MENTAL CAPACITY REPORT: PRACTICE AND PROCEDURE

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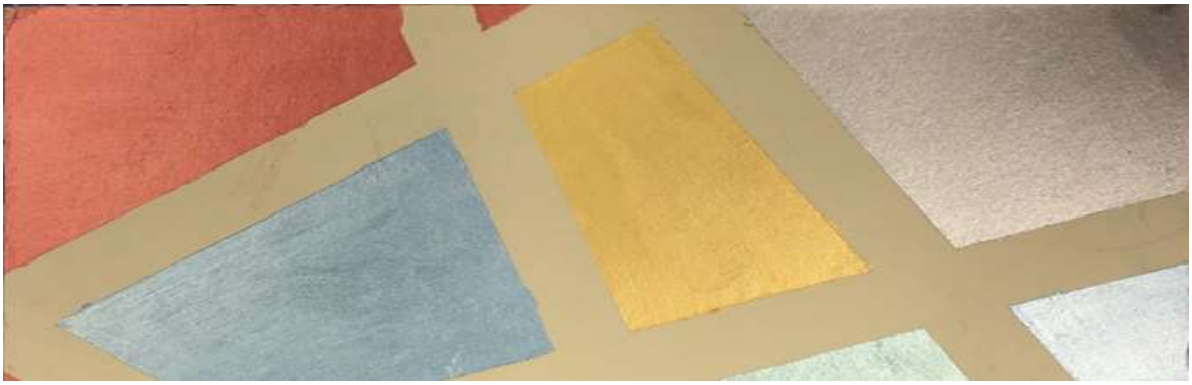

Welcome to the December 2019 Mental Capacity Report – our 100th*. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: an important guest article from Inclusion London, and reflections from Tor and Alex on 100 issues;

(2) In the Property and Affairs Report: a report of an interview with HHJ Hilder and deputyship refunds;

(3) In the Practice and Procedure Report: the administration of appeals, and important judgments shedding light by analogy on fact-finding, costs and vulnerable witnesses;

(4) In the Wider Context Report: assisted dying, Article 2 obligations and informal patients, and reports of developments in Northern Ireland, Jersey and wider afield;

(5) In the Scotland Report: an important judgment on guardianship and deprivation of liberty, a judicial review of conditions of excessive security and further observations on the operation of 'foreign' powers of attorney in England & Wales from the Scottish perspective.

You can find all our past issues, our case summaries, and more on our dedicated sub-site here. If you want more information on the Convention on the Rights of Persons with Disabilities, which we frequently refer to in this Report, we suggest you go to the Small Places website run by Lucy Series of Cardiff University.

Happy holidays, and we will return in February 2020.

* Confession: there was a numbering glitch a long way back which means that this is no.99 in this series, but in our defence no.1 in fact represented the formalisation of informal updates Tor and Alex had been doing for several months.

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The picture at the top, "*Colourful*," is by Geoffrey Files, a young man with autism. We are very grateful to him and his family for permission to use his artwork.

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Recognising and responding to the needs of vulnerable parties

Re N (A Child) [2019] EWCA Civ 1997 (Court of Appeal (King, Asplin and Rafferty LJJ))

Other proceedings – family (public law)

In this decision (mysteriously, and wrongly, not on Bailii), the Court of Appeal was concerned with the participation of the mother of the child in care proceedings, who had a mild learning disability, and took the opportunity to review the operation of Part 3A and PD3AA of the Family Procedure Rules 2010, introduced in November 2017, and which make provision for "Vulnerable Persons: Participation in Proceedings and Giving Evidence." As King LJ noted, having reviewed the background to and development of these provisions:

> *Part 3A and its accompanying Practice Direction provide a specific structure designed to give effective access to the court, and to ensure a fair trial for those people who fall into the category of vulnerable witness. A wholesale failure to apply the Part 3 procedure to a vulnerable witness must, in my mind, make it highly likely that the resulting trial will be judged to have been unfair.*

