisdiction and powers of the court and how they are exercised.

Independent News & Media v A

- Conclusion: the Art 8/10 balance requires that the media should be allowed to attend the proceedings, it being possible to accommodate the legitimate concerns for privacy and the legitimate aspirations for publicity at the same time.
- Media can report what is in the public domain already and that which answers the legitimate questions of a reasonable person who knows what is already in the public domain. Nature of earnings, details of care, nature of family discussions, questions of medical treatment should all enjoy privacy and not be reportable.

Independent News & Media v A

- Court of Appeal upheld Hedley J's decision
- First question: was there good reason?
- If good reason did appear, court had to assess all the relevant considerations and make a balanced fact-specific judgment
- Even where good reason appeared, better reasons might lead the court refusing to allow media attendance
- Here material relating to A was already in the public domain and A's case provided a rare and valuable opportunity for the public to be informed of precisely what happened in the new Court of Protection

2010

- G v E
- Decision of Baker J [2010] EWHC 621 (Fam)
- Decision of Court of Appeal [2010] EWCA Civ 822
- Decision of Baker J [2010] EWHC 2042 (Fam)
- Decision of Baker J [2010] EWHC 2512 (Fam)
- Decision of Baker J on costs [2010] EWHC 3385 (Fam)

G v E

- E was a man with severe learning difficulties, who for many years lived with a foster carer, F. Local authority removed him and placed him in a local authority unit without seeking agreement of his carer or his sister G, and without taking proceedings under the MCA.
- Judge held that the removal was a breach of article 5 and made an interim order under s. 48 MCA that E should continue to live in the local authority home, holding that article 5 did not impose a threshold condition that a court had to be satisfied that a person's condition warranted compulsory confinement.

G v E

- Court of Appeal held:
- The MCA was compliant with Article 5 and provided a procedure prescribed by law, in accordance with which a person who lacked capacity could be deprived of his liberty. The Bournewood gap was plugged and the inherent jurisdiction had been substantially superseded.
- Article 5 did not impose any threshold conditions that had to be satisfied before a court could consider whether it was in P's best interests to be deprived of his liberty.
- Persons with learning difficulties fall within the concept of "unsound mind" in Article 5 but there did not have to be medical evidence that the person had a medical disorder which was sufficiently serious to warrant compulsory confinement.

G v E

- Subsequently:
  - Baker J ordered that E should return to F's care on an interim and then final basis
  - The judge decided that Manchester City Council should be named: *"the arguments in favour of publicity – openness and public accountability – are truly compelling"* and there was no significant risk that E and other members of the family might be identified. *"It is important that the residents and council tax payers of Manchester know what has happened so that the local authority can be held accountable. And it is to be hoped that the publicity given to this case will highlight the very significant reforms of the law implemented by the MCA and in particular the DOLS in schedule A1, and the consequent very considerable obligations imposed on local authorities and others by the complex procedures set out in those reforms."*
  - The application by F and G to be appointed welfare deputies was dismissed: *"It is emphatically not part of the scheme underpinning the Act that there should be one individual who as a matter of course is given a special legal status to make decisions about incapacitated persons. Experience has shown that working together is the best policy to ensure that incapacitated adults such as E receive the highest quality of care. This case is an example of what can go wrong when people do not work together."*

2011

- London Borough of Hillingdon v Steven Neary [2011] EWHC 413 (COP) & [2011] EWHC 1377 (COP)
- Decisions of Peter Jackson J
- *"In this case a local authority accepted a young man with disabilities into respite care for a few days at the request of his father and then kept him there for a year. The question is whether this was lawful."*

The Neary case

- The ordinary powers of a local authority are limited to investigating, providing support services and where appropriate referring the matter to court

- If a LA seeks to regulate, control, compel, restrain, confine or coerce, it must, except in an emergency, point to specific statutory authority for what it is doing or else obtain the appropriate sanction of the court

