Hazards with the use of Court-approved Deprivation of Liberty Safeguards (DoLS) and Legal aid

This paper has been prepared for the information of legal practitioners by the Law Society's Mental Health and Disability Committee. It sets out our concerns as to the impact of the Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013 on the entitlement to non-means tested legal aid in DoLs cases where there is court challenge to a DoLS authorisation.

Background

Section 21A Mental Capacity Act 2005 (MCA) gives the Court of Protection jurisdiction to determine a number of matters which relate to deprivation of liberty safeguards standard or urgent authorisations under Schedule A1 MCA:

Powers of court in relation to Schedule A1

[21A][1]—(1) This section applies if either of the following has been given under Schedule A1—

(a) a standard authorisation;
(b) an urgent authorisation.

(2) Where a standard authorisation has been given, the court may determine any question relating to any of the following matters—

(a) whether the relevant person meets one or more of the qualifying requirements;
(b) the period during which the standard authorisation is to be in force;
(c) the purpose for which the standard authorisation is given;
(d) the conditions subject to which the standard authorisation is given.

(3) If the court determines any question under subsection (2), the court may make an order—

(a) varying or terminating the standard authorisation, or
(b) directing the supervisory body to vary or terminate the standard authorisation.

(4) Where an urgent authorisation has been given, the court may determine any question relating to any of the following matters—

(a) whether the urgent authorisation should have been given;
(b) the period during which the urgent authorisation is to be in force;
(c) the purpose for which the urgent authorisation is given.

(5) Where the court determines any question under subsection (4), the court may make an order—

(a) varying or terminating the urgent authorisation, or
(b) directing the managing authority of the relevant hospital or care home to vary or terminate the urgent authorisation.

(6) Where the court makes an order under subsection (3) or (5), the court may make an order about a person's liability for any act done in connection with the standard or urgent authorisation before its variation or termination.

(7) An order under subsection (6) may, in particular, exclude a person from liability.

It will be seen that the ambit of s21A is broad and goes beyond simply deciding whether or not an authorisation should remain in place. Appeals under s21A can involve complex issues of liability as well as bringing in broader best interests and welfare issues which still relate to the issue of the reason why the person was detained. For example, P wants to return to his or her own home, but the statutory body wants P to go and live in residential care.

Legal Aid before the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO")

When the amendments to the MCA, by way of the Mental Health Act 2007 came into force, non-means tested legal aid was made available to P and P's RPR challenging a standard authorisation. Clearly, this was because P was detained and this involved P's rights under Article 5 of the Human Rights Act and P's right to challenge his/her detention promptly under Article 5(4).

The wording of the LSC Manual 2E 002; 3C 653 was that means testing would not need to be carried out for:

> "Legal Representation of a person (or of a representative of that person) in respect of whom an authorisation has been made under para.2 of Sch.A1 to the Mental Capacity Act 2005."

Questions would sometimes arise as to whether non-means tested funding would continue if P's authorisation were to end but the Court were to substitute the authorisation with a personal welfare order authorising deprivation of P's liberty. The above wording is ambivalent and on the face of it, P would still be "a person in respect of whom an authorisation has been made", even if the authorisation did not continue throughout the litigation. P would remain detained which would continue to invoke P's rights to challenge the detention, but simply an order had been made in lieu of the DOLs authorization.

A P who was deprived of his or her liberty through order of the Court, for example because they lived in supported accommodation, was never able to obtain non-means-tested funding, raising questions over human rights compliance and fairness in a more generous funding arrangement being available to an incapacitated person deprived of their liberty through the statutory scheme than is available to an incapacitated person deprived of their liberty by the order of the Court.