In the course of the care proceedings, the judge held ground rules hearings in respect of two of the litigants in person who had been identified as vulnerable and requiring an intermediary. They were then, in compliance with Part 3A, secured the assistance of one Intermediary. Their Article 6 ECHR rights were therefore both engaged and protected. However:

> *53. Given that the mother's (then) legal team did not identify the mother's difficulties, no participation directions were given, and there was no ground rules hearing in relation to her. The mother was therefore deprived of the protection due to her as a vulnerable witness. A ground rules hearing would have put in place special measures which would have allowed her to give her best evidence in a carefully considered and bespoke form, the structure of which would have been facilitated by the reports of Dr Parsons and the Intermediary assessments.*
>
> *54. It is most unfortunate that those then representing the mother did not recognise the extent of her difficulties, such that they could have at least sought a psychological assessment of her, although in fairness to that legal*

team, Toolkit 4 specifically sets out that people with borderline learning disability "may not have been formally diagnosed and may be difficult to identify". It is nevertheless worth highlighting the duty under PD3AA 1.3 for legal representatives actively to consider whether their client may be a vulnerable witness. This is particularly so following the Working Group having observed (at Paragraph 10. Footnote 12) that, as of 2008, 72% of mothers in a sample in a Case Profiling Study by Masson et al experienced one or more difficulties with mental illness, learning difficulties, substance abuse and domestic abuse.

55. The judge could not have been expected to have identified the mother as a vulnerable witness prior to her going into the witness box. I have no doubt that once her concerns as to the quality of the mother's evidence were raised, she did all that she could to ameliorate the inevitable difficulties. I accept completely that the judge would have adjourned the case had she felt that her interventions and case management (breaks etc) during the trial were insufficient in order to allow the mother to do herself justice in the witness box. With the benefit of hindsight, despite the delay, it would, in my judgment, have been better, once the mother started giving evidence and her difficulties were exposed, if the judge had listened to the 'grey thoughts' she had had during the course of the evidence and which she subsequently expressed in her judgment and had stopped, or adjourned, the trial in order to have a cognitive assessment of the mother carried out.

At the end of the day, King LJ concluded (at paragraph 56):

> *the judge's efforts were not enough to enable the mother to give her best evidence, as is apparent from the reports of Dr Parsons and the Intermediaries. As a consequence, the mother did not have a fair trial.*

Although King LJ held that it would "*go too far to say that a rehearing is inevitable in all cases where there has been a failure to identify a party as vulnerable, with the consequence that no ground rules have been put in place in preparation for their giving evidence and no Intermediary or other special measures provided for their assistance*," in the instant case, and applying the dicta of the European Court of Human Rights *in P,C and S v UK* [2002] ECHR 604, there had *"undoubtedly* [been] *a fundamental breach of the mother's Article 6 rights and she was denied a fair trial*":

> *62. One knows not whether Mr Shaw is correct in his assertion that the outcome will ultimately be the same, but in the circumstances of this case, it matters not. This mother was denied the very protection which has been put in place to ensure that she, as a woman with learning difficulties, has a fair trial. The stakes could not be higher; she faces the permanent loss of her two infant children. In my judgment, the fact that the mother will have the assistance she requires for the balance of the proceedings cannot make up for the fact that she was without that help in the crucial hearing, the findings from which will form the basis for all future welfare decision in respect of these two children.*

Comment

Although there is not, yet, a formal structure in the Court of Protection Rules akin to that of Part 3A FPR, the fundamental principles underpinning Part 3A applying equally in the Court of Protection – above all, perhaps, the obligations upon representatives to recognise the potential needs of their clients. Prior to the completion of the work of the ad hoc Court of Protection Rules Committee in relation to vulnerable witnesses and participation, we remind practitioners of the practical guidance issued in November 2016 by the former Vice-President of the Court of Protection, Charles J, on facilitating the participation of 'P' and vulnerable persons in Court of Protection proceedings, available here.