The Neary case

- Hillingdon *"acted as if it had the right to make decisions about Steven, and by a combination of turning a deaf ear and force majeure, it tried to wear down Mr Neary's resistance, stretching its relationship with him almost to breaking point. It relied upon him coming to see things its way, even though, as events have proved, he was right and it was wrong. In the meantime, it failed to activate the statutory safeguards that exist to prevent situations like this arising."*
- Hillingdon breached Steven's rights by (1) keeping him away from his home contrary to Article 8; (2) by keeping him at the support unit and unlawfully depriving him of his liberty

The Neary case

- Hillingdon breached Steven's rights:

(1) by keeping him away from his home from January 2010 to December 2010, the LA breached his right to respect for his family life under Article 8;

(2) by keeping him at the support unit between Jan and April 2010, the LA unlawfully deprived him of his liberty contrary to Article 5(1);

(3) By keeping him at the support unit between April and Dec 2010, notwithstanding the DOLS authorisations, the LA unlawfully deprived him of his liberty contrary to Article 5(1);

(4) By failing to refer the matter to the COP, appoint an IMCA and/or conduct an effective review of the BI assessments, the LA deprived him of his entitlement to take proceedings for a speedy decision by a court on the lawfulness of his detention, contrary to Article 5(4).

The Neary case

- Learning points:
- Significant welfare issues that cannot be resolved by discussion should be placed before the COP.
- The DOL scheme allows a managing authority to deprive a person of liberty at a particular place: it is not to be used by a LA as a means of getting its own way on the question of whether it is in the person's best interests to be in the place at all.
- The responsibilities of a supervisory body require it to scrutinise the assessment it receives with independence and care.
- Where a supervisory body grants authorisations on the basis of perfunctory scrutiny of superficial best interests assessments, it cannot expect the authorisations to be legally valid.

2012

- A, B and C v X and Z [2012] EWHC 2300 (COP)
- Hedley J
- Did Z have capacity to marry, capacity to make a will, capacity to revoke or grant an EPA or LPA, capacity to manage his affairs, capacity to litigate, capacity to decide with whom to have contact?
- Each must be considered individually.

A, B and C v X and Z

- X was married for 56 years when his wife died in 2008. They had three children, A, B and C.
- X was diagnosed with dementia and executed LPAs in favour of A, B and C.
- In July 2010 Z became Z's full-time carer.
- In Oct 2010 X said he would like to marry Z.
- Thereafter family relationships deteriorated.

A, B and C v X and Z

- Capacity to marry (applying *Sheffield CC v E*):
  - Applicants have failed to satisfy court that X lacks capacity to marry: although he had suffered a significant decline in executive function, he retains many aspects of his intelligence in the fundamental level and the requirements for capacity to marry are relatively modest. Probable that he retains an understanding of the marriage contract and that his 56 years of beneficent experience of marriage has firmly etched upon his understanding the duties and responsibilities that go with it. Whether a decision he takes is wise or unwise, or leads to happiness or regret, is none of the court's business.

A, B and C v X and Z

- Capacity to make a will (applying *Banks v Goodfellow*):
  - Careful assessment of the medical evidence
  - Cannot make a general declaration that X lacks testamentary capacity but there will be times when he does lack such capacity and they will become more frequent. Any will now made by X, if unaccompanied by contemporary medical evidence, may be seriously open to challenge.
  - Same conclusion in relation to revocation or creation of EPAs/LPAs

A, B and C v X and Z

- Capacity to manage property and affairs (applying *Masterman-Lister v Brutton*)
  - Particular account has to be taken of the deterioration of executive function in the context of the complexity of X's business affairs
  - Although much of the details of his affairs are delegated to professional advisers, they remain advisers and decisions still have to be taken by X
  - On balance X lacks capacity to manage his own affairs. Although there will be times when a snapshot of his condition would reveal an ability to manage his affairs, the general concept of managing affairs is an ongoing act unlike the specific act of making a will

