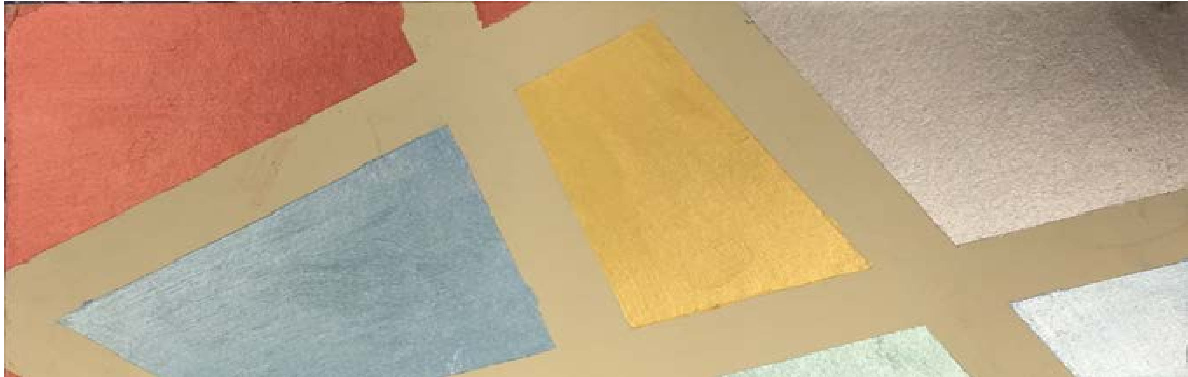

Welcome to the September 2024 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: the Court of Appeal on belief and capacity, and both sexual and medical complexities before the courts;

(2) In the Property and Affairs Report: a guest post updating deputies and attorneys on important responsibilities;

(3) In the Practice and Procedure Report: which decisions are for doctors, and which for the courts; jury-rigging Article 5(4) compliance in community DoL cases, and transparency under the spotlight;

(4) In the Mental Health Matters Report: a Mental Health Bill on the way, the hard edges of the MHA 1983 and the CQC and Valdo Calocane;

(5) In the Wider Context Report: the limits of Article 3 in the context of the inherent jurisdiction, the CQC and covert medication and Lord Falconer's Assisted Dying Bill;

(6) In the Scotland Report: the Scottish Government consults on legislative measures to respond to the Scott Review and a report from the World Congress on Adult Care and Support.

There is one plug this month, for a free digital trial of the newly relaunched Court of Protection Law Reports (now published by Butterworths. For a walkthrough of one of the reports, see here.

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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## Equal Treatment Bench Book - new edition

A new (2024) edition of the Equal Treatment Bench Book (ETBB) has been published. As it notes in the preface:

> *Treating people fairly requires awareness and understanding of their different circumstances, so that there can be effective communication, and so that steps can be taken, where appropriate, to redress any inequality arising from difference or disadvantage. This Bench Book covers some of the important aspects of fair treatment of which all judges should be aware, making some suggestions as to steps that judges may wish to take, in different situations, to ensure that there is fairness for all those who engage in legal proceedings in our courts and tribunals.*

And as King LJ notes in her foreword:

> *Since 2018 it has been published online and, whilst its focus is primarily aimed at all judicial office holders and is written by judges for judges, it has also come to be regarded as an invaluable resource for litigants in person and to many other people connected directly or indirectly with issues relating to equal treatment.*

Each chapter has been updated, with significant revisions, in particular, to the chapter on "capacity (mental)."

## Article 5(4), community deprivation of liberty and jury-rigging a solution

*Re PQ (Court Authorised Dol : Representation During Review Period)* [2024] EWCOP 41 (T3), Poole J

*Article 5 ECHR – deprivation of liberty*

### Summary[1]

Poole J has examined in some detail the requirements of Article 5(4) ECHR in the context of court authorised deprivation of liberty. On the facts of the case before him, he held that Article 5(4) required that PQ, the subject of the authorisation, had to be represented throughout its length, by a litigation friend, an ALR or a rule 1.2 representative. He noted (at paragraph 57) that:

> *My conclusion that there would be no compliance with Art 5(4) without the*

[1] Arianna having been involved in the case, she has not contributed to this note.