President's Working Group on Medical Experts

The President of the Family Division, Sir Andrew McFarlane, set up a working group to address the concerns he had received from his nationwide progress around the family courts following his appointment in July 2018, to address the relative scarcity of medical expert witnesses willing to participate in family cases involving children. While not strictly relevant to cases in the Court of Protection, the problems caused by the delay in finding appropriate medical experts to report timeously will be all too familiar to COP practitioners. Given the obvious similarities between the two jurisdictions (not least because many of the same Judges decide both types of cases) any change in culture in the family courts is likely to impact on the COP.

The working group survey undertook a survey of the medial and legal professions to investigate the extent of the problem, perceptions of causes and potential solutions and then held a symposium to discuss the survey results. The draft report which can be found here sets out a number of draft recommendations arising from this work, for consultation. The final Report is to be presented to the President in Spring 2020.

The results of the survey of the medical and legal professionals makes fascinating reading for COP practitioners. 709 individuals (412 medical + 297 legal) responded to it, and the report notes that this was across a good geographical and specialisation spectrum. The key findings were:

- That difficulties in securing expert witnesses were experienced across the country and in a wide range of specialisms.
- The impact of the shortages was principally in creating delay although there were also concerns about the quality of some expert evidence which were likely to be linked to the shortages. The working group were satisfied that the shortage of experts was likely in some cases to be harmful to children.
- Certain specialisms were identified as giving rise to particular shortages;
- The main factors which were identified as barriers or disincentives for medics being prepared to work as experts were:
    - Remuneration linked (the most commonly expressed barrier amongst both groups is the Legal Aid Agency prescribed rate, other elements of concern about finances included delays in payment, the payment system (multiple invoices) and the tax/pension implications)

- Court processes (385 of healthcare professionals identified inflexibility in court timetabling (including scheduling witnesses) as an issue and 37% the volume of material)
- Lack of support and training (35% of healthcare professionals identified lack of support from NHS Trusts)
- Perceived criticism by lawyers, Judiciary and press (58% of medics cited this as a barrier)

The responses from the medical consultees to what has been termed the Court processes is highly relevant to those that practice in the COP. The committee noted that '*It was repeatedly noted that lack of appropriate organisation i.e. late provision of bundles and last minute cancellation of court attendance has implications on the time that health professionals have to dedicate to expert witness work.'* Other issues highlighted were:the failure to provide only relevant material to the experts requiring them to spend time reading through reams of irrelevant material,

- the failure to provide the expert with the outcome of the case, thus failing to recognise their motivation in being an expert witness i.e. to improve outcomes for children and young people, and
- the failure on the part of lawyers to understand the limited time the medics had to devote to expert work.
- 25% of the respondees felt that the treatment they received in Court during hostile cross-examination (being barracked and interrupted) was responsible for a shortage.

The group made 22 recommendations, the key ones being:

- Action by the Royal Colleges to create online resources to support expert witness work and to increase awareness of existing training in the field
- The Royal Colleges to engage with commissioners and or trusts to promote a more supportive environment to medical professionals who wish to undertake expert witness work
- The Royal Colleges and the working group to engage with NHS England and Clinical Commissioning Groups to seek changes to contracting arrangements to enable healthcare professionals to undertake expert witness work within the parameters of their employment contracts
- Amending the Legal Aid Agency's guidance in respect of the granting of prior authority and payment to experts to simplify the process to enable an expert to render one invoice
- Seeking changes to the rates of remuneration for certain experts and the prescribed number of hours in respect of some categories of assessments to more properly reflect the amount of work involved
- Ensuring legal professionals including Judiciary adhere to the provisions of FPR Part 25 in relation to expert instructions
- Ensuring that the instruction to experts was more efficiently undertaken to ensure only the necessary paperwork was sent to the expert to consider and a unified point of

contact to ensure more effective and efficient communication

- Ensuring that experts were only required to give evidence where the court was satisfied an issue existed in relation to their report, to guarantee if their participation was required that it was fixed and not susceptible to last-minute change and to enable experts to attend by video link where appropriate
- Ensuring that experts are treated appropriately during court hearings, within judgments and thereafter to support constructive engagement and feedback
- Creating a subcommittee of the Family Justice Council (FJC) to support and maintain the implementation of the recommendations
- Creating regional committees based on Family Division circuits to promote interdisciplinary cooperation, training and feedback.
- To create greater training opportunities for medical professionals including mini pupillages with judges, cross disciplinary training courses with healthcare and legal professionals, and mentoring, peer review and feedback opportunities
- To promote greater awareness within legal professionals including by means of training, of best practice in relation to expert witnesses