A, B and C v X and Z

- Capacity to litigate (applying *Masterman-Lister v Brutton*):
  - Operates in a different and more restricted time frame than ongoing management of property and affairs, but quite different to the decision to make a will or grant an LPA
  - X can understand aspects of the case, but in the round lacks capacity to conduct litigation even with the skilled advice available to him

A, B and C v X and Z

- Decision on capacity to take decisions on contact not now sought.
- Observation from Hedley J: *"The idea that this distinguished elderly gentleman's life should be circumscribed by contact provisions as though he was a child in a separated family is, I have to say, deeply unattractive."*

2013

- *Aintree University Hospitals NHS Foundation Trust v James* [2013] UKSC 67
- First case under the MCA to come to the Supreme Court
- Mr James had suffered a stroke, cardiac arrest and multiple organ failure, receiving CANH
- Trust applied to COP for declarations that it would be lawful for life sustaining treatment to be withheld in the event of a clinical deterioration.

Aintree v James

- The key question in such medical treatment cases is whether it is in the patient's best interests to have the treatment, rather than on whether it is in his best interests to withhold or withdraw it.

- The starting point is a strong presumption that it is in a person's best interests to say alive.

- Every patient and every case is different and must be decided on its own facts.

Aintree v James

"The most that can be said … is that in considering the best interests of this particular patient at this particular time, decision-makers must look at his welfare in the widest sense, not just medical but social and psychological; they must consider the nature of the medical treatment in question, what it involves and its prospects of success; they must consider what the outcome of that treatment for the patient is likely to be; they must try and put themselves in the place of the individual patient and ask what his attitude to the treatment is or would be likely to be; and they must consult others who are looking after him or interested in his welfare, in particular for their view of what his attitude would be."

Judge was right to give great weight to Mr James's family life which was *"of the closest and most meaningful kind"* and to weigh the burdens of the treatment against the benefits of a continued existence.

Aintree v James

- The Judge was right to give great weight to Mr James's family life which was *"of the closest and most meaningful kind"* and to weigh the burdens of the treatment against the benefits of a continued existence.
- Where a patient is suffering from an incurable illness, disease or disability, the patient's life may still be very well worth living. The question is whether the patient would regard the quality of life as worth living. *"It is not for others to say that a life which the patient would regard as worthwhile is not worth living."*
- The test of the patient's wishes and feelings is not objective (what the reasonable patient would think): matters need to be considered from the patient's point of view. *"Insofar as it is possible to ascertain the patient's wishes and feelings, it is those which should be taken into account because they are a component in making the choice which is right for him as an individual human being."*

2014

- *Cheshire West and Chester Council v P, Surrey County Council v P* [2014] UKSC 19

- Now the leading domestic authority on what constitutes a deprivation of liberty

Cheshire West

- Axiomatic that persons with disabilities have the same human rights as the rest of the human race and what it means to be deprived of physical liberty must be the same for everyone

- Confining Lady Hale: *"If it would be a deprivation of my liberty to be obliged to live in a particular place, subject to constant monitoring and control, only allowed out with close supervision, and unable to move away without permission … then it must be also be a deprivation of the liberty of a disabled person. The fact that my living arrangements are comfortable, and indeed make my life as enjoyable as it could possibly be, should make no difference. A gilded cage is still a cage."*

Cheshire West

- The acid test:
- is the person under continuous supervision and control?
- is the person free to leave?
- Irrelevant factors are compliance or lack of objection; relative normality of the placement; the reason or purpose behind a particular placement.