> *appointment of a representative, be it a Litigation Friend, an ALR, or a r1.2 representative, is consistent with the domestic authorities, in particular the judgments of Munby J and Charles J set out above and the recent observations of Senior Judge Hilder in Bolton Council v KL (above). The likely need for representation for a P who is deprived of their liberty has been recognised not only in relation to the planned review of their deprivation of liberty but also during the whole of the review period. My conclusion also sits comfortably alongside the mandatory requirement for P to have a representative when deprived of their liberty in a hospital or care home under the DoLS regime. In the present case, without some form of independent representation, PQ's Art 5 rights would be "theoretical and illusory" not "practical and effective".*

Poole J also had to grapple with what to do where there was (as is often the case) no person who can act as unpaid 1.2 representative, and no funding available for a paid representative. He did not consider that the option of using a Court of Protection visitor was viable, not least because the OPG advised the parties that they were not known to have been used for purposes of providing ongoing representation. Having examined the public funding situation (and found it distinctly lacking), he held on the facts of the case – which arose at the end of proceedings in which the Official Solicitor had been involved – that:

> *66. […]Taking all matters into consideration, having determined that PQ's participation requires either the continued role of a Litigation Friend or the appointment of a representative, each being independent of the detaining authority, and there being no option to appoint a r1.2 representative, I shall direct that P shall continue to be a party and that the Official Solicitor shall continue to act as Litigation Friend until further order. Were an ALR appointed in place of the Official Solicitor acting as Litigation Friend, and were the duties of the ALR to include monitoring the arrangements during the review period and raising challenges and making applications as appropriate, then I would be satisfied that the appointment of an ALR would meet the requirements of Article 5 for the purposes of the review period. However, the Official Solicitor is already in place. I do not have evidence that the costs of maintaining the Official Solicitor as Litigation Friend will be disproportionate or indeed that they will be higher than the costs of appointing and then funding an ALR. I would consider authorising the appointment of a suitable ALR on application if assured that funding were secured and that it would be proportionate to make the appointment and to discharge the Official Solicitor as Litigation Friend but, for now at least, I shall direct that the Official Solicitor shall continue to act as Litigation Friend for PQ.*

Poole J identified that the question of PQ's continued participation was to be revisited at a review hearing, but that:

> *67. […] During the dormant period of the proceedings in the review period, the Official Solicitor as Litigation Friend should act as would an RPR under the DoLS scheme or as would a r1.2 representative. She must monitor the implementation of the Care Plan, provide to the Court updating information on the implementation of the Care Plan ahead of the review hearing as provided for in the order which the Court will make, and she must make an earlier application for review of the Court's order if she considers that the Care Plan no longer serves the best interests of PQ and that an application is required. She may act through a solicitor for those purposes or she might*

> *perhaps engage another kind of professional representative to carry out those functions insofar as they do not involve making or responding to court applications. For example, a professional RPR might be suitable for the purpose of monitoring the care arrangements, care plans, and the deprivation of PQ's liberty, reporting on them to the Official Solicitor.*

Poole J expressed the hope (at paragraph 68):

> *that the LAA will reflect on the need for such services to be provided to secure PQ's participation and the state's compliance with Art 5. These functions are important and they are connected with ongoing proceedings. There is no alternative form of representation available. There may be a need for future oral hearings but that cannot be known in advance. The very purpose of representation would be to ensure that the need for an oral hearing during the review period was swiftly identified and appropriate applications to Court were made.*

He noted that the outcome was:

> *69.* […] *unsatisfactory because, although important, the functions that the Official Solicitor will be performing during the review period could as well be performed by a r1.2 representative. I have not been provided with comparative costs but presume that the cost of a r1.2 representative would be less than the cost of retaining the services of the Official Solicitor and the solicitor or representative instructed on her behalf. The costs will fall on the LAA rather than the Local Authority. There is therefore an incentive on Local Authorities to refuse to fund r1.2 representatives if they know that the LAA will fund an ALR or the Official Solicitor. Charles J referred to these "budgetary battles" and sadly they are continuing eight years after his plea for a resolution. In the end, the state pays and the solution to which I have been compelled to arrive means that the state will probably pay more than it should pay. The Official Solicitor has not asked the Court to consider the wider ramifications for the allocation of limited resources, but the potential ramifications are plain for all to see. The solution, which lies in the hands of the state through central government and Local Authorities, is to fund a professional r1.2 representative. The failure to do so results in a solution that probably imposes a higher burden on the taxpayer. However, I cannot countenance the alternative of leaving PQ with no independent representation of any kind during the review period.*