Re HA [2012] EWHC 1068 (CoP)

Mr Justice Charles made the following comments in this case heard in February 2012:

> *"In a discussion with counsel for the Official Solicitor I have indicated that my present view is that in the context of an application under s. 21A the court should not, for example, extend a standard authorisation (even if it has the power to do so under s.21A), or somehow continue the statutory scheme, whilst it determines the application. Rather, my present view is that the court should exercise its own powers to hold the ring whilst it determines the application and therefore give appropriate interim authorisations of any deprivation of liberty and make appropriate interim orders. If, when it determines the application, the court concludes that the relevant person should live in a care home, or be in a hospital, then, it seems to me, that it should generally direct that the statutory DOLS scheme should apply again to any deprivation of liberty. That regime has checks and balances that generally should be preferred to review by the court.*
> *9 To my mind, on that approach, the application remains one under s. 21A notwithstanding that whilst it continues the court is exercising powers conferred by other sections and a, if not the, central issue is what available regime of care will best promote P's best interests. This is because the proceedings were issued under s. 21A and, in the exercise of the jurisdiction conferred by that section, the court has to consider amongst other things the best interests of P. I add that if, in those proceedings, the court reaches a conclusion that the statutory scheme should or would no longer apply to the regime in place to promote the best interests of P, it has more than adequate powers of its own motion to make longer term declarations and orders under ss.15 and 16.*
> *10 The discussion that gave rise to this expression of view arose, and is relevant, because, at the moment, there is a distinction between the funding available from the Legal Services Commission in respect of an application under s.21A, and other applications before the court, albeit that they can often raise the same central issues. I have recorded those views to indicate why I have proceeded on the basis that this application is, and remains, an application under s.21A and that the court is making interim orders in those proceedings."*

These comments should be reconsidered in the light of the change to the availability of non-means-tested funding following the Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013.

The New Regulations

On 1st April 2013 the Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013 came into force. Regulation 5 lists categories of cases where the means of the applicant are not taken into account; in other words the legal aid is not-means-tested.

This includes:

(f)legal help in contemplated proceedings or legal representation in proceedings or contemplated proceedings in relation to any matter described in paragraph 5(1)(a) or (b) (mental health and repatriation of prisoners) of Part 1 of Schedule 1 to the Act to the extent that the individual's case or application to the relevant tribunal under the Mental Health Act 1983(**2**) or paragraph 5(2) of the Schedule to the Repatriation of Prisoners Act 1984(**3**) is, or is to be, the subject of proceedings before the relevant tribunal;

(g)legal representation in relation to a matter described in paragraph 5(1)(c) (mental capacity) of Part 1 of Schedule 1 to the Act to the extent that—

(i)the legal representation is in proceedings in the Court of Protection under section 21A of the Mental Capacity Act 2005(**4**); and

(ii)the individual to whom legal representation may be provided is—

(aa)the individual in respect of whom an authorisation is in force under paragraph 2 of Schedule A1 to the Mental Capacity Act 2005; or

(bb)a representative of that individual appointed as such in accordance with Part 10 of that Schedule;

Turning to the comments in Re HA, it will be seen that for the purpose of funding the test is no longer whether or not the application is "under s21A'. The question is now, simply, whether an authorisation is in force or not. If the court decides to "hold the ring," then P or P's RPR will lose their non-means-tested legal aid. This in effect denies P his rights under Article 5(4) to continue to challenge his detention. He also loses his right to a relevant person's representative since the authorisation must be terminated by the supervisory body once the Court has made an order authorising the detention.

It is suggested that these issues are borne in mind by both practitioners and the judiciary in the event that the court considers "holding the ring", as the implications of this have changed since the HA judgment was given. The issues highlighted by this paper have been brought to the attention of the Court of Protection who are aware of the issues and potentially adverse impact on P. We are of the view that practitioners, and particularly Counsel should be mindful of the concerns expressed here as it is quite common for Counsel for the applicant to draft the directions order for the first hearing in terms of the Court substituting its order of detention for the authorisation. Solicitors and counsel for applicants should always consider opposing reliance on Re HA because of the consequences of the very narrow interpretation by the LAA of its human rights duties to P in granting him or her legal aid to challenge the ongoing detention.