Post-Cheshire West

- The cases still keep on coming …
- *R X (DOL) [2015] EWCA Civ 599*
- *AB (A Child) (DOL: Consent)* [2015] EWHC 3125; *D (A Child) (DOL)* [2015] EWHC 922; *A Local Authority v D* [2016] EWHC 3473
- *Staffordshire CC v KK* [2016] EWCA Civ 1317
- *R (Ferreira) v HM Coroner for Inner South London* [2017] EWCA Civ 31
- *R (Liverpool CC) v Secretary of State for Health* [2017] EWHC 986 (Admin)
- *Law Commission*

2015

- *King's College Hospital NHS Foundation Trust v C and V* [2015] EWCOP 80
- Decision of Macdonald J
- Widely reported (by the media) as "Court grants woman right to die after losing her sparkle" (see also from the same year *M v N* [2015] EWCOP 76)

King's College Hospital NHS Foundation Trust v C and V

- Whether C has capacity to decide whether or not to consent to the life saving treatment (renal dialysis) that doctors wished to give her following her attempted suicide
- C *"has led a life characterised by impulsive and self-centred decision making without guilt or regret … during her life C has placed a significant premium on youth and beauty and on living a life that, in C's word, 'sparkles'."*
- Issue was whether C was unable to use and weigh the information relevant to the decision in question
- Court undertook detailed examination of medical records and attendance notes as to what C had said, in what context and in response to what information

King's College Hospital NHS Foundation Trust v C and V

- Important not to confuse a decision by C to give no weight to her prognosis having weighed it with an inability on her part to use and weigh the information
- C had given a range of reasons for reaching her decision regarding further treatment: *"not the case that C has undertaken the decision making exercise in relation to dialysis solely on the basis of a concrete or black and white view taken in respect of her prognosis but rather on the basis of placing in the balance many factors relevant to the decision. That C considers that these factors outweigh a positive prognosis and the chance of life that it signals may not accord with the view that many may take in the same circumstances, and indeed may horrify some. However, they do … demonstrate C using and weighing information relevant to the decision in question when coming to that decision."*
- Court did not need to decide, but might have had difficulty in deciding that, any inability was because of an impairment or disturbance in the functioning of the mind and brain – rather than the *"thought processes of a strong willed, stubborn individual with unpalatable and highly egocentric views."*

2016

- *Briggs v Briggs (No 1)* [2016] EWCOP 48 – scope of section 21A, whether proceedings properly brought under section 21A, being heard by the Court of Appeal 3-4 July 2017

- *Briggs v Briggs (No 2) In re Briggs (Incapacitated Person) Medical Treatment: Best interest decision) (No. 2)* [2016] EWCOP 53

- Decisions of Charles J

Briggs v Briggs

- P in a minimally conscious state
- P's wife sought a declaration that it was lawful for him to cease to be given CANH and to receive only palliative care
- Application granted
- Of key importance was section 4(6) MCA and the weight to be given to P's past and present wishes and feelings, believes and values and other factors P would be likely to consider if able to do so
- Sanctity of life and basic instinct to survive relevant, but care had to be taken not to assume that P would regard those factors as determinative now that he was in different circumstances

Briggs v Briggs

- *"in all the circumstances of this case I have concluded that the weightiest and so determinative factor in determining what is in Mr Briggs's best interests is what I am sure he would have wanted to do and would have concluded was in his best interests. And so, for him, his best interests are best served by giving effect to what he would have been able to dictate by exercising his right of self-determination rather than the very powerful counter-arguments based on the preservation of his life."*
- *"At the heart of any application of the MCA is the relevant patient, here Mr Briggs. His family and those who know him best gave evidence with courage, dignity and at considerable emotional cost to themselves that convinced me of what Mr Briggs would have wanted and would have decided was in his best interests if he had been sitting in my chair during the hearing."*

2017

- *N v A Clinical Commissioning Group* [2017] UKSC 22
- Could the COP consider an option which the public body is not willing to offer and where the decision not to offer it has not been challenged by way of JR or under the HRA?

N v ACCG

- The Court has now greater power to oblige others to do what was best than the person would have had himself if he were of full capacity
- Court could therefore only choose between such options as would have been available to that person
- If a party is seeking a BI decision about options which the public body would not, and could not be obliged to, provide, the court could use its case management powers to refuse a hearing on the dispute as serving no useful purpose
- Not strictly a case about jurisdiction but about how the case should be handled given the limited powers of the court

Where next?