Additional recommendations which if implemented are likely to impact on COP practitioners are:

- Where a judge proposes to name an expert in their publicly available judgment, the expert should be entitled to see a draft of the judgment in advance of publication and have the opportunity to make representations to the judge.
- To provide a bespoke expert's bundle culled from the main bundle, including the full index and updating that bundle as further relevant material is provided. That should be an e-bundle in an accessible format which can then stand as the witness bundle for the expert at trial. Local Authorities to create e-bundles from which the experts Core Bundle can be created. (It should be noted however that this requirement exists already in practice direction 25 of the Family Procedure Rules where it does not in the equivalent part in the COP Rules (see part 15)).
- A direction should be made, at the conclusion of any hearing where an expert has been instructed and has provided evidence to the court whether by way of written report or oral evidence, directing the lead solicitor for the instruction to send a copy of the judgment to the expert.

The report poses 23 consultation questions at annex 1 and invites consultees to provide answers to those questions and the recommendations made by 31 January 2020. We shall report on the final report when it is published next year.

Short Note: when to terminate the appointment of a litigation friend?

R (Raqeeb) v Barts Health NHS Trust et al [2019] EWHC 2976 (Admin), which recently appeared on Bailii, concerns an application by the NHS Trust to terminate the appointment of Tafida Raqeeb's litigation friend days before the final hearing of the judicial review proceedings ([2019] EWHC 2531 (Admin) and [2019] EWHC 2530 (Fam)). The issue in those substantive proceedings was whether the Trust's decision not to permit Tafida to be transferred to the Gaslini hospital in Italy was unlawful. The Trust argued that XX should be removed as litigation friend because as a family member she loved Tafida, held – in the context of the tenets of her strong Islamic faith – a clear and settled view of where Tafida's best interests lay, and had lodged a position statement in the Children Act proceedings opposing the withdrawal of life-sustaining treatment.

MacDonald J dismissed the application and made a costs order against the Trust. The court stressed that the litigation friend was only appointed to act in the judicial review proceedings, not the Children Act / best interests proceedings, where Tafida was represented by the Children's Guardian. The application therefore had to be determined in that context. Akin to the Court of Protection Rules, a litigation friend must (1) be able fairly and competently to conduct proceedings and (2) have no interest adverse to that of the person.

(1) Fairly and competently conduct proceedings

His Lordship analysed the authorities and emphasised the central role of legal advice in the discharge of the duties. A litigation friend who did not act on proper advice may (not must) be removed. Furthermore, whilst the litigation friend is required to act on legal advice, he or she must be able to exercise some independent judgment on the legal advice received. In doing this, the litigation friend must approach the litigation with objectivity:

> *26 … Thus, in conducting these proceedings fairly and competently XX is required to take all measures she sees fit for the benefit of Tafida, supplementing the want of capacity and judgement of Tafida, her function being to guard or safeguard the interests of the Tafida for the purposes of the litigation. The discharge of that duty involves the assumption by XX of the obligation to acquaint herself with the nature of the action and, under proper legal advice and with the necessary objectivity, to take all due steps to further the interests of Tafida.*

(2) No adverse interest

Obvious examples included a social worker acting as litigation friend in a claim relating to the provision of services by a local authority employing that social worker. Or a relative with a financial interest in the outcome of a case. But having a deep affection for the person was not an adverse interest provided the litigation friend can "*take a balanced and even-handed approach to the relevant issues*."

Crucially, in the context of the litigation friend's role in the judicial review proceedings, XX's views about the religious probity of withdrawing treatment from Tafida were not relevant. The question for the court was one of law and fact, namely whether the Trust's decision not to permit her to go to Italy for treatment was contrary to her EU rights.