Anticipating that the LAA might withdraw funding, he made directions:

> *71.* […] *that, in the event of a decision by the LAA to refuse or to withdraw funding of the Official Solicitor and/or an ALR:*
>
> *i) The matter shall be re-listed before the Court for further consideration of PQ's participation.*
>
> *ii) The LAA shall provide a full explanation to the Court of its decision not to fund PQ's representation.*
> *i*
> *iii) The LAA shall be requested to secure ongoing funding for PQ's representation by a solicitor instructed by the Official Solicitor or an appointed ALR pending further determination of the Court of the participation of PQ.*
>
> *iv) The Local Authority shall review its decision not to fund a r1.2 representative and shall provide a written explanation to the Court in the event that it decides not to fund a representative even when, as a result,*

*PQ in their care will have no independent representation.*

*v) The Secretary of State for Justice shall be joined as a party and required to provide evidence as to the provision of funds for a professional r1.2 representative for PQ.*

Poole J did, however, emphasise that he did not rule out that:

*72. […] in some cases, compliance with Art 5(4) may not require the appointment of a representative or litigation friend during a review period or at all.*

Earlier in his judgment, he had amplified this point thus:

*49. […] That is not to rule out circumstances in which the Court might be satisfied that there is no requirement for P to be a party, and so to have a Litigation Friend, or to be supported by an ALR or a r1.2 representative. In principle, having regard to the matters to be considered under COPR r1.2(1), the Court might discharge P without appointing a representative if satisfied that there is no prospect of any contentious matters arising in the review period and that there will be sufficient monitoring and sufficient opportunity for P to raise concerns or to make challenges pending the planned review. Such circumstances are likely to be rare but to the extent that Charles J held in Re JM that it could never be Art 5 compliant for P as a non-party to have no representative when deprived of their liberty, I respectfully disagree. However, in most cases the Court will not be satisfied that P can participate without either being a party with a Litigation Friend or ALR, or as proceeding as a non-party with an ALR or a r.1.2 representative.*

### Comment

Given that a litigation friend cannot be compelled to act, it would have been open to the Official Solicitor simply to decline to act on an ongoing basis (or decline to act absent a cast-iron guarantee as to her legal costs in the 'dormant' period, which the court clearly could not provide). It is to her credit that she did not seek to do.

Whilst Poole J made clear that he was determining the issues solely as they related to the circumstances of PQ's case, the reality is that the observations that he made were of wider relevance, and his suggestion that there may be "some" cases in which there was no need for a rule 1.2 representative / ALR / litigation friend is, in reality, encompassing only rare circumstances. The continued (and it appears indefinite) non-appearance of LPS means that the issues considered by Poole J will remain live for the foreseeable future, together with the attendance complexity and additional expense required to jury-rig Article 5(4) compliance into the system.

## Which decisions are for the courts, and which for clinicians?

*Re AA ((Withdrawal of Life-Sustaining Treatment: No Best Interests Decision)* [2024] EWCOP 39 (T3) (Henke J)

*Best interests – medical treatment – practice and procedure*

### Summary[2]

This case concerned a young man, AA, in a prolonged disorder of consciousness, identified

[2] Tor having been involved in the case, she has not contributed to this note.

by the treating team as being on the border of a vegetative state/minimally conscious state-minus. His parents did not agree either with his diagnosis or prognosis. At the outset of the case, the applicant ICB[3] sought a determination as to which of two options were in AA's best interests.

1. Transfer to one of two identified nursing homes on a palliative care pathway, with no readmission to hospital, and continuation of clinically indicated medications and CANH.

2. Withdrawal of CANH at the hospital where he was being cared for, with provision of palliative care.

Matters then evolved in light of the deterioration in AA's condition, such that the applicant ICB contended that there was no available option other than a move to palliative care at the hospital. The ICB initially sought a transfer to the High Court under the inherent jurisdiction on the basis that there was no basis to suggest that the proposed plan was in breach of duties owed to AA in negligence or of his rights under the ECHR, and no necessity for further medical evidence in light of the opinions already received. In light of considerable resistance from the Official Solicitor and AA's parents, the ICB sought either a declaration of lawfulness under the inherent jurisdiction or a declaration of lawfulness and best interests under the MCA 2005.

Henke J made clear that she considered that the case should have been brought earlier than it was, given that AA's parents "*fundamentally do not accept and have not accepted the clinicians' opinion throughout his admission to hospital*" (paragraph 35). However, given where matters now were:

> *I have reminded myself of s.1(5) MCA and s.4. If the court is being asked to exercise its powers under the Act, then the court is required to exercise its judgment and to determine the application in accordance with the Act by reference to all the relevant circumstances. However, in this case I find myself with no choice of available treatment options. As Moylan J put it in An NHS Trust v L & Others [2012] EWHC 4313 (Fam) at paragraph 113.*
>
>> *"113 [...] If there are no treatment options, then the court has no effective choice to make. This is not the same as the situation where the medical evidence is all to one effect as in the case of NHS Trust v MB and others [2006] EWHC 507 Fam"*

Henke J agreed with these observations, and accepted the "well-established" principles that

> *i. a patient cannot require a doctor to give any particular form of treatment and nor can a court - NHS Trust v Y [2018] UKSC 46.*
>
> *ii. It is an abuse of process to try to use a best interests declaration under the MCA 2005 to persuade a clinician to provide treatment where none is being offered - AVS v A NHS Foundation Trust & Anor [2011] EWCA Civ 7.*

The ICB was recorded as inviting the court to consider proceeding to make a best interests decision as Moylan J (as he then was) had done in *An NHS Trust v L* and Judd J had done in *London North West University Healthcare NHS Trust v M* [2022] EWCOP 13. Whilst not stated on the face of the judgment it appears, reading

[3] Who, as the subsequent costs decision made clear, only became involved at the point when it became clear that one of the options for future care would include treatment outside hospital it would have commissioned.

between the lines, that the ICB was not positively advancing the proposition that a best interests decision should be made. Rather, it was doing so on the basis that this was a course of action open to the court in light of the approach taken in those two cases, in both of which there was, in fact, only one option. Henke J, however, was not prepared to do so. She considered that the two cases were different:

> *Moylan J had heard extensive evidence over many days and that he reluctantly proceeded to make a best interests decision because all parties asked him to and no one took the no other available option point before him. In the London North West case Judd J had had the opportunity to receive and hear evidence from the treating clinician, the second opinion doctor and another who appears to be a court appointed expert who had provided a review. Having read that case with care, it seems to me that the case Judd J had before her was one where all the available evidence, including that obtained through the court process, was all to one effect.*

Here, however, Henke J noted, the Official Solicitor had not pursued the instruction of an expert, because this would have been "futile," given:

> *40. […] the Applicant's clear position that regardless of any further expert opinion, they were only prepared to implement the PCP they had submitted to this court. The case before me is built on the evidence provided by the clinicians and that obtained by them. I do not for one moment doubt the good intentions or integrity of the clinicians in this case. Professor Turner-Stokes in evidence was an obviously committed and caring professional who understood the gravity of her task and made her clinical judgment in accordance with her considerable expertise and conscience.*

As the clinical view was that there was only one option, and the clinicians would only treat AA in accordance with that option:

> *40. […] This case is stark. There is only one available option before this court. The reality is that this court has no choice to make. Accordingly, I have concluded that there is no best interest decision to make here, and I do not do so.*

Henke J declined then to do what the ICB actually wanted it to do, namely to make a declaration in the inherent jurisdiction that it was acting lawfully. She accepted (at paragraph 41) that she could do, but the question was whether she should. As she noted:

> *Clinicians are not legally obliged to seek a declaration from a court as to the lawfulness of any proposed treatment - see Re Y [2018] UKSC 46 at paragraphs 29-33. Professor Turner-Stokes gave evidence that regardless of whether or not I granted the declaration, the clinicians would continue to treat AA in accordance with their clinical judgment and implement the PCP. That begs the question: why is the declaration being sought when whether or not I grant it does not affect the outcome for AA? It appears to me that the declaration is really being sought to protect the clinicians and medical staff now and in the future from potential legal action given AA's parents fundamental disagreement with the PCP. I have considered whether I should grant the declaration sought in such circumstances. If I thought that on the ground that the declaration would make any difference to the outcome for AA then I may have been persuaded to make it. But the reality here is that the declaration will not alter anything. The clinicians will continue to treat in accordance with their clinical judgment whether or not I make the declaration.*