His Lordship noted:

> *37… a solicitor who is acting for child or protected party is likely under an obligation to inform the court of any concern that the litigation friend is not acting properly. In such circumstances, the court must be entitled to rely on the assessment of the legal team when considering the extent to which it can be established that the litigation friend has or is pursuing an interest adverse to that of the child.*

In this case there was nothing from her legal team to suggest that XX was acting otherwise. This decision thus provides a useful summary of some of the main authorities on issues which bear upon the role of litigation friend in Court of Protection proceedings.

Costs – striking the right balance

Barts NHS Foundation Trust v Begum and Raqeeb, and Raqeeb (by her children's guardian) [2019] EWHC 3322 (Fam) (MacDonald J)

Other proceedings – Family (public law) – Judicial review

Summary[1]

This is the costs decision in the case concerning the medical treatment and best interests of Tafida Raqeeb, a five year old girl ('Tafida'). We reported on the substantive proceedings in an earlier report, but to recap, the court had before it two sets of proceedings in the substantive application:

(i) An application by Tafida for judicial review of the decision by the Trust not to agree to her being transferred to a hospital in Italy for continued medical treatment pending the determination of an application to the High Court for a declaration regarding her best interests. The Court held that that the decision of the Trust was unlawful but declined to grant relief to Tafida.

(ii) An application by the Trust for a specific issue order pursuant to s. 8 Children Act 1989, and an application for a declaration pursuant to the inherent jurisdiction of the High Court, that it was in Tafida's best interests for her current life-sustaining treatment to be withdrawn, a course of action that would lead inevitably to her death. That application was dismissed.

Following the handing down of judgment, the court had to determine the following costs applications on the papers:

(i) That the Trust should pay Tafida's costs of the judicial review proceedings on the basis that as a successful claimant costs should follow the event. Tafida's representatives also relied on the conduct of the Trust during the proceedings in support of her application for costs, including that it was unreasonable of the Trust to argue that it had not made a decision that was susceptible to judicial review.

(ii) That the Trust should pay Tafida's costs in the Children Act 1989 proceedings.

(iii) The parents sought their costs in the Children Act proceedings only, on the basis that the proceedings engaged the core

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

Article 8 rights of the parents, and so there would be an unacceptable inequality of arms (a core principle of Article 6) as between the parents and the State if the parents did not recover their costs in circumstances where:

a. the parents were required to respond to the proceedings instituted by the Trust, and

b. where the proceedings concerned the life of their child and there was no non-means tested public funding available (unlike for parents on public law family proceedings).

The parents also relied on the conduct of the Trust during the proceedings as a further reason why their application for costs should be granted, including that it was unreasonable on the part of the Trust to assert that the parents had at some point consented to the withdrawal of Tafida's treatment.

The Trust's position was that in each set of proceedings the parties should bear their own costs. The Trust submitted that:

(i) Tafida's application for judicial review was part of a calculated campaign seeking an anterior procedural ruling to obviate the need for any decision by the Family Division as to her wider best interests or to defer such a decision until Tafida was a patient in the hospital in Italy.

(ii) Tafida could not be considered to be the successful party in the judicial review proceedings as she had not avoided the need for a best interests decision being made by the Court and she had not been granted a remedy in the judicial review proceedings.

(iii) There were important policy reasons why the usual order for costs in welfare proceedings is no order for costs, including that:

a. Trusts will be deterred from making applications of this nature by the inevitable tension that will arise (in already difficult circumstances) between their safeguarding obligations in relation children who are not deriving benefit from life sustaining treatment and the duty to fund the treatment needs of all patients.

b. To grant such an application would have a chilling effect in that those children most in need of a judicial determination of their finely balanced best interests will be the children in respect of whom a Trust will be reticent about risking the cost consequences of a best interests application before the court.

The Trust also noted that the parents' legal costs were funded by a Gofundme campaign, and that they had been properly represented before the court, thus the Trust submitted, as a matter of fact, there was no inequality of arms.