> *AA's parents' views, whether reasonable or not, are deeply held. In my view, granting the declaration sought will not change his parents' views nor actually how they are likely to behave to staff implementing the plan. It is purposeless.*

Henke J made clear that she shared the Official Solicitor's frustration that the court process had been rendered "nugatory." She would have liked to permit the Official Solicitor's application to instruct an expert to overview the clinical evidence and that obtained from other sources by the clinicians. This would have given the court "*arms-length evidence which may or may not have supported the views of those treating AA*" (paragraph 42). But, as she noted, this would have been futile:

> *unless the expert was prepared to take clinical responsibility to implement any alternative plan. The stark reality of his case is that AA is too fragile to be moved to another hospital and that those at the RHRU are clear that the only treatment plan clinically viable for AA and which they are prepared to implement is the PCP. The court has no choice and I have asked myself whether in circumstances such as these, when the court has no choice at all, it should rubber stamp the decision of others. I have decided that I should not. In coming to that decision, I should emphasize that I have the greatest respect for the clinicians in this case and the difficult decisions that they have had to take and will have to take until AAs death. They do so in accordance with their* [Hippocratic] *oath and to the highest of professional standards. I do not criticise them or the judgment they have made. However, the reality of this case is that the treatment decision in this case is purely a clinical decision not the court's decision. The court's approval is not required to implement it. The court is not needed to sanction the plan and the court has no further role to play in what treatment AA does or does not receive.*

There was, therefore, nothing else that the court could do, and the proceedings were a "*purposeless distraction from AA and the remainder of his life however long it may be*" (paragraph 43).

Henke J made clear that she had in mind AA himself, and that there was no direct evidence before her as to what he would have chosen if he was not going to recover and would experience pain. His mother, she noted, thought he would, and his siblings' views had not been ascertained:

> *46. When Professor Turner-Stokes was asked about a bespoke plan for AA, she told me that the PCP plan for AA would be bespoke in that it would be varied to meet his presenting clinical symptoms as and when they occurred. That is a reasonable reaction from a doctor and is a reasonable clinical view, but it is one which in my judgment does not take into account that a person is more than their clinical symptoms. The plan, however, is set. The stance of the Applicant was clear in closing. Further evidence of AA's wishes and feelings is not necessary and, in any event, would not cause them to change their mind. I remind myself that would be an abuse of process for me to try to change the clinical view in this case. I therefore do not do so. I simply note that the PCP is the only option before the court and that further evidence from family about AA's wishes and feeling will not alter it.*

Shortly after the judgment was circulated to the parties, AA died; the judgment itself was not made public until the transparency order made in his case expired.

### Comment

It is not entirely clear from the judgment why the application was not made earlier in AA's case. In the subsequent costs judgment, however, Henke J declined to make an order for any costs against the ICB in favour of AA's parents, noting that

> *the criticism that the Court has made both about delay in initiating proceedings and the conduct of the Trust in this case cannot be levied against the ICB. They are a separate entity. The Trust did not appear before me. The ICB wase not responsible for AA's care and treatment in the hospital. They only became involved when there was an option for care outside the hospital which it would have commissioned.*

It is also, though, not entirely clear what difference that an earlier application would have made to the substantive outcome, if AA was, in fact, on a downwards trajectory, such that the clinical options (which only the clinicians themselves can determine) were in fact narrowing. That does not mean that there might not been a different flavour to the proceedings – but the reality also is that it may well have the case that AA had died before any external evidence could be obtained.

However, taking a step back, there are two critical observations of Henke J which are of wider importance:

(1) Clinicians are not legally obliged to seek a declaration from a court as to the lawfulness of any proposed treatment in respect of adults with impaired decision-making capacity.[4] They may well be well advised to,[5] but there is no legal obligation upon them to do so.

(2) Not only can the Court of Protection not seek to 'magic' up options which are not there through the lens of best interests, it is in fact an abuse of process to do.

It may be thought that these observations are not entirely easy to square with the observations of Hayden J in *Re GUP* discussed here, but, to the extent that they are inconsistent, the observations in the former case were obiter, whereas the observations here form part of the ratio of the decision, and were reached after full (if compressed) argument.

More broadly, however, they show that the courts and the clinicians remain engaged in a delicate dance. Alex first commented on this dance nearly a decade ago, and these cases show, to him at least, that:

(1) The rules of the game could perhaps usefully do with consideration through a restatement of the wider principles in play (not least for instance, one might think, in an updated Code of Practice for which Hayden J's guidance on serious medical treatment was only ever meant to be a stop gap).

(2) Questions of medical decision-making, and the authority for such decision-making, are ones about which there remains a considerable degree of ambivalence. Much of my work now seems to involve digging into this sources of this ambivalence and

[4] The position may be different in respect of children, at least in respect of non-therapeutic sterilisation: see AB v CD & Ors [2021] EWHC 741 (Fam) at paragraph 116.

[5] When I say "well-advised" above, that advice would be very strong if the question was one of which option was in the person's best interests: as the Supreme Court made clear in *NHS Trust v Y* at paragraph 125, "[i]f, at the end of the medical process, it is apparent that the way forward is finely balanced, or there is a difference of medical opinion, or a lack of agreement to a proposed course of action from those with an interest in the patient's welfare, a court application can and should be made, and there should be no reticence about involving the court in such cases."

thinking about ways in which to help think more transparently about it – and this briefing document may help at least give a framework for starting to identify some of the factors in play, to allow a better discussion.

## Short note: a (not) closed hearing judgment

*P v Manchester City Council & Ors* [2024] EWCOP 43 (T1) is a rare published example of an important type of judgment, namely that following an application for a closed material order (in this case, to prevent disclosure of material to P's mother, with whom he lived). Wherever such decisions are taken, and the outcome is that either material is withheld or a hearing takes place in the absence of a party, the guidance from the former Vice-President, Hayden J, makes clear that a judgment is required. In the instant case, it might be thought that a judgment was, strictly, not required, because District Judge Matharu refused the application, in essence because the evidence did not come close to satisfying the threshold required, and there was "not a shred" of evidence that disclosure of the relevant materials would put P at risk from his mother. She further ordered that all the public body applicants (who had all sought non-disclosure) should pay the costs of P's mother and of the Official Solicitor as P's litigation friend.

## Short note: the BBC, transparency and the naming of P

In *British Broadcasting Corporation v Cardiff Council & Ors* [2024] EWCOP 50 (T3), Hayden J had sought to vary a transparency order made in relation to a man called MC, whose case had been before the court for a number of years. The BBC sought the variation of the order to allow MC, his adoptive mother (and her parents) and adoptive father, to identify his current accommodation as a specialist secure mental health unit in Cardiff and to name a psychologist formerly involved in his case, with her consent).

As Hayden J identified:

> *13. There are two competing rights involved. One is freedom of expression, freedom of the press, a fundamental right protected by Article 10 which requires jealously to be guarded. And the other is the broad umbrella of MC's rights to family life i.e., to privacy, and to appropriate and proportionate protection of his vulnerability as an adult with disabilities.*
>
> *14. Whilst these are, manifestly, rights which have a wholly different complexion, they require to be balanced in a parallel analysis. Lord Steyn expressed that balance in the terms referred to above. The emphasis is that neither right has precedence over the other. Where they are in conflict, the focus is on the comparative importance of the specific rights on the individual facts of the case. In this exercise, the justification for interfering with each right requires to be considered, in which process proportionality is the lodestar.*
>
> *15. In her methodical submissions, Ms Overman emphasised the danger of conflating the approach to the making of a Transparency Order or Reporting Restriction Order during proceedings, with the analysis of the factors properly in play at this application. She emphasised, correctly to my mind, that the scope of the existing order is rooted in Rule 4 of the Court of Protection Rules 2017 and section 12 of the Administration of Justice Act 1960. This is not a steamroller which tramples all before it, in terms of freedom of expression. The provisions are focused on protecting the identification of the individual involved in the Court of Protection proceedings. They go that far and no further.*