MacDonald J held that Tafida was the successful party in the judicial review proceedings despite not being granted a remedy.

He therefore saw no reason for disapplying the ordinary rule that the unsuccessful party should pay the successful parties costs. Accordingly, he awarded Tafida 80% of her costs. The 20% discount was to take account of the unsuccessful argument she ran concerning article 5 of the ECHR.

MacDonald J declined however to make an order in favour of the parents in relation to their costs of the Children Act proceedings. Despite acknowledging that the parents had succeeded in persuading the court to adopt a conclusion consistent with their articulation of what was in Tafida's best interests, he found that the refusal to make a costs order in the parents favour would not result in unacceptable inequality of arms as between the parents and the State in breach of Article 6 of the ECHR even where the proceedings engaged the core Article 8 rights of the parents.

Of considerable significance in this conclusion was that, as a matter of fact, there had been no inequality of arms in the proceedings. The parents had the benefit of a highly experienced team of solicitors and were represented by specialist leading and junior counsel throughout the hearing. The time for making this argument, the judge held, would have been '*before the final hearing, supported by evidence that the parents would not have the benefit of legal representation unless a species of costs funding order was to be made.'* The judge noted that even then, such an application would have faced considerable hurdles.

MacDonald J acknowledged the apparent inconsistency in the approach to public funding as between a parent who is facing care proceedings concerning the welfare of their child brought by the State, in the guise of the local authority, and a parent who is facing proceedings brought by the State, in the guise of an NHS Trust, but stated, rightly, that this is a matter for Parliament:

> *To make an order for costs against a public body simply to remedy the fact that Parliament has not provided for public funding in the circumstances in question would be impermissible unless such a costs order is justified on ordinary principles in the particular circumstances of the case. It is not for the court to fill a lacuna by making a costs order against an NHS Trust where there is otherwise no principled basis for such an order on ordinary principles.*

Applying ordinary principles, MacDonald J concluded that:

(i) The trust had no option but to bring the proceedings for a best interests determination by the court in light of the disagreement between the parents and the clinicians.

(ii) The consequence of making a costs order in favour of the parents would be to deter Trusts from bringing applications in the future and give rise to the risk of situations, where the parents have secured private funding for all treatment, to depart from medical opinion and to prefer the fully funded position of the parents, which preference avoids the costs risk. The consequences of these risks being that they would affect "*the children most in need of a judicial determination of their best interests, namely those where the decision is a finely balanced one and therefore where the*

'litigation risk' presented by proceedings that put the Trust at risk of costs concomitantly higher."

(iii) Lastly the fact that the parents had raised a considerable sum of money for their legal costs made the court still less inclined to risk the disadvantages of departing from the ordinarily approach.

Comment

Insofar as to it relates to the inherent jurisdiction proceedings, this decision will no doubt be very welcome news to Trusts up and down the country as budgetary pressures get ever more significant. While this case is not concerned with proceedings in the Court of Protection, the analysis of the costs application in the Children Act proceedings are equally relevant to cases brought in the Court of Protection in relation to adults. The observations that MacDonald J made about the responsibility lying with the public body to bring proceedings in the case of dispute are equally applicable to cases involving medical treatment in relation to those (potentially) lacking capacity for purposes of the MCA 2005.

Fact-finding guidance

Re A No.2 (Children: Findings of Fact) [2019] EWCA Civ 1947 (Court of Appeal (Underhill, Peter Jackson and Newey LJJ))

Other proceedings – Family (public law)

Summary

The Court of Appeal has given important guidance, applicable by analogy, as to the approach to take to fact-finding hearings.

The case concerned a second fact-finding hearing into the death of a 10-year-old girl, S, found dead in her bedroom with genital injuries and signs consistent with strangulation in the winter of 2016; a death which Hayden J in a judgment in June 2019 concluded was caused by S's mother after an attempt at female genital mutilation (FGM) followed by strangulation, hidden through collusion with S's father.