> *16. What then of the competing rights themselves? An important piece of evidence filed in this application is the statement of Dr R. She is employed by the Health Board as a Consultant learning disability psychiatrist. She has been involved with MC's care since the commencement of the Mental Health Act proceedings in February 2024. It is obvious that she has got to know MC well and feels strongly that he should be protected from what she sees as the inevitable intrusion into his life, in consequence of his involvement and profile in the proposed documentary. The Health Boards' position, articulated succinctly by Mr Jones, is that they oppose the application made by the BBC because of real concern about the potential for adverse impact on MC's personal and private life should the application be granted. In the course of exchanges Mr Jones agreed that the essence of his clients' case is that there can be no advantage of any kind at all for MC of participating in this programme. Conversely however, he submits, there is real potential for harm. From this perspective, the Health Board consider that an evaluation of the parallel analysis comes down very heavily against MC's participation in the programme. Whilst this is an important analysis, the exercise is wider than that. Even were there to be likely harm to MC in consequence of the BBC's programme, I am still required to evaluate any such harm alongside the competing rights and interests under Article 10. This is not solely a welfare issue.*
>
> *17. There is, as I have said, no doubt that MC has latterly made real progress. Perhaps the most powerful evidence of that comes not from the evidence of the Trust, nor indeed from the litigation friend, but from MC's mother (CD). Her obvious delight and relief in her son's recent improvement, having gone through what have plainly for both been the darkest of hours in some very difficult years, was almost palpable. In my judgement, the risk of jeopardising that progress, recognising the enormous importance of it in unlocking (almost literally) MC's potential to live a more unrestricted life which promotes his autonomy, weighs very heavily when considering his Article 8 rights. Evaluation of MC's "private and family life" requires me to consider not just his present circumstances but the whole of his life and the importance of his treatment regime in providing potential for his future happiness and wellbeing*

On the evidence before the court, Hayden J found that:

> *24. MC can be eloquent and voluble, a little bit like his mother in some respects, if I may say so. But he is entirely unable to engage in the exercise which I am charged with, that is to say he is unable to weigh and assess the advantages to him, personally, of participation in the contemplated programme and weigh them against any identified disadvantages. Were he asked, there is no doubt he would agree with alacrity to participate in the programme. It would doubtless appeal to the gregarious and outgoing side of his personality. But it would entirely omit any contemplation of the negatives. I am clear that MC's treatment is poised at a very delicate stage. His participation, however limited, in a programme which will inevitably and no doubt properly contain criticisms of the mental health system, is fraught with danger for MC. That danger is not confined to his immediate situation but risks having an adverse impact on his whole life. I reiterate the professional aspiration for MC is to afford him the opportunity to develop his potential to the full and achieve some degree of independent living. Jeopardising that opportunity would require me to identify*

> *a competing interest that should be afforded greater weight. That has not been established in this case and I am entirely satisfied that MC's Article 8 rights are supported by qualitatively greater evidence than that which can be afforded to the Article 10 rights of the BBC. For these reasons, I dismiss the application.*

## Short note: how does the HRA apply when the wrong-doer is said to be the court itself?

*R (MTA) v The Lord Chancellor* [2024] EWCA Civ 965 concerned claim under the Human Rights Act 1998 (HRA) arising out of an injunction made against the Claimant, which was later set aside by the County Court. The injunction was accompanied by a power of arrest under s.1 of the Anti-Social Behaviour, Crime and Policing Act 2014, and the underlying claim also sought damages arising out of the subsequent arrests of the Claimant following alleged breaches of the injunction.

The Claimant, MTA, was described as a young man who suffered from severe mental ill-health, including episodes of acute psychosis. The underlying injunction had been granted on 17 February 2020. The injunction (which had been applied for by a housing association) barred MTA from entering certain areas for two years. MTA had not been present at the time the injunction was granted, but his family members had attended and informed the court that he had learning disabilities. The court granted the injunction, but advised that MTA should seek legal advice, and gave leave for a capacity assessment to be filed, giving a return date in a few months' time.

MTA had been arrested for a suspected breach of the injunction on 18 May 2020; the injunction proceedings had remained live as of this time due to the ongoing issue around MTA's capacity. MTA was brought to court the following day, and was remanded in custody for three weeks pending a decision on whether in view of his mental ill-health he had capacity in relation to the breach proceedings and, subject to that, whether he should be committed. On the return date he was found not to have the requisite capacity and was released. On two subsequent occasions, on 10 and 29 June 2020, he was again arrested and detained overnight, but he was discharged when brought to Court the following day. In due course the injunction was set aside, again on the basis that the Claimant lacked capacity. Underhill LJ considered that "it is necessarily implicit in [the] findings that the Claimant did not have capacity at the time of his remand in custody and accordingly that that order was wrongly made at the time and had, in the language of CPR rule 21.3 (4), 'no effect'" (paragraph 27). None of these orders were subject to any appeal.

The HRA claim was brought by MTA, acting through the Official Solicitor as litigation friend, on the basis that the episodes of loss of liberty referred to above constituted detention in breach of article 5.1 of the European Convention on Human Rights and were accordingly unlawful by virtue of s.6 HRA 1998. It was argued that:

1. the injunction had no legal effect because MTA had lacked capacity in the underlying proceedings (and thus the Metropolitan Police lacked any lawful basis to arrest MTA) and the Lord Chancellor was liable for the 'judicial act which results in unlawful detention' under s.9 HRA;
2. the order remanding MTA into custody following his arrest had no legal basis because he lacked capacity; and
3. making the order breached MTA's Article 6 rights.

The Lord Chancellor had applied to strike out the claim on the basis that it was an abuse of the process of the court for the claimant to bring proceedings in respect of the impugned orders unless and until they had been overturned on appeal. Freedman J had dismissed the strike-out application, and that dismissal was the subject of the appeal; the claims against the Metropolitan Police were not considered in this appeal. For the purposes of this report, we focus on the capacity-related issues.

In considering the effect of an order made where a party lacks capacity and has no litigation friend, Underhill LJ noted that CPR 21.3(4) states in relevant part "[a]*ny step taken before a … protected party has a litigation friend has no effect unless the court orders otherwise*." He noted that "[t]*here was some discussion before us about whether the words 'has no effect' mean that a court order made before the protected party has a litigation friend is invalidated retrospectively; and following the hearing counsel prepared a helpful joint note. I have no doubt that that is indeed what those words mean*" (paragraph 11).

The Court of Appeal upheld the first instance judgment, and found that, as a matter of law, it was possible to bring proceedings under s.9(3) HRA in respect of a judicial act which had not first been appealed, and this would not be an abuse of process. "*The reason why collateral challenges are objectionable is that they involve one court holding that the decision of another court of co-ordinate jurisdiction is unlawful. But if that other court has itself already held, in circumstances where it was entitled to review its own decisions, that the decision in question was of no effect that objection cannot arise*" (paragraph 61). In considering the effect of an order which should not have been made (in this case, due to a want of capacity to conduct proceedings by the person it was made against), Underhill LJ found at paragraph 64 that:

> *The impugned orders were of course effective in the sense that they were acted on by the police officers and (initially) the Court and resulted in the Claimant's detention, and that is what matters for the purposes of his pleaded claim; but it is not inconsistent with them having been wrongly made from the start.*

In other words, the key issue is substance rather than form. Here, it did not matter that a spent order remanding the claimant into custody had not been set aside, as doing so would have been "*pointless*" (paragraph 65). What mattered was that "*the impugned order was found by a competent court to have been of no effect. That being so, it cannot constitute an illegitimate collateral challenge for the court hearing the Claimant's damages claim to be invited to make a finding to the same effect, albeit on a different ground*" (paragraph 65). This meant that:

> *71. In those circumstances I can see no basis on which it could be an abuse of process for the Claimant to pursue his claim for damages under the 1998 Act, in the forum prescribed by the Act, without having first had them set aside in an appeal court. It also necessarily follows that I do not accept that there is any blanket rule such as that contended for by the Lord Chancellor.*

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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.

Adrian will be speaking at the European Law Institute Annual Conference in Dublin (10 October, details here).

Peter Edwards Law have announced their autumn online courses, including, Becoming a Mental Health Act Administrator – The Basics; Introduction to the Mental Health Act, Code and Tribunals; Introduction – MCA and Deprivation of Liberty; Introduction to using Court of Protection including s. 21A Appeals; Masterclass for Mental Health Act Administrators; Mental Health Act Masterclass; and Court of Protection / MCA Masterclass. For more details and to book, see here.

### 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 October. 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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