Fact-finding necessitated by care proceedings brought by the local authority with regard to S's siblings. The fact-finding proceedings concerned which if any of S's family, specifically her parents and elder siblings were involved in her death. Her family in turn denied any wrong-doing and argued that S had died as a result of entanglement in netting on her bunk bed or in the alternative that she had been attacked by an intruder.

An initial fact-finding by Francis J over 15 days in November 2017 resulted in proceedings being dismissed as a result of what he described as serious deficiencies in the police investigation and in police disclosure. He found on the balance of probabilities that the local authority had not proved that S's injuries had been inflicted by a third party as opposed to accidentally.

The local authority appealed. The Court of Appeal in *A (Children)* [2018] EWCA Civ 1718 concluded that Francis J had not correctly approached the burden of proof in that he had not looked at the whole picture, effectively analysed the expert evidence about S's injuries or taken them into account when considering the manner of death. Accordingly, the appeal succeeded and a retrial was ordered before Hayden J.

The retrial took place over 18 days between 21 January and 22 March 2019. According to the Court of Appeal's judgment, FGM featured 'only briefly' in the evidence before the court, occupying only 1 page in the thousand page trial transcript. This fact notwithstanding, Hayden J concluded that S's death was as a result of an attempt at FGM followed by strangulation, both committed by her mother.

The parents and S's elder brothers appealed on a number of grounds, essentially arguing that Hayden J wholly failed to look at the totality of the evidence. Instead, they argued, he developed a theory of his own and strained to fit the facts of the case into it. The family further argued that, the judge gave "*undue prominence to their origins and assessed their religious and cultural identity in an unbalanced way. The wider canvas showed no relevant family pathology, no mental illness or personality disturbance, and no relevant substance abuse. These matters were treated in a manner that was discriminatory in terms of Art. 14 as applied to Arts. 6 and 8.*" (para 80).

Following *Re B (A Child)* [2013] UKSC 33 and noting at paragraph 92 that an appeal court will rarely even contemplate reversing a trial judge's findings of primary fact unless a finding is insupportable on any objective analysis it will be immune from review, the Court of Appeal held:

> *The judge has had the opportunity to make a comprehensive assessment of all the information – written, verbal, non-verbal and visual – when reaching a conclusion. This court should therefore only interfere with findings of fact in limited circumstances, for example where there has been a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence: Henderson v Foxworth Investments Ltd [2014] UKSC 41; [2014] 1 WLR 2600, per Lord Reed at [67]. Without such error, an appeal can only succeed if the appeal court is satisfied that the decision cannot reasonably be explained or justified and is one that no reasonable judge could have reached: ibid at [62, 67].*

The Court of Appeal then set out at paras 93 to 99 a useful précis of the principles of fact-finding.

- At the outset, a judge should give himself a conventional self-direction in relation to fact-finding and to matters such as the possible significance of lies;
- The starting point remains that the facts must be proved on the simple balance of probability. Neither the seriousness of the allegations nor the seriousness of the consequences makes a difference. The inherent probabilities are simply something to take into account in deciding where the truth lies – see Baroness Hale in *Re B (Minors)* [2008] UKHL 35; [2009] 1 AC 11 at para 70;
- Findings of fact must be based on evidence, including inferences that can properly be drawn from the evidence, and not on suspicion or speculation: *A (A Child) (No 2)* [2011] EWCA Civ 12; [2011] 1 FLR 1817;
- The court is not bound by the cases put forward by the parties, but may adopt an alternative solution of its own: *Re S (A Child)* [2015] UKSC 20 at para 20. Judges are entitled, where the evidence justifies it, to

make findings of fact that have not been sought by the parties, but they should be cautious when considering doing so: *Re G and B (Fact-Finding Hearing)* [2009] EWCA Civ 10; [2009] 1 FLR 1145;

- As in *B (A Child)* [2018] EWCA Civ 2127, "*15. It is an elementary feature of a fair hearing that an adverse finding can only be made where the person in question knows of the allegation and the substance of the supporting evidence and has had a reasonable opportunity to respond. With effective case-management, the definition of the issues will make clear what findings are being sought and the opportunity to respond will arise in the course of the evidence, both written and oral*."

- As per MacFarlane LJ in *Re W (A Child)* [2016] EWCA Civ 1140; [2017] 1 WLR 2415, "*95. Where, during the course of a hearing, it becomes clear to the parties and/or the judge that adverse findings of significance outside the known parameters of the case may be made against a party or a witness consideration should be given to the following:*

    - *Ensuring that the case in support of such adverse findings is adequately 'put' to the relevant witness(es), if necessary by recalling them to give further evidence;*

    - *Prior to the case being put in cross examination, providing disclosure of relevant court documents or other material to the witness and allowing sufficient time for the witness to reflect on the material;*

    - *Investigating the need for, and if there is a need the provision of, adequate legal advice, support in court and/or representation for the witness*."

- With regard to the assessment of abuse,

    "*… evidence cannot be evaluated and assessed in separate compartments. A judge in these difficult cases has to have regard to the relevance of each piece of evidence to other evidence and to exercise an overview of the totality of the evidence in order to come to the conclusion whether the case put forward by the local authority has been made out to the appropriate standard of proof*." Dame Elizabeth Butler-Sloss P in *Re T (Abuse: Standard of Proof)* [2004] EWCA Civ 558; [2004] 2 FLR 838 at para 33.

Considering Hayden J's conclusions in this case, Peter Jackson LJ concluded:

> *"*107. […] *that once all* [the] *questions* [of what, when, where, who, how and why the deceased had come by her death] *had been considered, it was the court's task to decide what facts emerged and to consider whether they satisfied the threshold for making public law orders. In undertaking this task, the judge was operating within the framework of a sophisticated forensic process. There had been a police investigation, for all its faults. A large amount of information had been gathered in the course of two trials. The local authority had framed its case meticulously. The court had the benefit of expert opinion of the highest calibre and very experienced legal representation, all co-operating to assist the court to reach a sound conclusion.*
>
> *108. It was against this background that the judge developed his own case theory. In such a vexed case, he was bound to consider all the possibilities but, as he himself said, there must be parameters.*

In particular, a judge who believes he alone may have discovered a path that has not been revealed to other experienced professionals is bound to reflect on why that might be so. The situation in this case fell squarely within the sound guidance found in Re G and B – cited at [75] above – which bears repeating:

> *"Where, as here, the local authority had prepared its Schedule of proposed findings with some care, and where the fact finding hearing had itself been the subject of a directions appointment at which the parents had agreed not to apply for various witnesses to attend for cross-examination, it requires very good reasons, in my judgment, for the judge to depart from the schedule of proposed findings. Furthermore, if the judge is, as it were, to go "off piste", and to make findings of fact which are not sought by the local authority or not contained in its Schedule, then he or she must be astute to ensure; (a) that any additional or different findings made are securely founded in the evidence; and (b) that the fairness of the fact finding process is not compromised."*

In my judgment, the judge did not heed this guidance.'

The Court of Appeal did not accede to the family's submissions that the case should not, in the very unique circumstances, conclude without fact-finding: the case has been remitted for a second retrial.

Comment

Fact-finding hearings will be necessary in the Court of Protection in the circumstances set down in *Re AG* [2015] EWCOP 78. When they are necessary, the same principles will apply as in relation to those fact-finding hearings held in care proceedings. The guidance and observations of the Court of Appeal are therefore as applicable to judges hearing cases in the Court of Protection as they are to those hearing care cases.

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Conferences

Conferences at which editors/contributors are speaking

Approaching complex capacity assessments

Alex will be co-leading a day-long masterclass for Maudsley Learning in association with the Mental Health & Justice project on 15 May 2020, in London. For more details, and to book, see here.

Other conferences of interest

Safeguarding and the Care Act 2014 - Self-neglect

Continuing the SALLY (safeguarding and legal literacy) series, this day-long seminar at Keele University on 31 January focuses on self-neglect. For more details, and to book a free ticket, 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 February 2020. 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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